The Right to Social Security: Towards a New Dawn!

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List of abbreviations

AMWD	Adequate Minimum Wage Directive
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union (also ECJ)
CoE	Council of Europe
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice (also CJEU)
ECSR	European Committee of Social Rights
ECSS	European Code of Social Security
EPSR	European pilar of Social Rights
ESC	European Social Charter
ICESCR	International Convenant on Economic, Social and Cultural Rights
SNCB	Special non-contributory benefits
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights

Preface

This edited volume is an initiative following upon a three-day conference entitled 'The Right to Social Security: Towards a New Dawn!', held in Maastricht from 24 to 27 September 2024. The conference was co-hosted by the Department of Public Law of Maastricht University and the Province of Limburg, with the support of Instituut GAK, the European Institute for Social Security (EISS) and the EU MoveS Network for the Freedom of Movement of Workers and the Coordination of Social Security Systems. This volume presents a selection of the presentations and contributions discussed at the conference. Some address specific aspects of the right to social security itself, while others examine the relevance of broader human rights frameworks for the field of social security. Each of the chapters in this volume can be read as a standalone article. They each identify a central theme and research question, which is developed in the main body and revisited in the conclusion. As conveners and editors, we express our gratitude to all those who contributed to the discussions at the conference and/or this volume.

Suzanne Jongste, Saskia Klosse, Saskia Montebovi, Anne Pieter van der Mei and Gijsbert Vonk

The right to social security: towards a new dawn

A short editorial introduction

Anne Pieter van der Mei and Gijsbert Vonk

1. Introduction

This edited volume is dedicated to the fundamental right to social security. Long recognised as a cornerstone of the welfare state and an indispensable element of human dignity, this right is enshrined in most national constitutions as well as in international and European human rights instruments. At a time when welfare systems face pressures from demographic change, fiscal constraints, digitalisation, and geopolitical uncertainty, the question of how to secure this right for present and future generations acquires renewed urgency. Yet its meaning, scope, and enforceability remain deeply contested across jurisdictions.

What guarantees does the right to social security actually protect? Can the right to social security be invoked in courts in the same manner as other human rights? How does it interact with other rights applicable to social protection?

This volume brings together twelve contributions that approach the right to social security from diverse perspectives — constitutional, comparative, European, and international. Together, the contributions chart both the normative foundations and the practical challenges of the right, offering fresh insights into its doctrinal development, institutional enforcement, and potential for renewal.

2. Structure of the volume

Some chapters focus directly on the right to social security, while others examine the relevance of broader human rights frameworks to social protection. The contributions are grouped into four thematic sections.

The first three chapters analyse the right at the national level. Mark Steijns (Chapter 2) compares the interpretation of the right in the Netherlands with international standards. Max Gelissen (Chapter 3) contrasts the German Constitutional Court's approach to

the 'Existenzminimum' with the UN Committee on Economic, Social and Cultural Rights' interpretation of the 'absolute minimum'. Eleni de Becker (Chapter 4) presents a comparative analysis of Belgium, Germany, and the Netherlands.

The next four contributions focus on the European dimension. Grega Strban (Chapter 5) discusses the European Social Charter and the work of the European Committee of Social Rights. Anne Pieter van der Mei (Chapter 6) explores the added value of the EU Charter of Fundamental Rights for the coordination of social benefit systems. Luka Mišič (Chapter 7) critically analyses CJEU case law on mobile EU citizens' right to social assistance, through the lens of solidarity, chance, and cosmopolitan justice. Rob Cornelissen (Chapter 8) reflects on the functioning of the preliminary ruling procedure in relation to free movement and social security coordination.

Two chapters address specific legal and policy issues. Ane Aranguiz and Sarah Marchal (Chapter 9) explore definitions of the social minimum and their treatment in law and policy. Anne Spijkstra (Chapter 10) examines how predictive algorithms in welfare sanctions affect beneficiaries' procedural rights, particularly access to information as part of the principle of equality of arms.

The final two chapters provide overarching analyses. Gijsbert Vonk (Chapter 11) argues that the interpretation of the right to social security should emphasise qualitative guarantees that shield individuals from excessive bureaucracy, rather than focusing solely on systems being "available, accessible and adequate." Danny Pieters (Chapter 12) reflects on the right to social security as a connotational imperative, warning against judicial overreach.

3. Synopsis of main findings

A central theme across the volume is the recognition of social security as a fundamental right, while also probing its limits and vulnerabilities.

At the national level, even neighbouring countries display stark contrasts. Belgium and Germany have developed rich constitutional doctrines, whereas in the Netherlands the right remains dormant — what Steijns terms a "state of denial." The German doctrine centres on the *Existenzminimum* as an individually enforceable right while Belgian courts focus on standstill requirements and procedural guarantees (De Becker). De Becker's comparative analysis demonstrates that meaningful judicial review is possible without undermining the legislature — a striking contrast to Dutch political discourse, which fears an undue shift of power to the judiciary.

At the supranational level, Strban shows how the European Social Charter and its complaints mechanism offer underused but important avenues for enforcement. Cornelissen highlights the CJEU's balancing act between market integration and social guarantees. Together, these contributions underscore the importance of multi-level governance in shaping social rights.

Mobility and solidarity feature prominently in van der Mei's and Mišič's chapters. Van der Mei explains how EU coordination rules address cross-border workers, while Mišič interrogates the broader ethical challenges of solidarity in the Union. While both authors highlight the fragility of cross-border protections in times of political strain, but express some doubts as to the added value of the right to social security in this respect. Van der Mei actually doubts whether the EU Charter of Fundamental Rights has to add much to the existitng framework of social security coordination beyond the possible affirmation of an absolute minimum standard of social protection to ensure human dignity for cross-border movers.

Aranguiz and Marchal make a strong case for embedding reference budgets and multidimensional poverty indicators into legal frameworks. By operationalising adequacy, such tools enhance both judicial and policy oversight, linking legal theory to empirical poverty research.

Digitalisation emerges as both a challenge and a risk. Spijkstra shows how automated decision-making may perpetuate bias, undermine due process, and erode trust. Vonk extends this to the wider notion of welfare state dystopia, in which digitalisation, repressive administration, and weak legal protection combine to generate large-scale scandals in Europe and beyond. He calls for reinterpreting the right to social security through qualitative guarantees – compensation, elevation, and participation – arguing that the judiciary must safeguard these standards.

Finally, Pieters urges caution. While constitutionalising social rights is valuable, their scope should be defined primarily through democratic processes rather than judicial activism. This tension — between legal enforceability and democratic legitimacy — runs through this entire volume.

4. Challenges and perspectives

Despite these tensions, the subtitle 'Towards a New Dawn' is chosen for a good reason. Several chapters demonstrate how legal imagination can revitalise the right: Germany's subsistence guarantees, Belgium's creative jurisprudence, and the European Social Charter's procedures offer models of innovation. Proposals such as reference budgets, adequacy concepts, and even employee participation mechanisms point to ways of strengthening inclusiveness and legitimacy.

Fiscal pressures, digitalisation, and political fragmentation are real threats, but they also underline the urgency of rethinking social security. Far from being a relic of the twentieth century, the right to social security emerges in this volume as a living framework — adaptable, resilient, and central to human dignity.

If the metaphor of a "new dawn" has weight, it is because this collection shows that through legal innovation, comparative learning, and civic engagement, the right to social security can continue to serve as a cornerstone of solidarity and democracy.

A state of denial: comparing the Netherlands' approach to the fundamental right of social security and social assistance with the current international and European social rights doctrine

*Mark Steijns**

Abstract: Human rights are indivisible. This means that all human rights are considered to be universal, interdependent and interrelated. Even after the separation of economic, social and cultural rights from civil and political rights, the United Nations consistently upheld the principle that all human rights should be treated equally. Denying the equal status of socio-economic rights in relation to civil rights can have adverse consequences for individuals. This is illustrated by the Netherlands, which focuses primarily on civil rights and relegates socio-economic rights to a secondary position, resulting in an asymmetrical protection of human rights and depriving socio-economic rights of their potential to protect individuals against repressive state policies. This article explores the different approaches to socio-economic human rights, focusing in particular on the right to social security. It argues that the Netherlands' approach to this right has deviated from the international and European human rights doctrine. This is because international and European human rights authorities have developed an approach to the human right to social security that is consistent with the concept of indivisibility, while the Netherlands has remained in a state of denial.

Keywords: Socio-economic human rights, the human right to social security, the International Covenant on Economic, Social and Cultural Rights, the European Social Charter

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1. Introduction

'All human rights are universal, indivisible and interdependent and interrelated'.[1]

At the 1993 World Conference on Human Rights, the UN adopted the Vienna Declaration and Programme of Action to strengthen human rights around the world. A number of constructive steps by means of reaching these goals were taken, such as the reaffirmation of the UN's commitment to the principles contained in the Universal Declaration of Human Rights (UDHR). The General Assembly also affirmed that all human rights contribute equally to universal stability and individual well-being.[2] This means that freedom, peace and security depend not only on political and civil human rights (hereafter: civil rights), but are also guaranteed by rights that are social, cultural or economic in nature (hereafter: socio-economic rights).[3]

These 'second generation' socio-economic rights are frequently perceived as being inferior to their civil counterparts, especially following the Cold War, which resulted in a formal distinction between the two categories.[4] Nevertheless, international human rights authorities have sought to develop an understanding of human rights that restores both categories to an equal standing. This trend has yet to be fully established in the Netherlands. In fact, the current understanding of socio-economic rights in the Netherlands is that they are inferior to their civil counterparts, intended solely as policy guidelines for governments and are not directly applicable.[5] This is especially evident in the national approach to the right to social security.[6]

The primary objective of this article is therefore to understand the differences between the Netherlands' approach to the right to social security, and the international and European doctrine on socio-economic rights. In this regard, first the national fundamental right of social security and social assistance as outlined in Article 20 of the Constitution of the Netherlands (section 2) will be analysed. The results of this analysis will then be compared with the international and European human rights to social security, as set out in Article 9 of the International Covenant on Economic, Social and Cultural Rights and Articles 12 and 13 of the European Social Charter (sections 3 and 4). Article 34 of the EU Charter of Fundamental Rights is not included in this

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1 United Nations, *UN Vienna Declaration and Programme of Action*, A/CONF.157/23, Vienna 12 July 1993, par. 5.

2 Ibid, par. 6.

3 This indivisibility of human rights can be traced back to Roosevelt, see F.D. Roosevelt, 'Annual Message to Congress' (1941), *Records of the United states Senate; SEN 77A-H1 Record Group 46*.

4 A. Kirkup and T. Evans, 'The Myth of Western Opposition to Economic, Social and Cultural Rights? A reply to Whelan and Donnely', 31 *Human Rights Quarterly* (2009) p. 221-238; I. Bantekas and L. Oette, *International Human Rights law and Practice* (Cambridge University Press, 2020), p. 414.

5 A.W. Heringa, *Sociale Grondrechten – hun plaats in de gereedschapskist van de rechter*, T.M.C Asser Instituut, 1989, p. 73; G.J. Vonk, 'Het grondrecht van de bestaanszekerheid: een Nederlands perspectief', 12 *TRA,* 2023, p. 9-13; M. Kullman, 'Een heroriëntatie op sociale grondrechten' 5 *TRA,* 2024, p. 1-2; W.L. Roozendaal, 'Een grondrechtelijke blik op bestaansonzekerheid in Nederland', 6/7 *TRA,* 2024, p. 10-16; *Kamerstukken II* 2021-22, 35 925 VII, No. 169, p. 8.

6 G.J. Vonk, 12 *TRA*, 2023, p. 9-13.

study, as it has only been developed to a limited extent and is therefore not comparable to the above provisions.[7]

In section 5, the two most predominant approaches to the right to social security will be discussed, followed by concluding remarks in section 6.

2. The (national) fundamental right of social security

The inclusion of the fundamental right of social security in the Constitution of the Netherlands was intended to provide a basis for the main principles of social policy, to prevent the regression or repeal of social legislation, and to establish the then-existing standards as the baseline for social protection.[8] As a result, the current Article 20 of the Constitution of the Netherlands consists of three categories: subsistence security (20(1)), social security (20(2)), and social assistance (20(3)).[9]

In this article, the term 'fundamental right' refers to rights that are contained within national constitutions, while the term 'human right' is reserved for international human rights provisions. This distinction is based on the premise that the latter are inherent to the human condition, irrespective of nationality.[10] It also separates the right 'of' social security from the right 'to' social security. That is because a right 'to' social security seems to imply that individuals have the capacity to enforce some form of social security or assistance through the Constitution, whereas the term right 'of' social security merely refers to a provision that addresses the subject of social security. The latter is applicable to the situation in the Netherlands, as Article 20 of the Constitution is not regarded as a subjective right to subsistence, social security or social assistance.[11] However, this does not alter the fact that this provision can still be considered a fundamental social right. That is because these rights can manifest

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7 J. Paju, 'The Charter and social security rights: Time to stand and deliver?', 24 *EJSS*, 2022, p. 21-39; F.J.L. Pennings and S.S.M. Peters, *Europees Arbeidsrecht*, Wolters Kluwer, 2021, p. 47.

8 *Kamerstukken II* 1975-76, 13873, No. 3, p. 1, 7 and 11.

9 In order to avoid any potential confusion, these three paragraphs will be grouped together under the overarching umbrella of 'the fundamental right of social security' for the purposes of this article.

10 I. Bantekas and L. Oette, *International Human Rights law and Practice*, p. 5.

11 A.W. Heringa, *Sociale Grondrechten – hun plaats in de gereedschapskist van de rechter*, p. 73; M. Arambulo, *De betekenis van economische, sociale en culturele rechten in de Nederlandse rechtsorde* Stichting NJCM-Boekerij, 1998, p. 14; C.W. Van der Pot, *Handboek van het Nederlandse Staatsrecht* Kluwer, 2006, p. 272-273; P.H. Kooijmans, *Internationaal publiekrecht*, Kluwer, 2008, No. 5.2; M. Chétbi, 'Rechterlijke toetsing aan een ieder verbindende internationale verdragsbepalingen', in T. Gerverdinck e.a., *Wetenschappelijk Bijdragen. Bundel ter gelegenheid van het 35-jarig bestaan van het wetenschappelijk bureau van de Hoge Raad der Nederlanden*, Boom Juridische Uitgevers, 2014; E. de Becker, *Het recht op sociale zekerheid in de Europese Unie* PhD Thesis, KU Leuven, 2016, p. 207-2010 and 280; P. van Sasse van Ysselt, 'Realisering van grondwettelijke sociale grondrechten; wetgever, ubi est?', 4 *Regelmaat*, 2016, p. 284; B. Barentsen, 'Het recht op bijstand en sociale zekerheid', in J. Gerards, *Grondrechten, de nationale, Europese en internationale dimensie*, Ars Aequi Libri, 2020, p. 429; Raad voor de Rechtspraak, Zienswijze van de Rechtspraak op rechterlijke constitutionele toetsing 2022, p. 3; S. Klosse and G.J. Vonk, *Hoofdzaken socialezekerheidsrecht*, Boom Juridisch, 2022, p. 26; G.J. Vonk, 12 *TRA,* 2023, p. 9-13.

in various forms, such as constitutional provisions that establish a social minimum and grant individuals an enforceable right to social protection, or as provisions that solely provide guidelines for the legislature and refer to infra-constitutional legislation regarding social security.[12]

2.1 The Constitution

The first paragraph of Article 20 reads '*It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth*.'[13] It is interesting to note that this provision does not address the subject of social security. Instead, it refers to a broader notion of subsistence security. According to the parliamentary history, the purpose of this paragraph is to ensure that no individual is deprived of general prosperity.[14] This suggests that the government is obligated to implement policies that prevent the erosion of its populations' livelihoods and to take measures to ensure that its welfare is maintained at a level consistent with the subsistence minimum.

The second paragraph – *'Rules concerning entitlement to social security shall be laid down by Act of Parliament'* – obliges the legislature to establish rules on the allocation of social security benefits. The reason behind the decision to refrain from listing specific benefits, such as those related to sickness, unemployment, and disability, is that the government feared that such a list might evolve into an arbitrary and a politically motivated programme.[15] The legislature's intention was to use the vagueness of the wording as an incentive for continuous improvement of the social security system.[16]

The third paragraph is distinct from the others in that the wording suggests that individuals have the capacity to invoke a subjective right to assistance: *'Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to aid from the authorities.'*[17] The Council of State, in its capacity as an advisory body to the legislature, has recognised that this provision is indeed formulated as a subjective right.[18] Nonetheless, the Council explained that Article 20(3) should be regarded solely as a directive to the government to regulate social assistance for all Dutch nationals residing in the Netherlands.[19]

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12 D. Pieters, *Social Security: An Introduction to the Basic Principles*, Kluwer Law International, 2006, p. 10.

13 This translation is obtained from the English edition of the Dutch Constitution, published in 2018 by the ministry of the Interior and Kingdom Relations, see government.nl/topics/constitution.

14 *Kamerstukken II* 1975-76, 13873, No. 1-4, p. 11 and 12; F. Vlemminx, *Het profiel van de sociale grondrechten* Tjeenk Willink, 1994, p. 20.

15 *Kamerstukken II* 1975-76, 13873, No. 1-4, p. 12.

16 Ibid.

17 G.J. Vonk, 'Het grondrecht van de bestaanszekerheid: een Nederlands perspectief', 12 *TRA*, 2023, p. 9-13.

18 *Kamerstukken II* 2001-02, 28331, No. A; *Kamerstukken II* 2004-05, 28331, No. 16.

19 Ibid.

2.2 The legislature

The parliamentary history of recent social security legislation demonstrates that the fundamental right of social security is primarily directed towards the government, obliging it to ensure the provision of adequate social protection.

The Sickness Benefits Act is exemplar in this context. The SBA regulates the distribution of financial benefits to employees who are unable to work due to illness. At the end of the 20th century, efforts were made to privatise a significant proportion of the social security system.[20] During the legislative process, the Council of State noted that the privatisation of sickness benefits would result in a fundamental change in national social security and should therefore be explicitly justified.[21] The Council emphasised the importance of social security as articulated in Article 20(2), and called upon the government to explain how the privatisation plans aspired to strike a balance between solidarity and the envisioned emphasis on the role of the individual in enhancing their chances of re-entering the labour market.[22] The government stated that, in principle, Article 20(2) demands regulation by Acts of Parliament, but that it was also possible to meet this requirement through private regulations, provided that there are no reasons for public-law arrangements.[23] In light of this, the government recognised that Article 20 called for the implementation of a social safety net within the context of the privatisation process.[24] This resulted in the partial continuation of the SBA and the establishment of a (public-law) legal framework designed to eliminate the negative effects of the (private) market on worker protection.[25] This would ensure that the privatized sickness benefits remained within the parameters of the fundamental right of social security.[26]

This example illustrates the (directive) nature of the fundamental right of social security in the Netherlands: it instructs the legislator to actively guide the national organisation of the social security system. The parliamentary history of legislation regarding unemployment benefits and social assistance emphasises this perspective, by demonstrating that this fundamental right is primarily perceived solely as a positive obligation on the government to act, create or regulate.[27] However, these examples also show that the perception of Article 20 as a government directive does not render it meaningless. In extreme situations, such as the complete privatisation of a social security system, the fundamental right of social security can function as an instrument to ensure the continued availability of social safety nets.

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20 G.J. Vonk, 'De publieke taak in het stelsel van sociale zekerheid', in J.W. Sap e.a., *De publieke taak* Kluwer, 2003, p. 165-184; G.J. Vonk, *Recht op sociale zekerheid, van identiteitscrisis naar hernieuwd zelfbewustzijn* SDU, 2008, p. 9.

21 *Kamerstukken II* 1995-96, 24439, No. B, p. 2.

22 *Kamerstukken II* 1995-96, 24439, No. 3, p. 2.

23 Ibid.

24 Ibid, last paragraph.

25 G.J. Vonk, 'De publieke taak in het stelsel van sociale zekerheid', p. 165-184.

26 Ibid.

27 For the Unemployment Act, see *Kamerstukken I* 1986-87, 19261, No. 25b, p. 1-2. Another example can be found in the legislative process of the predecessor of the current Participation Act on social assistance, see *Kamerstukken II* 2002-03, 28870, No. 3, p. 42; During the legislative process of the legislation on payment for disabled workers, the legislature did not refer to Article 20 of the Constitution, see *Kamerstukken II* 2004-05, 30034, No. 3.

2.3 The judiciary

The legislature's approach to the fundamental right of social security is also reflected in case law. Court rulings on the application of this fundamental right are limited. This is due to the fact that the Constitution of the Netherlands prohibits the judiciary from reviewing legislation for its compatibility with national fundamental rights. The consequence of this prohibition is that the courts are obliged to dismiss any appeals to the fundamental right of social security without first conducting an assessment to determine whether the contested legislation violates this right.[28]

However, this prohibition does not apply to decisions taken by lower administrative bodies. This means that courts are able to assess whether, for example, provincial or municipality social security regulations are in breach of the Constitution. However, rulings in which an appeal to the fundamental right of social security has been upheld are scarce. This can been attributed to the aforementioned notion that this fundamental right is primarily seen as an instruction to the government to ensure that social security systems are in place. For instance, in a case that was brought before the court in 1994, the appeal to Article 20 was rejected on the basis that this provision is explicitly (and solely) directed towards the government.[29] Consequently, the individual concerned was precluded from invoking Article 20 to oppose the reduction of their net social benefits. A more recent example is provided by a case from 2021, regarding the denial of a request for benefits under the SBA. In this case, the invocation of Article 20 was rejected on the grounds that this provision merely obliges the government to regulate social security claims through legislation, and there was no evidence of a breach of these regulations.[30]

International human rights to social security – such as Article 9 of the ICESCR and Articles 12 and 13 of the ESC – are also excluded from the scope of the aforementioned prohibition. However, the applicability of international human rights in the Netherlands depends on their ability to bind all persons (Articles 93 and 94 of the Constitution), meaning that individuals should be able to invoke them in court.[31] This is only the case if the provision is unconditional and sufficiently clear for the court to apply in an individual situation.[32] The relevant case law demonstrates that Article 9 ICESCR nor Articles 12 and 13 ESC are considered provisions that fall within this category, as they are generally formulated as social objectives rather than as rights on which citizens can rely.[33] As a result, appeals to these provisions by, for example, individuals that are at risk of falling below the social minimum income due to a reduction in financial aid or as a result of their

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28 CRvB 22 May 2024, ECLI:NL:CRVB:2024:1049, para. 4.4.3.

29 ABRvS 5 July 1994, ECLI:NL:RVS:1994:AJ8672.

30 Rb. Den Haag 27 December 2021, ECLI:NL:RBDHA:2021:15131; Other examples are ABRvS 29 June 2011, ECLI:NL:RVS:2011:BQ9680; ABRvS 2 March 2022, ECLI:NL:RVS:2022:643.

31 J.W.A. Fleuren, 'Commentaar op Article 93 Gw' in P.P.T. Bovend'Eert, *TandC Grondwet en Statuut*, Kluwer, online edition, updated until 1 March 2023.

32 HR 30 May 1986, ECLI:NL:PHR:1986:AC9402 (*NS, Spoorwegstaking*); HR 10 October 2014, ECLI:NL:2014:2928 (*Rookverbod*), m.nt. R.J.B. Schutgens.

33 For example, CRvB 18 June 2004, ECLI:NL:CRVB:2004:AP4680; CRvB 29 August 2014, ECLI:NL:CRVB:2014:2889; ABRvS 19 July 2023, ECLI:NL:RVS:2023:2794; CRvB 11 October 2007, ECLI:NL:CRVB:2007:BB5687.

undocumented stay in the Netherlands, will generally not be honoured.[34] However, this does not preclude individuals or organisations from pursuing these claims successfully before international or European semi-judicial institutions. For example, in the cases of *CEC v. the Netherlands* and *FAENTSA v. the Netherlands*, the European Committee of Social Rights (ECSR) ruled that, inter alia, Article 13 ESC obliges states to provide a minimum level of subsistence to everyone within its jurisdiction.[35]

This analysis demonstrates that constitutional restrictions and the imprecise wording of the relevant international provisions can have a detrimental effect on the ability of the judiciary to apply this right in practice. It also shows that the courts primarily perceive the fundamental right of social security as a directive to the government to establish a social security system. However, the following sections will demonstrate that this right could also consist of a second element: the individual safeguard function. This function acts as a gatekeeper, preventing the impairment of a minimum subsistence level to which every individual is entitled. Its recognition is connected to the concept of indivisibility and is largely accepted in other jurisdictions in relation to the right of social security.[36]

3. The (international) human right to social security

Deriving directly from the UDHR, the ICESCR can be considered the most prominent human rights treaty in the socio-economic realm. This section examines the historical development of the ICESCR and the human right to social security that is contained therein, followed by an analysis of the social security cases examined by the Committee on Economic, Social and Cultural Rights (CESCR) under the individual complaints procedure.

The term 'human right to social security' is used deliberately in this section. 'Human right', because the following analysis takes place in an international rather than a constitutional context. And 'to' social security, because the international perspective on socio-economic human rights promotes the idea that this right also includes an individual's right to guaranteed access to the essential means of subsistence (the individual safeguard function).

3.1 The UN Commission on Human Rights

The roots of the ICESCR can be traced back to the Cold War, when the differences between the capitalist West and the socialist East resulted in a human right treaty containing the civil rights (ICCPR) and a separate treaty containing the 'second generation' socio-economic rights (ICESCR).

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34 CRvB 22 December 2020, ECLI:NL:CRVB:2020:3405;

35 ECSR 1 July 2014, Collective Complaint No. 90/2013, para. 104-108 (*CEC v. the Netherlands*); ECSR 2 July 2014, Collective Complaint No. 86/2012, para. 184 (*FEANTSA v. the Netherlands*).

36 E. de Becker, *Het recht op sociale zekerheid in de Europese Unie,* p. 207-210 and 280.

According to Article 9 of the Covenant, the ratifying states recognise the right to social security and social insurance of all humans.[37] During the drafting process, it was decided that the text of the provision should be as general as possible, since a detailed description would be an obstacle to the progressive development of national social security systems and would be counterproductive to the objective of getting as many states as possible to ratify the Covenant.[38] Furthermore, a general formulation was preferred to a precise list of benefits, as national social security systems should be able to develop progressively without being constrained by specific social entitlements.[39]

Article 9 ICESCR was therefore only intended to encourage progress at the national level. However, the drafting of the 2008 Optional Protocol to the ICESCR, which established an individual complaints procedure, demonstrates that this approach has evolved since then.[40]

3.2 The Committee on Economic, Social and Cultural Rights

The CESCR consists of eighteen independent experts who specify the obligations contained in the ICESCR and monitor compliance with the Covenant through the individual complaints procedure.

The CESCR distinguishes three obligations that can be found in every human right: the duties to *respect*, *protect* and *fulfil*.[41] This article has demonstrated that the fundamental right of social security in the Netherlands is seen as an instruction for the government to act, create or regulate. However, the international duty to *respect* explicitly obliges governments to refrain from interfering with the human right in question. This 'hands-off policy' means that Article 9 not only instructs governments to act, but also protects individuals' access to adequate social security.[42] In doing so, the CESCR suggests that the human right to social security consists of two elements. On the one hand, it instructs governments to provide for a system of social security and welfare. On the other, it also prohibits governments from engaging in activities that deny or restrict access to social security, which constitutes an individual safeguard function.[43]

The social security cases that were examined by the CESCR under the individual complaints procedure – *López Rodríguez v. Spain* in 2016 and *Trujillo Calero v. Ecuador* in 2018 – also show that both functions are equally recognised in the international

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37 Commission on Human Rights, Travaux Préparatoires, 7th session: summary record of the 220th and 221th meeting,1951.

38 Ibid; Working Group on Economic, Social and Cultural Rights, 7th session: Item 3(b) of the agenda, Compilation of proposals relating to Economic, Social and Cultural Rights, 1951.

39 Ibid.

40 The Netherlands have not yet ratified the Optional Protocol.

41 H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* Princeton University Press, 1996; C. Wellman, 'Basic Rights by Henry Shue', 3 *Human Rights Quarterly*, 1981, P. 144-147; I. Bantekas and L. Oette, *International Human Rights law and Practice*, p. 417.

42 CESCR, General Comment No. 19, 4 February 2008, E/C.12/GC/19, para. 44.

43 Ibid.

human rights framework.[44] The complaints procedure allows individuals to bring violations of socio-economic human rights to the attention of an independent (quasi-) judicial authority.[45] In these cases, the CESCR stated that Article 9 protects the right of every individual to a minimum level of benefits that will enable them to acquire at least basic health care, shelter and housing, water, sanitation, foodstuffs, and education.[46] The CESCR also recognised that national measures which threaten the minimum subsistence of individuals might constitute a violation of Article 9 of the Covenant. Furthermore, it was acknowledged that states can be held responsible for remedying such violations by providing benefits sufficient to ensure an adequate and dignified standard of living.[47] For example, in the case of Trujillo Calero, the CESCR issued that '*The State party is under an obligation to provide the author with an effective remedy, including by: (a) providing the author with the benefits to which she is entitled as part of her right to a pension, (...), or, alternatively, other equivalent social security benefits enabling her to have an adequate and dignified standard of living (...)*'.[48] Although the rulings of the CESCR are not binding, this indicates that it is possible to derive individual remedies from Article 9 of the Covenant.

In *General Comment No. 19,* the CESCR confirms that Article 9 not only encourages governments to establish social security systems, but also protects individuals from being deprived of the minimum essential level of benefits.[49] This indicates that the Netherlands' approach to the fundamental right of social security – solely as an instruction to governments rather than guaranteed access of individuals to basic subsistence – does not fully align with international human rights doctrine.

4. The (European) human right to social security

The ESC is the socio-economic counterpart of the European Convention on Human Rights (ECHR). The Council of Europe has declared that the social provisions of the ESC must be guaranteed on an equal footing with the civil rights protected by the ECHR.[50]

The human right to social security is embedded in Article 12 of the ESC, which obliges Member States to maintain a social security system of a satisfactory level, to strive for progressive improvement, and to take steps to ensure the granting, maintenance and

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44 The CESCR addressed a total of nine individual complaints relating to Article 9 ICESCR. Only two were examined on merits (consulted online on 10 January 2025 via https://juris.ohchr.org).

45 F. Coomans, 'Het nieuwe Facultatieve Klachtrecht Protocol bij het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten' 35 *NTM|NJCM-Bull*, 2010, p. 263-275; M. Sepúlveda, 'The right to social security', in J. Dugard e.a., *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Edward Elgar Publishing Limited, 2020, p. 90 and 99.

46 CESCR 20 April 2016, E/C.12/57/D/1/2013, para. 10.3 (*López Rodríguez v. Spain*).

47 CESCR 14 November 2018, E/C.12/63/D/10/2015, para. 18 and 20 (*Trujillo Calero v. Ecuador*).

48 Ibid. Para 22.

49 CESCR, General Comment No. 19, 4 February 2008, E/C.12/GC/19, para. 78.

50 Council of Europe, *The European Social Charter* (consulted online on 14 May 2025 via coe.int); Council of Europe, *European Social Charter – collected (provisional) edition of the Travaux préparatoires*, Vol. I, 1953, p. 7.

restoration of social security rights. In contrast to the ICESCR, the ESC contains a separate provision which ensures that anyone without a sufficient income receives adequate social assistance (Article 13).

As in the previous section, the obligations under Articles 12 and 13 of the ESC will first be discussed from the perspective of the treaty drafters. This is then compared with the ECSR's approach to this human right, as reflected in the collective complaints procedure.

4.1 The Council of Europe and the Member States

In the first version of the ESC that was presented by the drafting committee in 1955, individual living standards and the equitable distribution of collective resources were seen as its primary goals.[51] In this initial concept, the human right to social security consisted of two parts: an instruction for governments to provide for an adequate system of social security, and an enforceable right to social security as a direct protection against loss of livelihood due to unexpected circumstances.[52]

However, the lengthy negotiation process in conjunction with the social developments of the time eroded this initial approach. Consequently, when the ESC was adopted in 1961, the human right to social security focused solely on the obligation of Member States to endeavour progressively to maintain the social security system at a desirable level, rather than on the direct protection of individual necessities.[53]

The approach adopted by the treaty drafters with regard to the human right to social security was therefore similar to that of the Netherlands. However, this original approach has evolved over time as a result of current legal practices and the manner in which the ECSR defines and enforces the limits of Articles 12 and 13. The absence of this development in the Netherlands further highlights the gap between the national and the international/European approaches to this human right.

4.2 The European Committee of Social Rights

The ECSR has been entrusted with the responsibility of overseeing the adherence of Member States to the ESC through a reporting and complaints procedure. It is important to note that in contrast to the CESCR, the ECSR only examines collective complaints from specific organisations.[54]

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51 Council of Europe, *European Social Charter – collected (provisional) edition of the Travaux préparatoires*, Vol. II, 1955, p. 11-14.

52 Ibid; Council of Europe, *European Social Charter – collected (provisional) edition of the Travaux préparatoires*, Vol. I, 1957, p. 100.

53 K. Lukas, *The Revised European Social Charter*, Edward Elgar Publishing, 2021, p. 175.

54 Y. Donders, 'Europa's voorvechter van economische en sociale rechten', *Ars Aequi*, 2014, p. 253-261.

Article 12 requires states to establish or maintain a social security system that has sufficient capacity to provide a satisfactory level of social protection for a significant proportion of the population.[55] In addition, Article 13 requires states to protect individuals from financial deprivation by ensuring that those with insufficient income receive adequate assistance.[56] Although these provisions primarily direct Member States to design social assistance at a practical level, Dalli and Gilman suggest that Article 13 also contains an individual safeguard function. This is based on the premise that deprivation is the sole criterion for activating this provision, thereby creating a subjective right to adequate assistance and minimal living resources.[57]

According to the Digest of the case law of the ECSR, national social security systems must ensure an effective and adequate protection of the human right to social security.[58] This effectiveness is assessed on the basis of the poverty threshold that is established by the European Statistical Office, implying that social security benefits must not force individuals below this line.[59] In doing so, the ECSR confirms that the human right to social security not only instructs governments, but also draws a line below which it is no longer possible to speak of a socially secure existence.[60]

The ECSR's approach to the human right to social security thus deviates from the path outlined by the ESC drafters, as it recognises both the directive function and the individual safeguard function of this right.

5. The one- and twofold approach

Based on the analyses of the previous sections, two general approaches to the right to social security can be identified: the one- and twofold approach.

The (linguistically questionable) term 'onefold' refers to the idea of the human right to social security as a policy directive, meaning that it only imposes an obligation on governments to develop a social security framework and does not provide any direct protection against individual loss of livelihood. It has been established that the Netherlands has opted for a onefold approach. Recurring arguments in support of this approach are that socio-economic rights are fundamentally different from civil rights and should therefore be regarded only as state aspirations, or that the protection of fundamental

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55 Council of Europe, *Digest of the case law of the European Committee of Social Rights*, Council of Europe 2022, p. 119.

56 Ibid, p. 124.

57 M. Dalli, 'The content and potential of the right to social assistance in light of Article 13 of the European Social Charter', 22 *EJSS*, 2022, p. 9; J. Gilman, 'The rights to social security and social assistance in the European Social Charter: Towards a positive content…but what sort of content?', 26 *EJSS,* 2024, p. 420.

58 ECSR, Conclusion 2006/XVIII-1/def/NLD/12/1/EN (*The Netherlands*).

59 This poverty threshold is currently set by Eurostat on 60% of the national median equivalised disposable income, 'Glossary: At-risk-of-poverty rate', *ec.europa.eu*; In contrast, the ECSR has chosen to set the poverty threshold at 50%, see J. Gilman, 26 *EJSS,* 2024, p. 424.

60 For example, see ECSR 18 February 2009, Complaint No. 48/2008, para 39 (*European Roma Rights Centre (ERRC) v. Bulgaria*).

rights is primarily the responsibility of the government and protecting socioeconomic rights would require capacities that many states do not possess.[61] However, this approach is in stark contrast to the prevailing consensus on the indivisibility of human rights, as it effectively relegates socio-economic human rights to a secondary position in relation to civil rights.

Therefore, this article defends a twofold approach to the right to social security. This approach is more closely aligned with the concept of indivisibility, as it considers socioeconomic rights not only as guidelines for governments to actively realise the objectives contained in the corresponding right (positive obligations), but also as safeguards for individuals against government interference with the entitlement to which the right extends (negative obligations); a feature that is generally associated with civil and political rights. This is not to deny that positive obligations are evidently more dominant in socio-economic rights than in their civil counterparts. However, given the many positive obligations that also arise from the latter, this distinction is no longer evident, nor is it necessarily relevant to the intrinsic functions of human rights.[62]

Applying the twofold approach to the right to social security results in a right that imposes an obligation on governments to design an adequate social security system (the directive function), while at the same time opens the door to justiciability by guaranteeing access to the minimal essential means of subsistence, impervious to revocation or regressive measures (individual safeguard function). Therefore, this approach also aligns with the international enforcement bodies such as the CESCR and the ECSR in their approach to the human right to social security.

In this regard, it is important to note that there is a difference between the recognition of a justiciable individual safeguard function of the human right to social security, and enabling individuals to enforce financial benefits through the judiciary. Vonk and Olivier point out that the value of this function lies in the existence of a mechanism by which individuals can rely on the courts to address the shortcomings of the social security system. This allows the judiciary to critically examine the compatibility of the national system with constitutional and international requirements, thereby ensuring a more effective protection of the values underlying this fundamental right.[63]

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61 I.E. Koch, 'Dichotomies, Trichotomies or Waves of Duties?' 5 *Human Rights Law Review,* 2005, p. 83; D.J. Whelan and J. Donnely, 'The West, Economic and Social Rights and the Global Human Rights Regime: Setting the Record Straight', 29 *Human Rights Quarterly,* 2007, p. 909-949; A. Kirkup en T. Evans, 31 *Human Rights Quarterly,* 2009, p. 221-238.

62 I.E. Koch, *5 Human Rights Law Review*, 2005, p. 83; J.F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights*, Human rights handbooks No. 7, Council of Europe, 2007, p. 8 and 12; S. Friedman, *Comparative Human Rights Law*, Oxford Academic, 2018, p. 77; J.V. Wibye, 'Reviving the Distinction between Positive and Negative Human Rights', 35 *Ratio Juris*, 2022, p. 363-382.

63 G.J. Vonk and M. Olivier, 'The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa)', 16 *EJSS,* 2019, p. 238.

6. Conclusion

The UN strives for the equality of all human rights: civil and socio-economic. However, socio-economic rights are evidently different by design, as positive obligations are more dominant in these rights than in their civil counterparts. Does this mean that they are also different in character?

This article argues that the right to social security consists of two elements: a directive function (positive obligation) and an individual safeguard function (negative obligation). The directive function consists of an instruction to governments to proactively establish an adequate social security system, and the individual safeguard function ensures that individuals have access to the essential means of subsistence. While the Netherlands considers this right to be solely a government directive – and thus a right *of* social security – it can be argued that it also contains an individual safeguard function – a right *to* social security.

Four arguments support this conclusion. First, the UN explicitly promotes the idea that all human rights are indivisible. Second, both the CESCR and the ESCR reject the assumption that the right to social security is merely a directive to governments. Third, it is possible that socio-economic rights have traditionally been limited to policy directives. However, based on the current state of the art, it can be argued that these rights have developed into a form that is more in line with the twofold approach. And fourth, the textual formulation of fundamental/human rights does not necessarily correlate with its intrinsic functions, even when it is primarily addressed to governments.

In conclusion, this article has argued that the Netherlands' (onefold) approach to the right 'of' social security deviates from the (twofold) approach that is generally accepted by other jurisdictions and human rights authorities, according to which this right consists of both a directive and an individual safeguard function – a right 'to' social security. This approach has the potential to transform the currently abstract constitutional provision on social security into a fundamental right with which individuals can engage. This is because the twofold approach identifies the guaranteed access of individuals to the essential means of subsistence as an integral component of the right to social security. The acknowledgement of this approach could align the Netherlands more closely with the international perspectives on socio-economic human rights, thus marking the conclusion of its current state of denial.

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Operationalising the minimum protection dimension of social security: absolute minimum protection by the Committee on Economic, Social and Cultural Rights and the German Federal Constitutional Court

Max Gelissen

Abstract: This contribution examines the minimum protection dimension of the fundamental right to social security by assessing the Committee on Economic, Social and Cultural Rights' (CESCR) human rights approach under Article 9 ICESCR and the German Federal Constitutional Court's (FCC) Existenzminimum doctrine. It analyses the normative foundation and operationalisation of these approaches, highlighting how both maintain the absolute core of minimum protection without weakening it. The analysis considers critiques of the minimum core doctrine, particularly concerns about its absoluteness and judicial deference. The CESCR's approach in *Trujillo Calero v. Ecuador* and the FCC's approach in *Hartz IV* are analysed to illustrate that effective minimum protection can be ensured while respecting institutional limitations. The contribution concludes that both frameworks apply a two-tier test. First, the absolute nature of the minimum core is established at a conceptual level, grounded in specific normative justifications. Second, this absoluteness serves as the premise for the acceptance of the context-specific legal consequences of the minimum core's application in concrete situations. The joint assessment illustrates that rights-based approaches can ensure absolute minimum protection without compromising state sovereignty or legislative discretion, reinforcing the doctrine's viability in securing the minimum protection dimension of the fundamental right to social security.

Keywords: absolute minimum core protection, social security, CESCR, German Federal Constitutional Court, rights-based approach

1. Introduction

The minimum protection dimension of the fundamental right to social security continues to be a contentious issue in international discussions on fundamental social rights. Despite ongoing debates, it arguably constitutes the most crystallised dimension of the right to social security. This contribution analyses this dimension by assessing the international human rights approach of the Committee on Economic, Social and Cultural Rights (CESCR) to the minimum protection dimension of the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) alongside the often-praised interpretation of the constitutional right to a dignified *Existenzminimum* (subsistence minimum) as established by the German Federal Constitutional Court (FCC).

Although General Comment No. 19 (GC. 19) is not legally binding, it is widely accepted as an authoritative interpretation of the normative content and application of the right to social security set out in Article 9 ICESCR. In it, the CESCR attempts to normatively substantiate the human right to social security as outlined in Article 9 ICESCR by expanding upon and specifying the so-called 'minimum core obligations' doctrine of State parties concerning the human right to social security.[1] The doctrine asserts that certain obligations, including the provision of a minimum level of social protection, must be fulfilled immediately and are non-negotiable.[2] In this contribution, I will refer to these strict obligations as 'absolute', even though the CESCR does not seem to employ this term in its official publications.

Leijten identified a twofold critique in the international discourse regarding this absolute minimum core doctrine, primarily concerning its monitoring process. First, she highlighted the concern that many State parties may lack the financial capacity to meet these substantial and immediate obligations. Second, she mentions the perpetual critique of the 'absoluteness' of the minimum core doctrine and social rights doctrine in general. Determining the absolute minimum requires objectivity to ensure universal acceptance. Subsequently, Leijten points out that such an objective definition hardly seems possible. Social rights often depend on economic policy decisions regarding resource allocation. Consequently, the separation of powers argument arises, asserting that the determination of minimum core standards should be left to the democratically elected legislature, rather than an unelected supervisory body or court. According to Leijten, this two-fold critique on the minimum core approach has resulted in the protection offered becoming more flexible, potentially problematically relativising and deflating the notion of core protection (in the state-monitoring process).[3]

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1 UN Committee on Economic, Social and Cultural Rights, General Comment No. 19: The Right to Social Security (Article 9), 4 February 2008. This doctrine was originally established in UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Article 2.1), 14 December 1990.

2 I. Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection', *German Law Journal* 16(1), 2015, p. 36.

3 Leijten, *supra* note 2, p. 37-38.

Additionally, the CESCR has addressed the minimum core dimension of social security in its quasi-judicial role under the complaint mechanism of the Optional Protocol to the ICESCR (OP-ICESCR),[4] particularly in the case of *Trujillo Calero v. Ecuador*.[5] Given the critique about the absoluteness of the minimum core doctrine, it is interesting to assess how the CESCR navigates these concerns in its quasi-judicial capacity. Leijten, for instance, commends the FCC's Existenzminimum doctrine as a form of absolute minimum core protection that largely avoids this key criticism.[6] This prompts the question of whether, and to what extent, the CESCR addresses this concern in its quasi-judicial role.

This contribution contains an assessment of one of the pivotal FCC judgements regarding the Existenzminimum: the 2010 Hartz IV decision,[7] and the CESCR's communication from 2018 of *Trujillo Calero v. Ecuador*. This joint assessment serves to illustrate that the minimum protection dimension can be applied effectively without falling prey to the critique highlighted by Leijten regarding absoluteness. Even though it is manifestly clear that the institutional and judicial context within which the FCC operates is entirely different from the international quasi-judicial context of the CESCR, the joint assessment remains valuable from a legal-doctrinal perspective. The joint assessment is not structured as a systematic comparative evaluation, but instead presents a side-by-side analysis of how both institutions address the absolute nature of the minimum core.

To illustrate this, section 2.1 situates the minimum protection dimension within the broader human right to social security, as outlined in GC. 19. This section will highlight the minimum protection dimension of the human right to social security of Article 9 ICESCR and the normative content thereof, as described by the CESCR in GC. 19. Section 2.2 then examines the communication *Trujillo Calero vs. Ecuador* to illustrate the operationalisation of Article 9 ICESCR under the complaints procedure. This outline identifies the rights-based approach to Article 9 ICESCR and assesses the CESCR's review process for ensuring absolute minimum protection. To date, *Trujillo Calero* remains the only CESCR decision to find a violation of Article 9 ICESCR.[8] Nevertheless, *Trujillo Calero's* thorough analysis provides significant insights for the joint assessment.

Section 3.1 describes how the FCC has normatively substantiated the German constitutional right to an Existenzminimum in its 2010 Hartz IV decision. It provides a detailed discussion of the implications of the right for individuals and the absolute obligation of the state to ensure the fulfilment of this constitutional right. Thereafter, section 3.2 outlines how the FCC has operationalised the right to an Existenzminimum. It analyses exactly what

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4 UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 5 March 2009, A/RES/63/117.

5 CESCR 26 March 2018, (*Marcia Trujillo Calero v. Ecuador)*, Communication No. 10/2015.

6 Leijten, *supra* note 2, p. 28 and 39.

7 BVerfGE 125, 175 9 February 2010, Hartz IV.

8 The only other communication concerning Article 9 ICESCR that was resolved on its merits is: CESCR 20 April 2016, López Rodriguez v. Spain, Communication No. 1/2013. https://juris.ohchr.org/SearchResult last visited on: 30-2-2025.

the FCC reviews in its Existenzminimum approach, how it reviews this, and what the consequences of this review are. Notably, the FCC's decisions include a C.I section, which sets out the objective constitutional standards derived from the *Grundgesetz*, and a C.II section, which applies these standards to the specific case.[9] In contrast to the discussion of the international human rights approach, which draws on GC.19 for its normative foundation and *Trujillo Calero* for its application, the German constitutional approach relies solely on the Hartz IV decision to address both aspects of the doctrine. Given space constraints and this contribution's scope, only the FCC's 2010 Hartz IV decision will be discussed. However, because this decision has thoroughly and durably conceptualised the normative content and the application of the right to an Existenzminimum, it provides a strong foundation for the joint assessment.

Section 4 analyses both approaches, examining how each institution addresses the critique of the minimum core doctrine's absoluteness. Finally, section 5 concludes the contribution.

2. The minimum protection dimension of the human right to social security

2.1 The normative content of Article 9 ICESCR

According to Article 9 ICESCR. The 'States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.' In GC. 19, the CESCR makes an effort to elucidate the normative substance of this human right and establish its legal consequences for individuals and State Parties. It begins by emphasising the primary objective of the human right to social security, which is to ensure human dignity by enabling individuals to fully realise their other rights under the Covenant.[10] To pursue this objective, the right must encompass a right to access and maintain benefits to secure minimum protection against nine principal social risks and contingencies.[11] Social security benefits must guarantee 'all peoples a minimum enjoyment of this human right'.[12]

To fulfil this obligation, states must ensure a social security system that is available, adequate, accessible, and sustainable under domestic law.[13] The benefits provided under this system must enable everyone to realise an adequate standard of living, as required by Article 11 ICESCR. Moreover, the methods used to determine the adequate level of benefits must be subject to continuous monitoring.[14]

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9 O. Lepsius, 'The Standard- Setting Power' in M. Jestaedt, O. Lepsius, C. Möllers, and C. Schönberger (Eds.), *The German Federal Constitutional Court: The Court Without Limits*, Oxford University Press: Oxford, 2020, p. 75.

10 General Comment No. 19, para. 1.

11 Ibid, paras. 2 and 12-21.

12 Ibid, para.4.

13 Ibid, paras. 11, 22-27 and 47-58.

14 Ibid, para. 22.

Furthermore, states have an absolute core obligation to, 'at the very least', ensure the satisfaction of the minimum essential levels of each of the rights articulated in the Covenant. For minimum protection, this requires the following:

> 'To ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care,35 basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.'[15]

States are obliged to meet this minimum core obligation. A state claiming incapacity faces strict scrutiny and must prove it has exhausted all available resources to meet these minimum obligations.[16] To do justice to the special absolute nature of 'core obligations', the legal consequence of failing to meet this core is thus more strictly scrutinised than non-core obligations of the right to social security under Article 9 ICESCR.

