EUI WORKING PAPERS IN LAW

EUI Working Paper LAW No. 91/20

The Constitutional Protection of Social Rights: Some Comparative Remarks

LUIS MARÍA DÍEZ-PICAZO
and
MARIE-CLAIRE PONTHOREAU

European University Institute, Florence

Please note
As from January 1990 the EUI Working Paper Series is divided into six sub-series, each sub-series is numbered individually (e.g. EUI Working Paper **ECO** No 90/1).

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

The Constitutional Protection of Social Rights: Some Comparative Remarks

LUIS MARÍA DÍEZ-PICAZO
and
MARIE-CLAIRE PONTHOREAU

BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in December 1991
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

FOREWORD

This paper simply reproduces a presentation made at a conference on "Union Rights in an E.C. and Central European Perspective" (Certosa di Pontignano, 6-7 December 1991), held within the celebrations of the 750th Anniversary of the University of Siena and organised by Prof. Silvana Sciarra. With her kind permission, we publish it now as an E.U.I. Working Paper.

It should be noted that the word "liberalism" is used throughout the essay in its politico-legal meaning, i.e. as an abbreviation for expressions such as "rule of law" or "Rechtsstaat". It would be misleading to understand it in its economic or "laissez faire" sense. On the other hand, judicial decisions are cited in the usual way of the corresponding jurisdiction.

We warmly thank Alison Tuck not only for having typed our manuscript, but also for having made our English less unintelligible.

CONTENTS

FOREWORD

This paper simply reproduces a presentation made at a conference on "Union Rights in an E.C. and Central European Perspective" (Certosa di Pontignano, 6-7 December 1991), held within the celebrations of the 750th Anniversary of the University of Siena and organised by Prof. Silvana Sciarra. With her kind permission, we publish it now as an E.U.I. Working Paper.

It should be noted that the word "liberalism" is used throughout the essay in its politico-legal meaning, i.e. as an abbreviation for expressions such as "rule of law" or "Rechtsstaat". It would be misleading to understand it in its economic or "laissez faire" sense. On the other hand, judicial decisions are cited in the usual way of the corresponding jurisdiction.

We warmly thank Alison Tuck not only for having typed our manuscript, but also for having made our English less unintelligible.

CONTENTS

I. SOCIAL RIGHTS: A CONCEPTUAL APPROACH

It is well known that the idea of social rights is alien to the classical tradition of bills of rights, developed by liberal revolutions in the 18th and 19th centuries. The first documents that proclaim social rights appeared only after World War I and they reflected a heterogeneous ideological background. In fact, it is possible to identify three different lines of political thought at the origins of the concept of social rights.

First of all, there is the communist idea of "real freedom" (understood as an absence of material needs), that is opposed to the so-called "formal" or "bourgeois" liberties. An expression of this idea can be found in the several texts promulgated as a consequence of the 1917 Revolution, first only in the Soviet Union (1918 Working and Exploited People's Declaration of Rights, 1936 Constitution) and later also in other countries. These declarations, however, are absolutely irrelevant for comparative constitutional law analysis, not only because their ideological foundations radically differ from those of liberal-democratic countries, but especially because communism implied a frontal rejection of the cornerstone of constitutionalism: the limitation and control of political power through legal rules. The use of the word "constitution" in a communist context is, at best, merely rhetorical and lacks binding force whatsoever.

Secondly, it is necessary to consider those declarations of social rights that, though born from left-wing revolutionary movements, did not mean a break with the fundamental principles of democracy and rule of law. With the antecedent of the 1917 Mexican Constitution, this is remarkably the case of the German Constitution of Weimar of 1919. Undoubtedly, this

document is highly valuable as the starting point in the process of acceptance of the idea of social rights by European constitutionalism. Yet it is scarcely significant for the understanding of present legal problems, because it was not completed with adequate mecanisms of judicial enforcement (in substance, judicial review of legislation) and above all because the cruel totalitarian gap prevented its continuity and development.

Lastly, there is the rise of the welfare state after 1945. Here the background is more complex, because Keynesian economic doctrines (in favour of active state intervention in economic and social life in order to avoid recession) concur with certain conceptions of justice that, differently from what had happened in the above-mentioned experiences, do not have socialism as their only source of inspiration. Christian and populist-conservative ideals have also contributed to this purpose. It is within the welfare state that the notion of social rights has enjoyed development in genuine legal terms, through the introduction of adequate techniques of protection and the advantage of a broad (though never absolute) political consensus.

As anybody can see, the historical meaning of social rights is far from being linear. They prove themselves to be equally problematic as a legal category, even if the scope of analysis is circumscribed to liberal-democratic countries. This is basically due to the fact that the very concept of social rights is an equivocal one. Nowadays it has become usual to speak about the different "generations" of human rights: the first generation would cover civil rights of individual autonomy and political rights of participation (thus safeguarding the basic elements both of liberalism and democracy), whereas the second generation would include those rights intended to guarantee some material and spiritual conditions of life.

The assumption is that the efficacy and meaning of classical rights cannot be fully achieved without them. It is this second generation that is normally identified with social rights. Incidentally, it is worthwhile underlining that in the last decades reference is being made to a third generation of rights, characterised by the collective nature of the interests at stake (environment, artistic patrimony, etc.).

