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# Fundamental social rights of Europe

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## Abstract

Artikeln behandlar grundläggande sociala rättigheter i de tre europeiska nyckelkonventionerna, Europakonventionen om mänskliga rättigheter, Europeiska sociala stadgan (ESS) och Europeiska unionens stadga om de grundläggande rättigheterna (EUSGR). Presentationen börjar med att diskutera några allmänna egenskaper av sociala mänskliga rättigheter, deras kontext, bakgrund, natur samt deras funktion och roll i rättsordningen.

Huvudfrågan kommer emellertid att fokusera på det materiella innehållet i den europeiska sociala stadgan och dess fundamentala rättigheter, minimumsstandarder och situationen i olika stater. Därefter diskuteras förhållandet mellan de tre nyckelkonventionerna och speciellt relationen mellan ESS och EUSGR. Artikeln avslutas genom att påpeka några alternativ för att stärka EU:s sociala profil.

## 1. General features

### 1.1 *Background*

The European human rights treaties born out of the ashes of World War II were created to protect the civil and political rights that had been so brutally violated during the war. The ruined continent of Europe, however, was so poor that social rights could not effectively be protected at the same time as civil and political rights. Nevertheless, the European

Convention on Human Rights (ECHR), adopted by the Council of Europe (CoE) in 1950, contained in addition to civil and political rights the most fundamental social provisions for the protection of human dignity and fundamental freedoms, such as the right to life, health and integrity of the family.

Comprehensive social rights were guaranteed at the dawn of the birth of the welfare states in 1961, when CoE – at that time still an institution of Western European countries – adopted the European Social Charter (ESC of 1961). This original Charter comprised 19 articles covering 63 rights. Together the Convention and the Charter give full value to the principles of indivisibility, universality and interdependence of human rights.

The Charter was renewed and updated in 1996, at the eve of the reconstruction of the welfare states. The new Charter (ESC) was expanded to encompass 31 articles and 98 rights. Having participated myself in the process of revising the Charter, I can relate that the southern women and northern men who participated in the relaunching committee, the Charte-Rel, found each other and converted the Charter into a modern common denominator for social Europe.

I have always been puzzled by the political climate in which the reform of social human rights took place. The Nordic countries were experiencing their first financial crisis with social security cut-backs, the German government that had been building the unity of the country on employment and social security stopped investing, the EU was preparing for the adoption of the restrictive EMU criteria, and the great majority of European governments had as their main priority the competitiveness of the economy, not social welfare. How could all this fit in with the idea of raising the European social profile!

The preparations for the EU Charter on Fundamental Rights (CFREU) started under uncertainty in 1999. In spring 2000, the British and Danish representatives maintained that social rights should only be considered as principles, not rules. The result was a compromise where some of the provisions were considered rules whilst others open norms. The final outcome was to approve the Charter as a declaration.

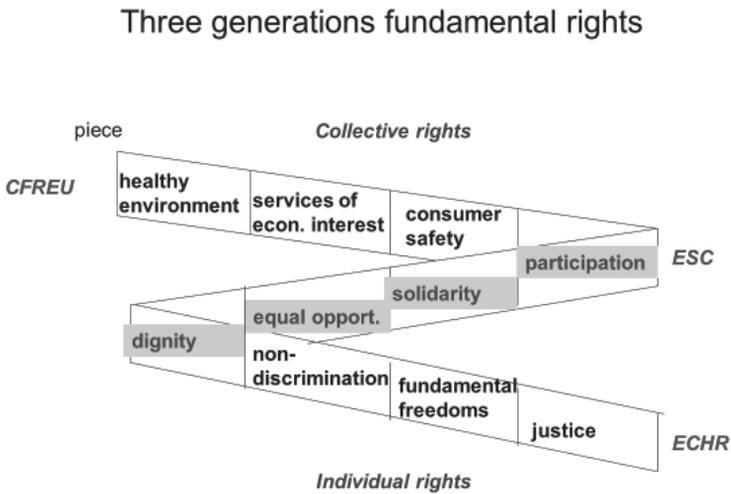
The binding nature of CFREU was part of the Treaty of Lisbon (2007). CFREU became one of the EU's basic treaties as it entered into

force in 2009. That was the year when Europe was facing a serious financial crisis and the question was raised, how will the new binding treaty protect the people. Unfortunately, it didn't as the EU Central Bank and the Commission, together with the International Monetary Fund (IMF), focused on cutting the social security of the crisis countries. Instead of being used to help individuals in need, the resources were used to secure financial stability.