Subsequently, a solely contributory social security system alone is insufficient to ensure *everyone* the required protection under Article 9 ICESCR because individuals unable to contribute would be excluded from minimum protection. Thus, GC. 19 specifically provides that:

> 'States parties will need to establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their protection.'[17]

This requirement is seen as an obligation to fulfil, in particular, 'to provide', as typically described by the CESCR when outlining state obligations. Consequently, the margin of discretion granted to each State party in implementing its social security system is more strictly limited regarding the core obligation of providing minimum essential benefits.

It can thus be argued that, at the international level of the ICESCR, the obligation to establish and provide entitlements for all individuals at a minimum level constitutes what Vonk and Olivier refer to as a 'fortified government obligation' within the broader state obligation to fulfil.[18] The minimum protection dimension of the human right to social security appears to function as an especially strengthened safeguard, operationalised as a direct and uncompromising government obligation to fulfil. If the minimum protection dimension is not safeguarded for all individuals through some form of minimum assistance, then states fail to meet their absolute core obligation to provide minimum protection.[19] The minimum protection dimension of Article 9 ICESCR can thus never be subject to the laissez-faire attitude of some legislatures concerning social policymaking.[20] Non-

15 Ibid, para. 59 (a).
16 Ibid, para. 60.
17 Ibid, para. 50.
18 G. Vonk and M. Olivier, 'The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa)', *European Journal of Social Security*, *21*(3), 2019, p. 228.
19 General Comment No. 19, paras. 59 (a) and 50.
20 Ibid, para. 41.

discriminatory access to essential social security benefits is a core right and must be guaranteed. If the guarantee of human dignity is the primary justification for the right to social security, then the minimum protection dimension must be at its core.

The next section outlines how the CESCR has applied this absolute minimum core obligation in practice, specifically concerning old-age benefits and the 'fulfil-obligation' of establishing a non-contributory system. Additionally, it emphasises the individual subjective claim of the rights holder, reflecting the core obligation described above.

2.2 The operationalisation of Article 9 ICESCR

In *Trujillo Calero v. Ecuador*, Ms Trujillo Calero, an unpaid domestic worker, was denied a pension despite having contributed to it through a voluntary affiliation scheme. Her application for special retirement was rejected by the Ecuadorian Social Security Institute, which relied on a statutory provision stating that voluntary affiliation is automatically terminated after six consecutive months of non-payment. Although Ms Trujillo Calero missed eight months of contributions, she subsequently paid the arrears retroactively. However, she was not promptly informed that her affiliation had already been terminated after the initial six months of non-payment. Notwithstanding this, the Institute continued to accept her contributions, up to a total of 65, even after her affiliation had formally ended.[21]

The method for operationalising the right to social security under Article 9 ICESCR follows a rights-based approach. Under the Optional Protocol to the ICESCR, individuals like Ms Trujillo Calero can assert their subjective right to social security before the CESCR, claiming a violation of their right.[22] The central question raised by the communication was whether her exclusion from special retirement violated her right to social security under Article 9 ICESCR. According to the CESCR, this legal issue was linked to three other key legal questions: (1) whether the six-month rule for termination was proportionate, (2) the specific impact of Ecuador's lack of a non-contributory social security system on Ms Trujillo Calero's case, and (3) whether the conditions for voluntary affiliation amounted to gender-based discrimination.[23] Accordingly, the CESCR considers four key issues concerning her claim. This contribution focuses primarily on the third issue, which concerns the absolute minimum core obligation.

First, the CESCR found that Ms Trujillo's right to social security was violated because the Ecuadorian Social Security Institute failed to inform her that her voluntary affiliation had been automatically terminated after six consecutive months of missed contributions, despite continuing to accept her payments for more than five years thereafter. This led her to reasonably believe that she was making the required contributions to qualify for her pension, and this understanding was reinforced by verbal confirmation from Institute officials. She only became aware of her ineligibility upon applying for retirement, a failure

21 *Marcia Trujillo Calero v. Ecuador, supra* note 6, paras. 2.1-2.2 and 3.2.
22 Ibid, para. 11.1.
23 Ibid, para. 10.6.

of communication that violated her right to social security by denying her timely and adequate information and disregarding her legitimate expectations.[24]

Second, the CESCR held that the State party bears the burden of demonstrating that eligibility requirements for social security benefits, like the automatic termination of voluntary affiliation after six months of non-contribution, are reasonable and proportionate.[25] In this case, the state failed to justify the reasonableness of this requirement as applied to independent workers, particularly unpaid domestic workers, for whom such a penalty may be especially inappropriate and disproportionate. The CESCR concluded that the combination of this disproportionality and the lack of adequate information resulted in a violation of Ms Trujillo's right to social security.[26]

Third, the CESCR reiterates that, to protect human dignity, it derived the following absolute minimum core obligation from Article 9 ICESCR: 'to ensure the satisfaction of, at the very least, minimum essential levels of this right.'[27] This obliges State parties, amongst other things, to ensure non-discriminatory access to a social security system that provides a minimum essential level of benefits.[28] Consequently, the CESCR endorses the 'fortified government obligation to fulfil' from GC. 19[29] in *Trujillo*, by stating that:

> 'In accordance with their core obligations with regard to the right to social security (…), States should provide non-contributory old-age benefits, social services and other assistance (…)'[30]

This obligation to fulfil requires states to provide either a non-contributory social security system or alternative social assistance measures. Without such provisions, (older) individuals who lack other sources of income and cannot access contributory benefits remain entirely unprotected, resulting in a breach of the minimum core obligation. Hence, the CESCR states that the violation of Ms Trujillo's right to social security is exacerbated by the State party's failure to ensure an adequate standard of living for her in old age through alternative means. This failure arose from the absence of a non-contributory system and the lack of other social assistance measures. Consequently, the state's omission to have a non-contributory system in place breaches the obligation to fulfil, which also leads to a breach of the absolute minimum core obligation, because no other social assistance measures were available.[31]

Fourth, the CESCR applies strict scrutiny to potential gender discrimination. Ms Trujillo Calero argued that the voluntary affiliation system, primarily designed for independent male workers, imposed disproportionate restrictions on unpaid domestic workers. Female domestic workers were required to pay the same contributions as workers with fixed

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24 Ibid, paras. 16.1-4.
25 Ibid, para. 12.1.
26 Ibid, para. 17.1-2.
27 Ibid, paras. 11.1-2, which references GC. No. 19, para 1-3. 41 and 59.
28 Ibid.
29 Ibid, para. 14.1, which references GC.19, para 50 about the obligation to fulfil.
30 Ibid, para 14.2.
31 Ibid, para 1.

incomes, thereby placing them at a distinct disadvantage. The CESCR observed that, where credible evidence indicates indirect gender discrimination, the burden of proof shifts to the State party to rebut such claims. In this case, the state failed to provide a satisfactory explanation, leading the CESCR to conclude that the system constituted gender-based discrimination against Ms Trujillo Calero.[32]

Finally, the CESCR issues both individual and general recommendations in its communication.[33] The CESCR made the general recommendation to 'formulate within a reasonable time, to the maximum of available resources, a comprehensive and complete non-contributory benefits plan.'[34] This recommendation can be seen as quite far-reaching, as minimum protection for Ms Trujillo could have been ensured through alternative means, such as those referenced as 'other social assistance measures'[35] in GC. 19, or even by making modifications to the pension system itself.[36] Nonetheless, the CESCR explicitly advocates this non-contributory approach as the 'state of the art' model for social assistance systems, considering it the most effective method of systematically preventing breaches of the absolute minimum core, as occurred in Ms Trujillo's case. After all, non-contributory benefits allow for universal coverage, at least when these benefits are general in nature (e.g. all retired persons, all people with a disability, etc.). Moreover, in GC. 19, the CESCR already emphasised the particular importance of providing non-contributory benefits in the context of 'old age'.[37] While this general recommendation in *Trujillo* may appear broad or even excessive, it is thus not without a previously established rational normative basis. It reflects a clear commitment to safeguarding the absolute minimum protection dimension of the human right to social security.

In respect of Ms Trujillo, the CESCR declares that the State party is obligated to either provide the author with the pension she was originally entitled to or to offer her an alternative effective remedy, which ensures that she receives the necessary social security benefits to maintain an 'adequate and dignified standard of living.'[38] This recommendation clearly emphasises the imperative to provide for absolute minimum protection. Ms Trujillo should either be maintained above the minimum threshold through her original pension or, if this is not feasible, be guaranteed, at least, the minimally necessary benefits required for a dignified existence. Ms Trujillo was left to her own devices, with no access to minimum benefits, contrary to the absolute minimum core obligation, which seemingly prompted the CESCR to take a firm stance.[39]

Having established the international human rights framework for absolute minimum protection under the ICESCR, the following section examines the FCC's Existenzminimum

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32 Ibid, paras. 19.1-6.
33 Ibid, paras. 22 and 23.
34 Ibid, para. 23 (f).
35 An example of this would be: in-kind provision. See ibid, para 14.1, which references GC. No. 19, para. 50.
36 G. Vonk and E. Bambrough, 'The human rights approach to social assistance: Normative principles and system characteristics', *European Journal of Social Security*, *22*(4), 2020, p. 383.
37 GC. 19, para. 15.
38 Ibid, para. 22.
39 Ibid, para. 22.

doctrine, illustrating how absolute minimum protection can be applied within a constitutional framework.

3. The right to an Existenzminimum

3.1 The normative content of the right to an Existenzminimum

In the Hartz IV decision, the FCC was tasked with reviewing the constitutionality of certain provisions of the Second Book of the Code of Social Law (SGB II), which guaranteed basic benefits for individuals in need of assistance. The benefit under consideration, in this case, is 'Unemployment Benefit II' or *Arbeitslosengeld II*, which has been in force since January 1, 2005, following the enactment of the Hartz IV legislation.[40] The key question was whether the level of standard benefit guaranteed by the relevant sections was compatible with the constitutional right to the guarantee of an Existenzminimum that upholds human dignity. This right has been interpreted by the FCC as being derived from Article 1 (1) of the Grundgesetz (GG), which establishes the inviolability of human dignity, in conjunction with the social state principle enshrined in Article 20 (1) GG, given that the Grundgesetz itself lacks an explicit catalogue of social rights.

From the obligation to protect human dignity in positive terms, the FCC deduced the constitutional rule that, if an individual lacks the financial resources to secure a dignified existence, the state is obliged to ensure that the material conditions for a dignified existence are available to the individual in need of assistance. This objective obligation from Article 1.1 GG corresponds to a benefit entitlement of the constitutional right holder because the constitutional right protects every individual's dignity, and in situations of urgent need, it can only be ensured through material support. The immediate constitutional entitlement to benefits for ensuring a dignified Existenzminimum only covers those means that are necessary for maintaining an existence in line with human dignity. The complete Existenzminimum is provided through a uniform constitutional rights guarantee, which encompasses both the individual's physical existence, such as access to food, clothing, household goods, housing, heating, hygiene, and health, and their minimum socio-cultural existence. This latter dimension ensures the individual's capacity to maintain inter-human relationships and participate, at a basic level, in social, cultural, and political life.[41]

According to the FCC, Article 1.1 GG establishes the claim to have an Existenzminimum guaranteed and, consequently, Article 20.1 GG bestows the legislature with an obligation to ensure that the subsistence minimum of all individuals is guaranteed in line with human dignity. This obligation to guarantee is a so-called *Gewährleistungsrecht* or a 'guarantee right'.[42] According to Aubel, this can be interpreted as a constitutional right

40 Hartz IV was replaced on January 1 2023 by the entry into force of the 'Bürgergeldgezets'.
41 Ibid, paras. 134-5.
42 Hartz IV note 8, paras. 133-4.

that imposes an obligation on the state to provide social benefits. However, while the constitution establishes this obligation in principle, the specific design and implementation of these benefits fall within the legislature's discretion, subject to certain constitutional constraints.[43] Bittner concludes that it is the right of every individual in need of assistance to be statutorily provided with the necessary minimum benefits.[44]

As a *Gewährleistungsrecht*, the constitutional right from Article 1.1 GG, in conjunction with Article 20.1 GG, takes on autonomous significance in addition to the right to respect every individual's dignity from Article 1.1 GG, which has an absolute effect. Essentially, 'the guarantee right' is inviolable and imposes an immediate obligation on the state to ensure its realisation.[45] I will refer to this strict obligation as an 'absolute obligation'.[46] However, since it is a 'guarantee right', the legislature is responsible for the concretisation and actualisation of this right.[47]

Although Article 1.1 GG provides for a benefit entitlement, its exact scope, including covered needs and required resources, cannot be directly derived from the Grundgesetz. The legislature must determine this scope based on societal views, living conditions, and economic and technological realities. The social state mandate in Article 20.1 GG obligates the legislature to capture social reality in a timely and realistic manner when it ensures a dignified minimum standard of living.[48] In fulfilling this obligation, the legislature thus needed to be granted a margin of appreciation or *Gestaltungsspielraum* for making the necessary assessments to determine the exact amount required to guarantee the Existenzminimum.[49]

Furthermore, the constitutional guarantee must be provided by a parliamentary statute that establishes a concrete benefit entitlement to the individual because an individual in need of assistance may not be left to rely on the voluntary benefits of the state or third parties. The statutory entitlement to benefits must be structured in such a way that it always covers the total basic needs for the subsistence of every individual constitutional right holder.[50] The Grundgesetz does not demand a specific method for doing this, but subsequent deviations from a chosen method require factual justification.[51]

After outlining the normative foundation of the Existenzminimum and the standards that follow therefrom, the next step is to examine how the FCC applied these standards to the case.

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43 T. Aubel, 'Das Gewährleistungsrecht auf ein menschenwürdiges Existenzminimum' in *Linien der Rechtsprechung des Bundesverfassungsgerichts: erörtert von den wissenschaftlichen Mitarbeitern*, Band 2, 2011 p. 277.

44 C. Bittner, 'Casenote – Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010', *German Law Journal*, 12(11), 2011, p. 1951.

45 Hartz IV note 8, para. 133.

46 See the introduction for this understanding and Leijten, *supra* note 2, pp. 28 and 39.

47 Hartz IV note 8, para. 133.

48 Ibid, para. 138.

49 Ibid, para. 133.

50 Ibid, paras. 136-7.

51 Ibid, para. 139.

3.2 The operationalisation of the right to an Existenzminimum

The margin of appreciation afforded to the legislature for assessing the Existenzminimum corresponds to a reserved review of the ordinary law by the FCC because the Grundgesetz itself does not allow an exact quantification of the entitlement. Concerning the result, the material review is limited to whether the benefits are evidently insufficient.[52]

The Court determines that evident insufficiency in the legislature's guarantee of the Existenzminimum through the provisions outlined in SGB II cannot be established. The amount of Euro 345 for single individuals, and the derived amounts thereof for adult partners and children, cannot be considered evidently inadequate to guarantee a dignified Existenzminimum. The FCC deems the amount, at a minimum, sufficient to cover the physical dimension of the Existenzminimum. Furthermore, due to the broad margin of appreciation of the legislature concerning the fulfilment of the social dimension, it is not possible to conclude that the amount is evidently insufficient.[53]

However, according to the Court, constitutional rights protection also extends to the procedure for determining the Existenzminimum because a review of results based on this constitutional right is only possible to a limited extent. This procedure is assessed according to four criteria: (1) the FCC will review whether the legislature has described and captured the essence of an existence in line with human dignity in a way that does justice to the constitutional obligation; (2) it will review whether the legislature, within its margin of appreciation, has chosen an appropriate calculation method for determining the dignified Existenzminimum; (3) the Court assesses whether the legislature has completely and accurately ascertained the necessary facts; and (4) it must be appraised whether all calculation steps were conducted using a verifiable set of figures. This must be assessed within the context of the chosen procedure and its structural principles to ensure that all actions remain within the limits of what is justifiable.

Additionally, if the legislature fails to adequately disclose the methods and calculations used to determine the subsistence minimum in the legislative procedure, this also leads to unconstitutionality.[54] This ultimately corresponds to a requirement for consistency and transparency in the legislative process of determining the Existenzminimum.[55] The FCC concludes that the legislature has fulfilled the first three criteria for assessing the procedure.[56] However, the Court does identify four reasons for the unconstitutionality of the system outlined in SGB II.[57]

First, regarding the fourth criterion, the Court finds that the legislature did not always apply its chosen method in a comprehensible and verifiable manner. It deviated from

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52 Ibid, para. 141.
53 Ibid, paras. 152-8.
54 Ibid, paras. 142-4.
55 C. Bittner, *supra* note 44, p. 1948.
56 Hartz IV note 8, paras. 146-50 and 160-6.
57 S. Egidy, 'Case note – The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Decision of the German Federal Constitutional Court', *German Law Journal*, 12(11), 2011, p. 1966.

the structural principles of the statistical model used to determine the necessary Existenzminimum without providing a factual justification. Instead, the legislature relied on 'random estimates' (*Schätzungen ins Blaue hinein*) to assess the portion of expenditures deemed irrelevant for securing the Existenzminimum and deducted this amount without a sufficient factual basis. Furthermore, it failed to verify whether individuals in single households had actually spent money on the excluded items. The Court ruled that such *Schätzungen ins Blaue hinein* were unjustifiable, leading to the conclusion that the standard benefit had not been calculated in a constitutionally valid manner. As a result, the derived benefits for partners and children were also deemed unconstitutional.[58]

Second, the Court argues that the legislature unjustifiably derogated from the structural principles of the chosen statistical method by determining that the total amount of expenditure relevant to the setting of the standard benefit (the standard rate), ascertained following the sample survey on income and expenditure, should be linked to and made dependent on the increase in the current pension value. This means that the standard rate and standard benefit do not increase if there is no pension adjustment. According to the FCC, this constitutes an inadequate mechanism for ensuring the standard benefit remains up to date.[59]

Third, the FCC is of the opinion that the 60% rule for the social benefit for children up until the age of 14 also does not rely on a justifiable method for determining the Existenzminimum of such a child. The Court states that 'children are not small adults', and their needs must be assessed based on their stage of development and well-being. However, the legislature has failed to investigate these specific needs. The Court deemed the deduction of 40% for children to be arbitrary because it lacks any empirical or methodological foundation, leading to a violation of the constitutional right to an Existenzminimum.[60]

Finally, the Court holds that the absence of a provision in SGB II to account for special, irrefutable, and recurring needs is incompatible with Article 1.1, in conjunction with Article 20.1 GG. As the constitution requires the Existenzminimum to be covered in every individual case, SGB II is required to cover these special, irrefutable, and recurring needs. However, in situations in which a greater-than-average need arises, the standard benefit proves to be insufficient. For this reason, in addition to the benefits provided for in SGB II, an additional hardship claim to benefits is constitutionally required.[61]

In light of the aforementioned deficiencies, the FCC determined that the SGB II provisions were unconstitutional. Instead of nullifying them, which would deprive beneficiaries of support, the court declared them incompatible. This decision meant that the existing framework remained in place but required urgent legislative correction. The court set a deadline of December 31, 2010, for the legislature to reformulate the benefits system

58 Hartz IV note 8, paras. 173-83.
59 Ibid, paras. 183-6.
60 Ibid, paras. 190-1.
61 Ibid, paras. 204-9.

in a constitutionally compliant manner. Furthermore, the FCC mandated an interim hardship clause for special recurring needs.[62]

With both minimum protection frameworks established, the subsequent section undertakes an analysis of both frameworks to illustrate that the minimum protection dimension can be effectively applied without succumbing to the criticism mentioned by Leijten regarding absoluteness.

4. Joint Assessment

As mentioned in the introduction, Leijten pointed out a key criticism of the minimum core doctrine: its perceived absoluteness. Defining an objective minimum standard is inherently challenging because it requires a universally acceptable determination of an absolute minimum. Consequently, this challenge could either potentially dilute the notion of absolute core protection in its application or impose too much restraint on the democratically elected legislature.[63]

Examining both the CESCR's and FCC's approaches, absoluteness does not appear to be an insurmountable hurdle. Instead, absoluteness merely serves as the justification for prescribing certain measures stemming from the minimum core doctrine in each particular case. It appears that a two-tier test is applied.[64] First, the absolute nature of the minimum core is established at an abstract level, based on specific normative justifications. Second, this absoluteness serves as an argument for accepting that certain concrete consequences should be drawn from the minimum core's application. These concrete consequences can vary significantly depending on the specific legal context. The approaches adopted by both the FCC and the CESCR provide a clear confirmation of the absolute character of the minimum core at an abstract level, while simultaneously allowing for a more flexible approach to establish the concrete implications of the minimum core in each particular case.

This understanding of absoluteness as a legitimising force is particularly evident in the German constitutional framework. The FCC first outlines what is protected absolutely on an abstract level, and subsequently, formulates the corresponding standard of review and applies it to the specific case. Unlike systems that recognise a broader constitutional right to social security, the FCC's Existenzminimum doctrine exemplifies a focused approach, ensuring only the essential means necessary for an existence in line with human dignity. As Leijten noted, by restricting this absolute, inviolable and immediate guarantee to minimum needs, the FCC avoids endorsing full socioeconomic rights, which are challenging to implement and adjudicate.[65]

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62 Ibid, paras. 210-20.

63 Leijten, *supra* note 2, p. 38.

64 Leijten identified a somewhat different 'two-step approach' in the FCC's review in Leijten, *supra* note 2, p. 39.

65 Ibid, p. 37.

The state's absolute obligation is thus only confined to providing the necessary benefits for a dignified existence, which is difficult to contest given its normative constitutional foundation in human dignity and the social state principle, especially because the latter principle requires the state to pursue social equalisation, social security, and social justice.[66] Consequently, to uphold the social state and ensure the inviolability of human dignity, providing absolute minimum protection appears to be an essential legal mechanism.

Furthermore, in the CESCR's approach, the understanding of absoluteness as a legitimising force can also be identified. In GC. 19 and *Trujillo Calero*, the CESCR has extensively normatively justified the absoluteness of the minimum core obligation and the corresponding fortified government obligation to fulfil at an abstract level, by explicitly referring to human dignity as the justificatory force behind the absolute minimum core obligation stemming from Article 9 ICESCR.[67] Subsequently, this absolute minimum from GC. 19 legitimises the CESCR's concrete recommendations in *Trujillo Calero*, evidenced by the explicit references to GC.19.

Moreover, the absoluteness of the minimum protection itself appears indisputable, as Ecuador, as a signatory to the ICESCR, has explicitly committed to upholding the Covenant's objectives, including the guarantee of every individual's human dignity. In light of this, the absolute minimum core doctrine and its concrete consequences seem indispensable.

This brings us to another point in Leijten's analysis: the concern that the minimum core doctrine may lose its significance if (quasi-)judicial bodies grant excessive discretion to the legislature or the state. To uphold the separation of powers, courts may defer to the legislature on economic policy decisions related to resource allocation and, by analogy, to State parties on the organisation of their social security systems.[68] Examination of the CESCR's human rights approach and the FCC's constitutional approach to minimum core protection suggests that this depreciation is not inevitable when (quasi-)judicial bodies grant the legislature/state the institutionally required appreciation margin. Both the CESCR and the FCC have successfully provided absolute minimum protection while adhering to appropriate institutional constraints.

The FCC's approach has been praised by Leijten for striking the right 'middle way' between a lack of substantive control and excessive interference in the democratic decision-making process.[69] The FCC achieves this by safeguarding the absolute Existenzminimum through the substantive 'evident insufficiency' test and its procedural review of the legislative process concerning the determination of the Existenzminimum. Consequently, the Court avoids the institutional 'pitfall'[70] of precisely quantifying the absolute Existenzminimum itself while ensuring that the legislature does not receive a carte blanche in determining the

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66 Egidy, *supra* note 57, p. 1971; Leijten also deems the guarantee hardly objectionable but for slightly different reasons. See Leijten, *supra* note 2, p. 39.

67 See *Marcia Trujillo Calero v. Ecuador, supra* note 6, para. 11.1, which references GC. No. 19, paras. 1-3.

68 Leijten, *supra* note 2, p. 38-9.

69 Leijten, *supra* note 2, pp. 28, 41, 46 and 48; See also: Egidy, *supra* note 57, p. 1962 and 1978.

70 Leijten, *supra* note 2, p. 40.

constitutionally required minimum protection. Through its consistency and transparency requirements, the Court has reconciled its duty to ensure absolute minimum protection with appropriate respect for legislative discretion.

The CESCR, acknowledging its role as a supranational quasi-judicial body, justifiably does not conduct a procedural review of a state's legislative process concerning the effectuation of its fortified government obligation to fulfil. However, the absence of this type of review does not necessarily lead to devaluation of the absolute minimum core doctrine. In *Trujillo Calero*, the CESCR ensures that the absolute minimum core retains substantive force without becoming over-prescriptive. After all, in its general recommendations, the CESCR merely reiterates the requirement from GC. 19 to roll out some sort of non-contributory safety net, while explicitly referring to the state's discretion to do so 'within a reasonable time, to the maximum of available resources.'[71]

Meanwhile, the recommendations specific to Ms Trujillo reinforce robust individual protection of the absolute minimum core obligation to ensure non-discriminatory access to a social security scheme that guarantees a minimum essential level of benefits. Regardless of the structure of Ecuador's social security system, Ms Trujillo must receive the necessary minimum benefits that enable her to have a dignified standard of living, one way or another. Consequently, the CESCR reinforces the substantive force of the minimum core obligation while addressing systemic and institutional flaws without overstepping its institutional boundaries or infringing on the state's sovereignty in structuring its social security system, albeit that it may be argued that the CESCR's general recommendation for Ecuador to introduce a non-contributory benefit system is a rather far-reaching one (but benign due to its quasi-judicial nature).

5. Conclusion

To conclude, this contribution has argued that the CESCR's human rights approach and the FCC's constitutional approach to minimum core protection are both effective in applying the minimum protection dimension of the fundamental right to social security in practice without weakening its absolute core. It has also outlined that both approaches achieve this by adhering to a two-tier test. First, the minimum core is established at a conceptual level, grounded in specific normative justifications. Second, this absoluteness is then applied as the premise for accepting that certain concrete legal consequences should be drawn from the minimum core, which themselves can differ considerably depending on the specific legal context. Moreover, it has asserted that both approaches show that doctrine dilution is not an inevitable result of judicial deference to the legislature or the State party. Both minimum protection frameworks effectively ensure absolute minimum protection through a rights-based approach, while adhering to appropriate institutional limitations. This analysis aimed to demonstrate that the minimum protection dimension can be effectively protected and implemented through a rights-based approach without being undermined by the critiques discussed.

71 GC. No. 19, para. 23 (f).

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The right to social security in Belgium, Germany and the Netherlands: a comparative analysis

Eleni De Becker

Abstract: This paper explores the right to social security by examining how this right is protected in the Netherlands in comparison with Belgium and Germany, with the aim of identifying what the Netherlands can learn from these two legal systems. The urgency of this comparative analysis lies in the lack of in-depth understanding of the potential scope and role of the right to social security within the Dutch legal order. This need for deeper insight became particularly apparent in the aftermath of the Dutch childcare benefit scandal (*Toeslagenaffaire*), which brought to light structural shortcomings and reignited debates about the constitutional significance of the right to social security in the Netherlands. Drawing on the Belgian standstill principle and the German case law on the *Existenzminimum*, the paper analyses how both jurisdictions have developed constitutional mechanisms that impose constraints on legislative discretion, without displacing it. Although Belgium and Germany illustrate different approaches to constitutional protection of social security rights, both countries focus on the decision-making process and the importance of protecting the most vulnerable in society. These different approaches show that social security rights can be subject to meaning judicial review, without necessarily undermining the role of the legislature. This contrasts with the prevailing assumptions in Dutch political discourse, where there remains a deep-rooted concern that judicial involvement in fundamental social rights could lead to an undue shift of power from parliament to judiciary.

Keywords: right to social security, judicial review, fundamental social rights, *Existenzminimum*, standstill principle

1. Introduction

The right to social security is enshrined in various national, European and international instruments.[1] Some provisions explicitly recognise a universal right to social protection, while other emphasise the State's obligation to implement and guarantee it.[2] The obligation has been further developed through the interpretation of the European Social Charter by the European Committee of Social Rights, which emphasises the duty of the legislator to develop and implement a social security system. The same applies to the UN Committee on Economic, Social and Cultural Rights.[3] While some instruments distinguish between social security and social assistance, others do not. Different instruments do, however, emphasise the need to ensure a decent standard of living for all.

This paper explores the right to social security by examining how this right is protected in the Netherlands in comparison with Belgium and Germany, with the aim of identifying what the Netherlands can learn from these two legal systems. The urgency of this comparative analysis lies in the lack of in-depth understanding of the potential scope and role of the right to social security within the Dutch legal order. This need for deeper insight became particularly apparent in the aftermath of the Dutch childcare benefit scandal (*Toeslagenaffaire*), which brought to light structural shortcomings and reignited debates about the constitutional significance of the right to social security in the Netherlands. This paper aims to contribute to filling this knowledge gap.

Although fundamental social rights have the potential to protect vulnerable persons, they have often been overlooked in Dutch politics and law. Since the childcare benefit scandal, calls to lift the constitutional ban on judicial review (Article 120 Dutch Constitution)[4] have gained momentum. However, recent proposals – including the *Hoofdlijnenbrief* (2022),[5] subsequent responses (e.g. 2023),[6] the coalition agreement (2024),[7] Omtzigt's letter (2024)[8] and the '*Contourennota*' (2025)[9] – focus on reviewing legislation on the

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1 See also the discussion in E. Eichenhofer, 'The Right to Social Security in the European Constitutions', Studia z zakresu prawa pracy i polityki spolecznej, 2016, p. 141-150.

2 See also: Eichenhofer, *supra* note 1 and G. Vonk, *Welfare state dystopia as a challenge for the right to social* security, Inaugural lecture Maastricht University, 2024, available at: https://research.rug.nl/nl/publications/welfare-state-dystopia-as-a-challenge-for-the-right-to-social-sec, accessed on 20 March 2025.

3 UN Committee on Economic, Social and Cultural Rights, General comment No. 19 The right to social security (Article 9 of the Covenant), consideration 11.

4 Voorstel van wet van het lid Halsema, Verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet, strekkende tot invoering van de bevoegdheid tot toetsing van wetten aan een aantal bepalingen van de Grondwet door de rechter, *Kamerstukken II* 2002-03, 28331.

5 Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Hoofdlijnenbrief constitutionele toetsing, 1 July 2022, *Kamerstukken II* 2021-22, 35925-VII, p. 8.

6 Minister van Binnenlandse Zaken en Koninkrijksrelaties, Constitutionele Zaken en Wetgeving, Drie Kamerbrieven inzake constitutionele toetsing, 28 March 2024, 2024-0000197057.

7 Nederlandse Regeerakkoord, *Meer zeggenschap van burgers door een ander kiesstelsel en versterking van grondrechten door een constitutioneel hof*, https://www.rijksoverheid.nl/regering/regeerprogramma, accessed 17 March 2025, 1.

8 Initiatiefnota van het lid Omtzigt, Tien voorstellen ter verbetering van de constitutionele toetsing, *Kamerstukken II* 36344 No. 4.

9 Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Contourennota constitutionele toetsing, 21 February 2025, 2025-0000026931.

basis of 'classic' fundamental rights (civil and political rights) rather than fundamental social rights.[10] This is somewhat surprising, given that it is precisely in the area of fundamental social rights where there is an urgent need to increase understanding of their functioning and to enhance judicial oversight in the Netherlands, particularly in light of the childcare benefit scandal.[11] Scholars have argued that greater understanding of fundamental social rights, such as the right to social security, could inform political debates on constitutional review.[12]

This paper outlines the possible ways in which the right to social security could be developed within the Dutch legal system, using a comparative approach. To achieve its objective, this paper examines how the constitutional protection of social security rights is ensured by fundamental social rights or a social state principle in Belgium, Germany and the Netherlands. It adopts a broad definition of the right to social security to reflect the varied approaches in these countries. Even with their geographic, legal, and cultural similarities, the level of protection provided differs significantly. Sections 2 to 4 examine these differences in detail.

In the Netherlands (Section 2), the analysis of the right to social security – part of the broader right to subsistence security (*recht op bestaanszekerheid*) – reveals its minimal role in the Dutch legal order. Despite its potential, the right to social security, part of a broader right to subsistence security in Article 20, has seen little substantive development. Like the Netherlands (1983), Belgium introduced fundamental social rights later (1994) than civil and political rights. However, Belgian courts, including the Constitutional Court, the Council of State, and the Court of Cassation, have since further developed these fundamental social rights. The protection offered, characterised as safeguarding against regression, bears similarities to Article 12 of the European Social Charter (Section 3).

Unlike Belgium and the Netherlands, Germany does not explicitly recognise fundamental social rights, except in limited cases. However, the German Constitutional Court has established the *Existenzminimum*, derived from the social state principle (Article 20 of the German Constitution, hereafter: Basic Law) and the right to human dignity (Article 1 Basic Law), ensuring a strong minimum level of protection (Section 4). Although their

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10 See also: J. Krommendijk, 'Meer rechtsbescherming, maar niet teveel. De jammerlijke uitsluiting van constitutionele toetsing aan sociale grondrechten', *NjB Blog*, 20 July 2022, https://www.njb.nl/blogs/meer-rechtsbescherming-maar-niet-teveel-de-jammerlijke-uitsluiting-van-constitutionele-toetsing-aan-sociale-grondrechten/, accessed 17 March 2025.

11 Staatscommissie Rechtsstaat, De gebroken belofte van de rechtsstaat, tien verbetervoorstellen met oog voor de burger, 2024, 47; as well as: Raad voor de Rechtspraak, Zienswijze van de rechtspraak op rechterlijke constitutionele toetsing, 27 May 2022, https://www.njb.nl/media/4737/zienswijze-van-de-rechtspraak-op-rechterlijke-constitutionele-toetsing.pdf, accessed 17 March 2025, 3.

12 Werkgroep Tijdelijke Commissie Grondrechten en Constitutionele Toetsing, *Verslag*, 4 October 2024, 024D40328, p. 4; see also I. Leijten 'Gespreksnotitie – sociale grondrechten in de democratische rechtsstaat d.d. 5 maart 2025, 4 March 2025, https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2025A00233, accessed on 20 March 2025; Joost Sillen 'Gespreksnotitie – rondetafelgesprek sociale grondrechten d.d. 5 maart 2025, 26 February 2025, https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2025A00233, accessed on 20 March 2025 and G. Vonk, 'Gespreksnotitie rondetafelgesprek sociale grondrechten 5 maart 2025' 28 February 2025, https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2025A00233, accessed on 20 March 2025.

approaches differ, both Belgium and Germany emphasise the legislature's duty to justify decisions, with case law playing a key role in shaping the principles of protection against regression and minimum protection.

2. The limited role of the right to social security in the Netherlands

In the Netherlands the right to social security falls under the broader right to subsistence security (*recht op bestaanszekerheid*), as guaranteed by Article 20 of the constitution (*Grondwet*). This provision was after an extensive debate on its role and enforceability inserted in the Dutch constitution in 1983 but has so far had little substantive impact on the Dutch legal order.

The first paragraph of Article 20 Gw. (Constitution) states: '*The guaranteed standard of living of the population and the distribution of wealth are matters of government concern.*' The Explanatory Memorandum emphasises the government's duty to develop policies aimed at guaranteeing social protection while allowing for discretion.[13] In practice, however, Article 20(1) Gw has neither shaped the Dutch social security system[14] nor has it played a guiding role in legal decision-making.[15] Houwerzijl and Vlemminx highlight its limited legal effect, as it primarily sets out a broad policy mandate without generating concrete obligations.[16]

Article 20(2) of the Dutch Constitution stipulates that legislation shall regulate entitlements to social security. While the principle of legality (*legaliteitsbeginsel*) is not explicitly mentioned, this provision reflects the idea that the legislator plays a central role in defining and safeguarding social security rights through clear legal norms. The question arises as to whether Article 20(2) Gw imposes an initial obligation on the legislator to establish the legal framework through clear (formal) legislation. Granting far-reaching powers of delegation to the executive or private actors for the implementation of social protection could be seen as contrary to Article 20(2) Gw. While further implementing measures will inevitably be necessary,[17] this interpretation ensures that the core framework for social security remains firmly established in primary legislation, thereby strengthening the constitutional guarantee. The parliamentary preparatory work also supports this interpretation.[18]

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13 Memorie van toelichting – Verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet, strekkende tot opneming van bepalingen inzake sociale grondrechten, *Kamerstukken II* 1975-76, 13873, No. 3.

14 P. van Sasse van Ysselt, 'Realisering van sociale grondrechten: wetgever, ubi est?', *RegelMaat* 28, 131 (4), 2016, p. 286-287 and M. Houwerzijl and F. Vlemminx, 'Artikel 20 – Bestaanszekerheid' in X, *Nederland Rechtsstaat over grondwet en rechtsstaat* (2022), https://www.nederlandrechtsstaat.nl/grondwet/inleiding-bij-hoofdstuk-1-grondrechten/artikel-20-bestaanszekerheid/, accessed on 19 March 2025).

15 Van Sasse van Ysselt, *supra* note 14

16 Houwerzijl and Vlemminx, *supra* note 14.

17 Ibid.

18 Verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet van bepalingen inzake grondrechten en Verklaring dat er grond bestaat een voorstel in overweging

The privatisation of the Sickness Benefits Act illustrates that the right to social security in Article 20(2) Gw requires a scrutiny of the legislator when adopting legislation. Following the advice of the Dutch Council of State, this reform was accompanied by several compensatory measures aimed at reducing the negative effects of market mechanisms on vulnerable groups and ensuring that adequate protection was maintained.[19] The Sickness Benefits Act should therefore, among other things, include appropriate measures to enable employers to take out affordable insurance policies, to provide protection in the event of an employer's bankruptcy, or to provide adequate safeguards for employees with chronic illnesses. Privatisation measures must not result in sickness protection being dependent on the employer or the insurer. As Vonk notes, the legislator was required to condition privatisation in a socially responsible manner.[20] This aligns with the obligation not to eliminate entitlements within the social security system entirely.[21] However, apart from the Sickness Benefit Act, Article 20(2) Gw has received little judicial attention,[22] and its wording (*the law makes the rules concerning the entitlements to social security)* makes clear that no direct subjective rights can be derived from it.[23]

Article 20(3) Gw explicitly enshrines the right to social assistance. Vonk describes its potential dual nature: it imposes a legal duty on the legislator while also creating a subjective entitlement for individuals.[24] Heringa similarly argues that this provision could impose stronger legal obligations.[25] The Dutch Council of State has stated that the provision 'recognises a subjective right', though its exercise depends on legislative implementation, as achieved through the General Assistance Act (now the Participation Act, *Participatiewet*).[26] However, Dutch courts have taken a more cautious approach than that proposed by Vonk, acknowledging that while subjective rights may arise from legislation, they cannot be directly enforced through the constitutional provision itself.[27] What emerges from this analysis, as well as prior discussions of Article 20 Gw,[28] is the ongoing uncertainty surrounding its precise scope and interpretation.

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te nemen tot verandering in de Grondwet, strekkende tot opneming van bepalingen inzake sociale grondrechten, *Kamerstukken I* 1976-77, 13 872-13 873, No. 55b, 25.

19 Memorie van toelichting bij wijziging van het Burgerlijk Wetboek, de Ziektewet en enkele andere wetten in verband met loondoorbetaling door de werkgever bij ziekte van de werknemer, *Kamerstukken II* 1995-96, 24 439, No. 3.

20 G. Vonk, *Recht op sociale zekerheid. Van identiteitscrisis naar hernieuwd zelfbewustzijn* (inaugural lecture University of Groningen, 2008), https://research.rug.nl/files/2723432/2008_recht_op_sociale_zekerheid.pdf, accessed on 19 March 2025, 8; see also: Houwerzijl and Vlemminx, 'Artikel 20 – Bestaanszekerheid'.

21 Houwerzijl and Vlemminx, *supra* note 14. d'.

22 Opinion Dutch Council of State *Kamerstukken II* 2011-12, 33 207, No. 4, 11 and Opinion Dutch Council of State *Kamerstukken II* 2013-14, 33 801, No. 4, 2.

23 Tom Barkhuysen et al., *De Nederlandse Grondwet geëvalueerd*, Kluwer, 2009, p. 57.

24 G. Vonk, 'Het grondrecht van de bestaanszekerheid: een Nederlands perspectief', 108 *TRA* 9, 2023, p. 10.

25 A.W. Heringa, *Sociale grondrechten: hun plaats in de gereedschapskist van de rechter*, Tjeenk Willink, 1989, p. 75 and 109; as also discussed in the parliamentary discussions: *Kamerstukken II* 1975-76, 13 873, No. 5.

26 Opinion Dutch Council of State, 21 June 2002, W01.02.0179/I, *Kamerstukken II* 2001-02, 28 331, No. A.

27 CRvB, 19 June 2017, ECLI:NL:CRVB:2017:2810.

28 A more detailed discussion can be found in Houwerzijl and Vlemminx, *supra* note 14.

3. Protection against change in Belgium

Economic, social, and cultural rights, including the right to social security and social assistance, are enshrined in Article 23 Gw (Constitution). As in the Netherlands, their inclusion in the Belgian Constitution in 1994 was accompanied by extensive debates on their legal effect and judicial enforceability.[29]

Article 23(3) Gw contains a non-exhaustive list of economic, social, and cultural rights, explicitly recognising both the right to social security and the right to social assistance. A separate right to family benefits was added in 2014 following the regionalisation of the family benefits system. This ensures that a significant reduction in benefits in one region cannot be justified by reference to other compensatory measures in other domains of the Belgian social security scheme, unless such measures specifically address the burden that the cost of maintaining and educating children places on families.[30] Article 23(2) Gw obliges the competent legislators to further shape these rights through legislation, granting them broad discretion in determining implementation. The provision does not impose detailed requirements or a duty to progressively expand social security protection.[31]

The drafters of Article 23 did not intend to create an enforceable subjective right to social security.[32] Instead, this article incorporates a standstill clause, requiring a two-step analysis. First, it must be determined whether the legislator has significantly reduced the level of protection (step 1).[33] Case law does not clearly define what constitutes a significant regression, as each case requires an individual assessment. The Belgian Constitutional Court has at times bypassed this first requirement by directly ruling that the legislation serves a general interest objective and therefore does not violate Article 23 Gw.[34] In step 2, the justification of the measure is scrutinised. Reductions in social security protection can still be justified if they serve an overriding public interest.[35]

The standstill clause grants the legislator broad discretion in shaping social policy,[36] while ensuring that social protection cannot simply be abolished or drastically reduced.[37] As a

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29 M. Stroobant, 'Sociale en economische grondrechten in de Belgische geschiedenis. Wordingsgeschiedenis van artikel 23: het akkoord van 'Le Ry d'Ave' Rochefort' in W. Rauws and M. Stroobant (eds.), *Sociale en economische grondrechten. Artikel 23 Gw: een stand van zaken na twee decennia*, Intersentia, 2010, p. 19-57.

30 Belgian Constitutional Court (hereafter: GwH), no. 198/2019, 5 December 2019, B.19.3; see also Laura De Meyer, 'Grondrechten en de gezinsbijslagen. Welke sky is (voortaan) the limit?' in A. Van Regenmortel and Herwig Verschueren (eds.), *Grondrechten en sociale zekerheid,* die Keure, 2016, p. 167, 196.

31 For example: GwH, no. 133/2015, 1 October 2015, B.6.1.

32 Belgian Senate, Special Session 1991-92, doc. no. 100-2/3, 13; W. Pas, 'Kan standstill op hol slaan? Een reflectie over de herijking van de standstillwerking van artikel 23 Gw.' in A. Wirtgen (ed.), *Liber amicorum Marnix Van Damme*, die Keure, 2021, p. 81; see also GwH, no. 62/2018, 31 May 2018, B.7.3.

33 Toelichting bij Herziening van titel II van de Grondwet, om een artikel 24bis in te voegen betreffende de economische en sociale rechten, Parl.St. Senaat, Special Session 1991-92, no. 100-2/3, 13.

34 See for example: GwH, no. 117/2022, 29 September 2022, B.16; GwH, no. 69/2023, 27 April 2023, B.7.2.

35 See for example: GwH, no. 41/2020, 12 March 2020, B.9.8; GwH, no. 123/2022, 13 October 2022, B.12.1 and B.12.

36 See for example: GwH, no. 79/2021, 3 June 2021, B.5.4.

37 Pas, *supra* note 32, p. 84.

result, Article 23 Gw has primarily a protective function, preventing severe reductions in social security rights.[38] Furthermore, it requires legislators to adequately justify new measures.[39] An important aspect of Article 23 Gw concerns the link between fundamental rights and corresponding obligations, including the duty of individuals to contribute to social and economic progress.[40]

The legislator has broad discretion in determining the measures necessary to serve the general interest.[41] The Belgian Constitutional Court has accepted several objectives as legitimate justifications, including intergenerational solidarity and financial sustainability,[42] as well as the promotion of activation measures.[43] Only in the absence of adequate justification can the policy choice of the legislator be overturned.[44] Case law from both the Constitutional Court and the Council of State shows that compensatory measures can be valid justifications.[45] The courts also consider whether a reform is part of a broader policy framework, whether social dialogue has taken place and whether transitional or protective measures have been introduced.

Initially, both the Belgian Council of State and the Belgian Constitutional Court, took a cautious approach to the application of the standstill principle.[46] However, its use has increased in recent years, though violations remain limited.[47] The best-known examples concern access to social protection for newcomers. In several cases, a ten-year prior residence requirement was introduced for certain social assistance benefits for the elderly and disabled, as well as in the Flemish long-term care schemes.[48] The Belgian Constitutional Court found a violation of Article 23 Gw in each of these cases, referring to the insufficient justification by the federal and Flemish legislators. The authorities failed to demonstrate how the residence requirement contributed to the financial sustainability of the system.[49] Other considerations included the limited funding of the Flemish long-term care schemes through individual contributions[50] and the vulnerability of the persons affected.[51]

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38 See also the criticism in Pas, *supra* note 32, p. 96.

39 D. Dumont, 'Le principe de standstill comme instrument de rationalisation du processus législatif en matière sociale', *JT* 602, 2019, p. 627.

40 GwH, no. 75/2015, 21 May 2015, B.10.1 and B.10.2; H. Bortels and D. Bijnens, 'Het recht op een menswaardig leven in de rechtspraak van het Grondwettelijk Hof – stilstand of vooruitgang?' in R. Leysen *et al.* (eds.), *Semper perseverans. Liber amicorum André Alen*, Intersentia 611, 2020, p. 614.

41 See for example: GwH, no. 130/2016, 13 Oktober 2016, B.17.2.

42 See for example: GwH, no. 112/2023, 20 July 2023, para. B.11.2.2.

43 See for example: Belgian Council of State, no. 250.892, 14 June 2021, 13.5.1 and 13.5.2.

44 See for example: GwH, no. 70/2021, 6 May 2021, B.4.3.

45 Council of State, no. 250.892, 14 June 2021, B.25.2.; see also Council of State, no. 69/2023, 27 April 2023, B.9. and B.10.

46 Pas, *supra* note 32, p. 83-84.

47 W. Vandenhole, 'Het jonge leven van sociaaleconomische grondrechten in de Belgische Grondwet' in C. Jenart (ed.), *De Grondwet en Jan Velaers. Deel IV – Een vriendschapsgewijze commentaar*, Bruges, die Keure, 2022, p. 153-159.

48 GwH, no. 6/2019, 23 January 2019; GwH, no. 41/2020, 12 March 2020 and GwH, no. 112/2023, 20 July 2023.

49 GwH, no. 112/2023, 20 juli 2023, para. B 11.2.4.

50 GwH, no. 112/2023, 20 juli 2023, para. B 11.2.4.

51 See also GwH, no. 6/2019, 23 January 2019, para. B.9.6. and GwH, no. 41/2020, 12 March 2020, B.9.7.

The Belgian Court of Cassation seems to apply a stricter review, requiring the legislator to specify the general interest in sufficient detail to ensure that the proportionality of the measure is clearly demonstrated.[52] One example concerns the time limit imposed on integration benefits for young jobseekers who do not qualify for unemployment benefits yet. The Belgian Court of Cassation ruled that the justification provided by the legislator was too general and that the impact on older unemployed persons had not been sufficiently examined.[53]

This divergence in approach ties into a broader debate on whether a proportionality test is embedded in the standstill principle. Unlike directly enforceable civil and political rights – where proportionality is part of the test applied by the Belgian courts – social, economic, and cultural rights under Article 23 Gw are in principle subject to a different form of judicial review via the standstill principle.[54] According to the parliamentary preparatory work, this difference is due to the nature of the rights enshrined in Article 23 Gw. However, case law and advisory opinions show that courts apply a proportionality test as part of the standstill principle, narrowing the distinction between civil and political rights and social, economic and cultural rights. In such cases, courts assess whether a reduction in social protection is manifestly disproportionate to the stated objective (see step 2 above).[55] Dumont and Hachez argue that recent case law suggests that the Belgian Constitutional Court has clearly incorporated a proportionality test into the standstill principle.[56] However, the extent of the judicial review remains a point of discussion, in particular how far the judge can go to review the decision taken by the competent legislator.

Recent case law from Belgian lower courts illustrates an additional challenge in applying the standstill principle, namely its use in individual adjudication. Although Article 23 Gw does not confer directly enforceable rights, courts may still intervene when individuals experience a reduction in social protection. A much debated strand of case law concerns the benefits reductions for persons with a disability. In these cases, several Belgian lower labour courts and labour courts of appeal havenot assessed whether there was a significant reduction of the legal protection provided in general, but focused to what extent the protection of the individual applicant constituted a significant reduction. However, an evaluation should be made asto what extent the applicable legislation reduces the

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52 See for example: Court of Cassation, S.18.0012.F, 14 September 2020.

