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**DEPARTMENT OF LAW**

DIVERSITY OF SOCIAL RIGHTS IN EUROPE(S)  
RIGHTS OF THE POOR, POOR RIGHTS



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**DEPARTMENT OF LAW**

*Diversity of Social Rights in Europe(S)*  
*Rights of the Poor, Poor Rights*

**UNIVERSITY PARIS OUEST NANTERRE - EUROPEAN UNIVERSITY INSTITUTE**  
**SOCIAL LAW WORKING GROUP**

EUI Working Paper **LAW** 2010/07

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## **Abstract**

A mainstream view of the rule of the law has denied for a long time that social rights are “real” rights. Referred to as “the rights of the poor”, Social and Economic Rights have been often thought as “poor rights”. Lawyers and judges often distinguish between social and civil rights, albeit human rights have been affirmed, since 1948, to be indivisible and interdependent. The distinction between civic and political rights on the one hand, and economic and social rights, on the other hand, often results in casting aside the social rights and prevent them from being justiciable.

However, the academic debate about judicial enforcement of social rights is undergoing changes. The divide between the fundamental rights tends to be questioned by social movements which do not hesitate anymore to take legal actions and claim those social rights (the right to housing, to food, to health care...), as well as by a number of academic researchers who try to rethink the universality and indivisibility of human rights. That trend is followed by judges, international ones as well as national ones, who help with such decisions to strengthen the justiciability, effectiveness and opposability of social rights.

The subject of the following contributions is this current trend of justiciability and enforcement of social rights in Europe. This working paper draws attention to and scrutinize the academic debate and the jurisdictional answers concerning the nature and regime of social rights through the use of comparative and international law. Rights are studied in UK (W. Bagniet), Belarus, Ukraine and Russia (U. Belavusau), Spain (M. E. Blas López), Italy, (G. Boni), Germany and Switzerland (C. Fercot), Norway & Scandinavia (T. Harbo), Poland (A.M. Jaroń), Portugal (B. Mestre) and the European Convention of Human Rights (C. Marzo). The Varieties of Social Rights in Europe is evident and reading the following pages will give an impressive example of the diversity of European legal systems.

## **Keywords**

social rights, economic rights, industrial rights, fundamental rights, nature, justiciability, enforceability, Europe, United Kingdom, Belarus, Ukraine, Russia, Spain, Italy, Germany, Switzerland, Norway & Scandinavia, Poland Portugal, European Convention of Human Rights.



## Introduction

Diane Roman

A mainstream view of the rule of the law has denied for a long time that social rights are “real” rights. Referred to as «the rights of the poor», Social and Economic Rights have been often thought as “poor rights”. Lawyers and judges often distinguish between social and civil rights, albeit human rights have been affirmed, since 1948, to be indivisible and interdependent. The distinction between civic and political rights on the one hand, and economic and social rights, on the other hand, often results in casting aside the social rights and prevent them from being justiciable. Numerous legal decisions invoke their particularity to justify the lack of judicial protection. In spite of the fact that social rights are recognized and proclaimed, they are often relegated to a specific category and opposed to civil and political rights: half-rights, pseudo-rights, special rights with a minor range, they don’t benefit from the same regime and the same guarantees as the other fundamental rights. References are common to the so-called “specific nature” of the former and generally they support the idea according to which legal interferences with parliamentary social and economic policies would constitute a violation of the separation of powers. Additionally, the argument that courts are not competent to decide on such complex issues is also often put forth.

However, the academic debate about judicial enforcement of social rights is undergoing changes. As South African Justice Albi Sachs has noticed,

“There is growing acceptance all over the world that certain core fundamental values of a universal character should penetrate and suffuse all governmental activity, including the furnishing of the basic conditions for a dignified life for all. I believe that 21st-century jurisprudence will focus increasingly on socio-economic rights” (Albie Sachs, *Social and economic rights: can they be made justiciable?*, Southern Methodist University School of Law, 1999, p. 18).

A few examples may illustrate this evolution.

The divide between the fundamental rights tends to be questioned by social movements which do not hesitate anymore to take legal actions and claim those social rights (the right to housing, to food, to health care...), as well as by a number of academic researchers who try to rethink the universality and indivisibility of human rights. That trend is followed by judges, international ones as well as national ones, who help with such decisions to strengthen the justiciability, effectiveness and opposability of social rights. As noticed by an author

“In the space of two decades, social rights have emerged from the shadows and margins of human rights discourse and jurisprudence to claim an increasingly central place. In a significant number of jurisdictions, adjudicatory bodies have intervened to protect a wide range of social rights from intrusion and inaction by the State and increasingly by non State actors. The breadth of the decisions is vast. Courts have ordered the reconnection of water supplies, the halting of forced evictions, the provision of medical treatments, the reinstatement of social security benefits, the enrolment of poor children and minorities in schools and the development and improvement of State programmes to address homelessness, endemic diseases and starvation. (...) What is novel is not the adjudication of social interest. Domestic legislation in many countries provides a measure of judicially enforceable labour and social rights. What is significant is that the more durable human rights dimensions of these social values or interests, whether captured in constitutions or international law, are being adjudicated” (Malcolm LANGFORD, *The Justiciability of Social Rights, From Practice to Theory*, in *Social Rights Jurisprudence: Emerging trends in International and Comparative Law*, Cambridge University Press, 2008, p. 3)

In the European framework, it has been underlined that one of the major characteristic of the Charter of Fundamental Rights and Freedom, approved in 2000, was that it transcended the opposition between civil and political rights on the one hand and economic and social rights on the other. As Pr. Bruno DE WITTE has focused on,

“in this respect, the Charter represented the endorsement of two core ideas that had slowly matured over the years in national constitutional law and in international human rights law, namely: (a) the idea that all rights require some measure of positive action from the side of the state, so that it is no longer justified to operate a sharp distinction between rights implying a negative duty of abstention and rights implying a positive duty to act; and (b) the idea that rights are not self-executing (to use the international law term) or are not “subjective” rights (to use a term familiar to continental lawyers) can nevertheless have important legal and political effects” (B. de Witte, “Fundamental, yes-But What Does It Mean?”, in “The Fundamentalisation of Social Rights”, EUI WP, Law 2009/05, p. 1).

Secondly, one can take into account the significant evolution represented by the adoption of the optional Protocol relating to the International Covenant on the Economic, Social and Cultural Rights (ICESCR) of the United Nations (1966). This evolution is an important step towards the justiciability of the rights to food, to work, to health, to education, to housing, for a decent life and human dignity... Those two examples are relevant testimonies of the renewal of attention given to social questions. It leads to a questioning of the potential particularity of social rights and to focus on the question of the justiciability of social and economic rights.

The subject of the following contributions is this current trend of justiciability and enforcement of social rights in Europe. These working papers draw attention to and scrutinize the academic debate and the jurisdictional answers concerning the nature and regime of social rights through the use of comparative and international law. Most of them have been written by researchers of the European University Institute and its working group of Labour Law, and were discussed during a workshop in Fiesole, on 26 June 2009. The following working papers are a branch of a global project, funded by the French Ministry of Labour and Solidarity and the French Ministry of Justice. The leading research center working on this project is the CREDOF, University Paris Ouest Nanterre la Défense (Center for the Research and Study of Fundamental Rights). About forty researchers including a great number of foreign academics (from Canada, Brazil, Mexico, India and China among others) are involved in the project. Those connections with foreign academics are meant to become part of an international network of lawyers interested in the interactions between rights and poverty. At this point, we would like to warmly thank Pr. Marie Ange Moreau and Pr. Ruth Rubio Marin, from the Institute, for their kind help and the interest they have had on this research.

One of the major challenges of the partnership between the University of Nanterre and the EUI Law Labour WG was a matter of coordination amongst all the researchers, taking into account the diversity of the legal systems in Europe. Claire Marzo (former PhD student at the EUI and whose contribution and involvement are gratefully acknowledged), has taken over the coordination and, to ensure the homogeneity of this team work and has created a common grid of analysis. The most important points of it were:

1. Definition of social rights

- What is the definition of social rights proposed by the author
- Enumeration of social rights?
- are discrimination rights included?
- are labor rights included?

2. How is the history of social rights explained?

- Was there a distinction between social rights and political rights?
- Conditions and moments of social rights creation, reasons of this emergence
- Notion of generation of social rights?

3. Are the social rights divided into categories of law?
  - Does the author affirm the existence of categories of rights?
  - what place for the notion of indivisibility of rights?
  - What categories? Subdivisions?
  - Content of the categories and sub-categories
  - definition of social rights (and other rights)
  
4. Fundamental rights? Human rights?
  - Social rights are fundamental rights? Human rights?
  - How is this label justified?
  
5. Legal value of the rights
  - Does the subdivision of rights lead to a hierarchy of rights?
  - Is there a distinction between value and value in litigation
  - is there a normativity? Are social rights norms or do they have a programmatic value (distinction between enforceability and political value) ?
  - what are the arguments of the author to justify the values of the rights? Are there political, religious, ideological, dogmatic considerations, etc...?
  
6. Question of social rights regime
  - entitlement of rights? Who has the social rights: person, family, vulnerable people. Is the problematic different for civil rights?
  - Territoriality of rights? Are social rights linked to the presence on the territory? Can we export social rights? Is it different of civil rights?
  - Justiciability of social rights: what are the arguments in favour of justiciability of rights: role of the judge, powers separation, conception of the State?

Finally, one may be impressed by the diversity of the fields covered by the substantive chapters of this collective working paper.

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Conclusion Marie-Ange Moreau

The Varieties of Social Rights in Europe is evident and reading the following pages will give an impressive example of the diversity of European legal systems. The difference between, for example, Russian and Polish systems on the one hand, and British or Italian ones, on the other hand, shall not be underestimated, not only because of history: of course, for example the “Soviet” heritage the eastern countries have to deal with may offer a guide of interpretation; but political explanation is not the only one. Actually, the first observation relates the contrasting debate about the justiciability of social rights, which is at the same time both constant and evolving. Finally, one may have the impression that social rights’ picture is quite different when viewed from the written bills of rights and when viewed from the courts.

The earlier bills of rights did not contain any explicit references to any social rights, except maybe the right to happiness. They were usually called “liberal” texts, including political and civic freedoms and having no interest in social rights. During the nineteenth century, the claims of the poor and the increased influence of socialist and Marxist critiques of human rights theories led to a recognition of new rights, as a shelter against poverty. During the twentieth century, a number of international declarations and constitutional bills of rights proclaimed both civil and social rights: for example, the ILO and the Universal Declaration of Human Rights with its well known art. 22. For example, the Portuguese report insists on the consequences that the recognition of the social principle carries with it. The foremost consequence of the recognition consists in its transformation from a simple aspiration towards a constitutional commandment. With this transformation has come an altogether new debate: should these social rights be enforced by courts? This debate has been ongoing since the 1960s, when the rights in the Universal Declaration were divided into two separate covenants. One contained economic, social and cultural rights with no judicial means of empowerment, while civil and political rights were set out in the other. Though both sets of rights were affirmed to be indivisible and interdependent, commentators have often distinguished between the two categories of rights by asserting that economic, social and cultural rights are not justiciable. The same division between the two sets of human rights was mirrored in a large scope of countries, in western European constitutions, in Latin American constitutions and also in Asian or African ones. At the European level also, the European treaties set apart the social rights in the European social charter, which was withdrawn from the jurisdiction of the European Court of Human Rights.

According to scholars, those who dispute the justiciability of social and economic rights tend to rely on 2 main arguments (Bruce PORTER and Aoife NOLAN, “The Justiciability of Social and Economic Rights: An Updated Appraisal” in the January 2006 edition of *Just News*). First, they tend to consider that social and economic rights are different in nature from civil and political rights and are therefore non justiciable. Unlike civil and political rights, social rights are said to impose positive duties rather than negative ones; to require government action rather than government restraint; to require allocation of resources and progressive fulfilment rather than immediate compliance; and to be vague and open-ended rather than precise and legally defined. A second common claim is that it would be undemocratic and a violation of the separation of powers for unelected courts to interfere with social and economic policy adopted by elected branches of government. Furthermore, it is often argued that social rights involve complex issues and competing claims on resources which courts are not competent to decide. That is typically the opinion of the European Court in many decisions. Similar assessment is put forward in the English reports. The state’s social obligations are said to be more of a political and administrative nature than a source of legally enforceable rights. However, notices the author, the courts have been prepared to intervene to prevent irrational allocation policies

However, it seems obvious that these times have changed. A new step has been taken with the help of the courts. It relies on two main points. First, social rights case law may be recent but there is yet an important amount of telling examples: all over the world, in a growing number of judicial decisions, courts have begun implementing social rights. For example, a recent book deals with two thousand decisions from 29 national and international jurisdictions (Malcom LANGFORD, *Social Rights jurisprudence, emerging trends in International and comparative law*, Cambridge university press,

2008. These decisions have been taken under the umbrella of social rights enshrined in conventional treaties or constitutional bodies (see, for example, the 2000 South African “grootboom” decision). But some courts have also rejected the distinction between social and civil rights. As Claire Marzo’s report has underlined, for the Strasbourg Courts, “there is no bright line that separates rights into two categories of rights” (Airey, 1979). Secondly, new adjudicatory bodies have been created: for example, an important step was taken in 2008 with the approval of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Its creation amounts to “closing a historic gap” stated the UN High Commissioner for Human Rights, Navi Pillay. Under the Protocol, individuals will be able to complain to an independent human rights body at the international level about violations of rights enshrined in the International Covenant on Economic, Social and Cultural Rights. Moreover, a strong legal literature now focuses on social rights: there were enthusiastic discussions amongst lawyers interested in South African or Indian case law. Within the world social forum, legal activists and NGOs promoted the concept of justiciability as a tool against poverty and inequalities. Among scholars, the question of the acknowledging social rights has become relevant.

There is no doubt, a “new wind” is blowing: stereotypical characterizations of social rights as being fundamentally different from civil and political rights have been rejected. The idea that all human rights give rise to a combination of negative and positive obligations and involve various degrees of resource allocation enjoys wider acceptance today than before. The right to vote, for example, entails considerable state expenditure and requires the state to take positive steps to ensure that elections are held at periodic intervals. Or, as a quotation of the Indian Supreme Court puts it,

“the right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in [...] For a human being [the right to shelter] has to be a suitable accommodation which would allow him to grow in every aspect- physical, mental and intellectual.” (Supreme Court of India, *Shakti Star Builders v. Naryan Khimali Tatome et al.* (1) SC 106, Civil Appeal No. 2598 of 1989 [JT 1990])

The wall between civic and social rights seems to be collapsing. But, albeit “there is no water-tight division separating” rights, as the ECHR said, maybe new boundaries are forming: not between rights, but between courts. The “social rights” case-law cuts across common law and civil law systems. But it is significant that the justiciability of social rights is stronger in developing countries: The Latin American, the South African and the Indian examples show that perfectly. How can we explain this difference? Are the courts in developing countries more audacious because of the urgency of the poverty in their countries? Or is there a different understanding of the legitimacy of courts adjudicating Social Rights? Certainly, everywhere, the role of the courts is to interpret and apply those rights that are identified as fundamental to democratic citizenship. But, courts seem to react differently. On the one hand, in European countries, most of the courts argue that exercising the authority to adjudicate social rights would lead them to assume the function of designing social programs. Under the doctrine of the separation of powers, it is the job of legislatures, not courts, to carry out an assessment of the priorities in the context of the allocation of limited State resources. The best example can be the Scandinavian one: as the report mentions, although Scandinavian countries have a well functioning welfare state, the reference to the welfare benefits as rights, with the legal, conceptual and constitutional implications that may have, might not be proper and the judicial review of the Norwegian social courts (*trygderetten*) is very limited. But the Spanish courts or the Swiss ones are also illustrative: the respective reports have underlined how ‘minimally protected’ are the Spanish constitutional rights to an adequate social assistance (41), to health protection (art. 43.1), to access to culture (44.1) or to enjoy decent and adequate housing (47). The German report has stressed on the ‘reserve of the possible’ (*Möglichkeitsvorbehalt*) brought out by the German federal court. On the other hand, in many developing countries, judges have noticed that enabling courts to adjudicate social rights simply means that courts can hear and adjudicate claims involving alleged rights violations. Under the doctrine of the separation of powers, it is the job of courts, not legislatures, to consider allegations of rights violations and to determine whether a right has been infringed. The question is whether this litigation has the potential to concretely ensure the achievements of social rights. Dealing

with social rights' justiciability is to seek for an "Optimal Equilibrium between Law and Politics, Rights and Duties" as Dr. Tor-Inge Harbo underlines it.

*Weak court, strong rights?* In his recent book ("Weak courts, strong rights, Judicial review and social welfare rights in comparative constitutional law", Princeton University Press, 2008), Pr. Mark Tushnet has been showing how creating weaker forms of judicial review may actually allow for stronger social welfare rights, even under American constitutional law. Here is perhaps the new challenge for imaginative lawyers. As a conclusion; let us remember President Roosevelt's *Four freedoms* speech. He insisted on the need for freedom, especially freedom for want and concluded: "Our support goes to those who struggle to gain those rights or keep them". 70 years later, Freedom from poverty still needs to be an enforceable human right (Thomas Pogge, *Freedom from Poverty as a human right*, Oxford Univ. Press, 2008) and the struggle continues, even inside the courts.



# Social Rights in Spain

María Esther Blas López\*\* \*

## Abstract

Spain is established by its Constitution as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system. The Constitutional recognition of social rights is, to some extent, coherent with the idea of social and democratic State. In other words, the social State does not conform to the formal assurance of fundamental rights, but rather requires its compliance affecting other spheres.

Attending to its object, social rights in Spain are defined as rights prosecuting the elimination or decrease of material inequalities, as well as the improvement of the living conditions of society. Even if the lack of homogeneity and uniformity of these rights prevent Spanish scholars from obtaining a common definition, the analysis of their elements allows to identify and to separate them from individual, civil and political rights.

The aim of this paper is to explore how the Spanish Constitution deals with social rights providing an overview of their justiciability. My analysis is two-fold.

Section I recalls the general historical background. We shall see the evolution of fundamental rights through their different generations (1.1) before looking at the notion of social rights in Spain, (1.2). In particular, we will focus on the elements which allow us to identify social rights (1.3).

Section II turns to the analysis of Chapter II and III (Title I) of the Constitution. We shall see how social rights are classified (2.1), assessing their judicial enforceability (2.2), and putting some touches on the justiciability of new social rights of last generation (2.3).

- I. SOCIAL RIGHTS: A PROGRESSIVE PHENOMENON
  - 1.1. SOCIAL RIGHTS: THE THIRD GENERATION OF FUNDAMENTAL RIGHTS
  - 1.2. A NOTION OF SOCIAL RIGHTS? A DIFFICULT TASK
  - 1.3. IDENTIFYING SOCIAL RIGHTS
- II. JUDICIAL ENFORCEMENT OF SOCIAL RIGHTS
  - 2.1. SOCIAL RIGHTS AS LITIGABLE FUNDAMENTAL RIGHTS?
  - 2.2. SOCIAL RIGHTS ENFORCEABILITY
  - 2.3. JUSTICIABILITY OF NEW SOCIAL RIGHTS REGULATED AT AUTONOMOUS LEVEL?
- III. CONCLUSIONS

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\* Paper presented at the conference “Varieties of Social Rights in Europe: At the Intersection of Legal Orders”, Florence, 26 June 2009, organised in the framework of the Research Project “*Rights of Poor, Poor Rights*”, University Paris X-European University Institute Social Law Working Group.

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## I. Social Rights: A Progressive Phenomenon

Social rights emerge in the nineteenth century, although at the beginning of the modern society, economic, social and cultural relations admitted a series of economic, social and cultural rights.<sup>1</sup> Certainly, the nineteenth century attended the intellectual construction of social mentality and rights.<sup>2</sup> The historical and ideological origin of social rights found its angular stone in the French Constitution of 1848 which established, among other rights, the right to work. Thus, while their historical origin had been identified with the first bourgeois liberalism crisis and the revolutionary events of the first half of the nineteenth century, from an ideological point of view,

“the concept of human rights, as it was elaborated by the *ius*-naturalism rationalist, suffered an important change after the contribution of the republican socialism. The concept of human rights changed due to new concepts like freedom as a capacity, equality as a satisfaction of basic requirements, or fraternity as the base of positive obligations between individuals. Human rights were only satisfied when the State provided them with the necessary resources (...)” (González Amuchástegui, 1986 pp. 606 and 607).

Since mid nineteenth century onwards, rights were conceived as means to reach the moral freedom and the integral development of individuals. This new conception of rights had as a consequence the necessary intervention of public authorities for the satisfaction of people basic requirements,<sup>3</sup> but at the same time limited the State and other powers pretending to invade the freedom of individuals. This generalisation of human rights together with the incorporation of economic, social and cultural rights concluded with the emergence of the Social State. Therefore, the first lines of the Social State ideology appeared during this century and the social rights were at its central core.

Finally, at the beginning of the twentieth century, the existence of the economic and social rights was recognised in two constitutions: the Mexican Constitution of 1917 and, two years later, in the Weimar Constitution. This trend continued intensifying with time and also with a clear influence in Monarchist constitutions, as for instance, the Rumanian Constitution of 1923, or the Constitution of the Serbian-Croat-Slovene Kingdom. In particular, post-war constitutions generalised the social trends and this is the case of the Spanish Republican Constitution of 1931.

By the end of the seventies, and after 40 years of dictatorship, the aim of the constitutional recognition of social rights in Spain was to bring to an end the individual lawlessness through a comprehensive list of rights. Today, the Spanish constitution of 1978, like Portugal's, occupies a prominent position among European constitutions. This is primarily due to the fact that in these young constitutions an attempt was made to take account of today's social problems rather than to exclude them.

The aim in this section is to briefly go into the historical evolution of fundamental rights (1.1), exploring the notion of social rights in Spain (1.2) and highlighting some elements for their identification (1.3).

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<sup>1</sup> Peces Barba Martínez (1995 pp. 16-18) argues that social rights historical genesis begins very much before. The generic and indispensable substratum for social rights rooting in the political and legal culture had its first origin in the ancient Greece. Indeed, during this period emerged the Greek feeling of human dignity. Then, the Age of Enlightenment was a second important moment for these rights appearing the human rights classical notion, as well as the use of the generic term 'social rights'. See also Peces Barba Martínez, 1993 pp. 33-99.

<sup>2</sup> The recognition of human or fundamental rights during the nineteenth century represents the transfer of the theory of natural rights elaborated by the *ius*-naturalism rationalist at the beginning of eighteenth century into positive law (Prieto Sanchís, 1995 p. 1).

<sup>3</sup> These basic requirements are essential for the human development.

### **1.1. *Social Rights: The Third Generation of Fundamental Rights***

Human rights came to light in the bosom of the “illuminist” atmosphere that inspired the bourgeois revolutions of the eighteenth century.<sup>4</sup> This genetic context awarded them with a clear ideological profile. In other words, “human rights appeared, with an individualistic mark, as individual freedoms founding the first phase or generation of human rights”. However, this ideological individualistic origin suffered a wide process of erosion, being challenged during the nineteenth century social fights. These movements of protest demonstrated the need to complete the existing catalogue of rights and freedoms of the first and second generation with a third generation of rights: the economic, social and cultural rights. Indeed, these rights reached their gradual legal and political consecration during the replacement of the liberal State by the social State of Law” (Pérez Luño, 1991 p. 205).

Thus, the historical evolution of fundamental rights determined the emergence of successive ‘generations’ of rights. Individual, civil and political rights, as for example the right to freedom of speech, association or voting, defined democratic and liberal regimes for over two centuries. As a consequence, “they are more often accorded national constitutional status, and are usually enforceable by sharper and more direct legal and judicial means” (Fabre, 2005 p. 15). By contrast, economic and social rights, the so-called ‘third generation of rights’,<sup>5</sup> as for instance, the right to strike or to health protection, which historically became part of liberal-democratic discourse at a later stage, are more controversial, even if most European democratic constitutions do have them (Fabre, 2005 p. 15).

The social rights ‘success’ of being constitutionally recognised does not go together with the appropriate judicial protection. Generally speaking, they are often relegated to a “second degree” category and their recognition has a programmatic character, instead of their practical accomplishment (Sastre Ariza, 2001 p. 253). They are often perceived “as aspirational or programmatic rather than concretely defined entitlements, and as collectively rather than individually enjoyed”.<sup>6</sup> Further, “they are generally believed to necessitate more extensive and immediate expenditure and intervention, normally enjoying weaker legal enforcement” (De Burca, 2005 p. 4). In this context, the absence of effectiveness — shown through the lack of rules and protection— allows to assert that social rights constitute the biggest core of a frustrated “what ought to be” (Sastre Ariza, 2001 p. 254).

As a result, some academics and philosophers deny that these rights should not be entrenched in the Constitution of a democratic State, in particular, because the idea of Constitution was created to protect civil and political rights. In addition, it is not difficult to find opinions denying their legal value arguing that social rights only integrate a “good intentions chapter” (Pérez Luño, 1991 p. 205).

### **1.2. *A Notion of Social Rights? A Difficult Task***

From a legal perspective, Peces-Barba points out that the definition of social rights contents is one of its biggest problems. In addition, social rights recognition raises some difficulties concerning their identification and acceptance. Indeed,

“in the light of the historical experience, most of the fights for the political rights recognition had a clear objective: to reach the social goals articulated in these new rights. Its aim was to achieve equality through the satisfaction of people basic needs. Without it individuals could not get the necessary levels of humanity to enjoy individual, civil and political rights (...)” (1995 p. 25).

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<sup>4</sup> Peces-Barba Martínez (1998 pp.13-264) understands human rights as historical categories that only can be attributed to temporarily limited contexts.

<sup>5</sup> On the notion of three ‘generations’ of human rights, see Vasak, 1977 p. 11.

<sup>6</sup> See for instance: Garrido Falla, 1979 p. 176 and Calsamiglia, 2000 pp. 142-143.

However, the appearance of totalitarian States during the first half of the twentieth century contributed to the reinforcement of economic and social rights rejection from some economic and liberalist sectors, as well as from the partisans of the “reduced State” (Peces-Barba, 1995 p. 25). Still today, some liberal-conservative inspired academic sectors contest the fundamental nature of social, economic and cultural rights. This negative reaction *vis à vis* social rights is an ideological position resulting “from prejudice traditions that place private interest as the driving force of human action, distrusting and rejecting public powers positive actions to help people who cannot reach, on their own, the minimal levels of humanisation (...)” (Peces-Barba, 1995 p. 27).

From a historical point of view, Peces-Barba notes that the four existing generations of rights are doubtlessly fundamental rights, but each generation is articulated in a different way *vis-à-vis* two elements of their identification: universality and equality criteria's. Therefore, whereas in the first and second generations, universality is understood as its early condition — here equal means ‘comparable’ treatment —, in the third generation, universality is understood as its final purpose — here equality means ‘differentiation’—. Accordingly, the notion of ‘equality’ must be understood as synonym of ‘differentiation’ as far as social rights are concerned. Only this interpretation allows acquiring the other category of equality: the equality understood as “comparable treatment.”<sup>7</sup> In brief, it implies to define social rights as what they should be, instead of what they actually are.<sup>8</sup>

Nevertheless, beyond this vision, academics agree with the following fact: the offered criteria to delimit the notion of social rights are as varied as heterogeneous. Whereas some authors defend the rights of workers as social rights, others also include in this category the right to property or the liberty of industry and commerce.<sup>9</sup> As a result, if there is not an agreement on the notion of social rights, there are, at least, some common elements that allow identifying them.

### 1.3. Identifying Social Rights

Some authors like better to refer to some common characteristics, elements or connotations of social rights, rather than building up a precise notion or definition.

#### a) Social rights need of public institutions

Whereas civil and political rights can be conceived without State, social rights cannot even be thought without any political organisation. For civil and political rights, the State is necessary to guarantee their protection, but it cannot define their essential contents. On the contrary, social rights are historical rights and their definition requires a previous decision on the distribution of resources and social charges which, obviously, can be taken neither in abstract terms, nor with a universal value (Peces-Barba Martínez, 1998 p. 14).

#### b) The legal entitlement of social rights

Everybody is clear about what civil and political rights are. Conversely, social rights can be neither defined, nor justified without taking into account their beneficiaries basic requirements. Consequently, they are not conceived as universal rights, since they are formulated with a precise purpose: to attend the lacks and requirements within the unequal sphere of social relations. In other words, “the

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<sup>7</sup> It should be noted that Peces-Barba Martínez (1995 p. 29) underlines that everyone is beneficiary of individual, civil and political rights (universality as an early condition), whereas social, economic and cultural rights should benefit only those individuals affected by a lack of financial resources (universality as a final objective).

<sup>8</sup> For an analysis of Peces-Barba position, see Llamas Cascón, 1995 p. 78.

<sup>9</sup> Those rights are not egalitarian rights, therefore they cannot be considered social rights, but first generation rights, even if they have been clarify through the social constitutionalism.

advantages and interests offer by the individual freedom and guarantees are undeniably valuable for any person, whereas the advantages that social rights bear are connected with certain necessities having a unequal satisfaction” (Peces-Barba Martínez, 1998 p. 17). For these reasons, even if social rights are configured as equality rights, it is not possible to make any division between social and civil rights on these bases (Pérez Luño, 1984 p. 90).

c) The objective dimension of social rights

Generally speaking, social rights are subjective rights if we considered them as legal relationships. However, at the beginning, only freedom rights were considered as subjective rights, and its own exercise allowed delimiting some objective norms within each freedom right. By contrast, social rights emerged as objective needs of the social State idea and had to wait to be articulated as subjective rights. As a consequence, it is argued that the objective dimension of social rights is predominant over its subjective one (Prieto Sanchís, 1995 p. 20).

d) Social rights as rights of beneficial nature

For Peces Barba (1995 p. 27), it is easy to identify social rights with “rights-benefits” or rights of beneficial nature (*derechos prestacionales*).<sup>10</sup> In fact, from a legal point of view, these terms are much more explanatory. In other words, social rights require positive State action to be satisfied (*acción de dar o hacer algo*) rather than an abstention or omission (*no hacer nada*) from the obliged individual. This concept is deeply rooted in the distinction between the liberal model of Abstentionist State and the social model of Interventionist State (Sastre Ariza, 2001 p. 256; Gargarella, 1998 pp. 11-15).

However, this position raises some problems: it brings to an end some current social rights, while including rights from the first or second generation as social rights. Certainly, it is the case of the social right to freely join a trade union or the right to strike.<sup>11</sup> Conversely, due to its beneficial nature, the right to legal aid could be considered as a social right (Prieto Sanchís, 1995 pp. 12 and 15).<sup>12</sup> In the same line, other examples can be found, as for instance, the social right to a limit working time, minimum wage, or annual leave. These social rights do not have a beneficial nature, even if they need some kind of public intervention—but they are social rights—. On the contrary, it could be argued that the right to an effective judicial protection is a social right—despite being dubious—because it implies a legal benefit (*prestación jurídica*).

As a result, it can be argue that not all social rights do have a beneficial nature, even if such a nature could characterise some freedom rights (Prieto Sanchís, 1995 pp. 15-16).<sup>13</sup> Nevertheless, even if the beneficial nature is also present in individual, civil and political rights, it has a greater weigh or a most intensive meaning within social rights (Sastre Ariza, 2001 p. 256). Moreover, there is certain interdependence or unity between the individual and social rights, because every right generates for the State a mixture of positives and negatives obligations, so it is not really possible to find in a categorical conceptual distinction the justification for a differential legal treatment for both groups (Sastre Ariza, 2001 p. 257).

In sum, attending to its object, social rights in Spain are defined as rights prosecuting the elimination or decrease of material inequalities, as well as the improvement of the living conditions of society. On

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<sup>10</sup> The author is one of the ‘fathers’ of the Spanish Constitution. Concerning rights-benefits, see also Prieto Sanchís, 1995 p. 12.

<sup>11</sup> It is so, except if the public protection is considered to have a beneficial nature.

<sup>12</sup> On the limits to the right to strike, see Saenz Royo, 2003.

<sup>13</sup> For instance, in 1982, the Constitutional Court gave judgment on religious aid in the Armed Forces. The Court has admitted that the existence of State’s catholic aid to these individuals implied the possibility to come into effect the right of worship of individuals and communities. See STC 24/182. On this decision see also, Aguiar de Luque, 1993 pp. 9-34.

the whole, therefore, one can agree with Martínez Estay (1997 p. 91) who write that “even if the absence of homogeneity and uniformity of these rights impede to have one common definition, the analysis of their elements allow us identifying and differentiating them from the classic rights”, that is to say, from individual, civil and political rights (See also López Pina, 1996 p. 23).<sup>14</sup>

The remainder of this paper seeks to explore how social rights have been constitutionally recognised in Spain. It begins with a legal analysis on the litigable nature of social rights (2.1), then studying their degree of enforceability (2.2), and it closes putting some touches on the justiciability the social rights of last generation (2.3).

## II. Judicial Enforcement of Social Rights

The Spanish constitution was guided by the German Basic Law. Its preamble refers to a desire to ensure democratic co-existence on the basis, *inter alia*, of a fair economic and social system. (Díez-Picazo and Ponthoreau, 1991 p. 20). Indeed, the expression “social and democratic state” started first, from the German constitutionalism following Second World War, then from the constitutions of certain *Länder*, and finally, from the Fundamental Law of Bonn (articles. 20 and 28).<sup>15</sup>

The Spanish constitution emphasises on Article 1 that Spain is “as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system”. The order in which the adjectives appear in this phrase and the unusually long list it includes reveals the importance of social rights in Spain. The institutions for which the constitution provides and the ordinary administration of justice must conform to this welfare state clause (Díez-Picazo and Ponthoreau, 1991 p. 20). The Constitutional recognition of social rights is, to some extent, coherent with the idea of social and democratic State. In other words, the social State does not conform to the formal assurance of fundamental rights, but rather requires its compliance affecting other spheres.

### 2.1. Social Rights as Litigable Fundamental Rights?

Fundamental rights in the Spanish Constitution are divided into three groups. The first group (Articles 14 to 29, Section 1, Chapter II, Title I: “*De los derechos fundamentales y de las libertades públicas*”) comprises the classical fundamental rights, including the right to education (Article 27). The second group (Articles 30 to 38, Section 2, Chapter II, Title I: “*De los derechos y deberes de los ciudadanos*”) is primarily concerned with citizens’ rights and obligations, including the right to work (Article 35), while the third group (Articles 39 to 52, Chapter III, Title I: “*De los principios rectores de la política social y económica*”) is largely devoted to the protection of rights arising from the economic and social policies.<sup>16</sup>

Undoubtedly, the Spanish Constitution is fairly expansive on the rights to be secured, the categories of rights, the people to whom they are granted, and the levels at which they are granted, which are different from one category to the other, leading to a hierarchy of rights. However, Spanish scholars have different opinions on the possible fundamental approach of social rights, being difficult to provide a single legal description. The dominant legal doctrine accepted by the Constitutional Court circumscribes the fundamental rights catalogue to the rights of the first two groups, in other words, to the rights listed in Chapter II, Sections 1 and 2 (articles 14 to 38).<sup>17</sup> This position is also based on the

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<sup>14</sup> For another perspective on the elements characterising social rights, see De Castro Cid, 1993 p. 35.

<sup>15</sup> See also Perez Royo, 1984 p. 157.

<sup>16</sup> On this classification, see Alzaga Villaamil *et al.*, 2005 pp. 42-45.

<sup>17</sup> See Constitutional Court Decision (hereafter, STC) 76/83; STC 67/85; STC 111/83 (*Rumasa* decision). A more restrictive opinion only describes as fundamental rights the rights recognised in Article 14 and the listed rights in Title I, Section 1.

special protection given by article 53.1 and 2 (Chapter IV: “*De las garantías de las libertades y derechos fundamentales*”). As a consequence, social rights can be divided into three sub-categories of rights.

The first category includes the so-called ‘fundamental social rights’<sup>18</sup> or ‘social rights with a fundamental character’. The social rights belonging to this first category are the right to education (article 27.4), the right to freely join a trade union (article 28.1) and the right to strike (article 28.2).<sup>19</sup> They are protected, as we have seen, by article 53.2. Further, under Article 53.1 and 2 the rights of the first two groups can be claimed before the ordinary courts (*Tribunales Ordinarios*), and all legislation must respect the essential substance of these rights. As regards to enforceability, rights are graded in such a way that those in this first group – which include the right to education – may be claimed, pursuant to Article 53.1 in conjunction with Article 161.1.a) in conjunction with Article 53.2, before the Constitutional court (*Tribunal Constitucional*) after all other legal means have been exhausted. These are, then, individual and also litigable fundamental rights.<sup>20</sup>

The second category or group of social rights is the so-called ‘social rights with a simple constitutional character’. Three social rights belong to this category: the right to work (article 35),<sup>21</sup> the right to collective bargaining (article 37.1), and the right to adopt collective labour dispute measures (article 37.2).<sup>22</sup> These social rights, including the particularly topical right to work are, pursuant to Article 53.1, binding on the public authorities and, as we have seen above, may be claimed before the ordinary courts. The opposite conclusion to be drawn from Article 53.3, however, shows that only the rights it lists enjoy protection to be obtained by appealing to the Constitutional court. As these rights cannot be claimed before the Constitutional court, they are not litigable fundamental rights.

Finally, the so-called ‘social rights of a legal configuration’ belong to the third category. They are listed in Chapter III and the principles governing them mainly concern the following social sphere of interest:

- a) *The right to family legal and social protection.* Under Article 39.1 the state affords such protection.
- b) *The right to the full protection of children,* who are equal before the law, regardless of their parentage, and of mothers, whatever their marital status (article 39.2).

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<sup>18</sup> Social rights “nominally fundamentals” (Perez Royo, 1996 p. 281).

<sup>19</sup> Article 27.4: “Elementary education is compulsory and free”. Article 28.1: All have the right to freely join a trade union. The law may restrict or except the exercise of this right in the Armed Forces or Institutes or other bodies subject to military discipline, and shall lay down the special conditions of its exercise by civil servants. Trade union freedom includes the right to set up trade unions and to join the union of one’s choice, as well as the right of trade unions to form confederations and to found international trade union organizations, or to become members thereof. No one may be compelled to join a trade union”. Article 28.2: “The right of workers to strike in defence of their interests is recognised. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services.”

<sup>20</sup> Article 53.1: “The rights and freedoms recognised in Chapter II of the present Title are binding on all public authorities. Only by an act which in any case must respect their essential content, could the exercise of such rights and freedoms be regulated, which shall be protected in accordance with the provisions of article 161.1.a).”

<sup>21</sup> Article 35: “1. All Spaniards have the duty to work and the right to work, to the free choice of profession or trade, to advancement through work, and to a sufficient remuneration for the satisfaction of their needs and those of their families. Under no circumstances may they be discriminated on account of their sex. 2. The law shall regulate a Workers’ Statute.”

<sup>22</sup> Article 37: “1. The law shall guarantee the right to collective labour bargaining between workers and employers’ representatives, as well as the binding force of the agreements. 2. The right of workers and employers to adopt collective labour dispute measures is hereby recognised. The law regulating the exercise of this right shall, without prejudice to the restrictions which it may impose, include the guarantees necessary to ensure the functioning of essential public services.”

- c) *The right to continuing education and training* and protection at the workplace and to guarantee leave and limited working hours (article 40.2).
- d) Article 40 requires the public authorities to improve the above conditions as well as the conditions for the fairer distribution of incomes (article 40.1).
- e) *The right to the social security*. Article 41 guarantees a public system for the social security of the public that provides them with adequate help in emergencies and especially when they are unemployed.
- f) *The right to health protection* (article 43.1). Article 43 recognises a right to health protection, paragraph 2 requiring the public authorities to organise this protection and paragraph 3 requiring them to promote health education.<sup>23</sup>
- g) *The right to access to culture* (article 44.1). Article 44 guarantees the individual access to culture, paragraph 2 also requiring the public authorities to promote culture.
- h) *The right to enjoy of nature*. Article 45 entitles everyone to the enjoyment of nature and also requires the state to use its influence to ensure the preservation and restoration of the environment (paragraph 2).
- i) *The right to housing*. Article 47 grants all Spaniards the right to housing, the necessary conditions to be promoted by the public authorities.
- j) The protection of young people. Article 48 requires the public authorities to create the conditions for the involvement of young people in social development.
- k) Article 49 is devoted to the integration and protection of disabled people, and article 51 to the consumers and users.
- l) Article 50 guarantees adequate provision for old age and support for the elderly with respect to health, housing, culture and leisure.

The rights to health, a healthy environment and adequate housing are worded as individual rights. Under article 53.2, however, they are principles which are binding on the three organs of state and so, take the form of a provision defining a state objective without providing the foundations for an individual right (Díez-Picazo and Ponthoreau, 1991 p. 20). This is the most defended position. These authors argue that not all social rights are subjective rights, but only those expressing freedom (e.g.: collective labour rights) (Martínez Estay, 1997 pp. 96-97). They consider these social rights as mere legal principles (community legal values) rather than rights, and so following article 53.3 *in fine* (Beladiez Rojo, 1994 p. 87).<sup>24</sup>

However, other authors defend their fundamental nature arguing that “the rights listed in Chapter III, Title I meet all the necessary conditions to be considered as fundamental rights: they are human rights that have been constitutionally recognised and legally guaranteed”. Furthermore, “the Constitution defines all the rights listed in Title I as fundamental rights”, and the fact that there is a number of legal instruments protecting them, does not keep us from claim their fundamental character (Perez Luño, 1996 pp. 257-258; 1984, pp. 83-85).

As we have seen, most of the scholars defend that Chapter III is limited to formulate State general obligations. But, an intermediate position argues that all social rights recognised in the Spanish Constitution are subjective rights, even if their protection depends on State economic resources (Ara Pinilla, 1990 pp. 46-47). Certainly, some articles include in Chapter III, Title I contains authentic

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<sup>23</sup> The same applies to physical education, sport and the suitable use of leisure time pursuant to article 43.3.

<sup>24</sup> See STC 36/1991 regarding article 39.4 “Children shall enjoy the protection provided for in the international agreements safeguarding their rights”, or STC 14/1992 with regard to article 51.1 “The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests” (understood as a guiding principle of the social and economic policies instead of a subjective right).



rights as the right to health protection, culture or housing with a clear social-economic nature. In spite of the fact that they could have a dubious fundamental nature, they are genuine rights — and not only mere principles — that need to be implemented by a legal provision. In other words, “they may only be invoked before the ordinary courts in accordance with the legal provisions implementing them”.<sup>25</sup>

## 2.2. *Social Rights Enforceability*

It seems that the division of fundamental rights in three groups within the Spanish Constitution establishes, through its article 53, three levels of protection: social rights exceptionally, ordinary and minimally protected.

### a) Social rights exceptionally protected

The rights to a free elementary education (article 27.4: “*derecho a la educación*”, to freely join a trade union (article 28.1: “*derecho a sindicarse libremente*”) or to strike (article 28.2: “*derecho a la huelga*”) are fundamental social rights which are ‘exceptionally protected’ by means of judicial and extrajudicial guarantees (Section 1, Chapter II, Title I: “*De los derechos fundamentales y de las libertades públicas*”).

These social rights have two normative or objective extrajudicial guarantees: i) article 168 imposes a constitutional rigidity if their revision becomes necessary, ii), article 81.1 imposes their implementation by the way of Organic Act (*Ley Orgánica*) and iii), as they are subjective public rights, they are directly and immediately applicable.<sup>26</sup> It should be noted, that they are issue of protection through the Spanish Ombudsman (article 54) which imply an institutional extrajudicial guarantee for these rights.<sup>27</sup>

Instead, judicial guarantees involve their protection “by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection (*recurso de amparo*) to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognised in article 30” (Article 53.2).

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<sup>25</sup> Article 53.3: “Recognition, respect and protection of the principles recognised in Chapter III shall guide legislation, judicial practice and actions by the public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them”. See López Pina, 1996 pp. 33-34. See also STC 36/1991, STC 55/1994, STC 222/1992, STC 189/1987, and STC 215/1994, STC 247/2007.

<sup>26</sup> Article 53.2: “Any citizen may assert a claim to protect the freedoms and rights recognised in article 14 and in Section 1 of Chapter II, by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection (*recurso de amparo*) to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognised in article 30.” Article 168: “1. If a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Title, Chapter II, Section 1 of Title I; or Title II, the principle of the proposed reform shall be approved by a two-thirds majority of the members of each House, and the *Cortes Generales* shall immediately be dissolved. 2. The Houses elected thereupon must ratify the decision and proceed to examine the new constitutional text, which must be passed by a two-thirds majority of the members of each House. 3. Once the amendment has been passed by the *Cortes Generales*, it shall be submitted to ratification by referendum.” Article 81.1: “Organic acts are those relating to the implementation of fundamental rights and public liberties, those approving the Statutes of Autonomy and the general electoral system and other laws provided for in the Constitution.”

<sup>27</sup> Article 54: “An organic act shall regulate the institution of the Defender of the People (*Defensor del Pueblo*) as high commissioner of the *Cortes Generales*, appointed by them to defend the rights contained in this Part; for this purpose he or she may supervise the activity of the Administration and report thereon to the *Cortes Generales*. (Senate Standing Orders, article 183).”

b) Social rights ordinary protected

The right to work (article 35: “*el derecho y el deber de trabajar*”), the right to collective bargaining (article 37.1: “*derecho a la negociación colectiva*”) and the right of workers and employers to adopt collective labour dispute measures (article 37.2: “*derecho a adoptar medidas de conflicto colectivo*”) are constitutional rights ‘ordinary protected’ (Section 2, Chapter II, Title I: “*De los derechos y deberes de los ciudadanos*”).

With regard to these rights, normative or objective extra judicial guarantees are: i) constitutional rigidity, but it is imposed by article 167, instead of article 168, ii) constitutional control and a uniform regulation (articles 139.1 and 149.1), iii) they are directly and immediately applicable binding public authorities (articles 53.1 and 9.1) and, iv)

“in case of extraordinary and urgent need —article 86.1 imposes that— the Government may issue temporary legislative provisions which shall take the form of Decree-laws and which may not affect the legal system of the basic State institutions, the rights, duties and freedoms of the citizens contained in Title 1, the system of Self-governing Communities, or the general electoral law”.

In addition, they are also issue of protection through the Spanish Ombudsman (article 54) which implies an institutional or organic extrajudicial guarantee for these rights.

With respect to judicial guarantees, the first paragraph of article 24.2 imposes that “(...) all have the right to the ordinary judge predetermined by law”, so these rights can be claim before the ordinary courts and have a constitutional control. It should be noted that there is a special judicial protection of the right to collective bargaining consisting in an urgent and preferential procedure.<sup>28</sup>

c) Social rights minimally protected

The right to an adequate social assistance (article 41: “*el mantenimiento de un régimen público de Seguridad social*”), to health protection (article 43.1: “*derecho a la protección de la salud*”), to access to culture (article 44.1: “*la tutela del acceso a la cultura*”) or to enjoy decent and adequate housing (article 47: “*derecho a una vivienda digna*”) are legal social rights ‘minimally protected’.

It is important to underline that the entire Constitution, including Chapter III (social rights with a legal configuration) have a normative and not a programmatic character.<sup>29</sup> However, not all social rights listed in this Chapter have the same effectiveness. Unfortunately, the principles arising from the economic and legal policies are neither directly none immediately applicable.<sup>30</sup> However, it can be argue that these social rights have a political, ideological and legal value, acting as genuine rights.<sup>31</sup> But, how they operate before the judge, the legislator and the government? The rights listed in articles 39 to 52 guarantee a number of social services first, limiting the discretionary role of the legislator to a social minimum (*eficacia impositiva*),<sup>32</sup> entrusting their protection to the Constitutional Court (*eficacia*

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<sup>28</sup> See Royal Legislative Decree 2/1995.

<sup>29</sup> See STC 1/1981: The Constitutional Court has insisted since its first decision, and without any hesitation, that the Constitution is a binding rule of law for all.

<sup>30</sup> With regard to social and political basis of social rights within the Spanish Constitution, see Ruiz-Rico Ruiz, 1991 pp. 171-195.

<sup>31</sup> See Cobreros Mendoza, 1987 pp. 34-35.

<sup>32</sup> Article 103.1: “The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law”. Article 106.1: “The Courts shall check the power to issue regulations and ensure that the rule of law prevails in administrative action and that the latter is subordinated to the ends which justify it”.

*impeditiva*),<sup>33</sup> and limiting fundamental rights objectively, in other words, counteracting the disproportionate subjectivism of citizen's expectations (*eficacia habilitadora*).

A common criticism levelled at social rights is that they do not dispose of the adequate judicial guarantees (with the exception of the fundamental social rights). Certainly, they are not issue of individual appeal for protection (*recurso de amparo*) before the Constitutional Court, and their claim before ordinary courts depends on what has been established by the law, so lacking of direct application. As a result, a strict vision of social rights justiciability will conclude that their justiciability is questionable as they are label as rights of a minor degree of protection because to the absence of a strong procedural action, as it is the case of individual, political and civil rights (Sastre Ariza, 2001 p. 267).

However, some authors decide on for a more comprehensive interpretation of the notion of justiciability. They suggest finding social rights legal operability by way of other means (Sastre Ariza, 2001 p. 267 & Prieto Sanchís, 1998, p. 73). For instance, not only looking at their direct effectiveness through the creation, interpretation and application of all the rules of the Spanish legal system, as article 53.3 imposes, but also through the alleged unconstitutionality of acts (*recurso o cuestión de inconstitucionalidad*)<sup>34</sup> and the individual appeal for protection (*recurso de amparo*) before the Constitutional Court when individual, political and civil rights, granted with this judicial protection, are connected with social rights. Therefore, the application of social rights could be linked with the defence of individual rights.

The absence of a preferential judicial protection must be interpreted here as a gap that must be fulfilled by the legislator, looking for 'possible' social rights instead of looking at them as 'rhetoric' social rights. And it is possible, as long as, we are able to go into the real significance of the democratic state as well as the Constitution (Sastre Ariza, 2001 p. 270).

### 2.3. *Justiciability of New Social Rights Regulated at Autonomous Level?*

As a result of the recent statutory reforms, the Statutes of Autonomy (EA) includes the so-called "rights of last generation"<sup>35</sup> which are not yet recognised under the Spanish Constitution as they are responding to recent social, scientific and technological evolution (Elías Mendez, 2008 p. 102).<sup>36</sup>

This new catalogue of rights and principles is quite extensive and devotes special attention to social rights considering immigrants, children, elderly, disabled, marginalised people and victims of poverty, social exclusion, terrorism and gender-based violence.

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<sup>33</sup> For example see STC 19/1982, (6º Fundamento): "(...) article 53.3 impede to consider such a principles [Chapter III] as empty rules, imposing that it must be bear in mind that they are necessary in the interpretation of the law and the remaining constitutional rules". See also Carmona Cuenca, 1992 pp. 103-125.

<sup>34</sup> Article 161.1.a): "The Constitutional Court has jurisdiction over the whole Spanish territory and is entitled to hear: a) against the alleged unconstitutionality of acts and statutes having the force of an act. A declaration of unconstitutionality of a legal provision having the force of an act and that has already been applied by the Courts, shall also affect the case-law doctrine built up by the latter, but the decisions handed down shall not lose their status of *res judicata*".

<sup>35</sup> For example: the right to live with dignity the death process (article 20 of the EA of Andalusia and Catalonia), the right to proper administration (article 31 and 14 of the EA of Andalusia and Balearic Islands, respectively), the right to access to the documents of the autonomous public institutions and administrations (article 9.1 of the EA of Valence) or the right to access new technologies (which is recognised as a "right" in the EA of Valence, and as a "principle" in article 53 of the EA of Catalonia and article 29 of the EA of the Balearic Islands).

<sup>36</sup> These new rights derive from the Autonomous Communities' competences regulated in the Constitution. In this respect, Quadra Salcedo Janini argues that "the Constitution that has established the central competences has not defined their meaning, meaning that requires an interpretation. Interpretation that could be made in first instance by the Autonomous Statute when attributes competences to the Autonomous Community. Interpretation, however, that could not bind the central State legislator and, of course, either the Constitutional Court, supreme constitutional interpreter" (2009 pp. 1-22.). See also STC 247/2007.

The objective of this paper is not neither to present the new catalogue of social rights at various territorial levels,<sup>37</sup> nor to analyse them.<sup>38</sup> As it has been already pointed out, the aim of the paper is to explore how the Spanish Constitution deals with social rights and their justiciability.

However, it seems to me important to underline very briefly that the most recent statutory reforms (for instance, the Statutes of Autonomy of Valence, Catalonia, Andalusia, Balearic Islands, Aragon<sup>39</sup> and Castile and Leon) and, in particular, the recent Constitutional Court rulings in this area (see STC 247/2007)<sup>40</sup> prevent this new catalogue of social rights from being justiciable.

Thus, the recent unconstitutionality appeal (*recurso de inconstitucionalidad*)<sup>41</sup>, states on the acceptability of the incorporation of a new list of rights in the recently reformed Statutes of Autonomy—and within the sphere of each Autonomous Community—, as long as these new rights are [social] “rights of legal configuration” and not directly applicable.

As a result, “they may only be invoked before the ordinary courts in accordance with the legal provisions implementing them” as states by article 53.3 regarding to the guiding principles of the social and economic policy (Chapter III, Title I).

### III. Conclusions

The Spanish constitution is fairly expansive on the rights secured, the people to whom they are granted, and the levels at which they are granted. Even in the absence of a common definition, its recognition in the Constitution allows their identification and differentiation from the classics rights.

Fortunately, the constitutional recognition of social rights in Spain makes an important contribution to challenging the typical characterisation of social, economic and cultural rights as ‘second class’ rights. From its privileged position in the Constitution, the three above mentioned groups of rights have a direct effectiveness through the creation, interpretation and application of all the rules of the Spanish legal system. Furthermore, the first and second groups are protected through a series of extra judicial and judicial guarantees.

In conclusion, in spite of their hierarchisation with respect to their judicial enforcement, it cannot be stated from social rights that they are ‘aspirational only and programmatic in nature’, simply because every single article of the Spanish Constitution has a normative and not a programmatic character, even if not all the rights have the same judicial enforceability.

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<sup>37</sup> Some authors refer to the regulation of social rights at territorial level as a certain “federalisation of social rights” (Cascajo Castro, 2009 p. 31).

<sup>38</sup> For the meaning and scope of social rights from their new positivisation both on the supranational level and the level of the autonomous region, see Cascajo Castro, 2009 (Cascajo Castro, 2009 p. 31).

<sup>39</sup> On the statutory reform of the EA of Aragon, see Sáenz Royo and Contreras Casado, 2008 pp. 267-286.

<sup>40</sup> Available at: <http://www.tribunalconstitucional.es/jurisprudencia/Paginas/Sentencia.aspx?cod=9408>.

<sup>41</sup> Unconstitutionality appeal (num. 7288-2006) raised by the Autonomous Community of Aragon against article 20 of the Organic Law 1/2006 which reforms the Organic Law 5/1982, on the Statute of the Autonomous Community of Valence and provides article 17.1 with a new content. See *Fundamento Jurídico 15*.

## **List of references**

- Alzaga Villaamar, O. et al. 2005. *Derecho político español según la Constitución de 1978. Derechos fundamentales y órganos del Estado*, II, Madrid: Editorial del Centro de Estudios Ramón Areces.
- Aguiar de Luque, L. 1993. “Los límites de los derechos fundamentales”, *Revista del Centro de Estudios Constitucionales*, No. 14, Enero-Abril, pp. 9-34.
- Ara Pinilla, I. 1990. *Las transformaciones de los derechos humanos*, Madrid: Tecnos.
- Beladiez Rojo, M. 1994. “Los principios jurídicos”, Madrid: Tecnos.
- Calsamiglia, A. 2000. *Cuestiones de lealtad. Límites del liberalismo: corrupción, nacionalismo y multiculturalismo*, Barcelona: Paidós.
- Carmona Cuenca, E. 1992. “Las normas constitucionales de contenido social: delimitación y problemática de su eficacia jurídica”. *Revista de Estudios Políticos (Nueva Época)*, 76, pp. 103-125.
- Cascajo Castro, J. L. 2009. “Los derechos sociales, hoy”, *Revista catalana de dret públic*, 38, pp. 21-42.
- Cobrerros Mendoza, E. 1987. “Reflexión general sobre la eficacia normativa de los principios constitucionales rectores de la política social y económica del Estado”, *Revista Vasca de Administración Pública*, 19, pp. 34-35.
- De Burca, G. 2005. “The Future of Social Rights Protection in Europe”, in *Social Rights in Europe*, G. de Burca and Bruno de Witte (Eds.), Oxford University Press, pp. 4-14.
- De Castro Cid, B. 1993. *Los derechos económicos, sociales y culturales*, León: Universidad de León.
- Díez-Picazo, L. M. & Ponthoreau, M.-C. 1991. *The Constitutional Protection of Social Rights: Some Comparative Remarks*, Florence: European University Institute.
- Elías Méndez, C. 2008. “Principales rasgos de las reformas estatutarias: ¿Hacia un Estado autonómico cooperativo?”, *Revista de Derecho de Extremadura*, 3, pp. 100-115.
- Fabre, C. 2005. “Social Rights in European Constitutions”, in *Social Rights in Europe*, G. de Burca and Bruno de Witte (Eds.), Oxford: Oxford University Press, pp. 15-30.
- Gargarella, R. 1998. “Primeros apuntes para una teoría sobre los derechos sociales. ¿Es posible justificar un tratamiento jurídico diferenciado para los derechos sociales e individuales?”, *Jueces para la democracia*, 31, pp. 11-15.
- Garrido Falla, F. 1979. “El artículo 53 de la Constitución”, *Revista Española de Derecho Administrativo*, 21, 1979, p. 176.
- González Amuchástegui, J. 1986. *Louis Blanc y su aportación a los orígenes del socialismo democrático*, Tesis original, Universidad Complutense de Madrid.
- López Pina, A. 1996. “Comentario introductorio al Capítulo III del Título I”, in O. Alzaga Willaamil (dir.), *Comentarios a la Constitución Española de 1978*, IV (arts. 39-55), Madrid: Edersa/Cortes Generales.
- Llamas Cascón, A. 1995. “Algunas consideraciones en torno a los derechos económicos, sociales y culturales”, *Derechos y libertades*, *Revista del Instituto Bartolomé de las Casas*, 3(6), pp. 77-83.
- Martínez Estay, J. I. 1997. *Jurisprudencia Constitucional Española sobre Derechos Sociales*, Barcelona: Cedecs.