### 1.2 Three generations

Social rights cover topics including worker rights, social security, housing, social and health care services, and cultural rights. They are the rights of the welfare state, which due to their birth history are also referred to as the second generation of human rights.

Figure 1



The core principles of ECHR are respect for human dignity, non-discrimination, fundamental freedoms and justice and the rule of law. The

principles of ESC build on these and go beyond. They also encompass the principles of equal opportunities, solidarity and participation.<sup>1</sup>

There is no human rights treaty protecting third generation fundamental rights. However, CFREU includes protection of several new rights, namely: 1) the right to a healthy living environment, 2) the right to services of economic interest (heat, water, transport, telecommunications), 3) consumer protection and 4) the right to participate in the decision-making of local communities. These are all collective rights but affect the conditions of every human being in a modern society!

When the state makes economic cut-backs, such might collide with human rights treaties or CFREU. This aspect at times is overlooked in both States and the EU.<sup>2</sup>

### 1.3 *Primacy of norms*

The relationship between human rights and national rights is complex. By their nature, most of the norms in the ESC as well as the ECHR are open norms, principles or flexible norms. Only some of these are concrete regulative rules and applicable with no greater need for interpretation, such as the prohibitions as to child labour, forced labour, sexual and other abuse or the ban of discrimination. These can be applied as such and must be respected without restriction in every society and in all circumstances.

The abstract nature of the norms gives space for speculation regarding the non-binding nature of norms or less dominating position in the legal system. The point of departure, however, is that those human rights as agreed by the states set minimum rights and standards that the national law may go beyond but not below. This is prescribed in Article 1 ECHR (1950): "The High Contracting Parties shall secure the rights and freedoms defined in Section I of this Convention to all persons within their jurisdiction." Furthermore, under Article 46 ECHR, the states undertake

1 See more: *Mikkola Matti*, Social Human Rights of Europe. Legisactio. Porvoo 2010, pp. 8-19.

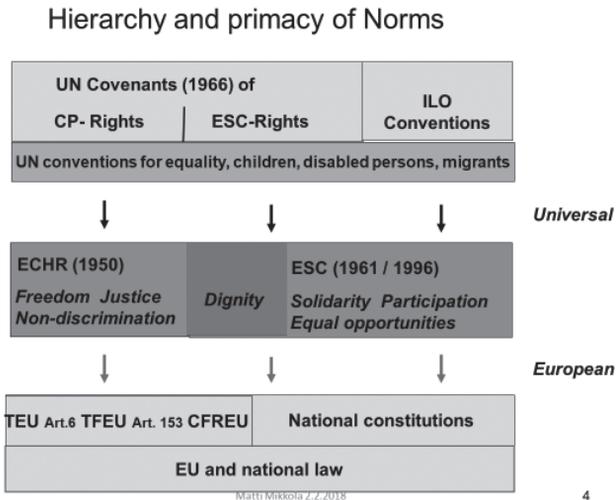
2 *Klaus Lörcher*, Legal and Judicial International Avenues: The Revised European Social Charter in The Economic and Financial Crisis and the Collective Labour Law in Europe, edited by Niklas Bruun, Klaus Lörcher and Isabelle Schömann. Oxford and Portland, Oregon 2014, pp.265 - 294.

to abide by the final judgment of the European Court of Human Rights in any case to which they are party, which clarifies the normative effect of the case law. It has long been the tradition to respect, in particular the latter undertaking.

Under the ESC, the state parties may select their undertakings, which also gives them the option not to select and not be bound by some of the provisions. This does not, however, free the state parties as not accepting all provisions of the ESC and being bound to all rights that they have ratified (Art. 20 1961 ESC and Art. A 1996 ESC).<sup>3</sup>

Although the European human rights treaties were agreed upon prior to the international universal treaties of the UN (1966), the universal treaties, in principle, also set the minimum rights and standards for regional human rights. The diagram below illustrates the hierarchy of provisions of human rights and their relation to regional and national laws as follows:

Figure 2



3 See more: *Olivier de Schutter*, *The European Social Charter as the Constitution of Europe in The European Social Charter and the Employment Relation*, edited by Niklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert. Bloomsbury, Oxford and Portland, Oregon 2017, pp. 11. – 51.

