

The opportunities of the European Social Charter (in Italy)

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Abstract: This work aims at highlighting the opportunities offered at national and European level by the European Social Charter. The actual EU process for the achievement of the complete protection of human rights in Europe is justified by the EU non-accession to the European Social Charter and to the ESC (revised). In fact the analysis of the Treaty of Nice allows to identify relevant gaps as concerns social rights and principles and underlines their actual juridical effectiveness in national laws. This work offers different interpretative techniques, studies various procedural peculiarities and focuses on the most relevant elements regarding the ESC and the ESC (revised) enforceability and justiciability. In this context the jurisprudential harmonization passes through the activity of the ECHR and the ECSR and stimulates an interesting jurisprudential and conceptual comparison with the Italian provisions on social rights, starting from the Italian Constitution.

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1. The EU non-accession to the European Social Charter.

European Commission and Council of Europe joint talks on European Union's accession to the European Convention of Human Rights (ECHR) started recently. After six months from the entry into force of the Lisbon Treaty, that expressly requires the above-mentioned accession under Article 6.2, a new process has been inaugurated in order to achieve the complete protection of human rights in Europe.¹

The negotiators from the European Commission and the experts from the Council of Europe's Steering Committee for Human Rights will meet regularly to work on the accession agreement. At the end of the process, the agreement on accession will be concluded between the Council of Europe's Committee of Ministers and the Council of the European Union (EU), acting by unanimous decision. The European Parliament, which has to be fully informed of all stages of the negotiations, must also give its consent. The conclusion decision needs ratification by all the contracting parties to the ECHR and by the EU Member States (under article 218.8 Treaty on the Functioning of the European Union - TFEU), in accordance with their respective constitutional requirements.

In this process it emerges (although marginally) the *other* instrument for the protection of human rights: The European Social Charter (ESC). It was originally conceived by the Council of Europe as a complementary instrument to the ECHR, in order to guarantee social human rights. This pendant was adopted in Turin in 1961, it was practically disregarded for a period of thirty years and re-launched during the Nineteenth of the XX Century (ESC revised).²

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¹ The official talks started on 7 July 2010. As above stated, the European Union's accession to the ECHR is required under Article 6 of the Lisbon Treaty and foreseen by Article 59 of the ECHR, as amended by the Protocol No. 14 on 17 March 2010. The Commission proposed negotiation directives for the EU's accession to the Convention (IP/10/291). Then, on 4 June 2010, EU Justice Ministers gave the Commission the mandate to conduct the negotiations on their behalf. On 26 May 2010, the Committee of Ministers of the Council of Europe gave an *ad-hoc* mandate to its Steering Committee for Human Rights to elaborate with the EU the necessary legal instrument for the EU's accession to the ECHR.

² The European Social Charter (revised) was revised during the period 1990-1994 by an *ad hoc* Committee called *Charte-Rel*, set up by the Ministers' Deputies at the end of their informal conference in Rome on human rights (5 November 1990). In 1996 the Committee of Ministers of the Council of Europe approved the text of the ESC (revised) (previously rejected by the Committee in 1994), opening it for signature on 3 May of the same year. Italy ratified the ESC (revised) in 1999. The revision of the ESC adopted in 1961 properly followed the evolution of social and economic rights in Europe, but aimed also at concretely face those social problems that other current international instruments did not deal with. Besides, the Additional Protocol of 1988 (that included new rights), the Protocol of 1991 and, in particular, the Protocol of 1995 (laying down an effective system of collective complaints) anticipated the reformatory purpose of the Council of Europe. The ESC control procedure is based on collective complaints, as well as on annual

The fortune of the Charter is deeply linked with the perception and the guarantees offered by social rights, that still have an unjustified servile position if compared with civil and political rights and are distressed by several well-known prejudices influencing the effectiveness of the same Charter. In recent times its fortune seems to be also afflicted with the considerable silence on it in the EC and EU Treaties and in the EU Charter of Fundamental Rights,³ although the preamble of the Single European Act of 1986 attached it the same importance given to the European Convention on Human Rights in promoting democracy through fundamental rights.⁴

In fact, although reflecting Article 136, Treaty of the European Community (TEC), the actual Article 151 TFEU only establishes that: 'The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 21 October 1961 [...], shall have as their objectives [...]', and simply assumes in this way a symbolic meaning for all its unquestionable practical relevance.⁵

Besides, the ECHR takes into particular account the reserves of the Court of Strasbourg about the defence of the social rights included in the ESC. It cannot escape that the ECHR does not comprise these rights and in particular the rights that were added in the revised text of 1996 (ESC (revised)).⁶ Therefore the EU process of accession to the European Convention on Human Rights risks to end with a damage to the real protection of European citizens' social rights because of the ECHR limited *permeability*.⁷ This view is obviously unacceptable, especially when reflecting upon the relation between civil and political rights and social ones. This relation is tightly grounded to the principle of indivisibility and interdependence of human rights,⁸ as ineluctably demonstrated both in the Treaty of Nice and in the recent optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹

reports that the States submit to a Committee of fifteen independent experts (European Committee of Social Rights – ECSR) designed by the Committee of Ministers of the Council of Europe. The decisions of the European Committee of Social Rights pertaining to the examination of governmental reports are called 'conclusions' and are published every year. In case of non-conformity with the European Social Charter in States, the Committee of Ministers shall adopt proper 'recommendations'. Decisions concerning collective complaints related to violations of the ESC are included in a report of the European Committee of Social Rights, that is submitted to the Committee of Ministers. The Committee of Ministers shall adopt a 'resolution', but it can also adopt a 'recommendation', in which it invites the State to implement the provisions of the Charter taking all the necessary measures to remove the violations reported by the European Committee of Social Rights (regarding both national law and its enforcement praxis).

³ The preamble just states that: 'This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.'

⁴ 'DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice, (...)'

⁵ Indeed the first paragraph of the following Article 153 TFEU (ex Article 137 TEC) specifies that, in order to achieve the objectives of Article 151 TFEU, the Union shall support and complement the activities of the Member States and that the provisions adopted by the European Union 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (paragraph 4).

⁶ Cf. the decision of the European Court of Human Rights: *Syndicat National de la Police belge v Belgique* Application No 4464/ 1970, Merits, 27 October 1975. In this way the inclusive effect of social rights is limited. On the contrary this effect clearly emerges in the famous decision of the same Court: *Airey v Irlande* Application No 6289/73, Merits, 9 October 1979, at 26. On this matter, cf. AKANDJI-KOMBE', 'Charte sociale européenne et Convention européenne des droits de l'homme: quelles perspectives pour le 10 prochaines années?', in DE SCHUTTER (ed.), *The European Social Charter: a social constitution for Europe/La Charte sociale européenne: une constitution sociale pour l'Europe* (Bruxelles, Bruylant, 2010) 149.

⁷ On the concept of *permeability* of the ECHR to social rights see: SUDRE, 'La 'perméabilité' de la Convention européenne des droits de l'homme aux droits sociaux', in *Mélanges J. Mourgeon* (Bruxelles, Bruylant, 1998) 467 at 478.

⁸ The origin of this principle is without doubts the *Vienna Declaration on Human Rights* adopted on 25 June 1993, in which it is solemnly stated that: '5. All human rights are *universal, indivisible and interdependent and interrelated*. The international community must treat human rights globally in a fair and equal manner, *on the same footing*, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.' (Italicized words are added by the author of this work).

⁹ In the Preamble of the Treaty of Nice it is stated that: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity'. In the Preamble of the optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), that was adopted with GA Res 63/117, 10 December 2008, A/RES/63/117 it is expressly reaffirmed: 'the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms'.

Furthermore, the same Treaty of Nice, which is often considered to be the most up-to-date catalogue of fundamental social rights (even though the content of numerous articles derives from the ESC and from the ESC revised)¹⁰, presents a range of relevant gaps, that can easily be found. Although the hermeneutic attempts emerging from the *Explanations*¹¹ of the same Charter, some rights are not included: For example article 17 ESC (right of mothers and children to social and economic protection) and the articles 1, at 1 (right to work)¹², 30 (right to protection against poverty and social exclusion) and 31 (right to housing) ESC (revised). Moreover, at 3 of article 52¹³ concerning the scope and the meaning of rights and principles, only refers to the corresponding dispositions guaranteed by the ECHR, without considering the other international instruments for the protection of human rights and, in particular, the ESC and the ESC (revised), which are instruments of the Council of Europe too. In other words the Treaty of Nice and the European Social Charter are linked, even though they partially overlap. Therefore relevant consequences may derive from the limit included both in the general provision of article 51, at 2, of the Treaty of Nice (its provisions do not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties) and in some of its articles (when providing that the rights they recognize are guaranteed 'in accordance with the national laws governing the exercise of these rights').

In other words, as the conventional right cannot be used to impose the EU Member States legislative duties that the ECHR and the Treaty of Nice do not include but expressly exclude, and if the ESC and the ESC (revised) do not receive total juridical effectiveness in national laws, several social rights could actually be given no effective protection.

Further doubts about the level of protection of the Treaty of Nice come from the same article 51, at 1, whereas it states that national authorities and EU ones have to apply the provisions of the Charter 'only when they are implementing Union law'¹⁴ (moreover, the article makes a distinction between the rights included in the Charter, that must be respected, and the principles, that must be observed)¹⁵ and from the following article 53. According to one of the possible interpretations of this article,¹⁶ a dividing clause is included among the

¹⁰ The analysis of the text of the Treaty of Nice demonstrates that a good fifteen articles (paragraphs are not counted) seem to be inspired by the ESC and ESC (revised) provisions: Article 14 (Right to education), inspired by Article 10 ESC; at 1 - Article 15, about the freedom to choose an occupation and the right to engage in work, by Article 1, at 2, ESC, at 3 seems to be inspired by at para. 4 - Article 19 ESC; Article 21.1 (Non-discrimination) by Articles 20 and E (Part V) ESC (revised); Article 23.1 (Equality between men and women) by Article 20 ESC (revised); Article 25 (The rights of the elderly) by Article 23 ESC (revised); Article 26 (Integration of persons with disabilities) by Article 15 ESC; Article 27 (Workers' right to information and consultation within the undertaking) by Article 21 ESC (revised); Article 28 (Right of collective bargaining and action) by Article 6 ESC; Article 29 (Right of access to placement services) by Article 1, at 3, ESC; Article 30 (Protection in the event of unjustified dismissal) by Article 24 CS ESC (revised); Article 31.1 (Fair and just working conditions) by Article 3 CSE and Article 26 ESC (revised); Article 31.2 by Article 2 ESC; Article 32 (Prohibition of child labour and protection of young people at work) by Article 7 ESC; Article 33.1 (Family and professional life) by Article 16 ESC; Article 33.2 by Article 8 ESC and by Article 27 ESC (revised); Article 34.1 (Social security and social assistance) by Article 12 ESC; Article 34.2 by Article 12, at 4, and by Article 13, at 4, ESC; Article 34.3 by Article 13 ESC and by Articles 30 e 31 ESC (revised); Article 35 (Health care) by Articles 11 and 13 ESC.

¹¹ The *Explanations* were initially prepared by the authority of the *Praesidium* of the Convention that drafted the Treaty of Nice and were subsequently updated under the responsibility of the *Praesidium* of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention and of further developments of Union law.

¹² The Article 15 of the Treaty of Nice deals with the *right to engage in work* and focuses its negative freedoms; its value and its material pregnancy are certainly inferior to the *right to work* included in the ESC (revised).

¹³ Art. 52, at 3: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

¹⁴ Although this expression is broadly interpreted (Member States have to respect the supranational contents of freedoms in relation with the so-called 'enforcement fields' of the EU law) the EU incorporation is anyway limited by the highest national standards.