- Peces-Barba Martínez, G. 1998. “Tránsito a la modernidad y derechos fundamentales”, *Historia de los derechos fundamentales*, 1, pp. 13-264.
- 1995. “Los derechos económicos, sociales y culturales: su génesis y su concepto”, *Derechos y libertades*, *Revista del Instituto Bartolomé de las Casas*, 3(6), pp. 15-34.
- 1993. “Concepto y problemas actuales de los derechos fundamentales”, *Derechos y libertades*, *Revista del Instituto Bartolomé de las Casas*, 1(1), pp. 33-99.
- Pérez Luño, A. E. 2006. *Derechos Humanos, Estado de Derecho y Constitución*, Madrid: Tecnos.
- 1996. “Artículo 45: Medio Ambiente”, in Alzaga Villaamil (dir.), *Comentarios a la Constitución Española de 1978*, IV (arts. 39-55), Edersa/Cortes Generales, Madrid.
- 1991. “Las generaciones de derechos humanos”, *Revista el Centro de Estudios Constitucionales*, 10, pp. 203-216
- 1984. *Derechos Humanos, Estado y Constitución*, Madrid: Tecnos.
- Pérez Royo, J. 1984. “La doctrina del Tribunal Constitucional sobre el Estado Social”, *Revista Española de Derecho Constitucional*, 4(10). Enero-Abril, pp. 157-181.
- Pérez Royo, J. 1996. *Curso de Derecho Constitucional*, Madrid: Marcial Pons, Ediciones Jurídicas y Sociales.
- Prieto Sanchís, L. 1998. *Ley, principios, derechos*, Madrid: Dikynson.
- 1995. “Los derechos sociales y el principio de igualdad sustancial”, *Revista del Centro de Estudios Constitucionales*, 22, pp. 9-57.
- Quadra-Salcedo Janini, “El régimen jurídico de los derechos sociales estatutarios: reflexiones tras la STC 247/2007, de 12 de diciembre”, *Revista General de Derecho Constitucional*, 5, 2008, pp. 1-22.
- Ruíz-Rico Ruíz, G. 1991. *Revista de Estudios Políticos (Nueva Época)*, 71. Enero-Marzo, pp. 171-195.
- Sastre Ariza, S. 2001. “Hacia una teoría exigente de los derechos sociales”, *Revista de Estudios Políticos (Nueva Época)*, 112, Abril-Junio, pp. 253-270.
- Sáenz Royo, E. 2003. “Algunas notas sobre los límites del derecho de huelga”, *Derechos constitucionales y formas políticas*, 2, pp. 265-292.
- Sáenz Royo, E. and Contreras Casado, M. 2008. “Los derechos, deberes y principios en la reforma del Estatuto de Autonomía de Aragón”, in *Derechos y principios rectores de los Estatutos de Autonomía*, M. Aparicio et al. (eds), Barcelona: Atelier, pp. 267-286.
- Vasak, K. 1977. “Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights”, *UNESCO Courier* 30 (11), Paris: United Nations Educational, Scientific, and Cultural Organization, November.

# Social Rights in Portugal

Bruno Mestre

## Abstract

The purpose of this paper is to analyse the protection of fundamental social rights in Portugal. The paper will defend that there is a variety of mechanisms for the protection of fundamental social rights in the Portuguese Constitution with variable forms of intensity covering directly applicable rights, the State's duty to create the necessary conditions for the implementation of those rights and the recent phenomenon of *Drittwirkung*. There is a constellation of mechanisms that must be seen in their context and unitary answers should be avoided.

## Introduction

The Portuguese Constitution of 1976 contains an extensive and potentially far-reaching regime of fundamental rights. Fundamental Social Rights assume a pivotal role in the Constitution because they are mentioned in several parts and may even enjoy some direct forms of applicability. The legal mechanisms to protect fundamental rights vary considerably however and give rise to distinct forms and intensities of protection of fundamental social rights. This paper will be occupied with the protection of fundamental social rights in the Portuguese Constitution and is organised as follows: the first part will review the concept of a fundamental social right; the second part will review the Social Principle contained in the Portuguese Constitution; the third part will review the regime of rights, freedoms and guarantees and the fourth part will terminate with a review of the several legal mechanisms to protect and implement fundamental social rights in Portugal. The last part will present the conclusion.

## 1. Definition of Fundamental Social Right

The study of fundamental rights in the Portuguese Constitution must initiate with a short review of the several approaches that have been laid out to define a fundamental social right. This is a necessary preliminary exercise because, as the following paragraphs will attempt to demonstrate, the protection of social rights in Portugal is not entirely coincident with the catalogue of fundamental social rights in the Portuguese Constitution. In this sense, it becomes necessary to define the object of the research to be able to understand the depth and intricacies of the Constitutional regulation.

The definition of a fundamental social right is as complex as the definition of a fundamental right. The most basic attempt to define a fundamental right consists in classifying it as a subjective right whose protection is considered fundamental by a given political community. In this sense they consist in positive rights (*i.e.*: statutorily recognised) that enjoy a specific constitutional dimension in the sense of being perceived as essential in a certain legal community and taking precedence over the public (and some private) powers. This specific constitutional dimension of fundamental rights is essential for its particular regime because, without the strength derived from their constitutionalisation, they would be nothing but simple political aspirations.<sup>1</sup> The words of Anna Maciejczyk are illustrative in this aspect:

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<sup>1</sup> Vieira de Andrade, J. C. (1987). *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, Almedina, Gomes Canotilho, J. J. (1998). *Direito Constitucional e Teoria da Constituição*, Almedina.

“...fundamental rights are a core of rights; they play a pivotal role in a society or a social system by constituting a basic pillar within it and an objective which orientates institutions and policies. Fundamental rights, therefore, should be regarded in the context of the existence of a society, assuming that they are concretely implemented through the fabric of an organised social system; any change in the fundamental rights model would result in a change in the societal model.”<sup>2</sup>

This short but dense description of the definition of fundamental rights deserves a further development. Fundamental rights were defined as constitutionally recognised subjective rights that enjoyed a pivotal role within a given political community. The concept and understanding of fundamental rights has had a distinct role throughout History however. Constitutional studies have tended to distinguish, in line with Georg Jellinek, between three basic types or stages of evolution of fundamental rights: the *status negativus*, the *status activus* and the *status positivus*. The *status negativus* consists in the first stage of development of fundamental rights. Historically they were born in the liberal states that arose from the influence of the French revolution of 1789 and consisted essentially in a margin of freedom from the State. The rights protected in this stage consisted fundamentally in the rights connected with the private autonomy of the individual - life, freedom and property - that were untouchable by the State. *Status activus* consists in the second stage of development of fundamental rights and focus on rights of political participation. The development of the liberal state led citizens to demand a greater capacity of influencing the public powers and to the development of a number of rights (e.g: the right to vote and be elected, the right to be informed of regulatory and administrative activity) that ensure the capacity to influence (*Mitwirkungsfähigkeiten*) the organisation of the State. The last form of development of fundamental rights consisted in a number of rights that were classified under the umbrella concept *status positivus*. These rights consisted in rights to demand provisions from the State (*Leistungsrechte*). In contrast to the *status negativus*, in which the individual demanded an abstention from the State, the *status positivus* demanded a positive action from the State in the sense of fulfilling (*Verwirklichen*) a number of tasks that the State should perform in order to correct the legal equality but substantial inequality of the individual. These rights carry with them a transformation of the perspective on the role of the State that should evolve from an abstention from intervening in the private autonomy of individuals towards the active promotion of social justice. An example of this right is the right to Social Security or to education.<sup>3</sup>

Current Constitutional jurisprudence currently distinguishes between two broad categories of fundamental rights: (1) rights, freedoms and guarantees and (2) economic, social and cultural rights. The first group refers, broadly speaking, to the ideas of *status negativus* and *status activus* developed in the former paragraphs. They consist in self-executing, constitutionally determined rights of the individual that either provide him with a margin of freedom from the State and overwhelming private powers (e.g: freedom of association) or provide the individual with a right to participate in the State activity (e.g: the right to be informed of on-going administrative procedures). Particularly important in this group are the so-called institutional guarantees, which provide the individual with substantive rights in criminal and administrative procedures (e.g: such as the right not to be interrogated without proper judicial support).<sup>4</sup>

Economic, social and cultural rights (or, broadly speaking, social rights) correspond to the *status positivus* category enumerated above. Their definition is more difficult as they span across a number of

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<sup>2</sup> Maciejczyk, A. (2009). Constitutional Courts as Actors of Fundamentalisation of Social Rights. The Fundamentalisation of Social Rights. Marie-ange Moreau and B. d. Witte, European University Institute.

<sup>3</sup> Miranda, J. (1998). Manual de Direito Constitucional, Coimbra IV; Sachs, M. (2003). Verfassungsrecht II - Grundrechte, Springer.

<sup>4</sup> Gomes Canotilho, J. J. (1998). Direito Constitucional e Teoria da Constituição, Almedina.



rights of a very distinct content that demand positive action from the State and very often from the individual for its fulfillment. The following definitions have been proposed for social rights:

“Social rights deal with the relationship between the individual and the constitutionally recognised social communities (e.g: marriage, family, religion, school) and to the State in its function as Social State”.<sup>5</sup>

“Social rights consist in a set of rights recognised to each citizen, which may only be performed in its relationship with the other human beings as part of a community and which may only be fulfilled when the political community makes provisions for the guarantee of the freedom to determine one’s life. Social rights are a necessary complement to civil liberties since civil liberties cannot be performed without a minimum of social security. In contrast to civil freedoms, social rights are not fulfilled free from the State but with the assistance of the State. It consists in a fundamental right to provisions or participation”.<sup>6</sup>

The exact content of these rights deserves a more elaborate explanation. The reference point of those rights consists in the margin of manoeuvre that the State has *vis-à-vis* the individual. The definition is not entirely correct however because in reality all of these rights demand a certain positive and negative activity from the State. For instance, the protection of property demands the setting up of adequate means (as police and courts) to protect the property of individuals; the right to vote demands the organisation of elections; social security or education demand the participation of individuals with enrollment and contributions to Social Security schemes or an active effort to study in school. The most important thing to retain is that rigid conceptualisations should be avoided to the fullest extent and that fundamental rights enjoy a multiplicity of dimensions - positive, active and negative - that composes its precise content.<sup>7</sup>

The question of the enforceability of Fundamental Social Rights has been heavily debated. The greatest doubt consists in drawing the line between their conceptualisation between simple political aspirations and concrete fundamental rights that may be enforced. The key to answer this questions lies in their constitutionalisation. Current Constitutional Theory perceives a Constitution as “*an open legal system of rules and principles*” that contains not only a description and enumeration of the organs that may exercise power and the means to exercise it but also the values regarded as fundamental by that community and the duties of those organs to respect and implement them.<sup>8</sup> The constitutionalisation of fundamental rights must be seen at this light. The inclusion of some aspirations of the community into the constitutional framework of that political community is an moment of significant importance because it draws the line between a simple political aspiration (e.g: to promote the dignity of all human beings) towards their recognition as a duty of the State to actively promote its implementation. Although the content and extent of the constitutional recognition of fundamental social rights vary to a great extent between the several communities because it depends of the concrete constitutional traditions of that community, it nonetheless reveals an express will of that community to promote the implementation of the values contained in those rights.

The implementation of those rights is a task of the State that may be performed by several means. The traditional constitutional doctrine distinguished between *self-executing* social rights and *programatic* rights. The former consisted in rights that could be directly claimed by the individual *vis-à-vis* the State (e.g: the right not to be discriminated against in the access to school); the second consisted in rights that depended on the regulatory activity of the State, which depended of the concrete financial and political conditions for their implementation (the so-called *pre-conditions* for the implementation

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<sup>5</sup> Rüßmann, H. (1994). Einführung in das Recht, Skript zur Vorlesung für den Fachbereich Wirtschaftswissenschaft im Sommersemester 1994, Saarland Universität.

<sup>6</sup> Parliament, E. (1999). Fundamental Social Rights in Europe, European Parliament.(author’s translation from the original German document).

<sup>7</sup> Vieira de Andrade, J. C. (1987). *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, Almedina.

<sup>8</sup> Gomes Canotilho, J. J. (1998). *Direito Constitucional e Teoria da Constituição*, Almedina.pp.1033 ff.

of fundamental social rights) as well as the political evolution of the people, the changing conceptions of the role of the State and the means of fulfillment of the principles of human dignity and free development of personality (the so-called *structural elements* of fundamental social rights). In accordance with the latter view, all claims needed to be based on the implementing legislation and their only possibility of practical enforcement consisted in the application of the implementing legislation, which would give it life.<sup>9</sup>

This view has been challenged lately by several scholars that have attempted to provide social rights with a greater practical expression at the light of the duties of the State. The main idea underpinning this new practical expression may be synthesized in the following words: *social rights impose positive duties to act upon the State*. In this sense, they are addressed not only to the regulatory bodies (Parliaments) but to all State organs (Judicial, Administrative and Legislative) in their activity. The regulatory bodies must promote at all times the fulfillment of those fundamental rights in accordance with the material pre-conditions and the structural elements; this does not mean that those rights are simple enunciations of principle completely at their disposal: they have a certain minimum content that not only imposes a positive duty to act but also limits the deregulatory impact of national policies on the rights recognised by the Constitution (e.g: a legislature cannot eliminate completely Social Security systems but it can conform them in accordance with the material and structural elements). Finally, those rights are also binding upon the Courts and the public administration when interpreting legal rules; these bodies must take into account the content of the right contained in those provisions and interpret the legal provisions at the light of those constitutional fundamental social rights in order to provide them with maximum expression in their implementation (the greatest expression of this last duty is the concept of *Drittwirkung*, which consists in the interpretation of private law rules at the light of the Constitution).<sup>10</sup>

This short review of the nature and content of fundamental social rights may allow us to extract some preliminary conclusions. Fundamental Social Rights must be seen at the light of the evolution of the State and of society; they represent a stage of evolution in the protection of fundamental rights of individuals in which those rights are not regarded simply as a right of defense or a right of influence but a right to demand the correction of social inequalities and to have the necessary preconditions for the development of one's personality. There is a plethora of fundamental social rights with variable degrees of densification and protection: some are purely programmatic norms (e.g: right to a sustainable environment), others are organisatory norms (e.g: the duty of the State to use tax policies to promote social objectives), others are institutional guarantees (e.g: right not to be discriminated in public procurement) among other norms. The constitutionalisation of fundamental social rights draws the line between their consideration as simple philosophical aspirations and their recognition as positive claims. The distinction between self-enforcing and purely programmatic rules does not serve to classify fundamental social rights; on the one hand, even civil freedoms demand a certain intervention from the State to make them enforceable (e.g: the right of manifestation might demand an administrative procedure to organise the manifesto and avoid the interference with the public order); on the other hand, the protection of fundamental social rights is not in the pure willingness of the State, in accordance with the material and structural elements enforced in a given society. The protection of fundamental social rights is directed to all State organs in all the stages of their activity; the main recipients are the legislative and the executive branches since they are the ones in control of the material resources and are more able to make the necessary decisions to allocate those resources in the best possible means to fulfill at a given point in time those fundamental social rights; the courts and the public administration have a distinct role: their role is to promote the implementation of those rights by giving them maximum expression in their activity (e.g: in the interpretation of legal rules

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<sup>9</sup> Ibid.

<sup>10</sup> Witte, B. d. (2005). The trajectory of fundamental social rights in the European Union. *Social Rights in the Europea*. G. d. Burca and B. d. Witte, Oxford, Moreau, M.-A. (2006). *Droit du Travail, Normes Sociales et Mondialisation*, Dalloz.

governing the allocation of social security provisions) and in the control of the deregulatory activity of the State. This promotes at all times the constitutionally protected rights and ensures the State's duty to implement them to their fullest extent.<sup>11</sup>

## **2. The “Social Principle” in the Portuguese Constitution**

The study of the protection of fundamental social rights in the Portuguese Constitution must initiate with the “*social principle*”. The Portuguese Constitution of 1976 was enacted in the follow up of a period of right wing dictatorship that lasted from 1933 to 1974. The Constitutional power decided to break with the past and declare that the “*fulfillment of the economic, social and cultural democracy*” was one of the main principles of the Portuguese Republic (arts.2, 9, 80 and 81). The simple reading of these provisions suffices to understand that the practical implementation of social rights is not simply a declaration of principle unbound by any type of enforceability but a true permanent task of the State in the promotion of the development of democracy.<sup>12</sup>

The Social Principle of the Portuguese Constitution suffered a substantial transformation throughout its life. The original text of art.2 contained the expression “*the building of a society without classes*”; this enunciation of principle was to be read at the light of important provisions of the economic chapter of the Constitution that contained directive rules such as “*the nationalisation of the means of production by the working classes*”(art.9,d)), the “*...reaction and opposition against capitalist relations of production*” (art.89 and 96) and the “*abolishment of the systems of exploration and oppression of man by man*”. The simple reading of these provisions reveals that the Social Principle of the Portuguese Constitution had originally a clear marxist connotation that was the fruit of the revolutionary spirit of the time. This option was severely criticised since the beginning because many claimed that the existence of a democracy presupposed that one form of dictatorship that preserved a certain distribution of wealth should not be substituted by another; on the other hand, the cristalisation of a marxist principle in the Constitution would impede the constitutional evolution of society, which is in itself an impediment to a full democracy.<sup>13</sup> The Constitutional revisions of 1982, 1989 and 1997 eliminated the marxist approach of the initial version of the Constitution towards new premisses of *democratic social and economic justice*.<sup>14</sup> This is in itself a significant whole new approach not only because it drew a line with the post-revolutionary marxist past but also because it made a substantial claim: it stated that the development of the democractic principle demanded a dimension of social justice that became a concrete task of the state. This has two serious consequences: the fulfillment of the economic and social democracy became a duty of all State organs in their activity and it equally became a teleological element of interpretation of the remaining provisions of the constitution because the social principle (in the sense of the fulfillment of the economic, social an cultural democracy) it is one of the fundamental principles of the Constitution at the light of which the remaining provisions should be interpreted.<sup>15</sup>

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<sup>11</sup> Witte, B. d. (2005). The trajectory of fundamental social rights in the European Union. *Social Rights in the Europea*. G. d. Burca and B. d. Witte, Oxford, Sanz de Galdeano, B. R. (2008). "La eficacia de los derechos sociales: la compleja articulación entre justiciabilidad, legitimidad y competencia " *Revista de Derecho Social*(44): 97 ff, Macieiczky, A. (2009). Constitutional Courts as Actors of Fundamentalisation of Social Rights. *The Fundamentalisation of Social Rights*. Marie-ange Moreau and B. d. Witte, European University Institute.

<sup>12</sup> Gomes Canotilho, J. J. (1998). *Direito Constitucional e Teoria da Constituição*, Almedina.

<sup>13</sup> Lucas Pires, F. (1988). *A Teoria da Constituição de 1976: a transição dualista*, Coimbra.

<sup>14</sup> This occurred in particular with the revision of 1982, which was so extensive (particularly in the economic constitution) to the point that many claimed that substantially it was a whole new constitution dressed in the clothes of the former. See Sousa Franco, A. and G. Oliveira Martins (1993). *A Constituição Económica Portuguesa. Ensaio Interpretativo*, Coimbra.

<sup>15</sup> Gomes Canotilho, J. J. (1998). *Direito Constitucional e Teoria da Constituição*, Almedina.pp.319; Miranda, J. (1998). *Manual de Direito Constitucional*, Coimbra I, pp.195 ff.

The recognition of the social principle carries several consequences with it. The foremost consequence of the recognition consists in its transformation from a simple aspiration towards a constitutional commandment. The State (in all its branches) becomes under a duty to fulfill the social commandment of the Constitution in its activity. The social principle legitimises the intervention of the State; it should be understood as a permanent duty to promote a certain end (similar to the tasks (*atribuições, Aufgaben*) of administrative bodies) by means of the use of certain competences (the constitutional competences of the State organs). This does not mean that the Portuguese State is not bound to a principle of subsidiarity in its social intervention - as it occurs in liberal states - nor that the Portuguese State should assume a dirigist role of the economy. The State is simply under a duty to use its competences in the promotion of social democracy by the most adequate means; this does not deny the principle of self-responsibility of the individuals; the promotion of social democracy is an open process that equally demands the participation of the civil society to the extent that it is necessary for the fulfillment of the particular aims of social justice. The State is under a duty to support and promote the development of these private sectors (such as housing cooperatives, private institutions of social security, among others) when they contribute actively to the development of the society; on the other hand, it should intervene actively and directly in the use of its public power when the private sector is not sufficient or may have harmful effects on society.<sup>16</sup>

The social principle may equally be used as an interpretative element when judging the acts of public powers; this is particularly important not only as concerns the acts of constitutional organs (*e.g.*: if the parliament is using its legislative power in the public interest or in the interest of some lobbies) but essentially in the review of the acts of public administration. The public administration must use its discretionary power granted by the law in accordance with the objectives of the State laid down in the Constitution and the social principle may be used as a ground to avoid some discretionary acts of public administration that stand in contrast to the social objectives of the State.<sup>17</sup>

The social principle has raised some considerable discussion as concerns the prohibition of social regression. Some authors claim that the densification of the constitutional commandments in statutes provided individuals with an institutional guarantee that forbid the latter legislator of depriving the people of the fundamental core of those guarantees; for instance, the existence of a system of Social Security as a means of fulfilling the fundamental social right to social security (art.63) means that the legislator cannot eliminate it completely albeit it may determine its recipients in accordance with the evolution of the economical conditions. This has even led to a ruling from the Constitutional Court (*ruling n.º.39/94*) that considered unconstitutional a statute that revoked part of the Portuguese national health service. The most important thing to retain, in the view of these authors, is that the hard-core of the fundamental social right implemented by a statute cannot be completely eliminated by latter statutes although these latter statutes may modify and readapt the right.<sup>18</sup> This has been heavily criticised by other doctrinal sectors: for instance, Paulo Otero believes that this prohibition only binds the legislative but not the executive power; Manuel Afonso Vaz believes that, although the Constitution considered the social principle as a commandment of the State, it equally reserved to the legislator the competence to determine the content of those rights; this author refuses to see a constitutional content in those rights outside the statutes implementing them; therefore, if the legislator is competent to determine the content of those rights, it is equally competent to modify the content of those rights.<sup>19</sup>

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<sup>16</sup> Gomes Canotilho, J. J. (1998). Direito Constitucional e Teoria da Constituição, Almedina, Miranda, J. (1998). Manual de Direito Constitucional, Coimbra

<sup>17</sup> Vieira de Andrade, J. C. (1987). Os Direitos Fundamentais na Constituição Portuguesa de 1976, Almedina.

<sup>18</sup> Gomes Canotilho, J. J. (1998). Direito Constitucional e Teoria da Constituição, Almedina.

<sup>19</sup> Vaz, M. A. (1992). Lei e Reserva de Lei. A Causa da Lei na Constituição de 1976, Quid Juris, Otero, P. (1995). O Poder de Substituição em Direito Administrativo, Lex.

This paragraph attempted to demonstrate that the protection of fundamental social rights in Portugal should not focus exclusively on the concrete catalogue of fundamental rights and the powers of the public bodies to implement them but that it should rather be connected to the fundamental principle of social democracy. The principle of social democracy - a revised version from the marxist intentions that arose in 1976 - became not only a fundamental principle but above all a concrete task of the State (in all of its branches) to be implemented progressively in accordance with the material preconditions and the substantive elements of society. It is a permanent task to intervene actively in society - alone, together with private parties or refraining from acting when private parties are more apt - in the promotion of social democracy.

### **3. The Regulation of Fundamental Rights**

One of the means of fulfilling the “*social principle*” in the Portuguese Constitution consisted in the protection of fundamental rights. The protection of fundamental rights was erected as a fundamental principle in the Portuguese constitution since arts.2 and 9,b) and d) claim that the Portuguese Republic is based upon the protection of fundamental rights and freedoms and the fulfillment of the economic and social democracy. One of the fundamental tasks of the State consists precisely in the creation of the necessary pre-conditions for those principles to turn into reality (*Verwirklichen, efectivação*). This protection was not limited to the proclamation of fundamental principles but it was rather accompanied with a concrete regime for the protection of fundamental (social) rights and freedoms. This regime is extremely complex and is capable of having several distinct consequences as the following paragraphs will attempt to demonstrate.

The Portuguese constitution contains an extensive catalogue of fundamental rights. As a preliminary word, it must be said that this catalogue of fundamental rights is - unlike in many other constitutions - an *open catalogue*. The key provision here is art.16: this provision claims that the constitutionally recognised fundamental rights do not exclude others contained in (infra-constitutional) statutes and applicable rules of international law. This is an extremely important provision whose impact should not be underestimated. This provision reveals that the Portuguese constitution did not adapt a formal concept of fundamental right but rather a *substantive conception* of a fundamental right. The protection of fundamental rights as such is a permanent task of the State independently of the place where they are incorporated. The question lies in the identification of a fundamental right: the Portuguese legal thinking has tended to consider as fundamental all the rights that are analogous to the Constitutional catalogue: this means that as long as a right recognised in a national statute or an international legal instrument contains a fundamental (social) right worthy of protection by the State, this right will enjoy the benefit of the general or specific regime of fundamental rights. It is worth saying that the legal thinking is practically unanimous in recognising that the “*open clause*” covers both fundamental rights, freedoms and institutional guarantees (the fundamental rights as such) as well as fundamental social rights (named as economic, social and cultural rights).<sup>20</sup> This provision of the Portuguese Constitution - art.16 - is particularly important as regards three European conventions that were signed by the Portuguese State: the European Social Charter (1996 revised), the Community Charter of the Fundamental Social Rights for Workers (1989) and the Charter of Fundamental Rights of the EU (2000). The most important of these provisions are the Community Charter of Fundamental Social Rights for Workers and the Charter of Fundamental Rights of the EU: although the former is deprived of a binding nature and the latter does not provide individuals with self-enforcing rights, there is strong evidence to support the conclusion nonetheless that they may be considered as

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<sup>20</sup> Vitorino, A. (1993). Protecção constitucional e protecção internacional dos Direitos do Homem: concorrência ou complementaridade?, AAFDL, Gouveia, J. B. (1995). Direitos Fundamentais Atípicos, Lisboa.

substantive fundamental social rights whose protection becomes a task of the State by force of arts.16, 2 and 9 of the Portuguese Constitution.<sup>21</sup>

The catalogue of the Portuguese Constitution on fundamental rights distinguishes between two sets of rights: (1) *rights, freedoms and guarantees* (arts.24-57) and (2) *economic, social and cultural rights*. (arts.58-79). As a preliminary note, one may say that an extremely basic understanding of these two groups of rights would correspond the former group (rights, freedoms and guarantees) broadly speaking to the *status negativus* and *status activus* mentioned above and the latter (economic, social and cultural rights) to the *status positivus*. The distinction made in these terms between the two sets of rights is not altogether clear however: firstly, there are rights contained in the set of rights, freedoms and guarantees that have a more social nature and depend on the action of the State for their implementation (e.g: the right to set up a family and to marry - art.36).<sup>22</sup> On the other hand, there are rights contained in the catalogue of economic, social and cultural rights that are self-enforcing and that correspond more to a proper fundamental right (e.g: the right to equal pay for equal work, a specific dimension of the general right of equality (arts.59(1),a) and 13). Therefore one must adopt a substantive and not formal or categorical concept of fundamental right. This will have significant consequences over its regime as the following lines will attempt to demonstrate.<sup>23</sup>

The first set of rights (*Rights, freedoms and guarantees*) is further divided into three sub-sets: (a) *personal rights*, (b) *political rights* and (c) *workers' rights*. *Personal rights* contain rights intimately connected to the person such as the right to life (art.24), personal integrity (art.25), rights in criminal procedures (art.28-32), freedom of expression (art.37) and freedom of association (art.46) among other. *Political rights* correspond to the *status activus* and contain provisions such as the right to vote (art.49), the right to set up political parties (art.50) among others. *Workers' rights* consist in a sub-set of fundamental rights dedicated to workers covering the protection against unjustified dismissal (art.53), the rights to set up works councils and trade unions (arts.54 and 55) and the rights to collective bargaining and to strike (arts.56 and 57).

It is worth mentioning that not all of these rights are not self-executing as there are a number of rights contained in this catalogue that enjoy a more programatic nature (art.36 - right to marry and set up a family; art.39 - regulation of the media; art.43 - freedom to learn and teach). On the other hand, the statement made in the beginning of this chapter that these rights demand a positive intervention from the State for their implementation applies fully because nearly all of these rights demand a regulatory intervention to determine the conditions for their exercise (e.g: right to strike or to set up trade unions).

The second set of rights (*economic, social and cultural rights*) is also divided in three sub-sets. *Economic rights* covers rights such as the right to work (art.59) and right to private property (art.62); *social rights* cover rights such as the right to social security (art.63), the protection in paternity and maternity (art.68); *cultural rights* covers rights such as the right to education (art.73) and cultural creation (art.78).

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<sup>21</sup> Mestre, B. (2009). The Right to Information and Consultation of the Workforce: context and content of a fundamental right. *The Fundamentalisation of Social Rights*. M.-A. Moreau and B. d. Witte. Florence, European University Institute.

<sup>22</sup> This provision has raised a considerable academic discussion in Portugal. Firstly, the provision distinguishes between marriage and family assuming that marriage - without children - is not by itself a family relation; secondly, it refrains from defining marriage leading many to assume that it intended to include in it both same-sex marriage (a type of marriage forbidden by the Civil Code, leading to a discussion currently running in the Portuguese Constitutional Court on the constitutionality of that provision) as well as the common-law marriage (a type of relationship regulated by a specific statute that grants partners with some rights as married couples but exempts them from a considerable number of rights and duties); finally, the provision contains several constitutional commandments for implementing legislation. The right therefore appears more to be of a programatic norm than a proper fundamental right. See Gomes Canotilho, J. J. and V. Moreira (1993). *Constituição da República Portuguesa Anotada*, Almedina, Pereira Coelho, F. and G. d. Oliveira (2003). *Direito da Família*, Coimbra.

<sup>23</sup> Vieira de Andrade, J. C. (1987). *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, Almedina.

The traditional legal thinking would assume that these rights demanded an intervention from the State for their implementation. This is only partially correct because, as the previous paragraphs attempted to demonstrate, the distinction between self-executing and rights dependent of public intervention is not completely clear and true and a number of these rights are self-executing and enjoy an analogous nature and protection as rights, freedoms and guarantees (such as the right to property - art.62).

This distinction was reflected in the concrete regulation of these rights. The regulation of fundamental rights in Portugal has two regimes: a *general regime* applicable to all fundamental rights (e.g: whether rights, freedoms and guarantees or economic social and cultural rights); and a *specific regime* applicable only to rights, freedoms and guarantees and rights of an *analogous nature*.

The *general regime of fundamental rights* contains the basic provisions applicable to any fundamental right regardless of its nature. The basic principles underlying it are the *principles of universality* (arts.12, 14 and 15), the *principle of equality* (art.13) and the *right to effective protection* (art.20 and 23). The *principle of universality* simply states that the regime of fundamental rights is applicable to every human being who happens to be in the Portuguese territory; this is an expression of the fundamental and humanistic nature of fundamental rights, which are not limited in their application to persons holding a Portuguese or European citizenship. This corresponds more to a declaration of principle than to the reality however: there are certain fundamental rights that are exclusively reserved for Portuguese citizens, such as the fundamental political rights (e.g: right to vote and to be elected) and the exercise of administrative tasks that evolve the *jus imperium* (public power); on the other hand there are also some fundamental rights that are applicable only to Portuguese citizens and citizens of the European member states (art.8 European Union Treaty) such as the right to vote and be elected for the European Parliament; finally, there is a third circle of rights that is recognised only to Portuguese citizens and to citizens of countries of Portuguese language. These exemptions are exceptional however and must be strictly interpreted; they concern fundamentally political rights that demand a certain connection of an individual with a territory or a community to be exercised.

The *principle of equality* (art.13) states that fundamental rights must be indistinctly applicable and that the infra-constitutional statutes must not discriminate unjustifiably against certain groups of persons. The protection of fundamental rights by the principle of equality is particularly strong in Portugal because the principle of equality contained in art.13 is an open clause: any unjustified ground for discrimination is forbidden and any one can contest a statute for violation of the principle of equality based on an arbitrary discrimination.<sup>24</sup>

The *right to effective protection* of fundamental rights guarantees to all individuals a set of means to implement their rights; this covers the right to go to courts and receive a ruling in a fair time (due process), administrative protection of fundamental rights and other types of means (such as the Ombudsman, right to resist, etc).<sup>25</sup>

The *specific regime of fundamental rights* is distinct. This is a regime that is applicable only to *rights, freedoms and guarantees* and rights of an *analogous nature*. This is a characteristic provision of the Portuguese regime that should be analysed with attention. The following paragraphs will attempt to outline the specific regime of rights, freedoms and guarantees contained in art.18 and its specific application.

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<sup>24</sup> The situation is not the same in countries where there is a *numerus clausus* of forbidden grounds of discrimination. The Court of Justice of the European Communities has equally claimed that the EU Directives should equally be strictly interpreted. For a comparison between the protection of equality in distinct systems and EU Law see Mestre, B. (2008). "Discrimination by Association: protected by EU Law but limiting the scope of Mangold." European Law Reporter: 300-305.

<sup>25</sup> Gomes Canotilho, J. J. (1998). Direito Constitucional e Teoria da Constituição, Almedina, Miranda, J. (1998). Manual de Direito Constitucional. Coimbra

The key provision here is art.18. This provision states (1) that rights, freedoms and guarantees and rights of an analogous nature are directly applicable both to public and private entities and (2) that their restriction by statute is subject to a particularly demanding regime.

The *direct applicability* of fundamental rights contained in art.18 has a very simple meaning: it means that they are rights whose content is constitutionally defined and therefore have the capacity of substantiating a claim from the individual holder independently of normative intermediation by the law maker. This does not mean however that the concrete exercise of these rights and that the protection of these rights might not be subject to a statute; it is a “*qualified direct applicability*” in the sense that it does not need to be provided in statute to be applicable and that they are not full subjective rights. It simply means that their perceptivity is sufficiently defined in the Constitution in order to be applied directly.

The addressees of these rights are public and private entities. As regards the *public entities*, it simply means that every State organ - legislative, administrative and judicial - is under a duty to abide by the fundamental rights contained in the Constitution that are directly applicable. The binding of State organs to the observance of fundamental rights is to be applied to its fullest extent independently of the functional, formal or organisatory form in which the State is acting. It must simply act within its *ius imperium* in order to be bound to the respect by directly applicable fundamental rights.

As regards *private entities*, the Constitution declares boldly that the directly applicable fundamental rights are equally applicable to private entities. This has raised a considerable degree of doctrinal discussion in Portugal and the dominant doctrine states that the constitution is not to be interpreted literally and that only some private entities are bound by the respect by fundamental rights. The directly applicable fundamental rights may bind private parties in two situations: firstly, when one the private parties is in a situation of power that places it in a position identical to a public body; secondly, by means of the reception of the theory of *Drittwirkung* of fundamental rights in Portugal, which claims that private law should be made and interpreted in such a way as to provide for the maximum expression of fundamental rights; the addressees are the lawmaker and the courts, who must make the law and interpret it in such a way as to implement fundamental rights in private relations. Without the mediation of the statute or the disproportion of powers however, there is a general consensus that fundamental rights cannot be applicable to private parties.<sup>26</sup>

The particular binding force of art.18 (which is directly applicable both to public and private parties in the terms referred above) is equally applicable to rights of an *analogous nature*. This means that art.18 should not be read formalistically but substantively: the direct application is not to be understood merely to the category of rights, freedoms and guarantees contained in the Constitution but rather to all rights (whether or not contained in the Constitution, in accordance with art.16) whose content is capable of granting them direct application. A typical example of an analogous right is art.268 of the Portuguese Constitution, which lays down the rights of individuals in front of the public administration (such as the right to be informed of on-going administrative procedures that directly interest an individual or the right to have a proper substantiation (*fundamentação*) of all administrative acts affecting them); another one is the right to private property (art.62) or the right to equal pay for equal work (art.59(1a)). The most important thing to retain is that any statutorily recognised right (in the Constitution, infra-constitution statutes and international legal instruments - art.16) capable of enjoying direct application as a fundamental right directly binds both public and private entities independently of the catalogue where it is contained. This obliges the public entities (and some private entities) to be extremely cautious with the respect for fundamental social rights.

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<sup>26</sup> Gomes Canotilho, J. J. and V. Moreira (1993). Constituição da República Portuguesa Anotada, Almedina, Gomes Canotilho, J. J. (1998). Direito Constitucional e Teoria da Constituição, Almedina, Miranda, J. (1998). Manual de Direito Constitucional, Coimbra, Canaris, C.-W. (1999). Grundrechte und Privatrecht - eine Zwischenbilanz, Berlin, Walter de Gruyter, Hörster, H. E. (1999). Teoria Geral do Direito Civil, Coimbra.



Another distinctive characteristic of directly applicable fundamental rights consists in the laws limiting their practical expression, which are subject to particularly demanding requirements (art.18(3)). This should not be developed here but it is sufficient to notice that the margin of manoeuvre of the legislator is severely limited.

This chapter attempted to demonstrate that the protection of fundamental rights in Portugal is far more complex than it initially appears: firstly, there is an open catalogue of fundamental rights, which obliges the public authorities to pay particular attention to constitutional, international and statutory provisions; secondly, the regime of fundamental rights has a particular binding force being applicable to both public and private parties (the latter with exceptions); thirdly, the State is under a permanent duty to promote the practical implementation of those rights both directly and indirectly under the Social principle of the Constitution.

#### **4. The Specific Protection of Social Rights**

This brings us to the last part of this work, which concerns the protection of fundamental social rights in Portugal. The answer to this problem is not straightforward as the variety of sources and means of protection of fundamental rights implies that fundamental social rights will be protected and applied differently. The following lines will demonstrate the various means offered by the Portuguese Constitution for the protection of fundamental social rights.

##### **4.1. *The State's Duty to Actively Promote its Implementation***

The first and most important form of protection of fundamental social rights consists in the duty of the State to take the necessary measures to promote its fulfillment in accordance with the Social Principle of the Portuguese Constitution. This is applicable both to directly applicable fundamental rights (whether rights, freedoms and guarantees of a social nature and analogous rights) as well as to programmatic norms. As regards directly applicable fundamental rights, there are a number of rights of a social nature with sufficient constitutional determination in order to enjoy the direct applicability granted by art.18. One may present as examples the right to marry and set up a family (art.36), right to cultural creation, (art.43), protection against unjustified dismissal (art.53) and the right to equal pay for equal work (art.59). All of these rights enjoy sufficient constitutional determination and are directly applicable. This does not exempt the State from the duty to undertake the necessary measures for their protection: the foremost example is the right to effective protection (judicial and administrative - art.20) but the State is also under a duty to promote their actual implementation in its constitutional duty to permanently develop and fulfill the social and economic democracy (art.2). These fundamental social rights enjoy a particularly high degree of protection not only because they are directly applicable but also because the State has a permanent duty to implement them.

Fundamental Social Rights that are not directly applicable but have a more programmatic nature are also protected. The problem with these rights is that their content is not constitutionally defined and all pretensions must arise from the statutes implementing them, which equally define their content. The right to work (art.58), consumer rights (art.60), social security (art.63), health (art.64), environment and quality of life (art.66) stand as examples of these rights. This does not mean however that they are simple political aspirations. Their constitutionalisation is an element of extreme importance because that is where the line is drawn between their conceptualisation as a simple philosophical aspiration and their concrete protection. Its inclusion in the constitution means that the State is under a duty to protect them and to promote their implementation: this means that the State becomes obliged to act. The concrete content of the right is defined in statute and may be modified considerably throughout the times in accordance with the material and structural preconditions: the law-maker is impeded however to nullify its "*hard-core*" and completely eliminate the right. This caused a considerable discussion on the prohibition of Social Regression that has even led to a ruling from the Portuguese Constitutional

Court (ruling n°.39/84); although the exact content and reach of the ruling is considerably discussed, the reality is that there is a consensus that the recognition of a right emanated from the duty to implement fundamental rights impedes the State from completely eliminating that right in the future (although it may freely modify its reach in accordance with the structural and material preconditions).

Therefore, one may say in line with Gomes Canotilho that (1) fundamental social rights are binding upon the State simply by means of their constitutionalisation, (2) they may serve as a constitutional parameter of appreciation when judging the constitutionality of statutes affecting those rights, (3) the State must adopt concrete measures to implement those rights and not limit itself to vague aspirations and (4) the State has a wide margin of manoeuvre when implementing fundamental social rights of a programmatic nature, depending on the material and structural pre-conditions, but it cannot eliminate the hard-core of those rights.

#### **4.2. Direct Application**

Another means of protecting fundamental social rights consists in the possibility of direct application granted by art.18. This powerful provision grants its recipients with the possibility of direct protection (art.20) against acts of the public power and some acts of private powers that harm their rights. It is worth noting that many social rights - particularly labour rights - are directly applicable such as the right to protection against dismissal (art.53), the right to equal pay for equal work (art.59) or the right to strike (art.57). The criteria for the direct application is the constitutional determination: as long as the content of a right is sufficiently determined in the constitution in order to provide its recipient with an enforceable claim, then the right may enjoy direct application by means of art.18. It is worth noting that art.18 must be read at the light of art.17 and 16: the binding force contained in art.18 is applicable to other constitutional fundamental rights of an analogous nature (art.17) and to fundamental rights contained in statutes and international legal instruments that form part of the Portuguese legal order. Considering that fundamental rights are by nature universally applicable (with very limited exceptions that must be strictly interpreted - art.12) and must be applied equally in all acts of public authorities (art.13), the regime of direct application provides the recipients of self-executing fundamental rights with a very strong protection.

#### **4.3. Indirect Application (*Drittwirkung*)**

A distinct form of application of fundamental social rights consists in its indirect application. This is an emanation of the State's duty to promote the implementation of fundamental rights in all of its activity (legislative, administrative and judicial) and is capable of having a wide range of applications. Firstly, the State must emanate the necessary statutes to implement fundamental social rights; the private law must be formulated in such a way as to give effective protection to the fundamental social rights protected by the open catalogue of the constitution. Most importantly, the State must undertake observe fundamental social rights in its administrative and judicial activity. Statutory rules must be interpreted to the furthest extent possible at the light of the fundamental social rights contained in the Constitution in order to give them effectiveness. This is particularly important as concerns acts of the public administration that evolve the exercise of discretionary power: an administrative act that would abusively misinterpret the concept of "*economic need*" in order to deny a social subvention to a person who was manifestly in a situation of poverty could be considered avoidable by violation of the law but equally void by violation of the hard-core of a fundamental right (the right to social security - art.63 and art.133(2),e) Code of Administrative Procedures). Secondly, judges must equally interpret private law in accordance with the fundamental social rights contained in the Constitution: this is particularly important as concerns the protection of consumers and the interpretation of open clauses and undetermined concepts such as (a) good faith, (b) fair dealing, (c) normal trade traditions among others; there are considerable arguments to support the assumption that the Constitution might impose a more favourable interpretation in the benefit of the consumer at the light of the fundamental social

rights of consumers (art.60). These are very effective means of protecting fundamental social rights permanently.

#### **4.4. Unconstitutionality for Failure to Act**

The Portuguese Constitution contains a form of protection of the constitutional duties imposed upon the State organs, which consists in the unconstitutionality by failure to act (*inconstitucionalidade por omissão*) - art.283. The President of the Republic, the Ombudsman or the Presidents of the Regional Parliaments may require the Constitutional Court to examine if a given State organ has failed to adopt all the necessary measures to fulfill the duties imposed in it in the Constitution. If the Constitutional Court deems so, it shall notify the competent organ with a commandment to act.<sup>27</sup>

Many fundamental social rights are programatic rights and depend on the intervention of the public bodies to enjoy actual expression. The State is under a duty to act to provide it with the necessary expression in accordance with the structural and material elements enforced in a given moment in time. There are certain authors that adapt a very wide approach to this legal mechanism and consider that the failure to act in fundamental social rights is capable of substantiating by itself the unconstitutionality by failure to act because the constitutionalisation of these norms is accompanied with a permanent duty to implement them.<sup>28</sup> Other authors take a more cautious approach and distinguish between self-executing norms and programatic norms. The former pages revealed that even self-executing norms sometimes depend on the creation of the necessary preconditions for its actual implementation (e.g: the exercise of the freedom of association depends of a regulatory framework governing the setting up and functioning of trade unions). These rights stand in sharp contrast to programatic norms that need the intermediation of the legislator to determine its content. These authors propose the reduction of the possibility of invoking the unconstitutionality for failure to act merely to the former type of rules (self-executing rules that need some regulatory intervention to be effectively exercised) since the content of the latter may be found only on statutory norms.<sup>29</sup>

## **5. Conclusion**

This short exposition of the regime of fundamental social rights in Portugal reveals that these rights have several distinct possibilities of implementation in the Portuguese legal order. The discussion initiated with a definition of fundamental social right; this revealed that it is a fluid definition that is capable of covering both rights, freedoms and guarantees (classic self-executing fundamental right) as well as economic, social and cultural rights (modern social rights that need regulatory intervention to become effective). The question of the effectiveness of these right is fairly complex: the Portuguese State is under a permanent duty to implement these rights in accordance with the social principle that is embodied in the Portuguese Constitution; this means that the fulfillment of these rights is part of the permanent duty to develop the economic and social democracy. The analysis of the concrete protection of fundamental rights in the Portuguese Constitution reveals that the means of protection are numerous: there is an open catalogue of fundamental rights (art.16) and fundamental social rights that have sufficient constitutional determination may be directly enforced against the State and against private parties (under some conditions) (art.18). The absence of constitutional determination of other fundamental social rights is no obstacle to their actual implementation because the State organs are

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<sup>27</sup> Gomes Canotilho, J. J. and V. Moreira (1993). Constituição da República Portuguesa Anotada, Almedina, Gomes Canotilho, J. J. (1998). Direito Constitucional e Teoria da Constituição, Almedina, Miranda, J. (1998). Manual de Direito Constitucional, Coimbra

<sup>28</sup> Gomes Canotilho, J. J. (1998). Direito Constitucional e Teoria da Constituição, Almedina.

<sup>29</sup> Vaz, M. A. (1992). Lei e Reserva de Lei. A Causa da Lei na Constituição de 1976, Quid Juris, Miranda, J. (1998). Manual de Direito Constitucional, Coimbra, Vaz, M. A. (1998). O enquadramento jurídico-constitucional dos "Direitos Económicos, Sociais e Culturais". Juris et de Jure. Nos 20 anos da Faculdade de Direito da UCP-Porto. Porto, Quid Juris.

under a duty to provide them with indirect implementation (the so-called *Drittwirkung*). The mechanisms of unconstitutionality for failure to act is the last form of implementation of fundamental social rights: although the scope of the mechanism varies considerably in accordance with the opinions of the authors, the reality is that there is a constitutional mechanism to pressure public bodies to adopt the necessary measures to implement fundamental social rights. The combination of these mechanisms provides fundamental social rights with a considerable degree of protection in Portugal.

## **Bibliography**

- Canaris, C.-W. (1999). *Grundrechte und Privatrecht - eine Zwischenbilanz*. Berlin, Walter de Gruyter.
- Gomes Canotilho, J. J. (1998). *Direito Constitucional e Teoria da Constituição*, Almedina.
- Gomes Canotilho, J. J. and V. Moreira (1993). *Constituição da República Portuguesa Anotada*, Almedina.
- Gouveia, J. B. (1995). *Direitos Fundamentais Atípicos*, Lisboa.
- Hörster, H. E. (1999). *Teoria Geral do Direito Civil*, Coimbra.
- Lucas Pires, F. (1988). *A Teoria da Constituição de 1976: a transição dualista*, Coimbra.
- Maciejczyk, A. (2009). *Constitutional Courts as Actors of Fundamentalisation of Social Rights. The Fundamentalisation of Social Rights*. Marie-ange Moreau and B. d. Witte, European University Institute.
- Mestre, B. (2008). "Discrimination by Association: protected by EU Law but limiting the scope of Mangold." *European Law Reporter*: 300-305.
- Mestre, B. (2009). *The Right to Information and Consultation of the Workforce: context and content of a fundamental right. The Fundamentalisation of Social Rights*. M.-A. Moreau and B. d. Witte. Florence, European University Institute.
- Miranda, J. (1998). *Manual de Direito Constitucional*, Coimbra
- Moreau, M.-A. (2006). *Droit du Travail, Normes Sociales et Mondialisation*, Dalloz.
- Otero, P. (1995). *O Poder de Substituição em Direito Administrativo*, Lex.
- Parliament, E. (1999). *Fundamental Social Rights in Europe*, European Parliament.
- Pereira Coelho, F. and G. d. Oliveira (2003). *Direito da Família*, Coimbra.
- Rüßmann, H. (1994). *Einführung in das Recht, Skript zur Vorlesung für den Fachbereich Wirtschaftswissenschaft im Sommersemester 1994*, Saarland Universität.
- Sachs, M. (2003). *Verfassungsrecht II - Grundrechte*, Springer.
- Sanz de Galdeano, B. R. (2008). "La eficacia de los derechos sociales: la compleja articulación entre justiciabilidad, legitimidad y competencia " *Revista de Derecho Social*(44): 97 ff.
- Sousa Franco, A. and G. Oliveira Martins (1993). *A Constituição Económica Portuguesa. Ensaio Interpretativo*, Coimbra.
- Vaz, M. A. (1992). *Lei e Reserva de Lei. A Causa da Lei na Constituição de 1976*, Quid Juris.
- Vaz, M. A. (1998). *O enquadramento jurídico-constitucional dos "Direitos Económicos, Sociais e Culturais"*. *Juris et de Jure*. Nos 20 anos da Faculdade de Direito da UCP-Porto. Porto, Quid Juris.
- Vieira de Andrade, J. C. (1987). *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, Almedina.
- Vitorino, A. (1993). *Protecção constitucional e protecção internacional dos Direitos do Homem: concorrência ou complementaridade?*, AAFDL.
- Witte, B. d. (2005). *The trajectory of fundamental social rights in the European Union. Social Rights in the Europea*. G. d. Burca and B. d. Witte, Oxford.



## Social Rights in Italy

Guido Boni

### Introduction

It has been argued that Italy offers one of the most mature and comprehensive catalogue of social rights which does not come second to any other Western country. Leading Italian scholars do not hesitate to reckon the Italian Constitution as unique in light of the refined and sophisticated formulation of social rights that it contains. Indeed social rights constitute a characteristic and indefectible aspect of the democratic model which guided the authors of the Constitution. It endorses a concept of freedom and personal dignity aimed at creating the Italian citizen as a truly “social person”.

It is for this very reason that scholars nowadays increasingly argue that in the Italian constitutional experience social rights and more traditional civil and political rights share the same nature of fundamental rights<sup>1</sup>. This is an essential result of a long doctrinal and judicial elaboration which has been conducted along the lines of the so called constitutionalisation of social rights which has been realised in 1948, year of entry into force of the Italian Constitution. For such a reason, they are not relegated to a status of minority, detached from the traditionally more important civil and political rights of the liberal State; in fact, they stand on equal footing. However, such an important dogmatic achievement<sup>2</sup> does not set aside the very fundamental observation that grounds the traditional theory: even though one recognises that they stand on equal footing a serious matter of enforceability remains.

It must not go unnoticed however, that the classical idea that social rights do not share the same juridical strength and the same degree of prescriptiveness as freedom rights has influenced the interpretation of the Constitution becoming predominant also in the light of the fact that some of the most influent Italian constitutionalists did subscribe to such a theory<sup>3</sup> and the aura of quasi sacrality of their teaching has made it extremely difficult to overcome in the academic debate.

The traditional relegation of social rights to an inferior level has also been justified on the basis of a theory which has been developed in the years following the enactment of the Constitution. Such a theory divides the norms written therein between prescriptive norms (“*norme precettive*”) on one side, and programmatic norms (“*norme programmatiche*”) on the other side<sup>4</sup>. A contraposition between the two typologies of norms does exist but critics are nowadays incline to stress that probably the terms chosen are not perfectly adequate since one should acknowledge that all norms are prescriptive, with the real difference being that the so called “*norme precettive*” bind all those who are subject to the legal order, for they directly regulate the topics that constitute their specific object, while the others – so called “*norme programmatiche*” – are prescriptive only for the legislator, as they require the latter to undertake certain actions in order to regulate a subject matter.

Now, what is really important to understand is that, according to this distinction, which has been widely endorsed by scholars and judges, the actual difference between the two groups of norms lies in

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<sup>1</sup> SALAZAR, C., *Dal riconoscimento alla garanzia dei diritti sociali. Orientamenti e tecniche decisorie della Corte costituzionale a confronto*, Torino, 2000; PEZZINI, B., *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali*, Milano, 2001; PILIA, R., *I diritti sociali*, Napoli, 2005.

<sup>2</sup> In this respect reference can be made to LUCIANI, M., *Sui diritti sociali*, in *Studi in onore di Manlio Mazzotti di Celso*, vol. II, Padova, 1995, p. 97 ff., here p. 111.

<sup>3</sup> One of the most respected supporter of this reading was CALAMANDREI, P., *L'avvenire dei diritti di libertà*, in *Opere giuridiche*, vol. III, Napoli, 1968.

<sup>4</sup> CRISAFULLI, V., *Le norme programmatiche della Costituzione*, in *Studi di diritto costituzionale in memoria di Luigi Rossi*, Milano, Giuffrè, 1952, here at 62-64.

their enforceability. The so called *norme precettive* since they include a prescription which affect all the subjects of the legal system are immediately enforceable in front of a court<sup>5</sup>. It is instead much more difficult to judicially enforce a provision which is addressed to the legislator who has the duty to enact the constitutional command - as it is the case for the purely programmatic norms.

Leaving aside the taxonomic issues, it is however clear that if the legislator incorrectly enacts a programmatic provision it is possible to ask the Constitutional Court to assess the constitutional conformity of the provision. Conversely, in case of inaction, the only possible way to react to it appears only to be through the instrument of political responsibility, i.e. casting a vote against the inactive government at the next general elections, but one can see how ineffective such a remedial is<sup>6</sup>.

Nonetheless, despite this apparent apory, it has been the merit of the Constitutional Court to find ways to soften the consequences of such a theory elaborating an *ad hoc* interpretation for numerous provisions of the Constitution normally regarded as merely programmatic and finding in them a prescriptive part which has allowed the judiciary to provide individuals with actual protection despite the relaxed attitude of the Parliament, which has often tended to use the asserted programmatic nature as an excuse for its inaction.

## 1. The Inclusion of Social Rights in the 1948 Constitution

Social rights compel societies to find remedies to poverty, unemployment, lack of access to health care and education; to guarantee pensions and, in general, to help individuals to face those situations which cannot be solved relying on one's wages solely, or worse, in absence of a wage whatsoever.

Similar challenges, as tough as they may well seem, were all addressed by the Fathers of the Italian Constitution already in the early 40ies of the XX century through a vast Parliamentary debate which is always regarded as a glorious moment in the young history of Italian democracy, because all political forces were put in an actual condition to contribute to shape the rising Italian Constitution. This is particularly significant if one remembers that this debate was conducted in a climate of commotion and relative turmoil: it was led by a shared desire of all political parties to move away from the recent and obscure pages of Italian history, as far away as possible then from the dolorous memories of a shocked country which was just come out of a lost war and a dreadful dictatorship.

It is probably also for these very contingent reasons that the Constitution which came out of those debates in 1948 has been always regarded by scholars as one of the most advanced for its comprehensive catalogue of fundamental rights enshrined in it. Indeed the Italian Constitution has acknowledged within its pages the affirmation of basic liberties whose history can be trace back to the American *Bill of Rights*, and the *Declaration of the Rights of Man and of the Citizen*. Such an attainment was of course common to all the 20<sup>th</sup> century Constitution, however what actually distinguish the Italian one from the others is the fact that, after this first and very important part focusing of freedom rights, it continues providing for an ample list of **social rights** which was introduced to integrate and complete the enunciation of the fundamental rights done in the first part. If indeed equality and freedom were seen as the core values of the new post-fascist era, the Constitution shows that, as scholars acknowledged "social rights are not, because of their nature, intrinsically in contrast with the rights of freedom for they tend to realise juridical equality. Quite on the contrary, they are in harmony with freedom"<sup>7</sup>.

Social rights then represent the cornerstones on which Social States are built, they are constitutional distinctive signs of the modern State. However, before analyzing in detail how they have been

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<sup>5</sup> For a more comprehensive reconstruction see MARTINES, T., *Diritto costituzionale*, Milano, Giuffrè, 2000, 37 and 205.

<sup>6</sup> CRISAFULLI, V., *ibid.*, 1952, 74-76.

<sup>7</sup> MAZZIOTTI DI CELSO, M., *Diritti sociali*, in *Enc. dir.*, XII, Milano, 1964.



regulated by the Italian Constitution, it must be preliminary noticed that in Italy, as in many other countries, as it will probably emerge today from the various presentations we will listen to, for a long time social rights have been dealt with by lawyers in general, and constitutional lawyers in particular, as lacking of a juridical substance, and therefore not comparable to **real** subjective rights<sup>8</sup>. It has been said that social rights have therefore faced in the 20<sup>th</sup> century the same sort of freedom rights in the 19<sup>th</sup> century: perceived at their origin as something alien to the logic of the legal order in force at the time, they have been initially conceived as merely **political principles**<sup>9</sup>. This means that according to customary interpretations they did not create well defined juridical positions, being their enactment, and therefore protection, left completely open to the free choices of the legislator<sup>10</sup>.

Even at a preliminary reading though, the Italian Constitution appears to be a fairly progressive and modern one which goes far beyond the timid results achieved by the very first socially oriented Constitution, the 1919 Weimar one. Here social rights were all but mere general indications, programmatic aspirations as it was written (so called *Programmsätze*) that the legislator according to its total discretionary power could decide whether or not to translate into binding rules. This is not true of the Italian Constitution instead, where at the very core there is the idea of a new man – who is not any more neither the liberal man nor the socialist-communist one.

## 2. A Truly Social Constitution: The Principle of Equal Social Dignity

The Italian Constitution embeds an idea of man with a new and unequivocal democratic and pluralistic identity encompassed by the idea of the human being as **both an individual and a social person**, and in this way the Constitution manages to unify both freedom rights and social rights in a single man.

This approach is clearly reflected at first by article 3.2 of the Constitution which poses on the Republic the duty “*to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country*”<sup>11</sup>. Another fundamental article which provides social rights with constitutional grounding is article 2, where it is affirmed that “*the Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed*”.

Now, in making reference to the inviolable rights of the person, it provides, together with art. 3.2, the normative content of the so called principle of dignity to which the Constitution expressly refers to at art. 3.1, which reads as follow: “*All citizens have **equal social dignity** and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions*”. Art. 3.1 of the Constitution provides for so called principle of formal equality (as opposite to substantial equality of art. 3.2). Such a principle dates back to the liberal State tradition. However, despite its origins, the express reference it makes to “social dignity” projects this article and the whole

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<sup>8</sup> See for example CALAMANDREI, P., *Il significato costituzionale del diritto di sciopero*, in *Riv. Giur. Lav.*, 1952, I, 233. As for the term “subjective right” this is a translation in English of an expression which is widely used in civil law countries (*diritto soggettivo* in Italian, *droit subjectif* in French, *Subjectives Recht* in German) but unknown to Anglo-American law. In general term, “subjective right” is used here to indicate a legal interest of a person who has the benefit of a legal relation in private law. The idea is that the legal order recognises the interest of the individual and seeks to effect the realisation of his interest. Therefore a subjective right confer the power to act for the satisfaction of one’s own interest protected by the legal order.

<sup>9</sup> For the view that civil liberties were just political principles see MORELLI, A., *Che cosa sono le libertà civili?*, Arch. Giur., LXII, 1889.