In the legal order, the hierarchy and priority of the norms is the following: 1) universal human rights, general and targeted, 2) regional, European human rights, 3) European Union and national constitutional rights and finally 4) the rights established by ordinary law. Respect for human values is the universal common denominator for all rights.

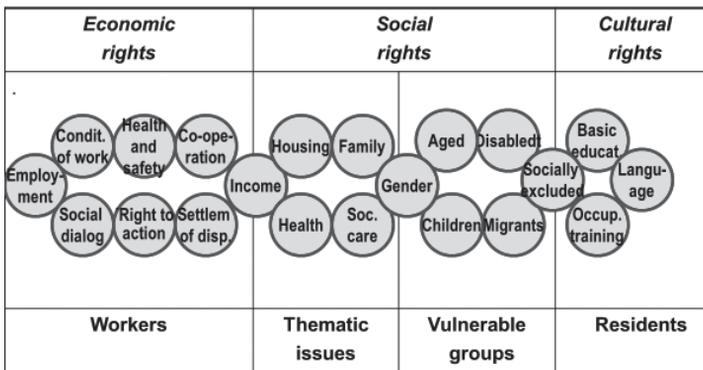
1.4 *Material scope of the ESC*

Social human and fundamental rights are economic, social and cultural rights. In European practice, they are commonly defined as social rights. The most comprehensive European treaty for the protection of these rights is the European Social Charter with 98 rights.

More closely, the ESC deals with: 1) labour law, both individual and collective, 2) the thematic areas of social law: income, housing, health, social services, and support for families, 3) protection of the vulnerable groups of people: mothers, children, the elderly, people with disabilities, migrants and socially excluded, and finally 4) cultural rights: the right to mother tongue and the language of the host country as well as equal opportunities for education from early education up to higher education.

Figure 3

**Material scope of the ESC**  
31 Articles; 98 Rights



### 1.5 Compliance

I published a monography in 2010 on the social human rights of Europe, which included a barometer of how the then 40 contracting countries fulfilled their obligations.<sup>4</sup> The comparison contained all 98 rights, of which 21 were defined as most fundamental rights, common for the ECHR and the ESC. The data was based on the situation in the countries in 2007, *i.e.* a year before the Lehman Brothers' bankruptcy that launched a deep recession for many European national economies. The barometer was based on compatibility studies and conclusions of the European Committee of Social Rights (ECSR).

Table 1 Compliance with 98 rights of the ESC

Country	All rights N=98	Country	Fundamental rights N=21	Compliance
Finland	62	Finland	14	50% or more
Sweden	61	Sweden	13	
France	56	Norway	13	
Norway	55			
Portugal	54			
Slovenia	50			
Netherlands	48	France	9	33% or more
Belgium	46	Slovenia	9	
Estonia	45	Netherlands	9	
Italy	44	Portugal	8	
Germany*	44	Belgium	8	
Austria*	41	Italy	8	
Lithuania	40	Germany	8	
Greece*	39	Estonia	7	
Cyprus	36			
Ireland	35			

4 Mikkola Matti, Social Human Rights of Europe. Legisactio. Porvoo 2010, p. 69.

Spain*	32	Austria	6	
Luxembourg*	32	Greece	6	
Denmark*	31	Lithuania	6	
Poland*	30	Cyprus	6	25% or more
UK*	29	Denmark	6	
Iceland*	26			
Malta	24	Ireland	5	
Czech Rep.*	23	Luxembourg	5	
Hungary*	19	Iceland	5	
Bulgaria	18	Malta	5	
Romania	16	Spain	4	
Slovakia	15	Czech Rep.	4	
Turkey	15	Hungary	4	
Croatia*	12	Poland	3	less than 25%
Armenia**	9	UK	3	
Latvia*	8	Bulgaria	2	
Moldova	7	Slovakia	2	
Albania	4	Turkey	2	
		Croatia	2	
		Romania	1	
		Armenia	1	
		Latvia	0	
		Moldova	0	no compliance
		Albania	0	

These results were hardly encouraging. In 2007, Finland and Sweden were on the top of the list, while complying fully with 2/3 of the rights of the ESC. In addition to them, four states met their obligations with more than 50%: France, Norway, Portugal and Slovenia. The disadvantage of Germany and Denmark in this comparison can be explained by the fact that these countries were not committed to the 1996 Revised Charter but rather still to the old one (1961), which covered fewer rights.

