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REPORT

"THE ADJUDICATION OF SOCIAL RIGHTS BY CONSTITUTIONAL COURTS: DOCTRINE AND SELECTED CASE-LAW"

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Ladies and Gentlemen,

Let me first of all express my gratitude to the organizers for inviting me to this timely and highly interesting conference. The co-author of my paper, Professor Marauhn, extends his regards and regrets not to have been able to come. It is a pleasure to be hear and to contribute to your discussions – not from a theoretical, but from a practical and comparative perspective.

I. Introduction

The primary objective of my presentation is to demonstrate that social rights as they are included in many constitutional instruments across Europe today can be made operational by courts, in particular, by constitutional courts for the benefit of the individual. Social rights do not provide a cushion for the individual to take a carefree look into his or her future. Rather they complement civil and political rights, thereby safeguarding one of the core elements of democracy and the rule of law, namely individual freedom. The empowerment of the individual to participate in a free and democratic society is the most important purpose of effectively safeguarding socio-economic rights. The other object of such operationalization of social rights is the link between the individual and society. Social rights ensure that modern day societies are not liberalist in the negative sense but that the individual's freedom is implemented with a view to him or her being part of the community. But rather than focusing

on the state as "état providence", social rights focus on the individual as the cornerstone of rule of law-based democracies as promoted by the Council of Europe, and the Venice Commission in particular.

To begin with, let us take a brief look at the traditional welfare state.

The traditional welfare state, in its rudimentary form as part of a liberal, more-or-less pure market economy, or construed as a pillar of a social market economy, or in any other, more elaborate regulatory framework, is a collective undertaking. The purpose of the traditional welfare state is to eradicate individual poverty in order to improve the economic and social life of society as a whole. Froma constitutional perspective, the establishment of a welfare state is a political decision within the prerogative of the legislature. Thus, the traditional welfare state is policy-based, not rights-based. While statutory provisions may establish individual entitlements, few of these entitlements have been attributed to the constitutional sphere. In a certain way, the traditional welfare state is designed to address poverty and social imbalances within a more-or-less closed economic and political environment.

Our claim is, that it is ultimately important to move beyond such a traditional welfare state perspective. One can no longer discuss welfare options within such a traditional and closed environment. It is our argument that the welfare state has to be reconstructed beyond its collective constraints. Even more, it is already being constructed along those lines when taking into account some of the developments which have occurred at the constitutional level in many member states of the Council of Europe. This is true, both with regard to the textual basis – but even more with regard to the jurisprudence of some of the constitutional courts established across Europe. We argue that the basis for a re-construction of the modern welfare state can be a re-construction of social rights, not as a kind of collective safety net but as individual entitlements established at the constitutional level with important backing from the international level. Such backing from the international level can be best illustrated by the adoption by the United Nations General Assembly, on 10 December 2008, of Resolution 63/117, recommending that the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, providing for an individual complaints procedure,

"be opened for signature at a signing ceremony to be held in 2009" and requesting "the Secretary-General and the United Nations High Commissioner for Human Rights to provide the necessary assistance" to this end.

Our approach does not mean that the individual is necessarily better cared for. Social rights as individual entitlements move beyond caring institutions (which often follow a paternalistic approach) – but are based upon individual freedom and individual responsibility. This interrelationship between freedom and responsibility can only be developed if the traditional concept of social citizenship no longer remains exclusively within the sphere of the nation-state: concepts of local, national, regional and international citizenship have to be promoted in order to adapt welfare options to the existing multi-level system of local, national, regional and international political entities. Nevertheless, we will concentrate in the following on national constitutional developments and national constitutional jurisprudence.

De facto, the establishment and maintenance of a welfare state system are contingent on adequate financial resources. The acquisition of funds and their availability in a given society or group depends on a variety of factors, including the existence of natural resources, the potential of technological and other forms of know-how, the composition and structure of society, participation in economic transactions, and others. Consequently, social politics is closely interrelated with public and private economic activities.