<sup>10</sup> For a thorough analysis of this evolution see BALDASSARRE, A., *Diritti della persona e valori costituzionali*, Torino, 1997, 123 ff.

<sup>11</sup> The translation in English of the articles of the Italian Constitution analysed in this essay is that published on the website of the Italian parliament: [http://legxven.camera.it/cost\\_reg\\_funz/345/346/listaarticoli.asp](http://legxven.camera.it/cost_reg_funz/345/346/listaarticoli.asp).

Constitution – as scholars have repeatedly highlighted - into the new democratic legal order which was created in Italy after the end of WWII. Indeed, it combines the liberal principle of formal equality with that of human dignity and it further develops it through the prescription of precise prohibitions of discrimination on various grounds thus conferring to the equality principle a normative sense that it never possessed before<sup>12</sup>.

However, such an interpretation of these articles – so strongly socially-oriented - that is the merit of a renown Italian constitutional lawyer, Antonio Baldassarre, gained momentum only during the 90ies as traditionally the academic discourse tended to provide a narrower interpretation of these articles, mainly conceiving – in the words of one of the most renown Italian scholars of the early post-Constitutional generation, Piero Calamandrei – solely a *promised revolution*. In his words: “in order to compensate the leftwing parties for a missed revolution, the rightwing parties did not make any opposition to a promised revolution”<sup>13</sup>. According to Calamandrei’s judgment the Italian Constitution, as it came out of the works of the Constituent Assembly, was a “compromise Constitution, very attentive to the contingencies of the present day and of the following day only, and therefore not far-seeing”<sup>14</sup>. Along the line traced by this authoritative scholar for the following two decades the vast majority of Italian scholars has therefore supported a reading of art. 3.2 as merely repetitive of the content of art. 3.1 without attempting to make a proper effort to develop an independent interpretation of it from the first paragraph. Therefore, art. 3.2 has been regarded as an open-clause (a “*norma in bianco*”) without a normative meaning, basically repeating what already said by the previous paragraph. Such a vision was deeply indebted to the traditional liberal vision, which saw in the role of the liberal State only the defender of formal equality<sup>15</sup>.

The real point to be stressed here, beyond doctrinal debates<sup>16</sup> however, is the fact that art. 3.2 arguably presents to its readers a very significant, rich and “beautiful”<sup>17</sup> sentence which summarises the very meaning of the principle of equality in a democratic society, such as the one to which Italy was aiming at the time. Art. 3, and its second paragraph in particular, therefore, are of the utmost importance in the light of the present inquiry, since they contribute to guide the action of the legislator when he is called to the enactment of social rights. Art. 3 indicates the main goal to be achieved, that of **realising a society where every citizen has equal social dignity and where everybody is provided with equal chances of self accomplishment notwithstanding his/her starting points**. Equal human dignity is therefore the polar star that must guide the understanding of social rights in the Italian legal system. To the equal social dignity of first paragraph of art. 3 must therefore follow a full personal self-accomplishment in the various sectors of collective and social life. In conformity to these very values, in a constitutional democratic and pluralistic system as the Italian one, social rights express the

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<sup>12</sup> See BALDASSARRE, A., *Diritti della persona e valori costituzionali*, Torino, 1997, 123 ff.

<sup>13</sup> CALAMANDREI, P., *Chiarezza della Costituzione*, Roma, 1947, 8.

<sup>14</sup> CALAMANDREI, P., *Cenni introduttivi alla Costituzione e ai suoi valori*, in CALAMANDREI, P. – LEVI, A. (eds.), *Commentario sistematico alla Costituzione italiana*, Firenze, 1957, p. XXXV.

<sup>15</sup> ESPOSITO, C., *La Costituzione italiana*, 18 ff. and 62 ff.; MAZZIOTTI DI CELSIO, M., *Diritto al lavoro*, Milano, 1956; ROSSANO, C., *L'uguaglianza giuridica nell'ordinamento costituzionale*, Napoli, 1966, 417.

<sup>16</sup> Some of the most important Italian lawyers have contributed during the decades to the debate on social rights. Reference to the most recent studies published on the issue should provide full reference for those interested in reconstructing the previous debate: LOMBARDI, G., *Diritti di libertà e diritti sociali*, in *Pol. Dir.*, 1999; BISCARETTI DI RUFFIA, P., *I diritti sociali*, in *Noviss. Dig.it.*, Torino, Utet; LUCIANI M., *Sui diritti sociali*, in *Scritti in onore di M. Mazziotti di Celso*, II, Padova, 1995; BOBBIO, N., *Sui diritti sociali*, in AA.VV., *Cinquant'anni di Repubblica italiana*, a cura di G. Neppi Modona, Torino, 1996; CASSESE, S., *Diritti sociali*, in *Dizionario di diritto pubblico*, Milano, 2006, Vol. III, 1904; MENGONI, L., *I diritti sociali*, in *ADL*, 1998; BIFULCO, D., *L'inviolabilità dei diritti sociali*, Napoli, Jovene, 2003.

<sup>17</sup> That the language of the Constitution is beautiful, or more precisely “of high linguistic value” has been acknowledged by the Amici del Premio Strega in 2006 (a very important literary prize conferred every year in Italy) and particularly by a renown linguist, DE MAURO, T., *Il linguaggio della Costituzione. Introduzione alla Costituzione della Repubblica italiana [1947]*, Torino, 2006, p. IX

dialectic tension between individuals and collective, according to which their enforceability must be articulated taking into careful account the interests which are protected by each social right.

The problem that therefore arises relates from the one side to the enforceability of social rights, and on the other side to the identification of social rights in the Italian legal system. Since the Constitution does not expressly refer to any of its titles to social rights, in order to make such a selection it is necessary to analyse first the rich and complex series of academic studies conducted on this issue since the enactment of the Constitution, a debate that has not yet reach a complete end. Once clarified which are the most accredited methods devised by scholars, and courts, to assess the social nature of a constitutional right, it will then be possible to move on to their identification. In order to do so it is necessary to see how and to which extent constitutional norms are enforceable.

### **3. Which Rights Are Social Rights?**

The ensemble of articles 2 and 3 (paragraph 1 and 2) is traditionally referred to by commentators as showing the political compromises of which the Constitution is the result: in enacting a norm on the fundamental principle of human dignity the Constituents had a clear understanding of the modification under which such a concept had undergone in the passage from the liberal State to the democratic one. Human dignity is then connected with positive freedom (the so called freedom *of*) and with the affirmation of the social conditions which are necessary to a person to fully achieve a dignified life. In the new Constitution it is acknowledged that beyond the individual man of the liberal tradition, who must only be free *from* (as he enjoys negative liberties only<sup>18</sup>), there is a man who is part of social relations or, better, of a society. Once the principle of human dignity is interpreted in light of this “social person”, both from an ethic-spiritual point of view and from that of an individual immersed in the concrete social existence, this man becomes the reference point of both civil and political rights as well as, what interests here, of all social rights. **This means that the principle of human dignity enshrined in the Italian Constitution, as nowadays commonly interpreted by scholars, aims at protecting the individuals also from material deprivation, and therefore it constitutes the essential cornerstone of social rights and of the corresponding duty of the State to act to remove deprivations and disparities .**

If we now read the principle of dignity in connection with that of equality, i.e. if we read jointly the above mentioned art. 2 and art. 3, it emerges that for the Italian Constitution every person, no matter his or her initial social condition is, must be given equal opportunities of self-accomplishment and thus of equal chances of actually enjoy those positive and negative freedoms which are constitutionally granted.

Despite these glorious intentions alas, the history of social rights in Italy is still a very difficult one. The basic trait of these rights - among whom, we will see in detail, the Italian Constitution counts very many: the right to work, the right to social security, the right to health care, the right to social assistance, the right to education, etc. - is that they are essentially claims to receive positive services by public authorities and organisations. However, one must acknowledge that in the doctrinal discourses social rights do not present an univocal meaning.

Three main positions can be identified in the academic discourse on social rights:

- a) According to a first group of authors with the expression “social rights” reference is made only to those rights which aim to enact the principle of substantial equality and therefore social rights only confer rights on those individuals who are regarded as economically or socially weaker<sup>19</sup>.

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<sup>18</sup> I clearly refer here to the distinction between negative and positive liberties drawn by BERLIN, I., *Two Concepts of Liberty*, Oxford, Clarendon, 1958.

<sup>19</sup> CARETTI, P., *I diritti fondamentali: libertà e diritti sociali*, Torino, Giappichelli, 2002, p. 371 ff.; MARTINES, T., *Diritto costituzionale*, 1988, Milano, Giuffrè, p. 684;

- b) Other scholars, on the contrary, use the term “social rights” to refer to those constitutional provisions which enumerate principles that identify public objectives in relation to precise goods, such as work, health, education, social welfare) while at the same time create subjective rights, some belonging to disadvantaged individuals and some – this being the main difference with the previous theory – to every person despite his/her personal, social, or economical conditions<sup>20</sup>.
- c) Finally, according to a third group of scholars social rights would encompass not only the rights of the weak individuals (as in the first group), and the rights that tend to confer upon all individuals those services and goods deemed essential in order to guarantee human dignity (as in the second group), but also all those rights which are aimed to allow everyone to carry on his/her natural inclination to build and consolidate social relations. The latter theory is the most recent one and it is the one according to which fundamental rights and social rights come closest<sup>21</sup>.

To precisely distinguish which rights are social rights these theories are insufficient, and the task remains therefore not an easy one since, on the one side, the Constitution does not label each right as a social, political, or civil one, and, on the other side, scholars have not come up with a commonly agreed classification. Although the first two theories have been developed during the decades following the enactment of the Constitution by highly respected scholars, one should acknowledge that nowadays it is the third theory the one which enjoys the stronger support and therefore we will rely on it for the purpose of proposing a classification of social rights in the Italian Constitution. As a consequence, this theory needs to be analysed more in detail.

The first point to be stressed is that the third group of authors tend to see in the Constitution a larger catalogue of social rights than the previous twos. Once agreed that scholars today are of the opinion that the Italian Constitution contains a vast catalogue of social rights, the second related issue is to analyse the theories developed around the problem of the social rights so identified. The question could therefore be the following: is it sufficient to identify a provision in the Constitution as one conferring a social right to make such a right directly enforceable in court? And if not, will a non directly enforceable social right still be of some utility?

When the time comes to analyse the actual content, and therefore the justiciability, of social rights, despite the “enlargement”, scholars are still rather unanimous in opposing a *Drittwirkung* to most social rights. And it is here that the more traditional theories regain territory, narrowing the scope of the social rights inscribed in the Constitution. Traditional theories are based on the assumption that freedom rights differ greatly from social rights in so far as the acknowledgment of the latter needs the positive intervention of the public powers. Indeed, according to the long-established interpretation, once recognised by the Constitution, only freedom rights are, so to say, *self-executing*. It must be mentioned however that even for the traditional theory this is not due to an inferior ranking of social rights, or to the fact that they would be second-category rights, but to the peculiar juridical structure of these rights, being rights that, for their effectiveness, require an action, a behaviour.

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<sup>20</sup> MAZZIOTTI DI CELSO, M., *Diritti sociali*, in *Enc. Dir.*, XII, Milano, Giuffrè, 1964 p. 802 ff.; and most recently PEZZINI, B., *La decisione sui diritti sociali*, Milano, Giuffrè, 2001, p. 2 ff.

<sup>21</sup> BALDASSARRE, A., *Diritti della persona e valori costituzionali*, Torino, 1997, 123 ff.; LUCIANI, M., *Sui diritti sociali*, in *Studi in onore di Manlio Mazzotti di Celso*, vol. II, Padova, Cedam 1995, p. 97 ff. SALAZAR, C., *Dal riconoscimento alla garanzia dei diritti sociali*, Giappichelli, torino, 2000, 89 ff.; D'ALOJA, *Egualianza sostanziale e diritto diseguale*, Cedam, Padova, 2002; GIUBBONI, S., *Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo*, WP C.S.D.L.E. “Massimo D’Antona”, INT – 46/2006, p. 4, at: [www.lex.unict.it/eurolabor/ricerca/](http://www.lex.unict.it/eurolabor/ricerca/)

#### **4. The Enforceability Issue between “Programmatic Provisions” and “Prescriptive Provisions”**

During the years it has been accepted by scholars that even without questioning the basic assumptions of the traditional theory, a distinction between social rights can be made and they can be subdivided into two categories:

- a) Those social rights falling into the first category are deemed to enjoy a higher status so to say, and consequently they are located to a level which is more or less that of freedom rights. They are normally referred to as “unconditional social rights” or “original social rights”, or “immediately prescriptive” since they too are immediately applicable and they encompass for example the right to choose an occupation freely, the right to strike.
- b) As for the other category it is composed of “conditional social rights” or “programmatic social rights”, as they are often referred to, for their application depends upon the intervention of the public powers. This is due to the fact that only once the conditions for their actual enjoyment have been put in place, they create an enforceable subjective right. Examples of these rights are the right to education, that to health, and, only to a certain extent though, to work.

Critics to this interpretation that would separate social rights in first class and second class ones insist that the lack of intervention that is necessary to enforce the factual prerequisite for the enjoyment of the right does not affect the existence of the right established by the Constitution and not revocable by the legislator, but merely involves the modalities of its enforcement. This reading opens up the door to the syndicate of the Constitutional Court responsible to assess the reasonableness of the choices of the legislator as far as the implementation – if any – of social rights is concerned. A syndicate which will address the correctness of the balance with the other public interests guaranteed by the Constitution and with the limits represented by public financial resources. An issue, the latter, very delicate, as social rights generally necessitate more extensive and immediate expenditure and intervention, than freedom rights do.

Indeed, outside the Constitution, more than other rights, social rights receive meaning and effectiveness by their legislative and administrative enactment.

In this latter respect reference must be made here to an issue of increasing relevance as far as social rights enactment and the control exercised by the constitutional court in this area is concerned, that of a relatively recent federal reform of the Constitution which took place in 2001 modifying Title V of the Constitution. Indeed, the new art. 117 now provides for a division of competencies among the central state and the regions where they have been given a much wider power as for the provision at local levels of civil and social rights. However, such a reform, if brought to its extreme consequences, would have most probably created disparity among the different Regions, mainly depending on, and reflecting the, wealth of each one. In order to avoid as much as possible excessive disproportion in such a delicate area, namely that of the enactment and protection of social rights, an area on which much of the legitimisation among the citizens of a State and its Government depends on, it has been provided that the central State continues to keep the power “to determine the minimum level of services concerning civil and social rights which must be guaranteed across the whole national territory”. This basically means that the Regions, despite the reform, cannot go under the levels set by the national legislation, but they can of course set higher levels<sup>22</sup>.

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<sup>22</sup> On the federal reform see e.g. CAVALERI, P. and LAMARQUE, E. (eds.), *L'attuazione del Titolo V, Parte seconda, della Costituzione. Commento alla legge "La Loggia" (Legge 5 giugno 2003, n. 131)*, Giappichelli, Torino, 2004.

## 5. Social Rights in the Constitution

Despite the various theories briefly outlined in the previous pages, it is possible to find substantial consensus on the fact that the core normative provisions regarding social rights are to be found in the Constitution. Of particular relevance are the first four articles, 1 to 4, which, as partially seen already, provides a general conceptual background against which the following more detailed articles dealing with social rights must be confronted. The latter are basically to be found listed in a more specific section of the Constitution: First Part, Titles II and III, i.e. from art. 29 to art. 47. It is now interesting to see how some of the most important social rights provided in the Constitution have been interpreted by scholars and applied as a grounding for substantial claims in court. In each case we will show on which ground each so identified social right has been granted the status of programmatic or prescriptive.

The right to work has been analysed in full as paradigmatic of the approach of scholars and judges to social rights. The other most important social rights are briefly analysed in separated paragraphs and the assessment made of each one by scholars in term of programmatic or prescriptive right is summarised.

### 5.1. *The Right to a Work: The First of the Social Rights*<sup>23</sup> (art. 1 and 4)

The cornerstone against which the whole architecture of the Constitution is grounded, that of labour, is solemnly affirmed by art. 1 (“*Italy is a democratic republic based on labour*”) and further detailed in other articles. Article 1 of the Constitution unquestionably represents the first social right as scholars commonly agree<sup>24</sup>, not only for its collocation in the Constitution but for the importance that performing a job has as the principal point of access to a dignified human life, and for a full social inclusion of any individual and his/her family members. The enunciation of art. 1 according to scholars<sup>25</sup> represents a *unicuum* in the Constitutions of Western Europe. It can be noticed here that a somehow similar formulation has now been included in the project for a European Constitution at art. I.3.3 – and then endorsed by the Lisbon Treaty – where among the general objectives it is stated that the EU is a “social market economy, aiming at full employment and social progress”.

This is even truer if we read art. 1 together with art. 4 where the basic principle of the first article is reaffirmed and specified. Indeed, to fully understand the importance of work as the main cornerstone of the Italian Republic, art. 1 must be put in relation with art. 4 of the Constitution (especially the first paragraph) where it is affirmed that:

“The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective.

Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society”.

What should strike the reader of this article is the fact that the Constitution literally recognises a *right* to work. It is striking because everybody can easily realise from his personal experience that it is of the

<sup>23</sup> As it reads the title of a contribution by GIUBBONI, S., *Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo*, WP C.S.D.L.E. “Massimo D’Antona”, INT – 46/2006, [www.lex.unict.it/eurolabor/ricerca/](http://www.lex.unict.it/eurolabor/ricerca/).

<sup>24</sup> See BORGOGELLI, F., GIUBBONI, S., *Il lavoro come diritto sociale. Appunti per una voce di enciclopedia*, in *Riv. dir. sic. soc.*, 2006, p. 327 ff.; GIUBBONI, S., *Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo*, WP C.S.D.L.E. “Massimo D’Antona”, INT – 46/2006, [www.lex.unict.it/eurolabor/ricerca/](http://www.lex.unict.it/eurolabor/ricerca/).

<sup>25</sup> See most recently NANIA, R., *Riflessioni sulla “costituzione economica” in Italia: il “lavoro” come “fondamento”, come “diritto”, come “dovere”*, updated version (19 January 2009) of a paper given at AIC annual conference on 24 June 2008 and to be published in *Scritti in onore di Angelo Antonio Cervati*, downloadable at <http://www.associazionedeicostituzionalisti.it/dottrina/libertadiritti/nania.html>.

utmost difficult for a modern State to provide all those who wish to work with a job. To make things even more complex is that recognising such a right would, according to a plain reading of the norm, entitle those who do not manage to obtain a job to bring an action to a court to obtain redress.

However, as all scholars have agreed upon – albeit after considerable ideological debate at the dawn of the enactment of the Constitution between the supporters of planned economy and those of free market economy – and as it also emerges by the way from the documents of the works of the Constituent Assembly, a more attentive reading shows that the Republic does not expressly entitle every citizen to a job, but merely “recognises”, in an abstract way, a right to a work. According to the more reliable and authoritative interpretation offered by Paolo Barile<sup>26</sup>, the Constituents chose to use the term right to underline the constitutional, moral and civil exigency for the newly created Republic to provide all its citizens with an actual opportunity to have access to a job.

It is therefore acknowledged by scholars that this social right is not enforceable through a judge but only through a political judgement which is left open for the citizens to voice, mainly at the electoral level against those responsible for economic and social policies in the Government. Art. 4 basically poses an objective to be reached in an approximate future through the direct involvement of public powers that are then requested to put in places the conditions necessary to its attainment.

Once clarified that art. 4 does not confer a subjective right enforceable in a court to every citizen who does not find a job, it must be nonetheless pointed out that this right does not have a mere programmatic nature, a solely political value<sup>27</sup>. First of all, it is indeed true that art. 4 provides for a social right at its first paragraph, as well as for a freedom right at the second one, the latter consisting in the freedom enjoyed by each citizen to choose his/her occupation without such a choice being imposed from the outside (negative liberty). The social right is more difficult to define but it actually has a content that goes beyond that of a mere programmatic norm. It indeed confers the right to work, which is to say to access a job and to keep it without abusive or discriminatory (this also thanks to art. 3.1 which prohibits discrimination) interferences of the public or private powers. In such a respect, the right to a work can be regarded as a truly personal right, i.e. pertaining to the person to be regarded as a “social person” in the meaning mentioned above. However, as said, this right cannot be automatically identified neither with the right to obtain a job through the intervention of the State nor with an indiscriminate protection against dismissal.

The constitutional right to work, despite the policies which can be necessary to make it actual through an increase of jobs opportunities, is the right of everyone to be equally treated (substantially and formally) with reference to the available jobs. Equality of access then, equilibrium in the competition between the job seekers and protection against abuses both on the labour market and within the employment relationship. It remains unquestionably out of its scope – and this clearly shows the ambiguity of this right<sup>28</sup> – the possibility to actually put into question the occupational and labour policies of the government. Somebody has however claimed that involuntary unemployment remains an element of constitutional alarm and it should entitle the person to a claim towards the State<sup>29</sup>. A claim that requires an answer from the State although it shall not be an actual job offer done to the

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<sup>26</sup> BARILE P. (2002), *Istituzioni di diritto pubblico*, Cedam, Padova

<sup>27</sup> On the multifarious meanings acquired along the decades by the right to a work, indicated as a right that has intensely felt “the burden of its historicity”, see D’ANTONA, M., *Il diritto al lavoro nella Costituzione e nell’ordinamento comunitario*, in D’ANTONA, M., *Opere*, vol. I, *Scritti sul metodo e sulla evoluzione del diritto del lavoro. Scritti sul diritto del lavoro comparato e comunitario*, edited by di B. Caruso and S. Sciarra, Milano, 2000, p. 265; in a similar direction see also SCOGNAMIGLIO, R., *La “storicità” del diritto al lavoro*, in L. MARIUCCI (ed.), *Dopo la flessibilità, cosa? Le nuove politiche del lavoro*, Bologna, 2006, p. 209 ff.

<sup>28</sup> In this respect see for example the recent APOSTOLI, A., *L’ambivalenza costituzionale del lavoro tra libertà individuale e diritto sociale*, Milano, 2005, p. 71 ff.

<sup>29</sup> In this respect see D’ANTONA M., *Diritto al lavoro e politiche per l’occupazione*, in *Rivista giuridica del lavoro e della previdenza sociale*, 1999, p. 15.

person but the realisation of adequate policies, an offer of training in order to enhance the employability of the involuntary unemployed people, so that to an individual claim the State would respond with a collective action to the benefit of the population actively seeking a job. A constant failure to act in this respect from the part of the State could however, according only to a minority of the scholars though, “re-individualise” the claim and thus entitle the “abandoned” involuntary unemployed person to bring an action against the State for damages<sup>30</sup>, possibly in a way conceptually similar to the principle affirmed in the ECJ case-law dating back to *Francovich*<sup>31</sup>.

Although similar extreme conclusions remain isolated in the Italian academic debate, a milder, although strong, position has been taken on these issues by the Constitutional Court<sup>32</sup>. According to a firm case-law developed during the decades, the Court considers that the right to a work cannot be regarded neither as a right to obtain a job nor as a right to keep one’s job since this right is inscribed in a legal order, such as the Italian one, where the principle of free market is recognised in the field of work<sup>33</sup>, although mitigated by public intervention with social aims. Two famous sentences can be quoted here. First of all in a famous sentence dating back to 1960 it clearly stated that **“the Constitution was oriented toward an energetic protection of workers’ interests”**<sup>34</sup>. Secondly, and going further, in a case decided in 1965<sup>35</sup> it basically acknowledged that the right to a work cannot be read as a mere conditional norm, as it instead entails all the various possible meanings of “social right”: art. 4, according to the Constitutional Court, does not pose only a futuristic objective through a programmatic norm, in fact quite on the contrary it recognises “a fundamental freedom right of the human being, expressed by the right to choose a work and to perform it”. Moreover **the Court added that art. 4 compels “to address the activity of all public powers, and of the legislator itself, towards the creation of the economic, social and juridical conditions which allow the employment of all able citizens to work”**.

The right to a work can thus be qualified as a social right to a public service. Of course what this actually means concretely remains uncertain in the real world, although it has been thoroughly analysed by scholars<sup>36</sup>. Indeed it is commonly agreed that **among the concrete measures that the Italian State can take, and has actually taken, in order to redress the failure to achieve full employment for its citizens, there are unemployment benefits and facilitation of the encounter of offer and demand through public employment agencies (or most recently through attentive control exercised on the newly open private agencies)**. As for the first, in the light of the above, the social security system intervene to compensate for the failure of the State providing for a redress of the

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<sup>30</sup> BARILE, P.,

<sup>31</sup> CARTABIA, M., Omissioni del legislatore, diritti sociali e risarcimento dei danni (A proposito della sentenza *Francovich* della Corte di Giustizia delle Comunità europee), in *Giur. Cost.*, 1992; PRINCIPATO, L., *I diritti sociali nel quadro dei diritti fondamentali*, in *Giur. Cost.*, 2001, p. 873 ff.; GIORGIS, A., *La costituzionalizzazione dei diritti all’uguaglianza sostanziale*, Jovene, Napoli, 1999, ch. II and ch. III.

<sup>32</sup> Among many, see cases (number and year) 81/1969, 174/1971, 194/1976, 183/1980, 300/1985, 2/1986.

<sup>33</sup> It is art. 41 which expressly recognises the principle of free market economy and at the same time temper it in view of protecting human dignity: “*Private-sector economic initiative is freely exercised. It cannot be conducted in conflict with social usefulness or in such a manner that could damage safety, liberty and human dignity*”.

<sup>34</sup> C. Cost. n. 29 of 1960.

<sup>35</sup> C. Cost. n. 45 of 1965, *Giur. cost.*, 1965, p. 655 ff., with a note by CRISAFULLI, V., *Diritto al lavoro e recesso ad nutum*.

<sup>36</sup> The contributions written on this article are numerous and cannot be all listed here, but at least three quotations customary regarded as the most important must be made: CRISAFULLI, V., *Appunti preliminari sul diritto al lavoro nella Costituzione*, in *Riv. giur. lav.*, 1951, I, p. 161 ss.; MORTATI, C., *Il lavoro nella Costituzione*, in *Dir. lav.*, 1954, I, p. 148 ss.; MANCINI, G. F., *Commento all’articolo 4*, in G. BRANCA (a cura di), *Commentario della Costituzione (articoli 1-12)*, Bologna e Roma, 1975.



social risk of unemployment<sup>37</sup> and so in contractual term it has been explained by authoritative doctrine that the unemployment benefit “is but a monetary compensation for the lack of access to a job<sup>38</sup>”.

As for the second, the Italian State has traditionally been very firm in exercising a monopoly in the employment services in order to guarantee equal, free and non discriminatory access to everybody supporting a redistributive vision of employment chances controlled exclusively by the State. Although such a monopoly has been declared in violation of EU law by the ECJ<sup>39</sup> and the market is now open to private employment agencies, the latter must comply with a detailed legislation in order to be allowed to operate in Italy, and this is in the end a consequence of art. 4 and of the burden that lies on the State to be the guarantor of access to employment for its citizens in line with the equality principle enshrined in the already mentioned art. 3.

Others areas – which won’t be analysed here as fallen outside the scope of the present essay – in which article 4 has played a key role were **the enactment of the Workers’ Statute in 1970 which recognises a set of very important freedoms in the working place; the protection against unfair dismissal; the right to strike.**

What can conclusively be stressed here is that art. 4, despite its mainly programmatic nature, has played an extremely important role in contributing to the development of the Italian individual as a truly social person dignified through actual access to a job, and will definitely continue to be the polar star of Italian labour law. In the present climate of economic crisis it is this article that after more than 60 years can still provide for answers to the social transformation which are taking places widening the scope of labour law and guiding the policies of the the actual and the future government in light of the need of the workers.

## **5.2. The Right to a Sufficient Remuneration**

In a Republic which is “based on labour” (art. 1 of the Constitution) the most important social rights cannot be anything else but the rights of the workers. Next to the fundamental art. 4 just examined, there is art. 36.1 according to which “*Workers have the right to a remuneration commensurate to the quantity and quality of their work and in all cases to an adequate remuneration ensuring them and their families a free and dignified existence*”. Moreover, next to the right to an adequate remuneration, art. 38.2 provides workers for “*the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment*”.

The case law developed around art. 36 is both copious and very important. Contrary to art. 4 this article has been interpreted by scholars and most importantly by the Constitutional Court as having **unconditional direct effect** (so called “*immediata precettività*”). The story is quite a long one.

The Constitution, at art. 39, provided that: “*Registered trade unions are legal persons. They may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have a mandatory effect for all persons belonging to the categories referred to in the agreement*”. In order for the system to work as provided by the Constitution there was the necessity to enact a law regulating the registration of trade unions in order for them to be recognised the right to sign collective agreements with *erga omnes* effects. Since this law was never enacted for a variety of reasons, including the unwillingness of the trade unions themselves to be registered for fear of being under state control, the case law of the Supreme Court (Corte di Cassazione) has since the first years of enactment of the Constitution established that the collective agreements, even if not applicable to all

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<sup>37</sup> See in this respect LA MACCHIA, C. *La pretesa al lavoro*, Giappichelli, Torino, 2000.

<sup>38</sup> MORTATI, C., *Istituzioni di diritto pubblico*, II, Padova, 1969, p. 1031.

<sup>39</sup> Case C-111/94. European Court reports 1995 Page I-03361.

workers, should have been used to determine the minimum salary<sup>40</sup> for the purpose of art.36. This was done by the court by making reference to art. 2099 civil code that provides for the case in which the parties have not agreed a remuneration: “if an agreement is lacking the remuneration is established by the judge”. In order to eliminate the margin of subjective discretionary left to the judge in such an important area, the Supreme Court basically stated that the point of reference should have been the remuneration provided in the relevant collective agreements also for those workers not subscribing to them, because those agreements provided for a level of retribution which was adequate to ensure the workers “*and their families a free and dignified existence*” exactly as required by art. 36. This judicial power basically stems from the fact that art. 36 is a prescriptive rule and thus every time that a judge finds a retribution agreed by the party to fall below the adequacy parameter inscribed in art. 36 s/he can – *rectius* he must – modify it accordingly. And the mechanism used to decide the level of adequacy of the retribution has always been the one succinctly described above and known as “indirect extension of the collective contract”<sup>41</sup>.

### 5.3. *The Right to a Legally Defined Maximum Working Time and Annual Leave*

Other workers’ rights that scholars tend to qualify as social rights<sup>42</sup> are the right to a maximum duration of the working day (art. 36.2: “*Maximum daily working hours are established by law*”) which for its clear formulation is regarded as a prescriptive norm that is nowadays regulated by D. lgs. 66/2005 which transposes into Italian legislation the requirements of two EU Directives on the subject matter.

A connected right is that to paid annual leave and rest. Nowadays these rights are all enforced and regarded as fundamental basic rights by each workers but at the time of the enactment of the Constitution when the traditional vision of contractual relations based on freedom of contract dating back to the liberal state was still strong, it was quite a progressive innovation. As art. 36.3 clearly provided already in the mid 40ies “*Workers have the right to a weekly rest day and paid annual holidays. They cannot waive this right*”. Such a right was of course interpreted as non programmatic but cogent on the legislator that therefore enacted it accordingly. Moreover it is interesting to notice that the Constitution itself firmly provided that not only workers are entitled to such a right but they could not renounce to it in order to protect them from pressure in the opposite direction from employers.

### 5.4. *Working Women’s and Working Children’s Rights*

A specific set of constitutional provisions provide for special protections for female workers who were traditionally strongly discriminated in Italy, as elsewhere, in comparison with male workers. The very aim of these norms is to oblige the legislator to take into account the very peculiar situation of the woman in society for both the “essential role” that they fulfil in the family and their role of mothers. The most important provision in this respect is Art. 37 which states that “*Working women have the same rights and are entitled to equal pay for equal work. Working conditions must allow women to fulfil their essential role in the family and ensure special appropriate protection for the mother and child*”.

It is nowadays acknowledged by the majority of scholars<sup>43</sup> and by the most recent case law of the Constitutional Court that art. 37 provides for directly enforceable rights. In particular it has been recognised that from art. 37 stem:

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<sup>40</sup> See e.g. Cass. 5 February 1958, n. 338.

<sup>41</sup> On this very theory see for a thorough explanation GIUGNI, G., *Diritto sindacale*, Cacucci, Bari, 2004, 141 ff.

<sup>42</sup> I follow here the classification proposed by CARETTI, P., *Diritti fondamentali*, quoted.

<sup>43</sup> See e.g. BALDASSARRE, A., *Diritti della persona e valori costituzionali*, Torino, 1997, 123 ff.

- a) the right of women to have judicially recognised equal pay to men for equal work;
- b) the right to an equal treatment as far as the general conditions of work are concerned<sup>44</sup>;
- c) the right to freely choose and access to a job without discriminatory barriers<sup>45</sup>;
- d) the freedom not to be discriminatory dismissed.

As the norm reads the State must then undertake all those actions necessary to protect the women and to allow her to both work without being discriminated and to have the possibility also to perform her peculiar social function. Despite such a clear rule it took some 30 years to for the Parliament to enact the first comprehensive law on equal treatment of women, law n. 903/1977 (a very first one was actually passed already in 1971 but it was limited to protect the maternity of the working woman). From that moment onwards the protection of women has increased through the enactment of various new pieces of legislation aiming at redressing every possible disparity, through the institution of the so called positive actions (law 125/1991); the creation of a network of public bodies entitled to monitor and advise workers on equality issues (so called *Consiglieri di parità*, “Equality Advisors”); the protection of the working mother has been reinforced through a specific law (n. 53/2000). And various recent modifications has provided for an effective enactment of this set of crucial social rights of the working women.

Art. 37.2 also provides for specific protection of the work performed by children by obliging the legislator to establish a minimum age for working and providing for a prohibition of discrimination in same way it does for women: “*The law establishes the minimum age for paid work. The Republic protects the work of minors by means of special provisions and guarantees them the right to equal pay for equal work*”. Seemingly to art. 36 for adults this one as far as the remuneration is concerned, is immediately prescriptive.

### **5.5. *The Protection of Disabled and Handicapped Persons***

As it has been previously mentioned the protection of workers lies at the very core of the Italian Constitution, which can indeed be regarded as a “labouristic” Constitution: beyond the fundamental ones analysed in detail above, there are many more social rights relating to the working relations which are recognised in the Constitution. Although it goes beyond the scope of the present essay to analyse them all, in order to properly assess how rich and various the Italian Constitution is in providing social rights, making it a truly piece of social legislation, it is important at least to list them.

Similarly to the special protection afforded to women and minors, the Constitution provides for a special protection for disabled and handicapped persons (art 38.3: “*Disabled and handicapped persons have the right to education and vocational training.*”). This is of course a conditional right which require the intervention of the State to be effective.

### **5.6. *The Right to Assistance and Social Protection***

There is then the very important right to assistance and social protection enshrined by art. 38.1 and 38.2 which afford protection for two different hypothesis. Art. 38.1, providing that “Every citizen unable to work and without the necessary means of subsistence has a right to welfare support”, is

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<sup>44</sup> Among many see cases (number and year) 137/1986; 1106/1988; 371/1989.

<sup>45</sup> Among many see cases (number and year) 163/1993; 188/1994.

basically an expression of art. 2 of the Constitution in so far as it envisage the protection of human dignity and also reaffirm the principle of equal social dignity of art. 3.1 and of social integration of art. 3.2. Instead, art. 38.2 providing that “*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*”, shares the same scope of art. 36 in so far as it entitles the workers that is involuntary unable to work to an adequate indemnity to maintain a dignified standard of living despite the occurrence of an incapacitating event.

### 5.7. *The Right to Strike*

The Constitution also recognise the very important right of strike with an open clause that leaves its regulation to the legislator: “*The right to industrial action shall be exercised in compliance with the law*”. Despite scholars all acknowledged in the years following the enactment of the Constitution this norm being unconditional and therefore directly enforceable<sup>46</sup> (“*immediatamente precettiva*”), and that therefore the art. 40 should have led to the adoption of a law by the Parliament immediately after the entry into force of the Constitution this never happened<sup>47</sup>.

Despite the clear letter of the rule the Parliament has never actually regulated industrial action until 1990 when it only provided for legislative regulation of strike in public services only. It has therefore rested on the judges to close the gaps and outside the area of public services it is in the case-law that the regulation of such an important social right can only be found.

### 5.8. *The Right to Housing*

A social right source of great doctrinal uncertainty is the right to housing. Scholars and judges have devised three possible meaning of it: a strong one which interprets it as the right to receive either the property, the rental or the assignation of a house; an intermediate one, endorsed by the Supreme Court case-law in the 1970ies which qualifies it as a subjective right to the stability of the enjoyment of one’s habitation; a weak one, to be found in the Constitutional Court’s case-law which frame it as an instrumental right with reference to other situations of need<sup>48</sup>. Scholars nowadays tend to deny that neither the first nor the second meaning are compatible with the ensemble of the Constitutional system in force<sup>49</sup> as such a view presupposes the existence of a public monopoly of the housing market, which is in contrast with art. 41 and even more with art. 42 of the Constitution<sup>50</sup> (not to mention the EU legal order). Instead, the third, minimalist meaning is the one that is nowadays supported by both scholars and judges<sup>51</sup>. Indeed, it is recognised that, although in the absence of a specific constitutional provision, the entire constitutional edifice, and in particular the principle of protection of human dignity and of equality, so requires that

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<sup>46</sup> See e.g. GIUGNI, G., *Diritto Sindacale*, Cacucci, Bari, 2004, 216-217.

<sup>47</sup> For a synthesis of the historical evolution of the right to strike in the academic discourse and in the courts, see among many, DEL PUNTA, R., *Lezioni di diritto del lavoro*, Giuffrè, Milano, 2006, p. 197 ff.

<sup>48</sup> See MODUGNO F., *I “nuovi diritti” nella giurisprudenza costituzionale*, Torino 1995.

<sup>49</sup> CARETTI, P., *I diritti fondamentali: libertà e diritti sociali*, Torino, Giappichelli, 2005, p. 425.

<sup>50</sup> Art. 41: “*Private-sector economic initiative is freely exercised*”.

Art. 42: “*Property is publicly or privately owned. Economic assets belong to the State, to entities or to private persons. Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all*”.

<sup>51</sup> See Constitutional Court (number/year) 49/1987, 599/1989, 142/1991, 169/1994.

“habitation is a good of primary importance whose enjoyment the legislator is constitutionally obliged to facilitate each time in which [...] it emerges a situation of severe factual inequality [...] that makes it extremely difficult, if not almost impossible, for certain categories of individuals to access the housing market without the intervention of the public powers”<sup>52</sup>.

This is therefore a clear example of a social right whose enjoyment is conditional upon the actual resources of a collectivity, an evaluation which can only be made by the legislator “measuring the actual available resources and the interests that can be satisfied through them, as only him can rationally balance means and objectives and build concrete rights based on the facts as an expression of such a fundamental right”<sup>53</sup>. Such an interpretation of this right as a conditional one is in conformity with art. 42 which requires that private property must be made “accessible to all”.

### **5.9. The Right to Health**

According to art. 32 of the Constitution “*The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent*”.

Indeed enjoyment of the human right to health is vital to all aspects of a person's life and well-being, and is crucial to the realization of many other fundamental human rights and freedoms. However it is composed of many different parts each bringing along different rights and problems of enactment and regulation.

Within the scope of the right to health there have been traditionally included *the right to psychic and physical integrity*, which is basically a “freedom from” right providing protection from external interferences which could bring prejudice to one’s own health, including administrative and legislative provisions. As such this is an unconditional social right, directly enforceable in court<sup>54</sup>.

Secondly, and very importantly, there is the specific *right to be healed*, i.e. the right to receive medical services and medical assistance. The realisation of this very right is of course conditional upon the intervention of the State, that is nowadays obliged to provide for the actual access to such a right through its territorial articulations, the Regions, the Provinces and City Counties (*Regioni, Province, Comuni*). The recourse to a public system of medical assistance involves, as required by the Constitution, the possibility for every citizen to access these structures despite his/her actual economic condition since every individual enjoys an absolute right to be healed. It is therefore a right to a service that must be realized by the State. As the Constitutional Court clearly affirmed in 1988 “the right to health is a primary and fundamental right that requires a full and exhaustive protection from the State”<sup>55</sup>. This means that the State must be committed to fully implement this right but that it remains a conditional social right that must also be balanced with other interests and of course taking into account the actual financial and organisational limits that the legislator may encounter in its action. Alas, the fact that the right to be healed is a costly right is the main reason why it often remains deprived of full protection despite the solemn affirmations contained in the Constitution as well as in some sentences of the Constitutional Court. And this is particularly regrettable as it contrasts with the right to free access to health care for the indigent expressly mentioned in the Constitution.

Of course there are also many other meanings of this right that all require protection from the State, one above all is the protection of the collective interest to health: *a right to live in a healthy environment* (which falls into the scope of environmental law), and that have forced the legislator to pass a number

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<sup>52</sup> BALDASSARRE, A., *Diritti della persona e valori costituzionali*, Torino, 1997, 123 ff., here

<sup>53</sup> Const. Court n. 252 of 1989.

<sup>54</sup> BALDASSARRE, A., *Diritti della persona e valori costituzionali*, Torino, 1997, 123 ff., here

<sup>55</sup> Const. Court. N992 of 1988.

of specific laws to regulate this area following some fundamental decisions of the Constitutional Court that has played a key role in the enforcement of this specific social right<sup>56</sup> which was firstly affirmed by it in ordinance n. 184 of 1983 where the right to a healthy environment is affirmed despite the absence of an express provision in this direction in the Chart<sup>57</sup>. But it is only after a long doctrinal elaboration and many decisions of the Constitutional Court that finally, and “officially”, so to say, the protection of the environment as a fundamental constitutional value was recognised. This appreciation is not important for its mere symbolic value, quite on the contrary such a firm position taken by the Court provides for a solid anchorage of precise subjective rights of the individuals entitling them to bring an action to a court for damages to the health caused by pollution for example.

### 5.10. *The Right to Education*

Within the scope of the social right to education falls on one side the right to teach, protected by art 33 of the Constitution:

“The Republic guarantees the freedom of the arts and sciences, which may be freely taught. The Republic lays down general rules for education and establishes state schools for all branches and grades. Entities and private persons have the right to establish schools and institutions of education, at no cost to the State”.

On the other side there is the correlative social right to be taught enshrined in the following art. 34, according to which:

“Schools are open to everyone. Primary education, which is imparted for at least eight years, is compulsory and free. Capable and deserving pupils, including those without adequate finances, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations”.

The most important for the present analysis is of course the latter since it establishes two fundamental principles, that of the freedom of access to the schooling system (reinforced by the provision that makes basic education compulsory and free) and that of the necessary intervention of the State (through scholarships and allowances) to protect, i.e. to make actual, the right to education for those pupils who prove to be capable and deserving. They are social rights which unquestionably require the intervention of the State in order to be realised and are therefore classified as conditional by scholars<sup>58</sup>.

## Conclusions

The panorama of social rights in Italy is probably one of the widest possible and from a comparative point of view it offers, at least in the European scenario, one of the most comprehensive available catalogue. Of course, as every first-year law student knows, to solemnly declare a right in a Constitution does not automatically mean that the right is actually enjoyed by the individuals. In the first part it has been shown that there has been the necessity of a thorough academic debate to firstly identify which of the rights listed in the Constitution are social rights, and secondly, how to differentiate these rights. If the first activity has been relatively easy as most of the rights listed in Part I, titles II and III of the Constitution are nowadays acknowledged as social rights, the second issue still ingenerates substantial debate. It is for this reason that the various conceptual categories identified by scholars have been presented in the first part and then used to qualify each of the most important social

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<sup>56</sup> In particular beginning with case

<sup>57</sup> The subject matter has been then thoroughly developed in a series of subsequent decisions: 94/1985, 39/1986, 167/1987, 210/1987 and then more recently in cases 302 and 356 of 1994.

<sup>58</sup> BALDASSARRE, A., *Diritti della persona e valori costituzionali*, Torino, 1997, 123 ff., here at...; CARETTI, P., *I diritti fondamentali: libertà e diritti sociali*, Torino, Giappichelli, 2005, p. 443;

right in the second part of this essay. Of course, as pointed out in the first part, there isn't common agreement as on how to classify social rights and various theories have been put forward.

Some scholars rely on the partition that is made also by the Constitution and propose to group them according to the particular social formations to which they refer (working environment, family, school, collective environment, etc.)<sup>59</sup>; while others propose instead to group them according to the goods protected by the norm (education, equality of sex, health, work, etc.)<sup>60</sup>.

However, once agreed on the list of the social right, the most important issue has been to assess the level of their enforceability, and this was approached by scholars through a variety of theories and numerous expressions. For the purposes of the present paper, the enforceability of social rights can be basically assessed according to two main options: either social rights are stand-alone, i.e. they can be judicially enforced without the intervention of the legislator; or they can only emerge from the pages of the Constitution as actual rights via a legislative action.

Actually, one must reckon that although the academic discourse provides for essential clarifications in this respect – and the contributions on which the present work is based are those of the most authoritative and respected Italian constitutional lawyers – the second part of the paper shows that a determinant role has often been played by the judges. Indeed, for all those rights that are unconditional the need of a legislative intervention lacks and therefore it is natural that judges can intervene and give substance to those provisions. What is probably more interesting is that due to the lack of initiative of the Parliament, many conditional social rights have been basically enacted by the judiciary, called by the citizens to provide actual satisfaction to subjective rights that would have remained otherwise frustrated as a consequence of the non intervention of the numerous governments that have ruled Italy since 1948. Indeed, despite some very well elaborated proposals contained in the writings of some scholars who have conceived the possibility to award damages through recourse to the judiciary for lack of action on the side of the legislator, similar proposals have always remained isolated, despite being elaborated by scholars of high calibre (e.g. Paolo Barile). It has therefore been the merit of the judiciary if workers have been entitled to actually receive a minimum salary which was in line with the cost of life and therefore apt to guarantee a dignified life through the anchorage proposed by judges of the minimum salary to that agreed upon by the signatory parties of a collective agreement. It is the merit of the judiciary if the protection of the environment is receiving increasing consideration. And similar observation can be made with reference to the right to strike, and many others.

Of course there are also other areas in which the Parliament has not renounced to play its essential role of enactor of the legislative provisions. Such a way must be of course regarded as the most appropriate as it relies on a thorough democratic process in comparison with the day-by-day solution elaborated by judges. But it is true however that the solutions elaborated by judges to put a temporary remedy to an actual injustice linked to the lack of enactment of the constitution, from a temporary remedy – thanks also to an open dialogue that has been undertaken with the scholars – Italy has managed to come out with a living legal system which provides for a satisfying protection of social rights.

Overall therefore, the combination of a highly progressive and socially oriented fundamental Chart, combined with the complex academic discourses developed during the decades and a judiciary that – mainly at the level of the Constitutional Court whose members often were authoritative academics author of the theories then endorsed by it – has found its own way, the Italian way, to the protection of social right, in spite of a rather lazy legislative power.

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<sup>59</sup> BALDASSARRE, A., *Diritti della persona e valori costituzionali*, Torino, 1997, 123 ff., here at 14.

<sup>60</sup> CORSO, G., I diritti sociali nella Costituzione italiana, *Riv. Trim. dir. Pubbl.*, 1981, 757 ff., here at. 758.





# The Emerging Concepts of Social Rights in Belarus, Ukraine and Russia

Uladzislau Belavusau\*

## I. Context and Scope

The very definition of social rights in the post-Soviet context of the three transitional countries (Belarus, Russia and Ukraine) is a hard nut. The ethos of the communist state was built around the vulgarized perception of Marxism and, consequently, underlined the egalitarian character of citizenship. Social [or better *socialist*] rights were proudly portrayed as the mainstream of the Soviet constitutionalism counter-positioned against the “hypocritical individualism” of the Western human rights. Therefore, these rights were described exclusively in terms of the legal benefits, guaranteed by state, including the right to education, the right to health protection and medical service, the right to accommodation, etc.

In the strictly heuristic terms, this article aims to explain the contemporary understanding of social rights in the three ex-USSR countries. Therefore, social rights are deconstructed as a socio-legal phenomenon bearing an essential legacy from the totalitarian perceptions of law and society in general, pertinent to the Soviet state and mutated in the first post-Soviet decade in a way to incorporate some rhetoric of “Western” human rights.<sup>1</sup> Considering the lacuna in the western bibliography on social law in post-soviet countries, this piece is designed as the introduction into the concept of social rights in Belarus, Russia and Ukraine.

## II. Soviet “Heritage”

In Soviet legal dictionaries the entries on social legislation were akin to the exemplary definition as follows<sup>2</sup>:

“in the capitalist countries that is a part of the labor legislation, dealing with certain aspects of the family relations, social insurance and social security, health protection, education, and house-building. In the sphere of labor, social legislation regulates the duration of a working day, vacations, salaries, trade unions, the right to strike and collective agreement. Social law appeared as a result of the intense struggle of the working class for their rights. As for their class-based essence, the progressive norms of social legislation amount to concessions, which the ruling classes are forced to make due to the struggle of labor class for their rights. They make those partial concessions in order to safeguard the dominance of the capital. The concessions serve to create an illusion that a state is interested in the welfare of people. [...] Social rights are actively used by the bourgeois propaganda (especially in the middle of the 20th century) to spread the ideas of “class cooperation” (like the fiction of welfare state) [...] Communist and labor parties have been constantly unmasking this bourgeois and reformist propaganda. They have been fighting for the rights of the workers and have been inspiring them for an active struggle for their interests.”<sup>3</sup>

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<sup>1</sup> For a comprehensive analysis of social rights in the post-communist countries of Central and Eastern Europe see Wojciech SADURSKI, *Rights before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer, 2008.

<sup>2</sup> Considering the significance of this definition for the proper understanding of the post-soviet rhetoric around social rights, I give a full quotation here.

<sup>3</sup> “Социальное законодательство – в капиталистических странах законодательство о труде, о некоторых сторонах семейных отношений, социальном страховании и социальном обеспечении, здравоохранении, просвещении,

Taking the rough differentiation of human rights into economic, cultural and social, one can observe that in the Soviet Union, there were no economic rights (i.e. to establish your own business) in their traditional understanding within the western rhetorical practices. Therefore, social rights were more accentuated due to the omnipresence of the state. The latter was supposed to “take care” of the collective freedoms.

This rudiment thinking is clearly present in the early post-communist legal definitions. As an example, one can quote the first legal dictionary in the Belarusian language.<sup>4</sup> It does not contain any definition of social law [as a discipline] and traces social rights under the entries of social services (*сацыяльнае забеспячэнне*) and social insurance (*сацыяльнае страхаванне*).<sup>5</sup> The post-perestroika period and radical shift towards the “capitalist economy” required the redefinition of the old concepts, including those dealing with social rights. The newest Russian legal dictionaries refer to social rights in a more pragmatic and westernized way, although still bearing the traces of Soviet terminology. Thus, Big Legal Dictionary<sup>6</sup>, edited in 2002 in Moscow, contains an entry called “*social rights of a person*”, described as a complex of constitutional rights safeguarding certain benefits from the state. The catalog of social rights, according to this dictionary, contains the right to social security, the right to education, the right to health and medical assistance, the right to accommodation, special rights of children and disabled persons. The authors of this dictionary still claim, however, that the most adequate constitutional proclamation of these rights is distinctive to socialist and post-socialist states. It is remarkable that the newest Big Legal Encyclopedic Dictionary, edited in 2007 in Moscow, simply copies the above-mentioned definition.<sup>7</sup>

Following the German model (Article 20 of *Grundgesetz*), the constitution of Belarus proclaims that the Republic is a social state (Article 1).<sup>8</sup> So does the Ukrainian constitution.<sup>9</sup> The Russian constitution

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жилищном строительстве. В области труда С.з. регулирует продолжительность рабочего времени, отпуска, установление размеров заработной платы, положение профсоюзов, право на забастовку и коллективный договор и др. С.з. появилось в результате упорной борьбы рабочего класса за свои права. По своей классовой сущности прогрессивные нормы С.з. представляют собой уступки, на которые правящие классы вынуждены идти в условиях усиления борьбы трудящихся за свои права. Эти частичные уступки трудящимся делаются, чтобы сохранить главное – господство капитала; для создания у трудящихся иллюзии о заинтересованности государства в поднятии благосостояния всего народа. [...] С.з. активно используется буржуазной пропагандой (особенно это характерно для середины 20 в.) для распространения идей о «классовом сотрудничестве» (теории «народного капитализма», «государства всеобщего благосостояния» и т.п.). [...] Коммунистические и рабочие партии неустанно разоблачают буржуазную и реформистскую пропаганду, отстаивают права трудящихся, ориентируют их на активную борьбу за свои жизненные интересы». А.Я. Sukcharyev, *Юридический энциклопедический словарь* [Legal Encyclopedic Dictionary], Moscow, Sovetskaya Entsiklopediya, 1987. 441-442. See also I. Ya. Kiselyov, *Современный капитализм и трудовое законодательство* [Contemporary capitalism and labor legislation], Moscow, 1971.

DISCLAIMER: here and after all the translations from *Belarusian, Russian and Ukrainian* are made by author.

<sup>4</sup> S. Kuźmin, *Юрыдычны энцыклапедычны слоўнік* [Legal Encyclopedic Dictionary], Minsk, Bielaruskaja encykłapiedyja, 1992.

<sup>5</sup> Ibid, 493.

<sup>6</sup> A. Ya. Sukcharyev, *Большой юридический словарь* [Big Legal Dictionary], 2<sup>nd</sup> edition, Moscow, Infra-M, 2002. 579.

<sup>7</sup> A. B. Bakharin, *Большой юридический энциклопедический словарь* [Big Legal Encyclopedic Dictionary], Moscow, Knizhnyj mir. 649.

<sup>8</sup> Article 1: “The Republic of Belarus is a unitary, democratic, social state based on the rule of law [...]” The original version: “Рэспубліка Беларусь - унітарная дэмакратычная сацыяльная прававая дзяржава.” (Belarusian). Compare to the respective German constitutional clause: “Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat. “

<sup>9</sup> The preamble to the Ukrainian Constitution states that “The Verkhovna Rada of Ukraine [Parliament – UB], on behalf of the Ukrainian people [...], striving to develop and strengthen a democratic, social, law-based state, [...] adopts this Constitution — the Fundamental Law of Ukraine.” The original version: “Верховна Рада України від імені Українського народу [...] прагнути розвинути і зміцнювати демократичну, соціально, правову державу, [...]”

refers to social rights in Articles 38-41 and 43.<sup>10</sup> The illustrative catalog of the variety of objects perceived in the realm of social rights may be demonstrated on the example of the Ukrainian legislative sources. The constitutional provisions<sup>11</sup> are backed up by the Statutes of Ukraine “On Pension Security” (1991), “On Status and Social Protection of Victims of the Chernobyl Catastrophe” (1991), “On Status of the Veterans of War, Guarantees of Their Social Protection” (1995), “On The Fundamental Principles of Social Protection of the Veterans of Works and Other Retired Citizens in Ukraine” (1994), “On State Social Aid to Low-Budget Families” (2000), “On Social Services” (2003), as well as by the Edicts of the President of Ukraine such as, the one “On the Strategy to Fight with Poverty” (2001), the decisions of the Cabinet of Ministers of Ukraine and other normative acts.

### **III. Social Law: Lost in Labeling**

The academic discussion in recent years has been focusing on two main issues. First of all, the debate was centered on the justifications to distinguish social law from other areas of law. And secondly, the scholars in all three countries have been trying to find an adequate niche for social rights in the dichotomy of public-private law. Thus, a Russian scholar Filimonova links social law to four main areas, namely administrative, financial, labour and even civil law.<sup>12</sup> She focuses on the interaction between social law and social policy.<sup>13</sup> The similar approaches can be found in the writings by L.N. Anisimov, M. Y. Fyedorova, D.A. Nikonov, A.V. Stryemoukhov, A.P. Fyedorov, M.I. Lyepikhov. Even the labeling of their academic pieces in the respective field often mirrors the Soviet perceptions regarding the social-protection-accent.<sup>14</sup> Social rights are therefore, comprehended rather through the binary lenses of private-public law than as the second generation of human rights [civil, political and social rights].

Consequently, Filimonova maintains that social law is the system of legal relations and respective legal rules, which defines the content and fulfills the social policy, i.e. the regulatory activity of the state and other social entities, who perform as state agents. This activity is mainly focused on the provision of social services and aims at social development.<sup>15</sup> Therefore, she identifies two main features of social law:

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*приймає цю Конституцію — Основний Закон України.*”(Ukrainian). Article 1 proclaims that Ukraine is a sovereign and independent, democratic, social, law-based state.

<sup>10</sup> The right to free labor (37), protection of mother and child (38), social age protection (39), accommodation (40), health protection and medical assistance (41), healthy environment (42), education (43).

<sup>11</sup> E.g., a traditional reference to social rights in Article 46:

Citizens have the right to social protection that includes the right to provision in cases of complete, partial or temporary disability, the loss of the principal wage-earner, unemployment due to circumstances beyond their control and also in old age, and in other cases established by law.

This right is guaranteed by general mandatory state social insurance on account of the insurance payments of citizens, enterprises, institutions and organisations, and also from budgetary and other sources of social security; by the establishment of a network of state, communal and private institutions to care for persons incapable of work.

Pensions and other types of social payments and assistance that are the principal sources of subsistence, shall ensure a standard of living not lower than the minimum living standard established by law.

<sup>12</sup> M.F. Filimonova (ed.), *Право социального обеспечения: Учебник*. [The Law of Social Protection], Moscow, Jurist, 2006.

<sup>13</sup> See in particular, D.A. Nikonov, A.V. Stryemoukhov, A.P. Fyedorov, *Социальное право* [Social Law], S-Petersburg, 2002. . Ye. Kozlov, *Социальная политика: Конституционно-правовые проблемы* [Social Policy: Legal Constitutional Problems], Moscow, 1990, 8.

<sup>14</sup> E.g., M.I. Lyepikhov, *Право и социальная защита населения (социальное право)* [Social Protection of the Population (Social Law)], Moscow, 2000. 7-36. M. Yu. Fyedorova, *Социальная защита населения в Российской Федерации* [Social Protection of the Population in the Russian Federation], Omsk, 1999. 25-31.

<sup>15</sup> “Социальное право – это система правоотношений и соответствующих правовых норм, в рамках которых определяется содержание и реализуется социальная политика, т.е. регулятивная деятельность государства и

1. Firstly, the subject of social law is represented by the relations stemming from the fulfilment of social policy, i.e. the activities in social sphere, aimed at social development.
2. Secondly, the subjects of social law are the state and public agents.

Although, the contemporary Russian scholars, like Filimonova, do not fully equate social law and the law of social security, the accent on social benefits and state guarantees is still omnipresent. Curiously enough, recently the Ukrainian universities have been developing the courses on social law under the label of the *Law of Social Protection of the Population*.<sup>16</sup> The key study areas of those courses have been focusing on the issues of social protection, social security, state insurance, social aid, subsidies, social standards, state social guarantees, low-budget families, and pensions. The Ukrainian scholar, Olena Chomakhishvili maintains that the subject of social law is threefold:

1. The protection of working rights, medical service, social service, obligatory social insurance, obligatory state insurance and pensions.
2. Social protection of certain groups (war veterans, disabled persons, women and children, military men, refugees, victims of the Chernobyl catastrophe, etc) living at the territory of Ukraine and requiring social protection.
3. Activities of the social protection bodies.<sup>17</sup>

The Belarusian scholar Postovalova deduces the essence of social law from the analysis of the international legislation (e.g., Conventions of ILO) and references to some German authors.<sup>18</sup> Among the peculiar methods of social law, she distinguishes the method of social insurance, the method of social protection and the method of social aids.

