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STEERING COMMITTEE FOR HUMAN RIGHTS
COMITE DIRECTEUR POUR LES DROITS DE L'HOMME
(CDDH)

**DRAFTING GROUP ON SOCIAL RIGHTS
GROUPE DE REDACTION SUR LES DROITS SOCIAUX
(CDDH-SOC)**

**Contributions received from experts to the draft report
on the legal protection of social rights within the Council of Europe**

**Contributions reçues des experts sur le projet de rapport sur la protection
juridique des droits sociaux au sein du Conseil de l'Europe**

MEMBER STATES/ETATS MEMBRES

SPAIN

General comments:

1. We are grateful for the work already done by the Secretariat providing a draft that gathers an important compound of all the legislation, case law and even practice of international and national institutions in the field of protection and promotion of social rights. As a result, the working group can profit from an important help to advance in the knowledge and, therefore, dissemination of this legal corpus.
2. It is noteworthy the numerous references contained in the draft, not only to case law or rulings from different Courts, but also comments and public speeches from different representatives of the international organizations concerned in the matter. This offers an insight not only of the legal position of the institution, but also of their goals and the main barriers that must be overcome in order to improve the protection and respect of social rights as a reflection of the rest of the civil rights.
3. In order to help in enhancing the in-depth analysis contained in the document we would like to propose the following

Observations:

4. Paragraph 25

A careful reading of the recommendation CONF/PLE(2015)REC1 mentioned in this paragraph indicates that the document does not criticise the privatisation programs in themselves, but on account of the lack of transparency and democratic controls with which they have been implemented in some occasions.

Therefore the following alternative text is suggested:

“25. The Recommendation also criticises the wide-ranging privatisation programmes on account of the lack of transparency and democratic control with which they have been implemented in certain occasions, posing in such cases an undue threat to the right of access to water, electricity and health care and to cultural and natural heritage”.

"25. La Recommandation critique également les vastes programmes de privatisation en raison du manque de transparence et de contrôle démocratique avec lesquels ils ont été mis en œuvre dans certains cas, ce qui entraîne dans de tels cas une menace injustifiée au droit d'accès à l'eau, à l'électricité et aux soins de santé ainsi qu'au patrimoine culturel et naturel."

5. Paragraph 118

The draft contains a reference to the *Garcia Mateos v. Spain* judgment of the Court of 19 February 2013.

Between brackets the following is stated:

“according to which the response to the applicant’s request for a reduction in working time so that she could look after her child amounted to discrimination on grounds of sex”.

An attentive reading of the judgment shows that this assertion might not be accurate. In this case, it was the Spanish Constitutional Court -instead of the ECtHR- the one who, in an adequate use of the subsidiarity principle, ruled that there had been a violation of the right not to be discriminated on grounds of sex because a woman’s request for a reduction in working time to be able look after her newborn child had not been granted by the Labor Court.

Therefore, the matter of discrimination in labor conditions was not specifically examined by the European Court of Human Rights. In its judgment the ECtHR only addressed the question of the right to obtain the proper enforcement of national court's decisions. This was because whilst the Constitutional Court had ruled in favour of Mrs García Mateos, the first instance labor Court had shown unwillingness neither to provide *restitutio in integrum* nor to grant her a compensation.

Therefore, we would like to suggest the following alternative drafting:

“according to which the failure to provide the applicant with compensation amounted to a violation of article 6.1, when Spanish Constitutional Court had already declared that the response to the applicant’s request for a reduction in working time so that she could look after her child amounted to discrimination on grounds of sex”

"selon lesquels le manquement à l'indemnisation de la requérante constituait une violation de l'article 6.1, alors que la Cour constitutionnelle espagnole avait déjà déclaré que la réponse à la demande de la requérante visant à réduire le temps de travail afin de pouvoir s'occuper de son enfant constituait une discrimination fondée sur le sexe "

6. **Paragraph 129**

The draft contains a brief reference to the *Fernandez Martínez v. Spain* judgment of 12 June 2014.

This ruling offers some interesting considerations about some issues, that should be enhanced in the draft:

- 1) the fact that social and other human rights can in fact conflict with other human rights, and, moreover, individual rights can conflict with the collective dimension of that same right and
- 2) the responsibility of the applicant when his or her conduct contributes to the wrongful outcome.

In the case at issue, the Court considered that the right to a private life and to freedom of religion of the applicant did not prevail over the principle of autonomy of confessions, such as the Catholic Church, and that in the event of any disagreement between a religious community and one of its members, the individual's freedom of religion was exercised by the option of freely leaving the community. Therefore, the Court found that the Spanish courts had sufficiently taken into account all the relevant factors and had weighed up the competing interests in a detailed and comprehensive manner, within the limits imposed by the respect that was due to the autonomy of the Catholic Church.

