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# social rights as fundamental rights

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le xix[e] congrès international de droit comparé

edited by
**krzysztof wojtyczek**

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*XIXth International Congress of Comparative Law / Le XIXe Congrès International de droit comparé*

Krzysztof Wojtyczek (Ed.)

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# Table of Contents

# 1 Introduction

*Krzysztof Wojtyczek*[*]

The present volumes contains the major part of national reports on social and economic rights prepared for the 19th International Congress of Comparative Law hold in Vienna on 20-26 July 2014. Only a few rapports/reports on social and economic rights could not be included in this book.

The national rapporteurs were either appointed by their national associations for comparative law or invited by the general rapporteur. Some of the national rapporteurs were able to come to Vienna to attend the Congress and to present their papers orally. Their presentations as well as the general report were discussed at one of the workshops during the Congress.

The national rapporteurs were asked to address issues identified in questionnaires prepared by the general rapporteurs. The questionnaire on social rights and economic rights is published below. The rapporteurs were free to structure their reports and to identify additional issues they found as the most relevant for their jurisdictions. Therefore, the reports published in the present volume do not follow a single pre-established pattern but rather reflect the personal choices made by the authors. Some of the authors decided to follow the questions, whereas other preferred to adopt a different approach. As result the readers should get a more interesting and deeper study of different legal questions connected with the protection of social and economic rights.

As general rapporteur to the Vienna Congress I wish to express my gratitude to all authors who accepted the invitation to prepare national reports on social and economic rights. A general report on this topic will be published separately in the collection of general reports presented to the Congress.

## SOCIAL RIGHTS QUESTIONNAIRE FOR NATIONAL RAPPORTEURS INTERNATIONAL CONGRESS OF COMPARATIVE LAW 2014 VIENNA

### *1 Social rights in national legal scholarship*

How does the national legal scholarship see the question of protection of social rights?

* Professor at the Jagiellonian University (Cracow, Poland).

Is the need to protect social rights questioned?
Are social rights perceived as a different from other types of rights?
Are social rights perceived as limitations or threats to the 'first generation" rights?
What are the most important questions of social rights protection discussed by the national legal scholarship?
What do you consider as the most original contribution of your national legal scholarship to the study of social rights?

## *2 Constitutional protection of social rights*

Does the national Constitution of your country provide for protection of social rights?
What are the rights protected?
How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family, a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?
How is the debtor of social rights defined? Is it the State, public authorities, public bodies, private bodies?
What is the content of the rights? What are the obligations of the legislator? What are the obligations of the administration? What are the obligations of other actors?
Does the national Constitution differentiate the scope and methods of protection of social rights and other rights?
Does the normative structure of constitutional social rights vary? Is it possible to distinguish different types of constitutionally protected social rights?
Is there a constitutional mechanism of protection vis-à-vis the legislator? How does it operate? Are there any an instruments that ensure protection against the inaction of the legislator?
How do you evaluate the efficiency of social rights protection offered by the Constitution and the constitutional justice?
What do you consider as the most original contribution of your national Constitution to the protection of social rights?

## *3 Protection of social rights under other constitutional rules and principles*

Are there other constitutional or jurisprudential principles used as tools for the protection of social human rights?
Is there a protection offered by the following constitutional principles:
– protection of legitimate expectations,

- protection of vested rights,
- precision of legislation,
- non-retroactivity of legislation,
- due process
- other general constitutional principles?

## 4 *Impact of the international protection of social rights*

Did your state ratify international treaties that pertain to social rights? Are they directly applicable in your domestic legal order?
Do these treaties have an impact on the national legal system? Did they trigger any changes in national legislation or practice?
Does the case-law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights?
In particular, did the case-law of the European Court of Human Rights and other regional human courts have an impact on national law in the field of social rights?
What are the most important social rights cases brought from your country to international rights protecting bodies?
What are the lessons you draw from the international litigation (pertaining to social rights) started by applicants from your country?

## 5 *Social rights in ordinary legislation*

To which extent does the ordinary legislation in your country ensure the protection of social rights?
Is this legislation in conformity with the national Constitution and the international instruments ratified by your country?
Are there any original legislative tools or mechanisms of protection of social rights created in your country?

## 6 *Justiciability of social rights*

Are social rights considered justiciable in your country? To which extent?
What is the role of the judge?
What are the practical effects of such justiciability?
What are the most prominent examples of social rights cases successfully brought to courts by the litigants?

### *7 Institutional guarantees of social rights*

Which national bodies are the institutional guarantors of social rights?
Are there any specific bodies created especially for the protection of social rights? What are their powers?
How do you evaluate the effectiveness of these national bodies?

### *8 Social rights and comparative law*

Did your national legal system influence foreign legal systems in the area of social rights?
Did other foreign legal systems influence your national legal system in the area of social rights?
Can you give examples of provisions, principles or institutions (in the area of social rights) borrowed from other legal systems?
Do your domestic courts rights quote judgments or legislation from other jurisdictions when adjudicating on social rights?

## DROITS SOCIAUX: QUESTIONNAIRE POUR LES RAPPORTEURS NATIONAUX CONGRES INTERNATIONAL DE DROIT COMPARE 2014 VIENNE

### *1 Les droits sociaux dans la doctrine nationale*

Comment la doctrine nationale voit-elle la question de la protection des droits sociaux?
Le besoin de protéger les droits sociaux est-il remis en question?
Les droits sociaux sont-il perçus comme des droits différents?
Les droits sociaux sont-ils perçus comme des limitations ou des menaces aux droits de la « première génération »?
Quelles sont les questions les plus importantes concernant les droits sociaux qui sont discutées par la doctrine nationale?
Que considérez-vous comme la contribution la plus originale de votre doctrine nationale à l'étude des droits sociaux?

### *2 La protection constitutionnelle des droits sociaux*

La constitution nationale de votre pays prévoit-elle la protection des droits sociaux?
Quels sont les droits protégés?

Comment est défini le sujet ayant droit à la protection? L'individu, le citoyen, la famille, un groupe de personnes? Quels groupes? Les droits sociaux sont-ils garantis aux non-nationaux?
Comment est défini le débiteur des droits sociaux? L'État, les pouvoirs publics, des entités publiques, des entités privées?
Quel est le contenu de ces droits? Quelles sont les obligations du législateur? Quelles sont les obligations de l'administration? Quelles sont les obligations des autres acteurs?
La structure normative des droits sociaux varie-t-elle selon les droits? Est-il possible de distinguer différents types des droits sociaux protégés constitutionnellement?
Existe-il un mécanisme de protection face au législateur? Comment fonctionne-t-il? Y-a-t-il des instruments de protection contre l'inaction du législateur?
Comment évaluez-vous l'efficacité de la protection des droits sociaux par la Constitution et la justice constitutionnelle?
Que considérez vous comme la contribution la plus originale de votre Constitution nationale à la protection des droits sociaux?

## 3 *La protection des droits sociaux sur le fondement d'autres règles et principes constitutionnels*

Existe-t-il d'autres principes constitutionnels ou jurisprudentiels utilisés comme instruments de protection des droits sociaux de l'homme?
Existe-t-il une protection assurée par les principes constitutionnels suivants:
- protection de la confiance légitime,
- protection des droits acquis,
- précision de la législation,
- non-rétroactivité de la législation,
- juste procédure,
- autres principes constitutionnels généraux?

## 4 *L'impact de la protection internationale des droits sociaux*

Votre État a-t-il ratifié les traités internationaux relatifs aux droits sociaux? Sont-ils applicables directement dans votre ordre juridique interne?
Ces traités ont-ils un impact sur le système de droit national? Ont-ils provoqué des changements de la législation nationale ou de la pratique?
La jurisprudence des organismes internationaux de protection des droits de l'homme impose-t-elle des changements de la législation nationale relative aux droits sociaux?

En particulier, la jurisprudence de la Cour européenne des droits de l'homme et d'autres cours régionales des droits de l'homme a-t-elle un impact sur le droit national dans le domaine des droits sociaux?
Quelles sont les affaires les plus importantes concernant les droits sociaux portées par des requérents de votre pays auprès des organismes internationaux de protection des droits?
Quelles leçons tirez-vous des litiges portés sur le plan international par des requérants de votre pays?

### *5 Les droits sociaux dans la législation ordinaire*

Dans quelle mesure la législation ordinaire assure-t-elle la protection des droits sociaux?
La législation est-elle en conformité avec la Constitution nationale et les instruments internationaux ratifiés par votre pays?
Existe-t-il d'autres instruments ou mécanismes originaux de protection législative créés dans votre pays?

### *6 La justiciabilité des droits sociaux*

Les droits sociaux sont-ils considérés comme justiciables dans votre pays? Dans quelle mesure?
Quel est le rôle du juge?
Quels sont les effets pratiques de cette justiciabilité?
Quels sont les exemples les plus éminents d'affaires concernant les droits sociaux portées devant les juridictions de votre pays par des justiciables?

### *7 Garanties institutionnelles des droits sociaux*

Quels organismes nationaux constituent des garanties institutionnelles des droits sociaux?
Y a-t-il des organismes créés spécifiquement pour la protection des droits sociaux? Quels sont leurs pouvoirs?
Comment évaluez vous l'effectivité de ces organismes nationaux?

### *8 Les droits sociaux et le droit comparé*

Votre système de droit national a-t-il influencé des systèmes de droit étrangers dans le domaine des droits sociaux?

Les systèmes de droit étrangers ont-ils influencé votre système de droit national dans le domaine des droits sociaux?
Pouvez-vous donner des exemples des dispositions, principes ou institutions importés d'autres pays (dans le domaine des droits sociaux)?
Les juridictions de votre pays se réfèrent-elles à des arrêts étrangers ou à la législation étrangère en statuant sur des litiges concernant les droits sociaux?

# 2 Social Rights in Austria

*Harald Eberhard*[*]

## 2.1 Social Rights in Austrian Legal Scholarship

The notion of social rights in Austria has several implications; the most relevant of which can be seen in the typology of human rights as such and the integration of these rights in the human rights system as such. If we speak about human rights system in Austria, first of all, one has to mention that the single fundamental rights in Austria are not codified in one core text of the constitution but are spread out over several legal sources deriving from different historical epoques.[1] From a historical point of view,[2] the oldest guarantees can be found in the Austrian Basic Law on the General Rights of Nationals ("Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger"; hereinafter StGG), RGBl,[3] dating from the Monarchian Era in Austria and transferred as Law of the Republic of Austria in 1920.[4] Certain guarantees such as the Equality Clause (art 7 para 1 of the Federal Constitutional Law ("Bundes-Verfassungsgesetz"; hereinafter: B-VG)[5] and procedural rights such as the right to proceed before the lawful judge (art 83 para 2 B-VG)[6] can be found in the core document of the Austrian Constitution, the B-VG, dating from 1920 and modified around 100 times during its history. The most relevant guarantees are enshrined in the European Convention of Human Rights (ECHR), which – as such and including all ratified protocols – have the status of constitutional law in Austria.[7] Finally, according to the recent jurisdiction of the Austrian Constitutional Court ("Verfassungsgerichtshof"; hereinafter VfGH), those provisions of the Charter of Fundamental Rights of the European Union which are similar in their wording and purpose to rights that are guaranteed by the Austrian Federal Constitution could also be claimed as constitutionally guaranteed rights before the Constitutional

* University Professor, Institute for Austrian and European Public Law, Vienna University of Economics and Business, Welthandelsplatz 1, 1020 Vienna, Austria, email: harald.eberhard@wu.ac.at. The author is very grateful to *Philipp Haas*, *Eva-Maria Kittl* and *Emanuel Matti* for their critical and valuable review of this contribution.

1 See in detail Öhlinger/Eberhard, *Verfassungsrecht*, 10th ed. 2014, Rz 679.

2 Cf Stelzer, *The Constitution of the Republic of Austria*, 2011, pp. 208 ff.

3 Imperial Law Gazette (RGBl) 1867/142.

4 Art 149 B-VG, BGBl (Federal Law Gazette) 1920/1.

5 Öhlinger/Eberhard, *Verfassungsrecht*, Rz 755 ff; Stelzer, *Constitution*, pp. 242 ff.

6 Öhlinger/Eberhard, *Verfassungsrecht*, Rz 949 ff.

7 BGBl 1964/59.

Court (VfGH),[8] which plays the central role as *protector of fundamental rights* in the Austrian legal system.

Given these general preconditions, it comes to the specific role of social rights in this system. Social rights are not a relevant topic *de lege lata*. In fact, these rights are a relevant topic *de lege ferenda*: the explicit introduction of social rights into the Austrian legal order has been discussed for a quite long time,[9] but no remarkable results in this development have taken place so far. Worth mentioning is the so-called "Österreich Konvent",[10] a committee consisting of around 70 members, which discussed a constitutional reform from 2003 to 2005[11] and whose proposals had been further elaborated by a smaller "Group of Experts for State and Administrative Reform" (2007-2008). But until today, no social rights catalogue has been explicitly guaranteed at a constitution level. To put it in a nutshell, one can say that the issue of social rights, as a general observation, does not play an important role in Austrian doctrine of public law.

Unlike the Basic Law of the German Federal Republic,[12] the Austrian constitution also does not contain a constitutional "principle of social welfare".[13]

Social rights are commonly defined as constitutionally guaranteed rights, which imply a certain commitment of the state such as individual claims in the fields of social welfare or labour law.[14] In a traditional view, social rights are seen as a counterpart of freedom rights[15] which focus on the demand for non-interference of the state in the sphere of privacy such as the protection of personal liberty,[16] the protection of private and family life,[17] the protection of property[18] as well as the freedom to practice gainful activity.[19] But even this distinction can be seen from a different point of view, because even liberty rights contain

8 VfSlg 19.632/2012.

9 For an overview about the development of the discussion with further references, see Machacek, *Die Justiziabilität sozialer Grundrechte*, in: Martinek/Wachter (eds), *FS Schnorr*, 1988, p. 521 (530 ff).

10 See www.konvent.gv.at.

11 Eberhard, *Die Entwicklung des österreichischen Bundesverfassungsrechts zwischen Stabilität und Reformdiskussion, European Review of Public Law/Revue Européenne de Droit Public* Vol 17 No 3, 2005, pp. 1165 ff.

12 Art 20 para 1 Grundgesetz: "democratic and social Federal State".

13 Stelzer, *Constitution*, p. 215.

14 See Öhlinger/Eberhard, *Verfassungsrecht*, Rz 701; Walter/Mayer/Kucsko-Stadlmayer, *Bundesverfassungsrecht*, 10th ed. 2007, Rz 1328; Berka, *Verfassungsrecht*, 5th ed. 2014, Rz 1218; Öhlinger/Stelzer, *Der Schutz der sozialen Grundrechte in der Rechtsordnung Österreichs*, in: Iliopoulos-Strangas (ed), *Soziale Grundrechte in Europa nach Lissabon. Eine rechtsvergleichende Untersuchung der nationalen Rechtsordnungen und des europäischen Recht*, 2010, p. 497 (503).

15 Schäffer/Klaushofer, *Zur Problematik sozialer Grundrechte*, in: Merten/Papier/Kucsko-Stadlmayer (eds), *Handbuch der Grundrechte in Deutschland und Europa*, Bd VII/1: Grundrechte in Österreich, 2nd ed. 2014, Rz 2.

16 Federal Constitutional Law on the Protection of Personal Liberty, BGBl 1988/684 as well as Art 5 ECHR.

17 Art 8 ECHR.

18 Art 5 Austrian Basic Law on the General Rights of National (hereinafter StGG), RGBl 1867/142; Art 1 Protocol No. 1 of the ECHR.

19 Art 6 StGG.

an "active element" in the way that the state has the function to protect the individual legal position ("grundrechtliche Gewährleistungspflichten").[20] Therefore, it's necessary that the state has to set up legal rules or to become otherwise active when it comes to the threatening of such fundamental rights. A very instructive example[21] for such protection commitments can be seen in the protection of an assembly against disturbances from other assemblies in the light of the guarantee of freedom of assembly.[22] The more liberal constitutional rights imply protection duties of the state: the less a fundamental difference between liberal rights on the one hand and social rights on the other hand can be made.[23]

The Austrian scholarship also uses the metaphors of *families* of individual constitutional rights. The "first generation" consists of the traditional liberal rights which limit state's interference in individual liberties. Apart from these rights, the Austrian legal order comprises equality rights, political rights and procedural rights as part of this generation.[24] Based on the well-known "Statuslehre" of *Georg Jellinek*,[25] the term of *status negativus* is often used.[26] The "second generation" – according to a controversial terminology[27] – is formed by social, economic and cultural rights. In this generation, the focus lies on the *status positivus*[28] and, thus, the role of an "active" state, whereas the "third generation" commonly is defined by "collective rights",[29] which means that rights that are at stake are devoted not to individuals but to groups as we can find them with regard to ethnical rights.[30] Although these differences are also confirmed in Austrian scholarship, one cannot say that social rights are perceived as limitations or threats to the "first-generation" rights, because active elements of the state are located in the rights of both the first and the second generation.

One of the main topics of the Austrian discussion regarding a potential introduction of social rights can be seen in the "justiciability" of social rights, which is assessed from a

20 See the fundamental study of Holoubek *Grundrechtliche Gewährleistungspflichten*, 1997, passim.

21 See Öhlinger/Eberhard, *Verfassungsrecht*, Rz 694 ff; Stelzer, *Constitution*, p. 214.

22 Art 12 StGG as well as Art 11 ECHR.

23 See for it Öhlinger, *Soziale Grundrechte*, in: Martinek/Migsch/Ringhofer/Schwarz/Schwimann (eds), *FS Floretta*, 1983, p. 271 (273 ff); Holoubek, *Zur Struktur sozialer Grundrechte*, in: Hammer/Somek/Stelzer/Weichselbaum (eds), *FS Öhlinger*, 2004, p. 507 (518, 516 ff).

24 Stelzer, *Constitution*, p. 215.

25 Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed. 1919-1964, pp. 81 ff.

26 See, e.g. Öhlinger/Eberhard, *Verfassungsrecht*, Rz 692; Holoubek, *Grundrechtliche Gewährleistungspflichten*, 1997, pp. 97 ff.

27 Holoubek, *Zur Struktur sozialer Grundrechte*, FS Öhlinger, p. 517; Holoubek, *Grundrechtskompilation oder Grundrechtsreform? Gedanken zu Zielen und Funktionsbedingungen einer Grundrechtsrevision im Rahmen des "Österreich-Konvents"*, in: Berka/Schäffer/Stolzlechner/Wiederin (eds), *Verfassungsreform. Überlegungen zur Arbeit des Österreich-Konvents*, 2004, p. 31 (37).

28 See with further evidence Damjanovic, *Soziale Grundrechte*, in: Heißl (ed), *Handbuch Menschenrechte*, 2009, p. 516 (517); Hengstschläger/Leeb, *Grundrechte*, 2nd ed. 2013, Rz 1/31.

29 Holoubek, *Grundrechtskompilation*, p. 37.

30 Ethnical rights are granted to the Croatian, the Hungarian and the Slovenian autochthonous minorities in accordance with the Austrian Ethnical Group Rights, BGBl 1976/396.

majority of authors in a rather critical manner.[31] The relevant main argument that social rights are not justiciable underlines the special dimension of these rights: the decision about the details of these rights should not be in the hands of a judge or a court, even a Constitutional Court, but – in the light of the principle of separation of powers which also in the Austrian constitution has the function of a basic principle[32] – in those of the elected parliamentary legislator which seems to be more legitimized to figure out these rights.[33]

Another relevant issue lies in the principle of the Rule of Law[34] and focuses on the aspect that it seems problematic to quantify the details of such rights, e.g. the amount of a certain claim.[35] The controversial debate regarding these aspects of social rights can be seen as a main reason for the lack of explicit catalogue of social rights in the Austrian legal system. Therefore, the Austrian national legal system has no influence on foreign legal systems in the area of social rights.

### 2.2 Constitutional Protection of Social Rights and Protection of Social Rights under Other Constitutional Rules and Principles

Given this status quo of social rights in Austria, another relevant topic has been the analysis to what extent other explicit fundamental rights contain social aspects. In other words, a central feature of the Austrian discussion in the field can be seen in the social understanding and interpretation of fundamental rights of the "first generation" in particular.

In this way, the main discussion takes place with regard to the Equal Protection Clause (art 7 para 1 B-VG), which states that all nationals (Austrian citizens) are "equal before the law" and "privileges based upon birth, sex, state, class or religion are excluded".[36] In order to comply with the Law of the European Union,[37] also citizens of other Member States of the Union ("Union Citizens") are protected. This Clause plays an important role in the jurisdiction of the Austrian Constitutional Court.[38] With regard to this Clause, there is a discussion to what extent it guarantees a specific degree of "social equality" which

31 Schäffer/Klaushofer, in: *Merten/Papier/Kucsko-Stadlmayer*, Rz 102.

32 See Öhlinger/Eberhard, *Verfassungsrecht*, Rz 75 ff; Stelzer, *Constitution*, pp. 32 f.

33 Eberhard, *Soziale Grundrechtsgehalte im Lichte der grundrechtlichen Eingriffsdogmatik*, Zeitschrift für öffentliches Recht, 2012, p. 513 (516 f, 533).

34 "Rechtsstaatsprinzip": see Öhlinger/Eberhard, *Verfassungsrecht*, Rz 73 f, 598 ff; Stelzer, *Constitution*, p. 24.

35 Eberhard, *ZÖR 2012*, p. 516.

36 See Stelzer, *An Introduction to Austrian Constitutional Law*, 2nd ed. 2009, pp. 99 f; Stelzer, *Constitution*, pp. 242 ff.

37 See in special Art 18 para 1 ("Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited") and Art 20 para 1 TFEU ("Citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship").

38 See in detail Öhlinger/Eberhard, *Verfassungsrecht*, Rz 755 ff.

demands – in the words of *Manfred Stelzer*[39] – that social rights contents counterbalance freedom rights or which at least would "prefer an interpretation of freedom rights that would encourage or even oblige the state to interfere with civil liberties to create and protect a social welfare system". One of the core elements of this Equality Clause can be seen in the so-called *allgemeines Sachlichkeitsgebot*, which postulates that discrimination is constitutional only if it is based on reasonable grounds.[40] In this way, the Constitutional Court has the power to review laws[41] on their compliance with the directives of the Equality Clause. The Court, e.g. has the power to control if a certain group of persons are excluded from a certain benefit based on unreasonable grounds.[42] Thus, the Court can decide if a legal provision contains a reasonable regulation of the privileged persons or of the design of a social service as well as of the social insurance systems.[43] In this way, the Equality Clause is expected to grant "derivative participation rights" (derivative Teilhaberechte).[44] Another relevant issue applies to provisions which restrict, reduce or abolish certain benefits or vested rights. The Court postulates on the one hand that there are no constitutional provisions that protect persons from being deprived of their rights by the legislator. But on the other hand, in certain cases, it is necessary to create temporary arrangements to protect legitimate provisions in that way that the affected persons have the chance to adapt their behaviour to the new legal situation (*Vertrauensschutzjudikatur*).[45]

Another issue of discussion regarding social rights aspects applies to the fundamental right of protection of property.[46] This right protects both "property" and "possession". While it is clear that core legal positions in the field of private law count as "property" it is more controversial whether rights based on public law are protected by this guarantee. Following the *ECtHR*, the VfGH[47] has decided that certain public social benefits that are based on significant contributions may count as "possession" in the light of Art 1 Protocol No 1 of the ECHR.[48] Although the details and dimensions of this jurisdiction have not yet

39 Stelzer, *Introduction*, p. 84.

40 With further references Öhlinger/Eberhard, *Verfassungsrecht*, Rz 765 ff.

41 Art 140 B-VG.

42 For example, VfSlg 19.732/2013, where the VfGH had to repeal a provision (art 10 para 1 lit 7 Staatsbürgerschaftsgesetz 1985, BGBl 1985/311 in the version 2006/37) of the Austrian citizenship law, because it violated the Equal Protection Clause in Art 7 B-VG. More precisely, the provision – which stated that a person only gets a citizenship if his or her livelihood is assured – discriminates persons with handicap, because for them this criterion can be seen as an exclusion.

43 See for further references Eberhard, *ZÖR 2012*, pp. 521 f; see, e.g. VfSlg 19.698/2012 (a reduction of 25 per cent of the needs-based minimum benefit is unconstitutional).

44 Öhlinger/Eberhard, *Verfassungsrecht*, Rz 701; see further Thienel, *Überlegungen zur Ausgestaltung sozialer Grundrechte*, in: Akyürek/Baumgartner/Jahnel/Lienbacher/Stolzlechner (eds), *Staat und Recht in europäischer Perspektive; Festschrift Heinz Schäffer*, 2006, pp. 861 f.

45 Öhlinger/Eberhard, *Verfassungsrecht*, Rz 786 ff.

46 Art 5 StGG; Art 1 Protocol No. 1 of the ECHR.

47 VfSlg 15.129/1998.

48 Stelzer, *Introduction*, p. 98; Öhlinger/Eberhard, *Verfassungsrecht*, Rz 869.

been sharpened, one can say that the protection of property has a vivid social dimension and the ECtHR has developed a general grant of social benefits created by law for all persons who comply with the relevant requirements.[49]

Moreover, it is worth to note that through the implementation of the constitutional law concerning the right of the child[50] in the year 2011, certain social rights were granted for minors; i.e. *the right to protection and care* (art 1 leg cit),[51] or *the right to particular governmental assistance and care* (art 2 and 6 leg cit).[52]

In regard to the Austrian autochthonous minorities ("autochthone Minderheiten") – these are the Slovenian minority in Carinthia, the Croatian and the Hungarian minority in Burgenland – certain rights are constitutionally granted.[53] Those rights include both collective rights concerning the autochthonous groups and individually granted social and cultural rights to the members of these groups.[54] In this context, the constitutional regulation of Art 7 lit 2, 3 and 4 of the State Treaty[55] and the Ethnical Group Act[56] are essential. Hence, Austrian citizens who belong to the Slovenian or the Croatian minority in Carinthia, Burgenland or Styria have the right to basic education in the Slovenian or Croatian language.[57] This constitutional granted right is implemented through the Minority-School-Act for Carinthia[58] and the Minority-School-Act for Burgenland.[59] In addition to the German language, the Slovenian and the Croatian languages are the official languages in

49 Eberhard, *ZÖR 2012*, pp. 527 ff.

50 BGBl I 2011/4.

51 Due to the recent decision VfGH 11.12.2014, G 119/2014 ua, it seems that also the Constitutional Court accepts this right as a constitutionally guaranteed right; see also VfGH 2.10.2013, U 2576/2012: Art 1 leg cit can be qualified as an equal right to Art 24 para 2 of the Charter of Fundamental Rights of the European Union.

52 Schäffer/Klaushofer, in: *Merten/Papier/Kucsko-Stadlmayer*, Rz 4; see further Fuchs, *Kinderrechte in der Verfassung: Das BVG über Rechte von Kindern*, in: Lienbacher/Wielinger (eds), *Jahrbuch Öffentliches Recht 2011*, 2011, pp. 91 ff.

53 For example, the Art 8 para 1 and 2 B-VG: (1) German is the official language of the Republic without prejudice to the rights provided by Federal law for linguistic minorities. (2) The Republic (the Federation, federal states and municipalities) is committed to its linguistic and cultural diversity which has evolved in the course of time and finds its expression in the autochthonous ethnic groups. The language and culture, continued existence and protection of these ethnic groups shall be respected, safeguarded and promoted. (Die deutsche Sprache ist, unbeschadet der den sprachlichen Minderheiten bundesgesetzlich eingeräumten Rechte, die Staatssprache der Republik. Die Republik (Bund, Länder und Gemeinden) bekennt sich zu ihrer Vielfalt, die in den autochthonen Volksgruppen zum Ausdruck kommt. Sprache und Kultur, Bestand und Erhaltung dieser Volksgruppen sind zu achten, zu sichern und zu fördern.).

54 Kolonovits, *Sprachenrecht in Österreich: das individuelle Recht auf Gebrauch der Volksgruppensprachen im Verkehr mit Verwaltungsbehörden und Gerichten*, 1999, pp. 13 ff.

55 State Treaty, BGBl 1995/152 and Art II lit 3 of the federal constitutional law from 2 March 1964, BGBl 1964/59.

56 BGBl 1976/396 modified through BGBl I 2013/84; this act includes a number of constitutional regulations: i.e. Art 12 para 1, 2 and 3; Art 13 para 1; Art 22a; Art 24 para 7 and Annex I and II.

57 Art 7 lit 2 of the State Treaty.

58 BGBl 1959/101.

59 BGBl 1994/641.

administrative and judicial districts of Carinthia, Burgenland and Styria, where a certain number of Austrian citizens reside, who belong to the Slovenian or Croatian population. In those districts, the government is also committed to use typographic designations in the Slovenian and the Croatian language as well as in German.[60]

## 2.3 Social Rights and the Constitutions of the Federal States of Austria

Single social guarantees can also be found in various State Constitution Laws, e.g. Art 12 of the State Constitutional Law Act of Upper Austria[61] and Art 13 of the State Constitutional Law Act of Tyrol[62] guarantee social rights for people in need of care in predicaments. It is doubtful whether these intended claims to social help and rehabilitation measures are enforceable social rights as they are only guaranteed within the scope of the laws.[63] In some State Constitution Laws, one can find a right to live in different manifestations[64] while others plan to support the family and the protection of parental rights[65] or confess to the care of residential dialects.[66] However, these social guarantees are predominantly "only" state aim regulations (so-called *Staatszielbestimmungen*) and are therefore not enforceable.[67] Nevertheless, they serve as a directive for the interpretation of other ordinary legal provisions as well as ordinances of administrative authorities.

60 See Art 7 lit 3 of the State Treaty and Art 13 para 1 of the Ethnic-Group Act, in accordance with Art 8 para 1 B-VG.

61 Landesverfassung Oberösterreich LGBl (State Law Gazette 1991/122 modified through LGBl 2001/6).

62 Tiroler Landesordnung LGBl 1988/61 modified through LGBl 2011/59.

63 Schäffer/Klaushofer, in: *Merten/Papier/Kucsko-Stadlmayer*, Rz 13 FN 28; disbelieving Berka, *Die Grundrechte*, 1999, Rz 1038; affirming Pernthaler, *Raumordnung und Verfassung*, Bd III, 1999, p. 444.

64 For example, Art 9 of the State Constitutional Act of Salzburg (LGBl 1999/25 modified through LGBl 2012/62) and Art 7 para 2 Tiroler Landesordnung, the State Constitutional Law Act of Tyrol (LGBl 1988/61 modified through LGBl 2012/147), determine that the federal state has to provide for the "creation and preservation of adequate living conditions"; Art 15 of the State Constitutional Law Act of Upper Austria (LGBl 1991/122 modified through LGBl 2009/90) determines that the federal state Upper Austria supports the elevation of the quality of life of his citizens and therefore supports measures which serve the improvement of living and the residential environment; see further Sonntag, *Recht auf Wohnen aus verfassungs- und verwaltungsrechtlicher Sicht, juridikum*, 2013, p. 221.

65 Art 13 of the State Constitution Law Act of Upper Austria (LGBl 1991/122 modified through LGBl 2001/6); Art 8 of the Constitution Law Act of Vorarlberg (LGBl 2004/43).

66 Art 5 of the State Constitutional Law Act of Vorarlberg (LGBl 1999/9).

67 Schäffer/Klaushofer, in: *Merten/Papier/Kucsko-Stadlmayer*, Rz 13; Sonntag, *juridikum*, 2013, p. 221.

## 2.4 Impact of the International Protection of Social Rights

Treaties of Public International Law which contain social rights such as the European Social Charta[68] or the UN Covenant on Social and Cultural Rights[69] have not brought any modification to the status quo mentioned in the beginning:[70] the first only accorded the status of ordinary law, the latter is not even directly applicable.[71] Thus, one cannot say that these instruments have been influencing the Austrian system of human rights notably.

The most relevant influence can be located in the jurisdiction of the ECtHR because of the fact that the provisions of the ECHR are endued with the status of constitutional law. As described before,[72] the Austrian Constitutional Court usually followed the ECtHR in its interpretation of the relevant fundamental rights, which have a certain amount of affinity with social rights or of rights which are interpreted in the light of social equality.

The most recent influences commonly are seen in the provisions of the Charter of Fundamental Rights of the European Union, especially with regard to the provisions of its Title IV (art 27-38). Given the fact that most of these rights are provided under conditions established by national laws and practices,[73] the major line of thinking currently remains that there is no significant influence because European social rights reach as far as the national social rights do. Therefore, the relevant development of social rights has to take place on the national level.

## 2.5 Social Rights in Ordinary Legislation

The Austrian system is often described as "social market economy",[74] which means that the state plays an active role in economy and intervenes in processes, which otherwise would take place in a free market. Traditionally, the social partnership between the representatives of the different social groups, which has an explicit constitutional base in Art 120a para 2 B-VG,[75] also plays an important role.[76] The main fields of social rights on the level of ordinary law can be seen in the provisions of needs-based minimum benefit ("bedarfsorientierte Mindestsicherung"), which according to the federal system of compe-

68 BGBl 1969/460.
69 BGBl 1978/590.
70 Chapter I, except the explanations regarding the implementation of the constitutional law concerning the right of the child, which was the transposition of the UN Convention on the Rights of the Child.
71 Öhlinger/Eberhard, *Verfassungsrecht*, Rz 682; Stelzer, *Constitution*, p. 215.
72 VfSlg 15.129/1998.
73 See, e.g. Art 34 und 35 of the Charter.
74 Öhlinger/Eberhard, *Verfassungsrecht*, Rz 77 f.
75 "The Republic recognizes the role of the social partners. It respects their autonomy and supports the social partners' dialogue by instituting self-administration bodies".
76 Öhlinger/Eberhard, *Verfassungsrecht*, Rz 359 f; Stelzer, *Constitution*, pp. 55 ff.

tences[77] belongs to the jurisdiction of the provinces[78] and the provisions of social insurance law, which dominantly is regulated at the federal level.[79] Almost 100 per cent of the population who are legally staying in Austria and are entitled to work are integrated in this mandatory social insurance scheme covering risks of poor health and providing for insurance against certain accidents, unemployment and old age.[80] Furthermore, also asylum seekers have access to basic social services (*Grundversorgung*).[81] Moreover, the Austrian legal system in fact does not provide a right to work, but it contains a right to attend training and retraining during the time of unemployment.[82]

77 Art 10-15 B-VG.

78 Art 15 para 1 B-VG.

79 See in special the provisions of compulsory sickness insurance, retirement pension insurance and statutory accident insurance in the Social Security Code (Allgemeines Sozialversicherungsgesetz – ASVG BGBl 1955/189). This field of regulation is of high complexity.

80 Stelzer, *Constitution*, pp. 215 f.

81 Art 2 of the basic social service law (Grundversorgungsgesetz 2005), BGBl 1991/405, which implement Art 17 para 1 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, laying down standards for the reception of applicants for international protection.

82 See Art 38a of the employment market service law (Arbeitsmarktservicegesetz, BGBl 1994/313) in conjunction with Art 7 para 1, 3 and 8 of the Social Security Code (Allgemeines Sozialversicherungsgesetz – ASVG BGBl 1955/189).

# 3 Les droits sociaux au Canada

*Mirja A. Trilsch*[*]

## 3.1 Introduction

Le présent rapport dresse l'état des lieux de la protection des droits économiques, sociaux et culturels à titre de droits fondamentaux au Canada[1], tant en ce qui concerne l'ordre juridique fédéral que les différents ordres juridiques des dix provinces canadiennes[2].

Le Canada est membre du *Commonwealth of Nations* et le droit public canadien (tant fédéral que provincial) relève de la tradition de la *common law*. La Constitution du Canada « repose sur les mêmes principes que celle du Royaume-Uni »[3], se distinguant néanmoins de son aïeule par la Charte des droits dont le Canada s'est doté lors du rapatriement de sa Constitution en 1982 et qui possède une suprématie constitutionnelle. La Cour d'appel ultime pour tous les différends juridiques (émanant des tribunaux fédéraux ou provinciaux) est la Cour suprême du Canada[4].

À travers notre exposé, il transparaîtra que le Canada a encore un bien long chemin à parcourir en matière de protection des droits sociaux. Au niveau constitutionnel, l'absence de garanties expresses et la réticence des tribunaux à interpréter les droits civils et politiques de façon à donner effet à certaines protections sociales font en sorte que les droits sociaux se voient refuser le statut de droits fondamentaux. Parmi les instruments quasi constitutionnels provinciaux, seulement celui de la province du Québec prévoit des dispositions garantissant des droits sociaux, réservant toutefois à cette catégorie de droits un statut inférieur à celui des droits civils et politiques. Cette tendance a pour conséquence de forger aux droits économiques et sociaux la réputation de simples aspirations politiques.

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* Professeure Mirja A. Trilsch, Dr. iur., LL.M., Faculté de science politique et de droit, Département des sciences juridiques Université du Québec à Montréal (UQÀM).

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2 En ordre alphabétique : Alberta, Colombie-Britannique, Île-du-Prince-Édouard, Manitoba, Nouveau-Brunswick, Nouvelle-Écosse, Ontario, Saskatchewan, Terre-Neuve-et-Labrador, Québec. Les trois territoires canadiens – le Nunavut, les Territoires du Nord-Ouest et le Yukon – sont sous administration fédérale (*Acte de l'Amérique du Nord britannique* (R-U), 1867, 34 & 35 Victoria, c 28 [*Loi constitutionnelle de 1871*], art 4), quoiqu'ils possèdent aujourd'hui leurs propres assemblées législatives.

3 Préambule de la *Loi constitutionnelle de 1867*, 30 & 31 Victoria, c 3.

4 Les arrêts de la Cour suprême du Canada peuvent être consultés sous « Jugements de la Cour suprême du Canada », en ligne: <http://scc-csc.lexum.com>.

La structure du présent rapport est basée sur le questionnaire « Droits sociaux » fourni aux rapporteurs nationaux pour la confection de leurs comptes-rendus. Bien qu'il reprenne toutes les sections du questionnaire et réponde aux questions posées, l'ordre des sections fut légèrement modifié par souci de clarté et de concision. Pour toute question ou demande de clarification concernant le contenu de ce rapport, veuillez vous adresser à la Rapporteure nationale à l'adresse trilsch.mirja@co.

### 3.2 La protection constitutionnelle des droits sociaux

Le Canada étant une fédération, les compétences législatives sont partagées entre le Parlement fédéral et les assemblées législatives des provinces[5]. La protection des droits et libertés fondamentales incombant tant au palier fédéral que provincial, par conséquent, il existe différents catalogues de droits et libertés attribués à ces deux paliers législatifs.

À l'échelle nationale, les droits et libertés de la personne sont protégés depuis 1982 par la *Charte canadienne des droits et libertés*[6], enchâssée dans la Constitution du Canada et, de ce fait, possédant le statut de loi suprême[7]. Bien que la *Charte canadienne* ne comporte aucune disposition expresse garantissant un droit d'ordre économique ou social, elle contient une section sur l'usage des langues officielles du Canada[8] – l'anglais et le français – et une section sur les « droits à l'instruction dans la langue de la minorité »[9]. En ce sens, elle vise des droits culturels, en l'occurrence ceux qui répondent spécifiquement aux besoins de la population canadienne en tant que société bilingue. Selon l'article 52 de la *Loi constitutionnelle de 1982*, toute règle de droit incompatible avec la Constitution, y compris avec la *Charte canadienne*, est inopérante. En l'absence de dispositions protégeant explicitement les droits sociaux, une déclaration d'inconstitutionnalité aux fins de la protection de tels droits ne sera possible qu'à travers les droits civils et politiques protégés par la *Charte canadienne*. Il s'agit ici seulement d'une protection ponctuelle de certains aspects des droits sociaux qui n'est guère efficace. Nous nous pencherons sur la protection indirecte des droits sociaux par le biais des droits civils et politiques dans la section 2 ci-dessous.

5 *Loi constitutionnelle de 1867*, *supra* note 3, art 91-92.

6 *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11 [*Charte canadienne*].

7 *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11, art 52 [*Loi constitutionnelle de 1982*].

8 *Charte canadienne*, *supra* note 6, art 16-22.

9 *Ibid*, art 23.

Au niveau provincial, toutes les provinces se sont dotées de documents législatifs énonçant la protection des droits et libertés de la personne. En ordre chronologique[10]: l'Ontario en 1962[11] ; la Nouvelle-Écosse en 1963[12] ; le Nouveau-Brunswick en 1967 (le *Human Rights Act* a été remplacé en 1971 et substantiellement modifié en 2011)[13] ; l'Île-du-Prince-Édouard en 1968 (le *Human Rights Code* a été remplacé par le *Human Rights Act* en 1975)[14] ; Terre-Neuve-et-Labrador en 1969 (le *Human Rights Code* a été remplacé par le *Human Rights Act* en 2010)[15] ; l'Alberta en 1972 (le *Individual's Rights Protection Act* a été renommé *Alberta Human Rights Act*)[16] ; la Colombie-Britannique en 1973 (le *Human Rights Code* a été substantiellement révisé en 1984)[17] ; le Manitoba en 1974 (*The Human Rights Act* a été remplacé par *The Human Rights Code* en 1987)[18] ; le Québec en 1975[19] ; la Saskatchewan en 1979[20]. Bien que les instruments des huit autres provinces – ciblant principalement l'interdiction de la discrimination – soient antérieurs à ceux du Québec et de la Saskatchewan, ces deux provinces ont agi comme pionnières dans l'adoption de dispositions protégeant un plus large éventail de droits[21].

D'après la jurisprudence de la Cour suprême du Canada, tous les instruments provinciaux de protection des droits et libertés de la personne jouissent d'un caractère quasi constitutionnel puisqu'ils établissent des objectifs fondamentaux de la société[22]. Par conséquent, les dispositions de ces chartes provinciales possèdent un statut suprême sur toute autre législation dans la province, que ces chartes contiennent ou non une disposition expresse à cet égard.

Parmi ces instruments provinciaux, la *Charte des droits et libertés de la personne* du Québec est le seul[23] à énoncer, de façon expresse, des droits économiques et sociaux (ci-après « DESC »)[24]. Au chapitre IV de la *Charte québécoise*, sous le titre « Droits économiques et

10 Maxime St-Hilaire, « The Codification of Human Rights in Canada » (2012) 42:1-2 Revue de droit de l'Université Sherbrooke 505 aux pp 549-550.
11 *Human Rights Code*, RSO 1990, c H19.
12 *Human Rights Act*, RSNS 1989, c 214.
13 *Human Rights Act*, RSNB 2011, c 171.
14 *Human Rights Act*, RSPEI 1988, c H-12.
15 *Human Rights Act*, SNL 2010, c H-131.
16 *Alberta Human Rights Act*, RSA 2000, c A-255.
17 *Human Rights Code*, RSBC 1996, c 210.
18 *The Human Rights Code*, CCSM c H175.
19 *Charte des droits et libertés de la personne*, RLRQ, ch C-12 [*Charte québécoise*].
20 *Saskatchewan Human Rights Code*, SS 1979, c S-241.
21 St-Hilaire, *supra* note 10 à la p 548.
22 *Winnipeg School Division No 1 c Craton*, [1985] 2 RCS 150 au para 8; *Robichaud c Canada (Conseil du Trésor)*, [1987] 2 RCS 84 au para 8; *Battlefords and District Co-operative Ltd c Gibbs*, [1996] 3 RCS 566 au para 18; *Scowby c Glendinning*, [1986] 2 RCS 226 au para 9.
23 St-Hilaire, *supra* note 10 à la p 551.
24 *Charte québécoise*, *supra* note 19, ch IV art 39-48.

sociaux », on trouve les droits suivants: le droit des enfants à la protection et à la sécurité (art 39) ; le droit à l'instruction publique gratuite (art 40) ; le droit des parents d'assurer l'éducation religieuse et morale de leurs enfants dans le respect de leurs convictions (art 41); le droit des parents de choisir pour leurs enfants des établissements d'enseignement privés (art 42) ; le droit des minorités de maintenir et de faire progresser leur propre vie (art 43) ; le droit à l'information (art 44) ; le droit à des mesures d'assistance financière et sociale susceptibles d'assurer un niveau de vie décent (art 45) ; le droit à des conditions de travail justes, raisonnables et respectueuses de la santé, de la sécurité et de l'intégrité physique (art 46) ; le droit de vivre dans un environnement sain (art 46.1) ; l'égalité des droits, obligations et responsabilités des conjoints, dans le mariage ou l'union civile, ainsi que dans la direction morale et matérielle de la famille et l'éducation de leurs enfants communs (art 47) ; le droit des personnes âgées ou handicapées à la protection contre toute forme d'exploitation, ainsi qu'à la protection et à la sécurité que doit leur apporter leur famille (art 48). Quoique ce chapitre soit inspiré par le *Pacte international relatif aux droits économiques, sociaux et culturels*[25], certains droits qui figurent au Pacte – tels que le droit à la santé, le droit à l'alimentation, le droit aux vêtements et le droit au logement – n'y ont pas trouvé mention[26].

Les DESC prévus à la *Charte québécoise* sont formulés comme droits individuels (« toute personne a droit à… ») et ressemblent à cet égard aux droits civils et politiques qui y sont énoncés. Les dispositions du Chapitre IV sont courtes et de nature abstraite; elles ne contiennent pas de détails quant aux obligations incombant à l'État pour mettre en œuvre ces droits. Certaines de ces dispositions s'adressent à « toute personne », alors que d'autres ne s'adressent qu'à des groupes spécifiques (enfants, parents, personnes appartenant à des minorités ethniques, travailleurs, conjoints, personnes âgées) sans qu'aucune différence ne soit faite entre citoyens et non-citoyens.

Une autre particularité de la *Charte québécoise*, en comparaison aux autres chartes provinciales, réside dans le fait qu'elle s'applique non seulement dans les relations entre l'État et les gouvernés, mais également entre personnes privées. Ceci est implicite dans la mesure où l'application de la *Charte* n'est pas expressément limitée à l'État[27]. Les DESC du Chapitre IV s'appliquent donc en principe entre personnes privées et certaines disposi-

25 *Pacte international relatif aux droits économiques, sociaux et culturels*, 16 décembre 1966, 993 RTNU 3 (entrée en vigueur: 3 janvier 1976) [*PIDESC*].

26 André Morel, « La Charte québécoise: un document unique dans l'histoire législative canadienne » (1987) 21 Revue juridique Thémis 1 à la p 4.

27 Pierre Bosset, « Les droits économiques et sociaux, parents pauvres de la Charte québécoise? » (1996) 75 Revue du Barreau canadien 583.

tions énoncent même explicitement des obligations incombant à des personnes privées (les parents, la famille, les conjoints).

Malgré les parallèles entre les deux catégories de droits, deux différences majeures perdurent entre les droits économiques et sociaux énoncés à la *Charte québécoise* et les autres droits s'y retrouvant. Premièrement, les DESC, contrairement aux autres droits, contiennent majoritairement un renvoi à la législation ordinaire. Par exemple, à l'article 40, on peut lire que « Toute personne a droit, dans la mesure et suivant les normes prévues par la loi, à l'instruction publique gratuite » [nos soulignements]. La qualification méthodologique de ce renvoi demeure incertaine. Selon nous, il ne s'agit pas d'une limitation de ces droits, puisque la législation ordinaire concrétisant le contenu des DESC n'est soumise à aucune exigence matérielle de proportionnalité ou autre. Par conséquent, nous estimons qu'il s'agit plutôt d'une réserve indiquant que les articles 39 à 48 doivent être concrétisés dans la législation ordinaire et qu'ils ne produiront pas d'effets au-delà de ce qui est prévu par la loi.

La seconde différence entre les DESC de la *Charte québécoise* et les autres droits qui y sont énoncés concerne leur statut dans la hiérarchie normative. À l'exception des DESC, les droits garantis par la *Charte québécoise* possèdent un statut quasi constitutionnel, supérieur à toute autre législation provinciale. L'article 52 de la *Charte québécoise* prévoit qu'« [a]ucune disposition d'une loi, même postérieure à la *Charte*, ne peut déroger aux articles 1 à 38, sauf dans la mesure prévue par ces articles, à moins que cette loi n'énonce expressément que cette disposition s'applique malgré la Charte ». Il ressort de cette disposition que les droits se retrouvant au chapitre IV (articles 39 à 48) sont exclus de son champ d'application. Par conséquent, les DESC de la *Charte québécoise* ne possèdent pas de statut quasi constitutionnel. Dans la hiérarchie des normes, ces droits se situent donc au même niveau que la législation ordinaire. Cette exclusion des DESC, et donc le refus de leur accorder un statut suprême, s'explique potentiellement par une volonté d'accorder une marge de manœuvre à l'Assemblée législative de la province du Québec dans ce domaine[28].

Dans leur combinaison, l'article 52 et le renvoi inhérent à la plupart des DESC font en sorte que ces droits restent en fin de compte lettre morte, ne produisant que peu d'effets au-delà de la législation ordinaire[29]. À titre d'exemple, l'article 45 de la *Charte québécoise* accorde le droit à des mesures financières et sociales assurant un niveau de vie décent, spécifiant que ces mesures doivent être « prévues par la loi ». Par conséquent, il faut se

28 Morel, *supra* note 26.

29 Voir aussi Mirja A Trilsch, *Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte im innerstaatlichen Recht / The Justiciability of Economic, Social and Cultural Rights in Domestic Law*, Springer, Heidelberg; New York, 2012 aux pp 159-160.

référer à la législation ordinaire pour déterminer quelles mesures sont accessibles en cas de besoin. La question relative à l'adéquation de ces mesures pour assurer un niveau de vie décent ne se pose pas, étant donné que l'article 45 n'est pas supérieur à la loi ordinaire et ne saurait servir de norme de contrôle. De ce fait, même si les mesures législatives sont manifestement insuffisantes ou absentes, il est impossible d'avoir recours au droit prévu par l'article 45. Ce dernier n'existe que dans la mesure prévue par la loi et peut donc, à la limite, être privé de tout sens. Conséquemment, aucun contrôle n'est possible quant au respect des DESC par la législation ordinaire, cette dernière *remplaçant* plutôt les articles 39 à 48. Compte tenu cette dynamique, il n'est pas surprenant que les DESC soient parfois considérés comme de simples aspirations politiques « en marge du droit positif »[30].

À la lumière de ces constats, il n'est que logique que les recours pour revendiquer un de ces droits soient limités. Généralement, dans le cas d'une incompatibilité de la législation provinciale avec les droits civils et politiques de la *Charte québécoise*, l'article 49 de cette dernière offre un recours valable devant les cours de justice de la province. Cette possibilité n'existe pas pour les DESC, vu l'absence d'un statut supérieur devant la législation ordinaire. Aux recours devant les cours de justice s'ajoute un mécanisme de protection qui, en cas de discrimination (art 10-19) ou d'exploitation de personnes âgées ou handicapées (art 48), permet de déposer une plainte devant la Commission des droits de la personne et des droits de la jeunesse (CDPDJ), qui à son tour peut ensuite saisir le Tribunal des droits de la personne. En vertu de l'article 10, la *Charte québécoise* interdit toute discrimination dans l'exercice des droits et libertés de la personne, y inclut dans l'exercice des DESC[31]. Par conséquent, tant les cours de justice que la CDPDJ peuvent être saisies en cas de discrimination dans l'exercice d'un des DESC. La jurisprudence traitant des DESC de la *Charte québécoise* sera davantage abordée dans la section « 3. La justiciabilité des droits sociaux », ci-dessous.

Considérant le peu de protection que les Chartes canadienne et provinciales offrent dans le domaine des DESC, il est difficile de conclure à une « contribution originale » à cet égard. Pour ce qui est de la *Charte canadienne*, nous estimons que le litige stratégique visant à élargir le champ d'application de certains droits civils et politiques est d'un grand intérêt. Nous nous attarderons sur différentes affaires ayant servi de « cas pilotes » dans les prochaines sections du rapport. En ce qui a trait à la *Charte québécoise*, il nous paraît

30 Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit constitutionnel*, 5e éd, Cowansville, Québec, Éditions Yvon Blais, 2008 à la p 942.

31 Voir Madeleine Caron, « Les concepts d'égalité et de discrimination dans la Charte québécoise des droits et libertés de la personne » (1993) 45 Développements récents en Droit Administratif 39 à la p 46; Hélène Tessier, « Pauvreté et droit à l'égalité: égalité de principe ou égalité de fait? » (1998) 98 Développements récents en Droit Administratif 45 à la p 58.

révélateur que les DESC énoncés soient applicables entre personnes privées et que ce soit dans ce contexte qu'ils aient eu, à ce jour, l'impact le plus tangible. Les détails de cette incidence seront exposés dans la section « 3. La justiciabilité des droits sociaux ».

### 3.3 La protection des droits sociaux sur le fondement d'autres règles et principes constitutionnels

La Constitution canadienne ne comporte pas de dispositions énonçant explicitement les principes directeurs de l'État, tels que, par exemple, la primauté du droit, la *rule of law* ou le principe de l'État social. Dans sa jurisprudence, la Cour suprême a néanmoins reconnu l'existence de certains « principes sous-jacents » de la Constitution. Il s'agit de principes qui sous-tendent les dispositions de la Constitution, inspirant et nourrissant son interprétation ainsi que son application[32]. Parmi ces principes sont reconnus la démocratie, le fédéralisme, le constitutionnalisme et la primauté du droit, la protection des minorités[33] ainsi que la dignité de la personne[34], la souveraineté parlementaire[35] et la séparation des pouvoirs[36]. Par contre, ces principes n'ont pas, à ce jour, permis « d'importer » de nouveaux droits (sociaux) ou d'influencer l'interprétation de la Constitution dans le sens de la protection des droits sociaux.

Les seules dispositions pouvant servir de véhicules constitutionnels pour la protection des droits sociaux sont donc les droits civils et politiques garantis par la *Charte canadienne*, plus particulièrement le droit à la vie, à la liberté et à la sécurité de la personne (article 7) et le droit à l'égalité (article 15). La revendication de certains aspects des droits sociaux à travers ces dispositions a toutefois obtenu un succès mitigé. Nous donnerons, dans cette section, un aperçu des revendications d'ordre social en lien avec les articles 15 et 7 de la *Charte canadienne*. La question de la justiciabilité de ces revendications sera ensuite abordée dans la section suivante.

Dans le contexte du droit à l'égalité, une certaine protection des droits sociaux est possible du fait que l'article 15 de la *Charte canadienne* prévoit que « tous ont droit à la même protection et au même bénéfice de la loi » et dans la mesure où ce droit fut interprété par

32 Warren J Newman, « "Grand Entrance Hall" Back Door Or Foundation Stone? The Role Of Constitutional Principles In Construing And Applying The Constitution Of Canada » (2001) 14 The Supreme Court Law Review 197; Jean Leclair, « Canada's Unfathomable Unwritten Constitutional Principles » (2002) 27 Queen's Law Journal 389.

33 *Renvoi relatif à la sécession du Québec*, [1998] 2 RCS 217; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 RCS 721.

34 *Blencoe c Colombie-Britannique (Human Rights Commission)*, [2000] 2 RCS 307.

35 *Babcock c Canada (Procureur général)*, 2002 CSC 57, [2002] 3 RCS 3.

36 *Terre-Neuve (Conseil du Trésor) c NAPE*, 2004 CSC 66, [2004] 3 RCS 381.

la Cour suprême comme garantissant non pas simplement une « égalité formelle », mais bien une « égalité réelle » (*substantive equality*)[37]. Par conséquent, toute législation produisant des « effets adverses » sans toutefois faire une différence formelle entre certains groupes de personnes, peut être attaquée sur la base de l'article 15, pourvu que le tout soit dû à un motif de discrimination reconnu. Contrairement à la *Charte québécoise*, qui énumère explicitement la « condition sociale » comme motif de discrimination[38], la *Charte canadienne* est muette à cet égard et les tribunaux n'ont pas, à ce jour, reconnu la condition sociale comme un motif analogue[39]. Toutefois, la Cour suprême reconnaît l'existence d'obligations positives incombant à l'État pour garantir l'égalité réelle. Le « bénéfice » auquel réfère l'article 15 peut donc être un bénéfice social[40]. À titre d'exemple, la Cour suprême a affirmé que le droit à l'égalité protège le droit des personnes sourdes d'obtenir des services d'interprètes gestuels en tant qu'avantage assuré dans le cadre du régime de services médicaux[41]. Par contre, un règlement prescrivant une réduction du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans ne portait pas atteinte à ce même droit, selon la Cour[42], à l'instar du refus du gouvernement de financer une thérapie comportementale pour le traitement de l'autisme[43].

Dans le contexte du droit à la sécurité de la personne (article 7), les contestations d'ordre social ont eu peu de succès jusqu'à ce jour[44]. Dans *Gosselin c Québec*[45], la Cour suprême a écarté la possibilité que cette disposition puisse créer des obligations positives de l'État dans le domaine social et a plutôt rattaché la protection de la sécurité de la personne à l'administration de la justice (pénale). Par contre, elle a relativisé ce dernier point trois ans plus tard lorsqu'elle a jugé que l'interdiction de souscrire une assurance maladie privée pour des services de santé déjà dispensés par le régime de santé publique portait atteinte

37 *Andrews c Law Society of British Columbia*, [1989] 1 RCS 143 ; *Law c Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 RCS 497 ; *R c Kapp*, 2008 CSC 41, [2008] 2 RCS 483 ; Emily Grabham, « Law v Canada: New Directions for Equality Under the Canadian Charter? » (2002) 22:4 Oxford J Legal Studies 641.

38 *Charte québécoise*, *supra* note 19, art 10. Toutes les chartes provinciales reconnaissent la condition sociale, l'origine sociale ou la source de revenu comme un motif de discrimination valable.

39 Martha Jackman, « Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law » (1994) 2:1 Review of Constitutional Studies 76.

40 Gwen Brodsky et Shelagh Day, « Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty » (2002) 14 Can J Women & L 185.

41 *Eldridge c Colombie-Britannique (Procureur général)*, [1997] 3 RCS 624.

42 *Gosselin c Québec (Procureur général)*, 2002 CSC 84, [2002] 4 RCS 429 (CSC) [*Gosselin (CSC)*].

43 *Auton (Tutrice à l'instance de) c Colombie-Britannique (Procureur général)*, 2004 CSC 78, [2004] 3 RCS 657.

44 Bruce Porter et Martha Jackman, « Justiciability of ESC Rights and The Right to Effective Remedies: Historic Challenges and New Opportunities » dans Malcolm Langford, dir, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, New York, Cambridge University Press, 2008, 209 à la p 212.

45 *Gosselin (CSC)*, *supra* note 42.

aux droits à la vie et à la sécurité de la personne garantis par l'article 7 de la *Charte*[46]. Une approche encore plus large du concept de « sécurité de la personne » se trouve dans *Victoria v Adams*[47], où les tribunaux de la Colombie-Britannique ont considéré que l'interdiction d'ériger des abris temporaires dans les parcs publics de la Ville de Victoria était contraire à ce même droit. Cette décision fut interprétée comme constituant une reconnaissance – quoique très partielle – du droit au logement sous la *Charte*[48]. L'affaire ne s'est pas rendue devant la Cour suprême et est généralement peu connue.

Mis à part le détour via les droits civils et politiques, les auteurs Jackman et Porter[49] ont évoqué une autre avenue pour la reconnaissance des droits sociaux à travers les dispositions de la Constitution. Il est vrai que l'article 36 de la *Loi constitutionnelle de 1982*, relative à la péréquation et aux inégalités régionales, est une disposition de la Constitution qui est parfois négligée. Cet article prévoit que les gouvernements fédéral et provinciaux s'engagent à « promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être », à « favoriser le développement économique pour réduire l'inégalité des chances » et à « fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels ». L'application par les tribunaux de l'article 36 demeure l'objet de controverses : cette disposition prévoit-elle un droit à des services publics de qualité raisonnable ou simplement un engagement des gouvernements à fournir ces services? Il est à noter que l'article 36 ne fait pas partie de la *Charte canadienne* et s'inscrit, en fait, dans la partie de la Constitution qui règle la péréquation entre les provinces. Dans l'affaire *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board*[50], l'interprétation qu'a faite la Cour d'appel manitobaine de la finalité de l'article 36 suggérait que cette disposition avait possiblement été créée dans le but d'établir des droits justiciables. À l'inverse, dans l'affaire *Canadian Bar Association v British Columbia*[51], la Cour d'appel de la Colombie-Britannique a pour sa part interprété cette même disposition de la Constitution comme

46 *Chaoulli c Québec (Procureur général)*, 2005 CSC 35, [2005] 1 RCS 791.

47 *Victoria (City) v Adams*, 2008 BCSC 1363 (British Columbia Supreme Court) [*Victoria v Adams (BCSC)*]; *Victoria (City) v Adams*, 2009 BCCA 563 ((British Columbia Court of Appeal)) [*Victoria v Adams (BCCA)*].

48 Poverty and Human Rights Centre, « Victoria (City) v. Adams: Advancing the Right to Shelter, Law Sheet » [2009] à la p 2, en ligne: <http://povertyandhumanrights.org/wp/wp-content/uploads/2009/07/phr_adamslaw_v3_1.pdf>; Martha Jackman, « Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box? » dans Kent Roach et Robert J Sharpe, dir, *Taking Remedies Seriously*, Montréal, Canadian Institute for the Administration of Justice / Institut canadien d'administration de la justice, 2009, 279 aux pp 291-292, en ligne: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006574>; Margot Young, « Rights, the Homeless, and Social Change: Reflections on Victoria (City) v. Adams (BCSC) » (2009) 164 BC Studies 103 à la p 111.

49 Martha Jackman et Bruce Porter, *Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework*, Huntsville, ON, Social Rights Advocacy Centre, 2012.

50 *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board*, (1992), 91 DLR (4e) 554, 78 Man R (2e) 141.

51 *Canadian Bar Association v British Columbia*, 2008 BCCA 92, 290 DLR (4e) 617 au para 53.

ne visant que « l'engagement » du gouvernement à fournir des services publics et ne permettant pas de remettre en question l'adéquation des ressources de l'assistance juridique de la province.

## 3.4 La justiciabilité des droits sociaux

Compte tenu de la rareté des dispositions expresses garantissant les DESC aux niveaux national et provincial, la question de la justiciabilité des DESC se pose de deux façons: (1) à quel point est-il possible de revendiquer et de rendre justiciables les DESC à travers les dispositions de la *Charte canadienne* (droit à l'égalité, droit à la sécurité de la personne) et (2) dans quelle mesure les dispositions de la *Charte québécoise* portant sur les DESC produisent-elles des effets?

### *3.4.1 La justiciabilité des DESC via les droits garantis par la Charte canadienne*

Quelques remarques concernant l'impact du débat entourant la justiciabilité des DESC et la dichotomie entre les droits civils et politiques et les DESC s'imposent. Les arrêts de la Cour suprême qui ont permis une certaine protection des droits sociaux par le truchement de l'article 15 de la *Charte canadienne* n'abordent pas les droits sociaux. Il n'y est donc pas question de justiciabilité de ces droits non plus. L'analyse demeure plutôt dans les jalons du droit à l'égalité, même si dans les faits, la décision a un impact sur un droit social, que ce soit le droit à la santé ou le droit à la sécurité sociale, par exemple. Pour illustrer ce point, citons l'arrêt *Canada c Hislop*[52], où la Cour suprême a jugé inconstitutionnelle l'exclusion de conjoints de même sexe d'une pension de survivant. Par contre, la question de la sécurité sociale du conjoint survivant n'a point fait l'objet des considérations de la Cour suprême.

L'exception à cette règle est l'arrêt *Gosselin*[53], où les juges se sont penchés sur l'article 7 de la *Charte canadienne* pour déterminer s'il impose des obligations positives à l'État et où au moins certains juges se sont prononcés de façon plus générale sur les liens qu'entretiennent la *Charte canadienne* et les DESC. Rappelons que l'affaire *Gosselin* traitait du contrôle de la constitutionnalité d'un règlement québécois prescrivant une réduction draconienne du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans (170 $ CAN mensuellement au lieu des 466 $ CAN normalement versés, le seuil de pauvreté étant de 914 $ CAN à l'époque). La majorité des juges, représentés dans l'opinion de la juge en

52 *Canada (Procureur général) c Hislop*, [2007] 1 RCS 429, 2007 CSC 10.
53 *Gosselin (CSC)*, *supra* note 42.

chef McLachlin, n'a pas exclu de façon catégorique la possibilité que l'article 7 puisse servir à revendiquer des droits sociaux. Plus particulièrement, les juges se sont interrogés sur la possibilité que l'article 7 puisse créer des obligations positives en matière sociale, assimilant ainsi les droits sociaux à des droits positifs. Finalement, cette option fut considérée sans importance dans *Gosselin*: « Je n'écarte pas la possibilité qu'on établisse, dans certaines circonstances particulières, l'existence d'une obligation positive de pourvoir au maintien de la vie, de la liberté et de la sécurité de la personne. Toutefois, tel n'est pas le cas en l'espèce »[54]. À l'inverse, la juge Arbour, dissidente dans *Gosselin*, a reconnu l'existence d'obligations positives découlant de l'article 7 et s'est ensuite questionnée sur la justiciabilité des « actions demandant à l'État d'intervenir concrètement afin de pourvoir à certains besoins »[55]:

> Bien qu'il puisse être vrai que les tribunaux ne sont pas équipés pour trancher des questions de politique générale touchant à la répartition des ressources – c'est-à-dire la question de savoir combien l'État devrait dépenser et comment il devrait le faire – ce facteur ne permet pas de conclure que la justiciabilité constitue une condition préalable faisant échec à l'examen au fond du présent litige. Comme on l'a indiqué plus tôt, le présent pourvoi soulève une question tout à fait différente, celle de savoir si l'État a l'obligation positive d'intervenir pour fournir des moyens élémentaires de subsistance aux personnes incapables de subvenir à leurs besoins. Contrairement au genre de questions de politique générale que soulève le problème de la justiciabilité, nous sommes en présence de la question de savoir quels types de droits les particuliers peuvent invoquer contre l'État. Dans leur rôle d'interprètes de la Charte et de protecteurs des libertés fondamentales contre les atteintes de nature législative ou administrative susceptibles de leur être portées par l'État, les tribunaux sont requis de statuer sur les revendications en justice de tels droits. Il est possible, en principe, de répondre à la question de savoir si la Charte reconnaît un droit donné – en l'occurrence le droit pour une personne de recevoir un niveau d'aide suffisant pour lui permettre de subvenir à ses besoins essentiels – sans se demander combien l'État devrait débourser pour garantir ce droit. Seule cette dernière question est, à proprement parler, non justiciable.[56]

Suivant une analyse des exigences de l'article 7, la juge Arbour ainsi qu'une seule autre juge (la juge L'Heureux-Dubé) ont finalement conclu à une violation du droit à la sécurité

54 *Ibid* au para 83.
55 *Ibid* au para 330 [juge Arbour].
56 *Ibid* au para 332.

tel que garanti par la *Charte canadienne*. En ce qui concerne l'article 15, quatre juges sur neuf ont reconnu une violation, sans toutefois que la discussion relative à l'article 15 ait entraîné de débats sur la justiciabilité des revendications en cause.

Nous retenons de l'affaire *Gosselin* que la plus haute cour de justice du pays a majoritairement mis l'accent sur la prétendue distinction entre droits civils et politiques – en tant que droits négatifs – et droits économiques et sociaux – en tant que droits positifs. Comme le souligne Robitaille, « [o]n estime ainsi, plus spécifiquement, que l'État est responsable de ses *actions*, mais qu'on ne peut lui reprocher son *inaction*, la satisfaction des besoins essentiels de la vie étant une responsabilité individuelle »[57].

Le traitement de revendications sociales dans le champ d'application de certains droits civils ou politiques peut aussi avoir des effets inverses, comme le démontre l'affaire *Chaoulli*[58]. Dans cette affaire, un patient et un médecin ont réclamé le droit du patient de se prévaloir de services de santé dans le secteur privé pour éviter les délais d'attente dans le secteur public. La Cour suprême leur a donné raison en affirmant que « [s]elon la jurisprudence de notre Cour, les délais d'attente pour un traitement médical qui ont une incidence physique et psychologique sur des patients déclenchent la protection de l'art. 7 de la Charte »[59], jugeant que le cas de *Chaoulli* correspondait à une situation où la vie et la sécurité d'une personne sont en jeu à cause de trop importants délais pour l'obtention de soins médicaux urgents et requis par l'état de santé[60]. À la lumière de ces faits, la Cour a conclu qu'à défaut d'assurer l'accès raisonnable à des soins de santé en temps opportun, accroissant ainsi les risques de complications et de mortalité, le gouvernement portait atteinte à la vie et à la sécurité de ses citoyens ordinaires en leur interdisant de souscrire une assurance maladie privée[61].

Dans *Chaoulli*, la Cour suprême a donc bel et bien reconnu que l'accès aux soins de santé dans des délais raisonnables était un droit protégé par l'article 7 de la *Charte canadienne*. À l'époque, et même aujourd'hui, les délais d'attente pour certains traitements médicaux au Québec dépassent largement des limites raisonnables[62]. Nonobstant ces délais, la Cour refuse de se prononcer concrètement sur les obligations de l'État face à cette situation:

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57 David Robitaille, *Normativité, interprétation et justification des droits économiques et sociaux: les cas québécois et sud-africain*, Bruxelles, Bruylant, 2011 à la p 221.

58 *Chaoulli c Québec (Procureur général)*, *supra* note 46.

59 *Ibid* au para 118.

60 *Ibid* aux paras 119 et 123.

61 *Ibid* au para 124.

62 La Presse Canadienne, « Urgences: un Canadien sur dix attend plus de 28 heures pour avoir un lit », *La Presse* (février 2014), en ligne: <http://www.lapresse.ca/actualites/sante/201402/13/01-4738726-urgences-un-canadien-sur-dix-attend-plus-de-28-heures-pour-avoir-un-lit.php> (consulté le 26 février 2014); Pascale

> Les gouvernements ont à maintes reprises promis de trouver une solution au problème des listes d'attente. Il semble cependant que la cristallisation du débat autour d'une philosophie socio-politique fasse perdre de vue l'urgence d'agir concrètement. Le dernier rempart des citoyens demeure alors les tribunaux. Le gouvernement tarde à agir depuis de nombreuses années et la situation ne cesse de se détériorer. Il ne s'agit pourtant pas d'un cas où des données scientifiques manquantes pourraient permettre de prendre une décision plus éclairée. Le principe de prudence, si populaire en matière d'environnement et de recherche médicale, ne peut être transposé en l'espèce. […] Le gouvernement a certes le choix des moyens, mais il n'a pas celui de ne pas réagir devant la violation du droit à la sécurité des Québécois.[63]

Ainsi que le remarque Prémont, « La Cour suprême confirme par cette décision paradoxale et symbolique que son rôle doit impérativement s'arrêter là où la conception des politiques sociales commence »[64]. À titre de remède, la Cour a donc tout simplement invalidé l'interdiction de souscrire une assurance maladie privée et, par conséquent, a permis aux demandeurs d'éviter les délais d'attente en s'achetant les mêmes soins dans le secteur privé.

Cette décision de la Cour suprême a sans aucun doute une incidence sur le droit à la santé – on y traite, après tout, du droit d'avoir accès à des soins de santé dans des délais raisonnables. Ironiquement, les effets de la décision ne sont point en conformité avec les protections du droit à la santé quant à la disponibilité et l'accessibilité des services de soins, tel qu'elles sont identifiées dans l'observation générale No 14 du Comité DESC[65]. Pour reprendre les termes de Bruce Porter, *Chaoulli* a créé « a right to healthcare: only if you can pay for it »[66].

La dernière décision en matière de DESC dont nous aimerions traiter dans cette section est probablement la plus concluante par rapport à la justiciabilité des DESC dans la *Charte canadienne*. Elle ne provient pourtant pas de la Cour suprême du Canada, mais des tri-

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Breton, « Médecin de famille: les Québécois doivent s'armer de patience », *La Presse* (février 2014), en ligne: <http://www.lapresse.ca/actualites/sante/201402/19/01-4740607-medecin-de-famille-les-quebecois-doivent-sarmer-de-patience.php> (consulté le 26 février 2014); Johanne Roy, « Opérations hors délais », *Le Journal de Québec*, en ligne: <http://www.journaldequebec.com/2014/02/23/operations-hors-delais> (consulté le 26 février 2014).

63 *Chaoulli c Québec (Procureur général)*, *supra* note 46 aux paras 96-97.

64 Marie-Claude Prémont, « L'affaire Chaoulli et le système de santé du Québec: cherchez l'erreur, cherchez la raison » (2005) 51:1 McGill Law Journal 167 à la p 197.

65 Comité des droits économiques, sociaux et culturels, *Observation générale No 14 (2000) Le droit au meilleur état de santé susceptible d'être atteint*, Doc NU E/C12/2000/4, 22e sess, 11 août 2000.

66 Bruce Porter, « A Right to Healthcare in Canada: Only if you can pay for it » (2005) 6 ESR Review: Economic and Social Rights in South Africa.

bunaux de la Colombie-Britannique. Dans *Victoria v Adams*[67], l'interdiction d'ériger des abris temporaires dans les parcs publics de la Ville de Victoria fut jugée contraire à l'article 7 de la *Charte canadienne*. En appel devant la Cour d'appel de la Colombie-Britannique, la Ville de Victoria a avancé l'argument selon lequel l'affaire n'était pas justiciable, car traitant de « considérations d'ordre public »[68], et que l'article 7 ne pouvait pas être interprété comme donnant droit à une action positive de l'État[69]. La Cour d'appel a rejeté le premier de ces arguments en affirmant:

> [I]t is clear that the fact that a legal issue raises political concerns does not render it non-justiciable. The respondents were not asking the court to adjudicate on the wisdom of policy decisions of elected officials on how to best allocate public resources to address the problem of homelessness. The question before the court was whether the provisions of the Bylaws that prohibit the erection of temporary overhead shelter violate the respondents' rights under s. 7 of the Charter, in circumstances in which there are insufficient alternative shelter opportunities for the City's homeless. There is no doubt this is a proper question for a court to address.[70]

Concernant le deuxième argument de la Ville de Victoria, la Cour d'appel explique:

> The decision only requires the City to refrain from legislating in a manner that interferes with the s. 7 rights of the homeless. While the factual finding of insufficient shelter alternatives formed an important part of the analysis of the trial judge, this does not transform either the respondents' claim or the trial judge's order into a claim or right to shelter. That is not to say the decision will not, from a practical point of view, require the City to take some action in response. That will likely take the form (as we were advised it already has) of some regulation of the overnight use of public parks, and perhaps the creation of additional shelters or alternative housing, which is consistent with the City's evidence about the initiatives it has undertaken to deal with the homeless. Such responsive action could be said to be a feature of all Charter cases; governments generally have to take some action to comply with the requirements of the Charter, which can involve some expenditures of public funds or legislative action, or both.[71]

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67 *Victoria v Adams (BCSC)*, *supra* note 47; *Victoria v Adams (BCCA)*, *supra* note 47.
68 *Victoria v Adams (BCCA)*, *supra* note 47 au para 43.
69 *Ibid* aux paras 44 et 90.
70 *Ibid* aux paras 67-69.
71 *Ibid* aux paras 95-96.

Il reste à voir si *Victoria v Adams* servira de précédent relativement à la notion de justiciabilité des DESC[72]. Nous soulignons, à cet égard, que l'approche retenue dans cette affaire n'est pas aussi progressive qu'elle puisse paraître au premier abord. Premièrement, le raisonnement de la Cour d'appel est toujours basé sur la même distinction entre droits négatifs et droits positifs qui a caractérisé les arrêts *Gosselin* et *Chaoulli*[73]; rien n'est gagné sur ce point. Deuxièmement, en ce qui concerne la *substance* du droit au logement, l'impact de l'arrêt est certes limité. Pour reprendre les termes de Jackman: « Like the right to buy private health insurance for the poor in *Chaoulli*, homeless women, youth and children have little to gain from a *Charter* right to sleep outdoors at night under a tarp or a cardboard box »[74].

### *3.4.2 La justiciabilité des DESC énoncés dans la Charte québécoise*

En ce qui a trait à la justiciabilité des DESC explicitement prévus à la *Charte québécoise*, il y a lieu de distinguer l'application de la *Charte* entre personnes privées et son application dans la relation entre l'État et les justiciables.

La possibilité de faire valoir l'article 48 de la *Charte québécoise* (portant sur la protection des personnes âgées ou handicapées) devant la Commission des droits de la personne et de la jeunesse (et ultérieurement devant le Tribunal des droits de la personne du Québec) a mené à de nombreuses décisions en la matière[75]. Généralement, il s'agit de réclamations pour dommages-intérêts contre des fournisseurs privés de soins destinés aux personnes âgées ou handicapées pour avoir omis d'offrir les services répondant aux besoins fondamentaux des bénéficiaires. On remarque dans cette jurisprudence une volonté prononcée de tenir compte du caractère social de l'article 48 et de l'interpréter à la lumière des instruments internationaux protégeant les personnes âgées ou handicapées[76].

En dehors de ce contexte, les tribunaux québécois, dans les litiges entre personnes privées, n'hésitent pas à se servir des DESC pour des fins interprétatives[77], que ce soit l'article 39

72 Voir aussi Trilsch, *supra* note 29 aux pp 501-502.

73 Young, *supra* note 48 à la p 107.

74 Jackman, *supra* note 48 à la p 292.

75 *Commission des droits de la personne du Québec c Brzozowski*, [1994] RJQ 1447 (TDPQ) ; *Commission des droits de la personne du Québec c Jean Coutu*, [1995] RJQ 1628 (TDPQ) ; *Comité des bénéficiaires du Centre d'accueil Pavillon Saint-Théophile c Centre d'accueil Pavillon St-Théophile Inc*, [1992] 16 CHRR D/139 (Commission des droits de la personne) ; *Commission des droits de la personne c Bradette Gauthier*, 2010 QCTDP 10 ; *Commission des droits de la personne et des droits de la jeunesse c Vallée*, JE 2003-1158 (TDPQ) (2003); *Commission des droits de la personne et des droits de la jeunesse c Venne*, 2010 QCTDP 9.

76 *Commission des droits de la personne du Québec c Jean Coutu*, *supra* note 75 aux pp 1635-6.

77 Bosset, *supra* note 27 à la p 590.

– droits de l'enfant – dans le contexte de la détermination de la garde de l'enfant[78] ou l'article 46 – conditions de travail – dans un litige concernant le droit de filmer les employés sur leur lieu de travail[79].

Pour résumer, nous pouvons constater que la justiciabilité des dispositions de la *Charte québécoise* garantissant des DESC n'est pas remise en question lorsque ces dernières sont appliquées entre personnes privées. Au contraire, c'est dans ce contexte que ces droits semblent avoir eu le plus d'impact à ce jour[80].

Par contre, dans la relation entre l'État et le justiciable, la situation est bien différente. Les tribunaux n'accordent généralement pas d'importance aux DESC protégés par la *Charte québécoise*. En l'occurrence, la Cour d'appel du Québec concluait, dans l'affaire *Lévesque c Québec*:

> [q]uant à la Charte, en 1975, à l'intérieur du chapitre IV, Droits économiques et sociaux, elle a consacré le droit des citoyens aux mesures sociales mais comme cette disposition n'a aucune préséance sur les autres lois du Québec, le droit à l'assistance financière doit être déterminé suivant les textes législatifs et règlementaires pertinents […].[81]

Abondant dans le même sens, le Tribunal des droits de la personne observe:

> Une première constatation s'impose d'entrée de jeu à ce propos: l'article 40 s'insère parmi les droits économiques et sociaux énumérés au chapitre IV de la Charte. Il est par conséquent exclu de l'application de la règle de prépondérance énoncée à l'article 52. Cette situation s'avère conforme à celle du droit international selon lequel la jouissance des droits économiques et sociaux se distingue de celle, immédiate, des droits dits "classiques" dont la mise en œuvre se traduit par un devoir d'abstention des États. À l'opposé, on reconnaît généralement que les droits sociaux et économiques ne bénéficient que d'une jouissance virtuelle dans la mesure où ils "ne peuvent recevoir satisfaction qu'après la mise en place [par l'État] d'un appareil destiné à répondre aux exigences des particuliers". La formulation, à l'article 40 de la Charte, du droit à l'instruction publique gratuite traduit pour sa part cette réalité en édictant

78 *Droit de la famille – 198*, [1985] CS 397-401, 400 ; *Protection de la jeunesse — 08972*, 2008 QCCQ 10214 ; *Droit de la famille — 091478*, 2009 QCCS 2781 ; *Droit de la famille — 123874*, 2012 QCCS 6892.

79 *Paquin c Distribution Nadair Ltée*, DTE 92T-905 (CT).

80 Bosset, *supra* note 27 à la p 590; Robitaille, *supra* note 57 à la p 185 s.

81 *Lévesque c Québec (Procureur général)*, [1988] RJQ 223 (QCCA).

> que le droit à l'instruction publique existe "dans la mesure et suivant les normes prévues par la loi".[82]

Ce faisant, les tribunaux affirment que la formulation des DESC de la *Charte québécoise* empêche ces derniers de pouvoir servir de fondement pour des réclamations dirigées directement contre l'État. Par conséquent, les tribunaux vont s'appuyer sur les DESC de la *Charte québécoise* seulement lorsque le bénéfice réclamé peut déjà être fondé sur les dispositions de la loi ordinaire. Dans une telle situation, les DESC, par exemple l'article 45 garantissant le droit à un niveau de vie adéquat, viennent soutenir le résultat[83].

L'exception notable à cette règle de la dénégation d'un effet justiciable des DESC est la décision *Johnson c Commission des Affaires Sociales*[84]. Il s'agissait dans cette affaire de l'exclusion de l'aide sociale d'un gréviste nécessiteux qui se trouvait sans emploi en raison d'un conflit collectif de travail. Le travailleur s'était vu privé des prestations syndicales, étant en période d'essai et n'ayant pu prendre part au vote de grève[85]. Afin d'éviter que le travailleur et sa famille – déjà sans revenu depuis huit mois – ne se retrouvent sans aucun soutien financier, la Cour a « rappelé » le droit à un niveau de vie décent protégé par l'article 45 de la *Charte québécoise* et a jugé que les circonstances exceptionnelles du cas justifiaient une application de cet article pour corriger, notamment, une « injustice imprévisible »[86]. Pourtant, six ans plus tard, cette interprétation généreuse de l'article 45 ne fut pas suivie par la Cour supérieure dans *Perreault c Gratton*[87], affaire dans laquelle une étudiante se voyait refuser l'accès aux prestations d'aide sociale.

Finalement, l'article 45 a également fait l'objet d'une analyse dans l'arrêt *Gosselin*, mentionné ci-haut. Seulement une parmi les neufs juges siégeant à la Cour suprême du Canada a pourtant conclu à une violation de l'article 45 et ce, en s'appuyant sur les motifs du juge dissident de la Cour d'appel (le juge Robert) qui s'est servi du droit international des DESC pour interpréter l'article 45 de façon à lui donner un effet justiciable:

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82 *CDP c Commission scolaire Saint-Jean-sur-Richelieu*, [1991] RJQ 3003; 16 CHRR 85 (TDPQ).

83 *Nicole Samson c Procureur Général du Québec*, [2000] RRA 562 ; *Peter Mackprang c Commission des Affaires Sociales*, [1986] CAS 258.

84 *Johnson c Commission des Affaires Sociales*, [1984] CA 61 [*Johnson*].

85 Pierre Bosset, « Étude no 5: Les droits économiques et sociaux, parents pauvres de la Charte? » dans Commission des droits de la personne et de la jeunesse, dir, *Après 25 ans: La Charte québécoise des droits et libertés*, Volume 2: Études, 2003, en ligne: <http://www.aihr-resourcescenter.org/administrator/upload/documents/bilan_charte_etude_5.pdf>.

86 *Johnson*, *supra* note 85 à la p 70.

87 *Danièle Perreault c Françoise Gratton et Procureur Général du Québec*, [1990] RJQ 152 (CS).

> La portée de l'article 45 ne doit donc pas être restreinte à un énoncé de politique générale ou revêtir un caractère purement discrétionnaire. Dans un pays favorisé comme le Canada, le droit à des mesures sociales et économiques susceptibles d'assurer un niveau de vie décent comprend à tout le moins le droit pour toute personne d'obtenir ce que la société canadienne considère, de façon objective, comme les nécessités essentielles de la vie.[88]

Cette opinion étant de caractère dissident, c'est plutôt l'opinion majoritaire dans *Gosselin* qui donne aujourd'hui le ton dans le traitement d'affaires impliquant l'article 45, tel que le démontre l'affaire *SM c Québec* : « Dans l'affaire Gosselin c. Québec (Procureur général), […] la Cour suprême du Canada a examiné la portée de l'article 45 de la *Charte québécoise* et a conclu que cette disposition n'était pas prépondérante et ne permettait pas aux tribunaux de contrôler le caractère adéquat du régime d'aide sociale du Québec »[89].

### 3.5 Les droits sociaux dans la doctrine nationale

La doctrine canadienne est divisée sur la question de la protection des droits sociaux comme droits fondamentaux. Tandis que les droits sociaux comme tels ne sont pas nécessairement remis en question, leur protection à titre de droits fondamentaux ne fait pas l'unanimité.

Selon ceux qui sont défavorables à la reconnaissance des droits sociaux au même titre que les droits civils et politiques, la mise en œuvre des droits sociaux relève du domaine politique et non pas juridique. Par conséquent, ces droits ne devraient pas être constitutionnalisés, ou rendus justiciables d'une autre façon. Ils avancent que, d'une part, les tribunaux ne sont pas équipés pour se prononcer sur « la promotion d'intérêts collectifs »[90] et que, d'autre part, il n'appartient pas à ces derniers « d'élaborer des programmes sociaux ou culturels »[91]. Selon ce courant, les droits sociaux sont considérés comme des droits à caractère positif et collectif. Par le fait même, la dimension négative et le caractère individuel de ces droits sont ignorés. En ce qui concerne les DESC contenus dans la *Charte québécoise*, on affirme qu'ils sont « d'intérêt d'un point de vue politique, à titre déclaratoire ou programmatoire »[92].

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88 *Gosselin c Québec (Procureur général)*, [1999] RJQ 1033 (CA) à la p 1092 [*Gosselin (CA)*], motifs du Juge Robert, dissident.

89 *SM c Québec (Emploi et Solidarité sociale)*, 2012 QCTAQ 061127 au para 153.

90 Brun, Tremblay et Brouillet, *supra* note 30 à la p 902.

91 *Ibid* à la p 904. Voir aussi: Peter W Hogg, *Constitutional Law of Canada*, 2012 Student, Toronto, Thomson/Carswell, 2012 aux pp 47-15 et ss.; Joel Bakan, « What's Wrong with Social Rights? » dans Joel Bakan et David Schneiderman, dir, *Social justice and the Constitution: perspectives on a social union for Canada*, Ottawa, Carleton University Press, 1992; Michael Mandel, *La Charte des droits et libertés et la judiciarisation du politique au Canada*, Montréal, Boréal, 1996.

92 Brun, Tremblay et Brouillet, *supra* note 30 à la p 903.

Les droits sociaux sont aussi caractérisés comme étant vagues et contraires au principe de la séparation des pouvoirs[93]. Finalement, on soutient que les droits individuels « peuvent empêcher le pire, mais ne peuvent générer le mieux »[94]. Par conséquent, ils sont « impuissants à améliorer le sort des démunis, des minoritaires, des défavorisés ou des handicapés. […] Toute intervention de l'État en faveur de ces groupes risque au contraire de faire subir aux droits individuels des atteintes […] »[95]. En ce sens, on perçoit effectivement les droits sociaux (ou la revendication des droits sociaux devant les tribunaux) comme une menace à la protection efficace des droits civils et politiques.

À l'autre extrémité du spectre existe un fort courant *en faveur* de la protection des droits sociaux comme droits fondamentaux. Ce discours est grandement inspiré du droit international des droits de la personne et a pris différentes formes au fil des années.

Au niveau national, à l'occasion d'une tentative de réforme constitutionnelle en 1992, la création d'une « Charte sociale » canadienne a été proposée, notamment par le gouvernement de la province de l'Ontario à l'époque[96]. Cette proposition fut partiellement retenue dans le projet de modification de la Constitution connu sous le nom *d'Accord de Charlottetown*[97]. Cet accord prévoyait l'inclusion dans la Constitution du Canada d'une disposition sur l'union sociale et économique du Canada énonçant, entre autres, l'objectif de « fournir des services et des avantages sociaux suffisants afin que tous les habitants du Canada aient un accès raisonnable au logement, à l'alimentation et aux autres nécessités fondamentales »[98]. *L'Accord de Charlottetown* a fait l'objet d'un référendum national en octobre 1992 qui s'est soldé par un refus de la proposition de modification constitutionnelle[99].

Depuis cet échec, la cause des droits sociaux est devenue une question d'interprétation des garanties de la *Charte canadienne* concernant le droit à l'égalité et le droit à la sécurité de la personne, tels qu'abordés dans la section précédente du présent rapport. Les travaux de Martha Jackman et Bruce Porter sont certainement ceux qui poussent les réflexions à cet

93 Bakan, *supra* note 92 à la p 86 et s.

94 Brun, Tremblay et Brouillet, *supra* note 29 aux pp 904-905.

95 *Ibid*, à la p 904.

96 Craig Scott, « Social Values Projected and Protected: A Brief Appraisal of the Federal and Ontario Government Proposals » dans Douglas M Brown, Robert Andrew Young et Dwight Herperger, dir, *Constitutional commentaries an assessment of the 1991 federal proposals: conference report*, Kingston, Ont, Canada, Institute of Intergovernmental Relations, Queen's University, 1992 à la p 81; Joel Bakan et David Schneiderman, dir, *Social justice and the Constitution: perspectives on a social union for Canada*, Ottawa, Carleton University Press, 1992.

97 Bureau du Conseil privé du Canada, *Accord de Charlottetown: Projet de texte juridique*, 9 octobre 1992.

98 *Ibid* au para 31, sous « Partie III.1 Union sociale et économique », art 36.1 (2) b).

99 Brun, Tremblay et Brouillet, *supra* note 29 aux pp 110-111.

égard le plus loin, considérant que leurs écrits s'inscrivent toujours simultanément dans une démarche de litige stratégique. En l'occurrence, les auteurs étaient impliqués dans la récente affaire *Tanudjaja v Attorney Général*[100], dans laquelle l'argument d'inclure le droit à un logement adéquat dans le champ de protection de l'article 7 de la *Charte canadienne* fut à nouveau rejeté par la Cour supérieure de l'Ontario:

> As it presently stands, there can be no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the "life, liberty and security of the person". In this context, there is no fundamental right to affordable, adequate and accessible housing provided through s.7 of the Charter. The majority in Gosselin does not depart from this view. It confirms what has been understood since the early days of the Charter. Our appreciation of its breadth and its limits will continue to evolve. This is no less the case for s. 7 than any of its provisions.[101]

Finalement, en ce qui concerne la doctrine portant sur la *Charte québécoise*, nombreux sont les auteurs qui continuent d'argumenter pour l'abandon de l'article 52, qui limite la justiciabilité des droits économiques, sociaux et culturels[102].

### 3.6 L'impact de la protection internationale des droits sociaux

Le Canada a ratifié tous les principaux instruments onusiens de protection des droits humains, dont ceux traitant des droits économiques, sociaux et culturels: le *PIDESC*[103], la *Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes*[104], la *Convention relative aux droits de l'enfant*[105] et la *Convention relative aux droits des per-*

100 *Tanudjaja v Attorney General (Canada) (Application)*, 2013 ONSC 5410.

101 *Ibid* au para 59.

102 Bosset, *supra* note 27; Lucie Lamarche, « Le droit international des droits économiques de la personne et le quart monde occidental: a-t-on parlé pour ne rien dire? » (1993) 8 Revue québécoise de droit international 34; Lucie Lamarche, *Le régime québécois de protection et de promotion des droits de la personne*, Montréal, Yvon Blais, 1996; Pierre Bosset et Lucie Lamarche, dir, *Droit de cité pour les droits économiques, sociaux et culturels – La Charte québécoise des droits et libertés en chantier*, Montréal, Yvon Blais, 2011.

103 *PIDESC*, *supra* note 25, adhésion du Canada le 19 mai 1976.

104 *Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes*, 18 décembre 1979, 1249 RTNU 13 (entrée en vigueur: 3 septembre 1981), ratifiée par le Canada le 10 décembre 1981 [CEDEF].

105 *Convention relative aux droits de l'enfant*, 20 novembre 1989, 1577 RTNU 3, RT Can 1992 no 3 (entrée en vigueur: 2 septembre 1990), ratification par le Canada le 14 septembre 2005.

*sonnes handicapées*[106], à l'exception de la *Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille*[107].

Malgré la ratification de ces traités, ils ne sont pas directement applicables en droit canadien : le Canada étant un pays dualiste, les normes de droit international, dont celles garantissant les droits humains, doivent être intégrées en droit national par le biais législatif afin de jouir d'une force obligatoire en droit interne[108]. Dans le système fédéral canadien, les deux niveaux de gouvernement (fédéral et provincial) sont donc dans l'obligation d'assurer la mise en œuvre des engagements internationaux en matière de droits humains.

Au niveau fédéral, la Cour suprême du Canada, dans son arrêt *Slaight Communications*[109] en 1989, a établi une « présomption interprétative » selon laquelle la *Charte canadienne* est le véhicule principal pour donner effet en droit interne aux protections internationales de droits humains[110], y inclus les garanties de droits économiques, sociaux et culturels. Cela dit, les instruments internationaux de protection des droits humains et notamment de protection des DESC sont relativement rarement cités par les tribunaux canadiens. La Cour suprême ne fait pas exception à cette règle. Au total, elle mentionne le *PIDESC* dans les motifs de 13 de ses décisions[111], sans toutefois lui donner d'effet concret dans l'interprétation des dispositions de la *Charte canadienne*, à l'exception de *Health Services and Support*[112]. Dans cette affaire, la Cour suprême s'est questionnée sur l'inclusion du droit à la négociation collective dans les protections de la *Charte canadienne* et a conclu que:

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106 *Convention relative aux droits des personnes handicapées*, 13 décembre 2006, 2515 RTNU 3 (entrée en vigueur: 3 mai 2008), ratification par le Canada le 11 mars 2010.

107 *Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille*, 18 décembre 1990, 2220 RTNU 3 (entrée en vigueur: 1er juillet 2003).

108 Hugo Cyr, *Canadian Federalism and Treaty Powers: Existential Communities, Functional Regimes and the Canadian Constitution*, Thèse LLD, Université de Montréal, 2007; *Baker c Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 RCS 817 [*Baker*]; Stéphane Beaulac, « Arrêtons de dire que les tribunaux au Canada sont "liés" par le droit international » (2004) 38 Revue juridique Thémis 359.

109 *Slaight Communications Inc c Davidson*, [1989] 1 RCS 1038 [*Slaight Communications*].

110 *Baker*, *supra* note 106; *R c Keegstra*, [1990] 3 RCS 697 ; *R c Ewanchuk*, [1999] 1 RCS 330.

111 *Renvoi relatif à la Public Service Employee Relations Act (Alb)*, [1987] 1 RCS 313 ; *Québec (Commission des droits de la personne et des droits de la jeunesse) c Maksteel Québec inc*, [2003] 3 RCS 228, 2003 CSC 68 ; *Slaight Communications*, *supra* note 192; *Québec (Commission des droits de la personne et des droits de la jeunesse) c Montréal (Ville); Québec (Commission des droits de la personne et des droits de la jeunesse) c Boisbriand (Ville)*, [2000] 1 RCS 665 ; *Renvoi relatif à la sécession du Québec*, *supra* note 116; *R c Advance Cutting & Coring Ltd*, [2001] 3 RCS 209, 2001 CSC 70 ; *Bell Canada c Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 RCS 749 ; *Delisle c Canada (Sous-procureur général)*, [1999] 2 RCS 989 ; *Office canadien de commercialisation des œufs c Richardson*, [1998] 3 RCS 157 ; *R c Sharpe*, [2001] 1 RCS 45, 2001 CSC 2 ; *Health Services and Support – Facilities Subsector Bargaining Assn c Colombie-Britannique*, [2007] 2 RCS 391, 2007 CSC 27 [*Health Services and Support*]; *Gosselin (CSC)*, *supra* note 125; *Ontario (Procureur général) c Fraser*, 2011 CSC 20, [2011] 2 RCS 3.

112 *Health Services and Support*, *supra* note 194 aux paras 71-79.

> Le PIDESC, le PIDCP et la Convention no 87 [de l'OIT] accordent une protection aux activités des syndicats d'une manière qui permet de croire que le droit de négociation collective est compris dans la liberté d'association. L'interprétation de ces instruments, au Canada et à l'étranger, permet non seulement de confirmer l'existence d'un droit de négociation collective en droit international, mais tend également à indiquer qu'il y a lieu de reconnaître ce droit dans le contexte canadien en vertu de l'al. 2d) [de la *Charte canadienne*].[113]

Un autre exemple d'une utilisation des dispositions du *PIDESC* à des fins interprétatives à l'égard de la *Charte canadienne* se trouve dans la décision de première instance dans l'affaire *Victoria v Adams*[114], dont nous avons déjà traité ci-haut[115]. La juge Ross de la Cour supérieure de la Colombie-Britannique (*Supreme Court of British Columbia*) s'est notamment servie de l'article 11 du *PIDESC* (droit à un logement adéquat) pour interpréter le droit à la sécurité de la personne garanti par l'article 7 de la *Charte canadienne*[116].