#### IV. Non-Discrimination and Social Law with the Traces of Authoritarianism

The timid development of the non-discrimination law has been perhaps the most contradictory side of the general social law in the three post-Soviet countries. The domain illustrates, on the one hand, a somewhat modest theoretical level of the respective scholars, very briefly acquainted with the Western writings about non-discrimination law. On the other hand, it is precisely the area where Soviet rudiments of legal thinking have been facing the fertile soil of the [conservative] religious propaganda, astonishingly blooming after the years of Soviet atheism, and often (especially in case of Belarus) re-inspired by the Anti-Western rhetoric, actively supported by the [authoritarian] state.

As a brief example, I shall quote a passage from a recent Russian textbook on comparative labor law, whose author suggests that “*the legal regulation of the work of women in Russian Federation not only corresponds to the strictest legal standards, but even exceeds the level of the protection of the work of women in many foreign [from the context of the book, the wording should be understood as attributed to western countries – UB] countries. Therefore, there are even suspicions that the benefits for women tend to become the anti-benefits, and their excessive protection sets a potential for a peculiar*

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*иных социальных образований, выступающих в качестве публичных агентов, выражающаяся, по преимуществу, в оказании социальных услуг и направленная на социальное развитие.”* (Filimonova, *supra* note 12).

<sup>16</sup> *Право соціального захисту населення* [Ukrainian].

<sup>17</sup> Olena Chomakhishvili, *Соціальне право як самостійна галузь права* [Social Law as an Independent Field of Law], *Jurydychnyj zhurnal*, 10, 2005. Available at: <http://www.justinian.com.ua/article.php?id=1961> For the Ukrainian academic discussion about human rights and social rights see also Petro Rabinovych, *Права людини: уніфікація назв та розмаїття змісту (теоретико-методологічні зауваги)* [Human Rights: Unification of Titles and Diversity of Contents (Theoretical and Methodological Observations)], *JI*, 21-2001. Available at: <http://www.ji.lviv.ua/n21texts/rabinovych.htm>

<sup>18</sup> T.A. Postovalova, *Право соціального забезпечення: общяя часть* [The Law of Social Security: General Part], Minsk, Tesey, 2005. 60-63.

discrimination”.<sup>19</sup> Another popular Russian textbook quotes such scholars as a Bolshevik minister Alexander Kollontaj<sup>20</sup> to justify the authority of the gender equality and non-discrimination in the labor relations, ignoring or most probably being poorly acquainted with the whole tradition of the gender-based deconstruction of law.<sup>21</sup>

The poor academic level is echoed in the adjudication on non-discrimination. Thus, in 2008 the regional prosecution department produced an illustrative decision on discrimination based on sexual orientation. The activists of a gay organization were trying to commence the prosecution against the governor of the Tambov region, who publically called for the physical annihilation of homosexuals. The refusal of the prosecutor to bring the case before the court under the criminal article of non-discrimination was based on a fact that apparently [...] “the claimants could not prove that they belong to homosexuals and, therefore, that their personal rights were violated”.<sup>22</sup>

The basic concepts of non-discrimination law, like gender-based discrimination, positive discrimination [affirmative action], and adequate comparator have entered the legal terminology in post-soviet countries rather recently and have not been enjoying a particular popularity, being limited mostly to the jargon of human rights activists.

In case of Belarus, the situation is aggravated by the particularly serious human rights violations for which the country is often referred to as the “last dictatorship in Europe”.<sup>23</sup> Being the only European country, which has not ratified the European Convention on Human Rights and, respectively, not represented before the bodies of the Council of Europe, Belarus has been severely criticized for the violations of non-discrimination standards and particular social and labour rights.<sup>24</sup> It is often suggested that, “while the main labour laws in Belarus, concerning equal treatment appear to comply with its international obligations, in the absence of an independent judiciary and basic civil liberties, law enforcement remains a problem”.<sup>25</sup> As far as the social rights are concerned, the most serious violations deal with the constitutional freedoms of trade unions and the peculiar contract system of employment, introduced in Belarus.

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<sup>19</sup> I. Ya. Kisyelyov, *Сравнительное трудовое право* [Comparative Labor Law], Moscow, 2005. 218-219.

<sup>20</sup> A. M. Kollontaj, *Новая мораль и рабочий класс* [New Moral and Working Class], Moscow, 1919. A.M. Kollontaj, *Труд женщины в эволюции хозяйства* [The Work of Woman in the Evolution of the Economy], Leningrad, 1928.

<sup>21</sup> M. Lushnikov, A. Lushnikova, *Очерки теории трудового права* [The Essays on Theory of Labor Law], San Petersburg, Juridicheskii Tsentr Press, 2006. 439-440.

<sup>22</sup> *Homophobic Governor of Russian Region Will Not Face Criminal Prosecution* // <http://www.gayrussia.ru/en/homophobia/detail.php?ID=11852>.

*Тамбовский губернатор может и дальше «рвать» геев, которые «не являются социальной группой»* [The governor of Tambov can further “tear out” gays, who “do not constitute a social group”] // <http://www.gay.ru/news/rainbow/2008/07/28-13526.htm>

<sup>23</sup> According to the 2008 worldwide annual press index (provided by the *Reporters without Borders*), Belarus is listed as the 154<sup>th</sup> in this “freedom-of-expression-measurement”, where Iceland took the first place and Eritrea the last (173), with a situation comparably better only in few other [mostly declaratively socialist or post-socialist] states like North Korea (172), Turkmenistan (171), Cuba (169), China (167), Uzbekistan (162), etc. The president of the country, Alexander Lukashenka initiated several referendums, the last of which has changed the constitutional restriction for the no-more-than-two-years term of presidency. Thus, Mr. Lukashenka has been in power for more than 15 years in Belarus, gaining a world-wide scandalous reputation for the coup d'état in the parliament and constitutional court, alleged falsifications of elections [OSCE observation mission reports] and severe prosecution of the leaders of the political opposition.

<sup>24</sup> For a full account of labor and social law violations see Yaraslau KRYVOI, *Discrimination and Security of Employment in a Post-Soviet Context*, *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 2211, 2006. 5-18. The author argues that the Soviet legacy of industrial relations and the legal nihilism of that era have been taken by Belarusian authorities as a model for their policies.

<sup>25</sup> *Ibid*, 5.

While the independent trade unions have been facing severe prosecutions, the state-controlled trade union is infamous as a puppet body, created to disguise the problems of the industrial dialogue in Belarus.<sup>26</sup> In addition in 2004, the government introduced a peculiar system of “contractualisation” [кантрактуалізацыя], i.e. the obligatory transfer of workers from the open-ended labor contracts to the fixed-term contract with one-year duration.<sup>27</sup> The effect of the transfer makes the employees totally dependent on the state, whose organs are not obliged any more to justify the non-renewal of the contract, nor to give advance notification nor to pay redundancy payment. In the absence of the mechanisms for the independent trade unions to participate in the industrial dialogue, the “contractualisation” is challenging the workers with the horns of a dilemma: either to subordinate to all the injustices of the Belarusian industrial model [the employer is not obliged to justify the non-continuation of the one-year contract] or to join the caste of the unemployed.<sup>28</sup>

## V. Conclusions

The collapse of the Soviet empire left the three re-emerged independent countries with a similar question of *Quo vadis?* The migration of the Western constitutional ideas combined with the traditional emphasis on the state-guaranteed-social-benefits opened a heated debate on the re-definition and an adequate protection of social rights. The bitter experience of the transit from socialism to capitalism has certainly aggravated the public discussion. Consequently, the emerging doctrines of social law in Belarus, Ukraine and Russia illustrate a peculiar muddle of Soviet “beneficial” mythology, traditional labor rights, regulation of collective bargaining, crescent consciousness of the environmental protection rationale and, most recently, a somewhat timid and ultimately contradictory development of the non-discrimination law.

Among the recent positive trends in the academic narratives on social rights, one may recall the ever-growing translation of European scholars on EU Law as well as the authors’ attempts to create the textbooks on EU Law in the local languages. Since these textbooks usually contain the chapter on labour and social law in the EU, the discourse of social rights have been inevitably filtering into the academic discussion in Belarus, Ukraine and Russia. In case of Ukraine, the studies on social rights have been also inspired by the declaratory intentions of the country to join the Union. Therefore, paradoxically social *acquis* is becoming a serious catalyst for the interest to social rights.

Despite some positive tendencies, the level of academic discussion is imprisoned between the rudiments of soviet thinking in terms of the “state beneficial mythology”, on the one hand, and, on the other hand, the problems of democratic deficit, a peculiar isolationism of comparative labour law vis-à-vis foreign doctrines, religious and political populism, corruption and lack of transparent public debate.

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<sup>26</sup> ILO, *Trade Union Rights in Belarus – Report of the ILO Commission of Inquiry*.

<sup>27</sup> Instruction of Council of Ministers of Belarus No. 30/14/102-925, 9 January 2004.

<sup>28</sup> Further see KRYVOI, *supra* note 24 [the author discusses the incompatibility of “contractualization” with the ILO Termination of Employment Convention No. 158, 1982].

# Social Rights in Poland

Anna M. Jaron\*

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## Introduction

In the bulk of recent Polish constitutional literature, the matter of social rights is treated rather scantily. In the main, however, the focus of interest revolves around the controversy over the justiciability of social constitutional rights, which was mainly debated in 1990s during constitutional debates. In particular, many detailed issues accompanying the enforcement of social rights were discussed, however, since then, the development of constitutional jurisprudence in social matters has gained less and less attention. This is not to deny, of course, that social issues are not discussed among constitutional scholars. Rather, it is simply to indicate that these matters are more extensively treated by social scientists and economists. It is perhaps an indication that the vast literature of other disciplines may be of reference for lawyers.

The point of departure of the present essay lies in the conviction that the multidisciplinary approach provides an adequate basis for studying the definition and understanding of social rights. Closer scrutiny of conceptual foundations in law, social sciences and economy is necessary and productive to our understanding of what is importantly at stake in the debate over social rights.

This paper outlines the most specific features of social rights, the understanding of the concept, the scholarly doctrine in the field of social policy issues and the main characteristic of its constitutional formulation. Consequently, it refers to Polish literature, legislation and constitutional case law. At the beginning, in Section 1, an attempt to define and contextualize social rights will be taken. The latter will be presented on the basis of an evolution of the concept of social policy in Poland. This issue is particularly crucial with regard to the linguistic dichotomy and imprecise definition of the word “social” (*socjalny* versus *społeczny*). The following part (Section 2.1) presents the main features and

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content of constitutional social rights in Poland. Special attention is given to social rights under the democratic Constitution of 1997. The general characteristic of the current constitutional social rights are discussed (Section 2.2), and are followed by examples of constitutional jurisprudence.

## 1. History of Social Rights in Poland

In Poland, the concept of social rights has emerged in a variety of contexts- political, legal, economic, social and religious. Such a vast variety of contexts has allowed the attribution of multiple features to the nature of social rights, their enforcement and protection. In the course of time, elements of political, social, legal and economic sciences, as well as religious arguments (mainly stemming from the Catholic social teaching), has constituted a multithreaded idea of what social rights are.

At the beginning of the formulation of social policy aspects, individual social issues were part of a scientifically defined social service system. This proves that a clear definition of the term “social policy” not only is entangled in linguistic subtleties, but also reflects the complexity of its contents. There are at least two major problems at this point. At one pole lies a problem with the distinction resulting from a two-fold understanding of the term “polityka” in Polish: first, understood as an interrelation between State and its institutions (*politics*), and second, as mechanisms that serve the regulation of social relations (*policies*). But more importantly, the division relates to a difference between “social policy” being a part of science versus “social policy” being an element of the domain of political action. The second difficulty stems from defining the scope of social policy, which is a direct derivative of a translation problem of the adjective “social”. Social policy (taken as *policy*) may be therefore translated and in fact is understood as “*polityka socjalna*” (like in German: *Sozialpolitik*), which encompasses all the actions that aim for the improvement of the social position of individuals and groups of individuals and/or that provide for insurance against the risk of threats to human existence. On the other hand, “*polityka społeczna*” (like in German: *Gesellschaftspolitik*) may be translated in broader terms. Precisely, in this case it would also refer to the process of social/societal evolution, and it would address changes in the social structure.

The linguistic aspect therefore sheds a light on the understanding of social rights in the Polish literature, depending whether the reference to the aspects of *politics*, or *policies*. Yet, the confusion over the notion of social policy also refers to the two-fold comprehension of the aims that social policy serves: on the one hand, it seeks to resolve socially generated risks (unemployment, loss of health, old-age pension guarantees, etc.) and, on the other, it intends to enhance the well-being and equality between citizens (education, consumer protection, freedom to choose one’s occupation, etc.). The former aspect forms part of the *social security system (system zabezpieczeń społecznych)*, while the latter is framed under the *social service system (system pomocy społecznej)*.

### 1.1. Concepts of Social Rights and their Constitutional Traditions

Conventionally, social rights have been regarded in Poland as rights that protect the worse-off. The association of social rights with the positive duties of the State to undertake actions happened as early as the 19<sup>th</sup> century with the introduction of social issues to the civil law code, and later on with the introduction of their elements to administrative law as well. The aim was, indeed, to protect the worse-off in legal relations. The influence of the Catholic Church thought and the Papal encyclicals, such as *Rerum Novarum* of 1891, have encouraged the articulation of the right to work, and its accompanying elements. These developments led to a formulation of a separate discipline of law, namely labour law, which traditionally is considered a source of social rights and social issues. From the very beginning, institutions of labour inspection and separate labour judiciary section in the courts were created.



The collection of labour law rules and rights was created in Poland during the Second Republic (1919-1939). It still did not take the form of a separate labour code but numerous laws in this field were already enforced. Although the constitutional traditions in Poland date back to the 16<sup>th</sup> century,<sup>1</sup> it was not until the March Constitution of 1921<sup>2</sup> that social rights were articulated for the first time in the text of the constitutional act. The March Constitution guaranteed protection of work by the State and the right to social security in case of unemployment, accident or disability (Article 102), as well as the right to education (Article 118). It provided for the protection of maternity and prohibition of child labour (Article 103). The subsequent 1935 Constitution<sup>3</sup> was least generous with regulating social rights. It barely mentioned work as a basis for the development of the State (Article 8(1)) and guaranteed the State's protection of work and working conditions (Article 8(2)). It omitted the right to education, along with rights relating to the protection of maternity and of minors guaranteed under previous Constitution.<sup>4</sup>

It is worth noting at this stage that in both the 1921 and 1935 Constitutions, the wording of provisions concerning protection of work suggests that the right to work was understood rather as the prerogative of the State than as an individual right. The scope of this right has changed with the introduction of the Constitution of 22 July 1952,<sup>5</sup> which in general ensured a wide catalogue of social rights.<sup>6</sup> The right to

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<sup>1</sup> The first elements of the constitutional regime of Poland were formulated as early as in 1573, by the so called Act of the General Warsaw Confederation, which established an elective monarchy of the Polish-Lithuanian Commonwealth, the Union of the Kingdom of Poland and of the Grand Duchy of Lithuania. The Act of the General Warsaw Confederation granted political rights to the nobility (*szlachta*). The first codified national constitution in modern terms was adopted in 1791 on May, 3<sup>rd</sup>. This Constitution extended political rights to the bourgeoisie and increased the rights of the peasantry. The basic rights that constitutional acts recognized were the right to property, freedom of religion, and guarantees of civil and political rights. Nevertheless, these acts were mostly passed under foreign supremacy, therefore they were not entirely independent. The general tendency in the subsequent Constitutions shows that primarily the right to property was linked to the rights of social character. Among other constitutional acts that contained elements addressing social issues, was the 1807 Constitution of the Duchy of Warsaw, which, together with the Napoleonic code, abolished distinction between social classes and introduced a principle of equality before the law (which was especially important with regard to the right to land property).

<sup>2</sup> *Constitution of the Republic of Poland of 17 March 1921*, (Dz. U. R. P. nr 44, poz. 267; nr 79, poz. 550; nr 101, poz. 935); referred to as the March Constitution; text in Polish available at: [www.trybunal.gov.pl](http://www.trybunal.gov.pl). The March Constitution was the first independent Constitution of Poland, although it was prepared and passed during the political domination of Marshal Józef Piłsudski, which gave a reason for criticism of its authoritative character. The Constitution recognised private property as a fundamental element of social structure and guaranteed civil rights to all citizens

<sup>3</sup> *Constitutional Bill of 23 April 1935*, (Dz. U. R.P. nr 30, poz. 227); the third Constitution of the interwar Polish Second Republic, also known as the April Constitution; text in Polish also available at: [www.trybunal.gov.pl](http://www.trybunal.gov.pl).

<sup>4</sup> The atmosphere of the 1926 coup d'état, after which the 1935 Constitution was proclaimed, led to the introduction of a presidential system with certain elements of authoritarian regime. The Constitution concentrated on the distribution of powers between the Parliament and the President. It largely repeated political rights as stipulated in the Constitution of 1921, but at the same time it subjected them to the "common good of all the citizens" (Article 1), which in fact limited them by emphasising the goals (and rights) of the State (Article 10(1)) and introduction of the prerogatives of the State to use means of coercion in case of resistance (Article 10(2)).

<sup>5</sup> *Constitution of the Peoples' Republic of Poland of 22 July 1952* (Dz.U. No. 33, Pos. 232), then amended on 16 February 1976. Text of both documents in Polish available at [www.trybunal.gov.pl](http://www.trybunal.gov.pl).

<sup>6</sup> The following rights were stipulated in the Constitution of 1952, and repeated in the amended Constitution of 1976: right to work (understood as the right to employment with remuneration) (Article 58 of 1952 Constitution; Article 68 as amended in 1976), right to rest and leisure (Article 59; Article 69 as amended), the right to health protection and to assistance in the event of sickness or inability to work (Article 60; Article 70 as amended), the right to education (Article 61; Article 72 as amended), a guarantee of the comprehensive development of science (Article 63; Article 74 as amended), extended special protection to the creative intelligentsia (Article 65; Article 77 as amended), equal rights for men and women in all fields of social rights (including payment, right to rest and leisure, social insurance, education, to honors and decorations and to hold public offices) (Article 66(2) point 1; Article 78(2) point 1 as amended), guarantee of mother-and-child care, protection of expectant mothers, paid leave before and after confinement, the development of a network of maternity clinics, crèches and nursery schools, the extension of a network of service establishments and canteens (Article 66(2) point 2; Article 78(2) point 2 as amended.), a guarantee of special attention to the education of

work under the 1952 Constitution was formulated as a right, a duty and a point of honour at the same time (Article 14). These features indicate general characteristics of social rights formulated in communist constitutions. Rights were considered as a function of the political and economic regime. According to the doctrine of that time, rights were bestowed by the State and, therefore, an individual was bound by duties towards the State in the fulfilment of the granted rights. Hence, rights that guaranteed social benefits were not stipulated as subjective rights to social security or social services, but were rather framed as granted rights. The other characteristic, common to all social rights guaranteed under communist constitutions was that they were not linked to any objective criteria, like for example citizenship, but were granted according to ideology-driven grounds, such as collective association in trade organisations (this means that social benefits were granted to railwaymen, steelworkers, miners, etc.), or according to the achievements (for example to the veterans of the struggles for peoples' government, or artists of merit of the peoples' government). This fact led to an instrumental analysis of rights and dogmatic interpretation of legal norms by the judiciary, since the rights could only be interpreted by the State, and more precisely by the Communist Party, which held a monopoly on national politics. The extent of ideology-driven formulation and the interpretation of constitutional (social) rights guaranteed by the communist constitutions is confirmed by the fact that these rights were not given any institutional or procedural guarantees. Instead, they were given material guarantees that aimed at strengthening the political and economic regime.<sup>7</sup>

Constitutional reorientation towards political pluralism and an emphasis of the inherent and inalienable dignity of the person that constitutes the source of constitutional rights and freedoms,<sup>8</sup> entailed a change in constitutional formulation of social rights with the political changes of the 1980s and 1990s. The modified wording of specific rights by itself does not give a comprehensive explanation to the transformation of these rights under the democratic Constitution of 1997. The democratic constitution provides for a set of procedural and institutional mechanisms that changed the character of social rights with comparison to their formulation under the 1952 Constitution. More importantly, the interpretation of social rights by the Constitutional Tribunal and the influence it bears on the legislature, not only indicates changes in the conceptual understanding of social right, but also reveals plurality of opinions on the nature of social constitutional rights.

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youth and to participation of the younger generation in public life (Article 68; Article 80 as amended). The protection of marriage and family was guaranteed in Article 67 of the 1952 Constitution, which was further extended by the protection of motherhood with a guarantee for special protection of families with many children by Article 79 as amended. Additionally, a comprehensive protection ensured to the veterans of struggles for national and social liberation was added in Article 76 by the amendment of 1976.

<sup>7</sup> An example of material guarantees may be found in a formulation of the right to work in Article 68 of the 1952 Constitution. The article said: (1.) *Citizens of the Peoples' Republic of Poland have the right to work, that is to employment with remuneration, according to the amount and quality of the labour.* (2.) *This right is guaranteed by: the socialist system of economy, planned development of productive force, rational use of all components of production, permanent implementation of scientific and technical development in the national economy and by the system of education and vocational training. The proper realization of the right to work is insured by socialist legislation on labour.* (Translation and emphasis are mine).

<sup>8</sup> Article 30 of the 1997 Constitution. The principle of dignity is also mentioned in the Preamble of the Constitution.

## **1.2. Social Policy in Poland - Definition of the Concept, its Elements and a Short Overview**

Polish practice and research in addressing social matters takes its ideological origin in the 19<sup>th</sup> century Bismarckian era, when the workers' issues and the need to accommodate inequalities at work became an important element of national policies. Ever since that time, the notion of social policy has become an issue of discussion. Mainly, its two-fold comprehension as a science and as an element of political action has been debated.<sup>9</sup> The question has been whether the matters of social policies should be regarded as an autonomous scholarly discipline, and if so, to what extent should it remain related with political actions of the State.

Three major views presented by scholars associated with the most prominent research centre created in the 1920, the Institute of Social Economy- Ludwik Krzywicki, Konstanty Krzeczkowski and Stanisław Rychliński- became predominant in the literature and largely influenced political practice of the inter-war and a brief post-II World War period. Gradually, the diagnosis of social matters understood as a prerogative of purely academic research on social policy (Krzywicki)<sup>10</sup> was linked to a practical dimension of social policy materialization, provided that it avoids affiliation with any political party or interest (Krzeczkowski).<sup>11</sup> Ultimately, the scientific aspects of social policy matters were seen as a utilitarian and operational discipline to political action (Rychliński).<sup>12</sup> In this view, social policy was perceived as a fusion of various scholarly disciplines (for example of demography and social structure analysis), which served the evaluation of a socio-economic plan subsequently used as a part of a national economic plan. In fact, social policy understood as a scientific discipline was assigned to materialization of political actions and aims. Not until 1957 was it simultaneously assumed that social policy as a science is free from any doctrinal influence.

The general understanding of scope of social policy, defined by its subject, evolved from an idea of the settlement of single social issues to a comprehensive regulation of particular matters supported by a systemic institutional framework. As mentioned earlier, at first, matters connected to workers' issues and inequalities in the work place were addressed in the social policy area. Social issues, which, indeed, constitute elements of social policy were quickly extended to many other aspects of inequality, such as those relating to ownership of property or financial status, resulting from different incomes, or social position.<sup>13</sup> It was also noted that such phenomena as poverty, migration, and housing issues significantly determine the scope of social policy matters. Unemployment was also defined as an important factor and added to the mosaic of social policy issues.<sup>14</sup> Despite of a vivid formulation of social policy doctrine in 20<sup>th</sup> century Poland, it was still divided and concentrated on single social issues. Often single social issues, like unemployment, homelessness, orphanhood, were merely identified and described as elements of societal life. The lack of comprehensive theory on social policy was not unique however to the general tendency in the World, where, in general, social policy, defined as a science, was a new-born discipline of research.

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<sup>9</sup> **Auleytner, J.** (2002), *Polityka społeczna, czyli ujarznienie chaosu socjalnego*, Wydawnictwo Wyższej Szkoły Pedagogicznej TWP, Warszawa, pp. 21-42, 49-59.

<sup>10</sup> See: **Krzywicki, L.** (1926), *Wstęp do historii ruchów społecznych*, Warszawa.; **Krzywicki, L.** (1951), *Studia socjologiczne*, Warszawa.

<sup>11</sup> See: **Krzeczkowski, K.** (1947), *Polityka społeczna*, Łódź.

<sup>12</sup> See: **Rychliński, S.** (1938), *Polityka społeczna*, Wiedza i Życie nr. IV; **Wójcik, P. (ed.)** (1978), *Rychliński Stanisław – Wybór pism*, Warszawa.

<sup>13</sup> See: **Głabiński, S.** (1939), *Historia ekonomiki*, Lwów.

<sup>14</sup> For example, Konstanty Krzeczkowski promoted an idea that insurance against various risks should be replaced by only one criterion, namely by a loss of employment. Also Zofia Daszyńska- Golińska claimed that the aims of social policy is the emancipation of labour, next to the general progress of welfare in the society. See: **Daszyńska- Golińska, Z.** (1933), *Polityka społeczna*, Warszawa.

Still, the new-born science underwent a process of regression during the Stalinist era<sup>15</sup> (1950-1957). The seven years impasse in the development of social policy thought mainly resulted from a prejudice of the Stalinist elites against anything that was created under the capitalist doctrine. The propaganda based doctrine of that time recognized that the communist foundations of the State allowed the State to ensure immediate ad-hoc actions which aimed at a complex satisfaction of material and cultural needs of the working class.<sup>16</sup> Also later, under the communist rule (from the 1960s until the 1990s), objective difficulties in attaining academic freedom efficiently imposed elements of the official state doctrine in all scholarly domains, including research on social policy issues. The dominance of the political and economic regime of the Peoples' Republic of Poland (the lack of political democracy, central planning and nationalization of property) as well as ideological, political and economic subordination to the Union of the Soviet Socialist Republics (USSR) largely influenced the formulation of objectives of social policies not only in Poland but in the entire Soviet-bloc. Even though, this did not imply a discontinuation of scientific research in the field.<sup>17</sup> It was mostly assumed that the research on social policy issues formed part of political economy. Its guiding principle was the differentiation of human needs rather than societal position, although economic progress of state socialism was often put forward as an outright guarantee of materialization of the defined needs. Legislation in the social policy field was mainly focused on the development of social benefits.

To a considerable extent, the political transformation of 1989 extorted reforms in the field of social policy, mainly due to the serious economic crisis that commenced in the 1980s. Two out of many significant laws illustrate the most pertinent social and economic problems of that time. Namely, the law on special rules concerning redundancies of 28 December 1989,<sup>18</sup> which introduced collective redundancies, and the employment law of 29 December 1989,<sup>19</sup> which set up benefits for the unemployed. Although the scope of social policy at that time was understood narrowly (as labour law category), the laws reflected a then-common phenomenon which was the restoration of free market economy mechanisms: reforms need to be backed up by the development of social benefits system. In this case, it was assumed that high unemployment, which results from privatization processes that accompanies the transition from central to market economy, needs to be protected by a system of social benefits in case of unemployment. Otherwise, it was feared that the reforms could fail due to social protests. The inefficiency of the social security system developed by the previous political regime necessitated further structural, institutional and material changes.

The broadest reforms after 1989 in the field of social policy were initiated in 1999 by the cabinet of Prime Minister Jerzy Buzek. The so called "4-reform package" comprised: (1) reform of the education system, (2) the reform of pension system, (3) administrative reform, (4) health care reform. The first of the reforms aimed at upgrading the level of public education, and comprised systemic changes in education as well as introducing changes in the education programme. The second of the reforms

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<sup>15</sup> Which is also referred to as the time of "real socialism", the policy aiming at the creation of a new social order enforced in Poland between 1949 and 1956. Its defining feature was the primacy of politics over economics and their reciprocal infiltration.

<sup>16</sup> See: **Szubert, W.** (1973), *Studia z polityki społecznej*, Warszawa. As Szubert suggests, the ad-hoc immediate actions directed to solve particular social issues generated wide claims against the State in the society. The idea of a one-time State activity was based on the conviction that the distinction of various social aspects and their formulation in State policies undermines the guiding principle of authority and complexity of responsibility of the socialist State. In this way, the socialist State became the only actor responsible for undertaking actions in social matters, and social policy was seen as a means to reinforce the communist doctrine.

<sup>17</sup> See: **Auleytner, J.** (2002), *op.cit.*, p. 32-38. In general, academic research in the domain of social policy was developed in Poland mostly in the economic or sociology departments at major Universities (in Krakow, Warsaw, Lublin, Katowice, Poznan, Gdansk, Lodz, as well as Lviv and Vilnius- before the Second World War).

<sup>18</sup> *Ustawa z dnia 28 grudnia 1989 r. o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn dotyczących zakładu pracy* (Dz. U. z 1990 r. Nr 4, poz. 19).

<sup>19</sup> *Ustawa z dnia 29 grudnia 1989 r. o zatrudnieniu* (Dz. U. z 1990 r. Nr 75, poz. 446).

aimed at the introduction of a three-pillar system of pension financing: a reduced pay-as-you-go system (PAYG), a mandatory funded system operated by private pension funds, and additional, fully funded voluntary private pension funds. The administrative reform assumed territorial decentralization (the introduction of the second and third level territorial self-government). Finally, the health care reform envisaged that the new health care system would be financed on the basis of compulsory contributions to regional public health insurance funds (*kasy chorych*) automatically deducted from personal income tax liabilities. This reform, however, was heavily criticised as it did not bring the expected results. After four years, the system was centralised by an introduction of the law on the National Health Fund (*Narodowy Fundusz Zdrowia*). On 7th January 2004, the Constitutional Tribunal ruled that a significant part of the law on the National Health Fund was unconstitutional.<sup>20</sup>

## 2. Definition of Social Rights in Current Legal Doctrine

The next division of categories of social rights concerns their status in the legal system. The distinction between constitutional and ordinary social rights will most probably not offend our conventional wisdom. Constitutional social rights are mostly discussed by scholars and practitioners with regard to their specific nature. The same is not true with respect to social rights defined at the ordinary law level. There seems to be a consent in understanding of social rights provided for by ordinary legislation as rights that do not bring legal disputes as to their nature, but rather that bring questions and doubts on the legal reality they shape. The question here is whether these rights are compatible within the system: whether they create a comprehensible system of social protection, and whether they are not empty rights.

The crux of the matter in the reformulation of social rights in the 1997 Constitution was determination of State duties in materialization of these rights. In general, Polish constitutional doctrine recognised the social rights formulated in the 1997 Constitution as positive rights, understood as a domain of the State's obligation to undertake actions. Consequently, the function of the State in the enforcement of social constitutional rights implies an obligation to act on the one hand, and, on the other, it creates expectations and claims from individuals towards the State to specific benefits and services. The duty of the State is to undertake activities that aim at enabling the entitled individuals to obtain pensions, and other social benefits, to get a place in a public school or in a public hospital.<sup>21</sup> Such an approach shows that the role of the State in the formulation of social policies is not considered any more as an injunction to interfere in the sphere of the freedoms of the individuals. This argument opens up a debate of the extent of democratic decision-making in enforcement of constitutional social rights. The controversy revolves around two diverging opinions: whether the constitution specifies duties in a way that they are inseparably grounded in social rights,<sup>22</sup> or whether it leaves some scope for democratic decision-making. On the one hand, it is believed that the nature of social rights entails duties on the State to provide people with the resources they need. On the other hand, it is claimed that these rights provide for a limited, responsive and accountable government.<sup>23</sup>

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<sup>20</sup> Decision of the Constitutional Tribunal from 7 January 2007, *K 14/03* (Dz. U. z 2004 r. Nr 5, poz.37).

<sup>21</sup> **Garlicki, L.** (2006), *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa, p.88.

<sup>22</sup> **Sadurski, W.** (2002), *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, Law and Contemporary Problems, Vol. 65, No.2, pp. 223-250; **Osiatyński, W.** (2003), *On Social and Economic Rights: A Needs-Based Approach*, Bulletin of Transnational Center for Democratic Studies, Vo. 13/3, No. 45, **Ciemiński, J.** (1995), *Konstytucja państwa socjalnego czy liberalnego?*, in: *Prawo w okresie przemian ustrojowych w Polsce*, Warszawa. Sadurski, for instance, claims that social rights should not belong to constitutional bills of rights, since by nature they are in contrast with the aims of the constitution, which serves the limitation of the State's powers rather than its enlargement.

<sup>23</sup> **Wieruszewski, R.** (1990), *National Implementation of Human Rights*, in: A. Rosas, I. Helgesen (eds.), *Human Rights in a Changing East/West Perspective*, London. Yet, it may be argued that since constitutional social rights are "surrounded" by procedural and institutional provisions that characterise democratic legislative process, it provides a scope for a

Yet, at the same time social rights are also comprehended as the kind of rights that do not require the State to “give” but to “create”. In this regard, social rights are deemed to enable their addressees to undertake actions that allow them to materialize proper rights within the system that the State creates. In this place, the principle of solidarity is important, as it has a significant meaning for the fulfilment of constitutional social rights.

Incidentally, though importantly, it needs to be noted that constitutional social rights in Poland are the result of a compromise reached during the constitutional debates in the 1990s. This compromise is well reflected in the way social rights are formulated, as well as in their placement in the chapters and titles of the constitution. This fact, referred to further in between the lines in this paper, explains why it is such a complex issue.

### **2.1. Formulation and Scope of Protection of Social Rights and Freedoms in the Recent Constitution**

In the Polish Constitution of 1997, the freedoms, rights and obligations of persons and citizens are derived from general principles defined in Articles 30-37. This fact allows us to define the scope of application of the freedoms, rights and obligations, but more importantly, it indicates the three fundamental sources that constitute the basis for the entire set of constitutional rights and freedoms.<sup>24</sup> The most important principle, the principle of the dignity of a person (Article 30), placed at a supraconstitutional, universal ground has not been elaborated by the judiciary as frequently as the principle of a democratic state ruled by law (Article 2). Yet, the principle of the dignity of a person gives an inborn and irrevocable source of freedom and it guarantees rights to individuals. Secondly, the principle of freedom (Article 31) ensures the respect of freedoms and rights of others, as well as the idea that no one should be compelled to do something that is not required by law. Finally, attention should be paid to the principle of equality (Article 32), which is relatively frequently referred to in Polish constitutional jurisprudence. It expresses equality before the law, the right to equal treatment by public authorities, and the prohibition of discrimination in political, social and economic life or for any reason whatsoever. Moreover, subsequent articles provide for the equality of men and women (Article 33), equal legal protection regarding ownership, other property rights and the right of succession (Article 64(2)), equality in the context of elections (Article 96(2) and Article 169(2)), and a separate provision that grants equal rights of churches and other religious organizations (Article 25(1)).

As to social and economic rights themselves, they are stipulated in Subtitle IV entitled “Economic, Social and Cultural Freedoms and Rights” of the Chapter II (“The Freedoms, Rights and Obligations of Persons and Citizens” of the Constitution. The entire catalogue of social (and economic) rights comprises:

- right to ownership (Article 64)
- labour rights (Article 65-66) also: protection against unemployment (Article 65(5))
- right to social security (Article 67)
- right to health care (Article 68)
- protection of disabled persons (Article 69)
- right to education (Article 70)
- protection of the family (Article 71)
- protection of the rights of the child (Article 72)

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constitutional dialogue between the legislature and the Constitutional Tribunal. (The latter is the author’s suggestion, supported by the study of the Constitutional Tribunal jurisprudence).

<sup>24</sup> **Garlicki, L.** (2005), *Constitutional Law*, in: S. Frankowski (ed.), *Introduction to Polish Law*, The Hague, pp.11-17.

- freedom of artistic creation and scientific research (Article73)
- right to favourable environment/ecological security (Article74)
- protection of housing needs (Article75)
- protection of rights of tenants (Article75(2))
- protection of consumers and customers (Article76)

They are derived from the three aforementioned fundamental principles. According to Article67(1), for example, while asserting the right to social security, particular attention should be addressed to the ill, the elderly or the disabled. This is an example of an extension of the principle of equal opportunities, since the guarantee of equal rights is its essential precondition. Article 67 is not subject to the general limiting clause, it is considered as a directly justiciable constitutional right. The article explicitly says that citizens are entitled to the right to social security in case of incapacity for work, sickness or disability, as well as in case of retirement. Section 2 of this Article stipulates that social security benefits are also granted to citizens in case of unemployment. Both section 1 and 2 are subject to concrete limitation clauses, which establish that the form and scope of the right to social security in these particular cases shall be established by a statute.

## **2.2. Characteristic of Constitutional Social Rights and Freedoms**

In seeking to define constitutional social rights, a preliminary distinction is drawn in the Constitution itself. Namely, current constitutional formulation brings in two concepts, that of rights and of freedoms. Provisions of interest of this paper are grouped under Title IV: Economic, Social and Cultural Freedoms and Rights of Chapter II: The Freedoms, Rights and Obligations of Persons and Citizens. As often as these two terms are used in the literature, there is confusion in a clear understanding of what they really refer to. In broad terms, the distinction is twofold. On the one hand, it depicts two situations of individuals (subjects) of rights and freedoms, and, on the other, it refers to a definition of the role of the State in guaranteeing the adequate rights and freedoms of individuals. A blatant comment at this place would not go further than stating that the understanding of the two concepts is very wide in the legal literature.<sup>25</sup> For the most part, it is the choice of the author to refer to one of these options, but it should be pointed out that rarely are both perspectives referred to. In brief, the freedoms-rights distinction from the perspective of individuals means that, on the one hand, we-as individuals- have a freedom of action, which is not a derivative of a legal norm. On the other hand, we have a right to act or not to act according to the substance defined in a legal norm, or equally we have a right to expect other subjects of that norm to act or not to act according to the substance of that legal norm.<sup>26</sup> In turn, in the context of the role of the State, freedoms are defined as correspondent to situations in which the State has a duty not to interfere in actions of individuals. Rights, accordingly, fit into a category of situations when a State has a duty to undertake an action. Under the first model, freedoms take on a form of negative rights, while under the second model, rights draw upon positive obligations, positive rights. Therefore, as far as materialization of rights requires an active role of a State, freedoms require a non-interference attitude. Nevertheless, the problem becomes even more complex as non-interference does not mean inaction. Once a State undertakes an action, it becomes difficult to assess the scope of its duties and responsibilities, but an even more thorny argument turns

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<sup>25</sup> See: **A. Łopatka**, *Prawo człowieka- refleksje wokół pojęcia*, in: *Teoria prawa. Filozofia prawa. Współczesne prawo i prawnoznawstwo*, Toruń, 1998, p.139; **P. Banaszak**, *Prawa człowieka i obywatela w nowej konstytucji Rzeczypospolitej Polskiej*, *Przegląd Sejmowy* 1997, No. 5(22), p. 56; **W. Sokolewicz**, *Nowa rola konstytucji w postsocjalistycznych państwach Europy*, *Państwo i Prawo* 2000, No. 10, p.25; **L. Wiśniewski**, *Prawo a wolność człowieka- pojęcie i konstrukcja prawna*, in: L Wiśniewski (ed.), *Podstawowe prawa jednostki i ich ochrona sądowa*, Warszawa 1997, p.55; also: **B. Gronowska**, in: Z. Witkowski (ed.), *Prawo Konstytucyjne*, Toruń 1998, p.87.

<sup>26</sup> **J. Oniszczuk**, *Wolności i prawa socjalne oraz orzecznictwo konstytucyjne*, Szkoła Główna Handlowa w Warszawie, Warszawa 2005, p.13.

out to be that of anticipated claims of individuals towards a State, once a State is judged to go too far in its positive action. The question is how to judge it, and how far such a judgement can limit the State's privilege to legislate.

### 2.2.1. Claim rights v. capability rights<sup>27</sup>

In the current Constitution, there is no straightforward definition of social rights as such. As it has been mentioned before, social rights are placed under a separate Title: Economic, Social and Cultural Rights. The separation of social rights together with economic and cultural rights from civil and political rights demonstrates a willingness to give them a specific meaning, in a strict sense. Some understand social constitutional rights as those rights that enable individuals to obtain the necessary means for living and to satisfy basic material needs.<sup>28</sup> Nevertheless, this definition is opposed by those who believe that social constitutional rights serve as means that justify and generate claims towards the State.<sup>29</sup>

An elaborated opinion on the nature of constitutional social rights was given by one of the constitutional scholars, prof. Wiktor Osiatyński.<sup>30</sup> Osiatyński points to the fact that social constitutional rights are claims to concrete material content of a right, but not to a mechanism of realization. With this respect he refers to the distinction of individuals' rights in their strict sense, and deny justiciability of constitutional social principles, i.e. the right to demand the State legislates in a concrete field of social policy. He refers to the justiciable character of the right to education, the right to protection of health, the right to minimal social security benefits, and other social rights written in the Constitution. Social rights, according to Osiatyński, create a guarantee of a minimal economic security to an individual. This minimal economic security is set at a level which allows individuals to claim social rights in a dignified way. Social rights, says Osiatyński, are different with respect to other rights, in a way that they entitle an individual to claim certain goods and services from a State, whereas other individuals gain the same goods and services by their own. This, in turn, means that the execution of a benefit of a certain value is a subject matter of a claim, which implies that a claim is directed to a society, which is obliged to guarantee certain minimal social security to an individual. Since society does not have a legal personality, as Osiatyński briefly explains, it therefore pays its "debt" off by hand of a State. The State is then bound to undertake such actions (like redistribution of a national income), which would allow the State to enforce social rights. Redistribution is not however the only means through which social rights enforcement is feasible. Fundamental economic security is a defining feature of social rights, rather than equality of living standards. In these terms, the right to social security should not be understood as a right of social equality.<sup>31</sup> Accordingly, Osiatyński calls social rights "the rights through a State".<sup>32</sup> The State's responsibility for the well-being of its citizens is, in fact, a basis for a concept of social rights. Osiatyński, in his analysis, explains the differences in

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<sup>27</sup> The term *capability rights* is mine. It is not used in the Polish legal literature, nor has it been discussed in the context of Derrida's circular reasoning over the concept of ability/right, which- based on the right to education- presupposes an access to the capacity or to instruction in order to gain access to this certain right. See: **J. Derrida**, *Privilege: Justificatory Title and Introductory Remarks*, in: J. Plug (trans.), *Who's Afraid of Philosophy? Right to Philosophy I*, Stanford University Press 2002, p.36-37.

<sup>28</sup> **P. Czarny**, *Konstytucyjny status jednostki w państwie polskim*, in: P. Sarnecki (ed.), *Prawo konstytucyjne RP*, Warszawa 2002, p.110.

<sup>29</sup> See: Speech of MP Jerzy Ciemniewski from 21 January 1993, during 35th seating of Sejm of the first cadence, day one, point one and two on the agenda. All speeches and interventions of MPs are available at the Sejm's Web Site [www.sejm.gov.pl](http://www.sejm.gov.pl).

<sup>30</sup> **Osiatyński, W.**, *Wprowadzenie do praw człowieka*, [http://www.hfhrpol.waw.pl/pliki/WOsiatynski\\_HistIFilo.pdf](http://www.hfhrpol.waw.pl/pliki/WOsiatynski_HistIFilo.pdf)

<sup>31</sup> **Osiatyński, W.**, *op.cit.*, p.9.

<sup>32</sup> This paraphrase is contrasted to another motto representative to the development of social rights doctrine, namely "freedom from the State".



the genesis of the role of a State in the enforcement of civil and political rights on the one hand, and of social and economic rights on the other. The role of the State in the enforcement of the first group of rights amounts to a duty of the State to respect freedoms and materialize rights, whereas in the case of social and economic rights, the role of the State originates from its obligations, which only then generate the right of an individual to a concrete benefit or service.

### 2.2.2. Social rights as fundamental rights

There are at least three features that characterise fundamental rights, and which allow us to take a moment of reflection whether social rights fall into this category. The most basic attempt to define rights as fundamental is by claiming that their protection is considered essential by a given society. This formulation supposes that fundamental rights are the core of rights; they play a pivotal role in a society and they constitute an objective which orientates institutions and policies.<sup>33</sup> Constitutional formulation of rights, *ipso facto* of social rights, should naturally be the most obvious evidence for attributing the fundamental character of those rights. Notwithstanding, however, the fact that constitutional recognition of social rights is desired in order to consider them fundamental, the recognition of their enforceability and implementation mechanisms is a critical point in such a conceptual embrace. Here the question is not so much whether constitutionalization of social rights makes them fundamental, or rather confirms their essential attribute. The mere constitutionalization does not make any rights fundamental.<sup>34</sup> It is important therefore that fundamental (constitutional) rights are supported by adequate mechanisms of implementation and protection. Materialization of these rights is only guaranteed when there are institutional and procedural instruments which enable their realization. Indeed, this was the crux of the matter discussed during constitutional debates in Poland. The controversy came with both the reformulation of existing constitutional social rights under the 1952 Constitution, and with embracing them in a democratic institutional context that would guarantee their enforcement and promotion.

Yet, crucially, the understanding of social rights as fundamental rights is discussed in the literature in the framework of a more legal issue, namely the interdependence of rights and values. Osiatyński for instance claims that human rights exclude certain values from a political process. Since human rights do not enclose all values or interests, they prevail in the event of collision with values or interests and therefore Osiatyński speaks about human rights as of fundamental rights.<sup>35</sup> Speaking of values, Sadurski puts different accents claiming that in order to be fundamental, human rights need to be based on a set of political values and ideals, irreducible to the “rule-of-law” type values.<sup>36</sup> Although Sadurski talks about individual liberty-rights, he defends his position in a principled manner. By large, he resonates Mill’s harm principle and Rawls’ “priority of the right over the good” concept when it comes to shaping the content of law. He thus holds that the State has to be neutral and may not interfere with individuals’ preferences of their own conceptions of what a morally good life means for them, and consequently that the conceptions that define what gives value to human life exclude the principle of independent content of law.<sup>37</sup> The issue is particularly relevant with respect to social

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<sup>33</sup> As Palombella suggests, fundamental rights should be regarded in the context of the existence of a society, assuming that they are concretely implemented through the fabric of an organised social system; any change in the fundamental rights model would result in a change of the societal model. See: **Palombella, G.** (2006), *From human rights to fundamental rights. Consequences of a conceptual distinction*, EUI Working Paper LAW No. 2006/34, p.3.

<sup>34</sup> See: **Maciejczyk (Jaroń), A.** (2009), *Constitutional Courts as Actors of Fundamentalisation of Social Rights*, EUI Working Paper Law No. 2009/05, p.9-10.

<sup>35</sup> **W. Osiatyński**, *op.cit.*, p.9.

<sup>36</sup> **W. Sadurski**, *Human Rights and Fundamental Values*, Archiv für Rechts-und Socialphilosophie, Beiheft 39, 1991, p.114-119.

<sup>37</sup> **W. Sadurski**, *op.cit.*, p.114-115.

constitutional rights, as these touch upon the core of value of human existence and presuppose, to certain extent, the content of law.

Insofar as the issue of fundamental (basic) rights, in the judgements of 15<sup>th</sup> November 2000 (P12/99),<sup>38</sup> the Constitutional Tribunal held that, in general, constitutional rights rise from the principle of human dignity. From among these rights, those that are fundamental *ergo* natural are those which refer directly to human dignity and express its essence. At the same time, in this judgement, the Constitutional Tribunal stated that there are yet other rights that need to be distinguished from fundamental (natural) rights. These are the rights that are not a direct emanation of the human dignity principle and which constitute merely a form or one of the forms of protection of human rights. The Constitutional Tribunal further ascertained that these rights enable the realization of other rights and principles.<sup>39</sup> Although often cited in the context of social rights, the role of the principle of human dignity was rarely commented on in the legal literature. It is equally true, though, to observe that there are two fundamentally different opinions as to the use of this principle by the Constitutional Tribunal in cases concerning such issues as housing law, consumer protection, etc. Lately, a group of constitutional scholars have criticized the use of the principle of human dignity as an interpretative guideline or the so called ornamental phrase in cases concerning social rights. The leading constitutional law professors claimed that:

“[The principle of respect for human dignity] is not a universal remedy to all wrongdoings connected with the existence of a human being. Nor is it a new general clause applicable to an unlimited number of situations. It certainly cannot be used to regulate the social and economic system of the State or, the more so, to rectify the government’s social policy”.<sup>40</sup>

Yet, this principle has also received recognition in one of the most recent significant publications in the field, as an important element that plays a vital role in refocusing attention from a paternalistic protection of individuals from dangers coming from public structures and social groups to rules that enable a proper personal development within the framework of a society. It is furthermore assumed that the presented approach that is based on “socialization” of human dignity constitutes a modern standard in protection of social rights.<sup>41</sup>

### 2.2.3. Enforceability of social rights

There are two counterbalancing opinions on enforceability of constitutional social rights. Traditionally, the axis of the dispute divides scholars and practitioners into those who believe that social rights can be justiciable and those who think that these rights, by their nature, are not enforceable before the courts. The theory of course coincides with practice, but it is often the case that scholars seem to forget about the diverging formulation of social rights that directly influences the extent of their enforceability. At one pole, therefore, some scholars believe that constitutional social (welfare) rights produce an “unfortunate institutional shift” in the separation of powers and, indeed, allow constitutional judges to enter into political discussions. On top of that, they decide matters in which they have neither qualifications nor political authority.<sup>42</sup> The institutional-competence argument

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<sup>38</sup> **P 12/99**, *Judgment of 15th November 2000* concerning principles of judicial control of decisions on extradition of foreigners from the Republic of Poland, published in: Dz.U. 2000.100.1085 of 21 November 2000. All judgements of the Constitutional Tribunal are published on Web Site [www.trybunal.gov.pl](http://www.trybunal.gov.pl).

<sup>39</sup> See: Judgment **P 12/99**, p.15 (as provided for on the Web Site).

<sup>40</sup> **K. Działocha** (ed.), *Basic Problems of Applying the Constitution of the Republic of Poland*, Sejm Publishing Office, Warsaw 2006, p.49.

<sup>41</sup> **P. Mikłaszewicz**, *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa w Unii Europejskiej*, Wolters Kluwer business, Warszawa 2008, p.105.

<sup>42</sup> **W. Sadurski**, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, Law and Contemporary Problems, Vol.65, No.2, pp.223-250, p.229.

was raised by a number of scholars in the early 1990s as a reaction to the proposal of a Social and Economic Charter that was supposed to constitute one of the parts of the constitutional Bill of Rights.<sup>43</sup> The key point that was stressed in this respect was that once a welfare right is constitutionalized, and even if subject to various provisions about nonjusticiability, there is nothing that will disable a constitutional court from scrutinising a government policy or a new law under the standards of the given constitutional provisions. By the same token, during discussions in the Sejm in the 1990s, a doubt was expressed as to whether rights formulated as a policy guideline for the State can be enforced before the courts.<sup>44</sup>

As it has already been pointed out, apart from the catalogue of social rights and freedoms, the Constitution refers to the scope of tasks and duties of the State that serve the materialization of the social rights of individuals.<sup>45</sup> It is claimed that without this reference to the system of the State's duties, nor without mechanisms that guarantee these rights, constitutional social rights could be regarded as declaratory only. The idea that defends this claim is an opposition to the redundancy of the ideological legacy of communism. The idea of an activist State protecting the citizens against economic downturns, together with the idea that citizens are entitled to a guaranteed standard of living, work, recreation and education, was counterbalanced by the vision of a comprehensive system of policies that provide people with opportunities to take care of themselves. Therefore, the ideology-driven empty constitutional rights were supported by a system of courts and a democratically elected Parliament that was to ensure a proper realization of the State's obligations. Again, however, programmatic norms, as they are present in the Constitution today, bring in uncertainty in the context of justiciability and coherence of the catalogue of social rights. It does not mean though that these are provisions of an ambivalent significance. The Constitutional Tribunal recognised in its numerous judgments that, despite the fact that programmatic norms provide for general provisions, they have a significant meaning in the creation and application of the law. Moreover, the lack of clear regulation in the Constitution does not exclude the State's obligation to positive action in the field of social policies.<sup>46</sup>

#### 2.2.4. Limitations to social constitutional rights

The criterion which addresses the issue of legislative discretion and hence determines means in which the State materializes social rights is defined in art.81 of the Constitution, in the so called limiting clause. Art.81 submits some of the social rights to the limits of the laws enacted to implement them. The submission of selected rights to the limits provided for by ordinary legislation entails two categories of rights: those which can be directly enforced with reference to the provisions of the Constitution (and ordinary law provisions),<sup>47</sup> and those which can be enforced within the limits

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<sup>43</sup> **J. Cierniewski**, *Sejm i Senat w projekcie Konstytucji RP*, in: J. Krukowski (ed.), *Ocena projektu Konstytucji RP*, 1996, p.41-42; **W. Osiatyński**, *Social and Economic Rights in a New Constitution of Poland*, in: A. Sajo, *Western Rights? Post-Communist application*, 1996 p.262-269; **A. Rapaczynski**, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, in: A.E. Dick Howard, *Constitution Making in Eastern Europe*, 1993, p.107-108.

<sup>44</sup> See: Speech of MP Jerzy Cierniewski from 21 January 1993.

<sup>45</sup> **B. Banaszak**, *Prawo konstytucyjne*, Warszawa 2001, p.233.

<sup>46</sup> **J. Oniszcuk**, *op.cit.*, p.38.

<sup>47</sup> These are the following rights: the right to ownership, other property rights and of succession (art.64), the freedom to choose and pursue an occupation and to choose a place of work (art.51.1), the prohibition of child labour (art.65.3), the right to social security in case of sickness, disability, old-age or unemployment (art.67), the right to health care (art.68), the right to education (art.70), the protection of rights of children (art.72), freedom of artistic creation and scientific research (art.73).

confined by laws.<sup>48</sup> The issue becomes even more complicated, since some of the articles, besides being limited by art.81 provision, have their own limitation clauses, which subject given rights to the ordinary laws. For example, the right to days free from work (art.66.2) shall be specified by a statute, and may be asserted subject to limitations specified by a statute, as it arises from art.81. What purpose does this double limitation serve? Does it not, in fact, bring in a differentiation between “better” and “worse” protected social rights?

The matter of a diverse enforceability of social rights enumerated in the Constitution, was taken up by the Polish Constitutional Court. In one of its judgements concerning the constitutionality of provisions regulating procedures of the determination of old-age pensions for those who served in the army,<sup>49</sup> the Tribunal clearly stated two categories of social rights, stemming from the application of art.81. In this regard, while the content of the rights subjected to provision of art.81 are left to be decided by the legislator, the content of the remainder of social rights is directly shaped by the constitutional formulation, even if the constitution refers formulation of concrete provisions to the ordinary legislation. In another judgment concerning the constitutionality of provisions regulating procedures of assigning material help to stationary students only,<sup>50</sup> the Tribunal went into details in defining the groups of rights under diverse enforceability. Here, three groups of rights were referred to, depending on the scope of legislative discretion. In the first place, the Constitution refers to provisions where policy goals and strategies are indicated. Such a formulation, according to the Tribunal, does not entail the State’s duty to materialize these goals through ordinary legislation.<sup>51</sup> Next, there is a group of rights that is subject to the State’s obligation to materialize them through acts of laws.<sup>52</sup> And finally, with reference to the third group of rights, the constitution indicates the duty to legislate and it defines the substance or direction of a specific regulation.<sup>53</sup> Although explicitly discussed in the constitutional jurisprudence, it seems obvious that the identification of a hierarchy of legislative discretion is hard to define in practice.<sup>54</sup> Importantly, this entails two other aspects subjected to the critique of impracticability of constitutionalization of social rights. First, it is assessed that the delegation of regulation of detailed constitutional rights and benefits by the ordinary legislator is a weak point of the Constitution.<sup>55</sup> Moreover, it remains unclear whether the legislative discretion in this field is full, or whether there are some standards that the legislator needs to obey in shaping social policy elements.<sup>56</sup>

As has already been mentioned in the judgement P 12/99, in the context of constitutional scrutiny of the principle of the openness of a trial (art.45.1 of the Constitution), the Constitutional Tribunal

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<sup>48</sup> Art. 81 of the Polish Constitution relates to the following rights: the right to a minimum wage (Art.65.4), the right to full employment (Art.65.5), the right to hygienic conditions of work and the right to days free from work (Art.66), aid to disabled persons provided for the public authorities (Art.69), protection of the family (Art.71), ecological security and protection of the environment (Art.74), the right to housing (Art.75), and finally the protection of consumers and customers (Art.76).

<sup>49</sup> **SK 22/99**, *Constitutional Tribunal Judgment of 8 May 2000*, published in: Dz.U. 2000.38.438 of 12 May 2000.

<sup>50</sup> **U 7/01**, *Constitutional Tribunal Judgment of 2 July 2002*, published in: Dz.U. 2002.104.933 of 11 July 2002.

<sup>51</sup> Here the Tribunal enumerates the following articles: 65.5, 68.3, 68.4, 68.5, 69, 72.1, 72.2, 74.1, 74.2, 74.4, 75.1.

<sup>52</sup> Rights in the following articles fall into this category: . 66.1, 67.1, 67.2, 68.2, 69, 70.4, 71. 2, 76 sentence 2.

<sup>53</sup> This applies to articles: 64.3, 65.1-4, 66.2, 70.1, 70.3, 75.2.

<sup>54</sup> Short of comprehensive enumeration, the Tribunal explicitly stated in the same U 7/01 judgment and repeated in numerous other decisions concerning social rights that whether beneficiaries of public authorities’ actions defined in the three groups of rights are eligible to claim concrete actions from the authorities is a matter of a separate, case-by-case analysis that should be performed by the Constitutional Tribunal. See in: **U 7/01**, *Constitutional Tribunal Judgment of 2 July 2002*, p.9 (as provided for on the Web Site).

<sup>55</sup> **B. Banaszak**, *op.cit.*, p.233, also: **K. Działocha** (ed.), *Basic Problems of Applying the Constitution...*, p.59. Here the report suggests that the *ad casum* reading of the Constitution in social matters means that deciding specific disputes about the relevant differentiation criterion may be regarded as unsatisfactory in view of the lack of broad substantive argumentation.

