

# How the European Court of Human Rights and the Court of Justice of the European Union ensure the protection of fundamental social rights: methods of interpretation and judicial techniques employed

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I

Studying the case-law of Europe's two supranational courts from a fundamental social rights perspective is no ordinary task.

Within the Council of Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms seems to enshrine civil and political rights, rather than economic and social ones,<sup>1</sup> while the European Union, despite its stated social objectives, looks relatively powerless to guarantee rights to social protection as fundamental rights.<sup>2</sup>

Appearances are deceptive, however.

The Strasbourg Court, using appropriate legal procedures, has succeeded in giving the ECHR a genuine social function, while the EU Court, although less inventive, has nevertheless carried out a substantial amount of work in this area.

In this paper, rather than addressing fundamental social rights in a static manner, as conceived and protected by the two Courts, I will endeavour to show them in the more dynamic context of their implementation, in cases where the two Courts have firstly confirmed them and, secondly, ensured their enforceability.

II

What do we mean here when we talk about "*fundamental social rights*"?

First and foremost, we mean "*subjective rights*", that is to say, legal powers which are intended to form part of individuals' "legal heritage"; we do not mean mere principles, which require fleshing out, or rules that create competences or introduce procedures.

Secondly, we mean rights that are "*fundamental*" in nature, to the extent that they are not solely governed by ordinary legislation but are recognised or proclaimed in documents that have

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<sup>1</sup> See in particular the last passage in the preamble, where it is stated that the intent, in adopting the Convention, was "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]".

<sup>2</sup> See Article 9 TFEU concerning the statement of principles, and in particular, paragraph 2, sub-paragraph 3, and paragraph 5 of Article 153 of the same Treaty, which severely limit the powers of the Union in social matters.

special legal or moral value.

As for the term "*social*", four texts have helped to illuminate its meaning.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations in 1966, the Council of Europe's European Social Charter (ESC) of 1961, revised in 1996, the Community Charter of the Fundamental Social Rights of Workers (CCFSRW) of 1989 and the Charter of Fundamental Rights of the European Union (CFREU) of 2000, which acquired legal force equivalent to that of the Treaties in 2009.

Underpinning all these documents is a common idea, namely the duty of governments to provide individuals with decent living conditions,<sup>3</sup> by taking action in various areas, five of which are recognised by all four instruments: work,<sup>4</sup> education,<sup>5</sup> health,<sup>6</sup> social security<sup>7</sup> and social assistance.<sup>8</sup>

The family as such,<sup>9</sup> the environment<sup>10</sup> and consumer protection<sup>11</sup> are recognised by one or more instruments, but not by all four.

### III

In the European Convention on Human Rights and Fundamental Freedoms, there are only two explicit references to what could be considered social rights: the prohibition, in Article 4, of forced and compulsory labour which, by opposition, leads us to define work that is normal or fair;<sup>12</sup> and in Article 11, the recognition of a right to form trade unions to protect the interests of labour, thereby implying a right to protection for members of trade unions and any collection action they may take.<sup>13</sup>

Despite this, the Strasbourg Court has managed to bring all, or nearly all, the basic social rights into the text of the Convention itself and its additional protocols.

The right to work, as it relates to unimpeded access to a professional career<sup>14</sup> and safeguards

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<sup>3</sup> ICESCR Art. 11, ESC Art. 13, CCFSRW point 10, CFREU Art. 34 § 3.

<sup>4</sup> ICESCR Arts. 6-8, ESC Arts. 1-8, CCFSRW points 4-6, CFREU Arts. 27-31.

<sup>5</sup> ICESCR Art. 13, ESC Arts. 10, 15, CCFSRW point 15, CFREU Arts. 14, 32.

<sup>6</sup> ICESCR Art. 12, ESC Art. 11, CCFSRW point 19, CFREU Art. 35.

<sup>7</sup> ICESCR Art. 9, ESC Art. 12, CCFSRW point 10, CFREU Art. 34 § 1.

<sup>8</sup> ICESCR Arts. 9 and 11, ESC Art. 13, CCFSRW point 10, CFREU Art. 34 § 3.

<sup>9</sup> ICESCR Art. 10, ESC Arts. 16 and 17, CFREU Art. 33 § 1. In all the documents, family life is deemed to be an interest of paramount importance for the individual which needs to be properly balanced in relation to professional life.