En ce qui a trait à l'impact politique du *PIDESC*, son évaluation est ardue dans la mesure où les instances politiques ne réfèrent jamais au *PIDESC* dans l'élaboration des politiques sociales. Devant le Comité des droits économiques, sociaux et culturels des Nations Unies (ci-après « Comité DESC »), le gouvernement fédéral soutient régulièrement que la vocation de l'article 7 de la *Charte canadienne* est d'assurer que les besoins de base (*basic necessities*) de toute personne soient comblés[117], affirmation qui est aux antipodes de la protection effective qu'accordent les tribunaux en matière sociale par l'entremise de l'article 7. Sinon, la réponse politique aux recommandations du Comité DESC semble plutôt déficiente: lors du dernier cycle d'évaluation par le Comité DESC du rapport canadien sur la mise en œuvre du PIDESC, le Comité note et déplore « que la plupart des recommandations qu'il a formulées en 1993 et 1998 à l'occasion de l'examen des deuxième et troisième rapports périodiques n'aient pas été suivies d'effet et que l'État partie n'ait pas traité efficacement les principaux sujets de préoccupation »[118].

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113 *Ibid* au para 72.

114 *Victoria v Adams (BCSC)*, *supra* note 47.

115 *Supra* section « 2. La protection des droits sociaux sur le fondement d'autres règles et principes constitutionnels » à la p 7.

116 *Victoria v Adams (BCSC)*, *supra* note 47 aux paras 87-100.

117 Comité des droits économiques, sociaux et culturels, *Review Of Canada's Third Report On The Implementation Of The International Covenant On Economic, Social And Cultural Rights: Reply to List of Issues: Canada*, E/C12/Q/CAN/1, 20 juillet 2001 au para 53, en ligne: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/1c60cc9b3dfe0f92c1256a8f00508a5e?Opendocument>.

118 Comité des droits économiques, sociaux et culturels, *Observations finales du Comité des droits économiques, sociaux et culturels: Canada*, E/C12/CAN/CO/4 E/C12/CAN/CO/5, 36e session, 22 mai 2006 au para 11.

Au niveau provincial, la situation dans toutes les provinces, sauf le Québec, est sensiblement la même qu'au niveau fédéral: faute de garanties expresses en matière de DESC, les garanties internationales (dont le *PIDESC*) ont la prétention de servir d'outil interprétatif dans l'application des chartes provinciales[119]. Au Québec, les dispositions du chapitre IV de la *Charte québécoise* ont pour mission de refléter les engagements internationaux en matière de DESC[120], quoique ce ne sont pas tous les droits du *PIDESC* qui s'y trouvent représentés. Toutefois, même les dispositions de la *Charte québécoise* trouvant leur origine dans les droits garantis par le *PIDESC* sont rarement interprétées à la lumière de ce dernier.

L'affaire *Gosselin*[121] avait le potentiel de changer la perception des liens entre la *Charte québécoise* et le *PIDESC*. Ainsi, un des juges de deuxième instance s'était servi de l'article 11 du *PIDESC* pour interpréter l'article 45 de la *Charte québécoise* (droit à un niveau de vie décent), soutenant que ce dernier révélait une « parenté irréfutable » avec l'article 11 du *PIDESC*[122]. En appel, la Cour suprême n'a majoritairement pas suivi cette interprétation, l'argument étant que contrairement à l'article 11 du *PIDESC*, l'article 45 de la *Charte québécoise* était trop ambigu pour dégager un droit justiciable[123]. Compte tenu du fait que le *PIDESC* s'est longuement vu refuser la création d'un mécanisme de plaintes individuelles sous prétexte que ses garanties étaient trop vagues, cette dernière affirmation s'avère plutôt surprenante.

Dans le système interaméricain, le Canada est seulement contraint par la *Déclaration américaine des droits et des devoirs de l'Homme*[124], n'étant pas signataire du *Protocole de San Salvador*[125], instrument interaméricain garantissant les DESC. L'impact du droit interaméricain au Canada en matière de DESC est plutôt minime: la *Déclaration américaine* n'est citée dans aucune décision de la Cour suprême du Canada, et le même traitement est réservé à la jurisprudence de la Cour interaméricaine des droits de l'homme, cette dernière n'étant point prise en considération.

Par contre, la *Convention européenne des droits de l'homme*[126] – instrument auquel le Canada n'est pas partie et auquel il ne peut pas adhérer – a servi de source internationale

119 Cyr, *supra* note 191 à la p 326.
120 Morel, *supra* note 26 à la p 17.
121 *Gosselin (CSC)*, *supra* note 42.
122 *Gosselin (CA)*, *supra* note 88 à la p 1092, motifs du Juge Robert, dissident. Voir la discussion de cette dissidence dans Trilsch, *supra* note 29 aux pp 184-186.
123 *Gosselin (CSC)*, *supra* note 42 au para 93.
124 *Déclaration américaine des droits et devoirs de l'Homme*, Doc off OEA/SerL/VII23/Doc211, rev 6 (1949) [*Déclaration américaine*].
125 *Protocole additionnel de la Convention américaine des droits humains*, 17 novembre 1988 [*Protocole de San Salvador*].
126 *Convention européenne des droits de l'homme*, Rome, 4 XI 1950.

à caractère persuasif dans l'interprétation des dispositions de la *Charte canadienne* dans 24 décisions. Parmi celles-ci, plusieurs touchent au droit à l'instruction de ses enfants[127] ou à la liberté d'association[128]. La *Charte sociale européenne*[129], pour sa part, n'a à ce jour eu aucun impact dans la jurisprudence canadienne.

En ce qui concerne les affaires contre le Canada ayant été portées devant des instances internationales, les plus importants cas traités par le Comité des droits de l'homme en matière de DESC portent sur les droits culturels des communautés autochtones[130]. La plus célèbre de ces affaires est certainement *Lovelace v Canada*[131], où le Comité a conclu à une violation de l'article 27 du *PIDCP* (droit à la vie culturelle des minorités) du fait que la plaignante, d'origine autochtone, avait perdu son statut d'Indienne suite à son mariage avec un non-Indien, en vertu de la *Loi sur les Indiens*[132]. Au total, 97 affaires ont été décidées contre le Canada, le Comité ayant trouvé des violations avec incidence sur les DESC dans des cas relatifs au droit au respect de la famille[133], à la discrimination dans le domaine de l'emploi[134], au financement public d'écoles catholiques[135] et à la discrimination linguistique[136]. Seules deux affaires présentées à la Commission interaméricaine ont fait l'objet d'une décision sur le fond: la première traitant du droit à la culture d'une communauté autochtone[137], et la seconde, traitant entre autres du droit à la santé, fut déclarée recevable en novembre 2013[138].

Les leçons à tirer de cette situation sont mitigées. À ce jour, si le litige international a offert l'opportunité d'attirer l'attention sur les conditions de vie des communautés autochtones, peu de décisions se sont penchées sur les DESC en dehors de ce contexte.

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127 *La Reine c Jones*, [1986] 2 RCS 284 ; *Chamberlain c Surrey School District No 36*, [2002] 4 RCS 710, 2002 CSC 86.

128 *R c Advance Cutting & Coring Ltd.*, *supra* note 111.

129 *Charte sociale européenne (révisée)*, Strasbourg, 3 V 1996.

130 Dominic McGoldrick, « Canadian Indians, Cultural Rights and the Human Rights Committee » (1991) 40:3 International and Comparative Law Quarterly 658.

131 *Sandra Lovelace v Canada*, Communication No R6/24, UN Doc Supp No 40 (A/36/40) 166 (1981).

132 *Loi sur les Indiens*, LRC 1985, c I-5. La loi fut modifiée suite à cette décision du Comité.

133 *Communication No 1052/2002*, CCPR/C/89/D/1052/2002 (Comité des droits de l'homme).

134 *Communication No 958/2000*, CCPR/C/82/D/958/2000 (Comité des droits de l'homme).

135 *Communication No 694/1996*, CCPR/C/67/D/694/1996 (Comité des droits de l'homme).

136 *Communication No 455/1991*, CCPR/C/51/D/455/1991 (Comité des droits de l'homme); *Communication No 359/1989*, CCPR/C/47/D/359/1989 (Comité des droits de l'homme); *Communication No 385/1989*, CCPR/C/47/D/385/1989 (Comité des droits de l'homme).

137 *Report No 61/08*, Case 12435, Merits, Grand Chief Michael Mitchell, Canada, July 25, 2008 (Commission interaméricaine). La commission n'a conclu à aucune violation.

138 *Report No 89/13*, Admissibility, Petition 879-07, Loni Edmonds and Children, Canada, November 4, 2013 (Commission interaméricaine).

## 3.7 Les droits sociaux dans la législation ordinaire

Tel qu'il en a été fait mention ci-dessus, les compétences législatives sont partagées entre les paliers fédéral et provincial. De nombreux domaines attribués à l'un ou l'autre des deux paliers peuvent être touchés par les droits économiques, sociaux et culturels, mais les exemples les plus évidents sont les suivants. Le Parlement fédéral est compétent en matière d'assurance-chômage[139], des Indiens et des terres qui leur sont réservées[140] ainsi que de l'établissement, du maintien et de l'administration des pénitenciers[141]. Pour leur part, les assemblées législatives des provinces sont compétentes en ce qui concerne la propriété et les droits civils dans la province[142] – par exemple, les questions de logement, de pension alimentaire ou de relations de travail – et généralement toutes les matières de nature purement locale ou privée[143] – par exemple, la compétence provinciale en matière de santé. Les provinces sont également compétentes en matière d'assistance sociale[144] et d'éducation[145]. Certaines compétences sont partagées entre les paliers législatifs fédéral et provincial. En l'occurrence, ils possèdent tous deux des pouvoirs de taxation[146] et le palier fédéral peut légiférer en matière de pensions de vieillesse à condition de s'harmoniser avec les dispositions provinciales concernées[147].

Les deux paliers législatifs ont fait usage de leurs pouvoirs dans ces matières et, de façon générale, la législation ordinaire fédérale et provinciale met en œuvre les obligations du Canada en vertu du *PIDESC* (existence d'un régime d'assurance et d'assistance sociale, d'un système de santé et d'éducation, protection contre la perte de travail injustifiée et garanties concernant les conditions de travail, y inclus un salaire minimum, etc.). Par contre, la législation ordinaire ne contient pas de catalogue de droits économiques, sociaux et culturels dans l'abstrait.

Cette absence de garanties explicites en matière de DESC est d'ailleurs l'un des principaux points de préoccupation du Comité DESC suite à l'examen des 4e et 5e rapports étatiques

139 *Loi constitutionnelle de 1867*, *supra* note 3, art 91.2 A.
140 *Ibid*, art 91.24.
141 *Ibid*, art 91.28.
142 *Ibid*, art 92.13.
143 *Ibid*, art 92.16.
144 Relevant soit de l'article 92.13, soit de l'article 92.16 de la *Loi constitutionnelle de 1867*, *supra* note 3. Voir *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act of Ontario*, [1938] SCR 398 [*Re Adoption Act*].
145 *Loi constitutionnelle de 1867*, *supra* note 3, art 93.
146 *Ibid* au para 91.3 et 92.2.
147 *Ibid*, art 94 A.

du Canada[148]. Dans ses observations finales en 2006, le Comité dénonce le fait que le Canada n'ait pas donné suite aux recommandations du Comité formulées en 1993 et 1998 concernant, notamment:

> [l]'absence de droit à réparation pour les particuliers lorsque les autorités n'appliquent pas le Pacte, résultant de l'insuffisance dans la législation interne de dispositions traitant des droits économiques, sociaux et culturels énoncés par le Pacte, le manque de mécanismes permettant d'assurer l'application effective de ces droits, le fait que les autorités ont engagé leurs tribunaux à privilégier une interprétation de la Charte canadienne des droits et libertés revenant à refuser toute protection des droits consacrés dans le Pacte, et l'insuffisance de l'aide juridique civile, en particulier pour les droits économiques, sociaux et culturels.[149]

D'autres points critiques soulevés par le Comité de façon répétée sont: l'inexistence d'un droit exécutoire à une assistance sociale suffisante reconnue à toutes les personnes nécessiteuses sur une base non discriminatoire et les incidences néfastes de certains programmes de mise au travail des allocataires sociaux; les disparités qui persistent entre les peuples autochtones et le reste de la population canadienne en matière de jouissance des droits énoncés dans le Pacte, ainsi que la discrimination dont sont toujours victimes les femmes autochtones en matière de biens matrimoniaux; l'absence d'un seuil de pauvreté officiel; l'insuffisance du salaire minimum et de l'assistance sociale pour assurer la réalisation du droit de tous à un niveau de vie décent et l'autorisation qu'ont les provinces et territoires de déduire le montant des allocations familiales versées au titre de la Prestation nationale pour enfants du montant de l'aide versée aux parents bénéficiaires de l'aide sociale[150].

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148 Conseil économique et social, *Quatrièmes rapports périodiques présentés par les États parties en vertu des articles 16 et 17 du Pacte: Canada*, E/C12/4/Add1528, 28 octobre 2004, en ligne: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CAN&Lang=EN>; Conseil économique et social, *Cinquièmes rapports périodiques présentés par les États parties en vertu des articles 16 et 17 du Pacte: Canada*, E/C12/CAN/5, août 2005, en ligne: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx? CountryCode=CAN&Lang=EN>.

149 *Observations finales du Comité des droits économiques, sociaux et culturels: Canada*, *supra* note 118 au para 11 b).

150 *Ibid* au para 11. Les problèmes soulevés par la société civile durant ce cycle d'évaluation sont résumé dans le document «Compilation of Summaries of Canadian NGO Submissions to the UN Committee on Economic, Social and Cultural Rights in Connection with the Consideration of the Fourth and Fifth Periodic Reports of Canada» (E/C.12/36/3). Pour une perspective québécoise sur la mise en œuvre du PIDESC, voir Ligue des droits et libertés, *Rapport social*, 2006, en ligne: <http://liguedesdroits.ca/wp-content/fichiers/rap-2006-03-00-rapport_social.pdf>. Le Canada a soumis son rapport faisant état de la mise en œuvre du PIDESC pour la période 2005-2009 en 2012 (Doc. U.N. E/C.12/CAN/6). Il n'a pas encore été évalué par le Comité DESC.

## 3.8 Garanties institutionnelles des droits sociaux

En l'absence de garanties expresses en matière de DESC, aucun organisme ayant la mission explicite de la protection ou de la promotion des DESC n'existe au niveau fédéral. Pour la seule province où de telles garanties existent, le Québec, la Commission des droits de la personne et de la jeunesse est chargée du mandat d'assurer la promotion et le respect de tous les droits énoncés dans la *Charte québécoise*[151]. Relativement aux DESC, la Commission s'est par le passé montrée militante en leur faveur. Dans son bilan à l'occasion du 25e anniversaire de la *Charte*, elle s'est prononcée pour le renforcement des DESC énoncés à la *Charte québécoise*, notamment par l'inclusion de ces droits à son article 52[152]. D'autres organismes œuvrant pour la promotion et la protection des droits sociaux en tant que tels ne sont pas prévus au Québec.

Par ailleurs, toutes les provinces comptent des tribunaux administratifs chargés de régler les différends dans leurs domaines de spécialisation respectifs, certains de ces domaines touchant les droits sociaux[153]. Au niveau fédéral ainsi que dans toutes les provinces, on retrouve ainsi un Tribunal ou une Commission des droits de la personne (*Human Rights Tribunal* ou *Commission*) – dont la compétence se limite, généralement, aux différends concernant les questions de discrimination – et une Commission des relations de travail (*Labour Relations Board*). L'Ontario compte également un Tribunal de l'aide sociale et une Commission d'appel et de révision des services de santé. Le Québec connaît la Régie du logement et la Commission de la santé et de la sécurité au travail. L'efficacité de ces tribunaux – pour ce qui est de la protection des droits sociaux – dépend de la législation en vigueur.

151 *Charte québécoise*, *supra* note 19, art 57.

152 Commission des droits de la personne et de la jeunesse, *Après 25 ans: La Charte québécoise des droits et libertés*, Volume 1: Bilans et recommandations, 2003 à la p 21, en ligne: <http://www.cdpdj.qc.ca/publications/bilan_charte.pdf>.

153 À titre d'exemple, nous retrouvons les instances suivantes: Tribunal canadien des droits de la personne, British Columbia Human Rights Tribunal, British Columbia Workers' Compensation Appeal Tribunal, Alberta Human Rights Commission, Alberta Labour Relations Board, Saskatchewan Human Rights Commission, Saskatchewan Labour Relations Board, Commission des droits de la personne du Manitoba, Manitoba Labour Board, Commission de révision des services à l'enfance et à la famille (Ontario), Tribunal des droits de la personne de l'Ontario, Tribunal des droits de la personne (Québec), Commission du travail et de l'emploi du Nouveau Brunswick, Nova Scotia Human Rights Commission, Nova Scotia Labour Board, Commission des droits de la personne de l'Île-du-Prince-Édouard, Prince Edward Island Labour Relations Board, Law Society of Newfoundland and Labrador, Newfoundland and Labrador Human Rights Commission, Newfoundland and Labrador Labour Relations Board.

### 3.9 Les droits sociaux et le droit comparé

Puisque les protections de droits sociaux sont peu nombreuses en droit canadien, le Canada ne se prête pas comme « modèle » dans le domaine. Pour ce qui est de la *Charte québécoise*, l'intégration qu'elle fait des DESC ne fut suivie ni par les autres provinces dotées de chartes des droits par la suite, ni au niveau national (*Charte canadienne*). Au moment de son adoption, la *Charte québécoise* fut surtout influencée par le *PIDESC*, mais non pas par d'autres systèmes étrangers.

Tel qu'il l'est expliqué dans les deuxième et troisième sections de ce rapport, peu de jurisprudence traitant explicitement des DESC existe au Canada. En outre, les quelques exceptions ne font pas preuve d'une approche de droit comparé. Malgré le fait que la Cour suprême cite relativement fréquemment des décisions étrangères[154], la jurisprudence dans le domaine des DESC provenant, par exemple, de l'Afrique du Sud, de l'Inde ou de la Colombie, n'ont jamais trouvé considération par le plus haut tribunal du pays, ni par d'autres tribunaux canadiens.

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154 Il s'agit surtout de la jurisprudence des plus hauts tribunaux des autres pays appartenant au Commonwealth.

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# 4 Social Rights in the Republic of Cyprus

*Constantinos Kombos*[*]

## 4.1 Introduction

The definition of the precise position and status of social rights in national and international legal orders and the description of their interaction with other types of more traditional fundamental rights, that are political and civil in nature, have proved to be a complicated and demanding task. The reasons are both historical and conceptual, while at the same time the debate is not merely theoretical, since the adoption of a specific theoretical standpoint as regards social rights is bound to influence the assessment of the protection reserved for social rights at the practical level. Consequently, this paper has as task the description and evaluation of the status of social rights in the legal order of the Republic of Cyprus, yet without being detached from the theoretical debate that underpins the concept of social rights. It must be noted from the outset, that the existing legal analyses on the issue of social rights in Cyprus are still at an infant stage, given the fact that the establishment of legal schools is a recent development. Therefore, the focus is placed on the existing case law, which is rich, and on the general theoretical discourse taking place internationally.

In terms of methodological approach, the study uses the theoretical framework and premises relating to social rights as the foundation for adopting a yardstick for assessing the quality of protection that the Cypriot legal order affords to social rights. In structural terms, the study is divided into four parts: (a) the identification and hierarchical status of social rights as well as the international dimension of protection for social rights, (b) the effectiveness of protection for social rights from the perspective of the judiciary, (c) the implementation and supervision mechanisms with reference to the judicial structure and protection framework and (d) the role of general principles of law.

The argument submitted states that the concept of social rights has been present and active in the Cypriot legal order from the moment of the constitutional genesis and the specific constitutional setting and structure has proved to be effective, progressive and forward-looking especially due to the special relationship that the Constitution, and the

* Dr. Constantinos Kombos, assistant Professor of Public Law, Law Department, University of Cyprus. An amended part of this study forms part of a larger paper coauthored with Arestis, G., Constantinides, A. and Paraskeva, C. that is yet to be published. The present contribution rests solely on the work of the author.

judiciary, has had with the European Convention for the Protection of Fundamental Human Rights (hereafter, ECHR). Moreover, the overly complex system of repetitive horizontal and vertical checks in balances that the Cypriot Constitution adopted has had a rather positive impact in creating a plethora of procedural avenues for addressing infringements of constitutional provisions, thus placing the judiciary at the epicentre of protection for fundamental rights. In the light of the unique approach of the judiciary that has been willing to engage into a comparative juridical analysis and to rely on the ECHR and the findings of the European Court of Human Rights (hereafter, ECtHT). Overall, the legal system of Cyprus has been progressive in placing social rights in a secure position. Nonetheless, the approach has not been systematic and consistent and there are examples of back-tracking in the jurisprudence.

In terms of terminological clarity, the term social rights is used in the current context as referring to the constitutionally attributed competence that aims to satisfy those essential interests necessary for the dignified survival of the citizen.[1]

## 4.2 Social Rights and the Cypriot Paradigm

### *4.2.1 Cyprus and Its General Legal Context*

The Constitution of the Republic of Cyprus can be seen as unique in inception and complexity.[2] The Constitution represented the final act of a broader compromise of international proportions between Greece, Turkey and Great Britain, with the former two being regarded as the rightful representatives of the interests of the two main communities residing in the island and with the latter being the colonial power that governed Cyprus. Therefore, the two main communities of Turkish-Cypriots and Greek-Cypriots that consisted around 18% and 70% of the population were from the outset attached to the so-called 'mother lands'; thus, their symbiosis became a matter for the international community rather than a purely domestic internal issue. Moreover, both communities had entered into a collision course with conflicting objectives and divergent aspirations. As far as the Greek-Cypriot community was concerned, their only aim was the expression of the principle of self-determination whereby the people of Cyprus would determine their future after decolonisation and that people had already expressed its desire in a referendum organised in 1950 where the overwhelming Greek-Cypriot majority voted in favour of unification with Greece. Therefore, from a Greek-Cypriot perspective the vast majority of the people of Cyprus had expressed its right to self-determination and that decision could not be

1 See Katrougalos, G., *Social Rights*, (Athens: Ant. Sakkoulas, 2006), p. 13.

2 Tornaritis, C., *Cyprus and Its Constitutional and Other Problems* (Nicosia, 2nd ed., 1980), pp. 54-66.

cancelled by the opposing views of the minority as that would defeat the principle of self-determination and would compromise the essence of the democratic principle. On this basis, the Greek-Cypriots fought against the British for four years (1955-1959) demanding unification with Greece. On the other hand, the Turkish-Cypriot minority opposed the unification with Greece and asked for separate expression of the right to self-determination that would in effect result to partition of the island and dual unification with Greece and Turkey, respectively. In pursuing that objective the Turkish-Cypriots were supported by Turkey and were encouraged by the British in their attempt to use the classic maxim of 'divide and rule'. Therefore, the two communities approached the moment of decolonisation with separate and divergent objectives and with a feeling of strong disappointment, lack of common vision and lack of proper autonomy given the highly influential role of the external powers.[3]

In terms of the constitutional setting, the Cypriot Constitution is the outcome of international law in its bizarre form. In specific, the process of decolonisation and the transfer of power to a newly formed independent State were decided in principle and in detailed content in Zurich by Greece and Turkey, in the physical absence of the legally responsible entity that was the colonial power. That paradox is significant as Great Britain within days of the conclusion of the international agreement between Greece and Turkey stated its acceptance of all the terms with just one single addition in relation to the status of the bases it was to retain on the island. The Zurich agreement had 17 points that would form the core of the new State and those were to be the framework and the content of the new Constitution. Therefore, the right of self-determination and more importantly the right to exercise primary constitutive power found no expression in the case of *Cyprus*. This pathogeny of the Constitution has been a significant factor in the latter collapse, as the absence of the expression of the will of the people in combination with the feeling of disappointment that related to the non-unification with Greece, partly removed from the Constitution one of its fundamental functional features: symbolic status that flows from the expression of constitutive power by the people and that results in the special hierarchy of and attachment to the Constitution by the people.

The Cypriot Constitution[4] was designed to serve as a compromise between the two communities through the creation of an independent State, where the rights of the

3 On the historical aspect, see Kyriakides, S., *Cyprus: Constitutionalism and Crisis Government* (University of Pennsylvania Press, 1969); Polyviou, P., *Cyprus: The Tragedy and the Challenge* (Washington, DC: American Hellenic Institute, 1975).

4 Loizou, A., *The Constitution of the Republic of Cyprus* (Nicosia, Cyprus, 2001), pp. 12-31; Nicolaou, I., *The Control of the Constitutionality of the Laws and the Separation of Powers of the State Institutions of Cyprus – Constitutional Regulation and the Evolution of the Law of Necessity* (Athens: Sakkoulas, 2000), pp. 105-34; Stavsky, M., "The Doctrine of State Necessity in Pakistan" (1983) 16 *Cornell International Law Journal* 341, pp. 355-58; Evriviades, M., "The Legal Dimension of the Cyprus Conflict", (1975) 10 *Texas International Law Journal* 227; Tornaritis, 1980, pp. 54-77.

minority were to be entrenched in a manner and scale that would ensure the failure of any attempt by the Greek-Cypriots to impose unification with Greece. In attaining that objective, the three interested States (Greece, Great Britain and Turkey) were given extraordinary powers of intervention in case of arrant constitutional anomaly, thus providing a rare paradigm in international law where an independent State is in effect at best operating under the auspices and the aegis of foreign powers and at worse indirectly controlled.

Surmising, the factors that one must have in mind before engaging into the study of the Cypriot Constitution are historical, political and finally legal in nature. In specific, there is the feeling of utter disappointment of the Greek-Cypriot majority with the solution of independence, given the long struggle for unification with Greece, the feeling that the view of the majority as expressed via self-determination should have been respected and the strong reaction to the fact that the decided independence was in effect imposed in the most absolute terms upon the Greek-Cypriots. Moreover, there is the feeling that the formation of even an independent State was ill-conceived and was in effect designed in order to create a semi-independent alas supervised State that would be closely observed and scrutinised by external powers, thus neutralising for a second time the role of a majority in a democratic system. In addition, the final outcome of the preceding international arrangement was a Constitution that lacked the necessary symbolism. This problem has an added complexity given the constitutional paradox whereby the Cypriot Constitution was granted to the new State with minimal room for subsequent alteration of its basic principles. As a corollary, that process excluded any effective expression of primary constitutive power by the people, thus alienated the people from the Constitution and its symbolic importance.

In the aforementioned context, the content *per se* of the Constitution proved to be overly rigid and has been accurately described by De Smith as being conceived "by a constitutionalist and a mathematician in nightmarish dialogue".[5] Nonetheless, the provisions on human rights seemed to provide a notable exception whereby in Part II of the Constitution 1960, the protection reserved for fundamental rights proved to be innovative both textual and in judicial pronouncements.

5 De Smith, S. A., *The New Commonwealth and Its Constitutions* (London: Stevens, 1964), at p. 284.

### 4.2.2 *Cyprus and Human Rights Provisions-Introducing the Social Part and the Impact of External Sources*

The Constitution 1960, as explained *supra*, has its foundations in the London Agreement,[6] which provided for the formation of a Joint Commission in Cyprus responsible for the finalising the document of the constitution as that had been defined in the constitutional framework that the London Agreement created.[7] Specific to that arrangement was the appointment of an independent legal expert, Professor Marcel Bridel, the University of Lausanne.[8] The Greek and the Turkish delegations submitted separate drafts for the Constitution, which contained a distinct part focusing on the protection of human rights, while the common approach that both drafts adopted was the placed emphasis solely on traditional political and civil rights. The independent expert, Professor Bridel, can be credited with the introduction of social rights in the Constitutional bill of rights, with the representations of the two communities adopting Bridel's holistic approach.[9] Therefore, the 1960 Constitution contains in Part II an extensive bill of rights that includes social rights. The constitution of the Republic of Cyprus by a series of articles guarantees to the individual certain social and economic rights which are to be exercised within the framework of public interest and common good.[10]

Before identifying the specific content and variety of protected social rights in the Constitution of the Republic of Cyprus, it must be pointed out that the Constitution adopts an ideologically neutral position as regards the economic, social and political structuring. That neutrality is nonetheless not value-free, since the Constitution strikes a careful balance between liberalism and protectionism, in the sense that the individual is guaranteed the necessary space and freedom of choice for engaging into its preferred commercial and professional activity, while simultaneously providing the safety net for maintaining social cohesion and equalitarian justice. Therefore, a social welfare state is underpinning the considerable margin of freedom provided to the free economic agent, in a manner akin to that adopted in the German *Grundgesetz* (Articles 20 and 28) providing for the *Sozialstaatsprinzip* (*social state*). Accordingly, the German jurisprudence has seen the individual actor as not that of an isolated sovereign individual. The Basic law has resolved the tension of the individual much more in the sense of relations to society and ties of a person to

6 Cmd. 679, 19 February 1959, between the Governments of the UK, Greece and Turkey and the leaders of the Greek and Turkish Community of Cyprus.

7 Tornaritis, 1980, available at <www.kypros.org/Documents/Tornaritis/docs/nicosia.html>, pp. 28-53. Accessed 18/10/2015; Tornaritis, C., *The Public Law of the Republic of Cyprus* (Nicosia), pp. 5-32.

8 See the original work by Tornaritis, 1980, available at <www.kypros.org/Documents/Tornaritis/docs/social.html>, p. 2. Accessed 18/10/2015.

9 Ibid. Tornaritis clarifies that Bridel recommended liberty to work, trade and industry, liberty of contracts and the right to strike.

10 Ibid.

society at the same time without infringing his own worth … the individual must put up with those limitations on his freedom of action which the legislator draws for the care and advancement of communal social life within the boundaries of what is generally reasonable in the given circumstances provided that the independence of the person is preserved at the same time.[11]

Needless to say, the textual and judicial approach to social rights in the Cypriot legal order is in no way a parallel of the German approach; a rather more limited approach has been adopted, as explained *infra*. The careful balancing between free economic activity and the welfare state is derived from numerous constitutional provisions construed in conjunction with each other.

### 4.3 Identification, Hierarchical Status and Effectiveness of Protection for Social Rights: The Perspective of the Juridical Approach

The Constitution 1960 provides for numerous rights of social content, which are analysed in turn in terms of content, with sporadic reference to relevant case law in this section. A full review of the jurisprudence is the task of the next section.

> In specific, *Article 9 of the Constitution* provides that:
> Every person has the right to a decent existence and to social security. A law shall provide for the protection of the workers, assistance to the poor and for a system of social insurance.

Certain observations can be made as regards this provision. Firstly, the provision contains different yet rights-related concepts, namely 'decent existence', 'right to social security' and also an obligation imposed on the State to offer (i) protection to a specific class of beneficiaries (workers), (ii) assistance to the poor (yet with not defining either the composition of that class or the criterion for it), and (iii) a system of social insurance.

Secondly, the provision is a partial reflection of Article 25 UDHR that provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event

11 4 BVerfGE 7, 15-16 (*Investment Aid Case*, 1954). Similarly in BVerfGE 80, 137, 6 June 1989, Reiten im Walde (Riding in the Woods).

> of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
> The UDHR provision includes a type of yardstick for setting the minimum content for 'decent existence', whereas the Constitution 1960 omits, and rightly so, to provide a specific definition of the concept of 'decent existence' or a measuring criterion.

Thirdly, the attachment of a specific meaning to 'decent existence' is according to Tornaritis inferred from the comprehensive analysis of the "whole tenor" of the provision.[12] Therefore, "the state has an obligation to create and maintain such conditions of living, of work and of health as to enable every person to enjoy a standard of living adequate for the health and well-being of himself and his family".[13] Moreover, Tornaritis argues that Article 9 can be seen as having two parts, with the second part specifying the practical steps that the State has to take in order to ensure the realisation of the more vague first part that refers to decent existence.[14]

Given the preceding observations, it must be noted that judiciary had to provide interpretations that would clarify two issues: firstly, the meaning of 'decent existence', and secondly, the nature of the obligations (programmatic directives or concrete legislative steps) derived from Article 9 and its justiciability.

The response has been immediate, since the judiciary from the early stages of the republic has undoubtedly accepted the justiciable and autonomously standing status of Article 9, as was established in the decision in the case of *Papafilippou v. Republic*.[15] According to Loizou,[16] the Supreme Constitutional Court in the given case held that individuals are not entitled under administrative law to demand from the Council of Ministers the preparation and introduction to the House of Representatives of a *specific bill*[17] promoting decent existence. Therefore, the Constitution in Article 9 imposed a specific obligation on the State to take action, but the assessment of that actions can take place only after its materialisation and surely not in abstract and not in terms of demanding specific measures to be taken even before the State had taken steps to comply with its obligations under Article 9. Put differently, under the principle of the separation of the powers, the judiciary has the duty to supervise the compliance of the executive and the legislature with the substantive obligation set out in Article 9 of the Constitution, but that

12 Tornaritis, 1980, available at <http://www.kypros.org/Documents/Tornaritis/docs/social.html>, p. 10. Accessed 18/10/2015.
13 Ibid., p. 11.
14 Ibid.
15 *Papafilippou v. Republic*, 1 RSCC, p. 62, at p. 64.
16 Loizou, A., *The Constitution of the Republic of Cyprus* [Σύνταγμα Κυπριακής Δημοκρατίας], (Nicosia, Cyprus, 2001), pp. 50-1.
17 Emphasis added.

supervision can take place only if there has been a prior specific action of the State, in the form of a particular provision of Law, that can provide the basis for examining whether it ensure a decent existence in each particular case.[18]

Moreover, Article 9 of the Constitution does not specify a right to a specific type of pension and does not provide for a right to social pension. This has been provided by the legislation in order to provide cover to those that remain uninsured by being outside the framework of the legislation on social insurance.[19]

In the cases *Hadjisavvas v. Republic* and *Kaoulas v. Republic*, the applicant claimed that Article 38(1)(d) του of the Law on Social Insurance (*Law 41/1980*), that connects the disability pension with contributions, is contrary to Article 28 of the Constitution that applies the principle of equality, as well as contrary to Article 9 on decent existence. However, the Supreme Court held that the provision of Article 9 cannot be construed by the Court in a manner that attributes specific monetary value to the provision.[20]

In the case of *Municipality of Pyrgon* it is stated that Article 9 on decent existence may provide to the individual and as a corollary to a municipal authority, a valid ground for challenging decisions affecting the environment in which the applicants live.[21] As with the right to life that is guaranteed under Article 7.1 of the Constitution, so the right to decent existence in Article 9 of the Constitution is defined as an autonomous right, thus expanding the scope of its application.[22]

In addition, the justiciable nature of Article 9 is further supported by the scope-setting provision of Article 35 under which "the legislative, executive and juridical authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient provisions of this Part". Therefore, Article 9 as construed under the scope set by Article 35 contains substantive constitutional obligations for the State, with the courts also being obliged to supervise the application of the relevant provisions.

Nonetheless, the issue of whether Article 9 contains programmatic in nature provisions does not seem to be a simple one. In *Katsaras Panayiotis and Others*,[23] the Supreme Court stated that in the context of Article 9 of the Constitution, the therein contained obligations must be construed as containing "*directives* tending to promote 'decent existence', 'social

18 See also *Tasoula Pelidi and others v. the Republic*, through the Social Insurance Department, Recourse No. 1650/1999, dated 15 June 2001.

19 *Pelide v. Republic*, Case 1650/99, 789/00, 15 June 2001.

20 *A. Hadjisavvas v. Republic*, Case 396/2005, 31 July 2006; *Kaoulas v. Republic*, Case 407/2009, 18 March 2011 (where reference was made to the classic decision in *Dias United Publishing Co. Ltd v. Δημοκρατίας* (1996) 3 CLR 550 and to *Vrountou v. Republic*, Case 3830, 3 June 2006).

21 Ibid; *Municipality of Pyrgon* (1992) CLR 223, Case 671/91, 31 January 1992; *Republic v. CI Geriou*, Appeals 2156 and 2158, 27 February 1998; Judge Pikis in *Sophocleous v. Republic* (1986) CLR 2220, Case No. 76/85, 20 September 1986.

22 *Republic v. CI Geriou*, Appeals 2156 and 2158, 27 February 1998.

23 Katsaras Panayiotis and Others v The Republic of Cyprus through the ministry of Labour and Social *Insurance* and Others (1973) 3 CLR 145, at p. 150.

security', 'social insurance', 'protection of the workmen'".[24] Nonetheless, the reference to directives should not be construed as downgrading the nature of the substantive nature of the obligations created by Article 9; rather, there must be a clear distinction between substantive obligations to act and substantive obligations to act that are judicially supervised. Therefore, the obligations of Article 9 are substantive obligations but they can be judicially scrutinised only after the State organs undertook action in order to attempt to comply with Article 9. There can be no judicial intervention in terms of Article 9 compliance *in abstracto*, but only in specific context that a legislative act had created and on a case-by-case basis.

The status of Article 9 has been explained clearly by the Supreme Court in *Apostolides Georghios and Others*[25] where it was held that "Article 9 has the effect of placing social rights on an equal footing with political rights, both fundamental under the Cyprus Constitution, as well as the universal declaration of human rights proclaimed by the General Assembly in 1948".[26] In specific, the Court found that the Termination of Employment Law, 1967 (Law 24/67) was enacted in discharge of the specific obligations of the State under Article 9 and that the temporary suspension of redundancy payments was a measure designed to protect the institution of redundancy payments for the sake of the longer-term interests of workers. Moreover,

> there was nothing before the Court proving that the temporary suspension of redundancy payments constituted, in the grave circumstances that followed the Turkish invasion, a departure from the constitutional dictate to provide for workers and the poor a system of social security compatible with the means of the State.[27]

Accordingly Law 1/75 was not found to be contrary to Article 9 of the Constitution. The Supreme Court also held that:

> the repeal or modification of a law granting social security, is far from being in itself conclusive about the discharge of the obligations of the State under Article 9. The whole field of social legislation must be reviewed and examined in order to ascertain whether, at anyone time, the sum total of the measures of social security are proportionate to the means of the State. This, in turn, would require a dual exercise involving examination of the compass of social legislation

24 Emphasis added.
25 Apostolides Georghios and Others *v* The Republic of Cyprus through the Ministry of Labour and Social Insurance and Others (1982) 3 CLR 928.
26 Ibid., at p. 932.
27 Ibid., at p. 932.

> in its entirety on the one hand, and the socio-economic climate of the country, on the other.[28]

Therefore, the economic situation and capacity are relevant factors to be taken into account when assessing the compliance with Article 9.

Finally, the issue of defining 'decent existence' has not taken a specific form and the Court has yet to provide a definition of the term, but since the court in effect engages in a specific evaluation of a specific legislation as to whether it ensures decent existence, the criterion can be inferred to be that of the reasonable man.

Article 25(1) provides that "Every person has the right to practice any profession or to carry any trade or business".

In this provision the Constitution adopts a classic balancing approach that is universally present in constitutional settings.[29] On the one hand, it safeguards the conditions that are essential for utilising the potential of the free economic actor by providing freedom to select profession or exercise any business. On the other hand, the Constitution sets real limits and boundaries on the exercise of such a freely selected profession and business, with the State reserving the power to regulate it for the protection of the rights of others or of the community at large.

Therefore, the choice of vocation is supposed to be an act of self-determination, a free decision of the individual will. It must as far as possible remain unaffected by interferences from state power. By exercising his vocation, the individual takes a direct part in social life. Limitations can be imposed on the individual here in the interests of others and of the general public. The more the individual's right to free choice of vocation is in question, the more powerful the effect of his claim to freedom. The greater the disadvantages and risks to the community from completely free exercise of vocation, the more pressing the community's protection becomes.

If an attempt is made to take both requirements into account in the most effective way possible, the solution can only be found in each case by careful balancing [*Abwägung*] of the importance of the opposing (and possibly actually conflicting) interests.

It must also be noted that the regulatory power of the State is expressly reserved by Article 25 and according to Tornaritis is not forming part of the general police power of the state. This specificity is significant since any restriction imposed has to be theme specific and

28 Ibid., at p. 943.

29 See, for example, the decision of the German Federal Constitutional Court in BVerfGE 7, 377 ("Apothekenurteil") (Pharmacy Judgment).

cannot be deducted from the generalised intention to safeguard public interest at large.[30] Moreover, according to Article 25(2):

> the restrictions must be provided by law and should relate regarding a profession exclusively to the qualifications usually required for the exercise of such profession or necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public or the public health or the public morals or for the protection of the rights and liberties guaranteed by the constitution to any person or in the public interest.

In this sense, the Supreme Court accepted in Kyriakides Christodoulos (No. 2)[31] that limitations can be imposed by the State on the exercise of Article 25(1) and as such "is an exercise of the police powers of the State, as understood in a technical sense in Constitutional Law. So paragraph 2 of Article 25 must be regarded as a constitutional provision enabling the exercise of such police powers within certain limits".[32] Interestingly enough, the Court went on to state that "The exercise of police powers by the legislative authority is not subject to judicial control in so far as its wisdom, adequacy or practicability are concerned",[33] citing to that effect classic US precedent.[34] The point was that the exercise of regulatory powers was subject to judicial review and that "the determination by the Legislature of what constitutes proper exercise of police powers is not final or conclusive, and it is subject to supervision by Courts acting within their competence in order to ensure that it is confined within the due limits".[35]

In *re Ali Ratip*,[36] it was stated that the freedom guaranteed under Article 25 is not merely theoretical, while in *Police v. Liveras*[37] it was held that Article 25 refers to a direct and not indirect intervention restriction of the right. Therefore, municipal regulations that restricted parking were lawful for serving the public interest. In *Nicosia Police v. Georghiou & Others*,[38] the Court examined the constitutionality of Law on Bakeries, Cap. 177. It was held that the restriction that the law imposed via Article 3 to the opening

30 Tornaritis, 1980, p. 13. Accessed 18/10/2015.

31 Kyriakides Christodoulos (No. 2) The Council for Registration of Architects and Civil Engineers (1965) 3 CLR 617.

32 Ibid., at p. 626.

33 Ibid.

34 *Nebbia v. New York* 291 U.S. 502; 78 L. Ed. 940.

35 Ibid. Also citing American authority: *Meyer v. Nebraska* 262 U.S. 390; 67 L. Ed. 1042, *Lawton v. Steele* 152 U.S. 133; 38 L. Ed. 385. To a similar effect, see *Meridian Trading Co. Ltd. v. Ministry of Commerce and industry* (1987) 3 CLR. 1930 per Judge Pikis; Siampetas Christos v. The Republic of Cyprus through the Minister of Commerce and Industry and Others (1989) 3 CLR 76.

36 *In re Ali Ratip*, 3 R.S.C.C. 102, 105.

37 *Police v. Liveras*, 3 R.S.C.C. 65.

38 *Nicosia Police v. Georghiou & Others*, 4 R.S.C.C. 36.

of bakeries at night was not necessary for the protection of public health or of the employees of the bakeries, thus rejecting the two grounds upon which the regulations were adopted.[39]

In *Georghiou v. Police*,[40] Judge Pikis stated that "only where the limitations restrict the exercise of the right in a manner that is incompatible with the freedom that the Constitution guarantees, will there be breach of the right". In specific, the limitations must in general comply with the different limbs of the proportionality principle. Moreover, in *President v. House of Representatives (No. 2)*[41] restrictions to the exercise of the profession of car salesman were found to be arbitrary and unconstitutional for not pursuing any public interest and also for failing to consider the essential features of the exercise of the profession.

Finally, in *Georghiou v. Police*,[42] it was held that unconstitutionality would arise only where the necessary restrictions imposed to the freedom to exercise a profession, like the opening times for shops, have a direct impact on the nucleus of the right protected under Article 25.1 of the Constitution and where the effect of such limitations is to neutralise the freedom guaranteed.[43]

Surmising, the police powers of the State in their regulatory form are taking a specific content relevant to restrictions imposed by law on Article 25(1). This specificity serves the purpose of guarantying the exclusion of general and broad arbitrary interference from the State, while at the same time without depriving the individual from the free choice of selecting profession and business.

*Article 20* provides for the right to education, including the right to free and compulsory primary education, and liberty of individuals and institutions to give instructions or education.[44] In specific, Article 20(1) states that:

> Every person has the right to receive, and every person or institution has the right to give, instruction or education subject to such formalities, conditions or restrictions as are in accordance with the relevant communal law and are

39 See also *District Officer Nicosia and Others v. Michael*, 4 R.S.C.C. 126, *Police v. Lanitis Bros Ltd (Coca-Cola)*, 3 R.S.C.C. 10, *Kontos v. Republic* (1974) 3 CLR 112, *Marabou Floating Restaurant Ltd v. Republic* (1973) 3 CLR 397, *Meridien Trading v. Minister of Commerce* (1987) 3 CLR 1930, *Eleourghia Pettemerides v. Republic* (1988) 3 CLR 1880, *και Vorkas and Others v. Republic* (1984) 3 CLR 757.

40 *Georghiou v. Police*, Criminal Appeals 6759, 6801, 6802, 8 December 1999.

41 *President v. House of Representatives (No. 2)* (1993) 3 CLR 165.

42 *Georghiou v. Police*, Criminal Appeals 6759, 6801, 6802, 8/12/1999.

43 See also *NANOKA LTD v. Police*, Criminal Appeal 6938, 12 July 2001; *Andronikos Vassiliades Ltd v. Police*, Criminal Appeals 6786 and 6800, 19 October 2001.

44 Report by the Republic of Cyprus, On the Implementation of the ICSECR, March 2009, <www.olc.gov.cy/olc/olc.nsf/0/0aa954e8aee4b23bc225758d001bf48b/$FILE/Answers %20to%20Issues%20-%20Questions.pdf>, p. 3. Accessed 18/10/2015.

> necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or the standard and quality of education or for the protection of the rights and liberties of others including the right of the parents to secure for their children such education as is in conformity with their religious convictions.

It is significant to note that the provision is broader than Article 2 of Protocol 1 ECHR that states

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

The broadness of the Constitutional provision relates primarily to the emphasis placed in paragraph 2 of Article 20 where it is provided that "Free primary education shall be made available by the Greek and the Turkish Communal Chambers in the respective communal primary schools". According to Loizou, the compulsory primary education that will be free creates obligations for the parents and responsibilities for the State.[45]

In terms of those obligations in relation to the free nature of education, it has been held that they do not extend to subsidising higher studies abroad as the decision in Constantinides George[46] established. In that case, it was held that the right to receive education, which is safeguarded under Article 20 of the Constitution, is clearly, applicable only to education in Cyprus and not to education abroad.[47]

In terms of freedom of choice, in the case of *Stella Theodoulidou*[48] the applicants challenged the decision of the educational authorities that restricted the exercise of free choice for registration at the school of their choice. The applicants argued that the restriction violated their right to education guaranteed in the Constitution under Article 20. The Supreme Court held that the right to education refers to the liberty of parents to choose between public and private education for their children and not the liberty to choose which public school their children will attend.[49]

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45 Loizou, A., *The Constitution of the Republic of Cyprus* (Nicosia, Cyprus, 2001), p. 131.

46 *Constantinides George v. The Republic of Cyprus through the Minister of Finance* (1967) 3 CLR 483.

47 Ibid., p. 491.

48 *Theodoulidou Stella v Republic* (1989) 3 CLR 2605.

49 Report by the Republic of Cyprus, On the Implementation of the ICSECR, March 2009,<www.olc.gov.cy/olc/olc.nsf/0/0aa954e8aee4b23bc225758d001bf48b/$FILE/Answers%20to%20Issues%20-%20Questions.pdf>, p. 3. Accessed 18/10/2015.

In the case *The Alpha and the Omega Evangelical Educational Foundation Ltd v. Republic*,[50] it was claimed that the legislative provision intending to regulate the level of tuition fees for private schools was unconstitutional. In specific, the argument stated that the provision infringed the right to enter freely into a contract as that is provided for Article 26 of the Constitution, as well the right to education and the subsequent right to establish private schools (Article 20). The Supreme Court held that Article 20 of the Constitution provides also for the imposition of such restrictions that are necessary for protecting the public interest, the rights of others and the essence of the right to education in terms of its quality.

Therefore, the establishment of private schools was held to be subject to the limitations necessary for protecting the public interest. This conclusion was reached by making reference to the decision of the ECtHR in the *Belgian Linguistic* case and to cases of the *Greek Conseil d'Etat*. Those limitations include the imposition of caps to tuition fees, provided that the financial viability of the private schools is taken into consideration.

In the case of *Kyriaki Kallenou v. Republic*, it was held that Article 20 of the Constitution, as well as relevant provisions of international treaties like Article 2 of the Additional Protocol of the ECHR and Article 13 of the ICESCR, allow the State to impose the necessary restrictions in the interest of ensuring the quality of the provided education, subject to not nullifying the essence of the right. Therefore, the decision as to the number of available places for applicants to the Educational Academy is constitutional.[51]

In conclusion, the Constitution offers clear and extensive protection to the right to education that is broader than that afforded under the ECHR and at the same time it imposes those restrictions necessary for safeguarding the quality and unrestricted substantive access to educational facilities in Cyprus.

*Article 21* provides for the right to form and join trade unions. In specific:

1. Every person has the right to freedom of peaceful assembly.

Every person has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. Notwithstanding any restriction under paragraph 3 of this Article, no person shall be compelled to join any association or to continue to be a member thereof.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are absolutely necessary only in the interests of the security of the

50 Case 583/89, 31 January 1990.

51 *Kyriaki Kallenou v. Republic*, Case 610/89, 9 May 1990; *Christophorou and Others v. Republic* (1985) 3(A) CLR 272.

Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person, whether or not such person participates in such assembly or is a member of such association.

Any association the object or activities of which are contrary to the constitutional order is prohibited.

A law may provide for the imposition of restrictions on the exercise of these rights by members of the armed forces, the police or gendarmerie.

According to Tornaritis, "a trade union is a combination whether temporary or permanent of the relations between workmen and employers or between workmen and workmen, or between employers and employers and includes a federation of trade unions the members of which are engaged in the same or similar trade or calling".[52]

It is also notable that the constitutional protection has a dual effect in the sense that it protects the exercise of the free choice to either join or not join a trade union, thus elevating the emphasis on free choice as a higher value than that embedded in organised action in the form of trade union membership. As Tornaritis rightly observed, "this is in line with the prevailing trend in Europe where 'compulsory trade unionism' is not favoured".[53]

In specific, the Supreme Court in *Iordanou Iordanis*[54] adopted a functional approach in favour of the effective operational capacity of trade unions and of the civil servants' union in specific, by finding that "existence and the proper and unhindered functioning of a trade union of public officers is not only a matter of fundamental rights and liberties (see Article 21 of the Constitution), but it is also a matter directly related to the proper functioning of the public service, as such".[55]

That required the close collaboration between the employer (State) and the trade union and it took the form of an obligation to consult before transferring a trade union official in a post that would hinder his capacity to act effectively as a trade union officer. The fact that the issue was elevated to a matter affecting the functionality of the public service in general and proper administration in specific, clearly illustrates the judicial willingness to ensure the substance of Article 21. That of course was qualified with the statement that such a transfer could not take place "unless there exist compelling reasons to the contrary and it follows that the Public Service Commission, in each case, has to weigh the needs of a particular Department as against the wider interests of the public service in general and has to decide which should prevail, giving due reasons in support of its relevant decision".[56]

52 Tornaritis, 1980, p. 20. Accessed 18/10.2015.
53 Ibid.
54 *Iordanou Iordanis G v. The Republic of Cyprus through the Public Service Commission* (1967) 3 CLR 245.
55 Ibid., p. 248.
56 Ibid.

Nonetheless, the Constitution also ensures that the functionality of the State is not endangered by providing for restrictive powers, via legislation, in relation to essential services. This matter has proved problematic recently with the members of the police being allowed to join a trade union after a reasoned opinion by the Attorney General in 2011 that pointed to the constitutionality of such an action on an individual basis and not on the basis of collective registration of policemen to the civil servants' union.

Therefore, the right to form and join trade unions must be seen as being distinctly and expressly protected irrespective of the broader freedom to contract protected under *Article 26*. That provision states that

> 1. Every person has the right to enter freely into any contract subject to such conditions, limitations or restrictions as are laid down by the general principles of the law of contract. A law shall provide for the prevention of exploitation by persons who are commanding economic power. 2. A law may provide for collective labour contracts of obligatory fulfilment by employers and workers with adequate protection of the rights of any person, whether or not represented at the conclusion of such contract.

The freedom to contract is closely connected with the employment relationship and the Constitution expressly reserves the power for the State to intervene in favour of the weaker party, that is the employees, in order to preserve the social equilibrium.

It can be observed that what is protected under this Article is the right to enter into a contract that does not necessarily extend to the contractual obligations *per se*.

As Tornaritis argues, "Rights arising out of a contract are not fundamental rights guaranteed by the constitution of Cyprus. It is competent, therefore, for the state by legislation to alter the terms and conditions of a contract in the public interest".[57] Article 26.1 of the Constitution was also construed in *Constantinos Chimonides v. Evanthia K. Manglis*.[58] Judge Triantafillides stated:

> …, the right under Article 26(1) is not the freedom of contract in the wide sense of the term, but only the right to enter into a contract. Thus, there is no constitutional prohibition against regulating by legislation, in an emergency or otherwise, the obligations arising under contracts; furthermore, as the right to

57 Tornaritis, 1980 available at <http://www.kypros.org/Documents/Tornaritis/docs/social.html>, p. 18. Accessed 18/10.2015. For such examples, he cites the Interest law (Cap 150) fixing the maximum rate of interest at 9% to the Ursury (Framers) Law (Cap 101); the Rent (Control) Law (Cap 86); the rent Control (Business Premises) Law 1961, the Commodities and Services (Regulations and Control) Law, 1962; the Agricultural Farmers Relief Law, 1962.

58 *Constantinos Chimonides v. Evanthia K. Manglis* (1967) 1 CLR 125.

> enter into a contract, guaranteed by Article 26(1), is expressly made 'subject to such … restrictions as are laid down by the general principles of the law of contract', and as one of such general principles is that contracts which are contrary to law are invalid, it is open to Government to regulate, through legislation in force at the time, the manner in which the right to enter into a contract is to be exercised, provided that such legislation is not otherwise contrary to the Constitution – as, for example, by being contrary to Article 28(2) of the Constitution.[59]

The regulatory power of the State is however not nullified but is rather exercised on the basis of the principle of proportionality.[60] This approach is once again in line with the balancing approach between free economic action and welfare-related protection. In relation to trade union rights, a specific reference needs to be made to an extremely important and interesting decision regarding the horizontality of human rights provisions. In *Pasyno v. Republic*,[61] it was held that the right to join a trade union is both positive and negative in the sense of enabling the creation and joining of a trade union and also of the right not to join. Moreover, there should be avoidance of an imposed syndicat unique obligatoire and there must be a guarantee for the pluralisme syndical. The Court also stated in obiter that the provisions on human rights are simultaneously a shield and a sward, while their effect is erga omnes and applies equally to private parties (employers). This extremely interesting approach towards social rights has not been followed in a systematic manner in other cases.

*Article 27* provides for the right to strike:

1. The right to strike is recognised and its exercise may be regulated by law for the purposes only of safeguarding the security of the Republic or the constitutional order or the public order or the public safety or the maintenance of supplies and services essential to the life of the inhabitants or the protection of the rights and liberties guaranteed by this Constitution to any person.

2. The members of the armed forces, of the police and of the gendarmerie shall not have the right to strike. A law may extend such prohibition to the members of the public service.

Therefore, the right to strike is recognised and protected while at the same time the State can by law regulate it for the purposes of safeguarding the broader public interest that is nonetheless exhaustively defined in paragraph 1. Consequently, the right to strike

59 Ibid, p. 162.

60 *The Alpha and the Omega Evangelical Educational Foundation Ltd v. Republic*, Case 583/89, 31 January 1990.

61 *Pancyriot Trade Union for Nurses (PASYNO) v. Republic*, Case No. 800/92, 26 January 1994.

as potentially regulated can be limited with reference to the specific circumstances and grounds provided in Article 27. That restrictive power, as Tornaritis rightly argues,[62] has to be understood in conjunction with Article 33 that states:

> the fundamental rights and liberties guaranteed by this Part shall not be subjected to any other limitations or restrictions than those in this Part provided. The provisions of this Part relating to such limitations or restrictions shall be interpreted strictly and shall not be applied for any purpose other than those for which they have been prescribed.

Therefore, a careful balance is maintained that ensures the core of the right yet not at the expense of the functionality of the State.

Moreover, the Constitution has not defined the concept of strike neither have the courts so far. In *Organisation of Crushed Stone and Sand Industrialists v. Protection of Competition Commission*,[63] the applicants argued that a decision of the Protection of Competition Commission that permanently suspended the sale of their product violated their right to strike. The Supreme Court rejected the claim and held that the right to strike requires an employer–employee relationship, that was absent in the present case. Therefore, the restrictions to the right to strike refer to employees only and the decision of the Completion Commission was not a restriction of the right to strike that had to comply with the specific conditions set in Article 27. As such the decision of the applicants to suspend the sale of their product was not a strike in the sense of Article 27 of the Constitution.

In *Panagia Mirtidiotissa*[64] that concerned a strike undertaken by International Transport (Workers) Federation (ITF) in order to safeguard the employment rights of two of its members, the Court held that the right to strike that aims to the improvement of pay conditions in the given case, cannot be considered as being exercised in breach of Article 27(1) that protects the right as a fundamental human right, the core of which cannot be negated.

It is also unclear as to whether sympathy strikes or even political strikes can be regarded as coming within the scope of Article 27. In any case, with the coming into force of the EU Charter on Fundamental Rights and with the therein contained provision of Article 28 it seems now doubtful whether any strike action can be regarded as legal if it does not have as its aim the protection of the specific interests of the specific trade union.

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62 Ibid., at p. 21.

63 *Organisation of Crushed Stone and Sand Industrialists v. Protection of Competition Commission* (case no. 734/91), 25 February 1992 as analysed in Report by the Republic of Cyprus, On the Implementation of the ICSECR, March 2009, <www.olc.gov.cy/olc/olc.nsf/0/0aa954e8aee4b23bc225758d001bf48b/$FILE/Answers%20to%20Issues%20-%20Questions.pdf>, pp. 3-4. Accessed 18/10/2015.

64 *Panagia Mirtidiotissa* (1998) 1 CLR 1000.

Finally, the so-called sensitive sections of the State are excluded from the protective scope of Article 27, thus excluding the members of the armed forces and the police and the public service from taking action of an industrial nature. However, there has been no legislative-specific exclusion to that effect yet, despite recent calls to that direction.

As regards the principle of equality, that is expressly guaranteed in Article 28 of the Constitution, the jurisprudence is vast and it must be clarified that the principle of equality is approached as a right and also as a yardstick for assessing the interference with other rights.[65] The full analysis of equality is omitted at this stage, with the emphasis being placed on rights that are perceived as more socially centred, since the principle of equality could be easily classified as a civil right. Moreover, the impact of EU law on the matter has been great and the full analysis is therefore exceeding the purposes of this paper.

In conclusion, the Constitution of the Republic of Cyprus offers substantive formal protection to social rights which at the time of its drafting was progressive. In terms of substantive actual protection, the judiciary seems to have shown a strong willingness to preserve the carefully structured balance that the Constitution intends, with the equilibrium between free individual choices on the one hand and general welfare and functionality of the State on the other.

## 4.4 The Implementation and Supervision Mechanisms Available in the Cypriot Legal Order for Protecting Social Rights: Judicial Structure and Protection Framework

### *4.4.1 General Observations*

The Constitution provides a plethora of devices for ensuring the effective supervision of the provisions of Part II of the Constitution relating to fundamental rights.

First, there is a general approach in Part II that does not distinguish in formal hierarchical terms between categories of rights, thus placing classic political and civil rights and social rights in an equal position.

Second, the Constitution focuses on the premise that sees all rights, with the exception of the prohibition against torture and the possible exception for forced labour and slavery, as non-absolute. Therefore, the Constitution provides that all rights can be restricted through action undertaken by State provided that such action is provided for by law and is compatible with the specific pre-conditions that each article protecting fundamental rights sets. Therefore, there is no absolute or general power of 'police' powers that the State

65 *Melpo Gregoriou v. Nicosia Municpality (No.1)*, Case 541/86, 12 September 1991; *Kyriakos Papagiannis v. Industrial Training Authority*, Cases 652/89 & 676/89, 19 June 1992.

can use in order to ensure an expansive and broad intervention against constitutionally safeguarded rights. This specificity that applies to restrictions ensures against the arbitrary use of power by the State and offers the framework for the judiciary within which it can effectively supervise the actions of the legislature and the executive.

Third, the Constitution also provides in Articles 33 and 35 for the scope of protection and the scope of the provided limitations. In specific, Article 33 states:

> Subject to the provisions of this Constitution relating to a state of emergency, the fundamental rights and liberties guaranteed by this Part shall not be subjected to any other limitations or restrictions than those in this Part provided. 2. The provisions of this Part relating to such limitations or restrictions shall be interpreted strictly and shall not be applied for any purpose other than those for which they have been prescribed.

Therefore, the effect is that the provided limitation clauses of Part II must be construed restrictively and specifically, thus ensuring a high standard of protection and the empowerment of the judiciary to supervise effectively the protection for all fundamental rights. Moreover, Article 35 states: "The legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this Part". Therefore, the duty to ensure protection for all fundamental rights applies horizontally to all branches of the State and in relation to all persons within jurisdiction. That latter provision needs to be read in conjunction with Article 32 stating that "Nothing in this Part contained shall preclude the Republic from regulating by law any matter relating to aliens in accordance with International Law". This constitutional clause permits in principle the treatment of aliens in a different manner that citizens, but that is provided that the selected course of action does not violate principles of Public International Law, which has the effect of guaranteeing that the essential core of fundamental rights cannot be interfered with for aliens in manner that is internationally regarded as unlawful. To that effect, one has to have in mind Article 169 that attributes to ratified international treaties an elevated status that gives them priority over other conflicting legislation but not against the Constitution. The end effect is that the multiple international conventions relating to human rights to which the Republic of Cyprus is a party, create a source for guaranteeing that Article 32 does not have a discriminatory and detrimental effect on aliens. It must also be noted that the State has not made use of that article in a way that could be said to infringe constitutionally provided rights.

Fourth, the Constitution provides for a plethora of procedural routes designed to offer access to judicial review in the administrative law (Article 146) and to judicial control in general. In specific, Article 146 ensures the right of access to court, since victims of violation of economic, social and cultural rights as well as of other fundamental rights and liberties

also included in Part II of the Cyprus have access to the Supreme Court acting as an administrative court and empowered to nullify any act or omissions of the authorities as being contrary to the constitutional provisions guaranteeing the rights, or as being based on laws that violates any provision of Part II.

Therefore, victims of violation can obtain redress in such proceedings by way of annulment of the relevant decision. Annulment can also be followed by civil proceedings for damage caused by the decision that was annulled by the Supreme Court (Article 146.6). Specific remedies for violation are also expressly provided in different laws concerning violation of rights protected by them or restricting specific rights. Moreover, in the landmark decision *Yiallouros v. Evgenios Nicolaou*,[66] it has been held "that a violation of human rights is an actionable right which can be pursued in civil courts against those perpetrating the violation, for recovering from them, inter-alia, just and reasonable compensation for pecuniary and non-pecuniary damage suffered as a result and or other appropriate civil law remedies for the violation".[67]

Therefore, the right to pursue civil proceedings for human rights violations is as a corollary expanded in the horizontal sphere between individuals and is thus exercisable both against the state and private persons.

In addition, there is a significant quasi-judicial form of redress through the office of the Ombudsman that is also entrusted with combating discrimination,[68] on the grounds on national origin, racial or ethnic origin, disability, age, religious or other beliefs, sexual orientation or gender. Moreover, the ombudsman is empowered to combat "direct and indirect discrimination as well as any other form of discrimination forbidden by law; to promote equality in the enjoyment of rights and freedoms safeguarded by the Cyprus Constitution and by international conventions ratified by Cyprus as referred to explicitly in the Law, irrespectively of race, community, language, colour, religion, political or other beliefs, national or ethnic origin; to promote equal opportunities irrespectively of the grounds listed in the previous section as well as the grounds of sexual orientation and special needs, in the area of employment, access to vocational training, working conditions including pay, membership of trade unions or other associations, social insurance and medical care, education and access to goods and services including housing".[69]

66 *Yiallouros v. Evgenios Nicolaou*, Civil Appeal No. 9931, Judgment of 8 May 2001.

67 As accurately summarised in Report by the Republic of Cyprus, On the Implementation of the ICSECR, March 2009, <www.olc.gov.cy/olc/olc.nsf/0/0aa954e8aee4b23bc225758d001bf48b/$FILE/Answers%20to%20Issues%20-%20Questions.pdf>, p. 6. Accessed 18/10/2015.

68 Combating of Racial and Some Other Forms of Discrimination Law (Ombudsman), 2004 (L.42(I)/2004).

69 Report by the Republic of Cyprus, On the Implementation of the ICSECR, March 2009, <www.olc.gov.cy/olc/olc.nsf/0/0aa954e8aee4b23bc225758d001bf48b/$FILE/Answers%20to%20Issues%20-%20Questions.pdf>, p. 7. Accessed 18/20/2015.

Therefore, the Ombudsman offers an effective alternative redress mechanism, yet with the limitation that its findings are not legally binding, although there has been a consistent trend of increasing compliance with the reports that the office produces.

Nonetheless, the main task of ensuring protection for all rights, and therefore for social rights, remains with the courts and the analytical assessment of the jurisprudence that was undertaken in the previous section examined the degree of success for that judicial supervision, with the conclusion being positive.

In terms now of the framework of protection in more specific terms, the analysis examines who are the holders and the addressees of social rights, the constitutional rules ensuring for effective enjoyment of social rights and the constitutionally provided for judicial jurisdiction for safeguarding compliance with the provisions of the constitution.

## 4.5 Identification of General Principles and Trends Emerging from the Case Law

In terms of structure, this section is divided into two parts: (i) identifying and explaining the content of general principles of law in the Cypriot legal order that have an effective impact on the substantive or procedural protection for human rights, (ii) identifying such general principles derived from external sources on the basis of the likelihood of them being adopted in Cyprus. From the outset, it must be stated that application of the general principles is limited in the field of social rights, simply because it is extremely rare to be invoked given the express constitutional provisions. Yet, the scope of general principles and their standing in the legal system can be construed as indicator of the judicial approach.

A notable exception is the principle of the social state, which as explained in Part III finds application in the approach of the Courts especially when construing Articles 9 and 25 of the Constitution. Therefore, a social welfare state is underpinning the considerable margin of freedom provided to the free economic agent, in a manner akin to that adopted in the German *Grundgesetz* (Articles 20 and 28) providing for the *Sozialstaatsprinzip* (*social state*). Accordingly, the German jurisprudence has seen the individual actor as

> not that of an isolated sovereign individual. The Basic law has resolved the tension of the individual much more in the sense of relations to society and ties of a person to society at the same time without infringing his own worth … the individual must put up with those limitations on his freedom of action which the legislator draws for the care and advancement of communal social life within the boundaries of what is generally reasonable in the given circum-

> stances provided that the independence of the person is preserved at the same time.[70]

Needless to say, the textual and judicial approach to social rights in the Cypriot legal order is in no way a parallel of the German approach; a rather more limited approach has been adopted, as explained in section III. The careful balancing between free economic activity and the welfare state is derived from numerous constitutional provisions construed in conjunction with each other.

In the Cypriot legal system, the concept of general principles in the field of public law is present and active either as an independent source of law or as an auxiliary tool used for supplementing existing constitutional provisions. Such general principles can be directly derived from common law that provides the early foundation for the Cypriot legal system (due process, *audi alteram partem*) and primarily procedural in nature yet with a substantive effect on the essence of the basic right to fair trial. Nonetheless, the influence of such principles has remained limited due to the fact that the Constitution exhaustively covers the rights to fair trial and personal liberty in a combined manner through Articles 11, 12, 30. An interesting example as regards due process is the decision in *Republic of Cyprus (Minister of Finance and Another) v. Demetrios Demetriades*[71] where the Supreme Court in a lengthy judgement examined the constitutionality of a tax law[72] and the taxing, thereunder, of the husband on the combined total of his and his wife's income derived from sources other than from her own labour. The Court examined the possible violation through the tax law of Articles 24 and 28 of the Constitution guaranteeing proportionate taxation and equality, through the lens of US jurisprudence.[73] The Court engaged in perhaps the most expansive use of comparative law and foreign jurisprudence, thus analysing in considerable depth the US case law on due process as well as that of India, Germany and Greece.

In terms of defining due process, the Court opted for the perception that sees "'due process' as a dynamic concept and the US Supreme Court has refused to give it any static definition. Broadly speaking, it negatives anything which is arbitrary or shocking to the universal sense of justice having regard to the circumstances of each case".[74]

In the earlier *Matsis* case[75] it was held that there is "nothing in our Constitution safeguarding *expressly* the right to 'due process' in the manner in which such right is safeguarded

70 4 BVerfGE 7, 15-16 (*Investment Aid Case*, 1954). Similarly in BVerfGE 80, 137, 6 June 1989, Reiten im Walde (Riding in the Woods).

71 *Republic of Cyprus (Minister of Finance and Another) v. Demetrios Demetriades* (1977) 3 CLR 213.

72 Section 21 of the Income Tax Law 58/61.

73 From a real plethora of U.S. decisions, particular emphasis was placed on *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931).

74 *Republic of Cyprus (Minister of Finance and Another) v. Demetrios Demetriades* (1977) 3 CLR 213, at p. 244.

75 *Matsis v. The Republic* (1969) 3 CLR 245.

under the US Constitution".[76] That decision was distinguished and clarified in the Judgement of Justice Triantafyllides in the *Tax* case, *supra*, with the Court stating that "it is to be noted that in *Boiling v. Sharpe*,[77] it was held that the notion of equal protection is related to the notion of due process. The equal protection component of the due process clause in the Fifth Amendment to the US Constitution corresponds to the principle of equality safeguarded by Articles 24 and 28 of our Constitution; therefore, the notion of due process to the extent to which it relates to the principle of equality forms part of our own Constitutional structure; and the *Matsis* case, *supra*, cannot be treated as being inconsistent with the above view, especially as this particular aspect of due process, which is connected with the concept of equality, was not considered in that case".[78]

The case law on due process in *Cyprus* is complicated and there are is a plethora of relevant decisions that cannot be analysed in the context of this report. Suffice to say that the relatively recent rulings of the CJEU in *Kadi I* and its aftermath[79] with the emphasis being placed on due process could have an impact on the approach of the Supreme Court where the EU Charter is applicable. That is the case given the long experience of the Cypriot legal system with due process, but there is always the 'obstacle' of the pre-established favourable approach towards concepts originating directly from the Constitution and the Convention. The primacy afforded to EU law under the Constitution could perhaps alter that, but that seems unlikely at present.

The focus now turns to general principles that are derived from the Constitution, namely the principle of equality that is provided for Article 28. As has been explained previously, the scope of Article 28 of the Constitution is broader than that of Article 14 of the Convention. The latter does not have independent standing and requires its use in combination with an alleged breach of another right covered by the Convention.[80] In the Constitution, equality takes various forms and does not entail precise mathematical equality but requires exclusion of arbitrary treatment.[81] The judge intervenes where the proper limits have been

76 Ibid., at p. 270.

77 98 L. Ed. 884.

78 *Republic of Cyprus (Minister of Finance and Another) v. Demetrios Demetriades* (1977) 3 CLR 213, at p. 327.

79 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*; Case T-315/01, *Kadi v. Council and Commission*; Case C-550/09, Criminal proceedings against E and F; Case T-348/07, *Stichting Al-Aqsa v. Council*; Case T-341/07, *Jose Maria Sison v. Council*; Case C-340/08, M and Others; For analysis, see Tridimas, T. and Gutierrez-Fons, J. A., "EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?", (2009) 32 *Fordham International Law Journal* 660; Van den Berghe, F., "The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?" (2010) 16 (2) *European Law Journal* 112; Hinarejos, A., "Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists" (2007) 7 (4) *Human Rights Law Review* 793.

80 *Thlimmenos v. Greece* (Application no. 34369/97), 6 April 2000, ECtHR.

81 *Argiris Mikrommatis and the Republic* 2 RSCC 125, at p. 131.

trespassed by the decision-maker, thus offering a margin of discretion and functionality for the public bodies.[82] Essential requirement is that the comparable situations are similar, while the determination of similarity is independent of the mental or physical state of person.[83] It must also be noted that in the equality clause there is also presence of the non-discrimination principle.

The relevant case law cannot be analysed in this context but specific reference has to be made to the rather unique approach of the Supreme Court as regards claims of discrimination and breach of equality that the Court acknowledges, yet refuses to strike down the relevant measures. The approach applies in situations where one applicant, or class of applicants, are discriminated against through a measure that attributes a specific benefit to another class, usually on the basis of sex. The effective remedy sought is the annulment of the measure and/or the expansion of its scope to cover the discriminated against applicant or class. This request is rejected by the Court on the dual basis that separation of powers cannot allow the creative interpretation of such provisions in order to include the complainants and also on the basis that the annulment would merely remove a benefit for another class without benefiting the applicants. Therefore, the Court refuses to declare breach of equality and the Constitution and to subsequently annul the measure, since it approaches the matter as *casus omissus*.

In this aspect, the Republic has faced a serious challenge in the case of *Aziz*, which does not concern social rights but is yet indicative of the problems arising out of the State's functioning post-1964.[84]

The Turkish-Cypriot applicant requested to be registered to the electoral catalogue in order to be able to vote in the forthcoming parliamentary elections. The Ministry of Interior refused to register the applicant on the basis that the Constitution (Article 62) provides for separate community electoral catalogues, thus excluding cross-registering. The applicant challenged the decision and the legislation on which it was based[85] before the Supreme Court. The Court dismissed the complaint holding that under the Cypriot Constitution and relevant electoral legislation, members of the Turkish Community residing in the Republic of Cyprus could not, after their withdrawal in 1964, vote in parliamentary elections and also that it could not intervene to fill a legislative gap.[86] In the view of the Court, that would amount to distorting the text of the legislation and would be an interference with the separation of powers. The identification of the necessity and the subsequent action to

82 *Marw Giassemidou (no. 2)* (1960) 3 CLR 491), pp. 499-500.
83 *A. Gavris and the Republic* 1 RSCC 88.
84 *Ibrahim Aziz v. Republic* (2001) 3 ΑΑΔ 501; *The Case of Aziz v. The Republic of Cyprus* (ECHR, decision of 22 June 2004).
85 Law 72/79.
86 *Ibrahim Aziz v Republic* (2001) 3 ΑΑΔ 501.

address it is a matter for the legislator and the judiciary is limited to the examination of constitutionality through the assessment of necessity and the proportionality criterion. It was therefore, not for the Court to create the norms for dealing with a necessity through interpretation.

The European Court of Human Rights held that "difference in treatment in the present case resulted from the very fact that the applicant was a Turkish Cypriot"[87], as well as "from the constitutional provision regulating voting rights between members of the Turkish-Cypriot and Greek-Cypriot communities, which had become impossible to implement, there was a clear inequality of treatment in the enjoyment of the right in question. Accordingly the ECHR decided that there had been a violation of Article 14 in conjunction with Article 3 of Protocol 1 of the Convention".[88]

As a result of the ruling, the Republic adopted Law 2(I)/2006, thus complying with the decision of the ECtHR.

Similarly, the Supreme Court adopted such a narrow conservative approach towards equality in a series of cases concerning the benefits available to refugees as a result of the Turkish invasion 1974, but only if their father was himself a refugee, thus excluding children of women refugees. The logic of the legislation is questionable to say the least and rests on a type of pragmatism, since "in case of expanding the meaning of 'displaced', 80% of the population will fall under the meaning of displaced".[89] The issue has recently being partly remedied yet without removing the discrimination completely. Before the Supreme Court the issue was raised in the case of *Maria Vrontou*.[90] At issue was the administrative act regarding the grant of internally displaced status to a child whose father is internally displaced due to the Turkish invasion, but not where the mother of a child is internally displaced. The claimant argued that the law violated the right to equality as recognised in the Constitution under Article 28, but the Supreme Court refused to annul the measure on the grounds that the Court has no jurisdiction to fill in the gaps resulting from omissions of the legislature. The case is currently pending before the ECtHR.[91]

87 Para. 36.

88 Demetriades, A. *et al*., *Report on the Situation of Fundamental Rights in Cyprus in 2004*, CFR-CDF/CY/2004, p. 101. Available at http://cridho.uclouvain.be/documents/Download.Rep/Reports2004/nacionales/CFR-CDF.repCYPRUS.2004.pdf. Accessed 18/10/2015.

89 Ibid., at p. 106.

90 *Maria Vrontou* (Application no. 436/2003, 12 May 2004).

91 Application no. 33631/06.

Similarly, in *Tsiakka and another*,[92] the Supreme Court refrained from effective intervention. It must be noted that the Court has an obligation to declare unconstitutionality, even if that declaration would not result in granting a specific benefit to the person challenging the measure. Such a finding would pressure the legislature to act in accordance with the principle of equality, thus the Court would adhere to its constitutional role under the principle of separation of powers. Refraining from such a constitutional duty is explainable only on the basis of being reluctant to remove a benefit already available to a class of citizens that are legally entitled to possessing it. The latter view is certainly problematic and it is in relation to this specific aspect of equality that the EU Charter could be influential, as well as the Convention of the pending decision in *Vrontou*, *supra*, before the ECtHR finds that the Republic is in breach of Article 14 of the Convention.

In terms of general principles not resulting directly from the Constitution, the most notable example is the principle of proportionality. The only reference to a notion of proportionality can be found in Article 24 of the Constitution: "Every person is bound to contribute according to his means towards the public burdens". It is interesting to note that proportionality has been given an elevated status through the codification of the general principles of administrative law in Law 158(I)/99 through Article 52. Nonetheless, proportionality already had a constitutional position as an unwritten principle of law and has been referred to by the Supreme Court not just as a subsidiary principle but also as an essential criterion to be met in order for the constitutionally crucial doctrine of necessity to be applicable. This premise is derived from the landmark judgement in *Mustafa Ibrahim*[93] where the Supreme Court held that the measures adopted on the basis of the doctrine of necessity are proportionate to the need. The overall effect is that the principle of proportionality is not just a general principle of law with constitutional status, but also that it constitutes an integral criterion for the assessment of the foundation of the Constitution post-1964, that is the doctrine of necessity.

Turning now to general principles of law that can become relevant to the Cypriot legal system due to the external sources of the Convention and the EU Charter, two such principles are identified: the right to good administration and the principle of equal treatment. As to the latter, it has already being explained that the principle of equality finds considerably satisfactory application in Cyprus, yet with certain specific problem relating to rights

92 *Tsiakka and another v. Republic of Cyprus ex parte Ministry of Internal Affairs*, Appeal Case 5/2008, 1 December 2010.

93 *The A-G of the Republic v. Mustafa Ibrahim* (1964) CLR 195.

of Turkish-Cypriots and the doctrine of necessity[94] and to the internal refugee status with the Court insisting on a conservative and perhaps incorrect reading of the principle of separation of powers. It has already been shown that the ECtHR has found against the Republic in the case of *Aziz*, *supra*, and there are other pending cases relating to the State as custodian of Turkish-Cypriot properties as well as in relation to Greek-Cypriot internal refugee status. The outcome of those cases could redefine the isolated problematic areas relating to the application of necessity. Another possible development that could be interesting in terms of the relationship of the Cypriot legal order with that of the EU and which relates to equality, is that of EU manual workers that are either posted in Cyprus or independently employed. The issue of social dumping is becoming significant in the current economic and fiscal crisis, with evidence suggesting a possible discrimination against EU workers in terms of lower salaries, thus making them more competitive. This has the effect of the direct receiver of discrimination being satisfied with the situation, thus placing the Cypriot worker in a position of indirect or reverse discrimination. So far, neither the trade unions have been successful in effectively challenging the situation, nor has the State, since the equality principle is rendered ineffective for Cypriot applicants mainly due to lack of *locus standi* in order to initiate a challenge. Therefore, the EU Charter and the non-discrimination principle as applied in Chapter III and Articles 20 and 21 in specific, especially as regards discrimination on the basis of nationality could be or relevance after a ruling by the CJEU.

In relation to the right of good administration, as provided for Article 41 of the EU Charter and which applies to EU Institutions, it could potentially become relevant in situations where: (a) the Republic implements or applies EU law, (b) as an indirect source of influence that could impact on the Cypriot administrative practices. The essential precondition for both possibilities is the existence of rulings by the CJEU and the willingness of the Supreme Court to engage with such ruling in a manner comparable to the favourable approach towards the decisions of ECtHR. It must be noted that the Constitution in Article 29 provides

> Every person has the right individually or jointly with others to address written requests or complaints to any competent public authority and to have them attended to and decided expeditiously; an immediate notice of any such decision taken duly reasoned shall be given to the person making the request or complaint and in any event within a period not exceeding thirty days. Where any

94 Kyriakou, N., "National judges and supranational laws on the effective application of EC Law and ECHR: the case of *Cyprus*", *Europa Law Publishing* (forthcoming), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623560>, at p. 4. Accessed 18/10.2015.

> interested person is aggrieved by any such decision or where no such decision is notified to such person within the period specified in paragraph 1 of this Article, such person may have recourse to a competent court in the matter of such request or complaint.

This provision often provides the route for access to the revisionary jurisdiction of the Supreme Court under Article 146 of the Constitution, since the statement of such reasons in the reply of the competent authority is effectively enabling the challenge of the relevant measure. Nonetheless, the Constitution makes no express reference to good administration as a rights, but Law 158 (I)/99 codifying the general principles of administrative law clearly provides for such an obligation for public bodies in section 50. Therefore, it seems more likely that the jurisprudence of the Supreme Court could be informed from relevant jurisprudence of the CJEU on the right to good administration, but that would be limited to administrative law. It would require an extraordinary shift in the approach of the Supreme Court to elevate the administrative law obligation of the public authority to a constitutional right, through a general principle of law, to good administration enjoyed by the citizen.

Synopsising, the Cypriot legal system the concept of general principles in the field of public law is present and active either as an independent source of law or as an auxiliary tool used for supplementing existing constitutional provisions. Such general principles can be directly derived from common law that provides the early foundation for the Cypriot legal system (due process, *audi alteram partem*) and primarily procedural in nature yet with a substantive effect on the essence of the basic right to fair trial. Nonetheless, the influence of such principles has remained limited due to the fact that the Constitution exhaustively covers the rights to fair trial and personal liberty in a combined manner through Articles 11, 12 and 30. In relation to general principles of law derived from the Constitution, the primary paradigm is that of the principle of equality that is provided for Article 28. The principle of equality that takes an umbrella effect and covers procedural and substantive equality, as well as non-discrimination has been informed by the Supreme Court in manner more expansive than that provided by the ECHR and the ECtHR. Overall, the assessment of the application of equality is positive, yet with two specific problem areas remaining: (i) in relation to rights of Turkish-Cypriots (property and voting) that were limited due to their withdrawal from the organs of the State in 1964, thus creating a complex issue of providing for their specific rights on the basis of articles of the Constitution that remain inactive due to their withdrawal, and (ii) in relation to the exclusion of children of female internally displaced persons from having access to the benefits that the State provides for children of male internally displaced persons. In both situations, the main problem is one of the conservative judicial approach, with the Court refusing to declare

unconstitutionality of the relevant measures on the basis of equality, given the view adopted that the Court that it cannot provide the benefit sought through interpretation.

The latter view is certainly problematic and it is in relation to this specific aspect of equality that the EU Charter could be influential, as well as the Convention of the pending decision in *Vrontou*, *supra*, before the ECtHR finds that the Republic is in breach of Article 14 of the Convention. In addition, the EU Charter could provide useful insight, as it would be construed by the CJEU, in relation to challenging reverse discrimination against Cypriot workers and in relation to the right to good administration, but it must be noted that it would require an extraordinary shift in the approach of the Supreme Court to elevate the administrative law obligation of the public authority to a constitutional right, through a general principle of law, to good administration enjoyed by the citizen.

## 4.6 Conclusion

The concept of social rights has been present and active in the Cypriot legal order from the moment of the constitutional genesis and the specific constitutional setting and structure has proved to be effective, progressive and forward-looking especially due to the special relationship that the Constitution, and the judiciary, has had with the ECHR. Moreover, the overly complex system of repetitive horizontal and vertical checks in balances that the Cypriot Constitution adopted has had a rather positive impact in creating a plethora of procedural avenues for addressing infringements of constitutional provisions, thus placing the judiciary at the epicentre of protection for fundamental rights. Therefore, the judiciary has been willing to engage into a comparative juridical analysis and to rely on the ECHR provisions and also on the findings of the ECtHT. In that respect, the legal system of Cyprus has been progressive in placing social rights in a secure position, mainly due to the centrality of the relevant constitutional provisions on social rights. Nonetheless, the approach has not been systematic and consistent, and there are examples of back-tracking in the jurisprudence. These are now under test as the impact of the economic crisis is creating a new field of operation.

# 5 Social Rights in the Czech Republic

*Jan Kratochvíl*[*]

## 5.1 Social Rights in National Legal Scholarship

### *5.1.1 How Does the National Legal Scholarship See the Question of Protection of Social Rights?*

Is the need to protect social rights questioned? Are social rights perceived as a different from other types of rights?

The need to protect social rights is not generally questioned by the majority of lawyers because social rights are included in the Charter of Fundamental Rights and Basic Freedoms (hereinafter "the Charter"),[1] alongside with civil and political rights. The Charter is part of the constitution, or, as called in the Czech terminology, the constitutional order, even though it is a document separate from the Constitution (with capital "C"). However, what is discussed and questioned is the strictness of constitutional protection of social rights. The majority opinion is that their judicial review should be very deferential.

The prevailing opinion is that social rights are in some aspects different from civil and political rights. Jan Wintr in the leading commentary to the Charter opined that social rights generated primarily positive obligations that required the state to act, in particular, to fulfil something and to guarantee certain services, whereas with civil and political rights the obligation of the State to refrain from certain acts prevailed.[2] He argued that the protection of social rights had got substantial financial implications. Therefore, the Parliament should be deciding on the level of their protection rather than a court because it is the Parliament who has democratic legitimacy. In his view, decisions in the sphere of social rights were primarily political questions that should be decided by a democratically elected Parliament and thus indirectly in elections.[3] That opinion is shared by other scholars.[4]

In contrast, Jan Kratochvíl in his monograph defended the thesis of indivisibility of all human rights and he argued that social rights were not fundamentally different to civil

* Faculty of Law, Palacky University in Olomouc, Czech Republic

1 In English available here: <www.psp.cz/cgi-bin/eng/docs/laws/1993/2.html>. Last accessed 16 October 2015.

2 Eliška Wagnerová, Vojtěch Šimíček, Tomáš Langášek, Ivo Pospíšil et al. Listina základních práv a svobod. Komentář. Praha: Wolters Kluwer, 2012, p. 832.

3 *Ibid.*, p. 627.

4 E. g., Ladislav Vyhnánek at <http://jinepravo.blogspot.cz/2012/01/prezkum-socialnich-prav-ustavnimi-soudy_18.html>. Last accessed 16 October 2015.

and political rights.[5] He argued that all human rights generated all three types of obligations – to respect, protect and fulfil, and he disputed the general misconception (in his view) that social rights were generally more financially demanding as compared to civil and political rights. He also attempted to refute other arguments for different nature of social rights, such as those social rights were vague, polycentric, progressive or collective. In his view, to the extent that there was some difference between some civil and political rights and some social rights, it was a difference in degree not in kind.

### *5.1.2 Are Social Rights Perceived as Limitations or Threats to the 'First-Generation' Rights?*

I have not encountered this opinion among legal scholars. It is only sometimes voiced by libertarian economists, but those views are not widely spread or publicised.

### *5.1.3 What Are the Most Important Questions of Social RIghts Protection Discussed by the National Legal Scholarship?*

What do you consider as the most original contribution of your national legal scholarship to the study of social rights?

There is not much literature and scholarship generally on social rights. Apart from textbooks for students and commentaries to the Charter, there are only two major monographs on social rights, both arising from PhD dissertations.

Pavla Boučková published a book about the protection of social rights through the right to equality (non-discrimination) and human dignity. That book dealt mainly with the principle of non-discrimination as applied in the sphere of social rights.

Jan Kratochvíl published a book on the protection of social rights through civil and political rights under the ECHR and the ICCPR. In that book, he applied the so-called integrated approach to human rights, according to which human rights were mutually permeable and one right could be protected also through other rights.[6] He concluded that there was quite a substantive overlap between social rights and those guaranteed in the Convention and the ICCPR and that many aspects of social rights were protected directly under especially the right to life, prohibition of torture and the right to private life and indirectly by the right to a fair trial and the prohibition of discrimination.

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5 Jan Kratochvíl. Sociální práva v Evropské úmluvě na ochranu lidských práv a Mezinárodním paktu o občanských a politických právech. Praha: PF UK, 2010, pp. 23-43.

6 For origins of that concept, see Craig Scott. 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' Osgoode Hall Law Journal, Vol. 27, 1989, p. 769.

What has however recently started to be discussed by the scholars in the context of social rights is the methodology of constitutional review of social rights. The incentive is probably a widely shared view that the case law of the Constitutional Court on social rights is inconsistent and confusing.

For example, Ladislav Vyhnánek identified a difficulty faced by the Czech Constitutional Court in applying the social rights due to the quite exceptional way that social rights were guaranteed in the Charter.[7] Therefore, the Constitutional Court was unable to look for models of their protection elsewhere as it had done in case of civil and political rights where the protection was more or less equivalent in the Czech Charter as in the ECHR, the German Grundgesetz and others. He argued that the proportionality test, known from judicial review of civil and political rights, could not be used with social rights because the Charter explicitly limited the protection of social rights to what was guaranteed by law (Article 41 of the Charter – see below). By that, the constitution acknowledged that the definition of the content of social rights should be left to political decisions. Proportionality test would seriously limit this wide discretion of legislators in the sphere of social rights acknowledged by the Charter and would thus be in contravention with the Charter. Similarly, Marek Antoš generally agreed with the lenient review of social rights by the Constitutional Court. He however argued that the methodology should be changed and the Constitutional Court should refrain from trying to define a core of a social right.[8]

## 5.2 Constitutional Protection of Social Rights

### *5.2.1 Does the National Constitution of Your Country Provide for Protection of social rights?*

What are the rights protected?

Yes. Depending on the definition of social rights the following rights, which are commonly described as social rights are protected:

Right to social security (Article 30 of the Charter)

Right to health (Article 31 of the Charter)

Right to special protection of parenthood, family, pregnant women and children (Article 32 of the Charter)

7 <http://jinepravo.blogspot.cz/2012/01/prezkum-socialnich-prav-ustavnimi-soudy_400.html>; <http://jinepravo.blogspot.cz/2012/01/prezkum-socialnich-prav-ustavnimi-soudy_18.html> Last accessed 16 October 2015 and Ladislav Vyhnánek. 'Proportionally or not? Judicial Review of Social Rights' Limitations' MUNI Law Working Paper No. 2014.03, 2014, available at: <www.law.muni.cz/dokumenty/29430>. > Last accessed 16 October 2015.

8 Marek, Antoš. 'Judikatura Ústavního soudu k sociálním právům' Jurisprudence, 6, 2014.

Besides those, the Charter protects also numerous economic and cultural rights.

How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family or a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?

Some of the social rights are guaranteed to all individuals, some only to citizens.

Right to social security:

> Only citizens have a right to social benefits in case of old age, work incapacity, or loss of their provider (that is social security in the terminology of the European Social Charter – hereinafter also "ESC"), whereas everyone has the right to assistance in case of material need (that is social assistance in the terminology of the European Social Charter).

Right to health:

> Everyone has the right to the protection of his health but free medical care on the basis of public insurance is guaranteed to citizens only.

Right to special protection of parenthood, family, pregnant women, children:

> This right is guaranteed to everybody belonging to the protected group. It could be argued that also a family is a sui generis subject of the right under Article 32 § 1 of the Charter, which reads: "Parenthood and the family are under the protection of the law".[9]
>
> It should be further noted that some commentators questioned whether[10] the limitation of some of the rights to citizens only was compatible with the EU law, which quite strictly prohibits discrimination on the ground of nationality.

### 5.2.2 *How is the Debtor of Social Rights Defined? Is It the State, Public Authorities, Public Bodies or Private Bodies?*

The debtor is not explicitly defined in the Charter. From common understanding of fundamental rights it however follows that the obliged party from fundamental rights are the

9 So Radovan Suchánek. 'Hospodářská, sociální a kulturní práva' in: Václav Pavlíček et al. Ústavní právo a státověda, II. díl. Praha: Leges, 2011, p. 660.

10 Michal Bobek. 'Article 42' in: Eliška Wagnerová, Vojtěch Šimíček, Tomáš Langášek, Ivo Pospíšil et al. Listina základních práv a svobod. Komentář. Praha: Wolters Kluwer, 2012, pp. 845-849.

public authorities. The state includes all its branches of power (legislative, executive and judicial). Due to decentralisation of the State also, local self-governing entities, including regions and municipalities, have duties from fundamental rights.[11]

It is further generally accepted and applied in the practice of the Constitutional Court (see, e.g. I. ÚS 185/04 from 14 July 2004) that private persons cannot be direct addressees of fundamental rights in the constitution (direct Drittwirkung) and if there is any effect on them it is only indirect via interpretation of ordinary laws in the light of fundamental rights guaranteed in the Charter – the so-called "radiating effect/Ausstrahlungswirkung" of human rights.[12] The radiating effect is generated also by social rights (IV. ÚS 27/09, § 25: the right to engage in enterprise; I. ÚS 1041/14: special protection of children).

### 5.2.3 *What Is the Content of the Rights? What Are the Obligations of the Legislator? What Are the Obligations of the Administration? What Are the Obligations of Other Actors?*

The social rights are defined very generally in the Charter. Article 41 of the Charter is of fundamental importance to social rights. It stipulates that some of the rights in the Charter, including social and economic rights, may be claimed only within the confines of the laws implementing these provisions. As a result, the effect in practice of having social rights guaranteed in the constitution is considerably limited. The legislator is to a considerable extent free to define the scope of social rights. As explained under the next question, the constitutional limits are only that the legislator cannot act unreasonably or disproportionally touch the core of the social rights.

Since social rights are guaranteed to the extent of ordinary laws, the legislator has a duty to adopt these laws. The Constitutional Court mentioned this problem (obiter dictum) in a case regarding an economic right, namely, the right to strike guaranteed by Article 27 § 4 of the Charter (see Pl. ÚS 61/04). There was no implementing legislation of this right with the exception of the right to strike in the context of collective bargaining. It held that such a situation could be assessed as unconstitutional omission of the legislature or an unconstitutional gap in the law. Accordingly courts would have to, in the absence of statutory regulation, protect this right; otherwise they would be denying justice. Conditions for the exercise of this right and its limits would then have to be set on a case-by-case basis in the case law.

11 Jan Wintr. 'Article 30' in: Eliška Wagnerová, Vojtěch Šimíček, Tomáš Langášek, Ivo Pospíšil et al. Listina základních práv a svobod. Komentář. Praha: Wolters Kluwer, 2012, p. 629.

12 So holds also Eliška Wagnerová. 'Úvod' in: Eliška Wagnerová, Vojtěch Šimíček, Tomáš Langášek, Ivo Pospíšil et al. Listina základních práv a svobod. Komentář. Praha: Wolters Kluwer, 2012, p. 13.

### 5.2.4 *Does the National Constitution Differentiate the Scope and Methods of Protection of Social Rights and Other Rights?*

Yes.

The Constitutional Court applies more lenient review regarding social and economic rights. That practice is based on the interpretation of the interplay of Article 41 of the Charter, which stipulates that some of the rights in the Charter, including social rights, may be claimed only within the confines of the laws implementing these provisions and which suggest that social rights are not directly applicable at all (above the extent of ordinary laws) and on the other hand Article 4 § 4 of the Charter, which stipulates that when employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and meaning of these rights and freedoms must be preserved. The Constitutional Court resolved this tension between these two provisions of the Charter by allowing constitutional protection of social rights but less intensive than that of civil and political rights. The case law of the Constitutional Court is mostly developed in cases of an abstract judicial review, in particular in challenges brought by a group of MPs against legislation.

That review is conducted using the following steps (see judgement of the plenary of the Constitutional Court no. Pl. ÚS 1/08 from 28 May 2008, §§ 103-104):

1. Identification of a core (essential content) of the social right.
2. Does the law touch the core (essential content) of the social right? If it does then the standard proportionality test applies.
    a. If not then does the law pursue a legitimate aim, that is, is it not arbitrary?
    b. Is the law used in pursuance of the legitimate aim reasonable, not necessary the best, the most adequate, the most effective or the wisest?

Therefore, in contrast to civil and political rights where the Constitutional Court reviews directly whether the interference had a legitimate aim and was proportionate, with regards to social rights it first defines the core (essential content) of the social right. If the legislation does not touch the core of the social right, then a lenient test of reasonability applies and the legislator enjoys a wide margin of appreciation in this sphere. In contrast, in the context of civil and political rights (and the essential core of social rights), the Constitutional Court uses the standard test of proportionality (suitability, necessity, proportionality stricto sensu), which requires that the interference is the least restrictive for the right in question. The difference between the test applicable to social rights on the one hand and civil and political rights on the other is thus twofold. First, social rights review requires the first additional step of identifying the core of that right. Second, if the core of a social right is not touched by the legislation in question a more lenient test of reasonability follows in the last step.