<sup>56</sup> **J. Oniszczyk**, *op.cit.*, p.41-42.

referred to the principle of human dignity and established a limitation to those rights that are not a direct emanation of this principle, but rather enable the realization of other (here: fundamental) rights. In the view of the Tribunal the latter, unlike the fundamental rights, can be “shaped” within the framework of axiology of the *democratic state ruled by law*.<sup>57</sup> It is not a straightforward juxtaposition of civil and political versus social and economic rights, though. In this judgment, the Tribunal indicates that not all of the rights have the same absolute “power” with respect to the limits that may be put on them by ordinary legislation. In dealing with the issue of limitations that the legislator may confer upon constitutional rights, the Tribunal clearly states that there are two conditions which: firstly, the Constitution itself or by the way of a reference to the ordinary legislation envisages, and second, the concrete limitation is acceptable taking into account the nature of a right. Moreover, the Tribunal stressed that these conditions are not limited to a literal formulation of a given provision, but is rather a result of the axiology of all constitutional provisions.<sup>58</sup>

#### 2.2.5. Essence of social rights and axiology of the Constitution

The concept of the essence of rights, taken from Alexy’s theory on constitutional rights, has been recognized by the Constitutional Tribunal in its numerous judgments.<sup>59</sup> The Constitutional Tribunal has acknowledged that each right and freedom has its core essence (pol.- *rdzeń, jądro*), without which neither rights nor freedoms could exist. The Tribunal further recognised that both rights and freedoms possess certain additional elements (surrounding- pol. *otoczka*) that can be formulated and modified without violation of their essence.<sup>60</sup> The very idea of the core essence bears therefore an ambivalent significance, as it implies negative and/or positive listing of elements<sup>61</sup> that constitute the core every time the given right or freedom is an object of the constitutional review procedure,<sup>62</sup> because, in general, the doctrine accepts that the essence (core) of a given right or freedom is infringed when provisions of ordinary law obstruct its addressees enjoyment of this right or freedom.<sup>63</sup> The practice of a reference to the protection of the core essence is, however, criticized by a claim that it is often an *idem per idem* explanation.<sup>64</sup>

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<sup>57</sup> **P 12/99**, *Judgment of 15th November 2000*, p.15.

<sup>58</sup> **P 12/99**, *Judgment of 15th November 2000*, p.15-16.

<sup>59</sup> In general: **W 3/93**, *Resolution of 2 March 1994*, OTK part 1, 1994, p.158, **W 8/93**, *Resolution of 16 March 1994*, OTK part.1 1994, s.165; **K 11/95**, *Judgment of 26 April 1995*, OTK part 1, 1995, p.132. With reference to social and economic rights, in particular the essence of the right to social security: **K 7/90**, *Judgment of 2 August 1990*, OTK 1990, p.55; **K 14/92**, *Judgment of 19 October 1993*, OTK part 2, 1993, p.331; **K 8/96**, *Judgment of 17 July 1996*, OTK ZU No. 5/1996, p.275; **K 7/95**, *Judgment of 19 November 1996*, OTK ZU No. 6/1996, p.414; the essence of the right to property in: **K 1/91**, *Judgment of 28 May 1991*, OTK 1991, p.91.

<sup>60</sup> See: **P 11/98**, *Judgment of 12 January 2000*, concerning “regulated rents” in private buildings, Dz.U. 2000.3.46 of 21 January 2000. Also: **SK 9/98**, *Judgment of 15 May 1999*, concerning the easement appurtenant, Dz.U. 1999.49.498 of 31 May 1999.

<sup>61</sup> See: **P 2/98**, *Judgment of 12 January 1999*, concerning lawlessness in construction, Dz.U. 1999.3.30 of 15 January 1999.

<sup>62</sup> The Tribunal follows this method in cases where it defines the core of the right to social security (ex. **K 11/97**, **K 10/92**). In general, the right of the legislator to define the scope of the right to social security concerns, in particular, the right to determine an age within a certain period, limits of which is set by the essence of the right to social security. (See: **R. Mizerski**, *Kilka uwag o wolnościach i prawach w Konstytucji RP*, in: T. Jasudowicz (ed.), *Polska wobec europejskich standardów praw człowieka*, Toruń 2001, p.23). The method is also used with reference to the right to property (ex. **P 11/98**), where the Tribunal stated that in order to decide whether the essence of the right to property was being protected, an analysis of the sum of existing limits in the ordinary legislation needs to be performed. In brief, a reference to the basic elements that have shaped the right to property in the course of time influences the understanding of the essence of this right. (See: **J. Oniszczyk**, *op.cit.*, p.74).

<sup>63</sup> **B. Banaszak**, *Prawa człowieka i obywatela w nowej Konstytucji Rzeczypospolitej Polskiej*, Przegląd Sejmowy No. 5, 1997, p.57.

<sup>64</sup> **W. Sadurski**, *Prawo przed sądem. Studium sądownictwa konstytucyjnego w postkomunistycznych państwach Europy Środkowej i Wschodniej*, Warszawa 2008, p.379.

Nevertheless, as mentioned previously, the issue of the definition of the core essence is not an exclusive element that gives a meaning to the given right or freedom. It is also the axiology of the Constitution, the accompanying provisions that set the ground for the rights and freedoms inscribed therein. Constitutional social rights, as all other rights, are supported and surrounded by general constitutional provisions. The underlying rights are shaped and influenced by other constitutional principles. The location and way of formulation of these principles is, in the eyes of constitutional lawyers, as important as the enumerated rights in the Constitution.<sup>65</sup> In the doctrine, it is accepted that the importance of constitutional principles<sup>66</sup> when adjudicating in social rights cases is of great importance, since general constitutional principles are a basis, a rationale, for the organisation and functioning of all constitutional institutions, as well as for the entire system of ordinary laws contained in the Constitution.<sup>67</sup>

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<sup>65</sup> **L. Wiśniewski**, *Zakres i konstrukcja praw socjalnych w przyszłej konstytucji RP*, in: L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich ochrona sądowa*, Warszawa 1997, p.90; **W. Santera**, *Prawa (wolności) pracownicze w Konstytucji*, *Praca i Zabezpieczenie Społeczne*, No.11, 1997, p.2-7; **L. Florek**, *Zgodność przepisów prawa pracy z Konstytucją*, *Praca i Zabezpieczenie Społeczne*, No.11, 1997, p.8-14.

<sup>66</sup> Especially with reference to social rights, the principle of social market economy (art.20), the principle of social justice (together with the principle of proper legislation and materialization of economic progress, the principle of creation of adequate conditions that allow the beneficiaries of social rights to care for themselves), the principle of sustainable development (art.5), principles derived from the principle of the rule of law (democratic state ruled by law) and the principles of social justice (art. 2).

<sup>67</sup> Two constitutional law professors confirmed this point of view during constitutional debates in the Commission of National Assembly. See the speeches of: K. Działocha, **Komisja Zgromadzenia Narodowego**, *Biuletyn VIII*, Warszawa, 1995, p.58, and P. Winczorek, **Komisja Zgromadzenia Narodowego**, *Biuletyn IX*, Warszawa, 1995, p.54.

# The Improbable Justiciability of Social Rights in Germany and in Switzerland

Céline Fercot\*

- I. The Scholars' Traditional Reticence towards Social Rights
  - A. An Unequal Consecration of Social Rights in the Swiss and German Constitutions
  - B. The Complex Scope of Social Rights
- II. Subnational Constitutions as "Reserves" of Social Rights
  - A. The Scholars' Ambiguous Position Facing Subnational Social Rights
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## Abstract

This paper analyzes the contribution of scholars to the protection of social rights both in Germany and in Switzerland. It applies a comparative approach to their under-enforcement by examining how scholars deal with affirmative rights embedded in the federal, but also subnational, Constitutions.

I. In both countries, scholars are generally very reticent to admit the justiciability of such rights. Moreover, the very small sphere of authors who assert the contrary do not really develop coherent strategies in order to achieve their goal. Nevertheless, the justiciability of social rights, although most of the time considered as "impossible," remains possible. Some authors have developed different arguments destined to defend it.

II. Furthermore, both Germany and Switzerland are federal states. Although the relationship between fundamental rights – especially social rights – and forms of government remains very rarely analyzed, it has large consequences. Indeed, federal Constitutions represent only a "minimum standard" that can be exceeded by federal entities.

Key words: Social Rights, Fundamental Rights, Germany, Switzerland, Constitution, Basic Law, Länder, Cantons.

In the past, a certain split between different categories of rights was widely accepted in the West as proper and necessary. Only the category of civil and political rights was determined to be enforceable in law. Today, it is increasingly apparent that the existing divide between rights which are supposed to be justiciable (civil and political rights) and those which are *a priori* not (social and economic rights), needs to be rethought and redefined. Indeed, the question of whether and to what extent entitlements can be derived from social rights provisions is one of the most controversial questions of more recent constitutional doctrine.<sup>1</sup> However, this controversy apparently does not concern the German and Swiss scholars.

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<sup>1</sup> A constitutional social right can be defined as one that grants a personal entitlement that can affect permanent income and welfare. We agree that positive rights are often guaranteed by statutes. Nevertheless, those statutes have to be in accordance to the Constitution. Consequently, this latest remains the primary source of such rights. It establishes a "floor" for social welfare, a minimum level of the state's duty of care to its citizens.

In order to bring out interesting aspects of the scholars' position from a comparative point of view, it is particularly relevant to take into account the structural and historical differences between these two nations' judicial systems.

First and foremost, the historical background of both countries is fundamental. The Swiss people, by their history, learned that social change and political decision-making needs a system of "brakes." Then, federalism and direct participation of the citizens in a local, regional and, to a certain extent, also in federal votes about welfare issues slowed down the emergence of the welfare state. Therefore, the notions of "welfare state" and "social rights" still raise the people's suspicions.<sup>2</sup> Nevertheless, the growing expectations for collective security measures did not prevent Swiss voters from opposing the introduction of explicit social rights into the Swiss Constitution.<sup>3</sup>

The same suspicion does exist in Germany, although it results from a different origin. In this country, fundamental rights were at the first place rights belonging to the Federation (*Bund*): the German princes were able to assure to "subjects" (*Untertanen*)<sup>4</sup> of German member states (*Bundesstaaten*) some rights, among which the right to property or the right to leave a German member state.<sup>5</sup> More recently, two main reasons can explain the suspicion towards social rights.<sup>6</sup> First, the Weimar Constitution of 1919 showed many weaknesses that led to Hitler's subversion of the country's Fundamental law. Secondly, the 1968 Constitution of the DDR was a symbol of the country's completion of the transition from a capitalist economy to a socialist state.<sup>7</sup> It follows from this history that fundamental rights are best conceived not as an ideal for the future, but as a necessary condition of the present existence.

Beyond those historical observations, one cannot study the question of social rights in these two countries without taking into account the structural context of federalism. Indeed, it has large consequences on the regime of fundamental rights in general, and of social rights in particular. Yet, in both countries, the expansion of the central – federal – government has played a major role in the realization of the welfare state and in the consecration of social rights. In this context, subnational

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<sup>2</sup> The Swiss tradition of the state, which is fundamentally the direct responsibility of free citizens, is transposed to the public and political sphere. This creates a deep-rooted value of citizen participation in public affairs: citizens not only have rights but also public responsibilities which cannot be reduced to paying taxes. Therefore, the expansion of the welfare state did not fundamentally modify the balance between civil rights and obligations in the value system of the Swiss people. There is the traditional conviction that social responsibilities as fundamental human features are rooted and have to be realized mainly in primary institutions. So, the principle of social responsibility is deeply rooted in the Swiss society.

<sup>3</sup> See *infra*.

<sup>4</sup> Individuals were considered like "subjects" who *were belonging to* the German Federation.

<sup>5</sup> See Art. 18 of the Federal Act (*Bundesakte*).

<sup>6</sup> See K. STERN, *Staatsrecht*, Tome I, § 21 V; *id.*, Tome III/1, § 67 I 2; J. ISENSEE, "Verfassung ohne soziale Grundrechte", *Der Staat*, 1980, vol. 19, pp. 367 s.; P. E. QUINT, "The Constitutional Guarantees of Social Welfare in the Process of German Unification", *Am. J. Comp. L.*, 1999, vol. 47, pp. 303 s.; M. ABELEIN, "Recht auf Bildung", *DöV*, 1967, n° 11, pp. 375-379; P. BADURA, "Das Prinzip der sozialen Grundrechte und seine Verwirklichung im Recht der Bundesrepublik Deutschland", *Der Staat*, 1975, n° 14, pp. 17-48; M. KUTSCHA, "Soziale Grundrechte und Staatszielbestimmungen in den neuen Landesverfassungen - Nostalgische Wunschformen oder justiziables Orientierungsprogramm?", *ZRP*, 1993, pp. 339-344; D. REUTER, "Überlegungen zur Kodifikation von Grundrechten auf Bildung", in: E.-W. BÖCKENFÖRDE, J. JEKEWITZ, T. RAMM (eds.), *Soziale Grundrechte. Von der Bürgerlichen zur sozialen Rechtsordnung*, Heidelberg, 1981, pp. 119 s.; W. BROHM, "Soziale Grundrechte und Staatszielbestimmungen in der Verfassung. Zu den gegenwärtig diskutierten Änderungen des Grundgesetzes", *JZ*, 1994, pp. 213-220. See also D. CAPITANT, *op. cit.*, pp. 181 s.; C. STARCK, "La jurisprudence de la Cour constitutionnelle fédérale concernant les droits fondamentaux", *RDP*, 1988, pp. 1263-1287. Nevertheless, the Basic Law contains some provisions related to the social area (see Art. 5 al. 3, Art. 7, Art. 74 n° 13, Art. 75 n° 1a, Art. 91a et b).

<sup>7</sup> M. BOTHE, "The 1968 Constitution of East Germany: A Codification of Marxist-Leninist Ideas on State and Government," *Am. J. Comp. L.*, 1969, vol. 17, pp. 268 s.



entities have played the role of “motors,” or “models,” that have clearly influenced the constitutional developments at the federal level.

In both countries, although some authors apply themselves to proving the justiciability of social rights, scholars are traditionally very reticent towards this category of rights (I). Beyond this point, some authors emphasize the role of the subnational Constitutions in order to assess the regime of such rights (II).

## **I. The Scholars’ Traditional Reticence towards Social Rights**

The German and Swiss Constitutions grant a unequal degree of consecration to social rights (A). From a doctrinal point of view, although their justiciability is rarely defended by the scholars, it is still conceivable (B).

### **A. An Unequal Consecration of Social Rights in the Swiss and German Constitutions**

In Germany like in Switzerland, commentators typically distinguish between negative rights (sometimes referred to as “first-generation rights”) and positive rights (so-called “second-generation” or “social rights”). Classically, negative rights comprise defensive claims against “invasion” by the state. On the contrary, positive rights entail affirmative claims that can be used to compel the state to afford substantive goods or services. Nevertheless, even if this distinction seems clear, the content of the positive rights to which the scholars refer differs largely from one country to another.

*Germany.* Unlike the Weimar Constitution of 1919,<sup>8</sup> the German Basic Law is very cautious in formulating social entitlements.<sup>9</sup> To this extent, it is significantly different from a whole series of Constitutions, which alongside the classic defensive rights guarantee rights such as the right to work, to accommodation, to minimum support in case of need, or to education. The German constitution-makers *deliberately* refrained from incorporating norms protecting subjective entitlements, first and foremost because they wanted to avoid the need for such rights to be constantly adjusted to changing economic and social conditions.<sup>10</sup>

In setting out the structure for government, the Basic Law begins with a provision, described as providing the “basic principles of state order,” saying that Germany shall be a *Rechtsstaat* (rule of law clause) and a *Sozialstaat* (social state clause). The first term is usually translated as “state governed by the rule of law,” and refers implicitly to the difference between the post-war German state and the

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<sup>8</sup> See D. CAPITANT, *op. cit.*, §§ 25 s., pp. 19 s.; K. FUZER, *Rights and Constitutional Theory in Weimar Germany*, VDM Verlag Dr. Muller Aktiengesellschaft & Co. KG, 2008.

<sup>9</sup> See K. STERN, *op. cit.*, Tome I, § 21 V ; *id.*, Tome III/1, § 67 I 2 ; J. ISENSEE, “Verfassung ohne soziale Grundrechte”, *Der Staat*, 1980, vol. 19, pp. 367 s. ; P. E. QUINT, “The Constitutional Guarantees of Social Welfare in the Process of German Unification”, *Am. J. Comp. L.*, 1999, vol. 47, pp. 303 s. ; P. BADURA, “Das Prinzip der sozialen Grundrechte und seine Verwirklichung im Recht der Bundesrepublik Deutschland”, *Der Staat*, 1975, vol. 14, pp. 17-48 ; M. KUTSCHA, “Soziale Grundrechte und Staatszielbestimmungen in den neuen Landesverfassungen - Nostalgische Wunschformen oder justitiables Orientierungsprogramm ? », *ZRP*, 1993, pp. 339-344 ; D. REUTER, “Überlegungen zur Kodifikation von Grundrechten auf Bildung”, in : E.-W. BÖCKENFÖRDE, J. JEKOWITZ, T. RAMM (éd.), *Soziale Grundrechte. Von der Bürgerlichen zur sozialen Rechtsordnung*, Heidelberg, 1981, pp. 119 s. ; T. TOMANDL, *Der Einbau sozialer Grundrechte in das positive Recht*, 1967, pp. 25 s. ; W. BROHM, “Soziale Grundrechte und Staatszielbestimmungen in der Verfassung. Zu den gegenwärtig diskutierten Änderungen des Grundgesetzes”, *JZ*, 1994, pp. 213-220.

<sup>10</sup> See *JöR*, 1951, vol. 1, pp. 54 s. See H. VON MANGOLDT, “Grundrechte und Grundsatzfragen des Bonner Grundgesetzes”, *AöR*, 1949, vol. 75, pp. 275 s. ; W. WEBER, “Die verfassungsrechtlichen Grenzen sozialstaatlicher Forderungen”, *Der Staat*, 1965, vol. 4, pp. 411 s.

Nazi regime it replaced. The second term, which is usually translated as “social welfare state,”<sup>11</sup> implies that every act of the public authorities must comply with the welfare state principle.

Consequently, although social rights, unlike the “classical” fundamental rights, are not specifically referred to in the Basic Law, they are nonetheless covered by the welfare state principle.<sup>12</sup> It is thus the overriding concept for the various social rights. Although this implies that social rights are implemented by means of ordinary laws, it has the advantage that the latter can be adjusted to requirements more quickly and more easily. However, because of its structural position, the German constitutional court reviewing social legislation can only control whether the statute in question is consistent with a reasonable understanding of abstractly stated constitutional norms: it cannot itself develop the background rules.

Moreover, the Basic Law contains a whole row of objective “guarantees,” which permit an entitlements-oriented interpretation.<sup>13</sup> The most obvious provisions are the “duty of all state power to protect” human dignity (art. 1 BL). It is also worth mentioning the guarantee of protection for marriage and the family (art. 6-1 BL), as well as the constitutional mandate to bring about the equal status of illegitimate children (art. 6-5 BL). The most express formulation of a social constitutional right in the sense of a subjective entitlement is the right of mothers to the protection and support of society, under which every mother is entitled to protection and care.<sup>14</sup> So, the combination of the social welfare principle with other constitutional rights has allowed the Federal Constitutional Court to give the principle some concrete meaning.<sup>15</sup> Moreover, the general principle of equality can justify the recognition of derivative entitlements, and can be understood in the sense of a principle of factual equality capable of giving rise to completely new entitlements.<sup>16</sup>

Nevertheless, the existence of those provisions should not detract from the fact that as regards its text and history, the Basic Law is primarily oriented towards defensive rights in the traditional Rule of Law conception.

*The Swiss “social constitution”.*<sup>17</sup> While the 1874 Swiss Constitution enumerated only a few civil rights,<sup>18</sup> some attempts were made in order to “codify” some social rights in the Constitution. Parallel to the expansion of welfare components of the federal state, efforts were made in the 1960s and in the 1970s to totally revise the federal constitution.<sup>19</sup> Today, the Swiss Federal Constitution of 18 April

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<sup>11</sup> The social welfare principle emerged in Germany in the late nineteenth century, when Otto von Bismarck responded to the rising political power of socialist parties by appropriating some of their programs, creating the first substantial program of social insurance to protect against economic losses caused by sickness, injury and old age.

<sup>12</sup> See KITTNER, in: *Kommentar zum GG für die Bundesrepublik Deutschland*, vol. I, Articles 1-37, lit. 64. Moreover, in 1994, Article 20a BL was inserted into the Constitution to protect the environment. It is worded as a provision defining a state objective and therefore transfers to all three organs of state the responsibility for protecting the natural foundations of life for future generations. The need for this provision was due less to deficient protection than to a need for clarification, since such protection could be deduced from the fundamental rights even before Article 20a was inserted into the Basic Law.

<sup>13</sup> See D. MERTEN, pp. 372 s. See Art. 6-4, 17 and 19-4 BL.

<sup>14</sup> See BVerfGE 55, 154 [157 s.].

<sup>15</sup> See *infra*.

<sup>16</sup> Art. 3 BL indicates that “all persons shall be equal before the law. Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.”

<sup>17</sup> A. AUER and al., *Droit constitutionnel suisse*, Berne, Staempfli, Précis de droit, 2006, § 1501, at 671.

<sup>18</sup> The main reason explaining the brevity of the 1874 Constitution relies on the fact that the cantonal constitutions were considered, at that time, as been complete and sufficient.

<sup>19</sup> In 1977 the debates led to a constitutional bill anticipating the welfare state with explicit social rights, granting the corresponding competences to the federal government and limiting the rights of the cantons and individuals. It is emblematic that that bill met with vehement criticism when it first appeared.

1999 explicitly asserts that the state “promotes common welfare, sustainable development, inner cohesion, and cultural diversity of the country” and “ensures the highest possible degree of equal opportunities for all citizen.”<sup>20</sup> Moreover, Title 2, entitled “Fundamental Rights, Civil Rights and Social Goals,” contains a directly enforceable bill of rights, as well as a set of social goals which the state authorities are to pay heed to.<sup>21</sup> The Swiss Constitution then implicitly codifies the fundamental rights recognized in the case law of the Federal Tribunal and the European Court of Human Rights. It also incorporates the fundamental rights guaranteed in the European Convention on Human Rights, which Switzerland has ratified in 1974.

Yet, the federal Constitution establishes a range of specific economic and social rights. Article 12 affords a “right to aid in distress”.<sup>22</sup> This provision provides for a right to obtain the means indispensable for leading a simple, dignified life. The cantons and municipalities are responsible for running welfare programs to that effect.<sup>23</sup> Article 19 protects a right to free primary education.<sup>24</sup> It sets the aims of education; according to it, it is the duty of the cantons to organize free public education that meets children's needs. They are in charge of the protection of children and adolescents, while the local authorities are responsible for child care, guardianship (in the Swiss German part) and leisure for children and adolescents. This education should be obligatory, sufficient and free.<sup>25</sup> Finally, Article 29-3 protects a “right to free legal assistance.”<sup>26</sup> Moreover, Article 41-1 refers to a list of “social goals,” which the confederation and the cantons “shall strive to ensure.” They include the availability of social security, health care, housing and public education.<sup>27</sup>

Nevertheless, the justiciability of such rights is generally lacking, and the scope of affirmative claims seems to be very limited.

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<sup>20</sup> See Art. 2-2 and 2-3 Swiss C.

<sup>21</sup> A few rights, notably political ones, are explicitly reserved to Swiss citizens, while all others apply to all persons in Switzerland, including (insofar as possible) legal entities such as corporations.

<sup>22</sup> “Whoever is in distress without the ability to take care of him- or herself has the right to help and assistance and to the means indispensable for a life led in human dignity.” About this provision, see K. AMSTUTZ, *Das Grundrecht auf Existenzsicherung*, Berne, 2002; A. AUER, “Le droit à des conditions minimales d’existence: un nouveau droit social?”, in: Mélanges Charles-André JUNOD, Genève, 1997, pp. 27-48; C. GYSIN, *Der Schutz des Existenzminimums in der Schweiz*, Bâle, 1999; K. HARTMANN, “Vom Recht auf Existenzsicherung zur Nothilfe – Eine Chronologie”, *ZBl.*, 2005, pp. 410-423.

<sup>23</sup> See ATF 131, I, 166, 18.3.2005.

<sup>24</sup> “The right to sufficient and free primary education is guaranteed.” See Art. 28 of the Convention on the Rights of the Child, that states clear rules: compulsory and free primary education, non-discrimination, elimination of illiteracy and ignorance, easier access to secondary and higher education. This convention was ratified by Switzerland in 1997. See S. HÖRDEGEN, *Chancengleichheit und Schulverfassung*, Zurich, 2005.

<sup>25</sup> See A. AUER and al., *op. cit.*, §§ 1535 s., pp. 685 s.

<sup>26</sup> “Every person lacking the necessary means has the right to free legal assistance, provided the case does not seem to lack any merit. To the extent necessary for the protection of one's rights, the person also has the right to free legal counsel.”

<sup>27</sup> “The Federation and the Cantons, in addition to personal responsibility and private initiative, furthers the achievement that every person shares in social security; every person, for his or her health, receives the necessary care; families as communities of adults and children are protected and supported; workers can sustain their living through work under adequate conditions; people looking for housing can find for themselves and for their family adequate housing at acceptable conditions; children and youths as well as people of working age can further their education and training according to their abilities; children and youths are encouraged in their development to become independent and socially responsible persons and are supported in their social, cultural, and political integration [...]” (Art. 41-1 Federal Constitution). Some other provisions are original. For example, Art. 11 indicates that “children and adolescents have the right to special protection of the personal integrity and to promotion of their development. They exercise their rights according to their capacity to discern.”

## **B. The Complex Scope of Social Rights**

In Germany as in Switzerland, many commentators dismiss positive rights as not sufficiently “constitutional,” maintaining that a state’s attention to social and economic matters is best expressed through statutory provisions, and not constitutional text (1). Nevertheless, the justiciability of social rights remains still conceivable (2).

### 1. The “improbable” justiciability of social rights

Scholars are very often reluctant to recognize a justiciability to social rights (a). They undeniably influence the constitutional judges (b).

#### a. The mistrust of German and Swiss scholars towards social rights

*Germany.* In Germany, the “self-restraint” of the constitution-makers is only one side of the matter. Moreover, most of the scholars refuse to consider such rights as justiciable.

The basic rights are principally regarded as subjective, defensive rights (“*Abwehrrechte*”) against attacks (“*Eingriffe*”) by the state. Indeed, the doctrine is generally influenced by the theory of Georg Jellinek about “subjective rights”.<sup>28</sup> According to him, there are four principal categories of “status” into which individuals could be placed under public law either as “subjects,” or “objects.” They could be passive objects with a duty to obey (*status passivus*). Fundamental rights can also be defined as a sphere of individual’s freedom where the government is restricted to intervene (*status negativus*). Moreover, the government has sometimes to ensure an undisturbed enjoyment of the rights for the individuals who are entitled to it (*status positivus*). Finally, Jellinek mentions rights of participation, which could be described as status that provide an entitlement to every individual to participate in public matters, i.e. civil rights such as right to vote (*status activus*).<sup>29</sup> According to Georg Jellinek, the main characteristic of a *fundamental* right is to be justiciable and enforceable against the state.<sup>30</sup> In other words, the existence of a defensive, *negative right* leads to the recognition of a *subjective right*, insofar as it protects not only the general interest but also an individual interest. Consequently, defensive rights are subjective rights.<sup>31</sup>

Be that as it may, German scholars rarely distinguish rights of first and second generation, because this distinction does not take into account the rights’ *purpose*. Another typology,<sup>32</sup> distinct from the one of Jellinek, insists on the nature of the guarantee afforded: “freedom rights” (*Freiheitsgrundrechte*);<sup>33</sup> procedural rights (*Justizgrundrechte*);<sup>34</sup> and “equality rights” (*Gleichheitsgrundrechte*),<sup>35</sup> which are the only rights not to be directly justiciable. But most scholars generally distinguish the rights according to their *effect*. First, rights to personal freedoms (*Freiheitsrechten* or *persönliche Freiheitsrechte*) are individual rights that prevent the state from infringing the individual’s personal “sphere of liberty.”

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<sup>28</sup> See G. JELLINEK, *System der subjektiven öffentlichen Rechte*, 2<sup>nd</sup> ed., Tübingen, J. C. B. Mohr [Paul Siebeck], 1892.

<sup>29</sup> See *ibid.*; *Allgemeine Staatslehre*, pp. 417s.; R. ALEXY, “Grundrecht und Status”, in: *Jellinek - Beiträge zu Leben und Werk*, pp. 221-25.

<sup>30</sup> See BVerfGE 7, 198 [204], *Lüth*.

<sup>31</sup> Olivier JOUANJAN writes : “[il existe] une forte adéquation entre la logique des droits défensifs et la logique des droits subjectifs” (“La théorie allemande des droits fondamentaux”, *AJDA*, 1998, Numéro special, at 45).

<sup>32</sup> See W. CREMER, *Freiheitsgrundrechte. Funktionen und Strukturen*, Mohr Siebeck, 2003, vol. 104.

<sup>33</sup> See art. 2-1 BL (“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law”).

<sup>34</sup> See article 19-4 BL (“Should any person’s rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts [...]”).

<sup>35</sup> See art. 3-3 BL (“No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability”).

Secondly, rights to political participation (*Teilhaberechte*) are individual rights whose respect imposes a limitation of state actions, but also implies that the state provides some benefits. This notion is thus linked to the concept of social justice, which is based on the idea of “equal participation rights” (*gleiche Teilhaberechte*). Since every citizen should have not only the opportunity but the right to participate in social life, society as a whole has the responsibility to guarantee these rights through an active “distribution policy” (*Verteilungspolitik*). Finally, “rights to social provisions” (“*soziale Leistungsrechte*”) or “social fundamental rights” (“*soziale Grundrechte*”) are rights that the individual can enjoy only as a member of a community, with regard to other members.<sup>36</sup>

In this long tradition, scholars generally support the same point of view. According to Josef Isensee, who is followed by many of his colleagues, the “constitutional state” is limited to norms, “which can be legally and judicially implemented, economically possible and politically responsible.”<sup>37</sup> In conclusion, the Constitution should not be “overloaded” with guarantees that are lacking in effectivity.<sup>38</sup>

Very reticent towards social rights, some scholars, like Günter Dürig, assert that the correctness of the opposition between protective and negative rights can be doubted.<sup>39</sup> Going further, Johannes Schwabe challenges the opposition of defensive rights and protective rights in a much more radical way.<sup>40</sup> According to him, the acceptance of protective duties - and thus to protective rights - is largely unnecessary and misleading. Their role can be much more easily and appropriately maintained in the context of the “negatory function” of constitutional rights.<sup>41</sup>

*Switzerland.* In Switzerland, the inclusion of social rights in the federal Constitution has been strongly contested on grounds of economic policy and cantonal autonomy. It also has been criticized by scholars who sometimes consider that such rights are only “constitutional poesy.” According to Jörg-Paul Müller<sup>42</sup> and to many of his colleagues, the deciding factor lies also in the justiciability of such “rights to positive benefits”.<sup>43</sup> Classically, Müller asserts that “the constitutional judge is not able to realize such legal promises.” If it was, it should take some fundamental decisions affecting the

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<sup>36</sup> According to David CAPITANT, “la notion de droit à prestation se présente [...], après la reconnaissance de l’obligation pour la puissance publique d’adopter des mesures d’organisation du droit à des fins d’aménagement et de protection, comme l’étape ultime d’une évolution de la fonction des droits fondamentaux qui part de l’aspect uniquement négatif de droits défensifs dirigés contre l’Etat, et va vers le développement d’un sens positif qui impose à l’Etat l’adoption de mesures favorisant l’exercice des droits fondamentaux” (*id.*, § 487, at 305). About the so called “droits à prestation,” see D. CAPITANT, *op. cit.*, §§ 485, pp. 305 s.

<sup>37</sup> “Der Verfassungsstaat [...] beschränkt sich auf Normen, die sich juristisch durchsetzen, ökonomisch erfüllen und politisch verantworten lassen. Diesen Bedingungen genügen die sozialen Grundrechte nicht, solange sie in ihrer rhetorisch-utopischen Urgestalt verbleiben. [...] Wenn die sozialen Grundrechte dagegen... pragmatisch reduziert werden, bleibt nicht viel mehr übrig als katalogisierte Selbstverständlichkeiten” (J. ISENSEE, “Verfassung ohne soziale Grundrechte”, *Der Staat*, 1980, vol. 19, n° 3, pp. 367 s. [382]).

<sup>38</sup> See C. Autexier, *op. cit.*, §§ 109 s., pp. 117 s.; A. Weber, “L’Etat social et les droits sociaux en République fédérale d’Allemagne”, *RFDC*, 1995, pp. 677 s. [689].

<sup>39</sup> G. DÜRIG, in: MAUNZ, DÜRIG, GGK, Art. 1-1 § 3.

<sup>40</sup> J. SCHWABE, *Probleme der Grundrechtsdogmatik*, Darmstadt, 1977, pp. 213 s.; *id.*, *Die sogenannte Drittwirkung der Grundrechte*, Munich, 1971.

<sup>41</sup> *Probleme...*, *op. cit.*, at 219.

<sup>42</sup> See *Eléments...*, *op. cit.*, pp. 62 s.

<sup>43</sup> “Ainsi, c’est la *justiciabilité* qui représente le critère décisif de la reconnaissance et de la mise en oeuvre, par le juge constitutionnel, de prestations positives tirées des droits fondamentaux : le droit à une prestation positive doit être susceptible de concrétisation et d’application par un organe judiciaire” (*Eléments...*, *ibid.*, at 67). See J.-P. MÜLLER, *Soziale Grundrechte*, *op. cit.*, pp. 19 s., 179 s.; D. TRACHSEL, *Über die Möglichkeiten justiziabler Leistungsforderungen aus verfassungsmässigen Rechten der Bundesverfassung*, PhD, Zürich, 1980, pp. 142 s.

economic and social domains; domains in which it cannot be competent.<sup>44</sup> According to him, if there were very strong oppositions in the doctrine in the 1970s, there was (i.e. in 1982) “a large consensus:” social rights can not be, in general, placed on a equal footing with “classical liberties.” Nevertheless, they are still able to produce “normative effects” in the form of provisions setting goals to the state, or of “compulsory legislative mandates.”<sup>45</sup> Müller then enumerates what is called “*little social rights*,” which only have an historical interest, i.e. the right to a free, sufficient and secular primary education,<sup>46</sup> the right “to a decent burial,”<sup>47</sup> or the right of the soldier “to a free equipment.”<sup>48</sup> Yet, concerning those rights, claims should not be addressed to the Federal tribunal, but to the Federal Council, which is a political authority and therefore in possession of the financial means to realize its decisions.<sup>49</sup> Analyzing the federal case law, Jörg-Paul Müller notes that the Federal Tribunal only recognizes “rights to positive benefits” when their “normativity” is sufficient *and* when they can be applied by the judge.<sup>50</sup>

*Shared characteristics in Germany and in Switzerland.* German and Swiss scholars most of the time claim that social rights are not inherently justiciable.<sup>51</sup> This is firstly argued on the basis of judicial capacity. Above all in Germany, it is claimed that these rights are too vague for judicial adjudication. The second argument is a legitimacy argument. Especially in Switzerland, it is most of the time maintained that courts cannot adjudicate on such rights since they will be making social policy, which is the role of the government, in the form of the executive and parliament. Therefore, it is argued, elected governments rather than the courts should properly decide the rationing and allocation of scarce resources between competing uses, since governments are responsible to the electorate, and the courts are not.

Consequently, the interpretation of social rights is generally close to a programmatic approach, which binds the state and public authorities only to the development and implementation of social policies, rather than to the legal protection of individuals.<sup>52</sup> Social rights have to be realized (“*verwirklicht*”) by the legislature.<sup>53</sup> They are “development rights” (“*Entfaltungrechte*”),<sup>54</sup> that are only linked to the future. As a result, scholars often consider social rights exactly like social goals: because they are of a

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<sup>44</sup> “[...] des dispositions fixant les buts étatiques et des mandats législatifs [obligatoires] sont les moyens adéquats pour consacrer au niveau constitutionnel les exigences découlant de l’idée de l’État social et pour leur conférer une force normative. Ce point de vue est partagé aujourd’hui par la doctrine dominant aussi bien en Allemagne qu’en Suisse” (*Eléments...*, *op. cit.*, 69). See also *Soziale Grundrechte*, *op. cit.*, 179 s.; W. RÜFNER, “Grundrechtliche Leistungsansprüche”, in: *Im Dienste des Sozial rechts*, Mélanges Georg WANNEGAT, Cologne, 1981, pp. 379 s.

<sup>45</sup> *Eléments...*, *ibid.*, at 69.

<sup>46</sup> Art. 27-2 C. 1874.

<sup>47</sup> Art. 53-2 C. 1874.

<sup>48</sup> Art. 18-3 C. 1874.

<sup>49</sup> The Federal Council (*Conseil Fédéral, Bundesrat*) is the executive council which constitutes the federal government. See Art. 73 and 79 Loi fédérale sur la procédure administrative; Art. 84 Loi fédérale d’organisation judiciaire.

<sup>50</sup> See J.-P. MÜLLER, *Soziale Grundrechte in der Verfassung ?*, 2<sup>nd</sup> ed., Basel, Helbing Lichtenhahn Verlag, 1981, pp. 5 s.

<sup>51</sup> About Austria see K. KORINEK, “Betrachtungen zur juristischen Problematik sozialer Grundrechte”, in: Katholische Sozialakademie Österreichs (ed.), *Die sozialen Grundrechte*, Wien, 1971, at 12; See T. TOMANDL, *Der Einbau sozialer Grundrechte in das Positive Rechte*, Tübingen, Mohr Siebeck, 1967, pp. 17 s.

<sup>52</sup> See H.-J. WIPFELDER, *ZRP*, 1986, n° 6, at 140 (“[...] soziale Grundrechte sollten, wenn überhaupt, nur als Programmsätze mit staatszielbestimmender Wirkung formuliert werden. Andere Wege sind zwar begehbar, aber letztlich doch von politischen, ökonomischen, finanziellen, vielleicht sogar ideologischen Fakten abhängig und daher so praktisch nicht zu realisieren”).

<sup>53</sup> See the notion of “Gesetzesvorbehalt.”

<sup>54</sup> VAN DER VEN, *Soziale Grundrechte*, 1962, at 104 (about Austria).

programmatic nature, they are declared not to be directly enforceable.<sup>55</sup> Consequently, they are not “justiciable” in the sense that one still cannot take legal action against a public authority for failing to fulfill its obligation to provide social goals.

*b. Case law*

According to the liberal understanding developed by the German Constitutional Court, constitutional rights “are designed in the first instance to secure a sphere of liberty for the individual from interferences by public power; they are defensive rights of the citizen against the state.”<sup>56</sup> In the same way, the Swiss Federal Tribunal agrees to recognize the justiciability of social rights only in a very restrictive way<sup>57</sup> – even more restrictive than the German constitutional court. Indeed, it refused, in 1973, to guarantee a right to culture as an unwritten provision. Contrary to the German Court,<sup>58</sup> it refused to deduce “*soziale Teilhaberechte*” from the right to pursue a freely chosen occupation (*Berufswahlfreiheit*), from the freedom to engage in a trade, business or profession (*Gewerbefreiheit*) or from the freedom of trade (*Handelsfreiheit*).<sup>59</sup> It then constantly repeats that the rights contained in the Constitution are negative rights.<sup>60</sup>

Consequently, although some social rights are contained in, or deduced from, the Swiss and German Constitution, they still raise suspicions in legal doctrine and practice. However, such rights are sometimes, in a certain extent, considered as justiciable.

2. The possible justiciability of social rights

According to a certain part of the scholars, some social rights do have a precise legal content (a). Moreover, courts have demonstrated their capacity to develop rulings on all aspects of those rights (b).

*a. The scholarly defense of the social rights’ justiciability*

*Germany.* In Germany, if one wants to interpret the Basic Law in order to find subjective entitlements guaranteed at the constitutional level, he is thus forced to derive the appropriate norms from provisions that do not expressly guarantee the subjective entitlements he is looking for.

Here is the constitutional theory of Robert Alexy very useful. According to him, in parallel to the *formal* concept, it is important not to forget the *substantial* concept of fundamental rights. Contrary to

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<sup>55</sup> They are also counterbalanced by a reference to individual responsibility in article 6, called “individual and social responsibility” (“Every person is responsible for him- or herself and advances, according to his or her abilities, the goals of state and society.”).

<sup>56</sup> BVerfGE 7, 198 [204], *Lüth*.

<sup>57</sup> See A. FILLI, *Die Grundrechte der Kantonsverfassungen im Gefüge des schweizerischen Staatsrechts*, PhD, Basel, Econom-Druck, 1984, pp. 190-205; M. KURER, *Die kantonalen Grundrechtsgarantien und ihr Verhältnis zum Bundesrecht*, PhD, Zurich, 1987, pp. 100-117; P. SALADIN, M. AUBERT, “Constitution sociale”, in: W. KÄLIN, U. BOLZ (eds.), *Manuel de droit constitutionnel bernois*, Berne, 1995, pp. 95-104.

<sup>58</sup> See BVerfGE 33, 303, *NJW*, 1972, at 1561.

<sup>59</sup> See ATF 103, Ia, 178 (1976). J.-P. MÜLLER writes: “Für die sozialen Grundrechte lassen sich aus der bundesgerichtlichen Rechtsprechung folgende Schlüsse ziehen: Das Bundesgericht ist nicht bereit, aus der Verfassung eine Verpflichtung des Staates abzuleiten, neue Leistungen zu erbringen. Dort, wo Gesetzgeber und Exekutive aber bereits eine Regelung getroffen haben, überprüft es, ob die Zulassung des Einzelnen zu einer bestimmten Institution der Leistungsverwaltung rechtsgleich und willkürfrei erfolgt, und ob allfällige Zulassungsbeschränkungen auf gesetzlicher Grundlage beruhen; in diesem beschränkten Ausmass können sich somit direkt aus der Verfassung subjektive Ansprüche gegen den Staat ergeben, die in gewissem Sinn über ein Teilhaberecht i.S. der deutschen Praxis hinausgehen, da sie nicht unter dem Vorbehalt des Möglichen stehen” (*Soziale Grundrechte, op. cit.*, at 68).

<sup>60</sup> ATF 100, Ia, 189 [194], *Feuz*; 102, Ia, 321 [324-325], X.

Carl Schmitt, or to Ernst Forsthoff,<sup>61</sup> Robert Alexy affirms that “there are [...] good reasons not to restrict this concept to [libertarian rights] [...]: social rights ought not to be excluded from the club of genuine fundamental rights merely because a concept follows the tradition.”<sup>62</sup> On the one hand, we can speak of subjective rights in contrast to objective principles,<sup>63</sup> and, on the other hand, of “rights as determinations,” in contrast to principles as “rules of optimization”.<sup>64</sup> The second type of view, developed by Robert Alexy,<sup>65</sup> differentiates *fundamental rights as determinations* from *fundamental rights as rules of optimization*, and thereby juxtaposes a strict and a relative conception of fundamental rights.<sup>66</sup> Robert Alexy then considers fundamental rights as determinations: it means that the citizen is entitled to have his freedom respected and to participate in the practice of state power and distribution of means, although the entitlement may be denied to him in exceptional cases. The rule is that the citizen is entitled; the exception lies in the denial of the citizen’s entitlements.<sup>67</sup> On the other hand, fundamental rights as “rules of optimization” means that fundamental rights guarantee the citizen entitlements *only in accordance with what is legally and actually possible*.

According to Alexy, the concept of an “entitlement” is broadly understood: every right to a positive action on the part of the state is an entitlement.<sup>68</sup> It exists three types of “entitlements in the wide sense:” rights to protection; rights to organization and procedure; and, finally, entitlements in the narrow sense, i.e. entitlements that can be “expressly enacted entitlements” (“social constitutional rights”) and “interpretatively derived entitlements” (“constitutional entitlements”, i.e. “social interpretation of rights to freedom and equality”). The rights “to something” are claims that introduce a relationship between the right-holder, the right-addressee and the purpose of the right. In that case, the purpose is always a “positive action” (to do something). But it can also be a “negative action”, i.e. an omission. Yet because of the difference between positive and negative actions, “rights to” acquire a complex structure, insofar as the changing of the nature of their purpose determines the judicial regime that is applied to them.

Despite of this effort of theorization, Robert Alexy’s theory rests also on the premise that *the necessary preconditions must exist to make it possible for one to provide a decent standard of living for oneself and one’s family*. For this to be achieved, it is argued that the corresponding material conditions must be accessible. The same difficulties are present in Switzerland.

Switzerland. In Switzerland, before the adoption of the 1999 Constitution, many authors did not even mention social rights. Today, Andreas Auer, Giorgio Malinverni and Michel Hottelier distinguish the liberties, the “state guarantees” (“*garanties de l’Etat*”), the “political rights” (“*droits politiques*”) and,

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<sup>61</sup> See C. SCHMITT, *Verfassungslehre*, Duncker und Humblot, 1970, pp. 163-165; E. FORSTHOFF, “Grundrechte”, in: J. RITTER (ed.), *Historisches Wörterbuch der Philosophie*, vol. 3, Basel und Stuttgart, Schwabe, 1974, pp. 922-923.

<sup>62</sup> R. ALEXY, “Discourse Theory and Fundamental Rights”, in: A. J. MENÉNDEZ, E. O. ERIKSEN, *Arguing fundamental rights*, Springer, 2006, pp. 15-29, citation at 16.

<sup>63</sup> See G. HERMES, *Das Grundrecht auf Schutz von Leben und Gesundheit*, 1987, at 110; E.-W. BÖCKENFÖRDE, “Grundrechte als Grundsatznormen”, *Der Staat*, 1990, pp. 1 s.; H. D. JARASS, “Grundrechte als Wertentscheidungen bzw. Objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgerichts”, *AöR*, 1985, vol. 110, pp. 363 s.; A. SCHERZBERG, “‘Objektiver’ Grundrechtssatz und subjektives Grundrecht”, *DVBl.*, 1989, pp. 1128 s.

<sup>64</sup> R. ALEXY, *Theorie...*, *op. cit.*, pp. 71-104 ; R. ALEXY, “Grundrechte als subjektive Rechte und als objektive Normen”, *Der Staat*, 1990, vol. 29, at 49.

<sup>65</sup> R. ALEXY wrote a theory of constitutional rights, which is a theory for the interpretation of fundamental rights in the German Constitution.

<sup>66</sup> R. ALEXY, *Theorie...*, *op. cit.*, pp. 71-104.

<sup>67</sup> The exception must be expressly admitted and justified, as, for example, when one citizen’s claim to his fundamental right conflicts with other citizen’s claims to their fundamental rights, or when conflicts arise between fundamental rights and state interests and cannot be settled in any other way.

<sup>68</sup> “The concept of an entitlement is thus the exact counterpart to that of a defensive right, which includes every right to a non-action, or an omission, on the part of the state” (R. ALEXY, *op. cit.*, at 294).



finally the “social rights” (“*droits sociaux*”).<sup>69</sup> According to them, the realization of social rights does not always imply positive benefits of the state,<sup>70</sup> for example in the case of the right to choose one’s own profession, or the right to strike. Moreover, the implementation of civil and political rights can also have a positive scope,<sup>71</sup> and a very high cost, for example in the areas of the rights of the prisoners.

Concerning the social provisions included in the Swiss *Bill of rights*, Andreas Auer and his co-authors assert that social rights whose content is enough precise, *are* fundamental rights:

“[...] les droits sociaux sont donc des droits fondamentaux, dont on peut obtenir l’application par une décision judiciaire. Ils peuvent certes être concrétisés par le législateur. Toutefois, si une loi fait défaut, ou est insuffisante, le juge doit pouvoir en déterminer lui-même le contenu et se fonder directement sur eux pour rendre un jugement. Les droits sociaux confèrent donc directement des droits à des prestations sociales.”<sup>72</sup>

According to this definition, only four provisions guarantee a social right: Article 12 (right to aid in distress), 19 (right to free primary education), 28-3 (freedom to strike),<sup>73</sup> and 29-3 (right to free legal assistance).<sup>74</sup>

In parallel, the “modern conception of social rights,”<sup>75</sup> very influenced by international law, asserts that *each* social right implies three levels of obligations pour the state:<sup>76</sup> to respect such rights, to protect them, and to implement them.

*Comparative point of view: the objective dimension of social rights.* In Germany as in Switzerland, some authors argue that the “classical arguments” determining the scope of social rights are less and less tenable. Consequently, the assumptions underlying them are increasingly challenged. One is that civil and political rights are basically cost-free: this is patently not so. Another is that the courts would run amok in adjudicating socio-economic rights: it is not true neither. Moreover, social rights, like the non-justiciable “programmatic” provisions, are especially of legal significance: these obligations are not addressed directly to the courts, but rather to the Parliament, the government and the administration, which have a certain obligation of conduct. This is patently not true: courts also have an important role to play in the implementation of social rights.

Above all, basic rights also include certain institutional guarantees and are the expression of an objective value-order (“*Wertordnung*”).<sup>77</sup> Consequently, in Germany, negative rights are not the only rights to be justiciable. Some rights, which produce “positive effects,” can also be qualified of

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<sup>69</sup> Op. cit., vol. II, § 77, at 38.

<sup>70</sup> Op. cit., § 1503, pp. 671-672.

<sup>71</sup> *Ibid.*, § 1509, at 674 (“Les droits sociaux ne sont pas tous, par leur nature et intrinsèquement, insusceptibles d’être examinés par un organe judiciaire. Certains d’entre eux peuvent, au contraire, être considérés comme justiciables. Il en va ainsi, d’abord du droit de jouir de ces droits sans discrimination aucune. Un tribunal est à même de vérifier si le principe de non-discrimination dans l’exercice des droits sociaux a été respecté. Par ailleurs, certains droits sociaux peuvent faire l’objet d’un examen judiciaire: droit de chacun à un salaire équitable et à une rémunération égale pour un travail de valeur égale [see ATF 130, III, 145]; droit de former, avec d’autres, des syndicats et de s’affilier au syndicat de son choix; droit à un enseignement primaire obligatoire et accessible gratuitement à tous; droit à des conditions minimales d’existence, droit à l’assistance judiciaire gratuite”).

<sup>72</sup> *Ibid.*, § 1512, pp. 675-676.

<sup>73</sup> “Strike and lockout are permitted, provided they concern labor relations and do not violate any obligation to keep labor peace or to resort to conciliation.”

<sup>74</sup> See Appendix.

<sup>75</sup> *Ibid.*, § 1510, at 674.

<sup>76</sup> *Ibid.*, § 1510, at 674-675.

<sup>77</sup> The legislature can concretize institutional guarantees, by providing that their “essential structure” (“*wesentliche Struktur*”, “*Wesensgehalt*”) is not infringed. However, institutional guarantees do not bestow individual rights as such.

“subjective rights”.<sup>78</sup> Indeed, a “fundamental right” exists insofar as an “individual interest” has to be protected. Yet, increasingly, there is a tendency to regard certain of the basic rights as conferring the right to claim positive action from the state (“*Grundrechte*” as “*Leistungsrechte*”).<sup>79</sup> For example, the right to exercise a profession (art. 12 BL) develop positive effects, and can create an “obligation of protection” when the economic inequality between the parties is too strong.<sup>80</sup> Nevertheless, it is important to distinguish the idea of social rights, and the implementation of such rights.<sup>81</sup>

*b. Case law*

The German and Swiss federal court went onto to give a variety of judgments on social rights.

*Germany.* In Germany, the Federal Constitutional Court accompanies the implementation of the welfare state principle with strict conditions. The notion of “margin of appreciation” (“*Beurteilungsspielraum*”) indicates that the judge puts back to the legislature the task of taking into account the different factual elements involved by the adoption of positive measures intended to promote the exercise of a fundamental right. More precisely, the Federal constitutional court brought out a “reserve of the possible” (*Möglichkeitsvorbehalt*),<sup>82</sup> in its decision *Numerus Clausus I*.<sup>83</sup> This reserve is the main limit fixed to the “rights to political participation” (*Teilhaberechte*), that is to what the individual has the right to “reasonably” expect from the collectivity. Yet the legislature has to establish the limits within which this right can be implemented, while taking into account the financial resources of the collectivity, always limited, and the budget balance.<sup>84</sup> For example, it has ensued from the first sentence of Article 2-2, in conjunction with Article 1-1 of the Basic Law, a “right to a minimum social subsistence level.” And one could imagine that it could deduce from the same provisions a “right to a minimum ecological subsistence level”.<sup>85</sup> Moreover, according to the “*Wesentlichkeitstheorie*,” essential political decisions (“*wesentliche Entscheidungen*”) must be taken by the legislature and cannot be delegated to the executive (“*Wesentlichkeitsprinzip*”). More generally, the Constitutional Court has consistently emphasized that it is the duty of the legislature rather than the court to determine the extent and nature of welfare benefits.

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<sup>78</sup> See O. JOUANJAN, art. préc., at 46 (“[même chez Jellinek], il existait une possibilité de penser et construire des droits publics subjectifs à prestations positives”).

<sup>79</sup> This is achieved by an “Umdeutung” (“*fresh interpretation*”) of the basic rights (see Art. 3 BL).

<sup>80</sup> See BVerfGE 81, 242, *Handelsvertreter*.

<sup>81</sup> *Soziale Grundrechte*, op. cit., 1980, pp. 7 s.

<sup>82</sup> Others expressions are sometimes used: “*Vorbehalt des Möglichen*,” or “*Vorbehalt der Möglichkeit*.” See the former Turkish Constitution of 1961: “Der Staat wird seine Aufgaben zur Erreichung der in diesem Abschnitt aufgezeigten sozialen und wirtschaftlichen Ziele nur soweit durchführen, wie es die wirtschaftliche Entwicklung und die ihm zur Verfügung stehenden Geldquellen erlauben.” See P. BADURA, *Der Staat*, 1975, vol. 14, pp. 17-18 (“Das Prinzip der sozialen Grundrechte sieht die verfassungsrechtlich zu gewährleistende individuelle Freiheit zuerst unter dem Blickwinkel ihrer realen, d. h. sozialen Bedingungen und stellt deshalb an den politischen Prozess und damit an die Gesetzgebung spezifische Anforderungen, die mit dem Rechtsinstrument der verfassungsmässigen Rechte nur zum Teil erfasst werden können”).

<sup>83</sup> BVerfGE 33, at 303 s. [333]. See also BVerfGE 43, 291 s., “*Numerus Clausus II*,” translated in: KOMMERS, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2<sup>nd</sup> ed., Durham, Duke University Press, 1997, pp. 282 s.

<sup>84</sup> “Auch soweit Teilhaberechte nicht von vornherein auf das jeweils Vorhandene beschränkt sind, stehen sie doch unter dem Vorbehalt des Möglichen im Sinne dessen, was der Einzelne vernünftigerweise von der Gesellschaft beanspruchen kann. Dies hat in erster Linie der Gesetzgeber in eigener Verantwortung zu beurteilen, der bei seiner Haushaltswirtschaft auch andere Gemeinschaftsbelange zu berücksichtigen und nach der ausdrücklichen Vorschrift des Art. 109 Abs. 2 GG den Erfordernissen des gesamtwirtschaftlichen Gleichgewichts Rechnung zu tragen hat” (BVerfGE 33, 303 [333]). See C. AUTEXIER, *Introduction au droit allemand*, PUF, 1996, pp. 118-119 ; D. CAPITANT, op. cit., § 492, at 308.

<sup>85</sup> SCHOLZ, in: MAUNZ, DÜRIG, Article 20a BL, I, lit. 28.

Moreover, among the “rights to social provisions” (“*soziale Leistungsrechte*”), two types of “rights to benefits” must be distinguished. Firstly, some of them were – timidly – deducted by the Federal Constitutional Court from the fundamental rights guaranteed by the Basic Law, and are rights to “new” benefits (“*originäre Leistungsrechte*”).<sup>86</sup> Such rights were only recognized in the areas of the assistance to the poor, the access to universities and the creation of private schools. In particular, the Federal Constitutional Court has considered that the social clause imposed on the state a “social obligation” to create a right to assistance toward the poor. Nevertheless, the Court leaves to the legislature a very large margin of appreciation, and only submits the action, or the omission, of the state to a restricted scrutiny. Today, the Constitutional Court considers that the right to a vital minimum income (*Existenzminimum*) can be deduced from Art. 2-2 BL, that protects the right to life and physical integrity, and from Art. 20-4 BL (social welfare clause), in the case of people who cannot get such a minimum income for reasons independent of their own will.<sup>87</sup> Secondly, other rights tally with the effects that “classical” fundamental rights can have on the benefits that already exist (“*derivative Leistungsrechte*”). These rights do not create rights to a benefit provided by the state, but to a “lay out” that already exist and that should be in accordance with fundamental rights. The Federal Constitutional Court recognize the existence of such rights more broadly than in the case of “*originäre Leistungsrechte*,” because the legislature has already intervened in order to set up the benefit, and because he only has to adapt its modes of access, in relation, for example, with the equal protection clause.<sup>88</sup>

However, whereas scholars agree that the social state principle places an affirmative obligation on the state, the court has never specified what that obligation is or under what conditions the state will have failed to meet it. The notion of “a subsistence minimum” (“*Existenzminimum*”) can be considered as a “floor,” below which the legislature cannot fall. However, the Federal Constitutional Court has never reached the question of how it might enforce a ruling that applies the social state principle to welfare legislation.

*Switzerland.* In Switzerland, it is important to note that the right to an aid in case of distress<sup>89</sup> was firstly advocated by the doctrine.<sup>90</sup> It was also contained in some cantonal Constitutions<sup>91</sup>. A few years

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<sup>86</sup> See BVerfGE 1, pp. 97 s., 19.12.1951, *Fürsorge* (“public welfare”); 40, pp. 121 s., 18.6.1975, *Waisenrente II* (“orphans’ pension II”). An excerpt of the latest decision is translated in: R. ALEXU, *A Theory of Constitutional Rights*, *op. cit.*, at 290.

<sup>87</sup> Robert ALEXU argues that the right to a subsistence minimum is firmly rooted in case law of the Administrative Court and in German scholarly opinion, even if it has no definitive constitutional foothold (*op. cit.*, at 290). He defines this right as a “binding subjective definitive right” (*id.*, at 336). In fact, in 1954, the Federal Administrative Tribunal determined that an individual right to welfare for the needy could be construed from the social welfare principle, but that no remedy against the state could be based solely on this principle (BVerwGE 1, 159, 24.6.1954, *Fürsorgeanspruch*).

In 1975, the Federal Constitutional Court found that the social state principle obligated the state to care for “those in need” and to provide those with physical or mental handicaps “the basic conditions for a dignified existence” (BVerfGE 40, 121 [133], *Waisenrente II*, dec. prec., translated in: R. ALEXU, *op. cit.*, at 290). Later, in 1990, the Karlsruhe Court held that the legislature could not impose taxes that deprived a family of the *Existenzminimum*, or subsistence minimum, based on the social state principle and the constitutional protection of the family. According to it, the state “must [provide] the basic conditions for a humane existence of its citizens. [...] As long as these basic conditions are not at stake, it lies in the discretion of the legislator to what extent social assistance can and is to be granted” (BVerfGE 82, 60, *Steuerfreies Existenzminimum*, translated in: S. MICHALOWSKI, L. WOODS, *German Constitutional Law*, 1999, at 31).

<sup>88</sup> See D. CAPITANT, *op. cit.*, §§ 488 s., pp. 306 s.