¹⁵ Unlike rights, principles can be implemented through legislative or executive provisions (these acts are adopted by the EU in conformity with its competences and by the Member States only within the scope of application of the EU law); principles are consequently relevant for the judge only when they are interpreted or controlled. However they do not lead to claim directly positive actions by the EU institutions or by Member States' authorities. Therefore it is not correct to affirm that EU citizens are at last recognized the right to take action against any act adopted in any case by a national authority or by the EU and in accordance with any provision of the Treaty of Nice. People can only hope that the Court of Justice of the European Union remedies the inconvenient formulation of the above mentioned Articles 51 and 52, at 5.

¹⁶ Following this interpretation and assuming that the implementation of the EU objective law is widely identified with the field of application of EU law (Article 51, at 1), the dividing clause indicated in Article 53 of the Treaty of Nice could hardly be implemented. It could consequently become only a general or apparent guarantee. This matter is clearly tackled by the clear exegesis and by the doctrinal references of BUTTURINI, '*La tutela dei diritti fondamentali nell'ordinamento costituzionale italiano ed europeo*' (Naples, Edizioni Scientifiche Italiane, 2009) 246 at 251. The

competences' spheres of the various laws involved in the protection of fundamental rights. However the article can make this clause be applied *in peius*, if compared to the other laws and the international one that include the ESC and the ESC (revised). The same Luxembourg Court (EUCJ) recently stated that the primacy of the international law 'at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part'¹⁷. On the other hand the EU Member States are bounded both by the Treaty of Nice and by the ESC and/or the ESC (revised) because they are all members of the Council of Europe and ratified the ESC and the ESC (revised) (although there is no coordination between these instruments of protection). Therefore it is necessary to seek the greatest possible cohesion between these two prescriptive contexts, including their different systems of protection (one is jurisdictional, while the other one is nearly jurisdictional). The aim is to avoid contradictions and incoherence in a so ticklish context, that could undermine the certainty of the law and the plausibility of these two systems of protection. Finally, and without going into other matters,¹⁸ it cannot be ignored that the non-accession of the EU to the ESC- ESC (revised) risks to cause unpleasant consequences at practical and jurisdictional level. In fact conflicting decisions of the Court of Luxembourg and of the European Committee of Social Rights (ECSR) concerning the same matter embarrass seriously the national judges,¹⁹ because they cannot make use of the same interpretative provision quoted in the article 52, at 3 of the Treaty of Nice. In theory the best solution was – and still could be – to make EU access the ESC –ESC (revised). This way is obvious but in this historical period and in the near future it is surely impassable. In effect there are numerous difficulties and some of them have political, economic and financial nature. These latest complications are surely prevailing, but cannot be studied in this work in detail. In fact, apart from the well-known positions of some Member States as regards EU recognition and protection of social rights (clearly underlined through the recent ratification of the Lisbon Treaty), the global economic and financial crisis that still affects Europe represents painfully the most evident and, at the moment, insurmountable obstacle. There are problems from the juridical point of view too. However they can all be overcome, as the most careful authorities have demonstrated from long time.²⁰ This work is not aimed at finding a solution of these difficulties, but at underling the interpretative techniques (at 2), the procedural peculiarities (at 3), as well as the most relevant aspects concerning ESC and ESC (revised) enforceability and justiciability (at 4). Following the original and farsighted project of the Council of Europe, whose purpose is the effective protection of all fundamental rights in the European continent, it is possible to make a petition, allowing these two Charters to support the ECHR in the usual procedures. In the background the final objective emerges (at 5): To support values' re-balancing in comparison with market and competition's rules, through mechanisms of solidarity among the Member States and in their home law. In this way the *social Europe*, that seems to

Author properly reminds that in any case 'The applicable protection will always depend on the level of guarantee offered by the law (regardless of its origin) and from its capability not to prejudice the fundamental constitutional rights that are protected by the rational choice (translator's note)'.

¹⁷ Cf. Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council*, [2008] ECR I-06351, point 308.

¹⁸ Even if the Lisbon Treaty had put the ESC and the ESC (revised) on the same level of the ECHR, several interpretative problems would have emerged. It is clear that the complex system of national and international sources aimed at protecting fundamental rights generates a range of complicated situations too, in particular when the level of juridical protection offered to subjective juridical conditions appears to be obviously dissimilar in comparison with these different levels. For example there is a dissimilar intensity of protection of the right to property among our Constitution, the ECHR and the Treaty of Nice. In this context it is relevant to underline the direct relation between the EU law and the ECHR, which is provided for by the new Article 6 TEU, that offers an extremely wide reference: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. It is useful to remind that the concept of common constitutional traditions was already mentioned in the foregoing text of Article 6. This concept generated a broad doctrinal debate in particular on how to define this notion more clearly and how the EUCJ identifies the presence of principles of right in the same common constitutional traditions. The sector regarding the general EU principles of law is not free from problematic elements too, such as in particular the relation between their value and the effect of the regulations of positive law (treaties and EU derived law). In other words are the general principles as binding as the undertakings expressly undersigned by the Member States through the Treaties? As the EU case-law has rarely attributed these 'general principles' to its own judgements, how should the ordinary judge act?

¹⁹ This is noticed by: JMENA QUESADA, '*La Carta social europea y la Unión europea*', (2009) 13 *Revista Europea de Derechos Fundamentales* 398 at 400; the author is inspired by the recent case-law of the ECSR and of the EUCJ.

²⁰ On this matter the most clear-headed and detailed analysis is made by: DE SCHUTTER, '*L'adhésion de l'Union européenne à la Charte sociale européenne révisée*', in <http://cadmus.eui.eu/dspace/bitstream/1814/2826/1/law04-11.pdf>. For most recent studies cf. ID., '*Les aspects institutionnels de l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme*', available at: <http://internationallawobserver.files.wordpress.com/2010/03/deschutteradhesionue-cedh18mars20102.doc> [last accessed 31 March 2011].

be a timeless Cinderella if compared with the reasons of macroeconomic orthodoxy and the imperatives of market globalisation, shall not succumb to citizens' perception and hopes and survive only in experts' dreams and works.

2. A first reaction: To develop the ECSR interpretative techniques.

It is necessary to organize this exposition starting from the ESC preliminary works, that the Council of Europe began around the middle of the last century, and from the following re-launching of the same Charter during the Nineties. As already anticipated, they demonstrate the complementarities of these two instruments (ECHR and ESC) with regard to their object (civil and political rights for the ECHR, social rights for the ESC). Obviously their objects should have had to require the same method of control, or at least similar controls, in order to guarantee their respective rights. On the contrary, as it is known by now, the political will prevailing in Turin in 1961 generated a so weak monitoring mechanism that the ESC role was concretely neutralized for more than thirty years. The juridical instruments which were adopted during the Nineties to re-launch the Charter (in particular the collective complaints) confirm its complementarities to the ECHR and its objective difference. However these instruments risk to deepen their separation at operative level. On the contrary this separation must be overcome in praxis, as to make these two systems of control converge in a final aim: The same protection of fundamental (indivisible) civil, political and social rights, as provided for by their respective texts.

Therefore it is not useful to predict the transformation of the European Committee of Social Rights (ECSR, that is the body which controls if the ESC and the ESC (revised) are respected) in a European Court of Social Rights parallel to the European Court of Human Rights or to entrust this latest court with the task to assure jurisdictional protection of social rights too²¹ or at least of the majority of these rights. First of all an interpretative method can be developed in all its facets: This is an effective solution, that can be immediately applied at procedural level. The interpretative techniques adopted to support the protective system of the European Court of Human Rights represent an unquestionable element by now.²²

One instrument stands certainly out from the others, that is the technique imposing Member States *positive obligations* too,²³ in order to protect the rights involved in a better way. In particular this technique turns upon the *principle of effectiveness of human rights*.

This interpretative dynamism can certainly be adopted by the European Committee of Social Rights, in order to support social rights. As a matter of fact this solution has been emerging since the first judgement of the ECSR after the entry into force of the Additional Protocol of the ESC in 1998, that allowed the ECSR to receive collective complaints concerning violations of the same ESC and, afterwards, of the revised ESC.

The judgement in which the above mentioned technique, based on the principle of effectiveness of human rights, is used was delivered by the ECSR in 1999, and is the result of the complaint of the *International Commission of Jurists v Portugal*²⁴ in 1998. In at 32 of the decision it is precisely affirmed that: 'The aim and purpose of the Charter, being a human

²¹ The other solution, concerning the introduction of the social rights in the ECHR, failed because of the evident ostracism of some contracting States; this ostracism arose inside the working party which was *ad hoc* created. Cf. CDDH, 'Rapport d'activité du groupe de travail sur les droits sociaux', 17 June 2005, GT-DH-SOC(2005)009, Addendum II, available at: http://www.coe.int/t/f/droits_de_l%27homme/cddh/3._comit%20E9s/01.%20comit%20E9%20directeur%20pour%20les%20droits%20de%20l%27homme%20%28cddh%29/05.%20rapports%20de%20r%20E9uni on/60thAddII_fr.asp [last accessed 31 March 2011].

²² On this matter: SUDRE, 'A propos du dynamisme interprétatif de la Cour européenne des Droits de l'homme' (2001) 335 *La semaine juridique, Edition générale (JPC G)* 1365.

²³ The *leading case* is represented by the judgement *Airey v Irlande* No 6289/73, Merits, 9 October 1979, in which (at 32) the European Court of Human Rights states that: 'Although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the above-mentioned Marckx Judgment, p. 15, at 31)'. Besides, and among all the authors, cf. SUDRE, 'Les obligations positives dans la jurisprudence européenne des droits de l'homme' (1995) 23 *Rev. trim. dr. h.* 363 at 384. The most recent work about this technique is: AKANDJI-KOMBE', 'Les obligations positives en vertu de la Convention européenne des droits de l'homme. Un guide pour la mise en oeuvre de la Convention européenne des droits de l'homme, Précis sur les droits de l'homme' (Strasbourg, No 7, Editions Du Conseil de l'Europe, 2006) available at: <http://echr.coe.int/NR/rdonlyres/37798829-2A4F-4737-9D56-E3BD989940B4/0/DG2FRHRHAND072006.pdf> [last accessed 31 March 2011].

²⁴ It is a decision concerning the Complaint No 1/1998. All the decisions of the European Committee of Social Rights can be easily consulted at the ESC web site: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_fr.asp [last accessed 31 March 2011].

rights protection instrument, is to protect rights not merely theoretically, but also in fact.²⁵ In particular the ECSR recalls the principle of effectiveness in order to guarantee the involved rights by imposing on States *obligations of results*, and not simply *obligations of means*. In fact in the 1999 decision the Committee does not only remind Portugal to respect the involved regulations, but it underlines that it is necessary to reach concretely the result imposed by the same decision.²⁶

This interpretative trend is confirmed by the ECSR in following decisions too.²⁷ The ECSR offers States a margin of appraisal in selecting the means used to guarantee the rights protected by the Charter²⁸ through an evident macroeconomic approach.²⁹ However the ECSR is more and more inclined to verify the effectiveness of the results achieved and to follow scrupulously the list of obligations it fixed considering them essential to be respected.³⁰

The ECSR valuations include both national regulations and praxis³¹ that are not respectful of the Charter, but also legislative and administrative gaps that highlight the absence of appropriate measures at normative and practical level³² and can make the exercise of the guaranteed rights be fruitless.³³

²⁵ Besides in the same decision, at 32, it is stated that: 'The satisfactory application of Article 7 cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised'.