However, in practice, the strictness of scrutiny with civil and political rights varies from the very strict "order for optimalisation" (term used by the Constitutional Court) to more

lenient reviews, such as ruling out extreme disproportionality in the review of taxation legislation (e.g. Pl. ÚS 29/08 from 21 April 2009). Yet, the distinction remains that the civil and political rights can be subjected to the strict proportionality review, whereas the social rights, save for their essential core, cannot.

Nevertheless, in practice, even the deferential test of reasonability can lead to a finding of a violation as happened in a decision of the Constitutional Court on the proposal of a group of deputies to repeal various parts of statutes setting, *inter alia*, direct payments for access to health care services (Pl. ÚS 36/11 from 20 June 2013). The court found that the payment of 100 CZK (approximately EUR 4) per day for hospitalisation violated the right to health under Article 31 of the Charter. It found the law to be unreasonable using two main arguments. Since the aim pursued by the law was to make patients pay for services (food, housing), it should have differentiated between various groups of persons, like for example those patients that had absolutely no possibility of choice and where it was very difficult to talk about them using these extra services, like patients at an intensive care unit. Second, there was no cap on the payments, such as for long-term patients, and it had to be paid by everybody without exceptions, including children.

The practice regarding individual constitutional appeals claiming violations of social rights is rare. Some commentators even argued that because of Article 41 of the Charter such individual appeals were not possible.[13] However, at least regarding some economic rights (such as the right to free choice of an occupation under Article 26 of the Charter), the Constitutional Court allows such appeals and subjects them to the same review as described above in cases of abstract review of constitutionality (see, e.g. III. ÚS 118/05 and IV. ÚS 266/09). In other decisions, it was mentioned that the legislator was free to set the standard of protection of social rights but it must preserve the essence and meaning of these rights, which suggests application of Article 4 § 4 of the Charter, that is a certain core of social rights (e.g. III. ÚS 1792/13 of 10 September 2013, § 7 or IV. ÚS 572/06 from 6 December 2010). In one judgement, the Constitutional Court found that a violation of the right to equality under Article 1 of the Charter led also to a violation of the right to adequate material security in old age under Article 30 § 1 of the Charter; the subject matter concerned the payment of a pension. The practice regarding individual constitutional appeals claiming violations of social and economic rights is thus far from settled and there is a general lack of case law on the issue.

However, in a recent judgement, the Supreme Administrative Court clearly stated that individuals can claim violations of their social rights in the Charter and the same four steps test as in cases of abstract review mentioned above should apply (no. 4 Ads 134/2014 – 29

13 See Jan Wintr. 'Article 41' in: Eliška Wagnerová, Vojtěch Šimíček, Tomáš Langášek, Ivo Pospíšil et al. Listina základních práv a svobod. Komentář. Praha: Wolters Kluwer, 2012, at p. 838.

from 30 October 2014). The case concerned the right of persons with disabilities to assistance from the State under Article 30 § 2 of the Charter.

### 5.2.5 *Does the Normative Structure of Constitutional Social Rights Vary? Is It Possible to Distinguish Different Types of Constitutionally Protected Social Rights?*

No, there seems to be no conceptual difference among individual social rights in the Charter. To all of them Article 41 of the Charter applies.

### 5.2.6 *Is There a Constitutional Mechanism of Protection vis-à-vis the Legislator? How Does It Operate? Are There Any Instruments That Ensure Protection Against the Inaction of the Legislator?*

Yes, the Constitutional Court is empowered by Article 87 § 1(a) of the Constitution to repeal laws or individual provisions thereof should they contravene the constitutional order. Such a proposal can be lodged by the president of the republic, a group of at least 41 deputies of the Parliament or at least 17 senators, a court if it considers that a law it should apply in the proceedings before it is unconstitutional and an individual together with a constitutional appeal. In practice, most of the challenges come from a group of MPs.

The issue of inaction of the legislator is more difficult since the Constitutional Court can only repeal laws and not issue them. Therefore, it can remedy only a prior positive action of the legislator, that is an adopted law. However, it is imaginable that in extreme circumstances, the Constitutional Court would issue a declaratory judgement saying that inaction of the legislator is unconstitutional. Such a ruling has been made once, to my knowledge. It was in the context of regulation of the maximum amount of rent under the right to property. In its decision no. Pl. ÚS 20/05 from 28 February 2006, the Constitutional Court faced with a long-term inaction of the legislator to somehow ease the strict rent control legislation, which it had declared unconstitutional already in 2002, declared that "a long-term inactivity of the Parliament to adopt a law setting the circumstances under which landlords are allowed unilaterally to increase rents is contrary to the constitution".

### 5.2.7 *How Do You Evaluate the Efficiency of Social Rights Protection Offered by the Constitution and the Constitutional Justice?*

Despite the declared lenient review (reasonability), it seems to have in practice some teeth and the Constitutional Court has already repealed a number of regulations because they

were in contravention with social or economic rights, including above mentioned direct payments by patients for hospitalisations (Pl. ÚS 36/11 from 20 June 2013) or the absence of any payments from the social security for the first three days of sick leave (Pl. ÚS 2/08 from 23 April 2008). Further examples are mentioned below.

All this case law however comes from case of abstract review of constitutionality lodged by groups of Members of the Parliament. Due to lack of practice and not yet developed case law on the topic, it remains to be seen and assessed whether also individuals can effectively protect their social rights before the Constitutional Court. As has been mentioned above, the Supreme Administrative Court however accepts that individuals have directly applicable social rights under the Charter.

Besides there is a quite strong indirect protection of social rights through the right to be free from discrimination. It should be however noted that sometimes the Constitutional Court does not explain why some cases are considered under the prohibition of discrimination (with a very specific, not explicitly numerated discrimination ground) and others are not (see, for example judgement no. 8/07 from 23 March 2010 below). It is hard to escape a conclusion that it does so when it wants to apply a stricter review than pertains to social rights.

### *5.2.8 What Do You Consider as the Most Original Contribution of Your National Constitution to the Protection of Social Rights?*

Quite original and not that common, is the situation that the Charter contains numerous economic and social rights but then limits their significance by Article 41. I will refrain here from any assessment whether that is a good contribution or a bad one. Although, it can be noted that there seems to be a trend towards such an approach (courts enforcing social rights only in the context of the implementing legislation) also in those countries where constitutions contain strong protection of social rights like in South Africa.[14]

## 5.3 Protection of Social Rights under Other Constitutional Rules and Principles

### *5.3.1 Are There Other Constitutional or Jurisprudential Principles Used as Tools for the Protection of Social Human Rights?*

Is there a protection offered by the following constitutional principles:

14 See Stuart Wilson and Jackie Dugard. 'Constitutional Jurisprudence: The First and Second Waves' in: Langford et al. *Socio-Economic Rights in South Africa*. Cambridge: Cambridge University Press, 2014.

- protection of legitimate expectations,
- protection of vested rights,
- precision of legislation,
- non-retroactivity of legislation,
- due process,
- other general constitutional principles?

All these principles, to the extent that they are part of the Czech constitutional principles, can be applied to social rights. Yet the practice varies and there seems to be a conflicting case law. Also since social rights are directly protected by the constitution, there is less of a need to protect them indirectly through the above principles.

The Czech administrative procedure guarantees the right of judicial review of administrative decisions, which can be considered a part of the procedural due process. The most common right invoked by individuals in their constitutional appeals is the right to a fair trial. The right to a fair trial under the Charter applies to all judicial proceedings irrespective of the nature of the right in question (unlike Article 6 of the ECHR). Individuals can, and often do, bring constitutional appeals claiming violations of their right to a fair trial when the subject matter of the proceedings concerns social rights, such as various social security benefits.

An example of a successful claim of legitimate expectations and the principle of publication of laws is the judgement of the Constitutional Court no. I. ÚS 420/09 from 3 June 2009. There the applicant's claim for a pension based on a bilateral treaty from the 1950s between Czechoslovakia and the Soviet Union had been rejected by ordinary courts because that treaty had been no longer in force as it had been unilaterally, by a diplomatic note to the other party, repealed by the Czech Republic in 2004. The Constitutional Court however quashed those decisions holding that the diplomatic note had not been published in the official gazette and thus the applicant had had legitimate expectations based on the bilateral treaty to receive the pension.

On the other hand, in its judgement no. Pl. ÚS 2/08 from 23 April 2008, the Constitutional Court 2/08 rejected the idea that legitimate expectations could be used in the sphere of social rights. It rejected a claim that a change in the eligibility for and amount of some social benefits could violate that principle (§ 68). However, it might have been just an unnecessarily broad statement as that claim might have been rejected on the facts.

In its judgement no. Pl. ÚS 19/13 from 22 October 2013, the Constitutional Court invoked the principle of foreseeability of law, which it derived from Article 1 § 1 of the Constitution that stipulates that the Czech Republic is a State that respects rule of law (Rechtsstaat). It concluded that the regulation of payments to health care providers from the public health insurance companies was not foreseeable as it allowed the insurance

companies to unilaterally and retrospectively change the payments to health care providers for their services.

## 5.4 Impact of the International Protection of Social Rights

### *5.4.1 Did Your State Ratify International Treaties That Pertain to Social Rights? Are They Directly Applicable in Your Domestic Legal Order?*

The Czech Republic is a party to the following major treaties protecting social rights:

- European Social Charter, Additional Protocol to the European Social Charter and Additional Protocol to the European Social Charter Providing for a System of Collective Complaints
- European Code of Social Security
- International Covenant on Economic, Social and Cultural Rights.
- The Czech Republic is also a party to 64 ILO conventions that are in force.

As per Article 10 of the Constitution international treaties, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order. Provisions of international treaties are thus directly applicable provided that they are self-executing. Indeed, international treaties are in the hierarchy of norms above ordinary laws. Article 10 of the Constitution stipulates that should a law contravene an international treaty, the international treaty shall be applied. Even more, according to the case law of the Constitutional Court, international treaties for the protection of human rights have the legal force as constitutional norms, that is they are on the same level as the constitution (this opinion was first developed in the case no. Pl. ÚS 36/01 from 25 June 2002).

The Constitutional Court directly applies international treaties on social rights in abstract review of constitutionality (e.g. Pl. ÚS 20/09 from 15 November 2011, § 32: Article 4 § 2 of the European Social Charter; Pl. ÚS 3/2000 from 21 June 2000: right to adequate housing in Article 11 ICESCR; Pl. ÚS 40/02 of 11 June 2004: Article 6 of the ESC; Pl. ÚS 83/06 from 12 March 2008: Article 3 of the Additional Protocol to the European Social Charter; judgement no. Pl. ÚS 54/10 from 24 April 2012: Article 26 § 3 of ILO Convention no. 130 Medical Care and Sickness Benefits Convention and Article 18 of the European Code of Social Security).

However, when it comes to individual constitutional appeals, a problem arises whether the particular provision of the treaty claimed by the individual is self-executing in order to be applied in lieu of the law. That question can be decided only on a case by case basis depending on the concrete provision in question. In any case, the case law of the Czech

courts on this issue is very unclear and far from consistent. Often the question of self-executiveness is not posed in the decision.

In several decisions, the Constitutional Court made rather broad statements suggesting that social rights in the international treaties were not directly applicable as they were mere "program" rights requiring the State to take steps (IV. ÚS 1360/09 from 7 August 2009, IV. ÚS 1823/08 from 6 October 2008: Article 16 of ESC and Article 11 of the ICESCR and some other decisions of that chamber and II. ÚS 282/02 from 15 April 2004). Nevertheless, it is interesting to note that in some of these decisions, the reasoning referred to a decision of a plenum, which had however on the contrary explicitly stated that the ICESCR was directly applicable (Pl. ÚS 3/2000 from 21 June 2000).

In several cases concerning right to social benefits or pensions based on a bilateral treaty, the issue of whether those treaties were self-executing was not discussed and they were applied as if they were (e.g. Constitutional Court in case no. I. ÚS 420/09 from 3 June 2009).

In one decision, the Constitutional Court explicitly described a provision on social rights in an international treaty not to be self-executing (II. ÚS 635/01 from 3 September 2003). It concerned Articles 2 and 3 of ILO Convention no. 111 on Discrimination (Employment and Occupation).

In one judgement, the Supreme Administrative Court found a provision on social rights in an international treaty not to be self-executing. It concerned Article 4 of the Additional Protocol to the European Social Charter (judgement no. 3 Ads 88/2006 – 72 from 28 February 2007).

On the other hand, in several decisions, the Constitutional Court found that a right guaranteed by a social rights treaty was not violated (e.g. IV. ÚS 572/06 of 6 December 2010: right to paid holidays under ICESCR and the ESC, I. ÚS 1395/09 of 13 January 2010: right to housing under ESC, II. ÚS 315/13 from 21 November 2013 and I. ÚS 3833/12 from 7 November 2012: Article 7 ICESCR), which would suggest that it considered it directly applicable and self-executing. But the question of self-executiveness was not discussed in those decisions.

In some decisions, the social rights in international treaties were used to support an interpretation that another right (fair trial) was violated. For instance, in IV. ÚS 511/98 from 4 October 2000, the Constitutional Court quashed a decision of ordinary courts because they failed to review whether a housing given to the applicant after he was evicted from his former home could be considered a "dignified accommodation" (a term used then by the Civil Code) also in the view of international treaties guaranteeing right to adequate housing (namely, Article 11 of the ICESCR and Article 16 of the ESC), which were directly applicable and had prevalence over ordinary laws. These decisions can be however explained in a way that even if it is considered that these social rights in international treaties do not provide for individual rights that can be claimed by individuals alone

they are nevertheless directly applicable in the Czech legal order to the extent that ordinary laws must be interpreted in view of this existing international obligations of the Czech Republic.

### 5.4.2 *Do These Treaties Have an Impact On The National Legal System? Did They Trigger Any Changes in National Legislation or Practice?*

Does the case law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights?

To the extent that I am able to asses that, my reading would be that the impact is limited. I am not aware of any major changes to the law because of international obligations arising from social and economic rights.

For example, in 2011, a new comprehensive act on health services was adopted. It regulates the provision of health care services. The explanation report to the bill only generally stated that it implemented also the international obligations arising from the ICESCR and ESC but then no individual provision was reasoned by a direct requirement of these treaties. The same applies to the new Act on Social Services that was adopted in 2006.

When the new Labour Code was adopted in 2006, about four of its provisions were reasoned by reference to an international treaty including the practice of the monitoring bodies. For example, two-month period of notice for termination of employment with the possibility to extend it in the employment contract was adopted because of the interpretation of Article 4 § 4 of the ESC by the European Committee of Social Rights. Further, with reference to the opinion of the European Committee of Social Rights that had found the Czech Republic to be in violation of Article 8 § 2 of the ESC, the new Labour Code no longer allows the employer to terminate the employment contract, when the employer moved to another place, which was however included in the employment contract as a possible place of work.

However, this latter change was still found to be not in compliance with the ESC by the European Committee of Social Rights (see below). So the acceptance of the views of the Committee was rather half-hearted.

### 5.4.3 *In Particular, Did the Case Law of the European Court of Human Rights and Other Regional Human Courts Have an Impact on National Law in the Field of Social Rights?*

The impact is also limited. This might be mainly due to the fact that there has been no finding of a violation against the Czech Republic in the case law of the ECtHR that might

be said to concern social rights. The possible exception being the cases of *Wallova and Walla v. the Czech Republic*, no. 23848/04 and *Havelka and Others v. the Czech Republic*, no. 23499/06 (for details about these cases, see the question below). As a result of these judgements, there is awareness among judges that children cannot be taken away from families for social reasons. The ombudsman has been repeatedly reminding the authorities that families with children in dire circumstances must be provided with adequate assistance in order to improve the living conditions of the children.

### *5.4.4 What Are the Most Important Social Rights Cases Brought From Your Country to International Rights Protecting Bodies?*

The Czech Republic is not a party to the Optional Protocol to the ICESCR. It has ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints only in 2012, and there has not been any decision on the two pending cases against the Czech Republic, yet.

As for cases at the ECtHR, which touch upon social rights, the following can be mentioned:

Article 8:

*Wallova and Walla v. the Czech Republic*, no. 23848/04, and *Havelka and Others v. the Czech Republic*, no. 23499/06: in both judgements, the Court stated the impermissibility of taking children from the family into care for social reasons, in particular a lack of adequate housing. As a result, the State is in fact obliged to provide families with children in need with material assistance because it cannot tolerate that children live in unbearable conditions and at the same time as a result of these two judgements children cannot be taken away from the family.

In its decision in *Zehnalova and Zehnal v. the Czech Republic*, 38621/97, the Court dismissed a claim that private life of disabled applicants in the wheelchair had been violated because large number of public buildings and buildings open to the public in their home town were not accessible to them. It found that Article 8 of the Convention was not applicable as by access to public buildings private life was not concerned.

Article 14:

In its decision in *Furtsev v. the Czech Republic*, no. 22350/10, which concerned alleged discrimination on the ground of pursuing remunerated work (the applicant was treated less favourably than if had not worked at all) in the amount of old-age pension, the Court found the different treatment to be justified in view of the wide margin of appreciation of the State. Nevertheless, it stated the following important principle:

> The Court first considers that pursuing remunerated work is covered by 'other status' for the purposes of Article 14 of the Convention. The choice to work, by which a person exercises his or her human right to work guaranteed by numerous international instruments, should be respected as an aspect of his personal status (see mutatis mutandis Carson and Others, cited above, § 71, where a relevant ground was a choice of place of residence, an exercise of a freedom of movement and a contrario *Peterka v. the Czech Republic* (dec.), no. 21990/08, 4 May 2010 where the different treatment was on the basis of various modes of work only).

In *Andrle v. the Czech Republic*, no. 6268/08, the Court found no violation in the case of alleged discrimination of men in the entitlement to an old-age pension. The facts were that women who raised children had earlier retirement age but not men, even though the applicant also raised children as a single father. The Court again applied the wide margin of appreciation of States and extreme deference to the State in matters of entitlement to pensions.

### *5.4.5 What Are the Lessons You Draw From the International Litigation (Pertaining to Social Rights) Started by Applicants From Your Country?*

The ECtHR is very deferential to the State when it comes to matters of social policy, such as entitlements to pensions or attempts of the disabled to improve their daily life and make it more comparable to the majority population. Especially, the case of *Andrle* is controversial as it was even hard to find any legitimate aim for such a different treatment.

## 5.5 Social Rights in Ordinary Legislation

### *5.5.1 To Which Extent Does the Ordinary Legislation in Your Country Ensure the Protection of Social Rights?*

There are comprehensive laws covering most of the social rights, like health or social security.

Yet, one of the deficiencies in the legal system is a lack of any comprehensive regulation of the right to housing. Since the 1990s, experts have called for the introduction of a Social Housing Act, but no government has presented it. There is a lack of social housing and the municipalities have no obligations to care for the homeless.

In general, the people in housing need are entitled to a housing benefit. This has become a source of income by some "entrepreneurs" who house these people in basic accommodation and charge them fees in the amount they are able to get from the State in housing benefits. As a result, these fees are often higher then market rents and the accommodation is of a low quality. But these people are for various reasons unable to obtain housing on the market (e.g. not enough money to pay the caution, discrimination, etc.).

### 5.5.2 *Is This Legislation in Conformity With the National Constitution and the International Instruments Ratified by Your Country?*

The Constitutional Court reviews the legislation if asked to by the competent bodies. Currently, there are only a few cases pending before the Constitutional Court, where it reviews the conformity of social rights legislation with the constitution. This includes case no. Pl. ÚS 10/12 on a proposal to repeal several provisions of the Labour Code, including the conditions for termination of employment by the employer.

The UN Committee on economic, social and cultural rights reviewed the periodic report of the Czech Republic at its session in May 2014. The concluding observations are not yet available.

The European Committee on Social Rights reviewed in its 2011 report on the Czech Republic (Conclusions XIX-4) the thematic group "Children, families and migrants". It concluded that the situation in the Czech Republic was in conformity with the ESC with the following exceptions:

a. The situation in Czech Republic is not in conformity with Article 7 § 4 of the ESC on the ground that the length of working time for young workers under 16 years of age is excessive. The Czech labour code does not differentiate between workers under 18 years and under 16 years. The Committee considers that the limit of 8 hours a day or 40 hours a week is in conformity for workers under 18 years but not those under 16 years. The legal age of work in the Czech Republic is 15 years.
b. The Labour Code provides for two exceptions where dismissal of a woman on maternity leave is possible: when the undertaking closes down, and when the employer relocates all or part of the business. The latter exception on relocation of business remains excessive and is not acceptable under Article 8 § 2 of the ESC.
c. The situation in the Czech Republic is not in conformity with Article 16 of the ESC on the grounds that it has not been established that families receive adequate social protection with regard to housing; and the level of family benefits does not constitute an adequate income supplement.

   However, I must note that the latter conclusion does not seem to be much reasoned. In my view, the amount of benefits for families in the Czech Republic is considerable.

d. The situation is not in conformity with Article 17 of the ESC as corporal punishment of children is not explicitly prohibited in the home and in institutions.

The European Committee on Social Rights reviewed in its 2009 report on the Czech Republic (Conclusions XIX-2(2009)) the thematic group "Health, social security and social protection", including Article 11 of the ESC (right to health), Article 12 (social security) and Article 13 (the right to social assistance). It concluded that the situation in the Czech Republic was in conformity with the ESC with the following exceptions:

a. The situation in the Czech Republic is not in conformity with Article 12 § 1 of the ESC on the ground that the levels of the minimum old age, invalidity and survivor's pensions as well as the level of unemployment benefit are manifestly inadequate.
   The Committee did not accept as sufficient the Czech practice that persons receiving low amount of benefits are entitled to means-tested kinds of benefits, including social assistance, which if added could be hardly described as "manifestly inadequate", I think.
b. The situation in the Czech Republic is not in conformity with Article 12 § 4 of the ESC on the ground that the retention of accrued benefits for persons moving to a State Party which is not covered by Community regulations or not bound by an agreement with Czech Republic is not guaranteed.
c. The situation is not in conformity with Article 13 § 1 of the ESC on the ground that it has not been established that the level of social assistance is adequate; and the granting of social assistance to foreign nationals is subjected to an excessive length of residence condition (permanent residence, for obtaining which five years of uninterrupted residence is required, unless an international treaty says otherwise).
d. The situation is not in conformity with Article 13 § 3 of the ESC on the ground that it has not been established that foreign nationals legally resident or regularly working in the Czech Republic are provided with equal access to advice and personal assistance services, without being subjected to an excessive residence requirement (as above).
e. The situation is not in conformity with Article 14 § 1 of the ESC on the ground that access to social services by nationals of other States Parties is subject to an excessive length of residence requirement (as above).

Regarding the requirement of permanent residence, which of course does not apply to EU nationals, to access social services, several exceptions have been introduced in the meantime, namely, for foreigners performing selected jobs requiring high qualifications.

The 2013 report of the European Committee of Social Rights dealt again with the thematic group "Health, social security and social protection" (Conclusions XX-2 (2013)). It concluded that the situation in the Czech Republic was in conformity with the ESC with the following exceptions:

a. It again found that the minimum unemployment benefit and the minimum level of sickness benefit was manifestly inadequate and that the minimum level of old age benefit falls below 40% of the Eurostat median equalised income.
b. Similarly, the Committee repeated that the situation in the Czech Republic is not in conformity with Article 12 § 4 of the ESC on the ground that the retention of accrued benefits for persons moving to a State Party which is not covered by Community regulations or not bound by an agreement with Czech Republic is not guaranteed.
c. Again under Article 13 § 1 of the ESC, the Committee found a non-conformity on the ground that it had not been established that the level of social assistance is adequate and the legislation allowed withdrawal of residence permit to foreign nationals in material need.
d. The Committee, while deferring its conclusion under Article 13 § 3 ESC, concluded that the situation was not in conformity with Article 13§4 of the 1961 Charter on the ground that it was not established that emergency social assistance was available to all non-resident foreign nationals of other States Parties, irrespective of their status.

## 5.6 Justiciability of Social Rights

### *5.6.1 Are Social Rights Considered Justiciable in Your Country? To Which Extent?*

See also question 2 above.

As regards individual constitutional appeals for violation of social rights, they are fairly common in the context of the right to social security, especially with person claiming that they were not awarded some kind of pension or benefit or that the pension is lower than it should be. In these cases, the Constitutional Court refers to Article 41 of the Charter and reviews only whether the ordinary courts did not violate any procedural rights of the complainant (right to a fair trial), that is including whether the interpretation and application of ordinary laws was not arbitrary or extreme or manifestly unreasonable – see, e.g. decision no. sp. zn. I. ÚS 1779/13 from 21 November 2013, I. ÚS 2815/13 from 21 November 2013 or III. ÚS 1789/13 from 8 August 2013 and hundreds of others. For a successful individual constitutional appeal in the sphere of social rights because of violation of the right to a fair trial see, e.g. I. ÚS 1415/10 from 23 August 2010 (right to an extraordinary pension for miners) or II. ÚS 2379/08 from 9 July 2009 (need to guarantee access to court for the protection of the right to health).

Fairly common is application of Article 32 § 4 of the Charter, which stipulates:

> (4) It is the parents' right to care for and bring up their children; children have the right to parental upbringing and care. Parental rights may be limited and minor children may be removed from their parents' custody against the latters' will only by the decision of a court on the basis of the law.

That is however at best a mixed right, as it is mostly a typical civil right – respect for family life. Although included among social rights in the Charter, it is also not covered by Article 41 of the Charter. What can be considered a social right is the right of children in the first sentence for care of their parents, which includes financial subsistence. That can be considered as an implementation of the duty of the State for special protection of children, which is a social right. Here the state fulfilled its positive obligation by introducing legislation (here even a constitutional norm then implemented by ordinary legislation) by placing obligation on the parents to care for their children. That provision of the Charter is often used in disputes regarding maintenance of children by their parents.

For instance, in the judgement no. IV. ÚS 1181/07 from 6 February 2008, the Constitutional Court found a violation of Article 32 § 4 of the Charter together with the right to a fair trial and Article 18 § 1 and 27 § 1 of the Convention on the Rights of the Child when the ordinary courts had found that the father of the child had had no obligation of maintenance because he had been imprisoned. It is however typical that this provision is always applied together with other rights, usually the right to a fair trial or the right to respect for family life. I have not found any case where violation of Article 32 § 4 alone was found.

### *5.6.2 What Is the Role of the Judge?*

What are the Practical Effects of Such Justiciability?

Since social rights are justiciable primarily in cases of abstract constitutional review, the effects, if such a challenge is successful, are quite tangible. Those laws that are found to contravene the social rights guarantees in the constitution are repealed and cannot be invoked. Usually though, the Constitutional Court awards the legislature some time when the repeal will take effect (*vacatio legis*). That is, the repeal is not immediate in order to enable the legislature to adopt a new law.

What are the most prominent examples of social rights cases successfully brought to courts by the litigants?

In its judgement no. Pl. ÚS 2/08 from 23 April 2008, the Constitutional Court repealed a part of the law, which denied the provision of sickness benefits during the first three days of work incapacity (illness), as being in conflict with Article 30 § 1 of the Charter (right to social security). In reaction, the respective provision of the law was amended. It kept the three-day period but altered the scheme. For instance, it no longer required the employees

to pay premiums for sickness allowance (only employers did). The amended law was again challenged before the Constitutional Court. In its judgement no. Pl. ÚS 54/10 from 24 April 2012, the Constitutional Court found the new legislation in compliance with the Charter. It distinguished the current situation from the previous ruling mainly on the ground that employees did no longer pay premiums towards sickness allowance (§ 64).

In its judgement no. 8/07 from 23 March 2010, the Constitutional Court concluded that the provision on how the old age pension was calculated were discriminatory against persons with the highest incomes during the working life in the context of the right to adequate material security in old age (Article 30 § 1 of the Charter). It concluded that persons who had earned more and thus had contributed more to the system during their working life were getting almost the same old age pensions as persons who had had low incomes. That is, the system was too egalitarian. Even though the most prominent right featuring in the reasoning was the prohibition of discrimination, the right to social security was also present and the law was found explicitly to contravene both rights.

This judgement however, I would argue, showed a lack of understanding of the concept of social rights by the Constitutional Court. The social right to adequate social security was effectively used to protect the interests of the wealthiest part of the society, while the ratio of social rights is to guarantee a certain standard of living to everybody and to protect the most vulnerable. The Constitutional Court wrongly decided what the "adequacy" of the pension should relate to. It considered the adequacy only in relation to the payments the individual had made to the system during his working life. However, the adequacy should relate primarily to the prospective adequacy of income to lead a decent life in the old age.[15]

It is no surprise then that this judgement disregarded or downplayed international or comparative materials. The Constitutional Court noted that the existing legislation was in fact in compliance with the international obligations of the Czech Republic, namely the European Code on Social Security and ILO Convention no. 128 Invalidity, Old-Age and Survivors' Benefits Convention (§§ 64-67) and that a comparative report showed that the situation in the Czech Republic was not that uncommon in Europe (§ 73). Despite all that it decided to repeal the legislation.

In its judgement no. Pl. ÚS 83/06 from 12 March 2008, the Constitutional Court repealed a provision of the Labour Code by which if there were multiple trade unions at a given employer and all of them could not agree on the terms of a collective agreement the employer could conclude an agreement with the union that had most members. It found that it contravened Article 27 § 2 of the Charter (no trade union may be given preferential treatment) and Article 3 § 2 of the ILO Convention no. 87 concerning Freedom

15 See General Comment of the Committee on Economic, Social and Cultural Rights no. 19, The right to social security, 4 February 2008, § 22.

of Association and Protection of the Right to Organise by giving preferential treatment to some trade unions to the detriment of others.

In its judgement no. Pl. ÚS 19/13 from 22 October 2013, the Constitutional Court repealed the regulation under which health care providers were receiving payments for the health care they provided. It concluded that the regulation was touching the core of the right to engage in enterprise and pursue other economic activity (Article 26 § 1 of the Charter), because a situation could happen when health care providers were obliged by law to provide services but at the end of the year the amount of remuneration they would receive could be less than simple costs they had had without any right to compensation (§ 73). The reason being that above certain amount of health services provided in the given year the payments the provider received from the health insurance company were about only one third of the usual payment. The reason was to limit somehow the expenses of the public insurance companies. Consequently, since the core of the right was concerned, the Constitutional Court applied the proportionality test and found the regulation not to be proportionate. It mentioned in its reasoning that indirectly the right to health was also violated as that regulation in fact forced the health care providers to limit the amount of health care (§ 77).

In its judgement no. Pl. ÚS 36/11 from 20 June 2013, the Constitutional Court found that the payment of 100 CZK (approximately EUR 4) per day for hospitalisation violated the right to health under Article 31 of the Charter. It found the law to be unreasonable using two main arguments. Since the aim pursued by the law was to make patients pay for services (food, housing), it should have differentiated between various groups of persons, like, for example those patients that have absolutely no possibility of choice and where it was very difficult to talk about them using these services (food and housing), like patients at an intensive care unit. Second, there was no cap on the payments, such as for long term patients, and it must be paid by everybody without exceptions, including children.

In a series of judgements, the Constitutional Court found that lower old-age pensions for persons who had worked during Czechoslovakia in the Slovak Republic and thus were receiving part of the old-age pension from Slovakia, which was generally lower than Czech pensions, were discriminatory (violation of Article 1 and Article 3 § 1 of the Charter (prohibition of discrimination) in conjunction with Article 30 § 1 of the Charter – right to social security) and should receive compensation (the main judgement was III. ÚS 252/04 from 25 January 2005 and then confirmed by the plenary in Pl. ÚS 4/06 from 20 March 2007). However, later, the provision of that compensation only to Czech citizens was found discriminatory by the European Court of Justice in Case C-399/09 (*Landtová*). The Constitutional Court did not accept that judgement and (in) famously ruled that the judgement of the ECJ was *ultra vires* (Pl. ÚS 5/12 from 31 January 2012).

## 5.7 Institutional Guarantees of Social Rights

### 5.7.1 *Which National Bodies Are the Institutional Guarantors of Social Rights?*

Are There Any Specific Bodies Created Especially for the Protection of Social Rights? What Are Their Powers?

How Do You Evaluate the Effectiveness of These National Bodies?

The institutional guarantors are in general the competent public authorities, like the Labour Office, which supports persons in unemployment and provides some social benefits, or the Child Office, which protects rights of children. Through these bodies, the state exercises its powers in the sphere of social rights, but they can hardly be described as human rights bodies. They are government agencies empowered with certain tasks.

There are several advisory bodies to the Government, which deal also with social rights:

> The Government Council for Seniors and Population Ageing was founded in 2006. The Council strives to create conditions for healthy, active and decent ageing and for equal treatment of seniors in all fields of life, for the protection of their human rights and for the development of inter-generation relations in families and in the society.
>
> The Government Council for Roma Community Affairs is involved in ensuring full enjoyment of the rights granted by the Covenant also to the Roma, who have been threatened more than other ethnic minorities by discrimination, social exclusion and poverty. Apart from representatives of competent state authorities, the membership of the Council also includes representatives of Roma communities (some of whom are, at the same time, activists of important non-governmental non-profit Roma organisations).
>
> The Government Council for Human Rights, which has a Committee for Economic, Social and Cultural Rights.

Their powers are only to suggest proposals to the Government, which then is free to act on the proposal or reject it.

The Ombudsperson is empowered to act on and investigate complaints of persons that the conduct of authorities was against the law, did not correspond to the principles of a democratic legal state and the principles of good administration, or the authorities were inactive. She deals a lot with complaints in the area of social security benefits and social assistance. It is a typical ombudsman office, however, which can issue only recommendations.

## 5.8 Social Rights and Comparative Law

### *5.8.1 Did Your National Legal System Influence Foreign Legal Systems in the Area of Social Rights?*

Did Other Foreign Legal Systems Influence Your National Legal System in the Area of Social Rights?

Can You Give Examples Of Provisions, Principles Or Institutions (in the Area of Social Rights) Borrowed From Other Legal Systems?

Not to my knowledge.

Do your domestic courts rights quote judgements or legislation from other jurisdictions when adjudicating on social rights?

The Czech Constitutional Court is well known for its frequent references, explicit or implicit, to the judgements of the German Constitutional Court. In the context of social rights that is however not quite possible because of lack of protection of social rights in the German Grundgesetz.

In general, these references in the context of social rights are much rarer compared to civil and political rights.

For example, in its judgement no. Pl. ÚS 54/10 from 24 April 2012, concerning the constitutionality of provisions providing no payments for the first three days of sick leave, the Constitutional Court referred to the case law of the Polish Constitutional Tribunal, specifically judgement no. K 6/09 from 24 February 2010, § 8.2, for the support of its position that social rights could not be subjected to the "strict" proportionality test and they had to be left to the discretion of the legislature except for a certain core of the right (§ 50). The reference suggests, in my view, that still in 2012 the Constitutional Court felt the need to improve its reasoning why it does not use the standard proportionality test in the context of social rights. When the reasonability test was developed in 2008 (see above), there were no such references to comparative materials.

In judgement no. Pl. ÚS 1/08 from 28 May 2008, § 99 to support its finding that direct payment for health care were in conformity with the constitution, the Constitutional Court referred to a decision of the Slovak Constitutional Court no. Pl. ÚS 38/03 from 17 May 2004.

In several judgements on social rights, it also noted on a general level and without much elaboration as to, for instance, whether the situation and contexts were comparable, that the reasonability test it was using was used also by the U.S. Supreme Court as the rational basis test (e.g. judgement no. Pl. ÚS 83/06 from 12 March 2008, § 179, and Pl. ÚS 1/08 from 20 May 2008, § 92).

In contrast to foreign case law, the comparative materials of legislation and practice are quite common in the case law of the Constitutional Court. That is due to the fact that the Constitutional Court has got a well-staffed analytical department, which can be used by the judges to draft comparative reports. If it is a high profile case (most cases of abstract norm control) such a comparative report is usually compiled. For instance, in its judgement no. Pl. ÚS 54/10 from 24 April 2012, the Constitutional Court used a comparative report noting that the non-payment of a sickness benefit for the first three days of sickness leave was common in several European states (§ 65). Or in judgement no. Pl. ÚS 1/08 from 28 May 2008, it noted that the right to health was not guaranteed in constitutions of many European states, the exceptions being mostly new democracies entering the EU in 2004 (§ 99).

# 6 Social Rights in Denmark

*Helle Krunke & Stine Hellqvist Frey*[*]

## 6.1 Social Rights in National Legal Scholarship

*How does the national legal scholarship see the question of protection of social rights?*

It is inherent in the Danish welfare system that social rights need to be protected. Thus, the controversial question in the debate on social rights in the national scholarship is not if social rights ought to be protected as such – rather it is a discussion on how and to what extent social rights should be protected. This debate also raises the question of which impact international and supranational legislation has on the internal protection of social rights in Denmark.

As mentioned, it is uncontroversial that certain social rights must be protected in the legal system. The Constitution guarantees certain basic social rights, which pose obligations on the State and provides individuals a positive right to receive a social welfare benefit. These articles are, however, brief and general leaving questions to be answered in regard of the scope of the protection granted. E.g. according to Article 75(2) in the Danish Constitution, a person who is unable to support himself and whom no one else is under the obligation to support, is entitled to assistance from the State. However, until a Supreme Court judgment from 2006, there was doubt as to whether an individual right could actually be based on Article 75(2).[1] Furthermore, the provision comes short in explaining the more specific guidelines of what constitutes adequate "assistance". Does this give the individual a pecuniary right? Or can the obligation be met by providing naturals such as food and clothes to the individuals?[2] This was unclear until a Supreme Court judgment from 2012.[3] We shall return to the two judgments in the following.

Keeping in mind that this question of scope and extent of the constitutional social rights is controversial it should also be mentioned that a debate is going on regarding the relationship between Danish legal sources and international and supranational legal sources.

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* By Professor, Ph.D. and Head of Centre for Comparative and European Constitutional Studies (CECS) Helle Krunke and Research Project Assistant Stine Hellqvist Frey, Faculty of Law, University of Copenhagen.

1 See *U.2006.770H*.

2 See J. E. Rytter, *Individets grundlæggende rettigheder*, 2013, p. 78.

3 See *U.2012.1761H*.

This uncertainty regarding the status of the legal sources adds to the complexity of the debate on the protection of social rights in a Danish context.

Finally, it is worth mentioning that yet another debate regards whether the social rights protection in the Constitution is dynamic and connected to the development of society and the welfare state as such. This is part of a general discussion in constitutional literature on whether the Constitution should be interpreted in a modern context.[4] This also contributes to the complexity of the debate on social rights. An interpretation of the Constitution which builds on the modern context would mean that the meaning and scope of social rights can in principle be altered over time due to societal changes. A part of the debate in the national scholarship on the scope of the given social rights is thus also one of how and if the dynamic change of society influences the substantial content of Danish social rights.

### *Is the need to protect social rights questioned?*

As mentioned above, it is not as much the need to protect social rights that is questioned, it is more a question of how this protection should be designed and interpreted, namely with regard to certain conflicts with one group's social rights inflicting on the rights of other groups in society.

Recent studies[5] revolve around the question on how to make an even split with regards to the fair distribution of social rights within different groups of individuals with certain rights that may not always be in conformity with the rights of others. Thus, the aim and goal of these studies are not merely to define the scope of certain social rights, but also to present conflicts of social rights granted to different individuals.

Common to these studies is that they seek to more precisely define the scope of certain social rights in present day and then present the areas in which social rights collide, leaving an unsettled legal status for the respective social rights in these contested areas.

With that being said it is also necessary to add the perspective that focus on the protection of social rights might differ slightly depending on the legal perspective put on the question. Thus, the need to protect and the motivation for this protection might be different depending on the point of departure as either from a constitutional legal aspect, a public legal aspect or a more narrow social legal aspect.

Seen from a constitutional aspect recent studies have investigated the scope of the protection of the right to property in the Danish Constitution[6] to see if this provision also

4 See for instance H. Krunke, *Pensionsreform. De retlige grænser og muligheder*, 2010, p. 30.

5 E.g. H. Krunke (2010), K. Ketcher, 'Retten til eksistensminimum – og retten til ikke at blive diskrimineret', *Juristen* (4, 2012) and J. A. Nielsen, *De retlige grænser for at gennemføre reformer af sociale sikringsordninger med særlig fokus på efterlønsordningen*, master thesis, University of Copenhagen, 2012.

6 See The Danish Constitution (Grundloven) Article 73.

protects the right to certain social benefits and if so to what extent.[7] Also the provision which grants "assistance" to individuals who cannot provide for themselves[8] has been scrutinized in order to determine if a more definitive right can be substantiated from this provision.[9]

Seen from a general public legal aspect Article 75(2) of the Danish Constitution is also interesting, as it obliges the administration to ensure compliance with this article when distributing the social benefits pertaining to social rights. either constitutionally founded or otherwise put forward in regular national legislation.

From a narrower social legal aspect, Article 75(2) is interesting in itself because its interpretation and scope tell us something about the development stage of the current social legal situation. E.g. up until 2012, it was contested and uncertain whether Article 75(2) of the Danish Constitution contained a pecuniary right for the individual against the state or if the State had free hands in determining how to provide sufficient "assistance". Even though some social legal scholars have argued that the provision did indeed contain a pecuniary right, other scholars have contested this position.[10] However, the doubt was waived by the Danish Supreme Court in a recent ruling[11] stating that the provision in the light of present day should be interpreted as containing a pecuniary right for the individual against the state in a situation where that individual was not able to support him or herself. Even though this brings clarity to the provision it also poses new questions, namely what then is the sufficient or minimal amount owed from State to individual. The Supreme Court refrained from giving a specific number only determining that there is such a thing as a minimal standard.[12]

In a social legal perspective, it has also been investigated if and how the right to primary education[13] as founded in the Danish Constitution contain substantial elements or merely a duty for the State to have a public school system.[14]

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7 Concurrent with the Constitution it has also been discussed whether these benefits are protected as property under the ECHR.

8 See The Danish Constitution Article 75(2).

9 This debate is arguably also of great interest in a more general social legal aspect.

10 Kirsten Ketcher stated that Article 75(2) did indeed contain a pecuniary right in her doctoral thesis: K. Ketcher, *Offentlig børnepasning i retlig belysning*, 1990. This was contested by other legal scholars; see for instance: J. P. Christensen and J. R. Bruun, 'At hitte på – om grundlovens §§ 29, 73 og 75', *U.1991B.32*, 1991. See also K. Ketcher (2012).

11 See *U.2012.1761H*.

12 See K. Ketcher (2012), p. 183.

13 See the Danish Constitution Article 76.

14 See S. Jørgensen, 'Børns ret til en grundlæggende uddannelse' in S. Jørgensen and J. Kristiansen, *Socialretlige udviklinger og udfordringer*, 2008, p. 153-169.

*Are social rights perceived as different from other types of rights?*

Social rights are distinguished from classical freedom rights such as civil and political rights which require the State to abstain from certain acts. Social rights contain a positive right to a benefit and not just the absence of force or control[15] from the State. It should be mentioned that some social rights already appeared in the first Danish Constitution from 1849 just as the more classical civil and political rights.

*Are social rights perceived as limitations or threats to the "first generation" rights?*

Extensive social rights protection may limit (necessary) social reforms. This can be a problem in times of crisis and not least seen from a demographic point of view. The older generations in Denmark and many other European countries are large and the younger generations are small. On top of this. the average lifetime is extended.

Seen from a legal aspect this raises a number of questions in the Danish context. Are future social benefits protected as property in Article 73 of the Constitution? Are future social benefits protected by legitimate expectations? And what about the younger generation – do they have any protected rights? Are there for instance limits to increase of taxation in Article 73? Could the young generation have legal expectations about a reasonable stable tax level? These questions are all highly debatable.[16] For instance, legal literature does not agree upon whether social benefits are protected as property according to Article 73 and if so to which extent and under what conditions. The scope of Article 73 in the Danish Constitution is highly debatable. Some theorists[17] argue that social rights do not fall under the protection of the article, some scholars argue that certain social rights can fall within the ambit of the provision in some circumstances, and others again argue that some social rights fall within the ambit of the right to property,[18] which limits the legislator in reforming the social rights having due regard for them as property rights for the individual. A recent study concludes that the future social rights are not protected by Article 73.[19] This conclusion is based on studies of preparatory works, case law, and legal literature. As

15 See J. E. Rytter (2013), p. 77.

16 For a recent study of these questions see H. Krunke (2010).

17 H. Krunke (2010) Chapter 6.3, and J. A. Nielsen (2012), p. 17 mention Knud Berlin, Ernst Andersen, Poul Andersen, Max Sørensen, Bernhard Gomard, Jens Peter Christensen & Jørgen Rønnow Bruun, and Jens Peter Christensen, Jørgen Albæk Jensen, & Michael Hansen Jensen as being opposed to the idea of protection of social rights under Article 73 of the Danish Constitution.

18 Namely when they rest upon insurance-like principles, see H. Krunke (2010), p. 63-68 and J. A. Nielsen (2012), who mention Henrik Zahle, Kirsten Ketcher, Alf Ross, and Peter Germer even though the acknowledgement of the extent of the scope of the protection under Article 73 is very different, with K. Ketcher arguing for the most extensive scope – see H. Krunke (2010), p. 69-70.

19 See H. Krunke (2010).

regards legal expectations in relation to pension, it is also highly questionable whether the older generation actually has legitimate expectations, since the demographic development has been public knowledge for more than 40 years, and therefore it could be expected that social reforms would very likely be necessary. On the other hand, the younger generation has also known about the demographic development, and therefore a certain increase in tax can be expected by them. The protection of social rights in Article 1, 1st Protocol, of The European Convention of Human Rights (ECHR), supplements the Danish constitutional protection. An interesting development is going on in this field starting with *Stec and Others against United Kingdom.*[20],[21] Obviously, the same considerations must be balanced in relation to Article 1, 1st Protocol, as regards the protection in the Danish Constitution.

*What are the most important questions of social rights protection discussed by the national legal scholarship?*

The legal limits of social reforms are important. Social reforms have been and are being carried out partly to strengthen the current Danish financial situation and partly because of the demographic development.

*What do you consider as the most original contribution of your national legal scholarship to the study of social rights?*

Kirsten Ketscher has made several original contributions. Thus, she has argued for an extensive protection of future social rights as a property right based on Article 73 and legitimate expectations as early as in 1990.[22] Many scholars do not agree with her. However, the development at the European Court of Human Rights (ECtHR) is along the same line of thought as Ketscher – though the ECtHR does not go as far as her. Kestcher has also claimed that Article 75(2) expressed an individual right and that this right was a pecuniary right in 1990.[23] She was the only scholar defending this position. However, now the Supreme Court has supported her views in case law from 2006 to 2012.[24]

Something which is missing in Kirsten Ketschers theory is the generational aspect. For instance as regards pension rights, not just the rights of the older generations should be scrutinized – also the possible rights of the younger generations should be scrutinized.

20 Case *Stec and Others against United Kingdom* (App. no. 65731/01 and 659000/01 et al., ECtHR 12/04/2006).
21 See H. Krunke (2010) where all case law in this field from the ECtHR is analyzed.
22 See K. Ketscher (1990).
23 Ibid.
24 See *U.2006.770H* and *U.2012.1761H.*

Also, it is not clear that the older generations can claim rights based on legitimate expectations in relation to, for instance, social pension rights since they have known about the demographic developments in society for 40 years. The more balanced generational aspect has been developed by Helle Krunke.[25] The research on generational aspects has contributed with a new demographic aspect on how extensive a social rights scheme can be without inflicting on other basic constitutional rights.

Stine Jørgensen has in recent years through her research focused on children's rights for instance in relation to the right to education.[26] Children's' rights have until now been a somehow underexposed field. However, it seems to be an emerging field of social rights. Jørgensen's work on free movement in relation to education should also be mentioned.[27]

Henrik Zahle has made an important original contribution as regards the general interpretation of human rights in the Danish Constitution. According to Zahle, the Danish courts can look to case law from the ECtHR when interpreting the Danish Constitution.[28] This position has been criticized by legal scholars with a more legal positivistic approach.

## 6.2 Constitutional Protection of Social Rights

*Does the national Constitution of your country provide for protection of social rights?*

The Danish Constitution holds a catalogue of basic rights, both classical first-generation rights and certain social rights, of which some grant individuals or nationals,[29] a positive claim on the State.

*What are the rights protected?*

The social rights protected under the Danish Constitution are few and the provisions are concise. This means that their scope and content are left rather unspecified in the Constitution, and thus there have been debates among national legal scholars what positive rights can be drawn from the Constitution. In short the protected substantial social rights are the right to be provided for by the State, when one cannot provide for oneself, Article

25 See H. Krunke (2010).
26 See for instance S. Jørgensen (2008), p. 153-169.
27 See *S. Jørgensen*, 'The Right to Cross-Border Education in the *European* Union', 46 Common Market Law Review, Issue 5, (2009), pp. 1567-1590.
28 See H. Zahle, *Dansk forfatningsret 3*, 2003, p. 56-58.
29 Some rights apply universally to anyone on Danish territory others however are solely for nationals.

75(2). As mentioned it is now clear that individuals can claim a right on the basis of Article 75(2) and that it is a pecuniary right.

Article 75(1) of the Danish Constitution contains a provision envisioning that everyone who can work should be able to. This article does not contain a positive right to obtain a job from the State if one does not have one,[30] the provision is merely a constitutional aspiration for labor for all not a guarantee for the individual. Article 75(1) does not then contain a social right for the individual.

Contrary to this Article 76 contains a positive right for all children to have primary education. This is in fact not only a right, but also a command that all children must have primary education either within the public school system or outside it. This entails an individual right (and duty) for every single child to an appropriate primary education.[31]

As mentioned some scholars have claimed that future social benefits are protected by Article 73 which protects private property. This is however not the common view in constitutional literature. Social benefits which have already been transferred and social benefits which are due can be considered as private property protected by Article 73.

*How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family, a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?*

The few constitutional positive social rights in the Danish Constitution are granted to individuals. More specifically Article 75(2) of the Danish Constitution states "*he* who cannot provide for himself or his (…) is entitled to assistance from the public (…)"[32] and thus singles out the individual as entitled to help.[33] This right is also guaranteed to non-nationals.[34]

Article 76, which grants a positive right for children to obtain primary education, also contains an individual right for every child on Danish territory to receive this education.[35]

30 See J. E. Rytter (2013), p. 445.

31 Stine Jørgensen notes two rulings in which children have won cases against the administration claiming that there special needs were not met during primary education and thus their right to primary education was violated. See S. Jørgensen (2008), p. 153-169.

32 Our own translation.

33 See also J. E. Rytter (2013), p. 435.

34 See Ibid., p. 436 who however mentions the dissenting opinion of legal scholar, Alf Ross (1980), p. 785.

35 See S. Jørgensen (2008) and J. E. Rytter (2013), p. 445.

*How is the debtor of social rights defined? Is it the State, public authorities, public bodies, private bodies?*

The debtor of the constitutional social rights is in Article 75(2) of the Danish Constitution "the public" meaning the State; however, in Article 76 concerning the individual right for every child to obtain primary education, the debtor is not explicitly identified. It is however clear that this provision contains a duty for the State to have a public school system in order to accommodate this individual right.

*What is the content of the rights? What are the obligations of the legislator? What are the obligations of the administration? What are the obligations of other actors?*

The legislator cannot amend the Constitution without going through a specific procedure for amending the Constitution.[36] This entails a comprehensive process in order for a constitutional amendment to come into force: The amendment bill must obtain a majority vote in Parliament, the Parliament has to be reelected, the amendment Bill has to have a majority vote in the new Parliament, the bill must be sent to a referendum in which a majority of those voting and at least 40% of those entitled to vote have voted in favor of the bill and finally the government must choose to uphold the bill. Because of this difficult process the Danish Constitution has only been amended five times since its founding in 1849. The obligation of the legislator in general can be said to be to ensure that legislation which is passed is not in conflict with the Constitution, which among others obliges the legislator not to pass laws, which are not in conformity with the basic constitutional social rights, and thus there is a limit to which legislation can be passed, since there are certain positive social rights in the constitution, which must be respected in ordinary legislation.

The administration is the key to the distribution of the benefits, which are the result of the social rights that the individual in the Danish welfare system is legally entitled to. In that way the administration is the facilitator, which overlooks every case and assess whether the individual has a right to a social benefit and if so to make sure that this right is fulfilled. The administration is bound by the Danish Constitution, legislation, the ECHR, and EU Law.

The courts can review the constitutionality of legislation and according to Article 63 of the Constitution the courts are entitled to pass judgment on any matter relating to limitations on the powers of public authorities.

36 See the Danish Constitution Article 88.

*Does the national Constitution differentiate the scope and methods of protection of social rights and other rights?*

No.

*Does the normative structure of constitutional social rights vary? Is it possible to distinguish different types of constitutionally protected social rights?*

Some of the constitutional provisions concerning social rights are merely aspirations for society and do consequently not contain positive individual rights. On the contrary, other constitutional social rights are more normative in the sense that they do contain an absolute and positive right for the individual against the State. The scope of these rights containing positive rights has been dynamically developed since the passing of the initial Constitution in 1849.

Thus, we see that there is a variation both in terms of content of the single rules and that there is also a variation of content over time reflecting the development of society in general.

*Is there a constitutional mechanism of protection vis-à-vis the legislator? How does it operate? Are there any instruments that ensure protection against the inaction of the legislator?*

When the government presents a new bill a special division in the Ministry of Justice will have checked whether the bill is in conformity with the Cconstitution, EU Law, the ECHR, and other international treaties. Furthermore, the President of Parliament will perform a brief check of whether the bill respects the cConstitution.

The courts can decide whether legislation is in conformity with the Constitution, the ECHR and the treaties of the EU. The courts have the competence to review legislation and its conformity with the Constitution though it has no legal basis in the Constitution. Danish courts have historically been very reluctant and shown much restraint in terms of ruling against the legislative will.[37] In recent decades, the will to apply a new more broad and intense review have been more present in the Danish courts. In *U.1989.928H*, *U.1990.13H*, and *U.1990.181H*, the Supreme Court established Danish authorities' duty to follow case law from ECtHR when applying national legislation.[38]

37 See J. E. Rytter, *Grundrettigheder – Domstolenes fortolkning og kontrol med lovgivningsmagten*, 2000, p. 46-47.

38 Ibid., p. 66.

In *U.1999.841H*, the Supreme Court found a law passed by the legislative to be in breach with the Constitution. This is the first and single time this has happened in Denmark, which shows that even though judicial review in regard of rights-protection has intensified, the courts are still influenced by the history of judicial restraint in Danish legal tradition. Still the courts have significantly changed the way they apply and interpret human rights and have shifted away from a strict, positivist form of interpretation and moved towards a more dynamic and teleological approach to these sources of law.[39]

As a recent example the Supreme Court in *U.2012.2874H* found the treatment of an Iranian who was rejected from Denmark due to a criminal sentence, and who could not be sent to Iran because of risk for persecution there was forced to live in conditions not in accordance with ECHR. This reflects that Danish courts actually review the cases brought before them in the light of human rights, and that they will actually review the rules passed by the legislator.[40]

*How do you evaluate the efficiency of social rights protection offered by the Constitution and the constitutional justice?*

The constitution offers some very basic, yet principled social rights, which underline the entire vast and complex scheme of social rights that pertain to the Danish welfare state.

Most rights are found in the ordinary legislation and are subject to change by the legislator via the ordinary legislative procedure. Thus, the actual protection of social rights in the Constitution is scarce and nor far-reaching; however, they are only part of a massive legal scheme on social rights and benefits available to individuals in Denmark.

In this way the efficiency of the constitutional social rights is both high and low, given that the Constitution is vital for the protection of the most basic social rights, however, not extensive in terms of specific social rights, which are to be found elsewhere in the national legal complex. Equality rights between the sexes are for instance missing in the Danish Constitution. If the Danish Constitution was to be amended constitutional protection of more social rights would most likely be considered and discussed. However, extensive constitutional protection must be weighed against room for political change – especially when the constitutional amendment procedure is as heavy as it is the case in the Danish Constitution.

39 Ibid., p. 68-69.

40 In this case, however, legislation was not changed since the Supreme Court in its ruling was very concrete on the specific case and did not rule on the legislation as such, see <www.justitsministeriet.dk/nyt-og-presse/pressemeddelelser/2012/h%C3%B8jesterets-dom-%C3%A6ndrer-ikke-reglerne-udl%C3%A6ndinge-p%C3%A5-t%C3%A5lt-ophold>.

*What do you consider as the most original contribution of your national Constitution to the protection of social rights?*

Article 75(2) according to which a person who is unable to support himself and whom no one else is under obligation to support is entitled to assistance from the State was part of the first Constitution from 1849. As we shall return to below at that time it was a unique and avant-garde provision compared to other constitutions.[41] In 1953, the provision was extended and according to Article 75(1) it should be an aim that every able-bodied citizen has the opportunity to work under conditions that safeguard his or her existence in order to promote the common good.

## 6.3 Protection of Social Rights Under Other Constitutional Rules and Principles

*Are there other constitutional or jurisprudential principles used as tools for the protection of human rights?*

It is not clear whether certain human rights are protected by unwritten constitutional principles.[42] The question whether a general constitutional principle on equality exists – which has no legal basis in the written Constitution – was raised in a Supreme Court case.[43] However, the Supreme Court left the question open. A Supreme Court judge later on wrote a comment on the case in a Danish legal journal stating that "if such a constitutional principle even existed it would probably protect against clear and arbitrary differential treatment of citizens".[44]

*Is there a protection offered by the following constitutional principles: Protection of legitimate expectations*

The protection and emphasis on legitimate expectations are evident in several articles of the Danish Constitution. Firstly, the principle can be linked to the protection of private property as protected by Article 73 of the Danish Constitution. In addition, Article 22 secures that a law is only effective once publically announced, which gives the citizens a possibility to know the legal situation at any time.[45] The respect for legitimate expectations

41 See J. E. Rytter (2013), p. 433.
42 Ibid., p. 42-43.
43 See *U.1965.293/2H*.
44 See *U.1965B.244*.
45 Contrary to this, there is no general prohibition of laws with retroactive consequences in Danish law.

is also evident in Article 43, which demands a basis in law[46] for the collection of taxes. It seems that there is an intimate relationship between legitimate expectations and the notion of predictability, and therefore one could raise the point that also Articles 64 and 3 of the Danish Constitution, which respectively secures the independence of the courts and the judges also to some extent flesh out the principle of the protection of legitimate expectations.[47]

The legal status of legitimate expectations as a source of law in Danish Constitutional Law is not clear. It is debated whether legitimate expectations represent an independent source of law, which can be used on its own to justify claims for social rights under the Constitution, or if it can only constitute a legal argument/a source of interpretation in relation to constitutional provisions such as Article 73 which protects private property.

Regardless of the status as an independent source of law or as an argument claiming that something falls within the ambit of the protection of property it is also necessary to determine what can actually be said to constitute a legitimate expectation.

The status of legitimate expectations as either an independent legal source or merely as a legal argument for the protection of property cases brought before Danish courts claiming rights on the basis of legitimate expectations is not clear. Looking through Danish court practice it is evident that parties actually make claims based on legitimate expectations in cases concerning the constitutionally protected rights.[48] Most of the cases in which legitimate expectations occur are cases about expropriation and here legitimate expectations are used as a legal argument for proving that a property right has come into existence.[49] In a few cases, legitimate expectations are used as an independent ground for a claim.[50]

As indicated it is relatively clear from looking at Danish court practice that legitimate expectations can be used as a valid argument, when claiming that a property right has been violated. The argument can also be used when determining what constitutes full compensation when an expropriation has been carried out.[51]

It must be kept in mind that legitimate expectations is an argument amongst others and may be deferred by other just as valid arguments.

More uncertainty clings to the question if legitimate expectations can also be used as an independent legal source within Danish Constitutional Law. From the scarce practice in which legitimate expectations have been used as an independent foundation for a claim within a constitutional context it is not possible to firmly establish that legitimate expecta-

46 Contrary to a basis in administrative rules.

47 See H. Krunke (2010), p. 97.

48 Ibid., p. 115.

49 See for instance *U.2009.1883H, U.2008.2823H, U.2008.1678H, U.2008.1408/2H, U.2006.1095H, U.2005.590H, U.1996.472H*, and *U.1996.472/2H*.

50 Unpublished ruling from *The Eastern High Court*, *B-1626-01*, and *U.1935.1H*.

51 According to the Danish Constitution Article 73 an expropriation can only be made under certain circumstances among others that full compensation is rewarded.

tions can be said to be a general constitutional principle under Danish law. In the two cases that refer to legitimate expectations as an independent principle the courts did not agree that the parties had such legitimate expectations, and thus it is difficult to determine the specific scope and content of a general principle of legitimate expectations in Danish Constitutional Law even if such a principle should exist.[52]

### *Protection of vested rights*

The question arises in relation to whether an administrative decision is irrevocable. Put in short terms Danish Administrative Law focuses on the effects of the decision meaning whether the decision confers a burden or a benefit to the citizen.[53] In general, if the decision confers a burden, it is easier to revoke the decision than if it confers benefits on the citizen.

### *Precision of legislation*

There exist no constitutional principles or rules on the precision of legislation. The Ministry of Justice has some internal procedures on how to work out bills seen from a technical point of view.[54]

In cases where the administration makes decisions that have far-reaching and intense effects to the detriment of a citizen or a group of citizens it is a guiding principle in the Danish Administrative Law that the legislative basis for such decisions must be clear and unambiguous.[55]

### *Non-retroactivity of legislation*

There is no general prohibition of laws with retroactive consequences in Danish law.[56] Normally, new legislation only concerns facts which have taken place after the new legislation has been promulgated.

52 See H. Krunke (2010) p. 117.
53 See S. Schønberg, *Legitimate Expectations in Administrative Law*, 2000, p. 72.
54 See A. L. Borman, J. Bülow and C. Østrup, *Loven. Om udarbejdelse af lovforslag*, 2002.
55 See J. Garde, 'Saglige krav' in Jens Garde et al., *Forvaltningsret. Almindelige emner*, 2009, p. 180.
56 See H. Zahle, *Dansk forfatningsret*, 2001, p. 318.

*Due process*

The right to bring administrative rulings before the courts is codified in the Danish Constitution Article 63(1). The courts have the competence to review the constitutionality of legislation though is not mentioned in the Constitution.

The Constitution also contains rules on the courts' openness to the public and the structure and independence of the courts and judges all of which contribute to ensure a due process.[57]

*Other general constitutional principles?*

It is assumed in parts of literature that derogation from the Constitution can be legitimate under extreme circumstances without a legal basis in the Constitution. There must be serious danger for the State and its institutions present. The derogation must be proportionate and principles of democracy and human rights must be followed as far as possible.[58]

The Danish principle of legality (though not entirely clear) might be said to support the protection of human rights.

## 6.4 Impact of the International Protection of Social Rights

*Did your state ratify international treaties that pertain to social rights? Are they directly applicable in your domestic legal order?*

Denmark has a dualistic legal system.

Denmark has ratified ECHR and in 1992 the Convention was incorporated into the national legal system. Denmark has been a member of the EU since 1972 with the supranational obligations pertaining to this membership.

Furthermore, Denmark has ratified numerous treaties pertaining to social rights, e.g. the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the CEDAW Convention, the International Covenant on Economic, Social, and Cultural Rights, the UN *Convention on the Rights of*

57 See the Danish Constitution Articles 61, 62, 64, and 65.
58 See H. Zahle (2003), p. 286-287.

*Persons with Disabilities.*[59] Denmark has also ratified the European Social Charter from 1961.[60]

Only the ECHR and the treaties of the European Union are directly applicable in the Danish legal order. Other treaties and conventions ratified by Denmark constitute relevant sources of law in the domestic legal order.[61] Legal theorists have differed in their view on how international treaties, which are not incorporated yet ratified, should be classified in the national legal order. It seems with recent Supreme Court rulings that it is now established that non-incorporated treaties are not directly applicable within the domestic legal order.[62] These treaties still constitute valuable sources for interpretation, which should be made in accordance with relevant ratified treaties.[63]

*Did these treaties have an impact on the national legal system? Did they trigger any changes in national legislation or practice?*

As mentioned the Danish Constitution is old dating back to 1849 and since then it has only been revised four times. The last revision was in 1953, and many provisions still have the same wording as in 1849. The human rights provisions are concise. One might claim that the constitutional human rights protection is not one of modern standards. The ECHR therefore plays an increasingly important role in the human rights protection in Denmark.

Just like the European Court of Justice (CJEU) the ECtHR has a more dynamic way of interpreting legal texts than Danish courts has traditionally had. It has been discussed

59 See, <http://menneskeret.dk/menneskerettigheder/danmark+og+menneskerettigheder/menneskerettighedernes+gennemf%c3%b8relse+i+dansk+ret>.

60 Denmark has not ratified the revised Social Charter from 1996. See <http://menneskeret.dk/menneskerettigheder/europa,+oplysning+og+rettigheder/europar%C3%A5det/den+europ%C3%A6iske+socialpagt>.

61 The ECHR was incorporated in 1992 (law no. 285 on April 29th 1992). Jens Elo Rytter argues that there is no reason not to establish that it is the ECHR complex as such that is directly applicable in the Danish legal order, which means that all case law and amendments post-1992 are also directly applicable; see J. E. Rytter (2013), p. 50-53. See also J. Vedsted-Hansen, 'Menneskerettighedskonventioner som bestanddel af landets indre retsorden', in J. H. Danielsen (ed.), *Max Sørensen 100 år*, 2013.

62 See J. E. Rytter (2010), p. 189 – where he refers to established practice from the Danish Supreme Court, which now states that non-incorporated treaty-provisions cannot trump national legislation. See *U.2006.700H*, *U.2010.1035*, and *U.2010.1547H* for this dualistic viewpoint.

63 Furthermore three important rules apply that modify the dualistic approach to national law and international, ratified treaties. A) Danish legal norms should be interpreted in accordance with international obligations if possible. B) When applying national legal norms, they should be applied under the impression that it has not been the legislative's intention to be in breach with international treaty obligations; and C) Administrative authorities shall conduct their cases in a manner where breach of international treaty obligations is avoided. See H. Zahle, *Dansk Forfatningsret (studieudgaven)*, 2012, pp. 362-364. Zahle further states that if an international treaty is in direct conflict with a national legal norm, and the conflict cannot be solved by applying the above-mentioned rules, and the legislator intended the breach with an international obligation, then the national norm must be respected by the national authorities. See ibid., p. 374.

whether the Danish Supreme Court has in general been inspired by this dynamic style of interpretation and has become more active and dynamic.[64] However, consensus on such a development does not exist.

It has been discussed which role the ECHR plays in relation to interpretation of the Danish Constitution. Where some scholars claim that the Convention and the practice connected to it can be a source of interpretation when interpreting Danish constitutional provisions on human rights and that the Supreme Court in some cases has been inspired by the ECHR when interpreting the Constitution[65] other scholars claim that this is not the case.[66]

The Ministry of Justice checks whether bills are in accordance with Denmark's international treaty obligations. This way the treaties including the ECHR play a role in relation to all new Danish legislation.

It should be mentioned that the executive power is also bound by the treaties.[67]

There have been several cases against Denmark at the European Court of Human Rights Denmark in the field of social rights understood in a broad sense. In particular, a number of cases have concerned the fact that Denmark permitted by law pre-entry closed-shop agreements in general in certain sectors. The European Court of Human Rights has found that Denmark violated Article 11 of the European Convention of Human Rights.[68] Depending on how broad one defines "social rights" other cases have for instance concerned placement of child in psychiatric ward (Article 5[69]), paternity rights (Article 14 taken in conjunction with Article 6 or Article 8[70]), objections to compulsory sex education in state primary schools (Articles 8 and 9 and Article 14 in conjunction with Article 2, Protocol 1),[71] whether proceedings in social rights cases have exceeded a "reasonable time" (Article 6[72]) and immigration, residence permits, and deportation (Article 8[73], Article 14 in conjunction with Article 8[74] and Article 3[75]). It should also be mentioned that a large number of social

64 See J. E. Rytter (2000), p. 61-69.

65 See for instance H. Zahle (2003), p. 56-58.

66 See for instance J.P. Christensen, 'Internationale konventioners betydning for Højesterets grundlovsfortolkning', *Ugeskrift for Retsvæsen Section B, 2013, p. 15.*

67 See K. Ketscher, *Socialret*, 2008, p. 46-47.

68 See for instance case of *Sørensen and Rasmussen v. Denmark* (Application numbers 52562/99 and 52620/99) of 11 January 2006.

69 See case of *Nielsen v. Denmark* (Application number 10929/84) of 28 November 1988.

70 See case of *Rasmussen v. Denmark* (Application number 8777/79) of 28 November 1984.

71 See case of *Kjeldesen, Busk Madsen, and Pedersen v. Denmark* (Application number 5095/71) of 7 December 1976.

72 See case of *Petersen v. Denmark* (Application number 11292/05) of 22 January 2007, case of *Petersen v. Denmark* (Application number 70210/01) of 18 September 2003 and case of *Brøsted v. Denmark* (Application number 21846/04) of 30 August 2006.

73 See case of *Osman v. Denmark* (Application number 38058/09) of 14 September 2011.

74 See case of *Biao v. Denmark* (Application number 38590/10) of 25 March 2014 and case of *Amrollahi v. Denmark* (Application number 56811/00) of 11 July 2002.

75 See case of *T.N. v. Denmark* (Application number 20594/08) of 20 January 2011.

rights cases brought against Denmark have been declared inadmissible by the European Court of Human Rights.

There are no decisions against Denmark under the European Social Charter. However, the Governmental Committee of the Social Charter has several times discussed the fact that Denmark permitted by law pre-entry closed-shop agreements in general in certain sectors and the Committee has found that this practice was not in conformity with Article 5 of the European Social Charter.[76]

As regards the International Convention on Economic, Social, and Cultural Rights Danish courts have applied it three times in a period from 1 January 2001 until 1 January 2014.[77] The cases concerned Article 13,[78] Article 8[79] and Articles 6 and 7[80].

*Does the case-law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights?*

*In particular, did the case-law of the European Court of Human Rights and other regional human courts have an impact on national law in the field of social rights?*

*What are the most important social rights cases brought from your country to international rights protecting bodies?*

Yes, regional human right courts have had an impact on Danish law in the field of social rights. Some examples of Danish cases which have been brought for the CJEU and which have had an impact on Danish legislation will be given.

The recent CJEU ruling C-46/12 *L.N.*[81] which found Denmark in breach of the obligations under the rule of free movement for workers within the Union will have an impact on the new reform of Danish student grant scheme.[82]

In C-150/04 *Commission v Denmark*[83] CJEU found Denmark to be in breach of community legislation, because it was only possible to get a tax reduction for pensions paid to Danish

76 See for instance Conclusions XIV-1 and XV-1 of the Conclusions of the European Committee of Social Rights.

77 See Rapport number 1546 on incorporation etc. within the area of human rights, Ministry of Justice, 2014.

78 See U2001.221H.

79 See U2002.2591Ø.

80 See U2006.2083H.

81 See case C-46/12 *L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, n.y.r.

82 See <http://fivu.dk/aktuelt/pressemeddelelser/2013/ny-reform-skal-malrette-suen>.

83 See C-150/04 *Commission v Denmark* [2007] ECR I-01163.

pension companies[84] as opposed to pensions placed in other Member State companies. This led to a reform of the legislation on this area in order to be in conformity with Union legislation.[85]

In 1996, the Danish Maritime and Commercial High Court asked the CJEU for a preliminary ruling[86] on whether then Article 7 in the Danish Law on salaried employees was in conflict TFEU Article 157[87] on the principle of equal pay for male and female workers and in conflict with the EU Equality Directives.[88] The national provision granted pregnant female employees the right to obtain half their salary from the time they were no longer able to work due to their pregnancy (maximum 5 months). This provision furthermore made it possible for an employer to make the pregnant employee temporarily stay at home obtaining half their salary if it was not possible to use her as work force, even if she was not unfit for working. In C-66/96 *Høj Pedersen and Others*, the CJEU found that the Danish legislation was contrary to the Community law as laid down in TFEU Article 157 and the Equality Directives when it did not grant pregnant women the right to full pay when illness due to the pregnancy and risk for the health of mother and child made the woman unfit for working. This led to a discrimination of pregnant women compared to other employees. Furthermore, the court found it to be contrary to the Equality Directives that an employer had the right to make an employed pregnant woman stay at home on half her pay, if the employer did not need the pregnant employee working.[89]

Because of this ruling the Danish Parliament passed an amendment of Article 7 in the Law on salaried employees making sure that the new provision was in accordance with Community legislation.[90]

Another example of conflict between EU legislation and national legislation has been seen in relation to the Danish Holiday Act, which contains a provision (Article 13(2)) after which a worker who is ill before his or her holiday commences is not obliged to commence

84 Pension schemes must be taken out with a life assurance company, a pension fund or a financial institution in Denmark.

85 See I. Henriksen and M. Reng, 'Ny pensionsbeskatningslov', *Ugeskrift for Skat* 2007.0499.

86 See case C-66/96 *Høj Pedersen and Others* [1998] ECR I-07327.

87 Then Article 119.

88 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

89 See J. Kristiansen, *Aftalemodellen og dens europæiske udfordringer*, 2013, p. 355f.

90 Ibid.

their legally guaranteed 5 weeks of holiday. According to Article 7 of the Working time directive[91], "Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least 4 weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice". When the directive was implemented in national legislation in 2000 the Danish Ministry of Employment noted that the Danish Holiday Act was in compliance with the working time directive, and thus no rules were changed.

According to Danish practice since 1938 the risk of falling ill during holiday rested upon the employee during the holiday period.[92] However, the CJEU interpreted Article 7 of the working time directive in such a way that the Member States could not make the right to holiday "…subject to any preconditions whatsoever…".[93] This contained a right for a substitute holiday for employees who had been unable to conduct their holiday with the necessary recreational purposes.[94] The CJEU rulings *Schultz-Hoff* and *Pereda*[95] led to a revision of the Danish Holiday Act, since the Ministry of Employment found that Danish practice with putting the risk for illness of the employee during holiday would not be accepted by the CJEU in the light of these rulings. Thus, the Holiday Act was amended in 2012 adding a new subparagraph to Article 13[96] after which:

An employee who has accrued 25 days of holiday and who falls sick during his or her holiday is entitled to replacement holiday after five sickness days during holiday in the holiday year, subject to presentation of medical documentation. An employee who has accrued less than 25 days of holiday is entitled to replacement holiday after a proportionately lower number of sickness days.

This amendment is thus a direct effect of CJEU case law and its impact on national legislation.

As a final example case C-499/08 *Ole Andersen*[97] can be mentioned. In this case, the Danish Western High Court requested a preliminary ruling from the CJEU in order to settle if a provision in the Law on salaried employees (Article 2a(3)) was in conflict with the general prohibition on age discrimination in Community law. The Danish provision institutes that employees who are discharged and whose employer has paid pension to the discharged employee since before the employee turned 50 years of age have no right to

91 Directive 2003/88/EC.
92 See J. Kristiansen (2013), p. 365.
93 See case C-350/06 Schultz-Hoff [2009] ECR I-00179, para. 28.
94 See J. Kristiansen (2013), p. 366.
95 See cases C-350/06 *Schultz-Hoff* [2009] ECR I-00179 and C-277/08 *Vicente Pereda* [2009] ECR I-08405.
96 Article 13(3).
97 See case C-499/08 *Ole Andersen* [2010] ECR I-09343.

demand severance pay.[98] Even if the employee wishes to stay active on the work market, he or she cannot demand severance pay once pension has been financed by the former employer since before the employee turned 50 years of age.[99] In the case, the employee who had been at his workplace for more than 18 years before being discharged did not wish to exercise his right to retirement, instead he claimed that the Danish legislation was in conflict with Directive 2000/78 EC[100] as he claimed the provision was discriminatory on the basis of age. The CJEU stated that:

Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labor market, and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.[101]

Thus, the Court examined whether the discrimination was legally justified. The Court found:

> that Article 2a(3) of the Law on salaried employees, in so far as it excludes from entitlement to the severance allowance workers who will receive, on termination of the employment relationship, an old-age pension from their employer, does not go beyond what is necessary to attain the objectives which it pursues."[102]
> However, the Court also found that "the measure at issue actually deprives workers who have been made redundant and who wish to remain in the labor market of entitlement to the severance allowance merely because they could, *inter alia* because of their age, draw such a pension.[103]
> In this regard, the curbing of the right to severance pay went beyond what was necessary in obtaining the otherwise justified goals of the discriminatory rule.[104]

This CJEU ruling has surprisingly not led to any changes in national legislation, as the actors of the national labor market were not able to reach an agreement on how the legis-

98 Article 2a (3): No severance allowance shall be payable, if the employee will – on termination of the employment relationship – receive an old age pension from the employer and the employee has joined the pension scheme in question before attaining the age of 50 years.
Other employees who fall without the ambit of this subparagraph have the right to severance pay, if they have been employed for more than 12 years.

99 See J. Kristiansen (2013), p. 360.

100 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

101 See case C-499/08 *Ole Andersen*, para. 26.

102 Ibid., para. 40.

103 Ibid., para. 44.

104 See J. Kristiansen (2013), p. 360.

lation should be changed in order to accommodate Community law.[105] The Government did not take any legislative initiative either; however, the Minister of Employment ensured that there was no reason to fear that the national courts would not be able to apply the ruling in a way so no employee were illegally deprived of their right to severance pay in the light of C-449/08.[106]

*What are the lessons you draw from the international litigation (pertaining to social rights) started by applicants from your country?*

It displays a lapse between a typical Danish positivist and legislator respecting approach as opposed to the often teleological approach set forth in the international legal bodies.

Also the Danish universalistic welfare model is closed in nature, where social benefits are meant for individuals who live on the territory and contribute to the welfare system by paying high general taxes. The Danish system is also built on the precondition that there will be a stable growth in the population.[107] Unfortunately, this is not the case. Denmark and the rest of Europe are moving towards a society with a large group of elderly people and fewer young people. This demographic development combined with a development in case law from the ECtHR according to which social benefits are increasingly considered protected by the right to property in Article 1, 1st Protocol, can lead to generational injustice in the future because of the Danish tax financed social welfare system based on the pay-as-you-go principle. Also the principle of free movement within the EU and the non-discriminatory principle in the EU put pressure on the national extensive social rights scheme, which now is also accessible for EU citizens under certain conditions.[108] The Danish social rights and welfare system stem from a time where borders were more closed, mobility was low, social benefits were awarded on the merits of citizenship and contributions to the social welfare system were based on the general taxation. This is not the case in the contemporary EU context.[109] The national system has thus been based on closed borders, whereas the CJEU and ECtHR presuppose an openness not contained in our national system which to some extent was based on discriminatory rules based on nationality directly or indirectly as a demand for connection to the Danish society for a number of years. Thus, some rules have to be altered to the detriment of nationals in order

105 Ibid., p. 361.
106 Ibid.
107 See in this direction H. Krunke (2010), p. 41, who points out that this is not the case as the new generations are smaller than the previous. She also notes that the median age is increasing, which means that the older generations live longer, thus putting more pressure on the social system.
108 Ibid.
109 Ibid.

to comply with the international obligations.[110] The lessons are thus that rules and social benefits must be in compliance with the modern society marked by high mobility and open borders and where international legal schemes have high relevance for the design of national social rights schemes. This also means that it will be difficult to uphold the Danish welfare system based on general taxation. In the future, social benefits will probably need to be closer connected to individual employment contracts.

## 6.5 Social Rights in Ordinary Legislation

*To which extent does the ordinary legislation in your country ensure the protection of social rights?*

*Danish legislation contains vast and complex sets of rules concerning social rights. Worth mentioning is the Active Social Policy Act which contains the rules for unemployment benefits and other benefits for people who cannot participate actively on the labor market. Other public benefits are:* Student grants (SU), allowances paid during periods of unemployment, illness or paternity leave, pension (including early and old-age pensions), housing assistance, financial support granted to an employer or flexjob position, extensively subsidized day-care for children and allowances to parents with children.[111] On top of this the health care system is free (tax financed). These examples of social benefits available in Denmark are regulated in ordinary legislation.

Denmark is a welfare state with an extensive system of public benefits. Some benefits are available to all people who reside in Denmark others are subject to certain criteria being met by the applicant. It is in the area of rights which are not available to all, that Danish national legislation sometimes collides with the principles and case law of the international courts.

*Is this legislation in conformity with the national Constitution and the international instruments ratified by your country?*

As mentioned the human rights protection in the Danish Constitution is quite old, and the provisions are few and concise. This limits the number of cases concerning conformity of legislation with the Constitution. However, as mentioned in the case *U2012.1761H*, the Supreme Court stated that Article 75(2) of the onstitution in the light of present day con-

110 Rules on family reunification, e.g. bringing a spouse to the country or permission to take residency in Denmark, now also affect the Danes who found a family outside of Denmark.

111 See <www.nyidanmark.dk/en-us/coming_to_dk/permanent-residence-permit/public-assistance.htm>.

ditions should be interpreted as containing a pecuniary right for the individual against the State in a situation where that individual was not able to support him or herself. Another example is a case from the High Court[112] concerning whether people who had paid contributions to a special social pension fund had a property right according to Article 73 to parts of the pension funds. This was not the case according to the High Court.

National legislations conformity with international instruments has given rise to much more discussion, especially in relation to EU legislation.

An example is the mentioned CJEU ruling *L.N.*[113] The CJEU found that the Danish rules for eligibility for obtaining student grants were in conflict with the EU mobility rules. Until 2012 non-nationals who came to Denmark to study could not obtain student grants as they could not at the same time be recognized as workers and thus be entitled to the more extensive benefits that are available for workers who move within the EU. This case was brought before the CJEU by the National Social Appeals Board as a reference for a preliminary ruling. The Court found that the Danish practice with not giving non-nationals student grants, when they were in fact workers in the EU legal perspective was a violation of EU law. This led to a national fear of social tourism[114] since the Danish scheme for student grants is very extensive and does not include an obligation to pay back the grants rewarded during the period of studies.[115] The Minister for Science, Education, and Higher education estimated that this ruling will cost Denmark approximately € 268.000 every year due to a new group of students entitled to grants.[116]

Another even more topical case concerns the Danish legislation on allowance to parents of children. Until now according to Danish legislation EU citizens from other Member States who work in Denmark can receive the allowance after 2 years. However, according to EU Law they should receive it immediately. The Commission has told Denmark to adjust to EU Law. Two judgments from the CJEU point in the same direction: C-619/11

112 Ruling of the Eastern High Court, June 24 2004, 6th division.

113 See case C-46/12 *L.N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, n.y.r.

114 See e.g. C.Jacqueson, 'Dugfrisk SU-dom på mudret baggrund', *Jylland Posten*, Febuary 28th 2013 and 'Regeringen vil analysere EU-dom mod Danmark', *Politiken*, Febuary 21st 2013 and "Jacqueson om SU-dom", *Ræson*, April 24th 2013, available from: <http://raeson.dk/2013/jacqueson-om-su-dom-social-turisme-er-mere-en-myte-end-virkelighed/>, [Accessed 01. januar 2013].

115 It should be noted that Catherine Jacqueson has stated that the content of the L.N. ruling was uncontroversial in a legal perspective and helped to clarify that Danish practice has knowingly been conducted in violation with EU law. See C. Jacqueson (2013) for this viewpoint and also C. Jacqueson, 'Unionsborgerens ret til sociale ydelser efter EU-retten - Hvilken vej blæser vinden?', *EU-Ret & Menneskeret*, no. 3, 2010, pp. 152-166, which already concludes that the connection to the labor market in order to qualify as a worker under EU law is not very strict. Jacqueson also questions the legality of Article 12 a in the Active Social Policy Act, which only grants help for the *returning* journey for EU citizens who are seeking for work in Denmark – see p. 152.

116 See Europaudvalget 2012-13, EEU alm. del – endeligt svar på spørgsmål 42. April 2013.

*Chassart* and C-257/10 *Bergström*.[117] However, the government is having great problems convincing the Danish Parliament that the Danish legislation must be amended in order to be in accordance with EU Law.

It should also be mentioned that recent case law from the CJEU on free movement of EU citizens (*Rottman* and *Zambrano*)[118] has caused much political and public debate and some discussion among legal scholars in Denmark.

Practise from the ECtHR on property rights to social benefits according to Article 1, 1st Protocol (*Stec and Others against United Kingdom*[119]) has also caused public, political, and academic debate.

*Are there any original legislative tools or mechanisms of protection of social rights created in your country?*

The Danish flexicurity model is often viewed as original by other countries. The idea is that it is relatively easy to fire employees compared to some other European countries. However, at the same time it is quite easy to receive social benefits and at a quite good level. Especially, benefits from the so-called "A-kasse-system" are quite high compared to ordinary unemployment benefits. People who have contributed to the system and been employed for a certain period are entitled to this kind of benefit for a couple of years.

Another, special Danish characteristic is collective agreements at the labor market between employers and employees. The legislator does normally not legislate in this field – it is left upto the employers and employees to agree on pay, working conditions etc.

## 6.6 Justiciability of Social Rights

*Are social rights considered justiciable in your country? To which extent?*

In Denmark, many cases on social rights are started within the administration. Citizens can file complaints over administrative decisions. In the area of social rights and welfare complaints over administrative decisions can be filed to The National Social Appeals Board (NSAB). The NSAB processes about 20.000 cases each year.[120] The NSAB is an independent authority which can sustain, alter or annul administrative decisions in this area. Decisions made by the NSAB can always be brought before the courts.[121]

117 See cases C-619/11 *Dumont de Chassart*, n.y.r. and C-257/10 *Bergström*, n.y.r.
118 See cases C-135/08 *Rottman* [2010] ECR I-01449 and C-34/09 *Ruiz Zambrano* [2011] ECR I-01177.
119 See case *Stec and Others against United Kingdom* (App. no. 65731/01 and 659000/01 et al., ECtHR 12/04/2006).
120 See <http://ast.dk/om-ankestyrelsen/hovedopgaver>.
121 The Danish Constitution Article 63(1) gives the courts the right to try the legality of administrative decisions.

In cases where the courts decide whether the rulings of the public authorities are legal, certain principles apply.[122] The intensity of the judicial review of administrative rulings differs from case to case depending on the nature of the administrative ruling. If the administrative decision brought before the court is based on clear legal rules the judicial review will be very intense. If the administrative decision is based on vague legal norms the court will refrain from an intensive review of the administrations interpretation of the vague rule, and only check that the interpretation is legal and consistent with former practice.

It is a prerequisite for a civil case to be tried that the part submitting the case has a legal interest in the outcome of the case. This means that there is no *actio popularis* in the Danish judicial system, and a case will be dismissed, if the suing part does not have an individual and relevant interest in the outcome of a case. There is no legal definition in the Danish Administration of Justice Act on how to determine, who can be part in a case; however, three requirements in general have to be met.[123] First, the case must be legal and real in the sense that it contains a question of law in a concrete situation. This means that a Danish court will refrain from rulings which are not linked to a specific material problem. In this way, it is not possible to get an authoritative ruling on how a general rule should be understood or put in other terms the courts do not perform abstract review. In the case of social rights contained in the Constitution; it is thus not possible to ask the Danish courts how a provision in general should be understood. This answer can only be given in relation to an actual legal dispute put before the courts.[124]

Secondly, the case in question must be ripe in the sense that the suing party must have an actual interest in the outcome of the case, which means that if the question raised in the case is no longer relevant for the part who wants to sue the case will be dismissed.

As the third and most difficult criteria, the person who wants a case tried at court must have a substantial and individual interest in the outcome of the case. This criterion is not absolute in the sense that it differs from topic areas and can be quite flexible depending on the specific case matter. In most cases the criteria are easily met; however, there can be cases, where it can be difficult to determine if the criteria are met, e.g. in cases concerning public building permits it has been difficult to determine whether neighbors to a construction site is affected in such a substantial way that they can be parties in a case against the public authority that gave the permit. In a quite different area, it is relevant to mention the particular question if the public, and thus every citizen in general can sue the government in cases concerning the distribution of sovereign power to a supranational organiza-

122 See M. Gøtze, 'Domstolenes prøvelsesstrategier', *Juristen* (8, 2007).

123 See G. T. Nielsen, 'Forvaltningssager i civilprocessen – Om søgsmålskompetence, rette sagsøgte, søgsmålsfrister og civile fuldbyrdelsessøgsmål', *U.2000B.319*.

124 In some cases, the courts may give an obiter dictum in which it elaborates on e.g. how a legal provision is generally to be understood, but only insofar as there is a link to the case in question.

tion (e.g. the EU). This was allowed in the *Danish Maastricht* case and in the *Danish Lisbon* case.[125]

Given that this is brief overview it will suffice to say, that the criteria of legal interest mark a line from where only parties that are truly affected by the question of the case can have it tried before the courts as opposed to just having a general opinion on what should be considered lawful.

This explanation of under what criteria cases can be tried at court is relevant as it explains that the courts can only adjudicate when actual situations involving questions on the scope of the social rights protection in the Constitution are brought before them by a plaintiff with relevant legal interest in a judicial trial. The courts can thus not be used to give final authoritative answers on the material content of the constitutional social rights except for when cases naturally contain these questions.

### *What is the role of the judge?*

The Danish civil procedure is based on a principle according to which it is for the parties to bring the case before the court. The parties are responsible for bringing the relevant evidence forward.[126] The court itself does not contribute with self-collected evidence. The parties are autonomous in the sense, that they have the right and responsibility to present their own evidence. This principle is based on the assumption that the parties are equal; however, the judge has certain possibilities in order to ensure that parties who are presumably weak (e.g. *a citizen vs. a public authority*) are not left without a chance; thus, it is within the judge's powers to ask question or suggest that certain evidence be collected; however, this possibility is carefully used with respect for the fundamental principle of the autonomy of the parties.

In general, Danish courts are quite reluctant and show considerable deference to the Parliament when interpreting legislation and the Constitution. This means that the courts normally do not apply creative and dynamic interpretations. However, judgments such as *U.2006.770H* and *U.2012.1761*, mentioned above, are examples of quite dynamic judgments. *U.2006.770H* reflected a break with the interpretation found in traditional legal literature according to which no individual claim could be based on Article 75(2). *U.2012.1761* reflects a modern understanding of "assistance" interpreting it as a pecuniary right and not as for instance naturals provided by the state.

125 H. Krunke, 'Lissabon-sagen', *Juristen* (8, 2011), pp. 245-251.
126 E. Smith, *Civilproces*, 2005, p. 26.

*What are the practical effects of such justiciability?*

The effects of this justiciabillity are that it falls within the courts' competence to decide whether or not the social rights provisions in ordinary legislation and in the constitution have been violated in concrete cases. As mentioned, in a recent case – *U2012.1761H* – the supreme court found that Article 75(2) of the constitution is to be interpreted as containing a pecuniary right for citizens who cannot sustain themselves. Thus, the courts are in certain cases given the chance to present their understanding of the social legal rights in Danish legislation. Former court rulings are usually followed in later administrative and court practice. They make a strong legal source, which is usually followed in later rulings.

*What are the most prominent examples of social rights cases successfully brought to courts by the litigants?*

A prominent successful case is *U2006.770H* where it was stated that citizens can base individual rights on Article 75(2), since before the judgment most scholars considered Article 75(2) to be a general statement which did not provide the citizens with individual rights. *U2012.1761H* is also an important case. The Court interpreted Article 75(2) as containing a pecuniary right for citizens who cannot sustain themselves. Before the judgment is was not clear how sufficient help should be provided – could it for instance be provided with goods?

## 6.7 Institutional Guarantees of Social Rights

*Which national bodies are the institutional guarantors of social rights?*

The National Social Appeals Board (NSAB) assesses complaints from citizens on administrative rulings in the area of social rights. Thus, this is the second instance, where the legality of decisions can be tried. Decisions from the NSAB can be appealed to the courts.[127] Normally, administrative rulings can also be appealed directly to the courts without going through the ordinary complaint system.[128] Thus, the guarantors are on the first hand the NSAB and ultimately the courts.[129]

127 See The Danish Constitution Article 63(1).
128 This is unusual since appeals boards are free of charge and less time-consuming for the citizen.
129 Starting with district courts and with the Supreme Court as ultimately the final arbiter of the law.

*Are there any specific bodies created especially for the protection of social rights? What are their powers?*

In the area of social rights and welfare complaints over administrative decisions can be filed to The National Social Appeals Board (NSAB). The NSAB processes about 20.000 cases each year.[130] The NSAB is an independent authority which can sustain, alter or annul administrative decisions in this area. Decisions made by the NSAB can always be brought before the courts.[131]

*How do you evaluate the effectiveness of these national bodies?*

They are effective.

## 6.8 Social Rights and Comparative Law

*Did your national legal system influence foreign legal systems in the area of social rights?*

The Nordic welfare systems including the Danish welfare system are often studied by other countries. In the following, we will mention some examples of areas which get specific attention.[132]

Other countries are often interested in the Danish model of day-care for children from ages 0-6 years. The kindergartens are open from ca. 7-17, and the parents only pay a smaller fee. The rest is financed by the State. The impact of the day-care system is equality between the sexes, more employees on the labor market, a birthrate of almost 2 children per woman etc. Since the birthrate in some countries in Southern Europe is very low and some countries have demographic challenges with many old people and few young people, these countries search for inspiration in the Danish day-care model. Also, countries in the North such as the UK have looked towards the Danish childcare policy for inspiration.[133] Besides the Nordic day-care system for children the Nordic models of parental leave have also been

130 See <http://ast.dk/om-ankestyrelsen/hovedopgaver>.

131 The Danish Constitution Article 63(1) gives the courts the right to try the legality of administrative decisions.

132 We have not been able to find concrete examples of foreign legislation which is inspired by Danish social rights legislation.

133 Daniel Boffey and Lucy Rock: 'Labour looks to Denmark for childcare policy', Guardian, 18th of February 2012: <www.theguardian.com/society/2012/feb/18/britain-learn-denmark-childcare-model> and Lucy Rock: 'What Britain could learn from Denmark's childcare model', Guardian, 18th of February 2012: <www.theguardian.com/society/2012/feb/18/britain-learn-denmark-childcare-model>.

studied by other countries.[134] Parental leave is compared to other countries: quite long, well paid, and with the possibility of both the mother and the father taking parental leave.

Another field which other countries have been inspired by in the field of social rights is the Danish flexicurity model.[135] The model is explained earlier in the questionnaire the main idea being that it is quite easy to fire employees at the labor market compared to other European countries. However, it is also quite easy to get social unemployment benefits and at a quite high rate because of the so-called "A-kasse-system". This means that Danish companies can cut down on labor quite fast when an economic crisis arises, and this improves the Danish competitive position. Other EU Member States have been interested in the flexicurity model not least in light of the financial crisis.

Finally, it should be mentioned that China is very interested in the Danish retirement homes. Traditionally, the children have looked after the old people and provided for them in China. However, because of the one child policy, it will be a very heavy burden for young people to provide for their old relatives. Therefore, China is very interested in Danish retirement homes, welfare technology etc.[136]

*Did other foreign legal systems influence your national legal system in the area of social rights?*

*Can you give examples of provisions, principles or institutions (in the area of social rights) borrowed from other legal systems?*

In general, the Danish Constitution was inspired by the French revolution and the Enlightenment with thoughts on separation of powers, human rights etc.

However, some of the individual social rights have a Danish historical background. Article 75(2) stems from 1849 and at that time was unique and avant-garde compared to other constitutions.[137] The reason behind the provision was not only just ethics, but also an attempt to prevent collective dissatisfaction among the poor and a possible rebellion against the state.[138] However, Article 75(2) was the first step towards a social welfare state.

134 See for instance IZA DP No. 2014, Child Care and Parental Leave in the Nordic Countries: A Model to Aspire to? By Nabanita Datta Gupta, Nina Smith and Mette Verner, Discussion Paper Series, Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor), March 2006.

135 On the flexicurity model, see J. Kristiansen, 'Den danske flexicurity-models fremtidsudsigter i EU', in S. Jørgensen og J. Kristiansen (2008), p. 33-49.

136 See for instance Ritzau: 'Kinesere køber plejehjems-viden i Danmark', 17th of June 2013: <http://jyllands-posten.dk/international/asien/ECE5624303/kinesere-koeber-plejehjems-viden-i-danmark/> and Anders Holm Nielsen, 'China buys retirement home expertise in Denmark', ScandAsia.com, 19th of June 2013: <http://scandasia.com/china-buys-retirement-home-expertise-in-denmark/>

137 See J. E. Rytter (2013), p. 433.

138 Ibid.

Important social reforms took place in Denmark in the 1890's. Old-age-pension, insurance against accidents at work and a health insurance was introduced. This legislation was inspired by Bismarcks social reforms in Germany. The 1890-reforms were the first steps towards legislation in the social field. A general reform took place in 1933.[139]

As regards women's and children's rights the Nordic cooperation on family legislation in the 1920's should be mentioned.[140]

*Do your domestic courts rights quote judgments or legislation from other jurisdictions when adjudicating on social rights?*

Danish courts do normally not quote foreign judgments and legislation from other jurisdictions. This probably has to do with the fact that the Danish legal system is very influenced by legal positivism and that foreign judgments and legislation from other jurisdictions are not considered relevant legal sources. Another obstacle is of course that national judges do not always have knowledge of case law from other countries. In a field like national judgments on the relationship between the *Maastricht Treaty/Lisbon Treaty* and national constitutions, it is easier to see a tendency where the national courts sometimes inspire each other and definitely have knowledge of other courts' decisions in this field. However, in the field of social rights, this tendency is not as clear.