De jure, social politics stricto sensu is and remains primarily a matter of national law. Nevertheless, national actors – be they political actors or juridical actors – have to take into account the international (and we may say – in our context – the European) environment, since the implementation of internationally guaranteed social rights has an impact on welfare (state) options at the local and national level – and in so far as it entails costs, the concept and the structure of pertinent agreements must be borne in mind as to their ability to meet the consequences of economic globalization.

In the following, I will first develop a comparative perspective on the operationalization of social rights by constitutional instruments and constitutional courts in selected European jurisdictions. While focussing on the European context, we should, however, be aware of the

fact that today many important political, legal and doctrinal developments take place outside Europe. As far as social rights are concerned, probably the most important developments can be noticed in South Africa and in Latin America. If you have a closer look at some of the jurisdictions in these areas, it is highly interesting that they have actively contributed to making constitutionally guaranteed social rights a reality which reaches the people, the individual. In an edited volume, recently published by Cambridge University Press and edited by Malcolm Langford from the Norwegian Centre for Human Rights at the University of Oslo, bearing the title "Social Rights Jurisprudence. Emerging Trends in International and Comparative Law", there are only few European jurisdictions covered – but you will find chapters dealing with innovative doctrinal approaches developed by courts in South Africa, India, Colombia, Argentina, Brazil and Venezuela. The fact that these jurisdictions are highly innovative in promoting the operationalization of social rights is not really surprising, because they are confronted with serious socio-economic problems and the legitimacy of their governments depends on communicating the legitimacy of constitutional instruments which should not only be nicely worded promises but which should become a reality. Europe, and this goes beyond our core contribution, should closely watch these developments and open itself for a reception of such doctrinal innovations and their integration in its own European and comparative constitutional doctrine.

Having taken a look at some of the developments at the constitutional level, we will draw a number of conclusions related to specific issue areas, not specific social rights. These will relate to (1) the competence of constitutional courts to address social rights, (2) questions of locus standi and access to justice, (3) and to the interpretation of social rights by constitutional courts. I will conclude by placing such doctrinal developments into a broader political and constitutional context.

II. A Comparative Perspective

Instead of a comprehensive comparative analysis, the following part of our presentation will demonstrate – on the basis of selected constitutional texts and pertinent jurisprudence – that

social rights can be made operational as individual human rights. Even though this only is a selective approach, it can provide the basis for some more general conclusions.

The Italian Constitution and the jurisprudence of the Corte costituzionale della Repubblica italiana

Let us begin with the Italian Constitution which was adopted on 22 December 1947 and became effective on 1 January 1948.

The Italian Constitution, as many other European constitutions, is a post-dictatorial instrument. However, in contrast to the German Basic Law, which I will address later, the Italian Constitution includes a number of social rights. We will take a closer look at Part I of the Italian Constitution which deals with the "Rights and Duties of Citizens". It includes both, civil and political rights, as well as social, economic and cultural rights. Commentators have considered this comprehensive approach towards human rights as an expression of a historic compromise between Roman Catholic and socialist-communist positions after World War II. In more general (and less historic) terms, it may be argued that Part I of the Italian Constitution reflects a perception of human beings not just as individuals but also as parts of a broader community. Individuality and community-orientation are considered by the Italian Constitution as equal pillars of society. Thus, the drafters of the Constitution did not perceive a need to categorically distinguish between civil and political rights on the one hand and social, economic and cultural rights on the other.

The catalogue of social rights included in the Italian Constitution covers, among others, ethical and social relations, such as marriage and family (Article 29), the protection of "individual health as a basic right" (Article 32), and educational guarantees (Article 34). Furthermore, we find a number of provisions on economic relations, such as the protection of labour (Article 35), the entitlement "to remuneration commensurate with the quantity and quality of their work" (Article 36, paragraph 1), the establishment of "limits to the length of the working day" (Article 36, paragraph 2), the entitlement "to private and social assistance" for all "citizens unable to work and lacking the resources necessary for their existence" (Article 38, paragraph 1) and an entitlement "to adequate insurance for their needs in case of

accident, illness, disability, old age, and involuntary unemployment" (Article 38, paragraph 2). It is worthwhile mentioning that "the right of all citizens to work" forms part of the "Fundamental Principles" of the Italian Constitution which precede the catalogue of human rights.

