

The role of the judiciary

*The European Social Charter, the next ten years.
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*Professor Martin Scheinin
Professor of constitutional and international law, Institute for Human Rights, Abo Akademi
University, Finland*

Professeur Martin Scheinin

Thank you very much Mr Chairman. And I also want to thank the Council of Europe for the initiative, including the invitation to us Academics to join in the discussion of the future of the European Social Charter. The *other* theme of this morning session is related to the implementation of the Social Charter in the member States and the latter part of the morning deals specifically with the role of the judiciary.

I will deal with that topic, but what I intend to do is to take up four different aspects into the issue and really the first one is the one that exactly deals with the question of the role of the judiciary in the domestic implementation of the European Social Charter. I am unwilling to limit myself strictly to that issue because it is not a very promising picture that I will paint in the first part. And therefore I think we need some complementary perspectives for looking into the broader issue of the role of the judiciary in the implementation of the Social Charter. But I will explain what the different dimensions are.

The first one, is related to the question : what is the role of domestic judges in the application of the *actual* provisions of the European Social Charter and the Revised European Social Charter here we were dealing with the direct domestic applicability of the provisions of the European Social Charter. One has to admit that so far this has not been a success story. There are many countries in which the European Social Charter or the Revised European Social Charter formerly is part of the domestic legal order. Those countries fall into two categories : in some of them, we speak of *automatic* cooperation, that is the monism that all international treaties duly ratified form part of the domestic legal order, and in the second category are countries of *legislating* cooperation that is the follow-up of the theory of dualism, but applied in a way that is analogic to monism, that is implement statutes that incorporate specifically one or another treaty into the field of domestic law.

So many countries fall into one of these two caps which have the effect, but formally speaking the European Social Charter or the Revised European Social Charter is part of domestic law. Nevertheless, in all too many of these countries, these decisions have remained at the formal level. In some countries, it was explicitly recognised that automatic incorporation or legislating incorporation results in principle in the justiciability of the provisions of the European Social Charter. My own country Finland falls into this category where it is part of preparatory works of the ratification process that it was recognised that the solution chosen will create a situation where courts will be capable of applying directly the provisions of the Social Charter. Nevertheless, not much has happened on the case law front. There are examples, and promising examples, from several countries of the application of some provisions of the European Social Charter by domestic courts. Quite often, these pieces relate to situations where the European Social Charter is used to fix a gap in the domestic legal

system. From one reason or the another, there is no comparable domestic provision of law and then judges find in their *tourbox* the European Social Charter which formally is part of the domestic law and provides for a rule which otherwise would be missing. We could speak of the right of strike for civil servants, we could speak of equal pay, equal work for men and women, we could speak of the right to join trade unions or moreoften the right not to join trade unions. And furthermore, in the field of social assistance all too many countries have been lagging behind in the sense of their schemes for social assistance have been discretionary and haven't implement the principles of needs based individual entitlement as a matter of right to social assistance. In such situations, the European Social Charter has proved to be helpful, it has helped to fill a gap. But in a much broader picture, it has been a constant battle to promote the direct applicability of the Revised European Social Charter as an international treaty in domestic courts. And there are several reasons why it as been a battle so far.

Firstly, there is an old fashioned line of thinking refering to economic, social rights as something fundamentally different from civil and political rights, it has been said that it is in the nature of these rights that they are not capable beeing applied by the judiciary. I think this is a remnant of a doctrine which no longer is valid. I think a lot of work has been done on domestic level, on international level, to demystify this kind of an approach. So that's not a real reason for continuing not to apply directly the provisions of the European Social Charter.

And second, more valid reason relates to the wording of the provisions European Social Charter. They are often written in an indirect and vague manner which does not give immediately for the domestic judge the appearance of providing for subjective individual entitlement as a matter of right. In these situations of judges beeing confronted with wording that does not look like an individual right, the method of legislative incorporation some what paradoxically might be more successful than the method of monism automatic incorporation. This is because of the legitimate boost given to the treaty provisions by the voluntary decision of the Parliament to enact the Social Charter as a piece of domestic legislation. That can be seen as a step by the legislator to activate the indirect provisions into directly applicable law even if the wording remains the same.