139 See D. Tamm, *Retshistorie*, 1990, p. 278.
140 Ibid., p. 318-319.

# 7 Les droits sociaux en France

*Thierry Rambaud*[*]

Le présent rapport a été construit en réponse aux principales questions identifiées par le rapporteur, le professeur Krzysztof Wojtyczek, juge à la Cour européenne des droits de l'Homme.

La présentation qui en résulte invite à considérer les droits sociaux comme de véritables droits fondamentaux et droits de l'Homme, à rebours d'une vision restrictive trop souvent défendue dans la doctrine classique des libertés publiques. Enoncés par la Constitution française de 1958 et des instruments internationaux de protection des droits de l'Homme, qui disposent d'une valeur juridique contraignante en droit français, ils sont mis en œuvre par le législateur, compétent en vertu de l'article 34 de la Constitution et garantis par le juge constitutionnel, administratif et judiciaire. D'un point de vue formel, ce sont de véritables droits fondamentaux au sens généralement donné à cette expression par la doctrine majoritaire. Il reste évidemment, au regard de la théorie des droits de l'Homme, à s'interroger sur l'universalité des titulaires des droits sociaux[1] et sur les nombreuses conditions dont sont assorties leur mise en œuvre effective. Ces dernières ont pu faire douter de leur reconnaissance comme véritables droits de l'Homme. Le professeur Jean-Jacques Dupeyroux évoquait ainsi, dans un article au Journal *Libération*, *Egalité, équité, fraternité*: « *les mêmes droits pour tous…La cohésion du corps social exigerait cette égalité. Quand cessera-t-on de se payer de mots*? » Et l'auteur de dénoncer: « *les aberrations auxquelles conduisent ces calembredaines égalitaires dans le domaine de l'assurance-maladie : le même forfait hospitalier (…), allègrement supporté par les plus aisés, est catastrophique pour le SMICARD. La belle « justice » que voilà (…) L'égalité de traitement est ainsi généralement génératrice de très graves inégalités dans l'accès aux services médicaux* »[2]. Ces doutes sur l'effectivité et la juridicité des droits sociaux ont en partie été levés. La doctrine et le juge ont su mettre en évidence leur caractère fondamental, parfois obscurci par des rédactions constitutionnelles très générales et une législation souvent bavarde, approximative et toujours changeante. Bien évidemment des interrogations légitimes persistent sur

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* Professeur de droit public à l'Université Paris Descartes (Sorbonne Paris Cité) et à Sciences po. Expert auprès du Conseil de l'Europe.

1 M. Borgetto, « Universalité et droit de la protection sociale », in G. Koubi et O. Jouanjan, *Sujets et objets universels en droit*, Presses universitaires de Strasbourg, 2007, p 20.

2 Jean-Jacques Dupeyroux, « Liberté, équité, fraternité », *Libération* du 6 août 1997, cité par Diane Roman, « Les droits sociaux, « droits des pauvres » ou droits de l'Homme? », *Les droits sociaux, entre droits de l'Homme et politiques sociales: Quels titulaires pour quels droits?* Préface de Dominique Rousseau, conclusion de Michel Borgetto, LGDJ, lextenso éditions, 2012, p 1 et ss.

la portée effective de tels droits, dans un contexte général caractérisé par des indéterminations sur le périmètre exact de l'Etat social.

Certains avancent même l'idée d'un « fracture sociale » constante qui minerait dans son principe même le modèle français de l'Etat social, compris comme le garant de la *solidarité sociale*. Ce modèle serait remis en cause par la mondialisation économique, la concurrence des systèmes sociaux due à l'Union européenne et la situation délicate des finances publiques. Concernant l'influence de l'Union européenne sur les systèmes de protection sociale, on se rappellera que le sujet est parvenu jusqu'à la Cour de justice des communautés européennes, bien qu'en vertu du partage de compétences entre l'Union européenne et les Etats membres, la protection sociale devait restée aux Etats. Le débat s'ouvrit à la suite de la remise en cause, par des professions indépendantes, de l'obligation de cotiser à des organismes de protection sociale. La Cour devait se prononcer sur le point de savoir si ces « organismes » constituaient ou non « des entreprises » au sens du droit communautaire. Le juge écarta cette qualification en précisant qu'il s'agissait d'un service public de la sécurité sociale. Pour définir le « caractère social » du service en cause, la haute juridiction européenne recourut à deux critères: l'absence de « but lucratif » et le fait qu'il était fondé sur le « principe de solidarité nationale »[3]. Aux termes de cette première décision, l'ensemble des régimes légaux et obligatoires de protection sociaux étaient soustraits du champ d'application du droit de la concurrence. Le débat allait cependant rebondir avec des mécanismes en marge de la protection légale, en l'occurrence un régime complémentaire de retraite facultatif institué par la MSA. Dans cette affaire, le juge conclut que le régime constituait une « activité économique », à laquelle s'appliquait le droit de la concurrence[4]. En effet, au fond, le mécanisme en cause ne se distinguait guère, eu égard à son caractère facultatif et à son mode de gestion, de certains produits d'assurance-vie de groupe qui sont, eux, soumis à la concurrence. La Cour a eu l'occasion de confirmer cette jurisprudence par la suite au sujet d'un fonds de pension: « en l'absence d'éléments de solidarité suffisants, le régime peut être soumis au droit de la concurrence sous certaines conditions »[5].

Dans ce contexte économique, institutionnel et politique global, l'idée d'une « hiérarchisation des priorités » dans le domaine du versement des prestations sociales[6], première manifestation de la mise en œuvre des droits sociaux est parfois invoquée. On le voit les interrogations sont nombreuses, mais elles ne doivent pas faire oublier qu'au fondement des droits sociaux se trouvent les exigences permanentes de garantie de la dignité de la

3 CJCE 17 février 1993, *Poucet et Pistre*, C-159/91 et 160/91, Rec. CJCE I-637.

4 CJCE 16 novembre 1995, *FFSA*, C-244/94, Rec. CJCE I-1403.

5 CJCE 21 septembre 2000, *Pavel Pavlov*, C-180-98 à C-184_98, Rec. CJCE 1-6451.

6 On retiendra la définition des « prestations sociales » donnée dans le manuel de M. Borgetto et R. Lafore, *Droit de l'aide et de l'action sociale*, Paris, Montchrestien, 2009, 7ème édition, p 75: « les prestations sociales sont celles en nature ou monétaires constituant une obligation mise à la charge des collectivités publiques par la loi et qui sont destinées à faire face à un état de besoin pour les bénéficiaires dans l'impossibilité d'y pourvoir ».

personne humaine, de la cohésion nationale[7] et du bien commun en général, bien commun qui doit guider l'action constante du pouvoir politique. A ces conditions, la juridicité des droits fondamentaux doit être pleinement garantie.

## 7.1 Les droits sociaux dans la doctrine nationale

Les typologies utilisées dans les manuels de Droits de l'Homme et de libertés fondamentales reposent généralement sur une présentation des trois générations de droits et de libertés en fonction de leur historicité. Ainsi, les droits de la première génération correspondent aux « droits civils et politiques », les « droits de la deuxième génération », aux « droits économiques et sociaux » et les droits de la troisième génération aux droits dits de « solidarité ». Les « droits économiques et sociaux », on relèvera au passage que le caractère économique des droits[8] est souvent rattaché à leur caractère social, supposent, d'après la présentation traditionnelle, une intervention de l'Etat pour les rendre effectifs. Ce sont donc des « droits-créances » qui ont été proclamés dans la première moitié du XIX$^{ème}$ siècle à la suite de revendications syndicales et socialistes[9]: on y trouve ainsi le droit aux prestations sociales, le droit à l'éducation, le droit au travail, le droit au repos et aux loisirs, le droit à la santé… Selon l'analyse classique de G. Gurvitch, les droits sociaux mettent l'accent sur l'enracinement de l'être humain dans différentes entités collectives[10]. Son titulaire serait l'Homme concret, travailleur, consommateur, membre d'une famille, à l'opposé de l'Homme abstrait de la Déclaration des droits de l'Homme et du citoyen de 1789. Cet « homme situé » (Georges Burdeau) renvoie à la réalité de la personnalité humaine au détriment de l'individu abstrait, coupé des liens et des solidarités traditionnels.

Pendant longtemps, ces droits, qui ne reposent donc pas sur la conception classique des libertés telle qu'elle est héritée de la Déclaration des droits de l'Homme et du citoyen de 1789 qui privilégie les droits-facultés, n'ont pas été considérés comme de véritables libertés publiques, en raison, notamment, de la difficulté à pouvoir les mettre en œuvre, à les rendre effectifs. Leur normativité a pu être contestée. Comme le soulève le professeur D. Lochak, « *en dépit de toutes les proclamations sur l'indivisibilité des droits de l'Homme, les droits économiques et sociaux continuent à subir un déficit de crédibilité* »[11]. C'est ainsi

7 A titre d'exemple, voir la décision du Conseil constitutionnel, décision no2011-123 QPC du 29 avril 2011, M. Mohamed T.: « les exigences constitutionnelles résultant de l'article 11 du Préambule de la Constitution de 1946 impliquent la mise en œuvre d'une *politique de solidarité nationale* en faveur des personnes défavorisées (…) »….

8 Il nous semble que les droits et libertés économiques peuvent être définis par la faculté dont dispose la personne, physique ou morale, d'agir sur les marchés économiques. Ces libertés économiques se distinguent des droits du travailleur à participer à l'élaboration de ses conditions de travail, à faire grève, à s'exprimer.

9 Le principe de fraternité a été énoncé sous la révolution française et en 1848.

10 Georges Gurvitch, *La déclaration des droits sociaux*, 1946, rééd. Dalloz, 2009, préface de C-M. Herrera.

11 Danièle Lochak, *Le droit et les paradoxes de l'universalité*, PUF, coll. Les voies du droit, 2010, p 179.

que certains auteurs continuent de refuser de les intégrer dans la catégorie des droits et des libertés publiques. Telle est notamment la position adoptée dans le manuel, par ailleurs tout à fait remarquable, du professeur Patrick Wachsmann[12]. Auteur d'un autre manuel de référence en droit des Libertés fondamentales[13], le professeur Jean Morange adopte une conception similaire des libertés publiques. En revanche, dans son manuel, Xavier Bioy, professeur à l'Université de Toulouse I, consacre un chapitre spécifique « aux libertés économiques et aux droits sociaux »[14]. Selon l'auteur, les « droits sociaux, souvent qualifiés de « créances », trouvent leur fondement constitutionnel dans le préambule de la Constitution de 1946: l'alinéa 5 et le droit d'obtenir un emploi, le 10 et les conditions nécessaires au développement de l'individu et de la famille assurées par la nation, le 11 et la protection de la santé, la sécurité matérielle, le repos, les loisirs, le droit d'obtenir de la collectivité des moyens convenables d'existence, l'alinéa 12 et les charges qui résultent de calamités nationales et enfin l'alinéa 13 qui concerne l'égal accès de l'enfant et de l'adulte à l'instruction, à la formation professionnelle et à la culture ».

Avant de discuter cette affirmation, il importe de proposer une définition des « droits économiques et sociaux ». Reprenons la définition qu'en a donnée le professeur Diane Roman dans une étude de 2012: « *ce sont des droits garantis, dans une perspective de justice sociale, par les textes constitutionnels et internationaux dans le champ social (droits des travailleurs, droits à des prestations, droit aux services publics), afin de réduire les inégalités d'ordre économique* ». La définition de Diane Roman, dont les travaux sur ces sujets sont très riches et précieux[15], appelle cependant une nuance, dans la mesure où le fondement de ces droits ne saurait être résumé à une lutte contre l'inégalité économique, car, au fondement des droits économiques et sociaux se situent au premier plan le droit à la dignité de la personne humaine[16] et la solidarité[17].

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12 Patrick Wachsmann, *Libertés publiques*, Hyper Dalloz, 2013, 7ème édition.

13 Jean Morange, *Manuel des droits de l'Homme et libertés publiques*, Paris, PUF, Droit fondamental, manuel, 6ème édition, 2007.

14 Xavier Bioy, *Droits fondamentaux et libertés publiques*, Paris, Montchrestien, Lextenso éditions, 2013, p 542.

15 Voir, notamment, l'introduction de Diane Roman, « Les droits sociaux, « droits des pauvres » ou droits de l'Homme?, *Les droits sociaux, entre droits de l'Homme et politiques sociales: Quels titulaires pour quels droits?* Préface de Dominique Rousseau, conclusion de Michel Borgetto, LGDJ, lextenso éditions, 2012, p 1 et ss. La réflexion conduite par l'auteur s'inscrit dans le prolongement d'une autre étude que nous avons consultée, D. Roman, « Les droits sociaux, entre injusticiabilité et « conditionnalité », éléments pour une comparaison, *Revue internationale de droit comparé* 2009, p 285.

16 Le Conseil constitutionnel a ainsi déduit du principe de sauvegarde de la dignité de la personne humaine, ainsi que des alinéas 10 et 11 du préambule, la « possibilité pour toute personne de disposer d'un logement décent comme un objectif de valeur constitutionnelle », décision °94-359 DC, 19 janvier 1995, Rec. P 176 ; voir aussi no95-371 DC, 29 décembre 1995, Rec. P 265 ; no98-403 DC du 29 juillet 1998, Rec. P 276.

17 Depuis plus d'un siècle, la notion de « solidarité » irrigue, selon une intensité variable, le droit public français. Elle a accompagné et nourri le développement d'une autre notion ayant joué un rôle décisif dans la fondation et la stabilisation de l'Etat républicain en France, celle de service public. Le juge administratif a donné corps à cette notion, notamment par les règles qu'il a dégagées en matière de responsabilité de la puissance publique.

Parler exclusivement d' « inégalité économique » revient à nier le « caractère universel » de ces droits, dans la mesure où les seuls bénéficiaires en seraient ceux qui sont temporairement dépourvus de moyens de substance au sein de la société. De la même manière, on ne saurait souscrire totalement à l'assertion selon laquelle les « droits sociaux se veulent instruments de transformation sociale, par les correctifs qu'ils apportent au libéralisme économique et par l'objectif de fraternité qui les caractérise ». Une des fonctions identifiables des « droits sociaux » ne peut servir à en déterminer l'objet.

La reconnaissance des « droits économiques et sociaux » constitue un élément de consolidation de la cohésion nationale au service du bien commun et non un instrument de revanche ou de contestation d'une classe ou d'une partie de la société contre une autre. Adopter cette conception des droits sociaux reviendrait à saper le consensus national et social qui doit constituer le support nécessaire de ces droits et à en privilégier une vision « clivante » qui en affaiblirait la légitimité. Comme le souligne M. Daly dans *l'accès aux droits sociaux en Europe*, « les droits sociaux sont les dispositions normatives qui permettent de satisfaire les besoins sociaux des personnes, ainsi que de promouvoir la cohésion nationale et la solidarité », (…), ils « recouvrent la protection sociale, le logement, l'emploi, la santé et l'éducation[18] ».

Traditionnellement, la doctrine universitaire française distingue les droits « civils et politiques » et les « droits économiques et sociaux » selon un double point de vue:

- le premier critère tiendrait à l'effectivité de ces droits: les droits civils et politiques constitueraient des droits subjectifs, susceptibles d'être invoqués en justice et de bénéficier d'une protection juridictionnelle, alors que les droits sociaux seraient en revanche exclus d'un tel régime, et verraient leur mise en œuvre davantage garantie par l'action collective et politique assurée par des politiques sociales ;
- selon un second critère, il existerait également une distinction relative à leurs titulaires, dans la mesure où les « droits sociaux » sont souvent présentés comme étant ceux réservés aux « indigents », « aux pauvres » ou encore « aux travailleurs »… Ce seraient des droits réservés à des catégories particulières de bénéficiaires au détriment de l'universalité des titulaires, comprise comme le critère de reconnaissance des véritables droits et libertés à caractère fondamental.

Sont-ils, dans cette hypothèse des droits réellement universels, conformément à ce qu'enseigne la théorie classique des droits et des libertés? Comme le soulignent M. Borgetto et R. Lafore, « l'approche traditionnelle des problèmes sociaux tend à concevoir ceux-ci comme étant propres à un ensemble d'individus réunis par des critères subjectifs communs ». Les débats actuels relatifs à la protection des droits sociaux s'inscrivent dans un contexte global qui conduit à en interroger la portée. Quels sont les éléments fondamentaux

18 M. Daly, *L'accès aux droits sociaux en Europe*, éditions du Conseil de l'Europe, 2002, p 15.

qui caractérisent ce nouveau paysage global au sein duquel se meuvent les droits fondamentaux sociaux? C'est un fait guère contestable que l'Etat social doit faire face à de nombreuses difficultés qui sont dues à des facteurs internes comme externes. Parmi les facteurs internes, on peut relever le vieillissement de la population, la précarité accrue sur le marché du travail et l'augmentation du chômage, le développement des tendances corporatives qui brisent la cohésion sociale, la perte d'influence des syndicats… Sur le plan externe, la concurrence des modèles économiques et des systèmes de protection sociale dans un espace européen et mondial de plus en plus dérégulé et ouvert provoque des déséquilibres qui fragilisent la liberté et les possibilités d'action des Etats sociaux. La pérennité du « modèle social français » est ainsi régulièrement remise en cause (on se souvient de la célèbre campagne de Jacques Chirac en 1995 sur le thème de la « fracture sociale », qui portait néanmoins davantage sur les blocages internes à la société française, plutôt que sur le sujet de l'accès aux droits sociaux fondamentaux, malgré l'importance du thème de l'exclusion sociale et l'action qui va en résulter, notamment, de Xavier Emmanuelli qui fut chargé de ce sujet dans le nouveau gouvernement issu des élections). Si un consensus émerge sur la nécessité de prendre des mesures correctives et de procéder à des adaptations afin de consolider la garantie des droits sociaux dans un contexte budgétaire et financier très délicat, les moyens et la temporalité de ces réformes font l'objet d'appréciations divergentes de la part des responsables publics. Dans ces conditions, l'identification de priorités doit faire l'objet d'un consensus national important, notamment sur la reconnaissance d'un « noyau central » des droits fondamentaux sociaux. C'est ce dernier qui doit être au cœur des politiques publiques dans le domaine social, animées par les exigences de solidarité et d'égalité. Non-discrimination et cohésion nationale se situent en effet au fondement du « pacte républicain » qui sous-tend la proclamation et la mise en œuvre de ces droits sociaux fondamentaux.

## 7.2 La Protection constitutionnelle des droits sociaux

Au niveau constitutionnel, la garantie des « droits sociaux » est principalement assurée par le Préambule de la Constitution de 1946 qui dispose d'une pleine valeur juridique contraignante dans l'ordre interne français. Adopté dans le prolongement du Programme national de la résistance qui se proposait de « prolonger la démocratie politique par la démocratie sociale » et de l'adoption des ordonnances de 1945 instituant la sécurité sociale, le préambule de la Constitution de 1946 innove très largement et vient consacrer en droit constitutionnel français un socle « de droit et de libertés » à dimension sociale.

Celui-ci énonce en effet plusieurs droits et garanties comme nous avons déjà eu l'occasion de rappeler.

Ainsi, à titre d'exemple, l'alinéa 11 du préambule de la Constitution de 1946 dispose que « *la nation garantit à tous, notamment à l'enfant, à la mère et aux vieux travailleurs, la protection de la santé et de la sécurité matérielle* », avant de préciser « que *tout être humain qui, en raison de son âge, de son état physique ou mental, de la situation économique, se trouve dans l'incapacité de travailler a le droit d'obtenir de la collectivité des moyens convenables d'existence* ». Cette dernière est donc dans l'obligation de garantir aux personnes une protection en face des principaux risques de l'existence qu'elle énumère. Ce droit à la protection sociale et à la sécurité matérielle s'est vu reconnaître une pleine valeur constitutionnelle par le Conseil constitutionnel. Dans une décision de 1980, le Conseil fait état de la nécessité d'assurer la « protection de la santé et de la sécurité des personnes et des biens » avant, dans une décision de 1987, de mentionner explicitement « le droit à la protection sociale et à la sécurité matérielle »[19]. Par la suite, le Conseil constitutionnel est allé plus loin encore, dans la mesure où il a déduit tant du principe de sauvegarde de la dignité de la personne humaine que des alinéas 10 et 11 du préambule de la Constitution de 1946 « la possibilité pour toute personne de disposer d'un logement décent comme objectif de valeur constitutionnelle »[20]. L'objectif de valeur constitutionnelle ne constitue pas un véritable droit constitutionnel dont disposerait le justiciable. Néanmoins, il n'est pas dépourvu d'effets juridiques, car il contraint le législateur à ne pas adopter de texte qui irait à l'encontre d'un tel objectif. En réalité, comme une thèse récente l'a bien démontré, les objectifs à valeur constitutionnelle s'apparentent aux conditions d'effectivité des droits et libertés constitutionnels: ils servent moins en définitive à limiter ces derniers qu'à les protéger. Leur « clé d'interprétation » réside ainsi dans l'effectivité des droits constitutionnellement garantis[21]. Concernant plus particulièrement le droit au logement, il importe d'évoquer la loi du 5 mars 2007 consacrant un « droit au logement opposable » (loi DALO), complétée par une loi de 2009 qui définit « l'habitat indigne » en son article 84 et reconnaît ainsi la nécessité du « programme national de requalification des quartiers anciens dégradés ». Depuis la loi DALO de 2007, le droit au « *logement est garanti par l'Etat à toute personne qui, résidant sur le territoire français, de façon régulière et dans des conditions de permanence définies par un décret en Conseil d'Etat, n'est pas en mesure d'y accéder par ses propres moyens ou de s'y maintenir* » (article 1er). La loi organise ainsi un mécanisme d'attribution prioritaire de logements en urgence pour des personnes qualifiées ainsi par une des commissions de médiation organisées par l'article L 441-2-3 du Code la construction et de l'urbanisme sous la responsabilité des préfets. Ouvert pour les plus défavorisés à partir de 2008, ce mécanisme est aujourd'hui ouvert à tous et cela depuis 2012. Une fois

19 Décision no86-225 DC, 23 janvier 1987, Rec., p 13.

20 Décision no94-359 DC, 19 janvier 1995, Rec., p 176 ; voir aussi no95-371 DC, 29 décembre 1995, Rec. P 265; no2000-436 DC, 7 décembre 2000, Rec. P 176.

21 Pierre de Montalivet, *Les objectifs de valeur constitutionnelle*, préface de Michel Verpeaux, Dalloz, Bibliothèque constitutionnelle et parlementaire, 2006, 680 pages.

sa situation reconnue comme prioritaire par la « Commission DALO », le demandeur devra faire valoir sa demande auprès des différents bailleurs sociaux. Le préfet peut alors enjoindre à un bailleur social de loger dans son parc la personne concernée sur un quota qui lui est réservé. A l'issu d'un délai fixé par voie réglementaire, le demandeur peut alors saisir le juge administratif d'un recours contre l'Etat en vue de sa condamnation sous astreinte à un accueil adapté, l'astreinte étant réservée à un fonds d'aménagement urbain.

Dans la mise en œuvre du droit constitutionnel à la protection sociale et à la sécurité matérielle, le législateur et le pouvoir réglementaire disposent d'une importante liberté de choix quant aux modalités de réalisation de ce droit-créance. Cette marge de manœuvre, qui se retrouve notamment dans la récente décision 2013-683 DC du 16 janvier 2014 du Conseil constitutionnel relative à *la loi sur l'avenir du système de retraites*, se justifie en large partie par la complexité des mesures d'application du droit et les incidences financières importantes qui leur sont attachées.

La protection constitutionnelle du droit à la sécurité sociale et à la sécurité matérielle rencontre néanmoins plusieurs limites. En premier lieu, la Constitution française, contrairement à d'autres textes constitutionnels étrangers, ne dispose pas d'un mécanisme qui permet de sanctionner l'inertie du législateur concernant la mise en œuvre d'un droit-créance. On est loin des garanties fixées par la nouvelle Constitution égyptienne adoptée lors du référendum des 14 et 15 janvier 2014. Aux termes de l'article 18 de la Constitution égyptienne, « *tout citoyen a le droit à la santé et à des soins de santé complets selon des normes de qualité. L'Etat veille au maintien et au développement des établissements publics de santé qui fournissent des soins à la population* ». Aux termes de l'alinéa 2 de ce même article, « *l'Etat s'engage à allouer un pourcentage des dépenses publiques qui ne soit pas inférieur à 3% du PIB à la santé…* » Un objectif chiffré est ainsi fixé au législateur qui adopte le budget de la nation. On retrouve une clause équivalente à l'article 21 de la Constitution qui est relatif à la garantie d'un enseignement supérieur de qualité. La constitution égyptienne fixe un seuil minimal de 2% du PIB pour les dépenses d'enseignement supérieur et de recherche. Un cadre contraignant enserre l'action du législateur, cadre au respect duquel devra veiller la Haute Cour constitutionnelle d'Egypte[22].

En droit constitutionnel français, le législateur dispose d'une importante marge de manœuvre dans la mise en œuvre des droits-créance. Le Conseil constitutionnel, comme on a eu l'occasion de le souligner, entend préserver la marge de manœuvre du législateur en raison de la complexité des mesures d'application et des incidences financières importantes qui lui sont attachées: « *Considérant que les exigences constitutionnelles résultant des dispositions précitées impliquent la mise en oeuvre d'une politique de solidarité nationale*

22 Thierry Rambaud, « Le pouvoir judiciaire et le texte constitutionnel de 2014 », dans *L'évolution constitutionnelle de l'Egypte*, Paris, Karthala, pp 109-124.

*en faveur des personnes défavorisées ; qu'il appartient au législateur, pour satisfaire à cette exigence, de choisir les modalités concrètes qui lui paraissent appropriées ; qu'en particulier, il lui est à tout moment loisible, statuant dans le domaine qui lui est réservé par l'article 34 de la Constitution, de modifier des textes antérieurs ou d'abroger ceux-ci en leur substituant, le cas échéant, d'autres dispositions ; qu'il ne lui est pas moins lisible d'adopter, pour la réalisation ou la conciliation d'objectifs de nature constitutionnelle, des modalités nouvelles dont il lui appartient d'apprécier l'opportunité et qui peuvent comporter la modification ou la suppression qu'il estime excessives ou inutiles ; que, cependant, l'exercice de ce pouvoir ne saurait aboutir à priver de garanties légales des exigences de caractère constitutionnel* »[23]…

L'exemple récent précité du contrôle de constitutionnalité exercé sur les lois de réformes des régimes de retraite en constitue un autre bon exemple[24].

## 7.3 La protection des droits sociaux sur le plan international

Les « droits économiques et sociaux », qui traduisent une exigence de solidarité, sont garantis sur le plan international et européen par plusieurs textes dont la portée juridique est néanmoins variable.

Au plan universel, la déclaration universelle des droits de l'Homme de 1948 affirme que toute personne « *a droit à un niveau de vie suffisant pour assurer sa santé, son bien-être et ceux de sa famille* » (article 25).La même formulation se retrouve dans le pacte de 1966 relatif aux droits économiques, sociaux et culturels (PIDESC) de 1966 qui en reprend néanmoins la liste d'une manière plus complète aux articles 9 et 11.

Sur le plan européen, bien que la Convention européenne des droits de l'Homme ne touche qu'indirectement à la solidarité et aux droits sociaux[25], il importe de mentionner la Charte sociale européenne du 18 octobre 1961 et révisée, notamment, en 1996[26] qui reconnaît l'essentiel des droits sociaux: le droit à la protection de la santé, à la sécurité sociale, à l'assistance médicale. Un protocole additionnel à la Charte sociale européenne a instauré, depuis 1995, une procédure collective de réclamation des droits sociaux. La Charte sociale, qui consacre le caractère « universel » de ces droits se réfère notamment à

23 CC, décision no2009-599 du 20 décembre 2009, Loi de finances pour 2010, considérant 101.

24 Les auteurs de la saisine semblent avoir été davantage guidés par la nécessité de saisir le Conseil constitutionnel sur un texte « emblématique » de l'action gouvernementale, que par la conviction profonde des griefs d'inconstitutionnalité que contenait le texte. Cela renvoie à un important sujet de science politique qui n'est pas le nôtre ici de la signification et des motivations profondes des saisines du Conseil constitutionnel.

25 La Cour européenne des droits de l'Homme a précisé que « si la jurisprudence énonce pour l'essentiel des droits civils et politiques, nombre d'entre eux ont des prolongements d'ordre économique et social », CEDH 9 octobre 1979, *Airey c./Irlande*, série A, no32. La Cour s'est, notamment, appuyée sur l'article 1er du protocole 1er, pour qualifier les « droits sociaux » de « droits à caractère civil » ou encore de « droits subjectifs à caractère patrimonial », CEDH 26 février 1993, *Salesi c./Italie*, série A, no257-E, sur le droit à l'aide sociale.

26 M. Daly, *L'accès aux droits sociaux en Europe*, éditions du Conseil de l'Europe, 2002.

« tous les travailleurs » (articles 20 à 24), « aux enfants » ou à « toute personne démunie de ressources suffisantes… » Elle a conduit à une extension du bénéfice des droits sociaux aux étrangers, sur le fondement des principes d'égalité de traitement et de non-discrimination.

Le PIDESC et la Charte sociale européenne, pris en tant que tels, ne disposent pas d'un effet direct dans l'ordre juridique interne français. Ils doivent être mis en œuvre par des dispositions législatives et réglementaires qui seront ensuite appliqués par les juges internes. Les juges français admettent néanmoins davantage aujourd'hui l'effet direct des conventions internationales en matière de droits sociaux. Il en va ainsi de la Cour de cassation à propos de la liberté du travail et du droit d'obtenir un emploi[27]. La même Chambre sociale de la Cour de cassation, dans un arrêt du 1er juillet 2008, a censuré en partie le dispositif des « contrats première embauche » sur le fondement de la convention 158 de l'Organisation internationale du travail[28]. De la même manière, le Conseil d'Etat semble conférer un effet direct à l'article 4 de la Charte sociale européenne qui expose « un droit à une rémunération équitable ». En effet, dans un arrêt du 20 juillet 2007, le Conseil d'Etat apprécie sa comptabilité avec la création d'une journée de solidarité prenant la forme d'une journée supplémentaire de travail non rémunéré qui ne méconnaît pas ces stipulations.

Dans le cadre de l'Union européenne, la Charte européenne des droits fondamentaux comporte un chapitre entier à la protection des « Droits fondamentaux ». Elle dispose, depuis l'entrée en vigueur du traité de Lisbonne au 1er décembre 2009, d'une pleine valeur juridique obligatoire.

### 7.4 La protection des droits sociaux dans la législation ordinaire

Le Conseil constitutionnel a jugé « que l'article 34 de la Constitution range dans le domaine de la loi la détermination des principes fondamentaux du droit du travail, du droit syndical et de la sécurité sociale, qu'ainsi c'est au législateur qu'il revient de déterminer, dans le respect de cette disposition à valeur constitutionnelle, les conditions et les garanties de cette mise en œuvre ». Les dispositions du préambule de la Constitution fondent ainsi la compétence du législateur dans la mise en œuvre des droits sociaux.

La mise en œuvre des droits sociaux conduit à identifier des catégories de « bénéficiaires ». On les présente parfois comme des « droits catégoriels » relatifs au travailleur, à la femme, à l'enfant, à la personne âgée…

La notion de « bénéficiaires » en matière de droits sociaux doit être distinguée de celle de « titulaires ». Si tout individu est titulaire de droits sociaux, en raison de l'universalité

27 Cass. Soc., 1er décembre 2008, *Eischenlaub c./ Société Axa France vie-Axa France IARD*.

28 Arrêt cité par Xavier Bioy, *Droits fondamentaux et libertés publiques*, Paris, Montchrestien, Lextenso éditions, 2013, p 542, no1444.

des droits de l'Homme, en revanche la liste des bénéficiaires varie en fonction de l'appartenance à des catégories déterminées par des caractéristiques personnelles (jeunesse, âge, vieillesse, infirmité, maternité, sexe) ou sociales, comme les revenus. Le professeur Diane Roman, dans l'étude précitée, opère un rapprochement avec les droits civils et politiques, dans la mesure où le droit de suffrage aux élections politiques ne concerne que les citoyens inscrits sur les registres électoraux et, sous certaines conditions, les ressortissants communautaires[29]. Il paraît néanmoins que les deux catégories de droits ne sont pas strictement identiques, dans la mesure où, contrairement aux droits sociaux, les droits civils et politiques sont dès l'origine limités quant à leurs titulaires et réservés aux seuls nationaux, sous certaines réserves concernant, pour les ressortissants de l'Union européenne, les élections municipales et européennes. La mise en œuvre des droits sociaux se révèle particulièrement complexe, dans la mesure où ils renvoient à des « créances « exigibles à l'encontre de l'Etat et d'autres collectivités publiques. Le sujet n'est pas neutre en termes de finances publiques, surtout dans le contexte budgétaire et financier actuel. On se rappellera, à titre de comparaison, que c'est la raison qui a conduit les rédacteurs de la Loi fondamentale allemande à ne pas inscrire dans cette dernière des « droits sociaux » et à s'en tenir à des droits à caractère « civil et politique ». c'est la même raison qui a conduit les autorités britanniques à refuser de conférer une valeur juridique obligatoire à la Charte européenne des droits fondamentaux dans l'ordre juridique interne britannique et cela alors même que la Charte dispose d'une valeur juridique obligatoire depuis l'entrée en vigueur du Traité de Lisbonne en 2009.

Il est des droits sociaux dont le caractère universel n'est *a priori* guère contestable. On peut à titre d'exemple invoquer le droit à l'éducation, dont la gratuité autrefois réservée aux indigents, a par la suite été universalisée par la loi du 16 juin 1881, puis par le Préambule de la Constitution de 1946 en son alinéa 13 : « *La nation garantit l'égal accès de l'enfant et de l'adulte à l'instruction, à la formation professionnelle et à la culture. L'organisation de l'enseignement public, gratuit et laïc à tous les degrés est un devoir de l'Etat* ». C'est au nom de cette universalité du droit à l'instruction que repose sur l'Education nationale une obligation de scolariser les enfants atteints d'un handicap depuis une loi de 2005. Selon une ordonnance de référé émanant du Conseil d'Etat du 15 décembre 2010, la « *privation pour un enfant, notamment, s'il souffre d'un handicap, de toute possibilité de bénéficier d'une scolarisation (…) selon les modalités que le législateur a définies afin d'assurer le respect de l'exigence constitutionnelle d'égal accès à l'instruction, est susceptible de constituer une atteinte grave et manifestement illégale à une liberté fondamentale* ». C'est dorénavant une véritable obligation de résultat qui repose sur le ministère de l'Education nationale et non

29 Voir le texte déjà évoqué de Diane Roman, « Les droits sociaux, « droits des pauvres » ou droits de l'Homme?, *Les droits sociaux, entre droits de l'Homme et politiques sociales : Quels titulaires pour quels droits?* Préface de Dominique Rousseau, conclusion de Michel Borgetto, LGDJ, lextenso éditions, 2012, p 14.

plus simplement une obligation de moyens. C'est un véritable changement de culture juridique qui s'opère dans la mise en œuvre de l'effectivité des droits sociaux. Ce changement passe par le dépassement de l'approche classique en matière de politiques publiques au profit de la reconnaissance de véritables droits subjectifs qui sont opposables à l'Etat.

Revenons à présent sur le droit à l'aide et aux prestations sociales. L'article 111-1 du Code de l'action sociale et des familles souligne, par ailleurs, l'universalité du droit à l'aide sociale : « *toute personne résidant en France bénéficie, si elle remplit les conditions légales d'attribution, des formes de l'action sociale telles qu'elles sont définies par le présent Code* ». Commentant cette formule législative, le professeur Diane Roman souligne : « si « toute personne » peut bénéficier de prestations, encore convient-il qu'elle réponde aux conditions légales ». C'est, semble-t-il ici, que se pose la principale difficulté dans la reconnaissance des droits sociaux comme de véritables droits fondamentaux. En effet, après avoir posé le principe d'un droit universel, subjectif et subsidiaire, l'article L 111-1 du Code de l'action sociale et des familles en conditionne la jouissance à la réalisation de nombreuses conditions : « légalité de la résidence en France, respect des critères d'octroi posés par la loi… » Deux types de conditions peuvent être identifiées :

1. les conditions liées au statut social : les premières conditions sont liées aux revenus de la personne et à l'appréciation de ses ressources. L'aide sociale prend en compte la pluralité de besoins de la personne humaine, pluralité à laquelle elle répond par la mise en œuvre d'une pluralité de prestations. Mais, qu'est ce qu'un « besoin » en termes d'aide sociale? Comme le note le Comité des droits sociaux du Conseil de l'Europe, une « situation de besoin est appréciée par rapport au fait de posséder des « ressources suffisantes », nécessaires pour mener une vie décente et « répondre de manière appropriée aux besoins élémentaires ». Le besoin se définit en lien avec la notion de « ressources suffisantes » et celles de « moyens de subsistance » pour mener une vie normale dans des conditions décentes. Un tel critère n'est bien évidemment pas exempt d'une certaine subjectivité. Ce principe de conditionnalité peut revêtir une portée plus générale que la seule prise en considération de l'appréciation du besoin. C'est particulièrement exact dans la conception française de la sécurité sociale dans laquelle l'accès à la protection sociale résulte de deux conditions : d'une part, l'appartenance à un groupe précis, qui soit assujetti à un régime de Sécurité sociale et, d'autre part, le « service rendu à la collectivité, voire (…) un achat par le biais d'une cotisation sociale ».
2. les conditions liées au rattachement à un territoire : la Sécurité sociale, fondée sur le principe de solidarité nationale, repose sur un principe de territorialité qui, sauf exceptions, ne bénéficie qu'aux personnes résidant en France. L'article R 115-6 du Code de la sécurité sociale, issu du décret no2007-354 du 14 mars 2007, consacre, notamment, la nécessité d'une résidence permanente en France pour bénéficier du service de prestations maladie liées à la CMU et complémentaire (CMUC), ainsi des prestations

familiales, de l'ASPA ou encore de l'allocation supplémentaire d'invalidité ainsi que du maintien des droits aux prestations de l'assurance-maladie. La condition s'avère être une condition de résidence et non de nationalité, dans la mesure où c'est la solidarité qui constitue le fondement de la protection sociale. A cet égard, les choses ont sensiblement évolué depuis la III$^{ème}$ République, période pendant laquelle le législateur ne manquait pas d'exclure les étrangers du bénéfice des prestations sociales, sauf l'hypothèse d'une convention comportant une clause de réciprocité signée avec le pays d'origine de l'intéressé. Depuis lors, la condition de nationalité n'a cessé de décliner comme critère d'attribution des prestations sociales au profit d'un critère plus conforme au caractère universel des droits en cause, le critère de la résidence sur le territoire. Ce dernier traduit la volonté des pouvoirs publics de fonder les droits sociaux davantage sur la *solidarité sociale* que sur la *solidarité nationale*. Michel Borgetto souligne néanmoins que « cette évolution ne saurait être considérée comme étant en tout point satisfaisante (…), car le bénéfice de certaines prestations est aujourd'hui subordonné, pour telle ou telle d'entre elles, à des durées de résidence assez longues : cinq pour le Revenu de solidarité active, quinze ans pour certaines prestations accordées aux personnes âgées… » Ces conditions supplémentaires se justifient bien évidemment pour des raisons liées à la cohérence et à la protection de l'ordre politico-social, ainsi qu'à l'état des comptes sociaux de la nation. On rejoint en revanche l'analyse de Michel Borgetto lorsqu'il estime « il n'en demeure pas moins que le déclin de la condition de nationalité témoigne bel et bien, dans la mesure où il a renforcé et accentué leur dimension universelle, d'un ancrage accru des droits sociaux dans la catégorie des droits de l'Homme »[30].

Le droit européen n'est pas indifférent à la matière. Dans un arrêt de 1996[31], la Cour européenne des droits de l'Homme a jugé discriminatoire le refus d'une allocation chômage à un ressortissant étranger en Autriche. De la même manière, l'Union consacre l'égalité de traitement entre nationaux et non-nationaux dans le cadre des régimes de sécurité sociale. Ce droit s'étend aux étrangers tiers à l'Union dès lors qu'ils résident de manière stable et régulière sur le territoire de l'Etat.

Les droits sociaux nécessitent fondamentalement la mise en place de « conditions ». Néanmoins, la mise en place de ces dernières ne doit pas faire oublier que les notions de dignité de la personne humaine et de solidarité unifient l'ensemble du droit de l'action sociale. La loi du 29 juillet 1998 relative à la lutte contre les exclusions, par exemple, bâtit

30 Michel Borgetto, « Conclusion », in *Les droits sociaux, entre droits de l'Homme et politiques sociales : quels titulaires pour quels droits?* Paris, LGDJ, lextenso éditions, 2012, p 180.

31 Voir l'arrêt *Gaygusuz c. Autriche* du 16 septembre 1996, Rec. CEDH 1996-IV, note J-P. Marguenaud et J. Mouly, *Dalloz* 1998, p 438.

son dispositif sur l'égal accès de tous aux droits fondamentaux et le fait sous le signe de la dignité de la personne humaine. Nous suivrons volontiers l'analyse du professeur Xavier Bioy, lorsqu'il évoque en écho à ce lien très fort entre « dignité de la personne humaine » et « droits sociaux », la notion européenne d' « indivisibilité des droits » selon laquelle « nulles cloisons étanches ne séparent la sphère des droits économiques et sociaux du domaine de la convention »[32]. Doublé du principe de l' « effet utile », cela conduit le « juge à concrétiser les droits civils et politiques par des exigences relevant des droits économiques et sociaux ». La CEDH protège également indirectement les droits sociaux par des droits civils et politiques comme le droit au procès équitable qui inclut le champ des droits de caractère civil et peut s'appliquer dans le champ du droit du travail ou des prestations sociales. On songe ici à l'arrêt *Obermeier c/ Autriche* de la Cour, du 28 juin 1990.

L'intervention du législateur ne suffit pas à conférer le caractère de « droits fondamentaux » aux « droits sociaux » : l'intervention du juge est nécessaire. On rappellera ici la position de Guy Braibant qui distinguait la justiciabilité normative (le juge identifie une violation en l'absence de mise en œuvre et fait respecter un certain niveau d'acquis) et la justiciabilité subjective (le bénéficiaire peut exiger une mise en œuvre)[33].

### 7.5 La garantie institutionnelle des droits sociaux

Plusieurs modes de protection des droits sociaux sont envisageables.

Si l'on fait abstraction du modèle dit « libéral », dans lequel prédominent à la fois l'assurance d'entreprise ou la prévoyance privée pour les catégories les mieux intégrées, et l'aide sociale pour les plus démunis (Etats-Unis, Canada), les Etats peuvent choisir entre deux grands modèles : le modèle dit « *bismarckien* » dans lequel la protection, fondée en priorité sur la qualité de « travailleur », est gagée par les cotisations qu'acquittent employeurs et salariés en vue de fournir aux intéressés « un revenu de remplacement » lorsque survient le risque contre lequel ils sont prémunis (Allemagne, France, Pays-Bas…) et le modèle « *beveridgien* », ou encore « universel », dans lequel la protection, fondée essentiellement sur la qualité de citoyens, vise à procurer à chacun une couverture minimale face aux risques essentiels de la vie (pays scandinaves ou Grande-Bretagne). En réalité, on le sait, ces deux modèles n'existent pas à l'état pur. Ils tendent bien davantage à converger. Ainsi, le modèle « *bismarckien* » emprunte au modèle « *beveridgien* » un certain nombre d'éléments comme l'extension de certaines formes de protection, s'agissant, notamment, de soutien aux

32 Xavier Bioy, *Droits fondamentaux et libertés publiques*, Montchrestien, Paris, lextenso éditions, 2013, pp 541-542.

33 G. Braibant, *La Charte des droits fondamentaux de l'Union européenne*, Le seuil, coll. Points Essais, 2001.

familles, ou encore le recours accru à l'impôt comme mode de financement. Revenons à présent au modèle français.

Maladie, vieillesse, famille relèvent de régimes d'aide sociale imposés par le préambule de 1946. Ces aides peuvent revêtir différentes formes : prestations générales ou spécifiques, directes ou indirectes, apportées aux familles tant par les organismes de sécurité sociale que par les collectivités publiques. Ce droit aux prestations de sécurité sociale s'inscrit dans un cadre défini par l'Union européenne et la Cour de justice de l'Union européenne : « *l'Union reconnaît et respecte le droit le droit d'accès aux prestations de sécurité sociale et aux services sociaux assurant une protection dans des cas tels que la maternité, la maladie, les accidents du travail, la dépendance ou la vieillesse, ainsi qu'en cas de perte d'emploi, selon les modalités établies par le droit communautaire et les législations et pratiques nationales* ».

La mise en œuvre institutionnelle des droits sociaux passe en France par trois grands régimes :

1. **le régime général** pour les et travailleurs assimilés à des salariés, soit environ 80 % de la population ;
2. **le régime social des indépendants (RSI)** qui constitue le régime des travailleurs non salariés non agricole, des artisans, commerçants et professions libérales qui relèvent d'un même régime depuis le 1er juillet 2006. Depuis le 1er janvier 2008, ces travailleurs indépendants bénéficient d'un Interlocuteur social unique (ISU) pour lequel les URSSAF sont centres de paiement ;
3. **le régime agricole** au sein de la Mutualité sociale agricole. Ce régime a la particularité de couvrir des employeurs (exploitants agricoles) et des salariés (salariés agricoles).

Il existe également divers régimes spéciaux de Sécurité sociale, créés antérieurement et qui, à la Libération, refusent de se fondre dans le régime général nouvellement créé : on peut citer la Caisse nationale militaire de sécurité sociale, la Caisse de la SNCF, le régime spécial de la RATP, le régime des industries électriques et gazières, le régime des marins, le régime des clercs et employés de notaires, le régime de la Banque de France, régime du sénat, régime de l'Assemblée nationale, régime du port autonome de Bordeaux.

En tout ce sont plus de cent régimes dont quatorze ont toujours de nouveaux adhérents. Par ailleurs, pour les divers régimes, des modalités particulières s'appliquent en Alsace-Moselle.

A ces régimes correspondent des « caisses ». Les « caisses » constituent les organismes financiers, le plus souvent de droit privé, qui matérialisent la « Sécurité sociale ». Pour des raisons historiques, chaque caisse est liée à un régime et un seul. En revanche, un même régime est souvent appliqué par de très nombreuses caisses, et même par des assureurs agissant dans le cadre d'un accord avec la « Sécurité sociale » (le cas le plus connu étant

celui des mutuelles de santé étudiantes, et on peut également citer RAM et GAMEX connus des commerçants et agriculteurs). Les régimes spéciaux ont chacun leur propre caisse. La gestion des caisses est en partie assurée par les syndicats considérés comme représentatifs. Depuis 1967, la gestion est normalement paritaire entre les représentations syndicales (CGT, CFDT, CGC, CGT-FO, CFTC) et patronales (MEDEF, CGPME, UPA, UNAPL/CNPL).

On notera enfin qu'un certain nombre de juridictions administratives spécialisées statuent sur les refus d'admission à l'aide sociale sur le fondement de l'article L 134-1 du Code de l'action sociale et familiale. Tel est le cas de la Commission centrale d'aide sociale qui relève en cassation du contrôle du Conseil d'Etat et se trouve ainsi intégrée dans l'ordre juridictionnel administratif.

## Annexes: le Préambule de la Constitution de 1946

1. Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés. Il réaffirme solennellement les droits et libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la République.
2. Il proclame, en outre, comme particulièrement nécessaires à notre temps, les principes politiques, économiques et sociaux ci-après :
3. La loi garantit à la femme, dans tous les domaines, des droits égaux à ceux de l'homme.
4. Tout homme persécuté en raison de son action en faveur de la liberté a droit d'asile sur les territoires de la République.
5. Chacun a le devoir de travailler et le droit d'obtenir un emploi. Nul ne peut être lésé, dans son travail ou son emploi, en raison de ses origines, de ses opinions ou de ses croyances.
6. Tout homme peut défendre ses droits et ses intérêts par l'action syndicale et adhérer au syndicat de son choix.
7. Le droit de grève s'exerce dans le cadre des lois qui le réglementent.
8. Tout travailleur participe, par l'intermédiaire de ses délégués, à la détermination collective des conditions de travail ainsi qu'à la gestion des entreprises.

9. Tout bien, toute entreprise, dont l'exploitation a ou acquiert les caractères d'un service public national ou d'un monopole de fait, doit devenir la propriété de la collectivité.
10. La Nation assure à l'individu et à la famille les conditions nécessaires à leur développement.
11. Elle garantit à tous, notamment à l'enfant, à la mère et aux vieux travailleurs, la protection de la santé, la sécurité matérielle, le repos et les loisirs. Tout être humain qui, en raison de son âge, de son état physique ou mental, de la situation économique, se trouve dans l'incapacité de travailler a le droit d'obtenir de la collectivité des moyens convenables d'existence.
12. La Nation proclame la solidarité et l'égalité de tous les Français devant les charges qui résultent des calamités nationales.
13. La Nation garantit l'égal accès de l'enfant et de l'adulte à l'instruction, à la formation professionnelle et à la culture. L'organisation de l'enseignement public gratuit et laïque à tous les degrés est un devoir de l'Etat.
14. La République française, fidèle à ses traditions, se conforme aux règles du droit public international. Elle n'entreprendra aucune guerre dans des vues de conquête et n'emploiera jamais ses forces contre la liberté d'aucun peuple.
15. Sous réserve de réciprocité, la France consent aux limitations de souveraineté nécessaires à l'organisation et à la défense de la paix.
16. La France forme avec les peuples d'outre-mer une Union fondée sur l'égalité des droits et des devoirs, sans distinction de race ni de religion.
17. L'Union française est composée de nations et de peuples qui mettent en commun ou coordonnent leurs ressources et leurs efforts pour développer leurs civilisations respectives, accroître leur bien-être et assurer leur sécurité.
18. Fidèle à sa mission traditionnelle, la France entend conduire les peuples dont elle a pris la charge à la liberté de s'administrer eux-mêmes et de gérer démocratiquement leurs propres affaires ; écartant tout système de colonisation fondé sur l'arbitraire, elle garantit à tous l'égal accès aux fonctions publiques et l'exercice individuel ou collectif des droits et libertés proclamés ou confirmés ci-dessus.

# 8 Social Rights in Germany

*Eberhard Eichenhofer*[*]

## 8.1 Social Rights in German Legal Scholarship

Because of lacking a catalogue of social human rights in the Basic Law ("Grundgesetz") – the German Constitution – in the current German legal thought, the observation prevails that social human rights are neither fundamental nor an integral part of human rights. As the full spectrum of human rights acknowledged in international law, among them above all the basic social human rights to work, education, health, accommodation, social insurance or social assistance (Articles 22-26 UDHR), does not correspond to the far more restricted catalogue of human rights explicitly figured out in the Basic Law as fundamental rights ("Grundrechte"); even more, the doctrine argues that due to their very legal nature, social human rights could not and never exist.

In this understanding, human rights are supposed to determine a negative freedom[1] – a *status negativus*[2] – which should leave open to each individual a sphere for choice and action free from any state intervention. As social rights, however, intend to create the positive freedom of the individual – a *status positivus* – this freedom is based on entitlements against public institutions like employment services, schools, city councils, social insurance administrations or the health services, which have to bring about and make practically feasible specific social rights.

But as all the rights of delivery addressed to public institutions depend on preliminarily given public institutions, taken actions, political choices made and financial capabilities sufficiently available, those rights are supposed to be inappropriate as human rights guarantees, as the individual entitlements stemming from them are not directly given by the Constitution, but are to be verified and made effective by acts of state legislation themselves. Those rights are therefore conceived as being enshrined in law, but not to be found in the guarantees of the Constitution.[3]

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* Prof. Dr., Professor for Social Security and Civil Law, Friedrich-Schiller-Universität, Jena.

1 Isaiah Berlin, Four Essays on Liberty, Oxford University Press, 1969.

2 This doctrine stems from Georg Jellinek, Allgemeine Staatslehre, 1960 (3. Aufl.), 419 ff.; ibid., System der subjektiven öffentlichen Rechte, Tübingen, 1905 (2. Aufl.), reprinted 2011, 94 ff., 114 ff., 136 ff.

3 Isensee, Der Staat 1980, 367; Scholz, RdA 1993, 249; Murswiek, in Isensee/Kirchhof, Handbuch des Staatsrechts, B and 9 (2011), § 192.

Hence, in the current German legal thinking, the fundamental rights, explicitly enacted in the Constitution, are taken as a *pars pro toto* for the human rights in general. So, among the main scholars in German law, there is a far-reaching consensus that social human rights are not an important legal category, because those rights do not matter or materialize in the conceptual framework within the German Constitution.[4]

## 8.2 Constitutional Protection of Social Rights

The Basic Law does not contain a fully elaborated catalogue of social human rights.[5] So, only a *few* of the *provisions* can be interpreted as giving rights due to social need or with social intentions. These are above all the equal treatment clauses for men and women or with respect to handicapped persons (Article 3 para. 2, 3 of the Basic Law). They do not only provide for equal rights but also provide for equal living conditions to all addressed persons. Further examples are the commitment to assist families, to protect mothers and their children, to guarantee equal treatment between marital and non-marital children and to respect the rights of collective bargaining and action for both employees and employers (Article 6 para. 1, 2, 5; Article 9 para. 3 of the Basic Law).

The framers of the Constitution *intentionally abstained* from providing a comprehensive catalogue of social human rights. This decision was taken against the constitutional traditions of the Weimar Republic and the international developments in human rights legislation in the formative era of the German Constitution. This decision was taken because the Basic Law intended originally to establish an interim regime for a short period of time until the German unification – the East-West unity – will come true. The framers of the Constitutions were so optimistic to assume that this incident could be brought about in the very next years after the constitutional formation of West Germany and, hence, within the foreseeable future.

In the first instance, this reluctance can be explained by the constitutional history of Germany. In the Constitution of the *Weimar* Republic of 1919, the social human rights played a pivotal role as an integral part of a broad and comprehensive catalogue of human rights,

4 Isensee, Verfassung ohne soziale Grundrechte, in Der Staat 1980, 367; Murswiek, Grundrechte als Teilhaberechte, soziale Grundrechte, in Josef Isensee/Paul Kirchhof, Handbuch des Staatsrechts, Band 9, 2011, 3. Aufl., § 192; Brunner, Die Problematik der sozialen Grundrechte, 1971.

5 Klee, Die progressive Verwirklichung wirtschaftlicher, sozialer und kultureller Menschenrechte, 2000; Lohmann, Soziale Menschenrechte und die Grenzen des Sozialstaats, in Kersting (Hg.), Politische Philosophie des Sozialstaats, 2000, 351; Eichenhofer, Soziale Menschenrechte im Völker-, europäischen und deutschen Recht, Tübingen 2012.

which had a similar profile than the one, enacted on the international level after World War II.

As to the Weimar Republic Constitution of August 11th, 1919, the *economic life* should coincide with the principles of *social justice* and follow the aim to guarantee a life in *human dignity* to each human being (Article 151). Human labour has to be protected by a unified labour law (Article 157). The freedom of association and collective bargaining is guaranteed to both employees and employers (Article 159). The right to social insurance (Article 161) was guaranteed, and it was stated, that irrespective of the individual freedom each citizen is exposed to the moral commitment, to utilize her/his physical or intellectual capability for the common good. Under there auspices each citizen should have a right to work in order to acquire his or her personal maintenance (Article 163). Employees are entitled to take part in the question of enterprises. For this purpose, works councils shall be established on the level of a factory, the enterprise, or on regional or national level.

The Weimar Constitution can be understood even more as even a *model* for the international enactment of social human rights, as it was – apart from the Mexico Constitution of 1917 and the Constitution of Finland of 1919 – one of the first constitutions of the World which did provide for fundamental social human rights. But in the Weimar Republic, the courts interpreted these human rights as provisions of a mere programmatic character, which did *not* have any *binding effect* – neither to the courts, nor the administration, nor finally the legislator.[6]

The framers of the Basic Law intended to avoid this arguing for the future definitely. It was the overall intention of them to make the Constitution a strictly and unconditionally mandatory piece of legislation, which as the supreme law of the land, paramount to all other legal provisions and is to abide without any reservation. As to the strictness of constitution, there was the assumption made, that this imperative could not cope with a social rights' guarantee, which leaves not only a wide room for interpretation, but depends also on legislative implementation.

Furthermore, the Basic Law as the Constitution of the Federal Republic of Germany did not intend to create a comprehensive Constitution, but to give shape to a provisional and interim status for the former West Germany to regain its sovereignty and at the same time to leave open the door for a re-unification of the then divided Germany. As to Carlo Schmid, a leading intellectual and Member of the Parliamentarian Assembly, the Basic

6 RGZ 113, 33, 37; 116, 268, 273.

Law shall *not constitute*, *but organise* the *state*.[7] So, the reluctance to implement social rights into the framework of the fundamental rights can also be explained by the concern not to anticipate a social order for a unified Germany, which should be established later on the basis of a new constitution. When the East-West divide of Germany had been overcome by 1990, the Constitution of West Germany was kept and not revised, as it was regarded at that time as the best Constitution Germany ever had before, and therefore the opinion prevailed that the unification did not give any ground for its revision. So, under the constitutional law of Germany after the unification the previous incompleteness of the Constitution as to the social sphere was not revised.

But the Basic Law established a substitute for its lacking social human rights – the principle of the "social state" (Sozialstaat). In Articles 20, 28 of the Basic Law Germany defines itself as a democratic, federal, republican and social state, which is based on the rule of Law. These five characteristics of the German state cannot be altered, nor abolished even not by a change of the Constitution itself (Article 79 para. 3 of the Basic Law). With other words, these five characteristics assume the character of "eternal", i.e. unchangeable principles of the Constitution.

As to the social state clause the state has to control, on whether from the freedoms guaranteed under the constitution follow detrimental social effects, above all inacceptable disequalities, unjustifiable differences as to incomes, pensions or social status. Whenever those impacts are about to happen, the state is obliged to react and light against poverty and exclusion, reduce inequalities in income and fortune and to overcome social dependencies. Under the social state clause, the state is supposed to make a social order becoming to exist, which is based on "social justice"[8] and shrives to overcome "social contracts".[9]

From this characteristic of Germany as a "*social state*"[10] does not stem any individual rights' guarantee, but it obliges the state to create a whole range of social legislation, which has to create individual social rights. So, under the social state clause, the state becomes mandatory to create social rights, which have to assume a legal, but not a constitutional rank.

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7 Speech of October 20th, 1948.

8 BVerfGE 22, 180, 204; 59, 231, 263; 69, 272, 314; 94, 241, 263; 110, 412, 445.

9 BVerfGE 1, 97, 105; 43, 213, 226.

10 Forsthoff, Begriff und Wesen des sozialen Rechtsstaates, in ders. (Hg.), Rechtsstaatlichkeit und Sozialstaatlichkeit, 1968, 165, 180: "A Constitution can never be a social law." "Eine Verfassung kann nicht Sozialgesetz sein"; Hartwich, Sozialstaatspostulat und gesellschaftlicher status quo, 1978 (3. Aufl.); Zacher, Das soziale Staatsziel, in Isensee/Kirchhof (Hg.), Handbuch Staatsrecht, Bd. 2, 2004 (3. Aufl.), § 28, 428; Spieker (Hg.), Der Sozialstaat, 2012; Heinig, Der Sozialstaat im Dienst der Freiheit, 2008; Wallrabenstein, Versicherung im Sozialstaat, 2009.

## 8.3 Protection of Social Rights under Other Constitutional Principles and Rules

The lack of genuine social human rights in the German Constitution brought about a debate on the question, under which legal perspectives those rights could find any constitutional attention at all. In the course of the developing case law of the German *Constitutional Court* – the Bundesverfassungsgericht – various contexts became relevant as to the question on whether those rights could get any protection under another angle of constitutional law.

As the German Constitution strives to give a full-fledged protection of the individual as to all circumstances, which stem from acts of the state, the freedom of action (Article 2 para. 1 of the Basic Law), the equality (Article 3 para. 1 of the Basic Law) and the property clauses (Article 14 of the Basic Law) had been addressed as instruments to protect social rights.

As to the universal guarantee of the freedom of action, the Constitutional Court did examine on whether a legal provision on a mandatory inclusion in a special scheme of old age protection for self-employed medical doctors can cope with the freedom of action.[11] The Court held that this is possible, as the obligatory inclusion into social security schemes is to be assessed as an appropriate means to a legitimate end, necessary and proportionate to achieve its end. As to the social legislation, a series of very distinct questions had been examined by the Constitutional Court on whether they comply with the principle of equality of each person before the law. As to the case law of the *Constitutional Court*, social legislation has to be enacted in accordance with the principle of equal treatment of each person.[12]

This provision does not require that differences are not allowed, nor does it hinder the legislator to make distinctions if there is a good cause for doing this, nor does it embarrass that social legislation is built upon typical cases,[13] which does not appropriately fit to atypical situations. The equality of treatment is, however, not granted, if distinctions are made which lack a convincing ground. So, the equal treatment clause is hurt if a social legislation is based upon irrational and unjustifiable distinctions.

11 BVerfGE 10, 354; 12, 319; 75, 108; further BVerwGE 87, 324.

12 BVerfGE 54, 11; 59, 287; 66, 234; 72, 141; 89, 365; 92, 53; 97, 103; 99, 165; 100, 195; 102, 68; 103, 242; 105, 73; 111, 176; 125, 75.

13 BVerfGE 63, 119; 66, 66; 67, 231.

Since the first year of the Constitutional Court case law, there was a broad debate about whether under the German Constitution a social right can be conceived as a *property right*.[14] Whereas the Federal Social Security Court[15] already very early qualified social insurance rights as property under the Basic Law, the Constitutional Court held in the formative era till 1980, that social insurance does not correspond with the requirements to property, which are peculiar to an entitlement under private law. Social insurance rights are, however, rights under public law; so they could fall into the substantial scope of the property clause of the Basic Law. But in 1980, the Constitutional Court[16] changed its position and accepted that social insurance rights also are to be conceived as property under the Basic Law.

This case law coincides with the one of the *ECHR*. But the meaning and the substantial scope of application of the property clause differs as to the case law of both courts. Under the latter, all social benefits based on a legal entitlement can be taken as property in the meaning of the 1st Additional Protocol to ECHR.[17] Under the German constitutional law, however, only those social rights can be regarded as property, which are based and stem from own contributions made by payments to the social security administration or own work.[18]

Under the property clause, the legislator is not only committed, but acts also in a legitimate manner, if it both defines the social insurance rights and also limits or reduces social insurance rights, because both acts are accepted or provided for under the property clause.[19] As to Article 14 para. 1 of the Basic Law, the legislator has to give shape to the content of property and it has to establish the limits of property. The Basic Law establishes property only within the social limits; the use of property shall also serve to the public benefit (Eigentum verpflichtet, sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen,

14 BVerfGE 32, 111; vgl. zur Problematik: Adam, Eigentumsschutz in der gesetzlichen Rentenversicherung, 2009; Axer, in Epping/Hillgruber, BeckOK GG, 2012, Art. 14 Rn. 56 ff.; Boecken, Der verfassungsrechtliche Schutz von Altersrentenansprüchen und -anwartschaften in Italien und in der Bundesrepublik Deutschland sowie deren Schutz im Rahmen der Europäischen Menschenrechtskonvention, 1987; Jährling-Rahnefeld, Verfassungsmäßigkeit der Grundrente, 2002; Krause, Eigentum an subjektiven öffentlichen Rechten, 1982; Lenze, Staatsbürgerversicherung und Verfassung, 2005; Papier, in von Maydel/Ruland/Becker (Hg.) Sozialrechtshandbuch, 2012 (5. Aufl.), § 3 Rn. 41 ff.; Pohl, Rechtsprechungsänderung und Rückanknüpfung, 2005; Preis/Kellermann, SGb 1999, 329; Reiter, SGb 1996, 246 ff.; Stober (Hg.), Eigentumsschutz sozialrechtlicher Positionen, 1986.

15 BSGE 9, 127.

16 BVerfGE 53, 257.

17 ECHMR 16.9.1996 (Gaygusuz v. Austria) 17371/90; 7.5.2002 (Burdov v. Russia) 59498/00; 25.10.2005 (Romanov v. Russia); 30.9.2003 (Koua Poirrez v. France) 40892/98; 12.4.2006 (Stec v. United Kingdom) 65731/01; 65900/01.

18 BVerfGE 101, 59, 104.

19 BVerfGE 97, 271; 122, 151.

Article 14 para. 2 of the Basic Law). From this follows clearly that restrictions of social insurance rights are permitted under the Constitution unless they are appropriate to make the social insurance burden bearable to the active population and proportionate and, finally, the amount of benefits keeps on to be substantial and adequate to the beneficiary.

In the context of the right to social assistance, quite early in the legal history of post-war West Germany the question emerged on whether such a right has a sound constitutional fundament. The Federal Administrative Court[20] held already in 1951 in one of its first judgments that under the Constitution of post war Germany a social assistance beneficiary has not only a legal entitlement to *social help*, but also that this right is embedded in and stem from the constitutional guarantee of *human dignity* and that it will find in this principle its conceptual fundament. In its sequent case law, the Constitutional Court[21] joined this perspective and held that human dignity in combination with the social state clause bring about a fundamental right to protection of a minimum level existence. This should be in the absence of other preliminary sources be guaranteed by the public administration, which should become active as a lender of the last resort. On this basis, the Constitutional Court hold that the individual's right to a minimum level of existence encompasses the socio-cultural minimum. This means, with other words, that not only the physical existence has to be guaranteed, but that, additionally to this, by means of social assistance the social and cultural participation of the beneficiary is to be made feasible. The Court also held that the level of social assistance benefits is to be determined in a transparent manner and on the basis of a rational method to identify and assess the specific needs to be covered by means of social assistance.

## 8.4 Impact of the International Protection of Social Rights

In the German legal system, the international social rights enacted in many provisions of international law – among them above all the UN, ILO, Council of Europe and EU legislation is relevant in the sense, that the leading provisions on social rights are *transformed* into the German legislation. By this act of transformation of international into national law, the international law rules assume the characteristic of a provision under German law. Therefore, it has the same rank as provisions under the legislation of Germany. If the international provision has the same content as the corresponding provision under German law, the latter will prevail to the first. So, under these circumstances the provision under German law is regarded as paramount to the international one. If there is a provision under

20 BVerwGE 1, 159.
21 BVerfGE 132, 134; 125, 175.

international law, whereas a corresponding provision in German law is lacking, the international law demands for a complementary provision to be enacted in German law.

The procedural rights – guaranteed under Articles 6 and 7 of the ECHR got a specific attention within the case law of the German Constitutional Court.[22] Also in the context of family law,[23] data collection[24] and criminal sanctions as to dangerous prisoners[25] the judgments of the European Court on Human Rights got a substantial attention and approval within the jurisdiction of the Federal Constitutional Court. In all these cases, the Constitutional Court held that European human rights give a general and broader orientation as to the interpretation of concurring human rights' definitions on both the national and international level.

But there is a huge reluctance within the German judiciary to give an international law rule such an important impact that it will make a revision of internal law a legal imperative.[26] There is a widespread reservation to international law, which is challenged predominantly as an act of intrusion and violation of national sovereignty. For those, who are not familiar with international law, but practise on the basis of the domestic law cultivate a widely diffused resentment against international law, which is not regarded as a fundament of or a frame of reference for domestic law, but which is seen as alien and so non-genuine component of domestic law and, hence, of law at all. So, there is up to now a widely shared tendency to *minimize* or even *annihilate* the *impact* of *international law* on *national legislation*. This tendency is also driven by the case law of the Constitutional Court, which is keen, with varying degrees of intensity and rigor to minimise the influence of international law on German law. The main argument in this context is that the national Constitution is the supreme law of the land, and that therefore also the international law, when incorporated into national legislation, has to comply with national Constitutional law and because of this assume a lower rank as to the Constitution. This reasoning, however, does

22 BVerfGE 74, 358; 82, 106, 114; Christoph Grabenwarter, Nationalae Gurndrechte und Recht der Europäischen Menschenrechtskonvention, in Merten/Papier (Hg.), Handbuch der Grundrechte in Deutschland und Europa, Band VI/2,2009,§ 164 -17; Oliver Dörr/Rainer Grote/ Thilo Marauhn (Hg.); EMRK/GG Konkordanzkommentar, 2013 (2.Aufl.)

23 BVerfG FamRZ 2013, 1195; it is also worthwhile to note that the Federal Court on December 10th, 2014 voted in accordance with the European Court of Human Rights judgement of June 26th, 2014 no. 65192/11 that from surrogate motherhood, family rights mature between the father and the child, irrespective of the legal ban of surrogate motherhood in German law, if the mother became pregnant under a law which allows surrogate motherhood.

24 BVerGE 125,260.

25 BVerfGE 128, 326; 131, 268.

26 BVerfGE 10, 271, 274; 64, 135, 157; 74, 102, 128; 111, 307, 317; critical remarks: Wahl, Das Verhältnis der EMRK zum nationalen Recht, in Stephan Breitenmoser (Ed.), Human Rights, Democracy and the Rule of Law, Liber Amicorum WildhuBer 2007, 865,883.

not. So, the role of international social rights to the German social legislation is still rather incremental and rarely to be fully observed.

But this argument cannot uphold under the Basic Law itself. As to Article 1 para. 2 of the Basic Law, the German people confesses to respect the unalienable human rights as fundaments of each human society and imperative as indispensable basis of peace in the world. This provision makes the international human rights in their entirety an integral part of the German human rights legislation and, hence, it imposes to it to regard them completely.

## 8.5 Social Rights in Ordinary Legislation

Within the social legislation of Germany, the Social Code plays an important role as it contains all the relevant provisions on social legislation in Germany. In integral part of this legislation is to be found in the *basic social rights*.[27] They are enacted in the introductory and most general part of the *Social Code*. It plays a key role to outline the purpose, function, structure and content of the German system of social security.

Despite of this, a strong civilicism is to be noticed as to the binding effect of social rights. In the legal literature, they are assessed as lacking any "normative substance",[28] they are conceived as irrelevant.[29] But this characteristic is not justified. As to the official justification,[30] the social rights in the context of the Social Code shall describe the targets of social benefits; it shall keep pace with the international development, where a rights-based approach to social legislation becomes more and more common and gained ground. Social rights shall emphasize, that the individual in a modern welfare state is supposed to be not an object for social policy but that social policy intends to establish the beneficiary as a subject of rights.

Seen from a systematic point of view, social rights in the Social Code help to translate the goal of social justice into the *structure* of the various *social branches of protection*. They are not made in order to create specific social rights, but to outline the normative basis on which social entitlements are built upon.

27 Eichenhofer, in Eichenhofer/Wenner (Hg.), Wannagat SGB I, IV, X, 2012, § 2 SGB I Rn. 2 ff.

28 Von Maydell, Die "sozialen Rechte" im Allgemeinen Teil des SGB, DVBl 1976, 1, 6.

29 Karlheinz Rode, Zum Wesen der sogenannten „sozialen Rechte" im Sozialgesetzbuch – Allgemeiner Teil, SGb 1977, 268, 272; Hauck/Noftz, SGB I, § 2 I 2; Schnapp/Meyer, Zur Entwicklung von sozialen Rechten in der Sozialgesetzgebung, DRV 1973, 66 ff.; Manfred W. Wienand, Bedeutungsgehalt und Funktionen der sozialen Rechte im Allgemeinen Teil des Sozialgesetzbuches, 1980.

30 Bundestags-Drucksache VI/3746, S. 16.

## 8.6 Justiciability of Social Rights

As to the low awareness for social rights, their justiciability is not a key issue under the arguments put forward against social right, their alleged injusticiability, on the contrary, plays a teaching role. So, due to the meagre role social rights play in the current legal debate in Germany, the problem of the *justiciability* of social rights did *not* attract a *broader interest* among the legal scholars in Germany so far.

## 8.7 International Guarantees of Social Rights

Despite Germany is member of the EU, the Council of Europe, the ILO and the UN, the international guarantees of social rights did not find a broad attention as a widespread interest among the official administrators and interpreters of German Law. There is still today a broadly shared conviction that matters of social policy are conceived as to be the key matter of national politics. Social protection is regarded as a subject, which reflects the peculiarities of a national system. So generally spoken, there is a reluctance to incorporate international human rights into the reflection of national social policy.[31]

This observation gained ground with Gøsta Esping-Anderson's discovery of the "Three Worlds of Welfare Capitalism",[32] which could precisely show that the welfare states adhere to different political ideals – as they are to be qualified as conservative, liberal or social democratic ones. So, the Constitutional Court[33] held that the matters of social security are seen as cultural affairs for national legislation as an essential matter, which constitutes national identity, and hence can be neither totally nor partially transferred to a supranational institution as the EU. Seen from this angle, international guarantees for social human rights are if not unravelled, exposed to the brinkmanship to be overseen, and hence neglected.

This result can be also explained by constitutional law observations. As to them, the Constitution is regarded as the supreme law of the land – second to no other legal source. From this follows that a transfer of legislative power from a national state to international or supranational bodies is only justifiable under the Constitution, as long as the national character of the German state is conserved. So, the national state is only upheld under the condition that it has s substantial say as to the substantial matters of politics.[34] In this context, the Constitutional Court demands in litigations about the Constitution, for the

31 Angelika Schmidt, Europäische Menschenrechtskonvention und Sozialrecht, Baden-Baden 2003.
32 Gøsta Esping-Anderson, The Three Worlds of Welfare Capitalism, 1990.
33 BVerfGE 123, 267.
34 BVerfGE 123, 267, 359; 89, 155, 205.

sake of keeping the sovereignty of a national state, the right to have the "ultimate word"[35]. This attitude leads to a wide spread complacency, which regards international and European law if not as not existent, at least as second-rank legislation.

So, there are only a few incidents to be mentioned under which in a law suit a provision under German law had been challenged from the perspective of international social law guarantees. One example was the topic on whether the German unemployment insurance scheme as to its provision on the impact of strikes to the entitlement to unemployment insurance benefit is compatible with the ILO minimum standards on social security.[36]

The other issue dealt with the question on whether the commitment to work as a prisoner without a sufficient remuneration had been discussed by the Constitutional Court under the auspices on whether the work offered to prisoners could violate the internationally expressed and declared ban of forced labour.[37] However, it is to be observed that in the most recent Constitutional Court decision,[38] a growing tendency is to be observed on to demonstrating that a decision taken corresponds with the internationally acknowledged social human rights.

## 8.8 Social Rights in Comparative Law

Due to the modern interest in social rights in general and on international social rights in particular, also a comparative view to social rights is a topic of these academic interest.[39] To sum up, social rights are more or less unknown rights in Germany – despite the fact that social entitlements are widespread and financially substantial, the social state is conceived as a key characteristic of Germany.

35 BVerfGE 111, 307, 319.

36 BSGE 40, 190; 69, 25; BVerfGE 92, 365.

37 BVerfGE 98, 169.

38 BVerfG – 18.7.2012 – 1 BvL 10/10 = NJW 2012, 3020.

39 The greatest attention found Julia Iliopoulos-Strangas (Ed.), Soziale Grundrechte in Europa nach Lissabon, Baden-Baden 2010; compare also Eberhard Eichenhofer, Soziale Menschenrechte im Völker-, europäischen und deutschen Recht, Tübingen 2012.

# 9 Social Rights in Hungary

*Tímea Drinóczi & Gábor Juhász*[*]

## Preliminary Remarks

1. Beyond the strict sense of the term, social rights in a broader sense embrace social, economic and cultural rights.[1] In general, two groups of social rights are distinguished based on their function and the obligation on the part of the state. In Hungary, based on the Fundamental Law,[2] social rights *in a wider sense* include economic rights.[3] Social rights *in a narrow sense* are confined to rights which aim at the satisfaction of socially accepted needs (the right to social security, health care and housing as well as the right to special protection for children, mothers and the elderly) and they also include the 'social side of the right to work' (the right to get support to find a job, the right to proper work conditions and paid holidays).[4]

2. The Fundamental Law as applied since 1 January 2012 diverges from the terminology and approach[5] of the Constitution (Act XX of 1949), which served as a basis for the rich case law of the Constitutional Court on fundamental rights.[6] The fourth amendment to the Fundamental Law prohibited the applicability of the previously developed case law but the Constitutional Court established in its decision 13/2013. (VI. 17.) that former findings may be used and referred to if such reference is feasible and justified by the conceptual sameness of the provisions and the contextual sameness of the Constitution and the Fundamental Law, the interpretation rules and the circumstances of the case. Against this background, in this report, we will discuss the relevant provisions of the Fundamental Law but we will also rely on the previous case law of the Constitutional Court, mainly because there is not too much to examine in the new, two-year-old, jurisprudence.

3. When we refer to social rights in a broader sense, we use the expression 'second-generation rights', and when we discuss social rights in stricto sensu, we simply use the term 'social rights'. The new constitution in effect is called the Fundamental Law, when

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* Dr Tímea Drinóczi is associate professor at the Faculty of Law, University of Pécs. E-mail: drinoczi.timea@ajk.pte.hu. Dr. Gábor Juhász is associate professor at the Faculty of Social Sciences, Eötvös Loránd University, Budapest. E-mail: juhaszsp@tatk.elte.hu.

1 See Halmai – Tóth 2008, Drinóczi (szerk.) 2006, Sári – Somody 2008.

2 Magyarország Alaptörvénye [The Fundamental Law of Hungary] (25 April 2011) Magyar Közlöny [Official Gazette] 2011. No. 43. 10656. (hereinafter FL).

3 Drinóczi 2008.

4 Halmai – Tóth 2008 p. 85-87.

5 Tóth (ed) 2012, Chronowski – Drinóczi – Kocsis 2012.

6 In this respect, see Chronowski – Drinóczi – Petrétei 2013.

we discuss it, we use its proper name or refer to it by the common noun 'constitution'. The proper noun 'Constitution' is used for referring to Act XX of 1949, the former basic law of Hungary.

## 9.1 Social Rights in National Legal Scholarship

### *9.1.1-9.1.4 How Does the National Legal Scholarship See the Question of Protection of Social Rights? Is the Need To Protect Social Rights Questioned? Are Social Rights Perceived as Different From Other types of Rights? Are Social Rights Perceived as Limitations or Threats to the 'First-Generation' Rights?*

Social legislation has had a long tradition in Hungary since the Hungarian Kingdom was amongst the leading countries to introduce social insurance legislation in continental Europe. Compulsory health insurance for industrial workers was enacted in 1891, and social insurance was gradually extended to work accidents (1907) and old-age pension (1928). The necessity of social legislation and its extension to other social risks (maternity, invalidity, survivors, etc.) has never been questioned during the 120-year-old history of this process.

In the last 22 years of Hungarian scholarship, no doubt has arisen about the necessity to protect social rights; however, the extent of state intervention and/or obligation is always debated in concrete cases. Understanding social rights as human rights did not gain much acceptance in the legal scholarship in the nineties as it is reflected in the most comprehensive work on human rights.[7] In some other, more recent books (in 2006, 2007 and 2008), social rights are perceived as fundamental rights; nevertheless not each of them discuss social rights profoundly.

### *9.1.5 What Are the Most Important Questions of Social Rights Protection Discussed by the National Legal Scholarship?*

There is no consensus about the very definition and nature of the *right to property*. Drinóczi[8] assumes that it is a fundamental economic right while Sonnevend argues that property is

7 Halmai – Tóth 2008 p. 96.
8 Drinóczi 2008.

not a liberty because it cannot be exercised without the acknowledgement of the state.[9] The question whether it belongs to the group of economic rights is also debated.[10]

There is no consensus on whether social rights are human rights at all (see 9.1.1-9.1.4). Consequently, there is an ongoing debate whether social rights are merely state duties[11] or they have a subjective right component.[12]

### 9.1.6 *What Do You Consider as the Most Original Contribution of Your National Legal Scholarship to the Study of Social Rights?*

*Sajó* argued for the constitutional declaration of a significantly reduced list of social rights. According to him, social rights contribute to the enforcement of individual human dignity, thus, he proposed to reduce constitutional protection to right claims that could be justified by the principle of social solidarity. On this basis, he concluded, the constitution should protect social rights as additional citizenship rights of those in need. *Juhász* contributed to the development of the theoretical foundations of social rights in Hungarian legal doctrine, arguing for their universal, enforceable and universal character.[13] *Sonnevend's* works implanted the concept of the protection of contributory benefits as property rights. In this context, he also promoted the inclusion of the principles of vested rights and the protection of legitimate expectations in the constitutional protection of social rights.[14] *Kardos* implanted the theory of the protection of social rights by 'satellite rights' (and principles), such as the right to life and human dignity, the right to property, the right to equal treatment and the principle of the rule of law into Hungarian constitutional doctrine.[15] *Drinóczi's* monograph was the first that gave a comprehensive understanding of fundamental economic rights and the economic constitution. Based on the formulation of Constitution, she argued that social rights in a wider sense are real fundamental rights because (i) they are enforceable; (ii) they have a have legal definition and (iii) they have a universal character. She also expanded the concept of the justiciability of fundamental rights, and suggested a move from the mere idea of subjective right under private law to subjective right under public law (amalgamating justiciability with enforceability); as the two together can provide

9 Salát – Sonnevend 2009a p. 456.
10 Halmai and Tóth do not consider the right to property as an economic right, due to the extensive possibility of state intervention and the phenomenon of social responsibility attached to it (c.f. Halmai – Tóth 2008 p. 86). Others perceive it as an economic right; see note 9.
11 Takács 2003 p. 811; Sajó 1996 p. 139.
12 Juhász 1995, Juhász 1996.
13 Juhász 1996.
14 Sonnevend 1997, Sonnevend 2000.
15 Kardos 2003.

a full protection for a fundamental right against any horizontal (by other natural or legal person) and vertical (state) intrusion (see also at point VI).[16]

## 9.2 Constitutional Protection of Social Rights

### *9.2.1-9.2.2 Does the National Constitution of Your Country Provide for Protection of Social Rights? What Are the Rights Protected?*

The Fundamental Law of Hungary recognises and protects fundamental rights (individual or collective) in a *general clause* and stipulates the rules of their limitation in *Article I.* It describes the economic system – though does not mention it expressis verbis – as a market economy, characterised by fair economic competition as enshrined in *Article M*. Article M recognises the *freedom of enterprise and the rights of consumers*, as well as it obliges the *state to act* against any abuse of dominant position in the market. *Article XIII* acknowledges the *right to property* but states at the same time that it entails social responsibility as well; it also defines the conditions of expropriation. Additionally, Article V acknowledges that to repel an unlawful attack against one's person or property is a 'right'. The *freedom of profession* is formulated in *Article XII* with the following content elements: the right to freely choose one's work, occupation and the right to engage in entrepreneurial activities. An obligation is also attached: the obligation to contribute to the enrichment of the community[17]; along with a much softer state 'obligation': "Hungary shall *strive to* create the conditions ensuring that everyone who is able and willing to work has the opportunity to do so". Article III(1) prohibits servitude, and Article XVIII prohibits the employment of children and stipulates a state obligation to adopt special legislation to protect younger people and parents at work. Article VIII(5) stipulates that trade unions and other interest representation organisations may be formed and may operate freely on the basis of the right to association. The content elements (subject matter or function) of the right to freely establish trade unions, besides the freedom element [Article VIII(1)], are determined by Article XVII(1) and (2) as follows:

> Employees and employers shall cooperate with each other with a view to ensuring jobs and the sustainability of the national economy, and to other community goals. Employees, employers and their organisations shall have the right, as provided for by an Act, to negotiate with each other and conclude

16 Drinóczi 2007. Her idea is based on the work of Robert Alexy (Alexy 2002) and Beddard – Hill (1999).

17 The official English translation of the FL, available on the website of the Parliament (<www.parliament.hu/angol/the_fundamental_law_of_hungary_consolidated_interim.pdf>), does not reflect properly the 'obligation character' of this sentence.

> collective agreements, and to take collective action to defend their interests, including the right of workers to discontinue work.[18]

Article L, a provision in the chapter 'Foundations' of the Fundamental Law, declares that 'Hungary shall encourage the commitment to have children'. Article XV (5) declares that special measures shall adopt *to protect children, women, the elderly and persons living with disabilities*. Article XVI acknowledges *children's right to the protection and care* necessary for proper physical, mental and moral development.

Article XIX declares that "Hungary shall *strive to provide social security* to all of its citizens". Social security measures include statutory subsidies for maternity, illness, disability, widowhood, orphanage and unemployment not caused by one's own actions. Article XIX(2) requires the state to run social institutions and take measures in order to implement social security for those listed above and also for other people who are in need. Basic principles of the pension system are also laid down, specifying the agents eligible to act in this field. According to Article XIX(4), pension funds shall be run by the state and membership in private insurance funds shall be voluntary, thereby the re-establishment of mandatory private insurance funds is prevented. Another provision of the article makes measures of affirmative action possible in relation to women's eligibility for state pension. Article XIX(3) attaches a rule which enables the legislator to determine the extent of social measures according to the usefulness of the beneficiary's activity to the community.

Article XX declares every person's right to physical and mental health. According to Article XX(2), the implementation of the right is supported by (i) ensuring that the country's agriculture remains free from any genetically modified organism; (ii) the provision of access to healthy food and drinking water; (iii) managing industrial safety and healthcare; (iv) supporting sports and regular physical exercise and (v) ensuring environmental protection.[19]

Article XXII(1) prescribes the state's duty to make efforts to provide every person with decent housing and access to public services. Article XXII(2) requires the state and local governments as well to strive to ensure accommodation for the homeless. Article XXII(3) authorises the legislator (including local governments) to declare that staying in public space as a habitual dwelling is illegal.

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18 In this national report, we do not deal with these rights in more details: we consider them freedoms with several content elements related to economic (the right to profession) and social rights (working conditions) while other content elements are clearly freedoms: participate, not to participate, voluntariness, prohibition of state intervention in this regard.

19 There is another provision to guarantee the right to the protection of environment: Article XXI(4) recognizes the right of every person to a healthy environment.

The Fundamental Law, quite differently from the Constitution, contains interpretation rules and obligations whose real legal nature and content is doubtful and vague. Article R makes it compulsory to interpret the constitution in accordance with its purposes, the National Avowal and the achievements of the Hungarian historical constitution. The National Avowal is nothing else but a preamble with binding force. It includes statements that may influence, change or even deteriorate the 'original' meaning and interpretation of any right, including second-generation rights, defined in the 'real' text of the Fundamental Law: We hold that (i) human existence is based on human dignity; (ii) individual freedom can only be complete in cooperation with others; (iii) the strength of community and the honour of each person are based on labour, and achievement of the human mind; (iv) we have a general duty to help the vulnerable and the poor and (v) the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty. As for the ambiguous obligations, Article O reads as follows:

> Everyone shall be responsible for him or herself, and shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities.

### 9.2.3 *How Is the Subject Entitled to Protection Defined in the Constitution? The Individual, the Citizen, the Family, or a Group of Persons? Which Groups? Are Social Rights Constitutionally Guaranteed to Non-Nationals?*

The *subject* of economic rights (the right to property, repel, profession, enterprise, rights of the consumer) is 'everybody', i.e. every human being, irrespective of his or her nationality, as well as any legal person, since according to Article I fundamental rights and obligations apply by their nature not only to Man but to legal entities as well, again regardless of place of origin. The formulation of the subject of the right to property was changed: the Constitution did not specify the subject of the right only the debtor; this, however, did not alter the fact that 'everybody' was considered as subject under the Constitution. Now, the subject status of legal entities is *expressis verbis* formulated in the constitution; previously this could only be found in the case law of the Constitutional Court.

As for the right to property, the subject declaration in Article XIII shall necessarily be re-interpreted in the light of Article U(5) as it allows for the lawmaker to reduce the pensions and other benefits of the leaders of communist dictatorship. The joint interpretation

of these articles may entail that there is a group of people whose right to property can be reduced in a way which was not pre-defined and it may be even taken away.[20]

The subject of social rights varies according to the provision in question. The subject of Article L is everyone who is willing to have a baby regardless of his/her nationality.

In relation to the *protection of children*, the subject of the provision is every child regardless of his or her nationality. Under Article XIX, the protection of *social security* is offered exclusively for Hungarian nationals. Statutory subsidies for maternity, illness, disability, widowhood, orphanage and unemployment, as well as the measures to be taken for the protection of people in need are aimed at Hungarian citizens. The only exception to this rule is the provision relating to pension schemes which shall contribute to the livelihood of the elderly in general, regardless of their citizenship. The subject of the right to health is 'every person', i.e. every human being. The subject of the state's effort to ensure *decent housing and access to public services* is 'every person'. As we can see, the social rights of non-nationals are only partially safeguarded in the Fundamental Law.

### 9.2.4 *How Is the Debtor of Social Rights Defined? Is It the State, Public Authorities, Public Bodies or Private Bodies?*

The *debtor* of economic rights (the right to property, repel, profession, enterprise, rights of the consumer) as well as the extent of the obligation shows an unusual variety.[21] Following from Article I, which can be found at the very beginning of the chapter on fundamental rights, the *state* has to respect and protect (as a primary obligation) inviolable and inalienable fundamental rights. This is a traditional vertical/status-oriented approach that is supplemented by a horizontal one as Article I reads as follows: fundamental rights 'shall be respected'. The debtor here is the individual in addition to the state. It means that in Hungary fundamental rights have to be respected by all (including state and non-state actors) and have to be protected by the state. The state's obligation to respect and protect fundamental rights means both the subjective and objective obligation, which makes it possible for all to exercise their fundamental rights.[22] There are no absolute rights (except human dignity and the right to life when they are united), so the Fundamental Law itself determines the main limitation test (Article I(3)[23]): a fundamental rights have to be regulated

20 This is strongly criticized by many, for instance, by the Venice Commission (Opinion 720/2013, delivered on 14-15 June 2013) Halmai – Scheppele 2013 pp. 14-16.

21 At least compared to the Constitution.

22 Chronowski – Drinóczi – Petrétei 2013.

23 Article I(3): The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the application of another fundamental right or to protect a constitutional

by an Act, their limitation have to be based on necessity and be proportional and have to leave the essential content intact. This formulation is based on both the Constitution and the test called necessity and proportionality, developed in the very beginning of the nineties by the Constitutional Court. The Court developed and then improved other tests as well for different fundamental rights, for example the 'public interest test' for the limitation of the right to property, the 'test of exceptionality' for the right to contract (see below at point 9.5). These tests are still applicable provided that the interpretation of the rights is not influenced to a great extent by the interpretative rules and other provisions mentioned above. It also follows that for the freedom of profession (including enterprise) the main limitation test, i.e. necessity and proportionality would be applicable, with a reasonable use of the relevant previous practice of the Constitutional Court (see below at point 9.5).

The *debtor of social rights* is usually the state (in the wording of the Fundamental Law: Hungary), sometimes local governments (in relation to ensuring accommodation for homeless people). There are some exemptions to this rule. In relation to children's rights, individuals (the parents) are the debtors of the right. Adult children are also debtors of their parents' right to care as it is regulated in Article XVI (3)-(4). As far as other social rights are concerned, individuals have derivate obligations since they are supposed to pay taxes and social insurance contributions for financing state activities in the field of social policy. Such obligations are grounded on Article XXX(1) of the Fundamental Law, ordaining a general and proportionate sharing in taxation. The Fundamental Law authorises the legislator to define the agents of the state who should be in charge to provide various benefits, and to 'define compulsory responsibilities and competences for local governments'.[24] On the basis of this Article, a significant part of the responsibilities and competences for social assistance, social care and primary health care is delegated to local governments. The Fundamental Law permits the involvement of private bodies in social and health care. The freedom of their activity is guaranteed by Article M, VIII and XII of the Fundamental Law.[25]

value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

24 Article 34(2) FL.

25 Article M declares that the economy of Hungary shall be based on the freedom of enterprise, while Article XII guarantees that every person has a right to freely choose his or her entrepreneurial activities. Article VIII guarantees the right to freedom of association and the right to establish and join organizations.

### 9.2.5 *What Is the Content of the Rights? What Are the Obligations of the Legislator? What Are the Obligations of the Administration? What are the Obligations of Other Actors?*

#### 9.2.5.1 The Right to Property

##### *9.2.5.1.1 The Reason for Including the Phrase Social Responsibility in the Fundamental Law Is to Put Emphasis to the Socially Binding Character of Property.*[26]

Textual amendment to the right to property has been made only in this aspect in the Fundamental Law, therefore, the survival of the earlier practice of the Constitutional Court can be expected with a view indicated below. The socially binding feature of property is a special limitation of the right to property for which compensation is not given. The Constitutional Court stated that if the function of the object of the right to property is to provide protection for personal freedom, it enjoys special protection; the more social the nature and function of the object, the bigger the legislator's freedom of limitation is.[27] In this respect, the former practice of the Constitutional Court[28] could be continued but special emphasis should be put on constitutional provisions that influence constitutional interpretation.[29]

The right to property also protects personal autonomy (*function*), so constitutional protection should follow the change of the social role of property in a way that the same protective function is guaranteed.[30] Like the traditional material basis of individual autonomy, this function of the protection of the right to property (object) extends to the substance of the property (rights in rem), and to property rights and public law-based entitlements that have taken over the role of property because of its substitutability (for example, contributory social security benefits).

26 See the reasoning of bill T/2627 (Fundamental Law of Hungary) page 42, Article XIII.

27 Cf. Decision 1138/B/1995 of the Constitutional Court, ABH 1996. 554, 556.

28 The topic is studied until 2006 from a dogmatic perspective in Drinóczi, 2007 pp. 185-199. For an approach from another aspect, see Salát – Sonnevend 2009a p 451. Summary of the relevant Decisions of the Constitutional Court until 2009 can be found in Holló-Balogh 2010.

29 See Drinóczi 2012 pp. 227-231.

30 As core decisions see Decision 64/1993. (XII. 22.) (ABH 373), 44/1995. (VI. 30.) (ABH 1995. 207), 56/1995. (IX. 15.) (ABH 1995. 264, 268), 38/1996. (IX. 25.) (ABH 1996. 130) of the Constitutional Court.

*9.2.5.1.2 The Right to Property as a Fundamental Right Prevents the State From Interfering With the Owner's Position, Apart From Exceptions Determined by the Fundamental Law.*[31]

The Constitutional Court declared in decision *64/1993 (XII. 22.)* that due to the principle of social responsibility related to the right to property, an intervention may be regarded as constitutional if the extent of the restriction of property is proportionate with public interests and this limitation does not violate other fundamental rights.[32] If the limitation made by the state (public authorities) results in the vanishing of the content of the right to property, compensation for the intervention should be paid unless property is considered as socially binding (i.e. compensation does not need to be paid).[33]

The Fundamental Law stipulates the *necessity-proportionality* (limitation) test and the Constitutional Court applies it in relation to public interest justifying necessity. Risks concerning social, medical, economic and national defence issues can be regarded as powerful public interests.

Compared with the respective rules of the Constitution, *the rules of expropriation*, have not changed in the Fundamental Law;[34] the Constitutional Court upholds its opinion delivered in 1993:

> The extent of the constitutional protection of property is always factual; it depends on the subject, object, function of property, and the method of restriction […] Due to the increasing number of legislative restrictions, the concept of expropriation is widened […] [b]ut the more expropriation-like protection is provided against a limitation of property, the more restrictions shall be accepted without compensation.[35]

In connection to the right to property, *the obligation of the administration and other actors* is to obey laws (e.g., not infringing private property by trespassing) and properly implement them (e.g. in the course of expropriation). As for the Constitutional Court, see below (point 9.8).

31 Decision 3009/2012. (VI. 21.) of the Constitutional Court upholds its opinion delivered in decision 64/1993. (XII. 22.).

32 Cf. Decision 64/1993. (XII. 22.) of the Constitutional Court, ABH 1993. 373, 381, 382.

33 Concurring opinion of Imre Vörös, judge of the Constitutional Court to Decision 64/1993. (XII. 22.) of the Constitutional Court.

34 Property may only be expropriated exceptionally, in the public interest and in cases and ways provided for by an Act, subject to full, unconditional and immediate compensation.

35 Decision 64/1993. (XII. 22.) of the Constitutional Court, ABH 1993, 373, 380-381, referred to by decision 3219/2012. (IX. 17.) of the Constitutional Court.

#### 9.2.5.2 The Right to Repel

Despite the fact that, as declared in Article I(1) of the Fundamental Law, the protection of fundamental rights, e.g. that of the right to property, shall be the primary obligation of the State, Article V stipulates that everyone shall have the right to repel any unlawful attack against his or her property, or one that poses a direct threat to the same. The first part of Article O is closely related to this provision and stipulates that '[e]very person shall be responsible for his or herself'. With this formulation, the boundaries between the responsibilities of the individual and the state may become uncertain[36] and it is not sufficiently clear today (i) what the right declared in Article V means, in what way it means more than the regulation of criminal law[37] (ii) and what is the benchmark for exercising the right to repel as this right can be exercised as provided for by an Act.[38]

#### 9.2.5.3 The Right to Profession (the Right to Freely Choose One's Profession and Engage in Entrepreneurial Activities

In the new jurisprudence of the Constitutional Court, there are no decisions dealing with Article M(1) (the basis of Hungary's economy) and Article XII (the right to choose work, occupation and to engage in entrepreneurial activities) on the merits.[39]

In a decision delivered in 2013, the Constitutional Court established that 'fair economic competition' does not formulate any 'right ensured by the Fundamental Law'.[40] This opinion reinforces the one stated in previous case law: ensuring economic freedom shall be interpreted as a state scope creating a substantive component and a prerequisite of market economy that is meant to foster the varied and effective prevalence of the right to freely choose one's profession and the right to enterprise.[41] Economic freedom is not a

36 See in more details in Chronowski-Drinóczi-Kocsis 2012 p. 15.

37 The wording implies more than actions in the framework of civil law, thus Article V shall be interpreted in terms of criminal law.