Eight countries did not meet even one-fourth of the requirements. North and West fulfilled their obligations better than the South and

East. Of the 21 fundamental rights, five EU-countries and four others fulfilled the requirements of two rights or less. In three states, Latvia, Moldova and Albania, none of the 21 most fundamental social rights were in compliance with the ESC.

## 2 Fundamental Social Rights of the EU

The Single Market Act on the EU Internal Market (1986) highlighted the social profile of the EC by facilitating regulation on health and safety at work and gender equality. Efforts were also made to strengthen the social dimension, in particular unemployment security, but the results were negligible.

### 2.1 *Basic norms*

Article 6 § 1 of the Treaty of European Union (TEU) assimilates the rights, freedoms and principles of CFREU as equivalent to the rights of other basic treaties agreed in Lisbon in 2007. The relation of the norms of CFREU and the social human rights of Europe is provided for in the horizontal articles 51 – 53 CFREU. This does not, however, extend the competence of the EU in relation to national legislation. A more detailed division of powers is provided for by the Treaty on the Functioning of the European Union (TFEU). Articles 151 – 161 cover the competence of the EU in the areas of labour and social law.<sup>5</sup>

5 See also *Ida Elisabeth Koch*, The interaction between human rights case law: Convergence or competition in Research Handbook on European Social Security Law, edited by Frans Pennings and Gijsbet Vonk. Edward Elgar, Cheltenham UK, Northampton MA USA, pp. 115 – 120.

Figure 4

### The EU treaties and the ESC

<b>TEU</b> <ul style="list-style-type: none"> <li>• values, objectives, principles</li> <li>• constitutional promise to accede the ECHR (covering 21 most fundamental social rights)</li> </ul>	
<b>CFREU Art. 51–53</b> rights and standards of the are binding and applicable within the competences of the EU	<b>TFEU Art. 151-161</b> provisions of competences of the EU in areas of labour law and social law
constitutional traditions common to the Member States,	protocols and annexes to the treaties

The relationship of EU law to European human rights is complicated. Unlike the US, China and Russia, the EU is not a party to any of the key human rights conventions of the UN, ILO or the Council of Europe. The EU is one of the Contracting parties to the UN Disability Convention but in other respects, it does not have any direct obligation to respect human rights.

However, the explanatory report of CFREU<sup>6</sup> indicates that the rights and standards of the Charter are based on the two key European treaties of human rights, the ECHR and ESC (1996), which opens an indirect road to the application of human rights in the EU law. This is also expressed in the horizontal Article 53 CFREU, which stipulates all international agreements binding to the EU that are approved by all Member States. Furthermore, Article 151 § 1 TFEU refers to the provisions of the ESC and sets the objective of harmonizing rights and standards on issues such as: promotion of employment, improvement of living and working conditions, social protection, social dialogue, human resources development and the fight against exclusion.

6 Convention drafting the Charter (the Convent) 49/2000.

## 2.2 *Social rights in CFREU*

CFREU does not cover all social human rights. CFREU rights can be divided into three baskets: 1) where the fundamental rights of the EU are the same as the rights of the ESC, such as health and safety at work, conditions of work and non-discrimination; 2) where the article as such or the lack of competence limits the applicability of it and 3) where the provision is unregulated in CFREU such as the right to housing and to mother tongue and the language of the host country. In addition, one should note that the United Kingdom and Poland have not accepted CFREU as a binding legal instrument.

In Article 52 § 7 CFREU, the EU and national courts are to take due account of the explanatory notes drawn up to guide the interpretation of CFREU, which refers to its interdependency with European human rights.