<sup>10</sup> CFREU Art. 37.

<sup>11</sup> CFREU Art. 38.

<sup>12</sup> See no. 73316/01.

<sup>13</sup> See no. 34503/97. On a "right to education" provided for in Article 2 of the Additional Protocol, see the European Court of Human Rights judgment on applications nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64: "There neither was, nor is now, therefore, any question of requiring each State to establish such a system, but merely of guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time".

<sup>14</sup> See nos. 33160/04, 26713/05, 552/10.

against wrongful dismissal<sup>15</sup> developed out of Article 8 of the Convention on the right to respect for private life; and as it relates to protecting remuneration for work, out of Article 1 of the Additional Protocol;<sup>16</sup> the right to education was engendered through a combination of Article 14 of the Convention and Article 2 of its Additional Protocol;<sup>17</sup> the right to health has been framed as a requirement arising from Article 8 of the Convention on the physical integrity of individuals and Articles 2 and 3, which guarantee the right to life and prohibit inhuman treatment;<sup>18</sup> the right to social security, as it relates to unemployment benefits,<sup>19</sup> retirement pension<sup>20</sup> and other social benefits<sup>21</sup> may be said to be derived either from Article 1 of the Additional Protocol<sup>22</sup> or from a combination of this article and Article 14 of the Convention, which prohibits discrimination;<sup>23</sup> lastly, a right to social assistance for people who are vulnerable or in need has been read into Articles 2, 3 and 8 of the Convention,<sup>24</sup> articles which, according to the Court, enshrine rights to protection in cases where a person's life or integrity is in extreme danger.

#### IV

Something truly miraculous is thus unfolding before our eyes.

By working away quietly and incrementally, yet with purpose and imagination, the Court has literally transformed a text which appeared to enshrine only human rights in the liberal tradition into an instrument that also enshrines basic social rights, by according them the same guarantees of protection as the latter.

How did the Court manage to arrive at such a reading of the Convention?

The answer is simple: it employed the right interpretative methods for this purpose.

Whilst not neglecting exegetical<sup>25</sup> and historical<sup>26</sup> methods of interpretation, the Strasbourg Court has nevertheless prioritised teleological and systemic methods.

#### V

In applying the teleological method, the Court established the basic principle of its interpretative approach, namely the principle whereby the Convention is intended to guarantee

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<sup>15</sup> See no. 56030/07.

<sup>16</sup> See nos. 57665/12, 57657/12.

<sup>17</sup> See no. 5335/05.

<sup>18</sup> See nos. 11275/07, 22743/07.

<sup>19</sup> See no. 17371/90.

<sup>20</sup> See nos. 27458/06, 39574/07, 71148/10.

<sup>21</sup> See no. 66529/11.

<sup>22</sup> See no. 45603/05.

<sup>23</sup> See no. 30078/06.

<sup>24</sup> See nos. 56869/00, 45603/05.

<sup>25</sup> See nos. 9697/82 § 53, 37452/02 § 118.

<sup>26</sup> See no. 18030/11.

not rights that are theoretical and illusory, but rights that are practical and effective.<sup>27</sup> In other words, rights that are of real value and have a tangible bearing on the lives of those who possess them and rely on them in court.

This interpretative principle has encouraged the Court to take an unusually bold line with respect to the meaning and scope of the rights enshrined in the Convention.

The very broad view which the Court has chosen to take of private life (Article 8), as also encompassing professional life and hence the right to work,<sup>28</sup> and of property (Article 1 of the Additional Protocol) as including a legitimate expectation of receiving a disability pension,<sup>29</sup> are the most striking examples of the Court's approach.

## VI

The same interpretative principle has enabled the Court to read into a discreetly worded text obligations on the states which signed the Convention to protect the human rights contained therein through acts, rather than merely observing them through omissions.<sup>30</sup>

The concept of positive obligation has proven to be the most powerful of the Court's instruments when it comes to creating new social rights out of the provisions of the Convention. Drawing on the idea of positive obligations arising for signatory states from Article 2 (protection of life) and Article 3 (prohibition of inhuman treatment) of the ECHR, for example, the Court has managed to develop its case law on the state's duty to provide assistance to individuals who risk living in a situation of extreme poverty,<sup>31</sup> or to ensure that hospitals,<sup>32</sup> nursing homes,<sup>33</sup> children's homes<sup>34</sup> and psychiatric facilities<sup>35</sup> are properly managed. Likewise, states have a positive obligation to prevent trafficking in human beings and to punish those who engage in such practices.<sup>36</sup>

## VII

The systemic method of interpretation, which is the Court's second method of choice, involves placing the rule to be interpreted in context and assigning it such meaning as the context imparts to it.