53 Court of Cassation, S. 16.0033.F, 5 March 2018 and Court of Cassation, S.18.0012.F, 14 September 2020.

54 See also GwH, no. 18/2018, 22 February 2018, B.10.2.3.

55 See for example: Advice Council of State 66.660/1/3, 25 Oktober 2019; GwH, no. 64/2019, 8 May 2019; in the French- speaking literature, the proportionality test is also put forward more explicitly, see for example: D. Dumont, 'Le « droit à la sécurité sociale » consacré par l'article 23 de la Constitution: quelle signification et quelle justiciabilité?', in D. Dumont (ed.), *Questions transversales en matière de sécurité sociale*, Brussels, Larcier 11, 2017, p. 82–83 and I. Hachez and F. Louckx, 'Morceaux choisis sur la justiciabilité des droits sociaux au sein de l'ordre juridique belge : de l'effet direct à la responsabilité civile', in S. Van Drooghenbroeck et al., *Europees Sociaal Handvest, sociale rechten en grondrechten op de werkvloer/Charte sociale européenne, droits sociaux et droits fondamentaux au travail*, Bruges, die Keure, 2016, p. 97-110.

56 See also GwH, no. 69/2023, 27 April 2023, B.6.4: Dumont and Hachez implicitly derive a principle of proportionality from the principle of standstill: Daniel Dumont and Isabel Hachez, 'Le principe de *standstill redéfini* par la Cour constitutionnelle: la confirmation logique et bienvenue de l'exigence d'un test de proportionalité', *JT* 2, 2024, p. 4.

level of protection provided *in globo* and whether or not this constitutes a significant reduction. The judge needs to compare the new legislation with the protection previously provided. This individualised application has resulted to a high degree of rigidity – almost *cementation* – in the level of protection provided. In some instances, lower courts have been overruled by the Court of Cassation, legal uncertainty persists regarding how the standstill principle should operate in individual cases.[57]

4. The right to minimum protection in Germany

The German constitution does not explicitly enshrine fundamental social rights.[58] Only a limited number of fundamental social rights have been incorporated – for example the rights of mothers in Article 6 (4) – reflecting the framers' deliberate choice not to include an extensive list of such rights.[59] However, social security rights are safeguarded through civil and political rights, such as the right to property – an aspect not further examined in this paper. The German constitution may lack an explicit right to social security, but Article 20 establishes the social state principle (*Sozialstaatsprinzip*), which has nonetheless played a crucial role in the German legal order. This provision defines Germany as a democratic and social federal state, a characteristic that cannot be altered, nor abolished even by a change of the Constitution itself (Article 79 para. 3 of the Basic Law).[60]

While the social state principle does not create individual rights, it imposes an obligation on the German state to develop social legislation and ensure necessary social protection, thereby materialising citizens' social rights.[61] The German Constitutional Court has interpreted the *Sozialstaatsprinzip*, in conjunction with the right to human dignity, as requiring a minimum level of protection through the concept of a right to a guaranteed subsistence minimum (*Existenzminimum*).[62] The concept of an *Existenzminimum* is not a recent development in German law. The duty to provide for this minimum has long been considered to derive from Article 20(1) Basic Law.[63]

Initially, while the state was obliged to provide tolerable living conditions through legal entitlements, individuals could not go to court to claim a violation of fundamental rights

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57 See also the discussion in N. Blomme, E. De Becker and T. Opgenhaffen, 'Het persoonsvolgend budget door zwaar weer. Welke (r)evoluties laten sociale grondrechten toe?', *Rechtskundig Weekblad*, 2024-2025, p. 323-338.

58 E. Eichenhofer, 'The Right to Social Security in the German Constitution' in A. Egorov and M. Wujczyk (eds.) *The Right to Social Security in the Constitutions of the World: Broadening the Moral and Legal Space for Social Justice: ILO Global Study, Volume 1: Europe,* ILO Publications, 2011 p. 72-73; see also M. Adler, 'The Legal Protection of Minimum Standards' in S. Devetzi and C. Janda (eds.), *Freiheit – Gerechtigkeit – Sozial(es) Recht* Nomos, 201, p. 15-19.

59 Eichenhofer, *supra* note 58, p. 72.

60 Eichenhofer, *supra* note 58, p.74.

61 G. Vonk and M. Olivier, 'The Fundamental Right of Social Assistance. A Global, a Regional (Europe and Africa) and a National Perspective (Germany, the Netherlands and South Africa)', *EJSS* 21(3), 2019, p. 219-230.

62 Vonk and Olivier, *supra* note 61, p. 230.

63 I. Leijten, 'The German Right to an Existenzminimum, Human Dignity and the Possibility of Minimum Core Socioeconomic Rights Protection', *GLJ* 16(1), 2015, p. 23- 29.

if the state failed to do so.[64] This position changed significantly following two landmark decisions:[65] the Hartz IV case (2010) and the *AsylbLG* case (2012). These decisions established that individuals could bring claims relating to the *Existenzminimum* before German courts, which enabled the German Constitutional Court to further clarify how and when the legislature had fulfilled its constitutional obligation.[66] Consequently, these rulings not only imposed an obligation on the state, but also confirmed that every individual has an enforceable right to an *Existenzminimum*, meaning that entitlements under the Hartz legislation could be reviewed in the light of this individual guarantee.[67] Although judges cannot directly grant individual entitlements to social assistance on the basis of the *Existenzminimum*, judicial proceedings can compel the legislator to enact legislation that meets certain constitutional criteria.[68]

According to the German Constitutional Court, the *Existenzminimum* guarantees the physical integrity of the individual and requires that it covers essential expenses such as food, clothing, accommodation, heating, hygiene and health care. Closely linked to this is its socio-cultural dimension, which ensures that individuals can maintain interpersonal relationships and participate in social, cultural and political life. Legislation must take account of both dimensions. While the legislator retains some discretion in defining the *Existenzminimum*, this discretion is more limited in relation to the physical integrity of the individual. A key feature of the *Existenzminimum* case law concerns the procedural requirements it imposes on legislation, thereby providing the courts with a framework for assessing legislative compliance. This is evident in the Hartz IV and AsylbLG cases, where the German Constitutional Court ruled that the legislator's method of calculation was inadequate.[69]

In the Hartz IV case, the legislator was obliged to introduce a new procedure for determining social assistance benefits. To allow time for legislative changes, the existing law remained in force until December 2010.[70] However, this did not mean that the legislator was obliged to increase the level of benefits. The Court held that the level of benefits was not inherently unreasonable; rather, the unconstitutionality arose from flaws in the method of calculation.

In the *AsylbLG* case, the German Constitutional Court further refined the principles established in the Hartz IV case, ruling for the first time that beneficiaries are entitled to more than what the law provides.[71] The case concerned benefits under the *Asylbewerberleistungsgesetz* (*AsylbLG*) of 1993, originally intended for short-term and

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64 Leijten, *supra* note 63, p. 29.

65 Ibid and See also the discussion in Ingrid Leijten, 'The German Right to an Existenzminimum, Human Dignity and the Possibility of Minimum Core Socio-Economic Rights Protection', p. 29 and Adler, *supra* note 58, p. 21 *et seq*.

66 Leijten, *supra* note 63, p. 29-30.

67 Leijten, *supra* note 63, p. 30.

68 Vonk and Olivier, *supra* note 61, p. 230.

69 BVerfG, decision no. 1 1/09, 9 February 2010, para. 142-144; BVerfG, decision no. 1 10/10, 18 July 2012, para. 71 and 75.

70 BVerfG, decision no. 1 1/09, 9 February 2010, para. 220.

71 BVerfG, decision no. 1 10/10, 18 July 2012, para. 102-107.

temporary stays in Germany and set at a lower level than benefits under the general social assistance system. Over time, the law was expanded to additional groups and the benefit duration increased from 12 months to four years.[72] During this period, recipients were not entitled to other forms of social assistance. Additionally, benefit levels had remained unchanged since 1993. The German Constitutional Court ruled that the *AsylbLG* benefits were clearly inadequate as they had remained unchanged for 20 years. Although the law included a review mechanism, neither the legislature nor the executive had applied it. To ensure benefits remain adequate, they must be periodically adjusted to reflect the rising cost of living.[73] However, the German Constitution does not prescribe a specific procedure for this, as doing so would excessively limit legislative discretion.[74] Since the benefits levels were incompatible with the *Existenzminimum*, the legislator was required to review the level of benefits immediately.[75] Given the fundamental nature of these benefits, the Court ordered transitional measures to take effect retroactively from 1 January 2011.[76] The basic benefit under the *AsylbLG* had to be recalculated in accordance with the general provisions of the Second and Twelfth Book of the Social Code, which govern the general social assistance system. Furthermore, the legislator had to modify the calculation method, as the existing procedure failed to meet legal standards.

The German Constitutional Court applies both a procedural and substantive review as part of the *Existenzminimum*. It assesses whether legislation is transparent, consistent and supported by sufficient data, while ensuring that individuals receive the minimum support necessary for a dignified existence.[77] It ensures that the legislator provides benefits in accordance with the right to a dignified existence and that the calculation method chosen remains within reasonable limits. This *Existenzminimum* includes covering the costs of food, clothing, housing, heating, hygiene, health care and participation in social, cultural and political life. Given the wide discretion of the legislature in this area, the German Constitutional Court's review is limited to cases where the benefits are clearly inadequate.[78] A similar approach was taken in a 2019 case[79] concerning sanctions imposed on jobseekers with a social assistance benefit. The German Constitutional Court found that the government had a duty to regularly assess the impact of the sanctions regime in terms of compliance. However, it ruled that no comprehensive review had been carried out.[80]

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72 BVerfG, decision no. 1 10/10, 18 July 2012, para. 95-98.
73 Ibid., para. 71-74.
74 Ibid., 68-69.
75 Ibid., 101 and further.
76 Ibid., 108-109.
77 See also Adler, 'The Legal Protection of Minimum Standards', p. 21-23.
78 BVerfG, decision no. 1 10/10, 18 July 2012, para. 102-107.
79 BVerfG, decision no. 1 7/16, 5 November 2019.
80 See also V. Gantchev 'Judgement of the German Constitutional Court on the (Un)Constitutionality of Welfare Sanctions BVerfG, 05.11.2019 – 1 BvL 7/16', *EJSS* 21(4), 2019 p. 378-383; and G. Vonk and E. Brambrough, 'The Human Rights Approach to Social Assistance: Normative Principles and System Characteristics', *EJSS* 22(4), 2020, p. 376, 385.

5. Concluding remarks

This paper provided a comparative analysis of the constitutional protection of the right to social security in the Netherlands, Belgium and Germany. In all three countries, the question of legal enforceability has beenthesubject of ongoing debate. While it is primarily for the legislature and the executive to give substance to social rights, this does not exclude a role for the judiciary.

In recent Dutch debates on strengthening judicial review of fundamental (social) rights, concerns have been raised about an overly prominent role for the courts. However, these concerns overlook the constructive role that judicial review can play in shaping and safeguarding fundamental social rights. If courts are not authorised to assess social legislation in the light of fundamental social rights, constitutional guarantees risk remaining purely declaratory. In such a context, there is little institutional pressure or incentive for the legislature to actively ensure compliance with fundamental social rights standards. Moreover, the absence of judicial review in the Netherlands prevents the emergence of a meaningful constitutional dialogue between the legislature and the judiciary regarding the scope and content of the right to social security.

Both Belgium and Germany illustrate different approaches to constitutional protection of social security rights. While Germany does not recognise a constitutional right to social security as Belgium does, it does provide strong protection through the *Existenzminimum*. The German Constitutional Court has established that the most vulnerable must be guaranteed a minimum standard of living. Rather than defining the *Existenzminimum* in quantitative terms, the Court assesses whether the protection provided is not manifestly inadequate. This minimum has both a physical and a socio-cultural component. Even if a benefit is not manifestly inadequate, the Court examines whether procedural safeguards – such as transparency and methodologically sound calculation methods – have been respected. In doing so, it seeks to balance legislative discretion with clear legal boundaries.

In Belgium, the question of how to interpret and implement fundamental social rights also arose when they were incorporated into the constitution. The standstill principle was introduced as a guiding principle. Here, too, the emphasis is on legislative justification: while broad political discretion allows for reforms, subjective rights do not derive directly from Article 23 Gw. A potential violation occurs when the legislator significantly reduces protection without invoking compelling reasons of general interest. Again, the focus is on the decision-making process and the impact on the most vulnerable. However, the application of the standstill principle in Belgium has been criticised for its narrow focus on identifying regression in individual cases. This approach risks sidelining the broader constitutional objective of social protection and may overlook the different ways in which the legislator seeks to uphold this right over time. A strict comparison between old and new legislation may obscure important contextual factors, such as broader systemic reforms or compensatory measures in favour of other groups.

The focus on the decision-making process and the importance of protecting the most vulnerable in society, shows a potential convergence between Belgian and German

constitutional practice: both recognise that social protection systems need to be adaptable and that carefully justified reforms can be legitimate, even if they negatively affect certain individuals. At the same time, the danger remains that a rigid, individualised application of the standstill principle in Belgium may entrench existing social benefits to such an extent that necessary systemic adjustments become impossible.

The different approaches in Belgium and Germany demonstrate that social security rights can be subject to meaningful judicial review without necessarily undermining the role of the legislature. This contrasts with prevailing assumptions in Dutch political discourse, where there remains a deep-rooted concern that judicial involvement in fundamental social rights could lead to an undue shift of power from parliament to the judiciary. The fear of extensive judicial review continues to shape constitutional thinking in the Netherlands.

This cautious attitude is reinforced by a structural feature of the Dutch legal system: Article 120 of the Constitution prohibits the courts from reviewing acts of Parliament against the fundamental rights provisions of the Dutch Constitution. As a result, the judiciary is formally excluded from playing a constitutional balancing role, even in clear cases of potential rights violations. This constitutional prohibition has significant implications. It not only limits the development of substantive case law on the right to social security but also hinders the broader constitutional embedding of fundamental social rights of the Dutch constitution.

In contrast, both the Belgian and German experiences illustrate how judicial review can support the constitutional entrenchment of fundamental social rights without leading to their politicisation. Rather than replacing the legislator, courts can help clarify the normative contours of social protection and ensure that legislative discretion is exercised within constitutional limits.

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Human right to social security under the European Social Charter and its supervision by the European Committee of Social Rights

Grega Strban

Abstract: The right to social security is among human rights according to many international and European legal instruments, which set up distinctive monitoring mechanisms for its realisation. European Committee of Social Rights supervises the right to social security under the (initial and revised) European Social Charter. It is composed of 15 independent experts, selected by the competitive procedure. Their status requires that they have an opinion on issues related to the right to social security before, during and after their membership. Reasons for inability to sit or to be recused have to be construed narrowly. Activities of the Committee are no longer limited to the reporting procedure. Focus is shifting towards collective complaints, along with ad hoc reviews and non-accepted provisions process. Council of Europe Statute requires every member state to accept the enjoyment by all persons of human rights and fundamental freedoms, without distinguishing between civil and political rights on one and social, economic and cultural rights on the other side. Every human shall enjoy all human rights.

Keywords: European Committee of Social Rights, European Social Charter, Council of Europe, human rights, social security

1. Introductory remarks

The right to social security is firmly anchored in international and European law. According to the Universal Declaration of Human Rights (UDHR), everyone should have the right to social security in the event certain social risk would occur.[1] Similarly, the

[1] Social risks of unemployment, sickness, disability, widowhood and old age are explicitly mentioned. Additionally, room for other social risks is made by adding an open-ended sentence (or other lack of livelihood in circumstances beyond his control).

International Covenant on Economic, Social and Cultural Rights (ICESCR) is stressing social insurance[2] as one of the main paths of its realisation.

International Labour Organisation (ILO) Convention No. 102 on minimum standards of social security (1952) does not stipulate the right to social security, but it has a pivotal role in determining its substance under international and European law. The nine, 'traditional' social risks, were used as a fundament for social security coordination in the EU[3] and for ensuring harmonisation of one of the basic legal principles, i.e. equality of treatment.[4] Since then, new social risks have emerged,[5] like reliance on long-term care. It has been included in the social security coordination mechanism by the decisions of the Court of Justice of the EU (CJEU)[6] and is explicitly mentioned (as dependency) in the Charter of Fundamental Rights of the EU (CFR-EU),[7] among the social risks pertaining to the right to social security.

However, by European law, not only the law of European Union (EU), but also the law of the Council of Europe (CoE) must be considered. The latter is even more concerned with respecting, protecting and fulfilling human rights than the EU law.[8] It is founded on the principles of human rights, democracy and the rule of law, which must be in balance (like a tree legged stool). Although, the European Convention of Human Rights (ECHR) may bare importance also for social security law,[9] it does not cover all human rights.

Social and economic human rights can be found in the initial (1961) and the revised (1996) European Social Charter (ESC or Charter). The Charter in its initial version proclaims a satisfactory level of social security which State Parties must maintain as the one required for the ratification of the ILO convention No. 102. By doing so, the substance of this convention has become a standard of the State Parties under the ESC. As a matter of prestige among international organisations, CoE passed its own version of social security minimum standards in the European Code of Social Security (1964), reiterating many of the ILO 102 Convention provisions. It has become a standard of the right to social security under the revised ESC.

Conversely to national and supranational law of the EU, international documents are rarely amended. Instead, a new one might be agreed upon. This applies also to the initial and the revised ESC. The latter amends certain provisions and adds new social rights.

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2 Article 9 ICESCR.

3 Article 48 TFEU and Article 3 Regulation (EC) 882/2004 on the coordination of social security systems, OJ L 166, 30.4.2004, as amended.

4 Directive 97/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10 January 1979.

5 G. Strban, 'Social risks and their development', in M. Mocella and E. Sychenko (eds): *The quest for labour rights and social justice, Work in a changing world*, Franco Angeli s.r.l., Milano 2024, p. 143-160, https://series.francoangeli.it/index.php/oa/catalog/view/1202/1264/6790, April 2025.

6 See also Article 34 Regulation (EC) 883/2004 and its proposed amendments (from December 2016), where a new chapter on long-term care benefits is foreseen.

7 CFR-EU, OJ C 326, 26 October 2012.

8 CESCR, General Comment 19, The right to social security (Article 9), U.N. Doc. E/C.12/GC/19, 2008.

9 G. Strban and L. Mišič, 'Property Protection of Social Rights: Perspectives of the European Court of Human Rights and the Slovenian Constitutional Court', *Iustinianus Primus Law Review*, 11, 2020.

Both are linked to such extent to be considered as a uniform (social) human rights instrument. A State Party is only bound by the provisions it has accepted by the initial or revised (or both) ESC, but the scope of contracting parties concerns both Charters. As the ESC does not rely on the principle of reciprocity, a State Party ratifying some of the initial ESC provisions may have obligations towards (citizens) of a State Party that has ratified other (or same) provisions of the revised ESC.[10] The ECHR must be ratified as a condition of CoE Membership,[11] but ESC is considered a voluntary instrument. It must be noted that CoE Statute obliges Member States to respect human rights without mentioning instruments enshrining them. Whereas, all EU Member States are bound by the ESC, this does not apply to all CoE Member States. Four of them are not bound by any ESC (initial or revised).[12] They are not only Lichtenstein, Monaco and San Marino, but also Switzerland.[13]

For the effective realisation of human rights public force is required, which was established already in 1789.[14] Hence, supervisory mechanism may exist under national law (in a form of regular or constitutional courts, general and specific ombudspersons) as well as under international law. They may take a form of direct international courts of law, like the European Court of Human Rights (ECtHR), or more indirectly by the CJEU (in cooperation with national courts), or other professional bodies, such as the UN Committee on Economic, Social and Cultural Rights (CESCR), ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) or the European Committee of Social Rights (ECSR). The latter is supervising social rights under the ESC. Distinctive supervisory mechanisms reflect diverging nature of human rights. Although all humans shall have all human rights (indivisibility of human rights), there is a distinction between civil and political rights on one hand and economic social and cultural rights on the other. It is reflected in the distinctive international documents, such as International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR), also ECHR and ESC. Moreover, it is reflected also in the composition and competencies of the human rights' supervisory bodies.

International and European legal instruments, containing (also) social rights, are more often subject of academic discussions compared to the bodies supervising their realisation.

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10 For instance, if the State has ratified the right to social security and the right to social and medical assistance under the initial ESC without reservations, it must provide them to the persons from a State that has ratified the revised ESC (also without the same provisions).

11 UK also wanted to exit the CoE, not to be directed by the ECtHR. Denouncing the ECHR is legally possible (Article 58 ECHR). It might not automatically lead to the expulsion from the CoE, since Article 3 CoE Statute requires Member States to respect human rights, without mentioning the ECHR. It would be possible to denounce the ECHR and remain a CoE member, if all ECHR obligations would be respected. Supervision would be lacking, and it would be politically and practically contested. The situation of Russia was different. It was expelled (2022) and therefore the ECHR was denounced (Article 58 ECHR). For more on Brexit, see G. Strban, 'Brexit and social security of mobile persons', *ERA Forum*, 18(2), 2017, p. 181.

12 Only seven CoE Member States are bound by the initial and not by the revised ESC (Croatia, Czechia, Denmark, Liechtenstein, Luxemburg, Poland, and UK).

13 More at https://www.coe.int/en/web/conventions/full-list, April 2025.

14 Articles 12 and 13 Declaration of Human and Civic Rights of 26 August 1789, https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf, April 2025.

Therefore, the present paper focuses on the ESCR as the monitoring body under the ESC. Questions are in particular, what its role and purpose actually are, is it effective, could it be done more to respect social human rights? Although, it might be interesting to analyse all international social rights legal instruments and their supervisory bodies in a (horizontal) comparative perspective (and their vertical influence on the countries bound by them), it would exceed the purpose of the present paper.

2. European Committee of Social Rights

Responsibility to implement human rights recognised by international treaties, including the right to social security, is primarily on the ratifying States. Although, it is primarily the States' responsibility to guarantee the realisation of social rights that they have committed themselves to by international instruments (which have followed certain national developments anyway), it is important to ensure that the protection of these rights is guaranteed at the international level as well.

Even though social rights as so-called second-generation rights are also effectively protected before (supreme and constitutional) national courts, their formulation in international instruments and the absence of the possibility of an individual to directly refer to an international court for protection,[15] gives the appearance of subordination to first generation rights. This appearance does not necessarily reflect the reality as social rights which might be more often called upon by people in need of social security and social assistance. Reflecting the legal nature of the ESC and the importance of social rights, CoE guarantees an effective supervisory mechanism in the form of ESCR. It is increasing the level of protection of social rights, also due to its composition and variety of activities.

2.1 Composition

Contrary to the ECtHR (and CJEU) where every Member State has a judge (at General Court of the EU even two),[16] the ECSR is composed based on merits in social law and competitive selection procedure. Similarly, in the UN and ILO, CESCR and CEACR are also composed of selected independent experts.[17]

At first, supervisory body of the initial ESC was referred to as the Committee of Experts and composed of not more than seven members, appointed by the Committee of Ministers (CM) from a list of independent experts of the highest integrity and of recognised competence in international social questions, nominated by the Contracting Parties.[18] Later, the number of members was increased. According to the ESCR Rules,[19] the ECSR

15 Conversely, an individual has access to the ECtHR concerning the first-generation rights.
16 More at https://curia.europa.eu/jcms/jcms/T5_5230/en/, April 2025.
17 See https://www.ohchr.org/en/treaty-bodies/cescr/membership, and https://www.ilo.org/resource/other/members-committee-experts-application-conventions-and-recommendations, April 2025.
18 Article 25 initial ESC.
19 Rule 1: Composiiton, https://rm.coe.int/rules-rev-343-en/1680b2726c, April 2025.

is composed of 15 members in conformity with the decision of the Ministers' Deputies applying Article 25 of the initial ESC as amended by the Turin Protocol. Among the reasons for such increase were to support the growing workload of the ECSR, especially after the introduction of the collective complaints' procedure (with the 1995 Additional Protocol to the Charter), and an increased number of social rights guaranteed by the revised ESC.

The procedure for each call for experts is adopted by the CM. According to the last call, only CoE Member States that have ratified the (initial or revised) ESC could have proposed candidates to the ECSR.[20] Hence, Switzerland, Liechtenstein, Monaco and San Marino were not entitled to make such proposal. Moreover, only one proposal per State Party was allowed. Conversely, more States could agree on a joint candidate, at the same time having in mind that ESCR may consist of no more than one member of any particular nationality. Selection is made by simple majority (i.e. half of the number of the Ministers' Deputies entitled to vote, plus one), considering geographical rotation and gender equality.[21]

They were five groups with 9 or 10 countries represented at the last call for experts.[22] It seems that due consideration was taken for the central, northern and southern, eastern and western Member States. The same grouping was used in the 2022 selection process. There are not always vacant seats in all groups at the same time. Nevertheless, it is a competitive process of selection. There are usually more candidatures than vacant seats. ESCR members are replaced in a consecutive manner, not to interfere with the continuity of the ESCR decision making process.[23] This also means that if a member was replaced by another member mid-term, only this (predecessor's) term can be completed. Normally, full term of appointment is six years.[24] It is renewable only once, which contributes to the democratically rotating membership.

ESCR is a committee of independent experts. They must perform their duties in conformity with the requirements of independence, impartiality and availability inherent in their office and shall keep secret the Committee's deliberations. If this would not be the case, ESCR is, on the basis of a report by the Bureau (composed of the President, two Vice-Presidents and the general Rapporteur), required to take appropriate measures to address the situation. This might include specifying to the member what must be done to address

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20 According to Decision CM/Del/Dec(2024)1500/4.3c (https://search.coe.int/cm/fre#_ftn2, April 2025), each State Party to the ESC or revised ESC could submit to the Secretary General of the CoE, the name of a candidate.

21 According to Recommendation Rec(81)6 of the Committee of Ministers adopted on 30 April 1981 on the participation of men and women in an equitable proportion in committees and other bodies set up in the Council of Europe, available at https://search.coe.int/cm/eng?i=09000016804ffbfb, April 2025.

22 Group I: Armenia, Austria, Czechia, Germany, Hungary, Liechtenstein, Slovak Republic, Slovenia and Switzerland. Group II: Belgium, Bulgaria, France, Lithuania, Luxembourg, Monaco, Netherlands, Poland and Romania. Group III: Denmark, Estonia, Finland, Iceland, Ireland, Latvia, Norway, Sweden and United Kingdom. Group IV: Andorra, Croatia, Cyprus, Georgia, Greece, Italy, Malta, Portugal, San Marino and Spain. Finally, Group V: Albania, Azerbaijan, Bosnia and Herzegovina, Republic of Moldova, Montenegro, Serbia, North Macedonia, Türkiye and Ukraine.

23 Already Article 25 initial ESC foresees distinctive mandates.

24 Ibid.

the non-performance, issuing an admonition, suspending the member from deliberations or, if necessary, referring the matter to the CM.[25]

At the same time, ESCR members enjoy freedom of expression, which they exercise in a manner not to undermine the authority and reputation of the ESCR and its members or give rise to reasonable doubt as to their independence or impartiality. While members are free to participate in public debate on matters pertaining to legal subjects or to social rights issues more generally, they are not allowed to comment on on-going examinations of national situations or pending collective complaints.[26]

There is a certain tension between professional independence and limited freedom of expression. Among members are university professors, with a significant record of publications on social rights, including the right to social security. This actually made them eligible for membership in the first place. Hence, their position on certain issues concerning social rights is well known and should not change due to the ESCR membership. Therefore, a new rule was vividly debated and inserted into the ESCR Rules by the 2024 amendment. It concerns more contradictory procedure when examining a collective complaint, where a Member State, which has proposed a candidate, does not agree with their position and would like to eliminate such member from the ESCR in a case at hand.

Therefore, a new rule has been adopted concerning inability to sit/recusal.[27] If any of the reasons for which members are not allowed to take part in the consideration exists,[28] inability to sit may be proposed by the member and decided by the President. Also, parties to the collective complaint may ask for a recusal of a member. If there is no agreement, a small committee (composed of the President, if not personally involved, and two members appointed by ESCR plenum) shall decide on recusal.

Such rule bears similarity to the ECtHR procedure.[29] Although, ESCR is occasionally referred to as a quasi-judicial body, its members are no judges. Their position, tasks, pay and privileges do not match. Whereas, judges of the ECtHR may afford and be more hesitant to express their views in academic articles, this is an obligation for many ESCR

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25 If the member concerned is the President or another member of the Bureau, the report will be drafted by the Bureau without the President or the member concerned. ESCR Rules, Rule 3: Duties of Committee Members.

26 ESCR Rules, Rule 7bis: Freedom of Expression.

27 ESCR Rules, Rule 28bis: Inability to sit/recusal.

28 If they have a personal interest in the complaint, including a spousal, parental or other close family, personal or professional relationship, or a direct subordinate relationship, with any of the parties; they have previously acted in the complaint, whether as the Agent, advocate or adviser of a party or of a person having an interest in the complaint, or as a member of another national or international tribunal or commission of inquiry, or in any other capacity; they have expressed opinions publicly on the complaint at issue through the communications media, in writing, through their public actions or otherwise, that are objectively capable of adversely affecting their impartiality (or the perception of same); for any other reason, their independence or impartiality may legitimately be called into doubt.

29 Rules of the Court, Registry of the Court, 2024, Strasbourg, Rule 28 – Inability to sit and recusal (as amended in December 2023) and Practice direction issued by the President of the Court concerning Recusal of Judges, Rules of the Court, p. 94. Available at https://www.echr.coe.int/documents/d/echr/rules_court_eng, April 2025.

members. Inability to sit or recusal may be justified in very restrictive instances of personal involvement with a concrete case, pending before the ESCR, if at all. General comments and comments on decided and published cases are, of course, in line with the independent status of ESCR members.

2.2 Activities

ECSR guarantees the protection of 31 fundamental social rights set out in the ESC, one of the most extensive and complete international instruments for the protection of social rights.[30] Monitoring is comprised of the reporting procedure and the collective complaints procedure.[31] Additionally, ESCR may produce ad hoc reviews and conduct visits and reports on non-accepted provisions.

2.2.1 Reporting procedure

States Parties are obliged to regularly submit a report on the implementation of the ESC, which is examined by the ECSR. The reporting procedure is set out in Part IV of the 1961 ESC as amended by the 1991 Turin Protocol, which despite not having entered into force is being applied on the basis of a unanimous decision taken by the CM.[32]

Up to the 2022 reform, the ESC provisions were divided into four thematic groups.[33] States Parties were required to present a report on the provisions relating to one of the four thematic groups on an annual basis. Consequently, each provision of the ESC was reported on once every four years. State Parties were encouraged to accept the collective complaint procedure, also by reducing their reporting workload. Since 2014, they have to submit a simplified report every two years. In order to prevent excessive fluctuations in the workload of the ECSR from year to year, those States accepting the collective complaints procedure were divided into two groups. The groups were composed by distributing the States according to the number of complaints registered against them.[34] Simplified reports had to contain information on what follow-up action had been taken in response to the decisions of the ECSR in collective complaints.

The 2022 reform introduced certain changes to the reporting system,[35] also by enhancing the dialogue between the State Parties and the ECSR. Since 2023, provisions of the ESC

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30 A. Eleveld and G. Katrougalos, 'The Right to Social Security and Social Assistance in the 'Case Law' and Conclusions of the Social Rights Committee', in F. Pennings and G. Vonk (eds.), *Research Handbook on European Social Security Law*, Cheltenham: Edward Elgar Publishing, 2023, p. 64.

31 ECSR Rules, Rule 2: Role of the Committee, more at https://www.coe.int/en/web/european-social-charter/implementing-the-european-social-charter, April 2025.

32 On Turin process https://rm.coe.int/16806f8f0 4 April 2025.

33 Group 1: Employment, training and equal opportunities, Group 2: Health, social security and social protection, Group 3: Labour rights, Group 4: Children, families, migrants, https://www.coe.int/en/web/european-social-charter/reporting-system, April 2025.

34 Group A, eight States: France, Greece, Portugal, Italy, Belgium, Bulgaria, Ireland, Finland; Group B, eight States: Netherlands, Sweden, Croatia, Norway, Slovenia, Cyprus, Czech Republic, Spain.

35 Decision CM(2022)114-final – [1444/4.4], 27. 9. 2022.

are divided into two groups (second one being more social protection oriented)[36] and States Parties not accepting the collective complaints procedure report on one group every two years. This means that all accepted provisions are reported on every four years. Those accepting the collective complaints procedure report on one group of provisions only every four years, all accepted provisions are reported on every eight years.

The rationale behind the simplification of the reporting procedure is that the collective complaints procedure improves the effectiveness of monitoring compliance with ESC rights, so that reporting as another supervisory mechanism is not required as frequently. Weakness of such simplification can be recognised where the right to submit a collective complaint is not sufficiently utilised by eligible applicants. The State Party only gets updated on ECSR positions on the (non-)violation of the ESC rights of each group every eight years, which is a rather long time.

Nevertheless, to make the reporting procedure more topical and focused, so-called targeted questions are prepared by the ECSR and the Governmental Committee of the European Social Charter and European Code of Social Security (Governmental Committee, GC).[37] They may concern occupational safety and health not only of regular workers but also domestic workers, digital platform workers, teleworkers, posted workers, workers employed through subcontracting, self-employed, workers exposed to environmental risks such as climate change and pollution. By targeted questions, State Parties are encouraged to tackle issues relevant in the present times, not just (more or less) repeat the standard reporting exercise.

The ECSR examines the reports and decides whether the situation in a State Party is in conformity with the ESC. Conclusions are made public each year,[38] while the most important positions are also summarised in the ESCR Digest, article by article.[39] In order to increase transparency, predictability, and legal certainty, the ECSR also adopts Statements of Interpretation (SOI), which clarify the content of a particular provision of the ESC or an aspect of a particular right.[40]

When the ECSR concludes that a situation is not in conformity with the ESC, the State Party must remedy it. It must be in a position to set out the measures taken or is contemplating taking (with a timetable) in order to achieve conformity. GC considers conclusions of non-conformity adopted by the ECSR in the months following their publication. If no

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36 The report must cover, alternately, the provisions under one of the two new groups of the Charter. First group: Articles 1, 2, 3, 4, 5, 6, 8, 9, 10, 18, 19, 20, 21, 22, 24, 25, 28, 29, and Second group: Articles 7, 11, 12, 13, 14, 15, 16, 17, 23, 26, 27, 30, 31, both groups adjusted as necessary for the 1961 Charter and 1988 Protocol.

37 GS is composed of representatives of the States Parties to the ESC and assisted by observers representing European employers' organisations and trade unions (ETUC), Business Europe and International Organisation of Employers, https://www.coe.int/en/web/european-social-charter/governmental-committee, April 2025.

38 In the HUDOC-ESC database, https://hudoc.esc.coe.int/eng, April 2025.

39 It brings together the views expressed by the ECSR in the reporting procedure and in the collective complaints, https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd, April 2025.

40 ECSR Digest, 2022, p. 8.

action is taken, the CG may propose the CM to address a Recommendation to the State concerned.[41] Every year, the GC presents a follow-up report to the CM.

Next to State Parties, social partners equality bodies and civil society organisations may provide comments and other information relating to the national reports (so-called shadow reports).[42] Some of them may also lodge a collective complaint.

2.2.2 Collective complaints procedure

Next to reporting procedure, collective complaints procedure presents a second pillar of the ESC compliance monitoring mechanism. Whereas it is still not possible for an individual, whose right to social security (or other social right) was breached, to access ESCR, an important participative and supervisory role has been opened to social partners and non-governmental organisations (NGOs).

They may lodge a complaint, if they are European social partners (European Trade Union Confederation – ETUC, Business Europe and International Organisation of Employers), or international NGO holding participatory status with the CoE and included at their request on the list drawn up by the GC.[43] Moreover, national trade unions and employers' organisations may lodge a collective complaint against the State Party in which they are representative. National NGOs have to be granted access to instigate a collective complaint procedure.[44] So far only Finland has deposited such declaration with the CoE Secretary General, according to Article 2 of the 1995 Additional Protocol.[45]

Contrary to the procedure before the ECtHR, collective complaints may be lodged without exhausting domestic remedies and without the complainant organisation necessarily being a victim of the alleged violation itself. Such participative and supervisory role over the activities of State Parties plays a vital role in the ESCR compliance monitoring system. Social States (in continental Europe) and welfare States (in Anglo-Saxon legal order) may turn out to be too intrusive, and despite being democratic and governed by the rule of law, they may fail to respect social human rights, including the right to social security. Examples might relate to too strict and anti-free movement sanctions of benefits recipients in Norway, the so called NAV scandal, where at least 80 people were wrongly convicted of social security fraud, and that at least 2,400 social security recipients had been wrongfully demanded payment due to incorrect interpretation of EEA Regulations by the courts and the administrations. The EFTA Court had to intervene and correct the wrong.[46] Another example might be the so-called

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41 Ibid., p. 15.

42 ESCR Rules, Rule 21A.

43 Currently there are 59 INGOs on the list. They are approved for four years, renewable, https://www.coe.int/en/web/european-social-charter/non-governmental-organisations-entitled-to-lodge-collective-complaints, April 2025.

44 C. Lougarre, 'How can National Human Rights Institutions and National Equality Bodies engage with the European Committee of Social Rights under the monitoring system of the European Social Charter', CoE 2024.

45 More at https://www.coe.int/en/web/european-social-charter/finland, April 2025.

46 E.g. Case E-8/20, Criminal proceedings against N. B. Spiegel, M. Andresen, 2024, p. 32.

Dutch childcare benefits scandal (*Toeslagenaffaire*), were thousands of families were wrongly accused of making fraudulent benefit claims and demanded to repay their received allowances in full, this sum amounted to tens of thousands of euros, driving families into severe financial hardship.[47]

Collective complaint procedure may be described as a hybrid between hard-core classical adjudication and deliberative supervision.[48] It gives voice to citizen through their collective participation. Where a violation of ESC is found, the decision on merits in a given collective complaint is publicised and media might spread this voice, like in a recent very much echoed landmark decision on Complaint No. 206/2022 submitted by DCI, FEANTSA, MEDEL, CCOO and ATD Fourth World v. Spain.[49]

Once violations have been identified, countries are obliged to report on the measures they have taken to remedy them. Following the reform in 2022, States are required to submit a single report on the follow-up approximately two years after the Recommendation was adopted by the CM. As there might be not many recommendations in the past, their number is growing. For instance, in 2023 five recommendations were adopted, some of the related to the right to social security and the right to health.[50] More specifically, against Finland due to a manifestly inadequate level of sickness, parental, rehabilitation benefits, basic unemployment allowance and guarantee pension[51] and on the grounds that the authorities have failed to adopt effective measures within a reasonable timeframe to remedy long-standing problems related to access to health care services for persons with disabilities.[52]

Social partners, NGOs and others can comment on such report. The ECSR examines it and transmits the assessment to the CM, which may either close the case with a resolution or renew the recommendation. It may also refer the case to the GC for further consultation, either on its own initiative or on the initiative of a State Party. Consultation with the GC may help the State to find appropriate measures to resolve the matter, as they may provide insight into best practice examples of other States or assist in developing and adopting appropriate strategies and plans. The GC informs the CM of the consultations' outcome, which either closes the case or adopts a recommendation.[53]

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47 G. Vonk, 'Welfare state dystopia as a challenge for the right to social security', Inaugural lecture Maastricht University, 2024, available at https://research.rug.nl/nl/publications/welfare-state-dystopia-as-a-challenge-for-the-right-to-social-sec, accessed on 20 March 2025.

48 Ibid., p. 11.

49 Available at https://rm.coe.int/cc-206-2022-dmerits-en/1680b48072, April 2025. See https://www.housingrightswatch.org/news/new-ecsr-decision-power-cuts-canada-real-informal-settlement-madrid, https://elpais.com/espana/2025-02-26/el-consejo-de-europa-confirma-que-espana-viola-la-carta-social-europea-por-dejar-sin-luz-a-la-canada-real-de-madrid.html, https://www.elmundo.es/internacional/2025/02/26/67be5066fdddffdbab8b4589.html, https://www.rtve.es/noticias/20250226/consejo-europa-recrimina-a-espana-cortes-electricidad-canada-real/16466142.shtml, April 2025.

50 ESCR Activity report, 2023, 2024, p. 20.

51 CM/RecChS(2023)1, 14 June 2023, also inadequate level of basic social assistance and the labour market subsidy.

52 CM/RecChS(2023)4, 6 August 2023.

53 Decision No CM(2022)114-final, 27 September 2022.

Although, the number of collective complaints is growing,[54] not all State Parties have accepted the 1995 Additional Protocol.[55] Hence, majority of State Parties are still very sensitive and reluctant to opening up to the civil society organisations to verify whether the right to social security (and other social rights) are available, accessible and adequate.[56]

2.2.3 Ad hoc reviews

One of the new features after the 2022 reform is a complementary supervisory procedure in a form of ad hoc reviews. They are mandated if new or critical issues arise which are of a broad or transversal nature, or of pan-European dimensions. The subject matter and timeframe of such reports is determined by the ECSR and the GC and adopted by the latter. Other organisations, institutions and civil society organisations may submit comments on ad hoc States' reports.[57] ESCR may consult other sources of information as well.

Ad hoc reviews do not involve legal assessments of State conformity with Charter obligations and conclusions or decisions of the ECSR. Rather, the review provides a legal analysis of the measures taken by States Parties in response to the actual societal disturbance at hand, by identifying examples of good (and not so good) practice from the ESC perspective. It may provide guidance and recommendations to be used as a framework by States Parties in ensuring social rights protection. Compliance with the obligations is ensured through dialogue between the States and the relevant stakeholders (social partners and civil society).[58] GC may also propose additional guidance or general recommendations to be addressed to all CoE Member States.

The first of its kind was the ad hoc review on the social rights and the cost-of-living crisis, published in March 2025.[59] The analytical structure of the ECSR's review is shaped by the specific questions that were addressed to States Parties when requesting the ad hoc reports. The review is divided into five thematic sections, each linking to specific rights guaranteed by the ESC, including social protection related rights guarantees to the rising cost of living.[60] It was established that where heightened inflation significantly reduced the real value of (income-replacement and cost-compensating) social security benefits and social assistance, the decline in purchasing power led to a decreased ability on the part of recipients to pay for essentials.

ESC obliges States Parties to take all necessary actions needed to ensure that social security and social assistance levels are adequate, including by continually adjusting

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54 By 2025, 215 collective complaints have been processed and 30 are pending, https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure, April 2025.

55 By 2025 only 16 States have ratified the Additional Protocol, *supra* note 34.

56 CESCR, 2008, General comment No. 19 The right to social security (Article 9 of the Covenant).

57 ESCR Rules, Rule 21A.

58 Decision No CM(2022)114-final, 27 September 2022.

59 ESCR, 2025.

60 They are guaranteed especially by social security benefits (Article 12 The right to social security and partially Article 11 The right to protection of health), and social assistance (Article 13 The right to social and medical assistance and Article 14 The right to benefit from social welfare services).

them as necessary (at least) to keep pace with inflation.[61] During the cost-of-living crisis many States Parties allocated additional resources towards social security benefits and social assistance for persons and families affected. In many instances, although positive in impact, the measures adopted were one-off or temporary. However, the cost-of-living crisis continued past the duration of those measures. ECSR made a number of recommendations to State Parties, e.g. they should introduce social protection-related measures benefiting all members of society and compensating for the rise in living costs, ensure regular indexation of social security benefits and social assistance, provide for extraordinary adjustments when necessary to preserve the purchasing power of those most at risk of poverty, and ensure consultation with those most affected by the crisis in the decision-making processes regarding the allocation of social security benefits and social assistance. Simplifying benefit and assistance application processes is of crucial importance.[62] The review closes with a statement of interpretation defining in normative language the key obligations flowing from the ESC in a cost-of-living crisis.[63]

2.2.4 Non-accepted provisions procedure

Special ex ante collaborative procedure is the one on ESC non-accepted provisions. It aims to encourage States Parties to progressively accept the revised ESC and all its provisions, as it is in the spirit of the CoE. Such procedure is based on Article 22 initial ESC as amended by the 1991 Turin Protocol. It complements the reporting procedure on accepted provision and evaluates State Party specific requirements of the Charter as a whole.[64]

However, a distinction between accepted and non-accepted provisions is sometimes difficult to make. ESC is conceived as a whole and all its provisions complement each other and overlap in pArticle It is impossible to drat watertight divisions between the material scope of each article or paragraphs. ESCR has to ensure that obligations are not imposed on State Parties under non-accepted provisions, but also that the essential core of accepted provisions is not amputated. In such cases obligations may also result from unaccepted provisions.[65]

Procedure may be written or oral, usually with visits and meetings with high officials of the State Party concerned. Its legislation and practice is evaluated through a prism of non-accepted provisions and suggestions to remove the obstacles and ratify ESC in its entirety are made.[66]

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61 Obligation under Article 12 ESC is not only to maintain, but also raise social security benefits to a higher level.

62 Ibid., p. 27.

63 Ibid., p. 73.

64 Reports at https://www.coe.int/en/web/european-social-charter/accepted-of-provisions, April 2025.

65 Decision on admissibility Collective complaint 41/2007 Disability Advocacy Center, MDAS v Bulgaria. D. Wisnuewska-Cazals, 'Procedure on non-accepted provisions of the European Social Charter', CoE, p. 8.

66 Ibid., p. 9.

3. The right to social security and its construction

Human rights documents usually stipulate human rights as individual or societal rights. For instance, UDHR shows relation between the theory of natural law[67] (individual perception of freedoms, directly based on human reason and conscience) and social human rights, including the right to social security (enjoyed by a person as a member of society). The latter could be described as fruits of the 20th century on the tree of the 18th century.[68]

Remarkably, the right to social security under the ESC (Article 12)[69] is not shaped as individual right, but as obligations of a State Party. Hence, enforceability before national courts of law is limited and depending on the State activities.[70] Nevertheless, the right to social security is a rich ground for elaboration. It contains static and dynamic parts. State parties have to not only establish or maintain a system of social security at a satisfactory level,[71] but have to endeavour to raise progressively the system of social security to a higher level. A partly restrictive development in the social security system is not automatically in violation. However, consolidation measures should not undermine the core of a national social security system and it should not be transformed to mere social assistance.[72]

However, these standards might be outdated. Hence, the ESCR felt urgent need to re-examine the normative content of Article 12 and the interrelationship between the paragraphs. It its statement of interpretation[73] it has emphasised that next to nine traditional social risks, new risks might have emerged and should be covered by Article 12. Moreover, to be considered as adequate, the level of benefit should in cases of wage substitution, always stand in a reasonable relation to the wage in question and should always exceed the minimum subsistence level. In particular, the income of the elderly should not be one of minimum assistance. It has held that indexation of benefits does not necessarily mean raising them progressively to a higher level.

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67 L. Pitamic,'Naturrecht und Natur des Rechts', *Österreichische Zeitschrift für öffentliches Recht*, N.F., 7, 1956, p. 190.

68 P. A. Köhler, *Sozialpolitische und sozialrechtliche Aktivitäten in der Vereinten Nationen*, Nomos, 1987, p, 274.

69 Article 12 ESC.

70 F. Pennings and G. Vonk, 'The future of European social security law: An analysis of the authors' approaches', in F. Pennings, and G. Vonk (Eds.), *Research Handbook on European Social Security Law*: Second Edition, Edward Elgar Publishing, 2023, p.445.

71 ILO Convention 102 on minimum standards of social security (initial ESC) or European Code of social security – ECSS (revised ESC). ECSS should provide higher standards and more social risks have to be accepted (six). But, if Part II Medical care (counting as two Parts) and Part V Old-age benefit (counting as 3 Parts) and one more are accepted, State has effectively ratified three social risks (same as for ILO Convention 102). Article 2 ECSS.

72 ECSR Digest, 2022, p. 122.

73 Conclusions XVI-1 (2002) – Statement of interpretation – Article 12-1, 12-2, 12-3.

Although, it is clear that social security benefits should not cover only minimum, but shall be above mere minimum and (monetary benefits) proportionate to previous earnings, the standard is rather low.[74] It is rightfully criticised[75] and should be re-examined.

The right to social security is not just about minimum standards, but is also connecting national social security systems for persons moving between State Parties. To this end not only bi-and multilateral socials security instruments can be used, but also 'other means', referring to unilateral measures of State Parties. However, there is no uniform coordination mechanism between EU Member States and other CoE Member States (or among non-members of the EU), which has been criticised by the ECSR.[76]

The right to social security presents the core of social protection under the ESC. It would be outside of the scope of the present paper to analyse all related social human rights, such as the rights to protection of health, social and medical assistance, benefit of social welfare services, of family, children and elderly persons to social protection (later important also for long-term-schemes), to protection against poverty and social exclusion.[77]

4. Concluding thoughts

The right to social security is a fundamental human right according to many international and European human rights instruments. Each of them provides for a human rights monitoring mechanism. ESC offers such extensive and comprehensive protection of the right to social security and other fundamental social rights as no other legal instrument in Europe.[78] Specific composition and role gives ECSR several options of monitoring the fulfilment of State Parties obligations under the ESC. It is an independent expert body, who not only adopts ex post conclusions under the reporting procedure or decisions under the collective complaints procedure, but engages with CoE Member States also ex ante. It screens their legislation and practice through a prism of the ESC under the non-accepted provisions procedure and shares best practices among the States by ad hoc reviews in order to advance their social protection for people in distress in the future.

