

Social Rights: A Wide Agenda

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Part II, passim; Article III-103 Draco¹

THE CONCEPT OF SOCIAL RIGHTS

There is considerable flexibility in the use of the term 'social rights.' The list of such rights varies in international documents, and it is difficult to find a common denominator or ground for classification for what are called social rights. A further standard problem is that not all social rights have the legal nature of more traditional civil and political rights. Social rights entail claims that are neither necessarily individual nor necessarily enforceable in court, at least not in the sense that they will result in remedies available to identifiable rights holders. Hereinafter, social rights refer to rights that are related to social status, including status rights that are applicable to the economic sphere (rights related to work are often discussed as economic rights, i.e., rights in the economy). Such status rights might apply to all in a given circumstance (e.g., a social subsistence minimum that applies to all who are in need) or they might be specific. In the latter case, the social status is related to a condition that one cannot change voluntarily, at least not in the short run (e.g., motherhood, or being a child, an orphan, or handicapped).

The principles or justifications behind the recognition of such rights are also quite different. This explains the heterogeneity in this respect present in the Constitution of Europe. Variety is to be found notably in the sources of social rights in the Constitution, in relationship of these rights to policy, in notions of solidarity involved and in legal impact.

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¹ All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

SOURCES OF SOCIAL RIGHTS IN THE CONSTITUTION

In one way or another, social rights were present in the operations of the Communities and the activities of the Member States, at least from the early 1960s, as documented in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers.

Community legislation emanating from equality considerations had the effect of generating a considerable body of social rights, though without necessarily turning these into entrenched fundamental constitutional rights. Notwithstanding the lack of such entrenchment, the progress towards more comprehensive endorsement of social rights was never interrupted. Only the Charter of Fundamental Rights, however, recognizes such rights as fundamental for the legal system of the European Union. This recognition becomes fully constitutionalized once the Constitutional Treaty is adopted, although the legal impacts are difficult to foresee.

The Constitution for Europe recognizes such rights among its values, under the heading of solidarity. One also finds additional considerations that serve as the basis for social rights (and their understanding) among the Union's objectives (Article I-3). The specifically relevant objectives are:

- social justice and protection;
- solidarity between generations;
- protection of children's rights; and
- the combat against social exclusion and discrimination.

The objective of equality between women and men, which is also in Article I-3, has strong social rights implications in having the potential to generate special rights for women. In addition, the Union is supposed to operate on the basis of a social market economy. One cannot underestimate the importance of the reference to a social market economy; a reference to the social welfare state combined with dignity resulted in a high level of constitutional social rights protection in Germany. The reference to a social market economy might be troubling because not all Member States subscribe to the concept or a similar design of the social market economy, at least not at the constitutional level. Of course, there is a difference between a social market-based economy and a social welfare state, but a social market might be conducive to social welfare considerations in the operation and regulation of the market. After all, the ECJ already found that in certain contexts economic goals are secondary to social goals that express fundamental human rights.²

² C-50/99 *Deutsche Telekom v. Schröder*.

SOCIAL RIGHTS AND POLICY

The Constitution for Europe uses the term ‘fundamental social rights’ only in the context of social policy (Article III-103, which is an unaltered replica of the present Article 136 EC). The understanding of social rights here refers to that of the two Social Charters mentioned above. Given that a number of Member States have not yet signed or ratified the revised 1961 Charter (1996) and that not all the obligations apply to all Member States, this reference can be interpreted as one that consolidates that understanding.

Arguably, the social rights in the Charters to which the Article refers, function as guidelines for Union and Member State policy. As the language of Article III-103 indicates, these rights are to serve as reminders in the creation of social policy, especially in the promotion of employment and improved living and working conditions.

The centrepiece of this social rights-activated social policy remains the sphere of work. Section 2 of Chapter III (Part III, Title III) contains important guidance (including fiscal restrictions) on the implementation of the social rights-activated social (labour) policy. Further social rights-enabling policies are called for under Section 1 of the same chapter (e.g., Article III-99(1): ‘The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action’). These policy objectives correspond more or less closely to specific employment-related rights of Part II.

Article III-104 sets certain limits to the implementation of the social rights, as Union implementation shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof.

SOLIDARITY

Although the term social rights comes up in a context where the impact of such rights does not correspond to that of other rights (as judicially enforceable individual claims), one can find a number of what are conventionally called social rights in Part II of the Constitution of Europe that incorporates the Charter of Fundamental Rights of the Union. One would expect most of these rights to be found under the Title IV, on Solidarity. Surprisingly, many of these solidarity rights are not related to social status but are rather traditional rights of employment and employment relations, including such banal rights as the right of everyone to have access to a free placement service. The right to work itself is presented under Title II (‘Freedoms’) as freedom of engagement, with emphasis on the free choice, including that of occupation (Article II-15). One could ar-

gue that solidarity does not extend to the establishment of employment relations; it should be added, however, that full employment is one of the Union's objectives.

