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# From the Principle of Systemic Integration to the Integrated Approach: The Pathway to the Integration of the European Social Charter for the Interpretation of the European Union Charter of Fundamental Rights

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## ARTICLES

# THE EUROPEAN SOCIAL CHARTER TURNS 60: ADVANCING ECONOMIC AND SOCIAL RIGHTS ACROSS JURISDICTIONS

*Edited by Giovanni Boggero, Francesco Costamagna and Lorenza Mola*

## FROM THE PRINCIPLE OF SYSTEMIC INTEGRATION TO THE INTEGRATED APPROACH: THE PATHWAY TO THE INTEGRATION OF THE EUROPEAN SOCIAL CHARTER FOR THE INTERPRETATION OF THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS

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ABSTRACT: The Europe of human rights is characterised by the duality of the legal orders of the Council of Europe and of the EU. Their instruments must coexist peacefully, and a coherent interpretation of social human rights is essential to this end, as EU Member States belong to both legal orders. In this sense, it is worth considering whether the integration of the European Social Charter into the interpretation of the EU Charter of Fundamental Rights could reinforce the protection of social rights. More specifically, would a shift from the application of the principle of systemic integration to the theory of integrated approach foster such a change? To answer these questions, two main hypotheses are developed, by focussing on the right to social security. The first one affirms that following the principle of systemic integration would lead to a stronger interpretation of social rights in the EU legal order. To explore such a hypothesis, the effects of the application of this principle to the interpretation of EU law are considered, in light of the customary nature of this principle and its codification. The second affirms that the impact of applying the theory of integrated approach would go beyond the simple pursuit of systemic coherence. By advancing the method of referring to instruments from other legal orders when interpreting provisions that are applicable to a given

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situation, this theory has a double objective: ensuring consistent interpretation and strengthening the protection of rights.

KEYWORDS: European Social Charter – systemic integration – *integrated approach* – European Union Charter of Fundamental Rights – right to social security – human social rights.

## I. INTRODUCTION

Social human rights are recognised and protected in Europe, within the two coexistent legal orders that are the Council of Europe and the European Union. The Council of Europe adopted the European Social Charter (ESC) to complement the European Convention of Human Rights which mainly recognizes civil and political rights. In its turn, the European Union adopted the Charter of fundamental rights of the European Union (CFREU or EU Charter) following the 1989 Community Charter of Fundamental Social Rights for Workers. This *Article* build on this parallel trajectory of recognition of social fundamental rights in Europe to explore the following question: Could the integration of the European Social Charter into the interpretation of the EU Charter of Fundamental Rights reinforce the protection of social rights?

The starting point of this *Article* is the coexistence of the European Union and the Council of Europe, both involved in the protection of human rights (including fundamental social rights). Both are independent human rights systems with their own instruments, supervisory bodies, systematic monitoring, and mechanisms to respond to crises.<sup>1</sup> At the same time, such a coexistence makes it so that a coherent interpretation of social human rights across the respective legal orders is essential due to belonging of EU Member States to both legal orders despite their systemic divergence.<sup>2</sup> In this context, this *Article* will focus on social human rights under ESC and the CFREU.

In order to analyse the interactions between these instruments, I will focus on a particular right: the right to social security. Under the definition of the International Labour Office, “Social protection, or social security, is a human right and is defined as the set of policies and programmes designed to reduce and prevent poverty, vulnerability and social exclusion throughout the life cycle”.<sup>3</sup> Firstly this right is recognised in both instruments (art. 12 ESC and art. 34 CFREU). Furthermore, the uncertainty surrounding the

<sup>1</sup> Concerning features of human rights systems see G De Búrca, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the EU' in O De Schutter and SF Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant 2005) 247-248.

<sup>2</sup> On these divergences, K Lukas, 'The Fundamental rights charter of the European Union and the European Social Charter of the Council of Europe: Partners or Rivals?' in G Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument* (Brill 2014) 222-244.

<sup>3</sup> International Labour Organization, *World Social Protection Report 2020-22: Social Protection at The Crossroads – in Pursuit of a Better Future*, [www.ilo.org](http://www.ilo.org).

protection of the right to social security<sup>4</sup> and its justiciability within the EU legal order offers an opportunity to explore the potential added value of relying on the ESC<sup>5</sup> when interpreting the CFREU, and in particular its “Solidarity” chapter. The respect of this right, which is recognized and protected by the CFREU and by the European Pillar of Social Rights,<sup>6</sup> is controlled by the Court of Justice of the European Union (CJEU)<sup>7</sup> and, to some extent, in the European Semester’s periodical monitoring.<sup>8</sup> However, art. 34 of the EU Charter has a limited justiciability, only playing a role in guiding the interpretation of EU law. This particular justiciability is due to the general requirement for invoking provisions of the CFREU, namely that EU law must be applicable to the situation.<sup>9</sup> Moreover, the right to social security is mainly referred to as a “principle”.<sup>10</sup> Therefore, its justiciability is limited by the EU Charter to the “interpretation of legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and acts of Member States when they are implementing Union law in the ruling of their legitimacy”.<sup>11</sup> The latter limitation means that the justiciability is only normative in scope.<sup>12</sup> Those reasons lead to a limited protection of the right to social security within the EU. The fact that this right is recognized and protected not only by the ESC, but also by other international law instruments, seems to suggest that there is a necessity for a better protection by the EU legal order.

Hence, two main hypotheses will be developed in the present *Article*. First, following the principle of systemic integration would lead to a reinforcement of the interpretation of social rights in the EU legal order. Second, applying the theory of integrated approach would have an impact going beyond the simple improvement of systemic coherence.

<sup>4</sup> On the right to social security within EU, A Crescenzi, ‘Social Security, Social Assistance and Health Care in the Charter of Fundamental Rights’ in G Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument* cit. 145-164.

<sup>5</sup> “It seems apparent that in some areas, the EU system lacks a certain level of protection that the European Social Charter can provide”. K Lukas, ‘The Fundamental Rights Charter of the European Union and the European Social Charter of the Council of Europe’ cit. 239.

<sup>6</sup> Art. 34 of the Charter of Fundamental Rights of European Union [2012]; art. 12 of the European Pillars of Social Rights (EPSR) of 16 November 2017.

<sup>7</sup> See e.g. case C-571/10 *Kamberaj* ECLI:EU:C:2012:233.

<sup>8</sup> See e.g. Country Report France 2020 SWD(2020) 509 final from the Commission of 26 February 2020, p. 54, 91.