38 According to Jakab, a statute enabling homicide in the interest of the protection of property may not be constitutional because of Article V. We dissent as the benchmark due to the referring rule in Article V shall be determined in an Act. However, we agree with Jakab that the Constitutional Court may face the dilemma of the *right to life v. the right to property* and should dissolve it considering, *inter alia*, the legal practice of the ECtHR. See Jakab 2011 p. 209.

39 According to the website of the Constitutional Court (<*www.mkab.hu/hatarozat-kereso*>), in 2012 one and in 2013 two proposals referred to the infringement of Article M; however, the Constitutional Court did not find any substantive constitutional relationship and rejected the petitions in this regard [decisions 3009/2012. (VI. 21.), 3107/2013. (V. 17.), 3214/2013. (XII. 2.) of the Constitutional Court]. The infringement of Article XII was alleged by two petitions in 2012 and 2013; they were rejected by the Constitutional Court due to the lack of constitutional connection. Decisions 3074/2013. (III. 14.) and 3107/2013. (V. 17.) of the Constitutional Court.

40 Cf. Decision 3139/2013. (VII. 2.) of the Constitutional Court

41 Decision 21/1994. (IV. 16.) of the Constitutional Court, ABH 1994. 117, 120, Decision 1105/B/1993. of the Constitutional Court, ABH 1994. 637, 640.

fundamental right,[42] and it is not probable that economic competition as a state objective alone shall be the basis of unconstitutionality in any circumstances.[43] It seems that the relevant case law is applied also in connection with the provision on competition in Article M(2). In this regard, it also has to be mentioned that constitutional provisions on state monopolies[44] are construed as rules not covered by the freedom of competition; thus, state obligations stemming from the freedom of competition do not apply here.[45]

The Fundamental Law in Article M defines that "the economy of Hungary shall be based on work which creates value, and on freedom of enterprise. Hungary shall ensure the conditions of fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers". Due to similar formulation, former case law is applied in the future as well.

Former case law remains relevant also in cases concerning the right to enterprise, even though the texts of the two constitutions differ here. The Fundamental Law (i) defines the 'freedom of enterprise' as the basis of economy and (ii) stipulates the subjective right part of the 'freedom of enterprise' as the right to 'freely engage in entrepreneurial activities' in Article XII(1). Basically, the Constitution-based interpretation of the 'right to enterprise' and the 'right to work/profession' appeared in decision 3380/2012. (XII. 30.) of the Constitutional Court.[46] The Court in its decision called the fundamental right in Article XII(1) the *freedom of profession*, and employed the two content elements of the freedom of profession developed in former case law. These are the *choice of one's profession* (a subjective right, a real fundamental right, a liberty) and the *exercise of one's profession* (not considered a subjective right, called 'constitutional right'). Besides, in previous jurisprudence (the use of which we do not see unrealistic at all) the Court established that the right to profession has a *subjective side* (the choice and exercise of one's profession; liberty-type protection) and a *social side*, i.e. an objective side.[47] Objective or 'social' side covers on the one hand

42 Decision 782/B/1998. of the Constitutional Court, ABH 2002. 845, 846. See dissenting opinion in Vörös 1993 p. 24.

43 Salát-Sonnevend 2009b p. 440.

44 See Article 38(2) of the FL: "The scope of the State's exclusive properties and exclusive economic activities, and the limitations and conditions of the alienation of national assets that are strategic in terms of the national economy, shall be defined by a cardinal Act in consideration of the goals set out in Paragraph (1)". Article 38(1) reads as follows: "The properties of the State and local governments shall be national assets. The management and protection of national assets shall aim to serve the public interest, to satisfy common needs and to safeguard natural resources in consideration of the needs of future generations. The requirements for the preservation, protection and responsible management of national assets shall be defined by a cardinal Act'.

45 The constitutional formulation of 'monopolies' are not the same in the Constitution and FL, as the latter is more detailed as regards the goals of such activities. See Article 38(1)-(2) FL.

46 The case was about the right to enter the profession for lawyers having bar exam. In order to be a bar member, a lawyer having bar exam had to be employed for one year in a law firm as an 'employed lawyer'. This rule was challenged on the basis that the one year employment was in contrary to the right to freedom of profession [Article XII(1) FL].

47 Decision 21/1994. (IV. 16.) of the Constitutional Court.

a state obligation to have proper employment policy [creation of jobs and social net – partly appearing in Article XII(2)], that is an active action by the state (see Article XVII and below at point 9.5.3.2.). On the other hand, it embodies 'social rights elements' such as the right to payment [this is not a part of the constitution any more, but it contains the right to 'proper' working conditions in Article XVII(3), see below] and the right to rest as stipulated by the Constitution.

The *prohibition of servitude* [Article III(1)] can be considered as a negative component of the right to profession and it is a new provision in the Fundamental Law. The Constitution contained neither this prohibition nor the prohibition of forced labour. In the former jurisprudence of the Constitutional Court, the prohibition of forced labour was considered a prohibition stemming from the freedom of profession and was interpreted in a narrow sense – however without providing any definition of it.[48] The Court established that the right to profession entails (i) the fundamental right not to be forced into a labour relation with those with whom the person have not concluded or do not want to conclude labour agreement and (ii) the right to freely decide on whether one wants to work or not.[49] This interpretation may be in line with the new prohibition of servitude, especially when we jointly[50] interpret it with the Charter of Fundamental Rights [Article5(1)], ECHR (Article 4) and related UN conventions.[51] Another new prohibition is attached to the freedom of profession in the field of child protection: Article XVIII provides that *the employment of children is prohibited*, except for cases specified in an Act where there is no risk to their physical, mental or moral development.[52]

In connection with the regulatory background of the right to profession, the Court also referred to a statement in a previous decision: (i) 'the right to enterprise cannot be attributed to a meaning that the *legal environment for the existing businesses would be*

48 See Juhász in Jakab (ed) 2009 p. 2556.

49 Decision 500/B/1994 of the Constitutional Court, ABH 1995.

50 The content and the extent of fundamental rights declared as prohibitions in the Charter is the same as the scope of the related article of ECHR.

51 The definition of servitude is defined by the supplementary agreement of the UN agreement on slavery. Protocol amending the Slavery Convention signed at Geneva on 25 September 1926 (New York, 7 December 1953), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956). Published in Hungary by law-decree nr. 18 of 1958.

52 This is obviously in connection with Article XVI on the right of the child. For related other state obligations, see Articles XV and XXX.

*unchangeable'* and[53] (ii) 'the free choice of work and right to enterprise does not mean that the legislation shall not urge *specific requirements* for some occupations'.[54]

The Fundamental Law formulates a completely new rule in connection with the exercise of the freedom of profession articulated in the second sentence of Article XII(1): everyone shall have the *obligation to contribute* to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities.

As for the *obligation of the state*, decision 3380/2012. (XII. 30.), which recalls ruling 21/1994. (IV. 16.) of the Constitutional Court, established again that the right to work [i.e. profession, enterprise] shall be provided protection similar to the one granted to freedoms against state interventions and restrictions. The constitutionalism of these restrictions shall be measured by different scales according to whether the state limits the exercise of profession or the free choice thereof. Within the latter one, the judgement may vary depending on the subjective or objective restrictions of getting into a profession. The right to work [profession, enterprise] is endangered the most seriously if the individual is excluded from the activity, i.e. he or she does not have the choice to choose a profession. The requirement of subjective conditions can also be regarded as the restriction of the freedom of choice; however, everyone has the possibility to meet these requirements (if not, then restriction is objective). This provides the legislator a wider margin of appreciation than in the case of prescribing objective restrictions. Finally, the restrictions of exercising a profession are justified mainly from professional and reasonable considerations; they can cause human rights infringements only in border-line cases.

Under Article XVIII(2) the state is also obliged to *ensure the protection of young people and parents at work* by means of separate measures. This provision means that the state has a special obligation to adopt proper and specified regulatory measures to achieve this objective.[55]

As for the freedom of contract, reading the provisions of the Constitution on market economy and the relevant rules of the Civil Code jointly, the Court developed exceptionality formulae as a test for the constitutional restriction of this freedom: the legislator (i) can determine the formal and technical requirements of the contracts, and within its frames the parties are provided with the opportunity to relatively freely modify the content of the

53 Decision 3062/2012. (VII. 26.) of the Constitutional Court refers to Decision 282/B/2007 of the Constitutional Court, ABH 2007. The main issue of the case in 2012 was that the state tried to urge the building of natural gas-based power plants instead of coal-fired power plants as part of the energy restructuring strategies. A part of the restructuring process was to reduce the feed-in tariff of electricity by 15% in 2011 compared to 2010, and by 30% in 2012.

54 Decision 3380/2012. (XII. 30.) of the Constitutional Court refers to Decision 942/B/2001 of the Constitutional Court.

55 This provision is motivated by the Charter. See Jakab 2011 p. 220.

contract; (ii) can determine some specific content elements of the contracts and declare that these are essential parts of the contract even if the parties decide differently and (iii) the content of contracts concluded before a new piece of legislation comes into force may be modified by this legal norm only in exceptional situations. This standpoint was the basis of the exceptionality test, and was reinforced in 2012 by the Constitutional Court[56] with a reference to its previous case law stating that in contemporary legal systems the areas of intervention are especially the fields of restriction of competition, antitrust, the abuse of economic position, the control of organisational merger, price regulation, environment protection, consumer protection etc. Within this regulatory framework the freedom of contracts of the parties, the free determination of the contract by the parties, and even 'unalteration' of the content might often be questionable. Circumstances that were unpredictable at the time of concluding the contract may significantly change the situation and the proportion of rights and duties of the contracting parties, or even make the maintenance and performance of the contract with unchanged content elements impossible. In these cases government intervention, reassessment of the contractual obligations and even the termination of the contract are deemed to be expressly necessary actions. Any change to the content of existing contracts by means of laws is usually prohibited, it becomes possible only if, due to changed circumstances occurred after the conclusion of a contract, the contract becomes harmful to the parties' essential legal interest, the changed circumstances were not reasonably foreseeable but still go beyond the normal risk and the intervention satisfies a society-wide demand. The necessity test and the task of the Constitutional Court to examine the constitutionality of legislative interventions **were** upheld by the Court in its decision in 2014.[57]

In connection to the right to profession and contract, the *obligation of the administration and other* actors, e.g. the Hungarian Competition Authority, is to obey laws and properly implement them.

#### 9.2.5.4 The Rights of the Consumer

Reference to the consumer is a novelty of the Fundamental Law; the Constitution did not mention consumers or the necessity to protect them at all. Under the regime of the Constitution, some stated (*Miskolczi* and *Sándor*[58]) that consumers could also be the subject of second-generation rights as their protection belongs to the scope of protection of second-generation rights; others (*Bencsik*[59]), however, dissented;[60] some authors (*Veres*[61] and

56 Decision 3062/2012 (VII. 26.) of the Constitutional Court.
57 Decision 8/2014. (III. 20.) of the Constitutional Court.
58 Miskolczi – Sándor 2009 p. 13, and the quoted paper of Fazekas 1995 p. 153.
59 Bencsik 2011.
60 Summarized by Veres pp. 1-2.
61 Ibid, at p. 2.

*Hajnal*[62]) argued that constitutional provisions not explicitly dealing with consumer protection might have a consumer protection related content as well (e.g. the right to association, the right to petition). Previously, the Constitutional Court touched upon the issues of consumer protection only slightly (justifying state intervention in economic life, necessary limitation of freedom of expression, etc.), and did not determine or deduce any specific fundamental right of the consumer, nor did it establish general criteria for consumer protection as a state objective.[63] The Court now established that Article M(2) does not grant any subjective right to costumers, it is merely a state obligation to provide for proper institution by legislation [decision 8/2014. (III. 20.) of the Constitutional Court].

The third sentence of Article M(2) on consumer protection can be interpreted in several ways. It might mean that the legislature ensures the protection of consumers in the interest of and in relation to fair economic competition, but then consumer protection is understood in a narrow sense.[64] It can also refer to the fact that consumer protection law as such exists in the legal system, consequently, this field of law cannot be constitutionally eliminated by the legislative power.[65] Lastly, since it is not in the fundamental rights part of the Fundamental Law, the wording 'right of the consumer' does not entail any subjective right, but only some kind of objective protection.[66]

#### 9.2.5.5 The Right to Social Security and the State Obligation to Strive to Provide Social Security

The debate over the human right character of social rights (see 9.1.1) is also reflected in the rulings of the Constitutional Court. In the early 1990s, the majority of judges refused to interpret social rights as subjective rights, while others insisted on attributing a subjective character to the right to social security.[67] In line with the majority opinion, the Court declared that it was impossible to interpret Article 70/E as a regulation guaranteeing a secured income or a minimum standard of living.[68] In the middle of the decade, there was a change in the Court's approach, and the judges started to invoke satellite rights in order to designate the constitutional limits of social legislation. In this new approach, contribution-based benefits were protected as property rights, and entitlement to social non-contributional benefits were supported by the constitutional doctrine of vested rights and legal

62 Hajnal 2009, referred to by Veres p. 2.

63 See, e.g. decisions 126/2009. (XII. 17.), 59/2009. (V. 22.) and 22/2009. (II. 26.) of the Constitutional Court. Referred to by Bencsik 2011 pp 40-41. See also Bencsik 2013.

64 Veres p. 3. Bencsik also mentions this possibility in Bencsik 2011 p. 40.

65 Jakab, 2011 195.

66 ibid. See also Bencsik 2011 p. 40. and Bencsik 2013 p. 28.

67 Dissenting opinion of Chief Judge Sólyom enclosed to decision 31/1990. (XII. 18.) of the Constitutional Court which was echoed in decisions 2093/B/1991, 32/1991. (VI.6.), 600/B/1993 and 26/1993. (IV. 29.) of the Constitutional Court.

68 Decision 32/1991. (VI. 6.) of the Constitutional Court.

certainty. At the end of the 1990s, the judges developed a new interpretation of Article 70/E: the Court identified the right to social security with the provision of a certain degree of minimum subsistence.[69] This definition could have served as a new start to develop the case law of the Constitutional Court in a way to use Article 70/E for setting the constitutional standards of social legislation, i.e. to realise the right to human dignity. However, it remained only a theoretical possibility since the Court never exploited the potential of this new approach. Thus, we can conclude that Article 70/E was de facto interpreted as a provision specifying state goals rather than subjective rights: in its case law, the Constitutional Court declared that no one had a right to social security as such, Article 70/E instead stipulated the state's duties in relation to social legislation.[70] Maintaining social welfare institutions and facilities was identified as the most important duty of the state. According to the Court, the state enjoyed a high degree of freedom in performing its duties: it can choose the ways and methods of implementation. In the Court's view, elimination of certain benefits did not raise constitutional issues automatically, constitutional concerns could only have occurred in relation to the depth of intervention.[71] However, the Court was reluctant to base any decision on the interpretation about the content of the right (the provision of a certain degree of minimum subsistence in line with human dignity), consequently, it never revealed to what extent an intervention should be constitutional. The text of the Fundamental Law does not grant a right to social security; instead, it stipulates that the state "shall strive to provide social security to all of its citizens". In view of the strict interpretation developed by the Constitutional Court, this change does not make much difference to the degree of constitutional protection. In other words, the Fundamental Law excludes the possibility of other interpretation and makes it explicit that the provision of social security is a mere state goal.

As far as the rules regulating the implementation of state objectives are concerned, the Fundamental Law did not leave them intact. In contrast to the Constitution, social insurance is no longer a constitutionally protected institution in the Fundamental Law. The new text sets up a system of unspecified social institutions and measures as agents for the implementation of social security. While the Constitution allowed governments to decide about the structure of the pension system and thus made it possible to create a mixed old-age pension scheme based on the three pillars of state pension, mandatory private pension and voluntary pension, the Fundamental Law restricts the number of pillars to two, thereby excluding the possibility of the reintroduction of the mandatory private pension scheme, which was terminated in 2010.

69 Decision 32/1998. (VI. 25.) of the Constitutional Court.

70 Decisions 31/1990. (XII. 18.); 2093/B/1991; 32/1991. (VI. 6.); 600/B/1993.; 26/1993 (IV. 29.) of the Constitutional Court.

71 Decision 43/1995. (VI. 30.) of the Constitutional Court.

As an incidental consequence of degrading the right to social security into a simple state objective, satellite rights started to play an increasing role as far as their constitutional protection was concerned. The Constitutional Court declared in several cases that entitlements to contributory benefits were similar to property rights, and it repealed legislation that imposed restriction on social rights. The constitutional protection of vested rights and legitimate expectations was often used for the defence of social benefits.[72]

However, a most recent judgement of the Constitutional Court has a potential to undermine the constitutional protection guaranteed by satellite rights in general and vested rights in particular. In decision 23/2013 (IX. 25.), the Constitutional Court concludes that the differences between the old (Constitution) and new text (Fundamental Law) serve as a ground for breaking with the old paradigm of social policy. In the view of the majority of judges, the old paradigm (associated with Article 70/E) contributed to the serious indebtedness of Hungary, whereas the new paradigm is characterised by balanced and sustainable budgets and the self-responsibility of citizens. This interpretation is supported by a statement of the Court about the necessity to read Article XIX jointly with Article N and Article O of the Fundamental Law. (Article N declares that Hungary shall enforce the principle of balanced, transparent and sustainable budget, while Article O says that every person shall be responsible for his or herself.) According to the judges, this paradigm change had started even before the Fundamental Law entered into force because the first step in the new direction was facilitated by an amendment to Article 70/E of the Constitution in June 2011. This amendment declared that pension should be available only for those who passed the state pension age, and authorised the government to reduce, transform and even terminate pensions paid to persons below the general pensionable age. Interpreting the amendment of the Constitution as a 'preamble' to the Fundamental Law's provisions on social security, the Constitutional Court concluded that, in line with the new constitutional paradigm of social policy, it was not an unconstitutional act of the state to transform already enjoyed *ex gratia* pensions into reduced rate benefits, and even to terminate them for some groups of the beneficiaries. The Court also declared that the new paradigm requires the state to impose certain limits on ex gratia pensions, and to make them available only for those who reached the pensionable age.

#### 9.2.5.6 The Right to Health Care

In contrast to social security, Article XX of the Fundamental Law guarantees the *right* to health care. However, there is little chance for a change in the rather restricted interpretation that was developed by the Constitutional Court before 2012. Interpreting Article 70/D of the Constitution, the judges concluded that the right to the highest possible level of physical and mental health did not ensure a subjective right to a certain degree of health or

72 Decision 43/1995. (VI. 30.), 44/1995. (VI. 30.) of the Constitutional Court.

medical care. The wording of the Constitution was being interpreted as a specification of the unilateral duty of the state to organise medical care and to maintain medical institutions. Interpreting the expression 'the highest possible level', the Court concluded that this wording referred to the capacities of the state budget rather than the standards of health care. This approach led to the conclusion that the provisions of the Constitution in relation to the right to health could only be violated in extreme cases, e.g. when health care was not made available in whole regions, or complete branches of health care provision were missing.[73] There is no reference to the 'highest possible level' of health in the Fundamental Law, it speaks of a right to health. It is unlikely, however, that this change in the wording will inspire the Constitutional Court to acknowledge the right to health as a subjective and/or a fundamental right. With regard to precedents, we can expect that contribution based health services and benefits will be protected as property rights in the future. Article XX(2) of the Fundamental Law enlists a number of new obligations for the state (to keep agriculture free from genetically modified organisms, to provide access to healthy food and water, to manage industrial safety and health care, to support sport and regular physical exercise and, to ensure environmental protection) but it does not grant individuals the right to get them enforced.

#### 9.2.5.7 The Obligation to Strive to Provide Decent Housing and Access to Public Services

The wording of Article XXII(1) of the Fundamental Law makes it clear that the provision on housing and access to public services is a state goal that requires the government to make efforts to satisfy *everyone's* housing needs. Controversially enough, XXII(2) ascertains that the obligation defined in XXII(1) should be promoted by efforts of the state and local governments to secure shelter to every homeless person. This provision might mean that preference should be given to sheltering the homeless over satisfying their housing needs. Prioritising this activity, however, could make the general duty of the state ever more relative since it relieves the state of its general obligation in relation to an elusive group of people.

Furthermore, XXII(3) authorises the Parliament and local governments to enact laws and decrees which declare habitual stay in public premises unlawful. This makes the provisions even more controversial since it allows the state to punish those (the homeless) who are anyway supposed to be supported by the state. XXII(3) is problematic, furthermore, because it undermines the implementation of the limitation rules declared in Article I, which requires that that the rules concerning fundamental rights shall be laid down in an Act. Limitations on the stay in public places affect fundamental rights (for example, the right

73 Decision 54/1996. (XI. 30.) of the Constitutional Court.

to free movement), and thus Article XXII(3) is in contradiction to the requirement enunciated in Article I.

#### 9.2.5.8 The Promotion of Families' Commitment to Have Children

Article L is regulated in the Chapter entitled 'Foundations', consequently, the requirement it specifies does not have a direct impact on the legislation and administration. It is a provision that helps one interpret articles dealing with social rights. Since Article L did not have an antecedent in the Constitution, there has not been precedent in relation to the state duties it concerns. Nevertheless, it is plausible to interpret Article L in conjunction with Article XIX(1), which declares that Hungarian citizens are entitled to a statutory maternity subsidy. A joint interpretation of the provisions can be that maternity benefit shall meet the criteria to give incentives to families to have children.

### *9.2.6 Does the National Constitution Differentiate the Scope and Methods of Protection of Social Rights and Other Rights?*

The entire structure of the Fundamental Law allows for a conclusion that it does differentiate the scope and the method of protection of economic and social rights. It is still uncertain, however, how the interpretation rules and other provisions will be applied. Access to pension, an element of the right to property, is restricted by the Fundamental Law itself for a certain group of people – an unusual regulation but applied to another fundamental right as well.[74] The Constitutional Court is not allowed to review laws on financial issues, leaving a certain area covered by the right to property unprotected (see point 9.8). These considerations, however, have nothing to do with any kind of constitutional theories on fundamental, second-generation rights but have firm political basis and motivation.

### *9.2.7 Does the Normative Structure of Constitutional Social Rights Vary? Is It Possible to Distinguish Different Types of Constitutionally Protected Social Rights?*

The Constitutional Court in its previous practice differentiated between rights based on their enforceability and limitability. While the Court itself is not entirely consistent in this respect, it can be stated that it uses three categories distinguishing subjective fundamental

74 Article U(4): The holders of power under the communist dictatorship shall be obliged to tolerate statements of facts about their roles and acts related to the operation of the dictatorship, with the exception of deliberate statements that are untrue in essence; their personal data related to such roles and acts may be disclosed to the public.

rights, basic constitutional rights and constitutional rights. To practice *subjective fundamental rights*, fulfilment of objective conditions is not required at all; the law provides a broad and absolute action for individuals. A subjective fundamental right is directly enforceable in the courts and may be restricted only by applying the general limitation test enshrined in Article 8 of the Constitution and Article I of the Fundamental Law.[75] *Basic constitutional rights* can be exercised when a number of objective criteria is fulfilled; these rights are not directly enforceable in the courts but they have a subjective right-creating effect. They can be restricted generally by applying Article 8, but in the assessment of the constitutionality of the limitation extralegal aspects (such as the economic capacity of the state) may also be taken into account and the test of public interest may be applied.[76] The *constitutional right* is recognised and protected by the Constitution, but it is neither fundamental nor subjective; it is only related to or interrelated with fundamental rights; the exceptionality test shall be applied for its restrictions.[77]

As for the various types of constitutionally protected social rights, the newest jurisprudence of the Constitutional Court has not given any answer yet. It is reasonable to assume that this practice will still be employed.

### 9.2.8 *Is There a Constitutional Mechanism of Protection vis-à-vis the Legislator? How Does It Operate? Are There Any Instruments That Ensure Protection Against The Inaction Of The Legislator?*

The legislator can infringe fundamental rights by unconstitutional regulation and non-regulation. As the Constitutional Court is the principal organ for the protection of the Fundamental Law,[78] it has competence to review laws and annul them or establish legislative omissions.

The Fundamental Law brought a major change to the Constitutional Court's competence to review laws: it put an end to the *actio popularis* ex post norm control – ex post-norm control can now be initiated only by the Government, one-fourth of the Members of Parliament, the President of the Curia, the Supreme Prosecutor or the Commissioner for Fundamental Rights. That is, those feeling that their rights may be unconstitutionally regulated and/or restricted need to approach some of the entitled persons (usually the Commissioner for Fundamental Rights). Another way to initiate a review is to get the judge to ask for a review of the legal regulation applied in one's case.

75 E.g. the freedom of expression, freedom of conscience, personal freedom and the right to freely chose one's profession.

76 E.g. the right to work and profession ('exercising component'), the right to social securitiy and health care and the right to rest.

77 E.g. the freedom to contract.

78 Article 24(1) FL.

The introduction of a 'more genuine' constitutional complaint system is a new element in the constitutional review regime. The interested person may lodge a complaint against a piece of legislation applied in court proceedings if it violates his or her rights laid down in the Fundamental Law. A constitutional complaint can also be submitted if the decision made on the merits of the case or a decision terminating the judicial proceedings violates the petitioner's rights laid down in the Fundamental Law. Another kind of constitutional compliant procedure can be initiated in exceptional cases: when a legal provision contrary to the Fundamental Law is applied, or when such legal provision becomes effective, and as a result fundamental right enshrined in the Fundamental Law were violated directly, without a judicial decision.[79]

The Fundamental Law upheld the restriction of the competences of the Constitutional Court adopted in the autumn of 2010 with minor changes.[80] Pursuant to the new rule,[81] as long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may only review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, or the right related to Hungarian citizenship.[82]

The Constitutional Court may establish a legislative omission. It may declare an omission on the part of the law-maker that resulted in violating the Fundamental Law and, by setting a deadline, it calls upon the organ that committed the omission to perform its task.[83] The following shall be considered as an omission of the law maker's tasks: (a) the law-maker fails to perform a task deriving from an international treaty; (b) a legal regulation was not adopted in spite of the fact that the law maker's task derives from explicit authorisation by a legal regulation or (c) the essential content of the legal regulation that can be derived from the Fundamental Law is incomplete.

79 In each case, the possibilities for legal remedy have to be exhausted or it has to be proved that no possibility for legal remedy was available. Articles 26-27 of Act CLI of 2011 on the Constitutional Court.

80 See Tilk 2011.

81 Article 37(4) FL.

82 The Constitutional Court shall have the unrestricted right to annul the related acts for non-compliance with the FL's procedural requirements for the drafting and publication of such legislation. This is, however, not a rule originating in a will to protect fundamental rights; it aims at the possibility of repeal of legal norms suffering validity failures from the legal system without any restriction.

83 Article 46(1) Act on the Constitutional Court.

### 9.2.9 *How Do You Evaluate the Efficiency of Social Rights Protection Offered by the Constitution and the Constitutional Justice?*

As it has been pointed out, the regulation of second-generation rights and the entire constitutional text have dramatically changed, offering a lower standard for the protection of rights both in substantive (wording) and procedural (competences of the Constitutional Court and procedural rules of initiations thereof) sense. It will have an effect on the jurisprudence of the Court, as it can already be seen in relation to the protection of social rights as vested rights in the abovementioned decision (point 9.2.5.5).

Compared to the previous constitutional protection guaranteed by the Constitution, the protection of social and economic rights is less effective, as the point of reference itself, the constitutional text, makes these rights even more relative. The constitutional protection of fundamental rights in general has been weakened by the newly adopted practice of inserting suisseshort-term political objectives into the text of the Fundamental Law,[84] and of making amendments to the Fundamental Law in response to unwelcome decisions of the Constitutional Court.[85]

### 9.2.10 *What Do You Consider as the Most Original Contribution of Your National Constitution to the Protection of Social Rights?*

Hungary belonged to the small number of European democracies that declared health care and social security as constitutionally protected rights. The Constitutional Court developed an interpretation of the right to social security which had a potential to specify the content of this right and the measure of the state's duties in relation to implement it. This interpretation was very close to the acknowledgement of the right to social security as a subjective right. On the positive side, we can also mention the efforts that the Constitutional Court made to protect social rights by satellite rights as referred to in 9.3.1-9.3.2. The Fundamental Law extended constitutional protection to the access to healthy foods and drinking water, the access to public services and decent housing, and protects human health with the introduction of a ban on the production and commerce of genetically modified organisms.

84 As it happened in relation to the undemining of the mandatory private pension scheme under Article XIX(4).

85 For example Article 8 of the Fourth Amedment to the Fundamental Law in relation to the authorization of local governments to declare habitual stay in public spaces unlawful.

## 9.3 Protection of Social Rights Under Other Constitutional Rules and Principles

### *9.3.1-9.3.2 Are there other constitutional or Jurisprudential Principles Used as Tools for the Protection of Social Human Rights? Is There a Protection Offered by the Following Constitutional Principles?*

**a Protection of Legitimate Expectations**

In the jurisprudence of the Constitutional Court, protection of legitimate expectations follows from the protection of legal certainty that is an element of the rule of law principle enshrined in Article B of the Fundamental Law;[86] and also belongs to the scope of protection of the right to property as it covers the security-type services of social security system and its legitimate expectations.[87]

Previous precedents of the Constitutional Court classified mainly social rights as aspirants for the protection of legitimate expectations (pension rights, contribution-based maternity benefits, family allowance). There are two groups of legitimate expectations according to the case law of the Constitutional Court. The first group contains entitlements based on the material consideration of the right holder, like old age pension and other contribution-based benefits. The second group contains entitlements being based on decisions of the right holder that have a serious existential element.

**b Protection of Vested Rights**

The principle of the protection of vested rights is also used for the protection of social rights. According to the case law developed by the Constitutional Court, the nearer is the possibility of exercising a right, the stronger is the constitutional protection of them as vested rights.[88] Although they are not declared as absolute rights, and thus, their amendments do not automatically constitute an unconstitutional act, the Court always required good and well-founded reasons for changing them.[89] There is a general assumption that respect for vested rights is a component of legal certainty which is derived from the rule of law, and thus vested rights can be changed only in exceptional cases. According to the precedents of the Constitutional Court, short-term promises of the law makers enjoy enhanced protection, their termination before expiry is usually unconstitutional. The Court reserves the right to examine the constitutionality of these changes on a case-by-

86 Hungary shall be an independent, democratic State governed by the rule of law. The Constitution contained exactly the same provision.

87 Decision 43/1995. (VI. 30) of the Constitutional Court.

88 Decision 43/1995. (VI. 30.) of the Constitutional Court.

89 Decision 43/1995. (VI. 30.) of the Constitutional Court.

case basis. As it was pointed out in section 9.2.5.5, the Constitutional Court started to read Article XIX with regard to Article N and O – this can make the constitutional protection of social rights as vested rights ever more relative.

**c Precision of Legislation**

In the practice of the Constitutional Court non-intelligibility (e.g. self-contradictory legislation) is unconstitutional.[90] A legal text which is difficult to understand, shall not be regarded as unconstitutional as long as it does not authorise discretionary implementation; it shall be examined in the specific context.[91]

**d Non-Retroactivity of Legislation**

Non-retroactivity of legislation is also a core element of legal certainty in the Hungarian legal system but it has never been used for the protection of economic and social rights. Judging a retroactive taxation case for the first and the second time,[92] the Constitutional Court made no reference to this principle and to the right to property, either. In the first decision, the Court based its annulment on the opinion that the legislator exceeded the power delegated to it by the new text of the Constitution. In the second decision, as a consequence of the restriction of its competence it had no power to review financial laws unless the case related to human dignity, data protection, the right to religion and citizenship.

**e Due Process – Rule of Law – Legal Certainty**

Procedural due process is guaranteed by the Fundamental Law. Article XXIV declares that everyone has "a right to have his or her affairs administered by the authorities in an impartial, fair and reasonably timely manner. This right shall include the obligation of the authorities to justify their decisions as determined by law". Article XXVIII guarantees the right to seek legal remedy against any court, administrative or other official decision violating the rights or lawful interests of the citizens. Equality before the law is declared by

90 E.g. Decision 10/2003. (IV. 3.) of the Constitutional Court.

91 Decision 745/B/1999. of the Constitutional Court, ABH 2002.

92 In one of the modifications to the Constitution (Act XX of 1949) during the summer of 2010, an exemption from the principle of the prohibition of retroactive legislation (the possibility of *retroactive taxation*) was inserted into the Constitution (Article. 70/I(2)). This was intended to be the constitutional basis of the retroactive taxation act that was adopted by the Parliament and then annulled by the Constitutional Court in autumn 2010. On the same day of the announcement of this decision, which was unfavourable for the leading political parties, Article 70/I(2) (on the possibility of retroactive taxation) was changed and a slightly modified retroactive taxation act was adopted. Simultaneously with modifying Article 70/I(2), the power of the Constitutional Court was restricted (it was prohibited to review financial laws). With its Decision 37/2011 (V. 10.) the Constitutional Court (second decision) annulled the act based on Article 70/I(2), but in Decision 61/2011 (adopted on 12 July 2011), it refused the constitutional review of constitutional amendments inserting the new Article 70/I(2) and the limitation of the competences of the Constitutional Court.

Article XIV (see below). Other aspects of due process (for example the need to give notice to the subject of legislation in advance) are defended by the concept of the rule of law and legal certainty.

### f Other General Constitutional Principles

*Equality before the law/prohibition of discrimination.* Article 70/A of the Constitution declared that human rights and civil rights should be respected without discrimination on any ground. The Constitutional Court interpreted this article as a general clause that should not be limited to human and civil rights but should be applied to the legal system as a whole. Thus, the compatibility of social legislation with the Constitution could be challenged on this ground. Article XIV(2) echoes the prohibition with a similar wording, consequently, there is good reason to assume that the Constitutional Court will continue to interpret this clause similarly to the way it has done so far.

## 9.4 Impact of the International Protection of Social Rights

*9.4.1-9.4.2 Did Your State Ratify International Treaties That Pertain to Social Rights? Are They Directly Applicable in Your Domestic Legal Order? Do These Treaties Have an Impact on the National Legal System? Did They Trigger Any Changes in National Legislation or Practice?*

Hungary has a dualistic approach towards the relationship between international obligations and national law, which is supplemented by the monist approach as regards the generally recognised rules of international law.[93] The very content of the relevant constitutional provision remained the same.[94]

Hungary transposed into its internal legal system the most important international and European measures.

International treaties have almost negligible effect on the protection of social rights in Hungary. It is partly a consequence of the communist past when an extended system of social security legislation was developed. The highly relative nature of safeguards enshrined in international treaties did not have a major impact on the relatively developed social legislation in Hungary. A third factor was the country's cautious approach to incur new liabilities deriving from international treaties protecting economic and social rights. The ratification of the European Social Charter is a perfect example of this attitude. The Parliament, in agreement with successive governments, consistently insisted on the ratification

93 See Article Q(2).

94 See Article 7 of the Constitution See more about it in Chronowski-Drinóczi-Ernszt 2011.

of a so-called optimal minimum of state parties' obligation, carefully avoiding to ratify those articles that would have induced changes in Hungarian social legislation.

An exemption to this approach is the equality law where the legal reasoning developed by international organisations had been drawn by national authorities.

### *9.4.3-9.4.4 Does the Case Law of International Bodies Protecting Human Rights Impose Any Changes in National Legislation Pertaining to Social Rights? In Particular, Did the Case Law of the European Court of Human Rights and Other Regional Human Rights Courts Have an Impact on National Law in the Field of Social Rights?*

The case law of international bodies protecting human rights had negligible and sometimes even negative effects on the legislation pertaining to social rights in Hungary. For example, the 'case law' of the European Committee of Social Rights prevented the Parliament from ratifying Articles 4 and 12 of the European Social Charter. In some cases, the Constitutional Court developed an argumentation for the protection of social rights similar to that of the European Court of Human Rights (as it happened in relation to the protection of contribution-based benefits like private property).

### *9.4.5 What Are the Most Important Social Rights Cases Brought From Your Country to International Rights Protecting Bodies?*

The European Court of Human Rights delivered its decisions in cases *N.K.M v. Hungary* (application nr. 66529/11) on 14 May 2013, and *Gáll v. Hungary* (application nr. 49570/11) on 25 June 2013. N.K.M. complained under Article 1 of Protocol No. 1 – read alone and in conjunction with Article 13 – that the imposition of a 98% tax on the upper bracket of her severance pay constituted an unjustified deprivation of property, or else taxation at an excessively disproportionate rate, with no remedy available. Gáll complained also under Article 1 of Protocol No. 1 that the imposition of a 98% tax constituted an unjustified deprivation of property, or else taxation at an excessively disproportionate rate. Both cases were decided to be admissible and in both cases the breach of the Article 1 of Protocol No. 1 was established.

### 9.4.6 *What are the lessons you draw from the International Litigation (Pertaining to Social Rights) Started by Applicants From Your Country?*

The ECtHR can provide an 'additional' and 'supplementary' human rights protection for those whose Convention rights have been violated by Hungary in situations when the Hungarian constitutional and ordinary law is inadequate, i.e. contrary to the Convention; but this protection is available only on a case-by-case basis and, due to its international law character, cannot provide a 'remedy' once and for all.

## 9.5 Social Rights in Ordinary Legislation

### 9.5.1-9.5.2 *To What Extent Does the Ordinary Legislation in Your Country Ensure the Protection of Social Rights? Is This Legislation in Conformity With the National Constitution and the International Instruments Ratified by Your Country?*

The Constitutional Court has competence to examine the compliance of ordinary legislation with the Constitution and with international obligations as well, and can annul laws on the basis of unconstitutionality and non-compliance with international obligations.

As for *economic rights*, the protection provided by ordinary legislation is adequate, except for the legislation on public law based entitlements and retroactive taxation. The Civil Code (both the former and the new one) and other related laws implement the right to property, including intellectual property, in private law properly. 'Infringements' in the field of the right to property are probable but the Constitutional Court would decide on the unconstitutionality of such infringements, provided that it has competence to review (see above). As for the right to profession, legislation would also be reviewed by the Court, like in case of the one-year long obligatory employment as an 'employed lawyer'.[95]

As for *social rights*, the protection of contribution-based benefits is adequate, since the acts regulating the operation of the health and pension systems provide a judiciable right to benefits and services and leave little room for discretionary decisions.

Nevertheless, there are some serious deficits in the protection of non-contributory benefits, especially social assistances. Rules ordering the indexation of universal benefits were terminated as a first reaction to the global financial crisis in 2008, *ex gratia* pensions, for which the beneficiaries had not been required to pay contributions, were abolished (13th month pension, pensions for people below the pensionable age). There is no legally regulated proceeding to determine the amount of various social assistance benefits and

95 See note 46.

thus their provision is at the discretion of the government. As a consequence, the amount of social assistance available to the most needy is constantly well below the officially declared subsistence level.

### 9.5.3 *Are There Any Original Legislative Tools or Mechanisms of Protection of Social Rights Created in Your Country?*

We can speak of original legislative tools in relation to the protection of second-generation rights mainly in a negative sense.

There is a rather questionable legislative tool 'not to protect' certain aspects of right to property in Hungary, see the restriction of the competence of the Constitutional Court.

In civil law, the rights of the proprietor and those of the holder/possessor are differentiated and given different protection in cases of violation of rights.

The importance of the mandatory private pension scheme was reduced to a minimum by sophisticated legislation in 2010: Act CLIV of 2010 required members of mandatory private pension funds to declare their will to stay with their fund. Those who failed to make a declaration were enrolled in the state pension fund automatically. Contributions of those choosing to stay with their private fund were redirected to the state pension fund for 14 months without compensation. In 2012, the Fundamental Law deprived mandatory private pension funds of the constitutional protection they had enjoyed previously.

Article XIX(1) creates the possibility to test the behaviour of claimants for social benefits in order to determine whether they deserve social benefits or not. Accordingly, Act III of 1993 on social assistance and social care authorises local governments to make access to social assistance for working-age claimants conditional on cleaning their household and its environment adequately.

## 9.6 Justiciability of Social Rights

### 9.6.1-9.6.4 *Are Social Rights Considered Justiciable in Your Country? To What Extent?*

*What Is the Role of the Judge?*

*What Are the Practical Effects of Such Justiciability?*

*What Are the Most Prominent Examples of Social Rights Cases Successfully Brought to Courts by the Litigants?*

Even though in the literature justiciability as a general category and one of the characteristics of fundamental rights, and thus that of second-generation rights was not so much debated, the Constitutional Court took an alternative standpoint (see above at point 9.1.1.-9.1.4., 9.1.5., 9.1.6., 9.2.5.5.-9.2.5.6.) even before 2012 (the entering into force of the Fundamental Law) and it was quite reluctant to recognise social rights as real fundamental rights.

Public law can offer proceedings in which laws can be challenged[96] on the basis of unconstitutionality, i.e. they infringe a fundamental right or they do not provide for access to justice; a legislative omission can be established when the legislator fails to adopt necessary legislation.[97] When public law offers these procedures, there is a possibility to enforce one's fundamental right even if there is no legal ground to go to ordinary court or the process before the ordinary court fails.[98] In this sense, all rights enshrined in a constitution, an international human rights agreement (cf. *pacta sunt servanda*), and/or rights that are ensured in constitutional court rulings can be considered as fundamental rights, provided that they are fundamental, universal and can be legally defined.[99]

Under the regime of the Fundamental Law, demanding the recognition of real social rights as fundamental rights based on the argument of justiciability (and enforceability), become more difficult as the individual's access to the Constitutional Court has been almost entirely changed, not to mention the restriction of the Court's competence by prohibiting the review of financial laws, i.e. laws most possibly containing elements of social and even economic rights.

The justiciability of economic rights before ordinary courts differs: the private and criminal law protection of the right to property (interpreted as proprietorial rights) is effectively regulated and implemented by judges; related freedoms (the right to association and strike) are also adequately protected by ordinary courts by applying the act on association, the civil code, the labour code and the act on strike. Judges (or another authority) may establish the intrusion to property or possession; may help to make a decision on the lawfulness of a strike (whether the service planned to provide is sufficient); and may protect the employee from possible disadvantages imposed by the employer because of participation in associations (e.g., trade unions) and strike.

As regards social rights, people have a subjective right to universal and contributory benefits, consequently, these rights are enforceable before ordinary courts. However, in relation to social assistance benefits in cash judges are prevented to make decisions on the

96 See the former *actio popularis* ex post-constitutional review by the Constitutional Court that was terminated by the FL.

97 Another competence of the Constitutional Court; it still has it.

98 When national law cannot be successfully used, the international human rights regime can be used for making a fundamental right justiciable.

99 Taking into consideration the interconnectedness of human rights, these characteristics can hardly be doubted. See Drinóczi 2007, and Drinóczi 2008.

merits of the cases; they are only allowed to consider the fairness of the administrative procedure.

To sum it up, the justiciability (and enforceability) of second-generation rights is provided for in public law; the level of protection is at a much lower level though.

## 9.7 Institutional Guarantees of Social Rights

### *9.7.1 Which National Bodies Are the Institutional Guarantors of Social Rights?*

First of all the *Constitutional Court* and the *Commissioner for Fundamental Rights*[100] need to be mentioned as far as the protection of the Constitution is concerned. The Commissioner, when exercising its competence, may act as a protector of any fundamental right by submitting a petition to the Constitutional Court asking for an ex post norm control. Previously, initiating an ex post norm control was *action popularis*; now it shall be initiated by the Government, one-fourth of the Members of Parliament, the President of the Curia, the Supreme Prosecutor or the Commissioner for Fundamental Rights. Practice shows that individuals prefer to turn to the Commissioner who, after consideration, submits his petition based on the request of the individual. Other institutional guarantors of subjective (economic and social) rights are the independent *courts*.

As for sectoral guarantors, the *Hungarian Competition Authority*[101] has to be mentioned. The preamble of Act LVII of 1996 on the prohibition of unfair and restrictive market practices[102] stipulates that the public interest attached to the maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness, as well as the interests of consumers require the state to protect the fairness and freedom of economic competition by law.

In relation to social insurance benefits, there are separate authorities dealing with pension and health care issues. As regards the state pension scheme, the *Directorate General of National Pension Insurance* is at the top of the administrative hierarchy, and it operates Pension Insurance Directorates located in the County Government Offices. The *National Health Care Fund* is the highest authority in health insurance which directs health insurance

100 Article 30 FL: The Commissioner for Fundamental Rights shall protect fundamental rights and shall act at the request of any person. (2) The Commissioner for Fundamental Rights shall examine or cause to examine any abuses of fundamental rights of which he or she becomes aware, and shall propose general or special measures for their remedy.

101 See <www.gvh.hu/gvh/alpha?do=2&st=2&pg=96&m172_act=1>.

102 This Act and other legislation is available in English at <www.gvh.hu/gvh/alpha?do=2&st=2&pg=129&m5_doc=4323&m176_act=22>.

specialised administrative bodies located in the County Government Offices. The *National Office for Rehabilitation and Social Affairs* is the highest authority in relation to disability and social assistance benefits.

*9.7.2-9.7.3 Are There Any Specific Bodies Created Especially for the Protection of Social Rights? What Are Their Powers?*

There are no bodies for the protection of social rights in Hungary other than the ones listed above in point 9.7.1.

*9.7.4 How Do You Evaluate the Effectiveness of These National Bodies?*

As long as there is no constitutional protection of fundamental rights to the fullest extent, one can hardly speak about the effectiveness of national bodies. They might be effective in a particular case and completely ineffective in another due to the application of an unconstitutional legislation that cannot be constitutionally reviewed. Adjudicating bodies may correct legislative shortcomings by way of coherent and consistent interpretations but they are not able to correct the deficiency caused by the constituent power.

## 9.8 Social Rights and Comparative Law

*9.8.1 Did Your National Legal System Influence Foreign Legal Systems in the Area of Social Rights?*

We do not have information on the effects of the Hungarian legal system on the legal system of other countries in the area of social rights.

*9.8.2-9.8.3 Did Other Foreign Legal Systems Influence Your National Legal System in the Area of Social Rights? Can You Give Examples of Provisions, Principles Or Institutions (in the Area of Social Rights) Borrowed From Other Legal Systems?*

The Constitutional Court has taken over the early opinion of the German Federal Constitutional Court (BVerfG) about the *economic neutrality of the constitution*, but it followed neither the development of the BVerfG's case law nor that of the German academic literature. The Constitution – besides declaring market economy – was regarded as neutral in

the sense of economic policy. Neither the size and the strength, nor the prohibition of state interference could directly be deduced from the Constitution.[103] The Constitutional Court followed the outdated German position without reconsidering and revising it in the light of the content of the Hungarian Constitution (preamble[104]) and without regard to the German dogmatic and constitutional practice.[105]

The Court in its main ruling of 1993 acknowledged that when developing the constitutional protection of the right to property (subject-matter, content elements, limitation), it necessarily used the private law notion of property as well as the decisions of the *BVerfG and the ECtHR*.[106] The Court for instance established the *socially binding character* of property developed by the German Constitutional Court, even though there was no reference to this phenomenon in the Constitution.

The Constitutional Court's ruling of 1998 on the *content of the right to social security* was inspired by the concept about the interrelation between the right to human dignity and the right to social security developed by the German Constitutional Court.[107]

### *9.8.4 Do Your Domestic Courts Quote Judgements or Legislation From Other Jurisdictions When Adjudicating on Social Rights?*

Domestic *ordinary courts* apply national (EU) law even when they deal with international obligations, due to dualism. The Supreme Court for instance stated *expressis verbis* in 2006 that foreign legislation invoked by the applicant cannot be taken into consideration by a Hungarian court. As for the *Constitutional Court*, it frequently refers to international court decisions (by using proper reference[108] or just stating that the practice is in accordance with the ECtHR[109]) but very rarely to foreign ones.

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103 Decisions 33/1993. (V. 28.) (ABH 1993, 153, 158), 915/B/1993. (ABH 1994. 619, 621) CC. 33/1993. (V. 28.) (ABH 1993, 153, 158), 915/B/1993(ABH 1994. 619, 621) of the Constitutional Court. Reference to neutrality can be found in decisions 963/B/1993 (ABH 1996. 437, 440) and 19/2004. (V. 26.) (ABH 2004. 321, 339.) of the Constitutional Court.

104 "In order to … establish a … social market economy …."

105 Cf. Decision 19/2004. (V. 26.) of the Constitutional Court referring to decisions 33/1993. (V. 28.) and 21/1994. (IV. 16.) (ABH 2004. 321, 340) of the Constitutional Court.

106 Decision 64/1993. (XII. 22.) (ABH 1993. 379-382) of the Constitutional Court established that the conception of the Hungarian Constitutional Court on the protection of the right to property is in line with that of the ECHR and the practice of the ECtHR.

107 BVerfGE B 55, 149 (1966).

108 Mainly in cases dealing with liberties (the right to life, euthanasia, due process), not economic and social rights.

109 See the case of the right to property.

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# 10 Social rights in Italy

*Giuseppe Franco Ferrari*[*]

## 10.1 Social rights in the Italian Constitution: an introduction

The Italian Constitution dates back to 1947 and entered into force on January 1st, 1948: therefore, it mirrors the political and cultural climate of the post-war years. Party solidarity in the Constitutional Assembly was at its climax, although some of the parties, specifically the left-wing ones, no longer participated in government. Most constitutional choices, particularly those focused on individual rights and their relationship with public powers, were made with almost unanimous support.[1] Yet, the implementation of the constitutional text and its impact on the organization of the public administration was neither quick nor easy and costless. It took some decades to push the Constitution ahead, and thus the process implied changes in the attitudes of the Parliament and the Constitutional Court.

A rough periodization can be defined as follows: (i) during the first eight years, preceding the activation of the Constitutional Court in 1956, only a few changes were introduced into the structure of the State and local authorities were put in charge of carrying out social services; (ii) between 1956 and 1970, certain reforms were promoted by the Parliament, mostly in the sphere of public education and social security, while some of the decisions of the Constitutional Court accelerated the pace of these reforms and compelled the State to find the necessary resources; (iii) in 1970, the establishment of the Regions, long contemplated in Articles 114–134 of the Constitution, helped to speed up the reform process, because a relevant share of social services then had to be provided by the Regions or by local authorities dependent on the Regions. Public law scholars supported the acceleration of functional devolution as well as an enlargement of the range of services provided; they also contributed to carving out the structure of the entitlements in terms of social rights, while the Court, often following sporadic doctrinal suggestions, started to recognize some constitutionally protected social rights, even qualifying some of them as fundamental, irrespective of any textual definition, at least until the end of the 1980s; it also compelled the Treasury to integrate its allotted financial resources to promote a better fulfillment of social rights; (iv) in the 1990s, the devolution of functions to Regions and local authorities was completed, the Constitution itself was revised in 2001, in order to increase the degree of decentralization and support the transfer of competences carried out in the preceding

* Full Professor of Comparative Public Law, Bocconi University, Milano: ferrari.giuseppe@unibocconi.it.

1 See E. Cheli, *Il problema storico della Costituente*, *Pol. dir.*, 1973, 485.

decade; (v) finally, in the new millennium, the reduction of available public resources – due to the enormous amount of the sovereign debt – together with the EU law pressure toward a more competitive approach in providing public functions and services, has caused a more prudent approach not only by the Parliament but also by the Constitutional Court: the Courts less disposed to costly "additive" decisions aiming at increasing number and quality of the social services.

These cycles or phases obviously describe the constitutional and administrative history of social rights, but they have no normative value. Trends have tended to overlap and some elements typical of one period may appear earlier or live on in later moments. The general portrait is correct, although some details should be further examined.

In a comparative diachronic perspective, Italian social rights as such belong to the so-called second generation of rights,[2] which is usually situated between the Beveridge Report (in Britain) and the adoption of the French Constitution of 1946, the Italian Constitution of 1948, and the German Basic Law of 1949 (in continental Europe). In synchronic terms, regarding the most common classifications of the types of welfare states,[3] the Italian case belongs neither to the institutional redistribution model, which includes Scandinavian countries and the UK, nor to the residual model, to which the US is usually ascribed; it is normally considered included in the selective merit model, though with an accentuation of particularistic elements, meaning that some of its characteristics do not exist elsewhere. For instance, the safety net to protect earning capacity and individual level of decent living is not correctly positioned, and several services are traditionally distributed according to improper parameters and not to real need. For instance, unemployment benefits overprotect formerly employed workers, while they do not cover young workers or persons dismissed from non-strictly dependent jobs; subsidies to handicapped persons are often assigned without proper controls or entitled as form of mere charity; retirement benefits were for decades given to persons leaving their jobs after too few years of work, thus charging the social security system with costs unbearable in the long run; public transport fares have been held for many years and are still partially under the cost level, charging the difference on tax payers; even the expansion of civil service at both national and regional levels has not always followed the growth dictated by the real exigencies of providing social services, but has instead been conditioned by the need to reduce unemployment in the most unpropitious areas of the Country.

These serious anomalies have affected the Italian welfare state, jeopardizing many citizens' full enjoyment of social rights due to wasted resources, the incorrect use of public funds, the improper or inefficient treatment of groups with special needs, and even

2 C. Grewe, H. Ruiz Fabri, *Droits constitutionnels européens*, Paris, 1995, 140 ff.

3 See P. Flora, J. Alber, *The historical core and the changing boundaries of the welfare state*, in P. Flora, A.J. Heidenheimer (Eds.), *The Development of Welfare States in Europe and America*, New Brunswick, 1981.

throwing an unfavorable light on the very idea of social rights. When finally, at the end of the twentieth century, Italy's amount of public debt as a percentage of GDP reached one of the highest rates in the Western world.[4] European institutions and the global finance organizations have separately started to impose significant cuts on public spending, in order to reduce this situation. Such pressure has compelled parliaments and governments of different political colors to reexamine the organization of social services and to undertake serious efforts to eliminate at least some of the most striking traditional defects of the system. However, in doing so, they have met with strong resistance in important segments of the electorate and public opinion; there is a general consciousness of the unsustainability of previous policies, together with firm opposition to the abolition of privileges and to the curtailment of long-standing benefits, even if improperly enjoyed. For this reason, many economic measures stick to flat cuts, instead of removing inefficiencies and anomalies, thus consolidating and even aggravating ill functioning and distortions.

At the end of the day, the anomalies accumulated following World War II still exist and often have been strengthened by the financial measures imposed by the economic and financial crisis of 2008 and the following years; this makes it harder to introduce reasonable redistribution initiatives capable of removing situations to which significant parts of the population have grown accustomed. In brief, the Italian welfare state is still very particular with respect to other countries in Continental Europe and beyond.

## 10.2 The right to education

Until the adoption of the 1948 Constitution, there was no trace in the Italian legal system of the right to education. The 1848 Casati statute[5] reformed the whole education system, charging local communities (*Comuni*) with the financing of elementary education. It also made the first two years of school compulsory and free and sanctioned families in case of violation of such an obligation; however, it did not put real pressure on local authorities to carry out their duties. In 1877, another law[6] elevated the State educational obligation to three years, and the later Orlando statute[7] lifted compulsory school attendance to twelve years, obliging local authorities to ensure at least the first four years of elementary school and to assist poor students. However, none of these measures succeeded in eliminating illiteracy or even in lowering the Italian rate to the average European level. In 1911, elementary schools were taken over by the State and financed directly.[8]

4 The relationship between GDP and public debt was about 130% in 2013: Eurostat data.
5 R.d. 13 November 1848, no. 3725, Article 319.
6 L. 15 July 1877, no. 3961.
7 L. 8 luglio 1904, no. 407.
8 L. 4 June 1911, no. 487, called Daneo-Credaro from the name of the Minister of Education.

Article 34 of the 1948 Constitution, using a somewhat rhetorical formulation, stated that "Schools are open to everyone. Primary education, provided for at least eight years, is compulsory and free. Capable and deserving students, though lacking adequate income, have a right to reach the highest levels of education. This right is made effective through scholarships, allowances to families and other benefits, competitively assigned." Only recently have Italian scholars agreed in affirming the existence of education as a social right.[9] Formerly, most authors simply admitted it as an entitlement to be satisfied only in circumstances in which school service had already been made concretely available.[10] Only a handful of scholars recognized a real right to education.[11] Private schools, however, are not bound by this constitutional obligation, although they might be compelled not to discriminate in admissions, especially when they enjoy the condition of equivalence to public schools in terms of the legal value of their degrees.

The constitutional principle of free access to compulsory schooling is considered an application of the democratic principle[12] enshrined in Article 1 of the Italian Constitution. The duration of compulsory school is deemed to be just a minimum, which a statute can increase, as in fact the Parliament did,[13] although some authors qualify these actions as *in peius* despite constitutional revision.[14] The obligation on students and their families is functional to the full development of one's personality (Article 2) and the accomplishment of substantive equality (Article 3.2). The free quality of at least the first eight years of education stipulates that it should include all necessary aspects of education, not simply the access to the classroom. The Constitutional Court was widely criticized when in 1967[15] it refused to state the unconstitutionality for omission of the statute recognizing textbooks free of charge to elementary school pupils of the first five grades but not to secondary school students of the next three.

As far as secondary and higher education is concerned, the right of capable and deserving students to attain the highest levels is not connected to the free character of education, notwithstanding public help in terms of allowances and other benefits. In this range of age, the content of the social right is not so well defined as for younger students; in particular, its enjoyment is not free. The intermediation of the legislative power is here

9 See for instance L. Paladin, *Diritto costituzionale*, Padova, 1998; G.Barone, G. Vecchio, *Il diritto all'istruzione come "diritto sociale". Oltre il paradigma economicistico*, Napoli, 2012.

10 For instance V. Crisafulli, *La scuola nella Costituzione*, *Riv. trim. dir. pubbl.*, 1956, 54 ff; M. Salazar, *Istruzione pubblica*, *Dig. disc. pubbl.*, IX, Torino, 1994, 19 ff.; N. Rizzi, *Il diritto soggettivo di iscrizione a scuola e i suoi limiti*, *Riv. giur. scuola*, 1963, 617 ff.

11 Like U. Pototschnig, *Insegnamento, istruzione, scuola*, *Giur. cost.*, 1961, 361 ff; U. Pototschnig, *Istruzione (diritto alla)*, *Enc. dir.*, XXIII, Milano, 1973, 96 ff.

12 M.Luciani, *Sui diritti sociali*, in *Studi in onore di M. Mazziotti di Celso*, Padova, 1995, 97 ff.

13 By increasing it to 15 years of age: l. 10 February 2000, no. 30, and then to 16: l. 27 December 2006, no. 296, Article 1.622.

14 A. Ruggeri, *Il diritto all'istruzione (temi e problemi)*, *Riv. giur. scuola*, 2009, 769 ff.

15 Decision of 4 February 1967, n. 7, *Giur. cost.*, 1967, 105. See U. Pototschnig, *Istruzione (diritto alla)*, 105.

strictly necessary to describe and implement its content. Before the adoption of one or more statutes, the entitlement has the nature of a mere expectation; after that, only capable and deserving students have a fully recognized right.

The right to education is thus articulated in different segments: entitled subjects include all pupils of compulsory school age, even if non-citizens; after that age, only capable and deserving students can receive continued support through the public administration. Capable and deserving students whose families can afford the expense can also reach the higher grades without any public support. The constitutional reference to competitive methods for the assignment of allowances and benefits helps to promote merit as an additional parameter in implementing substantive equality. Summing up, three categories of subjects enjoy the constitutional social right to education in different forms: all persons between five and fourteen years of age have the right to be educated freely for eight years, while the same right in the next two years is offered only a statutory foundation; capable and deserving students have the right to attend higher grades, including university, provided by public entities; when attaining high grades but lacking adequate resources they can be supported by public powers.[16]

The implementation of these constitutional provisions has followed a complicated path. In 1962,[17] the Parliament created a comprehensive secondary school system for students between six and fourteen years of age, to complete the eight years mentioned in Article 34. In 1966,[18] it introduced the guarantee of free textbooks for elementary school pupils only. In 1968,[19] it created State free but not compulsory kindergarten for the pre-scholar age, integrating similar institutional programming financed by local authorities of first level (*Comuni*). In 1970, the regional reform, long due according to Title V of Part II of the 1948 Constitution, implied the transfer of formerly State competences to the new administrative tier, according to the provisions of Article 117 in the version then in force. The Regions had then to offer vocational education courses and to activate all the ancillary services to primary and secondary school students, while public school continued to be managed and financed by the State. Although the concrete transfer of administrative functions was completed between 1972[20] and 1977,[21] a 1997 statute conferred budgetary

16 See A. D'Andrea, *Diritto all'istruzione e ruolo della Repubblica, qualche puntualizzazione di ordine costituzionale*, available at http://archivio.rivistaaic.it/dottrina/libertadiritti/D_Andrea.pdf, last access 17 October 2015.

17 L. 31 December 1962, no. 1859.

18 L. 31 October 1966, no. 942.

19 L. 18 March 1968, no. 444.

20 D.P.R. 14 January 1072, no. 3.

21 D.P.R. 24 July 1977, no. 616, Article 42 ff.

and management autonomy to the schools, which were formerly controlled by peripheral State authorities.[22] In 1998,[23] more competences were delegated to the Regions.

The constitutional revision of Title V in 2001 has reserved to the State the competence to prescribe general rules on education organization (Article. 117.2, lett. n) and to establish the essential levels of services (LEP: Article 117.2, lett. m). Consequently, Regions got concurrent competence to regulate education, leaving aside the autonomy of schools, and kept the existing competence on vocational education and ancillary services to State schools.

As far as the Constitutional Court case law is concerned, several notable decisions have helped to carve out the right to education. In 1967, the already aforementioned decision 7/67 declined to widen the limits of this right at the compulsory/free level, stating that it definitely includes the provision of school buildings, teaching, and other organizational elements, but does not necessarily extend to school texts, pupil transportation, or stationary, which can be provided consistently with resource allocation at the Parliament's legislative discretion. This limit is confirmed in decision 106 of the following year,[24] where the Court admitted that insufficient State efforts in terms of ancillary services could exempt families from the criminalization of school evasion. Further decisions confirmed such line,[25] though many authoritative scholars admonished that teaching, personal activity of the individual teacher protected as free speech in front of a very special audience by Articles 21 and 33, is quite different from instruction as a service, composed by a plurality of teachings coordinated and made systematic and a bunch of ancillary services, and that the constitutional guarantee of a free and compulsory service is referred not only to the teaching but also to the whole of school services.[26] Scholarly objections did not persuade the Court nor prevented it from stating that the constitutional guarantee of free compulsory education cannot be interpreted as to force the State or other public entities to adopt specific measures, independently of financial or political opportunity considerations.[27] According to the same line of cases, the free foundation of new schools by private individuals does not imply an obligation on the side of the State to provide free services to all their students.[28] By the end of the twentieth century and in a more important way after the constitutional revision of 2001, the Court has been very busy in defining the dividing line between the competences of State and Regions in providing school services giving content to the right to education.

22 L. 15 March 1997, no. 59, Article 21.
23 D.lgs. 31 March, no. 112, Article 138.
24 Decision 19 July 1968, no. 106, in *Giur. cost.*, 1968, 1671.
25 Like decision 24 May 1977, no. 89, *Giur. cost.*, 1989, 713.
26 Like U. Pototschnig, *Istruzione (diritto alla)*, 101 and G. Lombardi, *Obbligo scolastico e inderogabilità dei doveri costituzionali*, *Giur. it*, 1967, I, 1089 ff.
27 See for instance, decision 16 February 1982, no. 36, *Le Regioni*, 1982, 401.
28 See again decision 36/1982.

Decisions like nos. 383/1998,[29] 13/2004,[30] and 34/2005[31] have paved the way to the classification of State functions after the introduction of the new concurring legislation in 2001 operated in decision 279/2005:[32] here the Court enters in the details necessary to distinguish unitary exigencies, presupposing a normative framework uniformly applicable all over the Country, from organizational matters legitimately devolved to the regional level. It is anyway up to the State at least to define the type (classical, scientific, technological, linguistic) of secondary schools, the school building planning, and the guarantee of national educational standards.[33] A Region cannot create university courses open to those without secondary school degrees, but regulate students transfer from high schools to regional vocational courses and vice versa.[34] Finally, it is worth recalling that plenty of controversies, both in the administrative tribunals and in the Constitutional Court, has concerned the introduction of some forms of *numerus clausus* in the university admissions, which were previously unknown in the Italian context, at least up to the beginning of the 90s. At the end it was necessary to codify them through a statute, which was declared constitutional by the Court,[35] as not inconsistent with the right to education.

## 10.3 The right to social security

The Italian social security system is ruled by Article 38 of the 1948 Constitution, which regulates assistance and social insurance measures all together. The constitutional provision states that "Every citizen unable to work and without the necessary means of subsistence has a right to welfare support. Workers have a right to be assured adequate means for their needs in case of accidents, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons have the right to education and vocational training."

Workers as a group are thus fully entitled to receive, in case of loss of earning capacity, publically funded economic support sufficient to prevent them from falling under the poverty line. Using the words of the Beveridge Report, they have a right to a safety net, which is sustained as much as possible through its contributory basis. This guarantee is

29 Decision 27 November 1998, no. 383, *Giur. cost.*, 1998, 3316, with note of A. D'Atena, *Un'autonomia sotto controllo ministweraile: il caso dell'Università*, 33332.

30 21 January 2003, no. 13, *Giur. cost.*, 2004, 218 ff., with a note by A. Celotto, G. D'Alessandro, *Sentenze additive ad efficacia transitoria e nuove esigenze del giudizio in via principale*, 228 ff.

31 12 January 2005, no. 34, *Giur. cost.*, 2005, 248.

32 Decision 7 July 2005, no. 279, *Giur. cost.*, 2005, 2694, with note by M. Michetti, *La Corte, le Regioni e la materia dell'istruzione*, 5117 ff.

33 See decision 2 July 2009, no. 200, *Giur. cost.*, 2009, 2316, with note of L. Carlassare, *Norme regolatrici della materia modificabili con regolamento? Un'ipotesi logicamente impossibile.*

34 Decision 14 July 2009, no. 213, *Giur. cost.*, 2009, 213 ff.; 5 November 2010, no. 309, *Giur. cost.*, 2011, 4343 ff., with a note by F. Cortese, *Sul diritto-dovere all'istruzione e formazione tra potestà legislativa statale e competenze regionali: anatomia di un'interpretazione*, 4350 ff.

35 L. 2 August 1999, no. 264; see decision 11 December 2013, no. 302.

overlapped by the other one, included in Article 36, which states that they "have the right to a remuneration commensurate to the quantity and quality of their work and in all cases adequate to ensuring them and their families a free and decent existence." Workers apparently have a right, during work or in cases of lost or diminished earning capacity, not to a mere guarantee of the minimum subsistence or of the material needs of living, but to a reasonable living standard. Such protection is supposed to be the remuneration of their (past) contribution to the welfare of society, according to the so-called labor principle of Article 3. Citizens, even unable to work from birth, enjoy a right to maintenance and support in minimal terms. This distinction, literally stemming from the constitutional text, is shared by several decisions of the Constitutional Court.[36]

Private insurance funds, to which workers voluntarily subscribed in addition to compulsory security under public shelter, are also considered included in Article 38, and the Constitutional Court[37] stated that there is some functional relationship between the two: in saying so the Court might have exceeded a literal and originalist interpretation of the constitutional provision, but it probably meant that the legislative power shall predispose the conditions necessary and sufficient to leave some room, in fiscal and organizational terms, to the activation of the subsidiary protection, otherwise impossible.[38]

The Italian social security system started, like in most European countries, from friendly societies and mutual help unions, which, since the mid-nineteenth century, were often financed by savings banks and became regulated by statute in 1886:[39] some common risks such as illness, accident, unemployment, handicap, and death were shared among the associates of these voluntary associations of workers. State interventions began in 1898,[40] when an insurance against accidents was made compulsory for industrial workers and a national insurance fund for disability and old age was founded with State support.[41] After World War I the number of risks covered by insurance was extended and at the same time disability and old age insurance was rendered compulsory for more than 12 million workers[42] through the creation of a factory worker national insurance fund for invalidity and aging (CNAS), converted in 1933 into INPS,[43] public agency whose competence was progressively increased in the following years. The last reform before the War and the Constitution was introduced in 1939, with the creation of compulsory insurances against

36 See above all decision 5 February 1986, no. 31, *Giur. cost.*, 1986, 164 ff., with note by A. Andreani, *Assistenza, mutualità e "terza via"; il dilemma delle pensioni al minimo*.
37 Decision 28 July 2000, no. 393, *Giur. cost.*, 2000, 2757.
38 An overview of the constitutional problems of the Italian social security system in M. Cinelli, *Diritto alla previdenza sociale*, Torino, 2012, and M. Persiani, *Diritto della previdenza sociale*, Padova, 2012.
39 L. 15 April 1886, no. 3818.
40 L. 17 March 1898, no. 80.
41 L. 17 July 1898, no. 350.
42 D.lgs.lgt. 21 April 1919, no. 603.
43 R.D. lgs. 27 March 1933, n. 371.

unemployment and tuberculosis, of family subsidies and salary integrations in case of reduced work hours; retirement age was set at 60 for men and 55 for women and a survivor annuity was introduced.

After the Constitution, the 1952 reform[44] took in the automatic adjustment of retirement treatments to inflation and the minimum integration, in order to grant a very low treatment to workers with insufficient length of service. At the end of the 1950s the compulsory insurance for unemployment, old age, and survivors was extended to categories previously not covered, like farmers, craftsmen, and tradesmen. The constitutional project was thus considered completed.

Since then, several legislative measures have concerned the retirement system: in 1969,[45] the capitalization was set aside to give way to the retributory formula, which disengages the level of retirement benefit from the total amount of individual contributions, linking it to the salary of the last work years. The same statute introduced both a social benefit for citizens elder than 65 never insured and lacking a minimum income, and a seniority retirement system for workers with more than thirty-five years of contributions though younger than 60 or 55. This reform, together with the automatic adjustment to inflation, made the financial burden unbearable. The last strikes were a 1984 statute[46] eliminating all reference to social or economic conditions from inability benefits, now linked only to sanitary conditions, and the 1990 statute[47] equalizing self-employed workers to the dependent ones calculating their retirement benefits on the contributions of the last ten years only, irrespectively of former payments.

This trend was reversed only in 1992. The Amato reform[48] lifted the minimum retirement age to 65 for men and 60 for women. The Dini reform[49] returned to the contributory system, to be fully implemented only after 2012. Further restrictions for the sake of public finances were introduced by the Prodi reform of 2007,[50] which applied to seniority retirement the achievement of a number being the sum of years of age and years of work, and the Tremonti-Sacconi reform of 2009,[51] lifting women's retirement age to 65. Finally, in 2011, the two agencies in charge of civil servants' and private workers' benefits were melted in one, and in the same year the Fornero reform[52] introduced fixed-term employment contracts as well as incentives for employers to hire permanent workers, the results of which are still partially uncertain.

44 L. 4 April 1952, no. 218.
45 L. 30 April 1969, no. 153, Brodolini statute.
46 L. 12 June 1984, no. 222.
47 L. 2 August 1990, no. 233.
48 Legislative decree 30 December 1992, no. 503.
49 L. 8 August 1995, no. 335.
50 L. 24 December 2007, no. 247.
51 Article 22 ter, D.l. 1 July 2009, no. 78, converted into l. 3 August 2009, no. 102.
52 L. 22 December 2011, no. 214.

Overall, the national agency, INPS, serves about 90% of the Italian workers, while only professionals like lawyers, architects, and engineers depend on segregated funds. The National Institute for Insurance against Accidents at Work (INAIL) presides over the insurance against accidents, professional diseases, and workplace deaths.

Outside the area of insurance and its perimeter lies the assistance sector, which was originally undistinguished from health services, that were formally separated only in 1968, with one of the most important health reform in the Italian administrative history.[53] This statute transformed hospitals into health agencies, which were finally inserted in a national health service ten years later.[54] In the Italian context, most charitable institutions, from the middle ages to decades after the unification in 1861, were denominational or at least shared a denominational character with traditional municipal agencies.[55] A radical publicization, due to the separation between the Church and State that followed the liberation of Rome in 1870, was completed in 1890 by the so-called Crispi Statute,[56] which transformed all charitable institutions ("opere pie") from private religious subjects into local public agencies (*Istituzioni pubbliche di assistenza e beneficenza*, IPAB), under strict control of municipalities and Prefects, though the composition of the governing board was left to their charters, approved by the Central Government directly or by the Prefects. The qualification of all Catholic charities as public subjects was aimed at withdrawing assistance to poor people, in condition both of sickness and health of body and mind, and their education or vocational education, from the influence of the Church. The condition of the poor and their entitlement did not change substantially,[57] though the selection of the subjects in need and the assignment of benefits were now regulated more in detail.

When the Republican Constitution came into force, some scholars began to talk about a full substantive right,[58] while other authors preferred to use less demanding formulas, like "rights in an improper sense"[59] or "collective expectations."[60] After more than fifty years constitutional and administrative law, scholars are still divided about the possibility for the person in need to compel public institution to provide a service and the existence of a limit imposed by the availability of adequate financial resources. Some speak of a

53 L.12 February 1968, no. 132, called "legge Mariotti".

54 L. 23 December 1978, no. 833.

55 See for instance, M. Mazziotti di Celso, *Assistenza (profili costituzionali)*, *Enc. dir.*, III, Milano, 1958, 749 ff.; C. Cardia, *Assistenza e beneficienza*, *Enc. giur. Treccani*, Roma, 1988, 4.

56 L. 17 July 1890, no. 6972 and R.D. 5 February 1891, no. 99.

57 Not even after R.D. 30 December 1923, no. 2841.

58 Such as for instance M.S. Giannini, *Profili costituzionali della protezione sociale delle categorie lavoratrici*, *Riv. giur. lav.*, 1953, I, 8 ff; A. Romano, *L'assistenza e la Costituzione*, *Amm. it.*, 1962, 103 ff.

59 V. Crisafulli, *Costituzione e protezione sociale*, in *La Costituzione e le sue disposizioni di principio*, Milano, 1952, 135 ff.

60 A. Barettoni Arleri, *L'assistenza nell'attuale momento normativo ed interpretativo*, *Riv. infort.*, 1976, II, 410 ff.

financially conditioned right;[61] others refer to the right to life to define assistance as a corollary and to deny any limitations.[62]

From the viewpoint of the public structure governing the service, Article 38 mentions the Republic as responsible subject with reference to assistance, while Article 117 in its original formulation referred charity to the regional competence: the Constitutional Court at least once[63] seemed to accept such a division of competences. More recently, yet, the subject matter has been considered unified, even before the constitutional reform of 2001, which leaves it in the residual competence of the Regions. The administrative functions have been devolved to the Regions progressively, in 1972, 1977, and 1998.[64] Actually, the 1977 decree went much further, devolving most administrative functions directly to the municipalities, implying the suppression of all the IPABs and the complete publicization of charitable institutions, independently from their origins and charters. The Constitutional Court considered this reform incompatible with the absence of express delegation from the Parliament to Government along this line, as well as with the pluralism of charitable institutions implicit in Articles 2 and 38.[65] Again in 1988, the Court declared unconstitutional the 1890 Crispi statute for imposing a public imprinting on all the IPABs, while pluralism and subsidiarity implied leaving room for individual choices on a case-to-case basis.[66] Consequently, since 1990, a State rule has been approved in order to regulate the regional procedure in order to let charities opt out of the public regime and remain in the private one.[67] In 2000, a year before the constitutional reform, a framework statute[68] stated the new principles for the regional laws. Article 2 of this statute clearly mentions a fully protected right to the enjoyment of the newly integrated system of services, in terms of universalism, extending the benefits provided to all Italian and European citizens as well as non-EU citizens who have been permitted to stay with preference for subjects under the poverty line or with total or partial disability of physical or psychical nature, or with problems of access to active social life or to the job market.

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61 F.C. Rampulla, L.P. Tronconi, *I servizi sociali: dalla parcellizzazione ad un sistema integrato nella legge-quadro*, *Not. giur. reg.*, 2001, 137 ff.

62 See M. Mazziotti di Celso, *Assistenza (profili costituzionali)*, *supra* note 56, cit., 752.

63 Decision 24 July 1972, no. 139, *Giur. cost.*, 1972, 1397.

64 D.P.R. 15 January 1972, no. 9; D.P.R. 24 July 1977, no. 616; D.lgs. 31 March 1998, no. 112.

65 Decision 30 July 1981, no. 173, *Giur. cost.*, 1981, 1508.

66 Decision 24 March 1988, no. 396, *Giur. cost.*, 1988, 1744, with note by U. De Siervo, *La tormentata fine delle IPAB*. See also A. Pajno, *Assistenza e beneficenza fra pubblico e privato nella giurisprudenza della Corte costituzionale*, *Dir. proc. amm.*, 1993, I, 50 ff.

67 D.P.C.M. 16 February 1990.

68 L. 8 November 2000, no. 328. See also Lgs. D.4 May 2001, no. 207. Some indexes now indicate the basis of a possible option for the private law formula: the associative character, the private foundation, the religious inspiration, and the original will of the founders.

## 10.4 The right to housing

The provisions of the Constitution do not expressly provide a full right to housing. Actually, Article 47, in encouraging private saving in all forms, asks the Republic to promote "the ownership of house and directly cultivated land." In other words, the Constitutional Assembly accepted the proposal of MP Zerbi regarding the protection of house ownership as a peculiar aspect of savings.[69]

It was the Constitutional Court that carved out a social right to housing from the ambiguous formulation of Article 47. Initially, in 1976, it declared housing a target of "high social relevance"[70] and then, in 1983, "a primary value."[71] Finally, in the latter half of the 1980s, it recognized the existence of a social right to housing founded on Article 47.2, even defining it fundamental beyond the scope of the pertinent constitutional provisions.[72] The legislation stated that the full right to housing is a form of human dignity to be maximized.[73] A few months later[74] the right to housing was labeled inviolable, as a milestone of the welfare state, according to Article 2 of the Constitution. With a partial retreat, in 1989,[75] however, the Court started to condition the full enjoyment of the right to housing on the financial capacity of the State in a given historical situation; the availability of adequate resources thus became a precondition for the fulfillment of these obligations of public powers and for the justiciability or even the very existence of this social right. Since then the Court has never strayed from this line, affording the legislator room to set the aims, approve the available means for them, and allotting the desired resources.[76] In conclusion, according to this case law, the right to housing has been converted into a bunch of policies for providing rent control in the private housing market, to integrate the market output by building council houses, to favor the ownership of a house for large groups of the population,[77] to promote the cheap access to publicly owned apartments as tenants.[78]

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69 See G.F. Ferrari, *La tutela dell'abitazione tra normativa vigente e prospettive*, in AA.VV., *La casa di abitazione tra normativa vigente e prospettive*, Milano, 1986, 99-125.

70 Decision 28 July 1976, no. 193, *Giur. cost.*, 1976, 1201 ff.

71 Decision 28 July 1983, no. 252, *Giur. cost.*, 1983, 1516 ff.

72 Decisions 20 April 1988, n. 404, *Giur. cost.*, 1988, 1789, with note by A. Pace, *Il convivente more uxorio, il "separato in casa" e il cd. Diritto fondamentale all'abitazione*, and by R.Lenzi, *La famiglia di fattoi e la locazione della casa di abitazione*, and 25 February 1988, no. 217, *Giur. cost.*, 1988, 833, with note by G.F. Ferrari, *Diritto alla casa e interesse nazionale*.

73 See M. Benvenuti, *Diritti sociali*, in *Digesto disc. pubbl.*, Torino, 2012, 223 ff.

74 Decision 7 April 1988, no. 404, *Giur. cost.*, 1988, 1789 ff.

75 Decision 18 May 1989, no. 252, *Giur. cost.*, 1989, 1174 ff.

76 Decisions 3 February 1994, no. 19, *Giur. cost.*, 1994, 136; 5 May 1994, no. 169, *Giur. cost.*, 1994, 1507; 15 April 1996, no. 121, *Giur. cost.*, 1996, 1029.

77 Italy has the highest percentage of ownership houses in Europe: 81%, according to the 2012 Censis-ABI Report.

78 S. Civitarese Matteucci, *L'evoluzione della politica della casa in Italia*, *Riv. trim. dir. pubbl.*, 2010, 163 ff.

Social housing as a matter of legislative intervention was not contemplated in the original text of the 1948 Constitution, nor is it in the revised text of its Title V. Yet sectors such as "town and country planning," "low-cost housing," or "housing under agreed conditions" have long been occupied by the Parliament with a huge amount of measures, often quite complicated, due either to the lack of coordination between different administrative policies or to the definition of the lot of beneficiaries. At the end of the nineteenth century, the massive urbanization compelled municipalities to promote housing campaigns, and the State promptly reacted by regulating local experiments[79] and authorizing special loans by saving or local banks in favor of friendly societies or cooperation companies and funds, without getting involved in direct building activities. In the first half of the twentieth century, three social housing codes were approved,[80] but only after 1950 has the State entered this field as a direct player, through insurance institutions like INA-Casa or funds supported by a national agency (Gescal), since 1963.[81] In 1971, the State decided, by approving Statute 865,[82] to reorganize all the public entities operating in the social housing sector, also at the local level (IACP) and to assume a stricter coordination role; at the same time, given the implementation of the regional reform in 1970, it had to give up some management powers, devolving them to the Regions. In 1978,[83] a fair rent system was introduced, in order to control rents with reference to low-class tenants and make them have an easier access to social housing. This system, yet, was accused of jeopardizing the flexibility of the housing market, but it took twenty years to replace it with public subsidies for rents offered on the free market.[84] Also in 1978, another statute[85] tried to provide popular houses built on dismissed public estates to be restored, and to coordinate public efforts through a ten-year plan. Finally, in 1998, the legislative decree no. 112/1998, already cited, devolved other functions in the sector to the Regions, while the State remained competent for the definition of the basic elements of social housing as minimum standards of the national service.[86]

The constitutional revision of 2001 then traced the new division of competences between State and Regions. As mentioned above, the new text of Title V does not include social housing in any legislative subject matter, either State or regional. It is assumed that "town and country planning" and "landscape protection" are concurrent sectors, and it is up to the State to enforce a minimum standard of social services throughout the Nation, while regions have exclusive power to regulate the use of public estates to be used for social

79 L. 31 May 1903, no. 251, Luzzati statute.
80 R.D. 27 February 1908, no. 89; R.D.L. 30 November 1919, no. 2318; R.D. 28 April 1938, no. 1165.
81 M. Nigro, *L'edilizia popolare ed economica come servizio pubblico (considerazioni generali)*, *Riv. trim. dir. pubbl.*, 1957, 119; G. Roehrssen, *Edilizia*, *Enc. dir.*, XIV, Milano, 1965, 320 ff.
82 L. 22 October 1971.
83 L. 27 July 1978, no. 392.
84 L. 9 December 1998, no. 431.
85 L. 5 August 1978, no. 457.
86 See P. Urbani, *L'edilizia residenziale pubblica tra Stato e autonomie locali*, *Riv. giur. urb.*, 2010, 491 ff.

housing.[87] Social housing becomes therefore a composed matter, including all measures designed to the full enjoyment of the right to housing. More recently, the national Parliament has approved a massive plan directly managed by the center in order to provide more than 20,000 new houses at a publicly supported rent.[88] In 2007,[89] another national statute introduced taxation benefits for renters who accept contracts favoring poor tenants. And in 2008,[90] the Parliament has again approved a pack of measures including real estate funds provided by the State or by public/private partnerships to build popular houses, fiscal facilities for such houses, sale of public properties and of council houses to tenants, and other special programs.

Some remarks must be dedicated to the housing entitlements of non-citizens. The Italian system is quite generous in terms of its treatment of foreigners, even from the viewpoint of social rights. Since 1998,[91] foreigners have enjoyed access to social housing on an equal footing with Italian citizens, under the following conditions: they need to have obtained a residence permit of at least two years or alternately to have the status of refugee or another protected position; they also have to be employees or self-employed. Any limitations on the access of non-citizens to social housing by public agencies is considered discriminatory. The Constitutional Court has declared housing for non-citizens an inviolable social right.[92]

## 10.5 The right to health

Article 32 of the Constitution states, as already underlined, that "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent." Such a provision was the first one in Europe, given that there was no such reference both in the German Basic Law and in the French Charter of

87 Constitutional Court decisions 21 March 2007, no. 94 and 26 March 2010, n. 121, *Giur. cost.*, 2007, 902 and 2010, 1358.

88 L. 8 February 2001, no. 21.

89 L. 8 February, no. 9.

90 Law-decree 26 June 2008, no. 112, converted in law 6 August 2008, no. 133. See A. Venturi, *Dalla legge obiettivo al Piano nazionale di edilizia abitativa: il (ri)accentramento (non sempre opportune) di settori strategici per l'economia nazionale*, *Le Regioni*, 2010, 1378 ff.

91 Legislative decree 25 July 1998, no. 286, Article 40.6.

92 Decision 2 December 2005, n. 432, *Giur. cost.*, 2005, 4657, with notes by F.Rimoli, *Cittadinanza, eguaglianza e diritti sociali: qui passa lo straniero*, 4675 and M. Gnes, *Il diritto degli stranieri extracomunitari nella non irragionevole discriminazione in materia di agevolazioni sociali*, 4681. See F. Biondi Dal Monte, *I livelli essenziali delle prestazioni e il diritto all'abitazione degli stranieri*, in G. Campanelli, M. Carducci, N. Grasso, V. Tondi della Mura (Eds.), *Diritto costituzionale e diritto amministrativo: un confronto giurisprudenziale*, Torino, 2010, 213 ff.; G.F. Ferrari, *La condizione giuridica del non cittadino tra storia e comparazione*, in *Lo statuto costituzionale del non cittadino*, Napoli, 2010, 461-541.

1946.[93] It is clear, first of all, that the right is guaranteed to everybody, not just to citizens, and that in this way the principle of inviolability of rights is concretized in the social sphere.[94]

Italian scholarship has traditionally divided the right to health into two components. The opposition or antagonistic side refers to the defense of the psycho-physical integrity: every individual has the right to refuse any intervention on his/her body that might negatively influence his/her state of health. The most important application of this meaning resides in the case law on biological damage, directly deriving from any injury to health, regardless of the diminution of earning capacity and of moral distress, as well as age, profession and social conditions. The pretense or claim entails the entitlement to services from public powers, including freedom of choice in terms of health care treatments, among personal doctors, between public and private structures, possibly even inside public structures. In the 1950s and 1960s many constitutional law scholars considered this claim a mere programmatic expectation or the subjective side of a policy statement, more than a real precept, while no doubt could exist about the direct and immediate justiciability of the negative element. Since the Court qualified all constitutional provisions as prescriptive, though the implementation of some of them can be put off,[95] it is clear that the claim element presupposes the interposition of statutes and administrative acts creating structures before it can be satisfied, but when such a structure already exists, real subjective rights come to existence.

The Court has denied that an individual has the constitutional right to choose between private and public structures, when public finance covers the expenses.[96] A full freedom of choice between doctors or therapies, therefore, operates only when the service is paid by the private citizen.[97] It is not, however, an absolute value, but a principle that is instrumental to right to health and right to free enterprise. Free treatments are guaranteed to indigent persons only and not to all,[98] though the National Health Service tends to be available to all, on condition of the payment of a fee for some treatments.

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93 See M. Luciani, *Salute – 1) Diritto alla salute – dir. Cost.*, *Enc. giur. Treccani*, Roma, 1991.

94 See e.g. L. Montuschi, *Article 32*, in G. Branca (Ed.), *Commentario alla Costituzione (G.Branca Ed.)*, Bologna, 1976, 146 ff.; R. Balduzzi, D. Servetti, *La garanzia costituzionale del diritto alla salute e la sua attuazione nel Servizio sanitario nazionale*, in R. Balduzzi, G. Carpani (Eds.), *Manuale di diritto sanitario*, Bologna, 2013, 23 ff.

95 Decision 26 January 1957, no. 1, *Giur. cost.*, 1957, 1.

96 Decisions 26 May 2005, no. 200, *Giur. cost.*, 2005, 1761; 30 July 1997, no. 293, *Giur. cost.*, 1997, 2667; 28 July 1995, no. 416, *Giur. cost.*, 1995, 2978; 14 April 1987, no. 173, *Giur. cost.*, 1987, 1251; 10 November 1982, no. 175, *Giur. cost.*, 1982, 1981.

97 See L. Cuocolo, *Lo strano caso della "costituzionalità sopravvenuta" e il principio di libera scelta del medico*, *Giur. cost.*, 2005, 1768.

98 Decisions 10 November 1982, no. 175, *Giur. cost.*, 1982, 1981; 18 November 1983, no. 212, *Giur. cost.*, 1983, 1263; 27 October 1988, no. 992, *Giur. cost.*, 1988, 4673; 10 July 1990, no. 455, *Giur. cost.*, 1990, 2732.

As far as the sanitary structures are concerned, during the nineteenth century, public powers only engaged in taking care of hygiene and public order, while charitable institutions provided both assistance and health care to hospitalized persons. A complete separation of assistance and health care came only with the creation of the Ministry of Health in 1958[99] and the hospital reform of 1968, which transformed all public hospitals in public agencies with the exclusive responsibility of hospital health care.[100] This same statute introduced a national planning procedure, although in 1970 the Regions were effectively created, and the administrative functions were soon devolved to them.[101] The 1977 decree integrating the transfer of competences to ordinary Regions included the first definition of "health and hospital care" as a subject matter, including in it "promotion, preservation and recovery of the state of physical and psychic welfare of the population."[102] The most important piece of legislation in this sector is the 1978 reform,[103] still in force, which created the national health service, articulated on a regional basis, and still contains all the general principles of the subject matter: universality, freedom and equality of access, definition of essential levels of quality service by function (LEAs), regional planning, service delivering through local sanitary units (USL) composed by first tier local authorities. Only the last principle has been somewhat changed in the 1990s, due to the need to reduce the political engagement of public healthcare administrators,[104] by putting the USLs under direct regional control and emphasizing their managerial character. Also, the Parliament and Government have tried to bring in a stricter planning relationship between service levels and available resources.

The constitutional reform of 2001 has changed the dividing line between State and Regions in the health care area: there is now a concurring competence in the "health protection" sector (no longer called "sanitary and hospital assistance"), while the State has an exclusive legislative power in determining "the essential levels of the services concerning civil and social rights to be guaranteed all over the national territory." The definition of the LEAs thus has now constitutional protection.[105] The Court admits that the State defi-

99 L. 13 July 1958, no. 296.

100 L. 12 February 1968, no. 132, legge Mariotti.

101 D.P.R. 10 January 1972, no. 4.

102 D.P.R. 24 July 1977, no. 616, Article 27 and 31.

103 L. 23 December 1978, no. 833; see F.A. Roversi Monaco (Ed.), *Il servizio sanitario nazionale*, Milano, 1979; G. Cilione, *Diritto sanitario*, Rimini, 2003.

104 Delegation L. 23 October 1992, no. 421; legislative decree 30 December 1992, no. 502; legislative decree 7 December 1993, no. 517; legislative decree 19 June 1999, no. 229.

105 D.P.C.M. 29 November 2001, revised by D.P.C.M. 23 April 2008. Then a Law-decree, 13 September 2012, no. 158, converted into L. 8 November 2012, no. 189.

nition of LEAs can limit the autonomy of both ordinary[106] and special Regions,[107] even when such definitions go back to years earlier than the 2001 reform[108] (however analytical and changeable they may be)[109], though the State cannot abuse such an instrument in order to expropriate regional competences.[110] It is still controversial whether the LEAs can be used to define the quality standard of health services or organizational levels as well.[111] Some ambiguity is also present in the case law concerning the nature of the LEAs, viz. whether they impose public expenses automatically, giving rise to fully protected rights, or they may fix an amount of expenditure and consequentially authorize curtailments of services when the ceiling is reached.[112]

## 10.6 The effective guarantee of social rights

If social rights have to be assessed not only in the books but also in action, a look at financial data is necessary. It is well known that in the last three years or so, under strong pressure by the European Union and the global financial and rating institutions, Italy has severely cut current expenses and increased taxation to the limits of sustainability, though the amount of public debt is still enormous, due to the entity of its service, which prevents serious reductions in total terms. Within this framework, in the annual budget, the expenses dedicated to housing and town planning, regional competence, declined from 890 million Euros in 2009 to 710 in 2010, 436 in 2011, 510 in 2012, 490 in 2013; direct health expenses from 841 in 2009 to 766 in 2010, 739 in 2011, 731 in 2012, 724 in 2013, though some Regions, mostly in the South, have not respected their ceilings and have been compelled to find supplementary resources *ex post*; even school expenses, in an area that had to be curtailed from 44 billion Euros in 2009 to 42 in 2011, 41 in 2012, 40.5 in 2013; university expenses from 8.5 billion Euros in 2009 to about 8 in 2011 and 2012, and 7.5 in 2013. Social

106 Decision 31 March 2006, no. 134, *Giur. cost.*, 2006, 1249, with notes by L. Cuocolo, *Livelli essenziali: allegro, non troppo*, 1264 ff; S. Pesaresi, *Article 117, comma 2, let.m, Cost.: la determinazione anche delle prestazioni? Tra riserva di legge e leale collaborazione, possibili reviviscenze del potere di indirizzo e coordinamento*, 1273 ff.

107 Decision 8 March 2013, no. 36, *Giur. cost.*, 2013, 649; 16 July 2012, no. 187, *Giur. cost.*, 2012, 2714, with note by F. Mannella, *Concorrenza di competenze e potestà regolamentare nella disciplina del ticket sanitario*, 3751 ff.

108 Decisions 10 June 2010, no. 207, *Giur. cost.*, 2010, 2403.

109 Decisions 31 March 2006, no. 134, *Giur. cost.*, 2006, 1249 and 11 July 2008, no. 271, *Giur. cost.*, 2008, 3049, with note by G.U. Rescigno, *Variazioni sulle leggi provvedimento (o meglio sulle leggi al posto di provvedimento)*, 3072.

110 Decisions 10 June 2010, no. 207, *Giur. cost.*, 2010, 2403.

111 In favor of the first solution decision, 25 March 2005, no. 120, *Giur. cost.*, 2005, 1045 and 14 November 2008, no. 371, *Giur. cost.*, 2008, 4420; for the second, 31 March 2006, no. 134, cited; 23 May 2008, no. 168, *Giur. cost.*, 2008, 2026; 27 July 2011, no. 248, *Giur. cost.*, 2011, 3181.

112 Decisions 13 June 2008, no. 203, *Giur. cost.*, 2008, 2304 and 11 July 2008, no. 271, *Giur. cost.*, 2008, 3049.

and family policies, to the contrary, cost 25.372 million E. in 2009, 25.654 in 2010, 30.736 in 2011, 30.827 in 2012, 31.404 in 2013; social insurance grew too from 73.996 million Euros in 2009 to 77.255 in 2010, to decrease to 71.989 in 2011, 74.036 in 2012, 75.403 in 2013; work policies varied from a cost of 2.934 million Euros in 2009 to 2.727 in 2010, 5.678 in 2011, to 4.239 in 2012, to 4.111 in 2013.[113]

Having a look at the individual "missions" of the budget, and considering also the expenses of the Regions, the global sanitary expense amounted in 2011 to 112 billion Euros, equaling 7.1% of the GDP. Italy is therefore only 14th in Europe, in a list lead by the Netherlands with 4.050 dollars per inhabitant per year, versus 1.842 of Italy, more than 3.000 of France and Germany, 2.857 of the U.K. Italian sanitary expenses are 24% lower than the average EU level, while pharmaceutical expenses are 14.5% lower.[114] The global deficit of the NHS has decreased from 5.7 billion Euros in 2005 to 1.3 in 2011 and is concentrated in five Regions, three of which in the South (Campania, Calabria, Sardinia).

Given that it has one of the highest percentages of house ownership in Europe, behind only[115] Spain and Greece, Italy has a house market where rented houses and popular or council housing only account for a small percentage of the total (8% and 11%, respectively). The large wave of immigrants in the last fifteen years has jeopardized the efficiency of such social housing. The number of social houses available to locals and foreigners is insufficient, while there is a growing trend toward reducing land consumption, which makes building new houses more difficult. Furthermore, the system shows a worrying incapacity of recovering unpaid rents, so that the percentage of insolvency in social housing is very high.

Expenses for social benefits of various nature amount to about 17% of the GNP. Inability benefits, traditional proxy of unemployment subsidies, are more than 2.5 million,[116] and almost half a million also enjoy a special accompaniment indemnity. Minimum integration benefits amounted in 2011 to 3.805.000 and they are likely to have increased in years of sharp economic crisis.

Local services, like kindergarten schools or house services for the elderly, are distributed in an irregular way. Many northern regions cover the entire demand and offer good-quality performances, while other insular and southern regions have limited offer and mediocre quality. Territorial homogeneity is still a mirage.

In order to achieve a full rationalization of her welfare state, Italy still has apparently a long way to go.

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113 All data from Ministero dell'Economia e delle Finanze, Ragioneria generale dello Stato, *Note brevi*, 2011, 2012, 2013.

114 *IX Rapporto sanità Cies-Crea*, Tor Vergata University, Roma, 2013.

115 Cittalia, *Edilizia sociale*, Roma, 2010.

116 2.613, according to Istat data, Roma, 2013.