On several occasions the Italian Constitutional Court (the Corte costituzionale della Repubblica italiana) has emphasized that fundamental rights can be the basis for declaring legislation unconstitutional. According to the Constitutional Court, most of them enjoy the status of "inviolable human rights" as described by Article 2 of the Italian Constitution.

It is particularly noteworthy, that the Italian Constitutional Court has gone beyond those social rights which have been explicitly included in the Constitution. Referring to Article 25 of the 1948 Universal Declaration of Human Rights and to Article 11 of the International Covenant on Economic, Social and Cultural Rights the Constitutional Court has recognized an individual right to housing.

However, while the Italian Court has recognized the existence of such individual social rights, it has paid tribute to the specific obligations arising out of those individual rights. To this end the Court has developed a particular approach to assessing the compatibility of legislation with these constitutional guarantees. This approach, or this test of constitutionality, accepts the notion of gradual implementation of social rights (step by step) and, hence, applies particular benchmarks to the question of whether or not public bodies have complied with appropriate standards. It even allows the inclusion of considerations related to the availability of financial resources, thus inserting a degree of flexibility into benchmarking. The Constitutional Court applies a principle that has been used in the context of rights to equal treatment, the principle of *ragionevalezza* (which can be translated as adequateness or reasonableness). Taking a closer look at the jurisprudence of the Court, it is noteworthy that the Court applies strict standards with regard to the procedural aspects of implementing social rights, whereas the Court is much more cautious as to the extent of the benefits and services that have to be provided on the basis of appropriate guarantees (in other words: the Court is reluctant to apply strict standards as to the substance of social rights).

It is particularly interesting, that the Italian Constitutional Court has not only used social rights to derive obligations to fulfill therefrom but it has also read the social rights included in the Constitution as obligations to respect or negative obligations. Even more, the Court has recognized a direct third-party effect of social rights (one might refer to this as horizontal application of social rights as between private or non-state actors); this is particularly true for the protection of individual health as a basic right and for the entitlement to adequate remuneration.

Let us now turn to another Constitutional Court and its jurisprudence related to social rights:

The Portuguese Constitution and the jurisprudence of the Portugues Tribunal Constitucional

The Portuguese Constitution, which was adopted on 2 April 1976, also was elaborated after the overthrow of a dictatorial regime. It has been characterized as including the most detailed catalogue of economic, social and cultural rights among all West European constitutions. The Constitution in Chapter I of its Section II, labelled "Rights, Freedoms, and Safeguards", includes so-called "Personal Rights, Freedoms, and Safeguards" which basically can be described as civil and political rights. In addition, Chapter II of the said Section lays down "Rights, Freedoms, and Guarantees of Political Participation". Chapter III of the same Section covers "Rights, Freedoms, and Safeguards of Workers". This is followed by Section III of the Constitution which deals with "Economic, Social, and Cultural Rights and Duties". Again, we can find several sub-chapters, including "Economic Rights and Duties" (Articles 58-62), "Social Rights and Duties" (Articles 63-72) and "Cultural Rights and Duties" (Articles 73-79). Basically, it may be argued that the Portuguese Constitution distinguishes between civil and political rights in Section II, and economic, social and cultural rights in Section III. The Constitution itself establishes a number of differences between these two groups of rights: even though such terminology is not used explicitly, it may be argued that the former category is guaranteed, whereas the latter is promoted and furthered. While civil and political rights are considered as being directly binding upon all public bodies (sometimes even private entities), socio-economic rights are addressed to the legislature. It is noteworthy, that

limitation and emergency clauses are only laid down with regard to civil and political rights, not with regard to socio-economic rights. It is noteworthy, that the "Rights, Freedoms, and Safeguards of Workers" had originally been included in Section III, but with the 1982 constitutional amendment were moved to Section II. This was intended to strengthen the constitutional rights of workers. The effectiveness of social rights was improved by two other changes: first, the link between the nationalization of means of production and social rights was eliminated; and second, several objectively worded provisions (addressing the obligations of the state only) were transformed into subjective entitlements (the right to …).