The Court considering the ECHR to be an international treaty, it employs the methods appropriate to international treaties in order to interpret it. The text of the Convention is read

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<sup>27</sup> See nos. 6289/73 § 24, 6573/01 §§ 47-48, 34503/07 § 66.

<sup>28</sup> See nos. 33160/04, 56030/07.

<sup>29</sup> See nos. 27458/06, 39574/07, 71148/10.

<sup>30</sup> See nos. 27677/02, 5410/03, 14462/03.

<sup>31</sup> See nos. 56869/00, 45603/05.

<sup>32</sup> See no. 22743/07; concerning the army 11275/07; concerning prisons, 47095/99.

<sup>33</sup> See no. 59548/00.

<sup>34</sup> See no. 48609/06.

<sup>35</sup> See no. 47848/08.

<sup>36</sup> See nos. 73316/01, 4977/05, 58216/12.

not in isolation, therefore, but, as is the way with international treaties,<sup>37</sup> in conjunction with sources of international law that deal with similar subject matter.

For example, the European Social Charter and the agreements concluded within the International Labour Organization have guided the Court's understanding of what is meant by the concept of forced or compulsory labour (Article 4 of the Convention)<sup>38</sup> or by collective action in the context of trade unions (Article 11 of the Convention).<sup>39</sup> The rules which EU member states are required to obey regarding the protection of asylum seekers are likewise capable of being applied through Articles 2 and 3 of the Convention (protection of life and prohibition of inhuman treatment), to compel states to provide refugees with decent living conditions.<sup>40</sup> The international treaties on child protection<sup>41</sup> or protection of people with disabilities<sup>42</sup> have led the Court to interpret, in the light of these instruments, Article 8 of the Convention and Article 2 of the Additional Protocol as meaning that such groups are to be accorded special protection status.

Even "soft" international law<sup>43</sup> can be a source of inspiration for the Court, as we saw recently<sup>44</sup> when it drew on the resolutions adopted by international bodies to specify the minimum number of square metres that must be available per inmate in prison cells.

## VIII

In order to ensure the enforceability of the social rights thus identified and confirmed, the Strasbourg Court prefers to employ two quite distinct judicial techniques.

In cases where social rights have been restricted, its approach is to try to ascertain whether, as a result of the restriction, the very essence of the social right at issue has been impaired, in other words, whether the infringement has robbed the right of its *raison d'être* by rendering it meaningless.<sup>45</sup>

In cases where the applicant complains not about a restriction but about discrimination in the enjoyment of a social right, the Court's approach is first to seek to establish whether the exclusion is unwarranted and, if it is, to demand that the benefits which were denied to the applicant by the rule deemed discriminatory be extended to him or her.<sup>46</sup>

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<sup>37</sup> See no. 34503/97.

<sup>38</sup> See nos. 51637/12, 37452/02.

<sup>39</sup> See on collective bargaining, no. 34503/97; on striking nos. 36701/09, 31045/10, 48408/12.

<sup>40</sup> See no. 30696/09 and also nos. 53566/99, 60125/11, 29217/12, 17931/16.

<sup>41</sup> See no. 5335/05.

<sup>42</sup> See no. 7269/05.

<sup>43</sup> See the partly dissenting opinion of Judge Pinto de Albuquerque in the Strasbourg Court's judgment in case no. 7334/13, §§ 3-33 of the opinion.

<sup>44</sup> See no. 7334/13.

<sup>45</sup> See nos. 2033/04, 10373/05, 17767/08, 66365/09, 15189/10, 13902/11, 19828/13.

<sup>46</sup> See no. 30078/06.