<sup>9</sup> D Dumont, ‘Article 34: Sécurité Sociale et Aide Sociale’ in F Picod, C Rizcallah and S Van Drooghenbroek (eds), *Charte Des Droits Fondamentaux de l’Union Européenne* (Bruylant 2019) 857-860; C Nivard, ‘Les conditions d’application de la Charte des droits fondamentaux’ in A Biad and V Louvel-Parisot (eds), *La Charte des droits fondamentaux de l’Union européenne: bilan d’application* (Anthemis 2018) 31; R White, ‘Article 34’ in S Peers and others, *The EU Charter of Fundamental Rights: A Commentary* (Hart publishing 2014) 937-940.

<sup>10</sup> Explication ad 52, Explications relating to the Charter of fundamental rights 2007/C 303/02; see also, D Dumont, ‘Article 34’ cit. 869–870; R White ‘Article 34’ cit. 936-937.

<sup>11</sup> Art. 52(2) of the Charter cit.

<sup>12</sup> About “normative justiciability”, see C Nivard, *La justiciabilité des droits sociaux: étude de droit conventionnel européen* (Bruylant 2012) 21.

The first part of the *Article* will be devoted to the analysis of the principle of systemic integration and of its applicability to the interpretation of CFREU. The goal of this principle is to improve the coherence between instruments. Legal scholarship noted how the consistent interpretation of rights would reduce the risks of conflicts and divergent interpretations of the two major European social human rights instruments,<sup>13</sup> as well as prevent these contradictions in institutional settings.<sup>14</sup> An illustration of this conflict can be found in the *Laval* case and the subsequent decision by the European Committee of Social Rights (ECSR).<sup>15</sup> On one hand, the CJEU recognized that the right to collective action is fundamental, but also found that a collective action can represent a restriction to the fundamental freedoms of the internal market and, therefore, should be assessed through a proportionality test. On the other hand, the ECSR has decided that “Lex Laval”, the law adopted to bring the Swedish legal system in line with the CJEU ruling, violates the right to bargain collectively. In the eyes of the ECSR, the CJEU has put the freedom of movement above the fundamental right to take collective action, whereas economic freedoms “cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights”.<sup>16</sup> The ECSR also stated that “the fact that the provisions are based on a European Union directive does not remove them from the ambit of the Charter”.<sup>17</sup>

In light of this yet unresolved conflict, it is worth considering how the application of the principle of systemic integration within the EU legal order could improve the coherence in the field of the protection of (fundamental) social rights. In exploring this option, it will be necessary to address the very possibility of taking into account an instrument adopted in the context of a given legal order (such as the ESC) when interpreting a second

<sup>13</sup> O De Schutter, 'L'adhésion de l'Union Européenne à la Charte Sociale Européenne' (2015) RTDH 256; O De Schutter, *The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights* (European Parliament – Committee on Constitutional Affairs Study 2016) [www.europarl.europa.eu](http://www.europarl.europa.eu) 24-32.

<sup>14</sup> T Jagland, *Situation de la démocratie, des droits de l'homme et de l'état de droit en Europe* (Rapport du Conseil de l'Europe 2014) 41.

<sup>15</sup> Case C-341/05 *Laval un Partneri* ECLI:EU:C:2007:809; ECSR decision of 3 July 2013 complaint n. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* (“Lex Laval”); S Laulom, ‘Le comité européen des droits sociaux condamne la jurisprudence Laval’ (2014) *Semaine sociale Lamy* 5-7; K Lukas, ‘The Fundamental Rights Charter of the European Union and the European Social Charter of the Council of Europe’ cit. 240-242; M Rocca ‘A Clash of Kings: The European Committee of Social Rights on the “Lex Laval” ... and on the EU Framework for the Posting of Workers’ (2013) *EJSL* 217-232. This case concerns the right to collective action of Swedish Unions. Following decision of CJEU, Swedish law has been modified by a law called “Lex Laval”. Following this reform, a Swedish Union has filed a collective complaint before the ECSR.

<sup>16</sup> *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* cit. para. 122.

<sup>17</sup> ECSR decision of 23 June 2010 complaint n. 55/2009 *Confédération Générale du Travail (CGT) v France* para. 32; reminded in *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* cit. para. 72.

instrument belonging to a different one (*in casu*, the CFREU), with the goal of pursuing not just the goal of “systemic coherence”, but the better protection of social human rights. To this end, I will examine the specific right to social security.

The second part of this *Article* explores the potential of an integrated approach to tackle the various issues and uncertainties related to application of the principle of systemic integration for the interpretation of social human rights, particularly within the EU legal order. This second theory proposes cross-systemic references as a tool to improve the protection of social rights. In this context, I will briefly address the divergences with the theory of fragmentation, according to which the expansion of international law produces a diversity of sources by subject-matter and by region that threatens the unity of international law and so the consistency of the system.<sup>18</sup>

## II. THE PRINCIPLE OF SYSTEMIC INTEGRATION AND THE CONSISTENT INTERPRETATION OF SOCIAL RIGHTS

The “principle of systemic integration” addresses the fragmentation of international law by providing that “any relevant rules of international law applicable in the relations between the parties” shall be taken into account for the interpretation of a treaty.<sup>19</sup> If applicable to a given situation, such an approach has the potential to foster a consistent interpretation of human and fundamental rights, as well as to strengthen the interpretation of social rights under regional legal orders.

### II.1. QUESTIONING THE APPLICATION OF ART. 31(3)(C) OF VCLT TO ESC AND CFREU

The principle of systemic integration stems from art. 31(3)(c) of the Vienna Convention on the law of treaties (VCLT or the Convention), and results from an evolution of international customary law that has been progressively codified during the twentieth century.<sup>20</sup> Since the principle of systemic integration is rooted in international customary law, “the rules laid down in Arts 31–33 [...] can in principle be applied to all treaties outside the

<sup>18</sup> AJ Colangelo, ‘A Systems Theory of Fragmentation and Harmonization’ (2016) NYUJIntL&Pol 7; H Grant Cohen, ‘Fragmentation’ in J D’Aspremont and S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2019) 316; S Moundounga Ntsigou, *La fragmentation du droit international public: l’œuvre de codification à la lumière de la fragmentation du droit international* (Thesis University of Strasbourg 2013) 19-22.

<sup>19</sup> Art. 31(3)(c) VCLT and P Merkouris, ‘The Principle of Systemic Integration’ in *Max Planck Encyclopedias of International Law* (Oxford University Press 2020) paras 1-3.

