



Strasbourg, 22 September 2014

CDL-LA(2014)010  
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

in co-operation with the  
**SUPREME COURT OF BRAZIL**

**CONFERENCE ON**  
**“PROTECTING ECONOMIC AND SOCIAL RIGHTS**  
**IN TIMES OF ECONOMIC CRISIS:**  
**WHAT ROLE FOR THE JUDGES?”**

**Ouro Preto, Brazil**

**5-6 May 2014**

**CONSTITUTIONAL ENTRENCHMENT OF**  
**SOCIAL RIGHTS IN EUROPE:**  
**THEIR DEFINITION**

**REPORT BY**

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## CONSTITUTIONAL ENTRENCHMENT OF SOCIAL RIGHTS IN EUROPE: THEIR DEFINITION

Ever since the adoption of the UN Charter (1945) and the Universal Declaration of Human Rights (1948), social rights<sup>1</sup> have been an integral part of the universally recognized catalogue of human rights. Yet, the treatment of these rights at the national level has always revealed much more diversity than that reserved to civil and political rights. This applies both at the universal level and within more tightly-knit regional organizations such as the Council of Europe or, even, the European Union. Despite the claim that there is now “*a European culture of social justice*”,<sup>2</sup> European countries reveal high heterogeneity in the way in which they regulate social rights in their domestic legal orders. This paper gives an overview of this heterogeneous regulation by focusing on three aspects thereof. These are the presence or absence of social rights in the constitutions of European countries, the way in which social rights are defined or conceptualized in these constitutions and the justiciability of social rights at the national level.

### Presence or Absence of Social Rights in the Constitutions of European countries

The first aspect pertains to the presence or absence of social rights from the constitutions of European countries. The constitutions reveal high variableness in this respect. First, there are certain constitutions that do ***not invoke*** social rights at all. Such is, quite understandably, the case of the United Kingdom, which lacks any written constitution in the first place, but also of Austria. The Federal Constitutional Law of Austria, which was adopted back in 1920, only recognizes civil and political rights. Proposals have been put forward since the 1980s to amend the Constitution, adding various social rights.<sup>3</sup> None of the proposals has so far succeeded. It is however important to recall that Austria has an extensive set of sub-constitutional legal acts relating to social security that Austria which makes its social model quite different from that of

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\*The paper is based on the presentation made during the conference *Protecting Economic and Social Rights in Times of Economic Crisis: What Role For The Judges?*, held in Ouro Preto, Brazil, on 5-6 May 2014. A revised version of the paper will be published in a collective monograph on the Protection of Human Rights, which is the outcome of a collaboration project between the Charles University in Prague, the Czech Republic, and the West of Santa Catarina State University, Brazil.

<sup>1</sup> There is no uniform definition of social rights. Most sources, however, define them as individual rights which are necessary for full participation in the life of society. The catalogues usually include the right to social security, the right to health care, and the right to education. More extensive catalogues of social rights may include the right to job, the right to recreation, the protection of family and of vulnerable people etc.

<sup>2</sup> FABRE, Cécile. Social Rights in European Constitutions. In DE BÚRCA, Gráinne, DE WITTE, Bruno, OGERTSCHNIG, Larissa (eds). *Social Rights in Europe*. Oxford: Oxford University Press, 2005, p. 16.

<sup>3</sup> The following social rights were considered: the right to work, the right to appropriate remuneration, the right to fair conditions of employment, the right to the protection of children, young people and mothers, the right to housing, the right to education, the right to social security. See European Parliament, *Fundamental Social Rights in Europe, Working Paper*, 1999, p. 25.

the UK and rather close to that of Germany.

Secondly, certain European constitutions refer to social rights but the reference is either **unspecific** or it relates to a **very limited** number of social rights. The former (unspecific reference) is true for countries whose constitutions solely include a Social State's Clause, such as Germany<sup>4</sup> and France.<sup>5</sup> Similarly as in Austria, the absence of a detailed constitutional regulation is usually compensated for by a host of sub-constitutional legal acts establishing an ambitious welfare state.<sup>6</sup> The latter (limited catalogue) applies to most Scandinavian countries but also, for instance, to Ireland. The Danish Constitution recognizes the right to work and the right to education (Articles 75-76). The Finish constitution refers to the right to education, the right to work and the right to social security, encompassing the right to health care (Articles 16, 18 and 19). The Norwegian Constitution solely invokes "*the responsibility of the authorities of the State to create conditions enabling every person capable of work to earn a living by his work*" (Article 110). The Irish Constitution contains sections relating to the protection of the family and the right to education. Again, the differences in the scope and the wording reflect not that much the model these states adhere to but, rather, the time of the adoption of the Constitution (Norway 1814, Denmark 1949, Finland 1919, Ireland 1937).