## 10.7 Social rights in the Italian legal scholarship: theoretical roots and contemporary developments

The classical doctrine of constitutional liberalism that distinguishes between negative liberty and positive liberty[117] assigns a status of "constitutional marginality" to social rights.[118] The prevailing interpretation of positive liberties identifies them with entitlements necessarily requiring a legislative basis to be effective,[119] irrespective of the existence of appropriate constitutional provisions. Using the Hohfeldian matrix,[120] one can define social rights as "claim rights," that is as justified claims for which it is not possible to identify correlative obligations.

Against this background and due to the codification of social rights in the Constitution, the Italian scholarship developed innovative theories on the meaning and efficacy of social entitlements, though it was methodically influenced by the arguments developed within the liberal legal tradition. In the first part of the twentieth century as well as in the initial stage of the Republic,[121] Italian authors moved along the lines of the German school of thought: they fostered the idea that social rights were at most principles or directives for the exercise of legislative authority (*Staatszielbestimmungen oder Gesetzgebungsaufträge* or *principi programmatici*).[122]

Some scholars attempted to overtake the classical teaching of liberal constitutionalism through a more sophisticated theory. They interpreted social rights as "constitutionally protected interests" (*interessi costituzionalmente protetti*),[123] deriving their legal force from the binding nature of those principles that guide the exercise of legislative authorities (*norme programmatiche*). The theory draws a parallelism between constitutionally protected interests and the general category of legitimate interests coming from the administrative law tradition. In other words, authors supporting this doctrine construe social rights as expectations deriving from the existence of constitutional provisions that oblige the legislative power to fulfill specific (social) interests.

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117 See the classical theory elaborated by I. Berlin, *Two Concepts of Liberty*, in I. Berlin (Ed.), *Four Essays on Liberty*, Oxford, 1969.

118 See B. Pezzini, *La decisione sui diritti sociali*, Milano, 2001, 1 ff.

119 From a general perspective see K.D. Ewing, *Social Rights and Constitutional Law*, *Publ. Law*, 1999, 104 ff.

120 See W. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in W. Hohfeld (Ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, New Haven, 1923, 23-64. See also M.H. Kramer, *Rights Without Trimmings*, in M.H. Kramer, N.E. Simmonds, H. Steiner (Eds.), *A Debate Over Rights*, Oxford, 2002, 7 ff. See also N. McCormick, *Rights, Claims and Remedies*, *Law and Philosophy*, 1979, 337 ff.

121 See V. Crisafulli, *La Costituzione e le sue disposizioni di principio*, Milano, 1952, 75 ff.

122 See M. Luciani, *Diritti sociali*, *Enc. giur.*, Roma, 1997, 4 ff. See also E. Denninger, *I diritti fondamentali in Italia e Germania. Abbozzo di un confronto*, *Diritto pubbl. comp. eur.*, vol. 3, 2013, 881 ff.

123 V. Crisafulli, *La Costituzione e le sue disposizioni di principio*, supra note 121, 75 ff.

Although the theory of "constitutionally protected interests" endeavors to assert the non-heterogeneity between first-generation and second-generation rights, it ends up undermining the category of social rights, which tend to be identified with legitimate interests deserving some kind of constitutional protection. Furthermore, this theoretical framework does not enfranchise social rights from the need for legislative intermediation (*interpositio legislatoris*). On the contrary, the theory justified those scholarly opinions that construes second-generation rights as "statutory rights,"[124] which require legislative intervention as condition of existence rather than as requisite for enforceability.

As the Constitution progressively took root in the Italian legal culture, scholars gave up the methodological framework used to approach the issue of second-generation rights. The Constitutional Court's interpretation of provisions concerning social rights accomplished the shift in the Italian legal thought, although authors were generally prone to overcome the liberal background that laid behind the inquiry on this issue.[125] However, when the "constitutional rank" of those rights was finally recognized, some scholars promoted a theory aimed at distinguishing between conditioned and non-conditioned rights (*diritti sociali condizionati/diritti sociali incondizionati*). Such an elaboration mirrors the idea that some rights can be immediately accomplished because they are self-executing, while others are necessarily contingent to the arrangement of facilities and public accommodations (which in turn depends on the financial feasibility of social policies). The former group includes the right to health, the right to choose an occupation, and the rights pertaining to the family. The latter embraces the right to education, the right to social assistance and social security, and the right to housing.[126] Within this theoretical framework, conditioned rights are still peremptory norms; they do not belong to the category of statutory rights that need legislative intervention in order to generate individual entitlements. Nevertheless, conditioned rights need progressive and gradual enforcement (*diritti a realizzazione progressiva*) by means of ordinary legislation.

Contemporary legal thought justifies the constitutional rank of social rights linking their recognition to the democratic principle. The theory construes at least some social rights as pre-requisites for the exercise of the rights to political participation.[127] The resort to the democratic principle has the merit of somehow overturning the hierarchical rela-

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124 See C. Lavagna, *Istituzioni di diritto pubblico*, Torino, 1982, 425 ff.

125 The liberal background is clearly illustrated by the dialectic between the concept of liberty and the concept of equality, traditionally interpreted as opposing and non-reconcilable principles. See expecially A. Baldassarre, *Diritti sociali, Enc. giur.*, vol. XI, Roma, 1989, 6 ff. The author fosters an interpretation of the principle of equality as *Chancengleichheit*, that is, as equality of chances of life, rather than as equal distribution of social entitlements depending only on individual needs and oriented to achieve an ideal standard of absolute equality.

126 See M. Luciani, *Diritti sociali*, *supra* note 122, 30-31.

127 The most appropriate example being the right to education. See A. Baldassarre, *Diritti sociali, supra* note 125, 6 ff. and A. Barbera, *Le basi filosofiche del costituzionalismo*, Roma-Bari, 2003, 32 ff. See also A. Pintore, *I diritti della democrazia*, Roma-Bari, 2003.

tionship between civil and social rights. In light of this assumption, even the issue of the financial viability of the recognition of social rights ends up being reshaped: the economic and budgetary constraints and the rights *à contenu social* are indeed the object of an "unequal balancing process,"[128] which privileges the latter against the former.

The latest developments of legal scholarship concerning social rights are probably those studies that analyze the case law of the European Court of Human Rights (ECtHR) exploring carefully the influence of supranational adjudication of (at least) some social rights over domestic case law.[129] Indeed the ECtHR has developed a significant case law on social entitlements that can be at least indirectly derived from those rights that are expressly enshrined in the European Convention on Human Rights (ECHR). The most appropriate example is the right to social security, which is protected as a specific type of the pecuniary rights recognized in Article 1, Protocol 1 ECHR.[130] Even if the ECtHR and the Italian Constitutional Court perform an adjudication of social claims based on different standards of scrutiny, which in turn depends on the different nature of their parameters, the most relevant outcome of the incoming dialogue between the two Courts seems to be the progressive approaching of the model of reasoning. In the end, both the ECtHR and the Italian Constitutional Court share the belief that the classification of rights either in generations or in substantive categories (civil, social, political) does not impact the level of protection they deserve.[131]

Irrespective of the recognition of the constitutional rank of social rights as well as, in a broader perspective, of the indivisibility among categories of rights,[132] the Italian legal scholarship still isolates second-generation rights when approaching the topic of fundamental rights. As a consequence, many studies on the protection of rights do not include social rights[133] in the uncertain and somehow fading category of fundamental rights.

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128 M. Luciani, *Economia nel diritto costituzionale*, *Dig. disc. pubbl.*, vol. V, Torino, 1990, 380 ff.

129 See A. Guazzarotti, *Giurisprudenza CEDU e giurisprudenza costituzionale sui diritti sociali a confronto*, available at http://www.gruppodipisa.it/wp-content/uploads/2012/09/GuazzarottiDEF.pdf, last access 17 October 2015.

130 See *Gaygusuz v. Austria*, 31 August 1996, par. 36-37 and 41 and *Azinas v. Cipro*, 20 June 2002, par. 28.

131 G. Romeo, Civil rights v. social rights *nella giurisprudenza della Corte europea dei diritti dell'uomo: c'è un giudice a Strasburgo per i diritti sociali?*, in L. Mezzetti, A. Morrone (Eds.), *Lo strumento costituzionale dell'ordine pubblico europeo*, Torino, 2011, p. 487 ff.

132 See G. Azzariti, *Brevi notazioni sulle trasformazioni del diritto costituzionale e sulle sorti del diritto del lavoro in Europa*, available at http://archivio.rivistaaic.it/dottrina/libertadiritti/azzariti.html, last access 17 October 2015 and S. Rodotà, *La Carta come atto politico e come documento giuridico*, in *Riscrivere i diritti in Europa. Introduzione alla Carta dei diritti fondamentali dell'Unione europea*, Bologna, 2001, 73 ff.

133 See, for example C. Amirante, *Diritti fondamentali e diritti sociali nella giurisprudenza costituzionale*, and R. Granata, *Diritti fondamentali e diritti sociali tra giudice costituzionale e giudice comune*, in M.A., *Diritti di libertà e diritti sociali tra giudice costituzionale e giudice comune*, Napoli, 1999, respectively, pp. 233-272 and pp. 11-20.

# 11 Social Rights in Japan

*Toru Nakajima*[*]

## 11.1 Introduction – Social Rights as Addressed by National Legal Scholarship in Japan

Japanese legal scholars have highly valued social rights as a substantive guarantee of fundamental human rights in general. Social rights that are related to the social problems inherent in capitalist society are perceived as different from other types of rights such as civil liberties because they require the government to provide certain services or goods. Despite this, constitutional scholars have not perceived social rights as having a limiting effect on these other "first-generation" rights. In this sense, the need to protect social rights has not been questioned among national legal scholars.

An issue has arisen, however, with the Supreme Court of Japan's denial of the invocation of the welfare right, one of social rights stipulated in the Japanese Constitution, as an individual right.[1] This denial is based on widespread perceptions that the courts are constitutionally and institutionally ill suited to adjudicate politically sensitive disputes involving issues of resource allocation; it is also closely related to a prevailing understanding in Western style democracies that, in contrast to civil and political rights, social rights, whether enshrined in international, regional, or domestic instruments, are ideological aspirations or programmatic goals, dependent on resources for their satisfaction, and therefore inherently inappropriate for the mechanisms and techniques developed by courts for the protection of fundamental human rights.[2] In this context, the most important question for legal scholarship in Japan involving social rights protection is the normative force of welfare rights in the courts.

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* Waseda University.

1 The *Asahi* case, which will be discussed later.

2 Ellie Palmer, Judicial Review, Socio-Economic Rights and the Human Rights Act, (Hart, 2009), p. 1; Asbjorn Eide, Economic Social and Cultural Rights as Human Rights in A. Eide, Catarina Krause and Allan Rosas eds., Economic Social and Cultural Rights, 2nd ed., (Kluwer, 2001), pp. 22 ff.

## 11.2 Constitutional Protection of Social Rights in Japan

The Japanese Constitution provides for the protection of social rights (Articles 25 to 28) as follows.[3]

Article 25.1. All people shall have the right to maintain the minimum standards of wholesome and cultured living.

2. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

Article 26.1. All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

2. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.

Article 27.1. All people shall have the right and the obligation to work.

2. Standards for wages, hours, rest, and other working conditions shall be fixed by law. Children shall not be exploited.

Article 28. The right of workers to organize and to bargain and act collectively is guaranteed.

In addition,

Article 14 provides that:

1. All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.

2. Peers and peerage shall not be recognized.

3. No privilege shall accompany any award of honor, decoration, or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

As noted above, with the exception of "workers" in Article 28, the group entitled these protections as defined in Japanese Constitution is "all people" according to the official translation. However, in Japanese, it is referred to as "subete kokumin," which means Japanese citizen. Relying upon this wording, both Japanese courts and government have accorded the constitutional protection of welfare rights, which are among social rights, only to Japanese people. In support of this restrictive interpretation, it has been argued

3 <www.japan.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html>.

that the responsibility to fulfill welfare right of foreigners is attributed to their own nations, since such individuals do not contribute to Japanese financial resources for the distribution of income to do so. However, it should also be noted that the Japanese government grants welfare payments to foreigners who reside legally in Japan, as an administrative matter.

Also, the Japanese Constitution defines the debtor of social rights as the State, except for the rights of workers, for whom the employer is the debtor, including the State as the employer of public servants. As noted above, the contents of the rights are the right to welfare (Article 25), the right to receive education (Article 26), the right to work (Article 27), and the rights of workers (Article 28). Although the Constitution refers to these as "the right(s)," there is no word or phrase concerning the obligations of the legislator, administration or other actors. Moreover, Article 25.2 refers to the State's "endeavors" (rather than "obligations"). The question of whether these stipulations give concrete rights to the people or did these rights remain abstract, or whether they stand simply as legislative guidelines, has long been argued in Japanese courts.

The debtor of social rights is the State in general but as for the debtor of the right of workers, it is the employer including the State as the employer of public servants.

The normative structure of constitutional social rights is similarly vague. There is no constitutional mechanism of protection *vis-à-vis* the legislature or any instrument that ensures protection against the inaction of the legislature under the Japanese Constitution. In this sense, the welfare right is considered to be a programmatic provision, requiring only that the government to accomplish a goal. Accordingly, welfare rights can be asserted before the courts only when it has been transformed into a specific right by statute enacted by the Diet.[4] The specific content of these rights still has to be left to the broad discretion of the Diet.

As for welfare rights, some academics have argued that the government has a constitutional obligation to sustain the minimum standard of living stipulated by Article 25, regardless of national financial situation. However, it is not feasible for the courts to specify the minimum standard of living in any given case and order the government to prepare sufficient budget.[5] For this reason, welfare rights cannot be invoked before the courts unless such rights have been implemented under statutory requirements. Therefore, the best means of the courts' ensuring the efficient social rights protection would be for them to clearly define the Diet's discretion. The accumulation of such decisions would ultimately lead clarification of the standards for social rights protection.

The most important contribution of the Japanese Constitution to the protection of social rights is the eloquent statement of the constitutional protection of social rights itself. The protection has been highly valued among Japan's academics, as it represents a funda-

4 Shigenori Matsui, *The Constitution of Japan*, (Hart, 2011), p. 156.
5 Id., at 224.

mental qualitative change in the traditional means of protecting human rights, and gives substantive protection to civil liberties.[6] The problem is that, despite the positive phrases of the Articles, there is a lack of political will to devote needed resources to protect those rights. Therefore, it remains necessary to examine beyond the wordings of the Constitution to give true meaning to these rights.

There has been theory[7] posited that completely denies the existence of judicially enforceable welfare rights under Article 25. However, such denial has been criticized as an infringement on the principles of social justice on which the social rights expressed in the Constitution were based. A second theory asserts that welfare rights become concrete only when they are transformed into an actual claim of right by means of legislative enactment. This is nothing more than a reflection of the entitlement created by the legislation. In this sense, there is still no recognition that the provision actually obligates the legislative branch to enact laws that suitably embody the content of the welfare right. A third theory holds that the welfare right is a concrete right by which the people can demand that the legislative branch enact laws that give suitable embodiment to the content of the right.

Among these three theories, the second theory is held by a majority of the national academics, the third theory is held by a minority, and the first is supported by almost no one[8] except the Supreme Court itself.

As noted above, the legislature has primary responsibility for protecting welfare rights through the enactment of statutes in its broad discretion because of the lack of specificity within the Constitution on the subject. However, although various legislative bills intended to embody Article 25 have been enacted to confirm constitutional welfare rights, it is still necessary for citizens to demand their enactment in a way that suitably embodies the content of welfare rights both at the Diet and in the courts. Hence, it is the wording of the pertinent Constitutional Articles, rather than their direct impact on social rights, that is of primary interest regarding the Constitution's contribution to the protection of social rights.

6 Akira Osuka, Welfare Rights, in Percy R. Luney, Jr. and Kazuyuki Takahashi eds., Japanese Constitutional Law, (University of Tokyo Press, 1993), p. 271.

7 Sakae Wagatsuma, Shin Kenpo to Kihonteki Jinken, in Minpo Kenkyu 8, (Yuhikaku, 1965).

8 Osuka, supra note 6, pp. 274-5.

## 11.3 Protection of Social Rights Under Other Constitutional Rules and Principles

### *11.3.1 Protection of Equality*

In the *Horiki* case,[9] because the Child Support Allowance Law prohibited concurrent payment of child support to a disability pensioner, a blind woman who was living on disability payments sought further public assistance in the form of child support and filed suit arguing the unconstitutionality of the ban on concurrent payments based on Article 14 equality rights in addition to Article 25's "enjoyment of the minimum standards of wholesome and cultured living" Section 1 of Article 14 provides that "all of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status or family origin." Hence, the constitutional guarantee of equality under the law was used to correct the deficiencies of the system of social welfare and social security.

> The Supreme Court upheld the prohibition because both benefits were regarded as measures to supplant income. The Court admitted that the Diet should be allowed very broad discretion to preclude the recipients of one kind of benefits from receiving similar benefits. Clearly in this case, the Court assumed a deferential attitude with respect to welfare and social security law.

### *11.3.2 Protection of Legitimate Expectations*

Legitimate Expectation in Japanese public law represents a concept of reasonableness in a situation where a person has an expectation or interest in government services or support because of long-standing practices or promises. In this sense, it is similar to the principle of reasonableness, or the quality of being plausible or acceptable to a reasonable person. This is a view of the majority that results from the above-mentioned judicial deference to the Diet; for this reason, this protection is not well functioning in Japan.

9 36 Minshu 7 at p. 1235, Supreme Court, Grand Bench, July 7, 1982. See, Lawrence W. Beer and Hiroshi Itoh, The Case Law of Japan, 1970 through 1990, (University of Washington Press, 1996), pp. 323-327.

### 11.3.3 *Protection of Vested Rights: In McCullough v. Virginia, 172 U.S. 102 (U.S. 1898)*

The court wrote that:

> it is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

According to this decision, the theory of vested rights protects a person who won a legal decision from a legislature seeking to overturn the decision.

> In the aforementioned *Horiki* case, the Kobe District Court[10] admitted the constitutional guarantee of equality under the law. After the decision, the Child Support Allowance Law was amended in compliance with the decision, to repeal the provisions that had been in dispute. Because both the Osaka High Court[11] and the Supreme Court repealed that decision, the Diet overturned the amendment, consistent with the judicial theory of vested rights.

### 11.3.4 *Precision of Legislation*

Although it is very important to understand the precise meaning of a statute, the wordings of social rights legislations are usually vague because of technical issues, such as an inability to include changing costs of everyday living promptly. As legislation, wording should be specific, as social rights legislation, it should be inclusive in nature. The problems of the precision of social rights legislations in Japan have not been discussed well to date.

### 11.3.5 *Non-retroactivity of Legislation*

> According to *West's Encyclopedia of American Law*, 2nd ed. (Gale, 2005), a retroactive or retrospective law is one that takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes new duties, or attaches a new and different legal effect to transactions or considerations already past. In criminal law, retroactive legislation that increases the punishment for acts committed prior to their enactment is unenforceable. The question becomes

10 September 20, 1972, 23 Gyosyu 711.
11 April 22, 1981, 32 Gyosyu 593.

whether this is also applicable to social rights, especially with regard to welfare rights.

According to the second theory noted above (p. 4), welfare rights can be asserted before the courts only when they have been transformed into a specific right through statute enacted by the Diet. Welfare rights therefore become concrete only when the Diet enacts laws that embody their contents. If one assumes these to be vested rights, the explanation of Section 11.3.3 above would be repeated here. However, some academics argue that social security legislation, once enacted, cannot be curtailed. Inspired by the German theory of "Normbestandsgarantie,[12] they claim that the "right" is not just a statutory entitlement, but an embodiment of constitutional welfare right,[13] and such right cannot be curtailed by another statute. For instance, the Japanese government recently abolished the system of increasing benefits for the elderly who live on welfare, thereby lowering their benefits. This principle, proposed by academics and known as "the prohibition on retrogressive measures," does not permit the government to take such measures.

### *11.3.6 Due Process*

The Japanese Constitution protects the rights of criminal suspects and defendants in Articles 31-40. These rights are generally classified as protecting physical freedoms, but they may also be viewed as procedural rights. For instance, Article 31 provides that "[N]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law" is known as the Due Process clause. Some academics have argued that this Article should be applied to administrative procedure. The Supreme Court has generally admitted the point[14] but has been ambiguous about the reach of Article 31 and reluctant to demand fair procedure beyond that required by statute.[15]

In the *Narita International Airport Act* case,[16] the Supreme Court was faced with the question of whether Article 31 requires administrative agencies to provide the opportunity for a hearing before issuing an order prohibiting the use of property for public gatherings. The Supreme Court held that administrative procedure is not wholly exempt from its application for the simple reason that the procedure is not criminal in nature. Yet, even

12 Gertrude Lübbe-Wolff, Grundrechte als Eingriffsabwehrrechte, (Nomos, 1988), S. 33 ff., 45.; Martin Gellermann, Grundrechte in einfachgesetzlichen Gewande, (Mohr 2000), S. 406 ff.

13 Toshiyuki Munesue, On Justiciability of Welfare Rights, in Yasuo Hasebe ed., Readings Constitutional Law, (Nihonhyouronsya,1995), pp. 156-60.

14 Supreme Court, Grand Bench, November 22, 1972 (the *Kawasaki Minsho* case), 26 Keishu 554.

15 Matsui, supra note 4, p. 112.

16 Supreme Court, Grand Bench, July 1, 1992, 46 Minshu 437.

when Article 31 is to be applied, the Supreme Court stated that the necessity of an advance hearing should be decided by balancing the content and nature of the interests involved, and the degree of restriction, against the nature and degree of public interest and the necessity for urgency. It concluded that it was not a violation of the "basic philosophy" of Article 31 for the Transportation Minister to issue the order without affording an opportunity for a hearing.[17] Hence, because the Supreme Court has been reluctant to demand fair procedure beyond the procedure required by statute, Article 31 has not been useful to protect social rights.

### *11.3.7 Procedural Rights*

It also could be possible to protect welfare rights by means of procedural rights such as the American theory of New Property.[18] Although the Japanese Administrative Procedure Act of 1993 guarantees procedural rights to administrative agencies, Article 29.2 of the Public Assistance Act of 1950, one of welfare rights Acts, excludes the provisions of the Administrative Procedure Act. Therefore, it is still necessary to consider the constitutional protection of the procedural rights to welfare administration in general. As long as the courts deny the right of citizens to file suit to demand the payment of welfare assistance solely based on Article 25, constitutional procedural protections of welfare rights should be explored further.

### *11.3.8 Other General Constitutional Principles*

While there may be further principles to be discussed, this paper does not address them.

## 11.4 Impact of International Protection of Social Rights

In general, a ratified treaty has the same legal status as domestic law, and also takes precedence over all related laws, with the exception of the Constitution, under the Japanese legal system. Therefore, amendment or repeal of pre-existing laws must be undertaken, if they conflict with the provisions of a ratified treaty, or new laws must be enacted, if treaties are ratified, that obligate the government to take legislative measures where no such measures were previously in place.

17 Matsui, supra note 4, p. 112.

18 Charles A. Reich, The New Property, (733 Yale Law Journal, 1964), 73.

Japan has ratified the International Human Rights Treaties and the optional protocols adopted by the United Nations as follows.

i) The International Covenant on Economic, Social, and Cultural Rights (ICESCR) was ratified on June 21, 1979,[19] although the Japanese government reserved the right not to be bound to progressively introduce free secondary and higher education, the right to strike for public servants and remuneration on public holidays.[20]

Japan has not signed the Optional Protocol to the ICESCR, viewing the legal character of ICESCR, and especially the language regarding "progressive realization" of the rights set forth in Article 2, as consisting of not legal obligations, but political obligations, and therefore as not having normative effect.[21] Consequently, the Japanese government has failed to take any legal or administrative measures as required under the Covenant, considering it to be not applicable within the Japanese legal framework.

As for the general legal effects of the human rights treaties to which Japan is a contracting party, if a treaty may be seen as self-executing, all of its obligations are in action. However, the ICESCR is seen as non-self-executing and therefore requires implementing legislation that will direct or enable Japan to fulfill treaty obligations.

For these reasons, the ICESCR is not directly applicable within the Japanese legal framework in either substantive or procedural ways.

ii) With regard to equal rights, Japan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[22] on June 25, 1985 and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) on December 15, 1995. There is still no comprehensive law that prohibits discrimination between private individuals, resulting in it being very easy to discriminate on the basis of

19 For an overview of the ratification of Human Rights treaties by Japan, see <www1.unm.edu/human-rts/research/ratification-japan.html>.

20 1) In applying the provisions of paragraph(d) of Article 7 of the ICESCR, Japan reserves the right not be bound by 'remuneration for public holidays' referred to in said provisions; 2) Japan reserves the right not to be bound by the provisions of sub-paragraph (d) of paragraph 1 of Article 8 of the ICESCR except in relation to the sectors in which the right referred to in the said provisions is accorded in accordance with the laws and regulations of Japan at the time of ratification of the Covenant by the Government of Japan; 3) in applying the provisions of sub-paragraphs (b) and (c) of paragraph 2 of Article 13 of the ICESCR, Japan reserves the right not to be bound 'in particular by the progressive introduction of free education' referred to in the said provisions; 4) recalling the position taken by the Government of Japan, when ratifying the Convention (No. 87) concerning Freedom of Association and Protection of the Right to organize, that 'the police' referred to in Article 9 of said Convention be interpreted to include the fire service of Japan, the Government of Japan declares that 'members of the police' referred to in paragraph 2 of Article 8 of the ICESCR, as well as in paragraph 2 of Article 22 be interpreted to include fire service personnel of Japan.

21 See generally, Japan Federation of Bar Associations, Report of JFBA regarding Second Periodic Report by the Government of Japan under Articles 16 and 17 of the International Covenant on Economic, Social, and Cultural Rights (2001), <www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/society_report_2_en.pdf>.

22 As of December 2013, Japan has neither signed nor ratified the Optional Protocol to the CEDAW.

race, ethnicity, descent, and so on, in spheres such as employment, housing, customer service, and marriage.[23]

Article 14 of the Japanese Constitution prohibits discrimination on the basis of race, creed, gender, social status, or family origin. The Basic Law for a Gender-Equal Society (hereinafter cited as the Basic Law) was also enacted in June of 1999. However, the former has been construed as not seeking substantive equality (equality of outcome), and the latter does not seek such equality. The text of the Basic Law guarantees merely "equality of opportunity" between men and women, and contains no provisions prohibiting indirect discrimination in order to guarantee substantive equality. The Japan Federation of Bar Associations has insisted that the Basic Law should be revised to enable achievement of true social equality pursuant to Article 3, in the area of employment, the percentage of women serving in management positions is extremely low. Under the 1997 revision of the Equal Employment Opportunity Law, the government eliminated the restrictions in the Labor Standards Law on women performing overtime work, holiday work, and late-night work, ostensibly in order to guarantee women greater employment opportunities. Unfortunately, this revision has had the opposite effect of requiring women to work the same long working hours as men.

iii) Concerning children's rights, Japan has ratified the following conventions

The UN Convention on the Rights of the Child 1989 (CRC), the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography, the Optional Protocol to the CRC on involvement of Children in Armed Conflict, the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, and the Convention concerning Minimum Age for Admission to Employment.

Japan also signed the Hague Convention on the Civil Aspects of International Child Abduction in January 2014 and law implementing the Convention was subsequently enacted.

iv) With regard to child health and social welfare since 1961.

Japan has had a universal health care coverage system, under which, almost all children in Japan are officially covered by health care insurance. However, because of the prolonged recession and changes in the employment situation, the number of people falling into arrears with insurance premium payments has been increasing. Insurance cards will not be issued for those who have not paid for a year or more, and they will then be responsible for 100% of their medical costs, at least at the start of treatment.[24] Under such circumstances, not only parents but also children have tended to refrain from receiving treatment. The

23 Paragraph 29 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination issued on April 6, 2010, p. 9.

24 Id.

Japanese newspaper "Mainichi," investigated individual cases and insisted that remedial measures be taken. The Japanese government then amended the Health Care Law so that being without an insurance card would not hinder children from receiving a doctor's consultation.

The government also provides financial support for low- to moderate-income families with infants. When a parent has a child who is younger than three years old, the parent can receive a child allowance from the government unless the parent's income is more than the amount specified by the Child Allowance Law.[25]

v) Related to the right to education.[26]

The Japanese Constitution guarantees children's rights to education. Every person is obligated to have a child or children under their protection receive ordinary education as provided for by the Constitution. Six years of elementary school and three years of junior high school are mandatory, and such compulsory education shall be free. But the Constitution does not guarantee that everyone will be admitted to high schools or universities.

The right to education is also guaranteed for children with disabilities. The Basic Law of Education requires the government to take measures to make sure that children with disability can receive sufficient education, depending on their disability level.

Although education was available widely to students who met minimum academic standards at the upper secondary level through the age of 18, Japan still reserved the right not to be bound to progressively introduce free secondary and higher education by the ICESCR. While the percentage of students advancing to high school is unquestionably high, not all children who want to enroll in a public high school can do so. If the Japanese government increased the number of students taken in to public high schools, the financial burden on parents would be reduced.[27]

vi) For the rights of workers.

Since 1945, Japan has adopted a comprehensive legal framework dealing with labor conditions including labor relations, labor protection and social security. Labor conditions are managed mainly by the Ministry of Health, Labor, and Welfare.

Article 6 of the ICESCR requires the State parties to recognize the right to work as including the right to the opportunity to gain employment to earn living. Article 27 of the Japanese Constitution guarantees this Right: however, although the Japanese government states that to achieve and maintain full employment, appropriate and substantial employment measures should be implemented based on the conditions of the economy and employment, it has failed to adopt measures to guarantee the right to work. This is consistent with Japan's status as a capitalist country, as it cannot guarantee the right to be

25 See, the *Horiki* case discussed above, supra note 9.

26 On Japan's educational system, see Education by Ministry of Education, Culture, Sports, Science and Technology, <www.mext.go.jp/english/introduction/1303952.htm>.

27 See, supra note 21.

employed by private companies. The right to seek unemployment benefits falls within the provisions of the Employment Insurance Act. The Labor Standards Act regulates standards for wages, working hours and other working conditions. The Child Welfare Act also sets limitations on the employment of children.

Article 28 guarantees the rights of workers, including the right to organize or to join the union, the right to bargain with employers, and the right to collective action. Despite this, public workers have been deprived of many labor rights.

Due to the recession in Japan since the 1990s, the proportion of non-permanent workers such as part-time workers, dispatch workers and fixed-term contract workers is growing in Japan. It is reported that one third of the workforce is non-permanent employment.[28] Even doing the same work as regular workers, their wages, and other labor conditions are kept lower than regular workers.

The Second Periodic Report by the Government of Japan submitted according to Articles 16 and 17 of the ICESCR states in paragraph 31 that to "achieve and maintain full employment, which is the goal of the employment policy, appropriate and substantial employment measures should be implemented based on the conditions of the economy and employment." However, due to the Japanese government's failure to adopt measures to guarantee the right to work during two decades, the proportion of non-permanent workers has grown because of government's deregulation policies. Its implementation has diminished individual employment opportunities and could be against Article 6 of the ICESCR.

Article 28 of the Constitution guarantees "the right of workers to organize and to bargain and act collectively." The guarantee of these fundamental rights is grounded in basic ideas in Article 25, which guarantees the right to a descent livelihood, and aims at the improvement of the economic status of workers, with the guarantee of the right to work and of standards for working conditions under Article 27 of the Constitution.

According to a decision of the Supreme Court,[29] "public employees, unlike workers in private enterprises, are appointed by the government, which has charge of the affairs of the State based on the trust of the people, as Article 15[30] of the Constitution indicates. Their employer is in substance the whole nation and their obligation is to the whole people. Naturally, it is not permissible to deprive public officials of the right to organize and of any other fundamental rights of workers solely on the above basis, but we must recognize that sufficient grounds exist to impose necessary restrictions on the fundamental workers'

28 The proportion of non-permanent workers was 34.3% in 2010 according to a labour force survey by Ministry of Internal Affairs and Communications.

29 Supreme Court, Grand Bench, April 25, 1973 (the*Zennourin* case). See, Beer and Itoh, supra note 9, p. 244.

30 Article 15 of the Japanese Constitution provides that the people have the inalienable right to choose their public officials and to dismiss them.

rights of public employees based on their special status and the public character of their services."

The Supreme Court upheld the ban and applied this reasoning to local public cases[31] and to public corporation cases.[32] Therefore, public employees, including public corporation employees, have been deprived of the right to strike, and contrary to repeated recommendations from the International Labor Organization (ILO), the Japanese government has refused to change this.

Although domestic law must be interpreted in conformity with treaty obligations where possible, the international treaties that pertain to social rights have triggered little change in Japanese legislation or practice. Japanese courts have been observed as weak in citing international human rights standards in their decisions.

Moreover, neither international case law nor the European Court of Human Rights or other regional courts has had any impact on national law regarding social rights.

Japan has not adopted provisions for the Individual Complaints Mechanism established by The Optional Protocol for the ICCPR and the ICESCR. Consequently, there have been no social rights cases brought from Japan to international bodies rights protecting bodies that protect such rights by using such a mechanism. However, there have been ILO recommendations, concerning public employees' rights mentioned above.

On November 20, 2002, the Government Body of the ILO adopted the interim report of the Committee on Freedom of Association, recommending the right to establish voluntary associations (labor unions) in criminal justice facilities (prisons and detention facilities). The recommendation takes a severe view of the Japanese public service system as a whole from the perspective of basic labor rights, and strongly calls for protection of the right to organize based on ILO Conventions No. 87 and 98 for fire fighters and prison personnel.[33] Note that while the ILO Convention allows restrictions on the right to industrial action for prison personnel, but not on the right to organize.

The Japanese government's reasoning for the denial of this right was the effect on their duties when works went on strike. Consequently, the prison system of Japan has been reformed to be consistent with international human rights standards. However, the protection of the labor rights such as the right to organize and the right to collective bargaining also must be changed to meet international standards. To date, this maybe one of the most important social rights cases brought to international attention from Japan.

31 Supreme Court, Grand Bench, May 21, 1976, 30 Keishu 1178 (the *Iwate Teachers Union* case).
32 Supreme Court, Grand Bench, May 4, 1977, 31 Keishu 182 (the *Nagoya Central Post Office* case).
33 See, supra note 21.

## 11.5 Social Rights in Ordinary Legislation

There are many laws pertaining to social rights in Japan. Regarding "social security", the term often implies and includes income security, health care and social services. Japan does not have legislation such as the Social Security Act in the United States, but similar legal systems are recognized in an integrated form.[34]

The Government Council on Social Security was established, and in 1950, the council recommended the establishment of a universal social security system. A new Public Assistance Law was enacted in 1950, providing legal confirmation of the right to claim social security benefits for those in need of aid, following the Child Welfare Law (1947) and Welfare Law for Handicapped (1949), before the Social Service Law (1951) was passed. In the 1960s, the social security system aimed to shift "from selectivism to universalism" and "from relief to prevention." The pension and health insurance systems were reformed and the new systems were implemented in 1961. Since then, national pension and national health insurance systems include all Japanese.[35]

The Basic Act on Education, which was promulgated and put into effect in March 1947, sets forth in more detail the aims and principles of education such as equal opportunity, compulsory education, co-education, school education, social education, prohibition of partisan political education, prohibition of religious education for a specific religion in the national and local public schools, and prohibition of improper control of education in accordance with the spirit of the Constitution.

In 2006, the Act was revised to place value on public spiritedness and other forms of the "normative consciousness" that the Japanese people possess, as well as respecting the traditions and culture that have fostered said consciousness.[36] Although some academics have criticized this revision as anachronistic and contrary to the liberal principle of the Constitution, the Basic Act on Education provides basic aims and principles, and other educational laws and regulations are made in accordance with the aims and principles of this law. Such additional educational laws, including the School Education Law dealing with the organization and management of the school system, the Social Education Law regulating the activities of social education, and the Law Concerning Organization and Functions of Local Educational Administration, providing essential particulars on the system of local boards of education.[37]

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34 See, Yoshimi Kikuchi, recent Trends in the Social Security Law, <www.waseda.jp/hiken/en/jalaw_inf?topics/001kikuchi.html>.

35 Ministry of Foreign Affairs of Japan(MOFA), Social Security in Japan, <www.mofa.go.jp/j_info/japan?socec/maruo/maruo_5.html>.

36 Ministry of Education, Culture, Sports, Science and Technology(MEXT), Education, <www.mext.go.jp?english/introduction/1303952.htm>.

37 Id.

Article 27 of the Constitution pertains to an individual's right to work, and Article 28 to the rights of workers. The former requires that working conditions should be regulated by ordinary legislations, such as the Labor Standards Act, the Labor Contract Act, the Minimum Wages Act, etc.[38]

Article 28 of the Constitution protects workers' rights to organize, bargain, and act collectively without any restrictions[39] while Article 8 of the ICESCR "adds that such right exists 'provided that it is exercised in conformity with the laws of the particular country.'" This is reflective of a strong resolution never to repeat the harsh oppression of worker movements during pre-World War II times.[40] However, as mentioned earlier, all government workers and employees, regardless of the nature of their work, are prohibited from the exercise of the right to strike as follows:

a. Police Officers, fire fighters, prison guards, and Maritime Safety Agency officers are denied all fundamental labor rights including the right to organize.
b. Non-managerial administrative desk employees of national and local governmental bodies are denied the right to bargain collectively, as well as the right to strike.
c. Employees of national enterprises and local public corporations are restricted in their exercise of the right to bargain collectively as well as the right to strike.
d. Employees and workers in telecommunications and coal mines are restricted in their exercise of the right to strike.
e. Employees of enterprises of public import, such as transportation, postal office, telecommunications, water, gas, and medical institutions, are restricted in their exercise of the right to strike.

Constitutional topics concerning labor rights has long focused on the right to strike for employees of government and public enterprises, who have been prohibited from exercise of these rights. Japan has ratified six of the eight core ILO labor conventions. However, further measures are needed to comply with the commitments Japan accepted in the ILO's Declaration on Fundamental Principles and Rights at Work and its 2008 Social Justice Declaration.[41]

38 See in detail, Labor Laws of Japan, The Japan Institute for Labour Policy and Training, <www.jil.go.jp/english/archives/library/Laws.htm>.

39 Article 40 of the Italian Constitution of 1947 and the Preamble to the French Constitution of the Fourth Republic are examples of the constitutional protection of the right to strike, although both explicitly note that a legal restriction would accompany the exercise of such right. The Basic Law for the Federal Republic of Germany of 1949 mentions the right to organize, but not the right to strike.

40 Hideki Mori, Workers' Rights in Japanese Labor Praxis, in Yoichi Higuchi ed., Five Decades of Constitutionalism in Japanese Society, (University of Tokyo Press, 2001), p. 173.

41 International Trade Union Confederation, Internationally recognized Core Labour Standards in Japan (2011), <www.ituc-csi.org/IMG/pdf/CLS_report_Japan_2011_final_2.pdf>.

## 11.6 Justiciability of Social Rights

As noted above, the Supreme Court of Japan essentially gives government officials almost complete discretionary freedom on welfare rights. The object of legislative decisions is basically not cognizable as legal issues or as subject to judicial review. Accordingly, it can be concluded that the Supreme Court, which was willing to speak in terms of broad legislative discretion, has adopted the interpretation that, as a rule, social rights provisions create no judicially enforceable rights.[42]

For instance, the National Pension Act requires every adult citizen living in Japan to pay pension contributions and provides for various benefits, including basic disability pension benefits, to disabled citizens. It once exempted students from this obligation, and as a result, some students who did not contribute were refused basic disability pension benefits when they were injured and disabled. The Supreme Court upheld this exemption in the *National Pension Act Student Exemption* case[43] as being constitutionally valid. The Court recognized the broad discretion of the Diet and concluded that, considering that students do not have sufficient financial resources to pay contributions and that the risk of suffering injury is small, it was not completely unreasonable for the Diet not to mandate them to contribute to the national pension.[44]

There have been a series of court decisions that have interpreted the obligations of governments under the ICESCR, such as the obligations set forth in the provisions of Article 9, to be mere political responsibilities. For example, the Supreme Court[45] ruled in connection with the government's denial of national pension benefits to a Korean national that

> [Article 9 of the Covenant] confirms that for signatory states the right to social security is a right protected through a state party's social policy, and declares that the state party have a political responsibility to actively promote social security policies to realize these rights. It does not, however, confer immediate and specific rights on individuals.[46]

Therefore, the role of the judge is strictly limited to checking an apparent deviation from the Diet's discretion, which seems unlikely, unless the Diet loses its ability to exercise appropriate discretion. Consequently, there is no practical effect of such justiciability. The

42 Osuka, supra note 6, pp. 281-282.
43 Supreme Court, September 28, 2007, 61 Minshu 2345, Supreme Court, October 9, 2007, 4 Saibansho Jihou, 1445.
44 Matsui, supra note 4, p. 185.
45 March 2, 1989 (the *Shiomi* case), 68 Hanrei-Jihou 1363.
46 See, supra note 21.

only example of a social rights case successfully brought to the court by the litigants is the *Asahi* case[47] in which the Tokyo District Court held that both the standard of livelihood protection set by the Minister and the standard applied to Mr. Asahi by the local welfare office were in violation of Articles 3 and 8, section 2 of the Public Assistance Law.[48] Because the provisions of the Act have almost the same content as Article 25 of the Constitution,[49] this holding implicitly assumes the position that administrative decisions based on the Act are subject to judicial review of their constitutionality.[50]

## 11.7 Institutional Guarantees of Social Rights

Japan has not established a national human rights institution of the type sought in General Recommendation 10 and the Paris Principles. The Japanese government undertakes human rights promotion and protection work through the Civil Liberties Bureau of the Ministry of Justice and a civil liberties system administered by the District Legal Affairs Bureaus and their branches administered by the Ministry of Justice; in addition, there is a system of Civil Liberties Commissioners to assist these agencies. However, these bureaus or agencies lack ultimate authority to investigate or make final dispositions of cases and, as such, are essentially powerless.[51]

Among social security systems, pension programs are mainly operated by the national government, health care systems by prefectural governments, and welfare systems by municipal governments. There is no specific body created especially for the protection of social rights, and the Civil Liberties Bureau is not in a superior position in relation to other administrative agencies with regard to human rights issues, making it difficult to argue that the national agencies play an effective role in the protection of social rights.

## 11.8 Social Rights and Comparative Law

Although there has been no Japanese judicial decision or policy that has influenced foreign legal systems in the area of social rights, universal health insurance and pension systems are well-known Japanese legal frameworks. The pension system ensures pensions supporting the base of an old-age life and health insurance system giving every citizen an opportunity

47 October 19, 1960, 11 Gyoshu 2921.

48 See, <www.japaneselawtranslation.go.jp/law/detail/?id=24&vm=&re=>.

49 The case was a lawsuit for nullification of an administrative decision in which Mr. Asahi alleged that the decision of the director of the local welfare office to alter the level of assistance previously granted to him was in violation of Public Assistance Law.

50 Mr. Asahi's claim was defeated by the Tokyo High Court (November 4, 1963, 14 Gyoshu 53) and the Supreme Court(May 24, 1967, 21 Minshu 1043). See, Osuka, supra note 6, pp. 278-279.

51 See, supra note 21.

to receive medical service anywhere, anytime with a health insurance card. The long-term care insurance system also guarantees care needed to ensure independent life for people, even in conditions requiring long-term care due to aging. The system consists of occupational insurance (Health insurance, Employees' pension) for salaried workers (employees) and insurance (National health insurance, National pension) for the self-employed, including farmers and the elderly.

The idea of social rights was introduced to Japan from Germany by Japanese academics those who went to Germany to study the Weimar Constitution after the World War I. The Japanese term "social rights" comes from the term "soziales Grundrecht" used in German Law.

It is also well known that the first draft of the Constitution was written by the Government Section (Minsei-Kyoku) of the General Headquarters, Supreme Commander for the Allied Powers, which was mainly under the control of the United States, and that the American New Dealers, those who supported F. D. Roosevelt's administration, contributed to it. Moreover, an examination of this draft of the Constitution clearly illustrates that the experiences of "Constitutional Revolution" in the United States during New Deal era were incorporated into the Japanese Constitution.

Thus, social rights, including the right to a descent life, through formally modeled on the Weimar Constitution, substantially incorporate the fruits of the New Deal in the United States.

Article 31 stands out as an example of provisions, principles or institutions in the area of social rights protection under the Japanese Constitution. Article 31 guarantees due process of law, stipulating that "no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed except according to procedure established by law." This phrase is a direct result of the due process clause of the Fifth Amendment to the U.S. Constitution, the notable difference being in the word "property," which is included in the U.S. Fifth Amendment, but excluded from the Japanese Constitution. The Japanese Constitution accepted the U.S. Supreme Court decisions[52] that affirmed the constitutionality of the statutes that restricted property rights by regulating employment agreements and monopolistic pricing during the New Deal era. The Japanese Constitution thus accepted restrictions on property rights in support of the public welfare and recognized the necessity of direct state intervention in social and economic processes by excluding the word "property" from Article 31.[53]

As discussed above, the problem is that the Supreme Court of Japan adopted the so-called "Programmatic article theory" (Programmsatz)[54] under the Weimar Constitution.

52 For instance, *United States v. Caroline Products Co.*, 304 U.S. 144 (1938).

53 See Osuka, supra note 6, pp. 271-273.

54 Gerhard Anschütz, Die Verfassung des Deutschen Reichs vom 11. August 1919, Neudruck der 14 Aufl. (Scientia Verlag, 1933), S. 514 ff.

According to this theory, Article 25 of the Constitution imposes merely a political and moral obligation upon the legislative branch, rather than creating legal obligations; consequently the people have no judicially enforceable right against the state based on the state's failure to perform its obligation.[55] This is a negative example of comparative study for protecting the social rights in Japan.

Several lower courts[56] quoted judgments or legislation from other jurisdictions when adjudicating on social rights, although the Supreme Court of Japan has never quoted such judgments or legislation. Some academics insist that this is a matter of interpretation of domestic law, even if it is under the influence of laws from other jurisdictions.

55 Supra note 6, p. 273.

56 Nagoya High Court, June 29, 2000, 35 Hanrei-Jihou1 736, Osaka High Court, September 25, 1998, 103 Hanrei-Times 992, Sapporo District Court, November 11, 2002, 84 Hanrei-Jihou 1806.

# 12 Social Rights in Poland

*Janusz Trzciński & Michał Szwast*[*]

## 12.1 Social Rights in National Legal Scholarship

*How does the national legal scholarship see the question of protection of social rights? Is the need to protect social rights questioned? Are social rights perceived as different from other types of rights? What are the most important questions of social rights protection discussed by the national legal scholarship?*

The doctrine of Polish constitutional law in principle does not question the need to protect social rights. The most disputable issue however is the scope of protection of these rights, namely whether these rights are individual's subjective rights that may provide the grounds for the claims against the state, or whether they are only programme norms that prescribe that state authorities should achieve or pursue a specific goal. In other words, direct legal effectiveness of social rights is the most debated issue in the doctrine. Whereas it is generally accepted in the doctrine that ensuring minimum protection of social rights is a necessary premise to apply within the principle of human dignity as expressed in Article 30 of the Constitution of Poland. It is aptly indicated in the doctrine that "man deprived of proper living conditions (food, clothing, roof over their head), as well as health care or education, lives below human dignity".[1]

Social rights are perceived in the doctrine as different from other types of constitutional rights and freedoms, especially from first-generation rights and freedoms (personal and political). While personal and political rights and freedoms always constitute individual's subjective rights, the normative structure of some constitutional rights raises doubts in the doctrine. It is indicated that these are positive rights (rights entitlements, providing rights), which order public authorities to undertake specific actions addressed to an individual.[2] According to the doctrine, due to the subject matter of social rights protection

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* Janusz Trzciński is professor of law at the University of Warsaw, the former judge of the Polish Constitutional Tribunal, the former President of the Polish Supreme Administrative Court. Michał Szwast is a PhD student at the University of Warsaw, specialist in the Polish Supreme Administrative Court.

1 J. Oniszczuk, *Wolności i prawa socjalne oraz orzecznictwo konstytucyjne* – Eng. *Social rights and freedoms and constitutional case law*, Warsaw 2005, p. 47.

2 B. Banaszak, *Prawa i wolności obywatelskie w Konstytucji RP* – Eng. *Citizen's rights and freedoms in the Constitution of Poland*, Warsaw 2002, p. 30-31.

(e.g. employment, education, health), proper execution thereof depends to a large extent on state's financial capacities and is the subject of political decisions to determine priorities and allocation of available funds.[3] It is also pointed out,[4] that there are three fundamental elements distinguishing social rights from first-generation rights and freedoms. First of all, constitutional social rights leave more room to be precisely specified at the level of ordinary acts. Secondly, social rights allow more freedom to the legislator in specifying manner of execution and scope of permissible restrictions for these rights. In view of L. Garlicki, presumption of compliance with the Constitution has a stronger effect with reference to social rights than with respect to the regulations related to personal or political status of an individual. Thirdly, some of the social rights guaranteed in the Constitution may be pursued only within the limits set forth in an act, which weakens – although does not blight – their legal significance (see Article 81 of the Constitution).

*Are social rights perceived as limitations or threats to the 'first-generation' rights?*

In the Polish doctrine, social rights are not perceived as limitations or threats to first-generation rights – personal and political rights and freedoms.

*What do you consider as the most original contribution of your national legal scholarship to the study of social rights?*

The concept of minimum rights of an individual, which are equivalent to minimum obligations rested with the public authorities contained in programme regulations related to social rights, may be considered the most original contribution of the Polish legal doctrine to the studies on social rights. This concept has been described in greater detail in the second part of the questionnaire.

## 12.2 Constitutional Protection of Social Rights

*Does the national Constitution of your country provide for protection of social rights?*

The Constitution of the Republic of Poland in the second chapter, under the subchapter titled "Economic, social and cultural freedoms and rights" lists a number of rights that

3 L. Garlicki, *Commentary on Article 64 of the Constitution*, note 1, [in:] *Constitution of the Republic of Poland. Commentary*, Vol. III, Warsaw 2005.

4 L. Garlicki, *Commentary on Article 64 of the Constitution*, note 6.

belong to the group of social rights. The Constitution ensures protection of these rights, but the level thereof is different. Some of the social rights are articulated as subjective rights, whereas other as programme norms (in other words, principles of state policy). In the case of the latter, it is often claimed that they may not serve as the basis for pursuing rights in court or by way of a constitutional complaint procedure, since they do not constitute subjective rights. Large part of social rights may be asserted only within the scope specified in ordinary acts, which results from Article 81 of the Constitution ("The rights specified in Article 65, paras. 4 and 5, Article 66, Article 69, Article 71 and Articles 74-76, may be asserted subject to limitations specified by statute."). This does not compromise their legal significance, although quite substantially enfeebles it.

*What are the rights protected?*

Among the social rights included in the Constitution of the Republic of Poland, which have the nature of subjective rights, the following may be listed:

- employee's right to minimum level of remuneration for work (Article 65 sec. 4 of the Constitution),
- right to safe and hygienic conditions of work (Article 66 sec. 1 of the Constitution),
- employee's right to statutorily specified days free from work as well as annual paid holidays (Article 66 sec. 2 of the Constitution),
- right to work within the maximum permissible hours of work as specified in statute (Article 66 sec. 2 of the Constitution),
- right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age (Article 67 sec. 1 of the Constitution),
- right to social security for citizens who are involuntarily without work and have no other means of support (Article 67 sec. 2 of the Constitution),
- right to protection of health (Article 68 sec. 1 of the Constitution),
- right to education, free of charge in public schools (Article 70 sec. 1 and 2 of the Constitution),
- right of a family in difficult material and social circumstances – particularly one with many children or a single parent – to special assistance from public authorities (Article 71 sec. 1 of the Constitution),
- mother's right – before and after birth – to special assistance from public authorities (Article 71 sec. 2 of the Constitution) and
- right of a child deprived of parental care to care and assistance provided by public authorities (Article 72 sec. 2 of the Constitution).

At the same time, the Constitution of the Republic of Poland expresses a number of principles for state policy (programme norms) that refer to the realm of social and economic security of an individual. Among them, the following norms should be mentioned:

- Public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment, including the organisation of and support for occupational advice and training, as well as public works and economic intervention (Article 65 sec. 5 of the Constitution).
- Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute (Article 68 sec. 2 of the Constitution).
- Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age (Article 68 sec. 3 of the Constitution).
- Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment (Article 68 sec. 4 of the Constitution).
- Public authorities shall support the development of physical culture, particularly amongst children and young persons (Article 68 sec. 5 of the Constitution).
- Public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication (Article 69 of the Constitution).
- Public authorities shall ensure universal and equal access to education for citizens. To this end, they shall establish and support systems for individual financial and organisational assistance to pupils and students. The conditions for providing of such assistance shall be specified by statute (Article 70 sec. 4 of the Constitution).
- Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen (Article 75 sec. 1 of the Constitution).
- Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute (Article 76 of the Constitution).

*How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family, a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?*

Particular social rights listed in the Constitution are granted to various entities. Most of the social rights are granted to "everyone" – hence in line with constitutional terminology –

to every individual, both Polish citizens as well as foreigners. However, only Polish citizens are subjects of some of them. This refers to the right to social security, also the tasks of public authorities consisting in pursuing the policy that supports fulfilment of housing needs, ensuring universal and equal access to education and equal access to health care services, apply exclusively to Polish citizens. The Polish Constitution, among the subjects of some social rights (see above) lists also employees, children, families, mothers, pregnant women, persons with disabilities, senior citizens, pupils and students.

*How is the debtor of social rights defined? Is it the State, public authorities, public bodies, private bodies?*

Entities responsible for execution of social rights are defined in the Polish Constitution as "public authorities". Based on constitutional terminology, public authorities are both governmental bodies (in particular, the legislator responsible for establishing universally applicable law that ensures execution of rights guaranteed in the Constitution), as well as the bodies of local government. In other words, the term of public authorities refers to any body and institution within the structure of state power or local government, as well as those executing commissioned tasks within the scope of administration.[5]

Some obligations that result from various constitutional social rights are addressed to private entities. This refers, for example, to employee rights and certain, related with them obligations of employers (and similar entities). However, in the doctrine of constitutional law, it is pointed out that employer's obligation is established only when subjective rights listed in the Constitution are specified statutorily. In other words, we cannot refer to directly horizontal effect of subjective rights related to work and specified in the Constitution because employer's obligations are established only at the level of an ordinary act.[6] This refers, for example, to the provision included in Article 66 sec. 1 of the Constitution, which reads:

> Everyone shall have the right to safe and hygienic conditions of work. The methods of implementing this right and the obligations of employers shall be specified by statute.

The obligations under mentioned law are addressed in the first instance to the legislator, who is responsible for specifying the manner of execution of this right in a statute/act.

5 L. Garlicki, *Commentary on Article 65 of the Constitution*, note 10.
6 L. Garlicki, *Commentary to Article 66 of the Constitution*, note 4.

*What is the content of the rights? What are the obligations of the legislator? What are the obligations of the administration? What are the obligations of other actors?*

Answers to the above questions have already been provided in the answers to other questions contained in this questionnaire.

*Does the national Constitution differentiate the scope and methods of protection of social rights and other rights?*

In our opinion, the Polish Constitution does differentiate between the scope and methods of protection of social and other rights, especially personal and political rights. Personal and political rights are expressed in the Constitution of the Republic of Poland as subjective rights – therefore, they may serve as the basis for individual claims against public authorities, they may be asserted in court and may serve as the basis for lodging constitutional compliant. Therefore, we believe that personal and political freedoms and rights specified in the Constitution are well protected and articulated in such a manner, that an individual may use them before court, Constitutional Tribunal and other public authorities.

However, the social rights expressed in the Constitution are formulated in an inadequate way from the perspective of the possibility of building on their basis subjective right. Substantial part of social rights in Polish Constitution has been articulated as programme norms (such norms that prescribe achievement of a certain goal or pursing its achievement) – not addressed directly to an individual, but to public authorities. Therefore, it is not entirely clear whether these norms may serve as the basis for individual's claims against the state, for example, for lodging by an individual of constitutional complaint. Significant number of representatives of Polish constitutional law doctrine assesses that no subjective rights can be derived from the provisions of the Constitution within the scope of social rights expressed as programme norms (B. Banaszak, L. Garlicki). For these reasons, a significant number of commentators assess that these provisions cannot serve as the basis for submitting constitutional complaint to Constitutional Tribunal.

We believe, however, that social rights expressed in the Constitution of the Republic of Poland as programme norms addressed to public authorities are not deprived of legal significance. Every social right includes certain minimum indicated by its essence. It means that public authorities cannot establish regulations preventing execution of a given right below its minimum and are obliged to draw up regulations that ensure this right at minimum level. Therefore, it should be emphasised that it may happen that public authorities infringe social rights expressed in programme norms in such way, that an individual will be able to put forward claims against the state as a result of such violation. For example,

such a situation will take place when the legislator violates programme norm by adopting an act, which impedes the essence of a given social right – Article 31 sec. 3 of the Constitution absolutely prohibits limiting the essence of rights and freedoms stipulated in the Constitutions (including social rights). There is a borderline marking the minimum rights below which we are dealing with violation of the Constitution. Programme norms should be interpreted in such way, that they determine the minimum rights of an individual, which are equivalent to minimum obligations contained in programme regulations and imposed on the public authorities. Indicated structure gives grounds to claim that basing on the programme norms individuals may pursue their rights in court as well as by way of constitutional complaint procedure. Programme norms regarding social rights may not be interpreted only as a declaration or manifesto designating goals of public authorities, since it would be against the provision of Article 8 sec. 1 of the Constitution, which reads "The Constitution shall be the supreme law of the Republic of Poland."[7] This view was shared by Constitutional Tribunal when it pointed out that execution of a constitutional social right may never fall below the minimum as prescribed by the essence of a given right (judgement of Constitutional Tribunal of May 8th, 2000, SK 22/99).

There is also another way of differentiation between the scope of protection of certain social rights – on the one side, and personal and political rights and freedoms – on the other side. In line with Article 81 of the Constitution, "The rights specified in Article 65, paras. 4 and 5, Article 66, Article 69, Article 71 and Articles 74-76 may be asserted subject to limitations specified by statute." Such an expression limits the direct applicability of the rights indicated in Article 81 of the Constitution. In order to make an individual be able to pursue claims under these rights, it is necessary to indicate – apart from constitutional basis – also the provision of a statute, which specifies a given constitutional right. In other words, the possibility of pursuing rights, referred to in Article 81 of the Constitution, is based on validity of a statute that specifies the content, subjective and objective scope as well as the manner of asserting a given right (see, for example, ruling of the Constitutional Tribunal of January 12th, 2000, Ts 62/99).

*Does the normative structure of constitutional social rights vary? Is it possible to distinguish different types of constitutionally protected social rights?*

Normative structure of constitutional social rights varies. As indicated above, some of these rights have been articulated as subjective rights that may serve as the basis for citizen's claims against public authorities, for example, in court or by way of constitutional complaint

7 J. Trzciński, *Commentary on Article 68 of the Constitution*, note 7, [in:] *Constitution of the Republic of Poland. Commentary*, Vol. III, Warsaw 2005.

procedure. Whereas other social rights have been expressed as programme norms addressed to the state, pointing out to the objectives of public authorities' activities.

*How do you evaluate the efficiency of social rights protection offered by the Constitution and the constitutional justice?*

In our opinion, effectiveness of the protection of constitutional social rights is average or even – one might say – poor. The Supreme Court judicature established an opinion that most constitutional regulations within the scope of social rights have only the nature of programme norms addressed first of all to public authorities and only in the second instance to an individual. The Supreme Court emphasises in its judicature that the principles of state policy do not generate directly subjective rights and citizen's claims, they must be specified by the legislator and do not impose on the courts the obligation to undertake actions aimed at execution of these principles by their direct application (see resolution of the Supreme Court of May 19th, 2000, ref. no. III CZP 4/00).

*What do you consider as the most original contribution of your national Constitution to the protection of social rights?*

It might be difficult to refer to originality of Polish constitutional regulations regarding social rights in comparison to other European states. In our opinion, Polish solutions in this field do not differ much (neither in positive, nor negative way) from the norms of other European states, as well as the regulations included in the EU Charter of Fundamental Rights. In European states, the provisions regarding social rights have been standardised or even made uniform. We could refer to originality of constitutional regulations, if, for example, the Constitution provided for the right to work as individual's subjective right.

## 12.3 Protection of Social Rights under Other Constitutional Rules and Principles

*Are there other constitutional or jurisprudential principles used as tools for the protection of human rights?*

The Constitution of the Republic of Poland sets forth a number of measures for protection of human rights and among them also social rights. Based on Article 77 sec. 1 of the Constitution, everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. Statute may not bar the recourse

by any person to the courts in pursuit of claims alleging infringement of freedoms or rights (Article 77 sec. 2 of the Constitution). According to the contents of Article 78 of the Constitution, each party has the right to appeal against judgements and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute. Article 79 of the Constitution introduced individual's right to lodge constitutional complaint to Constitutional Tribunal. In accordance with this provision, anyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgement on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his or her freedoms or rights or on his or her obligations specified in the Constitution. Moreover, as it is provided for in Article 80 of the Constitution of the Republic of Poland, everyone – in accordance with principles specified by statute – shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his or her freedoms or rights infringed by organs of public authority. Furthermore, the following constitutional principles provide for protection of human rights: everyone has the right to a fair and public hearing of a case, without undue delay, before a competent, impartial and independent court (Article 45 sec. 1 of the Constitution), at least two stages of court proceedings (Article 176 sec. 1 of the Constitution), courts and tribunals shall be separate from and independent of other branches of power (Article 173 of the Constitution), administration of justice implemented by courts (Article 175 sec. 1 of the Constitution), statutory regulation of organisational structure and jurisdiction of the courts (Article 176 sec. 2 of the Constitution), independence of judges and its guarantees (Articles 178-181 of the Constitution). Finally, we should emphasise the general regulation provided in Article 31 sec. 3 of the Constitution, which determines the scope of permissible limitations of rights and freedoms specified in the Constitution.

Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

*Is there a protection offered by the following constitutional principles:*
- *protection of legitimate expectations*,
- *protection of vested rights*,
- *precision of legislation*,
- *non-retroactivity of legislation*,
- *due process and*
- *other general constitutional principles?*

Various principles ensuring protection of human rights have been derived by the Polish Constitutional Tribunal from Article 2 of the Constitution of the Republic of Poland, which stipulates that "the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice." Among them the following should be listed: principle of proper legislation, principle of protecting citizens' trust in the state, principle of legal certainty, non-retroactivity of the law, principle of ensuring proper *vacatio legis*, principle of protecting rights properly acquired, principle of protecting maximally established expectations, principle of specificity of legal provisions, principle of proportionality (no excessive interference). These principles were formed by Polish Constitutional Tribunal and are applied as the basis for rulings of common and administrative courts. Other constitutional principles that protect human rights include among others: principle of legality, principle of direct application of the Constitution, principle of separation of powers, principle of human dignity and principle of equality. Also key importance should be assigned to the principle of social justice, expressed in Article 2 of the Constitution, that imposes on public authorities the obligation to care for social legislation and its execution.[8]

## 12.4 Impact of the International Protection of Social Rights

*Did your state ratify international treaties that pertain to social rights? Are they directly applicable in your domestic legal order?*

Poland is a party to a number of international agreements that refer to social rights. These agreements constitute part of domestic legal order, are directly applicable (Article 91 sec. 1 of the Constitution of the Republic of Poland) and should be respected (Article 9 of the Constitution). Among the international agreements signed by Poland with reference to social rights, the following examples may be listed: International Covenant on Economic, Social and Cultural Rights (ICESCR), European Convention for the Protection of Human Rights and Fundamental Freedoms, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union, European Social Charter, Convention on the Rights of Persons with Disabilities, Convention on the Rights of the Child, series of conventions of International Labour Organisation, for example, Convention no. 102 of International Labour Organisation concerning Minimum standards of social security and many others. It is also worth to mention several acts from the legislation of European Union that impact the issue of social rights within the Polish legal order, among others: Directive of the Council 2000/78/EC of November 27th, 2000 establishing a general framework for equal treatment in employment and occupation, Directive 2002/73/EC of

8 See J. Oniszczuk, *Wolności*, p. 37.

European Parliament and the Council of September 23rd, 2002 amending the Directive of the Council 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, or regulation of European Parliament and the Council (EC) no. 883/2004 of April 29th, 2004 on coordination of social security systems.

*Did these treaties have an impact on the national legal system? Did they trigger any changes in national legislation or practice?*

Application of international agreements listed above is visible in the judicature of common courts, administrative courts and the Supreme Court. With respect to the process of law establishment, the most significant effect may be observed not so much in the case of the essence of social rights, as in the case of the issue of anti-discrimination policy pursuant to social rights. Poland has introduced series of solutions into its legislation that prevent discrimination in employment, for example, due to age, disability or sexual orientation, as well as a principle of equal pay for work of the same value.

*Does the case law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights? In particular, did the case law of the European Court of Human Rights and other regional human courts have an impact on national law in the field of social rights? What are the most important social rights cases brought from your country to international rights protecting bodies? What are the lessons you draw from the international litigation (pertaining to social rights) started by applicants from your country?*

Impact of the judicature of the European Court of Human Rights on the Polish legislation regarding social rights is rather of marginal significance, since the European Court of Human Rights in general very seldom (not only in Polish cases) pronounces violation of the Convention concerning the essence of social rights, i.e. failure to fulfil by the state the positive obligation in the scope of these rights, for example, consisting in ensuring a certain social benefit. Two examples of rulings of the European Court of Human Rights in the cases against Poland with respect to execution of social rights may be discussed at this point. The violations found by the European Court of Human Rights referred to anti-discrimination issues or right to a fair trial, rather than to the essence of social rights.

In the judgement of November 27th, 2007 in the case *Łuczak v. Poland* (complaint no. 77782/01), the European Court of Human Rights found that Poland violated Article 14 of the Convention with reference to Article 1 of the Protocol No. 1 to European Convention

on Human Rights. The case *Łuczak v. Poland* refers to a French farmer, living and running a farm in Poland, who was refused access to the Polish system of farmers' social insurance due to lack of Polish citizenship, despite the fact he met all of the other requirements necessary to be qualified to the system of this insurance. What is more, *Łuczak* as an employer paying taxes and contributions, supported the system of farmers' social insurance. The European Court of Human Rights pronounced violation of Article 14 of the Convention with reference to Article 1 of the Protocol No. 1 to European Convention on Human Rights and unjustified diversification of the legal situation in the access to farmers' social insurance system. The Court highlighted also that Polish authorities failed to substantiate the discriminatory nature of Polish legislation. The European Court of Human Rights pointed out, that even if there had been very serious reasons for excluding someone from the insurance system, such person should not have been left in a situation, in which they were entirely deprived of insurance and had their possibility of living a normal life threatened.

Important judgement of the European Court of Human Rights referring indirectly to social rights is the judgement of September 15th, 2009 in the case *Moskal v. Poland* (compliant no. 10373/05). Factual circumstances in the case were as follows.[9] In August 2001, Maria Moskal submitted a request for granting her earlier retirement pension entitlement for employees who raise children that require constant care. The petitioner along with other documents required for granting retirement pension submitted also medical certificate stating that her 7-year-old son suffered from a serious disease. In August 2001, Polish Social Insurance Institution issued a decision granting the woman earlier retirement entitlement, withholding at the same time payment thereof until the time the woman gave up her current work, which the petitioner did immediately. After 10 months, Polish Social Insurance Institution resumed the proceedings with reference to granting the petitioner entitlement of retirement pension. As a result of this procedure, this Institution found that health condition of her son did not justify granting her the right to earlier retirement pension. Therefore, Polish Social Insurance Institution issued a decision withholding payment of the benefit and revoking the previous decision on granting her earlier retirement entitlement. The decision was sustained by Polish courts.

The European Court of Human Rights pronounced that in this case the principle of proportionality was not observed, which should be interpreted as a balance between protection of social interest and protection of rights and freedoms guaranteed in European Convention on Human Rights. Firstly, property right of the petitioner was established upon the moment of granting her by a body responsible for retirement administration, the right to earlier

9 See the detailed commentary to *Moskal v. Poland* case by M. Szwed, available at: <www.prawaczlowieka.edu.pl/index.php?orzeczenie=dd2dfa50dc8feca1e5303a87b2c6a42db3ebe102-b0>.

retirement based on the documents submitted by her in good faith and undoubtedly influenced petitioner's and her family's situation. Secondly, the time that passed between the moments of granting her the right to the benefit to the moment when Polish Social Insurance Institution became aware of the mistake, was relatively long and on the other hand, immediately after the mistake was revealed the decision to abandon payment of the benefit was issued very fast and with immediate effect. Due to the fact, that retirement administration body made the mistake only through its fault, without any participation of third parties, the principle of proportionality should be interpreted in a particularly restrictive manner. The Court observed, that Ms. Moskal was entirely, and practically overnight, deprived of earlier retirement entitlement that constituted her only source of income, and considering country's economic situation and age of the petitioner – she could have had serious difficulties in finding new job, having given up her previous employment. The Court found that Poland violated Article 1 of the Protocol 1 to the European Convention on Human Rights. After issue by the European Court of Human Rights of the judgement discussed above, Polish Constitutional Tribunal found that the provision of Article 114 sec. 1a of the act of December 17th, 1998 on retirement and disability pensions from Social Insurance Fund – constituting a basis for withholding the payment of retirement pension in the case *Moskal v. Poland* – was inconsistent with the principle of citizens' trust in the state and law established by it, stemming from Article 2 and Article 67 sec. 1 of the Constitution of the Republic of Poland.

## 12.5 Social Rights in Ordinary Legislation

*To which extent does the ordinary legislation in your country ensure the protection of social rights?*

Response to the above issue would require comprehensive studies on the effectiveness of each social right guaranteed in the Constitution. Particular social rights expressed in a general sense in the Constitution are specified at the level of ordinary legislation in several dozen, or even several hundred normative acts. Response to presented issue would require in-depth analysis of the norms included in these normative acts in terms of execution of the norms set forth in the Constitution. So far in the Polish literature, there have been no academic studies that would be dedicated to this issue in a comprehensive manner.

*Is this legislation in conformity with the national Constitution and the international instrument ratified by your country?*

Response to the above issue would require in-depth analysis of hierarchic compliance of the norms included in all acts, which contain regulations regarding social rights with constitutional models of control stipulating specific social rights. Thus, it is impossible to answer this question without such an exhaustive analysis.

It should be stressed that one of key principles of Polish constitutionalism is the presumption of conformity normative acts at the lower level in the hierarchy of sources of law with Constitution. In other words, an act/statute is considered compliant with the Constitution, unless Constitutional Tribunal, acting at the request of an authorised entity (never *ex officio*) in the course of a procedure provided for in the Constitution, decides it is unconstitutional. This principle is fully applicable with respect to ordinary legislation containing regulations regarding individual's social security.

In practice, Constitutional Tribunal rarely pronounces non-compliance of ordinary legislation with social rights specified in the Constitution. Judgements on unconstitutional nature in this field result more often from violations of the principles of proper legislation or legislative procedures, and only in entirely exceptional cases, they are based on violation of provisions stipulating specific social rights.[10] An example of such decision is the judgement of Constitutional Tribunal of May 17th, 1999 (P 6/98), which pronounced non-compliance of provisions included in an ordinance, containing working time norms, indicating it should be a subject matter of an act/statute and could not be governed by an ordinance.

## 12.6 Justiciability of Social Rights

*Are social rights considered justiciable in your country? To which extent?*

Social rights are perceived as justiciable, whereby some of them (which results from Article 81 of the Constitution of the Republic of Poland) only up to the level of rights as specified in ordinary acts. Such interpretation of this issue is adopted by the Supreme Court, which in the structure of the judiciary is the body exercising ultimate control over application of law in the scope of social rights.

10 See L. Garlicki, *Commentary to Article 64 of the Constitution*, note 6, pp. 5-6.

*What is the role of the judge?*

It is difficult to say, what in reality the role of the judge in such cases is. In our opinion in the course of resolving cases related to social rights judicial activism would be desired.

## 12.7 Institutional Guarantees of Social Rights

*Which national bodies are the institutional guarantors of social rights?*

As it was already mentioned above, entities responsible for execution of social rights are 'public authorities', so all the bodies of governmental and local government administration. First of all, this obligation is imposed on the ordinary legislator, who establishes legal framework for exercising social rights, that crystallises constitutional provisions. The legislator is responsible for passing acts that ensure sufficient scope of protection. It may be said that all branches of power guarantee social rights execution. Legislature – because it adopts acts specifying constitutional norms in the scope of social rights. Executive – and under its framework governmental and local government administration – because it ensures application of social rights. And finally judiciary, that allows an individual to pursue social rights in court – before common courts, administrative courts and the Supreme Court, and also by way of constitutional complaint procedure, and abstract control of constitutionality of the norms, initiated by state bodies listed in the Constitution.

*Are there any specific bodies created especially for the protection of social rights? What are their powers? How do you evaluate the effectiveness of these national bodies?*

In Poland, besides the bodies mentioned above, there have been established a number of state bodies whose range of duties includes protection of human rights, including the social rights. The following bodies should be mentioned at this point: established under Constitution – Commissioner for Citizen's Rights and Commissioner for Children Rights and established under ordinary acts – among others: Commissioner for Patients' Rights, State Sanitary Inspection, National Labour Inspectorate, Office of Competition and Consumer Protection, social assistance facilities, facilities for mothers with underage children and pregnant women, Social Insurance Institution and institutions related to it, National Health Fund. These bodies execute provisions of the acts that specify various constitutional norms referring to social rights. Above-mentioned bodies are responsible for enacting statutory regulations within the scope of social rights, hence they perform executive function. Some

of the bodies listed above guard execution of social rights (for example, Commissioner for Patients' Rights, National Labour Inspectorate). The ultimate guarantors of social rights are however always the bodies of judicial system: common courts, administrative courts, Supreme Court and Constitutional Tribunal.

## 12.8 Social Rights and Comparative Law

*Did your national legal system influence foreign legal systems in the area of social rights?*

It seems that Polish legal system does not impact foreign legal systems in the area of social rights. We have no knowledge of any cases of Polish institutions being adopted by other legislations.

*Did other foreign legal systems influence your national legal system in the area of social rights? Can you give examples of provisions, principles or institutions (in the area of social rights) borrowed from other legal systems?*

The Polish Constitution of 1997 is a relatively young act, which in the field of social rights is noticeably inspired by the solutions present in older European constitutions. In the second half of the 20th century, provisions regarding social rights were subject to a standardisation, covering the legal systems of specific European states. We assess that social rights in the legislations of European states are regulated in a very similar manner. Standardisation was introduced mainly through acts of the United Nations, such as Universal Declaration of Human Rights or International Covenant on Economic, Social and Cultural Rights. A vast majority of social rights listed in these acts were included in the draft of Polish Constitution of 1997.

# 13 Social Rights in Portugal

*Jorge Pereira da Silva & Tito Rendas*[*]

## 13.1 Social Rights in National Legal Scholarship

**1.** Portuguese legal scholarship does not call into question, in general terms, the need to provide for an effective protection of social rights. On the contrary, since the current Constitution came into force, in 1976, social rights and problems relating to their legal effect and practice have been taken very seriously by legal scholars.[1]

As a matter of fact, the first part of the Portuguese Constitution relating to fundamental rights is divided into two major headings:

a. One relating to rights, freedoms and guarantees – including personal rights, political rights and workers' rights (Articles 25 to 57);
b. And another one relating to economic, social and cultural rights – including an extensive and detailed catalogue of social rights, which goes far beyond what is common in Western constitutional texts (Articles 58 to 79).

In this second set of constitutional provisions, each article assumes a dualistic structure. In the first paragraph, the universal ownership of a particular social right is stated in very clear terms. Namely, according to the Constitution, "everyone has the right to":

a. Work (Article 58);
b. Goods and services of good quality (Article 60);
c. Social security (Article 63);
d. Health (Article 64);
e. A house of adequate size (Article 65);
f. A healthy and balanced environment (Article 66);
g. Education and culture (Article 73);
h. Equal opportunities in education (Article 74);
i. Cultural enjoyment and creation (Article 78);
j. Sports (Article 79).

In each one of these constitutional provisions, the remaining paragraphs contain a wide range of tasks incumbent upon the State, in order to "conduct" or "implement" the social right in question. Many of these tasks, binding as they are, however, are relatively imprecise,

* Universidade Católica Portuguesa – Law School (Lisbon).

1 English version of the Portuguese Constitution available at *www.parlamento.pt*, January 20, 2015.

granting the legislative power ample freedom as to the time and the concrete course of action to comply therewith. Nonetheless, other constitutional imperatives are very clear and precise. For example, the State must:

a. Establish and update the national minimum wage (Article 59, paragraph 2, a);
b. Establish, at the national level, the legal limit on working hours (Article 59, paragraph 2, b);
c. Provide, as laid down by law, special guarantees for salaries (Article 59, paragraph 3);
d. Consider the entire duration of employment for the purpose of calculating pensions (Article 63, paragraph 4);
e. Create a national, universal and tendentiously free healthcare system (Article 64, paragraph 2, a);
f. Prohibit the work of school-age children (Article 69, paragraph 3);
g. Ensure universal, free and compulsory primary education (Article 74, paragraph 2, a);
h. Grant to all citizens, according to their capabilities, the access to higher levels of education (Article 74, paragraph 2, d);
i. Create a network of public schools covering the needs of the entire population (Article 75, paragraph 1).

In these cases, therefore, the legislator's prerogative is substantially reduced and it is easy to determine whether or not her constitutional obligations are fulfilled. As will be further discussed, judicial review of acts or omissions of public authorities itself is made significantly easier when these provisions are at issue.

Besides the referred social rights, whose assignment is made according to the principle of universality, the Constitution also grants social rights to certain limited categories of people, who have a need for special protection from the State and society due to a particular (transitory or structural) weakness. This is the case of the following:

a. Workers (Article 59);
b. Parents and pregnant women (Article 68);
c. Children and young people (Articles 69 and 70);
d. The disabled (Article 71);
e. The elderly (Article 72).

Finally, it is important to emphasise that some social rights are enshrined simultaneously as rights and duties, that is, not only as active legal positions on the basis of which their holders may, either mediately or immediately, make claims against the State, but also as legal positions involving responsibilities incumbent upon the holder as well as upon third parties. This is the case of:

– The right to the protection of health and the duty to defend and promote it (Article 64);

- The right to the environment and the duty to defend it (Article 66);
- The rights of parents to special protection and their responsibility to provide support and education to their children (Article 68).

**2.** The great importance granted by the Constitution to social rights – Article 9 establishes that the achievement of these is a "fundamental task of the State" – is largely explained by historical factors. In this matter, scholarship has been faithful to the spirit of the constitutional text.[2]

It should not be forgotten that by the time of the 1974 Portuguese Revolution, the world was still divided into two political and ideological blocs and that this division had a direct impact on fundamental rights. Like the world, fundamental rights were divided into two distinct blocs: the United Nations Covenants (1966) on civil and political rights on one side and on economic, social and cultural rights on the other. Even within the Council of Europe, fundamental rights were divided into two declarations of rights of a very different nature: the European Convention of Human Rights (1950) and the European Social Charter (1961).

The political forces in the Portuguese Constituent Assembly, in 1975-1976, thus reflected that division of the globe into two blocs. The constitutional text they drafted represents a *compromise* between two different (almost opposite) trends: on the one hand, under the inspiration of some Western Constitutions (and, in particular, of the German *Grundgesetz*), the rights of civil and political freedom are listed first; social rights, on the other hand, reflecting the influence of Eastern European constitutions and international texts, come after civil and political rights and are endowed with a broad formulation.

Amidst this compromise – a very difficult one to achieve at the time – the freedom of economic enterprise (Article 61) and the right to property (Article 62) were listed among economic rights, rather than where they would more obviously belong – among civil or freedom rights. Their social function was stressed and, ultimately, they were devaluated in legal terms. Moreover, social rights as a whole were presented, in the constitutional text itself, as instruments of a possible transition from the prevailing political and economic system towards socialism. Side by side with the progressive achievement of social rights, the nationalisation of large private companies was also part of this transition project involving the main sectors of production and economic activity.

2 J. MIRANDA, *Manual de Direito Constitucional*, IV, Coimbra, 2012, pp. 159-171, pp. 474-503; G. CANOTILHO, *Direito Constitucional e Teoria da Constituição*, Coimbra, 2005, pp. 398-406, pp. 473-483; V. ANDRADE, *Os direitos fundamentais na Constituição portuguesa de 1976*, Coimbra, 2012, pp. 73-106, pp. 357-389.

The first constitutional revisions, in 1982 and 1989, despite having maintained the bipartite division of fundamental rights, were very clarifying from the political and legal point of view. They made clear that:

a. The primacy of the rights, freedoms and guarantees should not jeopardise the need to attain economic, social and cultural rights;
b. The attainment of these rights should be understood as part of the construction of a Western-type Social State – and not as a tool towards more radical political and economic transformation;
c. The freedom of economic initiative and the right to property, in spite of maintaining their formal classification as economic rights, hold, in substantive terms, a similar position to the one held by civil rights (Article 17) and, as such, are to be legally treated as part of a market economy.

Hence, the consolidation of Portuguese democracy and the making of the welfare state – hrough the gradual achievement of social rights – happened in parallel and complementarily. Social rights added to political democracy what the Constitution itself called "economic, social and cultural democracy" (Article 2). The progressive achievement of social rights has thus played a decisive role in legitimising the democratic regime coming out of the 1976 Constitution. In fact, despite the great difficulties felt by Portugal in developing satisfactory social programs – taking into account that the first signs of the crisis that would later undermine the welfare state in the following decades could already be noticed in Europe at that time – Portuguese citizens have associated the "d" for "democracy" to the "d" for (economic and social) *development* since early years.[3]

Especially, since the democratic stabilisation fostered by the constitutional revision of 1982 and the clarification of the economic model in 1989, a broad political consensus on social rights has emerged. What the few dissenting voices – both in the world of politics and in the legal world – did was to criticise the excessive length and rigidity of those constitutional provisions. Ever since, the so-called second-generation rights have no longer been seen as threats to the first-generation rights – or, in other words, as the "Trojan horse" of socialism – and began to be understood:

a. not only as rights the realization of which is an essential condition for the full accomplishment of the rights of freedom;
b. but also as autonomous constitutional rights; and
c. furthermore, as rights that, regardless of their specific nature, are subject to a constitutional regime that should lead to their progressive realization.

3 H.M. CARREIRA, *As políticas sociais em Portugal*, Lisboa, 1996, pp. 29-54; F.C. SILVA, *O futuro do Estado social*, FFMS, Lisboa, 2013, pp. 26-32.

After the dissipation of some initial misunderstandings, the compromise between the rights, freedoms and guarantees and the economic, social and cultural rights is now regarded as one of the strongest traits of the Portuguese Constitution. These rights are not understood as being in a competitive relationship, but in a relationship of mutual complementarity. At the substantive level, the rights to freedom are essentially perceived as negative rights and, because their content is determined at the constitutional level, independent of legislative intervention. Social rights, on the other hand, are seen as positive rights to State benefits, the realization of which is largely dependent on the ordinary legislator, since their content is not discernable only from constitutional provisions.[4]

**3.** As a consequence of its different substantive nature, regarding the constitutional regime for allocation and protection of rights, the traditional scholarly view identifies a set of rules common to all fundamental rights: the principle of universality (Article 12), the principle of equality (Article 13), the principles of proportionality and protection of legitimate expectations (Article 2), the principle of effective judicial protection (Article 20), among others. Scholars subscribing to this view further identify two specific regimes:

a. One applicable to the rights, freedoms and guarantees composed of the following rules:
   - the legislative competence lies with the Parliament (Article 165, paragraph1, b));
   - direct applicability, without *interpositio legislatoris* (Article 18, paragraph 1);
   - immediately binding upon public entities and private individuals (Article 18, paragraph 1);
   - tight rules regarding legal restrictions (Article 18, paragraphs 2 and 3);
   - intangibility of the essential content (Article 18, paragraph 3);
   - tight rules regarding the suspension of its exercise, in state of emergency or siege (Article 19);
   - civil liability of the State (Article 22);
b. And one applicable to economic, social and cultural rights composed of the following rules:
   - Normative realization dependent upon *interpositio legislatoris*;
   - the so-called "reserve of the financially possible";
   - the "principle of no return" or "principle of prohibition of social regression";
   - unconstitutionality by omission of the legislative measures necessary for their implementation (Article 283).[5]

4 V. ANDRADE, *Os direitos*, pp. 172-184.

5 J. MIRANDA, *Manual*, pp. 474-502; G. CANOTILHO, *Direito*, pp. 473-485; V. ANDRADE, *Os direitos*, pp. 357-389.

Nowadays, this rigid division is largely outdated. Not only can a clear trend towards the extension of a common system of fundamental rights be discerned – with the consequent sharing of rules and principles relating to freedom rights – but some aspects of the system of social rights have also been thrown into crisis, especially the stronger versions of the so-called "principle of prohibition of social regression". The idea that the rights, freedoms and guarantees benefited from an exclusive regime, which granted them enhanced protection – partly founded on the text of Article 17 – and that social rights were doomed to have a weakened protection, is now being progressively abandoned.

**4.** On the contrary, the latest trend is to recognise the existence of an essential unity among all fundamental rights.[6] The Charter of Fundamental Rights of the European Union deals with both freedom rights (both civil and political) and social rights.

The reason for this doctrinal mainstream lies, of course, in the indivisibility of human dignity itself, which lies at the core of all fundamental rights catalogues. It is crucial to recognise that the full exercise of most civil and political rights requires a set of material conditions that only the satisfaction of social rights can provide. A life that allows each and every man to appear before other men as *sovereign and author of himself* (Mirandola) or as *an end in itself* (Kant) requires not only the satisfaction of basic needs for food, shelter, clothing and health, but also minimum access to education, information and culture. The right to life goes beyond the right to biological life; it requires the assurance of the conditions necessary to live a dignified human life, in which the person can develop as such, in all its various dimensions (physical, intellectual, spiritual etc.). Think about rights to political participation: it is beyond doubt that their realization depends on citizens being economically and socially integrated and having access to the information necessary to make informed and responsible choices.

This unifying trend is legally possible by considering the internal structural complexity of fundamental rights, when taken as a whole. In other words, all fundamental rights have positive and negative, objective and subjective, organisational and institutional dimensions, requiring the State – and, above all, the legislator – to protect, improve and promote them in various fields of social life. In this sense, all rights are (also) positive, requiring the State to grant regulatory and material benefits, and consequently depend, on a greater or lesser extent, on the financial and material resources available.[7]

Rights such as the right to life or the right to physical integrity require a police organisation designed to ensure their effective protection and the persecution of those who encroach on them. In the same vein, the State has ensured the protection of private property

6 J. ALEXANDRINO, *A estruturação do sistema de direitos, liberdades e garantias*, II, Coimbra, 2006, pp. 291-328; J.R. NOVAIS, *Direitos sociais*, Coimbra, 2010, pp. 251-332.

7 J.R. NOVAIS, *Direitos*, pp. 103-109.

since the liberal period, which obviously implies the mobilisation of large human and material resources. Moreover, the very content of private property, as well as that of other first-generation rights – like the right to marry and to start a family or the freedom of association – are largely dependent on the choices made by the ordinary legislator, particularly at the level of civil law. The right of access to courts of law presupposes the organisation of the judicial system and the passing of procedural laws, to what of course adds the necessary human, material and financial support. And in the case of people without sufficient economic resources, having access to justice also requires direct financial support from the State itself. Even the exercise of the right to vote implies the passing of electoral laws and the organisation of the electoral process, thus requiring the expenditure of public resources.

In contrast, a practical good as health – which is at the centre of a specific social right – has a clear negative side, which results in a duty of the State (or of the citizens, in general) of not undermining the health of individuals. As with other social rights – like the right to housing, the right to social security or the right to education – when the holder has access to the goods in question (by himself or herself or with the support of the State), he or she will be in a position to demand State omission, that is, to require the State not to deprive him (arbitrarily) from that fundamental right.

Therefore, one cannot compare fundamental rights understood as a whole – in order to reach the conclusion that some are positive and some are negative, or that some are enshrined in precise terms in the Constitution while others are not. Instead, fundamental rights must be compared in a smaller scale: comparing one segment, faculty or dimension to another. It thus follows that even though every fundamental right is unique, they all require from the State – in any of its dimensions of defence, protection, organisation or promotion – more or less legislative activity, more or less positive benefits, more or less financial resources and more or less omissive attitudes of respect.

**5.** Alongside the issue of the justiciability of social rights – which will be analysed below in Chapter VI – the problem of the relationship between the "reserve of the financially possible" and the "prohibition of social regression" is particularly controversial.[8]

It should be noted that the idea that social rights are subject to a "reserve of what is financially possible" in itself has never been controversial. Scholars, regardless of their ideological stance, have always accepted the existence and the inevitability of this reserve. Occasionally, small differences can be detected regarding the more or less strong effect produced by such reserve on social rights and on their fundamental nature. After all, as some social rights require from the State a huge financial effort – especially the right to education, the right to health and the right to social security – it has always been unanimous

8 *Idib.*, pp. 240-250.

among legal experts that the satisfaction of these rights is dependent upon the available financial resources and therefore on the taxes and social contributions that the State could collect. This reserve is particularly clear insofar as some of the most important social rights are constitutionally defined as being "free" (basic education – Article 74, paragraph 2, a), "progressively free" (higher education – Article 74, paragraph 2, e) or "tendentiously free" (health – Article 64, paragraph 2, a). Other social rights – despite being supported, in general, on a contributory basis – imply financial benefits targeted at beneficiaries who exceed that same contributory basis (social security – Article 63, paragraph 3). Closely dependent on the strength of public finances, social rights are therefore very dependent on the economy and its fluctuations as well – especially when they assume a structural nature.

What is controversial, rather, is the relationship between this reserve and the so-called "prohibition of social regression". As a matter of fact, this prohibition – particularly when understood in its strong version, that is, as a prohibition of reducing not only the fulfilment of the constitutional provisions for the achievement of social rights, but also the benefit level itself – turns out to be absolutely incompatible with the aforementioned idea. The prohibition of regression can only be explained in the light of a historicist conception of social evolution and, in particular, of a Marxist historicism, which believed in the irreversibility of the achievements of workers and their rights against the bourgeois capitalism. Out of this peculiar ideological framework, to prohibit any setback in terms of social rights would simultaneously and drastically reduce the margins of freedom of the democratic legislator and limit his ability to fight the economic crisis, the market instability, the disruption of the international order, etc. To legally prohibit social regression would be equivalent to looking at the future as a flat line, deprived of any major difficulties and to naively believe that political parties would never fall into the temptation of giving their citizens more than the allowed available resources.[9]

Understandably, some authors have eventually reduced the scope of this principle, stating that it only forbids regressions that are unjustified, arbitrary, disproportionate, in breach of citizens' legitimate expectations, or when the essential content of the rights in question is curtailed. In other words, they withdrew from the principle of prohibition of regression any dogmatic autonomy and reappointed its scope to other constitutional principles, the validity of which is undisputed in the field of social rights. The Constitutional Court itself, after having made a finding of unconstitutionality based upon the idea of prohibition of regression in 1984 (Judgement No. 39/84), has reduced the scope of this

9 J.P. SILVA, *Dever de legislar e proteção jurisdicional contra omissões legislativas*, Lisboa, 2003, pp. 247-284.

principle in several subsequent decisions and has come to accept its dismantlement (Judgement No. 148/94, Judgement No. 590/2004, Judgement No. 3/2010).[10]

In the current context of deep economic and financial crisis that Portugal is going through, legislative measures that operate a clear reduction on the subjective scope and amount of various social benefits – wage cuts in the public sector; cuts in old age security pensions and survival pensions; cuts in unemployment benefits, cuts in sickness benefits – do not represent any encroachment upon this principle. The Constitutional Court has been conducting the control of constitutionality of these measures only with reference to the principle of equality, the principle of proportionality and the principle of protection of legitimate expectations. Still, the critics accused the Court of excessive "judicial activism".

**6.** Perhaps the most original contribution of Portuguese scholarship in the field of social rights is the notion of "unconstitutionality by omission" and its review by the courts. An analysis of this contribution requires the consideration of three different aspects:

a. The definition of a legal substantive concept of unconstitutional legislative omission;
b. The prescription of a mechanism for abstract review, by the Constitutional Court, of this particular form of unconstitutionality (Article 283);
c. The defence of a concrete monitoring mechanism, by all courts, of these unconstitutional omissions (Article 204).

First of all, an unconstitutional omission should not be equated with simple legislative inertia, for it implies the failure of a real legal duty to legislate imposed by the Constitution. The sources of this duty are manifold and not all of them are within the scope of social rights. In particular, one should consider the following:

a. True orders to legislate, which impose the making of a specific law on certain matters;
b. Duties of legislative protection of fundamental rights – human dignity, life, physical integrity, protection of privacy, personal data, health, etc. – against external aggressions of various kinds (e.g., from private third parties, terrorist organisations, foreign states and forces of nature);
c. Duties to pass rules of organisation, procedure and process designed to the exercise and effective protection of fundamental rights;
d. Duties of regulatory densification – for example, in civil law – of the content of certain fundamental rights (e.g., property, marriage, freedom of association, freedom of contract);

10 All the decisions of the Constitutional Court are available at *www.tribunalconstitucional.pt*, Devember 15, 2014.

e. Finally, duties to complete non–self-executing constitutional rules, in particular duties to legally shape social rights and to provide for their practical achievement.[11]

Once the source of the duty to legislate has been attested, one must check whether the legal system provides for an adjusted procedural mechanism to verify and declare the failure to comply with that duty. Sometimes, it does not. In such cases, it should be noted that there is often no clear separation between action and omission and that the same reality can be seen from both perspectives. Moreover, what is at stake in the breach of the duty to legislate is not a subjective judgement about the legislator's fault or liability, but rather an objective judgement on the legal *status quo*.

As to the second aspect, the Portuguese Constitution actually provides a mechanism for the abstract control of unconstitutionality by omission (Article 283), which can be used when the legislator has failed to fulfil his obligations to implement non–self-executing constitutional provisions, in particular the constitutional provisions about social rights. However, for several reasons, this mechanism has proved inefficient in practice because:

a. Only the President of the Republic and the Ombudsman are entitled to ask for the review by the Constitutional Court;
b. Therefore, individuals do not have access to this procedural route;
c. Once the unconstitutionality by omission has been declared, the Court is merely obliged to communicate its decision to the competent body – which means, in fact, to issue an "appealing decision" addressed to the legislator.

Even so, it is possible to extract some legal consequences from the decision of the Constitutional Court: the breach of the Constitution is certified and delimited; the persistence of legislative inertia opens the door to the liability of the legislator for (omissive) violation of fundamental rights (Article 22). This mechanism enabled the Constitutional Court to reach an important decision about social rights, finding the unconstitutionality for partial omission of the statutory scheme for unemployment benefits. Unemployment benefits had been created only for workers in the private sector, since public officials enjoyed absolute stability in their employment relationship. However, because the State had been using the labour contract system to meet its needs of manpower, some categories of civil servants could be fired according to the law. Hence, the legal regime of unemployment benefits was found unconstitutional by omission, since it did not cover unemployed people previously working in the public sector (Judgement No. 474/2002).

The third aspect is still rather controversial. Although the Portuguese system of constitutional review has a mixed nature – combining abstract review, conducted by the Constitutional Court (Articles 278 and 281) and concrete review, conducted by all courts (Article

11 J.P. SILVA, *Dever*, pp. 29-86.

204), with appeals against these decisions to the Constitutional Court (Article 280) – two different currents of thought can be distinguished:

(a) One arguing that concrete review concerns only the unconstitutionality by action – i.e., of legal rules effectively enacted by the legislator – assuming that the Constitutional Court has exclusive jurisdiction over omissions (Article 283);

(b) Another arguing that legal rules that can be reviewed by courts may also be the result of partial or even total omissions of the legislator. Think about when the legislator fails to comply with his positive obligations – *maxime* when he does not implement a social right. Such an omission results in an implicit rule that would oblige the administration and force the courts themselves (unless they have the power to review it) to decide on the concrete case in clear breach of the constitutional plan, that is, to deny the applicant access to an asset protected by a social right.

Naturally, anyone who follows this second approach strongly reinforces the justiciability of social rights, because the courts may in the case *sub judice* – under the principles that allow them to fill gaps in positive law or to judicially develop the law – provide legal protection, however partial, to the appellant's right. For example, without encroaching on the principle of separation of powers, courts can ensure access to an essential or minimum content of social law, or enact a provisional measure until the legislator intervenes.[12]

In practice, however, the difference between these two points of view is of relatively little significance. Since there is no strict boundary between action and omission – whenever the legislator says "A", he is not saying "B" simultaneously, just like he is not saying "A + B" – the Constitutional Court (both within its powers of abstract review, and on appeal of decisions in the context of concrete review) has found many provisions unconstitutional "insofar as they do not say something"; or "because they do not establish some guarantee"; or because "they do not foresee a certain limit"; or because "they do not apply to a certain category of persons". After all, the Court reviews true and real unconstitutional omissions in the judicial procedures designed to review the unconstitutionality by action. Yet, quite recently, in its controversial decision on the State Budget Law for 2013, the Constitutional Court declared the unconstitutionality of a contribution imposed on sickness and unemployment benefits, but only because a safeguard clause to avoid the beneficiaries of that financial support to fall below the decent survival minimum (already provided by law, in general terms) was not established by the legislator (Judgement No. 187/2013).

12 *Idib.*, pp. 167-240.