<sup>20</sup> On the “codification” see P Merkouris, ‘The Principle of Systemic Integration’ cit. paras 6-19; and A Pellet, ‘Canons of Interpretation under the Vienna Convention’ in J Klinger, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019) 2-4. See also, RK Gardiner, *Treaty Interpretation* (Oxford University Press 2015 second edition) 295-296.

scope of the [Vienna] Convention".<sup>21</sup> This has also been addressed by the International Court of Justice, when it stated that "[the] principles [...] reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties [...] may in many respects be considered as a codification of existing customary international law on the point".<sup>22</sup>

*a) Addressing the conditions of application of the provision.*

The application of this principle requires that three conditions are fulfilled: first, the instruments at issue must be "rules of international law"; second, they must be relevant; and, third, they must be applicable in the relation between the parties.<sup>23</sup>

Firstly, ESC and CFREU are "rules of international law" under art. 31(3)(c). "Rules" might be defined as "binding rules of international law, emanating from an accepted source of international law, i.e. treaties, custom and/or general principles of law, recognized by civilized nations".<sup>24</sup> "Rules of international law" should be understood broadly as any "sources of law (treaties, customary law, general principles, and, as subsidiary sources, judicial decisions and academic writing)".<sup>25</sup> From the prospective of the ECtHR, ESC and CFREU are "rules of international law". Indeed, guided by VCLT provisions, the ECtHR took the ESC and the EU Charter into account (together with the International Covenant on Economic, Social and Cultural Rights and ILO conventions) to interpret the right to form a trade union under article 11 ECHR.<sup>26</sup>

Secondly, one has to determine whether ESC and CFREU as rules of international law are relevant, on the basis of their subject matter and temporality.<sup>27</sup> The *subject matter* criterion refers to rules that relate to the same subject matter as the provision interpreted.<sup>28</sup> Human rights instruments relate to the same subject matter.<sup>29</sup> The subject matter relevance criterion should be satisfied when a same right is protected by both instruments even if there is a terminological difference among provisions. That same is true for social human rights instruments. In that sense, the right to social security is recognised

<sup>21</sup> O Dörr, 'Article 31: General Rule of Interpretation' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018 second edition) 563.

<sup>22</sup> ICJ *Guinea-Bissau v Senegal* (Judgment) [12 November 1991] para. 48.

<sup>23</sup> P Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* (Brill, Nijhof 2015); RK Gardiner, *Treaty Interpretation* cit.

<sup>24</sup> P Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* cit. 14.

<sup>25</sup> RK Gardiner, *Treaty Interpretation* cit. 300.

<sup>26</sup> ECtHR *Demir and Baykara v Turkey* App n. 34503/97 [12 November 2008] paras 96 ff.

<sup>27</sup> On the "relevance" criterion of the principle of systemic integration see RK Gardiner, *Treaty Interpretation* cit. 299. Two other meanings of relevance have been put forward: *linguistic proximity* and *actor proximity*. P Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* cit. 36-78 (for a full development on the "proximity criterion", see *ibid.* 65). Ultimately, the question of relevance requires answering the "how", "what", "who" and "when" questions.

<sup>28</sup> O Dörr, 'Article 31' cit. 609-610; A Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) ICLQ.

<sup>29</sup> M Fitzmaurice, 'Interpretation of Human Rights Treaties' cit. 754.

and protected by the International Labour Organisation (ILO) Constitution and conventions, the International Covenant on Economic, Social and Cultural Rights (ICESC), the Universal Declaration of Human rights, the European Social Charter and the EU Charter of Fundamental Rights. To be more specific, the right to social security is expressly mentioned in both parts<sup>30</sup> of the ESC. Art. 12 of Part I reads: "All workers and their dependents have the right to social security". Art. 12 of Part II adds:

"With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;
2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. to endeavour to raise progressively the system of social security to a higher level;
4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
  - a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
  - b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties".

Art. 34 of the EU Charter recognise the right to social security within EU<sup>31</sup>. It provides that:

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices".

Reading these texts shows how both instruments have the same subject matter, both provisions concern the right to social security, despite their differences. Whereas art. 12

<sup>30</sup> The first part of the Charter enumerates the various rights recognized; the second part specifies the content of those rights.

<sup>31</sup> On the recognition of the right to social security see R White, 'Article 34' cit.; D Dumont, 'Article 34' cit.



ESC affirms the right to social security and seeks to ensure its effectiveness, art. 34 CFREU pertains to the entitlement to social security benefits and recognises the right to social assistance. Because of this, the protection of the right to social security is more limited in art. 34 than in art. 12. Nonetheless both recognize and aim to protect this right.

Because of their dynamic interpretation, those instruments are temporally relevant. Indeed, the *temporality*<sup>32</sup> *relevance* requirement raises the question of the time under consideration for the interpretation.<sup>33</sup> This refers to the debate of static interpretation versus dynamic interpretation.<sup>34</sup> In this sense, “the applicable rules are those in force at the time of the interpretation of the treaty”.<sup>35</sup> Hence, art. 31(3) VCLT is compatible with a dynamic interpretation.<sup>36</sup> This dynamic approach “has mainly developed through the interpretation of human rights treaties”.<sup>37</sup> Besides, the European Court of Human Rights (ECtHR) usually interprets European Convention of Human Rights (ECHR) provisions in a dynamic (evolutive) approach, as the ESCR does with the ESC.<sup>38</sup>

Nevertheless, ESC and CFREU might not be “applicable between parties”. Indeed, there is uncertainty surrounding which States are to be understood as “parties”: all parties to the treaty or only those involved in the given situation.<sup>39</sup> This is a particularly important question when it comes to the role of the ESC for the interpretation of the EU Charter. The ESC was revised in 1996 but the first version of 1961 is still in force. All EU Member States have ratified one of the European social charters (original or revised), but neither of the two Charters has been ratified by *all* Member States. Another question related to this issue is: should both European social charters be understood as a single continuum instrument and, therefore, should we consider that all EU Member States have ratified the latter?<sup>40</sup> Conversely, not all parties to the (R)ESC are EU Member States.

<sup>32</sup> About the evolution of temporality under art. 31(3) VCLT see: C Mclachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) ICLQ 316.

<sup>33</sup> O Dörr, ‘Article 31’ cit. 612.

<sup>34</sup> *Ibid.* 572-574.

<sup>35</sup> ME Villiger, ‘The Rules on Interpretation’ cit. 112.

<sup>36</sup> J Christoffersen, ‘Impact on General Principles of Treaty Interpretation’ in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 47-50.

<sup>37</sup> M Fitzmaurice, ‘Interpretation of Human Rights Treaties’ cit. 750.

<sup>38</sup> J Christoffersen, ‘Impact on General Principles of Treaty Interpretation’ cit. 47-50; O De Schutter, ‘The Two Lives of the European Social Charter’ in O De Schutter (ed.), *The European Social Charter: A Social Constitution for Europe / La Charte sociale européenne: une constitution sociale pour l’Europe* (Bruylant 2010) 29; S Theil, ‘Is the “Living Instrument” Approach of the European Court of Human Rights Compatible with the ECHR and International Law?’ (2017) EPL 587.