Thirdly, many European countries have Constitutions which explicitly refer to social rights and contain an **impressive catalogue** thereof. This category comprises most of the post-totalitarian countries of Southern, Central and Eastern Europe, such as Greece, Italy, Spain and Portugal (Southern Europe), the Czech Republic, Hungary, Poland or Slovenia (Central Europe) or the Russian Federation and Ukraine (Eastern Europe).<sup>7</sup> Such catalogues, usually putting social rights together with economic and cultural rights, encompass the rights to education, the right to work, the right to fair remuneration for work, the right to satisfactory work conditions, the right to health care, the right to enhanced health protection for certain categories of vulnerable persons (children, disabled people, pregnant women etc.), the right to adequate material security in old age and during periods of work incapacity, the right to paid leaves etc. Whereas countries of Southern Europe often adopted the catalogues of social rights after the fall of previous right-wing autocratic regimes, countries of Central and Eastern Europe have mostly inherited them

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<sup>4</sup> Article 20 of the German Fundamental Law: "*The Federal Republic of Germany is a democratic and social federal state*" (emphasis added).

<sup>5</sup> Article 1 of the Constitution of France: "*France shall be an indivisible, secular, democratic and social Republic*" (emphasis added).

<sup>6</sup> See European Commission, *Your Social Security Rights. Germany*. European Union, 2013.

<sup>7</sup> See European Parliament, *Fundamental Social Rights in Europe, Working Paper*, 1999.

from the communist period.

### **Definition of Social Rights in the Constitutions of European Countries**

The Constitutions of European countries differ not only in whether they refer to social rights or not. The definition or the conceptualization of these rights is also quite diverse across Europe. As Fabre rightly states, “*European constitutions vary considerably in their degree of precision, the kind of social provision they mention, and the categories of individuals they cater for. /.../ they also vary in the ways in which they conceive of social provision*”.<sup>8</sup> Obviously, the scope of inquiry is limited here to those constitutions which are not completely silent on social rights. Two main approaches can be identified, although the line between them is by no means absolute and the elements of the two can often be found within a single legal instrument.

In the **first approach**, social rights are conceptualised as political goals or instructions addressed to the legislator rather than as individual human rights. The constitutions simply refer to certain values and principles that the state should seek to protect and ensure. There is usually no individual right corresponding to these imperatives. This makes social rights different from civil and political rights, such as the right to life, the freedom of assembly, or the prohibition of torture, which are virtually always conceived of as individual entitlements. The distinction between the two generations of human rights<sup>9</sup> has yet another dimension, relating to their implementation. Whereas civil and political rights are considered to impose obligations of immediate and full application, social rights are seen to set programmatic goals that states should pursue progressively, step by step, and to the extent determined by their factual capacities.<sup>10</sup>

The first approach is prevalent, for instance, in Spain and in the Netherlands. The Constitution of Spain, adopted in 1978, contains a specific chapter on Principles governing Economic and Social Policy, This chapter, unlike the previous one on Rights and Duties of citizens, does not

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<sup>8</sup> FABRE, C. *op. cit.*, p. 19.

<sup>9</sup> The concept of three generations of human rights was introduced by Karel Vasak in the late 1970s. The first generation, that of civil and political rights, was supposed to include negative, liberty rights (freedom from something). The second generation, that of economic, social and cultural rights, was believed to encompass positive rights (right to something). The third generation, that of solidarity rights, was meant to include certain collective rights. See VASAK, Karel. Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights. *UNESCO Courier*. 1977, Vol. 30, No. 11, p. 29.