²⁶ Cf. at 40 and 43: 'These measures have brought about a progressive reduction in the number of children working illegally, an improvement which is not in dispute. However, it is clear that the problem has not been resolved [...] efforts must be maintained to increase the effectiveness of supervision of children's work within the family and in private dwellings. The Committee is aware of the difficulty of this task [...]'.
²⁷ For example cf. *Autisme Europe v France*, Complaint No 13/2002, Merits, ECSR, 4 November 2003, at 53: 'The implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognized in the Charter.' and *Mouvement International ATD Quart Monde v France*, Collective Complaint No 33/2006, Merits, ECSR, 5 December 2007, at 61: 'In connection with means of ensuring steady progress towards achieving the goals laid down by the Charter, the Committee wishes to emphasize that implementation of the Charter requires state parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein'.

²⁸ In this work I often speak about the 'Charter', in order to ease my exposition. This locution includes both the ESC and the ESC (revised). Cf. *Centre européen des droits des Roms v Bulgarie*, Complaint No 31/2005, Merits, ECSR, 18 October 2006, at 35: 'The Committee considers that the effective enjoyment of certain fundamental rights requires a positive intervention by the state: the state must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question. States enjoy a margin of appraisal in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources'.

²⁹ Cf. *Conclusions XVI-1, Observation interprétative de l'article 1 at 1*, page 9.

³⁰ For example cf. at 29 of the recent decision *Fédération européenne des Associations nationales travaillant avec les Sans-abri (FEANTSA) v Slovenie*, Complaint No 53/2008, Merits, ECSR, 5 December 2007: 'This means that, for the situation to be in conformity with the Treaty, States Parties must: a) adopt the necessary legal, financial and operational means of ensuring steady progress towards the goals laid down in the Charter, b) maintain meaningful statistics on needs, resources and results, c) undertake regular reviews of the impact of the strategies adopted, d) establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage; e) pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.'

³¹ Cf. the Decision *Syndicat national des professions du tourisme v France*, Complaint No 6/1999, Merits, ECSR, 10 October 2000, at 26: 'The Committee points out that "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact" (*International Commission of Jurists v Portugal*, Complaint No. 1/1998, Merits, ECSR, 9 September 1999, at 32). It is therefore of the opinion that compliance with Article 1 par. 2 cannot result from the mere existence of legislation if the legislation in question is not applied in practice'. And: 'The implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognized in the Charter' (*Association internationale Autisme-Europe (AIAE) v France*, Complaint No 13/2002, Merits, ECSR, 4 November 2003, at 53).

³² Paragraph 47 of the Decision *Mental Disability Advocacy Center (MDAC) v Bulgarie*, Complaint No 41/2007, ECSR, 3 June 2008 is hereby quoted. In fact it represents the clearest synthesis of the interpretative techniques and dynamism that the ECSR has been developing during the latest years, in order to favour the effectiveness of the social rights protected by the ESC – ESC (revised): 'As to the Government's argument that the right of children with intellectual disabilities residing in HMDCs to education is being implemented progressively, the Committee is aware of Bulgaria's financial constraints. It notes that any progress that has been made has been very slow and mainly concerns the adoption of legislation and policies (or action plans), with little or no implementation. It would have been possible to take some specific steps at no excessive additional cost (for example HMDC directors and the municipal officials to whom HMDCs and primary schools are accountable could have been informed about and given training on the new legislation and action plans). The choices made by the Government resulted in the situation described above (see in particular §§ 43 et 45). Progress is therefore patently insufficient at the current rate and there is no prospect that the situation will be in conformity with article 17§2 within a reasonable time. Consequently, the Committee considers that the measures taken do not fulfil the three criteria referred to above, i.e. a reasonable timeframe, measurable progress and financing consistent with the maximum use of available resources. In view of this situation, the Committee considers that Bulgaria's financial constraints cannot be used to justify the fact that children with intellectual disabilities in HMDCs cannot enjoy their right to an education'.

³³ Cf. *Association internationale Autisme-Europe (AIAE) v France*, Complaint No 13/2002, Merits, ECSR, 4 November 2003, at 54: 'the Committee notes that in the case of autistic children and adults, notwithstanding a national debate

The assessment regarding the inappropriate treatment of specific situations is replaced by the specification of *direct or indirect discriminations*,³⁴ in application of article E, Part V of the ECSR.³⁵ Among the decisions of the ECSR about this matter it emerges the decision on the merits of the Collective Complaint No 13/2002, *International Association Autism-Europe (AIAE) v France* (at 52), where it is expressly stated that: 'In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality. In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all'.

The following decisions of the Committee are in line with these statements, which particularly regard the forms of indirect discrimination. This is widely confirmed by numerous decisions on Rome conditions in various European countries.³⁶

Although changeable majorities in the Committee could generate the risk of jurisprudential regresses,³⁷ the ECSR decisions clearly highlight an other interpretative support. This help is given by the definition and the application of the *reasonable criteria* in the use and the assessment of national measures aimed at protecting effectively the social rights included in the Charter. This interpretative approach is applied in several decisions.³⁸ Among them the

going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has failed to achieve sufficient progress in advancing the provision of education for persons with autism'. Moreover please read the decision *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No 31/2005, Merits, ECSR, 16 October 2006, where it is stated (at 38) that: 'Notwithstanding the clear political will expressed by the Government to improve the housing situation of Roma families, all these programs and their implementing measures have not yet yielded the expected results', as well as the recent decision *European Roma Rights Centre (ERRC) v France*, Complaint No 51/2008, ECSR, 19 October 2009, at 41: 'The Committee therefore finds that the inadequate implementation of the legislation on stopping places for Travelers constitutes a violation of Article 31 at 1 of the Revised Charter'. Also the European Court of Human Rights takes into consideration the principle of effectiveness of the rights in order to examine the inanity of the States. Cf. *Airey v Ireland* Application No 6289/73, Merits, 9 October 1979, at 32, in which it is stated that: 'The Court does not consider that Ireland can be said to have 'interfered' with Mrs. Airey's private or family life: the substance of her complaint is not that the State has acted but that it has failed to act'.

³⁴ As its constant and abundant case-law demonstrates, the European Court of Human Rights has given its opinion on these discriminations in several occasions, supporting the decisions of the ECSR. This is confirmed by the explicit reference to the ECSR in the Complaint No 13/2002, Merits, ECSR, 4 November 2003, at 52: 'The Committee observes further that the wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the *Thlimmenos case [Thlimmenos v Grèce [GC]]*, Application No 34369/97, Merits, EHRR 2000-IV, at 44)'].

³⁵ On the necessity to combine Article E, Part V, ECSR with other provisions of the same Charter concerning the social rights to protect, and in order to apply Article E as *horizontal clause*, please read the recent statements of the ECSR about the decision *European Roma Right Centre (ERRC) v France*, Complaint No 51/2008, Merits, ECSR, 19 October 2009, at 79: 'Article E complements the substantive clauses of the Revised Charter. It has no independent existence as it applies only to "the enjoyment of the rights' safeguarded by these clauses. Although the application of Article E does not necessarily presuppose a breach of these clauses – and to this extent it has an autonomous meaning – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (*CFDT v France*, Complaint No. 50/2008, Merits, ECSR, 9 September 2009, at 37)'. These statements coincide almost word for word with the case-law of the Strasbourg Court regarding the Article 14 ECHR. However, in a recent decision (*Opuz v Turquie*, Application No 33401/02, Merits, 9 June 2009, at 183 ss.) there are elements that can perhaps confirm the possibility to apply this provision as an autonomous judgement's criteria in the assessment of violation of the Convention.

³⁶ Cf. in the following order the decisions: *European Roma Rights Centre (ERRC) v Greece*, Complaint No 15/2003, Merits, ECSR, 8 December 2004; *European Roma Rights Centre (ERRC) v Italy*, Complaint No 27/2004, Merits, ECSR, 21 December 2005; *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No 31/2005, Merits, ECSR, 18 October 2006; *International Helsinki Federation for Human Rights (IHF) v Bulgaria*, Complaint No 44/2007, Merits, ECSR, 14 September 2007; *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No 46/2007, Merits, ECSR, 3 December 2008; *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No 48/2008, Decision on admissibility, ECSR, 2 June 2008; *European Roma Rights Centre (ERRC) v France*, Complaint No 51/2008, Merits, ECSR, 19 October 2009; *Centre on Housing Rights and Evictions (COHRE) v Italy*, Complaint No 58/2009, Merits, ECSR, 25 June 2009. On the contrary the decision *European Roma Rights Centre (ERRC) v Portugal*, Complaint No 61/2010 is pending.

³⁷ Akandji-Kombè speaks about this danger, affirming that it already occurs in the ECSR. See AKANDJI-KOMBE', '*Charte sociale européenne*', in DE SCHUTTER (Coordinator), *supra* 20, 153.

³⁸ Also cf. the decision *Autism Europe (AIAE) v France*, Complaint No 13/2002, Merits, ECSR, 4 November 2003, at 53: 'When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected (...)'.

decisions on the merits of the complaints n. 33 and 39/2006³⁹ on the right to housing (article 31 ECSR) stand out for the relevance of their object and for their evident consequences on national systems for the social safeguard involved. In the first decision (at 66) it is stated that: 'In connection with timetabling – with which other regulatory bodies of international instruments are also very concerned – it is essential for reasonable deadlines to be set that take account not only of administrative constraints but also of the needs of groups that fall into the urgent category. At all events, achievement of the goals that the authorities have set themselves cannot be deferred indefinitely', while in paragraph 62 it is specified that: 'When one of the rights in question is exceptionally complex and particularly expensive to implement, states party must take steps to achieve the objectives of the Charter within a reasonable time, with measurable progress and making maximum use of available resources⁴⁰'. Paragraph 108 of the second decision analyses the conditions in which this right is exercised, affirming that: 'As regards living conditions in sheltering facilities, the Committee believes these should be such as to enable living in keeping with human dignity, and that support should be routinely offered to help the persons within the facilities to attain the greatest possible degree of independence. It also recalls that the temporary provision of accommodation, even decent accommodation, cannot be considered a satisfactory solution, and people living under such conditions must be offered housing of an adequate standard within a reasonable time'.

However, in order to apply completely the principle of effectiveness of the rights provided for by the Charter, this interpretative dynamism must have a position at subjective level too, that is with reference to those individuals that the Charter can protect.

In fact there is no doubt that the ESC and its revised version show some evident gaps *ratione personae*, that can damage their protective nature and universalism.

In accordance with the content of the Charter, foreigners should be included in its application's sphere 'only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned⁴¹'; therefore both foreigners who are not nationals of one of the Parties and irregular migrants who are nationals of a Party should be excluded. Besides, the protection provided for by the Charter could be given only to the «great majority of workers concerned⁴²'. In this way the undertakings deriving from the Charter as regards minorities of workers excluded are satisfied.

The exclusions highlighted in this instrument, which is aimed at safeguarding human rights, represent a glaringly obvious contradiction, that persuaded the ECSR to give a coherent and foreboding interpretation of the following positive developments (thanks to the filing of some collective complaints too). The literary interpretation of the Charter was for the first time overcome in the decision on the merits of the Complaint No 14/2003, *International Federation of Human Rights Leagues (FIDH) v France*. The complaint concerned the French provisions about medical treatment, which were considered detrimental to the fundamental rights of irregular migrants and their children. The ECSR based its decision on the right to human life and dignity,⁴³ changed the text of the ESC (revised), which was expressly impedimental, and concluded that: 'The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter⁴⁴'.

It is evident that in this way both foreigners who are not nationals of one of the Parties and irregular migrants shall have the possibility to benefit from this interpretation. As all the rights guaranteed by the Charter appear to be potentially enjoyable by the above mentioned individuals, this interpretation allows new developments. Moreover the interpretative contribution *ratione personae* of the ECSR is completed by an other decision on the merits of

³⁹ The above-mentioned decisions are respectively related to *International Movement ATD Fourth World v France*, Complaint No 33/2006, Merits, ECSR, 5 December 2007, and to *European Federation of National Organizations working with the Homeless (FEANTSA) v France*, Complaint No 39/2006, Merits, ECSR, 5 December 2007.