Accordingly, the following alternative text is suggested:

*“the Grand Chamber’s *Fernández Martínez v. Spain* judgment of 12 June 2014 (Church’s decision not to renew the employment contract of a religious education teacher, a married priest, father of 5 children, and member of an organisation opposed to official Church doctrine, considering that the interference with the applicant’s individual rights could be justified in terms of respect for the lawful exercise by the Catholic Church of its religious freedom in its collective or community dimension, and that in choosing to accept a publication about his family circumstances and his association with a protest-oriented meeting, Mr Fernández Martínez had severed the bond of trust that was necessary for the fulfilment of his professional duties).*

*"L'arrêt de la Grande Chambre *Fernández Martínez c. Espagne* du 12 juin 2014 (décision de l'Eglise de ne pas renouveler le contrat de travail d'un professeur d'éducation religieuse, un prêtre marié, père de 5 enfants et membre d'une organisation opposée à la doctrine officielle de l'Eglise, en estimant que l'ingérence dans les droits individuels du requérant pourrait se justifier en termes de respect de l'exercice légitime, par l'Eglise catholique, de sa liberté religieuse dans sa dimension collective ou communautaire, et que M. Fernández Martínez, en choisissant d'accepter une publication concernant ses circonstances familiales et son adhésion à une réunion contestataire, avait rompu le lien de confiance nécessaire à l'accomplissement de ses fonctions professionnelles").*

7. **Paragrah 136**

The draft contains a brief reference to the *Palomo Sanchez and Others v. Spain* judgment of 12 September 2011.

Again, there are some considerations noted by the Court that should be enhanced on the draft, as they amount to the interdependence between social and civil rights, in a positive and negative way.

In a positive way, the Court notes how the question of freedom of expression is closely related to that of freedom of association in a trade-union context (paragraph 52), as the members of a trade union must be able to express to their employer their demands by which they seek to improve the situation of workers in their company (paragraph 56). But, at the same time, the Court also takes the view that there are limits to that right, being one of those limits the specific features of labor relations (paragraph 65), as, in order to be fruitful, labor relations must be based on mutual trust (paragraph 76).

Therefore, the following alternative text is suggested:

“However, in the Grand Chamber’s Palomo Sanchez and Others v. Spain judgment of 12 September 2011, the Court found that there had been no violation of Article 10 concerning trade unionists’ dismissal for publishing articles deemed offensive to colleagues, considering that, even though freedom of expression is closely related to that of freedom of association in a trade-union context, there are limits to that right, being one of those limits the specific features of labor relations, as they must be based on mutual trust”

“Cependant, dans l’arrêt de la Grande Chambre Palomo Sanchez et autres c. Espagne du 12 septembre 2011, la Cour a constaté qu’il n’y avait pas eu violation de l’article 10 concernant le licenciement de syndicalistes pour la publication d’articles jugés offensants pour les collègues, en estimant que, « même si la liberté d’expression est étroitement liée à celle de la liberté d’association dans un contexte syndical, il y a des limites à ce droit, l’une de ces limites étant les caractéristiques spécifiques des relations de travail, du fait qu’elles doivent être fondées sur la confiance mutuelle”

8. **Paragrah 279**

This paragraph contains a mention of different rulings from regional Courts in Spain about the “binding effect” of the decisions of the Committee, as it is reflected in the draft.

A careful reading of those judgements in the light of Spanish legal system indicates that the statement reflected at the end of the paragraph goes beyond the scope of the meaning of those rulings. For that matter, the judgement 30/2016 of 28 January 2013 of the Superior Court of the Canary Islands begins by stating the binding effect of the Social Charter, as it is enshrined on article 31 of the Law 25/2014, 27 November, of Treaties and other International Agreements. That article states: “*The legal provisions contained in the international treaties validly celebrated and officially published will prevail over any other provision of the national legislation in case of conflict with them, except the rules of constitutional status*”. It is also stated in the judgement that the rulings of the Committee constitute “*jurisprudencia*” in the matter of social rights. But, it is important to take into consideration that the legal term “*jurisprudencia*” has not the same meaning as the term “case-law” in common law systems. According to the Spanish legal system, “*jurisprudencia*” is not a source of law, but has only an interpretative value, and that only happens when the decisions come from the Supreme Court and are “repetitive”, as it is stated in article 1.6 of the Spanish Civil Code¹.

¹ “Article 1.

1. The sources of the Spanish legal system are statutes, customs and general legal principles.
(...)

6. The “*jurisprudencia*” shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretation and application of statutes, customs and general legal principles.”

Therefore, the following alternative text is suggested:

“In the same vein, three judgments by high regional courts in Spain have recently applied the Charter with force of law (Article 4§4 on the right of all workers to a reasonable period of notice) and recognised the interpretative help that, for the Spanish judiciary in this subjects, may be derived from the Committee’s interpretations.”

« Dans le même esprit, trois arrêts des hautes cours régionales d'Espagne ont récemment appliqué la Charte en lui donnant un caractère contraignant (article 4§4 sur le droit de tous les travailleurs à un délai de préavis raisonnable) et ont reconnu que les interprétations fournies par le Comité peuvent aider le pouvoir judiciaire espagnol à interpréter ces dispositions ».