Despite any possible consideration about its historical accuracy, it is obvious that this generational viewpoint implies a substantial classification of human rights. In other words, to think of rights in terms of generations means, among other things, to classify them according to the type of interests or values they protect. Hence, precisely, the above-mentioned equivocation: independently from the protected object, rights can also be classified according to their legal structure, that is the kind of entitlement they provide. Thus, there is a widespread reflex thought that compels towards a simple definition of social rights as entitlements to obtain services from public authorities in order to improve material and spiritual conditions of life. Nevertheless, the criterion of the protected interest or value and that of the legal structure or entitlement do not always coincide. Not all the rights that can be defined as social from a substantial or axiological point of view consist of the entitlment to be provided with certain services, nor (and this is extremely important) do they necessarily consist only of this. Suffice to mention some elementary examples. It cannot be seriously denied that, given their axiological contents, trade unions' freedom and right to strike belong to the category of social rights, in that they are wage-earning workers' essential weapons to fight in order to improve their conditions of life; but, from the point of view of their legal structure, it is self-evident that they do not imply

any service, but are closer to classical rights. It is clear, on the other hand, that the right to education consists primarily of being admitted to educational facilities and enjoying them, or that the right to health consists basically of the possibility to use the health service; but it is not to be doubted that these welfare rights can have certain collateral aspects which are structurally similar to rights of individual autonomy and political participation, such as the claim to choose a type of religious and moral education (or, even, a kind of school) and to take part in the administration of schools, or the claim to be informed and consulted by doctors before certain medical treatments are undertaken. This scene will be more complex if one considers that nowadays some classical rights are deemed to be incomplete without certain services. For instance, the right of access to justice and due process of law does not only include the possibility to defend one's own interests before law courts, but also that this possibility is not impaired by economic obstacles. This is why institutions such as legal aid or public counsel are so deeply rooted in contemporary legal civilization.

The distinction between the structure of rights and the values they protect is important, at least for three reasons. First, it shows that the classification of human rights into generations is not absolute and that all of them share the same function, namely to constitute minimum standards of human dignity in a civilised community. Secondly, the suitability of remedies for the protection and enforcement of rights must not be assessed in relation to the value they incorporate, but in relation to their structure, that is the type of entitlements they provide for individuals. As will be seen later, many of the problems usually connected to social rights derive from the fact that they are conceived only as rights to

services. Yet this feature neither fits all social rights, nor belongs only to them. Thirdly, the political dispute on the expediency and scope of having a delcaration of social rights derives as well from the lack of differentation between these two aspects. So this distinction can be useful in order to make a balanced evaluation of social rights and a solid contribution to their legitimacy in contemporary constitutional law.

Before concluding this conceptual approach to social rights, it is advisable to make reference to a further source of equivocation. When speaking of social rights (and, more generally, of human rights), it is not unusual that they are looked at in a uniform way, as if the legal system in which they function and the level they occupy in such a legal system were irrelevant. Thus, in international law, human rights are nothing more than some objective values that states are bound to respect and safeguard within their jurisdiction under the penalty of international responsibility. This is also their meaning even in those more developed and sophisticated regional systems that, like the European Convention on Human Rights, allow individuals direct access to independent transnational tribunals; regional systems, moreover, whose level of protection of specifically social rights is undoubtedly low. This, of course, is not intended to mean that under other perspectives (creation of a European "ius commune", moral and persuasive authority, etc.) the experience of the European Convention is not highly appreciable. On the contrary, in domestic law, the legal force of human rights depends basically on two circumstances: whether they are or not guaranteed at a constitutional level and whether the constitution itself establishes mechanisms of judicial enforcement in order to safeguard its own supremacy. Despite the fact that morally and politically it can make sense to discuss social rights in an abstract way, a legal analysis (and

especially a comparative constitutional law one, like this) demands taking into consideration legal realities homogeneous enough to be comparable.

The question under examination is the constitutionalisation of social rights, i.e. how some social rights have become "fundamental" rights or rights with a constitutional status, as well as what are the legal and political problems posed by it. So the scope of the analysis has to be limited to those liberal-democratic countries whose constitutions include some provisions in this respect (or, at least, do not prevent some interpretative development in this direction) and are provided with some mechanism of judicial review of legislation. Anglo-American constitutionalism is of little interest in this field: in the case of the United Kingdom, because it lacks a constitutional bill of rights; in the case of the United States, because (except for some welfare principles concerning the fairness of criminal procedure, which are clearly collateral here) the Supreme Court has always been reluctant to give the U.S. Constitution interpretations that cannot be justified, in one way or another, with the so-called original intention of the framers. Therefore it is convenient to concentrate on certain Western European legal systems (Italy, France, Germany, Spain) which, apart fron the above-mentioned characteristics, also share the circumstance that their constitutions were passed after World War II, that is in the period when the welfare state was established.

II. SOCIAL RIGHTS IN CONTEMPORARY WESTERN EUROPEAN CONSTITUTIONALISM

1. Italy

The 1948 Italian Constitution contains a wide catalogue of fundamental rights. It can claim to be among the most progressive constitutional charters. It had been discussed in the Constituent Assembly whether to include social rights in a separate declaration, because some deputies (such as P. Calamandrei) wanted a "programmatic" nature of social rights clearly stated and opposed to the fully binding character and direct enforceability of all the other constitutional provisions. Yet this proposal was rejected because the majority wished to affirm (though without including a social state clause) the social aspect of the new political and social order.

The Constituent Assembly's special concern for social rights can be appreciated in its effort to systematise them. Social rights are built upon the concept of human personality and within the framework of social relationships that take place in the enterprise, the school, the family and other human groups. Thus, apart from the state duty to make effective the right to work (Art. 4), the Constitution regulates social rights in Titles II and III of Part I, under the headings "Ethical and Social Relations" and "Economic Relations" (Arts. 29 to 47). The declaration of social rights is thus exhaustive in the fields of work, education, family and health.

There is no doubt, therefore, that the Italian Constitution has given social rights a constitutional status. The level of protection they are provided with largely depends on how detailed the wording of the corresponding constitutional provisions is. So purely programmatic

provisions (such as Art. 31, which foresees state economic incentives for families) are not judicially enforceable. This leads to a basic distinction among fundamental rights in Italian constitutional law: those which are directly enforceable and those whose applicability needs some previous infrastructure. In other words, the former do not need any legislative intervention, whereas the latter depend on legislation to implement the service of which they consist. When this is the case, the Constitution determines who is the holder of the right, but leaves it to legislative discretion to define how and when the service can be supplied. For instance, the right to health can have different levels of protection depending on which of its aspects is considered: as the right to psychical and physical integrity, it is a subjective right directly guaranteed by the Constitution, but as the right to medical treatment it is a service right depending on the health system facilities and rules of organization (see Sent. no. 455, 1990).