⁴⁰ This is a constant trend of the ECSR. Please see for example the decisions: *European Roma Rights Center (ERRC) v Italy*, Complaint No 27/2004, Merits, ECSR, 7 December 2005 and *European Roma Rights Center (ERRC) v Bulgaria*, Complaint No 31/2005, Merits, ECSR, 18 October 2006.

⁴¹ Cf. at 1 of the Appendix to the European Social Charter (revised).

⁴² Cf. Article I, at 2, of the ESC (revised).

⁴³ Cf. at 30 of the decision: 'In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment'. Also read at 31: 'Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity'.

⁴⁴ Cf. at 32 of the above mentioned decision.

the Complaint No 27/2004, *European Roma Rights Center (ERRC) v Italy*. From this decision it emerges that the social right concerned (the right to housing, ex article 31 ESC revised) must be in any case guaranteed to all individuals, foreigners too (when it is not possible to distinguish these latest individuals from the *ordinary* beneficiaries of this right⁴⁵). Anyhow, even if diversified social policies can be adopted, States must guarantee the respect of human dignity to all individuals resident in their territory.

A relevant step towards the protection of irregular migrants of State Parties was already taken by the ECSR through the so-called *Conclusions*. The ECSR used this instrument after examining the reports that the States have to present, in order to allow the ECSR to monitor their national situations.

In the *Conclusions XIII-1*, concerning the Swedish report for the period 1990-1991, the ECSR interpreted Article 18 of the ESC specifying that its provision, although not regulating the entry of foreigners in the territory of the State, does not allow the adoption of national provisions which are more favourable for the citizens of the State Parties who already live in the national territory. In fact this provision is aimed at assuring 'the right to engage in a gainful occupation in the territories of the other Contracting Parties'. Therefore: '*The Committee considered it necessary to stress that regulations preventing nationals another Contracting Party who were not in the country from applying for the grant of a work permit (other than a short term permit) owing to the combined effects of the various rules on entry, length of stay, residence and the exercise of a gainful activity would be not be keeping with this provision of the Charter even where regulations governing foreign residents have been liberalised sufficiently in other respect*'. In fact it is clear the content of the provision concerned: 'The nationals of any one of the Contracting Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter (...)'

The third gap *ratione personae* concerns the so-called 'working minorities', whose protection could fade if the provisions afforded by Article 33 ESC and Article I ESC (revised), in accordance with the content of the Appendix to the ESC (Revised) regarding the Articles 21, 22 and 24 of the same ESC (revised), are applied. This gap is filled by the ECSR through an interesting decision of 2001, delivered on the merits of the Complaint No 9/2000, *Confédération Française de l'Encadrement 'CFE-CGC' v France*. In fact the Committee rejected the arguments advanced by the French Government,⁴⁶ that shielded itself with the clause "great majority of the workers concerned (translator's note)" in order to contrast the trade union objections to the negative effects of the application of the so-called '35 hour Act' (Aubry II Act) to managerial staff. The Committee finally concluded that: 'The Committee considers that, in view of the reference made in its very wording to the workers concerned, the application of Article I of the revised Social Charter cannot give rise to a situation in which a large number of persons forming a specific category are deliberately excluded from the scope of a legal provision'.

In this way the distortions caused by the above mentioned clause were reduced. In fact this clause is not applied to individuals belonging to a *particular category*, even if this latest is minority in comparison with the great majority of workers concerned. In other words the 'great majority' clause cannot permit the legislator to exclude some individuals only because they belong to a particular category of workers, even if a minority one.

⁴⁵ Cf. at 18 of the above mentioned decision: 'It follows that the Italian Government's contention that it would be impossible "to separate the behaviours contested in a manner to apply the principle of Article 31 of the Charter only to those persons covered by the Charter itself" cannot prevent the Committee from exercising its authority to review the application of Article 31 of the Charter. Even assuming that, as the Government contends, it is impossible to distinguish among Roma to whom the protection afforded by Article 31 shall be compulsorily guaranteed and those Roma to whom, according to the Appendix (at 1), the guarantee of such protection remains within the remit of States parties, the Committee does not see how such a circumstance would exempt the State from the obligation of ensuring that protection'.

⁴⁶ Cf. at 26 of the decision: 'The Government contends on the contrary that the proportion of persons concerned by agreements on annual working days is less than 5% of the total number of employees. It therefore considers that France has fulfilled its obligations under Article 2 at 1, given the application of Article I of the revised Social Charter'.

3. A 'procedural' view: the interaction between the European Court of Human Rights and the European Committee of Social Rights and the jurisprudential harmonization.

The maintenance and the strengthening of the interpretative techniques adopted by the ECSR after the entry into force of its Additional Protocol in 1998, which allows to submit collective complaints, cannot assure the hoped effects of balancing between the two complementary instruments of protection of human rights. In fact, in comparison with the result of the complaints submitted the ECSR, the petitions made to the European Court of Human Rights are individual and may lead to real judgements. Besides there is a media overlapping involving the ECHR and the same Strasbourg Court. As a matter of fact, in the latest years the Strasbourg Court has been increasing its image, thanks to historic sentences regarding matters which are extremely important and delicate for European citizens. You need only to think about the recent decision about the display of the crucifix in public premises and the decision related to homosexual marriages.⁴⁷

However, as above mentioned, it seems that the Strasbourg Court does not intend to shoulder the protection of all social rights regularly, with the obvious exception of those rights that can be connected with the ECHR provisions, in particular Protocol 1 and Protocol 12. Although the techniques and the interpretative methods developed, the Strasbourg Court's jurisprudence on this matter reflects a line of clear *self-restraint*.⁴⁸

Therefore it is necessary to identify the procedural peculiarities of the two instances of the Council of Europe, in order to find possible interactions and forms of jurisprudential harmonization.

The first element to underline is that the ECSR is submitted collective complaints that can actually concern subjects who are perfectly identifiable. Besides these subjects, although they suffered a prejudice, are not obliged to give any evidence. In other words they are not bound to proof to be 'victims' in the strict sense of the word.

The second aspect to focus is represented by the possibility to submit the ECSR collective complaints also when all national legal steps have not been taken. It is deducible that it is easier to go to the ECSR and to precede the times needed to petition the European Court of Human Rights.

On the other hand these considerations are neither new nor obvious: the complaints filled with the ECSR are not jurisdictional, because the decisions taken by this body have highly political consequence. In fact the Committee of Ministers of the Council of Europe is competent to 'apply sanctions' to State Parties through resolutions and simple recommendations that actually express the same Parties' purpose not to judge the social rights protected by the ESC (revised⁴⁹).

However the weakness of the claims submitted to the ECSR can be suppressed through the strategic application of article 1 of the Protocol n. 12 ECHR. From this article it emerges that: 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

If it is granted that every national or international normative text can be inserted within the application's sphere of the Protocol (ESC revised included), it is also agreed that the European Court of Human Rights may be requested to judge discriminations of the social rights safeguarded by the Charter. But in this case, if the European Committee of Social Rights has already delivered its judgement on the merits of the same matter and specified the content and the perimeter of the social right concerned, detrimental jurisprudential contradictions may rise. These contradictions must be absolutely avoided, in order not to generate in the citizens a damaging loss of credibility of the two international instances.

⁴⁷ Cf. respectively: *Lautsi c. Italy* Application No 30814/06, Merits, 18 March 2011 and *Schalk and Kopf v Austria*, Application No 30141/04, Merits, 24 June 2010.

⁴⁸ An author who is sure that the European Court of Human Rights shall not strengthen above all the protection of these rights is AKANDJI-KOMBE', *Charte sociale européenne*, *supra* 36, 159. An interesting analysis of the prospects of action of the European Court of Human Rights is made by SUDRE, 'La protection des droits sociaux par la Cour européenne des droits de l'homme: un exercice de 'jurisprudence fiction'?' (2003) 55 *Rev. trim. dr. h.* 755 at 779.

⁴⁹ Cf. SUDRE, 'Le protocole additionnel à la CSE prévoyant un système de réclamation collective' (1996) 3 *Rev. gén. dr. int.* 715 at 739. See also AKANDJI-KOMBE', 'Charte sociale européenne', *supra* 36, 155, who underlines that the Committee of Ministers has adopted ambiguous resolutions and recommendations and above all it acts without title as (political!) court of second instance, that is as court of appeal for the ECSR decisions.

From the other side, even if the ECSR decisions do not produce the same juridical effects of the sentences of the Strasbourg Court, the contrast between a sentence of this latest Court and a decision of the Committee concerning a civil or political right combined with a social right (in the light of the principle of indivisibility of fundamental rights) could engender the same negative effects. For example the ECSR recently pronounced a decision on the merits of a violation of article E of the ESC (revised), combined with article 30 of the same Charter, stating that:⁵⁰ 'The Committee considers that the reference to the social rights enshrined in Article 30 should not be understood too narrowly. In fact, the fight against social exclusion is one area where the notion of indivisibility of fundamental rights takes a special importance. In this regard, the right to vote, as with other rights relating to civic and citizen participation, constitutes a necessary dimension in social integration and inclusion and is thus covered by article 30.'

Consequently the Committee ascertains that French rules on the right to vote make a discriminatory distinction between travellers and other persons, including those ones of no fixed abode. In fact travellers are required to be connected with the same municipality for at least three years without interruption, while the other persons are allowed to vote in the municipality where they have been domiciled for only six months. Besides, as regard the right to vote, French rules fix that travellers without a fixed residence or domicile must not be greater than 3% of the municipal population. The Committee concludes that: '104. The Committee considers that limiting the number of persons with the right to vote to 3% has the effect of excluding some potential voters. In practice this restriction affects Travellers. The Committee considers that setting this limit at such a low level leads to discriminatory treatment with regards to access to the right to vote for Travellers and, thus, is a possible cause of marginalisation and social exclusion. [...] The Committee finds that the situation constitutes a violation of Article E taken in conjunction with Article 30 for the two complaints'.

Therefore, if the European Court of Human Rights took a different decision⁵¹ on the merits of an individual claim concerning the same national rules, the media clamouring would be obviously huge and risks to compromise (even if on a mere *de facto* level) the results of the sentence.

In the light of these potential results it is essential to think about a coordination between these two ways of recourse, using at the same time their peculiarities at material and temporal level. For example the European Court of Human Rights and the European Committee of Social Rights could be offered the opportunity to intervene each other in their respective proceedings. In this way the two instances can take reciprocally part in the ongoing proceedings through the mechanism of the 'participation of third parties'⁵². Just as it happens between the European Court of Human Rights and the Court of Justice of the European Union, this could avoid contradictory decisions and favour at the same time a jurisprudential harmonisation which is extremely useful for the effective protection of fundamental but also indivisible rights. These latest Courts refer to the harmonisation that has been emerging in the field of the international and supranational normative sources. Both Courts reciprocally indicate these sources in their most recent and significant sentences,⁵³ among which the ESC (revised) stands out.⁵⁴

⁵⁰ The passage quoted in the text derives from at 99 of the decision *European Roma Rights Centre (ERRC) v France*, Complaint No 51/2008, Merits, ECSR, 19 October 2009. This passage is immediately preceded by the following considerations: '99. The Committee notes that the measures taken to adopt an overall and co-ordinated approach to combating social exclusion must promote and remove obstacles to access to fundamental social rights, in particular employment, housing, training, education, culture and social and medical assistance. It should be noted that this is not an exhaustive list of the areas in which it is necessary to take initiatives in order to address the multidimensional phenomena of exclusion (Conclusions 2003, Article 30, France, p. 214)'.

