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The European Social Charter's applicability by national courts

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INTRODUCTION

The issue concerning the applicability of the European Social Charter (ESC) by national courts can be defined as knowing whether and how domestic courts can or should apply the provisions of the ESC in the disputes they have to settle.

This problem must be subdivided into several sub-issues concerning the diverse meanings of the concept of applicability, the relationship between domestic legal orders and the ESC, and the nature of the ESC provisions. These sub-questions are considered with reference to several examples of the application of ESC provisions by domestic courts.

DEVELOPMENT

I. The several meanings of applicability by national courts

The application of international law provisions by national courts involves different techniques. First of all, the *direct applicability* of those provisions means that they may be considered part of the domestic legal order and, consequently, abstractly enforceable by domestic courts. Second, their *direct effect* means that they may be applied directly by domestic courts in real disputes on the grounds of their nature or their content. Third, the question of *supremacy* relates to those international law provisions of a higher ranking than internal rules with which they are in conflict. The question is whether the international law provisions take precedence over those rules or whether they are substituted by the latter when resolving the case. Fourth, when international provisions are not applicable or do not produce a direct effect, can national courts use the tool of *consistent interpretation* to indirectly apply international law provisions by interpreting domestic applicable rules in conformity? On the other hand, if international rules are applicable in a concrete case, can courts avoid putting international and national provisions in conflict by interpreting the latter in accordance with the former? Or can domestic courts just refuse to apply or even decide to annul a rule of national law that violates international law provisions? If so, can they do it even if the latter do not produce direct effects? Finally, when all the options for applying international law provisions in a specific case fail, can national courts be asked to offer compensation to those affected by that misapplication? Can they

¹ We have benefited from helpful comments by Christina Deliyanni-Dimitrakou and Lorenza Mola.

enforce states' *civil responsibility* for a breach of international law? All these techniques are relevant when reflecting upon the applicability of European Social Charter provisions by national courts². However, as we will see, the extent to which the techniques are used will depend on each national legal order.

II. The relationship between the ESC and domestic legal orders

A. International law and domestic legal orders

The ESC is an international treaty, which was concluded according to the rules and principles of international law, namely the Vienna Convention on the Law of Treaties. Therefore, the question of knowing whether domestic courts can apply ESC provisions implies, first, knowing whether they can or should apply international law provisions in the first place.

The problem regarding the applicability of international law in domestic legal orders is an old one and was initially intermingled with the monist/dualist spat³. Monists claimed international law and domestic law were part of the same legal order, while dualists understood them as distinct legal orders. If one followed the former rule, one would presumably conclude that domestic courts would have to apply both national law and international law provisions, while following the latter rule would entail the conclusion that national judges would only be able to apply domestic law provisions (including those adopted with the aim of transposing international rules into the national legal order).

The fact is that, in practice, the answer to the question of applicability differs widely from state to state, from domestic jurisdiction to domestic jurisdiction, and even from supranational legal order to supranational legal order (as exemplified by the relationship between European Union law and member states' legal orders).

As a rule, international law does not impose on states any specific model of application of international law provisions⁴. The *pacta sunt servanda* principle requires states to comply with binding international law stipulations. However, in following those international obligations, states may choose among several models of application, based on either monist or dualist views (or without adopting a clear view).⁵ Needless to say, a state must take international responsibility if it adopts a defective mechanism of application of international law in the domestic legal system that entails breaches of international obligations. However, as a rule, the state will be responsible for the breach, not for the mechanism⁶.

The focus then changes to domestic constitutional provisions on the internal status of international law. Those constitutional rules can endorse an automatic adoption of international law provisions, which become immediately part of the internal legal order when internationally binding on the state

² These notions overlap with the similar concepts of 'jurisdictional applicability', 'judicial revocability', 'justiciability of international treaties' and 'normative justiciability'. For a relation between those notions see N. ALIPRANTIS, "Les droits sociaux sont justiciables", *Droit Social* 2006, p. 156 *et seq*; Carole NIVARD, "La justiciabilité des droits sociaux, Etude de droit conventionnel européen", Bruylant, 2012; J. F. AKANDJI KOMBE, "De l'invocabilité des sources européennes et internationales du droit social devant le juge interne. Après l'arrêt GISTI et FAPIL du Conseil d'Etat du 12 avril 2011", *Droit social*, 2012, p. 1014 *et seq*; IDEM, "La justiciabilité des droits sociaux et de la Charte sociale européenne n'est pas une utopie" in: *L'Homme dans la Société Internationale: Mélanges en hommage au Professeur Tavernier*, 1^{ère} édition, Bruxelles, Bruylant, 2013, pp. 1-21; G. BRAIBANT, *La Charte des droits fondamentaux de l'Union Européenne*, Editions du Seuil, 2011, p. 252.

³ Cf. Antonio CASSESE, *International Law*, 2nd Ed., Oxford University Press, 2005, pp. 213-217.

⁴ Cf. Antonio CASSESE, *cit.*, p. 219, according to whom international law "leaves each country *complete freedom* with regard to how it fulfils, nationally, its international obligations"; and André NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford University Press, 2011, p. 69: "International Law thus does not make international law automatically part of the applicable law of a domestic court" and "the result is that applicability of international law by a domestic court is necessarily contingent on domestic law".

⁵ Giorgio GAJA, "Dualism – A Review", in Jann Nijman/André Nollkaemper, *New Perspectives on the Divide Between National & International Law*, Oxford University Press, 2007, p. 62, concludes that there are no general answers regarding the relationship between international law and municipal legal orders and calls therefore for "a pragmatic solution (...) which consists in leaving the theoretical debate over monism or dualism aside". Cf., also, Eileen DENZA, "The Relationship between International and National Law", in Malcom D. Evans, *International Law*, 5th Ed., Oxford University Press, p. 388.

⁶ Cf. Antonio CASSESE, *cit.*, p. 218. International law requires "a result [the fulfilment of international legal obligations] rather than a method of implementation" – Eileen DENZA, *cit.*, pp. 383 and 386. Similarly, cf. André NOLLKAEMPER, *cit.*, p. 70: "unless a specific obligation provides otherwise, the fact that a state has not made international law part of the national legal order, is not a breach of international law".

and published in the state's official gazette. Alternatively, they can demand an *ad hoc* transformation or transposition of those international rules by domestic legal acts. Constitutions can, of course, adopt a combination of these mechanisms, depending on the source or content of the international legal rules at stake. In fact, regarding customary international law, most, if not all, domestic orders adopt the mechanism of automatic incorporation, while concerning treaty law, some adopt that same mechanism (e.g. France, Portugal, the Netherlands) and others adopt *ad hoc* transformation mechanisms (e.g., UK, Italy, Germany)⁷.

B. The European Social Charter and the legal orders of the Contracting Parties

Since the ESC is an international treaty, Parties have to comply with its provisions. Article 12 of the 1995 Additional Protocol⁸ states, “*It is understood that the Charter contains legal obligations of an international character*”.

However, Article A (Part III) of the revised ESC clarifies that there are two kinds of legal obligations. All the rights and principles stipulated in Part I are considered “aims which [the Parties] will pursue by all appropriate means”; the Parties engage to pursue “the attainment of conditions in which [those] rights and principles may be effectively realized”. In addition, the Parties have a duty to choose some articles of Part II, and each of the Parties undertakes “to consider itself bound” by those same articles. Therefore, regarding the provisions of the ESC, there are two kinds of legal obligations: a stronger one regarding those articles each Party chooses to accept and a weaker one concerning the remaining articles, which are presented in a broader manner in Part I of the ESC.

Additionally, Article 12 of the 1995 Additional Protocol, after stating the international and legal character of the Charter's obligations, clarifies that “the application of [those legal obligations] is submitted *solely* to the supervision provided for in Part IV thereof and in the provisions of this Protocol”. This rule restates, in more detail, Part III of the Appendix to the European Social Charter (both 1961 and Revised versions). Article 12 refers to two mechanisms: the “supervision procedure” enshrined in Part IV of the 1961 European Social Charter, which is also applicable to the revised 1996 Charter⁹, and the “system of collective complaints” adopted in the 1995 Additional Protocol to the Charter.

The supervision procedure is based on Parties' reports on the application of ESC articles¹⁰. However, there is a distinction between the articles accepted and those not accepted by the Contracting Parties. Only reports regarding the former are assessed by the European Committee on Social Rights “from a legal standpoint” to verify “the compliance of national law and practice with the obligations arising from the Charter”¹¹. The system of collective complaints, applicable only to the Parties that have ratified the 1995 Additional Protocol, is based on complaints submitted by (international or national) non-governmental organisations. However, the complaints may only “relate to a provision of the Charter accepted by the Contracting Party concerned”¹². The European Committee on Social Rights will then write a report on “whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter”. Both types of reports issued as part of the supervision procedure or the system of collective complaints will then form the (direct or indirect) base for the Committee of Ministers' recommendations to the concerned Contracting Parties¹³.

An outdated interpretation of these provisions was that they precluded any direct applicability and that the respect of the Charter was only controllable at the international level. According to another obsolete interpretation, these provisions stated the non-self-executing character of ESC rules¹⁴. However, as we will see, several domestic courts have considered ESC provisions directly applicable

⁷ Cf. Antonio CASSESE, *cit.*, p. 226; Eileen DENZA, *cit.*, pp. 389-391, 394-396.

⁸ This Additional Protocol to the European Social Charter, of 9 November 1995, provides for a “system of collective complaints” designated to improve the effective enforcement of the rights guaranteed by the Charter and entered into force the 1 July 1998.