<sup>39</sup> O Dörr, ‘Article 31’ cit. 610-611; RK Gardiner, *Treaty Interpretation* cit. 303-304, 310-318; C Mclachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ cit. 313-315.

<sup>40</sup> On this question, Olivier de Schutter seems favourable to considering the European Social Charter as one global instrument including the 1961 version and the revised one, see O De Schutter, ‘L’adhésion de l’Union Européenne à la Charte Sociale Européenne’ cit. 42.

Campbell McLachlan has suggested four possible interpretations of the meaning of “parties”.<sup>41</sup> First, the provision “requires that all parties to the treaty under interpretation also be parties to any treaties relied upon”.<sup>42</sup> This is the narrowest option since it would greatly limit the potential international sources of interpretation. The second interpretation requires “that the treaty parties in dispute are also parties to the other treaty”.<sup>43</sup> This is the broadest option, which would increase the number of sources of inspiration since only the parties to the dispute must be part of the given instrument. The third solution represents the intermediate option: “Insofar as the treaty were not in force between all members to the treaty under interpretation, the rule contained in it [is] treated as being a rule of customary international law”.<sup>44</sup> Therefore, this is “an intermediate test which does not require complete identity of treaty parties, but does require that the other rule relied upon can be said to be implicitly accepted or tolerated by all parties to the treaty under interpretation”.<sup>45</sup> Campbell McLachlan favours the first and third options; the ECtHR’s practice seems to be consistent with the third option.<sup>46</sup>

Coming back to the issue here at stake, the condition that might prove problematic regarding the application of the principle of systemic integration to the interpretation of the CFREU in light of the ESC, is the requirement of “being applicable between parties”.

*b) Addressing the application of the principle by supervisory bodies.*

Despite this difficulty, the principle of systemic integration has been applied between legal orders of Council of Europe and of European Union.

Firstly, the ECtHR applies the principle of systemic integration when interpreting the ECHR.<sup>47</sup> This was fully developed in the *Demir and Baykara* case, concerning the freedom of trade union association.<sup>48</sup> As for the specific relationship with the EU legal order, the ECtHR has stated, in the *Bosphorus* case, that the protection of fundamental rights under EU law should be considered as equivalent to the one provided by the ECHR,<sup>49</sup> leading to the

<sup>41</sup> C Mclachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ cit. 314-315. Even if the ECHR does not recognize the right to social security, an indirect protection of this right may be attained through ECtHR’s interpretation of ECHR’s provisions (through art. 2 ECHR: ECtHR, *Dodov v Bulgarie* App n. 59548/00 [17 January 2008] paras 80 ff.; through arts 6 and 14 ECHR and art. 1 1<sup>st</sup> additional Protocol: ECtHR *Koua Poirrez v France* App n. 40892/98 [30 September 2003]; through art. 3 ECHR: ECtHR *Larioshina v Russia* App n. 56869/00 [23 April 2002]).

<sup>42</sup> C Mclachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ cit. 314-315.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Demir and Baykara* cit. para. 72.

<sup>47</sup> C Mclachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ cit. 294.

<sup>48</sup> *Demir and Baykara* cit. paras 65–86.

<sup>49</sup> ECtHR *Bosphorus* App n. 45036/98 [30 June 2005] para. 165; R Lawson, ‘Protecting and Promoting Fundamental Rights in the “European Legal Space”: The Role of the European Court of Human Rights’ in O

establishment of a (rebuttable) presumption of conformity to the ECHR.<sup>50</sup> From this perspective, the dual system of human rights seems consistent. However, the situation is different on the side of the ESC. Indeed, the ECSR has made it clear that no such presumption of conformity can be afforded to EU law when it comes to the respect of the ESC.<sup>51</sup>

Secondly, the ECSR stated that “when it has to interpret the Charter, it does so on the basis of the 1969 Vienna Convention on the Law of Treaties”, with an explicit reference to art. 31(3).<sup>52</sup> Hence, the principle of systemic integration is applicable to the interpretation of the ESC. Accordingly, the ECSR draws inspiration from the body of decisions of concerning social human rights delivered by other supervisory bodies.<sup>53</sup> On this basis it is worth considering whether this includes EU law, notably the Charter of Fundamental Rights of the European Union (CFREU or EU Charter hereafter), and the case law of the CJEU. The answer to such a question is that, while the ECSR does not refer to EU Charter in its decisions, it does mention it among relevant provisions.<sup>54</sup> Therefore, the CFREU should be considered among the documents which can be taken into account for the interpretation of ESC under the principle of systemic integration.

Thirdly, this principle might be applicable, to some extent, to the interpretation of the EU Charter. The main obstacle along this path is the exclusive competence of the CJEU when it comes to the interpretation of EU treaties.<sup>55</sup> In *Costa/ENEL*, the CJEU argued that “by contrast with ordinary international treaties, the EEC treaty has created its own legal system”.<sup>56</sup> In other words, the CJEU considers EU treaties to be fundamentally different

De Schutter and V Moreno Lax (eds), *Human Rights in the Web of Governance: Towards a Learning-Based Fundamental Rights Policy for the European Union* (Bruylant 2010) 82–84.

<sup>50</sup> V Constantinesco, ‘C’est comme si c’était fait? Observations à propos de l’arrêt de la cour européenne des droits de l’homme, Grande Chambre, Bosphorus Airlines du 30 juin 2005’ (2006) Cahiers de Droit Européen 363.

<sup>51</sup> *Confédération Générale du Travail (CGT) v France* cit. para. 35: “the Committee considers that neither the situation of social rights in the European Union legal order nor the process of elaboration of secondary legislation would justify a similar presumption[of conformity] – even rebuttable – of conformity of legal texts of the European Union with the European Social Charter”; *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* cit. para. 74: “the Committee considers that neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter”.

<sup>52</sup> ECSR decision of 8 September 2004 complaint n. 14/2003 *International Federation of Human Rights Leagues (FIDH) v France* para. 26. See also, K Lörcher, ‘Interpretation’ in N Bruun and others (eds), *The European Social Charter and the Employment Relation* (Hart Publishing 2017) 52.

<sup>53</sup> O De Schutter, ‘The Two Lives of the European Social Charter’ cit. 32-33.

<sup>54</sup> ECSR decision of 9 September 2014 complaint n. 88/2012 *Finnish Society of Social Rights v Finland* paras 22-25.

<sup>55</sup> Case C-26/62 *Van Gend and Loos v Administratie der Belastingen* ECLI:EU:C:1963:1; JHH Weiler, ‘Rewriting Van Gend & Loos: Towards a Normative Theory of ECJ Hermeneutics’ in O Wiklund (ed.), *Judicial Discretion in European Perspective* (Norstedts Juridik 2003) 150.

