THE CHARTER AWAKENS
THE EUROPEAN SOCIAL CHARTER AS A YARDSTICK FOR CONSTITUTIONAL REVIEW IN ITALY *

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Abstract
The paper offers an overview of the role played by the European Social Charter in the Italian legal system. The topic swiftly attracted the attention of legal scholars in 2018, right after the Constitutional Court had recognised a parametric status to the Charter in reviewing ordinary legislation. The Court's rulings relied on the principles previously applied to the European Convention on Human Rights, albeit with some notable differences that are here discussed in detail. After describing the initial, less significant phases of the Charter in domestic law, the paper focuses on the most recent developments by analysing their premises and effects on the implementation of the protected rights and by comparing the different techniques adopted to incorporate the ECHR (and EU law) into constitutional adjudication.

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There has been an awakening.
Have you felt it?
Star Wars – Episode VII

1. Preliminary remarks

The codification of a set of rights into a solemn document aims generally to give them visibility in order to promote their enforcement. In this regard, the European Social Charter (the ESC or simply the Charter) seemed to re-emerge in Italy just a few years ago after a long period of 'hibernation', exactly in 2018, when for the first time the Italian Constitutional Court (ICC) invalidated some legislative provisions on foot of an infringement of the treaty[1].

The Charter, in force since 1965 in the domestic system, had seldom been invoked in the past by the ordinary courts under the incidental review procedure[2], and never successfully until this time. In this sense, the 2018 decisions 're-awakened' the Charter by conferring it a supplementary parametric status for constitutional review, in accordance with the general pattern established in Article 117(1) of the Constitution[3].

Numerous questions arise from these circumstances: why did not the Charter wake up before? Was this awakening 'felt', at least

[1] Constitutional Court, Judgements Nos. 120 and 194/2018.
[2] The main features of this procedure are described in V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini, *Italian Constitutional Justice in Global Context* (2016), 54 ff.
[3] «Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations».

by jurists or politicians? On what grounds (normative frameworks, judicial procedures, legal theories) has been this result achieved? How will this innovation affect the interplay between the Italian legal system and other international and supranational constraints regarding the protection of the same rights, particularly the European Convention on Human Rights (ECHR) and European Union (EU) law?

With a view to providing a new assessment of the role played by the ESC in the Italian legal system, the paper develops as follows. It begins with a three-phase articulation of the path taken by the Charter in the domestic legal system (para. 2); after a brief overview of the first phase (para. 3), it focuses more extensively on the second (para. 4) and third ones (para. 5), drawing then some conclusions on the prospects of the Charter (para. 6).

2. The three phases of the ESC in the Italian legal system

The late 'discovery' of the ESC in judicial practice seems somewhat odd for a country that, as a founding member, witnessed the birth of the treaty, hosted its official signing 62 years ago and completed its incorporation into domestic law rapidly[4]. There are several reasons for this tardiness. Perhaps the most significant is the late enhancement of the treaty protection mechanism provided by the 1995 Additional Protocol on Collective Complaint Procedures (CCP), which gave new impetus to the enforcement of the Charter at conventional level. Another driving factor, at national level, is the development over the last 15 years of original normative frameworks and operating techniques regulating the Italian constitutional 'openness' towards international and supranational legal orders, particularly in the field of fundamental rights.

Indeed, the 2018 judgements represent the final stage of a process spanning six decades during which the Charter experienced a vast array of different conditions: 'hibernation', 're-launch', and, finally, 'awakening'. I will describe this point by referring to three phases labelled, respectively, the 'invisible' Charter, the 'renewed' Charter, and the 'parametric' Charter.

[4] Law No. 929/1965. By that time, only six founding States had incorporated the Charter (Norway, Sweden, and the United Kingdom in 1962, Ireland in 1964, Germany and Denmark in 1965), while the remaining Members accomplished the task much later (France in 1973, the Netherlands in 1980, Greece in 1984, Turkey in 1989, Belgium in 1990, Luxembourg in 1991).

3. The 'invisible' Charter (1965-1997): legal status and substantive value of a dormant instrument

The first phase is also the longest, covering 32 years (1965-1997), during which the Charter remained largely ignored by both lawmakers and the judiciary.

Although a monitoring of Italy's compliance with the ESC obligations was regularly carried out by the Committee of Independent Experts (later the European Committee of Social Rights: ECSR), the formal status assigned to the treaty in the domestic system did not allow it to bind subsequent legislation. Once the Charter had been incorporated by a statutory law, its relationships with all other laws fell under the domain of the chronological tenet (*lex posterior derogat priori*, a later law repeals an earlier one), notwithstanding the nature of 'international obligation' of the former[5].

This was actually a common status for all the treaties implemented by ordinary legislation, with the significant exceptions of the European Community law (implicitly based upon the 'sovereignty limitations clause' of Article 11 of the Constitution) and of the Pacts concluded with the Holy See (expressly covered by Article 7 of the Constitution)[6].

The same limit also formally applied to the ECHR, but the more effective control guaranteed over the years by the European Commission – later the European Court of Human Rights (ECtHR) – partially counterbalanced this formal drawback. In 1993, the ICC referred to the domestic incorporation of the Convention as an «atypical law», with the implicit aim of combining its non-constitutional status with the ability to resist (subsequent) repealing legislation[7]. This precedent encouraged ordinary judges' efforts to give substantive 'constitutional' value to the Convention despite its

[5] This view was not, however, unanimous in scholarly debate. Some authors disputed its excessive formalism and argued the case for a higher status of international agreements, at least to those concerning human rights by virtue of their connection with substantive constitutional provisions. These attempts relied upon manifold interpretative techniques, for a critical appraisal of which see G. Sorrenti, *Le Carte internazionali sui diritti umani: un'ipotesi di «copertura» costituzionale «a più facce»*, 3 Pol. dir. 349 (1997).

[6] Due consideration is given, on the other hand, to international customary law, with which the *whole* Italian legal system must conform in accordance with Article 10(1) of the Constitution.

[7] Constitutional Court, Judgement No. 10/1993.

formal 'legislative' status[8], but it could not overrule the consolidated paradigm and ultimately remained an isolated obiter in the ensuing constitutional case law.

Nevertheless, the fire was smouldering under the ashes. The increasing influence of ECtHR jurisprudence – between the conclusion of the first phase and the beginning of the second – drove the ordinary courts to explore new ways of aligning the domestic legislation with the Convention; some of them were basically undisputed (harmonisation on an interpretative basis), while others were quite critical (case-by-case disapplication, sometimes under the shield of EC/EU law)[9]. In any case, none of these tools were even theoretically taken into account with regard to the ESC, which thus remained judicially 'asleep'.