⁹ See Part IV, Article C.

¹⁰ See Articles 21 and 22 of the 1961 Charter.

¹¹ See Article 24, Paragraph 2, of the 1961 Charter.

¹² See Article 4 of the 1995 Additional Protocol.

¹³ See Article 28 of the 1961 Charter and Article 9, Paragraph 1, of the 1995 Additional Protocol.

¹⁴ Regarding those old interpretations, cf. Stein EVJU, “Application by Domestic Courts of the European Social Charter”, *Nordic Journal of Human Rights*, vol. 28, n° 3-4, 2010, p. 419, and Carole NIVARD, “L'Effet Direct de la Charte Sociale Européenne devant les Juridictions Suprêmes Françaises”, *RDLF*, 2012, *chron.* n° 28.

and directly effective. A better interpretation of these provisions would be that they concern solely the *international* responsibility of Contracting Parties, leaving the internal application of ESC rules to be decided by domestic authorities.

As mentioned above, in any of those procedures, only the implementation of articles accepted by each Contracting Party may be supervised “from a legal standpoint”¹⁵. Considering that the application of the Charter’s international obligations can only be (internationally) subjected to those procedures, it seems to follow that the (legal) international responsibility of the Contracting Parties relates only to those articles accepted by them. Therefore, from the point of view of international law, the applicability of the European Social Charter by the courts of each Contracting Party seems only to be relevant in relation to the articles accepted by that Contracting Party.

Regarding the modes of implementation of those articles, Article I of the ESC seems to give a wide latitude to the Contracting Parties. Articles can be implemented either by “laws or regulations”, “agreements between employers or employers’ organisations and workers’ organisations”, “a combination of those two methods”, or by any “other appropriate means”¹⁶. Besides leaving the choice concerning all “the appropriate means” to Contracting Parties, Article I does not expressly mention the direct applicability of the ESC provisions by national courts. Although it accepts other “methods of implementation”, foreseen in Articles 1 to 31, none of these articles mentions or entails the direct applicability of ESC provisions by domestic courts.

The case law of the European Committee on Social Rights reflects a similar interpretation on the applicability of the Charter provisions by domestic courts. It has consistently recalled that “the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically but also in fact”, and that, consequently, “the implementation of the Charter cannot be achieved solely by the adoption of legislation”. Accordingly, the ECSR has insisted that the Charter’s application must be “accompanied by an effective and rigorous control” and that Contracting Parties must also “make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein”¹⁷. However, none of this appears to entail the necessary applicability of ESC provisions by domestic courts¹⁸.

In conclusion, there is no express statement or implied suggestion in the European Social Charter that its articles are (directly) applicable by national courts. That question is left at the discretion of domestic legal orders.

C. The relationship between the ESC and EU law

Before examining the domestic legal orders, it is important to analyse some questions concerning the relationship between the ESC and EU law, since the conciliation between them is still a matter of considerable debate.

First, the ESC is an autonomous legal instrument from an independent international organisation – the Council of Europe – while EU law is part of an entirely distinct international organisation – the European Union. Although the member states of both international organisations are largely the

¹⁵ One has to take into account, however, that, as stated by the European Committee on Social Rights, “It is impossible to draw watertight divisions between the material scope of each article or paragraph. It therefore falls to the Committee to ensure [...] the essential core of accepted provisions is not amputated as a result of the fact it may contain obligations which may also result from unaccepted provisions.” – ECSR, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, complaint No. 41/2007, decision on admissibility of 26 June 2007, §9.

¹⁶ According to the ECSR Secretariat, the “means of fulfilling Charter obligations is left to the discretion of the Parties, who are free to use all the methods referred to above” – *Digest of the Case Law of the European Committee of Social Rights*, December 2018.

¹⁷ See ECSR, *International Commission of Jurists (CIJ) v. Portugal*, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32; ECSR, *International Association Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, §53; and ECSR, *International Movement ATD Fourth World v. France*, Complaint No. 33/2006, decision on the merits of 5 December 2007, §61.

¹⁸ See, however, ECSR, *Confederation of Swedish Enterprise v. Sweden*, Complaint No. 12/2002, decision on the merits of 15 May 2003, §§27-28 : “[...] when, in order to implement undertakings accepted under Article 5, use is made of agreements concluded between employers’ organisations and workers’ organisations, in accordance with Article I.b, States should ensure that these agreements do not run counter to obligations entered into [...]. 28. The commitment made by the Parties, under which domestic legislation or other means of implementation under Article I, bearing in mind national traditions, shall not infringe on employers’ and workers’ freedom to establish organisations, implies that, in the event of contractual provisions likely to lead to such an outcome, and whatever the implementation procedures for these provisions, *the relevant national authority*, whether legislative, regulatory or *judicial*, is to *intervene*, either to bring about their repeal or to *rule out their implementation*.”

same and bound to the obligations emerging from both organisations, the legal systems remain distinct. On the other hand, the European Union, as an organisation gifted with legal personality, is not a party of the ECHR or the ESC. Therefore, neither the EU nor the Council of Europe are legally bound to the obligations emerging from one another.

Second, although the ESC and EU law remain two distinct legal orders, this does not mean that they are necessarily watertight. The mutual influence of both legal systems emerges primarily from the Preamble of the Charter of Fundamental Rights of the European Union (CFREU), which became mandatory after the entry into force of the Treaty of Lisbon in 2009. The Preamble expressly states that the fundamental rights consecrated therein reaffirm (in the French version *réaffirme* and in the German version *bekräftigen*) the fundamental rights emerging from other legal orders, including the European Social Charter. The use of these expressions is by no means innocent, because one can legitimately conclude that the European Social Charter was considered a source of inspiration in the recognition of the rights provided for in the Charter of Fundamental Rights and should be taken into account in the determination of its content. Although the latter has a strict scope of application, namely limited to the institutions and organs of the European Union and to member states in matters involving the application of EU law (see Article 51), the CJEU case law has widened its scope¹⁹. Moreover, as regards the consideration of the ESC in the determination of the content and extension of the rights prescribed therein, a progressive harmonisation between the interpretations of the several rights recognised in both legal instruments can be expected, especially since the ESC has a potentially wider and more ambitious scope of application, as it is not subject to the limitations imposed by Article 51 of the CFREU²⁰.

This progressive harmonisation has been observed in some CJEU case law, which expressly refers to the ESC as an interpretative source of some provisions of EU law.

In the *Sari Kiiski* case (C-116/06), the CJEU had to decide on the interpretation of a provision of Directive 76/207/EEC of 09/02 on the implementation of the principle of equal treatment between men and women in the workplace, as well as Directive 92/85/EEC on the protection of pregnant workers and workers who have recently given birth or are breastfeeding. The question posed to the CJEU was whether a new pregnancy during the period of leave in the 14 weeks following childbirth could be considered an “unforeseeable and justified ground” which could validate the modification of childcare leave. The CJEU resorted to the ESC to interpret the Directives when it stated in §48 that

(...) Article 136 also refers to the European Social Charter signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, to which in its original or revised version or both, all Member States are parties. Article 8 of the European Social Charter concerning the right of employed women to protection of maternity, aims to provide them with a right to maternity leave of at least 12 weeks (original version) or at least 14 weeks (revised version).

The CJEU followed the same approach in the *Impact* case (C-268/06), where the Court had to decide on the interpretation of Directive 1999/70/CE on fixed-term work. The issue at stake was whether the principle of prohibition of discrimination between fixed-term and permanent workers prescribed in Article 4 of the aforementioned Directive covered the conditions concerning remuneration and pensions determined in an employment contract. The CJEU referred to the ESC when it stated,

§113 Moreover, the first paragraph of Article 136 EC, which defines the objectives with a view to which the Council may, in respect of the matters covered by Article 137 EC, implement in accordance with Article 139(2) EC agreements concluded between social partners at Community level, refers to the European Social Charter signed at Turin on 18 October 1961, which includes at point 4 of Part I the right for all workers to a ‘fair remuneration sufficient for a decent standard of living for themselves and their families’ among the objectives which the contracting parties have undertaken to achieve, in accordance with Article 20 in Part III of the Charter;

¹⁹ See CJEU, *Akerberg Fransson*, C-617/10, § 19 and ff., and Fabrice PICOD, «Article 51 – Champ d’Application», in PICOD/VAN DROOGHENBROECK (Ed.), *Charte des droits fondamentaux de l’Union Européenne – Commentaire article par article*, Bruylant, 2018, pp. 1071-1074

²⁰ Olivier DE SCHUTTER, «The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights» (European Commission, 2016).

§114 – *In the light of those objectives, Clause 4 of the framework agreement must be interpreted as articulating a principle of Community social law, which cannot be interpreted restrictively (see Del Cerro Alonso, paragraph 38).*

In the *Commission v. Germany* case (C-271/08), the issue at stake concerned the direct grating by some municipalities of pension plans of municipal workers to private insurance companies in the performance of a collective agreement without observing a procedure of public procurement (a case with several affinities with cases *Albany* (C-67/96) and *Viking* (C-438/05)). The CJEU referred to the ESC as a reinforcement of the EU's commitment to strengthen collective bargaining by stating,

§37 – *In that regard, it should be noted, first, that the right to bargain collectively, which the signatories of the TV-EUmw/VKA have exercised in the present case, is recognised both by the provisions of various international instruments which the Member States have cooperated in or signed, such as Article 6 of the European Social Charter, signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, and by the provisions of instruments drawn up by the Member States at Community level or in the context of the European Union, such as Article 12 of the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, and Article 28 of the Charter of Fundamental Rights of the European Union (“the Charter”), an instrument to which Article 6 TEU accords the same legal value as the Treaties.*

It is worth noting that in this last decision, the ESC was not called into question by means of a direct provision of the Treaties²¹ but rather autonomously by the CJEU itself, which considered the obligations imposed upon member states by the ESC and placed them *on a par* with other instruments of EU law such as the Community Charter of Fundamental Social Rights of Workers, adopted in Strasbourg on 9 December 1989, and the CFREU.