As to the Portuguese Tribunal Constitucional, it has generally recognized the binding force of all such constitutional obligations, but it has not been eager to accept their direct enforcement by the judiciary. The Portuguese Constitutional Court has considered the implementation and realization of social rights primarily as an obligation imposed upon the legislature. In addition, the Tribunal has been reluctant to declare pertinent legislation unconstitutional for failure to meet the social rights standards established by the Constitution. On the other hand, the Portuguese Constitutional Court has recognized a constitutional prohibition of deterioration. While this goes beyond the protection of confidence, recent jurisprudence suggests that the Tribunal Constitucional now prefers to apply the much broader principle of protection of confidence. Similar to the Italian Constitutional Court the Portuguese Constitutional Court has recognized the obligation to respect (i.e. negative obligations) as an inherent element of social rights. However, the details of such negative obligation are disputed among the judges of the Court. Finally, the horizontal application of social rights (which – to a certain extent – is built into the wording of the Portuguese Constitution) has become part of the Court's jurisprudence. It may be argued that Article 18, paragraph 1, of the Portuguese Constitution indeed suggests such horizontal application by stating: "The constitutional provisions relating to rights, freedoms, and safeguards are directly applicable and binding on public and private bodies.".

The Spanish Constitution and the jurisprudence of the Tribunal Constitucional de España

Turning to the Spanish Constitution as a third example in our presentation, it also reflects – similar to the Italian Constitution – a political compromise between different conceptions of how to protect human or basic rights. The Spanish Constitution, however, primarily includes economic, social and cultural rights as part of its Chapter III on "Guiding Principles of Economic and Social Policy". There are only very few socio-economic rights in the Spanish Constitution outside of this Chapter. These include "the right to remunerated work and the pertinent benefits of Social Security" of prison inmates (Article 25, paragraph 2), "the right to education" (Article 27, paragraph 1), and "the right to work, to the free election of profession or office career, to advancement through work, and to a sufficient remuneration to satisfy their needs and those of their family" (Article 35, paragraph 1). These three rights are directly applicable human rights guarantees and can be enforced by way of individual constitutional complaint.

However, even though the other socio-economic rights cannot be enforced through individual complaints procedures, the Spanish Constitutional Court has recognized the binding force of such standards. The main difference is that they cannot be directly enforced by the judiciary. It is particularly interesting, however, that the Tribunal Constitucional de España has even reduced the scope of the prison inmates' right to work to a right to non-discriminatory access to work. Furthermore, the Spanish Constitutional Court is very reluctant to broadly interpret the guiding principles of economic and social policy. It is possible to conclude that the Tribunal will only declare legislation unconstitutional on the basis of Chapter III of the Constitution if such unconstitutionality is obvious. Furthermore, the Spanish Court does not recognize a constitutional prohibition of deterioration nor has the horizontal application of socio-economic standards been discussed by the Court in detail. There are, however, very cautious tendencies to recognize the horizontal application of negative obligations at least. In a case concerning Article 27 of the Spanish Constitution (which is the provision dealing with the right to education) the Tribunal has pointed out that the obligation to fulfill is only addressed to public bodies, not to private entities.

Seeking to explain the differences between the more or less pro-social rights courts in Italy and Portugal and the reluctant Spanish Court, one may refer to the intense reception of the

jurisprudence of the German Federal Constitutional Court by the Tribunal Constitucional de España. This cannot, however, be considered as the complete story. But it leads us to a closer look at the jurisprudence of the German Federal Constitutional Court with regard to the social state principle.