4. The *renewed* Charter (1997-2018): lights and shadows of a transitional phase

The second period, lasting about 20 years (1997-2018), is characterised by two concurring developments taking place at different levels. The first relates to the general re-launch of the treaty on a European scale in the mid-90s: a renewal to which Italy actively contributed, by a rapid ratification of both the 1995 Additional Protocol on CCP and the 1996 Revised Charter[10]. The second concerns a major constitutional reform that, in 2001, made the «international

[8] The most remarkable attempt was that of the Supreme Court of Cassation, 1st criminal sec., Judgement No. 2194/1993 (para. 8.2). At that time, however, some parts of the Convention had been already recognised as displaying direct effects: see Supreme Court of Cassation, un. sec., Judgement No. 15/1988.

[9] By means of an 'incorporation' in the general principles of EU law of the rights guaranteed by the Convention via Article 6(3) TEU. However, the outcome of these efforts appears empirically satisfying: «during more than half a century, the number of times international agreements yielded to subsequent domestic laws can be counted on the fingers of one hand or little more» (G. Tesauro, *Costituzione e norme esterne*, 2 Il Dir. UE 195, 212 (2009); my transl.). On this point, see E. Lamarque, *Regolare le antinomie tra norme pattizie e norme di legge: il potere del giudice comune tra interpretazione conforme, criterio di specialità e criterio cronologico*, in G. Palmisano (ed.), *Il diritto internazionale ed europeo nei giudizi interni* (2020), 113.

[10] Laws Nos. 298/1998 and 30/1999, respectively. The trend has gained new political momentum with the launching of the so-called 'Turin Process': see the *Declaration of the Committee of Ministers on the 50th anniversary of the European Social Charter* of 12 October 2011, and especially M. Nicoletti, *General Report to the High-Level Conference on the European Social Charter* (2014), in *www.coe.int/en/web/turin-european-social-charter/turin-process*.

obligations» in which Italy has taken part or will take part legally binding for the legislative powers of the State and the Regions[11].

Although these two parallel and largely independent factors will eventually converge to strengthen the role of the ESC in Italy, at this stage their effects are somewhat misaligned (not simultaneous). From a European perspective, the revitalisation of the Charter system enhanced the influence of the treaty upon national legal orders relatively fast. At national level, the constitutional reform established the conditions for a change that would ultimately occur only *in the next stage*. The second phase can thus be defined as intermediate or 'transitional'.

For a better description of it, the paragraph is divided into three sections focusing, respectively, on the impact of the re-launch of the ESC at European level (4.1), on the new interpretative pattern – originally tailored to the ECHR – developed by the ICC in accordance with the cited constitutional amendment (4.2), and on the judicial disregard of the Charter throughout the first and second phases (4.3).

4.1 Consolidating the Charter: the CCP remedy

The new protection mechanism gave the treaty tangible opportunities to gain effectiveness in national legal systems. Indeed, the CCP compelled the contracting States to take the collective claims of 'detailed' violations of the Charter seriously, moving from a bottom-up reading of its provisions fostered by very active stakeholders[12]. Furthermore, States' implementation of the CCP has boosted the efficacy of the other pre-existing procedure (monitoring mechanism), that now focuses exclusively on follow-ups of non-conformity decisions delivered by the Committee within the CCP, on the basis of 'simplified' reports submitted every two years by the State parties to the 1995 Protocol[13].

The 'interdependence' of the two procedures represents the most significant feature of the whole protection system provided by

[11] Above, at 3.

[12] Since 1999, around 39 complaints have been lodged against Italy with 31 findings of infringements confirmed by the ECSR (Decisions on the merits of the Complaints Nos. 27/2004, 58/2009, 87/2012, 91/2013, 102/2013, 105/2014, 133/2016, 140/2016, 143/2017, 144/2017, 146/2017, 158/2017, 170/2018).

[13] ESCR Decisions of 2 April 2014.

the (revised) Charter[14]. The supervision of the reporting procedure entails an assessment of the state of compliance of each Party with previous decisions on complaints lodged against that country[15] – and *vice versa* to lodge a complaint may highlight a shortcoming in remedying non-conformity situations declared in a previous conclusion. Furthermore, this interaction is extremely positive for the 'spillover effect' of the interpretations adopted: namely, a statement on a Charter provision concerning a complaint lodged against State 'A' may well become the legal ground for conclusions concerning the monitoring report of State 'B', whether or not the latter has accepted the CCP Protocol[16]. Although far from the notion of binding precedent, this hermeneutic process could however serve as a 'functional equivalent' to *stare decisis* in the broader context of the ESC, as the main international (regional) 'centralised' social rights protection system[17].

4.2 Shaping the pattern: the 'ECHR protocol'

The amendment of Article 117(1) of the Constitution had minor effects on international customary law and EU law, whose higher status remained mostly unaltered. For treaties, however, it was different, because after the revision they have become, under certain conditions, a parameter for constitutional review.

What are these conditions?

Firstly, that the treaty has been incorporated into ordinary law. This premise stems from a systematic reading of Article 117(1) alongside Article 80 of the Constitution, stating that «Parliament shall authorise by law the ratification of such international treaties

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[14] More extensively on this point: L. Jimena Quesada, *Interdependence of the Reporting System and the Collective Complaint Procedure: Indivisibility of Human Rights and Indivisibility of Guarantees*, in M. D'Amico & G. Guiglia (eds./dir.), *European Social Charter and the Challenges of the XXI Century / La Charte Sociale Européenne et les défis du XXIe siècle* (2014), 143, 151 ff.

[15] Art. 40 of the *Rules of procedure* adopted by the ECSR.

[16] Until now, only 16 of the 46 Parties to the Charter system have accepted and ratified the CCP Protocol.

[17] After all, the same concept of 'judicial guarantee' takes on different nuances (control, compliance, and the like) when applied in international rather in national context. As to the ESC see now, also for further references, L. Mola, *La Carta sociale europea e il controllo internazionale sulla sua applicazione* (2022), 49 ff.

as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation»[18].

Secondly, that treaty provision is consistent with the Constitution; otherwise, the duty to respect international obligations would automatically invalidate the domestic law.

Thirdly, that the parametric use of the treaty *increases* the overall protection of the rights involved, so that State Parties are not allowed to downgrade the standard provided by the treaty, nor may the treaty prevent States from achieving higher levels of guarantee.