The CJEU also referred to the ESC in a number of cases concerning the right to paid annual leave. The *European Commission v. Guido Strack* case (C-579/12) concerned the possibility of carry-over of days of paid annual leave not enjoyed for reasons of inability to work due to sickness. Cases *Stadt Wuppertal v. Maria Elisabeth Bauer* (C-569/16) and *Volker Willmeroth, in his capacity as owner of TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K. v. Martina Broßonn* (joined cases C-569/16 and C-570/16) concerned the transferability of an acquired right to paid annual leave to the heirs upon the death of the employee. Case *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v. Tetsuji Shimizu* (C-684/16) concerned the loss of a worker's right to paid annual leave upon termination of the employment relationship in a situation in which the worker did not ask to be able to exercise his right to paid annual leave during the reference period unilaterally determined by the employer.

In all of these cases, the CJEU recalled that, according to the settled case law of the Court, the entitlement of every worker to paid annual leave, provided for in Article 7 of Council Directive 93/104/EC, should be regarded as a particularly important principle of EU social law, affirmed by Article 31, n. 2 CFREU, which the first subparagraph of Article 6, n. 1 of the TEU recognises as having the same legal value as the Treaties. More precisely,

the CJEU also added that according to explanations relating to Article 31 of the CFREU, which must be taken into account in the interpretation of the Charter, according to Article 6, n. 1, 3 of TEU and Article 52, n. 7 of the CFREU, Article 31, n. 2 of the CFREU is based on (...) Article 2 of the ESC, signed in Turin on 18 October 1961 and revised in Strasbourg on 3 May 1996.

As we can see, the CJEU followed the same line of reasoning exposed above by integrating a provision of a directive within the larger framework of the fundamental rights enshrined in the legal instruments mentioned in the former paragraph, in particular the ESC and the CFREU.

The CJEU also made some far-reaching statements in the cases of *Wuppertal* (C-569/16) and *Tetsuji Shimizu* (C-684/16), which should be read together, concerning the possibility of application of the ESC between private parties.

In *Tetsuji Shimizu* (C-684/16), the CJEU expressly stated as settled case law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law. Since the right to paid annual leave is recognised as a fundamental right in Article 31, n.

²¹ As it occurred in the previous cases, where Article 136 of the TEC (today Article 151) expressly referred to it as a source of interpretation of the content of a Directive's provision.

2 TFEU, this requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensure an effective application of the Directive, even if this means changing the established case law. The Court further added that, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) CFREU, the interpretations of the committee of experts must be taken into consideration in the interpretation of the CFREU. Thereby, the CJEU expressly declared that a provision of the CFREU is based on a provision of the ESC and that member states are obliged to interpret national laws in order to assure its effectiveness (cf. §§49, 51, 52, 59).

In the *Wuppertal* case (C-569/16), the CJEU expressly declared that although Article 51, n. 1 of the CFREU states that the provisions therein are addressed to the institutions, bodies, offices, and agencies of the European Union with due regard to the principle of subsidiarity and to the member states only when they are implementing EU law, *this provision cannot be interpreted as necessarily precluding their application in a dispute between individuals*. The CJEU further added that if it is not possible to interpret national law in a manner consistent with the obligations flowing from Article 31, n. 2 CFREU, the national provision at stake (§§81, 83, 85, 87, 88, 89) must be disapplied.

Although all of these cases refer to the right to paid annual leave, the CJEU made some far-reaching statements concerning the interpretation of Article 31, n. 2 CFREU, which can be applied to other provisions also recognised in the ESC. First, according to Article 6, n. 2 TEU, the CFREU has the same legal value as the Treaties, and the rights, freedoms and principles recognised therein should be interpreted in accordance with the Charter. Second, the Preamble to the CFREU expressly states that it reaffirms the rights enshrined in EU law and Council of Europe law (which includes the ESC). Third, Article 52, n. 7 CFREU (which is integrated into Title VII, referred to in Article 6, n. 2 of the TEU) expressly provides for the obligation of both EU and member states' courts to take into account the explanations therein, namely as a way of providing guidance in the interpretation of this Charter²². Finally, the CJEU also stated that the field of application laid out in Article 51, n. 1 CFREU could not be interpreted as precluding the application of the rights provided for in the CFREU by national courts in legal disputes between private parties.

Thus, we can only conclude that when a certain right is recognised in both the ESC and the CFREU, national courts are obliged to apply the fundamental right provided for in the CFREU in a manner consistent with the ESC, even if the dispute is limited to private parties.

In the case of *INPS v. Tiziana Bruno and others* (joined Cases C-395/08 and C-396/08)²³, the CJEU also referred to the ESC as a source for interpreting Clause 4 of the Framework Agreement²⁴. It stated that Article 136 of the TEC [currently Article 151 of the TFEU] referred to the European Social Charter signed in Turin on 18 October 1961, which includes, at point 4 of Part I, the right of all workers to a “fair remuneration sufficient for a decent standard of living for themselves and their families” among the objectives undertaken by Contracting Parties in accordance with Article 20 of Part III of the Charter (§31). It proceeded to conclude that such a differentiation was, in principle, unlawful and that the national rule ought to be precluded unless the national court could ascertain objective grounds for that differentiation in treatment²⁵.

In the *O v. Commission of the European Communities* case (joined Cases F-69/07 and F-60/08)²⁶, the CJEU expressly referred to the ESC as a source of law for interpreting Regulation 1408/71 when it stated that the European Social Charter ensured “the ... maintenance ... of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties”. It also affirmed that although the Community had not itself acceded to the Charter, this legal instrument was expressly mentioned in the fourth recital of the Preamble to the Treaty on European Union and in Article 136 EC [currently Article 151 of the TFEU] and

formed part of the international instruments which should guide the institutions in the application and interpretation of the provisions of the Staff Regulations and of the Conditions

²² Many of which refer to the ESC when the same right is recognised in both legal instruments.

²³ Concerning the differentiation between horizontal and vertical part-time workers in terms of the computation of non-working periods when calculating the length of service required to qualify for retirement pension rights.

²⁴ Which provided for the principle of equal treatment between part-time workers and full-time workers unless objectively justified.

²⁵ For a similar reasoning, albeit in a situation concerning fixed-term work, see the *Impact v. Minister for Agriculture and Food and Others* case (C-268/06), §113.

²⁶ Concerning the conditions of employment as a member of the contract staff for auxiliary tasks of the European Communities.

of Employment, especially those which tend to deprive a worker of fundamental social protection by means of a simple option left to the discretion of the administration (§134).

The General Court employed a similar line of reasoning in the *Vahan Adjemian v. European Commission* case (T-325/09 P) concerning abuses of fixed-term work when it expressly referred to the ESC, stating that the fight against abuses in the domain of fixed-term employment contracts corresponded to one of the objectives enshrined in Article 151 TFEU and to the fundamental social rights proclaimed in the ESC (1961) (§60).

Thus, one can conclude that, although the EU is not formally bound to the ESC, this legal instrument has influenced the interpretation of primary and secondary EU law by means of Article 151 TFEU (former Article 136) and the activity of the Court itself. This means that the Treaties and the CJEU have managed to provide a “*reflex effect*” to the provisions of the ESC. On the other hand, EU and member states’ obligations derived from the ESC have influenced not only the European legislator but also the CJEU, which is significant in itself. This provides a pathway for the harmonisation of the protection of social rights prescribed in the ESC.

III. The application of the ESC by national courts

A. Introduction

The systematic option of dividing liberty and social rights is reflected in most international law developed after World War II.²⁷ At the global level, in 1966, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were approved. However, there are remarkable differences between the two, and the enforcement of the ICESCR has been far more challenging.²⁸

If we look closely at the international regional dimension, we can see that it mimics the abovementioned division of rights. In fact, when comparing the European Convention on Human Rights (1950) and the European Social Charter (1961), it comes as no surprise that the latter has a significantly inferior enforceability level.²⁹ First, the ECHR is enforced by the European Court of Human Rights, while the ESC is monitored by the European Committee of Social Rights, which has only recently begun to gain recognition as a real jurisdictional organ.³⁰ As Petros Stangos emphasised, it was the collective complaints mechanism that granted jurisdictional protection to the rights consecrated in the European Social Charter.³¹ Second, if the ECHR is widely cited by constitutional and supreme national courts, references to the ESC are infinitesimal and often in the form of *obiter dicta*.³² Third, while individuals can lodge a complaint regarding a violation of ECHR rights (under Article 34), this possibility does not exist for the protection of rights provided by the ESC.³³

Liberty and social rights are not impenetrable categories. The traditional *summa divisio* between rights was as follows: “(a) liberty rights → *non facere* obligations → non costly; (b) social rights → *facere* obligations → costly”.³⁴ However, liberty and social rights “cannot be successfully

²⁷ Jeff KENNER, «Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility», in *Economic and Social Rights Under the EU Charter of Fundamental Rights*, Hart Publishing, 2003, pp. 1-25.