Contrary to the ECtHR, ECSR is not an international court of law, and it does not hold punitive competence. Its role is foreseen collaboratively, and recommendations of the CM may pressure a State Party to improve their social security legislation to be in line with the Charter obligations. The right to social security is one of the most dynamic rights. Its realisation is constantly adjusted (by the national law of social security) to changing societal relations. Therefore, reporting cycles might be too long, especially for the (many) State Parties not accepted the collective complaint procedure. They

74 At 50% of median equivalised income, ESCR Digest, p. 120.

75 J. Gilman, 'The rights to social security and social assistance in the European Social Charter: Towards a positive content…but what sort of content?', *European Journal of Social Security*, 26(4), 2024, p. 421.

76 ESCR, Digest 2022, p. 123.

77 Ibid., p. 10.

78 O. De Schutter, *The European Pillar of Social Rights and the role of the European Social Charter in the EU legal order*, Council of Europe, 2019.

have shown no interest for a participative collaboration and supervision of a social (or welfare) state by the social partners and NGOs. It also takes quite some time to prepare an ad hoc review and decide on a collective complaint, due to their rising number and limited number and availability of the ESCR members. The procedure on non-accepted provisions may resemble to the Myth of Sisyphus, if nothing changes in the State Party concerned and ESCR visit might be mere awareness-raising campaign.

If human rights are indivisible and belong to every human, more could and should be done to protect human rights as one of the European essential values. Social human rights might be classified as second generation rights, but they are by no means of secondary importance. Already before the establishment of the ECtHR, it was recommended that the rights to be assured by the Court shall be those individual, family and social rights of an economic, political, religious or other nature in the UDHR which it is necessary and practical to protect by judicial process.[79] Interpretation of the ECHR by the ECtHR suggests that the neat division of socio-economic rights from civil and political rights is waning.[80]

Not only shall it be required that all State Parties accept the collective complaint procedure, ratification of the revised ESC shall be a condition for CoE membership.[81] Dynamic interpretation of CoE Statute, which mentions 'human rights' (and not instruments enshrining them, like ECHR or ESC)[82] is required if we really mean with the CoE values of democracy, rule of law and (all) human rights. Hence, a judicial body (uniform or a separate European Court of Social Rights) is required.

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79 Yet, the right to social security was not on the annexed list of rights, H. Lauterpacht et al., 'The Proposed European Court of Human Rights.' *Transactions of the Grotius Society* 35 (1949): 25–47. http://www.jstor.org/stable/743111, April 2025, p. 26.

80 L. Thornton, 2014, 'The European Convention on Human Rights: A Socio-Economic Rights Charter?', in Suzanne Egan, Liam Thornton, Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond*, Dublin: Bloomsbury, 2014, p. 227.

81 ESC also serves as a reference in EU law, unfortunately only in its initial version Preamble of the EU Treaty (TEU), OJ C 202 7.6.2016, and Article 151 Treaty on the functioning of the EU (TFEU), OJ C 202 7 June 2016.

82 CoE Statute Article 3, Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

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Freedom of movement and coordination of social benefit systems: does the EU Charter of fundamental rights have anything to add?

Anne Pieter van der Mei

Abstract: The EU Charter of Fundamental Rights has influenced numerous areas and topics of EU law, but its impact on free movement of persons and cross-border entitlement to social benefits has so far been minimal. There is only one ruling, *CG,* in which the Court of Justice found that the Charter may oblige Member States to grant social benefits to nationals of other Member States. This contribution briefly reflects on the question whether, when and how the Charter could nonetheless prove to have added value for social protection in cross-border situations. It concludes that the Charter is unlikely to have much more impact. It may provide a (very) low minimum standard of social protection, but it provides no new tools for overcoming the obstacles that EU citizens may face as regards cross-border access to social benefits.

Keywords: EU Charter, social security, social assistance, human dignity

1. Introduction

There is no denying that the EU Charter of Fundamental Rights (hereafter: Charter) has had a significant impact on the development of EU law since its adoption in 2000 and especially after its elevation to a source of binding primary law in 2009. The Charter has influenced numerous areas and topics of EU law, with its role in rule of law issues standing out.[1] Not all areas of EU law, however, have benefitted and the ones which have, have not done so to the same extent. Social law and policy are among the fields in which the influence has so far been relatively modest: the Charter has contributed

[1] See further M. Coli, *The Values of the European Union Legal Rules – Lessons from the Union's reaction to Constitutional Backsliding,* PhD, Maastricht, 2024, Chapter V.

to the enforceability of social rights[2] but it has not yet proven to be a rich source of additional substantive rights. When it comes to the topic of this contribution, namely free movement of persons within the European Union and cross-border entitlement to social benefits, the picture is even less bright. There is only one case, *CG,*[3] in which the Court of Justice of the European Union (hereafter: CJEU) found that the Charter may oblige Member States to grant social benefits to nationals of other Member States.

The fact that the Charter so far has had only minimal added value for cross-border access to social benefits may not truly surprise. There are at least two reasons for this. First, EU law already provides rules aimed at social protection in cross-border situations. The EU legislator has set in place a quite well-functioning system for the coordination of national social benefit systems. Regulation 883/2004[4] captures the main branches of social security, ensures that mobile Union citizens can only be required to pay contributions in one Member State and entitles them to claim benefits under the legislation of the Member State they move from or/and the legislation of the one they move to. Moreover, in order to ensure 'the greatest possible freedom of movement',[5] the CJEU has interpreted the provisions of Regulation 883/2004 broadly and read into Regulation 492/2011 on free movement of workers[6] and/or Directive 2004/38 on rights of residence[7] rights to claim benefits not covered by Regulation 883/2004, notably including social assistance. In other words, the EU has already provided a solution for the bulk of social protection problems mobile Union citizens might otherwise have encountered and, by doing so, it has decreased the need for reliance on the Charter.

Second, many of the Charter provisions that, at first glance, would seem to be most relevant for the topic under consideration do not add much, if anything, to the rights already guaranteed by EU law. For example, Articles 34(1) and (3) merely 'recognize[..] and respect..]' entitlement to, respectively, social security and assistance 'in accordance with the rules laid down by Union law and national laws'.[8] Article 34(2) confers upon everyone residing and moving legally within the Union a right to social security benefits and social advantages, but, again,

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2 See e.g. Case C-414/16 (*Egenberger),* ECLI:EU:C:2018:257; Joined cases C-569/16 and C-570/16, (*Bauer* and *Willmeroth),* ECLI:EU:C:2018:871 and Case C-715/20 (*KL v X),* ECLI:EU:C:2024:139.

3 Case C-709/20 (*CG),* ECLI:EU:C:2021:515. See further Section 3 of this contribution.

4 Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, 2004, OJ L 166/1, as amended.

5 Case 92/63 (*Nonnenmacher),* ECLI:EU:C:1964:40, p.7.

6 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, 2011, OJ L 141.

7 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004, OJ L 158/77, as amended.

8 Article 34 on its own does not seem capable of creating new substantive social security rights. J. Paju, 'The charter and social security rights: time to stand and deliver?', *European Journal of Social Security*, 2022, p. 26; and E. De Becker, 'Social Security in the Fundamental Rights case Law of the Court of Justice', in F. Pennings and G. Vonk (eds.), *Research Handbook on European Social Security Law,* Edward Elgar Publishing, 2023, p.13. When a given Charter right is given specific expression in EU legislation, national acts are only reviewed under that legislation. Case C-350/20 (*OD),* ECLI:EU:C:2021:659, para.47. However, the CJEU does use Article 34 in interpreting other provisions of EU law. See e.g. C-571/10 (*Kamberaj),* ECLI:EU:C:2012:233 and Joined Cases C-112/22 and C-223/22 *CU and ND,* ECLI:EU:C:2024:636. On Article 34 see also and F. Pennings, 'Does the

only 'in accordance with Union law and national law'.[9] In the same vein, Articles 15(2) and 45(1) on freedom of movement for workers and Union citizens respectively merely restate the rights already guaranteed by Articles 45 and 20(1) TFEU.[10] None of these provisions thus seem capable of creating new substantive rights for mobile EU citizens.[11]

Nonetheless, the above does not exclude the possibility that there is a role for the Charter to play. The 883-coordination regime is not perfect: it does not guarantee that cross-border movement is neutral as regards social security, it does not in all cases ensure access to or retention of social benefits and, in some instances, the coordination rules even prohibit Member States to grant benefits. Moreover, Regulation 492/2011 and Directive 2004/38 do not guarantee all Union citizens access to social assistance in the Member State they (wish to) move to.[12] There are gaps in the EU's system of social protection for cross-border movers and these could perhaps be filled by other Charter provisions such as, for example, those on the rights to human dignity (Article 1), family life (Article 7), property (Article 17) or equality of treatment (Articles 20 and 21).

This contribution briefly reflects on the question whether, when and how the Charter could possibly be of significance to further strengthen the social protection of Union citizens moving within the Union. Section 2 focuses on the coordination regime for social security, Section 3 discusses social assistance.

2. The Charter and the coordination regime for social security

The Charter is addressed to the EU institutions[13] and to the Member States 'when they are implementing EU law'.[14] Therefore, both the provisions of Regulation 883/2004 itself and national acts falling within its ambit must comply with the Charter.

2.1 Regulation 883/2004

Case law in fields other than the coordination of social security demonstrates that the CJEU indeed has subjected provisions of EU legislation to fundamental rights review. In

EU Charter of Fundamental Rights have added value for social security?', *European Journal of Social Security*, 2022, p.117-135.

9 Article34 (2) merely reflects the rules of Regulation 883/2004. See Explanations relating to the Charter of Fundamental Rights, Explanation of Article 34, 2007, OJ C303.

10 See Explanations relating to the Charter of Fundamental Rights, Explanation of Article 15 and Explanation of Article 45, 2007, OJ 2007, C303. When a provision complies with Article 45 TFEU, it also complies with Article 15(2) of the Charter. See e.g. Case C-284/15 (*M)*, ECLI:EU:C:2016:220, para. 34. See further the contribution by Houwerzijl in this volume.

11 S. Mantu, 'Economic or Social Union Citizenship – The Never-ending Quest for Transnational Social Rights', *Nordisk socialrättslig tidskrift*, 2024, p. 99.

12 See further Section 3.

13 For a discussion of what the Charter concretely implies for the political EU institutions see M. Dawson, *The Governance of EU Fundamental Rights*, Cambridge University Press, 2017.

14 Article 51(1) EUCFR.

some cases, the CJEU has done so quite intensively and actually annulled EU legislation[15] or legislative provisions.[16] These cases, however, seem to be quite exceptional. In general, the CJEU seems to take a quite deferential stance vis-à-vis the EU legislator, the standard of review being quite lax. In principle, the CJEU respects the choices made by the EU-legislator, also in as far as these involve fundamental rights.[17]

Even though the CJEU has so far never tested whether Regulation 883/2004 is compatible with the Charter,[18] case law does suggest that such a 'legislative priority rule'[19] also applies to social security legislation. As far back as in 1980 in *Testa*,[20] the CJEU was asked to consider whether Article 69(2) of Regulation 1408/71[21] possibly infringed – at the time still unwritten – fundamental rights, and specifically the right to property. That provision stipulated that a person who has exported an unemployment benefit on the basis of Article 69(1) and who does not return to the competent State before the expiry of the maximum period of three months, shall lose 'all entitlement' to his/her benefit. Did this quite severe penalty on returning too late to the competent State imply an unlawful infringement of the right to property? While the CJEU saw no need to determine whether entitlement to social security benefits may be regarded as a property right, it made clear that, if this were the case, there would be no violation. The CJEU observed that the right to export unemployment benefits that does not exist under the legislation of any of the Member States.[22] It is the EU legislator that has newly created this right and it is therefore entitled to attach conditions to it. Further, because the Article 69(1) provides for an optional right that recipients of unemployment benefits can but do not have to exercise, the CJEU concluded that the penalty Article 69(2) orders could not be regarded as an undue restriction of the right to unemployment benefits.[23]

In *Testa* the CJEU took a deferential stance vis-à-vis the EU legislator. The latter had decided that the penalty for not returning in good time had to consist of loss of all entitlement to unemployment benefits, whereas it could also have chosen for less harsh

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15 See e.g. Joined cases C-293/12 and C-594/12 (*Digital Rights Ireland),* ECLI:EU:C:2013 (declaring Directive 2006/24 on data retention invalid – violation of Article 7 on the right to private life and Article 8 on the right to data protection).

16 See e.g. Case C-236/09 (*Test-Achats),* ECLI:EU:C:2011:100 (striking down a legislative provision that allowed exemptions to unisex insurance premiums without any temporal limitation – violation of Articles 21 and 23).

17 See M. van den Brink, *Legislative Authority and Interpretation in the European Union,* Oxford Studies in European Law, 2024, Chapter IV.

18 The CJEU has declared invalid provisions of Regulation 1408/71, but not on grounds of violation of fundamental rights. See e.g. Case 41/84 (*Pinna),* ECLI:EU:C:1986:1 (declaring Article 73(2) of Reg. 1408/71 on family benefits invalid as it, first, created separate rules for France and other Member States and, second, implied indirect discrimination on grounds of nationality).

19 E. Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach,* Oxford University Press, 2022, p.71.

20 Joined cases 41/79, 121/79 and 796/79 (*Testa),* ECLI:EU:C:1980:163.

21 Regulation 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, 1971, OJ English Special Edition (II), p. 420.

22 Joined cases 41/79, 121/79 and 796/79 (*Testa),* ECLI:EU:C:1980:163, para. 20.

23 Ibid., para. 21-22.

sanctions.[24] If the CJEU had applied a stricter standard of review in *Testa,* it might have come to the conclusion that the loss of the entire benefit constituted a disproportional deprivation of a property right. Yet, the CJEU did not do so. It chose to respect the choice made by the EU legislator. This is understandable and one may assume that the CJEU, if asked, would do the same anno 2025.[25] To facilitate freedom of movement, Article 48 TFEU confers upon the EU legislator the task to set in place a social security coordination regime without concretely indicating how the legislator should do so. It is up to the legislator to shape this regime. In doing so the legislator has to consider not only what is best for the purposes of freedom of movement. It must also give weight to the countervailing legal, financial, administrative, practical or other interests or concerns the Member States and their administrative organs may legitimately have. Coordination of social security is very much a policy-making issue requiring a balancing of multiple interests. The political institutions that compose the EU legislator are better equipped than the CJEU to conduct this balancing exercise. Therefore, judicial deference is in order.[26]

Of course, one may not always be pleased with what the EU-legislator has decided. For example, one could criticize the decision to allow export of unemployment benefits for only three months as this period falls short of the much longer time that Union citizens may look for work in other Member States.[27] Yet, in considering whether this period can be extended, one cannot wholly ignore the Member States' concerns regarding adequate supervision of compliance with the duty to actually seek new employment. The choice for three, six or whatever other number of months is typically a policy matter to be handled by the political institutions, not the CJEU. In principle, the Charter does not alter this. The mere fact that the EU legislator is bound to respect fundamental rights does not order a stricter review by the CJEU. Fundamental rights do not have a fixed single meaning and they are not absolute. Views on what they precisely entail or the conditions under which limitations are permissible may differ. Limitations on the duration of right to export benefits can be said to deprive a property right but they may be justified. Whether three, six or whatever other duration is justifiable remains essentially a policy matter. In the context of coordination, fundamental rights are to be respected but, in essence, they are just one of the various factors to be taken into account.

In fact, strict fundamental rights review might be even be considered problematic. Take for example the exclusive effect of the rules determining the applicable legislation. This

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24 For example, the sanction could also have consisted of a temporary loss of benefits or – as the current Article 64(2) of Regulation 883/2004 now states – of allowing Member States to apply more favourable rules.

25 Today, entitlement to unemployment and other social benefits indeed constitutes a property right ex Article 17 EUCFR. Case C-258/14 (*Florescu), ECLI:EU:C:*2017:448, para.50. In its interpretation of this provision the CJEU has regard to the case law of the ECtHR, which has developed an extensive case law on the right to property in as far as relevant for social security. See L. Slinkenberg and I. Leijten, 'Social Security in the Case Law of the European Court of Human Rights', in F. Pennings and G. Vonk (eds.), *Research Handbook on European Social Security Law,* Edgar Elgar Publishing, 2023, p.30-63.

26 Indeed, the CJEU allow the legislator discretion. See e.g. C-62/91 (*Gray),* ECLI:EU:C:1992:177, at 12.

27 I.e. a reasonable period of time, which can be extended for as long as she has a genuine chance of finding work. See Case C-710/19 (*G.M.A.),* ECLI:EU:C:2020:1037.

does not only imply that a competent State must apply its legislation in a given case, but also that a non-competent State is not allowed to so. In its '*Bosmann*-case law'[28] the CJEU has mitigated the 'prohibitive effect' of the conflict rules and allowed a non-competent State to nonetheless award benefits, provided there 'are specific and particularly close' factors linking the case at hand to its territory.[29] If no such factors exist, however, the Regulation prohibits a non-competent State to grant benefits. For example, in *B* the CJEU did not allow the Czech Republic to award family benefits to a Czech national who worked and lived in France but still had a registered address in the Czech Republic. Having such an address sufficed under national legislation for entitlement to family benefits, but the CJEU did not consider this a sufficiently close link. Basically, the CJEU did not permit the Czech Republic to apply its legislation and by doing so, so one could perhaps argue, it deprived the person concerned of a property right. No doubt, however, there is a sound justification for this: the requirement of a close link is needed to ensure the predictability and effectiveness of the single State rule.[30] Simultaneous application of multiple legislations could create legal uncertainty and administrative complexities. A too strong focus on a given fundamental right could thwart the balancing of interests by the EU legislator and affect the functioning of the entire fabric of the coordination regime the EU legislator has set in place.[31]

2.2 National law and acts falling within the framework of the 883-coordination regime

Thus, the CJEU can subject EU legislation like Regulation 883/2004 to Charter review, but chances that it will find a violation would seem to be small. One may even wonder whether there are at all situations in which the Charter can be invoked to successfully challenge provisions of Regulation 883/2004. Similar doubts exist as regards national laws and acts that fall within the scope of the coordination regime. Because the CJEU in principle accepts the policy choices the EU legislator has made as regards coordination, it probably will also condone national acts that are in line with these choices. It is fair to assume that national laws or acts that comply with Regulation 883/2004, are also compatible with the Charter.

Nonetheless, there might still be situations in which the Charter may have something extra to offer. Take, for example, the case of *A*.[32] The CJEU was faced with the case of a Jehova's witness, A, whose son needed heart surgery. The operation in question could have been carried out in the State of residence, but this would have entailed a blood transfusion, which Jehova's witnesses oppose to. A's requests for authorization for treatment in another Member State where the otherwise similar treatment could be

28 Case C-352/06 (*Bosmann)*, ECLI:EU:C:2008:290; Joined cases C-611/10 and C-612/10 (*Hudzinski and Wawrzyniak)*, ECLI:EU:C:2012:339; Case C-382/13 (*Franzen)*, ECLI:EU:C:2015:261; Joined cases C-95/18 and C-96/18 (*van den Berg and others)*, ECLI:EU:C:2019:767.

29 Case C-394/13 *B*, ECLI:EU:C:2014:2199, at 28.

30 Article 11(1) Reg. 883/2004.

31 Compare Joined cases C-95/18 and C-96/18 (*van den Berg and others)*, ECLI:EU:C:2019:767, at 60-61.

32 Case C-243/19 (*A)*, ECLI:EU:C:2020:872.

received without a blood transfusion was rejected. Article 20 of Regulation 883/2004 on planned treatment was of no help to A because so the CJEU established, this provision only allows the patient's medical conditions to be taken into account, not his or her personal choices as regards medical care.[33] The CJEU did find, however, that when a Member State refuses authorization for planned care abroad, it is implementing EU law and thus bound to observe the Charter, including Article 21(1) on non-discrimination regardless of, inter alia, religion. Even though the CJEU concluded that the refusal to grant authorization was justifiable, the judgment in *A* does show that whenever a Member State acts within the context of the coordination regime it must, in principle, respect the Charter. This encompasses, so one may assume, not only the prohibition of discrimination on ground of religion but also the ban of discrimination on other grounds mentioned in Article 21 like age, sexual orientation, birth, disability, and genetic features and property[34] as well Article 16 on the right to property.[35]

Whether the Charter can be used as a 'new' tool for fixing other, 'typical' coordination problems left unsolved by the EU legislator is more doubtful. Such problems may result from, for example, the single State rule and the exclusive effect of the rules determining the applicable legislation. A resident of Member State A who accepts a small job in Member State B faces a switch in the applicable rules. As a result, s/he is no longer covered by the legislation of Member State A and s/he might not be eligible for benefits or even end up in a situation of having no insurance cover in Member State B. While in such a case residence may be a factor linking the situation to Member State A, this State is under no obligation to award benefits[36] nor can it be required to conclude an Article 16-agreement[37] with Member State B to help out the person concerned. Perhaps one could claim that the Charter can or should oblige the Member States involved to fill the gap in social protection. Yet, leaving aside the question which provision or right should be used for this purpose, which of the two Member States should take the responsibility? Why should Member State A be made responsible for a loss of social protection that is essentially caused by Member State B? It seems most logical to place the burden on Member State B. However, the EU would seem to have no competence to order a Member State like Germany to adapt its social benefit system, and the Charter cannot change that.[38]

Similar, or at least comparable, issues arise as regards gaps that result from differences in national rules on waiting periods. For example, Member State A has a waiting-period of one year for entitlement to an invalidity benefits, Member State B has chosen for a waiting-period of two years. A Union citizen living in Member State A and working in Member State B may end up in a situation in which s/he, after having received a sickness benefit in Member State A for one year, cannot claim invalidity benefit in either one of these States. In Member State A she may not satisfy substantive eligibility criteria, in

33 Ibid., para. 30.
34 Compare Case C-223/19 (*YS)*, ECLI:EU:C:2020:753.
35 Compare Case C-258/14 (*Florescu)*, ECLI:EU:C:2017:448.
36 See Joined cases C-95/19 and C096/18 (*van den Berg and others)*, ECLI:EU:C:2019:767, at 64.
37 Ibid., at 65.
38 Article 51(2) EUCFR.

Member State B s/he may only be entitled to a benefit after two years.[39] Such a one-year gap in protection is no doubt problematic. Yet, it is a coordination problem, not so much a fundamental rights problem. Neither Member State A nor Member State B can be said to infringe a fundamental right just because they have chosen for a given waiting-period. The gap in question only occurs because the two Member States have made different choices.[40] It is hard to see how the Charter could be of any additional help here as it contains no provisions indicating which Member State has to assume responsibility in such situations. The Charter is fundamental rights instrument, not a coordination instrument.[41]

All in all, the Charter does not seem to add much to the social security protection that Regulation 883/2004 already offers to Union citizens moving from one Member State to another. The Charter has greater potential as regards benefits that are excluded from Regulation 883/2004, and social assistance in particular.

3. The Charter and social assistance

The EU free movement rules rest on the premise that Union citizens can only claim social assistance in the Member State of residence. Such minimum subsistence benefits are not exportable, Member States' responsibility does not extend beyond their national borders. This holds true under national law, and EU law does not alter that. The key issue is whether Union citizens in need of social assistance can establish lawful residence in another Member State. Workers and self-employed are entitled to do so and, provided they indeed exercise that right, they can also get equal access there to social assistance.[42] The economically inactive are less privileged. First, according to Article 7(3)(c) of Directive 2004/38, they are only entitled to live in another Member State when they have sufficient resources to make a living for themselves and their family members.[43] Second, in principle they can be denied social assistance in the host Member State. Until the 2014 ruling in *Dano*,[44] according to the '*Martinez Sala – Trojani* case law', economically in active Union citizens could invoke Article 18 TFEU to claim access to social assistance under the same conditions as national of the host Member State, provided they lawfully resided there. In *Dano*, however, controversially reversed this case law[45] by holding

39 See Case C-134/18 (*Vester),* ECLI:EU:C:2019:212.

40 Where such gaps exist, the CJEU has found that 'the principle of cooperation in good faith laid down in Article 4(3) TEU requires the competent authorities in the Member States to use all the means at their disposal to achieve' freedom of movement. Case C-134 (*Vester),* at 45; Case C-3/08 (*Leyman),* ECLI:EU:C:2009:595, at 49 and Case C-165/91 (*van Munster),* ECLI:EU:C:1994:359, at 32.

41 Ibid., at 49. For further discussion see e.g. G. Essers and F. Pennings, 'Gaps in social security protection of mobile persons: options for filling these gaps', *European Journal of Social Security*, 2020, p. 163-179.

42 Case 249/83 (*Hoeckx),* ECLI:EU:C:1985:139, para. 20-22 (social assistance is a social advantage for the purposes of Article7(2) of Reg/492/2011).

43 Article 7(1)(c) Dir. 2004/38.

44 Case C-313/13 (*Dano),* ECLI:EU:C:2014:2358.

45 For an excellent overview of the academic discussion see V. Hooton, *Free Movement of Persons and Welfare Access in the European Union,* Hart Publishing, 2024, Chapter 5.

that the economically inactive can only rely on Article 24(1) of Directive 2004/38, which reserves the right to equal treatment for Union citizens who reside in the host State on the basis of this Directive.[46]

Nonetheless, this does not exclude the possibility that the 'needy' economically inactive Union citizens can rely on EU law to claim social assistance. More specifically, they, or at least some of them, can possibly benefit from the Charter.

In *Dano* the CJEU was asked whether the Charter, and in particular its provisions on the right to human dignity (Article 1) and equal treatment (Article 20), allow the Member States to lower social assistance to an amount necessary for return to the home State or that these provisions require more extensive payments which enable residence. The CJEU asserted that it could not answer the question. The competence to define the conditions for entitlement to social assistance, and thus the extent of the social cover provided by such assistance, falls within the domain of the Member States. So, when they exercise this competence, and when they grant or refuse social assistance, the Member States are not implementing EU law, as the Charter requires.[47]

In the afore-mentioned case *CG*,[48] however, the CJEU reasoned and concluded differently. Economically inactive Union citizens who have moved to another Member State, have made use of their fundamental freedom to move and reside freely with the Union as conferred by Article 21(1) TFEU. As a result their situation falls within the scope of EU law and, according to settled case law,[49] EU fundamental rights apply in all situations governed by EU law.[50] In the case at hand, the CJEU established that the Charter applied to the situation of CG, a Croatian-Dutch mother of two young children living in the United Kingdom (UK) who had fled a violent partner and had no resources to provide her and her children's needs, could possibly benefit from the Charter. Specifically, the CJEU required from the UK authorities to consider the Charter's provisions on the right to human dignity, the right to family life (Article 7) and the rights of the child (Article 24) and to ensure that vulnerable persons like CG and her children can live in dignified conditions. If there is an actual and current risk that this is not the case, Member States may not refuse to give the necessary support.[51]

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46 Case C-313/13 (*Dano)*, ECLI:EU:C:2014:2358, at 69. Residence based on other sources of EU law, like Article 10 of Regulation 492/2011, may also suffice for this purpose. Case C-181/19 (*Jobcenter Krefeld)*, ECLI:EU:C:2020:794, para. 76-77.

47 Case C-313/13 (*Dano)*, ECLI:EU:C:2014:2358, para. 87-92.

48 Case C-709/20 (*CG)*, ECLI:EU:C:2021:515. On *CG s*ee e.g. C. O'Brien, 'The Great Union Citizenship Illusion Exposed: Equal Treatment Rights Evaporate for the Vulnerable (CG v The Department for Communities in Northern Ireland)', *European Law Review*, 2021, p.801-817; H. Verschueren, 'The Right to Social Assistance for Economically Inactive Migration Union Citizens: the Court Disregards the Principle of Proportionality and Lets the Charter Appease the Consequences', *Maastricht Journal of European and Comparative Law*, 2022, p.483-498 and F. Wollenschläger, 'An EU Fundamental Right to Social Assistance in the Host Member State? The *CJEU*'s Ambivalent Approach to the Free Movement of Economically Inactive Union Citizens Post Dano', *European Journal of Migration and Law*, 2022, p. 151-169.

49 Joined cases C-609/17 and C-61017, (*TSB and AKT)*, ECLI:EU:C:2019:981, at 43.

50 Case C-709/20 (*CG)*, ECLU:EU:C:2021:515, at 84-86.

51 Ibid., at 88-92.

CG is groundbreaking because it establishes for the first time that the Charter alone may compel Member States to award social benefits. Exactly how groundbreaking the ruling is, however, is still unclear. The CJEU's reasoning was notably brief and focused on the specific case of CG and her children. Some conclusions can be drawn though.

First, *CG* does not imply that the economically inactive can claim social assistance under the same conditions as the host State's nationals. The CJEU confirmed *Dano*'s conclusion that EU law only obliges Member States to grant such Union citizens equal access when their right of residence is based on Directive 2004/38.[52] Further, the CJEU repeated that Union citizenship 'is destined to be the fundamental status of nationals of the Member States'. This time, however, it did not continue with the classic phrase that this entitles them to 'the same treatment irrespective of their nationality'.[53] The CJEU now rather stated that the fundamental status of Union citizenship obliges Member States to comply with the Charter, notably not referring to the non-discrimination provisions enshrined in Articles 20 and 21.[54] Thus, the '*Martinez Sala – Trojani* era' is over.

Second, *CG* does not offer a concrete judicially enforceable right to claim social assistance. The CJEU remained silent on Article 34(3), which requires the Union to recognize and respect 'the right to social [..] assistance so as to ensure a decent existence for all those who lack sufficient resources'. From the provisions on human dignity, family life and children's rights it merely derived a duty for Member States to make sure that Union citizens do not end up in a situation of having to live in undignified conditions. In essence, the CJEU requires from the Member States to provide some kind of financial safety net for economically inactive Union citizens who find themselves in a particularly vulnerable situation in another Member State.

Other issues are still left unsettled. For example, for which Union citizens must Member States ensure a dignified safety net? CG herself lacked sufficient resources, but the UK had nonetheless granted her a right of residence. By doing this, so the CJEU observed, the UK had recognized her TFEU-based right to reside freely within the Union and implemented the TFEU provision on Union citizenship. This is puzzling as it suggests that the prior grant of, or recognition of lawful, residence on the basis of national law is a pre-condition for application of the Charter. Yet, does this mean that the Charter does not apply when the host State does not grant or recognize residence? Has the CJEU actually meant to say that it is for the Member States themselves to decide when the Charter applies and whether or not they are obliged to ensure economically inactive nationals of other Member States a dignified living standard? This is hard to believe. It is more realistic to assume that all Union citizens who have moved from one Member State to another are protected by the Charter, regardless of whether their residence is lawful

52 Ibid., at 67.

53 C-184/99 (*Grzelczyk)*, ECLI:EU:C:2001:458, at 31.

54 It has been suggested that this reflects a more general trend in the case law according to which it is no longer equality of treatment but rather fundamental rights that serve as the foundation of the rights of mobile Union citizens. See F. De Witte, 'The Judicial Politics of Solidarity', in M. Dawson *et al* (Eds.), *Revisiting Judicial Politics in the European Union,* Edward Elgar Publishing, 2024, p. 77-99.

or unlawful and that they all, where necessary, can rely on the safety net *CG* orders the Member States to provide.

Further, what should the safety net comprise? What are dignified living conditions? As regards asylum seekers the CJEU has ruled that respect for human dignity requires that the person concerned does not end up 'in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene'.[55] One may expect that the bar for the host Member States to be higher as regards economically inactive Union citizens. Union citizenship would be deprived of much substance if merely guarantees the most vulnerable among them so little. At the same time, it is to be recognized that the Member States remain free to raise the bar themselves and to offer nationals of other Member States greater social hospitality. Outside the 883-coordination regime, as regards social assistance there is no risk of multiple legislations being applicable to the same person. The State of residence is solely responsible and free to offer more social protection than *CG* requires.

4. Final observations

A final answer to the question of what the Charter concretely has to offer to Union citizens moving between the Member States cannot yet be given. Yet, from the above discussion it follows that the Charter is not likely to have revolutionary impact. This is not as strange as one might have thought. The provisions on social security, social assistance, freedom of movement and equal treatment make clear that the Charter was never meant to add anything concrete to the 883-coordination regime or the EU-rules applicable to other benefits and one may doubt whether it is capable of having much of such added value. Regulating cross-border access to social benefits implies a balancing of various interests and is first and foremost a task for the legislature. The role of the judiciary would seem to be limited to correcting manifest errors the political may have made, solve issues left unsettled by them or, as *CG* essentially does, perhaps establish an absolute minimum standard of social protection to ensure human dignity for cross-border movers. The Charter may help for these purposes, but probably only a bit.

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[55] Case C-233/18 (*Haqbin),* ECLI:EU:C:2019:956, para. 46.

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The right to social assistance in EU law: on solidarity, chance, and cosmopolitan justice

Luka Mišič

Abstract: Unlike social security benefits, social assistance or minimum income support benefits, aimed at preventing poverty and social exclusion, fall outside the material scope of application of Regulation 883/2004. They are usually tax-financed and unrelated to social risks or contingencies listed in Regulation 883/2004, like sickness, old age, or unemployment. They are not coordinated nor exported, meaning that persons can only claim social assistance benefits in the territory of the Member State where they lawfully reside. Commonly, these benefits are available to nationals and permanent residents, following the idea of a genuine link with a given polity or tax community. The application for different forms of minimum income support may even lead to the expulsion of economically inactive persons from their host Member State, regardless of the provisions on equal treatment of EU citizens. Building on the vast state of research in the field of minimum income support, free movement, and EU law, this article offers distinct social-justice-based arguments for a possible extension of the material scope of application of Regulation 883/2004 to the field of social assistance, broadening the debate with some of the key theories of political philosophy.

Keywords: social assistance; social security; European Union; solidarity; equality of opportunity, cosmopolitan justice

1. Introduction: social assistance and free movement in EU law

The right to social assistance is not explicitly referred to in the Treaties. However, they refer to the fight against poverty and social exclusion, one of the policy objectives of the EU, in several of their provisions. The right to social assistance is explicitly mentioned

in Article 34(3) of the Charter,[1] even if the latter is of limited effect in the field of social security:[2] '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 Community law and national law and practices.' Nevertheless, neither these provisions nor the policy instruments have, as noted by Aranguiz and Verschueren, a direct impact on legal claims for social assistance made by persons facing poverty and social exclusion. Regarding secondary legislation, the objective of fighting povertyand social exclusion has not been implemented by secondary law instruments explicitly drafted for this purpose.[3] In this sense, EU law does not recognise an individual legal right to social assistance. Whilst not legally binding, the right to social assistance is also stipulated in Article 14 of the European Pillar of Social Rights (hereafter EPSR): 'Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.'

Excluded from the material scope of application of Regulation 883/2004,[4] social assistance remains in the exclusive domain of Directive 2004/38/EC[5] (hereafter the Citizens' Rights Directive).[6] This is surprising since the Citizens' Rights Directive is not a social security document, and the Member States have the sole competence to determine the content of the right to social assistance. While the EU level creates transnational social rights and sets out the conditions of access to an EU host Member State's welfare system, the delivery of welfare takes place at the national and local levels, making national administrations and bureaucrats important actors in the governance of welfare.[7] Through the case law of the European Court of Justice (hereafter CJEU), social assistance rights, administered at the national, regional or local level, have re-gained a transnational character. However, in its case law, general EU rules on citizenship and free movement were given priority over social security rules. The CJEU, for example, treated special non-contributory benefits (hereafter SNCBs) as plain social assistance benefits

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1 Charter of the Fundamental Rights of the European Union, 2000, OJ C 364/1.

2 See F. Pennings, 'Does the EU Charter of Fundamental Rights have Added Value for Social Security', 24 *European Journal of Social Security,* 2022, p. 117.

3 A, Aranguiz and H. Verschueren, 'Discussing strategies for Social Europe: 'The potential role of EU law in contributing to the Union's policy objective of fighting poverty and social exclusion', 22 *European Journal of Social Security,* 2020, p. 370.

4 Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, 2004, OJ L 166/1, as amended.

5 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004, OJ L 158/77, as amended.

6 G. Vonk, 'The EU (non) co-ordination of minimum subsistence benefits: What went wrong and what ways forward?', 22 *European Journal of Social Security,* 2020, p. 140. For the vast state of research in the field of minimum income support, free movement and EU law also see, for example, H. Verschueren (ed.), *Residence, Employment, and Social Rights of Mobile Persons,* Intersentia, 2016. More recently, S. Mantu and P. Minderhoud, 'Struggles over social rights: Restricting access to social assistance for EU citizens', 25 *European Journal of Social Security,* 2023, p. 3.

7 Ibid, p. 4.

in *Brey* (C-140/12)[8] and its subsequent decisions, despite their designation as a distinct category of benefits under Regulation 883/2004, where the principle of equal treatment applies differently to the Citizens' Rights Directive. In *Commission v. UK* (C-308/14),[9] the CJEU extended this interpretation to a broader range of benefits falling within the material scope of this regulation, beyond SNCBs alone.[10]

Under Regulation 883/2004, SNCBs are not classified as social assistance benefits, which fall outside its scope of application and are thus exempt from the coordination mechanism. Instead, SNCBs are considered benefits of a mixed nature and are designed to supplement social insurance benefits. While they are subject to coordination, they are not exportable. Consequently, an individual relocating from one MS to another cannot transfer an SNCB—e.g. an allowance supplementing an insurance-based pension—but may claim such benefits in the host member state if they are provided under its domestic legislation. From the perspective of the Citizens' Rights Directive and the now widely debated case law of the CJEU, such an allowance would, as noted, be regarded as social assistance under free movement law. This creates tensions between the rights and obligations established under Regulation 883/2004 and the Citizens' Rights Directive, despite both legal instruments being intended to facilitate the free movement of persons and EU citizens and having been adopted concurrently. Nonetheless, they establish different circles of solidarity within the European legal framework. While they partially converge concerning economically active persons, such as workers and the self-employed, they diverge in treating economically inactive EU citizens. This distinction also extends to international social security law, given that social assistance is generally excluded from the scope of international coordination agreements.[11]

According to the Citizens' Rights Directive, EU citizens can claim social assistance benefits only if they satisfy the conditions for lawful residence. If they are not economically active (i.e. workers, self-employed persons, persons retaining the status of a worker), they have to possess sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State. Failure to meet these conditions affects the legality of residence, which may ultimately result in expulsion, an extreme measure imposed by the host Member State. During the first five years of residence, the (un)lawfulness of an individual's stay thus depends on whether he or she constitutes an unreasonable burden on the host Member State's social assistance system. As a result, these Union citizens, when claiming social assistance benefits in the host Member State, may find themselves caught in a vicious circle: to be entitled to such a benefit, they must have a right of residence, which in turn is subject to the condition of having sufficient resources so that they do not have to use the benefit for which

8 Case C-140/12 (*Pensionsversicherungsanstalt v. Peter Brey)*, ECLI:EU:C:2013:565.

9 Case C-308/14 (*Commission v. United Kingdom)*, ECLI:EU:C:2016:436.

10 F. Pennings, *European Social Security Law*, Intersentia, 2022, p. 202.

11 G. Vonk and S. V. Walsum, 'Access Denied. Towards a new approach to social protection for formally excluded migrants', in G. Vonk (ed.), *Cross-Border Welfare State. Immigration, Social Security and Integration*, Intersentia, 2012, p. 17.

they are applying.[12] Additionally, following the ruling in *Dano* (C-333/13), a person's residence status is determined by whether he or she is economically active within the meaning of the Citizens' Rights Directive, without even requiring an assessment of the unreasonableness of the benefit claim.[13] In the said case, the claimant's application for an SNCB was sufficient to decide that she did not have the right to reside, according to the Citizens' Rights Directive, since it was assumed on the grounds of the application alone that she was an unreasonable burden.[14]

According to Vonk,[15] the current EU framework for social security coordination is based on two key distinctions between social security schemes: the first differentiates between social security (insurance) benefits and SNCBs, while the second distinguishes SNCBs from social assistance benefits. The classification of minimum subsistence benefits under EU law remains a subject of ongoing controversy. Member States are generally reluctant to extend tax-funded benefits to mobile EU citizens within their own borders, let alone those residing in other parts of the EU.[16] Although there is limited evidence to suggest that intra-EU migration is driven by welfare tourism,[17] Member States' efforts to protect their national welfare systems consistently compete with the EU's objectives of free movement, equal treatment, equal opportunities, and the fight against poverty and social exclusion. Shuibhne even argues that EU citizenship has evolved into something less than a normative conception of citizenship would require, deserve, or necessitate. She contends that the EU has, at best, generated a form of pseudo-citizenship that merely overlays a thin veil of self-serving rhetoric onto its fundamentally economic origins.[18] This raises the question of whether the EU is genuinely *citizenship-capable*, as it imposes little to no social assistance obligations on the host MS, in contrast to national citizenship systems, which do. By excluding non-nationals and short-term residents from social assistance, often accompanied by the looming threat of expulsion, EU law, as critically described by Minderhoud and Mantu, creates a narrowly defined form of solidarity. This solidarity is paradoxically accessible only to those who do not need it and precisely when they do not,[19] namely, economically active individuals or those with sufficient resources who effectively avoid the condition of not becoming an unreasonable burden on the host Member States' social assistance system. Furthermore, it extends to individuals who have belonged to the first or second category of EU citizens for a sufficiently long period to acquire a right to permanent residence.

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12 H. Verschueren, 'The role and limits of European social security coordination in guaranteeing migrants and social benefits', 22 *European Journal of Migration and Law,* 2020, p. 395.

13 H. Verschueren, 'The Right to Social Assistance for Migrating Union Citizens: A Step Forward in the Case Law of the Court of Justice This Time', 23 *European Journal of Migration and Law,* 2021, p. 204-205.

14 See Pennings, *supra* note 10, p. 209.

15 Vonk, *supra* note 6, p. 139.

16 Ibid., p. 138-140.

17 See H. Verschueren, 'Free Movement of EU Citizens. Including for the Poor?', 22 *Maastricht Journal of European and Comparative Law,* 2015, p. 26

18 N. Shuibhne, 'The Resilience of EU Market Citizenship', 47 *Common Market Law Review,* 2010, p. 1597.

19 P. Minderhoud and S. Mantu, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive', in D. Thym (ed.), *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*, Hart Publishing, 2017, p. 206.

This article examines specific social justice arguments and their viability for extending Regulation 883/2004 to encompass social assistance. It draws on key political philosophy theories to enrich the ongoing legal and policy discourse.

Section 1 outlines the current relationship between the EU coordination framework, core free movement law, and means-tested social assistance benefits. Section 2 analyses the absence of coordination for social assistance and summarises Vonk's recent argument for their inclusion. Section 3 examines various social justice conceptions frequently invoked to support or challenge transnational solidarity within the EU. Section 4 further explores a liberal-egalitarian and procedural theory of justice, drawing on key arguments from John Rawls, and considers it alongside a potentially more applicable theory of aspirational solidarity. Finally, Section 5 assesses the limitations of a cosmopolitan justice-based approach to social assistance benefits and free movement in EU law.

2. The (non)coordination of social assistance benefits

Based on the definition of minimum subsistence benefits from the decision in *Brey*—namely, benefits introduced by national, regional, or local public authorities and claimed by individuals who lack sufficient resources to meet their own basic needs and those of their families—Vonk argues that all benefits falling within this definition should be governed exclusively by Regulation 883/2004.[20] The author suggests that these benefits should be guaranteed in the host Member State. However, similar to SNCBs, they would have a special legal status and would not be exportable. He proposes a unified principle to regulate social security benefits under the regulation and residence rights under the directive. According to Vonk, this could be achieved by introducing a lawful residence requirement for economically inactive recipients of social security benefits, as included in the proposal for the revised Regulation 883/2004,[21] which aligns with the Citizens' Rights Directive. However, this requirement should not automatically exclude entitlement to social security benefits solely because an economically inactive individual is deemed not to have sufficient resources.[22] The legality of the residence will have to be officially established and given effect by the immigration authorities to end the right to benefits. Importantly, Vonk also suggests establishing a cost-sharing mechanism for benefits granted to economically inactive citizens. Furthermore, stranded EU citizens who no longer hold lawful EU residence status should not be entirely abandoned, even if excluded from rights under Regulation 883/2004. They should be entitled to minimum care obligations comparable to those for asylum seekers and persons applying for international protection.[23] This reasoning adopts a human dignity-based approach to social assistance.[24] It is also

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20 Vonk, *supra* note 6, p. 145.

21 See also Pennings, *supra* note 10, p. 207-206.

22 Vonk, *supra* note 6, p. 145-146.

23 Ibid.

24 For discussion on the concept of human dignity and the potential violation of fundamental rights under the Charter in cases where social assistance benefits are lawfully denied to EU citizens who are non-nationals, see Case C-709/20 (*CG v. Department for Communities in Northern Ireland)*, ECLI:EU:C:2021:602. Regarding human dignity, the protection of other Charter rights, and

somewhat akin to the ruling in Grzelczyk (C-184/99),[25] in which the CJEU found that the then applicable EU law allows for a certain degree of financial solidarity between nationals of a host Member State and those of other Member States, especially when the difficulties faced by the beneficiary are temporary.

While the author's perspective on enhancing social cohesion in Europe through the coordination of social assistance benefits is valuable from an academic standpoint, its practical feasibility remains highly uncertain. Given the significant socio-economic disparities among Member States, their debtor-creditor dynamics,[26] concerns regarding welfare tourism or the regulation of minimum wages as an improvement of living and working conditions, reduction of socio-economic disparities, promotion of upward convergence and more harmonious development of the EU,[27] social dumping in cross-border service provision,[28] or inconsistent or unlawful practices related to unemployment benefits,[29] the case of exporting and indexing family benefits,[30] and the lack of transnational solidarity in healthcare during the early stages of the COVID-19 pandemic,[31] it is challenging to envisage the implementation of a cost-sharing mechanism in the field of social assistance. Furthermore, given the absence of consensus on the necessity or urgency of amending Regulation 883/2004, the feasibility of implementing such disruptive changes remains questionable. As Pennings has observed, understanding the background to these disagreements in social security coordination requires recognizing that coordination is not solely a matter of ensuring free movement but also distributing costs among Member States. The divide between the 'East' and the 'West' or between the 'centres' and the 'peripheries'[32] further complicates this issue.[33] As previously mentioned, national authorities are reluctant to provide social assistance to their nationals and permanent residents, making providing such benefits to foreign nationals even more contentious. The following chapters examine key principles of social justice that could support arguments for extending the material scope of Regulation 883/2004 to include

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the fulfilment of basic needs for third-country nationals, see Case C-352/23 (*LF v. Zamestnik)*, ECLI:EU:C:2024:748 para. 41.

25 Case C-184/99 (*Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve)*, ECLI:EU:C:2000:518.

26 See A. Bobić, 'Imagining transnational solidarity in the EU through Hegel's idea of mutual recognition', *Maastricht Journal of European and Comparative Law*, 2025, p. 682.

27 Also see Opinion of AG Emiliou from 14 January 2025 in Case C-19/23 (*Kingdom of Denmark v. European Parliament, Council of the European Union)*, ECLI:EU:C:2025:11, para. 131.

28 See, for example, H. Verschueren, 'The CJEU's case law on the role of posting certificates: A missed opportunity to combat social dumping', 27 *Maastricht Journal of European and Comparative Law*, 2020, p. 484.

29 See F. Pennings, 'The discussion on the revision of the coordination rules of unemployment benefits – a battlefield between East and West', 22 *European Journal of Social Security,* 2020, p. 148.

30 See F. Marhold and C. P. Ludvik, 'Thoughts about indexing family benefits: Are authorities permitted to apply the Austrian indexation of family benefits? The primacy of EU law and the right/obligation to request a ruling from the Court of Justice of the European Union', 22 *European Journal of Social Security,* 2020, p. 273.

31 L. Mišič and G. Strban 'Functional and systemic impacts of COVID-19 on European social law and social policy', in E. Hondius (et al.) (eds.), *Coronavirus and the Law in Europe*, Intersentia, 2021, p. 986-987.

32 On the dichotomy see D. Kukovec, 'Law and the Periphery', 21 *European Law Journal,* 2015, p. 406.

33 Pennings, *supra* note 10, p. 23.

social assistance benefits and, in turn, guarantee these benefits, at least to a certain extent, to economically inactive EU citizens in host Member States.

3. From communitarian to aspirational solidarity

Given the extensive body of existing scholarship on the subject, I will not engage in an in-depth exploration of EU citizenship, free movement and transnational market solidarity, creating a tenuous yet sufficient link between economically active beneficiaries and the host Member State.[34] Instead, I will build upon Spaventa's premise—echoing perspectives previously discussed by scholars such as Minderhoud and Mantu or Shuibhne—that we are witnessing a reactionary phase in the evolution of EU citizenship. This phase is marked by the CJEU's apparent retreat from its original vision, adopting a more minimalist interpretation that reaffirms the centrality of the national bond of belonging and places the responsibility for the most vulnerable individuals in society squarely with their state of origin.[35] This aligns with the notion of financial fairness and an implicit assumption underlying the rules on social security coordination, which presupposes a balance between the rights and obligations of the individual, arising from the reciprocal and typically long-term relationship of social insurance. Such a balance is generally absent in social assistance, which is funded through taxes and lacks the direct relationship between payer and beneficiary found in social security. This identity is incidental, occurring only when and if a taxpayer applies for social assistance. The absence of reciprocity in social assistance further emphasises the role of financial redistribution and the associated principle of solidarity. As previously noted, it necessitates a sufficient connection between the beneficiary or claimant and the community of taxpayers to legitimise need-based assistance. According to Lenaerts, public authorities must strike the right balance between the number of persons who contribute to the functioning of the welfare system and those who benefit from it. If the latter were to outnumber the former significantly, national welfare systems would collapse. Understood as a criterion limiting the personal scope of social solidarity, membership guarantees the financial stability of national welfare systems.[36] This is one of the main reasons why a cost-sharing mechanism for social assistance granted to economically inactive citizens migrating from one Member State to another, without a special legal status that would justify financial redistribution, seems highly unlikely. This is further compounded by the fact that the EU consists of national welfare states, which often operate as closed systems of communitarian solidarity.[37] An argument in favour of including social assistance benefits within the material scope of the Regulation

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34 See F. De Witte, *Justice in the EU. The Emergence of Transnational Solidarity*, Oxford University Press, 2015, p. 88.