## 2.3 *Nothing less than the standards of human rights*

The key provision for the indirect application of ECHR and ESC is Article 53 CFREU:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The ECHR is expressly mentioned in this article. The ESC, in turn is one of the international treaties to which all the member states are party. That requires the EU to respect the rights and minimum standards of both key European treaties of human rights, while setting the concrete norms or interpreting the standards of fundamental rights. They must not go below the standards of the human rights.

## 2.4 *Competence of the EU*

Article 153 TFEU is the specific provision regulating the competence of the Union in the area of social security. Accordingly, the competence of the Union is absent as to issues of structure and financing but leaves operational space for the protection of mobile workers and to set minimum standards.

Based on paragraph 2 of this Article, the Union has now for years improved knowledge, developed exchanges of information and best practices, promoted innovative approaches and evaluated experiences between the member states. The same paragraph authorizes Union bodies to set by means of directives minimum standards of social security, if unanimity is reached by the states. This option, however, has not been used by the Union.

By using this given authority, the Union could set important guarantees for all European citizens against poverty and social exclusion and reduce instability in member countries.

## 3 Standards set by the case law

The European Convention on Human Rights has been applied for over 60 years and the Social Charter for over 50 years. The abstract legal norms have been developed to concretize minimum rights and standards. As examples here minimum social income and workers' right of association are given.

### 3.1 Combatting poverty

The minimum threshold as defined in ILO Convention 102, the European Code of Social Security and Article 12 § 2 ESC is related to previous income, which is to be at least 40–50 % of previous earnings.

The absolute minimum threshold under Article 12 § 1 ESC is 50 % of the net median equivalised income, calculated on all income: capital income, wages and social income.<sup>7</sup> The first mentioned is individual by nature and the latter is a collective minimum guarantee for everyone with

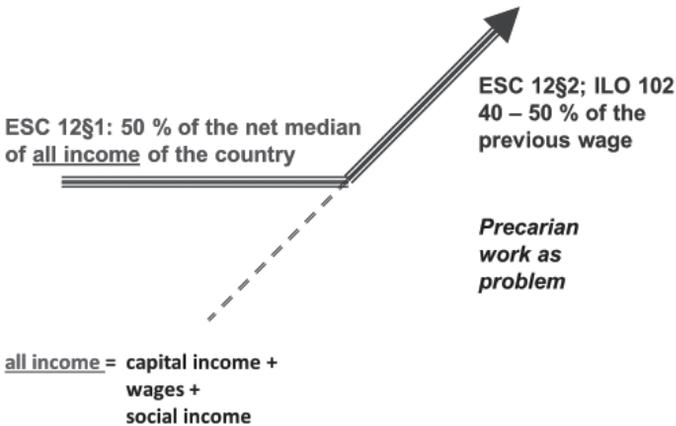
7 Conclusions of the ECSR 2004 and 2006, Bulgaria on Article 12 § 1.

the intention to guarantee the inclusion also of those with no earnings or with a precarious work history.

In summary, the minimum level of social security is defined by two thresholds.

Figure 5

## Two standards of minimum social income



Matti Mikkola 2.2.2018

12

The threshold of 50 % of the net median income is rather low and very low in some of the contracting states. In 2013, it was 1.514 euros per month in Norway and 88 euros in Romania. The function of the threshold is to prevent people from living in poverty and promote the inclusion of the beneficiaries in mainstream society. The same minimum threshold is applicable also as the minimum standard of social assistance (Art. 13 § 1 ESC).<sup>8</sup>

The State may compensate part of the benefit with low or no paid services, but the cash part of the benefit must never go below the threshold of 40 % of the net median.<sup>9</sup>

8 See e.g., *Finnish Society of Social Rights v. Finland*, CC 88/2012, para. 112.

9 Conclusions 2004, Bulgaria, Estonia, Lithuania ja Romania on Article 12 § 1. See also Digest of the case law of the ECSR 9/2008 on Article 12 § 1.