<sup>89</sup> “Le droit à des conditions minimales d’existence est un droit social. Il l’est d’abord parce que son but est indiscutablement social et parce que la responsabilité de l’Etat qui en découle l’est aussi : garantir à toute personne la satisfaction des besoins humains élémentaires en nourriture, habillement, logement et soins médicaux de base. S’il est vrai qu’un droit est social à partir du moment où il vient en aide aux personnes appartenant aux couches les plus défavorisées de la population, le droit à des conditions minimales d’existence mérite cet adjectif, car il est censé bénéficier aux personnes sans domicile fixe, aux chômeurs en fin de droits et aux autres exclus de notre société, comme les requérants d’asile déboutés, respectivement les réfugiés déçus” (*ibid.*, § 1521, pp. 680-681).

later, in a path-breaking judgment, the Swiss Federal Court found, in 1995,<sup>92</sup> that there was an unwritten constitutional right to a basic minimum of subsistence, based on or derived from fundamental human rights. There were, it said, elements which, although not expressly enumerated in the Swiss constitution, nevertheless acted as pre-conditions for the exercise of other rights, to liberty or justice, which were enumerated in the Constitution or which otherwise appeared as indispensable elements of a state based on democratic principles and the rule of law. The guarantee of elementary needs such as nourishment, clothing and shelter was 'absolutely necessary for human existence and development', it stated. This right affords "an aid in case of distress", and "the guarantee of elementary human needs like food, clothes or housing", in order to prevent "a state of begging unworthy of the human condition".<sup>93</sup> Nevertheless, Article 12 only guarantees "a vital minimum:" the scope of this right and its "hard core" ("noyau dur") coincide.<sup>94</sup> As a conclusion, this right cannot be limited<sup>95</sup>. That right was incorporated in the new Constitution; but one could imagine that the Federal Tribunal recognizes such other positive rights.

Moreover, although the Federal Tribunal often mentions the UNO Pacts, and in particular the Pact I,<sup>96</sup> Switzerland has not ratified the European social Charter yet.<sup>97</sup> But the federal case law related to the direct applicability of international treaties implies that social rights contained in the Pact I are mere "goals" that the state may fulfill.<sup>98</sup>

*The "positive effects" of fundamental rights.* The German Federal Constitutional Court has determined a range of "positive obligations" which has to be implemented by the state. According to David Capitant, those obligations can be classified in three categories determined by their object: an obligation to fit out (*obligation d'aménagement*); an obligation to protect (*obligation de protection*); and a "radiation effect" (*effet rayonnant*). Although the first ones concern mostly the legislatures, the third one concerns also the judges.

The question of the "positive effects" of fundamental rights is interesting because it refers to the potential "horizontal effect" of social rights. In Germany, the applicability of basic rights in the area of private relations, i.e. their "*Drittwirkung*," is not generally accepted, although they can indirectly ("*mittelbar*") be called in aid in the interpretation of law. In Switzerland, Articles 35 and 36 contain the general rules governing the application of fundamental rights. According to Article 35, "*the fundamental rights shall be realized in the entire legal system.*" This implies that the Constitution's fundamental rights are binding on all levels of state authorities and are directly enforceable in the courts, although the Constitution prohibits judicial review of federal statutes.<sup>99</sup> Going beyond the classical notion of civil rights as purely defensive rights against the state, though, Article 35 also mandates the authorities to give meaning to the fundamental rights in their legislative and executive acts, and to actively protect fundamental rights even to some degree against non-state actors. In

(Contd.) \_\_\_\_\_

<sup>90</sup> See J.-P. MÜLLER, "Soziale Grundrechte in der Verfassung?", *RDS*, 1973, II, pp. 896-899.

<sup>91</sup> See Basel-Land (art. 16), Berne (art. 29), Appenzell Outer Rhodes (art. 24), Ticino (art. 13), Vaud (art. 33), Neuchâtel (art. 13), Schaffhausen (art. 13).

<sup>92</sup> See ATF 121, I, 367 [371, 373]. See also ATF 122, II, 193.

<sup>93</sup> ATF 121, I, 367 [371, 373].

<sup>94</sup> ATF 130, I, 71.

<sup>95</sup> ATF 131, I, 166 [176].

<sup>96</sup> The Pact I was ratified in 1992 (RS 0.103.1).

<sup>97</sup> The Swiss Parliament refused twice the proposition of the Federal Council to ratify this text. See FF, 1996, II, at 717; 1983, II, at 1273.

<sup>98</sup> This position has been criticized by the Comity of economic, social and cultural rights (see Observations finales du Comité des droits économiques, sociaux et culturels du 7 déc. 1998, E/C.12/1/Add.30 ; ref. cited by A. AUER and al., *op. cit.*, at 671). See ATF 103, I, 113; 126, I, 240 [242].

<sup>99</sup> See Art. 190 C.

between private actors, the fundamental rights do not apply directly. Their “horizontal effect,” though, is supposed to be realized through legislation to the extent the rights are suited to application between private persons.

Beyond the nature of scholars’ arguments, their reflexion is always confined to the federal level. Yet, there is undeniably a potential diversity in the sources of rights and liberties within the federal structures. This is reflected in the large variety of rights secured in state Constitutions, among which many social rights.

## **II. Subnational Constitutions as “Reserves” of Social Rights**

Contrary to the federal Constitutions, there are many references to social rights in the Constitutions of the German *Länder* and the Swiss *cantons*. More precisely, the case of more extensive rights than those contained in the federal constitution, or of rights “alien” to the federal Constitution (“*aliud-Grundrechte*”), is very interesting in the sense that it illustrates very well the realization of the constitutional autonomy of subnational units. However, the scholars’ general position facing subnational social rights is relatively ambiguous (A). In the same way, subnational judges are most of the time reticent towards their implementation (B).

### **A. The Scholars’ Ambiguous Position Facing Subnational Social Rights**

The German and Swiss federal systems are of the integrative type. It means that they result from previously independent entities coming together. Some German and Swiss subnational Constitutions were influenced by the prior subnational Constitutions and by the draft of the Federal Constitution. Some of them are in parts modeled on other subnational Constitutions. Nevertheless, the similarities should not be overestimated. Each subnational Constitution contains some particularities and shows an individual character, especially in the field of fundamental rights. This reflects the fact that subnational entities have been able to develop and to maintain their own identity. Despite their differences, these Constitutions, at least the recent ones, can all be considered as complete Constitutions (*Vollverfassungen*). Indeed, those texts do not merely establish the subnational authorities, define their competences, and organize the legislative process. They also limit power, especially by guaranteeing fundamental rights, and they address the most important duties as well as the tasks of the respective subnational entities – for example, in the fields of education, public health, or protection of the environment.

The content of subnational social rights often goes beyond the federal level of fundamental rights (1). Nevertheless, their scope has to deal with the federal structure in which they are hugged tightly (2).

#### **1. The content of subnational social rights**

In spite of the supremacy clause, state supreme courts can deduce from their Constitutions some individual rights that do not exist at the federal level or they can interpret state constitutional rights more “liberally” than their federal counterparts, insofar as such an interpretation would not contradict any right secured at the federal level. Yet, many German *Länder* and Swiss *cantons* have decided to guarantee positive rights, which imply an “affirmative duty” for the state governments.

*Germany.* In Germany, some *Länder* Constitutions guarantee a right to education,<sup>100</sup> a right to work,<sup>101</sup> a right to a shelter<sup>102</sup> or a right to culture.<sup>103</sup> Moreover, three of the *Länder* – Bavaria, Brandenburg and

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<sup>100</sup> Art. 27 § 1 C. Brema; Art. 8 § 1 C. North Rhine-Westphalia; Art. 11 § 1 C. Baden-Württemberg; Art. 102 § 1-1 C. Saxony; Art. 29 § 1 C. Brandenburg; Art. 4 § 1 C. Lower Saxony; Art. 20 § 1 C. Berlin.

<sup>101</sup> Art. 166 § 2 C. Bavaria; Art. 8 § 1 C. Brema; Art. 45-2. C. Sarland; Art. 24 § 1-3 C. North Rhine-Westphalia; Art. 7 § 1 C. Saxony; Art. 18 C. Berlin. See also Art. 37 § 1 C. Baden; Art. 48 C. Brandenburg; Art. 28 § 2 C. Hesse.

Saxony – include culture among the main social goals of the state in clauses such as: “Bavaria is a legal, cultural and *social state*” (*Article 3 § 1*). The former states of the German Democratic Republic, in particular, have adopted Constitutions that contain numerous social rights, from the right to housing and employment to the right of social security.<sup>104</sup>

*Switzerland.* In Switzerland,<sup>105</sup> the Constitutions of Jura, Basel Land, Solothurn, Aargau and Berne include rights that have no counterpart in the federal Constitution, such as the particular right to scholarships and student loans,<sup>106</sup> or two emblematic rights such as the right to shelter<sup>107</sup> and the right to work.<sup>108</sup> For example, the Article 29 of the Bernese Constitution provides that:

“Everyone has the right to shelter when in need, to the means required for a decent standard of living, and to basic medical care. Every child has the right to protection, welfare provision and care as well as to a school education that is commensurate with their abilities and free of charge. The victims of serious offences have the right to assistance in overcoming their difficulties.”

Cantonal constitutional provisions affording social rights have been considered to be in accordance with federal law in the context of the “validation” of cantonal Constitutions.<sup>109</sup> Nevertheless, it does not mean that they are enforceable and plainly justiciable. Actually, neither in Swiss law, nor in German law, is this characteristic admitted. Yet, there is an important difference between German and Swiss law. While these rights are not justiciable in Germany, this characteristic is admitted by the Federal Assembly - which is a political authority: cantonal constitutional provisions affording social rights have been considered as being in accordance with federal law in the context of the “validation” of cantonal Constitutions.<sup>110</sup>

Subnational Constitutions are relatively old. But, in general, they can be amended quite easily. Since their adoption, German and Swiss subnational Constitutions have been repeatedly amended in parts. Thus, they can be “updated” to incorporate changes in preferences for social rights. Nevertheless, their scope is somehow complex.

## 2. The scope of subnational social rights

All the recent subnational Constitutions include a chapter in which the usual fundamental rights are guaranteed. Because the new federal Constitution, adopted in 1999, lists a comprehensive catalogue of fundamental rights, these cantonal “bills of rights” are generally of limited practical importance.

(Contd.) \_\_\_\_\_

<sup>102</sup> Art. 106 § 1 C. Bavaria; Art. 47 C. Brandenburg; Art. 14 § 1 C. Brema; Art. 7 § 1 C. Saxony.

<sup>103</sup> Art. 11 § 1 C. Baden-Württemberg; Art. 128 C. Bavaria; Art. 29 C. Brandenburg; Art. 27 § 1 C. Brema; Art. 8 C. North Rhine-Westphalia; Art. 7 § 1 C. Saxony; Art. 20 C. Thuringia.

<sup>104</sup> See A. B. GUNLICKS, “Land Constitutions in Germany”, *Publius: The Journal of Federalism*, 1998, at 121.

<sup>105</sup> See A. FILLI, *op. cit.*, pp. 190-205; M. KURER, *op. cit.*, pp. 100-117; P. SALADIN, M. AUBERT, “Constitution sociale”, in: W. KÄLIN, U. BOLZ (eds.), *Manuel de droit constitutionnel bernois*, Berne, 1995, pp. 95-104.

<sup>106</sup> Art. 10 § C. St-Gall.

<sup>107</sup> Art. 10A C. Geneva; Art. 22 § 1 C. Jura.

<sup>108</sup> Art. 19 C. Jura ; Art. 29 C. Berne.

<sup>109</sup> The cantonal Constitutions must be guaranteed by the Confederation. This guarantee is given by the Federal Parliament, or Federal Assembly (*Bundesversammlung*), if the reviewed Constitution is not contrary to any federal law (Article 49 and Article 51 Federal Constitution). See FF, 1977, II, at 259 (about Art. 18 to 23 C. Jura); FF, 1992, V, pp. 1157, 1168-1169 (about Art. 10 A C. Geneva); FF, 1994, I, at 401 (about Art. 29 C. Berne); FF, 1996, I, at 965 (about Art. 24 C. Aargau).

<sup>110</sup> Cf. FF, 1977, II, at 259 (about Art. 18 to 23 C. Jura); FF, 1992, V, p. 1157, at 1168-1169 (about Art. 10 A C. Geneva); FF, 1994, I, at 401 (about Art. 29 C. Berne); FF, 1996, I, at 965 (about Art. 24 C. Aargau).

Subnational constitutional rights are largely considered as useless, or “silent,”<sup>111</sup> by citizens and legal doctrine, which consider them as “less prestigious” than the federal sources of rights. Consequently, relations between state and federal constitutional rights are often ignored because federal rights are only considered from the perspective of their influence on the state rights. However, some cantonal fundamental rights go beyond the federal standard.

Theoretically, subnational units are perfectly entitled to extend the guarantees contained in federal Constitutions. Despite a minority of legal thought that considers that the federal Constitution is a “maximal guarantee,”<sup>112</sup> in general – whatever the country – if a state Constitution contains a broader protection, it must be applied. A state may see its constitutional protection of rights as independent, separate, and distinct from; or greater or lesser than the protections contained in the federal Constitution. They can broaden the material or personal scope of state constitutional rights protection, or limit the restrictions that can impose on these rights to stricter conditions. Indeed, many state individual rights offer a protection that differs from federal guarantees.

The existence of a federal structure permits the juxtaposition – or superposition – of two levels of constitutional instruments protecting individual rights. Nevertheless, this does not prejudice the existence of appropriate mechanisms of protection, which are able to allow an “autonomous” scope of rights protection. Contrary to the diversity in the sources noted, we notice a certain uniformity in their application. More precisely, the specific category of rights faces two main difficulties. First, their impact is entirely determined by the “*space of liberty*” left by federal law. Although they are said to be virtually unenforceable since the Federal Government has assumed almost total responsibility for social matters, this assertion is not always correct. Secondly, be that as it may, another difficulty is due to the fact that state provisions concerning individual rights have to be *in accordance with* federal – constitutional and statutory – law in order to be effectively applied. In fact, subnational individual rights that are likely to be more effective intervene in the domains in which states have exclusive competence. In these fields, any federal statute is likely to contradict state provisions, simply because there is theoretically none: only provisions of the federal Constitution can limit their impact.

Some scholars underline the role of subnational constitutions, and more generally subnational areas, as useful instruments in order to support the justiciability of social rights.<sup>113</sup>

Nevertheless, scholars and judges also generally express serious doubts facing the justiciability of such provisions. Such a reluctant position can be explained by the fact that social rights are listed as “state goals” without a justiciable individual right. The Saxony Constitution, for example, clearly states that social rights cannot serve as the basis of a citizen’s complaint in state constitutional court. Moreover, some *Land* Constitutions qualify welfare provisions with the statement that the obligation of government only extends as far as its ability to provide support.

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<sup>111</sup> See K. EICHENBERGER, “Die Verfassungsgerichtsbarkeit in den Gliedstaaten der Schweiz”, in: C. STARCK, K. STERN, *Landesverfassungsgerichtsbarkeit*, Studien und Materialien zur Verfassungsgerichtsbarkeit, vol. 25, Baden-Baden, Nomos, 1983, pp. 435-460.

<sup>112</sup> See, for example, in Germany, S. JUTZI, “Grundrechte der Landesverfassungen und Ausführung von Bundesrecht”, *DÖV*, 1983, pp. 836-841.

<sup>113</sup> See for Switzerland A. AUER, “Les constitutions cantonales: une source négligée du droit constitutionnel suisse”, *ZBl*, 1990, n° 91, p. 14-25; and for Germany J. DIETLEIN, *Die Grundrechte in den Verfassungen der neuen Bundesländer – zugleich ein Beitrag zur Auslegung der Art. 31 und 142 GG*, München, Vahlen, Studien zum öffentlichen Recht und zur Verwaltungslehre, vol. 54, 1993; A. BRENNE, *Soziale Grundrechte in den Landesverfassungen, Reihe: Verfassungs- und Verwaltungsrecht unter dem Grundgesetz*, Lang, Peter Frankfurt, 2003, vol. 30.

## **B. The Difficult Implementation of Subnational Social Rights**

The diversity related to subnational constitutional rights only exists in the field of the exclusive competences of federal units (1). Moreover, the treatment of “positive” subnational rights by federal law is ambiguous (2).

### 1. A diversity that only exists in the field of the exclusive competences of federal units

This specific category of rights faces a main difficulty: their impact is entirely determined by the “space of liberty” left by federal law.

The impact of state constitutional rights is not only limited by the supremacy of federal law; it is also restricted by the fact that constitutional protection of rights often has centralizing and unifying effects. Consequently, another difficulty is due to the fact that state provisions concerning individual rights have to be *in accordance with* federal – constitutional and statutory – law in order to be effectively applied. In fact, subnational individual rights that are likely to be more effective intervene in the domains in which states have exclusive competence. In these fields, any federal statute is likely to contradict state provisions, simply because there is theoretically none: only provisions of the federal Constitution can limit their impact.

The attribution of competences between federal and state levels differs in the three countries. In Germany, the *Länder* have an “exclusive competence” in the fields of education and school, religion and culture – fields that are strongly associated with their cultural “sovereignty” or “autonomy” (*Kulturhoheit*). On the other hand, work, social welfare and economy are competences of the federal level. Consequently, in these areas, social rights contained in the subnational Constitutions are able to be implemented by the subnational constitutional courts. For example, in an important decision of 1983, the constitutional court of Saarland<sup>114</sup> considered that the right to attain school establishments was a “fundamental right:” unlike the Basic Law, the Constitution of the Land guarantees this right directly (*unmittelbar*). The “positive nature” of this right ensues directly from its formulation; it does not need to be deduced from a “liberal and negative” fundamental rights.<sup>115</sup> Moreover, the court specifies that this right concerns “every human people” and not only German people, like it is stated in Article 12 BL. This difference reflects the “political culture” of the Land.<sup>116</sup>

Subnational constitutional judges seem generally reluctant to enforce social rights. However, this question has arisen recently, concerning the fees imposed to the students in the universities. In the Land of Hesse, the parliament decided, in 2006, to reintroduce such fees for the year 2007/2008.<sup>117</sup> Yet Article 59 of the Land Constitution asserts that “in every public schools, education should be free”; while admitting the possibility of “adapted fees” (“*angemessenen Schulgeldes*”), from the moment that “the financial situation of the student” permits it. In this context, the constitutional judges gave their opinion in June 2008, and decided that the establishment of such fees is not contrary to the constitution, because it does not contribute to exclude some of the students from the school system, and because the Land has established facilities in order that students can subscribe easily to different loans.

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<sup>114</sup> SaarlVerfGH, 2.5.1983 – Lv 2-4/82, *NJW*, 1983, n° 10, 604 s.

<sup>115</sup> “[...] der teilhaberechtliche Charakter des Grundrechtes wird bereits aus der Formulierung deutlich und braucht nicht erst, wie dies für den entsprechenden Grundgesetzartikel erforderlich war (BVerfGE 33, p. 303, *NJW*, 1972, at 1561), aus einem liberalen Freiheitsrecht unter Heranziehung des Gleichheitsgrundsatzes und des Sozialstaatsprinzips hergeleitet zu werden” (*NVwZ*, at 605).

<sup>116</sup> *Ibid.*, pp. 605-606.

<sup>117</sup> Gesetz zur Einführung von Studienbeiträgen an den Hochschulen des Landes und zur Änderung weiterer Vorschriften (GVBl., I, pp. 512-517).



However, when plaintiffs occasionally raise subnational constitutional claims under social welfare provisions, subnational courts almost uniformly defer to the legislature to determine the substance of these rights, or to the interpretation already developed by the federal Constitutional Court from analogous provisions.

## 2. The ambiguous treatment of “positive” subnational rights by federal law

First, the German *Länder* and Swiss *Cantons* depend on the federal government from a financial point of view. Indeed, they have few independent resources to spend on their own programs. Although subnational entities have primary responsibility for implementing social programs, partial federal funding for these programs also decreases their financial independence.

Moreover, despite the precedence of federal laws over that of the *Länder*,<sup>118</sup> in Germany, those basic rights also contained in the *Länder* Constitutions remain in force so far as they accord with Articles 1-18 BL.<sup>119</sup> In Switzerland, most competences are “concurrent,” that is *Cantons* are competent as long as the confederation does not legislate. But, *in fine*, any of the social welfare provisions in the *Land* Constitutions relate to areas such as employment and social security, which are preempted by federal law. Nevertheless, in spite of the fact that there are virtually no longer any areas in which the subnational entities have exclusive competence, subnational constitutional rights, and especially subnational social rights, still have great actual relevance: they can influence the jurisprudence of the cantonal constitutional jurisdictions and of the Federal Tribunal. Furthermore, they are all part of the national “constitutional identity.”

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Even if social rights have certain weaknesses in both countries, they have one important advantage: they can profit from the existence of a federal structure. Indeed, some protections afforded in the subnational units can set an example for the federal level. If subnational courts are to take the enforcement of social rights seriously, they could become the primary arena for contesting the extent and nature of social provisions.

If social rights are rarely applied by state courts, “hesitant” with regard to such generous rights guarantees, state judges sometimes make use of these rights. Indeed, they are more inclined than federal judges to implement these rights. This is to take into account, even if most of the time, judges consider them more to be a “source of inspiration” to influence the implementation of equal protection clauses. A general characteristic of positive rights is that they reflect the “constitutional identity” (*Verfassungsidetität*) of subnational units,<sup>120</sup> even if they “often promise more than they are able to provide.”<sup>121</sup> Constitutional social rights embedded have to be truly enforceable, otherwise they may become meaningless provisions in Constitutions, and undermine constitutional legitimacy. Yet, this depends on the interplay among constitutional provisions, the courts, and the legislatures within the German and Swiss federal states.

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<sup>118</sup> Art. 31 BL indicates that “federal law break state law” (“*Bundesrecht bricht Landesrecht*”).

<sup>119</sup> See Article 142 BL.

<sup>120</sup> Especially in Germany, this question has been raised by numerous authors. See W. GRAF VITZTHUM, “Auf der Suche nach einer sozio-ökonomischen Identität? - Staatszielbestimmungen und soziale Grundrechte in Verfassungsentwürfen der neuen Bundesländer”, *Verwaltungsblätter für Baden-Württemberg*, 1991, vol. 11, pp. 404-414; R. WAHL, “Grundrechte und Staatszielbestimmungen im Bundesstaat”, *AöR*, 1987, vol. 112, pp. 45 s.; D. GRIMM, “Verfassungsfunktion und Grundgesetzreform”, *AöR*, 1972, vol. 92, pp. 494 s.

<sup>121</sup> See V. MARTENET, *L'autonomie constitutionnelle des cantons*, Bâle, Genève, Helbing et Lichtenhahn, Faculté de droit, 1999, at 431.

## **Bibliography**

### I. First Part

#### A. German Law

##### 1. In German

- ALEXY Robert, *Theorie der Grundrechte*, Frankfurt a.M. 1986
- ALEXY Robert, “Grundrechte als subjektive Rechte und als objektive Normen”, *Der Staat*, 1990, vol. 29, pp. 49-68
- ARNDT Claus, “Soziale 'Grundrechte' als Staatsziele in einer künftigen deutschen Verfassung”, *RuP*, 1990, pp. 69 s.
- BADURA Peter, “Das Prinzip der sozialen Grundrechte und seine Verwirklichung im Recht der Bundesrepublik Deutschland”, *Der Staat*, 1975, vol. 14, pp. 17-48
- BADURA Peter, “Der Sozialstaat », *DöV*, 1989, pp. 491 s.
- BIEBACK Karl-Jürgen, “Sozialstaatsprinzip und Grundrechte”, *EuGRZ*, vol. 12, pp. 657 s.
- BIEBACK Karl-Jürgen, “Inhalt und Funktion des Sozialstaatsprinzips », *Jura*, 1987, pp. 229 s.
- BROHM Winfried, “Soziale Grundrechte und Staatszielbestimmungen in der Verfassung”, *JZ*, 1994, n° 5, pp. 213-220
- CRANSTON Maurice, “Kann es soziale und wirtschaftliche Menschenrechte geben?”, in: E.-W. BÖCKENFÖRDE, R. SPAEMANN (eds.), *Menschenrechte und Menschenwürde*, Stuttgart, Klett-Cotta, 1987, pp. 224-237
- DÖRFLER Reinhard, *Die Vereinbarkeit sozialer Grundrechte mit dem Grundgesetz der Bundesrepublik Deutschland*, PhD, Erlangen-Nürnberg, 1978
- FREIHERR VON CAMPENHAUSEN Axel, “Verfassungsgarantie und sozialer Wandel – Das Beispiel von Ehe und Familie”, *VVDStRL*, 1987, vol. 45, pp. 7 s.
- GEESMANN Rainer, *Soziale Grundrechte im deutschen und französischen Verfassungsrecht und in der Charta der Grundrechte der Europäischen Union. Eine rechtsvergleichende Untersuchung zu den Wirkdimensionen sozialer Grundrechte*, 1<sup>st</sup> ed., Peter Lang, Frankfurt, 2005
- GRIMM Dieter, “The protective function of the state”, in: G. NOLTE, *European and US constitutionalism*, Cambridge University Press, 2005, pp. 137-155
- HÄBERLE Peter, “Grundrechte im Leistungsstaat”, *VVDStRL*, 1972, vol. 30, pp. 1-43
- HEINIG Hans Mickael, *Der Sozialstaat im Dienst der Freiheit: Zur Formel vom “sozialen” Staat in Art. 20 Abs. 1 GG*, Mohr Siebeck, 2008
- ISENSEE Josef, “Verfassung ohne soziale Grundrechte. Ein Wesenszug des Grundgesetzes”, *Der Staat*, 1980, vol. 19, pp. 367 s.
- KLEINHEYER, *Grundrechte – Zur Geschichte eines Begriffs*, 1977
- KRAUSE Peter, “Die Entwicklung der sozialen Grundrechte”, in: F. BIRTSCH (ed.), *Grund- und Freiheitsrechte im Wandel von Gesellschaft und Geschichte*, Göttingen, Vandenhoeck & Ruprecht, 1981
- LEIBHOLZ G., “Die Problematik der sozialen Grundrechte”, in: *Strukturprobleme der modernen Demokratie*, 3<sup>rd</sup> éd., 1967, pp. 130 s.

- LOHMANN Georg, “Die unterschiedlichen Menschenrechte”, in: F. K. PETE, G. LOHMANN (ed.), *Menschenrechte zwischen Anspruch und Wirklichkeit*, Würzburg, Ergon, 2000
- LOHMANN Georg, “Soziale Menschenrechte und die Grenzen des Sozialstaats”, in: KERSTING W. (ed.), *Politische Philosophie des Sozialstaats*, Weilerwist, Velbrück, 2000, pp. 351-371
- LUEBBE-WOLFF Gertrude, “Justiziabilität sozialer Grundrechte und Verfassungsaufträge”, *JöR*, 2005, vol. 53, pp. 1-25
- LÜCKE J., “Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsaufträge”, *AöR*, 1982, vol. 107, pp. 31 s.
- MARTENS W., “Grundrechte im Leistungsstaat”, *VVDStRL*, 1972, vol. 30, pp. 12 s.
- MÜLLER Friedrich, *Die Positivität der Grundrechte*, Berlin, 1969
- MURSWIEK Dietrich, “Grundrechte als Teilhaberechte, soziale Grundrechte”, in: J. ISENSEE, P. Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Band V: Allgemeine Grundrechtslehre, Heidelberg, C. F. Müller, 1992, § 112
- REUTER Dieter, “Überlegungen zur Kodifikation von Grundrechten auf Bildung”, in: E.-W. BÖCKENFÖRDE, J. JEKEWITZ, T. RAMM (eds.), *Soziale Grundrechte. Von der Bürgerlichen zur sozialen Rechtsordnung*, Heidelberg, 1981, pp. 119 s.
- SCHNEIDER Jakob, *Die Justiziabilität wirtschaftlicher, sozialer und kultureller Menschenrechte*, Berlin, Deutsches Institut für Menschenrechte, 2004
- STERZEL Dieter, “Staatsziele und soziale Grundrechte, Zur Steuerungsfunktion eines Staatszieles Umweltschutz und sozialer Grundrechte”, *ZRP*, 1993, pp. 13 s.
- TOMANDL Thomas, *Der Einbau sozialer Rechte in das positive Recht*, Tübingen 1967

## 2. In french

- AUTEXIER Christian, *Introduction au droit public allemand*, Paris, PUF, Collection Droit Fondamental, 1997
- BÖCKENFÖRDE Ernst-Wolfgang, *Le droit, l'Etat et la Constitution démocratique*, Paris, LGDJ, 2000, p. 270 s.
- CAPITANT David, *Les effets juridiques des droits fondamentaux en Allemagne*, Paris, LGDJ
- DURLACH Emilie, “Le droit à l’emploi à la lumière des theories allemandes des droits fondamentaux”, in: A. LYON-CAEN, P. LOKIEC (dir.), *Droits fondamentaux et droit social*, Dalloz, 2005, pp. 117 s.
- FROMONT Michel, RIEG A., *Introduction au droit allemand (République Fédérale)*, Tome I (Les fondements), Paris, 1977, Tome II (Droit public – Droit Pénal), Paris, 1984, p. 26 : “Les droits fondamentaux” (p. 24 à 35)
- JOUANJAN Olivier, *Le principe d’égalité devant la loi en droit allemand*, Paris, Economica, Collection droit public positif, 1992
- JOUANJAN Olivier, “La théorie allemande des droits fondamentaux”, *AJDA*, 1998, pp. 44 s.
- MEINDL Thomas, “Le fondement et l’effectivité des droits de l’homme en France et en Allemagne”, in: *Les droits de l’homme et le suffrage universel, 1848-1948-1998*, Actes du colloque de Grenoble, Avril 1998, textes réunis et présentés par G. CHIANEA et J.-L. CHABOT, Paris, L’Harmattan, 2000, pp. 367 s.

- MEINDL Thomas, *La notion de droit fondamental dans les jurisprudences et doctrines constitutionnelles française et allemande*, LGDJ, 2003, vol. 112
- ROUBIER P., “Délimitation et intérêts pratiques de la notion de droit subjectif”, *Archives de philosophie du droit*, Tome IX: *Le droit subjectif en question*, Sirey, 1964, pp. 83 s.
- RUPP H., “Objet et portée de la protection des droits fondamentaux, tribunal constitutionnel allemand”, in: L. FAVOREU (dir.), *Cours constitutionnelles européennes et droits fondamentaux*, PUAM, 1987, 241 s.
- STARCK Christian, “La jurisprudence de la Cour constitutionnelle fédérale concernant les droits fondamentaux”, *RDP*, 1988, pp. 1263 s.
- WEBER A., “L’Etat social et les droits sociaux en RFA”, *RFDC*, 1995, pp. 677 s.

### 3. In english

- ALEXY Robert, *A theory of constitutional rights*, translated by Julian RIVERS, Oxford, Oxford University Press, 2002
- DUNKAN Kelly, “Revisiting the Rights of Man: Georg Jellinek on Rights and the State”, *Law and History Review*, 2004, vol. 22, n° 3, pp. 493-530<sup>122</sup>

### B. Swiss law

#### 1. In German

- AMSTUTZ K., *Das Grundrecht auf Existenzsicherung*, Berne, 2002
- BENZ Christian, *Die Kodifikation der Sozialrechte*, Zürich, 1973
- EGGENBERGER Margrith, “Nachgeführte Verfassung: Sozialziele und Sozialrechte”, in: *Festschrift für Yvo HANGARTNER*, St-Gall, 1998, pp. 497-521
- GYSIN C., *Der Schutz des Existenzminimums in der Schweiz*, Bâle, 1999
- HARTMANN K., “Vom Recht auf Existenzsicherung zur Nothilfe – Eine Chronologie”, *ZBl.*, 2005, pp. 410-423
- KIESER Ueli, “Gewährleistet die Bundesverfassung ein ungeschriebenes Recht auf Sozialhilfe?”, *ZBl.*, 1991, vol. 92, pp. 189 s.
- KLEY-STRULLER Andreas, “Anerkennung eines selbständigen Rechts auf Existenzsicherung als neues ungeschriebenes Recht der Bundesverfassung”, *PJA*, 1996, pp. 756-759
- KÜNZLI Jörg, “Soziale Menschenrechte: blosse Gesetzgebungsaufträge oder individuelle Rechtsansprüche?”, *PJA*, 1996, pp. 527-540
- MALINVERNI Giorgio, “Die Sozialrechte in der Schweiz”, in: MATSCHER Franz (ed.), *Erweitertes Grundrechtsverständnis – Internationale Rechtsprechung und nationale Entwicklungen – EGMR, EuGH, Österreich, Deutschland, Schweiz*, Kehl, 2003, pp. 289-314
- MÜLLER Jörg-Paul, SCHEFER Markus, *Grundrechte in der Schweiz : im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte*, 4st ed., Bern, Stämpfli, 2008
- TSCHUDI Hans Peter, “Die Sozialziele der neuen Bundesverfassung”, *Revue suisse d’assurances sociales*, 1999, pp. 364-375

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<sup>122</sup> [disponible sur internet : <http://www.historycooperative.org/cgi-bin/printpage.cgi>].

ÜBERSAX Peter, "Stand und Entwicklung der Sozialverfassung der Schweiz", AJP, 1998, pp. 3 s.

WALDMANN Bernhard, "Soziale Grundrechte und soziale Zielsetzungen", in : MERTEN, PAPIER (ed.) und Müller J.P./Thürer (Koord.), Handbuch der Grundrechte, Band VII/2, Grundrechte in der Schweiz und in Liechtenstein, Heidelberg/Zürich/St. Gallen, § 224

WILDHABER Luzius, "Soziale Grundrechte", in: P. SALADIN and L. WILDHABER (eds.), Der Staat als Aufgabe, Gedenkschrift für Max IMBODEN, Basle and Stuttgart, 1972, pp. 390 s.

## 2. In french

AUBERT Jean-François, "Un droit social encadré", RDS, 1991, vol. I, pp. 156-167

AUER Andreas, MALINVERNI Giorgio, HOTTELIER Michel, Droit constitutionnel suisse, Vol. II: Les droits fondamentaux, 2<sup>nd</sup> ed., 2006, 669-722

AUER Andreas, "Le droit à des conditions minimales d'existence: un nouveau droit social?", in: Mélanges Charles-André JUNOD, Genève, 1997, pp. 27-48

BORGHI Marco, "De nouveaux indicateurs d'effectivité pour les droits sociaux", in: Mélanges Thomas FLEINER, Fribourg, 2003, pp. 277-292

BÜRGENMEIER Beat, "Justice sociale par l'efficacité économique ?", in: Les droits de l'homme et la constitution. Etudes en l'honneur du Professeur Giorgio Malinverni, Genève, Schulthess, 2007, pp. 423-441

GRISEL Etienne, "Les droits sociaux", RDS, 1973, vol. II, pp. 1-153

HOTTELIER Michel, "Les regimes cantonaux d'allocations familiales; aspects constitutionnels", Cahiers genevois et romands de sécurité sociale, 2002, n° 29, pp. 43-67

HOTTELIER Michel, "La Constitution fédérale suisse et les droits sociaux", Cahiers genevois et romands de sécurité sociale, 2001, n° 27, pp. 9-30

MAHON Pascal, "Droits sociaux et réforme de la Constitution", in: Mélanges Jean-François AUBERT, Bâle, 1996, pp. 385-403

MALINVERNI Giorgio, "L'interprétation jurisprudentielle du droit d'obtenir de l'aide dans des situations de détresse", in: Mélanges Luzius WILDHABER, pp. 427-436

ROSSINELLI Michel, Les libertés non écrites, Thèse, Genève, 1987

## C. Comparative law

MATSCHER Franz (ed.), La mise en oeuvre des droits économiques et sociaux; aspects nationaux, internationaux et droit comparé, Kehl am Rein, 1991

## II. Second Part

BRENNE Anke, Soziale Grundrechte in den Landesverfassungen, Reihe: Verfassungs- und Verwaltungsrecht unter dem Grundgesetz, Lang, Peter Frankfurt, 2003, vol. 30

RIEPE Hilmar, Soziale Grundrechte in den Verfassungen der Länder Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt und Thüringen - ein Beitrag zur Verfassungsentstehung in den neuen Bundesländern, Reihe Hamburger Studien zum Kulturverfassungs- und -verwaltungsrecht, vol. 6, 1996

- DIETLEIN Johannes, Die Grundrechte in den Verfassungen der neuen Bundesländer – zugleich ein Beitrag zur Auslegung der Art. 31 und 142 GG, München, 1993
- FISCHER Peter Christian, Staatszielbestimmungen in den Verfassungen und Verfassungsentwürfen der neuen Bundesländer, Verlag V. Florentz, Rechtswissenschaftliche Forschung und Entwicklung, München, 1994
- KUTSCHA Martin, “Soziale Grundrechte und Staatszielbestimmungen in den neuen Landesverfassungen – Nostalgische Wunschformen oder justitiabiles Orientierungsprogramm?”, ZRP, 1993, 339-344
- MACKE Peter (ed.), Verfassung und Verfassungsgerichtsbarkeit auf Landesebene, 1998
- STARCK Christian, STERN Klaus, BACHOF Otto, GECK Wilhelm Karl, SCHMIDT Johann, Landesverfassungsgerichtsbarkeit, Bände I-III, 1983
- Band I : Geschichte, Organisation, Rechtsvergleichung
  - Band II : Zuständigkeiten und Verfahren der Landesverfassungsgerichte
  - Band III : Verfassungsauslegung
- ISENSEE Josef, “Fortgeltung des saarländischen Sozialisierungs-Artikels unter dem Grundgesetz – Eine bundesstaatliche Normenkollision”, DöV, 1978, n° 7, pp. 233-238
- VITZTHUM Wolfgang Graf, “Auf der Suche nach einer sozio-ökonomischen Identität? - Staatszielbestimmungen und soziale Grundrechte in Verfassungsentwürfen der neuen Bundesländer-“, VBl.BW, 1991, n° 11, pp. 404-414
- VITZTHUM Wolfgang Graf, “Soziale Grundrechte und Staatszielbestimmungen morgen – Landesverfassungsgebung und Grundgesetzreform”, ZfA, 1991, 695-711
- WERMECKES B., Der erweiterte Grundrechtsschutz in den Landesverfassungen. Zu Erscheinungsformen, Wirksamkeit und Bestand weitergehender Landes-grundrechte im Bundesstaat des Grundgesetzes, Düsseldorf Rechtswissenschaftliche Schriften, Band 13, Nomos Verlagsgesellschaft, Baden-Baden, 2000

## **Appendix**

Swiss Constitution<sup>123</sup>

Title 1 : General Provisions

Article 2 [Purpose]

- (1) The Swiss Federation protects the liberty and rights of the people and safeguards the independence and security of the country.
- (2) It promotes common welfare, sustainable development, inner cohesion, and cultural diversity of the country.
- (3) It ensures the highest possible degree of equal opportunities for all citizens.
- (4) It strives to safeguard the long-term preservation of natural resources and to promote a just and peaceful international order.

Title 2 : Basic, Civil, and Social Rights

Chapter 1 : Basic Rights

Article 11 [Protection of Children and Adolescents]

- (1) Children and adolescents have the right to special protection of the personal integrity and to promotion of their development.
- (2) They exercise their rights according to their capacity to discern.

Article 12 [Right to Aid in Distress]

Whoever is in distress without the ability to take care of him- or herself has the right to help and assistance and to the means indispensable for a life led in human dignity.

Article 19 [Right to Primary Education]

The right to sufficient and free primary education is guaranteed.

Chapter 3 : Social Goals

Article 41 [General Provisions]

- (1) The Federation and the Cantons, in addition to personal responsibility and private initiative, furthers the achievement that
  - a) every person shares in social security;
  - b) every person, for his or her health, receives the necessary care;
  - c) families as communities of adults and children are protected and supported;
  - d) workers can sustain their living through work under adequate conditions;
  - e) people looking for housing can find for themselves and for their family adequate housing at acceptable conditions;
  - f) children and youths as well as people of working age can further their education and training according to their abilities;
  - g) children and youths are encouraged in their development to become independent and socially responsible persons and are supported in their social, cultural, and political integration.
- (2) The Federation and the Cantons are working towards the goal that every person is insured against the economic consequences of old age, disability, illness, accidents, unemployment, maternity, orphanhood, and widowhood.

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<sup>123</sup> Translation : [http://www.servat.unibe.ch/icl/sz00000\\_.html](http://www.servat.unibe.ch/icl/sz00000_.html).

(3) They try to achieve the social goals within their constitutional competencies and with the resources available to them.

(4) From social goals no direct claims to state subsidies may be derived.

#### Basic Law<sup>124</sup>

##### Article 1 [Human dignity]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

##### Article 3 [Equality before the law]

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.

##### Article 6 [Marriage and the family; children born outside of marriage]

(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

##### Article 7 [School education]

(1) The entire school system shall be under the supervision of the state.

(2) Parents and guardians shall have the right to decide whether children shall receive religious instruction.

(3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned.

Teachers may not be obliged against their will to give religious instruction.

(4) The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the State and shall be subject to the laws of the Länder. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.

(5) A private elementary school shall be approved only if the educational authority finds that it serves a special pedagogical interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality.

(6) Preparatory schools shall remain abolished.

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<sup>124</sup> Translation issued from the Comparative Law Society's website [<http://www.iuscomp.org/gla/statutes/GG.htm>].



Article 20 [Basic institutional principles; defense of the constitutional order]

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
- (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
- (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.



# Social Rights in the UK at the Beginning of the 21st Century

William Baugniet

## Abstract

This article provides a critical overview of social rights in the UK from a legal perspective. It aims to identify and comment on the general characteristics and the specificities of social rights in the British context. It starts by addressing the notion of social rights before setting out the relevant legal sources. At the substantive level, the article first explores labour law rights, which are specific to the workplace. The spotlight then turns to social rights in the welfare state (health, education and social protection).

## Defining the Notion of Social Rights in the UK

There is no legal definition of social rights under national law in the UK. The general challenge is to say what the notion includes and excludes. For T.H. Marshall, social rights “covered the whole range from the right to a modicum of economic welfare and security to the right to share in full in the social heritage and to live the life of a civilised being according to the standards prevailing in society”.<sup>1</sup> Marshall promoted a chronological paradigm based on three generations of rights: civil, political and social rights.<sup>2</sup> This categorisation has attracted much debate. Palmer criticises any ideological divide that would obscure the rights’ “unitary moral heritage”; she refers to a “moral and existential overlap and indivisibility of civil and political rights and socio- economic rights”.<sup>3</sup> De Búrca refers to “rights which concern economic and social well-being” and raises the issues of redistribution and social justice<sup>4</sup>; Fabre evokes “rights which individuals have against those in a position to help them”.<sup>5</sup> Her list includes rights to adequate income, education, housing, health-care and rights in the workplace. Langford’s comprehensive and transnational study of social rights focuses on their quality as human rights.<sup>6</sup> It seems there is no uniform concept of social rights in the UK, nor even internationally. Clearly, social rights are not a closed concept and need to evolve to meet the needs of society.

## The Sources of Social Rights in the UK

The United Kingdom has an unwritten constitution. Parliamentary sovereignty and the rule of law are the key principles that govern the functioning of British democracy. Social rights are first and foremost determined by the laws enacted by each parliament and the policies put in place by each government. Some argue that the British constitution does not enshrine social rights as such<sup>7</sup>. Others support the

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<sup>1</sup> T.H. MARSHALL, *Citizenship and Social Class*, London, Routledge (1959)

<sup>2</sup> For Marshall, civil rights were achieved in 18<sup>th</sup> century, political rights in 19<sup>th</sup> century and social rights in 20<sup>th</sup> century.

<sup>3</sup> E. PALMER, *Judicial Review, Social Economic Rights and the Human Rights Act*, Hart (2007) p. 2 & 13

<sup>4</sup> G. DE BURCA in G. DE BURCA and B. DE WITTE (Eds.), *Social Rights in Europe*, Oxford (2005) p.4

<sup>5</sup> C. FABRE in *Social Rights in Europe*, (*supra* note 4) p. 17

<sup>6</sup> See M. LANGFORD, “Asserting social rights in a Multi-layered system” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. Ed. M. LANGFORD, Cambridge (2009).

<sup>7</sup> In the opinion of C. Fabre “it does not specify social rights, the fulfilment of which is grounded in the importance of ensuring that a basic need is met”. See *Social Rights in Europe*, (*supra* note 4) p.18

view that “the advantage of not having a written constitutional document is that the constitutional arrangements are sufficiently flexible to enable them to accommodate the vicissitudes of life.”<sup>8</sup>

There is a transnational aspect to social rights. The UK is a member state of the European Union and the Council of Europe. These legal systems also provide a source of social rights.<sup>9</sup> Some rights penetrate the UK’s legal systems<sup>10</sup>, directly or indirectly.

EU law provides a source of directly effective social rights. Article 141 EC grants men and women a right to equal pay for work of equal value. There are European regulations that protect the social security rights of migrant workers, namely by ‘coordinating’ the social security systems of the member states, including the UK.<sup>11</sup> In addition, numerous directives affecting the rights of workers have been implemented into national law. However, the UK has a history of opting out of certain EU texts that contain social goals or enact social rights, which has led to divisions with its European partners.<sup>12</sup> A recent example in 2007 is the British (and Polish) opt-out concerning the EU Charter of Fundamental Rights.<sup>13</sup>

In 1966, the UK recognised the rights of its citizens to petition the Court in Strasbourg for violations of the European Convention of Human Rights (ECHR). The Human Rights Act 1998 (HRA) implemented the provisions of the ECHR. These rights are now enforceable before the British courts. One may argue that the HRA is now part of the British constitution<sup>14</sup> but there are still calls for a new constitutional settlement.<sup>15</sup>

Other sources of social rights have been less effective. The European Social Charter of 1961 has been influential politically but does not provide individuals with justiciable rights. The UK has accepted 60 of the 72 rights in the 1961 Charter, but it has not ratified the additional rights in the revised Charter of 1996.<sup>16</sup> This reflects the ‘pick and choose’ approach that often characterises international social law. The UK is also a signatory to the United Nations International Covenant on Economic, Social and Cultural Rights (1996) and around 80 conventions of the International Labour Organisation (ILO).

Discussing social rights entails identifying the recipients of rights (workers, citizens, residents and refugees), focusing on the providers of rights (employers and the state) and analysing relevant social obligations in their context. The obligation on employers to respect workers’ social rights will be analysed in Part I. Moreover, the obligation to comply with and promote social rights, which applies to governments and public bodies through their role in the welfare state, will be dealt with in Part II.

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<sup>8</sup> See C. BARNARD, *The Fundamentals of EU Law Revisited*, Oxford University Press (2007) p.11

<sup>9</sup> H. COLLINS, K. EWING and A. MCCOLGAN, *Labour Law, Text and Materials*, Hart (2005) p. 32

<sup>10</sup> There are three legal systems in the UK: Scotland, Northern Ireland, England & Wales.

<sup>11</sup> The current main coordination Regulation 1408/71 is to be replaced by Regulation 883/2004.

<sup>12</sup> The UK was the only member state that opted out of the Social Protocol to the Maastricht Treaty. The UK’s political concern was that its social content might conflict with British legal culture or hinder the competitiveness of the British economy. After its election in 1997, the Labour Government ended the opt-out. When the Treaty of Amsterdam came into force on 1 May 1999, it incorporated the Social Protocol.

<sup>13</sup> See the argument by Catherine Barnard that the UK opt-out is merely a clarification in C. BARNARD, *The Opt-Out for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?* in S. GRILLER & J. ZILLER, *The Lisbon Treaty. EU Constitutionalisation without a Constitutional Treaty?*, Springer, Wien, New York, (2008), p.257-283

<sup>14</sup> “The Human Rights Act is a unique piece of legislation. It does not set out to deal with any particular mischief or address specifically any discrete subject area within the law. It is a type of higher law affecting all other laws” see J.X. KELLY, *Overview of Human Rights in Further and Higher Education*, 18 March 2004 at <http://www.jisclegal.ac.uk/humanrights/humanrights.htm>

<sup>15</sup> In 2006, David Cameron argued in favour of “A Modern British Bill of Rights” and in 2007, Gordon Brown suggested the UK needs a Constitution that is “clear” about citizens’ “rights and responsibilities”.

<sup>16</sup> H. COLLINS, K. EWING and A. MCCOLGAN, *Labour Law*, (*supra* note 9) p. 35

## **I. Social Rights in the Workplace: The Realm of Labour Law**

According to Deakin and Morris, labour law is defined by its subject matter and by reference to intellectual tradition.<sup>17</sup> A narrow view of labour law concerns the rules governing the employment relationship. A broader perspective, describes a “normative framework for the existence and operation of all the institutions of the labour market.”<sup>18</sup> For presentational purposes, the following analysis distinguishes between social rights that fall within individual labour law by contrast with those stemming from collective labour law (on industrial relations) although most authors recognise both are connected.

### **A. Rights Deriving from Individual Labour Law**

#### The employment contract

The starting point for determining social rights in the employment relationship is the contract of employment, which in the UK is viewed as a contract for the hire of services. The central obligation is the exchange of work for wages. Common law respect for the freedom of contract has meant that the employers and employees have remained relatively free to determine the terms of their relation.<sup>19</sup> Historically, oral contracts were the norm until the middle of the 20<sup>th</sup> century. The courts developed default rules applicable to most working arrangements, using the technique of implied terms (e.g. the employees’ duty of loyalty and the employer’s duty of mutual trust and confidence).

#### Compulsory restrictions in the workplace

In labour law, one may distinguish between three types of regulation: “mandatory standards backed by a criminal process, civil law rights supported by individual claims for compensation, and collective self-regulation”.<sup>20</sup> National legislation ranges from general prohibitions (e.g. child labour) to specialised labour law rights and obligations, which try to redress the imbalance in power between employers and employees. For example, in 1971 the statutory claim for unfair dismissal was introduced to “provide mandatory standards to control the employer’s exercise of the discretionary power of dismissal” usually through the employee seeking compensation.<sup>21</sup>

#### Health and safety

Historically, health and safety issues have been governed by a combination of types of regulation. They have been the subject of mandatory standards with criminal sanctions attached for non-compliance ever since the 19<sup>th</sup> century. In 1974, the Health and Safety at Work Act set basic safety standards. The UK has also implemented several EU Directives on health and safety. Health and Safety Inspectors may prosecute employers for breaking the rules. The employer also has an implied obligation under the contract of employment to take reasonable care of the health and safety of his employees. Employees can bring a claim for compensation in tort law where there is a breach of the employer’s duty of care.

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<sup>17</sup> S. DEAKIN and G. MORRIS, *Labour Law*, Oxford, (2005), p.1

<sup>18</sup> S. DEAKIN and G. MORRIS (*supra* note 17) p. 1&2. In the 1950s, Kahn-Freund stressed the “functional interdependence of positive law with extra-legal sources of regulation, in particular collective bargaining.

<sup>19</sup> This has led to “great diversity in the types of contractual relations through which work is performed.” See COLLINS, EWING AND MCCOLGAN, (*supra* note 9) p. 70

<sup>20</sup> See COLLINS, EWING AND MCCOLGAN, (*supra* note 9) p. 15

<sup>21</sup> This right is now consolidated in the Employment Rights Act 1996.

### Anti-discrimination laws

The right not to suffer certain types of discrimination in the workplace is considered here as a social right (as well as being a human right with civil and political connotations).<sup>22</sup> The law often provides a greater level of protection against discrimination in employment than in other social relationships. As the workplace provides a specific forum for tackling discrimination of all kinds, thus UK anti-discrimination legislation is extensive.<sup>23</sup>

### Reconciling work with family life

The work/life balance is especially relevant to working women who still do the bulk of childcare. Current law on maternity/paternity leave has been criticised as inadequate.<sup>24</sup> The UK has introduced legislation on part-time work and the right to request flexible working but there is also a need for better quality, affordable and accessible childcare<sup>25</sup>.

### The regulation of working time

Workers need to have time off, for health and safety reasons and for improved quality of life. However, many workers in the UK still work excessive hours due to limitations in both UK and EU legislation.<sup>26</sup> The UK has used the opt-out from the 48 hour maximum per week that is in the Working Time Directive.<sup>27</sup> The Trades Union Congress (TUC) points to the “use and abuse of the opt-out”.<sup>28</sup> Moreover, a report by Barnard, Deakin and Hobbs refers to employees’ concern about “internal professional pressure” and “unspoken threats to job security”, reflecting the UK’s culture of long working hours.<sup>29</sup>

### Employee information, consultation and participation

Business transfers or restructuring, employer insolvency and collective redundancies tend to have adverse repercussions on employees. UK law, shaped by EU Directives, provides a relative degree of protection, e.g. in the event of employer insolvency.<sup>30</sup> However, there may be a mismatch between rights and reality concerning information and consultation in business transfers. In practice, there is often a gap between signing and completion of a transaction. Many employers only consult during that

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<sup>22</sup> For example, the prohibition of race discrimination applies not just in employment but also in education and housing, in the provision of goods, services and facilities and to the conduct of public authorities.

<sup>23</sup> It includes: the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003. UK law on sex and race discrimination have domestic origins but anti-discrimination law has also been influenced a lot by EU law. Age-discrimination became unlawful following the Employment Equality (Age) Regulations 2006.

<sup>24</sup> See H. WILKINSON and I. BRISCOE: *The Price of Family Values* (London, Demos, 1996)

<sup>25</sup> See H. COLLINS, K. EWING AND A. MCCOLGAN, (*supra* note 17) p.368

<sup>26</sup> The Working Time Regulations 1998 implement the Working Time Directive 93/104/EC (amended by Directive 2003/88/EC).

<sup>27</sup> The derogation in Article 18(1)(b)(i) of the Working Time Directive is used in Regulations 4 & 20 of the Working Time Regulations 1998

<sup>28</sup> TUC, Working Time Directive Review 2003: the use and abuse of the opt-out” in the UK

<sup>29</sup> ‘Opting out of the 48-hour week’, C. BARNARD, S. DEAKIN & R HOBBS, *Industrial Law Journal*, December 2003

<sup>30</sup> Employees’ claim to wages due in the 4 months prior to insolvency is treated as preferential debt (against unsecured creditors). Unpaid wages can be claimed from the National Insurance Fund in certain conditions.

period, once the deal has already been agreed, which is surely too late to have any genuine impact. The UK has been condemned in the past for unduly restricting the obligation to consult prior to a transfer.<sup>31</sup>

Historically, there has been little legislation in the UK for the participation of employees in the affairs of the workplace. The resistance by the British Government to the EU approach changed when the Labour party came into power. This resulted in the implementation of EU legislation for the information and consultation of employees.<sup>32</sup> The Employment Relations Act 1999 contains measures to develop partnership at work and requires employers to recognise trade unions where a majority of the staff want it.<sup>33</sup>

### The National Minimum Wage

The importance of a decent wage was mentioned by Sir Winston Churchill in the House of Commons in 1906. In 1909, Parliament regulated wages in low paid industries through the Trade Boards Act and passed a second Fair Wages Resolution that was followed by another resolution in 1946. Collective bargaining on wages took place through Wages Councils. The UK's Fair Wages Resolution<sup>34</sup> was abolished in 1983 by the Thatcher Government. In 1998 Tony Blair's Labour Government brought in the National Minimum Wage, hailed as helping over 2 million workers avoid 'poverty pay'. As at 1 October 2009, the current National Minimum Wage is £5.80 per hour.

Work is a key means for individuals to fulfil their potential and contribute towards social and economic progress. It is a way for wealth to be generated and (hopefully) shared. Respect for all social rights in the workplace is crucial.<sup>35</sup> The recent financial crisis has focused on the excesses of the current system of capitalism.<sup>36</sup> The crisis has highlighted the need for both national and global measures to protect the jobs of many workers whose livelihoods are at risk. Some of these measures need to be taken by the state while other measures should be taken through social dialogue and respect for collective labour law.

## ***B. Rights Deriving from Collective Labour Law***

### Collective bargaining

Collective bargaining in the UK has reduced with the decline of union representation. Collective agreements are presumed unenforceable unless the contrary is stated in the agreement<sup>37</sup> or the agreement is with a union recognised by the employer.<sup>38</sup> However, social dialogue remains an important feature of European labour law as emphasised by the late professor Bercusson.<sup>39</sup> One social

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<sup>31</sup> See *Commission v UK* C-382/92.

<sup>32</sup> The European Works Council Directive 94/95 was extended to the UK by Directive 97/74 and was implemented by the Transnational Information and Consultation of Employees Regulations 1999. Furthermore, Directive 2002/14/EC established a general framework for informing and consulting employees; it has been implemented by the Information and Consultation of Employees Regulations 2004.

<sup>33</sup> In its first term, one key focus of the Blair Government was on promoting a "stakeholder society".

<sup>34</sup> For an analysis, see the thesis by B. BERCUSSON. Fair Wages Resolution. Mansell (1978)

<sup>35</sup> Other social rights in the workplace, such as the right to sick pay, data protection and protection for 'whistle-blowing' have not been mentioned here due to lack of space although they are also important.

<sup>36</sup> The media has homed in not just on institutional inefficiencies but also on bonuses paid to bankers and businessmen with the severest condemnation targeting "rewards for failure".

<sup>37</sup> See s.179 of Trade Union and Labour Relations (Consolidation) Act 1992

<sup>38</sup> See Schedule 1 of the Employment Relations Act 1999.

<sup>39</sup> B. BERCUSSON. The Conceptualization of European Labour Law, *Industrial Law Journal*, March 1995.

goal is that the recognition of workers' rights at European level should filter back to the UK, preferably through binding instruments.

### Freedom of association

Workers have the right to join (or not to join) a trade union. The Human Rights Act 1998 and the freedom of association contained in Article 11 have already shaped collective labour law. In *Wilson and Palmer v UK* [2002] IRLR 568, the European Court of Human Rights found the UK in breach of the right of freedom of association under Article 11 on the basis that section 146(1) (a) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) allowed employers to use financial incentives to encourage employees to give up trade union rights. Another important case on the freedom of association was *Young, James and Webster v United Kingdom* [1981] IRLR 408<sup>40</sup> A significant case dealing with Article 11 HRA 1998 and strike action in UK is *Unison v UK* [2002] IRLR 497.<sup>41</sup>

### The right to strike

The law in the UK takes a “narrow view of legitimate strike action”<sup>42</sup> and does not recognise secondary action taken in solidarity with other workers from a separate undertaking, i.e. where the employer of the workers on strike is not part of the trade dispute. There is a contrast between legal rhetoric and reality given that the UK has signed (but may be in breach of) a number of human rights instruments which promote the right to strike. In 1996, the Court of Appeal in *London Underground v RMT* recognised that a fundamental right was at stake.<sup>43</sup> The key feature of the right to strike in the UK is its indispensable connection with trade unions and collective bargaining.<sup>44</sup>

Although the right to strike can be seen as a fundamental right, one might argue that in practice there is no ‘absolute’ right to strike in the UK but that certain levels of protection and immunity apply in prescribed situations. TULRCA provides employees with varying levels of protection against unfair dismissal (including certain cases of automatically unfair dismissal). It also offers statutory immunity for action that would otherwise attract common law liability (e.g. the tort of inducing breach of contract), providing that certain conditions (substantive and procedural) are met.<sup>45</sup>

The employer has several courses of action available to deal with industrial action. The most obvious is not to pay the employees for the time spent on strike. In limited circumstances, an employer may

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<sup>40</sup> The court held the requirement on the applicants to join one of the unions specified in a closed shop agreement between British Rail and the railway unions was a breach of Article 11 as there was no such requirement at the time they were engaged and if they did not join the union, they would lose their jobs.