35 E. Spaventa, 'Earned Citizenship – Understanding Union Citizenship through Its Scope', in D. Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights.*, Cambridge University Press, 2017, p. 208.

36 K. Lenaerts, 'European Union Citizenship, National Welfare Systems and Social Solidarity', 18 *Jurisprudence,* 2011, p. 398.

37 See, for example, L. Mišič, 'Theories of political philosophy as guiding principles in social security', 25 *Study in Labour Law and Social Security*, 2018, p. 271.

883/2004 must, as Vonk suggests, either incorporate a lawful residence condition[38] or, less likely, present a robust transnational justice claim that exceeds the notion of market citizenship, granting access to national welfare states as bounded communities.

This could be achieved by applying the egalitarian-liberal principle of equality of opportunity within the transnational context of the EU, representing a shift from communitarian to aspirational solidarity. However, as De Witte observes,[39] aspirational solidarity—whereby Member States cannot prevent either their own nationals or migrant EU citizens from accessing the resources that constitute a good life, or more precisely, from making meaningful life choices following their conception of the good life, enabled by the access to public goods and services, active labour market policies, or inclusive social security benefits—is arguably the most divisive form of solidarity. According to De Witte, it has the potential to disrupt the redistributive preferences of Member States, constrain many of the traditional instruments they have relied upon to manage their welfare systems and create tensions by pitting the interests and aspirations of individual citizens against one another.[40] The fear of welfare tourism makes aspirational solidarity even more contentious, particularly involving economically inactive citizens.

Recently, Bobić has argued that EU integration created new types of encounters for its citizens that demand mutual recognition sustained through solidarity.[41] From a materialist point of view, free movement of workers, family reunification, migration and asylum rights demand, according to Bobić, a higher level of social protection from Member States who were traditionally providers of social security, putting functional pressure on the EU legislator to resolve common issues and pool resources. From an idealist perspective, contemporary European integration challenges existing ideas of belonging and the other: it transforms traditional notions of national identity by adding a European dimension, at the same time foreclosing it towards third-country nationals who seek to partake in the project, either as economic contributors or by seeking protection from harm elsewhere. The sheer scale of these interactions creates novel and unaddressed interdependencies between citizens in the EU.[42] Relying on Hegel's understanding of freedom, Bobić describes solidarity as mutual recognition, the basis for rethinking the notion of redistribution and as a starting point towards a genuine political community of citizens. Similar to Vonk, she is considering a direct EU tax to foster, in simplified terms, a stronger social Europe, or, put differently, make obvious how these contributions impacted the lives and livelihoods of those living in the EU. According to the author, cohesion of economic and social conditions across the EU's territory is indispensable for connecting those living in the EU. Put differently, only after solidarity acts of mutual recognition contribute to creating socioeconomic bonds and cohesion may we, according to Bobić, speak of a path towards a genuine political bond for citizens in the EU.[43]

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38 Vonk, *supra* note 6, p. 145.
39 See De Witte, *supra* note 34, p. 167.
40 Ibid.
41 Bobić, *supra* note 26, p. 687.
42 Ibid.
43 Ibid., p. 688.

However, one might question whether acts of mutual recognition stemming from several varied social interactions of self-determining individuals alone are sufficient to create genuine socioeconomic bonds and cohesion, as more profound structural inequalities, national interests, and differing political cultures could, on the contrary, create additional conflicts and continue to hinder the development of a genuinely unified political bond among EU citizens. In practice, as discussed, such scepticism is validated by conflicts within the coordination framework, particularly regarding unemployment benefits, such as the (non)recognition of periods completed in other Member States and restrictions on benefit exportation. Similar challenges arise in coordinating family benefits, where positive indexation is rare, while negative indexation is more common since benefits are generally exported to poorer Member States. Additionally, tensions emerge in the cross-border provision of services, with the most notable example being chauvinistic practices related to social assistance and other means-tested benefits.

In this contribution, the foundation for promoting social solidarity—which could involve providing means-tested minimum income support benefits to economically inactive EU citizens in a host Member State—derives from, as previously mentioned, a procedural concept of social justice that becomes transnational once national citizenship or membership is seen either as a personal endowment or constraint. The procedural elements can, at least superficially, render it more applicable than a theory of justice derived from the gradual but inherent recognition of the equal moral worth of all individuals and their ways of life. However, this approach also has significant limitations, which will be examined in the following discussion.

4. From aspirational solidarity to cosmopolitan justice

National citizenship and the associated right to permanent residence, theoretically acquired through a lottery-like process, significantly influence persons' opportunities to pursue their vision of a good life with minimal adaptation to their autonomously developed life plans.[44] At the same time, modern citizenship is fundamentally linked to respecting individual autonomy, often requiring support for personal life projects.[45] Cosmopolitan theorists, drawing on Rawls's original position, argue that parties to a hypothetical social contract should be, as further discussed below, ignorant of their citizenship and nationality, as these attributes are morally analogous to natural talents, abilities, or social starting points—none of which are within an individual's control.[46]

After the hypothetical lottery, an EU citizen may belong to a socially and economically advanced, highly egalitarian national community. In theory, such a society provides its citizens and permanent residents equal opportunities, ensuring fair access to primary

44 L. Mišič, 'Equality of Opportunity in the EU: Rethinking the European Pillar of Social Rights in Light of Free Movement as a Supranational Principle of Justice', 80 *Zbornik znanstvenih razprav,* 2020, p. 53.

45 D. Kochenov, 'EU Citizenship without Duties', 20 *European Law Journal,* 2014, p. 490.

46 D. Moellendorf, 'Equality of Opportunity Globalized?', 19 *Canadian Journal of Law and Jurisprudence,* 2006, p. 304.

goods like education, vocational training or healthcare. In these circumstances, individuals, regardless of their situations, are more likely to compete on equal terms for positions offering high or decent wages and material resources, enabling them to pursue their rational life plans and realise their conception of the good life with minimal compromise within a market economy. The role of social assistance is reduced, whilst, for example, the issue of minimum pay rates to trigger upward convergence, promote social and economic cohesion, etc., becomes less pressing. Moreover, accessible, high-quality public services—including long-term care, public transport or housing, and public cultural institutions—further facilitate the pursuit of a good life for less productive or economically inactive community members by limiting private consumption, allowing them to achieve their aspirations with little adaptation.[47] Only in part detached from the *money-maker* paradigm and market justice,[48] are the elements that make up the previously described notion of aspirational solidarity, as defined by De Witte, now combined with the idea of cosmopolitan justice. Aspirational solidarity is a liberal egalitarian concept, primarily emphasising the *ex-ante* facilitation of equal opportunities rather than the *ex-post* redistribution of material resources, though not to the exclusion of the latter.

Conversely, a person may become a member of a socially and economically underdeveloped or highly inegalitarian national community characterized by limited opportunities for social and economic advancement, high levels of unemployment, poverty, and social exclusion or stratification. In such a society, individuals have minimal access to quality public services, significantly hindering their ability to develop and pursue their rational life plans or idea of a good life. Realising their aspirations requires substantial adaptation, particularly for economically inactive or low-productive community members, or further private consumption. However, what links the winners and the losers of such a lottery is their common legal status, the fundamental status of an EU citizen.[49]

If the veil of ignorance—behind which the rules and principles of basic social and economic institutions of a future society are determined—is lifted just enough for fictitious rule-makers to recognise that they are formulating principles of justice governing a supranational community composed of socially and economically diverse national communities—without knowing their eventual placement—they might endorse unlimited mobility as a fundamental principle of justice.[50] If the idea of an original position is applied to the field of social security, residence and free movement rights and obligations, the ignorant members of a future society could support Vonk's proposal for the coordination (or even the export) of minimum income benefits and a solidarity-based cost-sharing mechanism between Member States as national communities in place. If they accept the principle of

47 Mišič, *supra* note 44, p. 53.

48 See A. Somek, *The Cosmopolitan Constitution*, Oxford University Press, 2016, p. 268. Rights and obligations in the field of social security primarily focus on providing income replacement, cost-reducing measures, and income-support benefits, thereby ensuring social protection for economically active individuals and their dependent family members. Social security serves as both a fundamental component and a cornerstone of social market economies.

49 Mišič, *supra* note 44, p. 55.

50 Ibid., p. 56.

fair equality of opportunity, the unrestricted movement of persons, regardless of their economic activity, seems logical.

This principle must be understood in a substantive rather than merely formal sense, ensuring open and merit-based access to jobs and positions while incorporating the difference principle, according to which social and economic differences are to the greatest benefit of the least privileged members of society. Such an application can reaffirm the tax-funded cost-sharing mechanism concerning minimum income support benefits, grounded in vertical solidarity. Going beyond mere procedural fairness regarding equal access to positions anywhere in the common market, Viehoff, for example, argues that it must be shown that having a market economy which generates such inequalities in power and authority is justified, for instance, because it is beneficial to everybody, since it maximises liberty, or because it is likely to improve the position of the worst off members of society.[51] In practice, a solely merit-based allocation of employment within the single market tends to favour citizens from more socially and economically developed Member States, where they likely had more significant opportunities to cultivate talents, acquire marketable skills, and attain transnationally relevant expertise. This advantage persists even if such individuals do not wish to or need to relocate. Furthermore, such a system remains morally arbitrary for those who, due to structural disadvantages, cannot compete or cannot do so on equal terms. Nevertheless, even for non-competitive EU citizens, the prospects of leading a life following an autonomously developed rational life plan with minimal adaptation are significantly better in the most socially and economically developed Member States.[52] If financially inactive EU citizens were to claim residence and social assistance, be it traditional social assistance or SNBCs, in another Member State without possessing a special legal status, they would merely be exercising their free movement rights, which could be regarded as a supranational principle of justice. Unlike under the current non-coordination framework, they would not be subject to the requirements of economic activity or the test of unreasonableness, which might otherwise lead to their expulsion. In such a scenario, nationals or officials from wealthier Member States would have to accept their fellow EU citizens within their solidarity-based community, as acting against them could constitute a violation of the quasi-social contract formed within the original position—an agreement shaped by the rational fear that they might belong to a socially or economically disadvantaged national community.

However, the cosmopolitan account of justice, if applied to the field of social assistance in the EU, generally violates the principle of reciprocity, a fundamental principle of social security law, limiting the effects of the principle of solidarity to make financial redistribution sustainable. Drawing on the concept of aspirational solidarity in the transnational context of the European Union, De Witte advocates for the exportability of benefits, arguing that while Member States must permit their citizens to export benefits, they are not required to increase these benefits to compensate for the higher cost of living in the host Member State.[53] This principle applies, for instance, to unemployment

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51 J. Viehoff, 'Equality of Opportunity in a European Social Market Economy', 57 *Journal of Common Market Studies*, 2019, p. 33.

52 Mišič, *supra* note 44, p. 56.

53 De Witte, *supra* note 34, p. 186.

benefits or family benefits. However, social security benefits that are inherently tied to the territory of a state or that necessitate an ongoing or future social or economic connection to that polity, e.g. social assistance benefits,[54] are non-exportable. According to the author, allowing their export would extend the principle of reciprocity beyond its sustainable limits.[55]

From this perspective, limits to the notion of aspirational solidarity are set by the communitarian as well as market accounts of justice,[56] offering *means-tested* benefits either to persons who inherently belong to a particular polity, e.g. nationals, permanent residents, or foreigners, who attribute to its common good, e.g. cross-border workers. Similarly, persons in the territory of another Member State cannot rely on equal treatment clauses when claiming social assistance benefits without fulfilling lawful residence conditions. In principle, the concept of aspirational justice, as previously mentioned, is conditional and rooted in the pursuit of equal opportunities through the ex-ante facilitation of equal opportunities, with ex-post redistribution of resources generally confined to the limited spheres of solidarity within national welfare states, as is the case in the European Union. This is supported by the free movement of workers or self-employed persons, equal access to social and tax advantages for workers in the territory of another Member State under Regulation 492/2011,[57] the export of unemployment benefits or, for example, the cross-border provision of health services under the Directive 2011/24,[58] or their coordination under Regulation 883/2004. EU citizens may invoke their free movement rights to pursue their life plans or conception of a good life within the transnational framework of the EU. Similarly, they may exercise these rights to, for example, study, work, provide services or claim healthcare in a host Member State, subsequently returning to their country of citizenship or permanent residence, where such pursuits are now economically more accessible. However, free movement rights alone do not grant access to the bounded solidarity circles. This is precisely what Vonk advocates by proposing an expansion of the material scope of application under Regulation 883/2004 coupled with a cost-sharing mechanism, and what this section argues for by drawing on a liberal-egalitarian approach to cosmopolitan justice.

5. Conclusion: from cosmopolitan justice to political compromise

Ordinary cosmopolitanism comes with the counterfactual purport that since humans are in the same situation together, it is imperative to reason about substantive issues as if the world were one large political unit.[59] Different vocabularies, traditions, social

54 Ibid., p. 190.
55 Ibid., p. 186-187.
56 Compare ibid., p. 208-209.
57 Regulation (EU) 492/11 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, 2011, OJ L 141/1, as amended.
58 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.
59 A. Somek, *The Cosmopolitan Constitution*, Oxford University Press, p. 262.

groups, prevailing ideologies, moral sensibilities, distributions of wealth, allocations of opportunities and attitudes towards a valuable life[60] among persons belonging and not belonging to a particular polity make advocating for a cosmopolitan account of justice challenging, particularly when communal resources must be shared with others. This also applies to the EU, where even common political action against an outsider aggressor seems unlikely. According to Kos, Kukavica and Sahadžić, the complexity and diversity of multilevel legal systems lead to specific difficulties in their governance. On top of the need to provide an effective and acceptable solution to the issues stemming from the complex relationship between different levels of legality in the multilevel legal systems, a balance between effectiveness (unity) and justified compromise (respect for diversity) of the system needs to be struck.[61] From this perspective, the application of a cosmopolitan account of justice, grounded in the Rawlsian original position, loses its practical appeal since it functions as a one-off thought experiment and seems ill-adjusted to the EU as an in-time expanding or changing political community, grounded not in a shared understanding of social justice or fairness but built on a series of justified (political) compromises.[62] The challenges posed by Brexit, which demonstrated the political and social tensions surrounding transnational solidarity, and the potential future expansion of the EU towards the East, which would further test the limits of resource distribution and integration, highlight these difficulties. However, despite its practical constraints, the very consideration of this theoretical framework broadens legislators' perspectives, encouraging a more inclusive and forward-thinking approach to policymaking, also concerning the coordination framework and the position of social assistance benefits therein. The concept of aspirational solidarity appears to be a more suitable framework for EU law and policy, as it balances the aspirations of the European peripheries with the efficiency of the common market, particularly by aligning supply and demand, especially concerning labour and services. As discussed, this is reflected in the principles of equal treatment of workers or economically active persons, the cross-border provision of services, and the exportability of unemployment and family benefits. Authors advocating for expanding the material scope of coverage under Regulation 883/2004 must either present a robust philosophical argument that unconditionally supports transnational solidarity or, more plausibly, demonstrate the underlying compromise involved in coordinating social assistance and explain why the European economic centres would be willing to accept it.

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60 Ibid., p. 261.

61 M. Kos, J. Kukavica, M. Sahadžić, 'Introduction. The Dialectics in Multilevel Systems – Mechanisms of Divergence and Convergence', in M. Shadžić (et al.) (eds.), *Accommodating Diversity in Multilevel Constitutional Orders. Legal Mechanisms of Divergence and Convergence*, Routledge, 2023, p. 3.

62 See ibid.

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Some reflexions on the functioning of the preliminary ruling procedure in the field of free movement of workers and coordination of social security

Rob Cornelissen

Abstract: This contribution is about the interaction between the national judiciary and the European Court of Justice and the interaction between judiciary and legislature in the field of Union law on free movement of workers and coordination of social security. It is based on my experience as a former official at the European Commission. It will: (i) highlight the importance of the quality and substantiation of preliminary questions for the Court's ruling; (ii) illustrate that the Court may change its mind on the interpretation of secondary legislation, sometimes without a convincing explanation; (iii) address possible consequences of an inactive European legislature for the national judiciary; (iv) show how a request for a preliminary ruling may ultimately lead to an adaptation of secondary European legislation and (v) illustrate how the persistence of a national judiciary can lead to a substantial improvement of national legislation to the benefit of people making use of their right to free movement.

Keywords: substantiation of preliminary questions, amending case-law, interactions between judiciary and legislature, impact on European legislation

1. Introduction

The European regulations based on Articles 45 and 48 TFEU are applied by national institutions and authorities. In case of a dispute, it is up to the national judiciary to take a decision. If, in order to do so, an issue of interpretation of a provision of Union law arises during the proceedings, the national judiciary may – and, in some circumstances, is obliged to – request the European Court to give a preliminary ruling thereon[1]. This creates opportunities but also challenges for the national judiciary.

[1] Article 267 TFEU.

2. The quality of the preliminary questions and their substantiation may have an impact on the Court's ruling

The quality of the questions raised to the Court is of utmost importance. The request for a preliminary ruling should make the Court fully aware of the impact of a certain interpretation for the functioning of the EU rules on free movement of workers or coordination of social security.

A good example of a well-documented referral by a national court is the *AFMB* case[2]. In fact, the 2020 Court's judgment in this case has been, extensively, inspired by the excellent substantiation of the request for a preliminary ruling made in 2018 by the Higher Social Security Court (Centrale Raad van Beroep) of the Netherlands. It concerned the interpretation of Article 13 Regulation 883/2004. Article 13 is part of Title II which contains the rules determining the applicable social security legislation. The main rule is contained in Article 11(3)(a) Regulation 883/2004: a person is subject to the legislation of the Member State where he/she works. For obvious reasons, the application of the law of the workplace is not suitable for people who normally work in two or more Member States. For workers which such a pattern, the special rules of Article 13 contain other connecting factors.

The first connecting factor for determining the applicable social security legislation for workers normally working in two or more Member States is the notion 'substantial part' of the worker's activities. Workers who normally work in two or more Member States and who pursue a 'substantial part' – i.e. 25% or more of their work or remuneration[3] – of their work in their Member State of residence are subject to the legislation of that State. If a substantial part isn't performed in the Member State of residence, then the decisive factor is the 'registered office or place of business' of the employer.

In this context it is important to underline that the number of A1 documents issued for persons covered by Article 13 increased from 170.000 in 2010 to 1.700.000 in 2023[4]. This is a remarkable growth in a short period of time. These figures could be viewed as an indication that in their search for the most advantageous social security legislation, businesses look at the possibilities offered by Article 13. Where 'posting' within the meaning of Article 12 Regulation 883/2004 is subject to strict conditions and limitations,[5] such conditions and limitations do not apply to Article 13. Therefore, the risk of 'forum shopping' is not far away.

The issue at stake in the AFMB case was the following. A number of truck-drivers reside in the Netherlands. They are employed by a transport company established in the Netherlands. They normally work in two or more Member States and, therefore,

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2 Case C-610/18, (*AFMB),* ECLI:EU:C:2020:565.

3 Article 14(8) Regulation 987/2009.

4 F. De Wispelaere, L. De Smedt and J. Pacolet: '*Posting of workers. Report on A1 Portable Documents issued in 2023',* October 2024, available on https://data.europa.eu.doi/10.2767/946945.

5 In particular, there must be 'a direct relationship' between the worker and the employer throughout the whole period of 'posting' and the employer must normally perform substantial activities in the Member state of establishment.

fall under Article 13. They do not perform a substantial part of their activities in the Netherlands. By virtue of Article 13 they are subject to the social security legislation of the Netherlands, where the 'registered office' of their employer is situated. However, after a while the enterprise has engaged in outsourcing part of its operations to Cyprus. Since then it is AFMB, a company established in Cyprus, that recruits the truck drivers concerned. The Cypriot company hires the truck drivers concerned out to the same transport enterprise in the Netherlands. The transport enterprise claims that the truck drivers are now subject to the social security legislation of Cyprus, because their employer has its 'registered office' in that Member State. The Dutch social security institution, however, is of the opinion that the truck drivers remain subject to the social security legislation of the Netherlands, since their real employer is the transport enterprise whose registered office is in the Netherlands. The dispute comes finally before the Higher Social Security Court of the Netherlands.

According to the findings of the Netherlands judiciary the truck drivers concerned remained in fact fully available to the transport enterprise in the Netherlands and it is the enterprise in the Netherlands which actually bears the wage costs. The Dutch court refers the case to the European Court of justice. The first question is which of the two companies involved had to be seen as the employer of the truck drivers within the meaning of Article 13. The Dutch court provided the European Court with strong arguments for the interpretation that it should be the enterprise who had the real authority over the truck drivers concerned. In this context the Dutch court referred to recital 1 of Regulation 883/2004 and to the case-law of the European Court[6] according to which the EU Regulations based on Article 48 TFEU aim at contributing towards improving the standard of living and conditions of employment for people exercising their right to free movement. In addition, the Dutch court expressed fears for the abuse of Article 13, since the objective of the EU Regulations is not to facilitate competitive advantages for employers. It feared circumvention of the social security legislation of the Netherlands by the companies involved by creating artificially the conditions for obtaining an advantage.

All these arguments can be found in the clear judgment of the European Court of justice[7]. The Court highlighted that the risk of 'forum shopping' should be taken seriously. The Court underlined that the application of the conflict-of-law rules 'depends solely on the objective situation of the worker concerned' and that it is important to avoid an interpretation of the conflict-of-law rules that would 'make it easier for employers to be able to resort to purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules. Such exploitation would be likely to have a race to the bottom effect of the social security systems of the Member States and, perhaps, ultimately, reduce the level of social protection offered by those systems.'

The EFTA Court has joined this case-law[8].

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6 Case C-352/06 (*Bosmann*), ECLI:EU:C:2008:290.
7 Case C-610/18, (AFMB), ECLI:EU:C:2020:565.
8 Case E-1/21, EFTA Court, 14 December 2021.

3. The Court may change its mind

In a general way the Court will stick to established case-law. But it does happen that the Court modifies or refines its case-law. Sometimes the Court is clear about amending its case-law, sometimes it modifies its case-law without a convincing explanation.

A good example of the first type of amending existing case-law is the development in the extent to which family members or survivors of workers can invoke the EU social security coordination Regulations. Like Article 2 of the current Regulation 883/2004, Article 2 of the old Regulation 1408/71 defined the persons covered by the Regulation. It referred to two clearly distinct categories of persons: workers, on the one hand, and members of their families and their survivors, on the other. In order to fall within the scope of the Regulation, the former had to be nationals of a Member State, or stateless persons or refugees residing in the EU. There was – and is – on the other hand no nationality requirement for application of the Regulation to family members or survivors of workers who were themselves Union nationals. In its judgment of 23 November 1976[9] the Court ruled that members of the family or survivors could only invoke the Regulation concerning derived rights: rights to benefits acquired through their status as members of the family or as survivors, such as family benefits, health care or survivors' pensions. This was known as the 'Kermaschek' principle. It meant that members of the family or survivors could not invoke the Regulation, unless it concerned benefits acquired through their status of members of the family. Twenty years later the Court modified its case-law substantially. In its *Cabanis-Isarte* judgment[10] the Court limited the scope of its *Kermaschek* ruling to cases in which a member of a worker's family relied on provisions of the Regulation which are applicable solely to workers. In practical terms it means that members of the family can now invoke the Regulation, unless it concerns provisions which are applicable solely to workers, such as chapter 6 relating to unemployment benefits. Members of the family can now, for instance, invoke the principle of equal treatment, laid down in Article 4 of Regulation 883/2004. In its *Cabanis-Isarte* judgment the Court mentioned explicitly its reasons for changing its previous case-law[11]. According to the Court, its previous case-law could adversely affect freedom of movement of workers which forms the context for the EU coordination of social security laws. It also referred to developments in national social security laws of the Member States and the tendency for social security cover to be universal, blurring the distinction between rights in person and derived rights.

In *Cabanis-Isarte* the Court was truly clear about amending its previous case-law and it explained why it did so. Such transparency stands in sharp contrast with the way the Court modified, in its Bosmann judgment,[12] significantly its previous case-law concerning the so-called exclusive effect of the EU rules determining the applicable social security legislation.

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9 Case C-40/76 (*Kermaschek*), ECLI:EU:C:1976:157.
10 Case C-308/93, (*Cabanis-Isarte*), ECLI:EU:C:1996:169.
11 Ibid., at 30-33.
12 Case C-352/06 (*Bosmann*), ECLI:EU:C:2008:290.

Like Article 11 of the current Regulation 883/2004, Regulation 1408/71 contained a provision (Article 13(1)) stipulating explicitly that persons to whom the Regulation applied were subject to the legislation of a single Member State only. The first time the Court was requested to pronounce itself on the interpretation of this provision was in the *Luyten* case[13]. It concerned a family residing in the Netherlands. The husband worked in 1983 as a self-employed person in Belgium. The question was whether the parents were entitled to family benefits in the Netherlands. To understand the context of the issue at stake, a short legal/historic introduction is indispensable. In fact, two elements complicated things. In the first place, there was, at that time, a gap in the protection offered by Regulation 1408/71 to self-employed persons. Mr. Luyten was as a self-employed person covered by Regulation 1408/71, because the personal scope of this Regulation had been extended, in 1981, to cover also self-employed workers[14]. He was, therefore, subject to Belgian social security legislation by virtue of Article 13 (2)(b) Regulation 1408/71. However, the scope of Article 73 (chapter 'family benefits') had not yet been extended to cover also self-employed persons, since the legislature had been unable to extend this provision to self-employed persons[15].

This was caused by the fact that Regulation 1408/71 had introduced a dual coordination system for family benefits: one for persons working as an employed person in a Member State other than France and one for employed persons subject to French legislation. In fact, Article 73 (1) stipulated that employed persons subject to the legislation of a Member State other than France were entitled, in respect of the members of his family residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State (the so-called 'employment principle'). Article 73(2) provided that an employed person subject to French legislation was entitled, in respect of family members residing in a Member state other than France, to family benefits provided for by the legislation of the Member State of residence (the so-called 'residence principle'). Negotiations were ongoing about replacing this dual coordination system with a single coordination system. Unfortunately, no unanimity could be reached about which principle should then apply to such a single coordination system for family benefits and for this reason it was decided not to touch upon Article 73 at all when the personal scope of Regulation 1408/71 was extended to self-employed persons. As a result, however, the Regulation did not contain any guarantee in 1983 that a self-employed person subject to the legislation of a Member State was entitled to family benefits for members of his family residing in another Member State[16].

The second complication concerned Dutch legislation applicable at that time. As a general rule, all persons resident in the Netherlands were entitled to Dutch family benefits. However, in case of a married couple, the wife of a person who was subject to

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13 Case C-60/85, (*Luyten*), ECLI:EU:C:1986:307.

14 Regulation 1390/81 of 12 May 1981, O.J. L 143 of 29 May 1981

15 Regulation 1408/71 was based on Article 51 EEC. By virtue of this Treaty provision, the Regulation could only be modified by Council voting by unanimity.

16 Such a guarantee was only introduced in 1989 by Regulation 3427/89 of 30 October 1989, O.J. L 331 of 16 November 1989. In fact, in its judgment of 15 January 1986, Case C-41/84 (*Pinna*), the Court had declared Article 73(2) of Regulation 1408/71 invalid.

the legislation of another State by virtue of the EU Regulations based on Article 51 EEC (the predecessor of Article 48 TFEU), was explicitly excluded from the social security applicable to all residents[17]. Such exclusion was incompatible with Council Directive 79/7[18] on the progressive implementation of the principle of equal treatment for men and women in matters of social security, but this Directive provided for a transitional period of six years[19]. The result was that Mrs Luyten, even when she resided in the Netherlands, was not insured under the Dutch legislation concerning family benefits, since her husband was subject to Belgian social security legislation by virtue of Article 13(2) (b) Regulation 1408/71.

If the regulation would not apply to Mr Luyten, he would have been himself entitled to Dutch family benefits by virtue of Netherlands law alone, as a resident of the Netherlands. Mr Luyten was subject to Belgian legislation, but Belgium was not bound to pay family benefits for a child not resident in Belgium.

Under these circumstances, the Dutch court (Raad van Beroep 's-Hertogenbosch) decided to refer the matter to the Court. It asked whether the determination of the applicable legislation, on the basis of the criteria laid down in Regulation 1408/71, had as an effect that the legislation of another Member State was excluded even if by virtue of national law alone, the person concerned would be entitled to benefits.

The Court confirmed and even emphasised the exclusive effect of the conflict-of-law rules laid down in Article 13 Regulation 1408/71. In the *Luyten* judgment, as well as in the *Ten Holder* judgment[20] delivered a month earlier, the Court underlined that the exclusive effect of the conflict-of-law rules was not at variance with the *Petroni* principle, according to which the application of the Regulations based on (the predecessor of) Article 48 TFEU cannot entail the loss of rights acquired exclusively under national legislation.

The contrast with the Court's reasoning in the 2008 *Bosmann* judgment is striking. Since this judgment it is in some cases possible that a person is also covered by the social security legislation of a Member State other than the one designated as the competent one by the Regulation. Ms. Bosmann, a Belgian national, was a single mother living with her two children, students of 20 and 21 years old, in Germany. Under German law, all residents are entitled to family benefits for children of such ages who are students. In 2005 Ms Bosmann started to work as an employed person in the Netherlands. Her claim for family benefits in the Netherlands was rejected, because the legislation of the Netherlands only provides for family benefits for children until the age of 18. Her claim for German family benefits was rejected since she, being employed in the Netherlands, was subject to the legislation of the Netherlands. The German authorities referred to Article 13(1) Regulation 1408/71 stipulating clearly: '*persons to whom this Regulation applies shall be*

17 Article 2 (1)(k) Besluit Uitbreiding en Beperking kring verzekerden volksverzekeringen van 19 oktober 1976, Stb. 557.

18 Council Directive 79/7 of 19 December 1978, O.J. L 6 of 10 January 1979.

19 Article 8 of Directive 79/7.

20 Case C-302/84, (*Ten Holder*), ECLI:EU:C:1986:242.

subject to the legislation of a single Member State only'. Ms. Bosmann appealed against this decision and the case came finally before the Court.

In its judgment the Court emphasised that all provisions of the EU Regulations on the coordination of social security systems must be interpreted in the light of Article 42 EC (now Article 48 TFEU) which aims to prevent that people who make use of their right to free movement would be penalised in the field of social security. In addition, the Court referred to the first recital of Regulation 1408/71 stating that the rules for coordination of national social security systems should contribute towards improving the standard of living and conditions of employment for people exercising their right of free movement. Therefore, the Member State of residence cannot be deprived of the right to grant family benefits to those who are resident within its territory. Even when it was denied,[21] by this judgment the Court overruled its previous case-law on the matter. The Court simply said that the *Luyten* case was different from the present case, since the latter concerned the 'likelihood of the simultaneous application of the legislation of the State of employment and that of the State of residence permitting those covered to receive child benefit'.[22] It seems to me that this statement is factually incorrect. In reality, as exposed above, in the *Luyten* case the 'likelihood of a simultaneous application' of the Belgian legislation and the Netherlands legislation leading to a risk of double payment of family benefits was non-existing. Quite the contrary is true. In fact, the mother, Mrs Luyten, was not entitled to Dutch family benefits since she was not insured in the Netherlands. And the father was indeed subject to Belgian social security, but he could not invoke the EU regulations to claim Belgian family benefits for his children residing in the Netherlands. And since he was subject to Belgian legislation by virtue of Article 13(2) Regulation 1408/71, he could not be covered by Dutch social security according to the *Luyten* judgment. In the 1986 *Luyten* and *Ten Holder* judgments the Court ruled that the *Petroni* principle did not apply to the rules determining the applicable social security legislation. In its *Bosmann* judgment the Court implies[23] that the *Petroni* principle does apply to the rules determining the applicable social security legislation. A couple of years later,[24] the Court explicitly says that the *Petroni* principle also applies to the rules determining the applicable social security legislation.

4. An inactive European legislature may have consequences for national judiciary

Where in the past the EU regulations based on (the predecessor of) Article 48 TFEU were, on average, adapted once a year, it can be noted that since a decade or so, this is no longer the case. In fact, the last time the EU regulations were amended was in 2012[25]. This might put pressure on the national judiciary to refer cases to the European Court of justice to clarify things.

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21 Case C-352/06 (*Bosmann*), ECLI:EU:C:2008:290, 32.
22 Ibid.
23 Ibid.
24 Joined cases C-611/10 and C-612/10, (*Hudzinski and Wawrzyniak*), ECLI:EU:C:2012:339.
25 Effectuated by Regulation 465/2012, O.J. L 149 of 8 June 2012.

By way of illustration, I refer to the rules determining the applicable social security legislation, the so-called conflict of law rules. These rules have been set up in a time when workers used to have a full and permanent job. They do not sufficiently take into account important developments in the labour market over the last decades, such as the rise of precarious jobs.

By virtue of Article 11(3)(a) Regulation 883/2004 persons who work in a Member State are subject to the legislation of that State, the so-called *lex loci laboris.* By virtue of Article 11(3)(e) people who do not fall under Article(11)(a) to (d)[26] are subject to the legislation of the Member State of residence. When is a person considered to fall under Article 11(3)(a)? The *lex loci laboris*, as it currently stands, does not differentiate between full employment and marginal employment. In its case-law[27] the Court has clarified that Article 11(3)(a) covers any person who is, by virtue of his/her activity, covered by a social security scheme falling under the material scope of the EU regulations, '*even if only in respect of a single risk'.*

More than ten years ago the judiciary of the Netherlands wondered whether the application of the rules determining the applicable legislation, as they currently stand, could not lead to unsatisfactory results, and therefore decided to ask the European Court of justice for clarification. A number of persons resided in the Netherlands but worked exclusively in Germany on the basis of a mini-job. Because of the marginal nature of their work, they were in Germany, by virtue of German legislation, only insured for the risk of accidents at work. Although in the Netherlands residents are normally insured for the risks of family benefits and old age, the Dutch legislation excluded explicitly from its scope people who are subject to the social security legislation of another Member State by virtue of the EU conflict rules. The requests of the persons concerned for family benefits and old-age pensions for the periods they were engaged in minor employment in Germany, were rejected by both the German and Dutch authorities. The case has led to two quite different judgments of the Court.

The first time, in the *Franzen* judgment,[28] the Court avoided answering the third question raised by the referring Dutch court. The question was whether Union law precluded the application of the legislation of a Member State according to which its residents are excluded from the social security coverage of that Member State for the sole reason that they are subject to the legislation of another Member State. Instead, the Court referred to the *Bosmann* judgment[29] and repeated that a Member State which is not the competent one by virtue of the EU conflict rules, has nevertheless the power to grant benefits to a mobile worker under its own national law.

After this judgment the case came before the Supreme Court of the Netherlands. It decided to refer the matter to the Court again. In its request for a preliminary ruling the Supreme Court clarified that the *Bosmann* judgment could not solve the problem, since the Dutch legislation did not allow the grant of family benefits and old-age pensions when

26 In particular non-economically active people.
27 Case C-543/03 (*Dodl*), ECLI:EU:C:2005:364.
28 Case C-382/13, (*Franzen*), ECLI:EU:C:2015:261.
29 Case C-352/06 (*Bosmann*), ECLI:EU:C:2008:290.

the persons concerned were, as residents in the Netherlands, engaged in employment in another Member State. In fact, the Dutch legislation did not provide for the possibility of applying the hardship clause laid down in Dutch legislation the Franzen judgment had referred to. On the contrary, the Dutch legislation explicitly excluded from its social security coverage all residents who were subject to the legislation of the Member State of employment. In the second judgment[30] the Court underlined that the EU regulations based on Article 48 TFEU only provide for a coordination, and not a harmonisation, of Member States' social security systems. It would be contrary to the character of coordination to oblige a non-competent Member State to provide social security coverage to its residents, even if the legislation of the competent Member State does not confer on the persons concerned any entitlement to family benefits and old-age pensions.

The result is, of course, unsatisfactory, and incompatible with the ambitious objective pursued by Article 45-48 TFEU, namely, to prevent persons from being penalised in the field of social security for having exercised their right to free movement of workers. If the persons concerned had not worked in Germany, they would have been entitled to family benefits in the Netherlands and they would have built up pension rights there[31]. Such consequences could be solved if both Germany and the Netherlands would agree to conclude an agreement under Article 16 of Regulation 883/2004. Such agreements can have retroactive effect[32].

Although Article 16 provides a helpful and easy-to apply tool helping to prevent/restore unsatisfactory results in exceptional situations, an adaptation of the conflict rules themselves could lead to more legal security and could also serve the predictability of the application of these rules. The clarification provided by the Court in the *Van den Berg* judgment could be an encouragement for the legislature to examine ways for a better delineation between Article 11(3(a) and 11(3)(e).

5. A request for a preliminary ruling may ultimately lead to an adaptation of secondary European legislation

It is not an exaggeration to say that the abundant case-law of the Court as a result of preliminary cases has played a substantial role in the development of the early coordination system set up in 1958 into today's Regulation 883/2004. In fact, the EU Regulations have often been modified to take into account, if not to 'translate', the case-law of the Court in the wording of the Regulations.

Already at an early stage the Court clarified that the competence of the EU legislature is limited by the aim of the Regulations based on (the predecessor of) Article 48 TFEU: to protect people moving from one Member State to another in the field of social security. Article 46(3) had been inserted in the chapter 'pensions' by the authors of Regulation

30 Joined cases C-95/18 and C-96/18, (*Van den Berg et al),* ECLI:EU:C:2019:767.

31 This was also the opinion of Advocate-General Szpunar delivered on 10 September 2014 in Case C-382/13 (*Franzen*), ECLI:EU:C:2015:261.

32 Case C-101/83 (*Brusse*), ECLI:EU:C:1984:187; and Case C-454/93 (*Van Gestel*), ECLI:EU:C:1995:205.

1408/71 as an EU anti-cumulation provision replacing the various national anti-cumulation provisions. In its famous *Petroni* judgment,[33] however, the Court declared this article invalid as an anti-cumulation provision, being incompatible with the aim of the predecessor of Article 48 TFEU. In later case-law[34] the Court confirmed that Member States were entitled, under certain circumstances, when applying national anti-cumulation provisions on pensions acquired under their legislation, to take into account benefits acquired under the legislation of another Member State. As a result of this case-law, in cases where the person concerned fulfilled the qualifying conditions by virtue of national law alone, the procedure for the calculation of pensions became even more complicated than initially foreseen by the authors of Regulation 1408/71. A comparison had to be made between, on the one hand, the result of the application of national law, including anti-cumulation provisions, and on the other hand, the result of the application of the provisions of Article 46 Regulation 1408/71. The person was entitled to the higher of the two. This case-law was in 1992[35] 'codified' in Regulation 1408/71 and is still to be found in Article 52(1) of the current Regulation 883/2004.

The content of Article 68 of Regulation 883/2004 too is, to a large extent, inspired by the case-law of the Court in relation to the chapter 'family benefits' under Regulation 1408/71, creating the differential amount of family benefits[36].

Another striking example is to be found in Article 5 Regulation 987/2009; it 'codifies' the findings of the Court,[37] under the old Regulation 1408/71, that a 'posting' document (A1) issued by the competent institution of the sending Member State, is binding for the institutions of the other Member States as long as this document is not withdrawn or declared invalid by the institution having issued the document.

As we all know, Regulation 883/2004 has strengthened the principle of equal treatment by the insertion of Article 5 providing for cross-border recognition of facts or events. The insertion of this provision in Regulation 883/2004 has been facilitated by the case-law of the Court under the old Regulation 1408/71. In fact, in a number of preliminary rulings the Court decided[38] in favour of a cross-border assimilation of facts or events as a requirement of the principle of equal treatment.

Some preliminary rulings have helped the EU legislature to unblock matters. The 1995 *Vougioukas* judgment[39] illustrates this very well. In this judgment the Court ruled that

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33 Case C- 24/75 (*Petroni*), ECLI:EU:C:1975:129.

34 Case C-296/84 (*Sinatra II*), ECLI:EU:C:1986:121; Case C-109/89 (*Bianchin*), ECLI:EU:C:1990:168; and Case C-5/91 (*Di Prinzio),* ECLI:EU:C:1992:76.

35 Effectuated by Regulation 1248/92 of 30 April 1992, O.J. L 136 of 19 May 1992.

36 Case C-100/78, (*Rossi*), ECLI:EU:C:1979:54; Case C-733/79, (*Laterza*), ECLI:EU:C:1980:156; and Case C-807/79 (*Gravina*), ECLI:EU:C:1980:184.

37 Case C-202/97 (*Fitzwilliam*), ECLI:EU:C:2000:75; and Case C-2/05 (*Herbosch Kiere*), ECLI:EU:C:2006:69.

38 Case C- 20/85 (*Roviello*), ECLI:EU:C:1988:283; Case C-349/87 (*Paraschi*), ECLI:EU:C:1991:372; Joined cases C-45/92 and C-46/92 (*Lepore and Scamuffa),* ECLI:EU:C:1993:921; Case, C-131/96 (*Mora Romero),* ECLI:EU:C:1997:317; Case C-28/00 (Kauer), ECLI:EU:C:2002:82; Case, C-290/00 (*Duchon*), ECLI:EU:C:2002:234; and Case C-373/02 (*Öztürk*), ECLI:EU:C:2004:232.

39 Case C-443/93, (*Vougioukas*), ECLI:EU:C:1995:394.

the legislature had not fully discharged its obligation under (the predecessor of) Article 48 TFEU by not introducing any measure for coordination in the sector of special schemes for civil servants. This judgment was an encouragement for the legislature to adopt[40] the 1991 Commission proposal aimed at bringing these schemes into the material scope of the Regulations.

6. The persistence of national judiciary may pay off

Sometimes an interesting interaction can be observed between national and European judiciary on the one hand and national legislature on the other. I would like to illustrate this with an example in the field of free movement of workers.

Under Luxembourg legislation applicable until 2013, to be entitled to financial aid for higher education, the student had to reside in Luxembourg. Several requests for such financial aid by children of frontier workers were rejected by the Luxembourg authorities. In 2012 the Luxembourg administrative court requested the European Court of Justice for a preliminary ruling on the question whether Article 7(2) Regulation 1612/68 (corresponding to Article 7(2) of the current Regulation 492/2011) precluded the Luxembourg legislation that gave rise to a difference in treatment between students residing in Luxembourg and those who, not being resident in Luxembourg, were the children of frontier workers carrying out an activity in Luxembourg. In its judgment[41] the Court held that the difference in treatment arising from a residence condition being imposed on students who are the children of frontier workers constituted indirect discrimination based on nationality which is in principle prohibited by Article 7(2) Regulation 1612/68, unless it is objectively justified. To be justified, it must be appropriate for securing the attainment of a legitimate objective and must be proportional, i.e. it must not go beyond what is necessary to attain that objective.

To justify the different treatment of frontier workers, the Luxembourg government relied on two arguments, one based on social considerations, the other on budgetary ones, namely, to prevent an unreasonable burden on State finances. It was no surprise[42] that the Court rejected the latter argument. But the Court accepted the former argument put forward by the Luxembourg government, namely, to significantly increase the proportion of Luxembourg residents holding a higher education degree. An action undertaken by a Member State to ensure that its resident population is highly educated pursues a legitimate objective which can justify indirect discrimination based on nationality. The Court then examined the appropriateness of the residence condition. The Luxembourg government argued that the imposition of a residence condition to be entitled to receive financial aid for higher education would make it reasonably likely that the students will return to Luxembourg after completing his/her studies and to make themselves available to the Luxembourg labour market. In this regard, the Court referred to its ruling in

40 Regulation 1606/98 of 29 June 1998, O.J. L 209 of 25 July 1998.
41 Case C-20/12 (*Giersch*), ECLI:EU:C:2013:411.
42 Case C-542/09 (*Commission versus Netherlands*), ECLI:EU:C:2012:346, 57.

the *Geven* judgment[43] to repeat that a frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State. The Court confirmed that the residence condition was appropriate for attaining the objective of promoting higher education and of significantly increasing the proportion of Luxembourg residents who hold a higher education degree.

The Court then had to determine whether the residence condition did not go beyond what is necessary to attain that objective. The Luxembourg government argued that the residence condition was necessary to ensure that the applicant for financial aid had a sufficient degree of attachment with Luxembourg society. The Court rejected this argument. According to the Court, the residence condition was too exclusive in nature. By imposing a residence condition the Luxembourg law favoured one element which is not necessarily the sole representative element of the actual degree of attachment to Luxembourg. The Court gave clear suggestions for other ways to prove a sufficient degree of attachment to Luxembourg society, such as the fact that, at the date of requesting the financial aid, one of the parents had been working as a frontier worker in Luxembourg for a certain number of years. As a result, the Court ruled that the residence condition went beyond what was necessary to attain the legitimate objective and was, therefore, incompatible with Article 7(2) Regulation 1612/68.

The Luxembourg legislature reacted within one month after the *Giersch* judgment[44]. From 2013 till 2014, financial aid for higher education was also granted to children of frontier workers who, at the time of application of the aid, had been working in Luxembourg for an uninterrupted period of at least five years. A couple of months after the introduction of the 2013 law, a request for financial aid made by a child of a frontier worker residing in France was rejected on the ground that the parent, despite having worked in Luxembourg for the last 8 years, had had a few short breaks during the last five years. The case came before the Luxembourg Tribunal Administratif and this judiciary decided to request a preliminary ruling from the Court on the question whether Article 7(2) Regulation 492/2011 precluded the amended Luxembourg legislation. The Court's answer was clear. It ruled[45] in the same line as in the Giersch judgment. The condition of the minimum and continuous period of work was too exclusive in nature. Despite the few short interruptions during the last five years, the parent of the student had shown, at the time of application of the aid, a sufficient degree of attachment to Luxembourg society. Therefore, also the amended Luxembourg legislation was incompatible with Union law.

Also, in the following amending law[46] the Luxembourg legislature continued to stick to one specific criterion for children of frontier workers. Under Luxembourg law applicable between 2014 and 2019, financial aid was granted to children of frontier workers who, during a reference period of seven years, had worked in Luxembourg for at least five years. In 2014, a student applied for financial aid. He was a child of a frontier worker who had worked in Luxembourg for more than 17 years during the 23 years preceding the

43 Case C-213/05 (*Geven*), ECLI:EU:C:2007:438.
44 Law of 19 July 2013, Mémorial A 2013, p. 3214.
45 Case C-238/15 (*Verruga*), ECLI:EU:C:2016:949
46 Law of 24 July 2014, Mémorial A 2014, p. 2188.

application of the aid, but with interruptions during the last seven years. Therefore, he did not comply with the condition laid down in the 2014 law. For this reason, his application was rejected. The case came before the Luxembourg Tribunal Administratif who had doubts about the compatibility of the 2014 Luxembourg law with Article 45 TFEU and Article 7(2) Regulation 492/2011. Therefore, it decided to refer, once again, the matter to the Court for a preliminary ruling.

Not surprisingly, the Court condemned[47] also the 2014 law for the same reasons as indicated in the *Giersch* and *Verruga* judgments.

Finally, the Luxembourg legislature understood the Court's message. Since 2019[48] the Luxembourg legislation contains various criteria to evaluate a sufficient degree of attachment to Luxembourg society. Two of these criteria can be fulfilled by the students themselves. These new conditions of entitlement constitute a considerable improvement for children of frontier workers. They are the result of a relentless effort by the national judiciary which saw its doubts about the compatibility of national law with Union law repeatedly confirmed by the European Court.

7. Conclusions

As to the interaction between national judiciary and European Court, this contribution illustrates that the national judiciary, by properly substantiating the preliminary question, may influence the Court's ruling. The quality of the preliminary question and its substantiation becomes even more important if the national judiciary is not satisfied by a certain interpretation of secondary European legislation provided by the Court in the past. In fact, this contribution provides some examples that the Court may change its mind.

To continue to be fit for purpose, the EU regulations based on Article 48 TFEU should be adapted on a regular basis. If the European legislature fails in this task, this will be reflected in an increasing pressure on the national judiciary to refer cases to the Court to clarify things.

In the past, the national judiciary, in particular in the Benelux countries, Germany and Austria, has been highly active in referring cases to the European Court in the field of coordination of social security. This has led to an abundant case-law of the Court, which in turn has played a crucial role in the development of the initial coordination system set up in 1958 into today's Regulation 883/2004.

Finally, this contribution provides a concrete example, in the field of free movement of workers, how the persistence of a national judiciary can lead, with the help of the European Court, to a substantial improvement of nation legislation to the benefit of people making use of their right to free movement.

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47 Case C-410/18 (*Aubriet*), ECLI:EU:C:2019:582.

48 Law of 26 October 2019 Mémorial A, 732 of 30 Ocober 2019.

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Defining the social minimum: legal and social policy perspectives

*Ane Aranguiz and Sarah Marchal**

Abstract: In different capacities, various social rights aim at guaranteeing that individuals receive a social minimum as a way to ensure a decent standard of living. What is less clear is how to define such social minimum. In this article, we look precisely at this question from the twofold perspective of law and social policy primarily looking at the EU level. The first exercise studies how different recent instruments delineate income adequacy while the second perspective studies the more multi-faceted view on effectiveness of social protection measures offered by socioeconomic literature. The article also offers a concrete illustration of the discussion with the Belgian case. The conclusion underlines common features of both perspectives and some potential learning opportunities.