So the Italian Constitutional Court has been inclined to define several social rights as genuine and directly enforceable rights. This is the case of the right to holiday, the right to a fair remuneration for work, trade union freedom both as a freedom to create and organize unions and to adhere or not to them, the right to social security, etc. When on the contrary legislative action is needed, the Constitutional Court controls whether the legislature degrades constitutional provisions or avoids implementing them. The Court is usually aware of the objective obstacles faced by the legislature on implementing social rights and, particularly, how it is necessary to allocate the existing financial resources through a balance of the several interests at stake. It has held that the implementation of these rights must be accomplished "gradually and according to a reasonable

balance with the other interests that enjoy an equivalent constitutional protection, as well as with the actual and objective availability of the necssary funds; a balance that, at any event, is subject to the review of this Court, through criteria suitable to preserve legislative discretion" (Sent. no. 455, 1990). The criteria so far used by the Court are three, namely the already mentioned principle of graduality of legislative innovations, the principle of provisional constitutionality in matters in need of legislative reform (decision 826/1988) and the principle of unconstitutionality of incomplete legislative implementation of social rights.

This latter criterion, that has so far been applied only once, had led the Court to declare a new right not explicitly foressen by the Constitution. In a 1987 ruling (Sent. n. 215, 1987), the Italian Constitutional Court has substituted a new norm for the legislative rule under challenge, in order to make it consistent with constitutional requirements. Actually, according to the original version of the law, handicapped students' access to secondary and university education "will be" encouraged. The Court, considering this committment too vague, has changed the future tense into the present ("is encouraged"), thus introducing a directly enforceable right on the basis of constitutional provisions in favour of disabled persons (Art. 34 and 38).

To declare other new or unwritten social rights, the Court has made recourse to Art. 2 of the Constitution, which in an abstract formulation recognizes the inviolable rights of man. This has been the case with the right to housing. The Court held that the law on succession in rent contracts was unconstitutional insofar as it did not grant succession rights

to unmarried partners (even if separated, when they have common children) and to "de facto" separated spouses (decision 404/1988). On other occasions, instead of using such a general provision as Art. 2, the Court adopted a less bold method: it has "enlarged" the contents of rights explicitly declared by the Constitution. For example, Art. 4, that recognizes the right to work, has been interpreted as comprehensive of the right not to have unreasonable limitations imposed in access to certain jobs, the right to choose a profession or the right not to be arbitrarily dismissed (see, as a recent example, Sent. no. 97, 1987).

Summing up, one can say that the Italian Constitution proves to be a "living" document, due to the activism of the Constitutional Court, which refuses to consider constitutional interpretation as a once-and-for-all task.

2. France

The 1958 French Constitution does not expressly declare any social rights. This is due to the fact that the Constitution of the present Fifth Republic was not drafted by any constituent assembly, but by the last government of the Fourth Republic presided over by General De Gaulle. After consultation with an "ad hoc" constitutional committee, the project was approved in a referendum. This text deals only with the organisation of state powers and lacks a bill of rights. This lacuna can be understood under the pressing circumstances of 1958 (the situation in Algeria and its repercussions on home politics) and the hurry with which the new Constitution had to be prepared. In order to facilitate consensus regarding the problem of fundamental rights, it was decided that the Preamble to the

Constitution made reference to the 1789 Declaration of Rights of Man and Citizen and to the Preamble to the Constitution of 1946.

The legal force of the 1789 Declaration had already been discussed under the Third and Fourth Republics. This question was raised again after 1958, but in a radically different context since the present Constitution establishes an organ with the specific task of reviewing the constitutionality of legislation. It is true that this organ, the Constitutional Council, had been intended to be, in the drafters' minds, a watchdog of the constitutional division of law-making powers between the legislature and the executive. However, the Council itself had changed its role from that of a "cannon pointed at Parliament" into that of defender of fundamental rights. After 13 years of existence, the Council proved to be a real constitutional court when, on 16 July 1971, it passed a decision that acknowledged the binding force of the Preamble to the 1958 Constitution. The Council was aware of the unfeasibility of judicial review of legislation without a bill of rights and, consequently, through the acceptance of the normative nature of the Preamble it indirectly incorporated a bill of rights: the 1789 Declaration and the Preamble to the 1946 Constitution.

Nowadays, all the fundamental rights included in these texts enjoy constitutional status. But the choice made in 1958 not to enact a bill of rights continues to produce some consequences, in that the list of explicit fundamental rights is clearly shorter than in other European countries. The 1789 Declaration only recognizes classical rights. The Preamble to the 1946 Constitution, in its turn, although belonging to the same period as the Italian and German Constitutions, suffers from its peculiar point of view, in not having been devised for judicial review. It only refers to the

"political, economic and social principles particularly necessary in our time", among which one can identify some social rights: right to work, trade union freedom, right to strike, right to collective bargaining, right to health, right to education, etc. However, the social rights that have so far been applied by the Constitutional Council are not many and, above all, it is difficult to identify their contents because the Council motivates its decisions in a very succinct way.

In the field of labour relations, the Council has recognised several rights. Thus, the right to take part in collective bargaining belongs to every worker, including public servants; but the Council has declared that the exclusion of young workers employed within the framework of economic measures to encourage their employment in not unconstitutional, since there must be some legislative discretion to organise collective bargaining. As for the right to strike, the Council has said that it is not an absolute right, but one that must be reconciled with other constitutionally protected interests, for which some discretion is given to the legislature. In this way, limitations to the right to strike in order to safeguard the continuity of public services, people's health or the safety of property have been held to be in conformity with constitutional requirements. On the other hand, trade union freedom has also been declared both as the right to create and organise unions and as the right to join them or not. Trade unions must always respect their members' individual freedom.