<sup>41</sup> The case concerned an alleged breach of Article 11 where an injunction restrained a strike falling outside the definition of “trade dispute”. The European Court of Human Rights held a prohibition of a strike was a breach of Article 11(1) but dismissed the application on grounds that the restraint complied with Article 11(2) as it was a proportionate measure necessary in a democratic society to protect others (i.e. here the employer).

<sup>42</sup> See H. COLLINS, K. EWING AND A. MCCOLGAN, (*supra* note 17) p. 867: “the legal controls introduced since 1980 are so tight as to make it very difficult for industrial action to be taken within the limits of the law”.

<sup>43</sup> *London Underground v RMT* [1996] ICR 170 p.181

<sup>44</sup> “The right to strike is an essential element in the principle of collective bargaining.” per Lord Wright in *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 435. Union involvement in strike action is not just a logical relationship but is also in practice a legal requirement. Contrast with French law where the right to strike is an individual constitutional right exercised collectively but with no need for union involvement.

<sup>45</sup> These conditions are summarized as follows: (a) it must be in contemplation or furtherance of a trade dispute (the “golden formula”); (b) it must have the support of a ballot (complying with TULRCA ballot/voting procedures); (c) it must have been properly initiated (complying with TULRCA notice procedures); and (d) there must be no reason causing immunity to be lost (e.g. unlawful secondary action).



dismiss employees on strike, either selectively or not selectively. This depends on whether the industrial action is considered to be ‘official’ (i.e. authorised or endorsed by a trade union) or ‘unofficial’. Employers may also apply to the High Court for an injunction to prevent certain actions from continuing.<sup>46</sup>

On the right to strike in the UK and its relationship with EU law, one cannot fail to make a brief mention of the *Laval* and *Viking* cases.<sup>47</sup> The right to strike was declared a “fundamental right” by the ECJ but “the exercise of that right may none the less be subject to certain restrictions” and is to be protected “in accordance with Community law and national law and practices” which (as seen above) are restrictive in the UK. The fact that strike action may constitute an unlawful restriction on the internal market appears to have “chilled industrial action in the UK” as recently mentioned by Catherine Barnard.<sup>48</sup>

### Enforcing social rights

The question of the enforceability of social rights cannot be avoided.<sup>49</sup> Professor Bercusson rejected a simple dichotomy between justiciable and non-justiciable rights.<sup>50</sup> Sometimes, enforcing rights judicially is neither the ‘be all and end all’ nor the most effective method of settling a dispute. Alternative methods of resolving work related disputes are being promoted much more (e.g. mediation). The existence of a legal framework is fundamental to lay down core labour rights but it is equally crucial that workers and employers should also strive to work together and overcome differences through negotiation in order to raise labour standards. According to Simon Deakin, labour law is necessary in order to prevent the market from destroying our society.<sup>51</sup> The stakes are just as poignant in the context of the welfare state. The issue of enforcing social rights is key in the fundamental areas of health, education and social protection.

## II. Social Rights and the Welfare State: Health, Education and Social Protection

In Part II, we note that state responsibility in the social sphere remains a key challenge today in the UK. Sections A and B deal with the issue of how the British welfare state engages in social solidarity by pooling resources in the fields of health and education. Section C addresses the question of social protection of individuals who due to a lack of means find themselves in a vulnerable position in society.

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<sup>46</sup> An injunction will be available if employees or unions are taking disruptive industrial action that is not in contemplation or furtherance of a trade dispute, unprotected secondary action or action for a purpose not within the statutory immunities, or spontaneous “wildcat” action taken without a ballot.

<sup>47</sup> *International Transport Workers Federation v Viking Line C-438/05; Laval un Partneri Ltd C-341/05*

<sup>48</sup> Comment made at the Memorial Conference in honour of Brian Bercusson and Yota Kravaritou held at the European University Institute on 23 and 24 October 2009.

<sup>49</sup> See J. KING, “Asserting social rights in a Multi-layered system” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (*supra* note 6).

<sup>50</sup> An intermediate category of “rights that are moving towards justiciability was introduced, see B. BERCUSSON in G. DE BURCA and B. DE WITTE, *Social Rights in Europe*, (*supra* note 4), p.17

<sup>51</sup> Comment made at the Memorial Conference in honour of Brian Bercusson and Yota Kravaritou (*supra* note 48)

**A. Health Care through the NHS: A Generous, Egalitarian but Discretionary System**

Public health in the UK is delivered through the National Health Service (NHS) that was born 60 years ago out of a long-held ideal that good healthcare should be available to all, regardless of wealth.<sup>52</sup> At its launch on July 5 1948, Aneurin Bevan, minister of health, stated the NHS's three core principles: (a) that it meet the needs of everyone; (b) that it be free at the point of delivery; and (c) that it be based on clinical need, not ability to pay.

These principles have guided the development of the NHS over more than half a century and remain true today although they have since been added to.<sup>53</sup>

The cost of the NHS (funded centrally from national taxation but managed locally through NHS trusts) puts huge strain on the public purse. Nevertheless, there is currently a cross-party consensus that the NHS should continue to be free at the point of access, as emphasised by David Cameron, leader of the Conservative party in opposition.<sup>54</sup>

As a general rule, the NHS is free at the point of use for anyone who is resident in the UK – more than 60 million people – making it a very generous health care system. It is also wide-reaching and egalitarian. All students registered on a recognised course in the UK are able to register with a doctor, regardless of their nationality. This goes beyond what is required under EU law as member states may require students from other member states to have adequate medical cover as a condition of residence.<sup>55</sup> However, there are limits to the generosity of the NHS: e.g. patients may incur charges for some prescriptions and optical and dental services. If one considers that such economic barriers have negative effects on dental and optical health, then one may argue they should be free as part of the NHS or that any charge be kept affordable.

There have also been inadequacies where patients have suffered. A criticism that was rife in the 1990s concerned waiting lists of patients needing healthcare. Improvements have undoubtedly been made but it remains a genuine concern. Patients are subject to the actions and decisions of those managing the NHS, with limited scope for intervention by judges. Palmer discusses the boundaries of “Judicial Intervention in Prioritisation Disputes regarding healthcare”.<sup>56</sup> She distinguishes between the role of the courts in the scrutiny of public authority decisions concerning delay or refusal of public services on grounds of resources and the role of the courts in disputes that address fundamental questions of medical ethics and human rights (e.g. the artificial prolongation of life). On health care rationing, Palmer refers to the well-known case of *Re B*.<sup>57</sup> She also points to the scrutiny of NHS policies by public administrative law, both from the optic of legitimate expectations and the meeting of individual

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<sup>52</sup> The NHS covers everything from antenatal screening and routine treatments for coughs and colds to open heart surgery, accident and emergency treatment and end-of-life care. The NHS has grown to become the world's largest publicly funded health service. To quote its website, the NHS is also “one of the most efficient, most egalitarian and most comprehensive.”

<sup>53</sup> In July 2000, a full-scale modernisation programme of the NHS was launched. New principles were added, including the need for the NHS to “shape its services around the needs and preferences of individual patients, their families and their carers” and to “treat patients as individuals, with respect for their dignity.”

<sup>54</sup> See the Speech by David Cameron to the King's Fund on 4 January 2006

<sup>55</sup> On the rights of residence and free movement of EU citizens, see Directive 2004/38 of 29 April 2004.

<sup>56</sup> E. PALMER, *Judicial Review, Social Economic Rights and the Human Rights Act*, (*supra* note 3) p.197

<sup>57</sup> *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898; The health authority refused to provide further treatment for a young girl with leukaemia, on grounds that the expenditure involved would not reflect an efficient use of resources, given the small chance of success and its responsibility for funding the care of other patients. The decision at first instance recognised it was for the health authority to determine the distribution of resources but pointed to the need for transparency and substantial objective justifications to be shown where the exercise by a public body of its discretion may infringe a fundamental human right. However, the Court of Appeal held the health authority could not be expected to advance reasons to justify the fairness of a refusal based on considerations of resource allocation, stating there could be no evaluative role for courts distinct from that of administrators.

needs, as in the case of *Coughlan*<sup>58</sup>, as well as from the perspective of challenging irrational allocation policies, as in the case of *Rodgers*<sup>59</sup> (funding of Herceptin for breast cancer patients), distinguished from *Re B*.

EU law has enabled patients to seek treatment in other member states, partly thanks to judicial activism from the ECJ.<sup>60</sup> It is not uncommon for English patients to go to France for routine operations such as hip replacements. The case of *Watts* C-372/04 concerned the right of a British patient to receive treatment abroad at the expense of the NHS.<sup>61</sup> The ECJ recognised the conflict between the UK discretionary system of health care and one based on socio-economic entitlements. In its judgment, the ECJ stated that “economic concerns regarding the impact on other patients were external to the assessment of any patient’s pathological condition on which decisions about treatment should be based”. It also rejected grounds based on the need to avoid disrupting waiting lists. As a result, “more transparency and patient-centred decision-making are required within the NHS than were previously considered possible or necessary.”<sup>62</sup>

### **B. Education: Parental Choice and Responsibility, Access and Government Investment**

As Tony Blair famously stated: “Ask me my three main priorities for Government, and I tell you: education, education, and education.” This struck a chord with the British electorate in 1997, for whom ‘Education’ was the top priority.<sup>63</sup>

Government has invested billions in education but under national law, the legal burden for ensuring that children receive a proper education lies with parents, not the state. Under section 7 of the Education Act 1996, parents are responsible for making sure that their children of compulsory school age (5-16) receive full time education that is suitable to the child’s age, ability, aptitude and to any special educational needs the child may have. This obligation is policed by local authorities who are required to identify children not receiving a suitable education.<sup>64</sup>

Under Article 2, Protocol 1 of the ECHR, implemented in the HRA 1998, “No person shall be denied the right to education.” The right to education can be seen as ‘negative’ in that children and young people have “a right not to be excluded from the existing means of instruction and training”.<sup>65</sup> Indeed, Kelly mentions that “the state does not have any positive obligation to provide or subsidise a particular type of education but if it does offer such provision or subsidy, it must make it freely available to all”. Restricting access to education is therefore a key breach of the right to education.

Fabre argues that the HRA 1998 “explicitly grants individuals a right to education but as part of what is necessary for the effective exercise of (political) citizenship”.<sup>66</sup> She criticizes the fact that (in her opinion) “education is not to be valued for its contribution to individual welfare” in the UK but argues instead that it draws its strength from its connection with civil and political rights. It is true that the

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<sup>58</sup> *R v North East Devon Health Authority, ex parte Coughlan* (2000) 51 BMLR1;[2000] 3 All ER 850

<sup>59</sup> *R (on the application of Rodgers) v Swindon Primary Care Trust* 2006 EWHC Admin 357

<sup>60</sup> See in particular the landmark cases of *Kohll* C-158/96 and *Decker* C-120/95

<sup>61</sup> Arguing for transparency and clear criteria restricting the discretionary power of the decision-making body, the Advocate General criticised the absence of a clearly defined procedure for considering applications for treatment abroad and the apparently “unlimited discretion” enjoyed by NHS bodies. He rejected the justification put forward by the decision-making body for refusing authorisation that was based on the fact that it would be possible to provide treatment within the target set under the national system.

<sup>62</sup> T. HERVEY: Mapping the Contours of European Health Law and Policy (2002) European Public Law

<sup>63</sup> Speech given by Tony Blair at the Labour Party Conference on 1 October 1996

<sup>64</sup> Truancy may be dealt with by a school attendance order and as a last resort parents may face prosecution.

<sup>65</sup> J. KELLY, Legal Information Officer JISC Legal Information Service 18 March 2004.

<sup>66</sup> Social Rights in Europe (*supra* note 4) p.18

British approach to parental responsibility and choice colours the nature of education as a legal right in the UK. However, one may dispute the point that its contribution to individual welfare is valued less than in other countries. The legal burden simply lies with parents. State expenditure on education is a more telling indicator of its value in British society.<sup>67</sup> Indeed, for Palmer, the right to education “demands expenditure by the state” on this socio-economic right.<sup>68</sup>

The private (independent) sector plays an important role in education in the UK and mainly includes children from middle-class families as well as those from a wealthier background.<sup>69</sup> Pressure has recently mounted on private schools to justify their charitable status by making additional social contributions, e.g. through community work and partnerships with state schools. This new approach may be interpreted as a ‘social contract’ between the state, private schools and their pupils, requiring ‘consideration’ for the right to provide and receive independent education.

Higher education is an area that has caused much controversy since 1998 when students in England were charged tuition fees for attending university.<sup>70</sup> Access to university has become a financial issue: critics claim many will be put off from studying due to the debt they will incur. The UK also has a geographic divide where access to higher education is better or worse depending on which side of the border a student is on. Political devolution has allowed the Scottish executive not to charge students ordinarily resident in Scotland. Under EU law, this may result in examples of reverse discrimination as other EU nationals will not have to pay tuition fees in Scotland in contrast with British students whose parents are living in England.

### ***C. Social Security and Social Protection: From Poverty Prevention to Human Dignity***

Historically, for centuries there has been British legislation that was designed to reduce poverty. Indeed, since the time of King Richard II in the 14<sup>th</sup> century, the law has been used to regulate the treatment of the poor.<sup>71</sup> Poor Laws are the predecessor to social security in Britain. However, the nature of today’s laws in the field of welfare and social security rights is very different from the Poor Laws of the past.<sup>72</sup> Indeed, the construction of social security and the welfare state, which took place in the UK at the end of the Second World War, heralded a new era for social rights.

Deakin and Wilkinson describe how Beveridge placed regular and stable employment at the core of the system of social security, culminating in the National Insurance Act 1946. Beveridge’s idea was for social insurance to operate as a legal entitlement rather than a form of charity: “benefits in return for contributions, rather than free allowances from the state, is what the people of Britain want.”<sup>73</sup> Today, the UK provides a whole host of social security benefits, ranging from unemployment benefits, to family benefits, to old age pensions. A full list can be found on the website of the Department for Work and Pensions: <http://www.dwp.gov.uk/>.<sup>74</sup> Work has remained at the heart of the system of

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<sup>67</sup> Over the past 10 years, there has been a big increase in state investment in education in the UK. One might argue this is a political commitment to be judged by voters rather than an enforceable legal right.

<sup>68</sup> E. PALMER, *Judicial Review, Social Economic Rights and the Human Rights Act*, (*supra* note 3)

<sup>69</sup> While there is no doubting that many parents make huge sacrifices in order to send their children to the best schools, the independent sector has often borne the tag of providing education for the elite.

<sup>70</sup> Since 2006, English universities have been able to charge “top-up” fees to raise additional income.

<sup>71</sup> From the statute in 1601 to the last Poor Law Act of 1930, there was much continuity in the legal language despite times changing significantly. See: *A history of the Poor Law* by Sir George Nicholls.

<sup>72</sup> For a succinct account of the evolution of the Poor Laws, see S. DEAKIN and F. WILKINSON: *The law of the labour market: Industrialisation, Employment and Legal Evolution* Oxford University Press (2005)

<sup>73</sup> See Beveridge’s report in 1942: “*Social Insurance and Allied Services*”

<sup>74</sup> The list includes: Jobseeker’s Allowance, Statutory Maternity Pay (SMP), Maternity allowance, Statutory Sick Pay (SSP), Incapacity Benefit, Employment and Support Allowance, Severe Disablement Allowance, Attendance Allowance, Carer’s Allowance, Disability Living Allowance, Benefits for accidents at work and for occupational diseases, Bereavement

unemployment benefits, with government promoting “Welfare to Work” programmes and making receipt of Jobseeker’s allowance conditional on actively searching for a job.

Adequacy of social protection is a key issue. Historically, social security benefits in the UK have been calculated on a flat-rate basis<sup>75</sup>. One example is the basic State Pension.<sup>76</sup> In 2009-2010, the full basic State Pension is £95.25 a week for a single person and £152.30 a week for a couple. Such amounts do not go very far; statistics show that over a quarter of old people in the UK are at risk of poverty.<sup>77</sup> There is a need for alternative sources of funding.<sup>78</sup> However, coverage of private sector employees by occupational pension schemes is in decline and many “defined benefit” schemes have been replaced with less generous “defined contribution” schemes. New reforms will require the auto-enrolment of workers into a pension scheme. The challenge remains whether old-people are going to avoid poverty. Where is the money going to come from? The answer may be to work longer, retire later and have other sources of income or savings. The risk is more people will fall into the safety net of social security and require income support. The cost of providing care in old-age is a key issue. Government proposals to fund a “compulsory care scheme” through a £20,000 tax on adults over 65 are proving controversial.<sup>79</sup>

Social welfare overlaps with the issue of human dignity, not just for UK nationals and residents but also for refugees and asylum seekers. In *Anufrijeva*<sup>80</sup>, Lord Woolf CJ in the Court of Appeal accepted that Article 3 ECHR (on the right not to be subjected to degrading treatment) could impose a positive obligation on the state to provide support for an asylum seeker to prevent degradation. On the impact of Article 8 ECHR (the right to respect for private and family life), Lord Woolf said the relevant question was “when might it be necessary to provide the crucial support needed to enjoy Article 8 rights?”<sup>81</sup> In *Limbuella*<sup>82</sup>, also on welfare benefits for asylum seekers, the House of Lords considered the severity of deprivation that would be a breach of Article 3 ECHR. It rejected any argument that the provision of state benefits was a political issue not subject to judicial scrutiny as this would deny the rights of asylum seekers under the ECHR.

## Conclusion

The notion of social rights in the UK tends to overlap with civil, political and economic rights. The justiciability of social rights is a very important issue but the subject should not be confined to the question of judicial enforcement of social rights. The UK has a mature legal system that protects social rights primarily through legislation targeting specific rights. However, the Human Rights Act 1998 has provided a major “constitutional” breakthrough that has prompted “positive obligations in the socio-economic sphere. EU law has had a major impact in areas of its competence, namely the social rights

(Contd.)

benefits and widows benefits, Benefits for children, including where one/both parents have died, State Pension, Pension credit, income support; Winter fuel payments

<sup>75</sup> Flat rate benefits were a pre-cursor to Beveridge’s approach in “*Social Insurance and Allied Services*”.

<sup>76</sup> This is the legacy of the Old Age Pension Act of 1908, which provided means-tested flat-rate old-age pensions from age 70 that were not subject to worker contributions.

<sup>77</sup> Source EU-SILC (2006), in Memo/08625 of the European Commission of 16 October 2008: Social Protection and Social Inclusion in Europe – Key facts and figures.

<sup>78</sup> The Second State Pension provides an earnings-related pension though it is possible to “opt-out” and receive contributions into a personal or occupational pension scheme.

<sup>79</sup> “Shaping the Future of Care Together” (Green Paper); see article in The Daily Telegraph of 15/07/2009

<sup>80</sup> *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406

<sup>81</sup> At paragraph 37 of his judgment, Lord Woolf opined that if a basic standard of private and family life exists, then “it must require intervention by the state, whether the claimant is an asylum seeker...or a citizen entitled to all the benefits of our system of social security.”

<sup>82</sup> *R v Secretary of State for the Home Department, ex parte Limbuella*, [2005] UKHL 66, [2006] 1 AC 396

of workers in the field of discrimination/equal pay and more recently on information and consultation. However, the UK's opt-out of the EU Charter of Fundamental Rights may limit its legal effects under national law. Many international instruments signed by the UK have more of a political impact than a legal impact.

There is a fairly comprehensive body of law to protect the social rights of workers although freedom of contract remains a key characteristic of employment in the UK's liberal labour market. There remains a number of loopholes, e.g. on working time. In some areas of industrial relations, such as the right to strike, the balance is still clearly weighted in favour of the employer.

Social rights are at the heart of the welfare state although individual responsibility is sometimes preferred over the role of the state. In education, parents are the main player in terms of choice and legal responsibility. Higher education is evolving to a compromise between the social rights of students and the economic needs of universities. Health and social protection may be subject to discretionary decisions of public bodies. The state's social obligations are often more of a political and administrative nature than a source of legally enforceable rights. However, the courts have been prepared to intervene to prevent irrational allocation policies. There is pressure from the ECJ for the UK to promote greater transparency from public bodies dealing with patients' rights. The courts have also shown their attachment to protecting social rights where there is a fundamental human rights dimension such as human dignity.

## Social Rights in Norway and Scandinavia

Tor-Inge Harbo\*

### Introduction

Gøsta Esping Andersen has in his well known book, *The three worlds of welfare capitalism*,<sup>1</sup> singled out the Scandinavian welfare state model as a unique model which parts from the Continental (German) cooperative welfare model as well as the Anglo-Saxon social security model. Characteristic of the Scandinavian model is, firstly, the strong involvement of the state, and thus in comparison with the Continental German model a minimum involvement of private actors, such as church or employer, as providers of welfare for the citizens, and, secondly, its comprehensive nature, which parts it from the rather wide-masked Anglo-Saxon social security net. In this article I shall explore the particularities of the Scandinavian welfare model, however, without making explicit comparisons with the abovementioned regimes.

Although the rights rhetoric has penetrated political and legal debates in western societies and beyond the last decades it is nevertheless difficult to grasp the exact meaning and scope of the concept. According to classical liberal political theory, which in this regard corresponds to a natural law conceptualisation, individuals are endowed with certain unalienable rights. The American Declaration of Independence mentioned in this regard three rights, namely, life, liberty, and pursuit of happiness.<sup>2</sup> The perception of rights as absolute<sup>3</sup> or “trumps”<sup>4</sup> has, at least in periods, been easier to sustain with regard to so-called negative rights, than positive rights, since the existence and scope of positive rights, such as social rights,<sup>5</sup> are apparently more dependent on the political and economic situation in a given polity than the former.<sup>6</sup>

Another way of conceptualising rights is to focus on their private contract law characteristics, in the meaning that there is a focus on the reciprocal nature of the right. Accordingly, an individual has a right when this right corresponds to others duty to respect this right.<sup>7</sup> Or, that there should be a balance between one individual’s rights and the same individual’s duties. A social right according to this perception implies a right of the individual to receive different services or benefits from the state which corresponds with a duty for the same individual to contribute to the society, in the form of, for example, paying general taxes or, more specific, contributions to a particular pension scheme.

The conceptualisations of rights as “unalienable” or “trumps”, on the one side and contractual, on the other are connected to the degree of redistribution laid down in the welfare regime. This means that the

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<sup>1</sup> Esping-Andersen, Gøsta, *The three worlds of Welfare Capitalism*, Cambridge: Polity Press 1990

<sup>2</sup> American Declaration of Independence, 4. July 1776

<sup>3</sup> Nozick, Robert, *Anarchy, State and Utopia*, US: Basic Books 1974

<sup>4</sup> For the idea of rights as “trumps” see Dworkin, Ronald, *Taking Rights Seriously*, Cambridge Mass: Harvard University Press 1977

<sup>5</sup> Marshall, T.H. *Citizenship and Social Class*, Cambridge: Cambridge University Press 1950, refers to three generation of rights, social right, being the third generation.

<sup>6</sup> It should be noted that property rights have been considered a negative right. However, one could clearly argue that the existence and scope of property rights is also heavily dependent on the political and economic situation, cf. the difference between it’s status in the US under what has been referred to as the Lochner era, on the one side, and the situation pursuant to President Roosevelt’s New Deal.

<sup>7</sup> See, for example, Alf Ross, *On Law and Justice*, London: Stevens 1974

greater the element of redistribution in a welfare regime, the more will the right have the character of a natural-law infested “trump”, and vice versa.

The constitutionalisation of rights means that the right would have to be respected by the legislator provided, of course, a norm hierarchical system.<sup>8</sup> However, constitutional rights are more than proclamations of a political program. Thus, intrinsic in the concept of constitutionally enshrined rights is their enforceability through judicial review. This means that constitutionally enshrined rights could be invoked by the before courts against the democratically elected legislator. The idea of incorporating rights in a constitution is clearly informed by the idea of rights as trumps rather than rights in contract. Thus, in the case rights have constitutional status the reciprocal relationship between right and duty is potentially distorted.

In this paper I will attempt to describe and explain the legal status of social rights in the Scandinavian welfare states. This leads me first to an elaboration on the particular Scandinavian constitutional and legal concept, or what I have referred to as the underlying legal rationality of the Scandinavian welfare state. Thereafter I will more concretely discuss the status of social rights in Scandinavia. In this regard I will discuss whether the social rights have a constitutional standing and whether this matters; whether, and to what degree, rights are judicable, and so on. In the fourth part I will see how the international regime might influence the position of social rights in Scandinavian law, and finally, in the conclusion, I will make some comments with regard to the sustainability of the Scandinavian model, the conceptualisation of rights and the rights terminology.

## **1. The Underlying Constitutional and Legal Rationality of the Scandinavian Welfare State**

As noted above, one characteristic feature of the Scandinavian welfare state is the involvement of the state apparatus. The state must in this regard be perceived as an instrument or means applied by the citizens in order to establish and maintain a common goal of securing a comprehensive welfare system for all. More specifically, welfare politics has been set on the agenda of the legislator by the beneficiary themselves in free elections and has been regulated through positive law. Thus, one could note that the establishment of the welfare state was not, as in continental Europe, driven forward by the ruling class as a tactical manoeuvre to prevent political and social unrest among the growing labour class, and thereby securing the continuous power of the same ruling class. Rather, the establishment of the Scandinavian welfare states goes hand in hand with the labour class’ acquisition of political rights, in more general terms, the democratisation process. To understand the connection between the democratisation and the development of the welfare state one has to take into account two interrelated factors: Firstly, that the industrialisation of the Scandinavian countries occurred later than in continental Europe, and second, that the democratisation process happened relatively earlier, and, thus, coincided with the industrialisation process.

The fact that welfare has been organised centrally – through the state – and not by societal, private economic actors, such as the church, the private or public employer, means that the need to make room for the operation of a multiversity of benefactors in society, which potentially could compete with the state over the citizens’ loyalty is close to non-existing. An important consequence of the centralised organisation of the welfare regime is that it secures and strengthens the legitimacy of the legislator. Since the welfare programs have rested on broad consensus reaching across political parties, there is no one party or societal group which will automatically benefit from the welfare policy. Rather, it is the state, more precisely: the legislator institutionalised through the parliament and the democratically political process as such which will be the net legitimacy profiteers of welfare politics.

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<sup>8</sup> See the concept of the hierarchy of law in Kelsen, Hans, *Allgemeine Staatslehre*, Berlin, Julius Springer 1925.



The establishment of the welfare state has not only explicitly secured the legitimacy of the legislator. It has also more implicitly secured the legitimacy of the law, more concretely informed the conceptualisation of the law. The concept of law is then reflective of the strong position of the legislator. Any attempt to undermine the position of the legislator and thus the democratic political consensus which it represents and rests upon would challenge the very concept of law itself. In this picture the conceptualisation of social benefits (entitlement) as individual rights is problematic since this would imply that the judiciary would in the end determine the content and scope of the rights. In the extreme case this would necessarily mean that the non-democratically elected judiciary would take over the role of the legislator with regard to determining the content and scope of welfare politics and budget.

It could in this regard be noted that the Norwegian courts, in particular the Norwegian Supreme Court is more explicit and elaborative in its approach with regard to reviewing legislative, but also administrative measures, than the Danish and Swedish counterparts.<sup>9</sup> For this reason it is natural in this article to make more references to the Norwegian Supreme Court case law. However, this does not necessarily mean that the individuals have a stronger legal status with regard to social benefits in Norway than in the other Scandinavian countries.

## **2. The Constitutional Status of Welfare Benefits**

Social benefits are left for a couple of exceptions not explicitly laid down in any of the Scandinavian countries' constitutions. The Norwegian constitution<sup>10</sup> § 110 requires the state authorities to secure that all who are capable thereof are given the opportunity to work. Similar provisions are laid down in the Danish<sup>11</sup> and the Swedish constitution.<sup>12</sup> One could clearly question whether this type of right – the right to work – could be characterised as a social right in the first place since in a market economy as opposed to in a plan economy (most) jobs are to be created by the market itself and not by the state. True, in the Scandinavian countries the schism between the market and the state is blurred – in some periods more than in other.

It is nevertheless clear that the constitutional provisions referred to above do not reflect a right in the procedural meaning of the word, implying that the individual could have the right enforced by a court decision. Rather the provisions must be perceived as more of a political statement which the ever shifting political authorities should take into consideration, i.e. first of all an obligation imposed on the government as well as the ever shifting legislative majority. The political goal set out in the provisions is hardly controversial; however, there are clearly different ways in which this goal can be reached.

The Swedish constitution, RF 1:2, contains, in addition, a number of references to individual welfare.<sup>13</sup> However, except for the right to education laid down in RF § 21, these references are not formulated as individual rights, but rather as political goals directed towards the government and legislator. It was long held that political goals should not be laid down in the constitution. The fact that provisions on social right nevertheless has been laid down in the constitution rests upon a presumption that the constitution should contain rules concerning the application of power and content of statutes which are of great importance for the democratic system and that also reflects the basic values upon which the

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<sup>9</sup> The Norwegian Supreme Court has practiced judicial review since the first half of the 19th century, see Smith, Eivind, *Høyesterett og Folkestyre* Oslo: Universitetsforlaget 1993; It should in this regard be noted that the ordinary courts hardly deals with administrative law in Sweden since this is handled by a separate administrative court.

<sup>10</sup> Kongeriget Norges Grundlov av 17 mai 1814

<sup>11</sup> Danmarks Riges Grundlov av 5 juni 1953, § 75 (1)

<sup>12</sup> Regeringsformen (RF) SFS 1974: 152, § 2

<sup>13</sup> *Ibid.* § 2 (general welfare); § 21 right to education

society is based, with regard to, for example, the relationship between the society institutions and the individual.<sup>14</sup>

The perhaps clearest example of constitutional enshrined right can be found in the Danish constitution § 75, 2. The provision regulates the individual's right to be provided for by the state in the case he is not able to provide for himself.<sup>15</sup> There has in legal doctrine been diverting views as to whether the individual can rely on the provision alone to obtain support from the state or not. The question appears to be settled by the Supreme Court in the case from 2006.<sup>16</sup> To state the obvious: the provision clearly presumes that a public social welfare system of some kind exists. However, this in itself is not more than one can read out of the political declaration of the Swedish constitution, as mentioned above. More important is what and how much (the amount) one, with reference to § 75, 2, have a right to receive from the state welfare system. With regard to the "what" it appears clear that the provision refers to economic benefits, as opposed to natural. The pending question is then: how much? This question has not been discussed by the courts. Legal scholars have been less careful to estimate an amount in this regard and has thus link the right to some general estimate or basic benefit (grunnbeløp), which it is, however, accepted will vary over time.<sup>17</sup>

In lack of explicit social rights in the constitutions other constitutional provisions have been applied or at least appealed to in the effort to secure social rights, in particular provisions on property rights but also provisions concerning the prohibition against retroactive laws, both formulated as prohibition against the infringement of obtained or entitled social benefits.<sup>18</sup>

The Norwegian Supreme Court has more recently dealt with the constitutional guarantees of social benefits with reference to a constitutional provision prohibiting retroactive laws (§ 97), namely in its *Borthen* and *Thunheim* judgments, both from 1996.<sup>19</sup> The judgements both concerned whether pension entitlements could be changed (to the disadvantage of a category of pension receivers) without being in conflict with the prohibition against retroactive laws. *Borthen* concerned the change in so-called basic benefits (grunnpensjon) and *Thunheim* the change in so-called additional benefits (tilleggspensjon). The former benefit secures everyone a minimum payment regardless the size of their earlier contributions in form of taxes. The latter benefit can be held to have a contract law element to it since its existence and size depends on the contribution by the individual employee.

The Norwegian Supreme Court stated (in *Borthen*) that welfare rights (trygderettigheter) in principle are guaranteed by § 97 of the constitution, regardless if they were basic benefits or additional benefits. According to the Court, the pending question is what the individual needs to maintain a decent standard of living, not how the pension right has been established. Thus one could claim that basic benefits are stronger protected by the constitution than additional benefits.<sup>20</sup> This position arguably underlies the idea of social justice of the Scandinavian welfare regime which can be interpreted as to imply that one should contribute to the society according to ones abilities and receive from the society according to ones needs. This interpretation reflects the welfare regime's strong element of redistribution. The position taken by the Supreme Court in these two cases is then contrary to the

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<sup>14</sup> Waesterhell, Lotta Vahlne, *Den starka statens fall? En rättsvetenskaplig studie av svensk social trygghet 1950-2000*, Stockholm: Norstedts Juridik, p. 88

<sup>15</sup> "Den, der ikke selv kan ernære sig eller sine, og hvis forsørgelse ikke påhviler nogen anden, er berettiget til hjælp af det offentlige, dog mod at underkaste sig de forpligtelser, som loven herom påbyder."

<sup>16</sup> UfR 2006.770 H

<sup>17</sup> Ketscher, Kirsten, *Socialret*, København: Forlaget Thomson 2008, 3. utg. pp. 204-206

<sup>18</sup> See f. ex. Ketscher ibid p. 214: "velerhvervede rettigheter"

<sup>19</sup> Rt. 1996: 1415 (*Borthen*); Rt. 1996: 1440 (*Thunheim*)

<sup>20</sup> Rt 1996: 1415, at p. 1427: "...grunnlovsvernet må være sterkere jo mer lovgiver kutter, og sterkest for kutt i selve grunnlytelsen. Nettopp fordi grunnpensjon er basislytelsen kan det, også tatt i betraktning at det ikke er betalt særskilt for lytelsen, ikke være holdbart å unnta grunnpensjonen fra grunnlovsvernet eller gjøre dette vernet særlig svakt".

assumption, which has guided the Supreme Court in earlier cases, notably in the state pension case,<sup>21</sup> namely that the pensions, which have a contractual character, should be better protected.

However, although the Court found that the basic benefits in principle are protected by § 97 in the constitution, this did not mean that the provision was infringed with in the two cases. The Court noted that there were different ways in which the provision could be interpreted. According to the Court there are areas of law in which § 97 has a clearly defined core which cannot be disregarded. However, the Court noted that in the area of law concerned here – economic law in general; welfare law in particular – § 97 could not be given such an interpretation. Rather in this area of law, § 97 should be perceived as a standard which would vary over time and with the different societal conditions, and thus which it would be difficult to detect the exact content of.<sup>22</sup> The standard is reflected in the test applied by the Court in this area of law. Accordingly, a legislative measure will only be deemed in breach of the prohibition against retroactive laws if the consequences in the concrete case could be considered as being a “clearly unreasonable and unjust retroaction”.<sup>23</sup>

One could hold that the reason why the threshold is set so high for the invocation of § 97 is first of all reflective of the constitutional role of the court, as well as in the concept of law. As stated by the Court, the freedom of the legislator to decide how the pension system at all time should be organised is an important consideration which has to be given considerable weight in these cases. At least it must be clear that the legislator must be able to make considerable alternations in the pension system with regard to rights and benefits in the case one faces an economic crises etc.<sup>24</sup> The pending question was then whether the amendment in the legislation which implied that an additional pension was reduced and cancelled in certain cases was “clearly unreasonable and unjust” for the individual or group of individuals concerned. The Court accepted that the loss of the additional pension could have a felt impact on the individual concerned. But, this was not enough.<sup>25</sup>

The discussion whether welfare provisions or social rights are to be considered as protected in the same way as other economic rights has also been discussed in Denmark. However, whereas in Norway the Supreme Court has, as we noted in the judgment discussed above, applied the prohibition against retroactive laws in these cases, the Danish courts have applied the constitutional provision on property right laid down in § 73. In lack of any landmark cases in Danish law, the Norwegian Supreme Court judgments in *Borthen* and *Thunheim*, discussed above, has been referred to in the relevant legal literature in the estimation of what the Danish Supreme Court would rule in this field, although, as noted, the legal point of departure differs.<sup>26</sup>

The private contractual element, which was rejected in *Borthen* and *Thunheim*, is apparently stronger in other fields of the social welfare system. In Denmark, the point of departure for the right to benefits according to the constitution § 75 (2) is, as noted above, that the individual is not himself able to provide for himself and his family, which there is a presumption that he would acquire through labor. The right to social benefits is, thus, closely linked to the individual’s connection the labor market. This link is underlined in a number of legislative regulations concerning the duty of the state to secure

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<sup>21</sup> Rt. 1962: 332 (*Statspensjonist*) This position, and interpretation of the judgment has been held by Professor Asbjørn Kjønstad, see for example, ”Trygderettighetenes grunnlovsværn”, *NOU* 1984: 10; See also Graver, Hans Petter ”Statspensjonistenes grunnlovsværn”, *LoR* 2004, pg. 21-42

<sup>22</sup> *Borthen* ibid pg. 1426

<sup>23</sup> Ibid. pg. 1430: “klart urimelig eller urettferdig tilbakevirkning”

<sup>24</sup> Ibid. pg. 1421

<sup>25</sup> *Borthen* ibid pg. 1430. For a comprehensive discussion on the judgements see Kjønstad, Asbjørn “Trygderettigheter, Grunnloven og Høyesterett”, *Lov og Rett* 1997 pp. 243 ff; and Kjønstad, Asbjørn ”Grunnlovsværn for sosiale rettigheter, særlig enkepensjon” in Jørgesen og Kristiansen (eds.) *Sosialrettslige utviklinger & utfordringer*, København: Jurist- og Økonomiforbundets Forlag 2008, s. 63-78

<sup>26</sup> I.e. Ketscher ibid. p 222 ff

social benefits for an unemployed individual. This duty of the state is, arguably, in particular important in Denmark given the comparable low protection which is provided for the Danish workers. The economic security provided for the workers is, arguably, the other side of the easy hire and easy fire policy which underpins the flexibility of the Danish labor market to the advantage of the economic operators in the free market. The flexible labor market implies that there is great mobility in the market which again means that the workforce constantly has to adapt to new circumstances. The high level of benefits provided the unemployed is again closely connected to the duty of the workers to undertake training in order to reenter the labor market and thus fill the demand for workforce which continuously arises within new areas.

The respective Danish authority has defined the duty of the individual to secure his swift reentering on the labor market strictly. The relevant national appeal authority – *Ankestyrelsen* – has, for example, ruled that a chain-smoking woman who did not turn up to an interview concerning a job where non-smoker was a precondition should have her benefits reduced.<sup>27</sup> And since whether or not an individual may wear a hijab etc. on the workplace is up to the private employer, the rejection of taking up a job where the wearing of a hijab is prohibited would similarly lead to the reduction of benefits. On the other hand, *Ankestyrelsen* has stated that the respective municipal authority could not demand that a 60 year old man underwent surgery in order to see whether this could prolong his working abilities, and thereby, avoid early retirement.<sup>28</sup>

### 3. Welfare Benefits and Administrative Law

Taking into consideration the discussion above, it must be clear that the constitutional status of welfare benefits is rather weak. To the degree welfare provisions or references to welfare of the individual are laid down in Scandinavian constitutions they rarely refer to rights in the meaning that they may be invoked by individuals before courts. It follows from this that the judiciary will not overrule decisions taken by the legislator with regard to welfare policies. The content and scope of welfare provisions is to be determined by the legislator.

This does not mean, however, that courts do not play any role in securing those individuals who are entitled to welfare benefits. In fact the judiciary plays an important role with regard to determining the content and scope of social benefits laid down in statutes. In some Scandinavian countries, special courts and tribunals exist with the jurisprudence to deal with these types of cases.<sup>29</sup> However, the extent of the review that the court will conduct in these cases is limited by the relevant legal provisions according to which the individual claim that he is entitled to a certain benefit. In other words, the court has to operate within the frames of the law, i.e. the review will be limited to reviewing the legality of the relevant administrative decision. The statute as such will not be questioned, and thus not the political consensus of which the statute is an expression.

The interpretation of the law and thus the content and the scope of a given welfare benefit is in the last resort the task of the judiciary. However, in some cases it is not always that simple to determine the exact meaning of the relevant legislative provision obviously because the legislator has applied words and terms which are difficult to determine the exact legal content and scope of. The reason why the legislator has done this is often in order leave room for discretionary power to the respective administrative body. There may be several reasons why the legislator would want the exact content of

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<sup>27</sup> A-7-05

<sup>28</sup> P-1-03

<sup>29</sup> Norway: Trygderetten; Denmark: Ankestyrelsen. In Sweden welfare issues are dealt with by a general administrative court.

the law to be determined by the administrative body, rather than the judiciary.<sup>30</sup> Making decisions in the concrete case may require particular competences which the relevant administrative body is in the position of, or the area of law is of such a political or economic nature that the provisions has to open up for different interpretations dependent on the political and economic situation at any given time. With regard to welfare benefits, the latter point is in particular relevant.

However, although Courts may as point of departure not review the substance or merit of the administrative decisions concerning welfare benefits, it might, in addition to securing that the procedural requirements are fulfilled, review whether the administrative body has taken into account correct facts, irrelevant considerations or whether the decision is discriminatory. In addition the court may quash an administrative decision if it finds it arbitrary or the outcome manifestly unreasonable for the individual concerned.<sup>31</sup> One could argue that the more intense (quantitative and qualitative) judicial review of administrative measures is the stronger is the position of the individual and thus in our context the legal standing or status of the respective social benefit.

The reasonableness review can be distinguished from the other heads of review since it does imply that the court gets involved with the merits of the administrative decisions, and, potentially, substitutes its own opinion for that of the relevant administrative body. Reasonableness is in this regard the only head of review which would allow the court to explicitly decide in favour of the individual right.<sup>32</sup> However, although applicants often claim that an administrative decision is unreasonable, the courts seldom quashed an administrative measure for being unreasonable, as we shall see below.<sup>33</sup> It may appear that the courts over time have set the threshold for its application ever higher.

Many administrative actions concerning social benefits have nevertheless been challenged by the courts for their alleged unreasonableness.<sup>34</sup> An interesting example with regard to both the legal status of social benefits and of the meaning of the manifestly unreasonableness test is provide in the Norwegian Supreme Court's *Fusa* judgment. The judgment concerned the right to basic health and social services in the client's domicile (hjemmesykepleie, hjemmehjelp).<sup>35</sup> According to the social care law (sosialomsorgsloven) § 3 (1) the municipal has a duty to provide health and social services to individuals with such needs. There was no doubt that the person concerned, according to the relevant provisions, had a right to these services. The question concerned the scope of the services, more concretely, the economy in it. One of the questions brought before the court was whether the relevant municipal authority had granted the sum necessary to provide the care which the person concerned was entitled to according to the abovementioned statutory provision.

The Norwegian Supreme Court first noted that the relevant law provision does not apply the word "rett" (right). Although the term is applied in the preparatory works, it appears clear that legislator did not thereby mean to refer to a right in the meaning of individual right which can be enforced by the

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<sup>30</sup> It should be noted in this regard that the situation in Sweden is somewhat different from that in Norway and Denmark since the administrative court can review not only the legality of a administrative decision, but also the merits of the administrative discretion, i.e. also whether a decision is reasonable. It has been suggested that the Norwegian (and Danish) courts have been more eager to review administrative decisions in later years, c.f. Boe, Erik "Hvem bestemmer – domstolene eller forvaltningen?", *Lov og Rett*, vol. 46, 2, 2007, s 67-88

<sup>31</sup> "manifestly unreasonable" is applied explicitly by the courts as a head of review in Danish administrative law – "åbenbart urimelig", and Norwegian administrative law – "sterkt urimelig". For Sweden, see note above.

<sup>32</sup> Some would claim that the very aim and purpose of administrative law is to control government power and thereby protect individual rights, see in Craig, Paul, *Administrative Law*, London: Sweet & Maxwell 2003, at pg. 3.

<sup>33</sup> In Rt 1951: 19 (*Mortveit*) the Norwegian Supreme Court quashed an administrative decision because it was manifestly unreasonable: "så urimelig og stridende mot alminnelig samfunnsoppfatning" (at p 24). However this is clearly the exemption rather than the main rule.

<sup>34</sup> See, for example, the decisions of the Danish Ankestyrelsen at: <http://www.ast.dk/afgoerelser/principafgoerelser/>.

<sup>35</sup> Rt. 1990: 874 (*Fusa*)

courts.<sup>36</sup> Thus, it was clearly the proposing ministry's intention that the content (what) and the scope (how much) of the benefit was to be determined on a discretionary basis by the respective administrative body. The court noted that the legislator's determination with regard to what could constitute a right or not was not binding on the court.<sup>37</sup> However, it nevertheless stated that a decision could only be quashed by the court to the benefit of the individual to the extent the administrative authority had taken irrelevant considerations into account, decided discriminatory or arbitrary, or if the outcome must be perceived as manifestly unreasonable for the individual concerned.<sup>38</sup>

With regard to the content of the service the court noted that it is difficult to pinpoint this exactly and that it was legitimate for the deciding administrative organ to take into considerations the economy and resources of the respective municipal. However, the relevant administrative decision must in this regard satisfy a certain minimum, and whether this is the case may be reviewed by the courts. In other words, the judiciary may get involved in the review of the merits of the administrative decision with regard to the minimum level of the benefit. The test to be applied in this case was the manifestly unreasonableness test, i.e. the decision would be held manifestly unreasonable in the case the benefit was seen as below the minimum level. The court found that the minimum level of social service was not fulfilled in the case, declared the decision manifestly unreasonable and thus invalid.<sup>39</sup>

A similar approach has been taken by the Norwegian Supreme Court with regard to education. In a case concerning education for adults the question brought before the Supreme Court was whether an administrative decision in this case could be subject to judicial review, or whether the judiciary should respect the administrations discretionary powers. The Appeal court had ruled that the decision was within the scope of the administration's discretionary powers and therefore could not be reviewed by the courts. The Supreme Court disagreed. Although it was clear that the extent of the right following the law had to be balanced up against the available resources in the municipal, the law gave a right to a certain minimum of education which the court could review whether had been fulfilled or not. Thus, the Appeal court had erred in law and, since the Supreme Court was precluded from deciding upon the substance of the case, the Supreme Court handed the case back to the Appeal court for a new trial.

The cases illustrate a number of interesting points with regard to the legal status of social rights. Firstly, the court does not see itself as bound by the legislator's categorisation of the benefit as a right, in the meaning that it is judiciable or not. Secondly, although the court may not review all sides of the decision, i.e. what kind of services the municipal according to the law has an obligation to provide, it will review whether the service provided falls below a certain minimum level. And thirdly, in the case it finds that the service provided is below a certain minimum level it will hold this manifestly unreasonable and hold the measure invalid.

This approach, one could hold, is in line with the approach taken in the pension cases mentioned above. Whether a welfare benefit is pursuant to the constitution or statute, then, does not really matter. In this regard it can be noted that the norm-hierarchical standing of fundamental individual legal guarantees apparently does not matter either. It appears for example clear that the Norwegian Supreme Court has always perceived it as its task to review and set aside (in the concrete case) legislative and

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<sup>36</sup> Ibid. at 886: "I utvalgsinnstillingen av 1953 til lov om sosialhjelp brukes ordet "rett" i lovutkastet, men ifølge merknadene er det ikke tale om "et sivilt rettskrav som kan gjennomføres ved domstolens hjelp. At det ikke skulle være en rettighet i denne betydning støttes også av departementets vurderinger..."

<sup>37</sup> Ibid. at 887

<sup>38</sup> Ibid. at 888

<sup>39</sup> Ibid. at 888

administrative acts conflicting with fundamental individual legal guarantees;<sup>40</sup> regardless if these are laid down in the constitution or not even regardless whether they are expressed in positive law at all.<sup>41</sup>

#### **4. The Impact of European Law**

It is difficult to reach a coherent conclusion with regard to the status of welfare benefits in Scandinavian legal systems with reference to the discussion above. There appear to be different tendencies, some reflective of the welfare benefits still being a political project or at least that their understanding and scope should still be safely within the realm of political decision making, whereas, in some cases there appear to be a contrary tendency to frame social benefits in, at least, the language of individual rights. Whether the application of rights terminology constitutes a reality or not, one would have to see. One could in this regard note that the Norwegian Supreme Court refrained from pinpointing what social benefits the clients in the two abovementioned cases were entitled to or to determine where the threshold for a minimum of social benefits should be set.

It appears clear that the rights rhetoric is imported, more specifically; it is imported through various international law regimes such as the European Convention on Human Rights and European Community law. One could be led to believe that the rights rhetoric is less rhetoric and more reality in European law than is the case in Scandinavian law. What might lead to this conclusion is the fact that although the legal basis, i.e. the basis in the European Convention or the EU treaties is rather weak, both these legal regimes is in possession of self conscious, activist courts who interprets the respective legal basis dynamically. At least one element of the concept of right, the possibility for the individuals to have their cases decided upon by courts potentially contrary to the interpretation of the national legislator, is a reality in European law. On the other hand, one could clearly argue that this is more a question of procedure than substance.

Nevertheless, many have held that decisive for the understanding of how far, for example, the right to property allows for the protection of social benefits in the Scandinavian countries is the Convention of Human Rights and the judgments of the Strasbourg court. In article 1 of protocol 1 of the Convention the protection of property is laid down. The Strasbourg court has interpreted the article broadly, in many respects, it has been held, more broadly, than would be possible with reference to the respective Scandinavian constitutions. And since all the Scandinavian countries are obliged to follow the rulings of the Strasbourg court, obviously, this broader understanding of the right to property also will apply in Scandinavian law.

In *Gaygusuz v. Austria* from 1996,<sup>42</sup> for example, the Strasbourg Court thus held that the Austrian state could not make the right to social benefits, or more concretely, “emergency assistance”, conditioned on a duty to pay taxes or other levies. The right to basic benefits is considered a right to property and is thereby guaranteed through the Convention. And even more than this, the right to “emergency assistance” has a clear natural law side to it as opposed to the private contractual, where the right is coupled with a duty. However, according to the Strasbourg court the right to welfare benefits is not only limited to the extreme cases, as noted above. In *Koua Poirrez v. France* the property provisions was applied with regard to continuous benefits for a handicapped person.<sup>43</sup> Also in this case it was clear that the court disregarded whether and to what degree the respective person had himself contributed by way of taxes to the welfare redistribution system. However, the court has not been

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<sup>40</sup> The human rights act (Menneskerettsloven) 1999 although formally a statute has been given a priority clause which implies that it by many considered to have “semi-constitutional” ranking.

<sup>41</sup> See, for example, Rt 1916: 648 (*Bidragssplikt* – presumption of innocence), Rt. 1952: 1217 (*To mistenkelige personer* – privacy) and Rt. 1979: 1079 (*Simmsykes ankerett* – effective remedy, fair trial)

<sup>42</sup> *Gaygusuz v. Austria* 39/1995/543/631

<sup>43</sup> *Koua Poirrez v. France* 40892/98

willing to state any exact amount that should be protected by the provision. Thus, in these cases the Court has taken a deferent approach leaving it to the respective states to decide the character and amount of the benefit see e.g. *Stawicki v Poland*.<sup>44</sup>

With basis in the cases mentioned one could hold that the core or content of the social benefits determined by the Strasbourg court with reference to the relevant provision in the Convention is nevertheless so uncontroversial that it is difficult to see that it really contributes greatly to the strengthening of the individual's position, at least not for nationals. It should thus be noted that the landmark cases with regard to social rights which has been decided by the Strasbourg Court concerns non-nationals. Thus, one could claim that these judgments - e.g. the *Gaygusuz* and *Koua Poirrez* - are not so much about social rights as they are about discrimination, i.e. the right not to be discriminated against on basis of nationality.

The same is apparently all that social law within the framework of the European Union amounts to. With regard to the Scandinavian welfare state it is difficult to see that the European law has contributed to its improvement with regard to benefits for the nationals. However, the prohibition against unequal treatment of nationals of the Member States has implied that the group of persons eligible for welfare benefits has increased.<sup>45</sup> The relevant case law then is again not so much about rights to various social benefits as the right for non-nationals not to be discriminated against on basis of nationality.

### **Conclusion: Law and Politics; Rights and Duties**

In the establishment face, welfare law was clearly about the achievement of political goals by way of democratic political processes; it was about realising political goals steered by an overarching idea of the good society. A good society had, according to the social democratic conception a strong redistributive side to it, expressed in the political slogan proposing that every one should contribute according to abilities and receive according to needs. This rationality, which is very well illustrated in the Norwegian Supreme Court's premises in the cases concerning pension benefits, rejects the private contractual rationality, which at an earlier stage had been the dominant rationality.

The rational of the social-democratic redistributive welfare system can, however, only be sustained under a particular societal contract. Because, although the system is infested with a number of control mechanisms it, nevertheless, has to a large degree to be based on trust between the member of the society: There are clearly limits to the intensity and scope of the control mechanisms to which one can subject individuals in a free society. True, under this welfare regime it might be fairly easy to determine a citizen's need for social benefit. Much more difficult may it be to determine the scope of his contribution. In the end it is the citizen himself who determines his abilities to contribute. Thus, in contrast to a welfare system predominantly based on reciprocity as in private contract law, which we in particular find in the United States, but also to an ever larger degree on the European continent, the Scandinavian welfare system requires for its sustainability a higher degree of civil virtue among its citizens. The reliance on civil virtue has been possible in societies with a strong communitarian ethos coupled with strong societal control mechanisms intrinsic in small, homogeneous, transparent and peaceful Scandinavian countries.

It may appear that this important premise upon which the Scandinavian welfare system is based is deteriorating. Evidence of the deterioration of civil virtue, more specifically, work ethics can, for example, be found in statistics over absence from workplace due to illness. Among the OECD countries Sweden and Norway is in the lead and the reason for this is more likely the lack of work ethics (promoted by generous welfare benefits) than that the Norwegian and Swedish population is

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<sup>44</sup> *Stawicki v Poland* 47711/99

<sup>45</sup> See, for example, C-184/99 *Grzelczyk*



sicker than people elsewhere in the OECD countries.<sup>46</sup> This deterioration in civil virtue threatens to undermine the very welfare system itself.

A paradoxical situation has risen: At the same time as the Scandinavian citizens have embraced the fruits of liberalism and individualism they have not been prepared to take the consequence of this with regard to welfare benefits. This means that they are perfectly happy with the fact that the state still provides for health care, pensions, kindergartens, etc.<sup>47</sup> There is apparently no contradiction between a strong welfare state and the (Scandinavian version of) liberalism and individualism. However, as we noted above, the benefit side is only part of the deal. True, the Scandinavian population is taxed heavily and this part of the citizen's duty to contribute is easily controllable. However, since the by far largest proportion of revenues is derived from income tax it is important that all able persons work. As noted above, this part of the societal contract is under strain.<sup>48</sup>

Whereas the quest for social justice – with regard to the right to social benefits – was secured by leaving the private contract conceptualisation with regard to, for example, pension rights, one could argue that the quest for social justice – with regard to the duty to contribute – can, in lack of civil virtue, notably, work ethics, only be reached by reintroducing private contractual thinking into welfare law. Private contractual thinking is, then, not about preferred legal theoretical approaches to social benefits, but about securing the sustainability of the welfare regime in the long run. On the other side, it might appear that private contractual thinking would undermine the developments we have seen in European law, where a prerequisite for the widening of the group of persons eligible to welfare benefits is that the idea of reciprocity is abandoned. However, this is not all true. It is more correct to hold that the order of the factors is turned around, meaning benefits first and then contribution. And the order of the factors in this case is, one could clearly hold, irrelevant.

Thus, in the Norwegian government's proposal to a pension reform of 2009 it has been important to construct incentives to work.<sup>49</sup> By, for example, postponing his/her retirement, an individual may increase his/her pension considerably. With regard to unemployment benefits there clearly is a private contractual element and the importance of this element increases the stronger the incentive to re-enter the labour market is. The contract element is thus arguably strongest in Denmark where the *flexicurity* system imposes on the individual not only incentives, but also clear duties to, for example, undergo retraining in order to be able to meet the new demands in the labour market. In other areas of welfare law, for example, health treatment etc. it is clearly more difficult to operate with a private contract rationality.

A right conceptualised as a private contract right is clearly not the same as an individual right in the meaning of a natural law informed constitutional right, although also the former may be invoked before courts. One could even claim that the reference to social benefits as rights undermines the very concept of rights, at least a unitary concept of rights. The alternative would be to pursue the approach taken by the Norwegian court in the *Kløfta* judgment and propose a relative understanding of rights, claiming that economic rights, including welfare rights, have a weaker standing than rights securing the individuals freedom or security.<sup>50</sup> Such a relative understanding of rights can be read into the

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<sup>46</sup> See, for example, OECD social, employment and migration working paper No. 78 (Mars 2009). Activation policies in Norway.

<sup>47</sup> See more general: Graver, Hans Petter "Mellom individualisme og kollektivism – forvaltningsretten ved inngangen til et nytt århundre" *LoR* 2000, pg. 451-482

<sup>48</sup> There are, naturally, other reasons why the welfare regimes in the Scandinavian regimes have come under strain in recent years, not at least due to times of economic recession. Thus both in Denmark and Sweden the welfare states have undergone fundamental reorganisations, respectively in the 1970/80s and in the early 1990s. Norway has, due to the economic advantages provided by large oil and gas reservoirs, been spared in this regard.

<sup>49</sup> Ot.prp. nr. 37 (2008-2009) *Om lov om endringen i folketrygdløven (ny alderspensjon)*

<sup>50</sup> Rt 1976: 1 (*Kløfta*)

Danish approach to welfare rights as well and could arguably also be read into the approach taken by the Strasbourg Court in these cases, reflected in its application of the margin of appreciation as well as the proportionality balancing scheme.

One could thus claim that it is a matter of preferences whether one decides to formulate social benefits as rights in the meaning of human rights or benefits. In both cases the individual may claim the respective benefit; however, in the latter case inflationary rights rhetoric is avoided. The point is then that whether one uses the one or the other terminology does not effect the individual's position, since the application of the terminology right does not have any added legal value in comparison with the term benefit. In this regard one should note that the Scandinavian welfare regime is widely regarded as one of the best regimes in Europe (and beyond).

One could even claim that the term "benefit" better reflects the legal reality in Scandinavia than the term "right" – at least right in the liberal law or even natural law tradition expressed by John Rawls and in particular Ronald Dworkin.<sup>51</sup> True, the word "benefit" has an inherent weakness in it since it does not reflect the reciprocal element of the benefit, notably, the right-duty relationship in the case the welfare regime is characterised by private contractual thinking. In the case the welfare benefit has a private contractual side to it, it may be more correct to refer to the benefit as a "claim" or "entitlement" that the individual has which corresponds to the duty the individual has to contribute to the society.

The reintroduction of private contractual thinking in the Scandinavian welfare regimes would alter the very rationality of these welfare regimes, i.e. their egalitarian and thus redistributive side. Whereas "receive according to needs, contribute according to abilities" was the mantra of the social democratic egalitarian welfare regime, the mantra under the new liberal and individualist welfare regime informed by private contractual thinking would be: "receive according to your contribution".