⁵¹ The judgement's criteria of the European Court of Human Rights should outwardly be Article 3 of the Protocol n. 1 of the Convention, combined with Article 14. On this matter it is also reported the famous case *Matthews v Royaume-Uni* Application No 24833/94, Merits, 18 February 1999.

⁵² In fact Article 36 ECHR states that: '1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings. 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings. 3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings'. On the other hand, as regards the ECSR, the corresponding provision of its regulations (Article 32) should be integrated in this way. This should not generate difficulties, because it is only an internal regulation which reflects the complete availability of the body.

⁵³ In particular I refer to the famous sentence of the EU Court of Justice concerning the Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council*, ECR II-3533 and to another well-known sentence of the European Court of Human Rights, *Demir et Baykara v Turkey* Application No 34503/97, Merits, 12 November 2008; these sentences

Besides it cannot be disregarded that some social rights are provided for by both the international texts. Therefore, in default of an effective harmonisation between the European Court of Human Rights and the ECSR and aside from the application of article 1 of the Protocol n. 12 ECHR, the risk of dangerous jurisprudential contrasts may concretize. In particular we can think about the prohibition of slavery and forced labour provided for by article 4 ECHR and by article 1, at 2 ECS (revised) (in accordance with the interpretation offered by the ECSR); the freedom of assembly and association under article 11 ECHR and article 5 ECS (revised); the right to social security and the right to social and medical assistance provided for by articles 12 and 13 ESC (revised) and recognized by the European Court of Human Rights on the basis of article 1 Protocol n. 1;⁵⁵ the right of the family to social, legal and economic protection, under article 16 ESC (revised) and partly provided for by article 8 ECHR (in accordance with the interpretation given by the Strasbourg Court).⁵⁶

However it is significant that in recent times both the ECSR and the European Court of Human Rights have reciprocally started referring in their jurisprudence to their respective decisions about 'analogous' rights.⁵⁷

4. The prospects of the Charter in the light of the new article 117, first paragraph, of the Italian Constitution.

The desirable coordination between the ECSR and the European Court of Human Rights at procedural level and the necessary above mentioned harmonization of their decision are without doubts useful and in some ways indefeasible instruments in order to optimize the protection of social rights on international plane.

At the same time, and together with the other solutions hereby referred to, they represent the essential conditions for an effective safeguarding of these rights in national legislations. Social rights are assured by the consequences that their respective decisions can or must have at national level in accordance with the provisions of the international act concerned and, in particular, of the constitutional rules on its direct application.

represent strong choices concerning the protection of fundamental rights, because they are both based on the sources of law of their juridical systems and express a reciprocal importation of values of international origins. On this matter cf. C. CIUFFETTI, 'Convergenze nelle giurisprudenze sovranazionali europee nelle tutele dei diritti fondamentali. Considerazioni a margine della sentenza della Corte di giustizia delle Comunità europee Kadi e Al Barakaat Foundation del 3 settembre 2008 e della sentenza della Corte europea dei diritti dell'uomo G.C. Demir e Baykara c. Turchia del 12 novembre 2008', available at: <http://www.federalismi.it> [last accessed 31 March 2011] n. 1/2009.

⁵⁴ Cf., at 45 and 49 of the decision of the European Court of Human Rights on the merits of the case *Demir et Baykara v Turkey*, supra 52, in which the Articles 5 and 6 ESC (revised) are respectively quoted. Although Turkey did not ratify them and even if there are no analogous ECHR provisions, these Articles are considered essential by the Court, in order to decide on the merits of the matters concerned: '[...] in finding that the right to organise had a negative aspect which excluded closed-shop agreements, the Court considered, largely on the basis of the European Social Charter and the case-law of its supervisory organs, together with other European or universal instruments, that there was a growing measure of agreement on the subject at international level (see *Sigurður A. Sigurjónsson v Iceland*, A 264 (1993)16 EHRR 462, at 35; and *Sørensen and Rasmussen v Denmark*, Applications No 52562/99 and 52620/99, at 72-75, ECHR 2006 ...). [...] The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State'.

⁵⁵ Article 1 of the Protocol n. 1 recognizes that every natural or legal person is entitled to the peaceful enjoyment of his possessions. The jurisprudence of the Strasbourg Court (cf. *Stec et autres v Royaume-Uni* Applications No 65731/01 and 65900/01, Merits, 12 April 2006, and in particular the relative Decision on admissibility) asserts that among property rights are to be included social services too, that is every kind of social assistance, even if not based on a previous contributory relation. The jurisprudence of the European Court of Human Rights on this matter is analysed by CINELLI, 'I 'diritti sociali' nella recente giurisprudenza della Corte europea dei diritti dell'uomo', available at: http://www.europeanrights.eu/getFile.php?name=public/commenti/CINELLI_testo.pdf [last accessed 31 March 2011]. On the violation of the first paragraph of Article 117 of the Constitution, in connection with the provisions of the Protocol n. 1 and with the provisions of Article 14 ECHR, please read the recent sentence on admissibility of the Italian Constitutional Court n. 187 of 2010, in the light of the sentences of the same Court n. 348 and n. 349 of 2007.

⁵⁶ Cf. the decision *Connors v Royaume-Uni* (66746/01), at 67 and following ones.

⁵⁷ Cf., for example, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece*, Complaint No 49/2008, Merits, 11 December 2009, at 37 and 58, concerning the violation of Article 16 ESC (revised), partly corresponding to Article 8 ECHR. Please reciprocally see at 22 of the recent decision of the European Court of Human Rights, case *Vörður Ólafsson v Iceland* Application No 20161/06, Merits, 27 April 2010, regarding Article 11 ECHR and its corresponding Article 5 ESC (revised). On this matter please also refer to the jurisprudence quoted by OLIVERI, 'La lunga marcia verso l'effettività. La Carta sociale europea tra enunciazione dei diritti, meccanismi di controllo e applicazione nelle corti nazionali', at 12, available at: http://www.europeanrights.eu/getFile.php?name=public/commenti/Carta_sociale_Oliveri_1.pdf [last accessed 31 March 2011]. Cf. also the sentences of the European Court of Human Rights mentioned by O'CONNOR, 'Social Rights and the European Social Charter – New Challenges and Fresh Opportunities', in DE SCHUTTER (Coordinator), *The European Social Charter*, supra 36, 179, nt. 14.

As regards this latest point it cannot be omitted that unfortunately in the legal orders of many EU States the problem of the direct application and of the justiciability⁵⁸ of the ESC still holds over. The majority of the Member States⁵⁹ have essentially recognised the direct effect of the ESC and/or of the ESC (revised) in their national legal systems. However, if there is a lack of far-seeing choices, the same justiciability of the Charters above can generate complications.

Besides, as for the provisions of the Lisbon Treaty concerning the ECHR (article 6.2), the EU accession to the European Social Charter has increased the protection of social rights, in particular those ones that are not included in the Treaty of Nice. However this accession seems not to have allowed in itself the direct applicability of the above quoted provisions in Member States' legislations. In fact, the EU accession should not imply the assimilation of the ESC (revised) to the EU law, but the simple use of their provisions as *general principles* of the EU Law under article 6.3 of the Lisbon Treaty, as for the constitutional traditions that Member States have in common.

Moreover the first paragraph of article 1, Part V of same ESC (revised), on the implementation of the obligations undertaken, provides for that its provisions shall be applied through laws, regulations and negotiations between employees and employers or employers' organisations and workers' organisations⁶⁰ before to appeal to national authorities, judicial one too.

This trend is also confirmed by the Appendix to the ESC (revised) (article N, Part VI), which is an integral part of the same Charter: 'It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof'. As it was mentioned, this control is exercised through *reports*, that the States are obliged to submit ECSR periodically, and through *collective complaints*. The ECSR decisions on the merits of these complaints are subsequently presented to the Committee of Ministers of the Council of Europe that, as already told, may follow them up with *resolutions* or *recommendations* yet based on considerations of clear political nature.

Moreover, juridical limits are intensified by the fact that the article 12 of the ESC (revised) Additional Protocol concerning collective complaints reaffirms the international dimension of the juridical obligations of the State Parties. This impedes the direct effectiveness

⁵⁸ The difference between direct applicability and justiciability of the Charter allows to avoid a misunderstanding often made by the oldest scholars, that thought that the lack of direct effectiveness inhibited justiciability too, that is the normative control and its judicial pleading. On the other side this difference clearly emerges in: DE SCHUTTER, 'La garantie des droits et principes sociaux dans la Charte des droits fondamentaux de l'Union européenne', in J.-Y. CARLIER, O. DE SCHUTTER (ed.), *La Charte des droits fondamentaux de l'Union européenne. Son apport à la protection des droits de l'Homme en Europe. Hommage à Silvius Marcus Helmons* (Bruxelles, Bruylant, 2002) 117 at 147; AKANDJI-KOMBÉ, 'Avant propos sur l'inscription des droits sociaux dans la Convention européenne des droits de l'Homme. Préalables méthodologiques sur la justiciabilité des droits sociaux', (2004) 2 *Cahiers de la Recherche en droits fondamentaux*, 83 at 92. Besides it is common opinion that the justiciability of social rights is denied because of more political than juridical reasons. On this matter see: JIMENA QUESADA, 'Sistema europeo de derechos fundamentales' (Madrid, Colex, 2006) at X. See also the interesting diachronic doctrinal analysis concerning the ESC by NIVARD, 'Le discours sur les droits sociaux dans la doctrine relative à la Charte sociale européenne', in *Droits des pauvres, pauvres droits? Recherches sur la justiciabilité des droits sociaux*, Working Paper October 2009, available at: <http://www.droits-sociaux.u-paris10.fr/index.php?id=143> [last accessed 31 March 2011], at 11. The study of this Author unmistakably underlines the prejudices and obstacles in reaching the full justiciability of social rights derive no more from the scholars, but 'demeurent portés par les représentants étatiques au Conseil de l'Europe. Le débat contradictoire se situerait plutôt à leur niveau'.

⁵⁹ Through the analysis of the Charter's web site (http://www.coe.int/t/dghl/monitoring/socialcharter/CountryFactsheets/CountryTable_fr.asp [last accessed 31 March 2011]) it is deduced that the States are: Andorra, Armenia, Azerbaïdjan, Bosnia and Herzegovina, Bulgaria, Czech Republic, Cyprus, Croatia, Latvia, Lithuania, Luxembourg, the Republic of Macedonia, Montenegro, Holland, Portugal, Romania, Slovenia, Spain, Turkey and Ukraine. As regards Belgium the automatic incorporation in the national law was allowed by a sentence of the Supreme Court of 27 May 1971 (*Arrêt Le Ski*). In France a recent sentence of the Supreme Court (Social Law Chamber) recognized the immediate applicability of the International Covenant on Economic, Social and Cultural Rights in the national legal system. In this way the Court detached itself from the orientation of the Council of the State and of the Supreme Court, not in favour of the immediate applicability of international treaties and of the same ESC (revised).

Cf. the sentence of 16 December 2008, *Eichenlaub v/ Axia France*: 'Mais sur le moyen de pur droit, relevé d'office après avis donné aux parties: Vu l'article 6.1 du Pacte international relatif aux droits économiques, sociaux et culturels du 16 décembre 1966, ensemble l'article 75, alinéa 3, du code du commerce local applicable dans les départements du Haut-Rhin, du Bas-Rhin et de la Moselle; Attendu que le premier de ces textes, directement applicable en droit interne [...]'

⁶⁰ At 1 of Article I ESC (revised) it is stated that: 'Without prejudice to the methods of implementation foreseen in these articles the relevant provisions of Articles 1 to 31 of Part II of this Charter shall be implemented by: a. laws or regulations; b. agreements between employers or employers' organisations and workers' organisations; c. a combination of those two methods; d. other appropriate means'.

of the ECSR decisions and of the recommendations of the Committee of Ministers in the national legal systems.