²⁸ Catarina Santos BOTELHO, «Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?», *Comparative Constitutional Law and Administrative Law Quarterly*, No. 3 (4), 2017, pp. 62-87.

²⁹ P. GARCIA PEDRAZA, *Crisis and Social Rights in Europe – Retrogressive Measures versus Protection Mechanisms*, Institut for Human Rights – Abo Akademi University, 2014, p. 17.

³⁰ Régis BRILLAT, «La Charte Sociale et son acceptation progressive par les États», No. 13, 2009, *REDF*, 227-243, p. 230.

³¹ «Les rapports entre la Charte Sociale Européenne et le Droit de l’Union Européenne – Le rôle singulier du Comité Européen des Droits Sociaux et de sa jurisprudence», *Cahiers de Droit Européen*, No. 49, 2013, pp. 319-393, p. 327.

³² Catarina Santos BOTELHO, «A proteção multinível dos direitos sociais: verticalidade gótica ou horizontalidade renascentista – Do não impacto da Carta Social Europeia (Revista) na jurisprudência constitucional portuguesa», *Lex Social*, No. 7, 2017, pp. 88-123, Gráinne de BURCA, «The future of social rights protection in Europe», in *Social Rights in Europe*, Oxford University Press, 2005, pp. 3-15, p. 11, J.-M. BELORGEY, «Quelles garanties des droits sociaux en temps de crise?», *Lex Social*, No. 7, 2016, pp. 1-11, p. 2, and Jean-François AKANDJI-KOMBE, «The Material Impact of the Jurisprudence of the European Committee of Social Rights», in *Social Rights in Europe*, Oxford University Press, 2005, pp. 89-108.

³³ Still, it is relevant to mention the collective complaint mechanism (Additional Protocol 1995). See Catarina Santos BOTELHO, «Aspirational constitutionalism, social rights prolixity and judicial activism», *loc. cit.*, pp. 68-69.

³⁴ *Idem*, «Aspirational constitutionalism, social rights prolixity and judicial activism», *loc. cit.*, pp. 69-70.

compartmentalized because they are deeply interconnected and mutually dependent”.³⁵ Both liberty and social rights have negative and positive dimensions. Regarding costs, all fundamental rights have significant budgetary implications, and “the idea of cost-free rights is a myth”.³⁶

When discussing whether the social rights granted in the European Social Charter are enforceable by national courts (by member states of the Council of Europe that have ratified the ESC), law in action is more revealing than law in books. International regional social rights can be applied by national courts, either as the ground of a judicial decision or as *obiter dicta*. However, law in action reveals a much complex situation.

Some national courts have ruled on the direct applicability of the provisions of the ESC in the light of their own legal orders with divergent results. Spanish, German, Italian and French courts have issued rulings on this matter, but it is difficult to find a consensus among national courts.³⁷

B. The example of Spain

According to the Spanish Constitution, “validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order”³⁸. From this point of view, the ESC should be recognised as directly applicable in Spanish law³⁹. Regarding its application in concrete cases by Spanish courts, this seems to depend on the recognition of the self-executing character of the ESC provisions. Apparently, however, there is a “doctrinal and judicial” division between those that reject and those that accept the invocation of ESC provisions in concrete cases⁴⁰.

Some Spanish courts have been particularly innovative in this regard, in the sense that they have not only accorded direct applicability to the ESC as a judicial reaction to certain legislative measures approved in the context of an economic crisis but also raised a number of interrogations in the relationship between the ESC and EU law.

In the *Iberclima* decision⁴¹, for example, the company asked the workers to sign a document, approved by the regional labour inspection, by means of which they bound themselves to be available to work from 9h00 to 20h00 on Saturdays and from 09h00 to 13h00 on Sundays for 7 or 8 weekends per year in exchange for an additional €100.00 gross in pay. The workers went to court, and the court began by framing the matter with the issue of “*periods of availability*”, which (at the time) apparently were not provided for in Spanish legislation. The Court then compared the treatment of the matter in the case law of the CJEU and the ECSR. Whereas the former considered that “*periods of availability*” should not be considered working time in the light of Directive 2003/88/EC as long as workers could do what they wanted with their time during that period⁴², the latter considered that those periods amounted to a violation of the right to a reasonable limitation of working time provided for in Article 2, n. 1 of the ESC⁴³. Faced with this contradiction, the Spanish Court decided that since the Spanish Constitution considers that both the ESC and the TEU are international treaties to which the Spanish state is bound and that norms on labour standards in EU law are simply minimal standards, there is nothing prohibiting national courts from providing for a superior level of protection and, hence, considered those periods of availability as working time.

³⁵ *Idem*, «Aspirational constitutionalism, social rights prolixity and judicial activism”, *loc. cit.*, p. 70.

³⁶ Catarina Santos BOTELHO, «Aspirational constitutionalism, social rights prolixity and judicial activism”, *loc. cit.*, p. 70, Luigi FERRAJOLI, «Derechos sociales y esfera pública mundial», in *Los Derechos Sociales in el Estado Constitucional*, Tirant to Blanch, 2013, pp. 47-59, p. 54, Stephen HOLMES and Cass R. SUNSTEIN, *The Cost of Rights – Why Liberty Depends on Taxes*, W. W. Norton & Company, 1999, pp. 43-48, and Volker NEUMANN, «Sozialstaatsprinzip und Grundrechtsdogmatik», DVBL, 1997, pp. 92-100.

³⁷ For a general perspective on the issue, see Stein Evju, «Application by Domestic Courts of the European Social Charter», *Nordic Journal of Human Rights*, 28.3-4, pp. 401-421.

³⁸ See Article 96, n. 1, of the Spanish Constitution.

³⁹ See Carmen SALCEDO BELTRAN, «La aplicabilidad directa de la Carta Social Europea por los órganos judiciales», *Trabajo y Derecho*, n.º 13, enero 2016.

⁴⁰ See Carmen SALCEDO BELTRAN, «La aplicabilidad directa...”, *cit.*. An additional complexity results from the argument on whether the issue should be framed as one of ‘control of conventionality’ of Spanish legislation vis-à-vis the ESC or one of ‘control of constitutionality’, which would refer the last word on the issue to the Constitutional Court – *idem, ibidem*.

⁴¹ Decision from the Juzgado Social n. 3 of Barcelona, issued in case n. 236/2015L.

⁴² Cf. cases *SIMAP* (C-303/98) and *Jaeger* (C-151/02).

⁴³ Cf. ECSR, case n. 55/2009 (*CGT v. France*) and the Conclusions n. XX-3 published in January 2015.

In the *Benicio* case⁴⁴, an undifferentiated worker⁴⁵ was hired under a law which provided for a probationary period of one year. The employment relationship was terminated after one year. Here, the Court made two far-reaching statements. First, it said that, in the light of the Spanish Constitution, the ESC had the same value as EU Treaties. Second, it confronted the Spanish legislation with the decision of the ECSR taken in case n. 66/2011 (*Genop-Dei and Anedi v. Greece*), in which the ECSR decided that Article 4, n. 4 ESC ruled that the duration of the probationary period should take into account the demands of the post in question, which determine the time required for the employer to evaluate the adequacy of the worker to the position. However, it could not be as wide as to empty the guarantees it intended to ensure, namely, to allow workers to look for another job while receiving a wage. The Court concluded that the Spanish provision violated Article 4, no. 4 ESC, since there were no valid reasons for an undifferentiated worker to be subjected to such an extensive probationary period⁴⁶.

C. The example of Germany

According to the German Basic Law, “treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific cases for such federal legislation”⁴⁷. This federal law operates “the double function of empowering the executive to ratify a treaty (thereby giving the treaty effect in the international sphere) and simultaneously endowing the treaty with the force of a statute in the domestic sphere”⁴⁸.

The ESC is not strange to German courts.⁴⁹ In a decision of the BAG of 10 December 2002 (1 AZR 96/02), Germany’s highest court for employment matters considered a strike action initiated by a trade union against an employer illegitimate on the grounds that it violated the so-called “*relative duty of peace*” (*relative Friedenspflicht*). This German law provision protects employers from strike actions destined to force the employer to enter into negotiations to bargain on an issue to reach a company-level collective agreement when the issue has already been dealt with in a higher-level collective agreement. The BAG considered that this restriction of the right to strike did not amount to a violation of the ESC:

[35] *The European Social Charter (ESC, BGBl. 1964 II S 1262) does not prevent the right to strike from being restricted by the obligation of peace. However, the ESC represents an obligation under international law entered into by the Federal Republic, the rules of which the courts must observe when filling in the gaps in statutory law regarding the organization of the industrial dispute based on value decisions in the constitution.*⁵⁰

⁴⁴ Decision from the Juzgado Social n. 2 of Barcelona, issued in case n. 426/2013. See Carmen SALCEDO BELTRAN, «L’effet direct de la Charte Sociale Européenne en Espagne en temps de crise économique», in Jörg LUTHER, Lorenza MOLA, *Europe’s social rights under the “Turin process”/Les droits sociaux de l’Europe sous le “Processus de Turin”*, Torino, Editoriale Scientifica, 2016, pp. 97-110.

⁴⁵ I.e. a worker for whose job no particular qualifications are required.