The German Basic Law and the jurisprudence of the German Federal Constitutional Court (Bundesverfassungsgericht)

The German Basic Law is one of the most reluctant constitutions with regard to explicit socio-economic rights. The most important provisions with regard to social standards is Article 20, paragraph 1, of the Basic Law, which declares: "The Federal Republic of Germany is a democratic and social federal state". This tiny reference to "social" has been used by the Federal Constitutional Court to not only develop objective social standards, but also to "create" individual entitlements by linking civil and political rights to the social state principle. But let us first have a look at the constitutional background in Germany:

In contrast to the Basic Law, the 1919 Weimar Constitution included a number of social rights. However, similar to all the other basic rights included in the Weimar Constitution, the constitutional instrument was not clear as to whether or not such guarantees were directly enforceable. Nevertheless, these rights have – according to some commentators – evolved into a system of social security – a free market economy has moved to a social market economy, including a network of state institutions for state welfare. This has traditionally been considered as the result and expression of an inherent tension between leaving persons free to exercise their individual intellectual, physical and economic capabilities and placing limits upon the results of the exercise of these freedoms.

Turning to the Basic Law, the inclusion of constitutional state policy objectives reflects the experiences of the past and develops a design for the future. Largely, the definition and implementation of policy goals is left to the legislature. However, the Court has occasionally moved beyond such restrictive approach. A more creative use of state policy objectives, including the protection of the environment, in conjunction with individual rights has been developed at the same time when also other innovative elements were included in the Basic

Law, such as the second sentence of Article 3, paragraph 2, of the Basic Law which stipulates: "The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist". We may also refer to Article 20a of the German Basic Law which reads: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

We can identify two different approaches of the German Federal Constitutional Court to dealing with social standards (and thereby implicitly developing the notion of social rights):

The first approach is based on the protection of property rights as may be taken from Article 14, paragraphs 1 and 2, of the Basic Law. This provision has been read by the Federal Constitutional Court as not only guaranteeing private property rights but as including all such assets which provide for an economic basis of life, or a livelihood, as long and as far as there is at least a minimum contribution of the holder of the right him- or herself. Based on such a broad interpretation of property rights, social security rights which were partly based on insurance models have come under the protection of the property rights guarantee of the German Basic Law. Thereby – and this is particularly important – such rights can be enforced through an individual constitutional complaints procedure.

Similarly, the Federal Constitutional Court obviously had in mind the need to empower individual human beings to bring cases against the government by making use of the individual constitutional complaints procedure. With regard to social standards, the Federal Constitutional Court has achieved this objective by linking the social state principle to either every person's right to the free development of his personality (as included in Article 2, paragraph 1, of the Basic Law) or to the provision on equality before the law, namely Article 3, paragraph 1. Both approaches ensure that the social state principle can be addressed by way of individual constitutional complaints.

Finally, as far as the interpretation of the social state principle is concerned, the Federal Constitutional Court follows a dual approach: on the one hand, the Court derives minimum

standards from the social state principle, on the other hand, the Court is prepared to apply strict scrutiny with regard to the procedural principles attached to the social state principle.

Hence, it may be argued that the Federal Constitutional Court in Germany follows the rhetoric, that there are no constitutional social rights of the individual; on the other hand, in practice, the social state principle is partially enforced through individual constitutional complaints because the Court links up the state principle to individual human rights, thereby giving rise to an impact of the constitution which would otherwise not be in place.

The French Constitution and the jurisprudence of the Conseil Constitutionnel

Let me briefly turn to the French Constitution. The preamble of the 1958 constitution refers to the preamble of the 1946 constitution: "The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution." It includes provisions which can be considered as social rights. Among others, it reads: "Each person has the duty to work and the right to employment". It also includes the following provision: "All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society". In 1983, the French Constitutional Council (conseil constitutionnel) has declared that the right to work only imposes an obligation upon parliament to adopt legislation ensuring that each individual's right to work can be exercised as far as possible. Hence, this illustrates that even though constitutional guarantees of social rights are often phrased as individual entitlements, constitutional tribunals tend to interpret them as policy objectives, thereby reducing their scope and limiting, in particular, access to court. In general, the French Constitutional Council has highlighted the constitutional value of social rights, but has avoided – in principle – to declare constitutional social rights as subjective rights. According to the Court, a legislative concretisation is absolutely essential to adjudicate on social rights. It is manifestly clear that this concretisation falls within the scope of the Parliament. Thus, the adjudication of social rights coincide with a wide margin of appreciation.