<sup>56</sup> Case C-6/64 *Costa v E.N.E.L* ECLI:EU:C:1964:66.

from other international treaties. Nonetheless, Olivier de Schutter considers that the principle of autonomy does not preclude external control.<sup>57</sup> According to Olivier Dörr, the general rule of interpretation applies to the European Union with some modifications such as the principle of *effet utile* and the constitutional principle of autonomous interpretations.<sup>58</sup> Others propose to use the general rule of interpretation as a “methodological guidance”, which would preclude its strict application.<sup>59</sup> Moreover, the principle of systemic interpretation, “can in principle be applied to all treaties outside the scope of the [Vienna] Convention”.<sup>60</sup> Henceforth, the principle of systemic integration could be applicable to the interpretation of EU Charter, and notably, for what matters here, lead to its interpretation in light of the ESC.

## II.2. SEEKING A CONSISTENT INTERPRETATION OF THE RIGHT TO SOCIAL SECURITY

The objective pursued by the principle of systemic integration is to maintain and guarantee a systemic coherence of the international legal order,<sup>61</sup> thus avoiding conflicts of interpretation between various international provisions. As Rachovitsa puts it, “[s]ystemic integration is being presented not only as a means of avoiding dissonant interpretations and/or judgments, but also as a remedy for the ‘piecemeal’ judicial functioning of international courts”.<sup>62</sup>

Such a principle has the potential of increasing the coherence in the interpretation of fundamental social right between the legal orders of the EU and of the Council of Europe. Indeed, a commitment to systemic integration might have prevented contradictory outcomes, such as in the context of the *Laval* cases.<sup>63</sup> Even if they do not concern the right to social security, these cases are the perfect illustration of the real danger of dissonant interpretations between the two European legal orders. In the context of this *Article*, it is worth considering whether the principle of systemic integration could lead to strengthening the protection of the right to social security by ensuring its coherent interpretation in the two legal orders at stake, the EU and the ESC.

The principle of systematic interpretation has three main aims: supporting the activity of interpretation, filling gaps, and preventing and resolving conflicts of obligations.<sup>64</sup>

<sup>57</sup> O De Schutter, ‘L’Europe des droits de l’homme: Un concerto à plusieurs mains’ in E Bribosia, L Scheeck and A Ubeda de Torres (eds), *L’Europe des cours: Loyautés et résistances* (Bruylant 2010) 272.

<sup>58</sup> O Dörr, ‘Article 31’ cit. 576.

<sup>59</sup> F Dorsemont, K Lörcher and M Schmitt, ‘On the Duty to Implement European Framework Agreements: Lessons to Be Learned from the Hairdressers Case’ (2019) ILJ 571. In this paper, authors refer to the VCLT but without addressing the issue of its application to EU law interpretation.

<sup>60</sup> O Dörr, ‘Article 31’ cit. 563.

<sup>61</sup> P Merkouris, ‘The Principle of Systemic Integration’ cit.

<sup>62</sup> A Rachovitsa, ‘The Principle of Systemic Integration in Human Rights Law’ cit. 559.

<sup>63</sup> *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* cit.

<sup>64</sup> RK Gardiner, *Treaty Interpretation* cit. 328, 331.

Considering how the right to social security seems to benefit from a stronger and more detailed protection under the ESC, interpreting art. 34 CFREU in light of art. 12 ESC (and the relevant decisions of the ESCR) might provide a more solid foundation for the development and protection of the right to social security in the European space. It is important to stress that the outcome of such an approach would be limited to the use of art. 12 ESC to assist the interpretation of art. 34 CFREU.<sup>65</sup>

### III. THE THEORY OF THE “INTEGRATED APPROACH” AND THE STRENGTHENING OF THE PROTECTION OF SOCIAL RIGHTS

Following this short analysis of the uncertainties and limitations surrounding the application of art. 31(3) VCLT to the interpretation of social human rights in the context of the EU legal order, I will now turn to a different option, notably the development of an “integrated approach” theory.

#### III.1. DEVELOPING THE THEORY OF AN INTEGRATED APPROACH

The idea of an integrated approach has been developed by legal theorists and scholars.<sup>66</sup> This approach involves taking into account one or more provisions from other legal orders for “a comprehensive approach to the sources of human rights law”.<sup>67</sup> Some authors have specifically called the practice of the ECtHR and the ECSR an integrated approach “founded upon the ideas of cross-fertilization between and convergence among different treaties”.<sup>68</sup> Others have claimed that “a common and integrated system of human rights screening of the policies undertaken both by the Union and by the Member States will, indeed, provide a way to relate policy efforts with outcome and enhance the transparency of the results of policies”.<sup>69</sup>

<sup>65</sup> ME Villiger, ‘The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crudible” Intended by the International Law Commission’ in E Cannizzaro, MH Arsanjani and G Gaja (eds), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 111.

<sup>66</sup> M Baumgärtel, D Staes and FJ Mena Parras, ‘Hierarchy, Coordination, or Conflict? Global Law Theories and the Question of Human Rights Integration’ (2014) *Journal Européen des Droits de l’homme / European Journal of Human Rights* 326; E Brems, ‘Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration’ (2014) *Journal Européen des Droits de l’homme / European Journal of Human Rights* 451-458; D Dumont, ‘Le “droit à la sécurité sociale” consacré par l’article 23 de la Constitution: quelle signification, quelle justiciabilité?’ in D Dumont (ed.), *Questions transversales en matière de sécurité sociale* (Larcier 2017) 15.

<sup>67</sup> E Brems, ‘Should Pluriform Human Rights Become One?’ cit. 452.

<sup>68</sup> A Rachovitsa, ‘The Principle of Systemic Integration in Human Rights Law’ cit. 566. Also, V Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2013) *HRLRev* 529.

<sup>69</sup> V Wagner and M Nowak, ‘Monitoring the Protection of Human Rights in the European Union: An Evaluation of Mechanisms and Tools’ in O De Schutter and V Moreno Lax (eds), *Human Rights in the Web of Governance* cit. 204.

Following such an approach, Courts and other (quasi-judicial or systemic) supervisory bodies should take into account other instruments and their interpretation by the relevant supervisory bodies in the interpretation of provisions from their own legal order. Hence, the concept of “integration” entails the reference to documents stemming from other legal orders, in order to use the rights recognised by these legal orders for the interpretation of similar rights protected by the supervisory body’s own order. This theory is grounded on human rights instruments and the practices of their supervisory bodies. Indeed, “the development of this common ground involves, among other things, adoption by treaty bodies of relatively similar approaches to the VCLT provisions relating to interpretation”.<sup>70</sup> As such, it appears that the integrated approach cannot be traced back to a single legal basis, such as in the case of art. 31(3)(c) of the VCLT for the principle of systemic integration. Instead, an integrated approach can be identified by looking at the instrument to be interpreted and/or at the instrument(s) which provide the control mechanism(s) of a given instrument and/or to the practice of the supervisory bodies of a given instrument.