While the first condition originates from a doctrinal assumption, the others belong to the judicial formant, having been laid down in two landmark decisions regarding the ECHR delivered in 2007 by the ICC and further detailed in later judgements[19]. According to this approach:

1) the Convention has not been constitutionalised but serves as a supplemental parameter for the constitutional review of ordinary legislation when Article 117(1) is invoked;

2) when a conflict arises, judges are not allowed to disapply the law in favour of the Convention (as in the case of EU norms having direct effects, via Article 11) but may only refer the question to the ICC for a declaration of invalidity provided with general efficacy (*erga omnes*);

3) before the referral, judges must try to resolve the antinomy by reading the law in accordance with the Convention, inasmuch as the text of the challenged provision makes it feasible;

4) the claimed treaty provision must itself not violate the Constitution. If it happens, the proceeding judge shall refuse to give priority to the external rule and the contrast be resolved by interpreting the Convention in compliance with the Constitution or, alternatively, by raising an issue of constitutionality on the law

[18] I rely upon the arguments of A. D'Atena, *La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione Europea*, 4 Rass. parl. 913, 926 (2002), in excluding from the scope of the revised clause both international agreements concluded in simplified form (executive agreements) and ratified treaties lacking the necessary parliamentary authorisation. The scholarly debate on this point is synthetised by A. Bonomi, *Il 'limite' degli obblighi internazionali nel sistema delle fonti* (2008), 185 ff.

[19] Constitutional Court, Judgements Nos. 348 and 349/2007, as refined by the Judgements Nos. 311 and 317/2009, 80, 236 and 303/2011, 264/2012, 49/2015, 236/2016, 16/2020.

incorporating the treaty (the choice depends on the degree of constraint acknowledged to the ECtHR's interpretations: below, point 6)[20];

5) the overall outcome of the supplemental guarantees provided by the Convention in the national system must be positive for the entire set of fundamental rights (balancing test). Otherwise, the treaty will not complement the constitutional parameter (above, point 4);

6) in all the mentioned steps – harmonising interpretation, comparison of standards, and declaration of invalidity – ordinary and constitutional judges must refer to the Convention in the meaning given by the ECtHR. This constraint, however, is limited to the "essence" of its case law and acts at different degrees. It is *maximum* (binding) in proceedings where national judges are asked to put an end to the harmful effects of a violation declared by the Strasbourg Court or when the decision relates to a «pilot judgement» or expresses «consolidated» or «well-established» case law. Conversely, the constraint is *minimum* in all the other situations: national judges (and the ICC itself), far from being «passive recipients of an interpretative command issued elsewhere», may give the Convention the meaning most consistent with the Constitution to avoid a potential declaration of invalidity of the (law executing the) treaty, which would have detrimental effects on the entire legal system.

I will refer to the comprehensive framework outlined as the 'ECHR protocol'. It relies on the general pattern of the sources of law's theory called 'interposition of norms', that recurs when the content of a constitutional principle limiting legislative powers is necessarily actualised by a non-constitutional provision, so that a violation of the latter causes an indirect infringement of the former[21].

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[20] How to overcome the constitutional deadlock has not yet been clarified. According to the latest ICC case law, a third way – beyond interpretative harmonisation of the external provision and the annulment *in parte qua* of the executing law – would simply be to *ignore* the international constraint in deciding the pending case, as if it had never entered the domestic system. For this conclusion, see Constitutional Court, Judgements Nos. 238/2014 (regarding an international customary rule) and 49/2015.

[21] … given that the 'interposed source' is not at odds with the Constitution. Similar schemes are provided in Articles 76 (delegation law/legislative decree) and 117(3) (national law/regional law in concurring subjects), but the logic may also apply to other 'concordances' established by the Constitution, although it is disputed whether the different cases may be grouped under a single category or not.

The 'protocol' differs in several aspects from the pattern developed by the ICC to ensure the primacy of EU law, by which judges have a duty to 'set aside' a law contrasting with EU self-executing norms, being this latter subject exclusively to the supreme principles of the Constitution[22]. Indeed, both scholars and the judiciary have questioned if the treatment of the ECHR should be aligned to the EU standard, considering the status granted to the Convention by the EU primary law[23] and the 'conformity' interpretative rule established in the EU Charter of Fundamental Rights[24]. In fact, in recent years, constitutional case law concerning EU norms having direct effects has moved in the direction of a greater involvement of the ICC in cases of 'dual preliminarity'. This occurs when a national law is deemed to infringe the guarantees provided both by the Constitution and the EU Charter, causing a potential overlapping of competing legal remedies for the same right. In this event, judges are encouraged – though not obliged – to give priority to the question of constitutionality, referring to the ICC the decision to dialogue directly with the European Court of Justice (ECJ) by means of the preliminary ruling procedure[25].

In short, the relationships between national and European legal orders are anything but static: the general framework is undoubtedly more fluid now than in the past. This means that significant changes in the domestic use of the Convention, despite being unlikely at present, cannot be completely excluded in future, with subsequent adjustments (or substantive alterations) of the 'ECHR protocol'.

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[22] See below, at 31.
[23] Article 6(3) TEU.
[24] Article 52(3).
[25] The momentous turnaround is based on the «typically constitutional stamp of [the EU Charter's] contents», which «largely intersect with the principles and rights guaranteed by the Italian [and other Member States'] Constitution», and on the subsequent «need for an *erga omnes* intervention» within the domestic legal order that only the ICC can properly ensure. See Constitutional Court, Judgement No. 269/2007 (to which the reported quotations refer), followed by the Judgements Nos. 20, 63 and 117/2019, 182/2020, 84/2021, 149/2022. For a general account of this approach, from different perspectives, see: G. Martinico & G. Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and its Aftermath*, 15 Eur. Const. L. Rev. 731 (2019); G. Parodi, *Effetti diretti della Carta dei diritti fondamentali dell'Unione europea e priorità del giudizio costituzionale*, 4 Riv. AIC 128 (2022).

4.3 The judicial account of the ESC: two weights, two measures

The key issue, in my opinion, concerns the 'generalisation' of this 'protocol', namely its potential use for treaties other than the Convention, above all for the ESC. In fact, while the major Bill of Rights of the Council of Europe was being given more and more effectiveness in judicial and constitutional case law, its junior sister rarely came under the spotlight in courtrooms and always with uncertain results.

For more than half a century and until recently, the ESC has been referred to in constitutional review proceedings only six times, the first occurring in 1983 (nearly 20 years after the Charter' incorporation)[26]. When concretely taken into account by the ICC's reasoning, the treaty has mainly been used to corroborate internal guarantees of the rights claimed, as a confirmation of their fundamental value or a proof of the development of a common understanding at European level on the subject. On the other hand, the Charter has never been considered as a supplemental parameter for reviewing the challenged legislation, even after the amendment of Article 117(1) and the development of the 'ECHR protocol', though reasonable arguments for a parallel 'upgrade' of the ESC did not lack[27].

'Two weights, two measures'. Paradoxically, the conditions of the two sister Charters were more similar in the early phase, prior to 2001, when both were assigned a mere auxiliary role in the interpretation of the constitutional parameter.

Before the ordinary courts, the ESC was simply mentioned without any practical effect, in the best case while, and disregarded as a merely political (not legally binding) document in the worst[28]. The general stance taken was to ignore it, with the exceptions of two daring orders of the Court of first instance of Rome, in 2012 and 2015 respectively, condemning the Capitol Council for its discriminatory treatment of Roma and Sinti populations on account of the

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[26] Constitutional Court, Judgements Nos. 163/1985, 86/1994, 46/2000, 434/2005, 80/2010, 178/2015.