The Italian position after the ESC (revised) ratification in 1999⁶¹ was similar to the situation deriving from the above provisions. This was characterized by the absence of a direct perceptive dimension and by the restricted justiciability of the rights recognized by the same Charter, that is the limited possibility to resort to the competent instance in order to obtain an interpretation of the national (subsequent) legislation which is in keeping with the provisions of the Charter. In other words the Charter seems to possess *normative justiciability* but not *subjective justiciability*.⁶²

After the entry into force of the new article 117 of the Italian Constitution, that expressly provides for the legislator's duty to respect international obligations,⁶³ and after the sentences of the Constitutional Court No 348 and No 349 of 2007⁶⁴, new opportunities seem to emerge.⁶⁵

The first prospect is connected with the international pactitional sources. This allows to consider the laws that have acknowledged the ESC and the ESC (revised) in our legislation as interposed sources in judging rules' constitutionality. Therefore this prospect involves both the constitutional judge and the ordinary judges.

As in the past there was no specific constitutional disposition on this matter, the Constitutional Court deemed the ECHR provisions to be of the same rank of that ordinary law which made them become executive in our normative system. In fact, after the reform of the first paragraph of article 117 of the Constitution through the Constitutional Law No 3 of 2001, the Constitutional Court has held that the introduction of the ECHR rules in the national legislation follows the new provision. As a consequence of it the national rule that is incompatible with the ECHR provision, and in other words with the international obligations included in the mentioned article, violates the new constitutional provision. However, within the themes hereby analysed,⁶⁶ the interpretative logic of the Court does not imply a general and mobile reference to the international rules from time to time involved, that is to all the pactitional international rights concerning the *constitutional topic* of the protection of human rights. The logic of the Court also regards the ESC and the ESC (revised).

In fact the Court denies the direct effectiveness of the international pactitional provisions in our normative system because it cannot put them in the field of application of articles 10 and 11 of the Constitution. Therefore the Court prevents the ordinary judge from non-applying the subsequent ordinary legislative provisions⁶⁷ which are in contrast with the rules that have

⁶¹ Cf. Law 9 February 1999, No 30. The ESC (revised) entered into force in our national normative system on 1 September 1999.

⁶² Both these expressions are equivalent to the literary translation of the corresponding locutions *justiciabilité normative* and *justiciabilité subjective*, which are coined from the French authors in connection with the German scholars. The German tradition sets social rights among the principles, in order to distinguish the judge's control of conformity of a rule (comparing it with a constitutional or international one) from the possibility to appeal to the safeguard of a (subjective) right in accordance with a rule aimed at protecting an individual (or collective) favourable position.

Cf., for all, ROMAN, 'Les droits sociaux: des droits à part entière? Éléments pour une réflexion sur la nature et la justiciabilité des droits sociaux', in DU CHEYRON, GÉLOT (ed.), *Droit et Pauvreté*, 2007, available at: http://www.onpes.gouv.fr/IMG/pdf/livre_entier_web.pdf [last accessed 31 March 2011], at 48.

⁶³ The first paragraph of Article 117 Cost. provides for that: 'Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European union law and international obligations'./ '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'.

⁶⁴ Basic sentences of a constitutional jurisprudence which is constant by now. More precisely cf. Sentence No 39 of 2008 and Sentences No 239, 311 and 317 of 2009, as well as the recent Sentences No 93, 187 and 196 of 2010.

⁶⁵ In this context I would like to illustrate immediately the prospects that I think may be opened up by the mentioned reform of the first paragraph of Article 117 of the Constitution. These views transpire from the jurisprudential trend that started dominating in 2007 through the well-known 'twin' sentences of the Constitutional Court. However I point out a foregoing order (on inadmissibility) issued by the same Court - No 434 of 2005, in which the different interpretations of the first paragraph of Article 117 of the Constitution are summarized in relation with the ESC Revised (Article 4, at 2). In particular this order briefly expresses the opposite arguments that the science of law has been discussing for some time now, in order to refuse its direct effectiveness.

⁶⁶ Therefore I agree with those authors who consider not seriously conceivable that the entire mass of international obligations must cause the involvement of Article 117 of the Constitution, generating the relevant consequences specified by the Constitutional Court. To mention just one see: CONDORELLI, 'La Corte costituzionale e l'adattamento dell'ordinamento italiano alla CEDU o a qualsiasi obbligo internazionale?' (2008) 2 *Diritti umani e diritto internazionale* 305.

⁶⁷ As regards the former laws please read the sentence of the Constitutional Court No 39 of 2008, that seems to be subjected to the Court's evaluation too. However the choice of the judge arouses some doubts. In fact it must be considered that ordinary laws and rules aimed at enforcing international treaties are identical from the formal point of view. Therefore, if the rules concerning the enforcement of international treaties are chronologically prior to ordinary

acknowledged the international agreements, as well as the rules concerning the ESC and the ESC (revised).

The asserted incompatibility of these normative sources does not cause problems of temporal laws' succession or considerations about their respective hierarchical position. However this incompatibility represents a question of constitutional legitimacy regarding the possible violation of the first paragraph of article 117 of the Constitution that requires the exclusive competence of the constitutional judge.

Conversely the national judge is not necessarily obliged to raise a question of constitutional legitimacy in case of an antinomy between national rules and international ones (*rectius*: norms of implementation of international provisions)⁶⁸, but has to try to solve it in an interpretative way. It is up to the ordinary judge to interpret the national rule in a manner which is in compliance with the ESC and the ESC (revised) provisions and within the limits specified by the text of the provisions. Only when this interpretation is not possible or when there are doubts regarding the compatibility of the national rule with the interposed sub-constitutional provision of implementation, the judge shall apply to the Constitutional Court submitting it the relative question of constitutional legitimacy, in accordance with the first paragraph of article 117 of the Constitution.

An other element of the Court's analysis, particularly highlighted in the sentence n. 348 of 2007, concerns the paradox that a legislative provision can be declared unconstitutional according to another sub-constitutional rule (in this context we refer to ESC and ESC (revised) norms of implementation), in its turn conflicting with the Constitution. In order to avoid this paradox it is 'absolutely and without fail' (translator's note) necessary these sub-constitutional rules to be in compliance with the Constitution and this conformity to be weighed by the Court in case of contrast between interposed rules and national legislative norms. But the Constitutional Court is requested to develop an *international oriented* interpretation. However it must firstly give a *pondered* interpretation of the Constitution's conformity and the compliance of the pactual international act involved. In reality the Court could consider the interests constitutionally guaranteed as prevailing over the international obligation. For example you need only to think about serious topics recently discussed, such as homosexual marriages and euthanasia.

In other words this is both a *vertical view*, because the provisions of implementation of the international pactual right (although they cannot have the same *status* of the constitutional norms) are positioned above the other legislative regulations, and a *horizontal view*, because a balance between obligations deriving from international pactual norms and interests protected at constitutional level is solicited, in particular in those sectors where the international provisions allow the States to have a greater margin of appraisal.

This double view seems to cancel definitively the perspective that vanished after the Sentences No 348 and 349 on the immediate applicability (not only for a parametric function) in the national normative system of pactual international rules,⁶⁹ even if not ritually implemented. However this view allows the ordinary judge to have some important margins of intervention. Although deprived of the possibility of disapplication of the national rules conflicting with the pactual international ones, the judge is still allowed to act in case of gaps and of national legislator's inactions. The judge can intervene directly, through the *conform-*

laws and if there are the conditions considered in the *Preleggi*, it is possible to resort to a repeal by implication of the first kind of rules over the ordinary ones. So, apart from any juridical and formal justification, we can wonder if the Court preferred in this way to adopt a 'jurisprudence of interests'. In order to reply in the affirmative it is perhaps sufficient to remind that a sentence declaring the constitutional illegitimacy of a law causes its *ex tunc* repeal, while the repeal by implication generates the *ex nunc* cessation of the laws' effectiveness and exclusive *inter partes* effects. Besides it must be recalled that the repeal by implication involves rules and not the provisions included by the same rules. Therefore the repeal by implication also allows its *pro futuro* application as long as the above mentioned rules are not interpreted in contrast with the subsequent rules.

⁶⁸ In the sentences mentioned the Court favours the substantive context and refers to the incompatibility of the national norm with the provision of the treaty, although at formal level this latest provision is pointed out in our national law as provision included in the implementing legislation. In this work the same definition of the Court is adopted: the pactual international rule is never effective apart from the procedure of adaptation used. The consequence of it is that possible questions of constitutional legitimacy can only be raised after the intervention of that act which inserts the international norm in the national normative system. Therefore from the theoretical point of view it is necessary an adaptation procedure and the interposed rule is represented by the legislative act of adaptation.

⁶⁹ As concerns what above I do not hereby deal further with the ECHR rules and with their immediate applicability after the entry into force of the Lisbon Treaty. On this matter please consult the first arguable sentences of the administrative judges: Regional Administrative Court of Law of Lazio, No 11984/2010 of 18 May 2010; Italian Council of State, Sentence of 2 March 2010, No 1220; and the doubts of the scholars: cf. CELOTTO, 'Il Trattato di Lisbona ha reso la CEDU direttamente applicabile nell'ordinamento italiano? (in margine alla sentenza n. 1220/2010 del Consiglio di Stato)', available at: <http://www.neldiritto.it/appdottrina.asp?id=5272> [last accessed 31 March 2011].

interpretation,⁷⁰ or indirectly, resorting to the Constitutional Court. The aim of this latest solution is to obtain manipulative judgements (more precisely *additive di prestazione* and *additive di principio*) that intervene 'in the part in which' the same legislator has formulated no provisions.

Contrary to what it seems the judge does not give the ordinary judge the possibility to introduce new categories of rights, but to offer new contents to the existing ones. The ordinary judge is allowed to be a kind of co-author and to take part in the hermeneutic procedure aimed at giving full effectiveness to some rights that are arguably provided for by the ordinary legislation or that the national legislator has not adapted to the international obligations accepted by the State.

Therefore this is a case of full acknowledgment of the intervention of the ordinary judges, that is of application of the so-called *normative justiciability*. This acknowledgment allows to analyse and improve both the coherence of the normative system and the coherence between the aims of the Charter and the means used to reach them. Besides the judges are not prevented from having recourse to the *speciality criteria* intended in its common meaning, that is as criteria used in resolving the normative antinomies between a general law and a law addressed to special categories of subjects or objects.

Compared with the 'twin' sentences of 2007, the role of national judges is further defined by the Sentence No 317 of 2009, in which the Court firstly recognizes to be bounded to interpretative options representing the *living law*. In other words when a real *living law* emerges from the ordinary jurisprudence, the Court considers necessary to focus its analysis on the prevailing interpretation of the contested provision. At the same time this is a fundamental acknowledgment for the delimitation or the re-establishing of the competences of the Court of Cassation and for the full acknowledgment of its *normofilattico* role in the interpretation of normative texts.⁷¹

Secondly the above quoted sentence highlights the role and the definition of the judgement of '*balance*', intended as a value process between principle-norms included in various levels of guarantee. In the opinion of the Constitutional Court this operation is primarily up to the legislator; only secondarily it is up to the same Constitutional Court, while the ordinary judge has simply the possibility to give an interpretation which is conform at constitutional and international level.

Besides it can be deduced that the ordinary judge, when giving a conform interpretation before the constitutional judge, has also to apply the *principle of the maximum expansion of the rights*. In other words, when referring to a single right the comparison between international protection and national safeguard of fundamental rights must be effected aiming at the maximum expansion of the guarantees, also through the development of a potential which is included in the national rules protecting the same rights.⁷²

The Constitutional Court must be resorted to only when a conform interpretation is impossible and interpretations added noticeably to the national legal obligations cannot be offered. However the task of the Constitutional Court is to prevent a provision of the Italian juridical system from continuing to be effective when it emerges a *deficit* in the protection of a fundamental right.