Addressing the foundation of this approach, a distinction must be introduced between a *formal integrated approach* (provided by the instrument organizing the control) and a *material integrated approach* (resulting from the practices of supervisory bodies). A typical case of *formal integrated approach* can be found in the supervision of fundamental rights by the Committee on Economic, Social and Cultural Rights (CESCR). Art. 8(3) of the protocol organizing communication procedures provides for consultation of any relevant documents during the procedure.<sup>71</sup> This procedural provision opens for the examination of communication to use of external sources. Because of this openness, I analyse it as a formal ground for an integrated approach. Conversely, a supervisory body might adopt a *material integrated approach* even though this is not specifically mandated by the relevant treaty. It goes without saying that this is not an absolute dichotomy. There might be grey areas where the instrument provides for a formal integrated approach and the supervisory body applies a material integrated approach without making any reference to the relevant provisions. That being said, one can identify the foundation of a *material integrated approach* in the insight proposed by Malgosia Fitzmaurice, stating that “a

<sup>70</sup> M Fitzmaurice, ‘Interpretation of Human Rights Treaties’ cit. 753-754 (on the development on the common ground in human rights treaties interpretation and its relations with VCLT).

<sup>71</sup> General Assembly, resolution 8/2, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 18 June 2008 A/RES/63/117, art. 8(3). See also, P Naskou-Perraki, ‘The International Covenant on Economic, Social and Cultural Rights and the Monitoring of its Enforcement’ in N Aliprantis and I Papageorgiou (eds), *Social Rights: Challenges at European, Regional and International Level* (Bruylant 2010) 209; Ph Texier, ‘Le comité des droits économiques sociaux et culturels: vers un véritable indivisibilité des droits de l’homme?’ in D Roman (ed.), *La justiciabilité des droits sociaux: vecteurs et résistances; actes du colloque tenu au Collège de France, Paris, 25 et 26 mai 2011* (Pedone 2012) 185. For an illustration of the CESCR approach see CESCR Decision 7 March 2019 Communication 022/2017 *S.C. and G.P. v Italy*; CESCR Decision of 11 October 2019 Communication 037/2018 *Maribel Viviana López Albán v Spain*; CESCR Decision of 5 March 2020. Communication 052/2018 *Rosario Gómez-Limón Pardo v Spain*.

potent basis for widening the ambit of interpretation”, and concluding that human rights bodies were moving “towards a broadly similar methodology in interpreting human rights treaties”.<sup>72</sup>

### III.2. IDENTIFYING AN INTEGRATED APPROACH FOR THE INTERPRETATION OF THE ESC AND THE CFREU

An integrated approach, whether *formal* or *material*, can be identified in rulings and documents from supervisory bodies from EU and Council of Europe.

Firstly, within the Council of Europe legal order, Article 53 ECHR may be understood as the foundation of the formal integrated approach. Indeed, by providing that “nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedom which may be ensured under the law of any High Contracting Party or any other agreement to which it is a party”, this provision requires that the Court take into account instruments from other legal order in the interpretation of the rights covered by the Convention.<sup>73</sup> The ECtHR’s integrated approach is confirmed by its case law.<sup>74</sup>

Secondly, the ECSR has a material integrated approach concerning the supervision of the ESC.<sup>75</sup> Indeed, the Committee refers to external instruments when it assesses the conformity to the Charter, including the CFREU.<sup>76</sup> An integrated approach is also adopted during periodical monitoring, as concluding reports contain references to EU law or to the International Covenant on economic, social and cultural rights.<sup>77</sup>

Thirdly, a formal integrated approach can also be identified when it comes to the interpretation of CFREU. Notably, art. 53 CFREU provides that: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all

<sup>72</sup> M Fitzmaurice, ‘Interpretation of Human Rights Treaties’ cit. 757, 769.

<sup>73</sup> In that sense: L Clements and A Simmons, ‘European Court of Human Rights’ in M Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 411-412.

<sup>74</sup> See e.g. the ECtHR decision in *Streletz, Kessler and Krenz v Germany* App n. 34044/96, 35532/97, 44801/98 [22 March 2001]; ECtHR *Lopes de Sousa Fernandes v Portugal* App n. 56080/13 [19 December 2017].

<sup>75</sup> *Finnish Society of Social Rights v Finland* cit.; ECSR decision of 24 January 2018 complaint n. 113/2014 *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v Italia*. See also: U Khaliq and R Churchill, ‘The European Committee of Social Rights’ in M Langford (ed.), *Social Rights Jurisprudence* cit. 433-434.

<sup>76</sup> In *Finnish Society of Social Rights v Finland* cit. art. 34 CFREU was mentioned among relevant provision.

<sup>77</sup> For an illustration, see ECSR, European social charter, conclusions 2017 of January 2018, p. 267, 271, 401, 875, 905, 1164; see also: CEACR, Report of the Committee of Experts on the Application of Conventions and Recommendations (arts 19, 22, 23 and 35 of the Constitution) of 13 February 2020 ILC.109/III(A), p. 506-508 (Spain) p. 543 (Greece).

the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

The abovementioned Article should be read in combination with the preamble of the EU Charter: "this Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights".

This has been interpreted as a basis for the interpretation of the Charter's provisions in light of other instruments.<sup>78</sup> Nevertheless, there is one major obstacle to that approach, since instruments covered by this provision are only those to which all Member States are parties. This brings up questions about the relation of art. 53 with the ESC in the same way as the application of art. 31(3)(c) VCLT which I presented before.<sup>79</sup> According to Klaus Lörcher, the ESC (and revised charter) and other international law instrument (and also their interpretation by supervisory bodies) "have to be taken into account" for the interpretation of CFREU.<sup>80</sup> Concerning the ESC (and RESC), his main argument is that the CFREU refers several times to (R)ESC. However, these references are not found in art. 53 itself, nor in CJEU rulings. Such an argument does not fully address one of the obstacles to the application of the principle of systemic integration, so that the formal integrated approach appears severely hindered. Therefore, one should consider whether a material approach might be better suited to the interpretation of the CFREU.