⁴⁶ The attitude of the Spanish Constitutional Court regarding the conformity of the above measures with the European Social Charter seems less generous, having declared their constitutionality without referring to the European Social Charter and the ECSR jurisprudence. On this question, see Carmen Salcedo Beltran, «L’effet direct de la Charte Sociale Européenne en Espagne...», *cit.*, with reference to the decisions of 16 July 2014, 22 January and June 2015 of the Spanish Constitutional Court.

⁴⁷ See Article 59, n. 2, of the German Basic Law.

⁴⁸ See Thomas M. FRANCK, Arun K THIRUVENGADAM, “International Law and Constitution-Making”, in Chinese JIL, 2003, p. 475. Additionally, German courts recognized the obligation of judges to interpret national law in the light of the international conventions ratified by Germany. See Deutscher Bundestag, «Streik und Koalitionsfreiheit als soziale Menschenrechte. UN-Sozialpakt und Europäische Sozialcharta vor deutschen Gerichten», available at <<https://www.bundestag.de/resource/blob/410018/beb5cd3099d66e5485c5f9372b01ef65/wd-6-076-15-pdf-data.pdf>> (last visit 07-02-2021).

⁴⁹ It is also a long-standing discussion: see e.g. Manfred ZULEEG, «Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der Europäischen Sozialcharta», *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 1975, pp. 341-363; Roland CZYCHOLL and Tino FRIELING, «Auswirkungen der Europäischen Sozialcharta auf das Arbeitskampfrecht. Das Streikrecht aus Art. 6 Abs. 4 ESC als vorrangige Gesetzgeberische Entscheidung», *ZESAR*, 2011, pp. 322-327; Reingard ZIMMER, «Soziale Grundrechte in der EU. Der Arbeitskampfrecht nach dem Inkrafttreten des Vertrags von Lissabon», *Arbeit Und Recht*, 3, 2012.

⁵⁰ Orig.: «Der Beschränkung des Streikrechts durch die Friedenspflicht steht die Europäische Sozialcharta (ESC, BGBl. 1964 II S 1262) nicht entgegen. Allerdings stellt die ESC eine von der Bundesrepublik eingegangene völkerrechtliche Verpflichtung dar, deren Regeln die Gerichte

The BAG ruling of 19 June 2007 (1 AZR 396/06) concerned the lawfulness of a sympathy strike (*Unterstützungstreik*) initiated by a union as a way of supporting a strike initiated in the context of another collective labour agreement. When analysing the lawfulness of a restriction on the right to strike based on the obligation of social peace (*Friedenspflicht*), the Court referred to the ESC when considering, in §18 aa of its decision, that the restriction of the right to strike based on the obligation of social peace did not contradict the obligations derived from Article 6, paragraph 4 ESC that the right to strike could be subject to obligations deriving from collective agreements previously signed between the parties⁵¹.

The BAG ruling of 20 November 2012 (1 AZR 611/11) also referred to the ESC. This ruling involved the exercise of the right to strike in religious institutions that had concluded a collective agreement with the trade union whereby they had agreed on an obligation of absolute social peace, as well as on subjecting conflicts to an arbitration procedure (*Schlichtungsabkommen*). When analysing the lawfulness of these restrictions regarding the exercise of the right to strike in religious institutions, the BAG decided that they did not violate the ESC on the same grounds as the BAG ruling of 12 October 2002 (1 AZR 96/02). The Court restated that the ESC represents an international obligation assumed by the Federal Republic, whose rules must be observed by the courts when they fill legislative gaps in the regulation of the right to strike. Subsequently, the Court went on to analyse the restrictions in the light of the criteria provided for in part III, Article 31, §1 ESC.

More interesting still is the judgment of the BAG of 19 January 2011 (3 AZR 29/09), involving a situation of indirect sex discrimination in an occupational pension fund set up by an airline. When analysing social partners' margin of discrimination in the regulation of this type of occupational scheme, the BAG (in a reasoning considerably close to the case law of the CJEU analysed above) integrated the ESC into the various legal sources (binding for the German state), protecting the right to collective bargaining. The decision reads as follows:

The principle of freedom of association, on which collective bargaining autonomy is based, has also been recognized in Union law. Just like Article 139 of the EC Treaty, Article 155 TFEU provides for a dialogue between the social partners that can lead to contractual agreements that are implemented under Union law (see BAG November 18, 2003 - 9 AZR 122/03 - on BI 2 c aa of reasons, BAGE 108, 333). In addition, in accordance with former Article 136 of the EC Treaty, Article 151 TFEU now refers to the European Social Charter and the "Community Charter on Fundamental Social Rights of Workers". The European Social Charter in Article 6 and the Community Charter in nrs. 11 to 14 also guarantee collective bargaining autonomy (cf. BAG January 14, 2009 - 3 AZR 20/07 - margin no. 46, BAGE 129, 105). Furthermore, according to Article 51 Para. 1 GR Charter, the fundamental rights contained in this charter must be taken into account when applying Union law. According to Article 28, this includes the right to collective bargaining, which then includes the right to negotiate and conclude collective agreements at the appropriate levels.⁵²

D. The example of France

According to Article 53 of the French Constitution, the most relevant treaties, including treaties "modifying provisions which are the preserve of statute law" and "those relating to the status of persons", "may be ratified or approved only by an Act of Parliament". Once that happens, however,

beachten müssen, wenn sie die im Gesetzesrecht bezüglich der Ordnung des Arbeitskampfes bestehenden Lücken anhand von Wertentscheidungen der Verfassung ausfüllen».

⁵¹ On this issue, see M. WEISS, «Die Entwicklung der Arbeitsbeziehungen aus arbeitsrechtlicher Sicht», Industrielle Beziehungen, 20(4): 393-417.

⁵² Orig: «Der Grundsatz der Koalitionsfreiheit, auf dem die Tarifautonomie beruht, hat auch im Unionsrecht Anerkennung gefunden. Ebenso wie bereits Art. 139 des EG-Vertrages sieht Art. 155 AEUV einen Dialog zwischen den Sozialpartnern vor, der zu vertraglichen Vereinbarungen führen kann, die unionsrechtlich umgesetzt werden (dazu BAG 18. November 2003 - 9 AZR 122/03 - zu BI 2 c aa der Gründe, BAGE 108, 333). Zudem verweist in Übereinstimmung mit dem früheren Art. 136 EG-Vertrag nunmehr Art. 151 AEUV auf die Europäische Sozialcharta und die „Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer“. Die Europäische Sozialcharta garantiert in Art. 6 und die Gemeinschaftscharta in Nr. 11 bis 14 auch die Tarifautonomie (vgl. dazu BAG 14. Januar 2009 - 3 AZR 20/07 - Rn. 46, BAGE 129, 105). Ferner sind nach Art. 51 Abs. 1 GR-Charta die in dieser Charta enthaltenen Grundrechte bei der Anwendung des Unionsrechts zu berücksichtigen. Dazu gehört nach Art. 28 das Recht auf Kollektivverhandlungen, das danach auch das Recht beinhaltet, Tarifverträge auf den geeigneten Ebenen auszuhandeln und zu schließen».

those treaties shall, “upon publication, prevail over Acts of Parliament”⁵³ and, therefore, have an authority superior to legislation.

Nevertheless, in order to be able to invoke a treaty provision before a judge, a party will have to show that the provision produces a direct effect. Regarding the ESC, and beginning with the case law of the Conseil d’État⁵⁴, the Court decided to revoke its traditional orientation of rejecting the direct effect of international treaties in the *Gisti et Fapil* case (n. 322326, 11/04/2012). Here, the Court expressly stated that international treaties could be lawfully and effectively (*utilement*) invoked by private parties as long as their object was not exclusively to regulate the relationship between states and did not require further complementary acts in order to produce effects in relation to private parties. This orientation obliged national judges to undertake a “dismemberment” (lit: «dépèçage») of the international treaty in order to ascertain if any of its provisions were sufficiently dense to provide individuals with an unequivocal right which did not require further complementary acts on the part of the state to be claimed in courts and applied in a case.

This turn in case law led to the *Fischer* case (n. 358992, 10 February 2014), where the same court, using the above criterion, expressly recognised direct effect to Article 24 ESC (right to protection in cases of termination of employment). The situation concerned the annulment of a decision taken by a professional chamber of commerce to dismiss its general secretary after a modification of the statute regulating the employment relations of its personnel on grounds of a loss of trust which jeopardised the regular functioning of the establishment.

This was not unanimously upheld, as the following rulings demonstrate. In the follow-up to the *Fischer* case, the decision of the Court of Appeal for Administrative Matters of Nantes of 27 March 2014 (n. 13NT00182) bluntly denied direct effect to the ESC as a whole. In the *Syndicat national des collèges et des lycées* case (n. 358349 of 23/07/2014), the Conseil d’État admitted the use of Article 5 ESC (right to organise) to analyse whether the Government had exceeded its powers in an administrative regulation concerning the distribution of working-time credits for the exercise of trade union activities, albeit never expressly stating its direct application or justiciability. However, in certain other rulings, the French courts denied direct effect to some provisions of the ESC⁵⁵ because these provisions did not satisfy the criteria for direct effect mentioned above⁵⁶. This shows that the reasoning of the Conseil d’État followed in *Fischer* is anything but unanimous and thus far does not seem to be too far-reaching because few provisions have been recognised as sufficiently dense in order to satisfy the criteria for direct effect.⁵⁷

The situation appears to be quite different as regards the Cour de Cassation, especially in the *Chambre Sociale*, the section dedicated to employment law matters. According to the analysis of C. Nivard, the Court initially undertook the same line of reasoning as the Conseil d’État, denying the possibility of invoking the provisions of the ESC directly (see ruling *Glaxion* of 17 December 1996 (n. 92-44202)). In the follow-up to a number of decisions recognising the possibility of direct application of international legal instruments⁵⁸, the *Chambre Sociale* of the Cour de Cassation reversed its case law and decided to align with the Conseil d’État and accord direct effect to several provisions of the ESC, namely arts. 5 (right to organise) and 6 (right to bargain collectively)⁵⁹. The Cassation went so far as to apply in the rulings of 29 February 2012 (n° 11-60203) and 10 May 2012 (n° 11-60235) certain

⁵³ See Article 55 of the French Constitution.