Some remarks on Central and East European developments

As has been discussed elsewhere many of the new constitutional instruments in Central and Eastern Europe which have been adopted after 1989 include a cataloge of social rights. It would be an underestimation of these provisions to simply consider them as a concession to perceptions of citizens that social rights are one of the positive remains of former socialist governance. Rather these social guarantees have played an important role in managing the economic transformation from planned economies to social market economies. Even though some commentators have criticized the existence of social rights in such post dictatorial constitutions, they are not reminiscent of the "old times" but they are an important instrument to ballance individual rights and communal values in a period of transformation. To refer to the right to work briefly, this is included the Hungarian constitution, in the Czech Charter of Fundamental Rights, in the Slovac Constitution, and in others. While none of the constitutional courts has interpreted such a right to work as an entitlement to a specific job or position they have all made it clear that, depending on the existence of individual constitutional complaints as such, these rights ensure that the individual can bring cases related to employment issues to the constitutional court but that the constitutional court will apply a wide marging of appreciation when assessing the constitutionality of a government's employment policies and pertinent legislation. To give a few examples: the Polish Constitutional Court has imposed an obligation upon the government to develop active policies against unemployment, and the Slovenian Constitutional Court hold a provision of insolvency legislation unconstitutional because it provided the possibility to simply get rid of workers, to consider them as redundant and to concentrate exclusively on the economic "survival" of the undertaking. In this context the Slovenian Court made use of the rule of law principle (Rechtsstaatsprinzip) to illustrate that there must be foreseeable criteria with regard to who might suffer from restructering of enterprises and who would be excluded therefore. The Hungarian Constitutional Court did not rely on the rule of law priciple but on the notation of legitimate expectations. It is noteworthy that the Hungarian Constitution explicitely guaranties a social market economy.

Time is too short here, to discuss all relevant developments there. It is, however, noteworthy that all constitutional courts who adressed social rights after 1989 have succeeded in making them operational. In other words: constitutional jurisprudence since 1989 has shown that social rights can be made a reality and is not pure rhetoric. This outcome probably is un unexpected one given the debates which took place during the idealogical conflict between East and Eest in Cold War times. Today even in the United States the debate about social rights has experienced renewed attention, both in legal theory and – at least since Obama's election – also in politics.

III. Tentative Conclusions

Ladies and Gentlemen, so far we have had a closer look at some of the developments at the national level. It can easily be argued that constitutional courts have become involved in a much more active way in operationalizing social rights than in earlier decades. The developments since 1989/1990 until today demonstrate that a rights perspective on the modern welfare state, focusing on liberal democracy and the rule of law, has not been to the detriment of social rights. Rather, these rights have moved beyond a mere claim. They have become real to a certain extent. This development – by no means – has come to an end. As indicated earlier, European courts should become active companions of constitutional and jurisprudential developments in Latin America and in Southern Africa, in order to enrich their own doctrine viz-à-viz social rights.

By way of conclusion, let me address a number of issues here, ranging from the competence of constitutional courts to address social rights, across questions of locus standi and access to justice, to the interpretation of social rights by constitutional courts.

The competence of constitutional courts to address social rights

As to the competence of courts to address social rights, this still is the core issue of whether or not social rights can be effectively implemented at the national level.