The scope of legislative discretion is wider when service rights are at stake, because they need statutory implementation. So, in spite of its recognition by the Council, the right to work has to be developed by the legislature through "rules suitable to maximise each individual's right to

obtain a job and simultaneously to allow this chance to as great a number of people as possible" (CC 83-156). This aim justifies the imposition of taxes on professional activities in order to subsidise the unemployed or the prohibition of accumulating two different jobs (decision 200/1986). Regarding the right to sufficient means of existence, the Constitutional Council has simply referred its adequate satisfaction to the political branches of the state (CC 86-225). The same reasoning has been applied to the constitutional requirement of "national solidarity" and "equality of distribution of public burdens" when national catastrophes occur (CC 87-237).

Summing up, it is obvious that the possibilities of review are limited when social rights are concerned. The Council considers it to be its role to preserve some room for legislative discretion. Social rights are not conceived as genuine subjective rights in France. They are programmatic principles whose implementation and concrete scope depends on the legislature. According to the case-law of the Constitutional Council, social rights have a lower degree of protection than classical rights. In short, the "political, economic and social principles particularly necessary in our time" are deemed to be complementary to the rights and liberties embodied in the 1789 Declaration (CC 81-132), so that if there is a conflict the latter must prevail. However, legislative discretion is broader in the field of social rights than in that of civil and political rights. An argument in this direction can be drawn from Art. 34 of the Constitution, according to which it is the legislature that has to determine the basic guidelines of labour, trade union and social security law. Yet it is true that this provision also covers the basic guidelines for the law relating to

the guarantees of civil liberties, although the Council has not made use of this broad approach when civil and political rights are at stake.

Consequently, the function of the Council in the sphere of social rights mainly remains that of watching the dividing-line between the legislature and the executive in respect of law-making powers. So legislative discretion is little impaired, since the Constitutional Council does not envisage controlling the appropriateness or expediency of legislation passed to implement social rights. In the view of B. Genevois, Secretary-General of the Council, the most positive aspect of the constitutional case-law in this field lies in that it prevents any attempt to go back as far as social conquests are concerned. Legislative discretion also explains why there are few rulings on social rights.

3. Germany

Contrary to the Weimar Constitution, the present German Basic Law of 1949 hardly includes social rights in its otherwise broad bill of rights. Apart from the different provisions concerning the protection of the family that are enunciated in Art. 6, the only specific social right recognised by the Basic Law is trade union freedom as declared in Art. 9 (III), which also covers the right to adopt measures of collective conflict. Except for every mother's right to enjoy the assistance of the community (Art. 6 (IV)), the Basic Law carefully refrains from using any wording that could suggest the existence of fundamental rights to obtain services.

Consequently, the main characteristic of German constitutional law in this respect is the absence of social rights and, particularly, of welfare

or service rights. This shortcoming is not an accident, but it was deliberately wished by the constitution-drafters. The most important reasons for this were (apart from the lack of the required consensus among political parties) the desire to grant the legislature a wide margin of discretion in budgetary and financial matters, as well as the fear that economic conditions could prevent keeping constitutional promises, thus risking a delegitimisation of the whole Basic Law. In addition, there was a firm political will to follow a rigorous financial policy and to avoid a repetition of former inflation and recession experiences.

This argumentation is frequently adopted by a majority of scholars and the law courts against each new attempt to reinterpret the Basic Law in a social rights vein. Thus, the proposals to construe some rights of individual autonomy (such as freedom of education or freedom of profession) as comprehensive of those services necessary to encourage their full enjoyment have had scarce success. Much the same can be said of the attempts to read the principle of equality before the law (Art. 3) as an imposition of substantial equality. The case-law seems to be clear in that Art. 3 demands equal treatment for all the users of the existing public services, but it does not impose upon the legislature any given positive course of action.

What has been said so far should not be misleading: it would not be accurate to say that the Basic Law is indifferent vis-à-vis the material and spiritual conditions of life of individuals. Just the contrary, Art. 20 defines Germany as a federal, democratic and social state. The richness of this "social state clause" in the field of constitutional interpretation must be positively evaluated in a double sense. On the one hand, the Basic

Law is deemed to be entirely binding (i.e. none of its provisions has a merely programmatic character), so that Art. 20 results in a compulsory guideline for all kinds of legal interpretation. One has to take into account as well that a purely procedural or neutral conception of the constitution has never been successful in Germany, but there is a widespread understanding of the Basic Law as the entrenchment of certain fundamental values. On the other hand, the Basic Law operates within the context of an old and deeply-rooted German tradition of charitable public institutions, according to which citizens' welfare is a state duty. It is not accidental that the German economic system is usually defined as a "social market economy". So the promotion function of declarations of social rights is less necessary in this case. The protection of social rights is well established and takes place at a statutory level.

This is the reason why the Federal Constitutional Court has not used the social state clause for the purpose of declaring specific social rights and, more generally, of establishing that some positive action is obligatory for the legislature. As a yardstick of the constitutionality of laws, Art. 20 has been used merely to justify some legislative measures that limit the scope of private property (or other property rights, such as freedom of enterprise), the best known of which took place in 1979 with the ruling about codetermination in companies (BVerfGE, 50, 290).