A material integrated approach is implemented in the practice and case law of the CJEU<sup>81</sup> and of the European Semester regarding the supervision of social rights. Concerning social human rights, CJEU's decisions include references to instruments from other legal systems.<sup>82</sup> In this regard, cross-systemic references are made for interpreting EU provisions.<sup>83</sup> However, for what it matters here, this approach cannot be found in decisions concerning the interpretation of art. 34 of the EU Charter, which protects the right

<sup>78</sup> Ph Alston, 'The Contribution of the EU Fundamental Rights Agency at the Realization of Economic and Social Rights' in Ph Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing 2005) 171-172; F Dorsemont, K Lörcher and M Schmitt, 'On the Duty to Implement European Framework Agreements' cit. 590-591; K Lörcher, 'Interpretation and Minimum Level of Protection' in F Dorsemont and others (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) 154-156.

<sup>79</sup> O De Schutter, 'L'adhésion de l'Union Européenne à la Charte Sociale Européenne' cit. 42.

<sup>80</sup> K Lörcher, 'Interpretation and Minimum Level of Protection' cit. 142 and 155-157.

<sup>81</sup> Concerning references by CJEU to ESC as source of interpretation see: O De Schutter, 'The Accession of the European Union to the European Social Charter: A Fresh Start' (2019) *Journal Européen des Droits de l'homme* 165-167

<sup>82</sup> On maternity protection, case C-5/12 *Marc Betriu Montull v INSS* ECLI:EU:C:2013:571 para. 3; on paid annual leave, case C-684/16 *Max-Planck* ECLI:EU:C:2018:874 paras 52 and 70; on fair remuneration cases C-395/08 and C-396/08 *Bruno and Others* ECLI:EU:C:2010:329 para. 31; on old age pension case C-465/14 *Wieland and Rothwangl* ECLI:EU:C:2016:820 para. 40.

<sup>83</sup> See e.g. *Bruno and Others* cit. para. 31.



to social security. In this sense, the CJEU does not appear to use the integrated approach in a systematic way.

One can also take into account the role of the European Semester, in light of the possible role of its tools in the monitoring of situations covered by (social) human rights. The European Semester is a four-phases process involving the European Parliament, the European Council, the Council and the European Commission. It starts with the Commission's Annual Sustainable Growth Strategy and ends with the national draft budgetary plans. At the midway point, the progress made by States is evaluated and recommendations are formulated to each of them. The Semester also represents the instrument to implement the principles included in the European Pillar of Social Rights (EPSR). Due to its periodical nature and to the existence of social indicators, introduced with the EPSR, which refer to situations covered by (social) human rights, I conclude that the European Semester can be analysed as a potential monitoring mechanism for human rights. In this context, it is possible to identify an integrated approach by looking at the references to Sustainable Development Objectives,<sup>84</sup> and occasional allusions to other systems' instruments throughout the process of evaluating national situations.<sup>85</sup> Hence, the integrated approach shall be considered as present in European Semester documents, although to a limited extent.

### III.3. THE CONTRIBUTION OF AN INTEGRATED APPROACH TO THE PROTECTION OF THE RIGHT TO SOCIAL SECURITY WITHIN EU

#### *a) The double effect of the integrated approach.*

In recent times, gaps and insufficiencies of access to social security and of systems of social security have been painfully highlighted by the Covid-19 crisis<sup>86</sup>. These shortcomings lead to a potential infringement of art. 34 CFREU, which protects the "entitlement to social benefits". Therefore, it is appropriate to look for a better protection of this right within EU.

Both the CJEU and the European Semester offer potential pathways to ensure the effective protection of this right. In this context, and in light of the previous analysis, an integrated approach could represent a powerful tool to increase the visibility of the right to social security and the need to protect it. It is important to note that the absence of CJEU case law developing an integrated approach for the interpretation of art. 34 CFREU does not preclude an evolution in this sense, considering how the Court followed such an approach in the

<sup>84</sup> Communication COM/2020/575 final from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 19 September 2020 on Annual Sustainable Growth Strategy 2021, p. 3; Communication COM/2019/650 final from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 17 December 2019 on Annual Sustainable Growth Strategy 2020, p. 1-17.

<sup>85</sup> Country Report France 2020 SWD(2020) 509 final cit.

<sup>86</sup> S Spasova and others, *Non-Standard Workers and the Self-Employed in the EU: Social Protection during the Covid-19 Pandemic* (ETUI Report 2021) 43-45.

context of other social rights.<sup>87</sup> Furthermore, explanation on art. 34 expressly refers to the ESC<sup>88</sup>. Hence, the ESC is central for the interpretation of the ECFR and particularly art. 34. In its turn, the monitoring process which takes place under the European Semester opens a different path for the integration of instruments from other legal systems. The integration of social consideration in the European Semester, visible in the proclamation of the European Pillar of Social Rights, might ultimately lead to taking into account the right to social security in the monitoring of Member States' social policies. This could happen through the use of indicators and/or recommendations addressing social security.<sup>89</sup>

That being said, in advocating for the development of an integrated approach one should not be blind to its potential shortcomings. In this sense, the main criticism regarding this approach pertains to the difficulty for supervisory bodies to fully appreciate the specific context of instruments adopted in legal orders other than the one in which they operate.<sup>90</sup> This could be addressed with a clear and systematic analysis of each legal order (or human rights system) and through better cooperation between human rights institutions.

Nonetheless, the previous analysis has hopefully shown how an integrated approach could provide a tool of interpretation which may strengthen the awareness and protection of the (fundamental) right to social security and, more broadly, of social human rights. This is, to some extent, observable in certain Opinions by some of the advocate generals (AGs) to the CJEU.<sup>91</sup> In this context, the AGs refer to European social charters when dealing with fundamental social rights. These references, which are not included on the basis of the VCLT, demonstrate the interpretative potential of the integrated approach.

Moreover, this approach would allow the EU system to take into account, in a timely fashion, evolutions happening in other systems, and, as such, contribute to the prevention of conflicts of interpretation between different human rights systems. The European Semester's openness to the integrated approach is indicative of the permeability of EU law to other international legal orders. Lastly, mutual influences exist between legal orders (as well as between their specific institutions), particularly between the EU and the Council of Europe.<sup>92</sup> All of this results in an increase in cross-references and, therefore,

<sup>87</sup> On maternity protection, *Marc Betriu Montull v INSS* cit. para. 3; on paid annual leave *Max-Planck* cit. paras 52 and 70; on fair remuneration, see *Bruno and Others* para. 31; *Wieland and Rothwangl* cit. para. 40.

<sup>88</sup> Explanation on art. 34, Explications relating to the Charter of fundamental rights 2007/C 303/02 cit.

<sup>89</sup> Communication COM/2021/740 final from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 24 November 2021 on Annual Sustainable Growth Survey 2022, p. 6, 11.

<sup>90</sup> A Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' cit. 566.