[27] I stressed this point in previous works: see, among others, C. Panzera, *Rispetto degli obblighi internazionali e tutela integrata dei diritti sociali*, 2 Consulta Online 488 (2015), 495 ff.

[28] Supreme Court of Cassation, civil sec.-labour, Judgements Nos. 1670/2007, 21706/2008, and 6264/2010; Supreme Court of Cassation, 6th civil sec., Judgement No. 900/2015; Council of State, 4th sec., Judgement No. 4439/2000; Council of State, 6th sec., Judgements Nos. 1033/2002 and 5804/2002.

Charter's provisions concerning the right to housing and the protection against forced eviction, as interpreted by the ESCR[29]. But this is the typical exception that proves the rule.

5. The 'parametric' Charter (2018-): prospects and limitations of a new season

The legacy of the 'ECHR protocol' and its likelihood of becoming a general template for the interactions of national guarantees with (other) international human rights treaties are matters regularly debated in Italy[30].

The major features of the 'protocol' (points 1-5) are indeed of broad application. For example, the one requiring that the external norm respects the Constitution is also being applied to EU law and customary international law, albeit with regard only to the supreme principles of the Constitution and the core content of fundamental rights[31]. Actually, the 'interposed parameter' scheme of Article 117(1) has been applied also to other human rights treaties[32], before

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[29] Court of first instance of Rome, 2nd sec., Judgements of 8 August 2012 and of 4 June 2015. The cases also affected the question of the personal scope of the ECS as defined in its Annex. On this crucial point, see: J.-F. Akandji-Kombé, *L'applicabilité* ratione personae *de la Charte sociale européenne: entre ombres et lumières*, in O. De Schutter (ed.), *The European Social Charter: a Social Constitution for Europe/La Charte sociale européenne: une constitution sociale pour l'Europe* (2010), 91; G. Palmisano, *Overcoming the Limits of the European Social Charter in Terms of Persons Protected: the Case of Third State Nationals and Irregular Migrants*, in M. D'Amico & G. Guiglia (eds./dir.), *European Social Charter*, cit. at 14, 171; C. Panzera, *The Personal Scope of the European Social Charter: Questioning Equality*, in J. Luther & L. Mola (eds./dir.), *Europe's Social Rights under the 'Turin Process'/Les droits sociaux de l'Europe sous le «Processus de Turin»* (2016), 173.

[30] See, for example, *I Trattati nel sistema delle fonti a 10 anni dalle sentenze 348 e 349 del 2007 della Corte Costituzionale*, 1 Osservatorio sulle fonti, special issue (2018).

[31] As to EU law, see Constitutional Court, Judgments Nos. 183/1973, 170/1984, 232/1989, 168/1991, 24/2017, 115/2018, 117/2019, 84/2021; for customary law, see Judgements Nos. 73/2001 and 238/2014. For a brilliant analysis of this multifaceted issue, see S. Polimeni, *Controlimiti e identità costituzionale nazionale. Contributo per una ricostruzione del 'dialogo' tra le Corti* (2018).

[32] Namely, the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change of 1997 (Judgements Nos. 124/2010 and 85/2012), the 2006 UN Convention on the Rights of Person with Disabilities (Judgement No. 236/2012), the 1989 UN Convention on the Rights of the Child and the 1996 European Convention on the Exercise of Children's Rights (Judgements Nos. 7/2015 and 102/2020), but not the 1985 European Charter of Local Self-Government (deemed a soft law instrument: Judgement No. 50/2015).

its extension to the ESC in 2018. The last phase – the 'awakening' – has thus begun.

5.1 The merits of the ICC judgements and the interest sparked within the legal environment

The first Judgement (No. 120/2018) concerns the right of military personnel to associate in trade unions. According to domestic law, they were strictly prohibited from forming professional associations within the Armed Forces or joining other (external) trade unions[33]. These exceptions to the general freedom of association had always been legitimised by the special nature and inner values of the military branch («compactness, unity, and neutrality»), such that prior issues of constitutionality on the same point were declared ill-founded[34]. The precedent has now been overruled after a crucial change occurred in the case law of the ECtHR and the ECSR relating to the same right[35].

Indeed, both the guardian bodies of the Council of Europe's 'sister Charters' declared that the restrictions applying to the members of the Armed Forces were legitimate insofar as they did not affect the 'essence' of the right at stake[36]. Thus, the general prohibition in force at that time in Italy was no more consistent with the new European judicial trend, as it totally deprived the military of their right to associate in trade unions. On this basis, the Constitutional Court ruled the non-conformity of the challenged provision, limited to the part preventing the military from forming professional associations within the Armed Forces (conversely, the prohibition on joining 'other' trade unions was upheld)[37]. It is noteworthy that the result has been achieved mostly in light of the external (European) rules than of the internal (constitutional) substantive norms protecting the claimed right.

The second Judgement (No. 194/2018) reviewed the latest rules governing the unlawful dismissal of workers, particularly the

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[33] Article 1475(2) of Legislative Decree No. 66/2010 (Code of Legislation on the Armed Forces).

[34] Constitutional Court, Judgement No. 449/1999, on account solely of the domestic parameter (Article 39 Const.).

[35] See Articles 11 and 14 ECHR and Article 5 ESC, respectively.

[36] ECtHR, *Matelly v. France* and *ADEFDROMIL v. France* (2 October 2017); ECSR, *European Council of Police Trade Unions* (*CESP) v. France* (27 January 2016, Complaint No. 101/2013).

[37] On the reasons supporting this partial annulment, see sub-para. 5.2.

criteria for determining the due compensation[38]. The referral order raised several questions, some of which were declared inadmissible and others ill-founded. The Court, however, struck down the most controversial aspect of the challenged provision, namely the inflexible mechanism regulating the amount of compensation to which the dismissed worker is entitled.

This rigid automatism, based on a lump-sum payment depending exclusively on length of service, ultimately deprived judges of the discretion to adequate the compensation – within fixed lower and upper limits – to the circumstances of each case. The provision infringed the Constitution on multiple grounds:

a) different situations received the same legal treatment, in violation of Article 3 (equal treatment and reasonableness of laws);

b) the fixed amount might have been completely inadequate, especially at its *minimum*, with regard to both the redress and dissuasive effects[39], in breach of Articles 4 and 35 (protection of the right to work);

c) as it conflicted at the same time with the standard set forth in Article 24 ESC (protecting the right to «adequate compensation or other appropriate relief» for unlawful dismissal), it violated Articles 76 – by which the Legislative Decree is content-bound to the Delegation Law[40] – and 117(1).