The third obstacle is related to the fact that not all countries have resulted to the method of automatic legislative incorporation. They don't feel a need to incorporate the European Social Charter as they see, it is a problematic instrument, an instrument which is implemented, but through decisions by the domestic legislation. I think more countries will join the scheme of legislative incorporation as soon as it becomes more clear that the Revised European Social Charter has relevance as a European constitutional instrument. We can refer to the success story of the European Convention on Human Rights which originally was not incorporated in all member States. But gradually, more and more countries realised that this is the way because of the European constitutional relevance of the instrument. And this path remains open. Just to refer to one country : Norway incorporated the European Convention on Human Rights and the two UN Convenants in 1996, including the covenant on economic, social and culture rights. But at that stage, Norway decided not to ratify the European Social Charter. I think, further evolution in the importance of the European Social Charter may change the situation in that particular member State. Finally, one has to attribute also the difficulties in domestic application to the weaknesses of the European Social Charter and the Revised European Social Charter as a human rights treaty.

The many approaches of giving a lot of discretion to individual States which provisions they

accept, reciprocity in personal scope so that rights are not protected universally to everyone within the jurisdiction of a member State and then the absence of a free standing right of non-discrimination, are all factors which weaken the application of the Social Charter, even the Revised one, as a human rights treaty. Of course, the Revised European Social Charter takes important steps forward but nevertheless, some of the weaknesses remain. This gap can be fixed through the further development of the collective complaints procedure and the margin jurisprudence, because it has the capacity of transforming the Revised European Social Charter and the Social Charter gradually to a more full-fledged human rights instrument. Still, there might be a need for some measures on the political level, that is creative thinking : what could be a new European level instrument to promote the human rights character of the European Social Charter. Personally, I do not think that the time is right for a new version of a revised Revised European Social Charter as a treaty, rather I would think that, one could look away for a consensus declaration on the political level by the member States which could amount to something more than a political declaration. I am speaking of interpreting the European Social Charter as a human rights instrument hence creating a common feeling of commitment in legal terms, a document that would amount subsequent State practice in the meaning of the Vienna Convention on the law treaties. So the supplementary document which would express the legal understanding of the new role of the instrument by the member States. It is a difficult path because it will require consensus, but nevertheless it might be more fruitful than renegotiating once again the substance of the Social Charter. These were the obstacles and some solutions to those obstacles I could identify in respect of the exact question : how to promote direct judicial application of the provisions of the European Social Charter.

I would like to add some more optimistical observations about how the European Social Charter indirectly can give much more inspiration to domestic courts. First, remaining on the domestic level, one could look at the domestic application of not nearly the European Social Charter, but of economic and social rights. On domestic level, the situation of creating justiciability for economic and social rights is much more a question of creative combination of sources than pushing one way approach of promoting the application of one particular treaty. We need more interdependence and integration between different sources of law in order to promote the justiciability of economic and social rights on the domestic level. The European Social Charter, of course, is one important source in that exercise, but equally, the European Convention on Human Rights, its social rights dimensions, existing in United Nations Human Rights Treaties, constitutional provisions ranging from explicit individual entitlements to very abstract constitutional principles, constituting treaties of the European Union and secondary norms from EU law and ordinary laws, laws inactive by Parliaments. All they provide elements for justiciable, economic and social rights and hence increased judicial activity in the defense of those rights. For the European Social Charter, it is very often a question of indirect application or interpreting effect of the European Social Charter in the application of, for instance, the constitutional provisions, other provisions in a domestic piece of legislation. In this exercise, the caselaw of the European Court of Human Rights in the field of economic and social rights or economic social as dimensions of traditional civil and political rights are important, simply cases such *Feldbrugge*, *Salesi*, etc are extremely important for the integration of different sources of law in the duration application of economic and social rights by domestic courts.

Domestic pieces of legislation including the Constitution are also extremely important in this combination of different sources into operative economic and social rights. One of the reasons why the Constitution and domestic pieces of legislation are so important is that they had a

legitimacy element into the application of economic and social rights. It is the judiciary that then comes to the support or defense of the democratically elected legislature when it can base itself not only on international treaties but also on the domestic Constitution or relevant pieces in domestic legislation giving force to economic and social rights entitlements.