Let me first address the United Kingdom, where there is no constitutional court system. As you may guess, this does not mean that social rights are not protected in the UK. However,

the UK strongly relies upon non-judicial and quasi-judicial compliance mechanisms. Among others, a complaints mechanism relating to the delivery of services has been introduced under a 1990 Amendment to the Local Authority Social Services Act. This procedure has been described as consisting of three parts: (1) an optional informal (often oral) stage; (2) a formal stage adjudicating written complaints; and (3) a review of this decision before a panel comprised of an independent chairperson and two others. Each stage is normally completed within twenty-eight days. There is a similar procedure for complaints about the administration of the National Health Service. The advantages of these procedures are that they are inexpensive, the duty to establish facts (including on matters of expert opinion) is placed on the public authority and not the claimant, and the public authority is required to assist the claimant in formulating his or her complaint where needed. The downsides of this model are, however, that the issue of social rights remains both an administrative-political affair and also a technical matter. This does not lead to effective empowerment of the citizen as part of society and part of democratic governance. From our perspective, the UK's tribunal system can provide remedies at a very practical level, but it cannot contribute to making social rights part of liberal democracy and part of the citizen's own responsibility. Contrary to some claims that may be found when reading constitutional literature from the UK, the very technical approach of the tribunal system tends to support paternalistic attitudes towards social security. Thus, the non-availability of appropriate constitutional jurisprudence seems to weaken the individual's legal position. In contrast, the Human Rights Act and its implementation demonstrate that such empowerment contributes to a modern human rights culture which should also be available for social rights.

Another jurisdiction which deserves attention in this context is the French Conseil constitutionnel. Due to its strong focus on preventive rather than repressive control of government activities, social rights again tend to be reserved for the more technical adminsitrative type of review. Again, such an approach does not facilitate the perception of social rights as individual entitlements and as part and parcel of individual responsibility. Rather such an approach upholds paternalistic perceptions of the welfare state – and also a

perception of the welfare state as "état providence", one might even talk about state-centred views or "perceptions étatistes".

Many other of the jurisdictions referred to in our presentation, whether the Italian Constitutional Court, the Spanish one or even the German Federal Constitutional Court, enjoy constitutional jurisdiction viz-à-viz social rights standards guaranteed by the respective constitutional instruments. The competence of these courts to address social rights has – at least to a certain extent – contributed to not only solving the practical problems on the ground but also to providing legitimacy for governance. This legitimacy stems from individual rights and responsibilities, coupled with governmental action. If citizenship is not limited to participation in elections, then the constitutionally guaranteed linkage between individual rights and communal responsibilities which the above-mentioned constitutional courts have developed strenghtenes the legitimacy of rule of law-based democratic governance.

Our conclusion as to this first issue is that constitutional courts should be equipped with the power to adjudicate issues related to constitutionally guaranteed social rights. The justiciability of social rights can only be ensured if courts are competent to address pertinent questions. How these questions can be addressed, I will come back to this shortly at the end of my presentation. Before turning to the issue, let us briefly focus on the functional equivalent of the competence of constitutional courts to address social rights, namely access to justice and locus standi.

Access to justice and locus standi

Perhaps even more important than the actual phrasing of constitutional rights in a constitutional document is the question of whether or not the individual citizen can bring a case based on such constitutional guarantees. While it is our perception, that individual rights are not only given if enforceable in court, access to justice, nevertheless, is an essential component of making individual rights operational. Probably, this is best reflected at the international level which easily demonstrates that the international protection of individual rights has improved whenever individual complaints mechanisms have been introduced. Such individual complaints mechanisms will never be able to address all case arising with

regard to certain instruments. But they will ensure that individual cases can be used to highlight deficiencies in certain countries and to provide an incentive for governments to comply with pertinent standards. Access to constitutional courts and the right of standing before such court with regard to social rights is a core element of making the competence of courts to address social rights a reality based on the individual's perception of social rights and the importance thereof.

The best example I can think of in this context is the jurisprudence of the German Federal Constitutional Court. While the Court, in theory, argues that there are no explicit guarantees of social rights in the German Basic Law – which is true if you simply look at the text thereof –, the Court has linked the social state principle to individual human rights guarantees whenever it considered it necessary and appropriate to take up a case related to social rights in the broader sense. And this was for the simple reason to give the individual access to the court's jurisdiction, to give the individual locus standi before the court. This illustrates that one of the essential reasons for interpreting social rights as individual entitlements is not the provision of a particular service to a particular individual, but access to justice!