## IX

As regards adjusting social rights, the Court grants the states bound by the Convention a wide margin of appreciation. It has explained that, when it comes to the disposal of – necessarily limited - public resources, where several factors are at play and where sometimes painful choices are required, it must, of necessity, trust the national decision-maker.<sup>47</sup>

For example, it might have been thought that the notion of impairment of the very essence of a social right would yield few practical results. Yet the Court's case law has proved otherwise.

In the case which best illustrates its approach,<sup>48</sup> the complaint centred on a sudden 67% reduction in the retirement pensions of a particular category of persons following a change in the law.

The Court has ruled that the total<sup>49</sup> or near-total<sup>50</sup> removal of the entitlement to a pension or other equivalent social benefit constitutes an impingement on the very essence of that right, whereas reductions lower than 20%, imposed by lawmakers in response to a major financial crisis, do not.<sup>51</sup> The Court had even conceded<sup>52</sup> that a two-thirds reduction in retirement pensions, whilst too much for one particular category of persons, did not impair the essence of the right as long as the remaining amount was not far from the national average pension.

In the case of the 67% reduction, the Court did, however, find that there had been an unjustified impairment of the essence of the right.

In order to arrive at this finding, it began by explaining that in the case in question, the applicants had had a legitimate expectation of receiving substantial pensions, having previously contributed large amounts for that purpose, throughout their long careers. It then went on to compare the national average pension and the national poverty line with the amount of pension which the applicants received after the reduction, only to find that it had left most of them in a state of near-poverty. To conclude, the Court held that the sacrifice imposed on the category of persons constituted by the applicants was excessive in relation to the rest of the population. For all these reasons, and not only on account of the arithmetic rate of the reduction,<sup>53</sup> the Court found that there had been a violation of the Convention in this respect.

## X

Extending the benefits denied under the rule considered to be discriminatory, as a remedy against discrimination, is common practice in the Strasbourg Court.

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<sup>47</sup> See nos. 62235/12, 13341/14.

<sup>48</sup> See no. 21838/10.

<sup>49</sup> See nos. 27458/06, 39574/07, 71148/10.

<sup>50</sup> See no. 66529/11.

<sup>51</sup> See nos. 62235/12, 13341/14 and also nos. 40862/98, 17972/07, 52273/08.

<sup>52</sup> See no. 15189/10.

<sup>53</sup> See nos. 2033/04, 10373/05, 17767/08, 66365/09, 15189/10, 77575/11, 19828/13.

Applicants allege a violation of Article 14 (prohibition of discrimination in the enjoyment of human rights) in conjunction with another article of the Convention, complaining that they have been excluded from the scope of a particular social right.

Consider, for example, the case of a military serviceman who had been denied parental leave and who claimed he should receive the same treatment as female military personnel under Article 8 of the Convention (respect for family life) in conjunction with Article 14.<sup>54</sup> Or two others cases, one involving the surviving member of a homosexual couple<sup>55</sup> and the other the surviving member of a Roma couple who had married according to the rites of their community,<sup>56</sup> where the applicants claimed they should be awarded a survivor's pension on the same terms as formally married couples, under Article 1 of the Additional Protocol and Article 14 of the Convention.

Gender equality cases are the most common, in a Court that applies strict tests before recognising the legitimacy of any unequal treatment.<sup>57</sup>

## XI

Anyone leaving the Council of Europe space and entering the realm of the European Union in the expectation of finding the Luxembourg court as inventive and productive as its Strasbourg counterpart is liable to be disappointed.<sup>58</sup>

What we see in European Union law, somewhat surprisingly, it has to be said, is that the Court of Justice, even when it is invited by the referring court or the parties to the case to ground its judgment on a fundamental social right,<sup>59</sup> prefers to employ secondary law rules, where they exist, thus subjecting social rights to ordinary legislation.<sup>60</sup>

CJEU references to the Strasbourg Court's social case law are nowhere to be found and, most importantly, the majority of the social rights enshrined in the EU Charter of Fundamental Rights, which has only limited scope,<sup>61</sup> are subject to the enactment of national or European rules.<sup>62</sup>

## XII

What we are left with is a limited number of directly applicable fundamental social rights such

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<sup>54</sup> See nos. 156/96, 30078/06

<sup>55</sup> See no. 35214/09.

<sup>56</sup> See no. 49151/07.

<sup>57</sup> See nos. 33014/08, 34538/08.

<sup>58</sup> See C-484/04, C-236/09, 122/15.