<sup>10</sup> See also BOSSUYT, Marc. **La distinction juridique entre les droits civils** et politiques et les droits économiques, sociaux et culturels. *Revue des droits de l'homme*, Vol. 8, 1975, pp. 783-820.

set individual rights but political tasks for the public authorities (*“The public authorities ensure social, economic and legal protection of the family”*, Article 39; *“The public authorities shall promote favourable conditions for social and economic progress”*, Article 40; etc.). In a similar vein, the new Constitution of the Kingdom of the Netherlands, adopted in 2008, makes a difference between civil and political rights drafted in terms of individual entitlements of immediate application (*“Everyone shall have the right to profess freely his religion or belief”*, Article 6; *“The right of association shall be recognised”*, Article 8; etc.) and social rights drafted in terms of societal imperatives subject to gradual implementation (*“It shall be the concern of the authorities to promote the provision of sufficient employment”*, Article 19; *“The authorities shall take steps to promote the health of the population”*, Article 22; etc.).

In the **second approach**, social rights are conceptualized as individual entitlements, at pair with civil and political rights. The constitutions of former communist countries of Central and Eastern Europe often adhere to this approach, using the same formulations for civil and political and for social rights. Thus, for instance, the Constitution of the Russian Federation, adopted in 1993, states that *“everyone shall have the right to freely use his labour capacities”* (Article 37), *“everyone shall be guaranteed social security”* (Article 39) or *“everyone shall have the right to a home”* (Article 40). Similar provisions, again drafted in terms of individual rights, are to be found in the Constitutions of Poland (section of economic, social and cultural freedoms and rights), the Czech Republic (chapter 4 of the Charter of Fundamental Rights dealing with economic, social and cultural rights) or Slovenia (general chapter of human rights and fundamental freedoms).

Yet, even constitutions defining social rights as individual entitlements often set these rights apart from civil and political rights. They do so by means of various techniques. One of the most frequently used ones consists in linking the extent in which individuals may exercise their individual rights to statutory provisions. When the Constitution of Poland, adopted in 1997, stipulates that *“a minimum level of remuneration for work, or the manner of setting its levels shall be specified by statute”* (Article 65 par. 4) or that *“an employee shall have the right to statutorily specified days free from work /.../”* (Article 66 par. 2), it effectively leaves it to the legislator to determine, and to change if need be, the actual content of the rights at hand. While adopting the relevant regulation, the legislator is free to take into account the economic capacity of the country as well as other important factors. From that perspective, the second approach is not, in its practical application, so different from the first one.

Moreover, as noted above, constitutions of the European countries sometimes combine the

elements of the two approaches. That is typical of the constitutions with longer catalogues of social rights which often include both individual entitlements and political goals addressed to the legislator. The Constitution of Poland, for instance, declares in its Article 65 that, on the one hand, “everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work” (par. 1), thus establishing an individual right to work. It then adds that, on the other hand, “public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment /.../” (par. 5), thus sending a message to the legislator. Such a combined approach is frequent, reflecting that even under the second approach, social rights are seen as rights of gradual implementation in the case of which “levels of provision may have to vary depending on the country’s level of economic and social development”.<sup>11</sup>

### ***Justiciability of Social Rights in the Constitutions of European Countries***

The third criterion dividing the constitution of European countries pertains to the justiciability of social rights<sup>12</sup> or, more broadly, to the role that the judiciary plays in the implementation of such rights. The justiciability of social rights has for long been an object of contention among scholars.<sup>13</sup> Whereas some authors believe that social (and also economic and cultural) rights are simply too vague and programmatic in content to lend themselves to adjudication in courts,<sup>14</sup> others are more optimistic.<sup>15</sup> The recent practice of several non-European countries gives arguments in support of the latter position. In India, social rights have been adjudicated in individual cases since the 1970s, first as a component of civil and political rights and later on as independent human rights.<sup>16</sup> In South Africa, social rights were incorporated in the 1997 Bill of

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<sup>11</sup> FABRE, C. *op. cit.*, p. 17.

<sup>12</sup> Justiciability denotes “the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur”. International Commission of Jurists. *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative experiences of justiciability*. Geneva: International Commission of Jurists, 2008, p. 6.