## 13.2 The Constitutional Protection of Social Rights

**7.** The social rights established in the Constitution – briefly described above – are configured as individual rights, that is, as rights of individual ownership and of individual exercise.

That does not mean that the many tasks of the State, the fulfilment of which should lead to the achievement of these rights, would share, in their formulation, that same individual reference. The Constitution requires the State (i) "to implement policies for full employment" (Article 58, paragraph 2, a)), (ii) *to create a* "social security system unified and decentralised" (Article 63, paragraph 2), (iii) *to establish a* "national health service" (Article 64, paragraph 2, a)) and (iv) *to execute a* "housing policy and plans for territorial planning" (Article 65, paragraph 2, a)) – but, obviously, no individual legal claims result directly from these tasks. However, the point is that, after legislative implementation and practical application of those laws, individual rights enforceable against the administration and the courts would result from the legal building formed by the interweaving of constitutional and legal provisions.

In this regard, the only exception can be found in Article 67, where, under the heading "family", it is established that, "as a fundamental element of society, family is entitled to protection by society and the State and to the implementation of all conditions enabling the personal development of its members". The family is mentioned in other provisions, although merely as an element to be considered in the setting of a right that is mainly individual:

a. In the context of the rights of workers, the labour organisation must "allow the conciliation of work and family" (Article 59, paragraph 1, b));
b. In the context of the right to housing, it is stated that "everyone has the right, for himself and his family, to a dwelling of adequate size (…) preserving (…) family privacy" (Article 65, paragraph 1);
c. Regarding the right of youth to special protection, the State assumes a duty of "collaboration with the families" (Article 70, paragraph 3);
d. It is established that the personal income tax must "take into account the needs and household income" (Article 67, paragraph 2, f) and Article 104, paragraph 1).

**8.** The general principle governing the allocation of social rights is the principle of universality (Article 12) – which, in practice, can hardly be dissociated from the principle of equality (Article 13). As noted earlier, many of the principles enshrining social rights start precisely by saying that "everyone shall have the right to".[13]

Nevertheless, despite the ownership of social rights being ruled by the principle of universality, this does not mean that all individuals may claim the corresponding State

13 J. MIRANDA, *Manual*, pp. 257-261.

benefits or that these benefits always have the same content. Universality does not preclude selectivity in the allocation of public benefits, according to the economic situation of each individual and, in particular, according to the possibilities of each individual having access, by him or herself, to many of the fundamental assets in question through the market, without resorting to public services or support systems. In paradigmatic terms, the national health service is said to be "universal, general, and, considering the economic and social conditions of the citizens, shall tend to be free of charge" (Article 64, paragraph 2, a)). And, regarding the right to housing, the Constitution explicitly delineates the difference between the obligations of the State in terms of "economic and social housing" and of "private building" and the "access to owned or rented housing" (Article 64, paragraph 2 b) and c)).

Moreover, the principle of universality does not preclude the constitutional text from identifying particular categories of holders of fundamental social rights. These categories of people are generally open – and therefore, they do not truly contradict the very idea of universality – and respond to very specific constitutional concerns. As a matter of fact, certain groups of people have a particular need for State protection, namely through social policies, including:

a. Workers, as a result of the legally subordinated relationship they have with their employers (Article 59);
b. Consumers, due to asymmetric information and to the economic weight of the major suppliers of goods and services (Article 60);
c. Pregnant women, due to their greater vulnerability (Article 68);
d. Children, youth, the disabled and the elderly, due to their fragile situation (Articles 69 to 72).

Regarding some social rights, the Constitution identifies smaller groups, with the purpose of requiring the State to endorse specific actions for the promotion of their rights and to avoid any discrimination against them, most notably:

a. The unemployed (Article 59, paragraph 1, e));
b. Victims of accidents at work or occupational diseases (Article 59, paragraph 1, f));
c. Underage workers (Article 59, paragraph 2, c));
d. Migrant workers (Article 59, paragraph 2, e));
e. Student workers (Article 59, paragraph 2, f));
f. Drug addicts (Article 64, paragraph 3, f));
g. Orphaned or abandoned children (Article 69, paragraph 2);
h. Children of emigrants and immigrants, regarding the access to education and culture (Article 74, paragraph 2, i) and j)).

**9.** Concerning non-nationals, Article 15 of the Constitution – under the heading "principle of equivalence" – establishes very clearly that "foreigners and stateless persons residing in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens".[14]

This provision encompasses all social rights. The distinction between nationals and foreigners is relevant only in what regards political rights and the access to certain public positions (Article 15, paragraph 2). Thus, foreigners in Portugal, regardless of whether they are EU citizens, have the same duties (e.g., tax payment and other social contributions) and, if they fulfil the legal requirements, the same rights (e.g., unemployment benefit, free access to basic education, free access to health care, retirement pensions or disability pensions) as Portuguese citizens.

A more delicate issue is that of foreigners residing illegally in Portuguese territory. It is evident that an effective immigration policy would advise against granting social rights to illegal immigrants. However, first of all, their illegal situation does not exempt them from taxes and other contributions to social security and of law enforcement in general. Many illegal immigrants are registered in the tax and social security services and meet their obligations in these areas. Moreover, a commitment with human dignity recommends against denying access to health care to someone in need (in case of emergency or serious illness) or denying education to school-age children (who cannot be penalised because of their parents' situation). Thus, in general terms, public services in the area of tax, social security, health and education do not control the lawfulness of residence of their users. This control is essentially done by the police, the immigration authorities and the labour inspection.

Finally, the social rights protection of minorities is based on the general principle of equality (Article 13). With respect to workers' rights in particular, Article 59, paragraph 1, mentions the rights of "all" the workers, "without distinction of age, sex, race, nationality, place of origin, religion, political or ideological convictions".

**10.** The debtor or passive subject of social rights is primarily the State. In the case of most social rights, it is (only) against the State that citizens can make their claims – for legal, material and financial assistance in its different areas of action. But the State is also responsible for most of the tasks listed in the Constitution as necessary conditions for the achievement of those rights.

The achievement of social rights is, therefore, a task that requires the cooperation between the three State branches of power:

14 J.P. SILVA, *Anotação ao artigo 15º*, in J. MIRANDA/R. MEDEIROS, *Constituição Portuguesa Anotada*, I, Coimbra, 2010, pp. 263-281.

a. The legislative power shall build (and permanently update) the legal structure necessary to the implementation of each one of the social rights, closely following the guidelines – very accurate ones, in some cases – provided by the Constitution;
b. The public administration as a whole – including the State, the autonomous regions, local authorities and even some other public institutions or public companies – shall be responsible for organising and making available the material, financial and human resources needed to carry out the services integrating the content of the different social rights;
c. It is naturally up to the courts to control the legislative and administrative activity. However, they shall be autonomously bound by social rights – as part of their direct linkage to the Constitution – and shall contribute with their decisions for the practical achievement of those rights. Thus, on the one hand, courts are expected to correct any deficits of legislative achievement of social rights and, on the other hand, to make use of various legal principles (e.g., equality, proportionality, trust protection) in order to assure the citizens an equitable access to the existing social protection systems.

In practice, when it comes to social rights, the citizens' main interlocutor is the huge public administration machine, whose decentralised organisation should also be reflected on the structures of national social security systems (Article 63, paragraph 2), health (Article 64, paragraph 2), housing (Article 65, paragraph 2, b)) and environmental protection (Article 66, paragraph 2, e)), as well as in their daily operations. That is, considering the complexity of the task in question and the need to get close to the citizens, the duty to distribute the various social benefits must be shared by the different (territorial and functional) sections of the administration.

**11.** In addition to the public authorities in general, it is possible that private persons may present themselves as direct debtors or passive subjects of social rights.[15]

It is important to draw attention to the fact that the Portuguese Constitution does not conceptualise fundamental rights, regardless of whether they have a positive or negative nature, as rights exclusively directed against the State. Paragraph 1 of Article 18 states that rights, freedoms and guarantees "bind public and private entities", even though scholars acknowledge that the linkage is more intense in the former than in the latter case. In the second case, the fact that rights, freedoms and guarantees bind private individuals must be balanced with the principle of private autonomy, which is also constitutionally protected (Article 61).

Considering the above trend towards a certain rapprochement between the regime of freedom rights and the regime of social rights – in the name of human dignity and the

15 G. CANOTILHO, *Direito*, pp. 483-484.

consequent indivisibility of fundamental rights – it is understandable that social rights can also legally bind some private individuals, at least regarding their negative dimensions or when their content is well determined by the Constitution. For example, the landlord is nevertheless bound by the housing rights of his tenant, who, in the terms set by ordinary law (Article 65, (paragraph 2, c)), cannot be evicted arbitrarily. Consumer rights (Article 60) – which are equally dependent on imperative systems of civil law and of material benefits of the administration – are also clearly directed against private companies, producers of goods and service providers.

This phenomenon is particularly evident in the case of employers in relation to some workers' rights (Article 59):

a. The right to remuneration according to the quantity, nature and quality of the work (equal pay for equal work (paragraph 1, a));
b. The right to work under socially dignifying conditions (paragraph 1, b));
c. The right to work under conditions of hygiene, health and safety (paragraph 1, c));
d. The right to special labour protection for pregnant women, minors and disabled (paragraph 2, c));
e. The right to fair compensation for damages, in case of accidents at work (paragraph 2, f).

It should also be noted that these fundamental rights are granted to the same extent to workers in the private and public sector.

**12.** A different question relates to the fact that the Constitution does not make the State the monopolist of social solidarity. Rather, the Constitution repeatedly demands the intervention of society and its institutions in the task of achieving social rights – a logic that shows a clear influence of the subsidiary principle.[16] Namely, the Constitution demands the State to involve the following private entities in its public policies:

a. Consumer associations (Article 60, paragraph 3);
b. Unions (Article 63, paragraph 2);
c. Private institutions of social solidarity (Article 63, paragraph 5);
d. Medical companies and private medicine institutions (Article 64, paragraph 3, d));
e. Housing cooperatives (Article 65, paragraph 2, d));
f. Associations of families (Article 67, paragraph 2, g));
g. Associations and foundations with cultural purposes (Article 70, paragraph 3 and 73, paragraph 3);
h. Associations for the protection of cultural heritage (Article 73, paragraph 3);
i. Private schools and education cooperatives (Article 75, paragraph 2);
j. Associations of teachers, parents and students (Article 77, paragraph 2);

16 J. MIRANDA, *Manual*, pp. 479-485.

k. Sports associations (Article 79, paragraph 2).

Thus, the principle of participatory democracy (Article 2) extends its effects to the achievement of economic, social and cultural rights. Several conclusions can be drawn therefrom:

a. The social policies of the State should be outlined in constant dialogue with civil society's private institutions and, ultimately, with the citizens themselves;
b. The management of public systems of social security, health and education must allow some space for the participation of users and other social agents involved – particularly in education, "teachers and students have the right to participate in school management" (Article 77, paragraph 1);
c. The public social network and the private and cooperative social networks – *maxime*, in education and health – should complement and articulate themselves smoothly, in order to ensure better access to and better quality of these services to the citizens;
d. The State may (and, in case of insufficient means, should) delegate some of its tasks for the achievement of social rights to private institutions – for profit or non-profit – and assume a merely supportive and regulatory role.

**13.** As stated above, the text of the Constitution clearly distinguishes rights, freedoms and guarantees, on the one hand, and economic, social and cultural rights on the other. The first can be found in Title II of Part I and the second in Title III of the Constitution. However, this distinction is not an inflexible one for a number of reasons:[17]

a. There are social rights alongside with rights of freedom, such as the right to judicial protection regardless of economic means (Article 20, paragraph 1);
b. There are, among social rights, rights of similar nature to the rights, freedoms and guarantees (Article 17), such as
   - Freedom of private economic enterprise (Article 61);
   - The right to property (Article 62);
   - Some of the rights of workers (Article 59 – Judgement No. 793/2013);
   - Some consumer rights (Article 60, paragraph 1);
   - The right to have all the working time taken into account for purposes of calculating the retirement pension (Article 63, paragraph 4);
   - Finally, the negative content of various social rights, such as rights to social security, health, housing, environment or education;
c. There are fundamental rights that form a meaningful unit – as the workers' rights (Articles 53 to 57 and Articles 58 and 59), the right to education (Articles 43 and 73 to

17 J. ALEXANDRINO, *A estruturação*, pp. 103-291.

77), or the right to culture (Articles 42 and 78) – but whose content is divided into several articles, some alongside freedom rights and others alongside social rights;

d. The structural criteria that are most commonly used to distinguish the two categories of fundamental rights – negative rights versus positive rights, constitutional determinacy versus indeterminacy of its contents, independence versus dependence upon the legislator – merely indicate a trend and, mainly, can only be strictly applied to each one of the multiple faculties and dimensions that form a fundamental right;
e. As a result, some of the rules and principles that traditionally shape the regime of rights, freedoms and guarantees also apply to social rights – e.g., the system of legal restrictions – and a few rules and principles that were part of the constitutional system of the latter have been abandoned or lost their dogmatic autonomy – e.g., the prohibition of social regression.

It is not unusual to find the enunciation of different categories of the current social rights in legal scholarship or in case law. Even the material or thematic distinction between economic rights, social rights and cultural rights has been the object of analysis.

However, there are some other differences that should be pointed out:

a. The aforementioned difference between rights the assignment of which is made in universal terms (education, health and social security) and those attributed to certain, more or less restricted, categories of people (workers, consumers, parents, children and youth, disabled, elderly etc.);
b. the difference between non-reflex rights (simply rights) and the rights duties (the right and duty to protect public health, the right and duty to protect the environment, the rights and duties of parents regarding the education of their children);
c. the contrast between the rights implying financial benefits (as a rule, the claims that unfold the right to social security) and the rights of access to material benefits provided by public services (health and education);
d. the rights that are gratuitously allocated (basic education – Article 74, paragraph 2, a) or progressively gratuitously allocated (higher education – Article 74, paragraph 2, e), the rights that are tendentiously free (health – Article 64, paragraph 2, a), and finally, the rights which require previous financial contributions (social security, including unemployment benefits – Article 59, paragraph 1, e) and (Article 63, paragraphs 3 and 4);
e. the social rights aiming specifically at the correction of more persistent discriminations, creating a true "equality of opportunities" where "legal equality" alone has not been enough (especially in education, culture and science – Article 73, paragraph 1), and all other rights that do not have that particular function, although they also contribute to building a society of greater justice and solidarity (Article 1).

**14.** In Portugal, the fundamental question is not whether the Constitution adequately protects social rights, but rather the opposite one, that is, whether the Constitution burdens the State with too many legal obligations and material tasks – some of them defined with a high degree of precision and determinacy – consequently reducing the conformational freedom of the democratic legislator and rendering a reform of the Portuguese welfare State – which could, in the future, ensure its sustainability – impossible.[18]

Portugal is going through a very difficult situation, with the sovereign debt crisis putting pressure on the State in addition to internal factors, such as the rising of unemployment, the rising cost of health care and serious problems concerning the financing of the social security system (e.g., the inversion of the demographic pyramid, with a decreasing working force and an increasing number and longevity of dependent subjects). And, in this context, the excessive rigidity of the Constitutional text on social rights makes it very difficult for the Parliament and the government to restrain public expenditure and achieve financial equilibrium.

Before the crisis, government expenditure to accomplish the three most relevant social rights – education, health and social security – already consumed about three fourths of State resources (based on a functional classification of expenditures, which of course excludes the debt service). And, when considering this figure on the allocation of public expenditure, one must not forget the tendency towards its exponential growth since the 1980s.[19]

This budgetary situation raises the question of whether the 1976 constitutional legislators were excessively ambitious, taking into consideration the characteristics of the Portuguese economy and the financial resources, it can generate (and has generated over the past decades). In this context, some reform proposals have been advanced in order to smooth the constitutional regime of social rights, by reducing the role of the State in accordance with the principle of subsidiarity and thus granting to the private and social sector a greater role in the achievement of social rights. The goal of these proposals is therefore to reduce the weight of the State as a direct provider, assigning it a regulatory function and the role of ultimate guarantor of social justice. Such proposals for constitutional revision, however, have not obtained the political consensus necessary for their approval.

**15.** Although the public expenditure is generally very high, it does not render any clear conclusion about the level of effectiveness of social rights.

The Portuguese welfare State has always been struggling with a serious shortage of financial, material and human resources available for social policies – a problem that is

18 J. LOUREIRO, *Adeus ao Estado social?*, Coimbra, 2010, *passim*; F.C. SILVA, *O futuro*, pp. 52-76; F.R. MENDES, *Segurança social: o futuro hipotecado*, FFMS, Lisboa, 2011, pp. 118-130.

19 State expenditure: budgetary implementation by functions (in millions of Euros): <www.pordata.pt>, November 10, 2014.

aggravated by the heavy and bureaucratic character of the public institutions responsible for their achievement. Therefore:

a. the value of some benefits is very low, especially that of the various pensions and allowances paid by the social security system;
b. the quality of other benefits could be clearly superior, as it happens with education and especially in the field of health care;
c. in general, the system is too slow in attending to the requests of the citizens, which, coupled with the lack of vacancies and shortage of goods and services available, generates "waitlists" in some sectors;
d. the level of population coverage of certain social systems is not yet satisfactory (e.g., support networks for children and the elderly).

Nevertheless – considering that scarcity is partly justified by the fact that social rights are subject to the "reserve of the financially possible" – from a strictly legal point of view the Portuguese welfare State does not suffer from serious shortcomings. However, one cannot conclude that the level of effectiveness of social rights is mainly attributable to the role played by the Constitutional Court or the adequacy of the remedies at its disposal, that is:

a. the abstract control of unconstitutionality by omission, for failing to implement (or for insufficiently implementing) constitutional provisions the realization of which depends on legislative intervention (Article 283);
b. the abstract control of unconstitutionality by action of laws which drastically repeal or unreasonably reduce the scope of previous laws that have achieved social rights (Article 281) – perhaps creating a new situation of unconstitutionality by omission;
c. the effective control of the unconstitutionality of certain provisions to the extent that they "do not include certain categories of people", "do not establish a certain guarantee" or "do not contain a certain limit" (Article 280). On the contrary, the current level of effectiveness of social rights is the product of the joint action of various actors and political, social, administrative and judicial mechanisms, such as:
d. the political will of successive parliamentary majorities and governments;
e. different mechanisms of participatory democracy, highlighting the role of trade unions and associations representing social interests;
f. the educational role played by the Ombudsman at the administrative level (Article 23);
g. the decisions of ordinary courts (judicial and administrative) in disputes between individuals and public services involving those normative omissions that limit the citizens' access to social rights.

## 13.3 The Protection of Social Rights under Other Constitutional Rules and Principles

**16.** The Portuguese Constitution proscribes retroactive laws in three special cases: laws that restrict rights, freedoms and guarantees (Article 18, paragraph 3); criminal laws (Article 29, paragraph 1) and tax laws (Article 103, paragraph 3).

Aside from these cases, the protection of individual rights may arise from *the principle of protection of legitimate expectations*, which is unanimously considered as the subjective projection of the value of legal certainty and as a corollary of the rule of law (Article 2). In particular, whenever the constitutional norms on social rights are already implemented by ordinary law, in such a way that subjective legal positions can be derived from those norms, this principle allows the Constitutional Court to examine the constitutionality of retrospective laws – the laws that, disposing only for the future, jeopardise "subjective rights" that were set up in the past or affect "acquired rights", i.e., rights that have entered into the individual legal sphere following a complex fact of successive production (e.g., the course of a contributory career). The law that retrospectively affects the content of a social right, which has meanwhile become part of the citizen's legal sphere, is then the object of critical examination.[20]

In fact, this principle aims to protect the confidence citizens have formed as to the maintenance of their rights – rights which were validly constituted under the law in force. However, considering the issue from a different standpoint, we could say the citizens in question hold a legal expectation regarding the maintenance of the existing legal framework, since it is this principle that allows them to protect their rights.

According to the Constitutional Court (Case No. 128/2009 and Case No. 862/2013), in order to constitutionally protect the confidence of citizens, two conditions must be fulfilled. Indeed, "the violation of expectations, in an unfavourable sense, will not be admissible:

a. when it represents a mutation of the law with which the addressee of its regulations could not reasonably count; and yet
b. when it is not dictated by the need to safeguard constitutionally protected rights or interests considered as prevailing".

The two assumptions set out above are assessable through the use of four requirements, or tests. Thus, "so that there is room for legal and constitutional protection of "legitimate expectations", it is necessary:

20 J.R. NOVAIS, *Os princípios constitucionais estruturantes da República portuguesa*, Coimbra, 2004, pp. 261-290.

a. first of all, that the State (especially the legislator) has initiated behaviour capable of generating «expectations» of continuity by private individuals;
b. second, that such expectations are legitimate, justified and based upon good reasons;
c. thirdly, that private individuals have made life plans taking into account the perspective of continuity generated by the State 'behaviour';
d. finally, that there are no reasons of public interest that could justify the non-continuity of the behaviour that led to the situation of expectation.

This last test implies, of course, an appeal to the principle of proportionality, in order to engage in a balancing exercise of the rights and interests at stake: on the one hand, the legal positions of private individuals and the expectations about them; and, on the other hand, the freedom of the democratic legislator to define, at each moment, the public interests that ought to be promoted.

**17.** In contrast, other constitutional principles – such as the principle of accuracy or determinability of the law or the principle of due process (or fair procedure) – have not been called upon to play a broad role in the protection of rights that, according to the Portuguese Constitution, are classified as social rights.

These principles have nevertheless been successfully invoked in defence of the right to job security, which, under Article 53, is qualified as a freedom right of workers (Case No. 285/92 and Case No. 474/2013). The Constitutional Court requires that the dismissal of workers must respect fair procedures – to ensure the objectivity of the grounds for the decision of dismissal and to grant them the necessary means of defence – and that the law must have a sufficient level of accuracy, in order to enable its addressees to foresee the practical outcome of its application.

Finally, in an important decision, the Constitutional Court (Case No. 509/2002) called upon the principle of human dignity to declare the unconstitutionality of a law reducing the universe of recipients of the minimum income. In fulfilment of the final part of paragraph 3 of Article 63 of the Constitution, according to which "the social security system protects citizens in sickness, elderliness (…) and in all other situations of lack or decline of livelihood or capacity for work", the legislator created in 1996 the right to "guaranteed minimum income". However, in 2002, a new political majority has imposed another (less assisting) scheme called "social integration income". This 2002 law made access to the new system dependent on being at least 25 years old – and no longer 18, as in the previous scheme – without providing any kind of social support for young people aged between 18 and 25. The Constitutional Court considered, then, that the respect for the human person's dignity (Article 1) "implies recognition of the *right* to a *minimum of decent survival*" – and

that this minimum was not properly secured by the State to people aged between 18 and 25.[21]

## 13.4 The Impact of the International Protection of Social Rights

**18.** Portugal is bound by a large number of international conventions on economic, social and cultural rights or conventions containing, among their provisions, rights of that nature. According to paragraph 2 of Article 8 of the Portuguese Constitution, those international conventions apply immediately in domestic law without the need for a legal act of transformation or transposition. This means that those conventions (i) *must have been approved and ratified in accordance with constitutional rules* and (ii) *published in the official journal*. Moreover, the most widespread understanding is that the rules of these international conventions are, in the internal legal order, in an infra-constitutional, but supra-legal position. Although the Constitution does not expressly establish so, the international rules thus enjoy priority over ordinary domestic law.

The most relevant among those conventions are the following:

a. In the framework of the United Nations, Portugal ratified:
   - the International Covenant on Economic, Social and Cultural Rights (1978-2003);
   - the Conventions on the Elimination of All Forms of Discrimination against Women (1980-2002), and against Discrimination in Education (1981);
   - the Convention on the Rights of the Child (1990-2013);
   - the Convention on the Rights of Persons with Disabilities (2009);
b. Within the International Labour Organisation (ILO), Portugal ratified all of the most important Conventions, covering areas like safety, health, migrations, minimum wage, maternity, night work, et alli.
c. Within the Council of Europe, Portugal has ratified:
   - the European Social Charter (1991-1998);
   - the Revised European Social Charter (2002);
   - the European Convention on the Legal Status of Migrant Workers (1979-1983);
   - the European Convention on Social Security and its Supplementary Agreement (1983);
   - the European Code of Social Security and Additional Protocol (1984-1985).
d. As a Member State of the European Union, Portugal is legally bound by the social rights contained in the Charter of Fundamental Rights of the European Union (Articles 27 to 38) – when the law of the Union is applied (in the sense contained in paragraph 1 of Article 51 of that Charter) – since the ratification of the Lisbon Treaty (2007-2009).

21 V. ANDRADE, *O "direito ao mínimo de existência" condigna* como direito fundamental, in Jurisprudência Constitucional, nº 1, 2004, *passim*; J.R. NOVAIS, *Direitos*, pp. 190-208.

**19.** There is an undeniable influence of the Convenant on Economic, Social and Cultural Rights (1966) and of the European Social Charter, in its original version (1961), on some provisions of the Portuguese Constitution of 1976. That influence is especially evident on the rights of workers.

In contrast, considering the highly developed nature of the catalogue of social rights that the Constitution incorporated, one cannot say that the international conventions mentioned above have had, over the years, a systematic impact on the development of domestic legislation on social rights. As it will be seen below, there are, however, individual cases where the action of the *Committee on Economic, Social and Cultural Rights* (UN) and of the *European Committee of Social Rights* (EC) exerted some influence on national law, at the legislative and judicial levels, and on the administrative implementation of social rights.

It must be taken into account, moreover, that some rights contained in those conventions are not considered by the Portuguese Constitution as social rights, from the point of view of their systematic location, as well as from the point of view of their regime. For example:

(a) the freedom to choose a profession (Article 47), the right to job security (Article 53), the freedom of association (Article 55), the right to collective bargaining (Article 56), or the right to strike (Article 57) are constitutionally qualified as freedom rights of workers;

(b) the freedom of cultural creation (Article 42), the freedom of learning and teaching (Article 43) and the right to emigrate (Article 44) also begin as rights of liberty, notwithstanding their obvious social dimension (expressed in other constitutional provisions);

(c) issues relating to equality and non-discrimination – of women, immigrants, ethnic or other minorities and vulnerable groups – are contemplated, not as social rights, but in the context of general principles such as the principle of equality (Article 13), the principle of equivalence (Article 15) and the protection against all forms of discrimination (Article 26, paragraph 1). But the Constitution also shows a special egalitarian concern with regard to social rights of workers (Article 59, paragraph 1).

**20.** Concerning the International Covenant on Economic, Social and Cultural Rights, the third "report" periodically submitted by Portugal (1998) was analysed by the *Committee on Economic, Social and Cultural Rights* in 2000, which raised the following general concerns in its "concluding observations":

a. one-fifth of the population is still below the poverty line;
b. occurrence of cases of child labour;
c. occurrence of intolerance and discrimination against Roma citizens, refugees and immigrants;
d. discrimination against women in the workplace and domestic violence;

e. there is an increasing number of cases of women trafficking, paedophilia and child pornography;
f. the levels of illiteracy and school dropout in secondary education are relatively high.

Portugal submitted, in 2011, its fourth "report", which however has not yet been considered by the committee.

**21.** Regarding the European Social Charter, the latest "findings" of the *European Committee of Social Rights* (2009, 2010, 2011 and 2012), concerning the "reports" submitted by Portugal over that period, now detect some non-conformities between national reality and some of the Charter's provisions, namely
a. the high number of fatal accidents at work (Article 3);
b. the inadequacy of some of the lowest pensions (disability, farm workers and non-contributory scheme) (Article 12);
c. the inadequacy of the minimum old-age pensions (Article 23);
d. the insufficient compensation for dangerous or unhealthy work conditions (Article 2);
e. the inadequacy of the minimum wage (Article 4);
f. the insufficiency of a 15-day notice for dismissal of workers with more than six months of service (Article 4);
g. the right to call a strike is generally reserved for unions (Article 6);
h. the amount of daily and weekly working time of children subject to compulsory education is excessive (Article 7);
i. migrant workers can be deported if they interfere with the exercise of political rights reserved to the Portuguese or if there is reason to believe that they have committed criminal acts in Portugal or in the European Union (Article 19);
j. the inadequacy of housing conditions of most Roma citizens (Article 31);
k. employment services do not work efficiently (Article 1);
l. the right of the long-term unemployed to professional retraining is not granted (Article 10).

Nonetheless, the European Committee of Social Rights, in the document "Portugal and the European Social Charter (April 2013)", highlights the progress made by Portugal in the implementation of the rights in question – as well as cases of lack of relevant information.

With regard to the processes of "collective complaint", the independent experts of the European Committee of Social Rights took so far ten merit decisions, seven of which, focusing mainly on labour rights, found no breach of the Charter. The findings of breach focused on:

a. employment of children under 15 (Article 7);
b. the right of children to social, economic and legal protection (Article 17);
c. housing conditions and discrimination against Roma citizens (Articles 16, 30, 31 and E).

What these three cases have in common is the fact that the violation of the Charter does not result from national legislation – which is consistent with it – but instead from a lack of effectiveness of that legislation, that is, from practices that are socially adopted or pursued by public entities. There has been, however, significant progress and those violations have been substantially corrected:

a. By the time of the first decision of non-compliance (1998), cases of child labour, especially in agriculture, textiles and footwear, with the goal of supporting the family economy, were still occurring in Portugal. That phenomenon was, however, strongly fought against with supervision measures and sanctions enacted by the competent authorities. Consequently, today's reality is significantly different.
b. The internal law clearly and accurately prohibits and sanctions all forms of violence against children. However, this violence existed in practice and, to some extent, was even tolerated by the courts when moderately exercised by the parents themselves, in the name of a power-duty to correct the behaviour of children. The law has evolved towards comprehensive condemnation of all forms of violence or corporal punishment against children, even when the responsibility lies with the parents.
c. Although domestic law does not discriminate against Roma people – who are national citizens – serious problems of social integration, resulting from their peculiar lifestyle, have been registered. Some local authorities have tried to solve their housing problems by building social homes, which, due to their location, ended up leading to their isolation. The public reporting of such cases of segregation and the action of the national authorities put an end to these procedures, but there are still isolation situations that need to be addressed.

**22.** The extensive case law of the European Court of Human Rights regarding Portugal has been having a major impact on specific areas of national legislation. That case law was the reason for an amendment to Article 20 of the Constitution (on the right to a judicial decision in a reasonable period of time and following a due process). Naturally, it has also been playing a decisive factor in the interpretation of national law.

The most important decisions of the Court concerning Portugal with respect to the following:

a. the right to freedom and security (Article 5);
b. the right to a fair trial (Article 6);
c. individual privacy and family life (Article 8);

d. freedom of expression (Article 10);
e. the guarantee of an effective judicial process (Article 13);
f. and the right to property (Protocol no. 1).

Two decisions on social rights deserve special reference:

(a) *Velosa Barreto v. Portugal* (1995), in which the Court held that the right of the landlord to terminate a lease in order to dwell with his family in his house does not follow from the right to respect for private and family life (Article 8). National law does not have to ensure that every family has a house exclusively for itself;

(b) *Conceição Mateus and Santos Januário v. Portugal* (2013), in which the Court held that the cuts on holiday and Christmas bonuses (the 13th and 14th months) of pensioners, imposed by the State budget for 2012, did not violate the right to property (Protocol No. 1). Indeed, the decision to grant benefits of this kind lies within the margin of appreciation of the State and considering the amount and the expected duration of the cuts, the pensioners did not have to bear a disproportionate and excessive burden. Moreover, the cuts in question were justified on grounds of public interest, which were properly balanced with the private interests of the applicants.

## 13.5 Social Rights in Ordinary Legislation

**23.** The Portuguese Constitution establishes that the power to legislate on social rights is split between the parliament and the government – and partly between the legislative assemblies of the autonomous regions as well.[22]

However, the Parliament has a reserved competence with respect to all matters affecting the rights of workers and their organisations (trade unions and workers' organisations), which, according to the Portuguese Constitution, should be qualified as freedom rights or have a similar nature. In addition, the Parliament has a reserved competence to make legislative bases (or laws of principles) on certain matters relating to economic, social and cultural rights, namely

a. the education system (Article 164, paragraph 1);
b. the social security system (Article 165, paragraph 1, f);
c. the National Health Service (Article 165, paragraph 1, f);
d. the system of nature protection and ecological balance (Article 165, paragraph 1, g);
e. urban leases (Article 165, paragraph 1, h);
f. spatial planning and urbanism (Article 165, paragraph 1, f).

22 J. MIRANDA, *Manual*, pp. 501-502.

In these cases, the laws on social rights are divided into two distinct levels: the level of the legislative bases, where the Parliament establishes the fundamental principles of each one of the different systems, services or implementation programs of social rights; the numerous pieces of legislation issued by the government (decree laws), which implement and develop those parliamentary laws and that often specifically define the substance or the amount of benefits that citizens can effectively require from the State. It is at this second level that it is usually determined who is entitled to what.

The fact that the legislative bases have reinforced value means that the government statutes must simultaneously comply with the Constitution and with the structuring principles contained in those reinforced parliamentary acts.

**24.** A system of judicial review ensures the compliance of the legislation:
a. with the Constitution itself;
b. with the legislative bases set out by the Parliament (which have enhanced value in relation to ordinary law) and;
c. with international conventions ratified by Portugal (and therefore occupying a supra-legal position in the hierarchy of the internal legal order).

This surveillance system includes the control:
a. of constitutionality, by action or omission of the legislator;
b. of constitutionality, according to a preventive (i.e., before the law comes into force) and successive procedure;
c. of constitutionality and illegality (for violation of legislative bases or of rules of international conventions), in abstract terms (by the Constitutional Court) and in concrete terms (by all courts, in the cases they are competent to decide).

Obviously, this complete and quite demanding judicial system of legislative control is not by itself a sufficient guarantee against the nonconformity of legal rules with higher law of domestic or international origin. In particular – as demonstrated by the foregoing analysis of the situation of Portugal at the international level – a good legislative framework, even when followed by a system of judicial review, does not guarantee that the reality experienced by the citizens is in accordance with the law, especially when the scarcity of financial and material resources hinders the fulfilment of social rights.

## 13.6 The Justiciability of Social Rights

**25.** As in other countries, justiciability – or, more precisely, justiciability's extent – is one of the most controversial issues in the Portuguese legal scholarship on social rights.[23]

Clearly, the justiciability of social rights is only a real problem when the ordinary legislator fails to adequately fulfil – or does not fulfil at all – his constitutional obligations. When social rights are sufficiently densified, as to their ownership and content, by ordinary law and the corresponding financial burden duly budgeted, it is enough for the citizens who consider themselves harmed to appeal in general terms to the competent courts and require the compensations they think they are entitled to. When there is an ordinary law, it is up to the different levels of public administration (state, regional and local) to implement that law, defining the material benefits and making the financial transfers necessary to meet the social rights. It is up to the courts to enforce that law, against the administration, but also sometimes against other private individuals (e.g., employers), in specific cases where they are also passive subjects of social rights.

**26.** When there is no legislative achievement, however, or when the level of achievement is patently insufficient or inadequate – intrinsically, when there is total or partial unconstitutionality by omission, be it absolute or relative –, the judicial protection of social rights must follow alternative (less safe) paths.

As noted above, the Portuguese Constitution provides a mechanism of judicial abstract control of unconstitutionality by omission (Article 283). This path can be used when the legislator fails to fulfil his duties when implementing constitutional provisions the purpose of which can only be achieved through legislative intervention, and in particular some constitutional provisions on social rights. However, it must be recognised that, since individuals do not have direct access to this procedure – which can only be triggered by the President of the Republic and the Ombudsman – its practical relevance is quite limited. The only relevant decision made by the Constitutional court in this matter was the aforementioned Judgement No. 474/2002, which declared the existence of a partial legislative omission regarding the achievement of the unemployment benefits.

More important in practice, even in respect to omissions relating to social rights, is the control of unconstitutionality by action undertaken by the Constitutional Court (both in procedures of abstract control and when deciding the appeals of concrete control undertaken by other courts). This is due to the absence, acknowledged by the Court itself, of a rigid boundary between unconstitutionality by action and by omission (Cases No. 162/2005 and 47/2006). So:

23 G. CANOTILHO, *Direito*, pp. 518-520; J.R. NOVAIS, *Direitos*, pp. 350-358; J.P. SILVA, *Dever*, pp. 167-236.

a. In the so-called relative omissions – where a constitutional imperative on social rights is fulfilled by the legislator, but in breach of the principle of equality, including certain classes of people but discriminating against others – the Court has declared part of those legal norms unconstitutional "insofar as they do not include" or "while excluding" a specific group of recipients. The Court, in this line, delivered a number of *additive judgements* on pensions for accidents at work (Judgement No. 12/88), elderly pensions (Cases No. 191/88 and 231/94) and salaries of civil servants (Judgement No. 254/2000).
b. In other cases, the control of possible unconstitutional legislative omissions – total or partial ones – is undertaken by the Court when ruling on laws that revoke, in whole or in part, prior laws that are important to the achievement of social rights. A law that eliminates or reduces the level of achievement of social rights – or that simply reduces the amount of benefits that were previously provided – is controlled within the action procedure. Nevertheless, the question to be answered is whether or not a situation of unconstitutional omission is created by this new law. In this line, the Constitutional Court declared as unconstitutional the elimination of the right of workers to participate in the management of public enterprises (Judgement No. 47/2006) and the reduction of the personal scope of application of the "minimum subsistence income", when it was transformed into "social integration income" (Judgement No. 509/2002). On the contrary, the Court has not declared as unconstitutional the law abolishing (just for the future) the system of subsidised credit for home buying – with the argument that the law contained other support mechanisms for facilitating the access to housing (Judgement No. 590/2004). Nor has the Court declared as unconstitutional a law repealing some administrative sanctions for violation of certain labour rules (Judgement No. 269/2010).

**27.** On the other hand, those who argue that the concrete review of constitutionality – prescribed in Article 204, under which courts should not apply, in their decisions, norms they find to be unconstitutional – also extends to the norms implicit within the unconstitutional legislative omissions end up hugely reinforcing the practical justiciability of social rights.[24]

Under this guidance, the courts may grant legal protection to the social right of the appellant in the *sub-judice* case – since they are allowed to fill legal gaps and to judicially develop the law – even though such protection may be incomplete or transitory. Specifically, the courts may, without jeopardising the freedom of the legislator to regulate these matters in general and abstract terms – and even putting pressure on him to do it – grant the applicant some guarantees, until the omission is duly resolved:

a. the right to minimum revenue (e.g., the right to minimum income for social integration);

24 J.P. SILVA, *Dever*, pp. 195-236.

b. the right to the essential content of a particular social guarantee (e.g., the right to basic health care in an emergency situation);
c. the right not to be arbitrarily excluded from the access to certain social rights, compared to other categories of persons (e.g., the right to be admitted in a particular school or the right to unemployment benefits);
d. the right to compete, in accordance with a fair and equitable procedure, for (obviously scarce) benefits arising from social rights programs (e.g., the right of access to certain university courses, subject to *numerus clausus*);
e. the right not to be unjustifiably deprived from a social right that is to be attained according to market rules (e.g., the right not to be dumped from a rented dwelling with no valid reason);
f. the right not to be deprived of the salary, through taxation or judicial execution, when that revenue is essential for the worker's (and his family's) life (e.g., the right to the unseizability of the national minimum wage).

Therefore, the lack of legislative implementation of social rights naturally renders full legal protection more difficult. However, that does not mean that, in such cases, those rights become unjusticiable.

**28.** It follows from the above that the Constitutional Court's most important decisions on social rights are:
a. Judgement No. 474/2002, where the Constitutional Court declared the existence of an unconstitutionality by omission, to the extent that the legal system of unemployment allowance did not include the unemployed coming from the public sector, but only the unemployed who were previously under private employment contracts. Although public officials have benefited of almost absolute job stability in the past, from the moment that public authorities deprived those working relations of that stability, using ordinary private employment contracts, the unemployment benefits had to cover all kinds of workers, regardless of their origin.
b. Judgement No. 509/2002, where the Court declared the law that transformed the "guaranteed minimum income" into the "social integration income", finding the immediate repeal, without replacement, of the previous regime, unconstitutional to the extent that young people aged between 18 and 25 lost the right to a minimum of subsistence, which guaranteed them a decent life. The Court based its decision not only on the right to social security, but also on the principle of human dignity.
c. Judgement No. 862/2013, where the Constitutional Court judged as unconstitutional, for breach of the principle of protection of legitimate expectations, a law that cut, with immediate effect – because of the imbalance of Portugal's public accounts – 10% of the pensions paid by the social security subsystem of public employees (considered to

be more favourable than the general social security scheme). The Court held that, although the actual amount of each pension that is being paid is not untouchable, its reduction could only be accepted as part of a structural reform that would ensure the sustainability of social security as a whole, undertaken in a gradual manner and with respect for the principles of equality and solidarity between generations – something that did not happen with the law in question, which was considered as an isolated measure to reduce public spending.

## 13.7 Institutional Guarantees of Social Rights

**29.** According to Article 23 of the Constitution, the ombudsman is an independent body, elected by a reinforced majority in the Parliament, which is competent to receive complaints from citizens concerning the possible violation (by action or omission) of fundamental rights – rights of freedom and social rights – and to appreciate those complaints with no decision-making power.

When exercising its normal activity, the ombudsman enjoys the right to the co-operation of all administrative entities and the power to issue them formal recommendations, in order to prevent and put an end to any injustices. Furthermore, he holds the power to ask the Constitutional Court for an abstract review of constitutionality, by action or omission of the legislator – which he can do, of course, following complaints from the citizens.

In addition to the ombudsman, though with no reference in the constitutional text, other administrative bodies of an executive or advisory nature play a role in the protection of social rights, such as:

a. the *High Commission for Immigration and Intercultural Dialogue*, whose activity is aimed at ensuring the integration of (legal and illegal) immigrants and the various ethnic minorities;
b. the *Commission for Citizenship and Gender Equality*, which operates against all forms of discrimination and violence against women (e.g., domestic violence, human trafficking) or based on sexual orientation;
c. the *Commission for Equality in Labour and Employment*, which focuses its activity in promoting equality between men and women, in the field of labour relations (e.g., salary position or maternity protection);
d. the *National Board of Education* – an independent agency with advisory functions, whose president is elected by the Parliament. The Board is responsible for providing advice and recommendations on all educational matters, on its own initiative or in response to requests submitted by the Parliament and the government. The Board must also promote the participation of civil society institutions in educational policies.

## 13.8 Social Rights and Comparative Law

**30.** The area of influence of the 1976 Portuguese Constitution – on social rights, as well as other topics – extends essentially to the Community of Portuguese-Speaking Countries (CPLP), whose Member States are Brazil, Angola, Mozambique, Cape Verde, Sao Tome and Principe, Guinea-Bissau and East Timor.

One can even speak of the recent formation of a Lusophone constitutionalism, where the 1976 Portuguese Constitution – historically, the first among the constitutions which are currently in force to be written in Portuguese – has significant influence over the others.[25] In some cases – as it happened with Cape Verde, Sao Tome and East Timor –, the actual constitutional text is very similar to the text of the Portuguese Constitution. Others, however, such as the Angolan and the Brazilian Constitutions, have great autonomy *vis-à-vis* the Portuguese Constitution, but were nonetheless evidently influenced by it.

One of the most characteristic features of this Portuguese-speaking constitutional family is precisely the express provision of social rights in a catalogue that – except in the Guinean Constitution – is autonomous within the larger fundamental rights catalogue. In some cases, the social rights catalogue is divided into two parts: a more subjective part (under the name of "social rights" or "economic, social and cultural rights") and a more objective one (amongst the fundamental principles or in matters of economic, social and cultural organisation of the State). The fact that other Lusophone Constitutions – except the Constitutions of Cape Verde, Mozambique and Guinea-Bissau – provide a judicial procedure of abstract control of unconstitutionality by omission – to which the Brazilian Constitution adds the figure of "court injunction", allowing the concrete control (and filling) of those omissions – is also noteworthy.

Thereby:

a. the Angolan Constitution (2010) prescribes social rights in Articles 76 to 88 and the control of unconstitutionality by omission in Article 232;
b. the Brazilian Constitution (1988) basically lists social rights in Article 6, prescribes workers' rights in Articles 7 to 11 and regulates in a more detailed fashion other social rights in articles 193 to 230, under the title "social order". The judicial control of legislative omissions is described in Articles 5, LXXI, 102, I and II, and Article 103 IX;
c. the Constitution of Cape Verde (1991-1999) establishes the freedoms of workers in Articles 60 to 66, and other economic, social and cultural rights in Articles 67 to 89;
d. the Constitution of Guinea-Bissau (1996) enshrines social rights primarily in Articles 15 to 17 and then, with regard specifically to workers' rights, in Articles 45 to 49;

25 RUI MEDEIROS, *Constitucionalismo de matriz lusófona: realidade e projeto*, Lisboa, 2011, pp. 36-42.

e. the Constitution of Mozambique (1990) contains a chapter on economic, social and cultural rights – Articles 82 to 95 – and regulates the remaining rights of this nature under the name "social organisation", in Articles 112 to 125;
f. the Constitution of Sao Tome and Principe (2003) regulates the economic, social and cultural rights in Articles 42 to 56, and the review of unconstitutionality by omission in Article 148;
g. finally, the Constitution of East Timor (2002) regulates social rights in Articles 17 to 21 and Articles 50 to 61, dealing with the legislative omissions in Article 151.

# 14 Social Rights in Romania

*Bianca Selejan-Gutan*[*]

## 14.1 Social Rights in National Legal Scholarship

*What are the most important questions of social rights protection discussed by the national legal scholarship?*

The main issues which have raised the interest of the national scholarship in this field were the effects of the economic and financial crisis on social rights, the justiciability and the effectivity of judicial remedies, as well as the national system of social protection, but this more specifically within the labour law scholarship.

## 14.2 Constitutional Protection of Social Rights

*Does the national Constitution of your country provide for protection of social rights?*

The Romanian Constitution sets forth that Romania is a "social state", in a provision having a status of principle – Article 1 para. 3 – but with a quite imperative wording: "Romania *is* a state based on the rule-of-law (…) and a social state". The principle so-worded is completed thereafter by other constitutional provisions specific to the consecration of the social state and inspired by other constitutions, but also by international social-economic rights instruments, without, however, stating the corresponding obligations: the right to work, the right to health care and protection, the right to education etc.[1] The constitutionalisation of the social state, expressly or impliedly done by most European states,[2] means, inter alia, to confer social rights an equal status with civil and political rights,

* Professor of Constitutional Law and Human Rights Law, Lucian Blaga University of Sibiu, Faculty of Law.

1 I. Muraru, S. Tănăsescu (coord.), *Constitutia României. Comentariu pe articole*. [Romanian Constitution. A Commentary Article by Article], C.H.Beck, Bucharest, 2008, p. 10 (I. Muraru, S. Tănăsescu); for the analysis of social rights in Romania: pp. 303-329 (B. Selejan-Gutan), 374-421 and 478-479 (A. Popescu), 459-477 (Fl. Baias, M. Tomescu), 482-509 (M. Tomescu).

2 Express provisions: Article 20 of the German Fundamental Law, Article 1 of the French Constitution, Article 1 §1 of the Spanish Constitution, Article 2 of the Portuguese Constitution, Article 25 of the Greek Constitution a.s.o. Indirect consecration: Belgium, Italy, the Netherlands etc.

firstly by recognizing their justiciability. In other words, in a social state, the social and economic policy is not an absolute apanage of the legislator, but is limited by the welfare of the individual, constitutionally quantified in the existence and benefit of an entire set of social rights.[3]

### *What are the rights protected?*

As in all Eastern European countries, economic and social rights were cherished rights under the communist rule (with the notable exception of the right to property), occupying privileged positions both in the constitutional texts and in practice, on ideological foundations and within the centralised economic system.

After the fall of the regime, following the international and European trends (almost inexistent during the inter-war period of democracy), the economic and social rights were maintained in the Constitution, but with a different position and in a different context. Although not expressly mentioned, the *status positivus* rights were given a secondary level of protection, all constitutional texts establishing these rights in a circumstantiated manner, i.e. making reference to subsequent legislation (e.g. "the state education is free of charge, according to the law", a disposition which was interpreted as allowing state universities to introduce tuition fees for a number of places). The Constitution provides for the main social and economic rights: right to education, right to medical assistance, right to work and to social protection, right to strike, right to property and right to inherit property and the right to a healthy environment. A purely economic right, newly introduced in 2003, is the "economic freedom", which guarantees the free access to an economic activity as well as guarantees the existence and benefit of the free economic initiative (however, this right remains mostly void of contents, in the context of tax increases and other burdens and hurdles of potential national and foreign investors).

The so-called "phantom" rights of this category, which benefit from a constitutional regulation but lack almost any substantial guarantees in practice are the right to a decent standard of living (Article 47), the protection of persons with disabilities (formally guaranteed by subsequent legislation, but dramatically disregarded in practice), the protection of children and youth.

As regards the "cultural rights", besides the right to education (with a mixed nature), in 2003, the right of access to culture was included, a wishful-thinking-provision, as long as, with some notable exceptions, the national culture and heritage remained a "Cinderella" of the budget priorities and is respected only in that the authorities abstain from any interference with the free access to cultural values. As for the other obligations, to ensure

3 G. Katrougalos, *Indivisibility of Rights: The Case of the Right to Social Security*, VIII the World Congress of Constitutional law, Mexico City, 2010, available at <www.juridicas.unam.mx/wccl/ponencias/10/184.pdf>.

the preservation of the spiritual identity, the support of national culture, the stimulation of arts etc., these were not visible in the late years' public policies.

*How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family, a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?*

Social rights are mainly individual rights, granted to "all persons". There are also rights from the third generation, like the right to a healthy environment, but granted in an individual tone: "the state recognises the right to each person to a healthy and ecologically balanced environment". Besides the "general" rights, recognised to all persons, there are also rights granted to specific categories: children and youth, persons with disabilities, family-related rights.

The constitutional texts do not make any specific distinctions between nationals and non-nationals in this respect. Article 18 of the Constitution establishes the principle of the general "protection of persons and wealth" of foreign nationals and of stateless persons. Therefore, provided they fulfil the other conditions established by law, these persons are also granted social and economic rights. However, Article 47 (*The Standard of Living*) refers only to citizens when it lists the main elements of this notion: the right to pension, to paid maternity leave, to medical assistance in public health care units, to unemployment aids and to other types of public or private social benefits, established by law, as well as to social assistance measures, according to the law. This provision is, of course, subject to the rule of non-discrimination: if a foreign citizen has contributed to the social insurance system, he/she will have the rights accordingly. The same caveat is valid for the EU citizens who work or reside in Romania.

*How is the debtor of social rights defined? Is it the State, public authorities, public bodies or private bodies?*

When it nominates the "debtor" of social rights, the Constitution usually refers to "the State".

Article 32(4) [The Right to Education]: *The state offers social grants to children and young persons coming from socially disfavoured families (…)*

Article 33(3) [Access to Culture]: *The State must ensure the preservation of the spiritual identity, the support of the national culture, the encouragement of arts, the protection and*

*preservation of the cultural heritage, the development of the contemporary creativity, the promotion of the cultural and artistic values of the country.*

Article 34(2) [The Right to Health Care]: *The State must take measures to ensure the public health and hygiene.*

Article 35 [The Right to a Healthy Environment]: (1) *The State recognises the right to each person to a healthy and ecologically balanced environment.* (2) *The State ensures the legislative framework for the exercise of this right.*

The only text, which provides for obligations upon individuals, is Article 35(3): *Natural and legal persons have the duty to protect and improve the environment.*

Indirect obligations are set forth for employers, by means of regulating the right to work and to social protection of workers, the right to strike and the prohibition of forced labour.

In a more general text, under the title *The Standard of Living*, Article 47 establishes the duty of the State *to take measures of economic development and social protection, able to ensure to citizens a decent standard of living.*

### *What is the content of the rights? What are the obligations of the legislator?*

The Constitution sets forth primarily the "classical" social rights and a few more targeted ones.

*Article 32* – the right to education includes detailed provisions on the main forms of education, the principle of the official language (Romanian) and the gratuity of the public education (subject to other legal provisions). Persons belonging to national minorities have the right to learn and study in their mother tongue, as provided for by law (in regions inhabited by large groups of national minorities, education of all levels is provided in their mother tongue). As more specific rules, the Constitution guarantees the academic autonomy and the freedom of religious education, according to the law.

*Article 33* – the access to culture is a right introduced by the revision of the Constitution, in 2003. The text provides the "guarantee" of this rights and the freedom of each person "to develop his/her spirituality and to have access to the national and universal cultural values". This article is among the few ones which clearly state the obligations of the state: it "must ensure the preservation of the spiritual identity, the support of the national culture,

the encouragement of arts, the protection and preservation of the cultural heritage, the development of the contemporary creativity, the promotion of the cultural and artistic values of the country". However, from the practical point of view, few actions have been actually taken to ensure the respect of this right.

*Article 34* – the right to health protection comprises a general statement of this right ('the right to health protection is guaranteed') as well as a general obligation of the state ("to take measures in order to ensure the public health and hygiene"). The elements of the right are left to specific subsidiary legislation.

*Article 35* – the right to a healthy environment is also a right, which was not included in the original constitutional text, but introduced by the 2003 amending law. There are no specific provisions, besides the obligations set to the state as well as to "natural and legal persons". The State has the obligation to create a legal framework in order to ensure the exercise of this right.

*Article 41* – the right to work is having a less state-oriented wording. It sets forth the "intangibility" of the right to work and the freedom to choose the profession and the place of work. The text also establishes the right to social protection of employed persons, which includes: security and health, the working conditions of women and young people, the establishment of a minimum wage at the country-level, the right to weekly rest, the right to paid annual leave, the regime of work in special conditions and the professional training. Subsidiary legislation is to deal with these issues. The Constitution sets forth the average duration of the working day (8 hours) and the principle of equal pay for equal work. Finally, the right to collective negotiations and the compulsory character of collective conventions are guaranteed.

*Article 42* prohibits forced labour and lists the situations which are not considered forced labour.

*Article 43* guarantees the right to strike of all employed persons, in the conditions set forth by the law. The purpose of this right is circumstantiated: the defence of the professional, economic and social interests of employed persons.

*Article 45* sets forth the only purely economic right – the economic freedom. It was introduced in the Constitution in 2003 and it sets the free access of each person to an economic activity, guaranteeing the free initiative and the exercise of both according to the law. This text reflects a liberal orientation of the economy, but in practice, it is strongly limited by fiscal and other restrictive or overburdening rules and measures.

*Article 47* guarantees the most "utopical" of the social rights – the right to – a "decent standard of living". The State is the main debtor of this right and it is bound to "take measures of economic development, so as to ensure to the citizens a decent standard of living". The second paragraph enumerates the elements of this standard: the right to a pension, to paid maternity leave, to medical assistance in public health care units, to unemployment aid and to other forms of social insurance, as well as measures of social assistance, according to the law.

*Article 48* provides the protection of the family. What is interesting here is the traditional vision on the definition of the family: "founded on the free consented marriage between spouses" and "on the right and duty of parents to ensure the rising, education and instruction of children". The Constitution recognises the religious marriage, but only subsequent to the civil one. It also sets forth the principle of the equality of children out of wedlock with the ones born in wedlock.

Article 49 states the "special protection regime" of children and young people. It is true that the constitutional text provides for the "state allocations" for children, but their actual value is symbolic (less than 10 euro/child/month). State aids for sick or disabled children are provided. The Constitution sets the minimum employment age to 15 years and prohibits the exploitation of children and their use in activities, which would damage their health and morality or might imperil their life or normal development. However, almost no measures are taken against persons or families, which use children as labourers, or as "professional beggars" or begging tools.

Finally, Article 50 provides the special protection of persons with disabilities. Once again, the state has special duties: to ensure the achievement of a national policy of equality of chances, of prevention and treatment of disabilities, with a view to participating effectively of the persons with disabilities in the community life, by respecting the rights of parents and tutors. Although this text is followed by a special legislation, its actual respect is still very low, especially at the public or state level.

*What are the obligations of the administration? What are the obligations of other actors?*

The Constitution does not set specific obligations to the administration. Every piece of subsequent legislation establishes such obligations in all social rights fields. As for other actors, sometimes the beneficiaries of the rights also have specific duties, like the ones emphasised at the right to a healthy environment.

*Does the normative structure of constitutional social rights vary? Is it possible to distinguish different types of constitutionally protected social rights?*

There are certain differences in the normative structure of the constitutionally protected social rights, but not inasmuch as to detect different categories of rights. Some of the texts are more detailed, some comprise only a regulation of principle. All rights are guaranteed as "debt-rights/*droits-créances*", with a strong emphasis on the positive obligations of the state in ensuring their benefit. The right to education, for instance, has a very detailed normative structure, from general issues (degrees of education, official language) to more specific aspects (social grants to unfavoured children, granting of the academic autonomy, freedom of religious education). At the opposite pole are the right to strike (the constitutional text only refers to subsequent legislation), the access to culture (the constitutional text only comprises very general matters of principle). The right to work and social protection has one of the strongest normative structures, prescribing in detail the elements of the general right: free choice of profession and place of work, specific rights to social protection, duration of the working day, equal pay for equal work, right to collective negotiations etc. The right to a healthy environment has a particular normative structure, as it imposes obligations on its beneficiaries as well.

*Is there a constitutional mechanism of protection vis-à-vis the legislator? How does it operate? Are there any instruments that ensure protection against the inaction of the legislator?*

There is the general mechanism of constitutional review of legislation, through the jurisdiction of the Constitutional Court. Insofar as the Constitution imposes specific obligations to the legislation (not only in general terms), the inaction of the legislator might be challenged before the Court.

The Constitutional Court has a limited jurisdiction to review legislation. It may act only upon request, either within the *a priori* review (initiated by public authorities like the President, the Parliament, the ombudsman, the High Court of Cassation and Justice) or within the *a posteriori* review (which is an incidental one), *via* the exception/referral of unconstitutionality, which may be raised before an ordinary court. The ordinary court, upon verification of the referral's admissibility, refers it to the Constitutional Court which is the sole authority allowed to render a constitutionality-related decision.

*How do you evaluate the efficiency of social rights protection offered by the Constitution and the constitutional justice?*

During the recent economic crisis, the Constitutional Court had the occasion to give an answer to these questions and dilemmas.[4] Unlike its counterparts in Germany, Hungary, Latvia, Italy, Portugal or Greece, the Romanian Constitutional Court has not been very effective in its duty to protect social rights. In its Decision 872/2010, the Court based its option to endorse the limitations of the social right to a salary (derived from the right to work) and to a pension (related to the right of property), measures proposed by the Government and endorsed by the Parliament, by the fact that these would only have a temporary character, "in order not to affect the substance of the constitutionally protected right". Moreover, the Court condoned the Government's argument, stating that

> the constitutionality criticism is not real, because, as it results from the mentioned legal text, starting with 1 January 2011, the salaries/indemnities (…) will be restored in the amount before these measures (…). It is an obligation of result imposed by the legislator because, otherwise, the temporary character of the restraining the benefit of the rights would be violated [provided for by Article 53 of the Constitution, n.n.].

As to the foundation of such limitations on reasons of "national security", the Court again endorsed the Government's arguments, placing itself at the limit of the correct interpretation of the constitutional text, because it did not consider the proportionality principle nor the substance of the rights: the limitation measure, in such a case, if applicable (defence of national security) must be the *ultima ratio* measure by which the declared aim could be reached.[5]

However, in an older decision, no. 1414/2009, in the same context of analysing the economic crisis as a reason to limit the right to work, the Court argued that "in a democratic society, the rule is the one of the unlimited exercises of fundamental rights and freedoms, limitations being provided for as exceptions, if there is no other solution to protect values of the state which are endangered.[6] It is the task of the state to find solutions to counterweigh the effects of the economic crisis, by an adequate economic and social policy. Reducing the earnings of the staff from public institutions and authorities cannot be, on a long-term basis, a proportionate measure with the situation invoked by the author of the bill. On the

4 See also B. Selejan-Gutan, *Social and Economic Rights in the Context of the Economic Crisis*, in (2013) 1 Romanian Journal of Comparative Law, pp. 139-158.

5 See E.M.Nica, Note/Notă to Decision 872/2010, in Pandectele Romane no. 9/2010, p. 104. Here, another issue could be raised: can financial crisis be considered as a 'national security' reason within the meaning of human rights-derogation clauses?

6 See also Decision no. 217/2003.

contrary, the eventual legislative intervention in the sense of extending these measures may determine effects contrary to those envisaged, by troubling the functioning of the public institutions and authorities". It is obvious that the Court tried to apply proportionality, but did not follow this path in its future decisions.

Beyond the inconsistency of the Constitutional Court jurisprudence (the Court is however consequent from an argumentative point of view, but not by the firm way in which it emphasised the temporary character of the measures and the necessity that they stay this way), it remains to be established which is the obligation of the legislator – primary or secondary/delegated – in this situation. And, moreover, what happens if the temporary character is not respected? The restoration of the salaries as they were before the cuts never actually happened.

More relevant and coherent in this matter is the response of Romanian *ordinary courts*, especially the decisions of the High Court of Cassation and Justice in solving appeals in the interest of the law regarding salary rights litigations: Decision no. 20 of 20 September 2009,[7] mentioned in *Zelca a.o. v. Romania*, or Decision 20 of 17 October 2011[8] on the cuts of the holiday benefits of teachers, by which the High Court achieved the unification of a divergent jurisprudence of domestic courts. In the last decision mentioned above, the Supreme Court made an ample research of the ECtHR case law on the right of property and salary rights, citing cases like *Vilho Eskelinen v. Finland*, *Kechko v. Ukraine*, *Mureşanu v. Romania* etc. The final conclusion of the High Court was that, on one hand, potential salary rights are not "possessions" protected by Article 1 Protocol 1 and, on the other hand, even if they amounted to possessions or "legitimate expectations", the 25% cuts would not have been an interference of the "deprivation of property" kind. As a consequence, being a measure within the state's margin of appreciation in limiting the right of property, the High Court concluded that it must only check the fair balance proportionality test, but without taking into account the obligation of the state to give any compensation, considering that, in the absence of a deprivation of property, this obligation is not active. The High Court's reasoning does not show, however, what kind of interference with the right to property is concerned (of the three types identified by the European Court's case law: interference with the substance of the right, deprivation of property and control of use of property[9]).

7 Official Journal (Monitorul Oficial), Part I no. 880 of 16 December 2009.
8 Official Journal (Monitorul Oficial), Part I no. 822 of 21 November 2011.
9 B. Selejan-Guțan, Protecția europeană a drepturilor omului [European Protection of Human Rights], 4th edition, C.H.Beck, Bucharest, 2011, p. 222 et seq.

However, the Constitutional Court has a quite rich case law in defining the scope of social rights protection. Thus, the Court used the solidarity principle to justify the compulsory character of the contributions to the national health insurance scheme,[10] it included sports in the category of national interest activities, as a part of the positive obligation of the state to ensure the right to health protection,[11] it stated the limiting the right to property on forest lands, by criminalizing unlawful deforesting,[12] it recognised the principle of legal certainty as regards work relationships,[13] it established that social protection measures must be taken by way of imperative rules,[14] it included the right to housing into the contents of the right to a minimum standard of living, making reference to the international documents on human rights (UDHR, ICESCR).[15]

## 14.3 Protection of Social Rights under Other Constitutional Rules and Principles

*Are there other constitutional or jurisprudential principles used as tools for the protection of social human rights?*

The Constitutional Court used various principles inspired mainly by the case law of the European Court of Human Rights, in adjudicating social rights-related cases. The protection of *legitimate expectations* principle, taken from the interpretation of the European Court of Human Rights, was used in adjudicating cases referring to the right to a pension:

> the State must pay the amount of the pension established according to the previous legal provisions, if it is more advantageous. This is a protection measure of the persons who benefit from pensions within the meaning of Article 47 para. 2 of the Constitution, being, in the same time, a legitimate expectation of the insured person, based on the legal provisions in force with regard to the award and payment of a certain amount of the pension. The difficulties of the state social insurance budget may not be opposed to the right to a pension in the sense of decreasing, even temporarily, the amount of pensions. The constitutional right to a pension be affected by the bad management of the abovementioned budget by the state.[16]

10 Decision no. 775 of 12 May 2009.
11 Decision no. 328 of 23 March 2010.
12 Decision no. 114 of 11 March 2004.
13 Decision no. 1039 of 9 July 2009.
14 Decision no. 356 of 5 July 2005.
15 Decision no. 256 of 20 March 2007.
16 Decision no. 872 of 25 June 2010.

As for the principle of the *protection of vested rights*, the Constitutional Court used it in the same context of the right to a pension: "the amount of the pension, established according to the contributivity principle, becomes a vested right; therefore, its mitigation cannot be accepted even on a temporary basis. By the amounts paid as contributions to the social insurance budget, the person won the right to receive a pension in the amount resulted by applying the contributivity principle; thus, the contributivity, as a principle, is of the essence of the right to a pension and the derogations, even temporary, from the State's obligation to pay the pension in the amount resulted from applying this principle affects the very substance of the right. The ECtHR, in the cases *Muñoz Díaz v. Spain* and *Maggio a.o. v. Italy*, reiterated its jurisprudence on the fact that the rights arising from the social security system are patrimonial rights, protected by Article 1 of the first Protocol to the Convention."[17] Furthermore, the Court stated that there is no constitutional right to a "service pension", therefore, as regards the supplements granted with this title by the state, it cannot be sustained that it is a future right vested *ad aeternam*.[18]

The principle of the *precision of legislation* was primarily invoked by the Constitutional Court with regard to the *right to access to justice and to a fair trial* (*due process*), but it had its reverberations upon the social rights protection. Thus, according to the Court, "the legality principle implies a positive obligation of the legislator to provide, by clear and precise texts, the clarity of the law being evaluated in the light of the normal legal experience, and the rule must be predictable and accessible. Even admitting that, due to the general character of laws, their wording cannot have an absolute precision, the requirement of predictability can be fulfilled by a coherent and predictable judicial interpretation."[19] The Constitutional Court repeatedly refers to the case law of the European Court of Human Rights:

> the case law of the ECtHR showed that the law must fulfill certain qualitative requirements, among which there is predictability (…). In this regard, the European Court noticed that it can be considered a 'law' only a rule with sufficient precision to allow the citizen to control his or her behaviour. By appealing to specialised counsel, the citizen must be capable to predict, in a reasonable measure, the consequences which may result from a certain act.[20]

17 Decision no. 940 of 7 July 2011.
18 Decision no. 1286 of 29 September 2011.
19 Decision no. 79 of 27 January 2011.
20 Decision no. 527 of 19 April 2011.

In more general terms, the Court subjected the respect of free access to justice to clarity and precision: "free access to justice, consecrated by Article 21 of the Constitution involves, *inter alia*, the adoption of clear rules of procedure".[21]

The Romanian Constitution expressly states the principle of non-retroactivity of legislation, in its Article 15 para. 2. The Constitutional Court referred to this principle in social rights-related cases, for instance, with regard to the right to pension: "the legislator may not change for the past – increasing or decreasing – the amount of pensions legally paid every month."[22]

The principle of equality and non-discrimination, inscribed in Article 16 of the Constitution, was used by the Constitutional Court to weigh norms related to the equality between men and women as regards the age of retirement,[23] as well as with regard to the removal of certain categories of persons from the benefit of a special kind of social protection measure, i.e. the parental leave.[24]

## 14.4 Impact of the International Protection of Social Rights

*Did your state ratify international treaties that pertain to social rights? Are they directly applicable in your domestic legal order?*

Some of the main treaties ratified by Romania in the field of social rights are:

### *14.4.1 ILO Fundamental Conventions*

Convention no.29 of 1930 – the Forced Labour Convention

Convention no. 87 of 1948 on Freedom of Association and Protection of the Right to Organise

Convention no. 100 of 1957 on the Equality of Remuneration

Convention no. 98 of 1949 on the right to organise and collective bargaining

21 Decision no. 647 of 5 October 2006.
22 Decision no. 1286 of 29 September 2011.
23 Decision no. 1237 of 6 October 2010.
24 Decision no. 90 of 10 February 2005.

### *14.4.2 UN Conventions*

The International Covenant on Economic, Social and Cultural Rights, 1966.

### *14.4.3 Council of Europe Conventions*

European Social Charter (revised), ratified on 7 May 1999. Romania did not accept the collective complaints clause.

### *14.4.4 European Union*

As a member of the European Union, Romania is under the obligation to apply the Union's law related to social rights, which is especially active in the field of nondiscrimination.

As for the direct application of the other treaties, Article 11 of the Constitution sets forth the fact that ratified international treaties are a part of the domestic law of the country. Moreover, Article 20 of the Romanian Constitution establishes the priority of the international law of human rights over domestic law. This text provides two precedence clauses: one for the constitutional dispositions and one regarding the other domestic legal provisions. The former are to be interpreted and applied according to the Universal Declaration of Human Rights, with the Covenants and other treaties to which Romania is a party, whereas the latter are to be removed from application, in case of conflict with international human rights provisions. The 2003 revision added a maximisation clause as regards the precedence over infra-constitutional legislation: international law will be given priority only if the national legislation does not offer a more favourable situation. This exception – an application of the *lex mitior* principle – is logical, as it avoids the artificial application of the priority of international law, to the detriment of the original purpose of the rule: the protection of the individual. The secondary constitutional legislator preferred an express provision to the trust in a logical and teleological interpretation of the courts (the exception might very well be deduced from the spirit, meaning and purpose of the text itself), because of the excessive formalism of Romanian courts, which were presumed thus to be capable of giving priority to international law even to the detriment of the individual.

*Did these treaties have an impact on the national legal system? Did they trigger any changes in national legislation or practice?*

Many national legal provisions are the result of applying international law, especially EU law, but also the European Court of Human Rights case law.

*Does the case law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights? In particular, did the case law of the European Court of Human Rights and other regional human courts have an impact on national law in the field of social rights?*

I would not say that international law of human rights by itself has had a significant impact on Romanian national legislation on social rights in particular. There were some influences, especially the right to education or the protection of children, but, in the pure social field, the EU law was more prominent in influence. To no extent have international bodies protecting social rights imposed any changes in legislation. Romanian authorities and courts have been hardly sensitive to the case law of the European Court of Human Rights in the matter and pay little attention to other international entities and bodies.

*What are the most important social rights cases brought from your country to international rights protecting bodies?*

The most important cases were brought before the European Court of Human Rights, as Romania has never ratified the other international instruments allowing complaints in the actual field of social rights (at the UN or Council of Europe levels).

In *Mureşanu v. Romania* (2010), a case on salary cuts and on establishing by judicial decision of the payment of the salary differences, the European Court showed that this judicial decision which ordered the state to pay the difference between the applicant's wages before the cuts and the present salary, conferred the applicant a legitimate expectation to acquire that sum of money. The Court held that this judicial decision represents a "possession" within the meaning of Article 1 (see also *Gavrileanu v. Romania*, 2007) and that, although the authorities must execute judicial decisions, in this case by paying the mentioned difference, the decision in the case had remained unexecuted until the moment of the Strasbourg litigation. However, the decision was a valid one, no annulment or modification proceedings being initiated. Therefore, the non-execution determined a violation of Article 1 of Protocol no. 1.

I must also mention here some of the more recent inadmissibility decisions in applications against Romania, originated in domestic litigations against the salary cuts of budgetary staff, starting with 2010. In *Zelca a.o. v. Romania*, pre-cited, the Court said that "in the present case, the alleged salary rights cannot be seen as having a sufficient basis in the national jurisprudence, as long as the national courts' interpretation in the matter was divergent. Moreover, the decision of the HCCJ of 21 September 2009 in appeal in the

interest of the law confirmed that public servants did not have the alleged rights, interpretation which led subsequently to rejecting the applicants' appeals".

Future earnings cannot be considered "possessions" unless they were already gained or there is a concrete obligation of payment. However, in some circumstances, a "legitimate expectation" to acquire a possession may benefit from the protection of Article 1, e.g. when there is an established case law of national courts, which would confirm the existence of the goods.[25] One cannot consider that there is a legitimate expectation when there is a dispute on the interpretation of national law and the applicants' requests are rejected by national courts.

In 2011, the Court also declared inadmissible the applications *Felicia Mihăieș v. Romania* and și *Adrian Gavril Senteș v. Romania* (decisions of 6 December 2011). Here, the applicants had invoked only Article 1 of Protocol no. 1 against the 25% cuts of the salary amount. The Court again stated that, according to its jurisprudence,[26] Protocol no. 1 does not guarantee a right to receive a salary in a certain amount: "a debt can only be considered a patrimonial value within the meaning of Article 1 if it has a sufficient basis in internal law, for instance, when it is confirmed by a well-established internal case law". In the present cases, the Court included in the margin of appreciation of the state the salary-cutting action showing that, as long as domestic courts did not recognise the applicants' right, it cannot be considered "possession" within the meaning of the invoked article.

It is interesting in these decisions that, beyond the concluded inadmissibility, the Court felt the need to make a deeper analysis touching the merits of the cases, showing "what would have happened if…" the applications were considered admissible. If there was an interference with the right to property, it would have been provided for by law and would have had a legitimate aim ("to protect the fiscal balance between public expenses and revenues in a state confronted with an economic crisis situation"). In these circumstances, the national authorities being better placed, in the classical wording of the Court, to determine the necessity of a public interest aim, the European judge must therefore respect the way in which the national legislator decided to reach that legitimate aim, "with the exception of the case when its decision lacks a reasonable basis". By applying the "fair balance test" between the different interests in case, the Court stated that the incriminated measures

25 ECtHR, *Kopecký v. Slovakia* (2004).
26 ECtHR, *Vilho Eskelinen a.o. v. Finland* (2007), *Kjartan Asmundsson v. Iceland* (2004).

> did not determine the applicants to support a disproportionate and excessive burden, incompatible with the right to respect of one's possessions (…). The Romanian state did not exceed its margin of appreciation and did not break the fair balance between the general interest of the community and the protection of the fundamental rights of the individual.

In order to better understand the implications of these decisions in domestic law, I must say that, like in *Zelca a.o.*, the Court did not evaluate on the merits the domestic courts' judgements, nor did it endorse their interpretations or those of the Constitutional Court, in the existing jurisprudence, as it is not within its jurisdiction to do so. By its explanations, the European Court only evaluated the facts through the prism of its existing jurisprudence and strictly on the cases, which were the object of the applications. As a consequence, the Court cannot be prevented, in the future, from declaring admissible an application raised from a similar state of facts, but in which there would be involved a judicial decision given before October 2011 and where to declare even the violation of the right of property, like it did in *Muresanu* case, cited above.

## 14.5 Social Rights in Ordinary Legislation

*To which extent does the ordinary legislation in your country ensure the protection of social rights? Is this legislation in conformity with the national Constitution and the international instruments ratified by your country?*

Romania has an extensive body of legislation in the field of social rights, which includes statutes and secondary legislation, in particular fields such as: labour security and health (transposing CEE Directive 89/391), equality of chances, social inclusion, social assistance, housing-related laws, collective negotiations, collective labour conflicts, protection of children, protection of persons with disabilities. These legal provisions are applied by a whole division of state institutions with bombastic names: the Ministry of Labour and Family Protection, the National Agency of Payments and Social Inspection, the National Agency for Equal Opportunities Between Men and Women, the National Authority for Persons with Disabilities, the National Agency for Roma people, the National Authority for the Protection of Children a.s.o. However, despite the abundance of norms and institutions, the actual level of protection is rather low. For instance, the amount of the state allocation for children over 2 is 9 euro/month. The protection of persons with disabilities and of Roma people (the field of social inclusion) weighs the burden almost exclusively on NGOs.

*Are there any original legislative tools or mechanisms of protection of social rights created in your country?*

Even though it is not an entirely original mechanism, the Romanian Constitution established the Economic and Social Council, of French inspiration but tailored to the Romanian constitutional system, as a "consultative organ of the Parliament and of the Government in the fields established by its organic law" (Article 141 of the Constitution). Although introduced in the constitutional text in 2003, the institution was actually established in 1997. In 2011, its legal status was regulated by some articles included in the Law on social dialogue, and only since 2013 it has again a specially dedicated organic law.[27] Even though it is a more "civic and social" establishment rather than a political one (due to its consultative nature), the ESC may act in the field of social rights protection (those labour-related rights), as the trade unions are represented equally in its structure. The purpose of the Council is the achievement of a "social dialogue" at national level, between employers, unions and government, with a view to achieve a climate of stability and social peace. It also has a competence to ensure the conformity of the Romanian legislation with the international labour law, by issuing "advisory acts" on proposed legislation in the field. However, its actual involvement in social rights-related issues is quasi-inexistent so far. In most of its advisory acts (which are not proper "advisory opinions" as in most of the cases they do not include a reasoning, just the word "favourable" or "unfavourable") the ECS rubberstamped the Government's legislative drafts.[28]

## 14.6 Justiciability of Social Rights

*Are social rights considered justiciable in your country? To which extent?*

According to the Constitution, there is no difference between civil and political rights and social rights from the point of view of justiciability. However, the specificity of social rights and their dependence on state action and resources places them on a more vulnerable position by reference to the other rights.

27 Law no. 248/2013 on the organisation and functioning of the Economic and Social Council.

28 See <www.ces.ro/>. For instance, in 2010 (a significant year for the economic crisis, when most of the restrictive measures in the field of social rights were adopted), the ECS advised as follows: out of 17 Government legislative initiatives, 14 were favourably advised; out of 25 Government Ordinances drafts (delegated legislation), 22 were favourably advised; out of 26 Government Decisions drafts, 22 were favourably advised. On the contrary, out of 62 legislative proposals (i.e. initiated by the parliamentarians), only 4 were favourably advised.

*What is the role of the judge? What are the practical effects of such justiciability? What are the most prominent examples of social rights cases successfully brought to courts by the litigants?*

Social rights have made the object of judicial actions especially in the years of the economic crisis. The most prominent were salary-related cases. For instance, in 2008, the Parliament enacted a law, which increased by 50% the salaries in the field of education. However, the Government refused to apply the law, on austerity grounds. In the following years, teachers all over the country filed actions against their employers and won the cases in courts. The High Court of Cassation and Justice even gave a RIL decision (appeal on grounds of law, a generally applicable decision) in which it ruled that the courts must apply the mentioned law and grant the salary raises. However, the Government decided to effectively pay the due amounts in several instalments, extended on a period of 5 years. Thus, in practice, the gain or redress is minimal. There would be of course the possibility to address the ECHR, but no case has been filed yet, to my knowledge.

## 14.7 Institutional Guarantees of Social Rights

*Which national bodies are the institutional guarantors of social rights? Are there any specific bodies created especially for the protection of social rights? What are their powers?*

The Romanian institutional system in the field of social protection and social rights is quite a dense one. There are many institutions with general and specific competence, but sometimes the overlap and the over-regulation generates a lack in effectiveness. The institutions may be divided in several categories: institutions related to the labour security and health, institutions related to the protection of children and family, to the protection of persons with disabilities, institution related to social protection. It is impossible here to list all of them, but, as an example, I could mention the Labour Inspection (a specialised institution, subordinated to the Ministry of Labour, which ensures the application of the legislation on health and security of labour), the Child Protection Directorate (an institution subordinated to the same ministry), which ensures the protection of the rights of the child a.s.o.

From a more general standpoint, the Ombudsman (*Avocatul Poporului*) has three out of four deputies specialised in the protection of social rights or related rights: the deputy in charge with human rights, equality of chances between men and women, religious organisations and national minorities, the deputy in charge with children's rights, family rights,

young persons, retired persons and of persons with disabilities and the deputy in charge with property rights, labour, social protection and taxes.

*How do you evaluate the effectiveness of these national bodies?*

Unfortunately, the effectiveness is very reduced, due to various factors: lack of funds, lack of personnel, slow procedures, ineffective cooperation with NGOs. Especially in the health protection system this ineffectiveness is very obvious (including the health security system), but also as regards other social rights (including children's rights and rights of persons with disabilities).[29]

## 14.8 Social Rights and Comparative Law

*Did your national legal system influence foreign legal systems in the area of social rights?*

No.

*Did other foreign legal systems influence your national legal system in the area of social rights? Can you give examples of provisions, principles or institutions (in the area of social rights) borrowed from other legal systems?*

The concept of "social state" was borrowed from the German system and introduced in the Romanian Constitution in 1991. Most of the social rights-related provisions in the Constitution are inspired either by foreign constitutions and/or by international conventions. The Economic and Social Council was borrowed from the French Constitution.

*Do your domestic courts rights quote judgements or legislation from other jurisdictions when adjudicating on social rights?*

Not really, maybe only from the European case law. The judicial dialogue is very reduced at the constitutional level and practically inexistent at the ordinary judge level, in Romania.[30]

29 See, for a critical presentation of the general situation of these rights in Romania, ECtHR, *Valentin Campeanu v. Romania*, Grand Chamber judgment of 17 July 2014.

30 E.S.Tanasescu, Șt. Deaconu, *Romania: Analogical Reasoning as a Dialectical Instrument*, în T. Groppi, M.C. Ponthoreau (eds.), The Use of Foreign Precedents by Constitutional Judges, Hart Publishing, 2013, pp. 321-345.

# 15 Social Rights in the Republic of South Africa

*Letlhokwa George Mpedi*[*]

## 15.1 Introduction

This chapter provides a general overview on the protection of socio-economic rights in the Republic of South Africa (hereinafter South Africa). It builds on the responses provided in the questionnaire for national rapporteurs on socio-economic rights for the International Congress of Comparative Law, which was held in 2014 in Vienna, Austria. For the purpose of this chapter, the protection of socio-economic rights in South Africa will be discussed under the following headings: socio-economic rights in national legal scholarship, constitutional protection of socio-economic rights, impact of the international protection of socio-economic rights, socio-economic rights in ordinary legislation, justiciability of socio-economic rights, institutional guarantees of socio-economic rights as well as socio-economic rights and comparative law.

## 15.2 Socio-economic Rights in National Legal Scholarship

Initially, there was a debate as regards the inclusion of socio-economic rights in the Bill of Rights and enforceability of such rights in South Africa.[1] This has since been settled in the *Certification of the Constitution of the Republic of South Africa* case where the Consti-

* Professor and Director: Centre for International and Comparative Labour and Social Security Law (CICLASS), Faculty of Law, University of Johannesburg, Republic of South Africa.

1 See, for example, K. Yigen, 'Enforcing social justice: Economic and social rights in South Africa', *The International Journal of Human Rights*, Vol. 4, No. 2, 2007, pp. 16-19; S. Liebenberg, 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?', *Law, Democracy & Development*, Vol. 6, No. 2, 2002, p. 162; and C. Heyns and D. Brand, 'Introduction to socio-economic rights in the South African constitution', *Law, Democracy & Development*, Vol. 2, No. 2, 1998, pp. 153-156. According to Scott and Macklem (C. Scott and P. Macklem, 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South Africa constitution', *University of Pennsylvania Law Review*, Vol. 141, No. 1, 1992, p. 17), 'justiciability' refers to 'the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect or fulfil a person's right'.

tutional Court found that they are justiciable.[2] There are a number of Constitutional Court cases to support this stance. Legal scholarship in South Africa does not question the need to protect socio-economic rights. In addition, socio-economic rights are not perceived as different from other types of rights. They are viewed as having the same status as and interrelated with other types of rights in the South African Constitution. Some of the most important questions of socio-economic rights protection discussed in national scholarship are the content of the socio-economic rights and the remedies (to be) issued. Furthermore, the ongoing scholarly discourse on the topic of the growing socio-economic rights jurisprudence of the South African Constitution could be considered as the most original contribution by the national legal scholarship to the study of socio-economic rights.

## 15.3 Constitutional Protection of Socio-economic Rights

### *15.3.1 Protected Rights*

Socio-economic rights are entrenched in Chapter 2, which is the Bill of Rights, of the Constitution. The following socio-economic rights are protected: the right to have access to housing;[3] the right to have access to health care services;[4] the right to have access to sufficient food and water;[5] the right to have access to social security;[6] every child's right to basic nutrition, shelter, basic health care services;[7] and the right to education.[8] The subject

2 The Constitutional Court in *the Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paragraph 78 rejected the objections against the justiciability of socio-economic rights as follows:
"The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise. They based this argument on…[the point] that all universally accepted fundamental rights shall be protected by 'entrenched and justiciable provisions in the Constitution'. It is clear, as we have stated above, that the socio-economic rights entrenched in [sections 26 to 29] are not universally accepted fundamental rights. For that reason, therefore, it cannot be said that their 'justiciability' is required… Nevertheless, we are of the view that these rights are, at least to some extent, justiciable…many of the civil and political rights…will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

3 Section 26 of the Constitution.

4 Section 27(1)(a) of the Constitution.

5 Section 27(1)(b) of the Constitution.

6 Section 27(1)(c) of the Constitution.

7 Section 28(1)(c) of the Constitution.

8 Section 29 of the Constitution.

entitled to protection is outlined in the Constitution. The Bill of Rights uses the phrases "Everyone has a right (of access) to…"[9] and "every child has a right to…"[10]

### *15.3.2 The Debtor of Socio-economic Rights*

The Constitution imposes a number of duties on the state as regards the rights contained in the Bill of Rights. Firstly, the state has a duty to take reasonable legislative and other measures to achieve the progressive realisation of the socio-economic rights.[11] However, this is subject to the availability of resources[12] and the general limitation clause.[13] In addition, the Constitution imposes a duty on the state to respect, promote and fulfil the rights in the Bill of Rights.[14] Moreover, the Constitution outlines the scope of application of Bill of Rights. It states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.[15] Another point to be noted is that in terms of section 8(2) of the Constitution, a provision of the Bill of Right binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

### *15.3.3 The Content of the Rights and Related Obligations*

The Constitutional Court in *Government of the Republic of South Africa and Others v. Grootboom and Others*[16] argued that:

> The determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken

9 See, for example, sections 26(1) and 27(1) of the Constitution.
10 See, for example, section 28(1) of the Constitution.
11 Section 27(2) of the Constitution.
12 *Ibid.*
13 Section 36 of the Constitution.
14 Section 7(2) of the Constitution.
15 Section 8(1) of the Constitution.
16 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

> by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.[17]

It proceeded by pointing out at paragraph 41 that: "The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable".

The legislator, who is bound by the Constitution, has a duty to enact national legislation to give effect to the right of access to information and the right to just administrative action. These rights are important for the enforcement of socio-economic rights. The state has a duty to take reasonable legislative measures towards the progressive realisation of the right to housing,[18] health care, food, water and social security.[19] The administration and other actors have a duty to abide by the Constitution. This duty originates largely from the supremacy of the Constitution;[20] the obligation on the state to respect, promote and fulfil the rights entrenched in the Bill of Rights;[21] and the binding effect of the provisions contained in the Bill of Rights on natural and juristic persons.[22]

### *15.3.4 Distinction between the Different Types of Constitutionally Protected Socio-economic Rights*

It is possible to distinguish between the different types of constitutionally protected socio-economic rights in South Africa. The point is that there are socio-economic rights that are to be protected subject to the availability of resources. This provision is often referred to

17 At paragraph 33.
18 Section 26(1) of the Constitution.
19 Section 27(1) of the Constitution.
20 Preamble, section 1(c) and section 2 of the Constitution.
21 Section 7(2) of the Constitution.
22 Section 8(2) of the Constitution.

as an internal limitation clause or internal qualification.[23] The implication of this is that the rights concerned are subject to the internal limitation clause in addition to the so-called external limitation clause, which is contained in section 36 of the Constitution.[24] The aforesaid rights include the right of access to housing, social security, food and water as well as health care.[25] On the other hand, there are socio-economic rights that are not subject to the availability of resources. A perfect example of such a right is every child's right to basic nutrition, shelter, basic health care services and social services.[26] The implication of the latter group of rights has been summarised as follows:

> Where socio-economic rights in the Constitution are not subject to the internal qualifications…the obligation on the state is much more immediate, and could be compared to the duties imposed by civil and political rights, including duties to directly provide certain benefits. Based on the difference between provisions that do include these qualifications, and those that do not, the different kinds of obligations placed on the state can consequently be distinguished. Where the internal qualifications do not apply, one is dealing with what could be described for the sake of convenience as 'priority obligations', those rights in respect of which they do apply could be described as 'internally qualified right'.[27]

### *15.3.5 Constitutional Mechanism of Protection Vis-à-vis the Legislator*

The South African Constitution does make provision for a mechanism of protection vis-à-vis the legislator. Firstly, it should be recalled that the Constitution is the supreme law of the country. Secondly, law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled.[28] In addition, the Bill of Rights applies to all law, and binds the legislator, the executive, the judiciary and all organs of state.[29] Fur-

23 See C. Heyns and D. Brand, 'Introduction to socio-economic rights in the South African constitution', *Law, Democracy & Development*, Vol. 2, No. 2, 1998, p. 161.

24 Section 36 of the Constitution makes provision or the limitation of rights contained in the Bill of Rights as follows: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation and (d) the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

25 See, section 27(2) of the Constitution.

26 Section 28(1)(c) of the Constitution.

27 C. Heyns and D. Brand, 'Introduction to socio-economic rights in the South African constitution', *Law, Democracy & Development*, Vol. 2, No. 2, 1998, p. 161.

28 Section 28(1)(c) of the Constitution.

29 Section 8(1) of the Constitution.

thermore, the Constitutional Court retains supervisory jurisdiction to monitor and enforce compliance with its order. It should be noted that: "The Constitutional Court (a) is the highest court of the Republic; and (b) may decide (i) constitutional matters; and (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and (c) makes the final decision whether a matter is within its jurisdiction".[30] A 'constitutional matter' is explained as "any issue involving the interpretation, protection or enforcement of the Constitution".[31]

### *15.3.6 The Evaluation of the Efficiency of Socio-economic Rights Protection Offered by the Constitution*

The South African Human Rights Commission has a constitutional duty to, each year; require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.[32]

### *15.3.7 The Most Original Contribution of the National Constitution to the Protection of Socio-economic Rights*

What one can consider as the most original contribution of the Constitution to the protection of socio-economic rights is that it has led to a body of South African constitutional jurisprudence, which refutes the negative views expressed against the enforceability of socio-economic rights. Such views include the argument that enforceable socio-economic rights undermine the rule of law and the separations of powers[33] and would bankrupt the state.

30 Section 167(3) of the Constitution.

31 Section 167(7) of the Constitution. Also see A. van Niekerk, N. Smit, M.A. Christianson, M. McGregor and B.P.S. van Eck, *Law@work*, 3rd edn, LexisNexis, Durban, 2015, p. 51.

32 Section 184 of the Constitution.

33 S. Liebenberg, 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?', *Law, Democracy & Development*, Vol. 6, No. 2, 2002, p. 162.

## 15.4 Protection of Socio-economic Rights under Other Constitutional Rules

There are other constitutional or jurisprudential principles used as tools for the protection of socio-economic rights in South Africa. For example, there is the principle of 'meaningful engagement'.[34] In *Occupiers of 51 Oliviea Road Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and Others*,[35] the court held that the government has a duty to engage meaningfully with residents it evicts from their home about possible steps that can be taken to alleviate their homelessness. Another notable principle is that of 'reasonableness'. In line with this principle, the measure adopted by the state must be reasonable in both conception and implementation.[36]

In addition, there is protection offered by the following constitutional principles:

a. Protection of legitimate expectations: The principle of legitimate expectation is well known in the South African legal system.[37] This is part of the South African administrative law and has been protected by courts long before the advent of the post-apartheid constitutional era.[38]
b. Protection of vested rights: In the decision of *Shilubana and Others v. Nwamitwa*,[39] the Constitutional Court held (at paragraph 47) that:
'The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights'.
c. Precision of legislation, non-retroactivity of legislation: This principle is seen as part of the rule of law, which is enshrined in section 1 of the Constitution. In *President of the Republic of South Africa and Another v. Hugo*,[40] the Constitutional Court pointed

34 See L. Chenwi, 'Meaningful engagement' in the realisation of socio-economic rights: The South African Experience', *South African Journal of Public Law*, Vol. 26, No. 1, 2011, pp. 128-156 and S. van der Berg, 'Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?', *South African Journal on Human Rights*, Vol. 29, No. 2, 2013, pp. 376-398.

35 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).

36 See, for example, *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paragraph 42.

37 See, for instance, M. Pieterse, 'Procedural relief, constitutional citizenship and socio-economic rights as legitimate expectations', *South African Journal on Human Rights*, Vol. 28, No. 3, 2012, pp. 359-379 and M.A. Ikhariale, 'The doctrine of legitimate expectations: Prospects and problems in constitutional litigation in South Africa', *Journal of African Law*, Vol. 45, No. 1, 2001, pp. 1-12.

38 See G. Quinot, 'The developing doctrine of substantive protection of legitimate expectations in South Africa administrative law: Judicial review of administrative action', *South African Public Law*, Vol. 19, No (Special Edition) 3, 2004, pp. 543-570.

39 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).

40 1997 (6) BCLR 708 CC; 1997 (4) SA 1 CC.

out (at paragraph 102) that: "The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law"

d. Due process: Section 33 of the Constitution makes provision for a right to just administrative action. It provides every person with a right to administrative action that is lawful, reasonable and procedurally fair.[41] In addition, every person whose rights have been adversely affected by an administrative action has the right to be given reasons.[42] The Promotion of Administrative Justice Act 3 of 2000 has been enacted to give effect to these provisions. This piece of legislation aims to "…promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action".[43]

e. Other general constitutional principles: Section 32(1) of the Constitution provides everyone with the right of access to information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights. The Promotion of Access to Information Act 2 of 2000 was enacted to "give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights…"[44] The act strives to
'…foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; [and] actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights'.[45]

## 15.5 Impact of the International Protection of Socio-economic Rights

### *15.5.1 Ratification of International Treaties Pertaining to Socio-economic Rights*

South Africa has signed and ratified a number of international instruments dealing with socio-economic rights. These instruments include the International Covenant on Economic,

41 Section 33(1)) of the Constitution.
42 Section 33(2) of the Constitution.
43 Preamble of the Promotion of Administrative Justice Act 3 of 2000.
44 Preamble and section 9(a) of the Promotion of Access to Information Act 2 of 2000.
45 Preamble of the Promotion of Access to Information Act.

Social and Cultural Rights;[46] Convention on the Rights of a Child;[47] African Charter on Human and People's Rights[48] and Convention on the Rights of Persons with Disabilities.[49] The Constitution makes provision for the binding effect of international treaties, including the aforementioned, on the Republic of South Africa. According to section 231(2) of the Constitution, an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. However, there is an exception to this provision in that an agreement of a technical, administrative or executive nature, or an agreement, which does not require either ratification or accession entered into by the national executive, binds the republic without approval by the National Assembly and the National Council of Provinces.[50] Nevertheless, it must be tabled in the Assembly and the Council within a reasonable time.[51]

### *15.5.2 Impact of International Socio-economic Rights Treaties on the National Legal System*

International socio-economic rights treaties do have an impact on the South African legal system and they did trigger (some) changes in national legislation or practice in the past. For instance, section 39(1)(b) of the Constitution obliges a court, tribunal or forum to consider international law when interpreting the Bill of Rights. In addition, the Constitution directs courts to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative that is inconsistent with international law when interpreting any legislation.[52] It must also be said that the legislator is conscious of the international law obligations of the country. This view is informed by the fact that often laws start by acknowledging, in their preamble or objective clauses, the fact that they have been enacted to, among others, give effect to the international obligations of the country. For instance, the preamble of the Children's Act 38 of 2005 provides as follows:

> WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person;

46 Adopted on 3 October 1994 and entered into force on 12 January 2015.
47 Adopted on 20 November 1989 and entered into force on 2 September 1990.
48 Adopted on 27 June 1981 and entered into force on 21 October 1986.
49 Adopted on 12 December 2006 and entered into force on 3 May 2008.
50 Section 231(3) of the Constitution.
51 *Ibid.*
52 Section 233 of the Constitution.