Outside the scope of the social state clause, the Federal Constitutional Court has exceptionally declared the eixstence of a few "lato sensu" social rights on the grounds that they are an aspect of rights of individual autonomy explicitly included in the Basic Law. A paradigmatic case in this respect is that of "numerus clausus" in universities, passed in

1972 (BVerfGE, 33, 303), where the Court held that such limitation of access is contrary to the freedom to choose a profession (Art. 12 Basic Law), unless two circumstances are met: that education facilities are really exhausted and, if so, that the selection process is carried out according to objective criteria. As can be seen, even in cases like this the Federal Constitutional court has refused to recognise the existence of service rights deriving directly from the Constitution.

4. Spain

The drafters of the 1978 Spanish Constitution were lucky in that they were able to take account of the experience accumulated by Western European constitutionalism after World War II. Declaration and protection of social rights is a good example of this. In this respect, it is necessary to differentiate two lines within the Spanish Constitution. On the one hand, it follows the model of the German Basic Law (that was its main source of inspiration) and in Art. 1 it defines Spain as a "social and democratic state based on the rule of law". No doubt, this social state clause, if considered in isolation, lacks legal force to create rights. Yet it is also clear that, by virtue of the principle of interpretation in conformity with the Constitution, it must be used as a necessary guideline for the interpretation and enforcement of other constitutional provisions and ordinary legislation, thus inciting the efficacy and expansion of social rights. On the other hand, the Spanish Constitution rejects the German example (and adopts the Italian one) on including a long list of social rights into its bill of rights. However, a correct understanding of the status of these social rights demands some previous reference to the complicated system of protection of fundamental rights in Spain.

The bill of rights is embodied in Title I of the Constitution, which classifies fundamental rights in three groups. The first group (Arts. 14 to 29) covers most classical rights of individual autonomy and political participation, although it also includes some rights of a social nature (right to strike, trade union freedom, the different aspects of the right to education). The second group (Arts. 30 to 38) contains a series of rights and duties in most cases connected to the functioning of the economic system (safeguards of private property, collective bargaining, freedom of enterprise, etc.), even though it also regulates some rights that are closer to the liberal tradition (right to marriage and to equality between the spouses, right to conscientious objection to military service). The third group (arts. 39 to 52), under the significative heading "Principles governing social and economic policy", includes rights (and objective guarantees) to public services, such as the right to health, the guarantee of a public system of social security, the right to housing, etc., along with some rights of the so-called third generation and some aspects of the principle of equality (legal equality of children independently from their birth).

Each of these groups is characterised by a different level of protection. The first and second groups contain rights that can be directly claimed before law courts and are binding even for the legislature which, on passing any kind of legislation, always must respect their "essential contents" or hard core. The only difference between these two groups lies in that, as a matter of additional guarantee, violations of rights belonging to the first group can be brought before the Constitutional Court by individuals ("recurso de amparo") once ordinary judicial instances have been unsuccessfully exhausted. The third group is subject to a completely

different regime, set out in Art. 53(3) ofthe Constitution. According to this provision, the principles in question "will inspire legislation, judicial decisions and public authorities' activity, but they can be claimed before ordinary law courts only if in accordance with ordinary legislation passed to implement them".

This means that constitutional provisions included in this group do not directly create subjective rights that can be claimed by individuals before the law courts, but in order that they become genuine rights some "interpositio legislatoris" is indispensable. The rationale of this rule lies, as in German law, in the Constitution drafters' distrust vis-à-vis any norms that cold have heavily predetermined the legislators' freedom of choice in bugetary and economic matters. Nevertheless, it would be erroneous to say that these constitutional provisions lack legal force whatsoever. First of all, because they are guidelines both for public administration and judges, who consequently are bound to interpret and apply the whole legal order in the most favourable way to the efficacy of the values embodied in those articles. Moreover, they are programmatic rules for the legislature and, despite the fact that it is not feasible to make it pass the implementing legislation, they always work as negative limits, in that any law that infringes any of these provisions (similarly to what happens with the rest of the Constitution) can be declared unconstitutional and void. Thus, for instance, if a law privatised social security it would be unconstitutional.

Hence, given that they belong to this group, most service rights only enjoy this limited form of protection. It has prevented both ordinary law courts and the Constitutional Court from having to decide on claims to

obtain a concrete service. Services can be requested only by virtue of detailed statutory provisions. The only real exception to this general rule comes from the right to compulsory and gratuitous basic education (Art. 27 (4) of the Constitution), which is unambiguously a right to obtain a service and, in principle, directly actionable. However, the Constitutional Court has connected this section of Art. 27 with the following one, according to which it is a duty of public authorities to set up the whole educational system and to create schools. The Court, in consequence, holds that the right to educational services cannot and does not exist "in abstracto" (i.e., in any school at the user's choice), but within the statutory framework that defines basic education objectives and its infrastructure. (as a recent example of this case-law doctrine, see STC 19/1990). Quite a different question, of course, is whether such a statutory framework complies with the direct constitutional duty to provide everybody with compulsory and gratuitous basic education. If not, the law could be declared unconstitutional. As can be observed, even in this case the request for concrete services tends to be made dependent on statutory implementation.

The judicial enforcement of social rights other than service rights does not raise specific problems. There is a wide case-law. The Constitutional Court fully reviews legislative action in this field and, when cases on the right to strike and trade union freedom come up, it can also control single administrative decisions through the "recurso de amparo" (see, for recent cases, STC 38 and 45/1990). For review of administrative action concerning other social rights, only ordinary law courts have jurisdiction. To conclude, one should stress that there is little Constitutional Court case-law in the field of the above-mentioned third

group of fundamental rights, perhaps due to their excessively general wording. So, for instance, the state duty to follow a policy oriented to full employment (Art. 40), in connection to the right to work (art. 35), was interpreted by the Constitutional Court as not comprehensive of a public obligation to provide a job to every unemployed person, as early as in a ruling of 2 July 1981.