The Charter's 'awakening' was undoubtedly felt by both scholars and the judiciary. On the one hand, scholars suddenly highlighted the change and launched an extensive debate over the Charter as a source of legal obligations, a means of social progression, and not least a reason for potential conflicts of national and European standards of protection[41]. On the other hand, the

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[38] Article 3(1) of Legislative Decree No. 23/2015 (Jobs Act).

[39] *Id est*, the aims of compensating the loss suffered by the dismissed worker (redress effect) and of preventing employers from unfair terminations of contracts (dissuasive effect).

[40] Indeed, Article 1(7) of the Delegation Law No. 183/2014 recalled the respect of international obligations.

[41] From around a dozen comments, see: *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea?*, 7 Forum Online di Quad. cost. – Rass. 1 (2018); C. Salazar, *La Carta sociale europea nella sentenza n. 120 del 2018 della Consulta: ogni cosa è illuminata?*, 38 Quad. cost. 905 (2018); D. Russo, *I trattati sui diritti umani nell'ordinamento italiano alla luce delle sentenze n. 120 e 194 del 2018 della Corte costituzionale*, 13 Dir. umani dir. int. 55 (2019); C. Panzera, *La Corte e la libertà sindacale dei militari in un'atipica sentenza sostitutiva della Corte costituzionale*, 23 Federalismi.it 2 (2019); L. Mola, *The European Social Charter as a Parameter for Constitutional Review of Legislation*, 28 It. Y.B. Int'l L. Online 493

judiciary was encouraged to take the Charter more seriously than in the past as a piece of the composite normative framework shaping the rule of law in overlapping legal systems. Consequently, judges have begun to refer to the Constitutional Court new issues regarding the compliance of domestic legislation with the ESC commitments. In doing so, they act as both 'guardians' of all kinds of rights (including social ones) and primary 'gatekeepers' of the constitutional legal order, understood as the 'outcome of the interplay' between national and international/supranational sets of fundamental principles[42].

5.2 A 'weakened Force': the nature of the ECSR decisions according to the ICC (a critical assessment)

An insight into the reasoning underpinning the two decisions clarifies the new role of the Charter and permits to gauge the general implications of the 'ECHR protocol'[43]. In this regard, three aspects must be highlighted.

The first concerns the 'substantive' value of the Charter. As a human rights treaty, it is worthy of special consideration among all other international obligations:

(2019). Before the mentioned 'turn', there were very few contributions explicitly dedicated to the ESC in the domestic debate, mostly published in recent years: O. Porchia, *Carta sociale europea*, in *Dig. disc. pubbl.*, Agg. II, 122 (2005); F. Oliveri, *La* Carta sociale europea *tra enunciazione dei diritti, meccanismi di controllo e applicazione nelle corti nazionali. La lunga marcia verso l'effettività*, 8 Riv. dir. sic. soc. 509 (2008); C. Panzera, *Per i cinquant'anni della Carta sociale europea*, 3 Lex social. Rev. jur. der. soc. 41 (2013); M. D'Amico, G. Guiglia & B. Liberali (eds.), *La Carta Sociale Europea e la tutela dei diritti sociali* (2013); M. D'Amico & G. Guiglia (eds./dir.), *European Social Charter*, cit. at 14; J. Luther & L. Mola (eds./dir.), *Europe's Social Rights*, cit. at 29; C. Panzera, A. Rauti, C. Salazar & A. Spadaro (eds.), *La Carta sociale europea tra universalità dei diritti ed effettività delle tutele* (2016).

[42] Court of first instance of Vibo Valentia, lab. sec., 13 March 2019 (in *Official Bulletin of the Italian Republic* 1st Special Series – Constitutional Court, No. 46/2019; hereafter: just *Off. Bull.*); Court of Appeal of Naples, 18 September 2019 (*Off. Bull.* No. 20/2020]; Court of first instance of Brescia, lab. sec., 2 May 2020 (*Off. Bull.* No. 37/2020); Court of first instance of Rome, 2nd sec., 26 February 2021 (*Off. Bull.* No. 24/2021). All the referrals have been declared inadmissible: Constitutional Court, Judgements Nos. 123 and 254/2020, No. 196/2021 and No. 183/2022 (but, in this last case only because of the respect of the legislative discretion).

[43] Although the ICC did not intend to forge a general legal pattern, but only to deal with the specific issues of the influence of Strasbourg Court's jurisprudence on the 'concentrated' nature of the Italian constitutional review system (further details in this paragraph), the potential effects of the 'protocol' go beyond the Convention itself and pose a question of consistency in the use of the mechanism.

For the purposes of establishing whether it is admissible to invoke that interposed parameter, it must be pointed out that it features distinctive aspects that are highly specific compared to ordinary international agreements, which aspects it shares with the ECHR. In fact, whereas the ECHR sought to create a 'system for the uniform protection' of fundamental civil and political rights (Judgement No. 349 of 2007), the Charter constitutes its natural completion on the social level since, as stated in the Preamble, the Member States of the Council of Europe sought to extend protection also to social rights, recalling the indivisibility of all human rights.

Thus, *by virtue of these characteristics*, the Charter must be classified as international law within the meaning of Article 117(1) of the Constitution[44].

Article 117(1) makes actually no distinction between international obligations on the basis of their subject which may, instead, be appraised under other constitutional provisions. The content of the Charter is crucial, on the other hand, for satisfying the preliminary condition of the 'interposition scheme', namely the conformity of the supplemental parameter with the Constitution, which is the second aspect to highlight. This condition is divided into a two-step assessment: firstly, it must be verified that the ESC does not contrast with any constitutional rule or principle (interpretative test); secondly, the outcome of the integration of external and internal guarantees must be positive for the system of national rights (balancing test).

Thus, in proceedings concerning the prohibition on members of the Armed Forces associating in trade unions, one of the referring judges correctly pointed out the need to ascertain whether and to what extent the Charter's standard of protection affected the conflicting public interest in the «compactness, unity, and neutrality» of this special bodies of the Executive branch[45]. In fact, the Court partly upheld the challenged provision, finding that the freedom to join 'other' trade unions (not limited to military personnel) was rightly prohibited:

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[44] Constitutional Court, Judgement No. 120/2018 (para. 10.1 of the *Conclusions on points of law*; emphasis added).
[45] Council of State, 4th sec., Judgment No. 2043/2017, para. 5.3.6.

> Indeed, whilst the imposition of conditions and limits on the exercise of that right may be optional as a matter of international law, it is instead necessary within the national perspective, so much so as to exclude the possibility of any gap within the law, a gap that would constitute an impediment on the very recognition of the right to associate within a trade union[46].