<sup>91</sup> E.g. case C-742/19 *Ministrstvo za obrambo* ECLI:EU:C:2021:77, opinion AG Saugmandsgaard, para. 62 fn 63; case C-709/20 *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:515, opinion AG de la Tour, para. 103 fn 89.

<sup>92</sup> O De Schutter, 'Le rôle de la Charte sociale européenne dans le développement du droit de l'Union européenne' in O De Schutter (ed.), *The European Social Charter* cit. 135; O De Schutter, 'L'Europe des Droits

increasing permeability of the EU system to other human rights systems. Ultimately, the right to social security may be presented as a *network right*, meaning that the right and its protection is linked to various legal orders, each connected to each other. In a similar sense, Professor Olivier de Schutter has argued that a better consideration of the ESC within the EU legal order would lead to greater protection of social human rights.<sup>93</sup> To that regard, he suggested “the systematisation of references to ESC in the development of EU law and policies”.<sup>94</sup>

*b) Reconciling with other theories.*

The risk of conflicts of interpretation between rights under the ESC and rights under the EU Charter has been highlighted in the introduction of this paper. It goes without saying that the development of a systemic approach is not the only approach to address this risk. Other theories which fall outside the scope of the present articles might be considered as potential alternatives. Without going into further details, these deserve to be shortly mentioned for completeness. Notably, Olivier de Schutter has proposed four solutions to the conflict of interpretation.<sup>95</sup> The first is close to the theory of integrated approach: he suggests considering the “ESC as a source of EU law” but without indicating a theoretical or practical means to do so. The fourth solution goes one step further and proposes the EU’s accession to the ESC.<sup>96</sup> The two other suggested solutions are *i)* “improving impact assessments” through the actions of EU institutions, *ii)* “defining a common approach” in response to the difficulties related to the “à la carte” acceptance of various rights in Member States. The development of an integrated approach could easily complement these solutions.

A further alternative is represented by the theory of fragmentation which react to the diversification of international law. It seems favourable to cross-systemic reference. Indeed, it could produce better coherence between self-contained legal regimes and foster the use of the various sources of law.<sup>97</sup> In that sense, it could provide an alternative pathway to achieve the development we are proposing in this paper. Nonetheless, it diverges from the integrated approach and from the purpose of this *Article*. The theory of fragmentation seeks harmonization, and some of its proponents have argued that “the general competence to

de l’Homme’ cit. 276-277; S Hennion and others, *Droit social européen et international* (Themis 2017 third edition) 68; V Wagner and M Nowak, ‘Monitoring the Protection of Human Rights in the European Union’ cit. 174-175.

<sup>93</sup> O De Schutter, ‘Le rôle de la Charte sociale européenne dans le développement du droit de l’Union européenne’ cit. 144-145.

<sup>94</sup> *Ibid.* 146.

<sup>95</sup> O De Schutter ‘The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights’ cit. 40-49.

<sup>96</sup> See also, O De Schutter, ‘L’adhésion de l’Union européenne à la Charte sociale européenne’ cit. and O De Schutter, ‘The Accession of the European Union to the European Social Charter’ cit.

<sup>97</sup> AJ Colangelo, ‘A Systems Theory of Fragmentation and Harmonization’ cit. 7, 10, 33-56.

determine issues of customary international law or to interpret treaties should be vested only, at least principally, to the ICJ".<sup>98</sup> In that sense, the theory seems mainly applicable to ICJ practice. Whereas the theory of integrated approach, as stated, seeks, mainly, the strengthening of rights and could be applied by any supervisory body.

A last theory is also close from the content of the integrated approach theory. According to the theory of "dialogic approach", "foreign jurisprudence should be treated as a mere source of inspiration" and should "be seen as establishing a rebuttable presumption of interpretation" shaping a "human right *jus commune*".<sup>99</sup> Once again, the theory seeks "the integrity of the human right system"<sup>100</sup> not the strengthening of the protection of human and fundamental rights.

#### IV. CONCLUDING REMARKS

The right to social security is a fundamental right recognized in the ESC (art. 12) and the CFREU (art. 34). Despite its recognition, uncertainties remain about its protection and its justiciability within the EU legal order. Furthermore, gaps in access to social security and in social security systems have been highlighted by the Covid crisis. This points to the necessity for a better protection of this right. Furthermore, the duality of human rights system in Europe entails the risk of a lack of coherence. Hence, guaranteeing the consistent interpretation and the effective protection of the right to social security are the challenges that this paper aimed to address.

A first partial response to these challenges is the principle of systemic integration. It refers to the use of the content from other rules in order to interpret provisions that are applicable to the conflict at stake. This principle concerns the "relevant rules of international law applicable in the relation between the parties" (art. 31(3)(c) VCLT). While the requirement of "applicability in relation between the parties" is an obstacle to this response, the main drawback of this solution is that it would only affect the interpretation of the rights at stake. Therefore, the potential to strengthen the awareness and effective protection of the right in question seems to be weak.

A second response which I analysed in this *Article* is the theory of integrated approach. A *material integrated approach* is visible in the decisions of the ECSR in which the European committee of social rights refers to the CFREU when interpreting ESC. The same can be said for the CJEU case law and European Semester documents which refer to documents from other legal orders. Thus, an integrated approach appears as a more effective way to influence the interpretation of social human rights in the EU legal order.

<sup>98</sup> S Cassese, *When Legal Orders Collide: The Role of Courts* (Global Law 2010) 19-20; AJ Colangelo, 'A Systems Theory of Fragmentation and Harmonization' cit. 14.

<sup>99</sup> O De Schutter, 'The Formation of a Common Law of Human Rights' in E Bribosia, I Rorive and AM Corrêa (eds), *Human Rights Tectonics: Global Dynamics on Integration and Fragmentation* (Intersentia 2018) 35-39.

<sup>100</sup> *Ibid.* 35.

Importantly the integrated approach does not aim to achieve the direct applicability of external instruments in the EU legal order, nor to bring about a uniform interpretation of the right to social security. Instead, the aim of this principle is to improve systemic coherence. However, its application could have broader effects than the principle of systemic integration, by strengthening the protection of social human rights.

At the end of this analysis, the answer to the question “Could the integration of the European Social Charter into the interpretation of the EU Charter of Fundamental Rights reinforce the protection of the right to social security?” can only be partially affirmative. As it has been highlighted before, the integration of ESC into the interpretation of the CFREU is already possible through the principle of systemic integration or the integrated approach. However, the fact that this would only stem from the willingness of the CJEU (or of the European Commission in the context of the European semester) means that moving forward with the protection of fundamental social right would request a change in political view of the EU’s institutions. Secondly, it appears that an integrated approach would have a greater potential to strengthen the right to social security. In conclusion, the integration of the ESC into the interpretation of CFREU by means of the integrated approach might strengthen the right to social security.