<sup>13</sup> See, for instance, DENNIS, Michael J., STEWART, David P. *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*. *American Journal of International Law*, Vol. 98, No. 3, 2004, pp. 462-515; TRILSCH, Mirja A. *The Justiciability of Economic, Social, and Cultural Rights in Domestic Law. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 234*, 2012, pp. 505-512.

<sup>14</sup> SUNSTEIN, Cass. *Against Positive Rights: Why social and economic rights don't belong in the new constitutions of post-communist Europe*. *East European Constitutional Review*, Vol. 2, 1993, pp. 35-38.

<sup>15</sup> LANGFORD, Malcolm. *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*. Geneva: Centre on Housing Rights & Evictions, 2003.

<sup>16</sup> See VERMA, Shivani. *Justiciability of Economic, Social, and Cultural Rights. Relevant Case Law*. The International Council on Human Rights Policy, *Review Meeting*, Geneva, 15 March 2005, pp. 16-38 (India).

Rights making part of the Constitution and have been extensively elaborated upon since then by the Constitutional Court.<sup>17</sup> Moreover, in 2008, an Optional Protocol to the 1966 International Covenant on Economic, Social and Cultural Rights was adopted making it possible for individuals to submit communications to the UN Committee on Economic, Social and Cultural Rights. These developments indicate that social rights could in fact be made justiciable.

Yet, many constitutions of the European countries remain **cautious** in this respect. The Constitution of the Netherlands only trust the judiciary with the competence of adjudicating “*disputes involving rights under civil law and debts*” (Article 112 par. 1) adding that the adjudication of any other matters would need to be allowed by an act of Parliament. Similarly, in Ireland, most social rights are included in the section on Directive Principles of Social Policy which, by virtue of Article 45 of the Constitution, “*shall not be cognisable by any Court under any of the provisions of this Constitution*” (par. 1). By the same token, the Constitution of Malta includes social rights into the Declaration of Principles concluded by Article 21 which states that “*the provisions of this Chapter shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws*”. In addition to constitutions that explicitly exclude the possibility of judicial review of social rights, some constitution, such as that of Denmark, remain silent on this issue. In practice such silence amounts to the exclusion of judicial review.

Yet, there is an important, and progressively increasing number of constitutions in Europe which make social rights **justiciable**. The models of justiciability differ, as do the conditions under which a complaint involving an alleged violation of social rights can be submitted to courts.<sup>18</sup> The differences operate on several plans. First of all, some constitutions make it possible for individuals to petition ordinary courts (Cyprus), others grant them direct access to the constitutional court (Bulgaria, the Czech Republic, Greece), and still others combine the two options (Estonia). Secondly, in some countries, judicial review is replaced or complemented by judicial preview which makes judges, usually those at constitutional courts, consider the compatibility of any new law with the Constitution, including its social rights provisions (Bulgaria, France, Romania). Thirdly, sometimes, social rights are in principle justiciable, yet individuals can only claim them “*within the confines of the implementing laws*”. Such is the case in the Czech Republic (Article 41 of the Charter of Fundamental Rights). This effectively shifts the

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<sup>17</sup> Ibid., pp. 42-59 (South Africa).

<sup>18</sup> See also International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*. Geneva: International Commission of Jurists, 2008.

balance from courts to the judiciary which is granted plenty of leeway to determine the content of social rights. Finally, even in countries where social rights are seen as non-justiciable, it is often possible for individuals to submit complaints to courts based on the ordinary legislation (Finland, Germany, Sweden).<sup>19</sup> This model obviously differs from the previous one, as it does not involve constitutional and human rights issues, yet from the functional perspective, it may play a role in ensuring respect for social rights.

### **Towards a European Culture of Social Justice?**

The previous sections demonstrated the plurality of approaches that the constitutions of the European countries adopt with respect to social rights. This final section discusses the causes of such plurality and considers the prospects of its future retreat and the creation of a true European (constitutional) culture of social justice.

Several factors can account for the current plurality of approaches. The first factor which has been extensively discussed in scholarly literature relates to the model of welfare state a country belongs to. In his book *The Three Worlds of Welfare Capitalism*, Esping-Andersen introduced three models of welfare capitalism<sup>20</sup> which are used to conceptualize the approach of European (or other) countries to social rights.<sup>21</sup> The liberal model, exemplified by the United Kingdom, is marked by a sheer absence of constitutional guarantees of social rights. The continental model, found in France, Germany, Italy or Spain, is characterised by explicit, albeit usually non-extensive constitutional regulation of social rights. The Scandinavian model, present in the Scandinavian countries, combines the elements of the two previous models by including provisions on social rights into constitutions but keeping these provisions short and complementing them by an extensive set of subconstitutional acts.