<sup>59</sup> See C-396/13, C-441/14 in which the Court employed the wording "the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive...".

<sup>60</sup> See C-484/04, C-236/09, C-122/15.

<sup>61</sup> See C-617/10 C-176/12 C-333/13 C-122/15.

<sup>62</sup> In chapter IV ("Solidarity") of the Charter, the rights which are proclaimed subject to such reservation are those provided for in Articles 27, 28, 30, 34 and 35, whereas Articles 29, 31, 32, and 33 seem to recognise rights that are directly applicable.

as the right to parental leave,<sup>63</sup> to daily, weekly and annual rest periods,<sup>64</sup> or to job protection for mothers,<sup>65</sup> as well as the right to working conditions that respect workers' health, safety and dignity.<sup>66</sup>

The Court's case law in this area is rather sparse owing to the fact that, when it comes to implementing these rights, there is a substantial body of secondary law rules to which the Court, as has already been said, prefers to refer.

Certainly there have been instances where, in order to protect fundamental social rights, the Court of Justice has employed the same interpretative methods and the same judicial techniques as those which have proven so popular with the Strasbourg Court. Examples, as regards positive obligations, include the *Chatzi* judgment<sup>67</sup> or, when it comes to interpreting the Treaties in the light of international law, the landmark *Viking*<sup>68</sup> and *Laval*<sup>69</sup> judgments, or, regarding the interpretation of secondary law in the light of the provisions of the Charter, the *Sähköalojen* judgment.<sup>70</sup> Apart from the Court's decisions on discrimination in labour relations, however, the cases in question are somewhat isolated and in any event do not amount to a solid, dynamic line of decisions of the kind that we have seen from the Strasbourg Court.

### XIII

One area where we really do need to pause and acknowledge the significance of the Court of Justice's output is its extensive application of workers' rights to non-discrimination, a right that is recognised as a fundamental social right in Article 157 TFEU, and Articles 21 and 23 of the EU Charter of Fundamental Social Rights. Here, a wealth of – technically demanding<sup>71</sup> - case law helps to make up for the paucity of case law mentioned earlier. Discrimination on the grounds of gender,<sup>72</sup> sexual orientation,<sup>73</sup> age<sup>74</sup> and disability<sup>75</sup> has been repeatedly sanctioned by a Court which expressly requires, as a remedy for the discrimination suffered, that the beneficial rule itself be extended to the category of persons affected by the failure to accord equal treatment.<sup>76</sup>

### XIV

I would like to conclude with a reminder of what the Strasbourg Court said about social rights in

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<sup>63</sup> See C-149/10, C-222/14.

<sup>64</sup> See C-484/04, C-173/99, C-230/11, C-579/12 RX-II.

<sup>65</sup> See C-363/12.

<sup>66</sup> See, with reservations, C-395/15.

<sup>67</sup> See C-149/10

<sup>68</sup> See C-438/05.

<sup>69</sup> See C-341/05.

<sup>70</sup> See C-396/13, See also C-395/15.

<sup>71</sup> See C-416/13.

<sup>72</sup> See C-32/93, C-313/02, C-319/03, C-104/09, C-236/09, C-363/12.

<sup>73</sup> See C-13/94, C-267/06, C-528/13.

<sup>74</sup> See C-144/04, C-297/10, C-298/10, C-476/11, C-416/13, C-441/14.

<sup>75</sup> See C-13/05, C-303/06 .

<sup>76</sup> See C-52/79, C-442/00.



one of its earliest judgments, <sup>77</sup>where it set out a whole jurisprudential agenda on this subject, one that has been brilliantly expanded upon since.

*" The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions (...) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (...). Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."*

Thanks to its methods of interpreting the Convention and its judicial techniques for ensuring the enforceability of rights, the Strasbourg Court has, as we have seen, arrived at a social reading of the Convention and, in so doing, has succeeded in providing effective protection for all the social rights which it has identified.

The Court of Justice meanwhile, even though EU secondary law means it can afford to be less bold in its rulings, has nevertheless managed to develop a significant body of case law where discrimination in the field of labour relations is concerned.

Thanks to their methods and techniques, therefore, the supranational courts thus have come to be recognised as key players in the protection of fundamental social rights.

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<sup>77</sup> See n. 6289/73 § 26.