The third aspect is the most interesting, but also the most questionable. It focuses on what makes the ESC different from (and hence not comparable with) the ECHR: the respective protection system, and particularly the interpretative function bestowed upon the correspondent supervisory bodies. While the Convention provides that ECtHR's jurisdiction «shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto»[47] and also that Member States «undertake to abide by the final judgment of the Court in any case to which they are parties»[48], no equivalent provision has ever been included in the ESC. Consequently, the interpretation carried out by the ECSR lacks the authority of *res iudicata*:

> Within the context of the relations thereby framed between the European Social Charter and the signatory states, the decisions of the Committee, whilst being authoritative, are not binding on the national courts when interpreting the Charter, especially if − as in the case at issue here − the expansive interpretation proposed is not confirmed by our principles of constitutional law[49].

This means that the relationships between the judiciary, the ICC, and the ESRC develop in a less rigid and formalised manner than those concerning the ECtHR, leaving within the domain of the Member States a more extensive 'margin of appreciation' than that pertaining to the parallel conventional context. Suffice to say that when Article 117(1) applies, the proceeding judge may always settle the potential conflict between domestic law and the ESC on an interpretative basis (by harmonising either the former or the latter),

[46] Constitutional Court, Judgement No. 120/2018 (para. 15 of the *Conclusions on points of law*).
[47] Article 32(1).
[48] Article 46.
[49] Constitutional Court, Judgement No. 120/2018 (para. 13.4 of the *Conclusions on points of law*), restated in Judgement No. 194/2018 (para. 14 of the *Conclusions on points of law*).

no matter how stable the divergent interpretation given by the ECSR may be. Conversely, in cases involving the ECHR the judge shall comply with the consolidated case law of the European Court and, if necessary, raise a question of constitutionality.

Indeed, a practical aim of the 'ECHR protocol' was to counteract the 'judicial drain' from constitutional referral, namely the trends of ordinary courts to review domestic law by directly applying, in its place, the Convention as interpreted by the European Court. Recognising the ECtHR's interpretative predominance was part of the compromise to secure judicial review in the steady hands of the Constitutional Court. None of these risks has arisen with regard to the ESC and its influence on national legal systems is admittedly not comparable to that exerted by the ECHR over the decades.

However, in my opinion, the manifold interpretations of the ESC do not concur on such an equal basis as the Constitutional Court seems to purport[50].

The ones delivered by the ESRC are in all respects 'qualified' by the institutional task, granted to this body alone, to 'ascertain' that all Parties effectively comply with the commitments they have deliberately undertaken. In fact, the Member States cannot rely on a divergent interpretation of the Charter to avoid adopting the measures required as necessary by the Committee of Ministers in the follow-up phase. Moreover, in deciding whether to address a recommendation to the State concerned, the Committee of Ministers could not «reverse the legal assessment made by the» ECSR, which must be considered to all effects 'final'[51]. Though national authorities cannot be equated in this respect to the mentioned Committee, the claim that the ECSR's qualified interpretation is one of many that national judges may follow would ultimately lead to the 'erosion' of the very foundations of the Charter's protection system, which instead require all national authorities (judges included) to collaborate to make it effective.

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[50] It is worth remembering that the cited statement of the Court is aimed at neutralising the potential conflict of the external (extensive) interpretation of the ESC with domestic constitutional principles. In different conditions, the ECSR 'case law' has successfully integrated national standards, as in the Judgement No. 194/2018.

[51] This consolidated principle of ECSR 'case law' – see *Defence for Children International (DCI) v. the Netherlands* (20 October 2009, Complaint No. 47/2008, para. 21) – is tantamount to the concept of «*res iudicata*» at least in a formal sense: G. Palmisano, *L'Europa dei diritti sociali. Significato, valore e prospettive della Carta sociale europea* (2022), 161.

The criticism of the 'equivalent interpretation' thesis does not intend to support the opposite conclusion that the ECSR is endowed with an exclusive jurisdiction over the Charter (neither granted, to this extent, to the ECtHR), but rather to test the consistency of the different treatment of the two Charters under this aspect.

The 'functional' argument is also corroborated by the usual recourse, in Italian constitutional case law, to the principle of conformity when a claim is based on international norms, *id est* the duty to «follow the interpretation given in its original legal order»[52]. This tenet has been applied in several degrees to international customary law, EU law and ECHR provisions, but the special treatment of the ESC breaks the unitary value of the principle[53]. This unity might be accomplished at least in its *minimum* (procedural) content, that is when external qualified interpretations are taken into due account and given priority, though national judges may however depart from them with adequate justification, so that their interpretative autonomy – a pivotal element of State sovereignty – is preserved[54]. In this latter, 'softer' meaning, the conformity principle could apply to the ECSR's interpretations as well.

Moreover, as constantly directed by the principle of indivisibility of human rights, ECSR 'case law' represents a valid support for interpreting the corresponding provisions of the Convention and the EU Charter[55]. Indeed, the Committee's interpretations

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[52] Constitutional Court, Judgement No. 238/2014 (para. 3.1 of the *Conclusions on points of law*).

[53] Upon which see, amongst all, F. Salerno, *La coerenza dell'ordinamento interno ai trattati internazionali in ragione della Costituzione e della loro diversa natura*, in *I trattati nel sistema delle fonti*, cit. at 30, 11.

[54] On this last point, see G. Palmisano, *Le norme pattizie come parametro di costituzionalità delle leggi: questioni chiarite e questioni aperte a dieci anni dalle sentenze "gemelle"* in *I trattati nel sistema delle fonti*, cit. at 30, 14.

[55] The ECtHR itself ruled against the idea of a «watertight division separating» civil/political and social/economic rights since *Airey v. Ireland* (9 October 1979, para. 26), but it is mainly the ECSR that has opened the Charter to the influences of international and European human rights (case) law, giving effective proof of the claimed principle of the indivisibility of rights, as correctly pointed out by J.-F. Akandji-Kombé, *The Material Impact of the Jurisprudence of the European Committee of Social Rights*, in G. De Búrca & B. De Witte (eds.), *Social Rights in Europe* (2005), 90. On this interpretative stance see also C. Panzera, *La Carta sociale europea presa sul serio*, 18 Rev. gen. der. públ. comp. 1, (2015), 5 ff. For a broad assessment of the methods of interpretation followed by the ECSR, see F. Oliveri, *La Carta*

might fall indirectly under judicial concern in domestic proceedings whether their 'essence' was shared by the European Courts jurisprudence applying to the pending case.

Finally, similar conclusions can be drawn from the application of the general principles affirmed in the 1969 Vienna Convention on the Law of Treaties, considering ECSR 'case law' as a part of the «context» delimiting the ordinary meaning of the Charter's provision or as one of the «supplementary means of interpretation»[56]. Of course, the weight of each canon cannot be predetermined; however, national judges should (not fear to) emphasise the ECSR 'jurisprudence' when the Charter effectively supplements the constitutional parameter. The interpretations of this supervisory body could then be placed 'halfway' between the antipodes of unconditionally binding precedents and the equal concurrence of free interpretations.