On the other hand the second view that seems to emerge is purposed to go over the negative tie deduced from article 117 of the Constitution, which regards the prohibition of adopting (so to speak) anti-international provisions. This view recognizes the markedly increasing protective role of the ESC and of the ESC (revised) in our normative system, in accordance with the positive tie that the same constitutional provision imposes on the legislator. The legislator is now obliged⁷³ (and no more only allowed) to implement the obligations undertaken with the entry into force of the respective Charters.

⁷⁰ Various examples of conform interpretation can be identified in the Italian and European jurisprudence. On the matter cf. OLIVERI, '*La lunga marcia verso l'effettività*', *supra* 56, 13.

⁷¹ Besides it is to be noticed that the same Court of Cassation shares by now the re-establishment of the competences made by the Constitutional Court in the sentence n. 317 of 2009, as confirmed by its recent Judgement No 2352 of 2010 (Cf. 5. A. in final part): 'The *filonomachia* of the Court of Cassation also includes the interpretative process aimed at conforming national and constitutional rights to principles that are not conflicting but promotional of the Lisbon Treaty and of the Nice Charter and considered the basis of the European Common right (translator's note)'.

⁷² Among the most recent sentences of the judges seized on the merits that clearly reflect the above mentioned jurisprudential position of the Constitutional Court please read the exemplary Sentence of the Court of Novara of the 1 March 2010, R.G. 926/2009, which justifies the adoption of a conform interpretation based on the principle of the maximum expansion of the rights with clear arguments.

⁷³ The existence of such 'positive' implementation's duty was already affirmed by the Constitutional Court before 2001, with regard to the position of the Regions (cf. sentence n. 124 of 1990). Therefore the expansion of this obligation to the State seems to be coherent.

Perhaps this is the most charming view, because it confirms the hermeneutic position of the ordinary judge, who is firstly required a conform interpretation, but it also offers a clearly manipulative space in favour of the constitutional area.

I do not intend to affirm that the tie deriving from the international provisions can be interpreted as a constant obligation for the State to enforce the treaties stipulated and ratified in accordance with constitutional provisions. In this case the first paragraph of article 117 of the Constitution would be considered a *clause of automatic* (or semi-automatic) *enforcement*, because the enforcement is achieved compulsorily but, in any case, through an executive provision.

On the contrary I would like to affirm that the innovative relevance of the mentioned constitutional provision also derives from the obligation for the ordinary legislator to enforce an international treaty which requires necessarily a national provision for its implementation. This complementary element implies the previous issuing of an executive order. The order is given through the introduction of the clause *per relationem* in the same law that authorizes the ratification or with apposite and separate act⁷⁴, and on condition that the act is entered into force.

In fact the executive order precedes the entry into force of the treaty, that occurs only at the end of the ratification process. After ascertained the entry into force of the treaty⁷⁵ the Constitutional Court cannot complain the absence of legislative judgement's parameters. In fact the executive order, which derives from an ordinary or special legislative procedure, can express at this point all its effectiveness, unmistakably attesting the will of the State to carry out in its internal normative system the international obligations subscribed.⁷⁶ Any necessity of further normative provisions by the national legislator, in particular as regards the adaptation function, does not restrain the manipulative intervention of the Court anyway.

As concerns the internal judge it is evident that his role does not imply the direct or not direct enforcement of the rules of an international treaty, but an intervention realized with the instruments he has, in order to make the factual norms be effectively operative in our normative system. In other words the effectiveness of the treaty can depend on further internal normative intervention⁷⁷. However it is undeniable that through the entry into force of the treaty and in the presence of an executive order issued with a law the obligation to attain a precise result agreed at international level is transferred in the national normative context and all the competent bodies, included the jurisdictional ones, must carry it out.⁷⁸

On the other hand, if the interpretation of the first paragraph of Article 117 of the Constitution, necessarily coordinated with article 80 of the Constitution, is accepted, the only international obligations that can generate the consequences highlighted by the jurisprudence of the Constitutional Court are those ones that the internal normative system acknowledge with an ordinary law including an executive order. In fact the Constitution considers the parliamentary way to be compulsory for all the treaties whose adaptation in the internal normative system requires the amendment of the pre-existing legislative acts. Even more so, when the most relevant consequences deduced by the Constitutional Court in accordance with the first paragraph of Article 117 of the Constitution are required from the international obligation, the parliamentary passage is absolutely obligatory. One of the main consequences is the constitutional illegitimacy of every internal norm conflicting with the international duty.

⁷⁴ Even if the same law usually provides for the authorization of ratification of a treaty and for the relative executive order, nonetheless the two legislative contents are to be separated: one regards the authorization of ratification and the other one concerns the execution of factual international obligations.

⁷⁵ From the Order No. 282 of 1983 the Court affirms that '*The reference to the carrying out of international treaties only stipulated and not ratified by the State could not legitimate their execution [...] before the ratification required in accordance with Article 80 of the Constitution, also because in this case the international agreement is certainly ineffective* (translator's note)' (Cf. Sentence No 379 of 2004, point 3, of the *Considerato in diritto*); in this way the relation of juridical precedence between the effectiveness of the State's ratification of the treaty at international level and the effectiveness of the executive order in the national normative system is confirmed.

⁷⁶ As a matter of fact when a State acknowledges a factual obligation it expresses a double juridical will: to assume the international undertakings and to regulate at internal level the topic concerned, in accordance with the provisions of the agreement.

⁷⁷ In fact it is possible to carry out a treaty through a variety of executive acts: cf. the Sentence No 223 of 1996 of the Constitutional Court.

⁷⁸ On the other hand it is unquestionable that the effectiveness of an international act depends on its *ratification*, on which the internal effectiveness of the *executive order* is based. Therefore it is always necessary to verify if the Italian State is effectively bound at international level. This check is made through the carrying out of the ratification procedure, which also includes the deposit of the instrument of ratification with the depositary, in accordance with Article 16 of the Vienna Convention. In this connection the dilator treatment that Italy reserved the Oviedo-Convention is emblematical. Cf. PENASA, '*Alla ricerca dell'anello mancante: il deposito dello strumento di ratifica della Convenzione di Oviedo*', available at: http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0007_penasa.pdf [last accessed 31 March 2011].

Moreover it is difficult to imagine that an international obligation can influence the activity of the future legislator when it is not fulfilled through an act and, under the traditional formulation, has no force to modify the pre-existing legislation. It is also hard to suppose that the same international obligation can influence the constitutional legitimacy of laws that come before it, forcing the judge to go to the Constitutional Court.

From this point of view it can also be added that the ordinary judge, when giving a conform interpretation in accordance with the hermeneutical logic emerging from the constitutional jurisprudence and as provided for by the first paragraph of the Article 117 of the Constitution (after issuing the executive order and acknowledging the treaty's entry into force), does not apply only the legislative provisions better suiting the treaty within the limits of their literary content, but recognizes the principles of any *additiva* sentence of the Court too. Besides the ordinary judge applies at the same time the *principle of the maximum expansion of the rights* that he has to safeguard.

On the complex this view corresponds to a *strong* configuration of the social rights, that projects them onto a full justiciability, sets aside any reference to legislative decisions and substitutes the (relative) inactivity of the legislator with the jurisdictional intervention.⁷⁹

The ordinary judge can intervene before or after the intervention of the constitutional judge. In any case his intervention is interpretative and of application,⁸⁰ but it becomes creative (in particular *additivo di prestazione* or *di principio*) if effected by the Constitutional Court. Moreover the Constitutional Court does not meet an absolute omission of the ordinary legislator, who has already intervened for the adaptation of the international act involved in the internal normative system, but only an incomplete action of the same legislator. Therefore the involvement of the constitutional judge could be defined using an expression developed by the constitutional jurisprudence on the inactivity of the regional or provincial legislator of Trentino-Alto Adige, that is as a judgement on *failure to fulfil obligations*. This concept is compared with an obligation to attain a precise result which was accepted by the State both at international and national level.

However the discretion of the legislator, when openly deduced, remains an insurmountable obstacle for the *additiva di adeguamento* action of the Court. When the Court meets different *additive* possibilities that are constitutionally allowed and although it is not legitimated to choose, the Court has in any case the possibility to address warnings and requests to the legislator,⁸¹ even when it rejects an issue of constitutional legality or declares it inadmissible (besides obtaining the "wished" result).

A third possible point of view is represented by the technique of the *ad abundantiam* recalls, that are still applied in the jurisprudence of the national judges. As it is known, these recalls are additional normative references aimed at strengthening the grounds of the sentence, which already includes sufficient connections with the internal law.⁸²

These recalls have only an additional nature as concerns the grounds of the sentence, they have no decisive relevance but help spreading the awareness of the multilevel protection of fundamental rights at judicial level and in public opinion. At the same time, if the sentences point out that the judges were not able to offer the maximum safeguard of the (social) rights

⁷⁹ Cf. TUSHNET, 'Social Welfare Rights and the Forms of Judicial Review', (2004) 82 *Texas Law Review* 1900, that quotes on this matter the famous Decision of the Supreme Court of the USA of 1962, *Baker v Carr*. As I essentially analyse the ESC and the ESC (Revised) implications in our normative system, I only refer to the juridical literature in Italian concerning the legislator's omission. I simply indicate the bibliographic references included in the *Quaderno* issued by the Italian Constitutional Court on the occasion of the Conference of European Constitutional Courts (2-7 June 2008), that was exactly dedicated to the '*Problemi dell'omissione legislativa nella giurisprudenza costituzionale*', available at: http://www.cortecostituzionale.it/informazione/file/STU199_Omissione_legislatore.pdf [last accessed 31 March 2011], at 24.

⁸⁰ In fact, as already mentioned, the ordinary judges are only required to apply a *reductio ad legitimitatem* through an extensive interpretation and/or a reasoning by analogy and to apply the principles that are inferable from any *additiva* sentence of the Constitutional Court before a legislative action.

⁸¹ Among the most relevant sentences including warnings and/or requests to the legislator it is hereby noteworthy the Sentence No 61 of 2006. Although this sentence considers inadmissible the issue of constitutional legality, it underlines the conventional bounds that the legislator was obliged and is still obliged to respect.

⁸² The following sentences are quoted as examples: Rome Court – II Civil Sector - Ord. Proc. No 69789/2002; Court of Cagliari – Civil Sector – Ord. Proc. No 2563/2005; Court of Naples – Sector for employment – Sentence of 22 April 2009, available at: http://www.bin-italia.org/UP/doc_istitutz/sentenza%20pilota.pdf [last accessed 31 March 2011]; Court of Novara, Sentence of 1 March 2010, in <http://dejure.giuffre.it>; Civil Court of Cassation, Sector for employment, 19 Juli 2007, No 16017 (*Soc. Alitalia v Soc. A.G. e altro*); Civil Court of Cassation, Sector for employment, 1 February 2006, No 2245 (*Ama c. Stentella*); Civil Court of Cassation, Sector for employment, 21 August 2004, No 16538; Council of State, Sect. VI, 17 May 2010, No 3054; as well as Constitutional Court.: No 163 of 1983, No 86 of 1994 and No 46 of 2000.

involved because of the non-fulfilments of internal judges, these recalls expose government leaders to an indirect form of delegitimization.

As concerns the legislative context it is finally to be mentioned the reorganization of the competences introduced with the reform of the Title V of the Second Part of the Constitution. Among other competences the Regions are allowed to implement and fulfil any international agreement involving matters in which they are competent 'in observance of procedures set by state law' (Article 117, at 5, of the Constitution).