⁵⁴ This part of the text is based on the very interesting studies of Carole Nivard, concerning the direct application of the ESC by two of France’s highest courts, the Conseil d’État (the highest court in administrative matters and advisor of the Government) and the Cour de Cassation (the highest court in judicial matters).

⁵⁵ Namely Articles 1 (right to work), 2, n. 1 (right to reasonable daily and weekly working hours), 13 (right to social and medical assistance), 15 (right of persons with disabilities to independence, social integration and participation in the life of the community) and 23 (right of elderly persons to social protection).

⁵⁶ I.e., they were not considered sufficiently dense to provide an individual with an unequivocal right, which did not depend on a complementary act from the state. See Conseil d’État rulings from 4 July 2012 (n. 341533); 7 November 2012 (n. 350313); 30 January 2015 (n. 363520); and from the Court of Appeal of Paris of 2 February 2015 (n. 14PA01938); 20 June 2016 (n. 15PA01325; n. 15PA01325).

⁵⁷ Carole NIVARD, «L’Effet Direct de la Charte Sociale Européenne Devant le Juge Administratif – Retour sur la Question Évolutive de l’Effet Direct des Sources Internationales», *Revue des Droits et Libertés Fondamentaux*, 2016, pp. 1-17.

⁵⁸ Ruling of 1 July 2008 (n. 07-44124), on contracts for young workers, i.e. those under the age of 26 (contrat nouveau embauches), which applied directly ILO Convention n. 158, and ruling *Eichenlaub* of 16 December 2008 (n. 05-40876), which applied directly Article 6, n. 1 of the International Pact on Economic, Social and Cultural Rights.

⁵⁹ See rulings of 14 April 2010 (n° 09-60426 et 09-60429); 10 November 2010 (n° 09-72856); 1 December 2010 (n° 10-60117); 16 February 2011 (n° 10-60189 et 10-60191); 23 March 2011 (n° 10-60185); and 28 September 2011 (n° 10-19113).

provisions of the revised ESC, namely arts. A, E and G combined with Article 5, concerning the range of the obligations assumed by the parties to the convention, the principle of non-discrimination on the exercise of the rights enshrined in the Charter, and the permitted restrictions. Nivard also notes that, unlike the Conseil d'État, the Cassation never adopted the technique of “*dismemberment*” (*dépeçage*) of the provisions of the ESC in order to ascertain which could be sufficiently dense to fulfil the criteria for direct application, thus implying that the Cassation accepted the applicability of the ESC as a whole.

However, as Nivard reports, there are several cases which seriously question the conclusion formulated in the last sentence. In a decision of the Cour de Cassation of 29 June 2011 (n. 09-71107) concerning a system of working time accounts which permitted certain employees to have a 78h working week, the Court based the lawfulness of that provision not on the direct application of Articles 2, 3 and 11 ESC but on the framing of the facts within Article 151 TFEU (which makes reference to the ESC as a programmatic objective) and Article 31 CFREU (whose terms are directly inspired by the provisions of the Charter mentioned above). It appears that by mediating the application of the ESC through Article 151 TFEU and Article 31 CFREU, both expressly referring to the ESC, the Cour de Cassation implicitly denied direct applicability to those provisions of the ESC. Nivard also notes that this approach was repeated in a series of cases⁶⁰.

Furthermore, in a reasoned opinion of the Cour de Cassation⁶¹, the French highest court for civil matters decided that Article 24 of the revised ESC did not enjoy direct effect (in stark contrast to the approach followed by the Conseil d'État in *Fischer*), thus providing an answer to a question which had not yet been answered by the social chamber of the Court of Cassation⁶². To reach this conclusion, it relied on the terms of Part II of the Charter and on those of Article 24 ESC, which appeared to provide a great margin of appreciation to the Contracting Parties and did not suffice to provide individuals with enforceable rights in the context of a dispute.

This decision was in line with the opinion of the Advocate-General (AG), who claimed that the *Cour de Cassation* should interpret national law in light of the stipulations of international conventions, even without direct effect. However, the social chamber rejected pleas that invoked an article of the Charter, considering that the domestic law was in conformity with the ESC. Furthermore, the annulment of a decision in line with a reasoned opinion based on the ESC did not imply the recognition of a horizontal direct effect of this legal instrument. The AG, therefore, interpreted the judgment of the social chamber of the Cour de Cassation of 29 June 2011 on forfeit agreements as not recognising horizontal direct effect in disputes between individuals to either Article 151 of the Treaty or to the ESC. The AG also concluded that the decision of the Conseil d'État in the *Fischer* case did not present an obstacle to this conclusion, since the ruling concerned a dispute between a chamber of commerce and an individual and limited the reach of the provision to the vertical direct effect. As for Article 24 ESC, the AG ruled that it could never enjoy direct effect on the basis of settled European and national case law, since the rights enshrined therein were not sufficiently precise as not to necessitate complementary acts of execution on the part of the state.

E. The example of Italy

As we can see, not all national courts are enthusiastic about the ESC, nor do they possess a linear and consistent case law on the applicability of this legal instrument. Two recent decisions on compensation caps for unfair dismissals taken by the French and Italian courts have also poured cold

⁶⁰ Namely cases of 31 January 2012 (n° 10-19807); 13 June 2012 (n° 11-10854); 19 September 2012 (n° 11-19016); 26 September 2012 (n° 11-14540); and 31 October 2012 (n° 11-20986) - Carole Nivard, «L'Effet Direct de la Charte Sociale Européenne», *Revue des Droits et Libertés Fondamentaux*, 2012.

⁶¹ Cour de Cassation, ass. plén., 17 July 2019, avis n° 15012 and 15013.

⁶² It is relevant to mention that this decision concerned solely Art. 24, paragraph 2. See Mélanie SCHMITT, « Les avis d'assemblée plénière du 17 juillet 2019 ou l'occasion manquée d'une (re)conceptualisation du contrôle de conventionnalité », *Revue de Droit du Travail*, 2019, n° 11, p. 699, and Tatiana SACHS, « La conventionnalité du plafonnement des indemnités de licenciement injustifié : des avis peu convaincants », *Recueil Dalloz*, 2019, p. 1916.

water on this judicial enthusiasm⁶³. The French case is discussed above. The Italian case went up to the Constitutional Court.

In Italy, according to Article 80 of the Constitution, “Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation”. Treaties, therefore, have to be incorporated into domestic law and assume “the rank of ordinary legislation”⁶⁴. Accordingly, treaties may be superseded by subsequent acts of Parliament. However, in case of doubt, courts tend to interpret national statutes according to international treaties, thereby preventing conflicts from arising⁶⁵.

The Italian Constitutional Court ruling n. 120/2018 concerned freedom of association and the right to set up trade unions by military personnel, while a second ruling (n. 194/2018) concerned a legal cap in compensation for unlawful dismissal. The Italian Constitutional Court clearly stated that the ESC could not enjoy direct effect in light of the Italian Constitution (art 117, a). The Charter has to be implemented by statute. If this statute is contrary to the provisions of the ESC, it is declared unconstitutional by the Constitutional Court for violation of one of the international obligations assumed by the Italian state. However, the ECSR’s decisions are considered non-binding, even in terms of any procedural obligation to take them into account by Italian judges for purposes of interpretation of national law in conformity with the ESC⁶⁶. It reads in the first case,

10.1. – For the purposes of the admissibility of the evocation of this interposed parameter, it should be noted that it has distinct elements of speciality compared to normal international agreements, elements that connect it to the ECHR. If the latter, in fact, intended to constitute a “uniform protection system” of civil and political fundamental rights (judgment n. 349 of 2007), the Charter constitutes its natural social completion since, as stated in the preamble, the member States of the Council of Europe also wished to extend protection to social rights, recalling the indivisible nature of all human rights.

For these characteristics, the Charter, therefore, must qualify as an international source, pursuant to Article 117, first paragraph, of the Constitution. It has no direct effect and its application cannot take place immediately by the common judge but requires the intervention of this Court, to which the question of constitutional legitimacy must be proposed, for violation of the aforementioned first paragraph Article 117 of the Constitution, of the national law deemed contrary to the Charter. This is all the more so in consideration of the fact that its structure is mainly characterized as an affirmation of principles for progressive implementation, thus requiring particular attention in checking the times and methods of their implementation.⁶⁷

This same line of reasoning was restated in the second ruling, which states,

This Court has already affirmed the suitability of the European Social Charter to integrate the parameter of Article 117, first paragraph, of the Constitution and has also recognized the

⁶³ Giovanni GUIGLIA, “La rilevanza della Carta sociale europea nell’ordinamento italiano: la prospettiva giurisprudenziale” (D’AMICO, M, GUIGLIA, G., e LIBERALI, B.) *La Carta Sociale Europea e la tutela dei diritti sociali – Atti del convegno del 18 gennaio 2013 Università degli Studi di Milano*, Edizioni Scientifiche Italiane, Napoli, 2013, pp. 61-97, pp. 85-94, and *Idem*, “The importance of the European Social Charter in the Italian legal system: In pursuit of a stronger protection of social rights in a normative and internationally integrated system” (ed. D’AMICO, M., e GUIGLIA, G.) *European Social Charter and the challenges of the XXI century – La Charte Sociale Européenne et les défis du XXI^e siècle*, Edizioni Scientifiche Italiane, Napoli, 2014, pp. 51-96, p. 87.