Keywords: poverty, minimum income, social protection, minimum wages, human dignity, adequacy

1. Introduction

Virtually every human rights instrument foresees the need to protect a social minimum as a way to ensure human dignity. The basic premise is clear: Without ensuring some basic social rights, individuals cannot enjoy a decent standard of living. Even those instruments primarily concerned with the protection of civil rights, such as the European Convention on Human Rights (ECHR), take a progressive interpretation of some of their rights to account for some social minimum that needs to be protected.[1] This minimum is often tied to acquiring essential resources by various means, including social security, social

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1 See on the case-law of the European Court of Human Rights (ECtHR) on social security: L. Slingenberg in,*The Reception of Asylum Seekers under International Law – Between Sovereignty and Equality,* Oxford and Portland, Hart Publishing, 2014.

assistance or minimum wages.[2] For example, the Universal Declaration of Human Rights (UDHR) establishes that 'everyone has the *right to social security* [..] indispensable for [their] *dignity* and the free development of [their] personality' (Article 22 UDHR) and that 'everyone who works has the right to just and favourable *remuneration* ensuring for [themselves] and [their] family an existence worthy of *human dignity*, and supplemented, if necessary, by other means of *social protection'* (Article 23.3 UDHR).

That human dignity necessitates some minimum resources is quite established. What is far more debated is how this minimum can be defined in a way that matches some level of adequacy that represents a decent or acceptable living standard. In this paper, we aim at weighing in on this debate from an interdisciplinary perspective elaborating on how we define a social minimum from both a legal and socio-economic perspective. In the next section we study how different instruments of European law define this social minimum. Next, we debate the effectiveness and adequacy of social protection from a socio-economic perspective. Section four zooms into the adequacy of benefits in protecting against poverty specifically and section five provides an illustrative example regarding the adequacy of social security and social assistance in Belgium. In the last section we conclude.

2. The legal minimum

Although we can already advance that there is no single way of defining the minimum necessary for a life in dignity, social rights instruments do make the concept of a social minimum more concrete. If we take a look at the most recent human rights-like instrument in Europe, the European Pillar of Social Rights (EPSR), which draws from other relevant instruments like the Charter of Fundamental Rights (CFREU), the European Social Charter (ESC) and the ECHR,[3] we find that several principles contain the idea that a certain minimum is necessary to ensure a decent or adequate standard of living to ensure human dignity. Some of these principles refer to material needs or essential services, such as housing, care or safety standards. In this article, rather, we focus on minimums in terms of income. In this vein, we can identify three general strands: minimum wages, social security and minimum income.[4] These have since been implemented in three main instruments: the adequate minimum wage Directive (AMWD),[5] the Recommendation on

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2 This goes along with the need to have access to some essential services, such as healthcare, energy or internet.

3 A. Aranguiz, 'Bringing the EU up to speed in the protection of living standards through fundamental social rights: Drawing positive lessons from the experience of the Council of Europe', *Maastricht Journal of European and Comparative Law*, 2021, p. 601.

4 Concretely we find references to a decent or adequate life in dignity in the form of a certain income in the following principle: Principle 6 on minimum wages, Principle 12 on social protection, Principle 14 on minimum income, principle 15 on old age income and pensions and the inclusion of people with disabilities. See the Commission Staff Working Document: Monitoring the implementation of the European Pillar of Social Rights, SWD (2018) 67 final.

5 Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union 2022, OJ L 275.

access to social protection[6] and the Recommendation on adequate minimum income.[7] In what follows, we discuss how these instruments define these minima.

2.1 Adequate minimum wage Directive

Principle 6 EPSR on minimum wages establishes that when fixating minimum wages three elements need to be considered: the needs of the worker and their families, social factors like the evolution of living standards, and economic factors such as wage development. This is replicated and concretised in the much debated[8] AMWD.

In the preamble we read that, to be adequate, minimum wages should satisfy the needs of the worker and their family considering the national economic and social conditions (Recital 5). These needs to be achieved safeguarding access to employment and maintaining incentives to work. In other words, working should be more beneficial than remaining inactive. Recital 8 adds that wages that meet a threshold of decency can contribute to the reduction of poverty, and to the demand and purchasing power, reduce inequalities, in-work poverty and limit the fall in income during economic crises.

Recital 28 phrases adequacy more concretely, which is then mirrored in Article 5 AMWD. According to these provisions, minimum wages can be considered adequate when they are fair vis-à-vis the wage distribution and provide a decent standard of living for workers based on a full-time employment relationship. Member States must assess this in line with the national socioeconomic conditions including employment growth, competitiveness and regional and sectoral developments. They shall also take into consideration the purchasing power, wage levels and wage distribution, the growth rate of wages and long-term national productivity (Article 5). Member States must apply these criteria when setting wages, but they are free to decide the extent of their influence. Other tools may be instrumental to assess the adequacy of statutory minimum wages. These include a basket of goods and services established at the national level to determine the cost of living, which should include material needs (food, clothing, housing) and needs to participate in social, cultural and educational activities. Moreover, Member States must use indicative reference values such as the ratio of the gross minimum wage to 60% of the gross median wage and the ratio of the gross minimum wage to 50% of the gross average wage, or the ratio of the net minimum wage to 50% or 60% of the net average wage. However, Member States may choose alternative indicators.

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6 Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed 2019/C 387/01, OJ C 387.

7 Council Recommendation of 30 January 2023 on adequate minimum income ensuring active inclusion 2023/C 41/01, OJ C 41.

8 The validity of the directive is, somewhat predictably, being challenged which concerns primarily the provisions on adequacy in it. Whereas there is not yet a court ruling, the advocate general argues that indeed the directive is invalid. Case C-19/23 (*Denmark v Parliament and Council of the European Union), ECLI:EU:C:*2025:11; Opinion of AG Emiliou. See Claire Kilpatrick and Marc Steiert, 'A little learning is a dangerous thing: AG Emiliou on the Adequate Minimum Wages Directive (C-19/23, ECLI:EU:C:2025:11)' EUI LAW Working Paper 2025/2, https://hdl.handle.net/1814/77887, accessed 27 May 2025. See more generally: Ane Aranguiz and Sacha Garben, 'Combating income inequality in the EU: A legal assessment of a potential EU minimum wage directive', 46 *European Law Review*, 2021, p. 156.

Before we discuss whether these criteria can protect wage-earners from falling into (in-work) poverty or act as a decent safeguard in times of economic downturn,[9] there are a few things to note. Most importantly, the Directive leaves an enormous leeway in terms of how to use the mandatory criteria for wages mentioned above and the relative reference values. For what concerns defining the social minimum, therefore, this has great consequences as adequacy can mean many different things depending on the choices that Member States take. Moreover, adequacy is based on a full-time worker, which already suggests that even if a minimum wage could provide a decent standard to the worker and their family (which we question), it could still fail to protect many who do not work full-time.[10]

2.2 Recommendation on social protection

Principle 12 EPSR on social protection establishes that 'workers, and, under comparable conditions, the self-employed, have the right to adequate social protection'. The Recommendation, adopted as means of implementing principle 12 is limited to social security benefits (unemployment, sickness and healthcare, maternity and paternity, invalidity, accidents at work and occupational diseases, old-age and survivors' benefits). It explicitly excludes social assistance and minimum income (Article 3).

The Recommendation talks about adequacy in terms of allowing individuals to maintain a decent standard of living, reasonably replace income loss as to live with dignity all while preventing poverty and facilitating activation measures where possible (Recital 17 and Article 11). Article 11 clarifies that other means of social protection need to be considered when talking about adequacy. In addition, Member States should ensure that contributions are proportionate to the contributory capacity of individuals (Article 12). Other than that, the Recommendation only mentions that the calculation of such benefits must be based on objective and transparent assessment of the income of the self-employed, which considers income fluctuations and refers to actual earnings.

The Recommendation is quite ambiguous regarding adequacy. It installs a sense of necessary fairness concerning previous earnings that allow both to maintain a certain standard and be proportionate with the real earnings (for the self-employed).[11] However, the Recommendation rather delegates defining the minimum to other tools, like other social assistance benefits, to ensure that a decent standard is being achieved. The Recommendation does not even take inspiration from other instruments, such as the European Code of Social Security (ECSS) or the ILO Convention 102 that, even if subject

9 See F. Dôme and A. Aranguiz, 'Could the minimum wage directive weather future financial storms? studying the potential to ensure upward convergence of minimum wages', *European Labour Law Journal*, 2025.

10 Here we must include, at least, part-time and fixes-term workers who, according to the most recent data (dec 2024, based on 2023 numbers) account for the 17.1% and % 11.6% of the employed people in the EU. Eurorstat, 'Part-time and full-time employment – statistics' and 'Temporary and permanent employment – statistics', 2024.

11 A. Aranguiz and B. Bednarowicz, 'Adapt or perish: Recent developments on social protection in the EU under a gig deal of pressure', 9 *European Labour Law Journal*, 2018, p. 329.

to criticism,[12] provide concrete replacement rates for when a social security benefit adequately maintains a certain standard of living.[13]

2.3 Recommendation on minimum income

Principle 14 EPSR spells out that a social minimum is necessary in order to ensure a life in dignity: 'everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life and effective access to enabling goods and services' which should be combined with work incentives. The Recommendation also clarifies this by stating that the goal of minimum income benefits is to reach a certain overall level of income in households where other sources of income or benefits have been exhausted or are not adequate to ensure a life in dignity. As such, these are essential in the anti-poverty fight and they also fulfilling an important economic function in times of economic downturn by acting as an automatic stabilizer by helping mitigate the drop in household income (Recital 17). Replicating the last sentence of Principle 14 EPSR, Recital 17 also remarks that minimum income benefits should comprise incentives to work for those who can work.

In this instrument, we find several concrete elements determining what adequacy entails, with clear references to reference values, like the national-at-risk-of poverty threshold or methodologies based on a nationally defined basket of goods and services that reflect the cost of living. Minimum income should also consider income from work, ensuring that the latter remains higher than minimum income benefits (Recital 21). Articles 3-8 of the Recommendation define minimum income adequacy. Accordingly, Member States are recommended to set transparent and robust methodologies that consider various income sources, the situation of disadvantaged groups and purchasing power and price levels (Article 4). To reach a level of adequacy, the instrument recommends setting the minimum level at least as equivalent to the national at-risk-of poverty threshold; the monetary value of necessary goods and services, including adequate nutrition, housing, healthcare and essential services, according to the national definitions or other comparable levels established by national law or practice. This level ought to be achieved gradually but safeguarding the sustainability of public finances and should be reviewed regularly also considering in-kind benefits.

Whereas this instrument is broad too, also considering its soft-law nature, it gives Member States more tangible orientation on the matter of what is adequate: to have incomes above the poverty line or high enough to consume certain goods and services. Yet, other

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12 D. Pieters and P. Schoukens, 'Social Security Law Instruments of the Next Generation: European Social Security Law as a Source of Inspiration' in Gijsbert J Vonk and Frans JL Pennings (eds), *Research Handbook on European Social Security Law*, Edward Elgar Publishing, 2015.

13 P. Schoukens, 'Instruments of the Council of Europe and Interpretation Problems' in Frans JL Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters*, Intersentia, 2007, p. 87. Note that, particularly for certain vulnerable groups, this may still not be enough to lift them out of poverty. See E. De Becker, 'The Role of Social Security in the Combat of In-work Poverty' in L. Ratti and P. Schoukens (eds), *Working Yet Poor: Challenges to EU Social Citizenship*, Hart Publishing, 2023.

considerations may trump (at least temporarily) achieving this level, including, public finances or the relation with income from (low) minimum wages.[14]

2.4 Other instruments

The instruments listed above are but a representation of how European and international law view the social minimum. Another concrete example is that of the ESC that, through the interpretation of the ECSR, has also concretely defined these minima.[15] Under Article 4 ESC (fair remuneration) a minimum wage can only be considered fair when it does not fall below 60% of the net average wage,[16] although the State party may provide evidence that a wage between 50-60% is sufficient for a decent standard of living. Anything below is considered in breach of the ESC.[17] Social security benefits (Article 12 ESC), should be proportionate as a reasonable replacement for their income, usually calculated as their 40% of the previous income and they shall never fall below the poverty line, defined at 50% of the median equivalised income.[18] The same limit applies to social assistance under Article 13 ESC, which can include basic benefits as well as additional benefits.[19] The ILO Convention 102 and the ESSC too, provide specific replacement rates (between 40-60% depending on the contingency) that are considered to be adequate to maintain a decent income.

Seldom, the European Court of Justice (ECJ) and the ECtHR have also been confronted with their approach to maintaining a social minimum, although they have been more ambiguous and leave ample margin of appreciation for the Member States. The ECtHR obliges Member States to conduct a thorough proportionality test for the benefit of the poor and vulnerable before imposing limitations on their rights.[20] The ECJ has been even more vague, with very limited real case law on Article 34 CFREU on social security and social assistance. Only in a couple of instances, mostly in reference to migration instruments, has the ECJ established that the result of leaving migrants without benefits should not leave them in extreme poverty.[21] Similar reasoning has been used in cases

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14 A. Aranguiz, 'Minimum income protection in the European Union: From politics to (soft) law' in F.J.L. Pennings and G.J. Vonk (eds), *Research handbook on European social security law,* Edward Elgar Publishing 2023.

15 See extensively K. Lukas, *The Revised European Social Charter: An article by article commentary,* Edward Elgar Publishing, 2021.

16 European Committee of Social Rights, 'Statement of Interpretation on Article 4(1)' in *Conclusions XVI-2*, 2003.

17 The following must be considered: Housing, healthcare, education and mobility at least. European Committee of Social Rights, *Conclusions Latvia*, 2008.

18 European Committee of Social Rights, 'Statement of Interpretation on Article 12' in *Conclusions XVI-1,* 2003.

19 European Committee of Social Rights, 'Statement of Interpretation on Article 13' in *Conclusions XIX-1*, 2009.

20 Personal circumstances (vulnerability) but also the burden placed on individuals (explicitly associated to Article 34 CFR), the need for a balanced distribution of these measures and the obligation for administrations to inform the applicant about the available options before drastic measures are taken. See Aranguiz, *supra* note 3, p. 601.

21 Case C-79/13 (*Saciri and Others v Federaal agentschap voor de opvang van asielzoekers)*, ECLI:EU:C:2014:103, 35; Case C-562/13 (*Abdida v Centre public d'action sociale d'Ottignies-Louvain-*

of insolvency and transfer of undertakings in which the ECJ deemed disproportionate reductions of pensions as a consequence of business restructuring when they were below the at-risk-of-poverty threshold.[22]

2.5 Intermediate remarks

From a legal point of view, the adequate social minimum is defined as pursuing three interconnected goals: Protecting acquired living standards (for social security), preventing long-term joblessness, protecting against poverty. The key element for the social minimum, remains protecting individuals against poverty, which should be the bare minimum even in times of crisis. However, a few questions remain. Can minimum wages and replacement ratios ensure dignity when they are designed for the standard or representative worker? Do the criteria set by these instruments, such as the at-risk-of-poverty threshold, deliver on the promise of a life in dignity? Can the goal of fighting poverty while maintaining financial incentives to join the labour market, coexist efficiently? In what follows, we look into some of these questions through the glasses of social policy.

3. A multi-faceted view on effectiveness and adequacy of social protection

Social policy researchers tend to address the question on whether social policies are adequate somewhat differently from law-makers. A broad *policy evaluation literature* focuses on the effectiveness and efficiency of social policies in reaching social outcomes, such as reducing poverty rates, inequality, or increasing employment and education levels. This literature predominantly builds on representative microdata that allow to assess how specific social policies affect net disposable incomes and living situations[23] at the individual and household level. Different techniques are used to disentangle the impact social policies have on outcomes. Comparisons of income inequality and poverty rates before and after adding social benefits to incomes are commonly used, as are a wide array of indicators that assess the efficiency of those benefits, in terms of reaching the

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La-Neuve), ECLI:EU:C:2014:2453, 42, Opinion of AG Bot para 106; and Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 (*Ibrahim v Bundesrepublik Deutschland v Taus Magamadov),* ECLI:EU:C:2019:219.90; Case C-163/17 (*Jawo* v *Bundesrepublik Deutschland), ECLI:EU:C:*2019:218; E. De Becker, *supra* note 13.

22 Cases C-674/18 and C-675/18 (*EM v TMD Friction GmbH),* ECLI:EU:C:2020:682, 80-86; Case C-168/18, (*Pensions-Sicherungs-Verein v Günter Bauer),* ECLI:EU:C:2019:1128, 44-46.

23 The EU Statistics on Income and Living Conditions (SILC) is a prime example. This dataset is collected by the national statistical agencies of the different EU Member States, under the auspices of Eurostat, in order to allow comparative poverty measurements. The SILC collects for a representative sample of the population information on the different income components they have, and inquires after housing, health and other living conditions (see H. Wirth and K. Pforr, 'The European Union Statistics on Income and Living Conditions after 15 Years' , 2022, *European Sociological Review,* 38(5), Together, this information feeds into the European Dashboard of Social indicators, that allows to track social progress across the different Member States.

poorest population,[24] in reducing poverty[25] or in assessing the progressivity of taxes and benefits.[26] Microsimulation models allow to apply the tax benefit rules applicable in a country on the microdata that represent the income distribution, and to assess which policy characteristics drive specific outcomes.[27] More sophisticated (quasi-)experimental designs furthermore assess the overall effect of benefits, taking account of behavioral reactions and impact on life domains other than incomes,[28] including labor supply reactions. In contrast to legal scholarship, this literature assesses the overall outcomes of social policies, rather than focusing on benefit levels (and overall eligibility and entitlement criteria) as the main distinguishing characteristic. Still, evidently benefit levels and access criteria are relevant in determining the overall poverty reducing outcomes of a scheme.[29]

Alternatively, a more *institutionally-oriented tradition in social policy scholarship* reflects more closely the legal approach discussed above, in that it assesses the guaranteed benefit levels. This literature traditionally focuses on tracking welfare state and social policy development, and on assessing the determinants of welfare state development, in cross-country comparative and cross-temporal research designs.[30] Part of this literature embraced social citizenship as the concept of interest when studying the welfare state. This concept was often operationalized by measuring the generosity of social rights, zooming in on the generosity and accessibility of benefits available under different welfare state programs.[31] Influenced by Esping-Andersen's seminal work on welfare state typologies, and the prominence of the decommodification dimension therein, operationalizations of social rights focused on the gross and net replacement rates guaranteed by different social insurance programs to average production wage and average wage workers. As in the legal yardsticks outlined above, there is no generally accepted threshold for 'adequate' social rights or sufficient replacement rates. Rather these measures are assessed comparatively, to trace changes over time, and to assess differences between different types of welfare state provisions.

There is however a widespread agreement over the use of *net* replacement rates, comparing net benefit incomes after taxes, and net work incomes after taxes.[32] Such a

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24 E.g. D. Coady and E. Skoufias, 'On the targeting and redistributive efficiencies of alternative transfer instruments', 50 *Review of Income and Wealth*, 2004, p. 11.

25 E.g. W. Beckerman, 'The Impact of Income Maintenance Payments on Poverty in Britain 1975', *The Economic Journal,* 1979, *p.* 243.

26 E.g. N.C. Kakwani, *Analyzing redistribution policies: a study using Australian data*, Cambridge University Press, 1986; N.C. Kakwani, 'Measurement of tax progressivity: an international comparison', 87 *The Economic Journal*, 1977, p. 71.

27 E.g. J. Hills et al. , 'Policy and poverty in seven European countries in the Lisbon decade: the contribution of tax benefit changes' in B. Cantillon, J. Hills and T. Goedemé (eds), *Decent incomes for all: improving policies in Europe*, Oxford University Press, 2019.

28 D. Kessler and D. Hevenstone, 'The impact of unemployment benefits on birth outcomes: Quasi-experimental evidence from European linked register data',17 *PLoS ONE*, 2022.

29 F. Figari, M. Matsaganis and H. Sutherland, 'Are European social safety nets tight enough? Coverage and adequacy of minimum income schemes in 14 EU countries?' 22 *International Journal of Social Welfare*, 2013, p. 3.

30 E.g. G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Princeton University Press, 1990.

31 J. Kvist, 'Measuring welfare state change' in Bernhard Ebbinghaus and Moira Nelson (eds), *Handbook of welfare state reform*, Edward Elgar Publishing, 2025.

32 L.A. Scruggs and G. Ramalho Tafoya, 'Fifty years of welfare state generosity', 56 *Social Policy and Administration*, 2022, p. 791.

focus on net disposable, after tax, incomes is increasingly warranted, in light of an ongoing shift towards fiscal welfare, in which already progressive tax systems include ever more elements that are functionally equivalent to traditional social policies, such as refundable child tax credits or low wage credits.[33]

Also, the past decades have seen a shift, in which replacement rates are no longer solely focusing on average wage workers, but are calculated for ever more diverse (and often vulnerable) target groups.[34] An interesting development is the assessment of last-resort social rights by looking at the generosity of means-tested minimum income protection packages using hypothetical household simulations,[35] rather than social insurance benefits.[36] This trend features into a shift towards a risk-type approach within institutional welfare state analyses, in which one asks which legally guaranteed and non-discretionary protection measures are in place for people confronted with similar risks, rather than focusing on a scheme by scheme comparison. The resulting net disposable incomes, including the interplay of all relevant benefits, of specific hypothetical households can be compared to in-work incomes, to proxy net replacement rates.[37] More often, such hypothetical household simulations are compared to poverty lines, asking how well the guaranteed minimum income protection packages may protect against poverty.[38]

Still, answering the question as to what adequate benefit levels are remains tricky, also in light of the different aims that social protection benefits have. Kvist points to '*tensions in the underlying assumptions of existing measures: for example, benefit net replacement rates are used by social policy scholars to denote social citizenship and by economists to denote work disincentives*'.[39] While the net replacement rates are commonly used to indicate decommodification and the protection of acquired living standards, work incentives are seen as important features in preventing long term joblessness. Even more so, in a context in which low wages can be lower than applicable poverty thresholds, it may become impossible to have benefits that simultaneously protect against poverty, safeguard acquired

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33 T. Ferrarini, K. Nelson and H. Höög, 'From universalism to selectivity: old wine in new bottles for child benefits in Europe and other countries' in I. Marx and K. Nelson (eds), *Minimum income protection in flux*, Palgrave Macmillan, 2012.

34 J. Kvist, 'Measuring welfare state change' in B. Ebbinghaus and M. Nelson (eds), *Handbook of welfare state reform*, Edward Elgar Publishing, 2025.

35 Hypothetical household simulations calculate the net disposable income and its components for hypothetical households as typical cases, in line with the applicable tax benefit regulations. Defining characteristics of the typical households are assumed by the researcher, such as age, income and wage levels, assets etc.

36 E.g. T. Böger and K.G. Öktem, 'Levels or worlds of welfare? Assessing social rights and social stratification in Northern and Southern countries', 53 *Social Policy and Administratio,* 2019, p. 63; S. Marchal, I. Marx and N. Van Mechelen, 'The Great Wake-Up Call? Social citizenship and minimum income provisions in Europe in times of crisis', *43 Journal of Social Policy*, 2014, p. 247.

37 E.g. J. Wang and O. van Vliet, 'Social Assistance and Minimum Income Benefits: Benefit Levels, Replacement Rates and Policies across 26 Oecd Countries, 1990–2009', 18 *European Journal of Social Security*, 2016, p. 333.

38 S. Marchal and I. Marx, *Zero poverty society. Ensuring a decent income for all*, Oxford University Press 2024. (Marchal and Marx, 2024).

39 J. Kvist, 'Measuring welfare state change' in Bernhard Ebbinghaus and Moira Nelson (eds), *Handbook of welfare state reform*, Edward Elgar Publishing, 2025.

living standards and still prevent long-term joblessness.[40, 41] This explains partly why the instruments discussed above leave so much margin to the Member States.

The economic literature on optimal social insurance design considers optimal benefit and contribution rates to maximize overall social welfare,[42] in light of the sustainability of insurance systems and its administrative complexity and efficiency. This literature finds that optimal replacement levels will depend on the broader context (e.g. whether there is also private insurance that partially covers certain risks[43]), the risk-aversion of individuals, social multipliers[44] and income elasticities, coupled to the risk for moral hazard. Higher contributions can lead to more generous benefits, but they also impose a greater financial burden on individuals. The risk aversion of individuals plays a crucial role; those who are more risk-averse may prefer higher replacement rates to ensure financial stability during periods of unemployment or illness. However, this must be balanced against the risk for moral hazard, where overly generous benefits might discourage individuals from taking necessary precautions to avoid risks, leading to inefficiencies in the labor market and higher costs for the insurance system. Using US data, Chetty argues that moral hazard is fairly limited once one takes the impact of liquidity constraints on unemployment duration into account, and that therefore, optimal unemployment replacement rates should be (somewhat) above 50% of the previous wage.[45] Previous calculations highlight the importance of risk aversion and moral hazard in determining optimal rates,[46] and generally end up with lower estimates. Kroft (2008) finds an optimal rate of 60% when taking account of social multipliers. Kolsrud, Landais, Nilsson, and Spinnewijn (2018) find that the risk for moral hazard is typically higher at the start of the unemployment spell,[47] and argue that the value that unemployment benefits represent to their recipients tend to be underestimated,[48] which provides support for setting benefit levels at a generous level.

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40 B. Cantillon, Z. Parolin and D. Collado, 'A glass ceiling on poverty reduction? An empirical investigation into the structural constraints on minimum income protections', 30 *Journal of European Social Policy* 2020, p. 129; I. Marx, H. Haapanala and S. Marchal, 'Is poverty reduction in Europe doomed? Conjectures, facts and a cautiously optimistic conclusion', 2024 IZA Discussion Paper no. 16967 https://ssrn.com/abstract=4820807, accessed 27 May 2025.

41 At least not without substantial in-work support offered by the government. See B. Cantillon, Z. Parolin and D. Collado, 'A glass ceiling on poverty reduction? An empirical investigation into the structural constraints on minimum income protections', 30 *Journal of European Social Policy,* 2020, p. 129.

42 M.N. Baily, 'Some aspects of optimal unemployment insurance', 10 *Journal of Public Economics,* 1978, p. 379; R. Chetty, 'Moral Hazard versus Liquidity and Optimal Unemployment Insurance', 116 *Journal of Political Economy,* 2008, p. 173.

43 R. Chetty and E. Saez, 'Optimal Taxation and Social Insurance with Endogenous Private Insurance', *American Economic Journal: Economic Policy* 2, 2010, p. 85.

44 K. Kroft, 'Takeup, social multipliers and optimal social insurance', 92 *Journal of Public Economics,* 2008 p. 722.

45 R. Chetty, 'Moral Hazard versus Liquidity and Optimal Unemployment Insurance', 116 *Journal of Political Economy*, 2008 p. 173.

46 M.N. Baily, 'Some aspects of optimal unemployment insurance', *10 Journal of Public Economics*, 1978, p. 379; J. Gruber, 'The Consumption Smoothing Benefits of Unemployment Insurance', 87 *The American Economic Review*, 1997, p. 192.

47 J. Kolsrud et al., 'The Optimal Timing of Unemployment Benefits: Theory and Evidence from Sweden', 108 *American Economic Review*, 2018, p. 985.

48 C. Landais, and J. Spinnewijn ,'The Value of Unemployment Insurance', 88 *The Review of Economic Studies*, 2021, p. 3041.

Long-term benefit dependency also stems from optimism bias in unemployed regarding their chances of finding a job.[49] Optimal replacement rates and the related financial incentives may therefore differ between groups and throughout an unemployment spell, be it not necessarily with a degressive pattern over time.[50]

Policy makers must additionally also consider the social equity implications, striving to provide adequate protection for vulnerable groups while maintaining incentives for work and self-sufficiency. In this regard it is worth mentioning that income volatility literature tends to operationalize income volatility as earnings drops exceeding 25% or 33% and finds long-term negative impacts on children's development and stress levels in affected households.[51]

4. And what about poverty?

When should a benefit be considered as inadequate to protect against poverty? An extensive literature exists on how to define and measure poverty. While there are many good reasons for using specific poverty lines, it is hard to argue that one specific value represents the 'best possible' proxy for a state of poverty.[52] Decancq et al. state that 'even if it is true that we tend to recognize extreme poverty when confronted with it, the abundance of definitions and measures of poverty in the specialized literature suggests that it is not so easy to pour such intuitions into an operational poverty measure'.[53] They highlight that poverty definitions and operationalizations reflect 'our value judgments on the notion of poverty. [...] Poverty has many faces, and hence different perspectives on poverty may lead to different empirical conclusions.'

Decancq et al. provide an overview of the many value judgements and choices that need to be made when measuring poverty. These relate to the selection of a metric of wellbeing (that can be one-dimensional or multi-dimensional, with related questions pertaining to which dimensions should be included, and how these should be weighted against one another), setting the level of the poverty line, and finally, how to aggregate towards poverty measures capturing the poverty rate over an entire population.

We highlighted above that hypothetical household simulations of minimum income protection packages tend to compare the resulting net disposable incomes with commonly

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49 J. Spinnewijn, 'Unemployed but Optimistic: Optimal Insurance Design with Biased Beliefs', 13 *Journal of the European Economic Association,* 2015, p. 130.

50 J. Kolsrud et al., 'The Optimal Timing of Unemployment Benefits: Theory and Evidence from Sweden', 108 *American Economic Review,* 2018, p. 985.

51 B. Hardy, H.D. Hill and J. Romich, 'Strengthening Social Programs to Promote Economic Stability During Childhood', 32 *Social Policy Report*, 2019, p. 1.

52 B. Menyhertet al, *'Measuring and monitoring absolute poverty (ABSPO) – Final Repor*t, EUR 30924 EN Retrieved from https://publications.jrc.ec.europa.eu/repository/handle/JRC127444, accessed 27 May 2025.

53 K. Decancq et al, 'The Evolution of Poverty in the European Union: Concepts, Measurement and Data' in B. Cantillon and F. Vandenbroucke (eds), *Reconciling work and poverty reduction: how successful are European welfare states?*, Oxford University Press, 2014, p. 60-61.

used poverty lines. For the specific purpose of comparing income packages to a poverty line, in principle only the first two elements are of importance.[54]

Within the EU, 'People are said to be living in poverty if their income and resources are so inadequate as to preclude them from having a standard of living considered acceptable in the society in which they live'.[55] The concept is further clarified as follows: 'Because of their poverty they may experience multiple disadvantages through unemployment, low income, poor housing, inadequate health care and barriers to lifelong learning, culture, sport and recreation. They are often excluded and marginalised from participating in activities (economic, social and cultural) that are the norm for other people and their access to fundamental rights may be restricted.'

A social minimum is here thus defined as a standard of living (minimally) acceptable to the society in which you live, which is associated with participating to various activities, on multiple domains, that are considered the norm. In addition, Decancq et al. note the explicit reference to resources, and elucidate that these can be defined either narrowly, referring to cash and other incomes and wealth, but might also refer to one's health, education, and human capital.[56] Interestingly, the definition adopted in the EU implies that the acceptable standard of living can be different in different societies and might therefore also change over time.

This is reflected in the indicator that has been adopted by the EU institutions to monitor *monetary poverty* in the EU Member States, on which we focus here since it is most straightforward to compare with benefit levels, and to assess benefit levels' adequacy against. This indicator identifies as (at risk of being)[57] poor every individual who lives in a household in which the net disposable equivalized income is below

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54 Evidently, for broader policy evaluations of benefits, the impact on overall aggregated poverty rates is one of the main evaluation criteria. Here, not only the benefit level itself is relevant, but also the accessibility of the benefit, non-take-up, interaction with other benefits, both at the individual and household level, and earnings and others incomes. In line with the first part of this article, we focus here on the assessment of the benefit level.

55 European Commission, *Joint Report on Social Inclusion*, Office for Official Publications of the European Communities, 2004, p. 10.
This definition closely resembles the poverty definition proposed by the Council of the European Communities, 1975: *'individuals and families whose resources are so small as to exclude them from the minimum acceptable way of life of the member state in which they live*'.

56 K. Decancq et al, 'The Evolution of Poverty in the European Union: Concepts, Measurement and Data' in Bea Cantillon and F. Vandenbroucke (eds), *Reconciling work and poverty reduction: how successful are European welfare states?*, Oxford University Press, 2014.

57 The official name of the indicator is the at-risk-of-poverty indicator (see Eurostat, 2024, Glossary- at risk of poverty rate. Accessed April 2025 at <https://ec.europa.eu/eurostat/statistics-explained)>. This name is intended to stress the multidimensional nature of poverty, and recognizes that the monetary dimension is only one aspect It should be noted that this indicator features in a broad set of social outcome indicators, among others collected and monitored in the social scoreboard, that serve to track trends on various dimensions of poverty. The official headline target of the EU is the AROPE, the at-risk-of-poverty and social exclusion indicator, that traces the number of persons that are at risk of poverty, living in households with a very low work intensity, or severely materially and socially deprived as evidenced by their lack of access to seven out of 13 common items (see A.C. Guio, E. Marlier, and B. Nolan, B. 2021, *Improving the understanding of poverty and social exclusion in Europe,* Luxembourg: Eurostat.

60% of the *national* median equivalized disposable household income. Equivalized household incomes are used to take account of different needs and economies of scales in households of different sizes.[58] The metric used for wellbeing is hence the equivalized disposable household income, whereas the threshold is (pragmatically) set at 60% of the median. The EU institutions have opted for a statistical poverty line, i.e. a poverty threshold defined as a function of the underlying distribution. The advantage for such an approach is that it is simple, and also straightforward to use in cross-national comparisons. In contrast, the actual living standards at (an arbitrary) percentage of the median can differ substantially between countries.[59] Even when taking account of differences in purchasing power, the threshold in the country with the highest poverty threshold (Luxembourg in 2023) is more then three times as high as the lowest threshold[60]. Moreover, a statistical line floats relative to the overall income distribution, and may therefore lead to a lower poverty line in times of recession, when incomes in general decrease. This may result in counterintuitive findings in terms of overall poverty rates.[61]

However, alternative methods to draw the poverty lines equally have a number of drawbacks. Subjective lines are based on responses to surveys inquiring after minimally acceptable or feasible income levels. Results however appear to be sensitive to changes in the wording of the questions, and resulting lines are rather unstable over time and between countries. Administrative or statutory lines equate the poverty line to the minimum income benefit levels applicable in a country. The underlying rationale is that such benefit levels, especially in democracies, reflect a majority view on what is acceptable in a society. Yet, evidently, also other considerations are at play when defining benefit levels, not in the least deservingness issues, financial incentives and the financial sustainability of the social protection system.[62] Moreover, for the specific purpose considered in this article, evaluating the adequacy of benefits in terms of a social minimum defined in terms of those very same benefits (at least in the case of minimum income protection) leads to a

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58 Household incomes are equivalized by correcting them in line with the modified OECD scale, in which the first adult accounts for a value of 1, additional household members aged 14 and more for a factor of 0.5, and younger members for a factor of 0.3 (see Eurostat (2024) Glossary- equivalized disposable income. Accessed April 2025 at https://ec.europa.eu/eurostat/statistics-explained). Incomes are assumed to be shared equally between the household members, i.e. within-household inequality is not taken into account.

59 T. Goedemé et al., 'What Does it Mean to Live on the Poverty Threshold? Lessons From Reference Budgets' in B. Cantillon, T. Goedemé, and J. Hills (eds), *Decent incomes for the poor? Improving policies in Europe*, Oxford University Press, 2019.

60 The spread between the second highest and the lowest threshold is smaller, but, at a factor of 2.3, still substantial (Eurostat, 2024, At-risk-of-poverty threshold – EU-SILC survey', available on https://ec.europa.eu/eurostat/databrowser/view/tessi014/default/bar?lang=enandcategory=t_ilc.t_ilc_ip.t_ilc_liaccessed 27 May 2025.

61 K. Decancq et al., 'The Evolution of Poverty in the European Union: Concepts, Measurement and Data' in B. Cantillon and F. Vandenbroucke (eds), *Reconciling work and poverty reduction: how successful are European welfare states?*, Oxford University Press, 2014.

62 B. Cantillon, Z. Parolin and D. Collado, 'A glass ceiling on poverty reduction? An empirical investigation into the structural constraints on minimum income protections', 30 *Journal of European Social Policy*, 2020, p. 129; N. Van Mechelen *Barriers to adequate social safety nets*, PhD thesis, University of Antwerp.

cyclical reasoning.[63] There are obvious issues in terms of cross-national comparisons, even more so as some countries do not have general minimum income protection benefits, even in the EU.[64] Still, administrative thresholds are used in some countries, in a national context, as an official poverty line. A well-known example is the official poverty line for the Netherlands, which is fixed at the (real) 1979 value of the social assistance benefit.[65]

Alternatively, budget standards can provide more substantive guidance as to where to draw the poverty line.[66] Budget standards, or reference budgets, are a priced basket of goods and services that represent minimal living standards for hypothetical households with specific characteristics. Through the clear connection with a list of goods and services, a budget standards-based poverty line is firmly rooted in a tangible concept of minimal living standards. The included goods and services stem from theoretical considerations, further refined based on expert opinions, actual spending patterns, focus group and public opinion consultations. This clear connection to an explicit living standard, makes reference budgets easily understandable, useful for communication purposes and also popular for broader, more practical, applications.[67] The Belgian reference budgets for instance, are widely used by local welfare agencies to assess the needs of the households applying for social assistance. In addition, reference budgets are used as yardstick by Belgian judges ruling in individual bankruptcy and debt cases.[68] While the approach certainly leads to less arbitrary values than (for instance) pragmatic cut-off values, value judgements remain necessary,[69] an issue that becomes more pronounced when one wants to apply budget standards for actual poverty measurements on population data, moving beyond their development in the context of hypothetical households. The Netherlands for instance publishes, in their supplemental poverty lines and assessments published by the SCP,[70] two variants, one focusing on goods and services needed for meeting basic needs, and one that is in line with a frugal lifestyle (but that does for instance cover a small budget for leisure, which the

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63 K. Decancq et al., 'The Evolution of Poverty in the European Union: Concepts, Measurement and Data' in B. Cantillon and F. Vandenbroucke (eds), *Reconciling work and poverty reduction: how successful are European welfare states?*, Oxford University Press, 2014.

64 S. Marchal and I. Marx, *Zero poverty society. Ensuring a decent income for all*, Oxford University Press, 2024.

65 B. Goderis,'De Nederlandse bijstand is niet toereikend' in T. Kampen et al (eds.) *Streng maar Onrechtvaardig: De Bijstand Gewogen,* Amsterdam: Van Gennep, 2020.

66 K. Decancq et al., 'The Evolution of Poverty in the European Union: Concepts, Measurement and Data' in B. Cantillon and F. Vandenbroucke (eds), *Reconciling work and poverty reduction: how successful are European welfare states?*, Oxford University Press, 2014; T. Goedemé et al., supra note 59.

67 B. Storm and K. Van den Bosch (Eds.), *Wat heeft een gezin minimaal nodig? Een budgetstandaard voor Vlaanderen,* Acco, 2009.

68 See the website of the Thomas More Centre of Expertise Budget and Financial Wellbeing for an overview of the different applications for practitioners in Belgium (https://thomasmore.be/nl/expertisecentrum-budget-en-financieel-welzijn/expertise/referentiebudgetten accessed 27 May 2025).

69 S. Marchal, , B. Storms, B. Cantillon, et al., *Onderzoek naar de haalbaarheid van het ontwikkelen en het gebruik van een bijkomende indicator om armoede te monitoren op Vlaams niveau*. Leuven: Steunpunt Welzijn, Volksgezondheid en Gezin, 2022. Retrieved from https://repository.uantwerpen.be/docstore/d:irua:15881, accessed 27 May 2025.

70 Commissie Sociaal Minimum, *Een zeker bestaan: Naar een toekomstbestendig stelsel van het sociaal minimum,* 2023. Retrieved from https://open.overheid.nl/documenten/d0ab26e9-096b-41fd-ada9-ede686c99169/file, accessed 27 May 2025.

former does not).[71] For cross-national comparisons, budget standards have the drawback that they are very labor intensive to develop, and therefore hard to construct and update in a cross-national comparable framework. Goedemé et al. (2019) and Storms et al.[72] have developed cross-nationally comparable reference budgets for selected European countries and domains.[73] Interestingly, Goedemé et al.[74] found a (relatively) close alignment between the final reference budget values and the 60 per cent at-risk-of-poverty threshold for the richer, Western-European countries included in their analysis, while the at-risk-of-poverty threshold appeared to grossly underestimate the minimally needed budget for an acceptable living standard in poorer Eastern and Southern European countries.

5. An illustration: the adequacy of social security and social assistance in Belgium

In recent years, De Becker and Schoukens[75] and Van Limberghen et al.[76] have combined both legal and socio-economic approaches to consider the adequacy of social insurance provisions in Belgium. Frederickx, Delanghe, Penne, and Storms[77] recently assessed guaranteed net disposable income by various benefit schemes to the Belgian reference budgets. This research shows that while assessments relative to legal yardsticks and socio-economic measures can lead to the same conclusions regarding adequacy, this is not necessarily the case.

For illustrative purposes, Table 1 below shows similar calculations, based on the hypothetical household tool of the EUROMOD microsimulation model,[78] referring to the situation in 2023 in Belgium. We show the wage incomes, net disposable incomes and appropriate reference values for a single person and a lone parent with children, and ask to what extent this family type is protected, in terms of acquired living standards, against poverty, and against long-term joblessness, according to selected yardsticks

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71 We refer to Goderis (*supra* note 65) for an interesting comparison of poverty rates in the Netherlands, as measured by the EU at-risk-of-poverty measure, the SCP budget standard-based poverty lines and the official administrative poverty threshold.

72 B. Storms et al., 'Towards cross-country comparable reference budgets in Europe: a methodological note on the development of food baskets', *EuSocialCit*, 2023.

73 B. Storms et al., (2023). How can reference budgets contribute to the construction of social indicators to assess the adequacy of minimum income and the affordability of necessary goods and services?, EuSocialCit Working Paper, January 2023. developed reference budgets to cover necessary food expenditures, rather than full reference budgets. T. Goedemé et al. (2019) developed reference budgets for 5 selected countries, whereas additionally, they developed food baskets for a broad range of EU Member States.

74 T. Goedemé et al., *supra* note 59.

75 E. De Becker, 'The Role of Social Security in the Combat of In-work Poverty' in L. Ratti and P. Schoukens (eds), *Working Yet Poor: Challenges to EU Social Citizenship*, Hart Publishing 2023.

76 G. Van Limberghen et al.,'Un regard critique et propositionnel sur les assurances sociales des salariés et des indépendants. Analyse au départ de la recommandation de l'Union européenne relative à l'accès des travailleurs à la protection social', 63 *Belgisch Tijdschrift voor Sociale Zekerheid*, 2019, p. 49.

77 M. Frederickx et al., 'Kan je menswaardig leven met een minimuminkomen in België? Referentiebudgetten als toetssteen', 1 *Belgisch Tijdschrift voor Sociale Zekerheid*, 2025, p.66.

78 See T. Hufkens et al., 'The hypothecial household tool (HHoT) in EUROMOD: a new instrument for comparative research on tax-benefit policies in Europe', European Commission, 2019.

discussed in this paper. We limit ourselves to an assessment of the adequacy in case of unemployment, both with and without access to the unemployment insurance scheme. It is clear that in specific instances, the different measures lead to different conclusions regarding the adequacy of social protection benefits. Interestingly, and confirming an observation previously made by De Becker and Schoukens,[79] the lower the previous wage, the more adequate replacement benefits are from a legal perspective: the gross replacement rate is above 50 (single) and 65 (family) per cent of previous income, well above the 40% proposed in the ECSS/ILO Convention. Yet, precisely for these low wage earners, who likely have only very limited financial buffers outside of their social insurance entitlements,[80] the monetary value of net disposable incomes guaranteed at these benefit levels does not necessarily suffice to meet a minimal living standard, whether it is operationalized in terms of the 60% at-risk-of-poverty threshold, or relative to a reference budget. The protection offered by minimum income benefits falls short for both family types considered, whether one takes as yardstick the at-risk-of-poverty threshold, or the reference budget. We do not account of the impact on public finances, one of the relevant considerations for below-adequate benefits in the Recommendation on adequate minimum income, but the distance to in-work net disposable incomes appears fairly substantial, at least if one considers a full-time wage.[81]

Table 1. Adequacy of Belgian unemployment insurance benefits, various yardsticks, 2023[82]

		single				**single with two children (6-11; 14-17)**			
		minimum wage	**low wage**	**average wage**	**high wage**	**minimum wage**	**low wage**	**average wage**	**high wage**
In-work income	gross wage + child benefits	2,105	2,854	4,384	5,934	2,689	3,416	4,731	6,282
	net disposable income	1,938	2,179	2,702	3,336	2,741	2,930	3,271	3,875
Income when unemployed, with access to unemployment insurance	unemployment benefit + child benefit	1,341	1,735	1,785	1,785	2,239	2,319	2,369	2,369
	net disposable income	1,338	1,631	1,657	1,657	2,237	2,317	2,367	2,367
unemployed – no access to unemployment insurance	net disposable income at minimum income protection	1,238	1,238	1,238	1,238	1,674	1,674	1,674	1,674

79 E. De Becker, 'The Role of Social Security in the Combat of In-work Poverty' in L. Ratti and P. Schoukens (eds), *Working Yet Poor: Challenges to EU Social Citizenship*, Hart Publishing, 2023.

80 See J. Horemans et al. 'De kwetsbare werkende. Een profielschets van armoede en financiële bestaanszekerheid bij werkende Belgen', CSB, 2020.

81 In the margin, we also note the difference between the minimum wage and the average wage. The gross minimum wage only equals 35% of the average wage, well below the reference values proposed in the minimum wage directive. However, thanks to a progressive tax system, and supplementary measures to boost low wage take home pay, the ratio in net terms does meet the proposed threshold.

82 Source: calculations based on EUROMOD-HHoT.

	single				single with two children (6-11; 14-17)			
	minimum wage	**low wage**	**average wage**	**high wage**	**minimum wage**	**low wage**	**average wage**	**high wage**
poverty line	1,509	1,509	1,509	1,509	2,716	2,716	2,716	2,716
reference budget	1,552	1,552	1,552	1,552	2,915	2,915	2,915	2,915
with access to social insurance								
gross replacement rate (cf. social code)	64%	61%	41%	30%	83%	68%	50%	38%
net replacement rate	69%	75%	61%	50%	82%	79%	72%	61%
% poverty line	89%	108%	110%	110%	82%	85%	87%	87%
% reference budget	86%	105%	107%	107%	77%	79%	81%	81%
without access to social insurance								
Net replacement rate	64%	57%	46%	37%	61%	57%	51%	43%
% poverty line	82%	82%	82%	82%	62%	62%	62%	62%
% reference budget	80%	80%	80%	80%	57%	57%	57%	57%

6. Conclusion

There is no bullet-proof way of defining a social minimum that protects against poverty, let alone provide a decent or adequate living standard compatible with a life in dignity. Nevertheless, there are a few lessons to learn from the interdisciplinary analysis we carried above. First, although law and social policy present some common features, social policy views the issue in a more multifaceted way, which provides a more nuanced approach to the problem. Normative instruments should also reflect this by, inter alia, putting more emphasis on the outcome (i.e. reducing poverty) instead of the benefit levels. Similarly, there is no apparent reason why legal instruments would refer to gross income, considering the increasing role of fiscal welfare states. Legal instruments should reflect better on all branches of the welfare state in *combination*. There should also be a focus on vulnerable groups, such as non-standard workers or single parents, rather than on specific levels, as these do not otherwise reflect equally on the population. Budget standards, in combination with poverty thresholds, do provide more substantive context to the definition of a minimum living standards, but come with their own problems in terms of operationalization and cross-national comparability. It is therefore commendable that recent legal instruments do refer to both poverty threshold and reference budgets in combination, even though the formulation appears too permissive to the national level. In the absence of robust cross-nationally comparative budget standards, such is

however lamentable, but difficult to overcome. It might be worthwhile to include in legal instruments minimal norms that should be included in national budget standards, so as to refer to a minimum that is as comparable as possible, given the current prevalence (and ongoing research into) cross-national comparative reference budgets.

Social security aims primarily at *maintaining* a certain standard of living (adequate or not) and minima generally refer to combinations with means-tested benefits. Minimum wages, which rather aim at keeping up with other wages, should be set above this minimum if we want to maintain work-incentives. Therefore, the fundamental minimum starts with setting adequate minimum income benefits, which, as shown above, should refer to various yardsticks to reflect on the multifaceted nature of adequate standards.

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The high score nobody wants: automation, welfare sanctioning, and the principle of equality of arms

Anne Spijkstra

Abstract: This article examines the impact of automated systems in welfare sanctioning on the principle of equality of arms, as outlined in Article 6(1) of the European Convention on Human Rights (ECHR). It explores how the use of predictive algorithms in welfare sanctioning affects the procedural rights of benefit recipients, particularly in relation to their right of access to information as a component of the equality of arms. Drawing on examples from Sweden, Denmark, and the Netherlands, alongside relevant European Court of Human Rights case law and social security literature, the findings suggest that while automation offers certain benefits, such as efficiency, these do not mitigate the disadvantages caused by the opacity of the algorithms used. The article highlights how this opacity limits recipients' ability to identify potential biases and discrimination, with special attention to expert opinions and the imposition of benefit sanctions under domestic administrative law, ultimately hindering their ability to effectively challenge sanction decisions.