The interpretation of social rights by constitutional courts

Let me finally draw some conclusion as to the interpretation of social rights by constitutional courts – and thereby highlighting three methodological approaches which contribute to the operationalization of constitutionally guaranteed social rights.

First, as we know from the practice of the UN Committee on Economic, Social and Cultural Rights, the obligation to respect (in other words: the negative obligation) forms a core part of social rights. These rights are by no means simple entitlements for the government to interfere with the private sphere of the individual. The opposite is true: the government is prevented from interfering with the individual's capacity to pursue the objectives included in social rights standards. The duty to respect must be understood as the traditional negative duty not to interfere. With regard to social rights, this has been described as the duty to avoid depriving, but it is much better to use the terminology that is common with regard to civil and

political rights. So let us take the duty to respect, not to interfere, as the first level of protection.

Second, the obligation to protect, which is the second layer of the international social rights doctrine, at the national, in particular, the constitutional level, is often closely linked to the question of horizontal application of social rights. Indeed, numerous constitutional courts have moved into a much broader view of "Drittwirkung" (third party effects) than was the case in the early years of post-World War II human rights jurisprudence in Europe. It is important to note, that this approach has not only been followed by constitutional courts which could rely on an appropriate textual or literal basis in the constitutional instrument but it has also been taken up by other courts.

Finally, the obligation to fulfill is well-placed at the intersection between equality rights and socio-economic rights. Constitutional courts have been very careful not to establish claim rights towards specific entitlements from sratch. Rather, they have construed the obligation to fulfill as a right to participate in what is available. In German, we read this as "Teilhaberecht" or participatory entitlement. Such an interpretative approach ensures that social rights do not promise something they can't keep, but they ensure that all citizens have – according to their needs – the same perspective of participating in social achievements, they are treated equally. It is no surprise that many constitutional courts in Europe have used equality rights as a substitute for social rights whenever the constitutional instrument did not explicitly include such social rights or whenever there were problems with the right of access to justice. Furthermore, such participatory entitlement to equal participation in social achievements strongly supports an interpretative focus on procedural aspects of implementing social rights. This is an approach that has not only been followed by the Italian Constitutional Court but it can be equally found in the UK, where tribunals and courts have used the reasonableness criterion to make social rights part and parcel of the judicial review of administrative decisions. Additionally, one may point to Article 26 of the International Covenant on Civil and Political Rights which – if you take a closer look at the practice of the Human Rights Committee established under the Covenant – has been used for making social rights justiciable as part of the civil and political rights enforcement mechanisms.

All this shows that social rights are inextricably linked to civil and political rights. Indivisibility of the two categories is not just ideological but it is the approach that has recently been followed by more and more constitutional courts, not just in Europe but even more in South Africa and Latin America. Given this indivisibility of civil and political rights on the one hand and economic and social rights on the other hand, it is easy to follow a functional approach to constructing and interpreting social rights. Social rights provide the necessary basis for the actual realization of civil and political rights while civil and political rights themselves are indispensable for the realization of economic and social rights. As Amartya Sen has put it: "Political rights, including freedom of expression and discussion, are not only pivotal in inducting political responses to economic needs, they are also central to the conceptualization of economic needs themselves".

The approach to social rights which, often implicitly, less so explicitly, has been followed by constitutional courts in Europe and elsewhere makes them enforceable and justiciable. It is based on the idea that the indiviudal is – at least in socio-economic terms – not just a neutron, but a member of civil society. Thus, the individual must be considered equally responsible for social rights and for civil and political rights. Social rights can thus be viewed as individual entitlements, leaving a wide margin of appreciation to the addressees of such rights. Such social rights are the necessary individual counterpart of economic globalization. As Philip Alston has rightly observed, "individuals must be empowered to participate in decision relating to the steps to be taken towards meeting those rights and be given the opportunity to contribute to monitoring and evaluation processes." A modern understanding of social rights as individual entitlements can facilitate this contribution at the level of constitutional law and constitutional jurisprudence.

Let me conclude by pointing out that we will produce a more elaborate written version of our report in August, and let me express my thanks for your attention!