A more thorough analysis of the 2018 constitutional judgements reinforces this conclusion. In the case concerning the freedom to associate in trade unions, the coupling of the relevant ECHR and ESR provisions was facilitated by the Committee's alignment to ECtHR *revirement* in *Matelly v. France* of 2014[57]. The parametric use of the Charter ultimately depended on that interpretative shift. Similarly, in the case involving the right of workers to adequate compensation for unlawful dismissal – Article 24 of the ESC supplementing the content of Article 35(3) of the Constitution – the Court actualised this principle by referring to ECSR decisions, once again, concerning other Countries[58].

sociale europea come "strumento vivente". Riflessioni sulla prassi interpretativa del Comitato europeo dei diritti sociali, 10 Jura Gentium 41 (2013), 60 ff.

[56] Articles 31 and 32, respectively. For a comprehensive account on this point in reference to the ESC, see L. Mola, *Oltre la Cedu: la rilevanza della Carta sociale europea e delle decisioni del Comitato europeo dei diritti sociali nella recente giurisprudenza costituzionale*, in G. Palmisano (ed.), *Il diritto internazionale ed europeo nei giudizi interni*, cit. at 9, 409, 422 ff.

[57] *CESP v. France*, cit. at 36 (paras 64, 78, 84-86 and 90-91), but see also *CGIL v. Italy* (22 January 2019, Complaint No. 140/2016) on the parallel prohibition on forming trade unions and on striking for members of another military force (*Guardia di Finanza*), wherein Constitutional Judgement No. 120/2018 is explicitly considered.

[58] Constitutional Court, Judgement No. 194/2018 (para. 14 of the *Conclusions on points of law*). Several constitutional and other national high Courts have started to refer to the ECSR 'jurisprudence' regardless of its formal status: namely, whether the respective States are party to the CCP Protocol or not. As rightly notes G. Palmisano, *L'Europa dei diritti sociali*, cit. at 51, 164 ff., this trend

Against this backdrop, the presumption of the Council of State, referring judge in the proceedings settled by the Judgement No. 120/2018, that the Committee's decisions not only lack direct effects but «neither are fit to generate international obligations upon the interested Member State» seems to be unfounded[59]. By contrast, the entire follow-up procedure is based on the compulsory nature of ECSR findings on the claimed infringement of the Charter.

In conclusion, many reasons support the argument of the 'duty of diligence' on national judges to refer to ECSR decisions relating to their own country and, in general, to its 'consolidated' case law when domestic legislation is deemed to conflict with the Charter. Of course, judges must test the conformity of this external interpretation (of the treaty) with the Constitution and, in the event of a contrast, refuse to integrate the international norm within the domestic parameter (up to raise a question of constitutionality *in parte qua* upon the law incorporating the Charter). At the same time, the ICC should acknowledge the qualified value of the Committee's interpretation and act accordingly. In fact, the stability of the interpretative trends that progressively detail the Charter's commitments is a preliminary condition for achieving the main purpose of that system: promoting effective social justice on a European scale.

6. Conclusions

This challenging goal has much to do with the questions concerning the features of social rights (mostly requiring 'positive' actions and financial support from public institutions) and the nature of the norms that protect them, generally expressed in the form of directive principles of social policy. As the Constitutional Court has put it, the Charter

> is made up predominantly of statements of principle requiring progressive implementation, thereby calling for particular

buttresses the «substantial interpretative authority» held by the Committee's decisions.

[59] Order cit. at 45 (para. 5.3.2). Less extreme, but strictly in line with the principled arguments of the Judgement No. 120/2018, is the reasoning underpinning Council of State, 5th sec., Judgement Nos. 1326 and 7762/2020.

attention when considering the time scales for and manner of their implementation[60].

For this reason, the prospects of the ESC are not separable from the issue regarding the limits of a judicial enforcement of social rights, which calls on the indefectible responsiveness of 'political' law-making. To this end, however, an increase in judicial concern for the Charter and dialogues with its guardian body might put lawmakers under pressure and successfully counterbalance regressive trends in the field of social rights.

Let us consider a couple of examples. During the horrible years of the global financial crisis begun in 2007-2008, neither the ECtHR nor the ECJ contained the national cutbacks of protection from increasing poverty and social exclusion of that time. The ECSR opposed the trend, ruling that the austerity measures adopted in Greece under the constraints of the loan conditionality (imposed by the IMF, ECB, and EU Commission) violated the Charter as to their «cumulative effect», which resulted in an excessive deprivation of the rights of pensioners to social security, disregarding the principle of proportionality («lesser means» test)[61]. A few months later, dealing with the balancing of economic freedom and social rights, the Committee found that the Swedish legislation enacting the ECJ ruling in the *Laval* case was in breach of the Charter's guarantees of the right to strike and collective bargaining of posted workers[62]. It

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[60] Constitutional Court, Judgement No. 120/2018 (para. 10.1 of the *Conclusions on points of law*).

[61] *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*; *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*; *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece* (7 December 2012, Complaints Nos. 76-80/2012). But see also the earlier *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece* (23 May 2012, Complaint No. 66/2011). For a comparative account of these decisions, see L. Mola, *The Margin of Appreciation Accorded to States in Times of Economic Crisis. An Analysis of the Decisions by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures*, 5 Lex social. Revista jurídica de los derechos sociales 174 (2015).

[62] *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* (3 July 2013, Complaint No. 85/2012) to compare with Case C-341/05, *Laval un Partneri Ltd*, ECLI:EU:C:2007:809. For a comment, see: Mª.C. Salcedo Beltrán, *El Consejo de Europa frente a la Unión Europea. Vulneración de la Carta Social Europea por 'Lex Laval'*, 77 Estudios Fundación 1 de Mayo 5 (2014); M.

was a warning for all Parties, but indirectly also for the EU and its Court: the *Bosphorus* doctrine would have not applied to the Charter system[63].

To conclude on the parametric role of the ESC in Italy, it is worth considering its implementation even beyond the recourse to the 'interposed norm' scheme. Below, I suggest three viable paths.

1) Even though legislative enactments regarding social rights often neglect the Charter as a source of inspiration akin to other internal (constitutional) or external (ECHR or EU) principles[64], judges should take the former into account, along with the respective ECSR 'case law', to the same extent as the latter. Indeed, greater visibility of the Charter would lead to broader awareness of the external constraints imposed upon domestic legislation, which is even more crucial when the respective standards of protection diverge[65].

2) Legislative provisions should be interpreted, as far as possible, fully in compliance with the Charter's obligations. This duty is not expressly stated in constitutional case law, but implicitly descends from the general principles applying to all treaties once incorporated into the domestic legal system, as a means for granting their *effet utile*[66]. The same duty is logically implied by the scheme envisaged by Article 117(1), at least for as long as the interpretative

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Bassini & F. Ferrari, *Reconciling Social Rights and Economic Freedom in Europe. A Constitutional Analysis of the Laval Saga (Collective Complaint n. 85/2012)*, in M. D'Amico & G. Guiglia (eds./dir.), *European Social Charter*, cit. at 14, 193.