The typology by Esping-Andersen was introduced in 1990, prior to the political and also constitutional changes in the post-Cold War period. In reflection of these changes, the study commissioned by the European Parliament in 1999 offers a modified typology.<sup>22</sup> While

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<sup>19</sup> For more details, see LANGFORD, Malcolm (ed.). *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law*. Cambridge University Press, 2008.

<sup>20</sup> ESPING-ANDERSEN, Gøsta. *The Three Worlds of Welfare Capitalism*. Princeton: Princeton University Press, 1990.

<sup>21</sup> See KATROUGALOS, George S. The Implementation of Social Rights in Europe. *Columbia Journal of European Law*, Vol. 2, 1996, pp. 277-312; and European Parliament, *Fundamental Social Rights in Europe, Working Paper*, 1999.

<sup>22</sup> European Parliament, *op. cit.*



maintaining the liberal model, it complements it with two new models: a moderate one, which groups together countries with minimalistic constitutional regulation of social rights (France, Germany, Scandinavian countries); and a southern European model, reserved for countries with ambitious constitutional regulation of these rights (Italy, Spain etc.). This typology, on its turn, predates the accession to the European Union of ten States preponderantly from Central and Eastern Europe. Most of these states would, due to the detailed set of provisions on social rights that their constitutions contain, fit under the southern European model which would then have to be relabelled. The classification of a country into one of the models is more the consequence of its constitutional regulation than its cause but it is still useful to take it into account.

Another factor accounting for the plurality of approaches is the legal culture. European countries belonging to the common law system, such as the UK, tend to place less emphasis upon an explicit constitutional entrenchment of social (and any other human) rights than countries belonging to the civil law system (France, Germany, Poland, the Russian Federation etc.). The two main legal cultures, however, are no monoliths, as the heterogeneity of models adopted in civil law countries clearly demonstrates. The third factor relates to the origins of the Constitution and the time of its adoption. More ancient instruments are usually either silent on social rights or contain only general references to them (Austria, Denmark, Norway etc.). More recent constitutions, on the contrary, tend to be more ambitious in this area (the Czech Republic, Poland, Spain etc.), though again, this rule is not without exceptions. Finally, historical developments also play a role, with countries having experienced right-wing or left-wing totalitarian regimes in the recent past having clear preference for explicit constitutional entrenchment of all human rights, including social rights.

Does the plurality of approaches adopted in the constitutions of the European countries with respect to social rights entail that “a European culture of social justice”<sup>23</sup> is nothing more than an unrealistic dream? Not necessarily. After all, the constitutional regulation is complemented by sub-constitutional instruments and case-law, which in many cases narrow the differences between national legal orders.<sup>24</sup> Moreover, the domestic regulation constitute nowadays only one of several levels at which social rights and, indeed, any human rights, are protected. In most European countries, this level is complemented by instruments of the EU law and of international law. The European Union has over the past decades established an ambitious

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<sup>23</sup> FABRE, Cécile, *op. cit.*, p. 16.

<sup>24</sup> KATROUGALOS, George S., *op. cit.*

system of protection of social rights.<sup>25</sup> Indeed, the 2000 Charter of the Fundamental Rights of the European Union contains a separate chapter dealing with social rights (chapter IV – Solidarity). In a similar vein, international law has several instruments on social rights, most prominently the 1966 International Covenant on Economic, Social and Cultural Rights, adopted within the UN, and the 1961 European Social Charter, adopted within the Council of Europe. These instruments are binding on virtually all European countries and it is likely that they will push these countries towards more uniformity in social matters.

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<sup>25</sup> See DE WITTE, Bruno. The Trajectory of Fundamental Social Rights in the European Union. In DE BÚRCA, Gráinne, DE WITTE, Bruno, OGERTSCHNIG, Larissa (eds). *Social Rights in Europe*. Oxford: Oxford University Press, 2005, pp. 153-168.