The employment-related rights under the Solidarity Title include the right to information and consultation within the undertaking, the right of collective bargaining, protection in the event of unjustified dismissal, and fair and just working conditions. Additionally there are rules protecting children at work, which might also be seen as specific children's rights. Rights of workers are also discussed in the context of free movement in Part III. Where is the solidarity element in all these work-related rights? It is not clear that the rights promote solidarity among workers, and they hardly qualify as relations of solidarity between labour and employers.

At the same time the Title on Solidarity contains rights that are undeniably related to social solidarity, like those regarding social security and social assistance, or the provisions regarding health care. The relevant provisions (Article II-34, II-35) are written in a way that refers to rights in special circumstances only. The term entitlements is used in the context of social security in Article II-34. Are entitlements rights? If not, how are they different? The social security entitlements are risk-related. Some of these risks are also employment-related (industrial accidents, loss of employment); others are related to social status or condition (age, illness, and motherhood, which is also protected as a right against dismissal). The Constitution recognizes dependency as a situation generating entitlement while, in order to carry out its social justice objectives, the Union recognizes the right to social and housing assistance to those who lack sufficient resources. The standard for such rights is relatively high in view of the prevailing standards in the Member States: the assistance should ensure a decent existence. Whether this means a uniform standard or not (as one might infer from the reference in the same Article II-34(3)) might become a contested matter, at least at the level of ideology.

Health care is another issue mentioned in the context of solidarity: it is, however, limited to an access right (to preventive health care and medical treatment) under the conditions established by national laws and practices (Article II-35). Equal access to health care in all the Member States is not expressly granted to European citizens, and no reference is made to free or subsidized health care. At least for the time being, it seems that health protection will be more relevant as a directive principle in the definition and implementation of all Union policies and activities. Public health is one of the areas where the Union may take co-ordinating, complementary, or supporting action (Part III, Title III, Chapter V). A high level of human health protection shall be ensured, arguably an equally high level in all the Member States, to the extent health (or

health protection only?) is affected by or results from Union policies and activities.

Other strongly solidarity-motivated social rights are listed among Freedoms in Title II, e.g., the right to education, which means the right to free compulsory education. The rights of the child, the elderly, and the rights of persons with disabilities are mentioned within Title II on Equality, while specific reference is made to members of these groups in terms of security rather than in terms of freedoms. The emphasis on special protection through rights is aimed at integration of the elderly and the disabled into society. Once again, it might cause complications that the legal nature of the protected interests (or are they individual rights?) of the groups to be integrated remains unclear. What might a provision of the Constitution entail that states, e.g., that the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community (Article II-26)? Who will create such measures that will ensure their integration? Is this a policy requirement that implies that Union laws and their nation state implementation should not undermine such measures, if these exist? Article III-104 (1.h.) provides only supportive and complementary competence to the Union in the integration of persons excluded from the labour market and does not apply to social exclusion.

Additional social right-related provisions are to be found among others in Title VI, Part I (on the democratic life of the Union). Article I-47 contains a provision on social partners and autonomous social dialogue. Again, such provisions are more like policy statements that entail the recognition of certain principles.

THE LEGAL IMPACT OF SOCIAL RIGHTS

Beyond the standard problems related to social rights that are common problems in domestic constitutional law, like judicial enforceability and standard-setting competence, the highly complex system of reference to national and international standards and the general provisions governing the application of the Charter rights make it difficult to predict the exact meaning of the social rights provisions and the way national courts and the ECJ will enforce those rights. There are special problems with standing, as access to the ECJ was not structured with the needs of individual rights protection in mind. Given the extremely varied combination of national and international systems of protection that are to be taken into consideration in setting the standards applicable to one or another right, the exact meaning of the social rights remains a mystery for the time being.

The relevant sources of standards differ from right to right. For instance, the right of access to preventive health care is given ‘under the conditions established by national laws and practices’ (II-35), while there is no reference to national laws or practices regarding paid maternity leave (II-33(2)). As to social security entitlements, the protection is to be provided ‘in accordance with the rules laid down by Union law and national laws and practices’ (II-34(1)). Do these phrases purport to limit the EU Charter’s rights? The history of the horizontal clauses indicates a strong fear on the part of certain Member States of ‘creeping Union competences.’ Additional comparative research needs to be carried out in order to determine what the national laws and practices entail. This research agenda will help to determine the needs of and possibility for further harmonization.

QUESTIONS

1. To what extent do Union citizenship, European identity and Treaty-mandated solidarity among the Member States require at least comparable social systems and levels of protection in the Member States in order to make social rights equal in principle, or functionally equivalent, within the Union.
2. How should the content of the social rights, given the limitations in the horizontal effects, be determined?
3. Does the incorporation of the Charter in the Constitution for Europe enlarge EU competence over national legislation affecting status-rights and in areas such as social and industrial policy?

LITERATURE

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