[63] In this sense, see explicitly *Confédération française de l'Encadrement (CFE-CGC) v. France* (12 October 2014, Complaint No. 16/2003, para. 30); *Confédération générale du travail (CGT) v. France* (23 June 2010, Complaint No. 55/2009, paras 32-38); *LO-TCO v. Sweden*, cit. at 62 (paras 72-74).

[64] Until now, there are incredibly few laws and regulations which mention the Charter. A noteworthy exception is the Calabria Regional Law No. 47/2016 for the implementation of national legislation on women's right to abortion, which expressly refers to the ECSR decisions *International Planned Parenthood Federation - European Network (IPPF EN) v. Italy* (10 September 2013, Complaint Co. 87/2012) and *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* (12 October 2015, Complaint No. 91/2013).

[65] A good example of a 'showcase' citation of the Charter, as part of the «integrated system of protections», is offered by Constitutional Court, Judgement No. 59/2021. Conversely, Court of Cassation, lab. sec., Judgement No. 6336/2023, relies on the non-judicial activity of the ECSR to set apart the potential (interpretative) impact of its decisions in a case concerning the principle of due compensation for unlawful dismissal.

[66] See J.-F. Akandji-Kombé, *La justiciabilité des droits sociaux et de la Charte sociale européenne n'est pas une utopie*, in J.-F. Akandji-Kombé (dir.), *L'homme dans la société internationale. Melangés en hommage au Professeur Paul Tavernier* (2013), 499 ff.

harmonisation of national law does not conflict with other constitutional norms. The 'duty to harmonise', if properly accomplished and not abused, could achieve two important results: firstly, to complement – and sometimes to prevent – the declaration of invalidity of the applicable law, conceived as the last resort (*extrema ratio*); secondly, to reduce the risks of 'non-compliance' assessments rendered by the Committee under both procedures, since its supervision encompasses the degree of effective enjoyment of the Charter's rights[67]. A decision delivered by the Court of first instance of Rome in 2021, extending the principle ruled in the Judgement No. 194/2018 to a case regarding a collective unlawful dismissal, displays a positive and reasonable use of ECSR 'case law' that other courts could hopefully replay[68]. Indeed, the current case law encompasses different uses of the ESC, such as: *a*) 'application' of the principles affirmed in Judgements Nos. 120 and 194/2018[69]; *b*) 'quotation' of the Charter alongside other international/EU or constitutional norms[70]; *c*) parametric use of the Charter to confirm the validity of the legislation[71], to harmonise the law on interpretative

[67] This is due to the directive nature of many Charter provisions, which burden the Parties with obligations 'of result' rather than 'of means'.
[68] Court of first instance of Rome, lab. sec., Judgement No. 8207/2021 (para. 11.7).
[69] Council of State, 4th sec., Judgements Nos. 2887/2019 and 3859/2019; Administrative Tribunal, Veneto-Venezia, 1st sec., Judgement No. 1103/2018; Court of 1st instance, Genova, Judgement 21 November 2018; Court of 1st instance, Rome, lab. sec., Judgement No. 9079/2018; Court of 1st instance, Perugia, lab. sec., Judgement No. 106/2021; App. Court, Venezia, lab. sec., Judgement No. 249/2022; Administrative Tribunal, Valle d'Aosta, 1st sec., Judgement No, 15/2023.
[70] Court of Cassation, un. sec., Judgement No. 20819/2021; Court of Cassation, 1st civil sec., Judgements Nos. 40495/2021, 3059 and 3246/2022; Court of Cassation, 3rd civ. sec., Judgement No. 15882/2019; Court of Cassation, lab. sec., Judgements Nos. 26675, 28439 and 32587/2018, 987/2020, 20216/2022, 27711 and 28320/2023; Council of State, 2nd sec., Judgement No. 7646/2019; App. Court, Florence, lab. sec., Judgement No. 19/2022; Court of 1st instance, Vicenza, Judgement No. 2489/2018.
[71] Court of Cassation, lab. sec., Judgement Nos. 12174/2019, 19660/2019, 12629/2020, 16711/2020, 16855/2020, 16917/2021; App. Court, Cagliari, lab. sec., Judgement No. 262/2021; Council of State, 7th sec., Judgements Nos. 906/2023 and 6291/2023.

basis[72], to refer questions of constitutionality to the ICC[73] or preliminary rulings to the ECJ[74].

3) Most Charter provisions incorporate directive principles to States' actions in the field of the labour market, healthcare, and social policies. Nonetheless, judges should not refuse direct application to norms having more precise and detailed content, particularly if this qualification originates from ECSR consolidated case law. The issue relates more generally to all treaties and has been addressed in Italy with specific regard to the ECHR. In fact, the caution guiding the ICC on this slippery point is plainly justified when the treaty is deemed to display direct effects in place of the applicable law. In this way, direct application is wrongly used as a means for concealing the conflict arisen and, ultimately, for taming it at judicial level in contrast with the concentrated nature of the Italian constitutional review system. Without a constitutional amendment or an enlargement of the ICC doctrine regarding international customary and EU law, it is difficult to foresee the development of a 'conventional' review alternative to the 'constitutional' one, expressly provided and already applied to the ESC in other European Countries (France and Spain, for example)[75]. Outside of this scenario, I do not see any real hindrances to give direct effects to the Charter, as long as some of its provisions fit to this end and there is no apparent clash with domestic law.

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[72] Court of 1st instance, Rome, lab. sec., Judgement No. 10149/2019; Court of 1st instance, Turin, 1st sec., Judgement No. 32/2019.

[73] Above, at 42.

[74] Council of State, 4th sec., Order No. 4949/2019; Court of 1st instance, Milan, lab. sec., Order 5 August 2019; App. Court, Naples, lab. sec., Order 18 August 2019. All referrals were declared inadmissible by the ECJ: see C-561/19, *Consorzio Italian Management e Catania Multiservizi SpA*, ECLI:EU:C:2021:799; C-652/19, *KO*, ECLI:EU:C:2021:208; C-32/20, *T.G.*, ECLI:EU:C:2020:441.

[75] For an appraisal of these recent trends, see: C. Nivard, *Le rôle des juges nationaux dans l'application de la Charte sociale européenne en France* and C. Salcedo Beltrán, *Le rôle des juges nationaux dans l'application de la Charte sociale européenne en Espagne*, 1 Europe des droits & libertés/Europe of Rights & Liberties 87 and 97 (2020). On the positive impact of this parallel scrutiny, L. Jimena Quesada, *Jurisdicción nacional y control de convencionalidad. A propósito del diálogo judicial global y de la tutela multinivel de derechos* (2013); on its spread in Europe, see G. Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 23 Eur. J. Int'l L. 401 (2012), 412 ff.