Table 2

**50 % of the net median of all income of the country**  
**Conclusions 2013**

	€	Soc. Sec. ESC 12§1	Soc. Ass. ESC 13§1
<b>Norway</b>	<b>1.514</b>	<b>+</b>	<b>- (- *)</b>
<b>Denmark</b>	<b>1.100</b>	<b>+</b>	<b>+ (- *)</b>
<b>Sweden</b>	<b>938</b>	<b>-</b>	<b>+</b>
<b>Finland</b>	<b>909</b>	<b>-</b>	<b>+</b>
<b>Netherlands</b>	<b>846</b>	<b>+</b>	<b>+</b>
<b>Germany</b>	<b>793</b>	<b>o</b>	<b>o</b>
<b>Greece</b>	<b>458</b>	<b>-</b>	<b>-</b>
<b>Bulgaria</b>	<b>121</b>	<b>-</b>	<b>-</b>
<b>Rumenia</b>	<b>88</b>	<b>-</b>	<b>-</b>
		<b>o</b>	<b>differal</b>
		<b>-</b>	<b>negative</b>
		<b>*</b>	<b>unequal treatment</b>

The positives in the table mean that the state fulfils the obligations and the minuses that it does not. Norway and Denmark met all the standards, except with young persons under the age of 25 in the social assistance system. In Romania and Bulgaria, the poverty line was 10 times lower but the states did not meet the requirements. – This is not a sign of common European values!

Cut-backs of the Greece old-age pensions reduced the income of tens of thousands of retired persons below 458 € / month and condemned them to poverty for the rest of their lives.<sup>10</sup> This was done based on the conditions of the loans established by the EU Commission, the Central Bank of EU and the IMF. Two key institutions of the EU actively affected results, which were clearly contrary to the right to minimum income, provided by ESC and thus indirectly also by CFREU. These institutions had no respect for fundamental social rights, which raises the question: are they friends or enemies of fundamental rights and social stability?

10 *Five Organisations v. Greece*, Decisions on Collective Complaints 76–80/2012.

The body blamed for the cut-backs was not the EU institutions nor the IMF but the Greek government by ECSR.

### 3.2 *Collective labour rights*

Freedom of association for workers is provided in Article 12 CFREU, the right to information and cooperation in Article 27 and the right to negotiate and enter to collective bargaining in Article 28. Article 152 TFEU recognizes bilateral social dialogue as well as tripartite consultations. However, under Article 153 § 5 TFEU, the EU lacks the competence to lay down provisions on wages, the right of association and the right to industrial action, which limits its power for intervention in questions on income policy.

These restrictions did not prevent the EU Court of Justice (CJEU) from taking an active position in the *Laval* case, where the Latvian company was considered eligible to pay Latvian workers, posted to Sweden with wages lower than defined as the minimum in the Swedish collective agreement. The decision was based on competition norms and free movement of services and the Court had no respect for the fundamental social rights of workers.<sup>11</sup> The ECSR referred to the protection of workers and came to a different conclusion in the matter.<sup>12</sup>

## 4 Further development of EU law

In conclusion, there are several options for the EU to increase its social profile. The legal framework for further development of the EU law looks as follows:

- Art. 53 CFREU does not allow the Union to go below the level of minimum standards of the ECHR or ESC.
- Articles 151–161 TFEU define the competences of the EU to set up the rights and standards of social law and labour law.

<sup>11</sup> *Laval v. Sweden*, Grand Chamber Judgment of the ECtHR, C-341/05.

<sup>12</sup> *Lo and TCO v. Sweden*, Decision on Collective Complaint 85/2012.

- Article 153 TFEU gives the EU the competence to agree on minimum standards of social income.
- Art. 6 § 2 TEU requires the Union to fulfil the constitutional promise that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- No obstacles exist either for the accession to the European Social Charter.

Although the binding nature of social human rights is implicit (Art. 53 CFREU), it is to be respected by EU institutions and member states when EU law is applied. If we want the Union, its institutions and member countries to respect social human rights comprehensively, the Union must become a party to both key European human rights treaties, the ECHR and the ESC. Finally, without further delay, the Union should adopt common rules and standards for minimum social income as defined in the ILO Convention 102, European Code of Social Security and the European Social Charter (Art. 12 § 1 and 12 § 2). As the first step, the European Commission should use the competences it already has and ensure a minimum income for all in society, which means that everyone must be entitled to an income of at least 50% of the equivalent net median income in the country concerned.