Quite often, we are confronted with the situation when the judiciary is not questioning the decisions of the legislature, it is defending the decisions of democratically elected legislature in relation to the administration or in relation to regional or municipal authorities that are trying to escape their legal obligations. For instance, in my own country Finland, we have fairly broad case law by the Supreme Administrative Court but to some extent also the Supreme Court related to various economic and social rights : issues such as social assistance, services to persons with disabilities, access to certain very expensive forms of medical treatment or rehabilitation services, right to work and also right to municipal day care for children are all areas where the Finnish Courts have been quite creative in combining different sources of law including the Constitution in order to deliver judgements concerning justiciable entitlements in the field of economic and social rights. The Constitution has been here important and usually there hasn't been a reference to the European Social Charter as one of the applicable sources. One should not take that as a defeat, rather it is a question of the drafting of the Finnish Constitution that the European Social Charter was used as one social inspiration; hence we can speak of transformation of the European Social Charter on the constitutional level and then the judiciary upholding the Constitution provisions that resulted quite often in respect of reluctant and administrators or reluctant at municipal authorities that are trying to escape their legal obligations.

The third dimension I want to touch very briefly is the issue of international judicial application of the European Social Charter through focusing on one instrument the European Social Charter and the Revised European Social Charter. The procedure is already clear : we are dealing with the monitoring mechanisms created by the Council of Europe for the Social Charter and the Revised Charter focuses on the European Committee on Social Rights and the procedure for collective complaints. This innovation has been remarkable in promoting justiciability of economic and social rights and it has its clear effect also on the domestic level.

The success story of the European Convention on Human Rights has largely been one of international justiciability, creating justiciability on the domestic level. Domestic judges need international case law in order to be convinced that it is really law that is inscribed in the treaties. It is capable of creating individual entitlements. Mr Belorgey referred to this issue that domestic courts have been slow, but they are coming after the international body and I am sure that the further evolution of institutional patterns of interpretation through the caselaw of European Committee of Social Rights will encourage also domestic judges to give more attention to the European Social Charter itself. In this respect, one has to refer to what was said by Mr Bruto da Costa and also the distinguished Representative of Norway that there insufficient commitment by the Committee of Ministers within the Council of Europe framework. The European Committee of Social Rights is all too often left on its own in its effort to implement its own decisions taken through the collective complaints procedure in order to convince domestic actors including domestic judges. It would be important that the Committee of Ministers would be more systematic, more principled in securing the implementation of all decisions taken, at least what comes to the legal interpretation taken by the European Committee of Social Rights. We need stronger commitments from the side of Governments through the Committee of Ministers in order to convince domestic judges that

the European Social Charter and the Revised Charter really are about law legal entitlements in the field of economic and social rights.

Finally, Mr Chairman, international judicial application of economic and social rights is broader as an issue than the procedures established under the Social Charter and the Revised Charter. Again we are dealing with a combination of sources and under each one of the relevant international sources there are their own procedures. The European Court of Human Rights remains to be important for identification of economic and social rights dimensions in those rights that are covered by the European Convention on Human Rights. Similarly, the EU Courts in *plura* have an important role in the promotion of economic and social rights as part of the European fundamental rights architecture. One should not regret when the EU Court or the European Court of Human Rights are active in dealing with this use of economic and social rights in the long term and in the broader perspective the only support the *goal* of proving the domestic actors including judicial actors that we are dealing with law and that results in the long term in a more effective, more broad and more systematic domestic judicial application of economic and social rights and also of the actual provisions of the European Social Charter. Mr Chairman, these were the four dimensions I wanted to touch upon, the three latter ones are complementary relation to the direct application of the European Social Charter itself by domestic judges. What I try to prove that the all work to works the same goal and in order to promote more systematic judicial application of the domestic level. We need to look at other sources for economic and social rights and we also need to look at international judicial and quasi judicial procedures behind the European Social Charter because they have in general promoting effect in respect of the main issue. If there is room in the discussion, I will return to the relationship of judicial application of economic and social rights and the principles of democracy, the question whether judicial activism here is a challenge of future democratic decision making. Thank you Mr Chairman.