⁶⁴ See Antonio CASSESE, *International Law*, cit., p. 229. See also, Giovanni GUIGLIA, “The importance of the European Social Charter in the Italian Legal System...”, in Marilisa D’Amico, Giovanni Guiglia, *European Social Charter and the Challenges of the XXI century*, Edizioni Scientifiche Italiane, 2014, pp. 53 ff.

⁶⁵ See Antonio CASSESE, *International Law*, cit., p. 230.

⁶⁶ See Lorenza MOLA, «The European Social Charter as a Parameter for Constitutional Review of Legislation», *The Italian Yearbook of International Law*, Volume XXVIII, 2018, pp. 493 ff.

⁶⁷ 10.1. – *Ai fini dell’ammissibilità dell’evocazione di tale parametro interposto, va rilevato che esso presenta spiccati elementi di specialità rispetto ai normali accordi internazionali, elementi che la collegano alla CEDU. Se quest’ultima, infatti, ha inteso costituire un «sistema di tutela uniforme» dei diritti fondamentali civili e politici (sentenza n. 349 del 2007), la Carta ne costituisce il naturale completamento sul piano sociale poiché, come si legge nel preambolo, gli Stati membri del Consiglio d’Europa hanno voluto estendere la tutela anche ai diritti sociali, ricordando il carattere indivisibile di tutti i diritti dell’uomo. Per queste sue caratteristiche la Carta, dunque, deve qualificarsi fonte internazionale, ai sensi dell’Art. 117, primo comma, Cost. Essa è priva di effetto diretto e la sua applicazione non può avvenire immediatamente ad opera del giudice comune ma richiede l’intervento di questa Corte, cui va prospettata la questione di legittimità costituzionale, per violazione del citato primo comma dell’Art. 117 Cost., della norma nazionale ritenuta in contrasto con la Carta. Ciò tanto più in considerazione del fatto che la sua struttura si caratterizza prevalentemente come affermazione di principi ad attuazione progressiva, imponendo in tal modo una particolare attenzione nella verifica dei tempi e dei modi della loro attuazione.*

*authoritativeness of the Committee's decisions, even if they are not binding on the national courts (judgment no. 120 of 2018).*⁶⁸

F. The example of Portugal

The Portuguese Constitution states that the “norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published”⁶⁹, clearly conferring direct applicability on treaty provisions. In addition, the Constitution grants the Portuguese Constitutional Court (PCC) strong judicial review powers, even though it has no consecrated constitutional complaint mechanism. The PCC is a cosmopolitan constitutional court that does not hesitate to engage in comparative constitutional law approaches and takes international and European law in consideration.⁷⁰ However, the ESC has not had a significant impact on Portuguese constitutional jurisprudence.⁷¹

In ruling no. 474/2013, the PCC preventively analysed legislation that would widen the grounds on which the contractual public employment bond could be terminated for objective reasons.⁷² The PCC then emphasised that the relevance of the prohibition on dismissal without just cause derives from its condition as a public European law principle, enshrined in Article 24 of the Revised Social Charter.⁷³ Rulings no. 328/2018⁷⁴ and no. 583/2018⁷⁵ are other examples of *obiter dicta* citations, as the PCC referred to Article 25 of the Revised Social Charter regarding the protection of the effective exercise of the right of workers to the protection of their claims in the event of the insolvency of their employer.

Notwithstanding this jurisprudential scenario, it is important to mention the dissenting opinion of Justice Mariana Canotilho in Ruling no. 612/2019 (right to housing),⁷⁶ who considered that constitutional social rights norms should be interpreted in consonance with European Union law and international law. Hence, the right to housing – enshrined in articles 30 and 31 ESC – ought to be granted in the widest extension possible given its intrinsic connection with human dignity.

Regarding ordinary courts, Portugal opted once more for a cautious approach. The ESC was mentioned in two decisions by the Portuguese Supreme Court of Justice as a source of law in the interpretation of some national provisions of the Portuguese Labour Code, although it did not adopt a final position on the binding character of the ESC or of the decisions of the European Committee of Social Rights.

In its decision of 09 September 2015 (proc. n. 180/10.7TTVRL.P.S1), the Court had to decide on the legality of an unlawfully terminated open-ended employment contract which was followed by the conclusion of a fixed-term contract between the two parties six months later. The legality of the fixed-term contract was not questioned. The Court decided that the second contract had implicitly revoked the first, even though the first was unlawfully terminated. The Court then added that this interpretation did not violate Article 1, n. 1 ESC, since the national statute makes the conclusion of a fixed-term employment contract dependent on a number of preconditions in order to avoid abuse, so the legality of the fixed-term contract was not challenged in accordance with Portuguese law. Furthermore, since the worker maintained the right to compensation for unlawful dismissal, the Court concluded that there had been no violation of the rights enshrined in Article 1, n. 1 ESC.

⁶⁸ *Questa Corte ha già affermato l'idoneità della Carta sociale europea a integrare il parametro dell'Art. 117, primo comma, Cost. e ha anche riconosciuto l'autorevolezza delle decisioni del Comitato, ancorché non vincolanti per i giudici nazionali (sentenza n. 120 del 2018).*

⁶⁹ See Article 8, n. 2, of the Portuguese Constitution.

⁷⁰ Catarina Santos BOTELHO, «Is there a middle ground between constitutional patriotism and constitutional cosmopolitanism? The Portuguese Constitutional Court and the use of foreign (case) law», in Giuseppe Franco FERRARI (dir.), *Judicial Cosmopolitanism – The Use of Foreign Law in Contemporary Constitutional Systems*, Brill/Nijhoff, 2019, pp. 424-448.

⁷¹ A search into the database of the PCC revealed ten entries for the word “European Social Charter”, although six of them were ruled out, as the ESC was only mentioned in the summary of the facts. On four occasions, though, the PCC referred to the ESC.

⁷² August 29th, 2013.

⁷³ Par. 9.

⁷⁴ June 27th, 2018, par. 2.3.1.

⁷⁵ November 8th, 2018, par. 2.3.

⁷⁶ October 10th, 2019.

In the Court's decision of 14 November 2018 (proc. n. 1181/15.4T8MTS.P1.S1), the issue at stake was very much akin to the Spanish *Benicio* case analysed above. The question concerned the conformity with Article 2, n. 5 ESC of a situation in which a company's shift work was organised in such terms that the worker was obliged to work for 12 consecutive days, followed by a rest period of two consecutive days. The Court affirmed the legality of such an arrangement in accordance with Portuguese law by invoking the CJEU's judgement *Marques da Rosa* (C-306/16)⁷⁷ together with a decision of the European Committee of Social Rights,⁷⁸ both expressly allowing for such an organisation of working time. However, the most important part of the ruling is the one in which the Court invokes Article 8, n. 2 of the Portuguese Constitution and expressly states that conventional international law (i.e., international treaties) is not only binding in the Portuguese legal order as an autonomous source of law, but also has a supra-legal dimension, being capable of setting aside conflicting national norms. Although the Supreme Court did not expressly state that the European Social Charter was one of those norms, it appears to be legitimate to conclude from the reading of the text that that may be the case.

The binding character of the Charter is not expressly stated, although it appears to be assumed when it conflicts with national norms. Such parsimonious citation of the European Social Charter could be justified by the fact that the Portuguese Constitution has one of the widest lists of social rights in the world. On these grounds, one could ignore the lack of relevant citations of international law and mere *obiter dicta* citations. However, surprisingly (or not quite so), we found that the PCC regularly cites other regional international law instruments, namely, the European Convention of Human Rights.⁷⁹ Thus, the sparse citation of the Charter is not a matter of aversion to international law but a serious problem as regards the place of social rights in the present legal arena.

In Portugal, as in several other constitutional orders, the ESC is echoed *sotto voce*. When speculating on the possible reasons behind such discrepancy of international regional instruments, some quickly emerge: (i) the circumstance of the Portuguese Constitution having a prolix list of social rights; (ii) the fact that Portuguese law schools, scholarship, and justices are not familiar with the European Social Charter; and (iii) the likelihood that several justices might consider the European Social Charter a soft law instrument and, therefore, not immediately enforceable.⁸⁰

G. Are national courts obliged to implement the ESC through EU law?

A complex but extremely relevant issue is the relationship between the ESC and EU law. As the above discussion demonstrates, even though the ESC is not part of EU law, it is expressly referred to in many of its provisions⁸¹, in the Preamble to the CFREU⁸², and in several explanations of the content of the CFREU, which must be taken into account in its interpretation (Article 52, n. 7).

The case law of the CJEU has expressly referred to the ESC in its rulings and in the interpretation of many provisions of EU law, *thereby applying the ESC through EU law*.