Article 6.1 of the Law No 131 of 2003 carries out the constitutional provision. In fact it states that autonomous Regions and Provinces may directly provide for implementation and fulfilment of the international agreements ratified by Italy. They must previously inform the Ministry of Foreign Affairs and the Presidency of the Council of Ministers, which within the following thirty days can outline criteria and observations. In case of non-fulfilment and taking into account the responsibility of the Regions towards the State, the provisions concerning the substitutive power of the State are applied. These provisions are specified in the same Law (Articles 8.1, 8.4 and 8.5), in order to apply the second paragraph of Article 120 of the Constitution.

Therefore Regions may intervene with their own regulations in questions of their competence, such as social assistance, in order to apply the ESC (revised). In fact Article 13 of the ESC (revised) considers the right to social and medical assistance, while Article 14 recognizes the right to benefit from social welfare services through the introduction of some provisions aimed at assuring the effective exercise of this right.

As far as we know no Region has intervened to fulfil the ESC (revised) so far. The only legislative measure that quotes the ESC is the Law No 11 of 2007 of the Region Campania, which includes provisions on a matter that could receive a better approach ('*Legge per la dignità e la cittadinanza sociale*. Fulfilment of the Law no 328 of 8 November 2000'). The first paragraph of Article 1 just states that this Law: '[...], being inspired by the Constitution, the Universal Declaration of human rights, the European Social Charter and the Charter of Fundamental Rights of the European Union, regulates the planning and the realization of an organized system of interventions and social services'.

5. Some (not) conclusive reflections.

As far as I tried to underline in this work, the European Social Charter (ESC – ESC revised) is not recognized direct effectiveness. However this Charter is attached a remarkable juridical relevance in our normative system, despite the EU non-accession of the same document. Its *normative justiciability* cannot be doubted and, in accordance with the interpretation of the first paragraph of Article 117 of the Constitution hereby developed, its *subjective justiciability* can be now considered within reach too.⁸³ In fact it is possible to achieve a *judgement* of the Constitutional Court *concerning the failure of a State to attain an obligation of result* agreed at international juridical level and transformed in an executive duty at national legislative level.

According to the national judge the principle trend to follow is defined by the Constitutional Court and is based on a conform interpretation which is able to assure the highest level of protection offered by the multilevel system of safeguard of fundamental rights and on the principle of the maximum expansion of these rights.

More precisely, the same *ratio* can be also noticed in Article 53 of the Treaty of Nice, if a very simple *garantistica lettura* of the same article is accepted. The article 53 makes the principle of the maximum expansion and protection of the rights be effective and explicit in the multilevel normative system. This interpretation is furthermore different from the analysis exposed at the beginning of this work (paragraph 1). This rule clearly provides for a synergistic comparison between internal law, conventional and international law and EU law, also in the light of the same Charter. From this comparison it necessarily emerges and prevails the most protective provision concerning the safeguard of fundamental rights.

Therefore, at jurisprudential level, it is a question of favouring a fusion among the different catalogues of rights and of assuring at the same time the most intense safeguard that a value can obtain through an instrument different from the Nice Charter, such as the

⁸³ This does not mean that the European Social Charter offers directly subjective rights, which can be vindicated by the individuals at jurisprudential level, and that allows the so-called *subjective justiciability*.

European Social Charter. In other words it is a question of guaranteeing the maximum pluralism as regards the protection of fundamental rights in Europe.⁸⁴

However the point is that judges cannot overcome some limits: the ESC (revised) does not include provisions similar to the ECHR ones⁸⁵ as concerns the effectiveness and the consequences of the decisions issued by its control bodies, and has only an almost jurisdictional weapon, unless the same States prepare the juridical conditions to make the ECSR decisions be fully effective.

In any case our judges should begin to take seriously in consideration the ECSR jurisprudence in their sentences,⁸⁶ exactly as they take into account the decisions of the European Court of Human Rights. Or better still the same resolutions and recommendations of the Committee of Ministers of the Council of Europe, which, as above mentioned, follow the ECSR decisions on collective complaints, should be highlighted by the internal jurisprudence. In particular they should be pointed out when the internal sentences clash with what the ECSR upholds and, all the more reason, when they underline the necessity for the contracting State to adapt its own internal legislation in order to avoid violations of the Charter. However the ordinary judges continue demonstrating short interest in the Charter, even after the entry into force of the new first paragraph of Article 117 of the Constitution.

On the other hand, apart from the judges' attention to the ESC (revised), it can be noticed that they continue following, without efforts, the 'old' way based on the conform interpretation, while ignoring the 'new' one introduced with the constitutional sentences of 2007. This new way implies the raising of a question of constitutionality, which is confirmed by the same lack of matters of illegitimacy having as unique interposed parameter an international treaty that is different from the ECHR.⁸⁷

Therefore a risk emerges: the ordinary judge, that is absorbed by his own *secundum Constitutionem* hermeneutical role and is strengthened by the recent sentences of the

⁸⁴ On the other hand the methodological and substantial landing place as regards the protection of fundamental rights, included the economic and social ones, is the same that the European Court of Human Rights recently confirmed (cf. *Demir et Baykara v Turquie*, *supra*): '85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases. 86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies'.

⁸⁵ Cf. Articles 41 and 46 ECHR.

⁸⁶ On this subject it is paradigmatic a recent Sentence of the Council of State (Section IV, 15 May 2009, No 3029) concerning unauthorized buildings implying the demolition of the house of some Sinti families. In relation to the applicants' reference to the norms and the jurisprudence connected with the European Social Charter and to the specification that 'The unauthorized building, which is the subject of the impugned order, was required by the urgency to guarantee a house solution (although temporary and uncomfortable) to the applicants' families, because it was not possible to find alternative solutions on the free market and to involve the authority charged with the searching of other solutions (*translator's note*)', the administrative judge just stated in a hasty way that: 'The mentioned violation of international norms and conventions, which derives from a substantial discrimination of nomads' communities, is irrelevant, seeing that the judged question lies outside this kind of theme and is part of town planning and building topic (*translator's note*)' (Cf. the last paragraph of point 3.1. of the *in diritto* Part).

⁸⁷ Cf. LAMARQUE, 'Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune', available at: http://www.cortecostituzionale.it/informazione/file/lamarque_definitivo_6112009.pdf [last accessed 31 March 2011], at 10. On this matter it is emblematic the long list of sentences concerning the criteria of wage calculation for overtime work, in which the Court of Cassation develops very brief and sometimes literally repeated grounds and rejects the questions of constitutionality of the internal legislation. These questions are considered expressly groundless and are raised in relation with the interposed parameter based on the European Social Charter. In fact, after ascertaining that the Italian legislation corresponds to the provisions of Article 36 of the Constitution, the judge of legitimacy easily resolves the doubts concerning the interposed parameter. The judge of legitimacy confers the text of the Charter the mere value of confirming instrument of the constitutional provisions. For example the judge highlights that the same Charter 'provides for the increase in salary for overtime work, that cannot be denied workers (*translator's note*)' (Civil Court of Cassation, Section Employment, 17 April 2009, No 9238), or 'confirms the right to this overtime wage without fixing its size' (Civil Court of Cassation, Section Employment, 15 January 2008, No 649). Moreover the judge affirms that 'in this regard it is relevant the distinction between the legal and the contractual overtime work and that the bounds deriving from the Charter only concern the legal overtime work' (Civil Court of Cassation, Section Employment, 15 March 2010, No 6264). In a similar way and with different grounds, other sentences of the Court of Cassation, Section for employment, can be mentioned among the other ones: 15 January 2008, No 650; 18 January 2008, No 1080; 21 January 2008, No 1199; 22 January 2008, No 1332 and No 1333; 24 January 2008, No 1571 and No 1572; 26 March 2008, No 7880; 8 April 2008, No 9132; 28 July 2008, No 20519; 8 September 2008, No 22608; 9 September 2008, No 23120, No 23121 and No 23122; 15 December 2008, No 29297; 19 July 2007, No 16017; 1° February 2006, No 2245.

constitutional law, solves by himself any matter of constitutionality. On the other hand the judge is constantly pushed into developing this kind of hermeneutical exercises and maybe he convinced himself that it is always possible to bring a law back to the context of the constitutional principles, avoiding – and unfortunately obstructing – the Court to act. However all the judges are charged the major responsibility in this phase of further flourishing of social rights through international obligations deriving from the European Social Charter. To be more precisely, in this phase it can still be useful the 'old' and in a certain sense limited and even 'dangerous'⁸⁸ proposal concerning the reform of these rights. This new wording acts not only in connection with the positive right, but also at hermeneutical level and transforms the mentioned rights implying positive obligations for the legislator in rights implying negative obligations for the State.⁸⁹ For example you can just think about the freedom to procure autonomously the maintenance (self-determination is expression of human dignity) and about the consequences of this 'conversion' regarding the charitable and paternalistic nature of the right to social assistance in the context of the wider and more inclusive right to protection and social security. These consequences also include the significance of the right to work in all its complex meanings and interrelations.

However the most important element is that social rights are systematically considered to be juridical situations that can be objectively and subjectively justiciable, apart from their concrete legislative regulation too. These rights are exploitable means for the development of indivisible and universal values and principles that represent the axiological nucleus of the European constitutional legislation and are not considered only as functional to the exercise of economic freedoms.

In the light of what I hereby tried to ascertain, the European Social Charter projected social rights onto our legislation in order to support the truthfulness of inalienable and unailing universal values. The most prevailing values are (personal and social) dignity, freedom (from needs and poverty), (formal and substantial) equality, solidarity and (social) justice and by now it does not seem that obstacles can be placed in order to influence indefinitely their effectiveness.⁹⁰ What could we add (not) to end with optimism⁹¹?

⁸⁸ In this way, if it is true that the social right is not autonomously protected, but mostly safeguarded as auto-limit of the economic right involved or as realization of the principle of non-discrimination, it is similarly unquestionable that the effects deriving from the non-protection of the social right are frequently the same that could emerge when the judge protects directly the same social right. In any case the result reached is the recognition (and sometimes the integration) of the guarantee regarding the social right concerned.

On the other hand this means that social rights must be firstly protected in themselves, in order to avoid – and this is the real danger – their irremediable belittling of their significance and importance. For example we could think about the state of the right to have a work if it was simply recognized as right to work or as the mere protection of workers through the principle of non-discrimination.

⁸⁹ HERINGA, 'Droits sociaux et Etat de droit', in *La Charte sociale du XXI^e siècle* (Strasbourg, Editions du Conseil de l'Europe, 1997) 217 at 219.

⁹⁰ The ECSR recently decided in the case *Centre on Housing Rights and Evictions (COHRE) v Italy*, Complaint No 58/2009, Merits, ECSR, 6 July 2010, concerning the Rome and Sinti communities *status* in our Country. From this decision it emerges that Italy violated the ESC (revised), in particular Article 16 (Right the family to social, legal and economic protection), Article 19 (Right of migrant workers and their families to protection and assistance), Article 30 (Right to protection against poverty and social exclusion) and Article 31 (Right to housing), as well as Article E of the same Charter (Non-discrimination). The Committee of Ministers of the Council of Europe, after receiving from the ECSR the report concerning this decision, adopted in its turn a Resolution (CM/ResChS(2010)8), which underlines the efforts of our Country to guarantee Rome and Sinti groups the effectiveness of the rights provided for by the ESC (revised).

Therefore normative answers and significant judicial reactions can be supposed in our legislation too, such as the French reactions after the ECSR decisions on the merits of the Complaints No 33/2006 and 39/2006. In particular I allude to the adoption of the so-called 'Loi DALO' on the right to housing.

⁹¹ Maybe it is sufficient to remember what Jacques Maritain affirmed sixty years ago in his famous 'Man and the State' (Chicago, University of Chicago Press, 1951) 104: '[...] it is obvious that human reason has now become aware not only of the rights of man as a human and civic person, but also of his rights as social person engaged in the process of production and consumption, especially of his rights as a working person'.