Keywords: equality of arms, Article 6 ECHR, automation, predictive algorithms, social security enforcement, welfare sanctioning, repressive welfare state

1. Introduction

In Sweden, the Social Insurance Agency *(Swedish: Försäkringskassan)* has silently conducted large-scale experiments using algorithms to score benefit recipients, supposedly predicting their likelihood of committing fraud.[1] Similarly, in Denmark, Pay Out Denmark *(Danish: Udbetaling Danmark),* the public authority responsible for distributing social benefits,

[1] G. Geiger *et al*, 'How we investigated Sweden's Suspicion Machine'(2024) *Lighthouse Reports*, https://www.lighthousereports.com/methodology/sweden-ai-methodology, accessed 25 April 2025; S. Granberg *et al*, 'Sweden's Suspicion Machine', *Lighthouse Reports*, 2024, https://www.lighthousereports.com/investigation/swedens-suspicion-machine, accessed 25 April 2025.

deploys fraud detection algorithms to inform benefit distribution.[2] In the Netherlands, the city of Rotterdam has deployed a machine learning algorithm to generate risk scores for welfare recipients.[3] These cases, which all occurred in the past decade, mark the start of a new era in social welfare enforcement.

Automation has transformed fraud investigation and sanctioning, significantly increasing their speed and efficiency. While combating fraud is essential to preserving welfare solidarity, it is equally important to prevent the disproportionate targeting of marginalised groups and to safeguard procedural rights, ensuring a fair defence. This article examines the procedural position of benefit recipients sanctioned for welfare fraud or misuse in the context of automation. The growing reliance on automated systems in welfare sanctioning raises concerns about its impact on the principle of equality of arms, a key aspect of the broader right to a fair trial under Article 6(1) of the European Convention on Human Rights (ECHR). The principle of equality of arms has been examined in the literature on social security enforcement, particularly in relation to the use of expert assessments for social benefits due to work incapacity and their outcomes.[4] The impact of automation on the principle of equality of arms has primarily been explored in the context of criminal proceedings, where it has been argued that reliance on automated data, particularly when based solely or massively on algorithmic processes without transparency mechanisms, undermines the effective balance between parties, and that such reliance creates inequalities in knowledge and access to information.[5] However, the impact of automation on the principle of equality of arms in welfare sanctioning, often under administrative law, remains an underexplored area in the literature, a gap that this article aims to address.

This article explores the relationship between automation in welfare sanctioning and the principle of equality of arms through an extensive review of literature on social security enforcement and automation, as well as detailed case law analysis of the European Court

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2 G. Geiger, 'How Denmark's Welfare State Became a Surveillance Nightmare', *Wired, 2023,* https://www.wired.com/story/algorithms-welfare-state-politics, accessed 26 April 2025; Amnesty International, 'Coded Injustice. Surveillance and Discrimination in Denmark's Automated Welfare State' (2024) EUR 18/8709/2024, https://www.amnesty.org/en/documents/eur18/8709/2024/en, accessed 25 April 2025.

3 E. Constantaras *et al*, 'Inside the Suspicion Machine', *Wired,* 2023, https://www.wired.com/story/welfare-state-algorithms, accessed 24 April 2025.

4 W.A. Faas *et al*, 'Equality of arms en quality of arms in arbeidsongeschiktheidsgevallen', 3 *Expertise en Recht,* 2018, p. 115; B.M.A. van Eck, 'Geautomatiseerde ketenbesluiten and rechtsbescherming', PhD thesis, Tilburg University, 2018; P.A. Willemsen and I. van der Helm, 'Deskundigenbewijs en equality of arms bij WIA-zaken, 10 *Advocatenblad* 54; W.A. Faas, 'Bruggen bouwen over de kenniskloof', PhD thesis, Vrije Universiteit Amsterdam, 2019.

5 J.A.E. Vervaele, 'Surveillance and Criminal Investigation: Blurring of Tresholds and Boundaries in the Criminal Justice System?' in S. Gutwirth, R. Leenes and P. De Hert (eds), *Reloading Data Protection: Multidisciplinary Insight and Contemporary* Challenges, Springer Netherlands, 2014, p. 115, 124; S. Quattrocolo et al, 'Technical Solution for Legal Challenges: Equality of Arms in Criminal Proceedings', 20(1) *Global Jurist,* 2020, p. 2; S. Quattrocolo, *Artificial Intelligence, Computational Modelling and Criminal Proceeding. A Framework for A European Legal Discussion,* Springer, vol. 4, 2020, p. 73-98; B. Custers, 'A fair trial in complex technology cases: why courts and judges need a basic understanding of complex technologies', 52 *Computer Law and Security Review: The International Journal of Technology Law and Practice* 2, 2024, p. 3-4.

of Human Rights (ECtHR) rulings on the subject. Although this analysis applies to all 46 member states of the Council of Europe, it draws on examples from Sweden, Denmark, and the Netherlands to illustrate the use of predictive algorithms in welfare sanctioning. These countries share similar levels of economic development, welfare systems, and digitalisation and have all recently seen a shift in welfare policy from solidarity to conditionality, particularly impacting certain benefit recipients through algorithmic profiling technologies.[6] The research question is: How does the use of automated systems in sanctioning welfare benefit recipients impact the principle of equality of arms under Article 6(1) ECHR?

The scope of this article is limited to the principle of equality of arms, as outlined in Article 6(1) of the ECHR, within the context of welfare sanctioning procedures. It particularly emphasises access to information as a component of equality of arms, as the rise of automation impacts this. This analysis particularly focuses on the sanctioning of benefit recipients as part of social security enforcement, which can be categorised into benefit sanctions and punitive sanctions, a distinction that will be further clarified in Section 2. Furthermore, this article specifically examines the use of algorithmic profiling technologies, wherein risk profiles are generated through predictive indicators based on data correlations and patterns to inform surveillance decisions.[7] This is particularly relevant in the context of digital welfare states, as they involve the automation of service delivery and the prediction, surveillance, detection, and punishment of fraud.[8]

This article is structured as follows: Section 2 looks into the use of automated systems in welfare sanctioning, Section 3 examines the principle of equality of arms of Article 6(1) ECHR, and Section 4 analyses the impact of using automated systems on the principle of equality of arms, followed by conclusions.

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6 G.J. Vonk, 'Repressive welfare state, the spiral of obligations and sanctions', 15(3) *European Journal of Social Security,* 2014, p. 188; R.F. Jørgensen, 'Data and rights in the digital welfare state: the case of Denmark', 26(1) *Information, Communication and Society,* 2021, p. 123; A. Kaun, 'Temporalities of welfare automation: On timing, belatedness, and perpetual emergence', 34(3) *Time and Society,* 2025, p. 1. These countries rank in the top 20 of the UN-E-Government Development Index of the year 2024, see https://desapublications.un.org/sites/default/files/publications/2024-09/%28Web%20version%29%20E-Government%20Survey%202024%201392024.pdf, accessed 12 May 2025.

7 M. Hildebrandt, 'Defining Profiling: A New Type of Knowledge?' in M. Hildebrandt and S. Gutwirth (eds) *Profiling the European Citizen. Cross-Disciplinary Perspectives*, Springer, 2008, p. 17; L.M. Haitsma, 'The Murky Waters of Algorithmic Profiling: Examining discrimination in the digitalized enforcement of social security policy', 44(2) *Recht der Werkelijkheid* 61, 2023, p. 62-63. The terms algorithmic profiling, risk profiling, risk analysis, data analysis, data mining, automated decision-making and data set comparison are often used interchangeably in literature, practice, and data analysis.

8 P. Alston, 'Note by the Secretary-General Report of the Special Rapporteur on Extreme Poverty and Human Rights', 11 October 2019, UN Doc A/74/493: 4; Jørgensen, *supra* note 6.

2. The Use of Automated Systems in Sanctioning Welfare Recipients

2.1 Enforcement in the Welfare State

Modern welfare states are increasingly characterised by a repressive climate.[9] This is reflected in the growing emphasis on conditionality, with progressively stringent eligibility requirements and obligations that citizens must fulfil in order to receive welfare benefits.[10] This shift is driven by the stigma surrounding benefit recipients, who are often portrayed as risks to the public interest, reinforcing the notion that those deemed undeserving should be sanctioned.[11] The cycle of repressiveness in welfare systems is further illustrated by the introduction of harsher consequences aimed at addressing benefit fraud and misuse. The cases of Sweden and Denmark were shaped by elements of this trend towards repression. In Sweden, public discourse surrounding the social security system facilitated increased budgets and granted authorities new powers in the name of fighting fraud.[12] In Denmark, the fight against fraud has become a prominent political priority.[13]

In line with this trend, there has been an increased focus on the enforcement of social security proceedings, which encompass multiple phases, including prevention, control, reclamation, and sanctioning activities, collectively forming a cohesive 'chain of enforcement'. Within this framework, the sanctioning regime in social security proceedings involves both investigative processes and the actual imposition of sanctions, which is a central focus of this article.[14]

Investigations aim to identify individuals who improperly use the social security system by failing to meet the conditions for receiving benefits, thereby obtaining assistance to which they are not entitled. A key aspect of this process is gathering detailed information about recipients' lives to detect suspicious behaviour. Due to the infeasibility of investigating each benefit recipient individually, fraud or misuse investigations may be initiated and conducted by municipalities, welfare agencies, (anonymous) tips from citizens, or private investigators.[15] Given the personal nature of the information sought, such as details concerning intimate relationships, authorities may also gather details from individuals close to the suspected recipient, such as neighbours, co-workers, friends, or family.[16] When fraud or misuse is suspected, recipients may be required to provide financial records or undergo investigator visits.

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9 Vonk, *supra* note 6.

10 P.J. Dwyer, 'Creeping Conditionality in the UK: From Welfare Rights to Conditional Entitlements?', 29(2) *Canadian Journal of Sociology,* 2004, p. 265; G. McKeever, 'Balancing Rights and Responsibilities: The Case of Social Security Fraud', 3 *Journal of Social Security Law,* 2009, p. 139.

11 A.N. Spijkstra, 'The New Paupers: A Historical Analysis of Social Security Law and the Rise of Automation', 29(1) *Tilburg Law Review* 14, 2024, p. 29-33.

12 Geiger, *supra* note 1.

13 Geiger, *supra* note 2.

14 S. Klosse and G. Vonk, *Hoofdzaken socialezekerheidsrecht,* Boom Juridisch, 2022, p. 361-364.

15 M. Button, 'Fraud Investigations and the 'Flawed Architecture' of Counter Fraud Entities in the United Kingdom' 39(4) *International Journal of Law, Crime and Justice,* 2011, p.249.

16 S. Headworth, 'Getting to Know You: Welfare Fraud Investigation and the Appropriation of Social Ties', 84(1) *American Sociological Review,* 2019, p. 171-172.

Once individuals are identified as abusing the social security system, they may face a range of sanctions, classified as either punitive or benefit sanctions. In welfare sanctioning, punitive sanctions may be governed by domestic criminal law but can also fall under administrative law, such as in the case of administrative fines. These sanctions are imposed for breaches of information obligations, for example failing to disclose employment. In contrast, benefit sanctions, regulated under administrative law, address misuse, particularly non-compliance with co-operation duties, such as seeking employment.[17] Sanctions in social security vary in nature and severity, ranging from imprisonment and fines to the withdrawal or reduction of benefits. While both punitive and benefit sanctions fall under Article 6(1) ECHR, guaranteeing the equality of arms, their procedural protections may differ. This will be examined further in Section 4. Regardless of their classification as punitive or benefit, these sanctions can have serious consequences. While imprisonment clearly has a profound impact, benefit reductions can also directly harm a recipient's livelihood, particularly for those reliant on social security, leading to financial insecurity.[18]

2.2 The Era of Automation

In recent years, the sanctioning of benefit recipients in Western European countries has been notably influenced by the adoption of automation in the fight against welfare fraud and misuse. In the context of investigating and sanctioning, there is an increasing reliance on automated systems.[19] Whereas traditional methods of investigating benefit recipients primarily depend on information gathered from sources such as municipalities or citizens, automated systems now have the capability to detect suspicious behaviour through the processing and analysis of large datasets, allowing for the prediction of fraudulent activity.[20] Currently, risk profiles are developed using predictive indicators derived from correlations and patterns in data to inform surveillance decisions.[21] Using these datasets, the algorithms deployed can generate risk scores for welfare recipients, flagging individuals who warrant further investigation for potential fraud or misuse of the system. If a benefit recipient is flagged, they will be subjected to an investigation by the authorities, which often results in the imposition of sanctions.[22] The development of these algorithmic systems, their so-called 'lifecycle', is shaped by their design, implementation, and practical application. Each stage involves decisions about technical and procedural aspects, such as whether algorithms are designed to be transparent or opaque, whether their implementation is accessible or concealed, and whether their application is context-

17 A. Eleveld, 'The Duty to Work Without a Wage: A Legal Comparison Between Social Assistance Legislation in Germany, the Netherlands and the United Kingdom', 16(3) *Journal of Social Security Law* 2014, p. 206-209; Vonk, *supra* note 5, p. 190-194.

18 S. Pattaro et al, 'The Impacts of Benefit Sanctions: A Scoping Review of the Quantitative Research Evidence', 51(3) *Journal of Social Policy,* 2022, p. 621.

19 Haitsma, *supra* note 7, p. 61.

20 S. Ranchordás and Y. Schuurmans, 'Outsourcing the Welfare State: The Role of Private Actors in Welfare Fraud Investigations',7(1) *European Journal of Comparative Law and Governance*, 2020, p. 7.

21 Haitsma, *supra* note 7, p. 61.

22 Alston, *supra* note 8, p. 4, 18, 21-22; K. Dobson, 'Welfare Fraud 2.0? Using Big Data to Surveil, Stigmatize, and Criminalize the Poor', 44(3) *Canadian Journal of Communication,* 2019, p. 336-338.

specific or standardised.[23] These choices directly influence how investigations and sanctions are carried out, impacting both the fairness and effectiveness of the process.

The integration of new technologies in sanctioning benefit recipients offers several advantages. To begin with, automation enhances efficiency by significantly reducing processing times compared to manual methods. Automated systems can detect data patterns with a level of precision, consistency, and speed that surpasses human capability.[24] As efficiency is a key principle of good administration, it should be upheld in the execution of social security law.[25] Additionally, automation can lead to substantial cost savings for governments by reducing the need for a large workforce to investigate welfare fraud and misuse.[26] In the broader context of the welfare state, efficiency and cost savings help uphold solidarity and public confidence, both of which are undermined by wrongful benefit claims. Preventing and sanctioning abuse is therefore essential to preserving the system's integrity and ensuring that welfare mechanisms remain fair and sustainable. In the Dutch city of Rotterdam, the adoption of risk-scoring models was presented as a progressive step, promising mathematical objectivity and fairness, which aligns with the view that those deemed undeserving of benefits should be sanctioned.[27]

However, the use of automated systems in sanctioning benefit recipients raises several legal and ethical concerns. First, although these systems are typically semi-automated and involve some degree of human oversight, they have the potential to perpetuate bias and discrimination, while diminishing human autonomy, as their capacity for independent decision-making is reduced.[28] In many instances of algorithmic governance, human discretion has been shifted to the design and configuration of decision-making systems or to the review of cases flagged by algorithms for further scrutiny.[29] Automated fraud detection systems disproportionately target specific groups by assigning higher 'risk scores' to individuals based on characteristics beyond their control, such as nationality, language, or place of residence.[30] This selective scrutiny raises serious concerns about fairness, as individuals who meet certain risk criteria and receive 'high scores' are disproportionately investigated and punished for even minor irregularities in their records, while others engaging in fraudulent behaviour remain undetected due to lower risk scores, thus avoiding

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23 M. Marabelli, S. Newell, and V. Handunge, 'The Lifecycle of Algorithmic Decision-Making Systems: Organizational Choices and Ethical Challenges', 30(3) *The Journal of Strategic Information Systems* 2, 2021.

24 S. Ranchordás, 'Empathy in the Digital Administrative State', 71 *Duke Law Journal* 1341, 1358-1371, 2022.

25 Commission Decision (EU) 2024/3083 of 5 December 2024.

26 Vonk, *supra* note 6, p. 194-195.

27 Constantaras et al, *supra* note 3.

28 A. Korinek, 'Integrating Ethical Values and Economic Value to Steer Progress in Artificial Intelligence' in M.D. Dubber, F. Pasquale and S. Das (eds) *The Oxford Handbook of Ethic of AI*, Oxford University Press, 2020, p. 475, 487; B. Green, 'The Flaws of Policies Requiring Human Oversight of Government Algorithms', 45 *Computer Law and Security Review*, 2022, p.1; T. Carney, 'The Automated Welfare State' in Z. Bednarz and M. Zalnieriute (eds) *Money, Power and AI. Automated Banks and Automated States,* Cambridge University Press 2023, p. 93.

29 D.A. Elyounes, ''Computer Says No!': The Impact of Automation on the Discretionary Power of Public Offenders', 23(3) *Vanderbilt Journal of Entertainment and Technology Law,* 2021, p. 451.

30 Spijkstra, *supra* note 11, p. 29-33.

scrutiny.[31] Despite appearing objective, these systems may rely on flawed parameters that, in practice, reinforce systemic biases.[32] Second, opaque algorithms prevent citizens from understanding why they were flagged and from effectively challenging decisions that affect their benefits. This opacity may be intentional by the algorithm's creator or user, a result of technical illiteracy, or due to a mismatch between human reasoning and mathematical optimisation.[33] In many cases, individuals are unable to understand, or even access, the data used.[34] As these algorithms are primarily designed to detect fraud, rather than assist citizens, the lack of transparency may be deliberately embedded in the algorithm's design, or decisions regarding its implementation may intentionally restrict access to prevent facilitating fraud.[35] Furthermore, due to technical illiteracy, it is difficult for both benefit recipients, administrative agencies, and courts to understand how the algorithm works, making it equally challenging to identify potential discriminatory patterns arising from optimisation purposes.[36] Third, the functioning of these algorithms must be understood within the broader context of an increasingly repressive welfare system.[37] While introducing a 'human in the loop' may seem to address opacity and algorithmic bias, both organisational and personal imperatives motivate welfare fraud investigators to identify behaviours they encounter as meeting the standards of proscription.[38] Consequently, this system penalises not only intentional fraudsters but also individuals who make minor administrative errors, thus undermining the balance between citizen's rights and obligations.[39]

This has been observed in practice in Sweden, Denmark, and the Netherlands. In all cases, predictive algorithms demonstrated bias, labelling certain benefit recipients as 'high risk' based on their ethnicity. In the Dutch city of Rotterdam, additional factors such as gender, age, and language ability also influenced risk assessments, whereas in Sweden, gender, income, and education were among the criteria for flagging recipients. Moreover, opacity was a common feature of the predictive algorithms used in all three countries. In Sweden and Denmark, the systems were deliberately kept opaque to prevent fraudsters from evading detection.[40] In Denmark, citizens also had no means of understanding how their personal data was used in the monitoring process, while certain groups were disproportionately targeted.[41] Similarly, in Rotterdam, the algorithm

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31 Alston, *supra* note 8, p. 11, 21-23.

32 Ranchordás and Schuurmans, *supra* note 20, p. 29-30.

33 J. Burrell, 'How the machine 'thinks': Understanding opacity in machine learning algorithms', 3(1) *Big Data and Society*, 2016, p.1.

34 Marabelli, Newell, and Handunge, *supra* note 23; Haitsma, *supra* note 7, p. 65-66.

35 M. Zajko, 'Automated Government Benefit and Welfare Surveillance', 21(3) *Surveillance and Society,* 2023, p. 252; Custers, *supra* note 5, p. 5.

36 Burrell, *supra* note 33, p. 4.

37 M.F. Bouwmeester, 'System failure in the digital welfare state: Exploring parliamentary and judicial control in the Dutch childcare benefits scandal', 44(2) *Recht der Werkelijkheid,* 2023, p. 32; G. Vonk, *Welfare state dystopia as a challenge for the right to social security*, Inaugural Lecture, Maastricht University 2024, available on: https://doi.org/10.1177/13882627251321174.

38 S. Headworth, 'Broke people, Broken Rules: Explaining welfare fraud investigators' attributions', 23(1) *Punishment and Society*, 2020, p.24; Green, *supra* note 28.

39 Ranchordás, *supra* note 24.

40 Amnesty International, *supra* note 2, p. 71; Granberg et al, *supra* note 1.

41 Jørgensen, *supra* note 6, p. 133; Amnesty International, *supra* note 2, p. 52-62.

was opaque, preventing benefit recipients from comprehending how their data was processed.[42] However, the nature of this opacity varied: while the algorithmic outcomes remained opaque in all cases, the city of Rotterdam was transparent in disclosing the code behind its algorithm, whereas Sweden and Denmark refused to provide insight into their models.

3. The Principle of Equality of Arms in Article 6(1) ECHR

Article 6 ECHR guarantees the right to a fair trial, a fundamental provision that ensures justice within the legal systems of countries party to the Convention. This right must be 'practical and effective'.[43] As part of this right, Article 6(1) ECHR guarantees fairness, which includes the principle of equality of arms, a public hearing, and a reasonable length of proceedings. The principle of equality of arms, the focus of this article, requires a fair balance between the parties, ensuring that each party has a reasonable opportunity to present their case, including their evidence, without any substantial disadvantage of a party vis-à-vis the other party.[44]

The principle of equality of arms applies to both civil and criminal cases.[45] The civil limb, under Article 6(1), applies to benefit sanctions, while the criminal limb, covering Article 6(1-3), applies to punitive sanctions. A case is considered civil if it concerns 'civil rights and obligations', a concept interpreted autonomously under Article 6(1) ECHR.[46] Therefore, Article 6 ECHR applies whenever a dispute involves civil rights and obligations, regardless of the parties' status, the nature of the domestic legislation, or the jurisdictional authority involved.[47] This means the civil limb can extend to disputes governed by administrative law, including those under the jurisdiction of administrative authorities.[48] In *Feldbrugge v. the Netherlands* and *Deumeland v. the Federal Republic of Germany,* the ECtHR confirmed that article 6(1) ECHR applies to proceedings concerning social security benefits, recognising them as affecting civil rights and obligations.[49] It is now widely accepted that Article 6(1) applies to social security benefits, including benefit sanctions.[50] While the principle of equality of arms does not automatically apply to the administrative preliminary procedure, it is particularly relevant in judicial proceedings, as the standards for the preliminary procedure in domestic administrative law do not necessarily fall within the scope of the equality

42 Constantaras et al, *supra* note 3.
43 ECtHR 5 April 2018, appl. no. 40160/12 (*Zubac v. Croatia),* paras 76-79.
44 ECtHR 12 May 2005, appl. no 46221/99 (*Öcalan v. Turkey),* para 140.
45 ECtHR 27 October 1993, appl.nNo. 14448/88 (*Dombo Beheer B.V. v. the Netherlands),* paras 32-33.
46 ECtHR 28 June 1978, appl. No. 6232/73 (*König* v. *Germany),* paras 88-89; see also European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Civil Limb,* 2024, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_civil_eng, accessed 12 May 2025.
47 ECtHR 16 July 1971, appl. no. 2614/65 (*Ringeisen v. Austria),* para 94.
48 ECtHR 23 October 1985, appl. No. 8848/80 (*Benthem v. the Netherlands),* paras 35-44.
49 ECtHR 29 May 1986, appl. No. 8562/79 (*Feldbrugge v. the Netherland*), paras 27-40; ECtHR 29 May 1986, appl. No. 9384/81 (*Deumeland v. Germany),* paras 60-74.
50 ECtHR 26 February 1993, appl. no. 13023/87 (*Salesi v. Italy),* para 19; ECtHR, 5 October 2000, appl. no. 33804/96 (*Mennitto v. Italy),* paras 27-28.

of arms under Article 6(1) ECHR.[51] Criminal cases fall under the 'criminal limb' of Article 6 ECHR.[52] Punitive sanctions imposed on benefit recipients, even if classified under domestic administrative law, are considered criminal in nature. For criminal proceedings, the pre-trial procedure is included, as the Court considers criminal proceedings as a whole, including the inquiry and investigation stages.[53] While both benefit and punitive sanctions are subject to the principle, the Court recognises that the rights of individuals accused of a criminal offence require greater protection than those of parties in civil proceedings.[54]

A breach of the principle of equality of arms arises when one party enjoys significant advantages, such as greater access to relevant information, a dominant position in the proceedings, or considerable influence over the court's assessment,[55] with the first of these being the focus of this article. In the context of welfare sanctioning, access to relevant information is important in order to reveal the reasoning behind decisions, as it is essential for benefit recipients to understand the basis of a sanctioning decision in order to have a fair opportunity to present their case effectively. This includes access to their case file and reports necessary for preparing a defence, as both parties should have the opportunity to review and respond to all relevant procedural documents.[56] With respect to the reasoning, adequate justification of decisions is an essential component of the right to a fair trial. Decisions at first instance should be sufficiently motivated to allow parties to determine whether or not to pursue legal remedies.[57] Additionally, in administrative proceedings, the principle is implicated when the reasons provided by the administrative authority are too summary and general to allow the appellant to effectively challenge a decision.[58] Furthermore, the lack of information in a case file, such as the verification of the integrity of data used, may justify seeking an examination by an independent expert.[59] Regarding expert opinions, the principle may also apply to decisive documents produced by experts appointed by the administrative court, particularly when the expert's assessment concerns technical matters and the question posed to the expert aligns with that before the court.[60] Similarly, the principle is relevant when administrative authorities rely on expert opinions to provide guidance on matters beyond the court's expertise. In such cases, the court should ensure equality by offering appropriate safeguards, such as consulting an independent expert.[61]

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51 ECtHR 18 March 1997, appl. No. 21497/93 (*Mantovanelli v. France)*; see also DWM Wenders, *Doorwerking van de beginselen van behoorlijke rechtspleging in de bestuurlijke voorprocedures*, PhD thesis, Maastricht University, 2010, p. 11, 293-304.

52 European Court of Human Rights, *supra* note 46.

53 ECtHR 20 October 2015, appl. no. 25703/11 (*Dvorski v. Croatia*), para 76.

54 ECtHR 11 July 2017, appl. no. 19867/12 *(Moreira Ferreira v. Portugal (No. 2),* para 67.

55 ECtHR 24 July 2003, appl. no. 44962/98 (*Yvon v. France),* para 37.

56 ECtHR 18 March 1997, appl. no. 22209/93 (*Foucher v. France*).

57 EHRM 27 September 2001 (*Hirvisaari vs. Finland).*

58 ECtHR 22 September 1994, appl. no. 13616/88 (*Hentrich v. France),* para 56.

59 ECtHR 26 September 2023, appl. no. 15669/20 (*Yüksel Yalçinkaya v. Turkey),* paras 332-333.

60 ECtHR 18 March 1997, appl. no. 21497/93 (*Mantovanelli v. France)*; ECtHR 11 December 2008, appl. no. 34449/03 (*Shulepova v. Russia),* para 64.

61 ECtHR 8 October 2015, appl. no. 77212/12 (*Korošec v. Slovenia*), paras 51-57.

Ultimately, the ECtHR must assess whether the proceedings as a whole can be deemed unfair.[62] This means that defects in the objection phase can be remedied during the appeal stage. The ECtHR acknowledges that perfect equality cannot always be ensured, as a privileged position for prosecuting authorities may be justified to protect the legal order. However, this should not result in an undue disadvantage for the other party.[63] It is therefore essential to ensure that no party has substantial advantages.

4. An Analysis of Digital Welfare Systems and the Equality of Arms

The increasing use of automation in welfare sanctioning raises important questions about its impact on the principle of equality of arms. Scholars argue that, in criminal law, reliance on opaque algorithmic systems can undermine the fair balance between parties the principle seeks to protect.[64] A key concern is that such reliance creates disparities in knowledge and access to information between administrative agencies and citizens, restricting affected individuals' ability to challenge decisions effectively.[65] The principle of equality of arms safeguards benefit recipients, whose position is increasingly affected by predictive algorithms in welfare sanctioning within a more repressive enforcement system. It is therefore essential to assess whether the use of automation in welfare sanctioning upholds, weakens, or reinforces the procedural protections afforded to individuals under this principle.

With regard to access to information as an element of the principle of equality of arms, individuals must be able to review and respond to all procedural documents in order to prepare an effective defence.[66] The growing role of automation in social security investigations and the subsequent sanctions has introduced large datasets and complex algorithms into the decision-making process, which can significantly hinder this ability. The opacity of many algorithmic systems often prevents individuals from accessing or understanding the data used, the operation of the algorithms involved, or the rationale behind the decisions made, as illustrated in the cases of Sweden, Denmark and the Netherlands. In many cases, the reasons provided to benefit recipients are insufficiently detailed, making it difficult for them to understand why they were flagged and to challenge the decision effectively.[67] By contrast, administrative agencies possess far greater resources to access and interpret these algorithmic systems, mitigating any potential technical illiteracy, and have already relied on them in making sanctioning decisions. While the ECtHR has acknowledged that absolute equality between parties cannot always be ensured, one party must not be placed at an undue disadvantage. The inability of benefit recipients to access or comprehend the full basis of a sanctioning decision

62 ECtHR 18 January 2017, appl. no. 61838/10 (*Vukota-Bojic v. Switzerland*), paras 91-100.
63 ECtHR 6 April 2006, appl. no. 46917/99 (*Stankiewitcz v. Poland),* paras 68-69.
64 Vervaele, *supra* note 5, p. 124; Quattrocolo et al 'Technical Solution', *supra* note 5; Quattrocolo 'Artificial Intelligence', *supra* note 5.
65 Custers, *supra* note 5, p. 2-4.
66 ECtHR, 18 March 1997, appl. no. 22209/93 (*Foucher v. France).*
67 Marabelli, Newell, and Handunge, *supra* note 23; Haitsma, *supra* note 7, p. 65-76.

conflicts with this principle, as it risks rendering the right ineffective and impractical, potentially undermining the fairness of the proceedings.[68]

The opacity of automated systems also makes it difficult to detect bias and discrimination. These systems frequently assign higher risk scores to recipients based on characteristics such as nationality, sex, or place of residence. While automated systems offer unmatched efficiency and speed, their parameters are not neutral.[69] Moreover, access to the functioning of these algorithms is often restricted, and risk scores are kept confidential, making it difficult to identify discriminatory patterns.[70] This opacity has two significant consequences. First, certain benefit recipients are placed under heightened scrutiny based on discriminatory criteria, subjecting them to disproportionate investigations that can intrude upon their personal lives and increase their likelihood of being sanctioned, often for minor irregularities. These are often individuals in vulnerable positions that are not commonly involved in information technology systems, further exacerbating the imbalance between them and administrative agencies.[71] Second, this selective sanctioning creates a loophole whereby some individuals who may actively engage in fraudulent behaviour, evade scrutiny entirely.

It is important to recognise that the factors negatively affecting access to information are closely linked to decisions made at various stages of algorithm development, including their design, implementation, and practical application. These systems are primarily designed to detect fraud, specifically, their design prioritises opacity, and their implementation restricts access to their workings, as authorities seek to prevent individuals from exploiting knowledge of the algorithmic process to evade detection, thereby making it easier to commit fraud.[72] Furthermore, in practical application, these systems often rely on the 'law of averages' in their predictive models.[73] As a result, individuals in particularly vulnerable positions are more likely to be selected for scrutiny, as decisions are based on statistical likelihood rather than individualised assessment. Although human oversight is intended to act as a safeguard, the primary objective of these systems remains fraud detection, meaning that decision-makers may not always maintain a neutral stance. Ultimately, decisions regarding the algorithm's design and operation may restrict access to information, obscuring discriminatory patterns and hindering benefit recipients' ability to participate on equal terms. It is upon administrative agencies seeking to deploy such technologies to identify and mitigate the associated risks, in order to prevent algorithmic discrimination.[74]

While access to information under the principle of equality of arms is essential for all benefit recipients, it is important to note that the type of sanction a recipient faces, whether a benefit sanction or a punitive sanction, can influence the application of this principle. Under the civil limb of Article 6 ECHR, when citizens face benefit sanctions,

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68 ECtHR 4 December 1995, appl. no. 23805/94 (*Bellet v. France),* para 38.
69 Ranchordás and Schuurmans, *supra* note 20, p. 29-30.
70 Alston, *supra* note 8, p. 11.
71 Alston, *supra* note 8, p. 16.
72 Zajko, *supra* note 35, p. 252.
73 Alston, *supra* note 8, p. 17.
74 Haitsma, *supra* note 7, p. 76-78.

administrative agencies and national courts have more discretion than they would enjoy under the criminal limb.[75] For instance, procedural elements such as the admissibility of evidence, the allocation of the burden of proof, and the assessment of the relevance and probative value of evidence are left to the discretion of national courts.[76] In practice, these courts may prioritise efficiency and cost savings over more robust procedural safeguards, thereby admitting evidence based on the predictive algorithms used in enforcement, which may be opaque and inaccessible, weakening citizens' ability to challenge benefit sanctions. Additionally, benefit sanctions often take immediate effect, causing harm before the individual has the opportunity to challenge the allegations of misuse.[77] This reflects an inherent tension within the sanctioning regime for misuse of benefits. While benefit sanctions aim to address non-compliance with welfare conditions and encourage behavioural change rather than to punish recipients, their impact on recipients' lives is often far-reaching and extends beyond mere behavioural correction.[78] Although proportionality must be observed, the severity of sanctions remains somewhat subjective, often involving a degree of judgment.[79] Administrative agencies could refrain from imposing a sanction if it would cause hardship for the recipient.[80] However, this discretion can also result in situations where a recipient, who may have only minor culpability due to a small or involuntary mistake, faces a disproportionate and harsh sanction, such as the complete suspension of their benefits. Therefore, it is essential for recipients facing benefit sanctions to understand the basis upon which the sanctioning decision was made. They must be informed of the reasoning behind the decisions, as administrative authorities have significant discretion. Given that benefit sanctions are not placed within the scope of criminal proceedings and do not receive the same protections, it becomes even more important to ensure transparency in the sanctioning process.[81] On the one hand, the principle of equality of arms is sufficient to address this, as it is breached when an administrative authority provides reasons that are too summary or general to effectively challenge the decision. Consequently, deficiencies in pre-trial procedures may lead to a breach of the principle of equality of arms.[82] On the other hand, the ECtHR has recognised that individuals accused of a criminal offence, and thus subject to punitive sanctions, require greater protection than parties in civil proceedings. However, it may be argued that, in light of the significant impact benefit sanctions can have on recipients, the discretion afforded to administrative agencies not only contributes to an inequality of arms through restricted access to information, but

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75 A.N. Spijkstra, 'Fairness in welfare: Applying Article 6 ECHR to benefit sanctions', 27(2) *European Journal of Social Security,* 2025, p. 1, 7, 11-13.

76 European Court of Human Rights, *supra* note 46, p. 43-44.

77 Sharon Wright, Del Roy Fletcher and Alasdair BR Stewart, 'Punitive benefit sanctions, welfare conditionality, and the social abuse of unemployed people in Britain: Transforming claimants into offenders?', 54(2) *Social Policy and Administration,* 2019, p. 278, 283.

78 E.Y. Kidron, 'Understanding Administrative Sanctioning as Corrective Justice', 51(2) *University of Michigan Journal of Law Reform*, 2018, p. 313, 345-347.

79 B. Bahçeci, 'Redefining the Concept of Penalty in the Case-law of the European Court of Human Rights', 26(4) *European Public Law,* 2020, p. 867, 879-888.

80 D. Pieters, *Social Security: An Introduction to the Basic Principle,* Kluwer Law International, 2006, p. 118.

81 Spijkstra, 'Fairness in welfare', *supra* note 75, p. 12-13.

82 ECtHR 22 September 1994, appl. no. 13616/88 (*Hentrich v. France*) para 56.

also places these agencies in such a dominant position in the proceedings that it creates an imbalance between the parties.

While expert opinions are common in social security law, particularly in work incapacity assessments, algorithmic systems create new grounds for consulting independent experts, such as verifying data integrity in sanctioning decisions to uphold the equality of arms.[83] A longstanding asymmetry of knowledge exists, reflected in courts' reliance on expert evidence in complex cases, with computational modelling now seen as the final stage of this trend.[84] The ECtHR has already acknowledged the influence of expert opinions, affirming that the principle of equality of arms applies when decisive documents produced by experts appointed by an administrative court concern technical matters that align with the questions posed before the court.[85] As writing and reading code and the design of algorithms is a specialised skill, this principle is particularly relevant to the use of predictive algorithms in welfare sanctioning, as these algorithms play a central role in selecting benefit recipients for investigation and informing subsequent sanctioning decisions, which the court must later review.[86] For administrative authorities relying on expert opinions, the court should ensure equality by compensating for any imbalance by appointing an independent expert.[87] This highlights the need for a more active, *ex officio* role for the court, as deficiencies in the appeal phase must be rectified, given that proceedings should be considered as a whole.[88] However, for reasons similar to how the equality of arms is affected by automation in criminal proceedings, these measures to ensure fairness can be compromised if access to algorithmic processes is hindered by intellectual property restrictions or confidentiality concerns. In such cases, even an independent expert appointed by the court may struggle to validate the automated systems used, making it difficult to identify and address any potential imbalance between the parties.[89] This is often the case with predictive algorithms used in welfare sanctioning, where decisions about implementation may deliberately withhold access to the algorithm to prevent facilitating fraud.[90] This is illustrated by the cases of Denmark and Sweden, as these countries were unwilling to provide full insight into their algorithmic models. Besides restricting access to information, this may also be interpreted as administrative agencies having a considerable influence over the court's assessment, as they determine whether to withhold access to the algorithmic models used in decision-making, thereby undermining the principle of equality of arms. It is therefore argued that in this era of rising automation, courts must be better equipped with knowledge of technological matters to effectively address these issues.[91]

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83 ECtHR 26 September 2023, appl. no. 15669/20 (*Yüksel Yalçinkaya v. Turkey*) paras 332-333.

84 Quattrocolo et al 'Technical Solution', n. 5.

85 ECtHR 18 March 1997, appl. no. 21497/93 (*Mantovanelli v. France).*

86 Burrell, *supra* note 33, p. 2-4.

87 ECtHR, 8 October 2015, appl. no. 77212/12 (*Korošec v. Slovenia*).

88 ECtHR, 24 June 1993, appl. No. 14518/89 (*Schuler-Zgraggen v. Switzerland*) para 52, 66; see also R. Koenraad, 'Deskundigen in het Nederlands bestuursrecht. Rechterlijke controle van bestuursoptreden dat op deskundigenadvisering is gebaseerd' in *Preadviezen 2017 Vereniging voor de vergelijkende studie van het recht van België en Nederland,* Boom Juridisch, 2017, p. 69.

89 Quattrocolo et al 'Technical Solution', *supra* note 5.

90 Zajko, *supra* note n. 35, p. 252; Custers, *supra* note 5.

91 Custers, *supra* note 5.

5. Conclusion

This article highlights the need for strong procedural rights for benefit recipients. Access to information in welfare sanctioning proceedings is significantly influenced by the use of automated systems, directly affecting the principle of equality of arms. Administrative agencies not only choose to deploy these systems and possess greater resources to understand and operate them, but they also are in a position to withhold access to algorithmic models and risk scores, often while providing benefit recipients with insufficient reasoning for their decisions. This requires extra attention for courts, also when expert opinions are involved. Consequently, recipients facing benefit sanctions may find themselves in a particularly precarious situation, as administrative agencies are granted a degree of discretion under the civil limb of Article 6 ECHR. The use of predictive algorithms can reinforce bias and discrimination, yet their opacity makes it challenging for benefit recipients to identify and challenge such injustices. While automation offers advantages such as efficiency, cost savings, and accuracy, administrative agencies may prioritise these benefits over the potential risks. Transparency, accessibility, and the use of context-specific data could help mitigate these risks, but current practices suggest otherwise. As demonstrated in the cases of Sweden, Denmark, and the Dutch city of Rotterdam, the algorithms deployed are designed to predict fraud by assigning risk scores to benefit recipients. The prevailing repressive climate reflects the perception that welfare should be reserved for the 'deserving', evidenced in the imposition of stringent conditions and an intensified focus on welfare sanctioning.[92]

However, the necessity of this perspective is questionable, as welfare fraud may not be as widespread as often suggested.[93] Building on Alston's analysis, rather than obsessing over fraud, cost reduction, sanctions, and market-driven efficiency, the emphasis should shift to how technological advancements could be used to transform welfare budgets, ensuring an improved standard of living for the vulnerable and disadvantaged.[94] This would both reinforce the principle of equality of arms and promote a fairer, more humane welfare system in a broader context. Without such a shift, benefit recipients will continue to find themselves in a game they never chose to play – one where the highest scores come at the greatest cost.

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92 Spijkstra, *supra* note 11.
93 Dobson, *supra* note 22.
94 Alston, *supra* note 8, p. 21-23.

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Compensation, elevation and participation: galvanising qualitative standards for the fundamental right of social security

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Abstract: Social rights have developed in response to 19th-century laissez-faire capitalism. They have given rise to an interventionist welfare state that purports to liberate people from the whims of the market, making use of a plethora of social transfers. Legal doctrine on the right to social security reflects this 'rationale of decommodification' by focusing on the promotion of a benefit system which is 'available, accessible and adequate'. However, with such a system, the welfare state accumulates more and more powers. These may turn against the very people whom it is designed to protect, sometimes with devastating effects for individual claimants. Recent scandals in a number of countries have shown how the ideal of the welfare state may turn into a 'dystopia'. Legal doctrine pertaining to the right to social security will have to face this challenge. It must be accompanied by stronger qualitative guarantees that protect individuals from social bureaucracy. This contribution proposes three qualitative guarantees of individual treatment to enhance interpretation of the right to social security: compensation, elevation and participation. These standards are not alien to the right to social security, but in mainstream thinking are often given only secondary importance. Now they need to be dusted off and placed centre stage.

Keywords: Social rights, right to social security, dystopia, repressive welfare state, compensation, elevation, participation

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1. Introduction

The focus of this contribution is on welfare state dystopia. I reserve this term for the alienation and oppression of benefit recipients by the social security system. It refers to a dysfunctional system which turns against the very citizen which it is supposed to help.

There are things in social security that go well. There are things that go wrong. In the slipstream of the many social security scandals that have occurred in different parts of the world, a collective soul-searching exercise is going on. How is it possible that the welfare state has lost its human dimension? How can it be restored?

In this article I shall discuss the contribution of the fundamental right of social security to combatting welfare state dystopia. When a lack of respect for individual social security beneficiaries is seen as a human rights problem, usually it is the civil and political rights that are called upon. Less often so social rights and least of all the right of social security itself. It is as if legal doctrine adopts the stance that the right is only there to ensure that a system of social benefits is introduced, regardless of the consequences for citizens. That would seem to be a bit an anomaly. Yet, to a certain extent, that is the legal interpretation of the right of social security as it stands today.

Meanwhile, this article will suggest that civil and political rights are unable to fully address the ills of welfare state dystopia either. This points to a gap, a human rights void. Perhaps this gap is another explanatory factor for the lack of judicial protection citizens experience in the wake of the many social security scandals. Such a lack of protection points to a failure of the system of checks and balances in the administrative state. If it is true that there is a human rights void, then such failure is not just that bureaucrats, parliamentarians and courts are not doing their jobs properly. It is also that these officials simply do not have the normative tools to provide a proper remedy. This is a proposition this article would like to investigate further.

The central question of this contribution is how the right of social security could respond to the threat of welfare state dystopia. This right will be approached from the general perspective of the national constitutional level in interaction with the international legal doctrine as developed by human rights institutions. In reality this state practice may vary vastly from country to country, also depending on the typology of the national welfare states concerned. In the limited scope of the present article it is not possible to analyse the response of the right to social security with reference to such national and typological differences. Nonetheless, it is felt that a generic approach is warranted by the fact that in the end all jurisdictions are faced with similar challenges, although, admittedly, in some countries my suggestions will probably land on more fertile soil than in others.

The argument of this contribution is built up in three layers. The first layer will delve into the concept and characteristics of welfare state dystopia (Section 2), also paying attention to some of the drivers of this phenomenon. The second layer deals with the response of the human rights framework to the phenomenon of welfare state dystopia (Section 3). This part analyses how and why the onus of human rights protection does not currently lie with the right of social security, but rather with the corpus of civil

and political rights, such as the ones included in the European Convention on Human Rights and Fundamental Freedoms (ECHR) . In the third layer three concrete qualitative standards will be formulated to enrich the normative interpretation of the right of social security in order to better respond to the thread of welfare state dystopia. In this manner this article travels from darkness into the light (Section 4). Finally, this article will be concluded with a short reflection (Section 5).

2. Welfare state dystopia?

It there is any person that can be seen as the *auctor intellectualis* of the phenomenon of welfare state dystopia it is Franz Kafka. His book *Der Prozess* is the symbol of how a bureaucratic legal system can crush an innocent citizen with its strange, absurd logic. Kafka studied law in Prague. In 1908 he began working for the Kingdom of Bohemia's brand-new Institute for Industrial Accidents. That made him one of the first social security lawyers. He had clearly found an inspiring working environment. This did not bode well for the future of social security law.

Delving into dystopia subsequently became a passion of sociologists rather than lawyers. It was Habermas who warned us against excessive legal regulation and surveillance in the welfare state. In his view, these lead to a 'colonization of the lifeworld' of citizens: normal human relationships are polluted by impersonal bureaucratic systems.[1] As a matter of fact, Habermas did not speak of 'dystopia', but of a 'depletion of utopian energies'. That is not the same thing of course.

Those who wonder if the term welfare state dystopia is an exaggeration, only have to look at the many social security scandals that currently occur to change their mind. When the Netherlands was getting used to the testimonies of the victims of the child care benefit scandals, known as the *Toeslagenaffaire*,[2] the Australians were faced with *Robodeb*t[3] with half a million social security recipients being pursued for social security debts that turned out never to have existed. Around the same time Norway struggled with the *Nav scandal*,[4] with its miscarriages of justice resulting in prison sentences for European migrants on invalidity benefits who had not declared their absence from Norway. This was followed UK *Carer's Allowance affair*[5] leaving lower paid carers in serious financial distress with small excesses in their earnings leading to full recovery of benefits.

The list of social security scandals does not end with these examples. Major incidents have been reported in the USA, France, Serbia, Denmark and Sweden, as well as in some

1 J. Habermas, 'The new obscurity: the crisis of the welfare state and the exhaustion of utopian energies', *Philosophy and Social Criticism*, 1986, p. 1-18.
2 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.
3 Royal Commission into the Robodebt scheme 2023.
4 Blindsonen, Gransking av feilpraktiseringen av folketrygdlovens oppholdskrav ved reiser i EØS-området. Investigation by committee appointed by royal decree 8 November 2019.
5 See https://www.localgov.co.uk/The-Carers-Allowance-scandal/604.

emerging economies.[6] In the meantime, in many of these countries parliamentary inquiries have started, political heads severed and compensation schemes rolled out, paying out billions to the victims. It would be naïve to treat the scandals as isolated incidents. They rather point at structural deficiencies.

While welfare state dystopia is not a clearly defined concept, it is possible to point to certain characteristics which lie at the root of the problem. In the first place *digitalisation*. It was Philip Alston, then UN Special Rapporteur on extreme poverty and human rights, who, in his 2019 report,[7] raised alarm about the rise of a 'digital welfare dystopia' where automated technologies deepen poverty, erode individual freedoms, and undermine human rights. While digitalization is often justified as a means to improve efficiency, reduce costs, and streamline services, the report argued that the digital welfare state has serious downsides too, especially for vulnerable populations in terms of exclusion, privacy concerns, algorithmic bias and discrimination, and excessive corporate influence.

In the second place there is the *repressive welfare state* to be taken into account. Repressive welfare state policies are rooted in the well recorded trend of increasing conditionality in social security, leading a proliferation of duties for claimants, increasingly strict sanctions and recovery practices and a general disturbance of the balance between rights and obligations in social security.[8]

A third element that constitutes a characteristic of the dystopian threat, is the eminent *lack of judicial protection* citizens experience in the wake of the many social security scandals. Digitalisation and repressive welfare state policies are separate flows, which once they come together can form a torrent that drags everything along with it, including the judicial protection for individual citizens in the administrative state. Internal review procedures and judicial control often do not come to the rescue of citizens, nor are they capable of

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6 See S.H. Ranchordás, 'Empathy in the Digital Administrative State', *Duke Law Journal* 2022, 71(6), p. 1340-1389 (on the MiDAS scandal from Michigan); V. Eubanks, 'Automating inequality: How high-tech tools profile police and punish the poor', New York: St. Martin's Press, 2018 (on discriminatory welfare surveillance in Indiana); La Quadrature du Net, 'Notation des allocataires: La CAF étend sa surveillance à l'analyse des revenus en temps réel', 2024, available at www.laquadrature.net/2024/03/13/notation-des-allocataires-la-caf-etend-sa-surveillance-a-lanalyse-des-revenus-en-temps-reel, accessed 12 December 2024 (on France and Caisses d'Allocations Familiales); Amnesty International, 'Trapped by automation: Poverty and discrimination in Serbia's welfare state', Report no. EUR 70/7443/2023, London: Amnesty International, 2023 (on Serbia and social card system); Amnesty International, 'Denmark: Coded Injustice: Surveillance and Discrimination in Denmark's automated welfare state', Report no. EUR 18/8709/2024, London: Amnesty International, 2024 (on Denmark); Amnesty International, 'Sweden: Authorities must discontinue discriminatory AI systems used by welfare agency', 2024, available at https://www.amnesty.org/en/latest/news/2024/11/sweden-authorities-must-discontinue-discriminatory-ai-systems-used-by-welfare-agency, accessed 12 December 2024, and P. Alston, 'Note by the Secretary-General Report of the Special Rapporteur on Extreme Poverty and Human Rights (A/74/493), United Nations, Human Rights Council, 2019 (for some examples in emerging economies).