First, the CJEU has, on many occasions, expressly referred to the ESC through Article 151 TFEU when interpreting provisions of Directives or Regulations that fall within the scope of application of a right recognised in the ESC. Whenever the CJEU has needed to clarify the scope of a certain provision in the context of a preliminary ruling procedure, it has consistently resorted to the obligations placed on the EU under Article 151 TFEU to interpret the provision in a manner consistent with the rights provided for in the ESC. We can clearly perceive this in rulings *Sari Küiski*

⁷⁷ CJEU, António Fernando Maio Marques da Rosa v. contra Varzim Sol – Turismo, Jogo e Animação, SA (C-306/16), 09/11/2017.

⁷⁸ Conclusions 2010, Romania; Conclusions 2014, Sweden; Conclusions XX-3 (2014) Denmark ; see Digest of the Case Law of the European Committee of Social Rights (2018), p. 69.

⁷⁹ Catarina Santos BOTELHO, «A proteção multinível dos direitos sociais: Verticalidade gótica ou horizontalidade renascentista», *loc. cit.*, pp. 105-106. Reporting the same discrepancy in Italy, see G. GUIGLIA, «El derecho a la vivienda en la Carta Social Europea: A propósito de una reciente condena a Italia del Comité Europeo de Derechos Sociales», *Revista de Derecho Político*, No. 82, 2011, pp. 543-578, pp. 572-573.

⁸⁰ We followed closely Catarina Santos BOTELHO, «A proteção multinível dos direitos sociais: Verticalidade gótica ou horizontalidade renascentista», *loc. cit.*, pp. 106-107.

⁸¹ Namely Article 151 TFEU (former Article 136 TEC).

⁸² Which has the same legal value of the Treaties – Article 6 TEU.

(C-116/06), *Impact* (C-268/06), *Commission v. Germany* (C-271/08), *Tiziana Bruno* (C-395/08 and 396/08) and *Vahan Adjemian* (T-325/09P)⁸³.

Second, as regards the CFREU, which is binding upon member states since it has the same legal value as the Treaties (Article 6 TUE), the Preamble expressly states that the rights recognised in the Charter simply reaffirm the rights recognised in other international legal instruments for the protection of human rights. In addition, Article 52, n. 7 CFREU states that the explanations drawn up by a committee of experts on the rights recognised in that Charter should be taken into consideration when interpreting the rights enshrined therein, and the explanations published so far often refer to the ESC and the case law of the ESCR. Hence, we can conclude that the rights recognised in both the CFREU and the ESC should be interpreted in a consistent manner because the former expressly demands it.

The CJEU has reinforced this obligation of member states in a number of cases concerning the right to paid annual leave. The CJEU has expressly stated that it is settled case law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, thus requiring national courts to interpret national law in conformity with EU law and to do whatever lies within their jurisdiction to ensure the protection of such rights.

Finally, concerning the scope of application of the right at issue, the CJEU has expressly stated that although Article 51, n. 1 CFREU declares that the provisions therein are addressed to institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to member states only when they are implementing EU law, *this provision cannot be interpreted as necessarily precluding their application in a dispute between individuals*.⁸⁴

Hence, we can only conclude that if a certain dispute falls within the scope of application of EU law and that provision may be integrated within the scope of a right recognised both in the ESC and the CFREU, the national court is obliged to construct its national law in a manner consistent with the obligations emanating from both of these legal instruments, even if the dispute is between private parties, disapplying national law if necessary.

It is worth remembering that one of the pillars of EU law is the doctrine of supremacy. According to this principle, the validity of EU law can never be assessed by reference to national law, and national courts are required to give immediate effect to EU law, of whatever rank, in cases which arise before them and to preclude (i.e., interpreting it in conformity or setting it aside) any national law, of whatever rank, which could hinder the application of EU law. According to the CJEU, any EU law norm takes precedence over any provision of national law, including constitutional law. The requirement to set aside conflicting national law does not entail the obligation to entirely nullify the provisions, which may continue to apply in all situations not covered by a conflicting provision of EU law. Although the exact reach of this principle has been challenged by national courts – most notably the German Constitutional Court in its (much discussed) Ruling 2 BvE 2/08 of 30/06/2009 – it is generally accepted as part of the *acquis communautaire*.⁸⁵

Given member states' obligations emerging from the doctrine of supremacy and from the interpretation of this doctrine in the context of Article 151 TFEU and the CFREU, we can only conclude that whenever a dispute falls within the scope of application of a certain provision of EU law and this provision, in turn, is covered by a provision of the ESC or the CFREU, the national court is obliged to interpret it in a manner consistent with the ESC, either through Article 151 TFEU or through an expansive reading of Article 51 CFREU, if the situation also falls within a right recognised in the CFREU, disapplying national law if necessary.

CONCLUSIONS

Determining whether and to what extent national courts should apply the provisions of the ESC directly in disputes pending before national courts is complex and demands a multilevel analysis.

First and foremost, one has to consider the domestic constitutional law of the member state concerned. This brings us to the monist/dualist feud, which can only be addressed at the national

⁸³ See above the comments on the rulings for a more detailed explanation.

⁸⁴ See cases *Strack* (C-579/12), *Wuppertal* (C-569/16 and 570/16) and *Tetsuji Shimizu* (C-684/16).

⁸⁵ Paul CRAIG and Gráinne DE BÚRCA, *EU Law. Text, Cases and Materials*, 6th edition (OUP, 2011), pp. 266-316; Damian CHALMERS and others, *European Union Law* (Cambridge University Press, 2006).

level since each constitutional order has its own stance on this issue. The ESC does not demand from signatory states a specific model of domestic applicability of its provisions. As for international law, it simply requires member states to respect the obligations that they voluntarily entered into, and while it can make them liable for the breach, it cannot provide a mechanism for direct implementation.

Second, one must also consider the specific provision of the ESC at issue. Despite the fact that Article 12 of the 1995 Additional Protocol explicitly states that the Charter's provisions are binding in character, a closer look at other articles pours some cold water over the potential reach of that precept. The ESC itself makes a distinction between provisions of a declamatory nature (part I), whereby states are only bound to take the necessary and possible steps to achieve the aims prescribed in those provisions (art A (III)), and those of a binding character. On the other hand, states also enjoy discretion as to their choice of binding provisions in Part II. Finally, signatory states are only bound to the system of supervision provided for in Part IV and to the collective complaints procedure contained in the Additional Protocol to the ESC regarding the provisions they chose. In conclusion, there is no express statement or implied suggestion in the European Social Charter imposing the (direct) applicability of its articles by national courts. Therefore, that question is referred to the domestic legal orders.

Third, the issue changes when considering the relationship between the ESC and EU law. Even though the ESC is not part of EU law, the former is expressly referred to in many provisions of the latter⁸⁶. The CJEU's case law has, on many occasions, expressly referred to the ESC in its rulings and in the interpretation of many provisions of EU law, thus applying it through EU law, namely in the context of its case law concerning Article 151 TFEU. As regards the CFREU, which is binding upon member states, since it has the same legal value as the Treaties (art 6 TUE), the Preamble expressly states that the rights recognised in that Charter simply reaffirm the rights recognised in other international legal instruments for the protection of human rights, including the ESC. Article 52, n. 7 CFREU also proclaims that the explanations drawn up by a committee of experts on the rights recognised in that Charter ought to be considered when interpreting the rights enshrined therein, and the explanations published so far often refer to the ESC and the case law of the ESCR. Hence, if a certain dispute falls within the scope of application of EU law and if that provision of EU law may be integrated within the scope of a right recognised in the ESC, the national court is obliged to construct its national law in a manner consistent with the obligations emanating from both EU law and the ESC, even if the dispute is between private parties, disapplying national law if necessary.

Fourth, from the selected domestic case law discussed above, we can perceive two clearly distinct trends concerning the direct applicability of the ESC. The first trend, which we could call "*progressive*", and which is exemplified by the selection of case law of the Spanish and some French courts, recognises the ESC as a binding legal instrument in the light of the respective national constitutions and thus gives it direct effect at the national level, either setting aside national law, if necessary, or interpreting it in accordance with the obligations emanating from the ESC in a phenomenon similar to the direct effect of EU law. The second trend, which we will call "*conservative*" and which is exemplified by the case law of Italian and other French courts, does not deny that the ESC is binding upon the state, only that it cannot be directly invoked by private persons in national courts. This trend considers that the implementation of the obligations emanating from the ESC is a matter for the state and that its implementation is a task of its competent constitutional organs. A third trend, between the progressive and the conservative ones, can be found in German and Portuguese courts, where the binding character of the Charter appears to be assumed, although without a concrete example of incompatibility of the latter with national provisions.

To sum up, the legal framework for the direct application of the provisions of the ESC in disputes pending before national courts seems weak, layered and complex. The ESC itself does not provide much assistance because it expressly proclaims the declaratory character of many of its provisions, it allows member states to cherry-pick other provisions, and the enforcement of rights is dependent on a weak supervisory and collective complaints mechanism. The outlook seems more positive if we consider the issue of EU law. The provisions of the ESC could benefit from an indirect application through the doctrine of supremacy of EU law (yet, only when there is a specific provision of primary

⁸⁶ Namely in Article 151 TFEU (former Article 136 TEC), in the Preamble to the CFREU (which has the same legal value of the Treaties – Article 6 TEU), and in several explanations on the content of the CFREU.

or secondary EU law making an express reference to it). The approval of the CFREU provides leeway for a broader application, although Article 51 still limits its potential scope considerably. Apart from these issues, it is a matter to be solved by domestic constitutional law, which brings us to the monist/dualist dilemma and the combination of both that most states have adopted. However, this does not provide for any legal uniformity. On the contrary, it provides for a differentiation between levels of protection in signatory member states.