III. AN OVERALL ASSESSMENT OF THE CONSTITUTIONALISATION OF SOCIAL RIGHTS

The previous summary presentation of the constitutional protection of social rights in several Western European countries shows the existence of some common features. First of all, it is now clear what the function of social rights (or, depending on circumstances, of social state clauses) is: it highlights at the top normative level that the state is not indifferent or neutral in the economic and social sphere, that is as far as its citizens' material and spiritual conditions of life are concerned. This indicates that in present European constitutionalism a conception prevails according to which constitutions must proclaim and safeguard certain substantive basic values, thus drawing a dividing line vis-à -vis the Anglo-American world, more inclined to a procedural view of constitutions.

It also clearly emerges from the comparative analysis that the legal force of constitutionalised social rights is limited and, at any event, they do not enjoy the same degree of direct and full enforceability as civil and political rights, except when their structure does not consist of services (trade union freedom, right to strike, etc.). In the case of Germany, the reason for it is obvious, since the Basic Law does not explicitly recognise any social right. Yet it is remarkable that neither the French Constitutional Council nor the Spanish Constitutional Court have so far used their respective Constitutions to declare the existence of positive duties for public authorities, nor even to state that there are some genuine service or welfare rights deriving directly from constitutional provisions. On the contrary, they seem to have restrained themselves (not very differently from the German Federal Constitutional Court) to a merely "negative" use of social rights: they have been adopted as standards to

justify the constitutionality of innovative laws in economic or social matters, or to declare the unconstitutionality of those laws that do not sufficiently protect the values embodied in those recognised social rights. This leads to the judicial technique of the so-called "unconstitutionality for omission", which is not synonymous with judicial imposition of positive duties, but simply consists of invalidating an act for what it does not (and ought to) include. So, although the level of constitutional protection of social rights is connected to the existence and length of a declaration of them, it also depends on other factors.

The only partial exception to this trend seems to be Italy, where the Constitutional Court has developed a much more activistic attitude in these last years. The best proof of this attitude is the extremely complex set of decision techniques devised by the Constitutional Court ("sentenze manipolative", "sentenze addittive", etc.) in order to reinterpret legislation in a compulsory and unavoidable way according to the requirements that, in the Court's own view, derive from the Constitution. It has led, if not to grant service rights directly (which, procedurally speaking, would be almost impossible, since in Italy there is no individual recourse to the Constitutional Court), at least to a quite similar outcome. The consequences of such a situation can be properly evaluated only if one considers the current discussion among scholars and politicians about public expenditure originating from the rulings of the Constitutional Court and, particularly, whether the Court is bound by Art. 81 (4) of the Italian Constitution: "Any other statute (i.e. different from the state budget) which involves new or higher expenses must indicate the corresponding revenue". This behaviour of the Italian Court, that deviates from the self-restraint practised by most European constitutional courts, can only be

understood in the context of the Italian complex political situation, in that it prevents many social demands from being met by the political branches of the state. Probably, this helps such judicial activism (that would be unacceptable in other countries) enjoy a broad consensus among the population.

These remarks lead directly to the other set of questions that an overall assessment in this field has to face, namely to what extent it is expedient or advisable to constitutionalise certain social rights and especially those of a service kind? Here, there are good reasons on both sides. However, despite the heavy ideological nature of this problem, it seems possible to make some objective (or, at least, reasonably acceptable within a wide range of political opinions) reflexions that can illuminate the debate. So two facts are fairly clear. On the one hand, certain social conquests (education, health, pensions, etc.) already belong to the European cultural and political patrimony. If in addition one considers that the Continent has never been characterised by the same high degree of individualism as it is common in Anglo-Saxon societies, it will not be unreasonable that those conquests enjoy some safeguard at the top normative level, that is at a constitutional level. On the other hand, it must be submitted that the concrete and adequate way of implementing many social rights does not meet the same degree of political consensus as it does when classical rights are at stake, precisely because the implementation of the former is much more dependent on contingent circumstances and ideological preferences. Therefore, if one admits that the primary function of a constitution in a liberal-democratic state is to set up a basic framework (both procedural and substantive) for political and social co-existence, it will not be wise to introduce into the constitutional charter such elements

likely to make it a partisan weapon. Shortly, any constitutional guarantee of social rights should be balanced with the requirements of political pluralism and possible different governments, as they fit a democratic society.

It is in close relation with this balance that the specific difficulties inherent in the enforement of welfare or service rights as fundamental rights have to be considered. No one can deny that, at the present stage of economic development and political civilisation, the implementation of most constitutional commands in the social sphere cannot be achieved without legislative intermediation. A different course of action would lead both to a dangerous imbalance among state powers (transforming the judiciary into a non-elected legislature or, even worse, a non-accountable administration) and the incapability of governing financial resources according to economic circumstances. In this sense, the argumentation that prevails in Germany is quite convincing. One could counter-argue that other fundamental rights (right to vote, right to public counsel, etc.) are not no-cost and nobody has ever questioned their direct enforceability. But, undoubtedly, the financial consequences of direct enforceability of service rights would be incalculably higher, not to mention the danger of delegitimisation of the constitution for having been unable to fulfil constitutionally created expectations. In addition, the necessary premise for the effectiveness of all public services is an orderly administered economic and financial situation. For all these reasons, to acknowledge the need to guarantee certain substantive values of an economic and social nature in the constitutions should not obstruct the awareness that social rights are not susceptible of enjoying the same level of protection as classical fundamental rights.

The awareness of this necessarily different level of protection should not be misleading. Constitutional delcarations of social rights have some binding force and constitutional courts have an important function to carry out. Their role, especially when service rights are concerned, consists of imposing limits to legislative discretion according to objective constitutional standards (i.e. the substantive values embodied in the constitution). However, as can be appreciated from the comparative analysis, the depth of the courts' intervention is also determined by other factors, such as the legislature's inertia and the concrete relations they have with the political branches of the state.