7 Alston, *supra* note 7.

8 L. Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity*, Durham, NC, Duke University Press, 2009; B. Watts, and S. Fitzpatrick, *Welfare Conditionality*, Routledge, 2018 and E. Kiely, and K. Swirak, 'Disciplining the poor: Welfare conditionality, labour market activation and welfare 'Fraud'', in E. Kiely and K. Swirak (eds.), *The Criminalisation of Social Policy in Neoliberal Societies*, Bristol University Press, 2022, p. 34-55.

preventing the scandals to occur. In this manner, these safeguards rather operate as a legitimation of the malpractices, pointing at failure of the constitutional system of checks and balances.[9] (Bouwmeester, 2023 and 2025).

It is the above three characteristics which form the constituents of welfare state dystopia as meant in this contribution. What emerges is a welfare state which is capable of yielding an enormous potential of power, both legal and instrumental, to enforce their will on the people. Such welfare state comes with an overload of conditions, excessive surveillance, unforgiving automated recovery practices and harsh sanctions, supported by an omnipotent, yet uncontrolled 'ICT-industrial complex'. Together these may result in excessive practices such as ones that have come to light in recent social security scandals which so adversely affect the position of individual claimants.

Welfare state dystopia is not an exaggeration and no longer just a matter of alienation, as Habermas saw it. It is a matter of oppression. A typical feature is that people are treated as invisible numbers and deprived of their dignity. Indeed, when you listen to the testimonies, the latter aspect is often emphasised by the victims of the scandals. In the end, it is not the money I had to pay back that bothers me; it is the shame of being branded a fraud, of not being able to look your neighbours in the eye, of being excluded from society, ostracized.[10]

The harsh treatment offered by the welfare state is not equally bestowed on everybody. Dystopia favours the poor, many of whom are ethnic minorities or immigrants, not necessarily intentionally but indirectly as a result of the way automated processes interact. For example, it may be the case that poor and vulnerable individuals are disproportionately subject to invasive monitoring, as part of digital fraud detection technology.[11] This is a typically painful lesson learnt from the Dutch *Toeslagenaffaire*. The victims, who had kept their plight to themselves, began to rally support for their case, only to find out that not only they, but also other participants in the public lobby, were representatives of minority groups; most of them as single mothers. As it turned out this was not a coincidence, but a result of sequential of biases operating in the system[12] It is these kind of biases which Alston referred to in his 2019 report when he warned against the exclusionary effects of digital welfare state for the poor sections of the society.[13]

A last brief remark deals with 'welfare state chauvinism'. This term is used in academic literature to capture the attitudes of radical populist parties and their electorate towards

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9 M. Bouwmeester, 'System failure in the digital welfare state', Recht der Werkelijkheid, 2023, p. 13-37 and M. Bouwmeester, B. Brink and G. Vonk (red.), *Eerlijk, eenvoudig en toekomstbestendig, Drie pleidooien voor universalisme in het Nederlandse socialezekerheidsstelsel*, Groningen, Serie Bestuursrecht en Bestuurskunde Groningen, 2023.

10 For some of the testimonies see Blind voor mens en recht, *Rapport parlementaire enquetecommissie Fraudebeleid en Dienstverlening*, Tweede Kamer der Staten-Generaal, 2024.

11 V. Eubanks, *Automating inequality: How high-tech tools profile police and punish the poor*, New York: St. Martin's Press, 2018 and Ranchordás, *supra* note 7.

12 S.H. Ranchordás, *Administrative blindness: All the citizens the state cannot see*, Inaugural Lecture, Tilburg University, 2024.

13 Alston, *supra* note 7.

the welfare state.[14] It refers to the belief that social benefits and services provided by the welfare state should be exclusively available to certain groups, often based on nationality, ethnicity, or cultural identity and reflects exclusionary attitudes toward immigrants or minorities, arguing that they should have limited or no access to welfare provisions, which are reserved for the 'native' population. Populist government feeds on clientelism,[15] it forges a bond between the state and the people, using social benefits as a tool. In doing so, the 'hard-working patriot' is readily played out against other beneficiaries, such as, minorities, certain marginalized groups and dissidents. It is submitted that the link between welfare state dystopia and welfare state chauvinism is that the latter openly advocates the exclusionary mechanisms which are unintentionally caused by the former. If that is true, minority groups have something to fear from the surge of populism that is currently taking place in many parts of the world.

2. The implications for the right of social security and other human rights

In the face of these shortcomings and threats, the welfare state should be harnessed with stronger constitutional guarantees. This brings the fundamental right of social security into focus. This right is recognised in international and European human rights treaties and in the national constitutions of most countries.[16] For many, the rationale of the right goes back to the notion of 'no food, no freedom'. In other words, true freedom cannot exist in a society where people are burdened by poverty and deprivation. This is the understanding of Roosevelt's 'freedom from want', a liberal value that underlies the post-war recognition of the right of social security.

In whatever principle social rights are vested, the legal conceptualization of the right of social security emphasizes the obligation of states to develop an infrastructure to provide social benefits, whatever form they may take.[17] This is also the view taken by human rights bodies when they attempt to articulate the content of this right, initially with a certain bias towards the historical development of social security in the Western world,

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14 W. De Koster, W. Achterberg, P. and J. Van der Waal, J., 'The new right and the welfare state: the electoral relevance of welfare chauvinism and welfare populism in the Netherlands', *International Political Science Review*, 34(1), 2012, p. 3–20 and G. Eickand C.A. Larsen, 'Welfare chauvinism across benefits and services', *European Journal of Social Policy*, Volume 32, Issue 1, 2021.

15 J.W. Müller, *What is populism?*, Philadelphia: University of Pennsylvania Press, 2016.

16 E. Riedel, (ed.), *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges*, Berlin: Springer, 2007; M. Sepulveda, and C. Nyst, *The Human Rights Approach to Social Protection*, *Ministry of Foreign Affairs of Finland*, 2012; E. Eichenhofer, 'Social security as human right, A European perspective', in F. Pennings and G. Vonk (eds.), *Research Handbook on European Social Security Law*, Cheltenham, 2015; A. Egorov, and M. Wujczyk, *The Right of social security in the Constitutions of the World: Broadening the moral and legal space for social justice*, Volume 1: Europe, Geneva, International Labour Organisation, 2016 and E. De Becker, *Het recht op sociale zekerheid in de Europese Unie*, Die Keure, 2022.

17 E. Eichenhofer, *Soziale Menschenrechte im Völker-, europäischen and deutschen Recht*, Tübingen: More Siebeck, 2012, p. 133-134.

but now also taking into account the needs and realities of countries in the developing world. In the words of the UN Committee on Economic, Social and Cultural Rights:

> 'The right of social security requires, for its implementation, that a system, whether composed of a single scheme or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies.'[18]

According to the triple-A approach of this committee, social security must thus be 'available', and furthermore 'accessible' and 'adequate'.[19]

This focus on developing a proper system for social security transfers explains the strong reliance on the legislative responsibility of governments to comply with the requirements of the right of social security. It is in the political arena that decisions have to be taken on whether to enter into the financial obligations that flow from new systems of social security benefits.

This does not mean to say that the right of social security cannot be invoked before the courts, at least not necessarily. It is true that the justiciability of the right of social security (or sometimes social rights at large) is often seen as problematic. Nonetheless, in many jurisdictions judges have found ways to protect the collective levels of protection against interferences by the legislator, offering procedural guarantees against retrenchment or defining a minimum level of protection.[20]

But even then, is this approach sufficient to keep welfare state dystopia at bay? I do not think so. That would require a stronger focus on qualitative guarantees for the respectful treatment of benefit recipients. In all frankness, legal doctrine pertaining to the right of social security does not pay much attention to such qualitative guarantees. Not that they are completely absent, but they are rather relegated to the second echelon as compared with the primary goal of rolling out a system.[21]

The lack of qualitative guarantees against mistreatment by welfare state bureaucracies can be explained in historical terms Social rights can be seen as an anti-thesis to the system of laissez faire capitalism of the 19th century. They have given rise to an interventionist welfare state that purports to liberate people from this system, by creating a system of

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18 UN Committee on Economic, Social and Cultural Rights, General comment No. 19 The right to social security (Article 9 of the Covenant), consideration 11.

19 Ibid., considerations p. 10-27.

20 De Becker, *supra* note 17.

21 An example is the requirement of Article 13(2) of the European Social Charter that persons receiving social or medical assistance should not suffer any diminution of their political or social rights. In the past, the European Committee of Social Rights has interpreted this provision as meaning that beneficiaries should not be treated as second-class citizens, simply because they are not able to support themselves. Conclusions on article 13 (ESC, No. 1, p. 65 1969). If we are looking for a value that should protect people from the evils of welfare state dystopia, this is one of the things one can come up with: not treating people as second-class citizens because they have to rely on the welfare state. But unfortunately, this qualitative strand in legal doctrine has never gained much attention. The latest text of digest of case law of the European Committee does not even mention this interpretation anymore. Cf. Digest of the case law of the European Committee of Social Rights, edition 2022.

income protection and social transfers. Legal doctrine on the right of social security still reflects this 'rationale of decommodification'; the central objective is to promote the development of a social security system which is 'available, accessible and adequate'. But now that the systems are put in the place, they run the risk of turning against the very people it set out to protect. Legal doctrine on the right of social security will have to face this challenge. It must be accompanied by stronger qualitative standards that protect people from this social bureaucracy.

In reality, however, the onus for the protection of human rights against welfare state dystopia does not currently lie with the right of social security. Rather, it is placed on the corpus of civil and political rights, such as the ones included in the European Convention on Human Rights and Fundamental Freedoms. In a way this is understandable, since these rights are there to protect citizens from state interference. It is also convenient to let the European Court of Human Rights (ECtHR) take the lead because its decisions are suitably enforceable and legally binding.

As a matter of fact, the ECtHR has responded well to the need to provide protection against an omnipotent welfare state. At the beginning of the 1980s, the number of judgments relating to social security was still very limited. Some were even convinced that the protection of the European Convention did not extend to social security because this was the domain of social rights. Now whole monographs are being written on social rights arising from the case law of the ECtHR.[22] The case law has crept into every nook and cranny of the system: from recoveries, sanctions and medical assessments to the obligation to provide shelter in case of emergency, extreme poverty and deprivation.

Yet, in whatever positive terms the proliferation of social case law of the ECtHR may be valued, it is arguable whether civil and political rights can be seen as a full substitute for social rights. As a matter of fact this is also the point of view of the ECtHR itself. Thus according to the Court, the protection of the ECHR does not extend beyond civil and political rights included in the treaty without extension to:

> 'socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living'.[23]

It must be borne in mind that the guarantees offered by the ECHR in the field of social security do not even come close to the level sought by fundamental social rights. Thus, for example, Article 3 and Article 8 ECHR are capable of invoking positive obligations for the state to offer protection to destitute citizens, thus offering the theoretical prospect of creating something of a human rights social minimum.[24] But in reality the bar for invoking these obligations is raised so high by the ECtHR that these articles are only activated in theory in cases of extreme destitution and dependency, instead of offering a

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22 I. Koch, *Human rights as indivisible rights*, Leiden: Brill, 2009 and I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge University Press, 2018.

23 ECtHR 28 October 1999, appl. no. 40772/98 (*Pancenko v. Latvia*).

24 C. O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights', August 2008, SSRN Electronic Journal 2008, (5).

decent social minimum such as the one which is required by, for example, Article 13 of the European Social Charter (the right to social and medical assistance).[25]

It must be doubted that the ECHR is in itself capable of thwarting welfare state dystopia. Limitation clauses allow for restrictions necessary in a democratic society, which give the contracting states a wide margin of appreciation in deciding how to balance individual rights and collective interests. Consequently, If welfare state policies are rooted in the public interest and clearly legislated, interferences are not necessarily seen as human rights violations. This is clearly visible in the area of privacy protection. In general, data protection law is laden with exceptions and pitfalls giving large powers to governments to process data.[26] Sometimes, the ECtHR prescribes stricter scrutiny, for example as part of the objective justification test pertaining to the principle of non-discrimination, where a very weighty reasons test is employed.[27] Nonetheless, it has to be borne in mind that group biases in social security do not always constitute clear cut cases of violation of the principle of non-discrimination; the burden of proof is not easily met when adverse treatment is related to poverty stigma and social origin instead directly to suspect criteria, such as gender or race.[28]

As a starting point (but not more than that),[29] civil and political rights are based on the notion of formal equality before the law and are therefore blind to adverse treatment of groups of disadvantaged backgrounds, be it social, economic or cultural. Social rights, on the other hand, start from such inequalities and demand that these be compensated. Since the dystopia of the welfare state targets particularly the less advantaged in society, such compensation is ultimately in safer hands with the right of social security than with civil and political rights. Or at least, the two categories cannot do without each other, which is indeed and expression of their interdependence and 'indivisibility'.

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25 ECtHR 28 July 2016, appl. no. 17931/16, (*Hunde v. The Netherlands*): 'The Court reiterates that there is no right to social assistance as such under the Convention'.

26 V. Gantchev, 'Welfare Sanctions and the Right to a Subsistence Minimum: a troubled marriage, *European Journal of Social Security*, 2020, p. 257-272 and W. Damen, 'Sounds good, doesn't work: the GDPR principle of transparency and data-driven welfare fraud detection', in Y. Jorens (ed,), *The Lighthouse function of social law*, London / New York: Springer Nature, 2023.

27 J. Gerards, 'The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination', in: M. Balboni (ed), *The principle of discrimination and the European Convention of Human Rights*, Editoriale Scientifica, 2017, available at https://ssrn.com/abstract=2875230.

28 S. Ganty, 'Poverty as misrecognition: What role for antidiscrimination law in Europe?' *Human Rights Law Review*, 21(4), 2021, p. 962–1007 and S. Jørgensen, 'Social Assistance and the end of poverty', *European Journal of Social Security*, Vol. 26 Issue 1, 2024. Jørgensen observes that while there is scattered yet growing awareness in legal scholarly circles of the subjection of those in poverty to stigma and stereotypes leading to their further exclusion, the issue of discrimination based on social origin is still only marginally addressed. For a positive exception in the framework of the ECHR she refers to a very interesting dissenting opinion of two judges in ECtHR 6 November 2017, Appl. 43494/09 *(Garib v. the Netherlands)*. Dissenting opinion of Judge Pinto de Albuquerque joined by Judge Vehabovic, paras 22–29. See Jørgensen, *supra*, p. 31-32.

29 But not more than that, as it does not rule out that according jurisprudence, societal differences must be taken into account, for example in consequence of a vulnerability approach. Cf. for example C. Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR*, Oxford: Hart Publishing, 2021.

3. New standards for the right to social security

So what are the kind qualitative standards that could help to keep the dystopian threat at bay? I propose three of such standards: compensation, elevation and participation.

3.1 Compensation

In this context the notion of compensation does not refer to the circus of paying damages to victims after scandals have occurred. I use the term to refer to the recognition that people who may be disadvantaged, vulnerable or from minority groups need to be given extra support to enable them to participate normally in society. In other words, it is about inclusion.

Compensating for inequalities is a social rights imperative. In the legal interpretation of the right of social security we can see it back in the form of a requirement to give extra protection to vulnerable groups. Thus, for example, the General Comment No. 19 on the right to social security specifically calls upon States parties to:

> 'give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, homeworkers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees.'[30]

Taking this instruction seriously is important because of the divide that exists in our modern societies between those who have sufficient economic, social and cultural capital and those who lag behind. The poor work in precarious jobs, struggle from day to day to make ends meet, face daily discrimination and are more dependent on the welfare state.

Compensation is not just a theoretical notion, It can be applied in practice. The following example may illustrate this. For a long time, the Dutch highest Administrative Court interpreted social-fiscal legislation in such a way that the tax authorities are under an obligation to always recover the full amount of unduly paid child care allowances. It was exactly this interpretation which withheld the court to offer any judicial protection to individuals who were confronted with recoveries of undue payments, leading up to the Dutch *Toeslagenaffaire* referred to above in Section 2. When the harsh consequences of the recovery practices became public knowledge the Court was forced to change its mind about this and allowed for a proportionality test.[31] This U-turn was motivated with reference to a number of empirical studies highlighting the dire situation of vulnerable citizens who incur welfare state debts. The court also mentioned a study by the Dutch

30 See for example UN Committee on Economic, Social and Cultural Rights, General comment No. 19 The right to social security (Article 9 of the Covenant), consideration 31.

31 ABRvS, 23 November 2019, ECLI:NL:RVS:2019:3535 and 3536.

Scientific Council, entitled *Weten is nog geen doen, '*knowing is not doing'.[32] This report relied on evidence that people's capacity to act rationally may be inhibited, due to life events or stress resulting from structural poverty. The report criticized the doctrine of individual self-reliance which has become prevalent in Dutch social security policies and practices. These insights inspired the court to change its mind by taking due account of the personal position and circumstances of people when determining the amount of repayments.

Subsequently, the notion of personal capacities (in Dutch: *doenvermogens*) also served as a touchstone for a government initiative to screen the relevant legislation on possible hardship for vulnerable groups, in an attempt to restore 'the human dimension' of the welfare state. This led to a number of legislative initiatives to soften the recovery and sanction rules and to strike 'a new balance' in the rigid social assistance scheme.[33]

The example shows how the principle of compensation for adversity may work. The only caveat is that the highest administrative court never presented its new approach as a mandatory consequence of applying the constitutional right of social security. In this way the new approach is merely based on an acquired insight into human behaviour. In my view, taking into account someone's personal capacities when adjudicating adverse benefit decisions (recoveries, sanctions, etc.) should not merely be a court's prerogative. It must be seen as a hard constitutional requirement following from the right of social security.

3.2 Elevation

The standard of elevation as I understand it requires that conditions imposed on a beneficiary should always be conducive to his or her development and position. This principle is particularly relevant to remedy the trend towards conditionality in social security, which is one of the determinants of the welfare state dystopia This trend feeds on the neo-liberal fixation with educating people to become self-reliant, responsible consumers. If not voluntarily, then by disciplining them with all sorts of behavioural conditions enforced by sanctions.[34]

In reality, however, not all people are able to live up to the lofty liberal ambitions: the long-term unemployed, single mothers in precarious employment, people with mental or physical problems, people in debt, drop-outs, victims of domestic violence, the homeless, people struggling with addiction, etc. For them, it is necessary to check that the conditions imposed are not merely disciplinary, but are genuinely helpful in improving their situation.

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32 Wetenschappelijke Raad voor het Regeringsbeleid, *Weten is nog geen doen, Een realistisch perspectief op zelfredzaamheid*, WRR-rapport, 2007, nr. 97.

33 G. Oldenhuis, and G. Vonk, 'Eerder een worsteling dan een vrijpartij, de zoektocht van wetgever en rechter naar de menselijke maat in de sociale zekerheid', *Tijdschrift voor recht en arbeid,* 2024/103.

34 E. Kiely,and K. Swirak, 'Disciplining the poor: Welfare conditionality, labour market activation and welfare 'Fraud'', in E. Kiely and K. Swirak (eds.), *The Criminalisation of Social Policy in Neoliberal Societies*, Bristol University Press, 2022, p. 34-55.

Elevation is not codified as a social rights principle as such but it frequently pops up in the legal doctrine with regard to the right of social security, for example in the digest of the case law of the European Social Rights Committee.[35] Another example where the principle played a role, is a ruling of the Czech Constitutional Court of 27 November 2012[36] in which the court struck down a rather draconic mandatory work scheme that had been introduced by the Czech government for the unemployed. According to the court the obligation to accept an offer of public service did not serve to limit social exclusion, but to intensify it, and it can cause those performing it a humiliation to their personal dignity. This was deemed to be contrary to, *inter alia*, the right to social security as part of the Czech constitution.

Elevation can be tested in an *abstract way* by examining the rationality of policies on the basis of empirical evidence. An example of this is the 2019 sanctions case,[37] in which the *Bundesverfassungsgericht* examined the strict sanctions regime in the German social assistance system. It contains a meticulous analysis of the state of research on the impact of harsher sanctions on people's behaviour. According to this research, there is insufficient evidence that harsher sanctions are effective or beneficial for the development of beneficiaries. For Germany's highest court, this was another reason to declare the sanctions unconstitutional.

Elevation can also be tested in *concrete terms*. If, for example, it is considered justified to oblige recipients of social assistance to do unskilled work in order to gain work experience, this does not mean that such an activity can be imposed on an experienced 60-year-old builder who has become unemployed due to unforeseen circumstances. He does not need to gain work experience, he is simply being punished for being unemployed.[38]

3.3 Participation

I use this term to denote the involvement of benefit recipients and other stakeholders in policy development and implementation. The voice of the citizen should be taken into account, if not directly (by means of an individual standard), then indirectly through forms of representation by trade unions, client councils or interest groups (by means of a collective standard).

The need for participation appears in the case law of judicial and quasi-judicial social rights institutions.[39] It is also defended in literature. For example, Anja Eleveld c.s.

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35 Cf Digest of case law of the European Committee of Social Rights 2022, comments on Article 13(1) ESC.

36 Available in English at http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl_US_1-12.pdf, accessed on 13 December 2024.

37 BVerfG 1 BvL 7/16, 05 November 2019, cf. Gantchev 2020.

38 Case taken from Rb. Zeeland-West Brabant 25 februari 2013, ECLI:NL:RBZWB:2013:BZ5157.

39 For a general overview see G. Mossisa, *A Re-examination of Economic, Social and Cultural Rights in a Political Society in the Light of the Principle of Human Dignity*, Cambridge and Antwerp: Intersentia, 2020. For examples of participation in the preparation of social security cut backs, cf. ECSR Compaint No. 76/2012 Federation of employed pensioners of Greece (IKA –ETAM) v. Greece; ECSR Complaint No. 111/2014, (*GSEE v. Greece*).

have recently written about the importance of 'voice' for social assistance recipients who have to perform compulsory work.[40] Indeed, in this manner, participation operates as qualitative standards of individual treatment. Long before her, and in a broader context, the legal philosopher Henry Shue wrote about it in his ground breaking 1980 book on social rights.[41] Shue worked not only from the proposition 'no food, no freedom', but also from the reverse proposition 'no freedom, no food'. It is precisely this reverse proposition that is being explored in the present article. Shue selects participation as one of the freedoms that serves as a basic right, meaning that it cannot be reduced in the name of providing a sufficient livelihood. In this manner participation rather operates as a standard of good governance. It is based upon the notion of 'nothing about us without us.'

Indeed, in a welfare state which is capable of unleashing so much power and influence over ordinary lives, citizens involvement cannot solely rely on formal parliamentary democracy alone. A right to vote every four years is not enough. Not allowing for other forms of individual or collective participation could even framed in terms of a 'democratic deficiency'.[42]

Admittedly, taking into account the client's viewpoints in policy and administration is not always an easy task. Governments must be open to experiments. There is no fixed way and there are many ways that lead to empowerment of social security recipients, ranging from individual service contracts to town hall meetings, co-designing, deliberative polling, citizens' assemblies. Also, a social rights collective complaints procedure with an independent authority of experts could be a useful tool to strengthen participation rights of citizens. The procedure set up on the European Social Charter serves as perfect precedent for such a novel approach, as a hybrid between hard core classical adjudication and deliberative supervision.

As a final note, it is interesting to speculate whether direct involvement of stakeholders in the administration of social security impacts upon the prevalence of welfare state dystopia. Such direct involvement exists for unions and employer organisations in countries which allow for self-government in social insurance, for example Belgium, Germany and Italy.[43] In other countries, such as the UK and the Netherlands, these stakeholders do not have a direct, formalized role in governance comparable to Germany's *Selbstverwaltung* system; they are at best indirectly involved through a system of advice and consultation. Could the relative quiet on the front of social security scandals which seems to exist in countries like Belgium, Germany and Italy, also be explained by the stakeholder participation? Without further evidence this cannot be confirmed. Further research would come highly

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40 A. Eleveld, 'Conclusions', in A. Eleveld, T. Kampen and J. Arts (eds.), *Welfare to Work in Contemporary European Welfare States – Legal, Sociological and Philosophical Perspectives on Justice and Domination*, Bristol: Policy Press, 2020.

41 H. Shue, *Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy*, Princeton University Press, 1980.

42 S. Oomens, and E. Vossen, 'Het democratisch gebrek in de sociale zekerheid', in E. Hirsch Ballin et al (red.), *De toekomst van de sociale zekerheid: de menselijke maat in een solidaire samenleving*, Den Haag: Boom Juridisch, 2021, p. 249-258.

43 U. Becker, 'Sharing power with employers and employees: a tried and proven form of functional decentralisation in Europe', in G. Vonk, and P. Schoukens, (eds), *Devolution and Decentralisation in Social Security; a European Comparative analysis*, The Hague: Eleven International Publishing, 2020.

recommended, as it could shed more light on the causes of – and the remedies against welfare state dystopia.

4. Conclusion

Combatting welfare state dystopia is not the sole responsibility for the right of social security. All human rights have a role to play: the prohibition of discrimination, the right privacy and many other rights as vested upon the underlying value of human dignity and supported by the principle of proportionality. But also the right of social security has to respond to the contemporary threats in the welfare state. For that purpose I have formulated three qualitative standards of individual treatment to augment the interpretation of the right of social security. As such these standards are not totally alien to the right of social security; they only need to be taken from the shelf and put in the limelight.

Taking the three standards seriously will also place a burden on the three branches of state power. Some may see this at as a disadvantage in particular from the point of view of protecting the administration against a further increase of the workload. But here is a relation with the kind of social security system that we are building. For example, universal unconditional forms of social security require much less supervision of the claim as conditional means tested schemes do.[44] Those who are worried about the capacity of administration should take this to heart.

There may also be those who worry that a new focus on qualitative standards of individual treatment takes away from collective values underlying to social security, such as solidarity. Indeed, individual claims may conflict with the general interest. But does such conflict arise here? I rather doubt that. System standards on availability, accessibility and adequacy may well go hand in hand with qualitative standards for individual treatment. Thus, it is difficult to see how. for example, the compensatory principle discussed above, taking into account socio-economic and cultural differences, cannot be in line with the principle of solidarity.

The right of social security, as reinterpreted in this article, must be applied by the legislature, the administration and the judiciary, both nationally and in the EU by the Court of Justice, which has so far been rather reluctant to apply this right.[45] In the light of the potential for judicial review, we may wonder: are these standards freedoms or are they promotional social principles? Perhaps they are a bit of both. That would be a perfect outcome of the resolution of the conflict between the liberal state and the social state: a synthesis. As if the clash between negative and positive freedom, as theorised by Isiah Berlin in his famous essay on two concepts of liberty,[46] were finally overcome by an internal human rights dialogue. It is to be hoped such a little twist in the interpretation of human rights will lead to a strong welfare state with respect for the individual.

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44 Bouwmeester et al, *supra* note 10.

45 F. Pennings, 'Does the EU Charter of Fundamental Rights have Added Value for Social Security?', *European Journal of Social Security*, 24(2), 2023, p. 117-135.

46 I. Berlin, 'Two concepts of liberty', *Four Essays On Liberty*, Oxford University Press, 1969, p. 118-172.

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Social security as a constitutional imperative: contemporary challenges

*Danny Pieters**

Abstract: The right to social security can be found in national constitutions of European countries, in the European Charter of Fundamental Rights and the European Social Charter. However there is no correlation between the level of social security protection and the presence or not of a constitutional right to social protection. The article then examines the question what a constitutional provision relating to social security actually does. We subsequently discuss a number of hurdles a right to social security has to overcome in order to be effective. We conclude that the constitutional enshrinement of social security may be very valuable, but should be used only when this is appropriate in a democracy governed by the rule of law.

Keywords: Right to social security, Stand-still, Minimal protection, Judicial self-restraint, Democracy

1. The fundamental right to social security

The right to social security can be found in national constitutions of European countries, in the European Charter of Fundamental Rights and the European Social Charter (Revised). Sometimes the right to social security is not mentioned as such, but the constitution mentions the right to some social security benefits. Some examples of national constitutional provisions include:

> Article 23 of the Belgian Constitution we read: 'Everyone has the right to lead a life in keeping with human dignity. To this end, the laws, federate laws and rules referred to in Article 134 guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them. These rights include among others: [...] 2° the right to social

* The reflections expressed in this article are of a personal nature and do not reflect necessarily the opinions of the institutions I am affiliated to.

> security, to health care and to social, medical and legal aid; [...] 6° the right to family allowances.'
>
> Article 38 of the Italian Constitution provides rights to social security benefits: 'Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons are entitled to receive education and vocational training. Responsibilities under this article are entrusted to entities and institutions established by or supported by the State. Private-sector assistance may be freely provided.'
>
> The Spanish constitution in its Article 41 states that 'The public authorities shall maintain a public Social Security system for all citizens which will guarantee adequate social assistance and benefits in situations of hardship, especially in cases of unemployment. Supplementary assistance and benefits shall be optional.' And in the first paragraph of Article 43: 'The right to health protection is recognised.'
>
> In Article 2 of the Constitution of the Republic of Slovenia we read that 'Slovenia is a state governed by the rule of law and a social state'. The commitment to social security is then repeated in Article 50 of the constitution on the right to social security. Article 51 proceeds with recognising a right to health care. Subsequent articles guarantee special protection of disabled persons (Article 52), as well as family, motherhood, fatherhood, and especially children (Articles 53 to 56).

On the European level we can refer to provisions of the European Charter of Fundamental Rights and to the European Social Charter. In the European Charter of Fundamental rights we read in Article 34:

> '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 Community 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 Community 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 Community law and national laws and practices.'

Article 35 continues with a right to health care. The European Social Charter (Revised) recognizes the right to protection of health (Article 11), the right to social security (Article 12) and the right to social and medical assistance (Article 13).

2. The fundamental right to social security versus the reality of social security

Often the right to social security was introduced in the constitution at the moment of a radical breach with the past. The mentioning of social fundamental rights in the constitutions of Italy[1] after the collapse of fascism and of Portugal[2] or Spain[3] when democracy was established, can be given as examples. Often these social fundamental rights express the will of these new democracies to establish a social state for all. We shall come back to this 'for all' in opposition to 'for the workers' later.

If we compare the level of social security protection, – and we know how difficult it is to evaluate this level –, and the presence of a fundamental right to social security in the constitution of the same state, we can only observe that we find no correlation whatsoever. Take Scandinavian countries, lacking constitutional provisions on social security, but with extensive social security protection; take some countries of the South with elaborate constitutional rights to social security, but a less developed social protection system. This might even make us think that the presence of a constitutional provision on social security functions somewhat as a compensation, be it a compensation in words and programmatic statements, rather than in reality. However, we also find countries with a well-established social security system and also a right to social security, for example in Belgium. We should therefor conclude that there is no correlation between the level of social security protection and the presence or not of a constitutional right to social protection.

3. What does a constitutional provision relating to social security actually do?

Let us take a closer look at how social security, and more precisely the right to social security appears in national constitutions. The constitutional involvement with social security can take various shapes. At a rough estimate, four kinds of constitutional provisions can be distinguished with regard to social security:[4]

- very general provisions proclaiming the state as a 'social state';
- provisions merely confirming the existence of social security, social insurance and/or social assistance;
- fundamental social rights
- articles attributing competence in terms of social security.

Obviously, one and the same constitution can contain several of these kinds of constitutional provisions; it is even possible for one and the same provision to change its kind or to

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1 Dating back to 1947.
2 Dating back to 1976.
3 Dating back to 1978.
4 See D. Pieters, *Social Security : An Introduction to the Basic Principles*, Kluwer Law International, 2006, p. 9-11.

become multi-dimensional in the course of time. But we will first provide a clarification of each of the kinds involved.

Some constitutions contain provisions, often to be found at the beginning, which describe the fundamental character of the state. In a number of countries, these provisions stipulate that the state is (among other things) a 'social' state.[5] Still, in legal doctrine, different sorts of responses are given to those stipulations: whereas in some countries legal doctrine and jurisprudence will attach great importance to such a constitutional 'social-state-principle',[6] in other countries identically worded provisions will go by largely unnoticed.

There are also constitutions which explicitly confirm the existence of social security, social insurance and/or social assistance, even though none of the contents of these issues are mentioned. Provisions of this kind are not merely restricted to social security as such: they can also apply to a certain administrative body, to forms of financing, and the like. They are meant to provide nothing less than an 'institutional guarantee': as such they cannot be completely repealed nor are they likely to be negatively affected in their essence. Provisions of this kind are somewhat related to the constitutional provisions which accomplish a constitutional protection for the institution of marriage.

Fundamental social rights to benefits go a step further: they promise the beneficiaries that they can claim social protection. We shall hereafter focus on these social fundamental rights and more specifically on the constitutional right to social security.

Some constitutions deal with social security so as to provide Parliament with some guidelines which, in principle, are not meant to be legally enforceable; they ought to 'inspire' the legislator.[7] Sometimes these guidelines may also appear in the form of a fundamental right to social security, and thus call for our attention here.

Sometimes, constitutional provisions providing institutional guarantees or fundamental social rights have also proved to be important in relation with the possibility to change previous social security law and thus to deviate from acquired rights or rights in way of

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5 The German constitution reads in its article 20 § 1: 'The Federal Republic of Germany is a democratic and social federal state.' The French constitution of reads in the first sentence of its first article: 'France shall be an indivisible, secular, democratic and social Republic.'

6 This is certainly the case for the German 'Sozialstaatsprinzip', which has lead to an extensive legal literature.

7 It might be interesting to refer here to article 45 of the Irish Constitution, stating: 'The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.
1. The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life. 2. The State shall, in particular, direct its policy towards securing that the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs. [..] .....' Notwithstanding the 'guidance'-character of these provisions, Irish courts have been using these. provisions in their decisions.

acquisition. Stand still provisions concerning social security can be mentioned here.[8] We shall deal with them in more depth later on.

The provisions attributing competence in terms of social security are of a totally different nature. They can, as a matter of fact, in turn be subdivided into provisions attributing competence on the subject of social security to the central/federal legislator and the legislators at regional and local levels, and into provisions dealing with the attribution of these competences over the legislative power, the executive power and the autonomous institutions.

Let us just mention here that the need for an intervention by the legislator may be seen as a substantial protection of the social security rights and that the possibility of substantial reform of social security schemes, say the pension scheme, by-passing the Parliament, as is possible in France, can be seen as a weakening of the protection provided by the constitution.

If we now focus on the right to social security in national constitutions or in European instruments, and examine their legal meaning, we can find that the right to social security can be seen as, and was in the past often considered, an (empty) constitutional declaration from which citizens cannot possibly derive subjective rights/entitlements. However, this has somewhat changed in more recent decades.[9] Some provisions proved their legal value, in marginal situations or for the benefit of marginalized individuals. It concerns those provisions in terms of fundamental social rights which warrant a certain social minimum (e.g. the right to medical assistance, or to a general subsistence level) and/or which are supported by a complete network of infra-constitutional arrangements. The right to social security also showed its meaningfulness in combination with the equality and non-discrimination principles. Since the welfare state entered heavy weather, the right to social security became more and more important as a protection against downsizing social security rights. The interpretation of the right to social security as a stand-still provision gained more and more attention, the idea that the state should gradually improve the social protection (as expressed in § 3 of Article 12 of the European Social Charter) became more obsolete.

It cannot be the purpose of my talk to examine the right to social security in all its legal implications. Not so long ago prof. Eleni De Becker made in her doctoral thesis[10] an excellent overview of the meaning of the right to social security in the European Union, taking into account the national constitutions of the Member States, the European Charter of Fundamental Rights and the European Social Charter. What I would like to do, is to temper the enthusiasm which seems to prevail these days, enthusiasm to have social security mainly governed by the fundamental right to social security and its implementation by the courts, rather than by the social security legislator. The challenges I shall mention

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8 Article 23 of the Belgian Constitution contains such stand still provision.

9 This could already be noticed four decades ago and has been an ongoing trend. Compare in this respect, the comparative doctoral theses of myself in 1985 (D. Pieters, *Sociale Grondrechten op Prestaties in de grondwetten van de landen van de Europese Gemeenschap*, Kluwer Rechtswetenschappen, 1985) and of Eleni De Becker in 2019 (E. De Becker, *Het recht op sociale zekerheid in de Europese Unie,* Die Keure, 2019).

10 De Becker, *supra* note 9.

hereafter, call for more caution when intruding in social security legislation on the basis of a fundamental right to social security.

4. The challenges

If we consider social security as a constitutional imperative, a first hurdle to take is to know what is meant by 'social security'.[11] For sure we all have in our national legal orders definitions of what social security is, or more often, we enumerate the various risks and benefits we consider to compose the notion of social security. That defining by enumerating is also the technique used in international social security instruments. A real internationally agreed definition of what is social security is absent though. So, if we see social security as a constitutional imperative, we have to realise that the notion itself of social security varies from country to country and from time to time. One may say that also the contents of the traditional freedoms, such as the freedom of religion or the freedom of speech , also undergo changes over time and may somewhat differ from one country to the other; yet the basic idea of these freedoms is much more solid and well-established than is the case for the constitutional right to social security. Does social security include health care? Family allowances? Social assistance? Study grants? War pensions? I cannot give an answer which would be valid for all countries. This makes it difficult to perceive social security as a universal human right. Or to put more gently, we have to realise that a right to social security will always have to be understood in the context of the given legal order, national or international.

This finding has in some countries led people to understand the right to social security as the duty to maintain the social security (arrangements) as they are, or at least not to reduce the benefits. We are than confronted with the right to social security as a constitutional stand-still imperative. Some even go a step further and advance the idea of an obligation to raise progressively the system of social security to a higher level. Let us examine both social security as a stand-still obligation and as a duty to raise progressively social security protection. But, let me first point out another problem surrounding the right to social security: the question who is the subject of these rights. If we look at the constitutional provisions dealing with the right to social security, we may find in line with what is usual in human rights, that 'everyone' has the right to social security. Sometimes however the right to social security is formulated as a right of the own citizens or as a right of the workers etc. It is rather typical that after the fall of fascism in a number of countries, rights to social security (or specific benefits, such as a right to pension etc.) are proclaimed as the right of all persons or of all workers, whereas at the same time the social security system was limited to social insurances for the wage earners.[12] Universal social insurances or social insurances for the self-employed were not in place … still this was not seen as an

11 On the notions of 'social security', see Pieters, *supra* note 4, p.1-8.

12 Article 38 (2) of the Italian constitution reads: 'Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment.' Yet self-employed workers have had to wait many years for yet an incomplete coverage of the mentioned risks.

immediate legal problem. Sometimes it was believed that soon a transition to universal social insurances would be made; sometimes one did not see the sense of social security for people who chose to take economic risks, i.e. the self-employed. Even in international social security instruments it remains often unclear whether the right to social security of workers also benefits self-employed workers, platform workers or even workers in the informal economy. Is the right to social security also to benefit persons not allowed to stay and/or to work in the country? So if we consider social security as a constitutional imperative, it remains to be examined to the benefit of whom? Simplistically saying that as a human right, social security should be there for anyone, will not do.

If we consider social security as a constitutional imperative of stand-still, a number of questions require an answer. First of all, we need to understand what is being protected: the actual benefits? or broadly the over-all social protection? including the viability of the existing system over time or looking only at the benefit side? In a human rights context, these questions are usually approached from the position of the social security beneficiary: does he or she gets less benefit or less social protection as compared with the previous situation? The question remains of whether we should take an individualistic perspective? In other words, do we have to apply the stand-still obligation comparing what the (complaining) individual concretely got before and after the legislative change? Or may we take a broader view and compare the over-all social protection of citizens before and after? Again in a human rights approach an individualistic approach seems appropriate, but is such an approach fit to evaluate the evolution of social security, i.e. of a solidarity system?

When considering social security as a constitutional stand-still obligation, we also have to define the starting point: do we compare the social security entitlements before and after a legislative change? Or do we compare the situation at the moment of the constitutionalisation of the right to social security and the situation now, per hypothesis after a legislative change in social security? If we answer in the first direction, we obviously get close to an approach where legislative changes only can improve the social security situation of the concerned individual and never reduce the entitlements, in other words we get close to an approach of a duty to progressive improvement, we shall discuss this later. If we answer the question in the second way, that is we take as a starting point for comparison the moment social security was elevated to the constitutional rank, we risk freezing social security in concepts, norms and levels of many years ago.

Of course social security as a stand-still constitutional imperative may also operate in a more nuanced way: the situation of the concerned individual is than taken as a starting point, a comparison made between the situation before and after the legislative change, but changes which reduce the entitlements of the concerned individual are accepted if there are good grounds of general interest dictating the legislative change. Sometimes this is combined with checking whether the legislative change, though acceptable on grounds of general interest, does not impose an unreasonable burden on some citizens. These more moderate readings of social security as a constitutional stand-still imperative, still use a number of broad concepts, such as 'good grounds of general interest' and 'unreasonable burden' which need filling in in the concrete situation.

Let us now address the ever increasing social protection paradigm; the right to social security as a duty to endeavor to raise progressively the system of social security to a higher level, as we find it e.g. in Article 12 § 3 of the European Social Charter. One can of course question what is meant by a 'higher level of the system of social security', but we have to accept it was clearly the vision of the drafters of this provision that always more people should enjoy better benefits at more accessible conditions. After World War II we have lived in a period where indeed the social benefits have improved progressively, but since half a century this evolution has not continued. One has realized there is price tag to the improvement of the benefits side and that this price tag had to be paid by someone, now or in the future. If we can understand that the social security system needs continuous assessment and improvement in order to make it more efficient and effective, as is the case for all public services, the imperative of Article 12 § 3 European Social Charter could still be valid, but not as a paradigm that always more for more people under less conditions should be possible.

A next challenge presented by the recognition of social security as a constitutional imperative, is that it risks unbalancing the social security system on the basis of one-sided judicial decisions.[13] Indeed, when courts are called upon to test social security legislation, this is most often the result of a concrete complaint of one person or group of persons, i.e., on the basis of an individual complaint. The courts will than most often be bound to the issues raised in that case. If, e.g., the complaining persons or group consider the cuts too harsh upon them in comparison with other persons or groups, the court will indeed check whether the fundamental rights of that specific person or group were violated and provide redress to that person or group. It is, however, questionable whether social security (policy) decisions can be taken from such an individual perspective; social security decisions and policy require a collective vision, implying taking a much broader perspective. Democratic decision-making will indeed respect the fundamental rights of any person or group, but at the same time will need to consider the public interest, the general welfare, not only of the present generation, but also of those to come. A decision in an individual case may be *in se* justified from an individual fundamental right perspective, but what if it jeopardises the logics or structure of much broader arrangements, and hence, also fundamental rights of others? Let us also not forget that individual complaints will always be directed to pay less and/or to get more, never to obtain the opposite; the decision of a judge in the concrete case can as a consequence only result in a status quo or in more rights and less duties for the complaining parties. The fundamental right should of course not be set aside in such cases, but the judiciary should avoid undermining the broader democratically decided solutions. Courts cannot in social security issues merely look at the case before them, without considering the broader fallout of what they will be deciding. Moreover, when considering this broader perspective, they should not put themselves in the place of the political decision-makers, but rather align themselves on the vision of these political responsible persons in order to find an acceptable solution to the case.

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13 See on this issue: D. Pieters, 'Social Security and Democracy', in M. Accetto, K. Skrubej and J.H.H. Weiler, J.H.H. (eds.), *Law and Revolution. Past experiences, future challenges*, Routledge, 2024, p. 229-234.

A specific problem arises when social security entitlements are recognized on the basis of the constitutional right to social security, whereas this implies important additional costs, for which no budget has been foreseen. In some countries this may even collide with constitutional provisions guarding the budget equilibrium. One may object that judicial decisions on the basis of other fundamental rights may also have an important budgetary impact; one needs to admit however that this will more seldom be the case when fundamental freedoms are at stake. When rights to a positive action by the state are involved, as is mostly the case for the right to social security, the budgetary impact will most often be important, unless the intervention on the basis of the right to social security is marginal or effects only marginal groups of persons. More in this line of thought later on.

It is with some diffidence that I would like to point at another problem with using the constitutional imperative of social security to solve concrete cases. I am afraid to have to establish that constitutional judges, be they on the national or on the European level, sometimes have a rather overhauled conception of what social security is today.[14] So we find quite some decisions where we read that a person has to be granted a benefit on the basis of the constitutional right to social security, because he or she has paid contributions for the benefit scheme. In social security thinking we have in most schemes abandoned the direct linkage between contribution and benefits long ago. Yet some constitutional judges continue to base decisions on such a link. Perhaps a reason for doing so is that in most constitutional courts, be they national or European, judges only seldom come from a social security background.

5. How to use the constitutional imperative of social security?

Do all the previous challenges indicate that it would be better to refrain from using a constitutional imperative of social security to challenge actual social security legislation?

In order to answer this question, it may be useful to examine how in the past decades both national constitutional courts and the European constitutional courts (Court of Justice of the EU and European Court of Human Rights) have examined social security legislation and decisions in light of the fundamental rights their respective constitutional instruments protect. These decisions could be related to the protection of classical freedom rights, such as the freedom of religion; more often though, they applied the equality and non-discrimination clauses of the constitutional instruments upon social security. In some cases, the constitutional protection of property was even extended to social security entitlements or even expectations. The fundamental right to social security was sometimes opposed to the actual social security legislation. The question arises if the judiciary in challenging statutes does not take over part of the social policy responsibilities of parliament and government, which from a democratic perspective may be questionable. In so far as the conflicts are based on rather concrete fundamental freedoms

[14] Until recently, for instance, the Belgian Constitutional Court linked systematically the notion of social security in the constitution to the contributory character of the benefit scheme.

(e.g., the religious freedom), the danger of a judiciary invasion of the legislative power is very limited. However, when on the basis of very broad and open fundamental rights, such as the right to social security, concrete statutory social security policy decisions are overturned, the problem is more apparent.

Here the PhD thesis of Eleni De Becker[15] concerning the right to social security in the European Union may provide us with some interesting information as to how the national and European constitutional courts have in fact operated until now. In her rich doctoral thesis, she discerns three major trends:

- the right to social security is used by the courts in order to protect against change,
- a minimal protection, even a subjective right to social assistance may be derived from the right to social security,
- courts often use the right to social security in combination with the prohibition of discrimination.

In a way, the second and third trend De Becker identifies are in line with what we could concluded 33 years earlier with relation to the fundamental social rights to benefits. In my PhD thesis,[16] I found that the social fundamental rights to benefits only got their real relevance for people who socially, economically or culturally are marginalised or in case of important societal changes jeopardising the very essence of these rights. Social fundamental rights to benefits only protect the essence of the benefits they guarantee, not the way they are being implemented: that is the task of the lawmakers. In cases where persons or groups are being marginalised, they may have been forgotten or excluded when implementing the social fundamental rights; in such cases, the social fundamental right may, sometimes in connection with the equality principle, cause the 'gap' to be closed in favour of the marginalised person. In my conclusions I considered it less a task of the social fundamental rights to protect against change, as I considered the preservation of the social nature of the state, and thus of a good social security, primordially the task of the whole people and their representatives. The first trend De Becker identifies does not fundamentally contradict this, but points at a number of good practices political decision-makers should take into consideration.

What should we think from a democratic perspective of the way constitutional courts examine social security legislations and governmental policy decisions in the light of the right to social security? It is important to first and foremost recognise the self-restraint of the courts: they are always stressing that in the first place, legislation and policy-making is the province of parliament and government, not of the courts. When they do intervene to guarantee a right to a minimal (social assistance) benefit in order to be able to live a decent human life or when they combine the non-discrimination clause with the right to social security, they are completely in line with what can be expected from courts invigilating fundamental rights in a democratic society.

The first tendency established by De Becker, i.e., the use by the courts of the fundamental right to social security to monitor legislative or executive changes and more specifically

15 De Becker, *supra* note 9.
16 Pieters, *supra* note 9.

cuts in social security, calls for more attention from a democratic perspective. Certainly, also here courts will often stress the broad competence of parliament and politically responsible persons to make policy choices; courts claim merely the competence to marginally check the way these choices are being made. We can ask ourselves whether this is still in line with the separation of powers many constitutions proclaim. Of course, any policy decisions, and thus cuts in social security, need to be well motivated, but should the lack of motivation be sanctioned by a judge or by the electorate? Of course, one could argue that if social security is to provide security, the legislator of the day may not break commitments of its predecessors, but what if these commitments were unreasonable or turn out not to be tenable under present conditions? We are aware that the mainstream literature welcomes the proactive approach of courts to protect against social security regression, but we would like to call for more caution here. The danger that on the basis of a constitutional imperative of social security, the way to judicial activism or a 'gouvernement des juges' is paved, is not unthinkable. Most constitutional courts already stress the self-restraint they observe in this respect, and that is good. Let them continue to show this self-restraint, also in the name of a dynamic democracy. Let them stay away from judging the options taken by government or parliament, but let them merely remediate when hypotheses have not been considered by the politically responsible persons, when legislative gaps have remained, etc. If the courts go further and become too much of an active player in the political debates concerning social security reforms, we believe they lack the democratic legitimation to do so and transgress the principle of separation of powers.

6. Conclusion

The constitutional enshrinement of social security may be very valuable, but should be used only when this is appropriate in a democracy governed by the rule of law. Using the right to social security indiscriminately to found any claim to benefits is dangerous for democracy, for the social security as a solidarity system and thus at the end also dangerous for the fundamental rights of all.

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