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<sup>51</sup> Rawls, John, *A Theory of Justice*, Cambridge Mass: Harvard University Press 1971; Dworkin, Ronald, *Taking Rights Seriously*, Cambridge Mass. Harvard University Press 1977

## Doctrinal Vision as to the Protection of Social Rights by the European Court of Human Rights

Claire Marzo

The protection of social rights by the European Court of Human Rights (hereafter ECHR) has been the subject of numerous articles. Because these rights are still today heavily debated as to their reality, their definition and their justiciability, they are at the centre of our attention.

Their definition is still difficult to assess. Not only are there multiple expressions referring to them – economic and social rights, economic, social and cultural rights, social rights, labour rights, social rights of the workers, fundamental rights of the workers or social fundamental rights – but their diversity also appears when analysing their content, for instance when deciding whether cultural rights or propriety rights<sup>1</sup> should be included or not in this category.<sup>2</sup>

Their justiciability is even less clear. Defined as the existence of jurisdictional remedy or as the possibility to ask to a judge to draw the consequences of a law,<sup>3</sup> it has two characteristics: first, the victim of a violation should have an access to a judge; then, the rights applied by the judge should be effective. Justiciability is a condition of the efficiency of the guarantee and of its sanction. It is more contested when it comes to economic and social rights.

The debates around this question have evolved with time and have been shaped by the ECHR case law. First, the recognition of social rights started at the end of the Second World War, when Western European countries controlled international law and when they adapted in diverse ways the welfare state to their internal legal orders. In the same way that state nationals were being given social security

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<sup>1</sup> ILIOPOULOS-STRANGAS, J., « La Charte des droits fondamentaux de l'Union européenne face à la protection constitutionnelle des droits sociaux dans les Etats membres », in FLAUSS, J.-F. (dir.), *Droits sociaux et droit européen, bilan et prospective de la protection normative*. Bruxelles, Bruyant, Nemesis, 2002, p. 15 ; C. PELISSIER, *La protection des droits économiques et sociaux fondamentaux dans la communauté européenne*, Faculté de Montpellier I, Diffusion ANRT, Montpellier, 2001, p. 25 et s.

<sup>2</sup> For Isabelle Daugareilh, a hard core of social rights consists in the right to social protection which includes social security, social and medical assistance, labour law, trade union law, collective bargaining, right of the family to a legal, social and economic protection, rights of migrant workers and their families to protection and assistance. DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, see footnote 5, p. 123. For Antonio Cancado Trindade, the results of the debates around the ECHR were that social and economic rights were, in the end, an emanation of labour law and social security rights and that, turning to cultural rights, it should be focused on the right to education; CANCELADO TRINDADE, A.-A., « La protection des droits économiques, sociaux et culturels : évolutions et tendances actuelles, particulièrement à l'échelle régionale », *Revue générale de droit international public*, 1990, pp. 913-946, p. 925-926. For Professor Bonnechère, social rights are freedom of association and the interdiction of forced labour, BONNECHÈRE, M., « La production des Cours européennes en droit social : éléments de réflexion », *Droit ouvrier*, 2008, fasc. 724, pp. 552-562 ; For Professor Flauss, social rights include the right to education of article 2, protocol 1 of the ECHR, FLAUSS, J.-F., « Les interactions entre les instruments européens relatifs à la protection des droits sociaux », in FLAUSS, J.-F. (dir.), *Droits sociaux et droit européen : bilan et prospective de la protection normative, actes de la journée d'études du 19 octobre 2001*. Institut international des droits de l'homme, 2001, pp. 89-114, p. 91. Finally, the president of the ECHR mentions as social rights the right to association, the right to propriety, the right to education and the interdiction of forced labour, COSTA P., « Exposé sur la Cour européenne des droits de l'homme et la protection des droits sociaux », *Discours prononcé à Bruxelles le 22 janvier 2009 lors du Colloque « Droit et solidarité » organisé à l'occasion de la rentrée solennelle du Barreau de Bruxelles* [http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7083E7314C55C/0/2009\\_Bruxelles\\_Institut\\_DH\\_du\\_barreau.pdf](http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7083E7314C55C/0/2009_Bruxelles_Institut_DH_du_barreau.pdf). In this study, the notion of social rights will be used in a broad way. This approach is justified by the scope of the research, i.e. the ECHR.

<sup>3</sup> BONNECHÈRE, M., « La production des Cours européennes en droit social : éléments de réflexion », *Droit ouvrier*, 2008, fasc. 724, pp. 552-562.

rights, many international law texts were taking into account social rights.<sup>4</sup> The Council of Europe perfectly illustrates this development. The ECHR aims to protect civil and political rights whereas the Social Charter is turned towards social rights.

Different mechanisms have then limited the potential application of social rights. The Social Charter was only bound to be protected through reports even though it has recently partially been completed with collective actions,<sup>5</sup> whereas the ECHR is a real Court which can be directly referred a matter according to article 34 ECHR as corrected by protocol 11<sup>6</sup>. This distinction echoes, once again, the international law position.<sup>7</sup>

Consecutively, several authors have proposed a better protection of social rights. Several tendencies can be distinguished.

A first consists in drawing a line between civil and political rights on the one hand and economic and social rights on the other hand. It recognizes the indivisibility of rights in order to accept social rights as consequences of political and civil rights (I).

The second and newer tendency consists in making social rights equal to civil and political rights, in considering them like real, entire human rights. It could lead to the idea, less well-known, of considering social rights not anymore like consequences of political rights, but like causes of these first-generation rights, thus giving them a complete justiciability (II).

## **I. Social Rights Inferior to Political and Civil Rights**

If some authors consider that the individual is the virtual beneficiary of social rights, even though he cannot reach their effective exercise,<sup>8</sup> others give it a reality through civil and political rights. Social rights, potential consequences of civil and political rights, are presented like inferior rights (A), but benefiting from some justiciability (B).

### **A. Positive Social Rights of an Inferior Value to Negative Civil and Political Rights**

A first tendency consists in analysing social rights as rights of an inferior value to political and civil rights. Several typologies of human rights have systematically led to the treatment of social rights as inferior. Professor Vasak identifies six typologies of human rights.<sup>9</sup> The first criteria have to do with

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<sup>4</sup> As to the recognition of social rights at an international level, one finds articles 22 à 25 of the Universal Declaration of Human Rights adopted by the general Assembly on 10 december 1948; in the international covenant on economic, social and cultural rights of 3 january 1976; in the European social Charter of 1961 and revised in 1996; in the chapter II of the additional protocol to the American convention on Human rights of the 18 july 1978; in article 15 to 18 of the African charter of human rights and people adopted the 26 june 1981 dans les articles 15 à 18 de la *Charte africaine des Droits de l'Homme et des Peuples* adoptée le 26 juin 1981.

<sup>5</sup> DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, ndbp 5, p. 124.

<sup>6</sup> Came into force the 1<sup>st</sup> novembre 1998.

<sup>7</sup> This situation can be compared to the one of the international covenants. (see CANCADO TRINDADE, A.-A., « La protection des droits économiques, sociaux et culturels : évolutions et tendances actuelles, particulièrement à l'échelle régionale », *Revue générale de droit international public*, 1990, pp. 913-946). It can be contrasted to the Universal declaration of human rights which puts together all the rights, COHEN JONATHAN, G., « René Cassin et la conception des droits de l'homme », *Actualités de la pensée de René Cassin, Actes du colloque international paris 14-15 nov 1980*. Paris, Editions du CNRS, 1981, pp. 51-62, p. 51.

<sup>8</sup> SUDRE, F., *Droit européen et international des droits de l'homme*, 6, Paris, PUF, 2003.

<sup>9</sup> VASAK, K., « les différentes typologies des droits de l'homme », in BRIBOSIA, E. & HENNEBEL, L. (dir.), *Classer les droits de l'homme*. Bruxelles, Bruylant, 2004, pp. 11-23. The last criteria of the belonging to a present and future generations will not be taken into account here as it cannot be linked to social rights.

the importance of different human rights. Varying through times, it has been a way to identify several superior rights<sup>10</sup> such as propriety, freedom of expression, the right to life or to dignity. Others have just stated that civil rights were more important than social rights.<sup>11</sup>

The second criterion depends on the intrinsic nature of human rights. The programmatic character of a right makes it a principle, by opposition to a right which are understood in a more restrictive meaning as the only ones having a compulsory nature. This distinction, more recently repeated by Guy Braibant in order to make the Charter of Fundamental Rights acceptable to all Member States does not necessarily fit the distinction between social rights and civil and political rights, but the association was proposed for a while and many commentators recognized it again at the reading of the Charter. It was considered that civil and political rights have an immediate application, create an obligation not to act on the part of the state whereas social, economic and cultural rights would be rules of progressive application, creating positive obligations of action.<sup>12</sup> In other words, there is a difference of nature between civil and social rights.<sup>13</sup> Their nature is revealed by a certain idealism of these rights<sup>14</sup> or their formulation.<sup>15</sup> They are not, according to Judge Costa, President of the ECHR, “rights whose content could be based on a solid enough political consensus and which could be defined in legal and precise definitions”.<sup>16</sup>

This approach can be compared to a typology according to the implementation of the rights and to its mechanisms of protection.<sup>17</sup> It is noted that the difference between the freedom to do and the right to demand an action to the state is so obvious in terms of legal technique that, after 1948, it was necessary to create distinct instruments and different procedures at the universal level as well as at the regional level. The underlying problem is that, in a vicious circle, the “myth of injusticiability” is automatically renewed. According to Olivier de Frouville, this injusticiability is based on the refusal to create individual claims procedures. And the absence of these procedures creates uncertainty as to the

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<sup>10</sup> DECAUX, E., « la question de la typologie des droits de l'homme au sein du système du Conseil de l'Europe », in BRIBOSIA, E. & HENNEBEL, L. (dir.), *Classer les droits de l'homme*. Bruxelles, Bruylant, 2004, pp. 297-314, p. 308 et s.

<sup>11</sup> LAROQUE, P., « La Charte sociale européenne », *Droit Social*, 1979, p. 100 et s.

<sup>12</sup> CANCADO TRINDADE, A.-A., « La protection des droits économiques, sociaux et culturels : évolutions et tendances actuelles, particulièrement à l'échelle régionale », *Revue générale de droit international public*, 1990, pp. 913-946, p. 915 et BOSSUYT, M., « La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels », *Revue des droits de l'homme*, 1975, vol. 8, pp. 785-820.

<sup>13</sup> He notices that this difference is not systematic. Some social rights –like the right to strike or the right to association are not positive rights. It is individual rights used collectively and which do not imply a allowance given by the state. COHEN JONATHAN, G., « René Cassin et la conception des droits de l'homme », *Actualités de la pensée de René Cassin, Actes du colloque international paris 14-15 nov 1980*. Paris, Editions du CNRS, 1981, pp. 51-62, p. 51.

<sup>14</sup> For instance, JASUDOWICZ, T., « The legal character of social rights », in DRZEWIKI, K., KRAUSE, C. & ROSAS, A. (dir.), *Social rights as human rights*. Finland, Institute for human rights, Abo Akademi university, 1994.

<sup>15</sup> LIEBENBERG, S., « The protection of economic and social rights in domestic legal systems », in EIDE, A., KRAUSE, C., ROSAS, A. (dir.), *Economic, social and cultural rights, a textbook*, 2<sup>nd</sup> ed., Dordrecht, Boston, London, Martinus Nijhoff Publishers, 2001, p. 55

<sup>16</sup> COSTA P., « Exposé sur la Cour européenne des droits de l'homme et la protection des droits sociaux », *Discours prononcé à Bruxelles le 22 janvier 2009 lors du Colloque « Droit et solidarité » organisé à l'occasion de la rentrée solennelle du Barreau de Bruxelles* [http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7-083E7314C55C/0/2009\\_Bruxelles\\_Institut\\_DH\\_du\\_barreau.pdf](http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7-083E7314C55C/0/2009_Bruxelles_Institut_DH_du_barreau.pdf), p. 2.

<sup>17</sup> STEINER, H. J. & ALSTON, P., *International Human rights in context Law, Politics, Morals, Text and Materials*, Oxford, Clarendon press, 1996, p. 279. For Isabelle Daugareilh, the inferior value of social rights of the European social Charter is linked to the absence of direct effect of social rights and to the fact that the obligations have a non jurisdictional control. DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, footnote 5, p. 124.

regime of these rights, and consequently, the knowledge that these rights are not real rights, but simple political objectives.<sup>18</sup>

Another typology of human rights which has also been used in order to distinguish social rights from political and civil rights is the criteria of the beneficiary of human rights. It has been said that social rights were collective rights (allowing for collective claims in front of the Committee of Social Rights) whereas political and civil rights would be protected by the ECHR.<sup>19</sup>

The typology according to the positivity or the negativity of human rights has been correlated to the second typology and used on several occasions. The point is to explain that social rights are positive rights<sup>20</sup> ('droit à') whereas political rights are negative or called 'droit de'. The classical analysis states that social rights need, in order to exist, an implementation by the state.<sup>21</sup> Negative rights, on the contrary, do not request any action from the state. It is only protected by interdictions<sup>22</sup> or abstentions of the state. This criterion can be compared to that depending on the role of the state. Several authors state that the nineteenth century was the period of recognition of individual freedoms which were written in constitutions in order to protect the individual from the state. Some public lawyers today call these negative freedoms. The 20th century sees social claims which necessitate the action of the state. As long as these freedoms create obligations for the state to realise, the freedoms can be considered as positive.<sup>23</sup> This typology naturally leads to another one based on a historical perspective.

The historical approach relies on the notion of 'generations of rights' which suggests that the most important rights were recognised first. Thus, the French Declaration of the Rights of Man and the Citizen only affirms rights of the first generation. In France, social rights only found a constitutional recognition in the preamble of the French Constitution of 1946. Generations are not found at the international level since the Universal Declaration of Human Rights not only recognized all types of rights, but also gave them a similar value.<sup>24</sup> Similarly, the European Convention of Human Rights is quasi simultaneous to the Social Charter within the Council of Europe.

One could add an administrative typology which would consist in distinguishing according to the treaties which determine mechanisms of implementation of the rights. In Europe, social rights are, thus, distinguished by the elaboration of the Social Charter.<sup>25</sup>

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<sup>18</sup> DE FROUVILLE, O., *L'intangibilité des droits de l'homme en droit international, régime conventionnel des droits de l'Homme et droit des traités*, Paris, A. Pedone, Publications de la fondation Marangopoulos pour les droits de l'Homme (FMDH), 2004, p. 260.

<sup>19</sup> LIMPENS, J., *La reconnaissance et la mise en œuvre des droits économiques et sociaux, Actes du Colloque international de droit comparé Bruxelles 14-17 septembre 1967*, Bruxelles, CIDC, 1972, p. 3 et DECAUX, E., « la question de la typologie des droits de l'homme au sein du système du Conseil de l'Europe », in BRIBOSIA, E. & HENNEBEL, L. (dir.), *Classer les droits de l'homme*. Bruxelles, Bruylant, 2004, pp. 297-314, p. 306.

<sup>20</sup> The positivity of a right is not necessarily associated to its social nature, it can be analysed differently, see *infra*.

<sup>21</sup> BOSSUYT, M., « La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels », *Revue des droits de l'homme*, 1975, vol. 8, pp. 785-820.

<sup>22</sup> See COHEN JONATHAN, G., « René Cassin et la conception des droits de l'homme », *Actualités de la pensée de René Cassin, Actes du colloque international paris 14-15 nov 1980*. Paris, Editions du CNRS, 1981, pp. 51-62, p. 58 ainsi que SUDRE, F., *Droit européen et international des droits de l'homme*, 8, Paris, PUF, 2006.

<sup>23</sup> LIMPENS, J., *La reconnaissance et la mise en œuvre des droits économiques et sociaux, Actes du Colloque international de droit comparé Bruxelles 14-17 septembre 1967*, Bruxelles, CIDC, 1972, p. 2.

<sup>24</sup> René Cassin explained in its course of La Hague in 1951., see COHEN JONATHAN, G., « René Cassin et la conception des droits de l'homme », *Actualités de la pensée de René Cassin, Actes du colloque international paris 14-15 novembre 1980*. Paris, Editions du CNRS, 1981, pp. 51-62, p. 57-58.

<sup>25</sup> DECAUX, E., « la question de la typologie des droits de l'homme au sein du système du Conseil de l'Europe », in BRIBOSIA, E. & HENNEBEL, L. (dir.), *Classer les droits de l'homme*. Bruxelles, Bruylant, 2004, pp. 297-314, p. 305. This affirmation will be discussed, see *infra*.

Most of the time, the different typologies have been juxtaposed, which implies to superimpose four distinctions:

- social rights/civil and political rights
- positive rights/ negative rights
- droits à/ droits de
- action, implementation/ interdiction

This approach is also found in the *Airey* case of the ECHR. One can read that “fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State”,<sup>26</sup> and that “the Court is aware that the further realization of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question”.<sup>27</sup> Without taking into consideration the association proposed of the different categories of rights,<sup>28</sup> one notices that the last sentence explicitly associates social rights and rights to an action of the state. The first sentence links positive measures and positive obligations of the state, to which we can add positive right. The conjunction of the two sentences allows to state that social rights are positive rights, ‘droits à’ which implies an action of the state and corresponding to an expenditure of the state<sup>29</sup>. They must be distinguished from civil and political rights which are negative rights, ‘droits de’, corresponding to an abstention of the state.

However, the *Airey* case has transformed the doctrinal approaches since it was an occasion for the Court to assert the indivisibility of civil, political, economic and social rights.

### **B. Social Rights as Consequences of Civil and Political Rights**

The European Court of Human Rights, like the Human Rights Committee of the United Nations<sup>30</sup> has developed a case law protecting social rights. Paradoxically, these Courts which were not supposed to take into account social rights according to their statuses and constitutive missions of protection of civil and political rights have evolved. Thanks to their accessibility, they have become primary places of protection of social rights. This unexpected protection is made thanks to the affirmation of the indivisibility of human rights.

The indivisibility of human rights, widely recommended by the doctrine,<sup>31</sup> has been recognized in several occasions in the Vienna Declaration of the United Nations<sup>32</sup>, the Maastricht Guidelines,<sup>33</sup> in the Limburg principles and finally by the ECHR.

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<sup>26</sup> ECHR, *Airey*, 9 octobre 1979, A 32, paragraphe 24

<sup>27</sup> ECHR, *Airey*, 9 octobre 1979, A 32, paragraphe 26.

<sup>28</sup> See *infra*, B.

<sup>29</sup> Combination of paragraphes 24 et 25 de l’arrêt *Airey* in F. SUDRE, *Les grands arrêts de la Cour européenne des droits de l’Homme*, 2<sup>e</sup> édition mise à jour, Thémis, PUF droit, Paris, 2003.

<sup>30</sup> See *Broeks c/ Pays-Bas*, dec. 9 avril 1987, n 180/1984 ; *Danning c/ Pays-Bas*, dec. 9 avril 1987 ; *Gueye et autres c/ France*, communication no 196/1983, 3 avril 1989, UN. Doc. Sipp. No. 40 (A/44/40) at 189 (1989), voir p.8 in M. LANGFORD, A. NOLAN, *50 Leading Cases on Economic, Social and Cultural Rights*.

<sup>31</sup> DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, ndbp 5, p. 126.

<sup>32</sup> Déclaration et programme d’action de Vienne (Partie I, par. 5), adoptés par la Conférence mondiale sur les droits de l’homme, Vienne, 25 juin 1993.

<sup>33</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 22-26 January 1997 at the invitation of the International Commission of Jurists, nouvelle parution dans (1998) 20 *Human Rights Quarterly* 691.

It was declared that “human rights and fundamental freedoms are indivisible and interdependent”, that “the same attention regarding the application, the promotion and the safeguarding of civil, political, economic, social and cultural rights should be taken”, that the Member States should, at all times, act in good faith in order to fulfil their obligations of observance of the covenant of economic, social and cultural rights.<sup>34</sup> These different statements tend to assimilate two conceptions of indivisibility. It appears as an inseparability of human rights as well as an equality of value. However, only the first definition really fits the context of the ECHR.

In the *Airey* case and numerous following ones, the ECHR applies an evolutive method of interpretation<sup>35</sup> and states that “there is no water-tight division separating that sphere from the field covered by the Convention”<sup>36</sup> and that “whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature”.<sup>37</sup> This case has transformed the doctrinal approach. If everybody agrees as to the permeability of the ECHR to social rights,<sup>38</sup> the extensive interpretations of civil and political rights vary. Some authors consider that social rights are recognized,<sup>39</sup> others refuse to recognise social rights, but see the application of civil rights in the field of social law<sup>40</sup> specifically in the case of the recognition of a right to a fair trial in the social case law and of a right not to be discriminated while doing social activities.<sup>41</sup>

When it comes to the right to a fair trial under article 6 ECHR, the taking into account of all litigations which include a patrimonial object and/ or based on a hindrance to patrimonial rights allow to include claims about labour law or social security law. The Court has been able to protect several social rights. For instance, it recognises that claims about the legality of a redundancy,<sup>42</sup> to benefit from social security allowances<sup>43</sup>, social aids<sup>45</sup> or pension benefits<sup>46</sup> are part of the right to a fair trial<sup>47</sup>.

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<sup>34</sup> Paragraphes 3 et 7 des Principes de Limburg concernant l'application du Pacte international relatif aux droits économiques, sociaux et culturels, Doc. de l'ONU E/CN.4/1987/17, accessible sur [http://www.aidh.org/ONU\\_GE/Comite\\_Drteco/limburg02.htm](http://www.aidh.org/ONU_GE/Comite_Drteco/limburg02.htm)

<sup>35</sup> DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, ndbp 5, p. 126.

<sup>36</sup> ECHR, *Airey*, 9 octobre 1979, A 32, paragraphes 24 et 26.

<sup>37</sup> ECHR, *Airey*, 9 octobre 1979, A 32, paragraphe 26.

<sup>38</sup> SUDRE, F., « La « perméabilité » de la Convention européenne des droits de l'homme aux droits sociaux », *Pouvoir et Liberté, Etudes offertes à Jean Mourgeon*, Bruylant, Bruxelles, 1998, pp. 467-478.

<sup>39</sup> It is the recognition of a « new » social right for Professor SUDRE, F., « Les droits sociaux et la Convention européenne des droits de l'homme », *Revue universelle des droits de l'homme*, 2000, pp. 28-32, p. 28, but he then decides that there is no « consecration of a social substantial right », p. 32. Another piece of evidence is given by Isabelle Daugareilh whose article states that the *Gaygusuz* case makes the right to social security a fundamental social right realised and protected by the jurisdiction of the ECHR, see DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, ndbp 5, p. 130.

<sup>40</sup> DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, footnote 5, p. 126.

<sup>41</sup> For a precise analysis of the methods of the ECHR, see DELZANGLES B., « L'émergence des droits et objectifs sociaux dans le contentieux européen des droits de l'homme », *L'Observateur des Nations Unies*, n° 17, 2004, pp. 27-49 et son mémoire de D.E.A., université Paris X, non publié.

<sup>42</sup> ECHR, *Obermeier*, 28 juin 1990, A, n° 179.

<sup>43</sup> ECHR, *Feldbrugge*, 29 mai 1986, A, n° 99.

<sup>44</sup> ECHR, 17 mars 1997, *Neigel c/ France*, Rec. 1997 II.

<sup>45</sup> ECHR, *Salesi*, 26 février 1992, A, n° 257 E.

<sup>46</sup> ECHR, *F. Lombardo*, 26 novembre 1992, Srie A, n° 249 B.

<sup>47</sup> The ECHR method is found in other legal orders. In India, the use of a civil right has led to the protection of a social right, *Ors, Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan and Olga Tellis*, on grounds of the right to life. In the *Hijirizi* case, it is the interdiction of torture, see NOLAN, op.cit.



As to the application of the principle of non-discrimination on grounds of nationality of article 14 ECHR, the *Gaygusuz* case transforms the right to social security into a fundamental human right protected by the ECHR.<sup>48</sup>

Numerous authors, independently of the recognition of an equal legal value of social rights notice that “fundamental social rights - and especially the right to social protection - appear in the middle of normative influences in which the conflict of logics, of rights and of case law carry a “*dynamic of social progress*”.<sup>49</sup> In other words, social rights are the rights of the poor and they are protected with the least bad option, thanks to subterfuges.<sup>50</sup> In order to protect these rights,

“the Court has used all the means it could find: recognition of autonomous notions, protection “by addition”; positive obligations; horizontal effect, and even “soft law”, finding an inspiration in non binding instruments but which reflect the evolution of the international community and the collective sensitivity”.<sup>51</sup>

It appears thus that, within the ECHR, social rights are less absent than one would think.<sup>52</sup>

Social rights are protected, but they have a value which is inferior to political and civil rights. This concept was questioned by a small group of authors who propose a revolution of the conception of social rights and their better protection.

## **II. Social Rights Equal to Civil and Political Rights**

Several Anglo-Saxon authors have proposed a revisiting of the classical distinction between positive and negative rights by separating it from the opposition between civil, political, economic and social rights (A). It leads to a more concrete recognition of the justiciability of social rights (B).

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<sup>48</sup> See DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, footnote 5, p. 130. Sur l’application de l’article 1 du protocole 1, see BUGADA, A., « Protection des pensions vieillessees par la CEDH ; Note sous Cour européenne des droits de l’homme, 19 juin 2008, *Ichtigiaroglou* contre Grèce, requête numéro 12455/06 », *JCP E Semaine Juridique (édition entreprise)*, 2008, vol. 47, fasc. 20/11/2008, pp. 68.

<sup>49</sup> DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, footnote 5, p. 137.

<sup>50</sup> Interpretation of BONNECHÈRE, M., « La production des Cours européennes en droit social : éléments de réflexion », *Droit ouvrier*, 2008, fasc. 724, pp. 552-562 ; SUDRE, F., GONZALEZ, G., LEVINET, M. & SURREL, H., « Chronique de jurisprudence de la Cour européenne des Droits de l’homme (2007) par l’Institut de Droit Européen des Droits de l’Homme (IDEDH) », *Revue du Droit public*, 2008, vol. 3, fasc. 01/05/2008, pp. 937-968 ; PRISO ESSOWE, S., « Les droits sociaux et l’égalité de traitement dans la jurisprudence de la CourEDH », *Revue trimestrielle des droits de l’homme*, 1998, p. 721 et s. ; TULKENS, F., VAN DROOGHENBROECK, S., « Pauvreté et droits de l’Homme. La contribution de la Cour européenne des droits de l’Homme », in *Pauvreté, Dignité, Droits de l’Homme*, Centre pour l’Égalité des Chances et la lutte contre le racisme, Bruxelles, 2008, p. 65 et s. ; TULKENS, F., VAN DROOGHENBROECK, S., « Le droit au logement dans la Convention européenne des droits de l’Homme : bilan et perspectives », in *Le logement dans sa multidimensionnalité. Une grande cause régionale*, BERNARD, N., MERTENS, C. (dir.), Ministère de la Région Wallonne, Études et Documents, Namur, 2005, pp. 311-325.

<sup>51</sup> COSTA P., « Exposé sur la Cour européenne des droits de l’homme et la protection des droits sociaux », *Discours prononcé à Bruxelles le 22 janvier 2009 lors du Colloque « Droit et solidarité » organisé à l’occasion de la rentrée solennelle du Barreau de Bruxelles* [http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7-083E7314C55C/0/2009\\_Bruxelles\\_Institut\\_DH\\_du\\_barreau.pdf](http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7-083E7314C55C/0/2009_Bruxelles_Institut_DH_du_barreau.pdf), p. 4.

<sup>52</sup> COSTA P., « Exposé sur la Cour européenne des droits de l’homme et la protection des droits sociaux », *Discours prononcé à Bruxelles le 22 janvier 2009 lors du Colloque « Droit et solidarité » organisé à l’occasion de la rentrée solennelle du Barreau de Bruxelles* [http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7-083E7314C55C/0/2009\\_Bruxelles\\_Institut\\_DH\\_du\\_barreau.pdf](http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7-083E7314C55C/0/2009_Bruxelles_Institut_DH_du_barreau.pdf), p. 2-3.

### A. *Indivisible Rights in the Sense of a Equality of Value or the Redefinition of Positive Rights*

Two interpretations of the indivisibility of rights are in competition. The first one is based on the arguments already seen of injusticiability and an opposition between positive and negative rights.<sup>53</sup> They recall that “even though the full exercise of the rights recognised in the Covenant must be ensured progressively, the application of some rights can be implemented immediately though laws, whereas others will be recognized more progressively”.<sup>54</sup> This difference of timing revives forever the debate about the lack of justiciability of social rights.

The second, especially that proposed by Professors Alston and Eide,<sup>55</sup> more recently followed by Professors de Schutter<sup>56</sup> and Akandji-Kombe<sup>57</sup>, involves a new interpretation of positive rights which allows a recognition of an equal value between civil, political and social rights. It consists in questioning the association between a social right and a positive right, ‘droit à’. They explain that each type of human right – political, civil, economic or social - contains three different levels of obligations put on the state: « the obligations to respect, to protect and to fulfil ». <sup>58</sup> Each human right has a positive side and a negative side.

Negative rights consist in an abstention of the state. Positive rights correspond to an obligation to implement a right in order to give the beneficiaries of the right an effective access to the right. Positive rights imply an action of the state. It can be understood either as an obligation to facilitate or in an obligation to realize. For instance, positive rights consist in the obligation of the state to protect the freedom of action and of use of the resources of individuals against third persons.<sup>59</sup> The state is thus responsible for its (in)action, but also for the actions of the third persons because of its inaction.<sup>60</sup>

It can be deduced from this that political and civil rights are not only negative rights. They also include positive rights. For instance, in the *Airey* case,<sup>61</sup> access to justice is considered as an economic and social right<sup>62</sup> when it could be interpreted as the positive side of the civil right to a fair trial.<sup>63</sup>

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<sup>53</sup> See *supra*.

<sup>54</sup> Id. paragraphe 8.

<sup>55</sup> STEINER, H. J. & ALSTON, P., *International Human rights in context Law, Politics, Morals, Text and Materials*, Oxford, Clarendon press, 1996; EIDE, A., KRAUSE, C., ROSAS, A. (dir.), *Economic, social and cultural rights, a textbook*, 2 ed., Dordrecht, Boston, London, Martinus Nijhoff Publishers, 2001.

<sup>56</sup> DE SCHUTTER, O., « Changer de perspective », voir COSTA P., « Exposé sur la Cour européenne des droits de l’homme et la protection des droits sociaux », *Discours prononcé à Bruxelles le 22 janvier 2009 lors du Colloque « Droit et solidarité » organisé à l’occasion de la rentrée solennelle du Barreau de Bruxelles* [http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7083E7314C55C/0/2009\\_Bruxelles\\_Institut\\_DH\\_du\\_barreau.pdf](http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7083E7314C55C/0/2009_Bruxelles_Institut_DH_du_barreau.pdf), p. 6.

<sup>57</sup> AKANDJI-KOMBE, J.-F., *Les obligations positives en vertu de la Convention européenne des Droits de l’Homme, Un guide pour la mise en œuvre de la Convention européenne des Droits de l’Homme*, Précis sur les droits de l’homme, n°7, Conseil de l’Europe, Strasbourg, 2006.

<sup>58</sup> EIDE, E., « Introduction », in EIDE, A., KRAUSE, C., ROSAS, A. (dir.), *Economic, social and cultural rights, a textbook*, 2 ed., Dordrecht, Boston, London, Martinus Nijhoff Publishers, 2001, p. 22-23.

<sup>59</sup> AKANDJI-KOMBE, J.-F., *Les obligations positives en vertu de la Convention européenne des Droits de l’Homme, Un guide pour la mise en œuvre de la Convention européenne des Droits de l’Homme*, Précis sur les droits de l’homme, n°7, Conseil de l’Europe, Strasbourg, 2006, p. 14.

<sup>60</sup> ECHR, *Lopez Ostra*, 9 décembre 1994, p. 27 in F. SUDRE, *Les grands arrêts de la Cour européenne des droits de l’Homme*, 2<sup>e</sup> édition mise à jour, Thémis, PUF droit, Paris, 2003.

<sup>61</sup> ROLAND, P., Chronique, *Journal de Droit international*, 1982, p. 187.

<sup>62</sup> ECHR, *Airey*, 9 octobre 1979, A n° 32, paragraphe 26.

<sup>63</sup> It is the economic characteristics of the right which makes it a social right. Should economic and social rights be understood as a right to receive a benefit? see *supra*, footnote in the introduction on the notion of social right and AKANDJI-KOMBE, J.-F., *Les obligations positives en vertu de la Convention européenne des Droits de l’Homme, Un*

Similarly, the state should forbid landlords from arbitrarily evicting tenants. It could also prevent factories from creating an unhealthy environment for public health. This second illustration comes from the *Lopez-Ostra* case in which Spain had failed to protect the claimant by allowing the building of a factory next to the city of Lorca. The Court gives a positive interpretation of the civil right to have to privacy to protect the environment.<sup>64</sup> Here again, the case law influences the doctrinal approach.

There is no more correspondence between a social right and a positive right. This theory does not come as a surprise when analyzing civil and political rights. The ECHR had explained that "fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is ... no room to distinguish between acts and omissions".<sup>65</sup> It has also states that article 8 about the right to privacy and family life has a positive dimension and a negative dimension.<sup>66</sup> However, in a *Petrovic* case of 27 March 1998 where it is proposed to the ECHR to apply article 8 (respect of a normal family life) in conjunction with the principle of non-discrimination in order to give an allowance for maternity leave, the Court states that the refusal to give a maternity leave benefit should not be considered as a lack of respect to family life as article 8 does not impose to states a positive obligation to furnish financial assistance.<sup>67</sup> Professor Sudre considers the role of case law in the affirmation of the theory of positive obligations.<sup>68</sup> He adds that it has only had disappointing results in the field of social rights.<sup>69</sup>

What is original is the fact that social rights can put positive obligations on the state, but also negative ones.<sup>70</sup> For instance, the right to work is the negative obligation not to prevent an individual from working, but also the positive obligation to give to this person the means to access a job.<sup>71</sup>

Article 11 ECHR on trade union rights is a social right.<sup>72</sup> It is a negative right as it involves the right not to join a trade union<sup>73</sup> and a positive right as it has been explicitly linked to collective bargaining even though the Court explicitly added that "article 11 does not guarantee in itself a right not to join

(Contd.) \_\_\_\_\_

*guide pour la mise en œuvre de la Convention européenne des Droits de l'Homme*, Précis sur les droits de l'homme, n°7, Conseil de l'Europe, Strasbourg, 2006, p. 56 et s.

<sup>64</sup> This is not a surprise as the ECHR has the aim and mandate to judge claims on grounds of political and civil rights of the ECHR.

<sup>65</sup> ECHR, *Airey*, 9 octobre 1979, A n° 32.

<sup>66</sup> See ECHR, *Marckx*, 13 June 1979, A n° 31 ; See DAUGAREILH, I., « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la protection sociale », *Revue trimestrielle de droit européen*, 2001, pp. 123-137, ndbp 5, p. 131.

<sup>67</sup> The right to health can also be interpreted in a positive and in a negative way. See EIDE, A. & BARTH EIDE, W., *Article 24 Right to health, A commentary on the United Nations Convention on the Rights of the Child*, Leiden Boston, Martinus Hijhoff Publishers, 2006.

<sup>68</sup> ECHR, *Lopez Ostra*, 9 décembre 1994. See SUDRE, F., « Les obligations positives dans la jurisprudence européenne des droits de l'homme », *Revue trimestrielle des droits de l'Homme*, 1999, p. 600).

<sup>69</sup> SUDRE, F., « Les droits sociaux et la Convention européenne des droits de l'homme », *Revue universelle des droits de l'homme*, 2000, pp. 28-32, p. 32 commentant l'arrêt CEDH, *Botta c Italie*, 24 février 1998.

<sup>70</sup> This approach was repeated by the Committee of economic, social and cultural rights in its general observations and by several national supreme courts. They discovered justiciable rights. See NOLAN, op. cit.

<sup>71</sup> VILJANEN, V.-P. , « The nature of state obligations », in DRZEWIKI, K., KRAUSE, C., ROSAS, A., (dir.), *Social rights as human rights*, Institute for human rights, Abo Akademi university, Finland, 1994.

<sup>72</sup> A limit to this approach is already recognised in the fact that article 11 appears like a negative right even though social, see footnote 11 and see COHEN JONATHAN, G., « René Cassin et la conception des droits de l'homme », *Actualités de la pensée de René Cassin, Actes du colloque international Paris 14-15 nov 1980*. Paris, Editions du CNRS, 1981, pp. 51-62, p. 51.

<sup>73</sup> ECHR, *Sorensen-Rasmussen v. Denmark*, aff. n° 52562/99 et 52620/99.

collective bargaining".<sup>74</sup> The court mentions in the *Demir* case an organic link between article 11 and the freedom of association for trade unions.<sup>75</sup>

This new analysis leads to a rethink of the role of social rights within the Council of Europe. The European Social Charter could be a very useful instrument with regards to this development of negative social rights which could then be considered without having to link them to political and civil rights.<sup>76</sup> The question of the links between the two instruments could then be revisited. For some authors, there is a convergence of the European instruments of protection of human rights. Professor Flauss sees a crossed fertilisation process.<sup>77</sup> For other authors, the opposite is taking place: the ECHR would aim at excluding social rights already protected by the Charter, from its jurisdiction.<sup>78</sup>

If the social rights of the Charter cannot be considered in the frame of this study because of its centring of its focus on the ECHR, one can still focus on social rights not being considered anymore as consequences of civil and political rights, but as their causes.<sup>79</sup>

### **B. Social Rights as Causes of Civil and Political Rights**

Professor Amartya Sen explains that in order to be able to use one's civil and political rights, one should have fulfilled ones primary needs. This leads to an overturning of the traditional approach which consisted in putting first civil and political rights. In other words, social rights could be considered like constitutive foundational elements of civil and political rights.<sup>80</sup>

More precisely, Professor Sen relies on the theory of capabilities in order to explain that a right to vote will only have a reality if the electors are able to be informed and understand the programs of the candidates or to get to the polling station.<sup>81</sup> To borrow Professor Pettiti's words, without education,

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<sup>74</sup> ECHR, 30 July 1998, *Gustafsson v. Sweden*, aff. n° 15573/89.

<sup>75</sup> See *Demir and Baykara v. Turkey*, 12 novembre 2008 Grand chamber, n° 34503/97, paragraph 64, quoting the case of the second chamber of the 21 novembre 2006, paragraph 35.

« Case Comment: *Demir v Turkey* (34503/97) Unreported November 12, 2008 (ECHR) », *European Human Rights Law Review*, 2009, vol. 2, pp. 248-253; MARGUÉNAUD, J.-P. & MOULY, J., « L'avènement d'une Cour européenne des droits sociaux (à propos de CEDH 12 novembre 2008, "Demir et Baykara contre Turquie") », *Dalloz Sirey*, 2009, vol. 11, fasc. 19/03/2009, pp. 739 –744 ; See also about the right to strike, ECHR, *Karaçay c/ Turquie*, 27 march 2007, aff. 6615/03 and ECHR, *Saltimis et autres c/ Turquie*, 17 July 2007, aff. 74611/01, 26876/02 et 27628/02 and BONNECHÈRE, M., « La production des Cours européennes en droit social : éléments de réflexion », *Droit ouvrier*, 2008, fasc. 724, pp. 552-562, p. 554.

<sup>76</sup> CULLEN, H., « The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights », *Human rights law review*, 2009, vol. 5, fasc. 9, p. 61.

<sup>77</sup> FLAUSS, J.-F., « Les interactions entre les instruments européens relatifs à la protection des droits sociaux », in FLAUSS, J.-F. (dir.), *Droits sociaux et droit européen : bilan et prospective de la protection normative, actes de la journée d'études du 19 octobre 2001*. Institut international des droits de l'homme, 2001, pp. 89-114, p. 89.

<sup>78</sup> SUDRE, F., « Les droits sociaux et la Convention européenne des droits de l'homme », *Revue universelle des droits de l'homme*, 2000, pp. 28-32, p. 32 commentant l'arrêt *Botta c Italie* 24 février 1998.

<sup>79</sup> Allowing the ECHR to judge on the field of the European social Charter. Several cases are in the field of compulsory work (*Van der Musselle* 1983, *Siliadin v. France*, 2005 on grounds of article 4 ECHR), rights of the workers (*Glaserapp et Kosiek v. Allemagne*, 1986) and trade union rights (case law about article 11). COSTA P., « Exposé sur la Cour européenne des droits de l'homme et la protection des droits sociaux », *Discours prononcé à Bruxelles le 22 janvier 2009 lors du Colloque « Droit et solidarité » organisé à l'occasion de la rentrée solennelle du Barreau de Bruxelles*, p. 4-5, [http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7083E7314C55C/0/2009\\_Bruxelles\\_Institut\\_DH\\_du\\_barreau.pdf](http://www.echr.coe.int/NR/rdonlyres/A6F10408-7A2A-45FA-9CD7083E7314C55C/0/2009_Bruxelles_Institut_DH_du_barreau.pdf).

<sup>80</sup> See the notion of generation, *supra*. See also Marshall who explains the recognition of rights in this order in Sociology, MARSHALL, T. H., *Citizenship and social class*, London, Pluto perspectives, 1992.

<sup>81</sup> There are no social rights in this case, but preliminary conditions to the exercise of a fundamental right.

without a roof, without resources, what is the point of benefiting ifrom political and civil rights? What is the point of being free if one cannot afford it? <sup>82</sup>

As Professor Rivero explained, these freedoms are reciprocally complementary: social rights are the ones through which the others become real. Conversely, what is the worth of the right to work without the right to choose one's work? <sup>83</sup> For René Cassin, the right to life includes not only the right not to be assassinated, but also the right to work, to receive food, a home, clothes and care. <sup>84</sup>

Social rights are thus understood as rights to primary access. Labour rights are excluded. <sup>85</sup> Professor Sen mentions a "substantive freedom". Thus, a capability is "the substantive freedom to achieve alternative functioning combinations". <sup>86</sup> It shows how social rights allow an individual to make more choices and not to be limited only to the question of his subsistence. The persons are given procedural and substantial<sup>87</sup> rights in order to ensure the good recognition of their rights. This philosophy reverses the classical order between political, civil and social rights. It is also corroborated by Social Economy which suggests that social rights correspond to the recognition by the society of needs which are primary to the ones identified previously. <sup>88</sup> Applied to the ECHR, this approach demonstrates the interest of reconsidering the role of social rights. If they are a condition to the realisation of civil rights, they should enjoy a better protection.

An application could be defined concerning the right to housing. This approach allows taking into consideration the different aspects of this right instead of focusing on only one. For instance, instead of the limited vision of the ECHR, <sup>89</sup> one could imagine a more global vision focusing on "the integral components of the housing market, such as landowners' control of land, the power of financial corporations targeting housing equity markets across Europe, developers' monopoly positions, compliance with standards and the role and relative power of other stakeholders in the housing market. Increasingly, in this market context (both free enterprise and social arenas), housing rights can also involve consumer protection rights, in terms of standards, mortgage finance, and unfair contracts terms in renting agreements and purchases. <sup>90</sup>

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<sup>82</sup> Cahiers de doléances d'ATD quart monde « un peuple parle » cité par PETTITI L.E., « Pauvreté et Convention européenne des droits de l'homme », *Dr. soc.*, 1991, n°1, pp. 84-88, p. 85.

<sup>83</sup> COHEN JONATHAN, G., « René Cassin et la conception des droits de l'homme », *Actualités de la pensée de René Cassin, Actes du colloque international paris 14-15 nov 1980*. Paris, Editions du CNRS, 1981, pp. 51-62, p. 128.

<sup>84</sup> COHEN JONATHAN, G., « René Cassin et la conception des droits de l'homme », *Actualités de la pensée de René Cassin, Actes du colloque international paris 14-15 nov 1980*. Paris, Editions du CNRS, 1981, pp. 51-62, p. 128.

<sup>85</sup> Apparaît une nouvelle distinction dans la catégorie des droits sociaux. Si les droits sociaux au sens large intègrent droits de la sécurité sociale et droits au travail, l'approche anglo-saxonne distingue entre les welfare rights et les labour rights, voir les contributions de Tiago Fidalgo et William Baugniet.

<sup>86</sup> "A capability is the substantive freedom to achieve alternative functioning combinations". It can be interpreted in order to provide a legal framework which shapes fundamental social rights in accordance with the market. This approach renews the application of "traditional" social rights without preventing market integration". Voir SEN, A., *Inequality Reexamined*, Oxford, Oxford University Press, 1995.

<sup>87</sup> *Endowment of persons with procedural and substantive collective rights. See Eurocap, SALAIS, R., « L'avenir du Modèle social européen face à la mondialisation: Pour une Europe des capacités? », Dialogues franco-allemands en sciences humaines et sociales*, 2006, Berlin, et SALAIS, R., « Libertés du travail et capacités: pour une construction européenne? », *Droit Social*, 1999, pp. 467.

<sup>88</sup> DOMIN, J.-P., MARIC, M., DELABRUYERE, S., HEDOIN, C. (dir.), *Au-delà des droits économiques et des droits politiques, les droits sociaux ?*, 28<sup>èmes</sup> journées de l'association d'Economie sociale Université de Reims Champagne Ardenne, 4-5 septembre 2008, Paris, L'Harmattan, 2008, Jean-Paul Domin, Michel Maric, Sophie Delabruyère, Cyril Hédoïn (dir).

<sup>89</sup> See KENNA, P., « Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights », *European Human Rights Law Review*, 2008, vol. 2, pp. 193-208.

<sup>90</sup> See KENNA, P., « Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights », *European Human Rights Law Review*, 2008, vol. 2, pp. 193-208, p. 9.

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A new interpretation of the ECHR is proposed by numerous authors. A general tendency towards a progressive and measured recognition of fundamental social rights appears. Through an extensive interpretation of political and civil rights, the ECHR is more and more receptive to a social dimension of the Convention. This case law movement also appears in the doctrine.

Beyond the classical opposition between opponents and supporters of social rights, two movements can be drawn. The first focuses on the affirmation of social rights themselves, the second focuses on a redefinition of positive rights (whether they are political, civil, economic or social) which leads to a better protection of social rights. The superposition of these two waves leads to a rethinking, within a new framework, the concept itself of social rights.

The ECHR is at the heart of these evolutions. It shows that case law developments are sometimes more in advance than the doctrine. It remains to be seen what will ultimately be the role of social rights as compared to political and civil rights. The time might have come for the rights of the poor not to be anymore “poor rights”.<sup>91</sup>

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<sup>91</sup> IMBERT, Ph. « Droit des pauvres, pauvres droits », *Revue de droit public*, 1989, p. 739.

## Conclusion

Marie-Ange Moreau

The fact that comparative legal studies on social rights have flourished is hardly surprising<sup>1</sup>: while the globalisation of the world economy has generated profits, increased inequalities throughout the world require new analyses and new thought processes regarding the emergence of counter-powers and the development of legal instruments to improve the protection of persons and peoples.

The unprecedented development of human rights also requires particular attention to be given to those rights known as second generation rights, which play an essential role in re-balancing economic and social positions in the world.

Social rights find a new place and have a renewed function provided they are able to act as a rampart against the winds and tides of a turbulent economy. In Europe, this construction finds new illustrations in the recent case-law of the European Court of Human Rights, even though the Strasbourg Court traditionally has only given a secondary place to social rights.

In the European Union, since Nice, the integration of social rights at the same level as civil and political rights in the EU Charter of fundamental rights has been a cornerstone in the protection of European citizens and workers. The Charter, now integrated in the additional protocol of the Treaty of Lisbon has been given a new lease of life following the entry into force of the latter. It has given the European Court of Justice the possibility to pursue on new legal grounds the European construction of fundamental social rights through general principles of Community law and it enables the Court to rely on « common constitutional traditions».

The social rights recognized in the Member States thus provide reference models upon which the EU construction of fundamental rights is based as well as the stepping stone for them to gain more strength in the future.

The current study, which is part of a broader research<sup>2</sup>, presents in parallel the conceptions of social rights that have been retained in a significant number of member states: the analysis includes Spain, Portugal, Italy, Poland, the Scandinavian countries and the United Kingdom. The dynamic that has been developed in the Council of Europe and at the ILO in respect of fundamental social rights is added to the aforementioned national presentations. They exclude a detailed analysis of the constitutional case-law of these countries.

The sample chosen is limited as it does not include countries such as France, Germany and many of the new Member States; the lack of analysis of the constitutional jurisprudence also limits the comparative interest. However, some lessons can be drawn when the choices made are put into perspective.

A few comparative observations are presented here by way of conclusion:

- first of all, it appears evident that the scale of the discussions on social rights in Europe and in particular on fundamental social rights, is based on a wide variety of approaches, which also justifies the debates on the notions and the typology of social rights<sup>3</sup>;

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<sup>1</sup> See the working paper by the EUI Working Group in Labour Law on *The fundamentalisation of social rights* (EUI working papers. LAW, European University Institute, Florence 2009); see also the important work of collective research carried out under the direction of M. Langford, (ed) *Social rights jurisprudence : emerging trends in international and comparative law*, Cambridge University Press, Cambridge, New York 2008),

<sup>2</sup> Directed by Diane Roman, see the introduction above

<sup>3</sup> see C. Marzo above

- Social rights reflect the key choices made within a legal order given the specific constitutional background of each country and its legal traditions;
- The place of social rights is anchored in the social dimension of each Member State, when considered from a democratic perspective. They therefore reflect the conception of social democracy retained by each legal order<sup>4</sup>.
- There is no doubt that the debate that takes place on the international scene clashes strongly with the different conceptions that exist at the constitutional level in the different national legal orders. Thus, the interaction between the perspectives built on the basis of human rights and the recognition of fundamental social rights shows that the rights that develop are not only individual social rights but also collective rights.
- Despite the interference (and reciprocal interference) that a comparative perspective entails, it also shows that when dealing with the question of the evolution of social rights, there is no need to limit oneself to a constitutional perspective or to an international perspective that analyses such rights on the basis of a classification of second and third generation rights.
- There is a strong academic movement in favour of giving greater strength and autonomy to social rights, which not only requires the State to respect social rights but also places upon it positive duties going beyond a simple programmatic implementation<sup>5</sup>.
- Finally, the question of the justiciability of social rights remains the key concern of European legal doctrine. It brings one back to the role of the judge in the implementation of social rights, given their position as key actors of the effectiveness of fundamental social rights.

Each of the above observations would warrant further discussion. However, we will focus on just two aspects: the impact of the variety of conceptions retained in Europe (I) and the identification of emerging movements at European level in the field of social rights (II).

## **I. The Variety of Conceptions of Social Rights Retained in Europe**

However banal this first observation may be, it is not devoid of interest: the analysis of the positions taken in the different countries shows in a striking manner that the choices made in the field of social rights are not just simply the reflection of the rank given to them by the legal order compared with civil and political rights but it also stems from a number of other factors.

The historic context is key as social rights are directly linked to the choices made at the democratic level: they are all the more important and their justiciability is greater insofar as they were built as a strong legal response to periods of dictatorship (Portugal, Spain), of war and political repositioning (Italy), as well as in the transition in a former a European socialist economy towards fundamental rights based on social rights (Poland). In all cases, they reveal the strength of social democracy in the Member State.

The place given to fundamental social rights<sup>6</sup> also explains the very different roles that the State or private actors play in the implementation of social rights. Thus, the trust put in the State's capacity to put in place a genuine welfare policy is significant in the Scandinavian countries, whereas it is reduced to debates on the insufficient and programmatic nature of such policies in other Member States.

At the opposite end from the Scandinavian model – or from the German constitutional model which is entirely based on the strength of social rights in Germany's *basic law* – lies the English model. It

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<sup>4</sup> Conclusion drawn from putting into perspective the studies of the different countries analysed.

<sup>5</sup> See above, in particular B. Mestre and C. Marzo

<sup>6</sup> The typical French position is that the answer to this question lies in having a written Constitution.....



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reminds us that social rights can become constitutional without a written constitution, through the action of the democratic institutions in accordance with the way the law is made in the legal order.

The English example brings one back to the very difficult question of defining fundamental social rights. This comparative exercise shows with ease how different conceptions are confronted with one another. This is the case when it comes to marking the borders of what is social, especially when the inclusion of property rights and cultural rights are deemed relevant in relation to social rights, as well as for establishing the criteria of what is fundamental.

The catalogues of social rights in the Constitutions show that while there is a nucleus of common provisions in relation to social protection, labour law, and the law on the protection of families and migrants, nevertheless, there is also a wide variety of rights that are recognised without there being any uniformity.

As to their fundamental nature, the criteria of what makes them fundamental remains highly debated<sup>7</sup> : while in Spain, their direct justiciability justifies that they should be considered as fundamental, this is not the same everywhere else. Their integration in the Constitution gives some of them a fundamental nature, while in other countries, this nature depends on the values that they reflect. In this regard, a social right would be fundamental if it enabled the promotion of human dignity and equality<sup>8</sup>.

Finally, the choices made regarding the nature and the justiciability of rights are very different. On the one hand this is because few Member States allow for the direct enforceability of the social rights recognised by their Constitution (see in particular the Spanish example with the four categories of social rights); on the other hand this is because the Constitutions take very different positions on the scope for the open interpretation of fundamental social rights, which gives the judge very effective room for intervention (see Italy and Portugal in this respect).

The nature of social rights thus varies greatly as does their place in the legal order, even though they may have constitutional force.

In addition, one might ask whether, when confronted with the presentation of social rights in the United Kingdom, the question is really one of fundamental social rights.

There is no doubt that the process of making rights « fundamental » and constitutional in the UK illustrates the importance of the evolutions that are linked to the impact of Europe. They reveal a larger movement that indicates the place of social rights in Europe, which is achieved in a number of very different ways that shows how the different legal orders articulate national and international norms in their own original way.

It is important to focus on the way the law is formed in order to explain the place and the meaning in the articulation of fundamental rights. Indeed the UK shows how, beyond the specific approach of the Common Law to recognising social rights, the logic of equality and of non-discrimination carry a lot of weight given the weak protection afforded by employment law and the law on collective rights<sup>9</sup>.

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<sup>7</sup> See on this point the very convincing and pertinent presentation by Véronique Champeil-Desplat, « Les droits et libertés fondamentaux en France, genèse d'une qualification », in *Droit fondamentaux et droit social*, dir. A. Lyon-Caen et P. Lokiec, Dalloz, 2005, p. 11-40.

<sup>8</sup> This criterion is debatable as one must then translate these values; we know that with regards to both dignity and equality, there are very different conceptions that are opposed to one another.

<sup>9</sup> To simply transpose the approach of the UK or even more so that of the USA with regards to dealing with discrimination would be highly debatable as it excludes from a comparative reasoning the dimension of its articulation with rights under employment law. This is all the more striking when the comparative analysis is only carried out at the constitutional level, thus excluding the analysis of the effectiveness of social rights in the legal order.

From a comparative perspective and from a European perspective, it is always necessary to look at social rights in light of their articulation, in particular the articulation of individual rights with collective rights and access to justice.

One thus observes a variety of criteria for identifying social rights, a variety in the place and the justiciability of social rights, which nevertheless contribute to the development of the role and the place of fundamental social rights.

## II. The Evolution of Social Rights at the European Level

This comparative analysis of social rights in the Member States of the EU shows both the specificity of the choices made within the legal orders but also the existence of a core of social rights, which allows one to identify the areas of convergence at the European level.

The European Court of Justice, just like the European Court of Human Rights seeks to show that these areas of convergence exist. Take the proclamation of social rights in the founding and universal declarations on human rights or by the ILO, as well as at the European level in the Social Charter of 1961 and/or in the EU Charter of Human Rights declared at Nice. These enable one to observe the existence, for some of these rights, of common ground that outweighs the normative differences that result from the different origins of such rights. The most recent example is the reversal by the European Court of Human Rights of its case-law in the case of *Demir v. Turkey*<sup>10</sup> which concerned the link between the right to strike and the right to the freedom of association (Article 11 of the ECHR). There, the Court searched in the relevant texts for consensus regarding the recognition of such rights, independently of their legal force<sup>11</sup>.

The differences that affect social rights also explain why the ILO, when dealing with the issue of fundamental social rights of workers has been able to take two distinct approaches : the first consists of strengthening universal protection through its conventions ; the second consists of the adoption of the 1998 Declaration in order to ensure a common floor of universal protection that focuses on the hard core of rights in respect of which there is consensus and synergy at international level in order to combat the worst inequalities.

Thus, there are European movements that emerge from the existence of very different conceptions of social rights in the Member States.

In addition to the convergence that is linked to the key role of the judges, one may also observe multi-faceted movements of cross-fertilisation: first of all one observes the « permeability » of civil and political rights with regards to social rights<sup>12</sup> which can be seen essentially in the context of the jurisprudence of the European Court of Human Rights. It is likely that this led to the choices made at Nice in the EU Charter of fundamental rights to treat as equal both civil and political rights with social rights. This movement also has another face, which is reflected by an extension of the strength with which fundamental social rights are brought to light even though they may be contained in a piece of soft law. The 1998 Declaration is indeed used as the legal basis in many texts as a mark of universal recognition of a core of fundamental social rights: whether these are international texts that are addressed to multinationals (Global Compact, OECD guidelines), guidelines in international

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<sup>10</sup> ECHR 12 November 2008 **CASE OF DEMİR AND BAYKARA v. TURKEY**(*Application no. 34503/97*)

<sup>11</sup> Of course, according to some authors, this results in a form of uncertainty regarding the place of those fundamental rights that have been ratified or are in force in the legal order. In the circumstances of the *Demir* case, a convention of the ILO had not been ratified by Turkey. The strength of the Court's reasoning lies in identifying the convergence in order to turn it into the *raison d'être* of its interpretation.

<sup>12</sup> F. Sudre, « La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux » *revue universelle des droits de l'Homme*, 2000, p. 28-32, see C. Marzo above.

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institutions (IMF, World Bank), codes of conduct, international framework agreements, European collective agreements, etc.

Despite these trends, the landscape of social rights is still far from providing a unanimous analysis by Europe's scholars. This will be illustrated by the debates that will recommence in the EU on the interpretation of the Lisbon Treaty and the place of the EU Charter of Fundamental Rights in the EU legal order. In particular, the reference to the « social market economy » will be significant. It would appear that this formula refers back to the *ordo-liberal* conception that has been strongly put forward in Germany and which may explain the recent orientations of the ECJ with regard to the predominance of economic freedoms over fundamental social rights<sup>13</sup>.

However, this formula could also be construed, following the Italian example<sup>14</sup>, now that the EU Charter of Fundamental Rights has entered into force, as inviting the judge to articulate the economic choices of the European Union by taking fundamental social rights as a starting point.

The ECJ has indeed displayed in the past a great deal of freedom in its use of examples taken from comparative law<sup>15</sup>.

Thus, beyond scholarly debates, this comparative study shows that fundamental social rights are indeed a major challenge for Europe.

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<sup>13</sup> C. Joerges, "A renaissance of the European Economic Constitution ?" , in *Integrating Welfare Functions into EU Law, from Rome to Lisbon*, ed. U. Neergaard, R. Nielsen, L.M. Roseberry,

<sup>14</sup> See G. Boni above

<sup>15</sup> *L'échange entre les droits, l'expérience communautaire*, ed . S. Robin-Olivier, D. Fasquelle , Bruylant , 2008.