To close this critical evaluation, two further considerations are pertinent. First, nowadays the very idea of the welfare state is subject to criticism, at least as far as public services are concerned. Some argue that the service-supplier state should be substituted by the service-regulatory state. If this new conception succeeds, it will deeply influence the legal meaning and status of social rigthts. Secondly, there is a social trend, particularly widespread in Europe, that closely touches the problem of the constitutionalisation of social rights. It is what could be described as the "inflation of fundamental rights", that is the tendency to make of each new social or political demand a request for recognition of a new fundamental right. Probably this is no more than an expression of the wide pluralism of values that characterises the contemporary world, although it also indicates some inclination towards maximalism in that it implies an absence of differentiation on what values are really indispensable for a civilised coexistence. However, from the standpoint of constitutional law, it is worthwhile stressing that fundamental rights are those proclaimed by an entrenched constitution, so that they are above changing majorities and

cannot be disposed of by the legislature. Consequently, if there are too many fundamental rights, "fundamentality" will risk devaluation andthe effectiveness of guarantees that cannot be derogated will deteriorate. Perhaps it would be advisable for continental Europe to draw some lessons from the Anglo-American experience: politics (as opposed to law) can give a response to new demands and these can be met through statutory rights, without always having to make recourse to the category of fundamental rights.

IV. SOME BASIC BIBLIOGRAPHICAL REFERENCES

The most comprehensive comparative analysis on the meaning, scope and protection of fundamental rights in Western Europe is still L. FAVOREU (ed.), Cours constitutionnelles européennes et droits fondamentaux, Economica, Paris-Aix, 1982. A clear conceptual discussion of the different possible meanings of the category of fundamental rights can be found in R. GUASTINI, "Le garanzie dei diritti costituzionali e la teoria dell'interpretazione", in Dalle fonti alle norme, Giappichelli, Torino, 1990. The overall origin and evolution of social rights in Western constitutionalism is described by G. DE VERGOTTINI, Diritto costituzionale comparato, Padova, 1981.

The constitutional protection of social rights in Italy is examined by: A. BALDASSARRE, "Diritti sociali", in Enciclopedia giuridica, vol. XI, Treccani, Roma, 1989; G. CORSO, "I diritti sociali nella Costituzione italiana", in Rivista trimestrale di diritto pubblico, 1981; M. MAZZIOTTI, "Diritti sociali", in Enciclopedia del diritto, vol. XII, Giuffrè, Milano, 1964; F. MODUGNO, "Nuovi diritti e principi supremi della costituzione", typewritten report to V Convegno dell'Associazione italiana dei costituzionalisti, Taormina, 30 November and 1 December 1990. For a single social right, although in a wider perspective, see M. LUCIANI, "Diritto alla salute", in Diritto e società, 1980.

The French constitutional case-law of social rights can be consulted in: B. GENEVOIS, La jurisprudence du Conseil constitutionnel (Principes directeurs), S.T.H., Paris, 1988; F. LUCHAIRE, La protection constitutionnelle des droits et des libertés, Economica, Paris, 1989.

Useful doctrinal analyses are those of: J.F. FLAUSS, "Les droits sociaux dans la jurisprudence du Conseil constitutionnel", in Droit social, 1982; X. PRETOT, "Les bases constitutionnelles du droit social", in Droit social, 1991; J. RIVERO, "Vers des nouveaux droits de l'homme", in Revue des sciences morales et politiques, 1982; P. TERNEYRE, "Droit constitutionnel social (Inventaire en guise d'ouverture)", in Revue française de droit constitutionnel, 1990 (no. 2).

A good introductory description of the German system of fundamental rights is given by Ch. STARCK, "Constitutional Definition and Protection of Rights and Freedoms", in Ch. STARCK (ed.), Rights, Institutions and Impact of International Law according to the German Basic Law, Nomos, Baden-Baden, 1987. The most relevant case-law can be found, with very useful explanatory comments, in D.P. KOMMERS, The Constitutional Jurisprudence of the Federal Republic of Germany, Duke University Press, Durham-London, 1989. for a balanced account of the social state clause of Art. 20 of the Basic Law, see K. DOEHRING, "Sozialstaat, Rechtsstaat und freiheitlich-demokratische Grundordnung", in B. HECK (ed.), Die politische Meinung, Eichholz, Bonn, 1978. On the problem of recognition of fundamental social rights, see W. SCHMIDT, "I diritti fondamentali sociali nella Repubblica Federale Tedesca", in Rivista trimestrale di diritto pubblico, 1981.

On the constitutional protection of social rights in Spain, see, J.L. CASCAJO CASTRO, La tutela constitucional de los derechos sociales, C.E.C., Madrid, 1988; J.R. COSSIO DIAZ, Estado social y derechos de prestación, C.E.C., Madrid, 1989. The scope of the social state clause is discussed by: M. BASSOLS COMA, Constitución y sistema económico, Tecnos, Madrid, 1985; A.

GARRORENA MORALES, El Estado español como Estado social y democrático de Derecho, Tecnos, Madrid, 1984.

The changing role of the state in the field of welfare and social services is discussed by G. MAJONE and A. LA SPINA, "Lo Stato regolatore", in Rivista trimestrale di Scienza dell'Amministrazione, 1991 (no. 3). For the European Community law dimension of social rights, not dealt with in this essay, see B. BERCUSSON, "Fundamental Social and Economic Rights in the European Community", in A. CASSESE/A. CLAPHAM/J. WEILER (eds.), European Union - The Human Rights Challenge, vol. II, Nomos, Baden-Baden, 1991.

EUI WORKING PAPERS

EUI Working Papers are published and distributed by the
European University Institute, Florence

Copies can be obtained free of charge – depending on the availability of stocks – from:

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf

Publications of the European University Institute

To The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

From Name . . . . . .

Address . . . . . .
. . . . . .
. . . . . .
. . . . . .
. . . . . .

❒ Please send me a complete list of EUI Working Papers
❒ Please send me a complete list of EUI book publications
❒ Please send me the EUI brochure Academic Year 1992/93

Please send me the following EUI Working Paper(s):

No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .

Date . . . . . .

Signature . . . . . .

EUI Working Papers as from 1990

As from January 1990, the EUI Working Papers Series is divided into six sub-series, each series is numbered individually (i.e. EUI Working Paper HEC No. 90/1; ECO No. 90/1; LAW No. 90/1; SPS No. 90/1; EPU No. 90/1; ECS No. 90/1).

December 1991

Working Papers in Law

LAW No. 90/1
David NELKEN
The Truth about Law's Truth

LAW No. 90/2
Antonio CASSESE/Andrew CLAPHAM/Joseph H.H. WEILER
1992 – What are our Rights? Agenda for a Human Rights Action Plan

LAW No. 90/3
Sophie PAPAEFTHYMIOU
On a "Constructivist Epistemology of Law"

LAW No. 90/4
Joachim WÜRMELING
Legislativer Trilog im Institutionellen Dreieck der Europäischen Gemeinschaft. Das Verfahren der Zusammenarbeit nach Artikel 149 Absatz 2 EWGV.

LAW No. 90/5
Renaud DEHOUSSE
Représentation territoriale et représentation institutionnelle: réflexions sur la réforme du Sénat belge à la lumière des expériences étrangères

LAW No. 90/6
J. KORTE (ed.)/
A. E. KELLERMANN/
W. M. LEVELT-OVERMARS/
F. H. M. POSSEN
Primus Inter Pares: The European Court and National Courts. The Follow-up by National Courts of Preliminary Rulings ex Art. 177 of the Treaty of Rome: A Report on the Situation in the Netherlands

LAW No. 90/7
Reiner GRUNDMANN
Luhmann Conservative, Luhmann Progressive

LAW No. 90/8
Bruno DE WITTE
The Integrated Mediterranean Programmes in the Context of Community Regional Policy *

LAW No. 90/9
Anne-Laurence FAROUX
Le Ministère de la Culture en France: Création et organisation

* * *

LAW No. 91/10
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 1
Christian JOERGES
The Juridification of Product Safety Policy

LAW No. 91/11
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 2
Gert BRÜGGEMEIER/
Hans-W. MICKLITZ
Product Safety Legislation in France and in the United Kingdom

EUI Working Papers as from 1990

As from January 1990, the EUI Working Papers Series is divided into six sub-series, each series is numbered individually (i.e. EUI Working Paper HEC No. 90/1; ECO No. 90/1; LAW No. 90/1; SPS No. 90/1; EPU No. 90/1; ECS No. 90/1).

December 1991

Working Papers in Law

LAW No. 90/1
David NELKEN
The Truth about Law's Truth

LAW No. 90/2
Antonio CASSESE/Andrew CLAPHAM/Joseph H.H. WEILER
1992 – What are our Rights? Agenda for a Human Rights Action Plan

LAW No. 90/3
Sophie PAPAEFTHYMIOU
On a "Constructivist Epistemology of Law"

LAW No. 90/4
Joachim WÜRMELING
Legislativer Trilog im Institutionellen Dreieck der Europäischen Gemeinschaft. Das Verfahren der Zusammenarbeit nach Artikel 149 Absatz 2 EWGV.

LAW No. 90/5
Renaud DEHOUSSE
Représentation territoriale et représentation institutionnelle: réflexions sur la réforme du Sénat belge à la lumière des expériences étrangères

LAW No. 90/6
J. KORTE (ed.)/
A. E. KELLERMANN/
W. M. LEVELT-OVERMARS/
F. H. M. POSSEN
Primus Inter Pares: The European Court and National Courts.
The Follow-up by National Courts of Preliminary Rulings ex Art. 177 of the Treaty of Rome: A Report on the Situation in the Netherlands

LAW No. 90/7
Reiner GRUNDMANN
Luhmann Conservative, Luhmann Progressive

LAW No. 90/8
Bruno DE WITTE
The Integrated Mediterranean Programmes in the Context of Community Regional Policy *

LAW No. 90/9
Anne-Laurence FAROUX
Le Ministère de la Culture en France: Création et organisation

* * *

LAW No. 91/10
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 1
Christian JOERGES
The Juridification of Product Safety Policy

LAW No. 91/11
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 2
Gert BRÜGGEMEIER/
Hans-W. MICKLITZ
Product Safety Legislation in France and in the United Kingdom

LAW No. 91/12
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 3
Gert BRÜGGEMEIER/
Josef FALKE/Christian JOERGES
Product Safety Legislation in the Federal Republic of Germany and in the United States

LAW No. 91/13
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 4
Josef FALKE/Christian JOERGES
"Traditional" Harmonisation Policy, European Consumer Protection Programmes and the New Approach

LAW No. 91/14
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 5
Christian JOERGES/
Hans-W. MICKLITZ
Internal Market and Product Safety Policy

LAW No. 91/15
Christian JOERGES
Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die Renaissance der regulativen Politik

LAW No. 91/16
Erk Volkmar HEYEN
Systemic Interference and Social Segmentation of Scientific Legal Discourse: Some Theoretical Perspectives and Empirical Results in the Field of Continental Administrative Law

LAW No. 91/17
Andrea SCHULZ
Verfassungsrechtliche Grundlagen der auswärtigen Kulturpolitik

LAW No. 91/18
Hans-W. MICKLITZ
Internal Legal Instruments for the Regulation and Control of the Production and Use of Chemicals and Pesticides

LAW No. 91/19
Hans Ulrich Jessurun d'OLIVEIRA
Class Actions in Relation to Cross-Border Pollution.
A Dutch Perspective

LAW No. 91/20
Luis María DÍEZ-PICAZO/
Marie-Claire PONTHOREAU
The Constitutional Protection of Social Rights: Some Comparative Remarks