AND WHEREAS every child has the rights set out in section 28 of the Constitution;

AND WHEREAS the State must respect, protect, promote and fulfill [sic] those rights;

AND WHEREAS protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities;

AND WHEREAS the United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance;

AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children;

AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows…

## 15.6 Socio-economic Rights in Ordinary Legislation

There are several laws that have been enacted to give effect to the socio-economic rights entrenched in the Bill of Rights. This is in the spirit of a constitutional duty imposed on the state to take reasonable legislative and other measures to achieve the progressive reali-

sation of each of the right to have access to adequate housing[53] and the right to have access to social security, health care, food and water and housing.[54] Examples of ordinary legislation that give effect to the socio-economic rights contained in the Constitution include the following:

| Ordinary legislation | Socio-economic rights | Relevant section(s) in the Constitution |
|---|---|---|
| Social Assistance Act 13 of 2004 | ☐ Access to appropriate social assistance | ☐ Section 27(1)(c) of the Constitution. |
| National Health Act 61 of 2003 | ☐ Access to health care services | ☐ Section 27(1)(a) of the Constitution. |
| | ☐ Emergency medical treatment | ☐ Section 27(3) of the Constitution. |
| | ☐ Basic health care services for children | ☐ Section 28(1)(c) of the Constitution. |
| National Water Act 36 of 1998 | ☐ Access to water | ☐ Section 27(1)(b) of the Constitution. |
| Housing Act 107 of 1997 | ☐ Access to adequate housing | ☐ Section 26(1) of the Constitution. |
| | ☐ Right to shelter | ☐ Section 28(1)(c) of the Constitution. |
| Children's Act 38 of 2005 | ☐ Right to education | ☐ Section 29 of the Constitution. |
| | ☐ Right to shelter | ☐ Section 28(1)(c) of the Constitution. |
| | ☐ Right to adequate food | ☐ Section 27(1)(b) of the Constitution. |
| | ☐ Right to (basic) health care | ☐ Sections 27(1)(a) and 28(1)(c) of the Constitution. |
| | ☐ Right to appropriate housing | ☐ Section 26(1) of the Constitution. |

## 15.7 Justiciability of Socio-economic Rights

Rights entrenched in the Bill of Rights, inclusive of the socio-economic rights, are fully enforceable.[55] As remarked by the Constitutional Court: "…they cannot be said to exist on paper only".[56] The following persons may approach a court: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own

53 Section 26(2) of the Constitution.
54 Section 27 (2) of the Constitution.
55 Section 38 of the Constitution.
56 *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paragraph 20.

name; (c) anyone acting as a member of, or in the interest of, a group or a class of persons; (d) anyone acting in the public interest and (e) an association acting in the interest of its members.[57] A judge may grant appropriate relief, including a declaration of rights.[58] One of the practical effects of the justiciability of socio-economic rights is that (an) affected person(s) or parties with an interest may approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened.[59] This means that the socio-economic rights are subject to "the 'hard protection' offered by the binding decisions which courts can take".[60]

The following decisions are part of the most prominent example of socio-economic rights cases successfully brought to the Constitutional Court by litigants in South Africa:

| **Constitutional Court Case** | **Socio-economic Right** |
|---|---|
| *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) | Right of access to housing. |
| *Minister of Health v. Treatment Action Campaign* (No. 1) 2002 (5) SA 703 (CC); 2002 (10) BCLR 1075 (CC) | Right of access to health care and access to HIV/AIDS treatment. |
| *Minister of Health v. Treatment Action Campaign* (No. 2) 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 | Right of access to health care and access to HIV/AIDS treatment. |
| *Khosa and Others v. Minister of Social Development*; *Mahlaule and Another of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) | Right of access to social security [i.e. social assistance] by permanent residents. |
| *Occupiers of 51 Oliviea Road Berea Township and 197 Main Street, Johannesburg v. City of Johan-* | Right of access to housing. The government has a duty to engage meaningfully with residents it |

57 *Ibid.* Also see the *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) – a Constitutional Court case where it was found that socio-economic rights are indeed justiciable. The justiciability of socio-economic rights is of great significance in South Africa. As pointed out by Liebenberg (S. Liebenberg, 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?', *Law, Democracy & Development*, Vol. 6, No. 2, 2002, p. 160): "The inclusion of socio-economic rights as *justiciable* rights indicates that the Constitution envisages an important role for the judiciary in their enforcement. The jurisprudence will define the nature of the state's obligations in relation to socio-economic rights, the conditions under which these rights can be claimed, and the nature of the relief that those who turn to the courts can expect. The evolving jurisprudence is not only significant for future litigation aimed at enforcing socio-economic rights, but also in guiding the adoption and implementation of policies and legislation by government to facilitate access to them. It is also important to the monitoring and advocacy initiatives by civil society, the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality" (italics in the original).

58 Section 38 of the Constitution.

59 *Ibid.*

60 C. Heyns and D. Brand, 'Introduction to socio-economic rights in the South African constitution', *Law, Democracy & Development*, Vol. 2, No. 2, 1998, p. 155.

| Constitutional Court Case | Socio-economic Right |
|---|---|
| *nesburg and Others* 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) | evicts from their home about possible steps that can be taken to alleviate their homelessness. |

Source: Constitutional Court of South Africa, *Landmark cases*, Retrieved on 7 January 2015 from <www.constitutionalcourt.org.za/site/thecourt/history.htm#cases>.

## 15.8 Institutional Guarantees of Socio-economic Rights

### *15.8.1 National Bodies That Are the Guarantors of Socio-Economic Rights*

The Constitution makes provision for the so-called state institutions supporting constitutional democracy. The institutions most pertinent to socio-economic rights are the Public Protector and the South African Human Rights Commission. For example, the South African Rights Commission has a constitutional duty to, each year; require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education, education and the environment.[61]

The Public Protector and the South African Human Rights Commission do, among others, deal with socio-economic rights matters. This can be distilled from the powers, functions and duties of these national bodies. The powers of the Public Protector are outlined in section 182 of the Constitution in the following terms:[62]

> (1) The Public Protector has the power, as regulated by national legislation – (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspended to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action. (2) The Public Protector has the additional powers and functions prescribed by national legislation. (3) The Public Protector may not investigate court decisions. (4) The Public Protector must be accessible to all persons and communities. (5) A report issued by Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

61 Section 184(3) of the Constitution.

62 The powers of the Public Protector are amplified in the Public Protector Act 23 of 1994.

As is apparent from the foregoing powers, the Public Protector's central focus revolves largely around administrative issues, whereas investigation of crimes and related issues is referred to the police. Examples of investigation reports stemming from the Public Protector related to socio-economic rights include the following:

- Report on an Investigation into Allegations of undue Delay by the South African Social Security Agency in Implementing the Decision of the Independent Tribunal for Social Assistance Appeals (30 September 2014);
- Report on an investigation into Alleged Poor Service Delivery at the Gugulethu Community Health Centre (Western Cape Department of Health) (28 September 2011);
- Report on an Investigation into an Allegation that the South African Social Security Agency Suspended Payment of a Child Support Grant Without Furnishing Written Reasons (25 February 2010);
- Report on an Investigation of Alleged Unfair Conduct By The City of Cape Town in Connection with the Transfer of a Municipal Housing Tenancy (10 June 2010);
- Report on an Investigation into Alleged Failure by the Western Cape Department of Health to Proper Health Care to a Disabled Person (25 November 2010);
- Report on an Investigation of a Complaint by Residents of Units R and S Lebowakgomo against the Department of Local Government and Housing, Limpopo Province, in Connection with Applications for Housing Subsidies (18 February 2009) and
- Report on an own Initiative Investigation into an Allegation that the South African Social Security Agency Suspended the Social Security Grant of Ms. N S Mphephu without good cause (18 February 2009).[63]

The functions, powers and duties of the South African Human Rights Commission are prescribed by the Constitution as follows:

> The South African Human Rights Commission must – (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights and (c) monitor and assess the observance of human rights in the Republic. (2) The South Africa Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power – (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research and (d) to educate. (3) Each year, the South Africa Human Rights Commission

63 All these reports and many more can be retrieved from <www.pprotect.org/library/investigation_report/investigation_report.asp> accessed on 7 January 2015.

> must require relevant organs of state to provide the Commission with information on the measures that they have towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. (4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.[64]

The top five complaints handled by the South African Human Rights Commission by category in 2013/2014 were as follows:

| **Nature of Complaint** | **Percentage** | **Right Violated** |
|---|---|---|
| Arrested, Detained and Accused Person | 13% | – Conditions of detention in detention centres<br>– Imprisonment without trial<br>– Right to appeal |
| Just Administrative Action | 12% | – Unfair administrative procedure<br>– No outcome/decision of an administrative action<br>– No reason provided for an administrative action |
| Equality | 11% | – Hate speech<br>– Racial discrimination<br>– Disability<br>– Sexual orientation<br>– Religion |
| Labour Relations | 10% | – Racial discrimination in the workplace<br>– Hate speech in the workplace |
| Health Care, Food, Water and Social Security | 7% | – Health<br>– Food<br>– Water and sanitation |

Source: South African Human Rights Commission, *Annual Report 2014*, South African Human Rights Commission, Pretoria, 2014, p. 29.

It should be noted that the decisions of the South African Human Rights Commission are not legally binding.[65] It is for this reason that it has been remarked that this approach "could be referred to as a mechanism for the 'soft protection' of socio-economic rights,

64 Section 184 of the Constitution. Also see the section 13 of the South African Human Rights Commission Act 40 of 2013.

65 C. Heyns and D. Brand, 'Introduction to socio-economic rights in the South African constitution', *Law, Democracy & Development*, Vol. 2, No. 2, 1998, pp. 155-156.

emphasising the programmatic involvement of all sectors in government in the implementation of socio-economic rights."[66]

### *15.8.2 The Evaluation of the Effectiveness of National Bodies That Serve as Guarantors of Socio-economic Rights*

The Public Protector and South African Human Rights Commission are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.[67] The Public Protector is required to "'report in writing on the activities of his or her office to the National Assembly at least once every year: Provided that any report shall also be tabled in the National Council of Provinces".[68] In addition, "any report issued by the Public Protector shall be open to the public, unless the Public Protector is of the opinion that exceptional circumstances require that the report be kept confidential".[69]

## 15.9 Socio-economic Rights and Comparative Law

### *15.9.1 Influence of the National Legal System on Foreign Legal Systems in the Area of Socio-economic Rights*

The post-apartheid constitution and the jurisprudence of the South African courts, particularly the Constitutional Court is among the most talked about. It is has been referred to as "the darling of advanced jurisprudential opinion"[70] and some countries seeking to rewrite their Constitutions (e.g. Egypt) have been advised to look at the Constitution of South Africa.[71] In addition, section 43 of the Constitution of Kenya, 2010, which deals with economic and socio-economic rights seems to have been influenced by the South African model.

66 *Ibid*, p. 156.
67 Section 181(5) of the Constitution.
68 Section 8(2)(a) of the *Public Protector Act* 23 of 1994. Annual reports of the Public Protector are can be accessed at <www.pprotect.org/library/annual_report/annual_report.asp> accessed on 7 January 2015.
69 Section 8(2A)(a) of the *Public Protect Act* 23 of 1994.
70 D. Schaub, 'South Africa's Orwellian Constitution' Defining ideas, 4 April 2012, Retrieved on 23 February 2015 from <www.hoover.org/research/south-africas-orwellian-constitution>.
71 *Ibid*.

### 15.9.2 *Influence of Other Foreign Systems on the National Legal System in the Area of Socio-economic Rights*

The drafters of the Bill of Rights examined constitutions in other countries including those of Canada,[72] Germany[73] and Namibia.[74]

### 15.9.3 *Examples of Provisions (in the Area of Socio-economic Rights) Borrowed from Elsewhere*

Examples of provisions borrowed from other legal systems include the limitation clause.[75] The provisions in section 36(1) of the Constitution that the law may be limited only in terms of law of general application is along the lines of the provision of article 19(1) of the German Basic Law. Furthermore, the provision that a limitation of a fundamental right (inclusive of socio-economic rights) should be reasonable and justifiable in an open and democratic society is influenced by section 1 of the Canadian Charter of Rights and Freedoms. In addition, provision in the Constitution that the state should strive towards the progressive realisation of the rights has been borrowed from article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

### 15.9.4 *Domestic Courts Right to Quote Judgements or Legislation from Other Jurisdictions When Adjudicating on Socio-economic Rights*

Section 39(1)(c) of the Constitution provides a court, tribunal or forum with discretion to consider foreign law when interpreting the Bill of Rights. South Africans courts are not bound to follow foreign law. In *S v. Makwanyane*,[76] the Constitutional Court has pointed out that "[w]e can derive assistance from public international law and foreign case law, but we are in no way bound to follow it". Nonetheless, they have exercised this discretion on a number of instances and have referred to foreign laws and court decisions.[77] However, they are cautious of the fact that they must be mindful of the "different contexts within which other constitutions were drafted, the different social structures and milieu existing

72 Canadian Constitution – particularly that Canadian Charter of Rights and Freedoms (1982).
73 German Basic Law (1949).
74 Constitution of the Republic of Namibia – particularly the Fundamental Human Rights and Freedoms (1990).
75 Section 36 of the Constitution.
76 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraph 39.
77 See, for example, *S v. Makwanyane*.

in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being".[78]

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78 *Park-Ross v. Director*, Office of Serious Economic Offences 1995 (2) SA 148 (CC) at 160.

# 16 Social Rights in Spain

*José María Rodríguez de Santiago & Luis Medina Alcoz*[*]

## 16.1 Social Rights in National Legal Scholarship

### *1 How does the national legal scholarship see the question of protection of social rights?*

Art. 1(1) of the 1978 Spanish Constitution (hereinafter CE[1]) constitutes Spain as a "social and democratic State subject to the rule of law". The State, as a social State, is entitled to protect the community as a whole by promoting a merit-based (found on merit standards), politically directed distribution of rights. Thereupon, it detaches itself from the classic liberal tradition, in virtue of which the sole purpose of the State is to protect each individual, and therefore to define rights, not aiming at fulfilling collective objectives, but looking to prevent mutual aggression, as well as to punish the ones actually betided, thus preserving everyone's *status quo*. The allocation of rights in the liberal State is rooted on commutative justice, and therefore, it is performed on the basis of everyone's formal and substantive equality (equal dignity). However, in the social State subject to the rule of law the allocation of rights may also pursue the common good established in virtue of the political process (distributive justice). For instance, the State is entitled to limit the scope of an individual's right to private property not only to prevent his/her neighbour from being disturbed, but also to benefit handicapped people or those who enjoy parks and libraries.

The social State clause does not *impose* on public authorities any specific form of redistribution. It *entitles* them to redistribute as they please within the rule of law, by means of a democratically determined general interest (purposes) along with a subsequent allocation of rights. In other words, the first and foremost legal dimension of the constitutional social State clause is only – no more and no less – to legitimise State action. Therefore, the mentioned State action is aimed at redistributing wealth to protect the community, regardless of the purpose or the distribution criterion, since this is logically impossible in a constitutional establishment which only acknowledges the individualistic essence of the

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* José María Rodríguez de Santiago is professor of Administrative Law (Universidad Autónoma de Madrid), Former Law Clerk at the Spanish Constitutional Court. Luis Medina Alcoz is professor of Administrative Law (Universidad Complutense de Madrid), Law Clerk at the Spanish Constitutional Court.

1 Abbreviations used: CE: Spanish 1978 Constitution; STC: Constitutional Court Judgment; STS: Supreme Court Judgment.

rule of law. From this perspective, completely different areas of regulation can equally be an expression of "social State". Examples of the former include public procurement procedural rules aimed at safeguarding free competition or the social security pension scheme. They are both intended to increase global wealth by allocating rights, not based on the individual itself but on general interest purposes as considered by political authorities. In this regard, the enactment of the social State provides the grounds lacked by the liberal State, which had to present the protection of the community (distributive justice) as protection of the individual (commutative justice). For example, street lighting has been substantiated only on safety at night, and water supply only on the need for suppressing fires.[2]

However, the Spanish Constitution does not only allow for redistributive policies (social State) but it also sparks policies specifically dedicated to social care and, generally speaking, to achieving substantive equality (tied to the notion of welfare State), the latter being in which this report is particularly interested. Art. 9(2) CE states the irrevocability of this collective purpose: "it is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective…" Secondly, Chapter 3, Part I, CE (Arts. 39 through 52 CE) identifies – under the designation "Principles governing Economic and Social Policy" – distinct social State objectives and sets certain state tasks that shall be permanently fulfilled, such as protection of the family, social security, the right to health protection and housing, protection for the handicapped and citizens of old age, etc. Finally, Art. 53(3) CE addresses the effectiveness of these constitutional provisions, which will "guide legislation, judicial practice and actions by the public authorities". In addition, "they may only be invoked before the ordinary courts in accordance with the legal provisions implementing them". Accordingly, the 1978 Spanish Constitution can most certainly be described as "socially dense".

The Spanish public law scholarship offers an approach on the understanding of the Constitution's social rights, influenced since the 1980s by the German legal scholarship with regard to the interpretation of fundamental rights. Along with the explicit regulation provided by the aforementioned Chapter 3, Part I CE, a social content has been inferred from the *objective legal dimension of* (classic) *fundamental rights*. An example is the "integration minimum income", an economic benefit governed by many of the Autonomous Regions[3] legislation, not referenced in the aforementioned constitutional provisions and normally regarded by the scholarship as a right in relation to economic benefits owing to

2 See José Esteve Pardo, *La nueva relación entre Estado y sociedad. Aproximación al trasfondo de la crisis* (Marcial Pons 2013) 55-56.

3 The Spanish term is "Comunidad Autónoma," referring to an entity with political and administrative autonomy in a strongly decentralized State whereas not formally federal.

the objective legal dimension of the dignity of the person (Art. 10(1) CE), which sets forth the obligation of the State to aid those who do not reach minimum standards of living.[4]

This introduction is consistent with most of the current scholarly lines,[5] but the terms social State and welfare State are often confused.[6] This has to do with the range of meanings that can be given to the adjective "social". It also has to do with the fact that the welfare State is a prominent manifestation of the social State (far from the only manifestation, however). In any case, the idea of the State as an entity entitled to protect the community by means of the allocation of rights pursuant to collective purposes is so deeply assimilated that the social State is often inaccurately brought into line with a specific form of distribution.

Constitutional law scholars, often along with theory and philosophy of law authors, focus on the interpretation of the above-mentioned constitutional provisions. Sometimes they try, by dint of this work on interpretation, to strengthen the constitutional protection granted to those social rights regulated herein. Sometimes, they also interpret them to be, when possible, as binding on public authorities as classic fundamental rights. Administrative law scholars take care of the regulation governing the public administration's social performance (housing, environment, the right to health protection and other social benefits, etc.). Labour law authors also pay attention to those social rights ruled by Chapter 3, Part I CE tied to the employment contract (salary and holidays, health insurance, etc.).

## 2 *Is the need to protect social rights questioned?*

The need to protect social rights is widely accepted among scholars because there is a constitutional provision (Art. 53(3); see question 1 above) that governs, in a somewhat precise fashion, the way in which those social rights contained in Arts. 39 through 52 CE are binding on the State institutions and bodies. These articles provide for a constitutionally limited legislator's autonomy, for instance, public authorities shall maintain a public social security system (Art. 41 CE) and a limitation of working hours and periodic holidays with pay ought to be covered by legislation (Art. 40(2) CE). In addition, pursuant to the cited provisions, the enforcement bodies (the public administration and the courts) are subject to the rule of law when it comes to decide on the aforesaid social rights in a given case.

4 See José María Rodríguez de Santiago, *La Administración del Estado social* (Marcial Pons 2007) 23.

5 See Luciano Parejo Alfonso, "El Estado social administrativo: Algunas reflexiones sobre la 'crisis" de las prestaciones y los servicios públicos" (2000) 153 *Revista de Administración Pública* 217-219; Alfonso Fernández-Miranda Campoamor, "El Estado social" (2003) *Revista española de Derecho Constitucional* 141, 163.

6 See Manuel Aragón Reyes, "Constitución Española: economía de mercado y Estado social" in Luis García San Miguel (ed.), *El principio de igualdad* (Dykinson 2000); Paloma Durán y Lalaguna, *Derechos sociales y políticas sociales. Coincidencias y diferencias* (Tirant lo Blanc 2013) 128-123.

Resultantly, there is no discussion whatsoever on the need for protecting social rights. There is much debate, however, between those who entrust to democracy the establishment of social rights and those who prefer to fossilise this establishment in the Constitution, thus promoting its interpretation or amendment accordingly.[7] In our judgement, the matter is settled somewhere in between: the Spanish Constitution entrusts the shaping of social rights to the legislator, yet setting some restrictions of varying intensity depending on the case (see questions 7, 8, 11 and 15 below).[8] It is within this framework where we can inscribe the heated and current debate on the social cutbacks carried out by the State and the Autonomous Regions in order to face the economic downturn (see question 5 below).

### 3 *Are social rights perceived as different from other types of rights?*

Yes. They are not only perceived as substantially different, but they are also subject to a distinct constitutional regulation. In Spanish law, the distinction is clearly visible, since it is explicitly established by Art. 53 CE through its three paragraphs. *Paragraph 1* lays out a set of fundamental rights (those recognised in Arts. 14 through 38 CE) which are binding on all public authorities and that may only be regulated by law while preserving their core content. *Paragraph 2* sets out a smaller group of fundamental rights (those guaranteed in Arts. 14 through 30 CE, among which, remarkably, we cannot find neither the right to private property nor the right to entrepreneurial freedom) which will be granted a preferential judicial protection regime: the appeal for protection[9] before the ordinary courts and the Constitutional Court. Finally, *paragraph 3* governs the aforementioned rights (most of them of a social nature) recognised by Chapter 3, Part I (Arts. 39 through 52 CE): attached to them there is an extensive legislator's autonomy and subjection of the public administration and the courts to the rule of law (see above, questions 1 and 2).

It is remarkable that the parting line between a more constitutionally protective regime and a less protective one does not match the line that has traditionally separated freedom rights and performance rights.[10] It has been widely acknowledged by the Spanish legal scholarship that the classic freedom rights may have a performance dimension, and there

7 See Aniza F. García Morales/Antonio de Cabo Vega, "La definición de los derechos sociales" in *Constitución y democracia: 25 años de Constitución democrática en España* (Universidad del Páis Vasco 2005) 511-520.

8 Our opinion is somehow classical among Spanish public lawyers: Luciano Parejo Alfonso, *Estado social y Administración pública. Los postulados constitucionales de la reforma administrativa* (Civitas 1983).

9 This is the translation given for "recurso de amparo" (a particular form of fundamental rights protection constitutional appeal in the Spanish legal system) provided by the official English version of the 1978 Spanish Constitution accessible at <www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf>.

10 In Spanish, "derechos prestacionales," which are those rights by virtue of which State action shall be taken with regards, among others, to granting social benefits.

are performance rights of a social nature that attain the highest constitutional protection, such as the fundamental right to free education (Art. 27(1) and (4) CE).[11]

## 4 *Are social rights perceived as limitations or threats to "first-generation" rights?*

From a general standpoint, it can be asserted that the social State clause, along with the constitutional provisions aimed at enforcing the welfare State, have a strong influence on the so-called first-generation rights. The State is authorised (and sometimes obliged) to limit or restrict such rights in accordance with collective purposes that may or may not be directly related to the right holder in question, as could happen with personal fundamental rights in somewhat extraordinary situations. For example, the legislator has set limits on the freedom of movement (Art. 17(1) CE) to fulfill a social function through the regulation in place for preventive detention, which allows for this precautionary measure, even though some of the detainees will later be acquitted because they would have not been found liable for the crime (see Constitutional Court Judgement – STC – 4/1982, of 2 July). Likewise, the legislator validly shapes the right to life and to physical integrity (Art. 15 CE) in accordance with collective objectives when it sets up vaccination campaigns to prevent epidemics, despite the fact that some of the vaccinated subjects may suffer serious harm (see Supreme Court Judgement, Chamber 3, of 9 October 2012).

In any event, the content of the economic fundamental rights could be adjusted with ease to fit social purposes, specifically that of the right to private property (Art. 33 CE) and that regarding entrepreneurial freedom (Art. 38 CE). As regards the right to private property, Art. 33(2) CE explicitly states that the law may, and at times must, modulate this right's social function so that it does not only serve individual interests but also collective interests. These interests could entail, precisely, social rights protection: the profitability of urban property could be legally restricted to make it possible for others to enjoy the right to decent and adequate housing (Art. 47 CE). At the same time, the State is entitled to deprive someone of his or her property on justified grounds of public utility or social interest by means of compulsory expropriation (Art. 33(3) CE) and taxes (Art. 31 CE). The right to freely conduct business activity (Art. 38 CE) is limited. For example, in virtue of the collective agreement's binding force, guaranteed by law to protect the workers and employers' right to collective bargaining through their respective representatives (Art. 37(1) CE); and, furthermore, by means of the regulation by law of the employment contract (Arts. 35(2) and 40(2) CE).

11 See Marcos Vaquer Caballería, *La acción social. Un estudio sobre la actualidad del Estado social de Derecho* (Tirant lo Blanch 2002) 91-94.

As it has been stated, the social State has an effect on first-generation fundamental rights. Similarly, the rule of law constrains redistributive policies, including those implemented to develop social rights. Depending on the intensity of these constraints, three constitutional realms can be drawn.

a. The recognition of human dignity (Art. 10(1) CE) and freedom rights operate at times as a *prohibition of redistribution*. The Law may not segregate citizens from a given race even if the majority of the community wanted it. In those cases, the State is authorised neither to delimit nor to restrict first-generation rights to accomplish collective purposes, external or not related to the right holder (e.g., public safety, economic revitalisation, general well-being). In this domain, the law may not shape freedom rights in order for them to fulfill a "social function".
b. Some other times, human dignity and freedom rights operate as a *relative prohibition of redistribution.* The Constitution allows for restrictions on first-generation rights that are deemed to be valid even if they bring along an individual redistribution of wealth. Therefore, it is possible to delimit or restrict freedom rights in accordance with collective purposes that are not closely related to the recipient. In these cases, State intervention does not violate the fundamental right; it validly delimits its content to fit public purposes. The rights involved herein are rights arranged by law that serve a social function. However, the State shall make sure that the victim is compensated if the intervention entails a sacrifice for it, so that it is not instrumentalised. Let's think of the economic and/or personal losses suffered by an individual as a result of an expropriation or an unequal distribution of profits and burdens deriving from urban planning enforcement. Other examples could be preventive detention of innocent people or serious illness triggered by compulsory vaccination. Compensation is a key tool in the social State subject to the rule of law, since it preserves the individualistic logic without having to give up the fulfillment of collective purposes. The harmful intervention, along with a proper compensation, increases global wealth (thus protecting the community) without instrumentalizing the individual (respects the individual). Let's take into account that the Spanish Constitution only refers explicitly to the obligation to compensate regarding compulsory expropriation (Art. 33(3) CE).
c. Finally, there are cases that fall into a third domain: *authorisation for redistribution*. Public authorities are entitled to collect taxes and apply them in a way that does not benefit the taxpayer. They may set personal duties (e.g., compulsory military service, being part of a jury or of a polling station, testifying in court), even if that involves severe impoverishment (e.g., if the remuneration is clearly lower than the one the citizen would have attained by other means). When the legislator asserts the constitutional authorisation for redistribution (and the public authority enforces it), there is no violation of freedom rights. On the contrary, it delimits or restricts them in order to validly adapt them to social purposes. Accordingly, the delimited or restricted rights are also

rights arranged by law which fulfill, in these circumstances, a social function, since their content rests on the social purposes politically selected. The subsequent losses are impossible to compensate, since the Constitution allows for full redistribution.

The foregoing proposal is ours, yet basically consistent with the Spanish scholarship. The latter widely accepts that in our constitutional establishment social rights may limit classic liberal rights or first-generation rights and states the subordination of private wealth with respect to general interests (Art. 128(1) CE). Therefore, it is possible to redistribute the mentioned wealth by means of the tax system or public expenditure (Art. 31 CE). In any event, according to the Spanish scholarship, social rights setting restrictions on liberal rights does not exactly imply that the first pose a threat to the latter. In broad terms, these restrictions are considered to be positive, far from being understood as threats.

## 5 *What are the most important questions of social rights protection discussed by the national legal scholarship?*

A traditionally controversial subject in this domain is the so-called "irreversibility" of the legally achieved content of social rights (Chapter 3, Part I, CE) ("irreversibility of social conquests"). The matter has been strictly academic as the economic growth has been constant, but it has turned into a relevant practical question in times of crisis, when there has been a downgrade regarding social rights: civil servants' salary cuts, care of dependent people, free healthcare for illegal immigrants, pharmaceutical "copayment" etc.

Among the different approaches, not even the more prone to emphasise the social rights constitutional regulation binding nature understand the principle of irreversibility to be enshrined in the Spanish Constitution. This approach stresses the importance of setting a minimum content of social rights among other restrictions (prohibition of arbitrariness, statutory reservation clauses (*Gesetzesvorbehalt*[12])) yet acknowledging that the content of social rights mainly depends on the democratic process, and therefore on the various ideologies within the Constitution and a given economic situation.[13]

From the standpoint offered by the general part of administrative law, the conceptual world created by Otto Mayer in Germany or Eduardo García de Enterría in Spain addressed to an Administration subject to the rule of law (fundamental rights, statutory reservation, interventional Administration, administrative act, judicial control, etc.) does not suffice to fully cover the theoretical systemic framework of the administrative law dimension regarding administration's social performance. This is why it has been necessary to draw

12 It has traditionally been translated as "legal reservation," but we consider that "statutory reservation" better describes the essence of this concept, since we are talking about a principle in virtue of which certain matters must compulsorily be regulated by Law.

13 See Juli Ponce Solé, *El derecho y la (ir) reversibilidad limitada de los derechos sociales de los ciudadanos. Las líneas rojas constitucionales a los recortes y la sostenibilidad social* (INAP 2013).

upon theoretical and methodological tools to improve the scholarly work in this field. Concepts such as State and society's responsibility (in the context of the difference between State as a "guarantor" and State as a "performer"), or the notions of organisation and procedure as directing resources of administrative legislation constitute good examples of the aforetasted improvement. Another source of improvement is brought about by a more careful attention to the substantive administrative action (not formalised through the administrative procedure) by means of which important social activity is carried out (health care, care of dependent people, etc.).[14]

### 6 *What do you consider as the most original contribution of your national legal scholarship to the study of social rights?*

The above-mentioned regulation provided by Art. 53(3) CE (extensive legislator's autonomy and subjection of the public administration and the judges to the rule of law (see questions 1 and 2 above)) can be understood in a different, clearer manner: the implementation of these rights is ascribed by the CE to the constitutional bodies that enjoy the greater democratic legitimacy (the legislator and the Government). This brings along the prohibition set on the judges to rule on social policy issues according to criteria of their own (not determined by law) in social policy decisions. In other words, shaping public policies by giving substance to constitutional social rights is much like distributing resources on politically determined merit standards. It is not the judges' but the Parliament's and Administrations' duty to do so. The latter is known as "fear clause" (*Angstklausel*), expression taken from the German scholarship on Art. 20(a) of the *Grundgesetz*, regarding State environmental protection.[15]

From a more academic standpoint, closely tied to administrative law scholars, it has been pointed out in Spain that whilst the rule of law is basically guaranteed by the Constitution by means of the judiciary, the social State is implemented (becomes real), above all, through legislation and by the Administration.[16]

14 See José María Rodríguez de Santiago, 2007.
15 See José María Rodríguez de Santiago, 2007, 48.
16 Luciano Parejo Alfonso, 2000, 220; José María Rodríguez de Santiago, 2007, 12.

## 16.2 Constitutional Protection of Social Rights

*7 Does the national Constitution of your country provide for protection of social rights?*

Although some rights traditionally considered as social rights are given a strengthened constitutional protection, (see question 8 below), most of their regulation relies on the legislative implementation of social policies (Chapter 3, Part I CE (Arts. 39 through 52 CE): "principles governing social and economic policy"). Therefore, these rights are only granted the constitutional protection provided by Art. 53(3) CE, as it has been repeatedly stated. These constitutional provisions "shall guide legislation, judicial practice and actions by the public authorities" and "they may only be invoked before the ordinary courts in accordance with the legal provisions implementing them" (see questions 1, 2 and 6 above).

*8 What are the rights protected?*

The rights awarded the greatest constitutional protection (provided by Art. 53(1) and (2) CE: public authorities bound, statutory reservation, guaranteed preservation of the core content and a preferential judicial protection regime through the individual appeal for protection; see question 3 above) are: the right to free education (Art. 27(1) and 4 CE), the right to freely join a trade union (Art. 28(1) CE) and the right to strike (Art. 28(2) CE).

The rights granted the constitutional protection provided only by paragraph 1 of Art. 53 CE (political authorities bound, statutory reservation and a guaranteed preservation of the core content, with no preferential judicial protection regime through the individual appeal for protection; see question 3 above) are the right to work and to freely choose a profession or trade (Art. 35 CE) and the right to collective labour bargaining (Art. 37 CE).

The following rights are only awarded the protection provided by Art. 53(3) CE (extensive legislator's autonomy and subjection of the public administration and the judges to the rule of law (see questions 1 and 2 above)): protection of the family and children (Art. 39 CE), workers' rights within an employment relationship (reasonable limitation of working hours and periodic holidays with pay, etc.) (Art. 40(2) CE), assistance and benefits from a public social security system (Art. 41 CE), safeguards for Spanish workers abroad (Art. 42 CE), right to health protection (Art. 43(1) CE), the right of access to culture (Art. 44(1) CE), the right to enjoy an environment suitable for the development of the person (Art. 45 CE), the right to enjoy decent and adequate housing (Art. 47 CE), youth protection (Art. 48 CE), special protection for disabled people (Art. 49 CE), adequate and periodically updated pensions (Art. 50 CE) and the protection of consumers and users (Art. 51 CE).

9 *How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family, or a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?*

The subject of the rights is, on occasion, the individual itself (assistance and benefits from a public social security system (Art. 41 CE), right to health protection (Art. 43(1) CE), right of access to culture (Art. 44(1) CE), the right to enjoy an environment suitable for the development of the person (Art. 45 CE), the right to enjoy decent and adequate housing (Art. 47 CE)). The family, mothers, their children and children as a whole are specific recipients of the protection provided by Art. 39 CE. At times, the subject of the rights may be the worker: collective bargaining (Art. 37 CE) and workers' rights within an employment relationship (reasonable limitation of working hours and periodic holidays with pay, etc.) (Art. 40(2) CE). There are many other situations in which these constitutional provisions target groups of people in need: Spanish workers abroad (Art. 42 CE), young people (Art. 48 CE), disabled people (Art. 49 CE), citizens of old age (Art. 50 CE) and consumers and users (Art. 51 CE).

Art. 13(1) CE establishes that aliens in Spain shall enjoy the public freedoms guaranteed by the present Part (1). In principle, this provision refers to both classic fundamental rights and social rights "under the terms to be laid down by treaties and the law". Notwithstanding, the Constitutional Court has declared that the "reference made to the law by Art. 13(1) does not bring along a deconstitutionalisation of the legal sphere of aliens, since the legislator, in spite of its autonomy to shape the 'terms' in which aliens will enjoy rights and freedoms in Spain, is still constrained". These constraints stem from the somewhat vague criterion on the "degree of connection with human dignity of a given right" (STC 236/2007, of 7 November, §3). Furthermore, Organic Law 4/2000 of 11 January on the rights and freedoms of aliens in Spain and their social integration, grants foreign nationals lawfully residing in Spain a good deal of social rights on the same terms as Spanish nationals (assistance and benefits from a public social security system (Art. 14(1)), medical care (Art. 12), etc.). Other rights, such as the right to education (Art. 9) or the right to health care (Art. 12), are awarded to immigrant minors born of immigrant parents, even if the latter are unlawfully residing in Spain. Foreign nationals staying illegally in Spain are also entitled to free health care in case of emergency and in the event of birth (Art. 12), as well as to the basic social services and benefits (Art. 14(3)).

*10 How is the debtor of social rights defined? Is it the State, public authorities, public bodies, private bodies?*

Defining the debtor of social rights depends on the *kind of responsibility* constitutionally and legally attributed to the State with regards to social performance.[17] The State is ultimately responsible for guaranteeing and performing social functions as they are laid down in the Constitution. However, in some situations the State shall only *set out the regulatory framework* for an ordinarily unequal private law relationship (worker – employer, consumer – offerer, owner – tenant, etc.). The State only sets the rules governing the relationship in question in accordance with social criteria (protecting the weak part) thus complying with its social function without becoming the debtor of the given social right. The debtor of the social right will be the employer, the offerer, the owner with respect to the tenant, the wealthy father with respect to an estranged mother taking care of children, etc. In case of conflict, the specific obligations are enforced by a civil court.

Some other times, the State's duty is to *create an adequate benefit system* (education, health, care of dependent people) in addition to guaranteeing the availability of the benefits, both in terms of quality and quantity. It is not necessarily the State who assumes the obligation to award the benefit and, therefore, it is not always the debtor of the social right. It depends on how these benefits have been regulated. If there were private actors in the "benefit-providing network", they could be the debtors of the social right.

Finally, there are other situations in which the State takes on the responsibility for *completely fulfilling* the function in question, from the regulatory framework until the effective provision of the benefit to the recipient. This is particularly the case of economic social security benefits (unemployment benefit, retirement pension, etc.). The State is in fact the debtor for these benefits (normally of a contributory nature) which are enforced, in Spain, by the social security administration.

*11 What is the content of the rights? What are the obligations of the legislator? What are the obligations of the administration? What are the obligations of other actors?*

In certain cases, the social right's core content is constitutionally guaranteed. However, in these situations, the *legislator* is not released from developing it by means of legislation. The right to free education (Art. 27(1) and 4 CE) as well as the right to collective bargaining (Art. 37 CE), see question 8 above, provide good examples of what has been stated.

17 See José María Rodríguez de Santiago, 2007, 63-89.

In most cases, the legislator must decide on the content of these rights, since it is not determined by the Spanish Constitution. This group contains the rights governed by Chapter 3, Part I CE. See question 8 above.

The *Administration's* role varies depending on the kind of responsibility that rests with the State. When the latter has to ensure the proper provision of the social benefits system, the former only takes care of organizing and monitoring the mentioned system (education, health care, care of dependent people, etc.). However, the Administration might also have to undertake the effective provision of benefits if it is in charge of public facilities where the benefits are actually provided. This is fairly common in Spain, where it is easy to find public schools, public hospitals and public elderly homes. Notwithstanding, when the responsibility for a full performance (as in social economic benefits such as unemployment benefits, retirement pensions, etc.) lies with the State, the Administration shall exclusively take care of managing the aforesaid provisions. See question 10 above.

Other *private actors* have the same duties as the Administration if they privately provide benefits within a public provision system (private and charter schools, concerted healthcare, private elderly homes). In addition, we must take into consideration the social obligations imposed on them in private law relationships by private law regulations: employer to worker, owner with respect to tenant or the wealthy father with respect to an estranged mother taking care of children, etc. See question 10 above.

### *12 Does the national Constitution differentiate the scope and methods of protection of social rights and other rights?*

This question has already been answered. See question 8 above.

The rights awarded the greatest constitutional protection (provided by Art. 53(1) and (2) CE: public authorities bound, statutory reservation, guaranteed preservation of the core content and a preferential judicial protection regime through the individual appeal for protection; see above, question 3) are: the right to a free education (Art. 27(1) and 4 CE), the right to freely join a trade union (Art. 28(1) CE) and the right to strike (Art. 28(2) CE).

The rights granted the constitutional protection provided only by paragraph 1 of Art. 53 CE (political authorities bound, statutory reservation and a guaranteed preservation of the core content, with no preferential judicial protection regime through the individual appeal for protection; see above, question 3) are the right to work and to freely choose a profession or trade (Art. 35 CE) and the right to collective labour bargaining (Art. 37 CE).

The following rights are only awarded the protection provided by Art. 53(3) CE (extensive legislator's autonomy and subjection of the public administration and the judges to the rule of law): protection of the family and children (Art. 39 CE), workers' rights

within an employment relationship (reasonable limitation of working hours and periodic holidays with pay, etc.) (Art. 40(2) CE), assistance and benefits from a public social security system (Art. 41 CE), safeguards for Spanish workers abroad (Art. 42 CE), right to health protection (Art. 43(1) CE), the right of access to culture (Art. 44(1) CE), the right to enjoy an environment suitable for the development of the person (Art. 45 CE), the right to enjoy decent and adequate housing (Art. 47 CE), youth protection (Art. 48 CE), special protection for disabled people (Art. 49 CE), adequate and periodically updated pensions (Art. 50 CE) and the protection of consumers and users (Art. 51 CE).

*13 Does the normative structure of constitutional social rights vary? Is it possible to distinguish different types of constitutionally protected social rights?*

See questions 8 and 12 above. Within the context of what has already been stated, the Constitutional Court has declared that the provisions contained in Chapter 3, Part 1 CE, "are binding regardless of the generality of their content, as it is unmistakably inferred from Arts. 9 and 53 CE" (STC 14/1992, of 10 February, §11). Although, "whereas they shall guide the actions of the public authorities, they do not create rights judicially enforceable by themselves" (STC 36/1991, of 14 February, §5).

*14 Is there a constitutional mechanism of protection vis-à-vis the legislator? How does it operate? Are there any instruments that ensure protection against the inaction of the legislator?*

Yes, the action and the exception of unconstitutionality against laws and Regulations having the force of a law before the Constitutional Court (Arts. 161(1)(a) and 163 CE), but in Spain, the individuals do not have the capacity to challenge laws and Regulations having the force of a law. The action of unconstitutionality may be raised by political bodies pursuant to Art. 162(1)(a) CE, such as the President, 50 Representatives, 50 Senators, Regional Governments, etc. The exception of unconstitutionality is a form of procedural control of the constitutionality of laws that may be raised by a court when hearing a case, provided that the law in question is applicable thereto (Art. 163 CE).

Despite the broad autonomy awarded to the legislator to regulate the content of social rights governed by Chapter 3, Part I CE in virtue of Art. 53(3) CE, it is clear that this power shall not be interpreted as a blank cheque. A law that differentiated between children born in, or outside of wedlock, would be blatantly unconstitutional (Art. 39(2) CE). The same consideration applies to a law that did not provide for criminal or administrative sanctions as well as for the obligation to compensate the damage caused, for whoever was to harm

the environment (Art. 45(3) CE). The Constitutional Court has even stated that the existence of social security binds the legislator as an institutional guarantee with a "core content which must be preserved in a way that social security is recognizable by society at any given time and in any given place" (STC 37/1994, of 10 February, §3).

In the Spanish Constitutional establishment, there is no action to be raised against the legislator's lack of activity. It is possible, as it may seem understandable, a political control on the mentioned lack of activity.

*15 How do you evaluate the efficiency of social rights protection offered by the Constitution and the constitutional justice?*

Positively. The CE contains a number of constitutional guidelines on the regulation of social rights by the legislator while conferring on the institutions invested with democratic legitimacy (Parliament and Government) broad powers to define specific public social policies. For instance, with regard to social security retirement pensions the Constitutional Court has stated that Arts. 42 and 50 CE impose on the legislator "a duty to establish, within the realm of possibility, the social security system best suited to attain the constitutional aims (…)" (STC 189/1987, of 24 November, §10). The assessment of how to establish that system and what the realm of possibility is, in principle, a prerogative of the legislator.

The economic downturn has recently shown that "the realm of possibility" varies depending on the economic situation. And, unlike in the case of so-called "first-generation" fundamental rights – not subject to democratic political debate –, the CE refers the definition at any given time of social policies listed in Chapter 3, Part I precisely to that political debate.

*16 What do you consider as the most original contribution of your national Constitution to the protection of social rights?*

Art. 53(3) CE addresses mainly (and directly) the legislator when referring to the guiding principles of the social and economic policy (Chapter 3, Part I CE). It also subjects the enforcement bodies (the Administration and the judiciary) to the laws governing specifically those social policies, and forbids courts to rule on social policy issues according to criteria of their own not derived from the rule of law (the so-called "fear clause"). Art. 53(3) is, unless we are mistaken, original of the 1978 CE. A similar drafting can be found today in Art. 52(5) of the Charter of Fundamental Rights of the European Union, on the effectiveness of the Charter provisions containing principles (for instance, according to the "explanation" on the said Art. 52, those referred to the rights of the elderly (Art. 25), to the integration of the disabled (Art. 26) and to environmental protection (Art. 37)).

The Spanish Constitution can be included among those socially "dense" Constitutions that somehow follow the historic model symbolically laid down by the Mexican Constitution of 1917 and the Weimar Constitution of 1919. The question as to whether the *reality* of the social State depends on the *actual constitutional development* of such principle is debatable. It seems, on first consideration, that the answer should be negative. The broad outlines of social policy in western European countries are very much alike regardless of whether there is constitutional development and definition or not. Therefore, it has been said in a rather graphic manner that "a social Constitution is practically irrelevant to the social State (…), we are here confronted with the limits of constitutional law's driving force".[18]

From the standpoint of the social State's obligations, the German *Grundgesetz*, for example, is much less dense than the Spanish Constitution. Arguably, the doctrine of the objective legal dimension of fundamental rights (irradiation effect, protection obligations, organisation, procedure and benefits at the service of these rights) has enjoyed a much wider development in Germany than in our legal system. Mainly, because the provisions in Chapter 3, Part I CE have played in Spain the role of social guidance for the State's activity regarding fundamental rights in a manner somewhat similar to the aforesaid doctrine of the objective legal dimension in Germany. Many of the provisions in Chapter 3, Part I CE impose protection duties on the State or require the establishment of a service system, or organisations or procedures that can be directly linked to the classic subjective dimension of fundamental rights. Health services (Art. 43 CE) are obviously related to the right to life and physical integrity (Art. 15 CE); State's promotion of science and scientific research (Art. 44(2) CE) refers to the right to scientific production and creation (Art. 20(1)(b) CE); the organisation and procedures of the social security system (Art. 41 CE), old people pensions (Art. 50 CE) and the right to housing (Art. 47 CE) relate to the dignity of the person (Art. 10(1) CE); Art. 45(1) CE directly connects the State's protection of the environment to the free development of personality (Art. 10(1) CE), etc.

18 Ewald Wiederin, "Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge" (2005) 64 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 80.

## 16.3 Protection of Social Rights under Other Constitutional Rules and Principles

*17 Are there other constitutional or jurisprudential principles used as tools for the protection of social human rights?*

As previously noted (see questions 1 and 16 above), the Spanish public law scholarship offers an alternative approach on the understanding of the Constitution's social rights, influenced since the 1980s by the German legal scholarship with regard to the interpretation of fundamental rights. Along with the explicit regulation provided by the aforementioned Chapter 3, Part I CE, a social content has been inferred from the *objective legal dimension of* (classic) *fundamental rights*. An example is the "integration minimum income", an economic benefit governed by many of the Autonomous Regions legislation, not referenced in the aforementioned constitutional provisions and normally regarded by the scholarship as a right in relation to economic benefits owing to the objective legal dimension of the dignity of the person (Art. 10(1) CE), which sets forth the obligation of the State to aid those who do not reach minimum standards of living. Something similar can be said of health care for foreigners unlawfully residing in Spain. They have recently been excluded from free health care, but they are entitled to free attention in case of medical emergency, since the dignity of the person (Art. 10(1) CE) forbids the State to refrain from acting when faced with a person in such need.

Furthermore, a *broad interpretation of classic fundamental rights* has led to the strengthening of some social rights' content. This is the case, for instance, of the protection against noises, odour or light pollution granted by laws that further elaborate the right to enjoy a suitable environment (Art. 45(1) CE). The Constitutional Court (SSTC 119/2001, of 24 May; 16/2004, of 23 February; and 150/2011, of 29 September) reinforced the protection against such external interferences by declaring that it is at least partially encompassed in the right to physical and moral integrity (Art. 15 CE) and to personal and family privacy and the inviolability of the home (Art. 18(1) and (2) CE), pursuant to the ECtHR case law (among other judgements, *López Ostra v. Spain*, 9 December 1994 and *Guerra and others v. Italy*, 19 February 1998).

However, other rights such as immigrants' right to family reunification have not met the same fate, since in this case, the Constitutional Court (STC 236/2007, of 7 November, §11) refused to consider the right to family reunification as an integral part of the right to family privacy (Art. 18(1) CE).

Also, the Constitutional Court has broadened in several occasions the subjective scope of social benefits when ruling on the legally established eligibility for them. Based on the *principle of equality* (Art. 14 CE), the Court has considered that the inclusion of some

subjects and not others is incompatible with the CE. See, for example, the controversial STC 41/2013, of 14 February, on a legal regulation of the eligibility for a survivor's pension that excluded homosexual couples from such benefit.

*18 Is there a protection offered by the following constitutional principles:*

**a Protection of legitimate expectations**

In principle, no.

**b Protection of vested rights**

It can be said that contributory benefits (in which the right to the benefit is capitalised by the recipient through regular payments to social security insurers) are somehow protected by the *right to private property* (Art. 33(1) CE). It is not that Art. 33 CE prevents absolutely any amendment of the regulation on such financial situation, but rights capitalised through payments levied from the recipient of the social benefit are guaranteed by the constitutional right to property. In the case of *STC 65/1987*, of 21 May, the Constitutional Court did not deem unconstitutional the new regulation of the rights against a mutual provident society because there was "no question of a deprivation of rights of any kind". However, the starting point for the Court's analysis was precisely that such situations are under the constitutional cover of Art. 33 CE (see, in particular, § 12 and 15).

**c Precision of legislation**

In principle, nothing relevant.

**d Non-retroactivity of legislation**

The principle of non-retroactivity of regulations restrictive of individual rights (Art. 9(3) CE) may have an effect on social rights already capitalised by their holders similar to the protective function of the right to private property (Art. 33(1) CE) discussed above (see question 18b). The theoretical link between these provisions is self-evident. Art. 33 CE protects consolidated property rights and is in line with Art. 9(3) CE in its prohibition of retroactivity, since it sets a limit to new legislative regulation on property rights (especially if such rights stem from regular payments) intended to restrictively affect consolidated property situations. In referred STC 65/1987, of 21 May, regarding a new legal regulation of the benefits of a mutual society, the Constitutional Court established that "the contested regulation could not be deemed to retroactively affect consolidated situations, such as goods or rights integrated in the area of availability of the recipients of the benefits" (§ 16). It can be noted that the Court assumes again that if consolidated rights integrated in the

property of their holders were retroactively impaired, the principle of non-retroactivity enshrined in Art. 9(3) CE could be considered infringed.

**e Due process**

According to the Constitutional Court's doctrine, the fundamental right to an effective remedy before a tribunal (Art. 24(1) CE) includes the right to obtain a judicial decision in compliance with the law. That approach has allowed the Constitutional Court to protect the holder of a social right whenever the judgement by the ordinary judge is affected by arbitrariness, manifest unreasonableness or error in the interpretation or enforcement of the law governing it. A paramount case is that of the labour rights of pregnant women. The right to non-discrimination on account of sex (Art. 14 CE) implies that the employer who fires a pregnant woman bears the burden to prove that the facts underlying the dismissal constitute a legitimate ground and are in any case unrelated to a discriminatory motive (STC 166/1988, of 26 September). The employer may fulfill this task, for instance, by providing evidence that he/she was unaware of the employee's pregnancy (STC 41/2002, of 25 February). The Statute of Workers Rights raised this constitutional standard of protection by setting an objective guarantee that provides for the nullity of any dismissal of a pregnant woman, regardless the prior knowledge of the pregnancy by the employer. This way, the dismissal of a pregnant woman unaware of her own pregnancy would not violate the constitutional prohibition of discrimination, but it would be null and void under the scheme voluntarily established by the ordinary legislator. Hence, the Constitutional Court has granted protection to pregnant women when the ordinary judge had refused to apply such scheme, not declaring the nullity of the dismissal when presented with the evidence of lack of discrimination by the employer (STC 92/2008, of 21 July; 124/2009, of 18 May). In these cases, the Court reviews the judicial decision in the light of a higher standard of effective judicial protection ("reinforced canon"), as the right to non-discrimination on account of sex is involved.

Moreover, the right to an effective remedy (Art. 24(1) CE) is the basis for the right to *free legal aid* granted to those who do not have sufficient means to defend their rights in court.

**f Other general constitutional principles?**

The so-called *"indemnity guarantee"* in the exercise of fundamental rights (meaning that no negative legal consequence can result to the holder of a fundamental right in its exercise) grants an additional guarantee for employees in the event of *dismissal*. If the employee provides circumstantial evidence that the dismissal is an employer's retaliation for the exercise of a fundamental right (for example, having taken part in a strike or pursue trade union activities), the *onus probandi* is reversed. Hence, in such cases, the burden of proof rests with the employer, who will have to prove sufficiently the reasonableness and propor-

tionality of the dismissal, as well as it being completely unrelated to any kind of retaliation for the exercise of fundamental rights (see, for instance, STC 48/2002, of 25 February, §5).

## 16.4 Impact of the International Protection of Social Rights

*19 Did your state ratify international treaties that pertain to social rights? Are they directly applicable in your domestic legal order?*

Spain is a party to the main international treaties on social rights, such as: International Covenant on Economic, Social and Cultural Rights (1966), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Convention on the Rights of Persons with Disabilities (2006), etc.

In Spain, international treaties become part of the internal legal system once they are officially published (Art. 96(1) CE), without the need for internal transposition.

*20 Did these treaties have an impact on the national legal system? Did they trigger any changes in national legislation or practice?*

In principle, none relevant. Nonetheless, the Constitutional Court occasionally cites those treaties and conventions as supplementary arguments. For example, SSTC 175/2005, of 4 July, §3, and 20/2001, of 29 January, §1, on the right to equality, mention the Convention on the Elimination of All Forms of Discrimination against Women.

*21 Does the case law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights?*

See question 22 below.

*22 In particular, did the case law of the European Court of Human Rights and other regional human rights courts have an impact on national law in the field of social rights?*

Current Spanish regulation of *family reunification* is clearly inspired on Art. 8 ECHR (respect for private and family life) and the relevant ECtHR case law (see, for example, *Sen*

*v. The Netherlands*, 21 December 2001). Art. 16 of Organic Law 4/2000, of 11 January, on the rights and freedoms of foreign nationals in Spain and their social integration, states that "foreign residents have a right to family life and family privacy in accordance with this Organic Law and with the provisions of the international treaties ratified by Spain"; and that "foreign residents in Spain are entitled to sponsor those relatives listed in Art. 17". It has already been said (see question 17 above), however, that the Constitutional Court (STC 236/2007, of 7 November, §11) has refused to accept that the right to family reunification forms an integral part of the right to family privacy (Art. 18(1) CE).

It has also been noted (see question 17 above) that the Constitutional Court has reinforced the protection against noises, odour or light pollution granted by the laws that further elaborate the right to enjoy a *suitable environment* (Art. 45(1) CE). The Court declared (SSTC 119/2001, of 24 May; 16/2004, of 23 February; and 150/2011, of 29 September) that the protection against such external interferences is at least partially encompassed in the right to physical and moral integrity (Art. 15 CE) and to personal and family privacy and the inviolability of the home (Art. 18(1) and (2) CE), pursuant to the ECtHR case law (among other judgements, *López Ostra v. Spain*, 9 December 1994 and *Guerra and others v. Italy*, 19 February 1998).

### 23 *What are the most important social rights cases brought from your country to international rights protecting bodies?*

In the referred field (noises and odours as interferences in private and family life) (see questions 17 and 22 above), the cases leading to ECtHR judgements *López Ostra v. Spain*, 9 December 1994, *Moreno Gómez v. Spain*, 16 November 2004 and *Martínez Martínez v. Spain*, 18 October 2011, are specially relevant.

### 24 *What are the lessons you draw from the international litigation (pertaining to social rights) started by applicants from your country?*

The impact on the internal legal system is remarkably lower than that of the judgements of international courts on classic fundamental rights. Recent examples of pronouncements on "first-generation" fundamental rights with great impact are the ECtHR judgement *Del Río Prada v. Spain*, 21 October 2013 (regarding the non-retroactive nature of criminal law and the so-called "Parot doctrine" applied, among others, to prisoners of the terrorist group ETA); ECJ judgement C-399/11 *Melloni* of 13 February 2013 (on the first preliminary ruling referred by the Spanish Constitutional Court when it detected an alleged incompatibility between the European arrest warrant and Art. 24(2) CE (right to a trial with full guarantees).

## 16.5 Social Rights in Ordinary Legislation

*25 To which extent does the ordinary legislation in your country ensure the protection of social rights?*

As previously noted (see questions 1, 2, 6, 7 and 8 above) and leaving aside the enhanced protection of certain social rights such as the right to free education (Art. 27(1) and (4) CE) and collective bargaining (Art. 37 CE), it would be more correct to rephrase the question and, therefore, also the answer: in principle, the content of social rights is the one provided by ordinary legislation.

Generally speaking, it can be said that Spain grants a high standard of protection of social rights. An advanced system of social benefits for dependent people was even established by law in 2006. It was presented as the "fourth pillar" of the Welfare State (together with pensions, education and health care). The economic crisis that broke out shortly after caused that new benefit system to be only a partial reality.

*26 Is this legislation in conformity with the national Constitution and the international instruments ratified by your country?*

In principle, yes. Nevertheless, some issues regarding the cutbacks of social rights in the context of the economic crisis (elimination of the right to free health care for illegal aliens – except in the case of emergencies –, salary cuts for civil servants, the so-called "pharmaceutical copayment" in some Autonomous Regions, etc.) are – in most cases– pending before the Constitutional Court.

*27 Are there any original legislative tools or mechanisms of protection of social rights created in your country?*

In principle, no.

## 16.6 Justiciability of Social Rights

*28 Are social rights considered justiciable in your country? To which extent?*

See question 29 below.

*29 What is the role of the judge?*

The aforementioned regulation provided by Art. 53(3) CE (extensive legislator's autonomy and *subjection of the enforcement bodies to the rule of law* (see questions 1, 2 and 6 above)) can be put in a different, clearer manner: the establishment of rights is ascribed by the CE to the constitutional bodies that enjoy the greater democratic legitimacy (the legislator and the Government). This brings along the prohibition set on the judges to apply criteria of their own (not determined by law) in social policy decisions. It is the latter what is properly referred to as "fear-clause" (*Angstklausel*). It has also been said in Spain that the courts are subject to the law even when it could lead in a particular case to an apparently "anti-social" outcome.[19]

However, in the context of the last economic downturn, we could point to a tendency of the civil courts to interpret eviction regulations in a very favourable way for the mortgage debtor (to the disadvantage of creditor banks). It could be considered an isolated phenomenon intended to protect the right to housing (Art. 47 CE) of families at risk of social exclusion. In some cases, it could be doubted whether the courts have exceeded the room for interpretation given by such regulations; or whether they have simply not enforced them. The protective conduct of the courts has been covered in part by the recent Judgement of the Court of Justice of the European Union of 14 March 2013 on the partial incompatibility of the Spanish foreclosure procedure with European consumer protection law. The matter is still awaiting scientific legal research.

On the other hand and in parallel to declaring that the courts are subject to the rule of law when it comes to social rights enshrined in Chapter 3, Part I CE, the Constitutional Court has also stressed the value of these constitutional principles as *interpretative criteria*. As such, they impose on the judge the obligation to interpret the law in favour of the enactment of those rights. For instance, STC 19/1982 of 5 May rules on a specific interpretation (questionable from the standpoint of the rules governing the matter) adopted by the Administration and a court. They had both considered that survivor's pension and retirement were mutually exclusive. The Constitutional Court declared that Art. 50 CE (protection of old age) "mandates to discard the application of a rule when it leads to an outcome contrary to the constitutional provision's intended aim" (§6).

*30 What are the practical effects of such justiciability?*

The normal effects of any right that can be judicially recognised and enforced.

19 See José María Rodríguez de Santiago, 2007, 48.

*31 What are the most prominent examples of social rights cases successfully brought to courts by the litigants?*

In the late 1980s, a case brought by a Catalonian lawyer had great impact. By means of a contentious-administrative action he contested the legal regulation of personal income tax because it made him pay more as a married person than if he had stayed single. The case reached the Constitutional Court, which on the first place upheld the appeal for protection (STC 209/1988 of 10 November). Furthermore, the Court later declared by way of an exception of constitutionality that such tax legal provisions were incompatible with the CE since, among other reasons, they breached the constitutional mandate to ensure the protection of the family (Art. 39(1) CE) and marriage (Art. 32 CE) (STC 45/1989 of 20 February). Those legal provisions were annulled and the legislator had to pass new regulation, delaying the date of the tax return for millions of Spaniards that year.

There have been other several relevant cases (see question 17 above) in which the Court has broadened by means of exceptions of constitutionality the subjective scope of the benefits and social rights' holders. This was the case when it ruled on the legally established eligibility for them from the standpoint of the *principle of equality* (Art. 14 CE), declaring the inclusion of some subjects and not others to be incompatible with the CE. The Court considered in STC 184/1990 of 15 November that providing for the pension only of the surviving spouse and not of the unmarried partner in an analogous situation was not unconstitutional. STC 222/1992 of 11 December, on the other hand, declared the unconstitutionality of excluding unmarried couples from the right to subrogate to the rights of the deceased tenant provided only for spouses in the Spanish law on urban rental. Lately, STC 41/2013 of 14 February on the legal regulation of eligibility for a survivor's pension held the exclusion of homosexual couples to be unconstitutional. These cases usually have great impact on public opinion (and judgements come with separate opinions of dissenting judges) because of the debate that such issues spark in society.

The aforementioned constitutional doctrine on the labour rights of pregnant women is equally remarkable (see question 18e) above).

## 16.7 Institutional Guarantees of Social Rights

*32 Which national bodies are the institutional guarantors of social rights?*

The administrative bodies that enforce social administrative law and the judiciary.

From a procedural perspective and not an organisational one, it should be noted that the *administrative procedure* is defined by principles and specific rules when it is used in order for the Administration to decide on social benefits: particularly strong obligations

of the Administration to inform the recipient, more severe protection of confidentiality regarding personal data, relating the procedure's final decision to technical opinions (medical or from social workers) issued along the procedure, relaxation of general provisions that establish the immutability of what has been declared by administrative acts in order to allow to consider new personal circumstances of the benefit recipient, etc. At the same time, even if decisions are adopted in virtue of administrative acts, judicial review of such acts concerning social benefits is, at times, not undertaken by contentious-administrative courts but by social affairs ones.

*33 Are there any specific bodies created especially for the protection of social rights? What are their powers?*

The Ombudsman is considered in Spanish law as a high commissioner of the *Cortes Generales* (the Spanish Parliament) appointed by them to defend the rights contained in Part I of the CE (including, thus, social rights of Chapter 3). To that effect, the Ombudsman may supervise the activity of the Administration and report thereon to the *Cortes Generales* (Art. 54 CE).

The Economic and Social Council, which forms part of the central State's organisational structure, is a consultative body to the Government in socioeconomic and labour issues, ascribed to the Ministry of Employment and Social Security. There are equivalent consultative bodies to the Governments of the Autonomous Regions.

Some Autonomous Regions' legislation provides that administrative appeals (previous to a judicial remedy) against administrative decisions rendered on certain social benefits (for example, the integration minimum income; see questions 1 and 17 above) shall be decided by a special Commission (integrated not only by civil servants but also by other social agents) the composition of which ensures the impartiality of its decisions and the assessment of circumstances that have to be considered with certain social sensitivity.

*34 How do you evaluate the effectiveness of these national bodies?*

The Ombudsman's action is probably the most relevant, given its intense inspection powers regarding the activity of the Administration and its entitlement to lodge an appeal of unconstitutionality (Art. 162(1)(a) CE). Appeals of unconstitutionality raised by the Ombudsman frequently have some significance from a social standpoint. For example, among the most recent constitutional judgements on cases brought by the ombudsman, we could note STC 45/2007 of 1 March, on the regulation of the ways of participation of municipalities in State taxes; and STC 31/2006 of 1 January, on the teachers' eligibility in Basque Country schools.

Its reports and studies should also be mentioned, such as the widely spread Report issued in 2003 on "Immigrant schooling in Spain: descriptive and empirical analysis".

## 16.8 Social Rights and Comparative Law

*35 Did your national legal system influence foreign legal systems in the area of social rights?*

It may have exerted a certain influence on some Latin American countries, but a deeper research would be needed in order to confirm this.

*36 Did other foreign legal systems influence your national legal system in the area of social rights?*

The Mexican Constitution of 1917, the Weimar Constitution of 1919, the Italian Constitution of 1947 and especially the Portuguese Constitution of 1976 exercised an obvious influence on the regulation of social rights provided by the 1978 Spanish Constitution.

*37 Can you give examples of provisions, principles or institutions (in the area of social rights) borrowed from other legal systems?*

All contents of Chapter 3, Part I CE (except for the constitutional rule on the effectiveness of such provisions – Art. 53(3), see question 16 above – ) have an historical precedent in the constitutional texts referred to in question 36.

*38 Do your domestic courts rights quote judgements or legislation from other jurisdictions when adjudicating on social rights?*

It is unusual, except for what has already been said (see questions 17, 22 and 23 above) regarding ECtHR case law.

# 17 Social Rights in Sweden

*Gunilla Edelstam*[*]

## 17.1 Social Rights in National Legal Scholarship

### *17.1.1 Definition of Social Rights*

There is no exact definition of social rights. It can be defined in a wider or a more narrow way from a Swedish point of view.[1] From a wide and more concrete point of view, social rights can involve many legal issues from different parts of the legal system such as leasehold, goods and consumption, labour market regulations, for example, work environment, working hours, some tax law, social insurances and social allowances. Also subsidies regarding the housing market and production of places to live in can include aspects of social rights. Social rights can therefore have a rather comprehensive definition that includes civil law where the legislator has given legal rights for weaker parties in relation to some other person, for example, the employer in labour law. In administrative law, however, a social right is a measure that shall be fulfilled by the state. Thus, the individual has a social right in relation to the state. This paper will focus on social rights in relation to the state, the county councils and the local governments where the state etc. is obliged to perform. I will distinguish between social civil law rights where the debtor or the one that shall give the right is a private law person (for example, the landowner or the employer) and social administrative law rights where the debtor is the state, the county council or the local government. This paper will mainly deal with the latter.

Social rights are perceived as different from other types of rights. While the freedom rights are mainly negative commitments, where the state shall refrain from acting, the social rights are positive commitments, where the state shall act. The state and other public bodies must act by performing.[2] The social insurances, the health care and the social services shall be performed by the state, the county councils and the local governments.

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* Assoc. Prof., Dr. (Public Law).

1 Compare H. Strömberg, B. Lundell, Speciell förvaltningsrätt (Special administrative law). Liber 2011, 18 uppl. s. 121.

2 Anna-Sara Lind, Sociala rättigheter i förändring (Social rights in transition). Uppsala Universitet (diss.) 2009, p. 29f.

The 290 local governments are obliged to take care of some welfare issues according to the law decided by the Parliament. They handle such matters as, for example, geriatric care and child care. Through laws such as the law on social services (2001:453), the Parliaments have made it an obligation for the local governments to handle welfare issues. The local governments are also in charge of the school system. The 20 county councils are according to a law decided by the Parliament in charge of the public medical service. The state is in charge of the national social insurances through its National Insurance Board.

The Swedish legislator has created a system of social rights within the welfare system, where some rights are granted to all citizens, while some only are granted to persons fulfilling specific criteria. An important reason behind this rule has been that it is presumed that people in general will be more positive to the idea of welfare rights if they receive support.

Either you are guaranteed to get a right automatically or when you ask for it (such as, for example, child care, child allowance, medical treatment) or you apply for an individual right (such as, for example, social allowance or housing allowance). In the latter case, you can appeal if you do not get your social rights.

### *17.1.2 Scandinavian Legal Realism*

Social rights are sometimes seen as rights arising from the social contract, in contrast to natural rights which arise from natural law. This is something that existed before the establishment of legal rights in positive law. In Sweden, however, social rights are not seen as parts of a social contract. They are instead established by positive law.

The Instrument of Government states (chapter 1 Article 2) that, "The personal, economic and cultural welfare of the individual shall be the fundamental aims of public activity". In particular, the public institutions shall secure the right to employment, housing and education, and shall promote social care and social security, as well as favourable conditions for good health. A social right thus exists if it is a legal right according to law. The notation "right" is even considered to have no meaning unless it is connected to a law that is clear enough as regards prerequisites and legal consequences. The right comes into existence through such material law. Crucial is how law is elaborated.[3] A social right must, therefore, be concrete and possible to claim. It must be clear as regards to prerequisites and legal

3 Compare Anna-Sara Lind, aa. s. 34f.

consequences. The word "right" has no meaning without the support of the law.[4] Ideas of philosophers such as R. Dworkin, J. Rawls and A. Sen on social justice, has played no major roles in the development of social rights. Instead the Scandinavian legal realism, in which the philosopher Axel Hägerström was a prominent figure, has played a prominent role. According to Hägerström, in the legal realism, values had no objective existence as they only were expressions of feelings. Such expressions were not considered to be true or false, they were just feelings.[5] Such ideas can be traced behind the law:

i. matters regarding social rights are only expressed as goals in the constitution,
ii. it is not possible to have such issues examined in relation to the constitution,
iii. rights depends fully on the concretization in ordinary law, its prerequisites and legal consequences.

The consequences of the Scandinavian legal realism have been much debated in Sweden. Professor of environmental law Staffan Westerlund has found that Scandinavian legal realism marked the legal system in a fatal way and that it has reduced the area of legal studies.[6] Professor of legal sociology Håkan Hydén has found that the Scandinavian legal realism liberated the law of its value as something per se and that the scientific work of law professors primarily is dedicated to the textbooks. He states that merits of research has no higher value and that Swedish lawyers are more technicians than theorists.[7]

Sweden has as Anna-Sara Lind points out,[8] chosen to keep social rights that are stipulated in the constitution outside of the binding part of the constitution. Principles for the form of government are emphasized, but there can be no legal review, only political control as to whether the parliament comply with the constitutional goals regarding social rights. The constitutional social goals cannot be invocated before courts. Social rights have, however, partly been stipulated in ordinary law. Anna-Sara Lind finds[9] that the constitutional solution where social rights are articulated as fundamental goals for society and not as individual rights leaves no possibility to have the social rights according to ordinary law examined by Court with regard to their concordance with the constitution.

4 Lotta Vahlne Westerhäll, Om sociala rättigheters funktion och konstruktion (On the functioning and the construction of social rights). s. 365-386. Compare Stig Strömholm, Rätt rättskällor och rättstillämpning, 5 uppl. Norstedts juridik 1996, kap. 12.

5 See Gunilla Edelstam, Wissenschaft vom Verwaltungsrecht: Schweden, in (von Bogdandy, Cassese and Huber eds.) Handbuch Ius Publicum Europeum band IV, Verwaltungsrecht in Europa: Wissenschaft, p. 277ff.

6 Gunilla Edelstam, aa. p. 282ff.

7 Gunilla Edelstam, aa. p. 277.

8 Anna-Sara Lind, aa. 2009. p. 435ff.

9 Anna-Sara Lind, aa. s. 463ff.

The legal implications would be[10] that the Swedish constitution is "not equipped to handle the factual status of social rights as constitutional rights" and that this matter can have consequences for our implementation of international law.

A consequence of the above-mentioned factors would be that the question of constitutional protection of social rights is not in focus of the national legal scholarship and in addition there is no constitutional case law that promotes legal philosophical debates on such questions amongst legal scholars. However, Sweden is a leading welfare state. For most situations in life where a person might needs help from the society, there are social rights, sometimes formulated as individual rights for someone that fulfils certain criteria (social allowance, for example), sometimes formulated as more collective rights for all citizens (child allowance, for example). This can be seen as a contradiction, but as legal scholars have pointed out[11] a social right is seen as a right only if it is stipulated in the law and is clear enough regarding prerequisites and legal consequence. This is the dominating legal technical point of view. Social rights are not seen as expressions of a higher legal principle. In addition, legal scholars point out that the resources (in the budget) and the possibility of appeal are important aspects as regards the existence of a right.

### *17.1.3 Social Welfare – A Matter of Competitive Strength?*

The question of budget leads to the question of economic growth. The most important questions of social rights protection concern resources and how the welfare shall be paid in the future. Problems are many and huge. They are discussed by economists and politicians.[12] There is not enough economic growth in Sweden to support the welfare state. Big enterprises such as Ericsson, Volvo and Sandvik that contributed in building the welfare state do not create enough Swedish jobs. They have become multinationals and create jobs in other countries. The competitive strength of Sweden is falling. Innovations are not sufficiently well promoted by the state. The school system is lagging according to PISA evaluations. Infrastructure is not good enough. Integration of immigrants could be better. These are all threats to the Swedish welfare system.[13] Social rights involve questions of national competitive strength and this is the heart of the problem. Legal scholars have little to say in such matters.

10 Anna-Sara Lind, aa. s. 46ff.

11 Compare Anna-Sara Lind, aa. s. 35.

12 See, for example Mikael Törnwall, Vem ska betala för välfärden? (Who shall pay for the welfare). Atlas 2014; K. Almqvist, L. Gröning (eds.), Välfärdsstatens framtid (The future of the welfare state). Axel och Maragret Ax:son Johnsons stiftelse 2011.

13 Mikael Törnwall, Vem ska betala för välfärden? (Who shall pay for the welfare). Atlas 2014, kap. 9.

Another economic question in relation to social rights concerns the distribution of income policy. The incomes are considered to be more equally distributed than in other comparable countries. The Swedish tax and transferring system has a strong levelling out effect. One of the major debates is whether this matter has put a break on economic growth.[14] The debate concerns whether the transfer of money through the taxes in exchange for subsidies such as child allowances, pension and job seekers allowances are obstacles to the growth of economy. The Swedish system of transferring money levels out differences with regard to income. Though there is an increasing difference in incomes (due to globalization and need of good knowledge in a high-technological society), the levelling out is still comprehensive and it is up for debate whether this matter has slowed down the growth of the economy. It ought to be mentioned that the welfare rights to a large extent are directed towards the middle classes that have possibilities to organize their lives. They pay for pensions, school, preschool, child allowances, etc., through their taxes. This policy of giving with one hand and taking with the other hand creates a vicious circle. Over lifetime, this transfer means taking an amount of money from an individual as taxes and giving him the same amount as welfare. This implies that there, to a large extent, is not a real transfer of money in the welfare state as far as the middle class is concerned. People adjust to the existing system and learn how to benefit the most from what they have paid for. One criticism is that financing the system with taxes leaves little choice for the individual. People feel that they have to use the benefits because they have paid for them and their choice is limited. Others, i.e. politicians and bureaucrats, decide what they can get. You can thus have no influence on the content of the welfare service and you have not the choice of putting your tax-money into something else than what the local government or the county councils pay for. People adjust to the possibilities that the system offers. One debate, therefore, concerns the political and economic consequences of the transfers of taxes to social right and welfare for the middle classes. There are huge transfers of money from the state to the middle classes but over lifetime it is not just a transfer of money. There is a transfer of power to the state and the local governments that can decide how people shall live their lives. You are of course free to choose something else than what is offered to you by the authorities but this means that you will have to continue to pay taxes for the general welfare systems without getting the benefit, but on top of that the fee for the service that you choose outside of the system. The local governments are also in charge of the school system and the same holds true for that activity.

The local governments and the county councils have however opened up for private enterprises to handle their legal obligations. This possibility has been done by contracting out some activities like hospital care, services such as old people's home, and schools or

14 Klas Eklund, Vår ekonomi. Norstedts 2010, s. 145.

by giving permits to privately owned entities to run some welfare activities. The service that individuals choose from such privately owned entities is thereafter paid by the local government or the county council. This possibility has opened up for some freedom for taxpayers that want to use such services. However, on a political level, this policy is very much debated. The Left Party (Vänsterpartiet) that have some influence on the present government has as their political main issue that tax payer's money shall not finance private entities. It is to some extent possible today to choose to use such a private alternative, meaning that local government pay for the alternative with tax money.

During the last decade, a lot of the social services such as schools, preschools and old people's home have been contracted out. The discussion is mainly political but it has important legal implications such as whether and how obligations for the state, the local governments or the county councils can be contracted out without contravening their legal obligation. Another question is how supervision should be performed when such obligations are contracted out.

As regards the public medical care, a debated economic issue concerns that the costs are expected to rise with 50% between 2010 and 2025.[15] Demography and more advanced medical care imply higher costs that will lead to higher taxes or less welfare unless the competitive strength of Sweden and its industries as well as its entrepreneurs improves.

The National Social Insurance system is regulated in the Social Insurance Law (2010:110). Fees are paid to the system but the benefits are also partly covered by taxes. For example, you find the income pension and the guarantee pension. The income pension will everyone that worked and paid fees to the system get as they retire and the guarantee pension will those get that have not had a working life, when they obtain the age. The income pension is covered by fines while the guaranteed pension is covered by tax revenues. Most of the money that came into the system as the general pension was set into place in the beginning of the 1960s was however spent on other things, such as building of houses. The system is, therefore, regarding the income pension as well as the guarantee pension dependent on a sufficient amount of people working to support the system and that there are enough work offered by industries and entrepreneurs. The official unemployment rate in January 2015 was 8.4 but for young people aged 16-24 it is higher, around 14%.

The pressure on the welfare system has connection also to the wages. Lower salaries are not allowed. The labour unions and the employers decide the salaries through collective agreements. People from other European countries come to work in Sweden in accordance

15 Mikael Thörnvall, aa. s. 48f.

with the EU-regulation on free movement. If they are paid by a foreign enterprise and receive lower wages than Swedish workers, this constitutes a worry to Swedish workers and Labour Unions. The ECJ has found that Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State from attempting, by means of collective action in the form of a blockade ("blockad") of sites, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, more favourable conditions than those resulting from the relevant legislative provisions.[16] The labour unions found that this would not guarantee equal treatment on the labour market. The "Swedish model" in which the unions and the employer decide the wages should be followed according to them. The fear of course is that Swedish workers, the members of the labour unions, will have to lower their salaries or lose jobs. The issue of lower wages is also debated from an economic point of view with regard to asylum seekers and other immigrants from countries outside the European Union. It can be difficult to find a job in Sweden especially for people having no or low education. Possibilities to give lower salaries than those agreed upon by the Unions and the Employer Organization are debated, but there is a resistance against such a solution from the Labour Unions.

The debates regarding salaries are not social – administrative law – rights. However, the possibility to work is basic for people and can, therefore, be seen as a social right. In addition, the goal "to secure the right to employment" is stipulated in the constitution. With high salaries, many people are left without work and with low salaries, the collective agreements might lose importance. But lots of people without jobs can be difficult to handle through the welfare system.

All problems are not economic. Regarding the school which is free of charge, the problem consists of falling results which PISA[17] investigations have shown. Sweden however spends more than most other countries on education. In order to make it possible to remain a welfare state, it is considered necessary to improve the basic school system. Innovations and new jobs are created by skilled people especially by engineers. "Free of charge" does not mean much if the quality of education is low.

16 JUDGMENT OF THE ECJ (Grand Chamber) 18.12.2007 Case *C-341/05*, REFERENCE for a preliminary ruling under Article 234 EC from the Arbetsdomstolen (Sweden): *Laval un Partneri Ltd v. Svenska* Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet.

17 Programme for International Student Assessment.

### 17.1.4 A Legal Positive Approach

The debate concerns economy and politics where economic growth and the competiveness of Sweden and its industries and enterprises is in focus. For legal scholars, resources and economic growth are difficult to debate from legal points of view. Social rights could probably be debated in relation to economy and politics from a legal philosophical starting point. But as the constitution (Instrument of government chapter 1 Article 1) only stipulates social matters as goals for the parliament and not as a right for the individual and as the legal philosophical debate has denied the existence of values, there is not much of tradition of debating such issues. Instead Swedish scholars[18] tend to choose a legal positive approach: The right exists if there is a clear law.

Regarding how to apply the law when a disabled person want to live in a special apartment for a group of disabled persons, a crash between economy and law can occur in case law. According to acts of parliament, there are obligations for the local governments and the county councils concerning amongst others services for disabled persons. The local government thus has to pay. But the decision-making in unilateral single cases are often done by the politicians on the local first level. This implies that the decision-maker (a board with local government politicians) in such a case have to follow the law regarding the social right but also at the same time adjust to the limited economic resources from the tax revenue. If a social service is expensive, the politicians in the boars might have to raise local government taxes. However, the local government is obliged to provide the activities with enough resources so that the obligations can be fulfilled. In a case[19] that concerned the right for a mentally retarded person to live in a special apartment for a group of disabled persons, the local government (in this case the county council) was obliged to take necessary measures according to the Supreme Administrative Court. The county council had denied the disabled person this right as there were no such places available at the time.

The need to protect social rights in ordinary law is not questioned. The welfare system is seen as an important part of the Swedish democracy. We elect the members of the parliament and there are goals for the Parliament to comply with according to the constitution.

Resources are questioned but this is not a legal problem, it is an economic issue on a macroeconomic level. However, a choice between higher taxes or less welfare could be painful to the whole society and that choice might be necessary to make if there is not enough growth of the economy.[20] The lack of money can also be handled by reducing the

18 Anna-Sara Lind, aa. s. 34.
19 RÅ 1988 ref. 40. (RÅ=Supreme Administrative Court, since 2011 HFD).
20 Mikael Törnwall, aa. s. 57.

social right. The income pension that is financed through fees has been reduced during times when there was not enough money coming into the system from the workforce. This is possible as the law stipulates that adjustment can be made if such a situation should occur as has happened in the past. An average retired person has lost about 31.000 SEK (3.500 Euro) due to the balancing during 2010-2014 and will lose another 16.000 SEK during 2015-2018.[21] Also in cases where there is no law on "balancing", resources can be cut for example, in schools and preschools and care in old people's home resulting in economy measures on the food served in the old people's homes and more hours without a teachers for the pupils in the schools. This cannot be appealed and it is not treated as legal philosophical issue nor as a legal technical issue. These measures are not considered as legal problems. The problems are on an economic level and concern economic growth and the competitive strength of the Swedish enterprises in a globalized world.

The legal debate tends to be legal technical and the rights that are in place for everybody and the individualized rights for those that meet certain criteria gives a rather strong legal rights in relation to the debtor, that is the state (social insurances), the County Councils (health care) and the Local Governments (social care). The individualized social rights for persons that meet certain criteria can be appealed to Administrative Courts and the rights that are for everybody will be given automatically (child allowance) or on demand (medical care). But if the discussion/debate concerns whether a person gets enough from the welfare system, the problems are not primarily legal.

The conclusion regarding the legal scholarship and the protection of social rights is that the scholarship has a legal positive approach to such matters. The lack of specific social rights (except for the right to access to private land (Allemansrätten) and free schools) in the constitution, as well as the heritage from the Scandinavian regal realism, does not promote another approach. Debates regarding social rights take place from economic and political points of view and the legal scholarship does not add legal philosophical views to their debates, only legal technical, in accordance with positive law.

The politics regarding social rights emanates from the observation of the social issue during the nineteenth century. The treat of the "social issue" to the existing society due to rapid changes, industrialization and urbanization started the debates and later the politics.[22] Legal philosophy has not had any important influence on the development of social rights. Rights did not exist according to the philosophy of the Scandinavian legal realism. Swedish

21 Storförlust för pensionärerna (A loss for the pensioners), Svenska Dagbladet 31 okt 2013.

22 Jan Larsson, Folkhemmet och det europeiska huset (The Swedish Welfare State and Europe). Hjalmarsson och Högberg förlag 2008, s. 37ff.

legal scholars have focused on legal technical issues were rights are a consequence of clear legal facts.[23] Social rights, except for schools free of charge, do not exist in the chapter of fundamental rights in the Swedish Constitution. It is just a goal for the State and this is the starting point for legal scholars.[24] Our starting point is not legal philosophical ideas. The approach to social rights is legal technique and legal positivism.

## 17.2 Constitutional Protection of Social Rights

### *17.2.1 Social Rights in the Constitution*

The Swedish constitution (chapter 1 Article 2 of the Instrument of Government[25]) establishes that "public power shall be exercised with respect for equal worth of all and the liberty and dignity of the individual" and in connection to this article, it also establishes that "The personal, economic and cultural welfare of the individual shall be fundamental aims of public activity. In particular, the public institutions shall secure the right to employment, housing and education, and shall promote social care and social security, as well as favourable conditions for good health". This is the only relevant provision as regards social rights (except for "Allemansrätten" (right of access to private land) and the right to free school) in the constitution. No judicial review of the social rights in ordinary laws can be made as regards the accordance with the constitution. The reason is that the provision contains goals for the legislation but no individualized social rights. The Parliament shall act but the constitution does not express any social right for the individual and there is, therefore, no possibility of a constitutional legal review. The article expresses some basic political values that all parties could agree upon when this institution was established in 1974 (in force since 1975) but it has no binding force in relation to the citizens. It, therefore, has limited importance with respect to individual cases.[26] Citizens and others cannot claim any specific right with regard to this stipulation. However, when a law is established, it gives some guidance to the parliament as to the goal of its legislative activities. It can play a role in the political debate but not much in jurisprudence.

Free school can be seen as a social right. The constitution (Instrument of Government, chapter 2 Article 18) states that "All children covered by compulsory schooling shall be entitled to a free basic education in the public education system". The nine years of basic

23 Anna-Sara Lind, aa. s. 35.
24 Anna-Sara Lind, aa. s. 34f.
25 Statutes in translation can be found on <www.government.se/publications>.
26 T. Bull, F. Sterzel, Regeringsformen en kommentar, s. 55.

education in school is according to the School Law (2010: 800, chapter 7 Article) compulsory for children from the age of seven.

### *17.2.2 Legal Review*

Sweden does not have a constitutional court. A constitutional mechanism of protection *vis-à-vis* the legislator however exists. Constitutional matters can be considered by ordinary courts. The Instrument of Government (Article 10 of chapter 12) stipulates that "If a public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied". As the social rights in the constitution are established as vague guidelines for the legislator, this article does not have any importance as protection *vis-à-vis* legislator and its activities. There is furthermore no special protection against passivity from the legislator except for the possibility to vote in the next election. Establishing debtors and subjects are not needed in the constitution. The free basic education is according to the school law to be handled by the local government. Other social rights exist in ordinary law and these laws points out the debtor (the state agency, the county council or the local government).

### *17.2.3 Allemansrätten*

There is however one article in the constitution that do give certain protection of something similar to a social civil law right. It is Allemansrätten (right of access to private land). The constitution (Article 15 of chapter 2 in Instrument of Government) states that "Everyone shall have access to the natural environment in accordance with the right of public access, notwithstanding the 'above provisions'". These "above provisions" concern the land owner's right to their land. In this case, there is not a matter of social rights paid by the tax-payers but a right similar to social right, that the landowners might have to provide or rather accept from "everyone". The stipulation does not give a specific right for "everybody" against the owner. Allemansrätten is not defined. The constitution provides a kind of commitment for the legislator not to create obstacles for "everybody" which implies that the legislator as well as the institutions of the state shall be inactive as to give protection for property right if it interferes with Allemansrätten.

Allemansrätten can be seen as a kind of social right as it gives "everyone" the right to pick for example, berries and take passage through and walk on and even stay overnight on the owner's property. Berries can be picked and sold and give an income to a person or even a group of persons that use Allemansrätten. But as mentioned, it is however not a constitutional right for individuals in relation to the owner. Instead it is a commitment

to inactivity as regards legislation that might be obstacles to "everyone's right". The parliament as well as state agencies (such as, for example, the police or the enforcement agency) must retain themselves from protecting landowners property rights if that would intrude on Allemansrätten. It is thus not expressed as a right in the relation debtor and subject, but in reality it gives possibilities to pick and sell and earn money by using landowner's properties. Instead it is expressed as a constitutional restriction to protection of property rights of private landowners, and Allemansrätten is in the Constitution seen as being a principle above the law. Similar to the way that social rights in other countries can be seen as above the law due to legal philosophical ideas regarding the nature of social rights, Allemansrätten is a principle.

Allemansrätten has during the last year been widely used by people from the eastern parts of the European Union and the landowners have in many cases had a lot of inconvenience when cars and families have been staying on their private property picking berries. The use of Allemansrätten can give an income. This is the way it has been used during the last years by people coming especially from Eastern Europe. It is thus not the tax-payers that have to pay, but the landowner might have some disadvantages which is the case according to media reports during the last years. The Schengen agreement has involved possibilities to travel across the borders in a way that increases the possibilities to use Allemansrätten.

Allemansrätten is not a social right in relation to the state or local government (like the Social Administrative Law rights) but a right in relation to landowners (like the Social Civil Law rights). Is has existed as common law for a very long time but was stipulated in the constitution from 2010. In cases that have been taken to administrative courts, the question of respect for property has been assessed in relation to Allemansrätten. In a Supreme Court case from 1996-09-29[27] where an enterprise had organized white water canoeing on a private landowner's property, the organizer was forbidden to continue his activity as it had clearly transgressed what the landowner had to accept according to Allemansrätten. There had been considerable damages and inconveniences.

Allemansrätten does not exist in relation to the State (unless the state is the landowner). The legislator thus makes the landowner the debtor when it comes to Allemansrätten. Protection of Allemansrätten is a rather original contribution to the constitution, especially if you look at Sweden as a leading welfare state, without constitutional protection of social rights in cases where the state is the debtor, but with protection of a social right (Allemansrätten) where a landowner is the debtor. The protection of Allemansrätten cannot be restricted through ordinary legislation. This is however the case with other fundamental

27 T3615-95, NJA 1996, s. 495.

rights. Most of the freedom rights and the political rights can be restricted through ordinary law if it is deemed to be necessary and acceptable (Instrument of Government chapter 2 Articles 20-22). Partly the freedom rights therefore do not have a strong constitutional protection either.

## 17.3 Protection of Social Rights under Other Constitutional Rules and Principles

Due process is one principle to follow. It was stipulated as a part of the constitution in 2010. Another, but older, principle according to the constitution is that "Neither the Riksdag, nor a public authority or a decision-making body of any local authority may determine how a court of law or an administrative authority shall adjudicate or decide in an individual case or otherwise apply a rule of law in a particular case." (chapter 11 Article 3 and chapter 12 Article 2 in the Instrument of Government). Another principle in the Constitution (chapter 1 Article 9) is that "Courts of Law, Administrative Authorities and others, performing public administration functions, shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality".

These constitutional principles are seldom or never subject to legal review in case law. Until 2010, the constitution stipulated that "it had to be obvious" that the application of an ordinary law was not in accordance with the constitution. Such matters are never obvious as regards material law.

There is in addition impartiality an article on non-discrimination in the constitution.

Even though there is no special protection of social rights in the constitution except for Allemansrätten and the school free of charge and only the goals are set out regarding other social rights, there is in ordinary law, as will be dealt with below, a legal protection of social rights that create the base of Sweden as a welfare state. This is not the result of ratification of international treaties. Concerning social rights where the state is the debtor (Administrative Law), Sweden is still in the forefront as a welfare state, but we are facing changes and difficulties to preserve it. The ECHR however has had some relevance as regards to social rights. The ECtHR has found that Article 6 can be applied in social rights issues.

## 17.4 Impact of the International Protection of Social Rights

### *17.4.1 Dualism*

International treaties are not directly applicable. Sweden follows the dualistic system. The precondition for binding force is that the treaty has not only been ratified but also implemented into national Swedish legislation. The ECHR is Swedish law from 1995 (SFS 1994:1219) when Sweden became member of the European Union and the constitution (Instrument of Government chapter 2 Article 19) states that "No act of law or other provisions may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms". However, before 1995, the legal status of the ECHR was debated. The dualistic system regarding the obligation for Swedish courts to apply international treaties from 1953, when Sweden ratified the convention, until 1995 when it became Swedish law, made it unclear how Swedish courts were to act. The existence of the ECtHR and the obligation for Sweden to follow its adjudication added to the confusion.

### *17.4.2 Fair Trial*

Regarding social rights where taxes are needed in order to provide the needed resources, it is not common that international treaties establish a clear obligation. The European Convention of Human Rights has a certain impact through its Article 6 on due procedure and Protocol 1 on respect for property in relation also to social rights and pensions.

The ECtHR has pronounced that Article 6:1 is applicable on social benefits when such a social right exists in national law (*Salesi v. Italy* 12.10.1992). The ECtHR has in *Döry v. Sweden* (12.11.2002), *Lundevall v. Sweden* (12.11.2002), *Salomonsson v. Sweden* (12.11.2002), *Miller v. Sweden* (08.02.2005) and *Andersson v. Sweden* (07.12.2010) applied Article 6 on procedures regarding compensation for disablement and compensation for occupational injury. In the case *Lundevall* and in the case *Salomon*, the ECtHR found that oral proceedings should have taken place. In the *Lundevall* case, the question was how to access his need for help and the costs that it caused. In the *Salomonsson* case, the question was if the costs that his disablement caused were large enough to give him the right to receive the compensation. The ECtHR found that oral proceeding would have given the administrative appeal court a better basis for the judgements and that there were no exceptional circumstances that motivated an adjudication without oral proceeding. In the *Miller* case, an oral proceeding should have taken place as an overall assessment was needed. In the *Döry* case on compensation for occupational injury, the ECtHR found that as the proofs in the case

were medical, the court could make its judgement on written documents in the case and an oral proceeding was not needed. In *Andersson v. Sweden* that also concerned compensation for occupational injury, the ECtHR came to the opposite conclusion as an assessment of the proofs was needed. Since 2009, the administrative court procedure act (1971:291) stipulates that an oral hearing shall be held in Administrative Court unless this hearing is deemed unnecessary, if the private party that is bringing a case to the Administrative Court requests an oral hearing.

It is however possible that Allemansrätten – as a consequence of increased use of private land by groups of persons – will be reviewed in relation to respect for property in amendment 1 to the ECHR.

### *17.4.3 An EU Perspective*

When evaluating the Swedish constitutional protection of social rights in the light of international obligations, it has been found.[28] that the Swedish constitution does not handle the constraints that the membership in the EU means for the national welfare state, nor is it equipped to handle the factual state of social rights as constitutional rights. There is a strong tension between individual rights steaming from the four freedoms and collective rights, built on the principle of solidarity and the welfare rights that are built on collective solutions that give legitimacy for the state.[29]

## 17.5 Social Rights in Ordinary Legislation

Social rights is here above all be defined as welfare rights, where individuals according to legislation have rights and where the State, the County Council or the Local Government is the debtor. The Swedish legal discipline of Social Law (*socialrätt*) includes Social Administrative Law rights in relation to these debtors.

The social rights in ordinary legislation can be divided into three parts: The social care and services, the public medical care and the national social insurances.[30] Social allowances or services the individual can be entitled to after an application to the Social Board (Local Government Authority) if he fulfills stipulated legal criteria according to the law. The local government may charge fees for its services. Public medical service is free – except for a

28 Anna-Sara Lind, aa. s. 465.
29 Anna-Sara Lind, aa. s. 449.
30 H. Strömberg, B. Lundell, aa. s. 121ff.

smaller fee – to anyone in need. The service is handled by the county councils. Swedish Social Insurances Law consists, as regards to pension, of insurances where some are paid by the state (tax-based guaranteed pension) some through fees paid into the national social insurance system (income-based pension). For families there are Parental Allowance, Child Allowance and Child Alimony. There are also other benefits such as, for example, housing allowances. The state is in charge of the social insurances through the National Social Insurance Board. There are in addition some other kinds of special needs of support such as, Study Allowances and Unemployment Benefits that are handled by other state bodies.

There are many social rights and they all exist according to legislation from the Parliament. The debtors can be either the state through its administrative authorities (mainly the National Social Security Agency) or the 20 County Councils (medical care) or the 290 Local Governments (Social Aid, Geriatric Care and Child Care amongst others).

Person that are resident in Sweden – citizens or other nationals with permanent residence permit – have the same social rights.

Of importance to the social rights is the national registration and connected possibilities to run information through computerized system. Information from different authorities can be run together including information where confidentiality applies.[31]

Are the social rights in conformity with the constitution? The constitution mainly points out goals for the legislator. Through legislation on social care, health care and social insurance social rights have been have been implemented in the law. However, as regards the goal "to secure employment" and to "secure housing", it is different.

In big cities like Stockholm, there is a lack of housing. The Local Governments have not built enough. This is even seen as a threat to the growth of the economy. Regarding the goal of securing employment, the Labor Unions oppose changes in the collective agreements in relation to salaries. The Government and the Parliament have not interfered. This does not help those immigrants with low or none education, or Swedish young people with only basic school.

As regards schools, the constitution only stipulates that they shall be free of charges. The goals for the schools are stipulated in the school law and it is a duty to take part in the education. There are huge problems as regards quality.

31 Compare G. Edelstam, What about Integrity, in (M. Ruffert ed.) Administrative Law in Europe: Between Common Principles and National Traditions. Europa Law Publishing 2013, p. 107ff.

## 17.6 Justifiability of Social Rights

The social rights, that are granted to persons that fulfill certain criteria and where the State or the Local Government is the debtor (social care and social insurances), can be appealed to Administrative Court.

The judge can change the decision from the lower instance which means that he can decide that the social right that the applicant applied for, shall be given to him or her. He can remit the case for retrial in the lower instance or he can declare the decision from the State Agency or the Local Government or the judgement from a lower court null and void. He can of course also come to the conclusion that the decision or judgement from the lower instance not shall be changed.

The practical effects of a court judgement can result in the Local Government finding that the aid (the social aid or the aid for disable persons) is more expensive than they expected. The Local Government Council and executive board as well as the municipal boards for different tasks such as the schools or the social care consists of politicians. In general, they make decisions themselves and do not delegate the decision-making power to officials if the aid can cause high costs. In the above-mentioned case[32] where a mentally retarded person was denied a place in a home for disabled persons, the political board had looked more to the cost than to the social right. The Local Government might if the costs become to high, have to raise the taxes or take money from some other activity, for example, from school education. This happened, for example, in Gothenburg in 2014. Money from the school education was transferred to social allowances. When questioned in Television about this, the responsible politician (now minister in the present government) answered: Do you have a better idea? The question came after the PISA investigation had shown bad results and thus low quality in the schools. The decision to transfer money from the schools can only be appealed to administrative court by the inhabitants of the municipality but the court can only nullify the decision or declare it legal. A pure local government decision cannot be changed by the court as the local government has autonomy, self-government. However, the individual that does not receive social aid that he applied for can appeal to administrative court and the court and in such a case the administrative court can change the decision. In cases where persons have individualized social rights in accordance with special administrative acts of parliament (such as law on Social Services, Law on Social insurances), the administrative courts can change the decisions from the lower instance, for example, the local government. Social rights that are not individualized in legislation (such as school education that is expressed as a duty) cannot be brought to court in order

32 See note 17.

to have an examination as to the quality. However, a decision by a local government to transfer money from the school system to the social care system can be examined in court as to legality. The court can then declare the decision illegal (null and void) or legal but not replace it with any other decision. The reason for this is that the local government has autonomy.

## 17.7 Institutional Guarantees of Social Rights

The social rights are handled by the State through one of its agencies (social insurance), the County Councils (public health care) and the Local Governments (social aid and services). The individualized social rights such as social aid social insurances can be taken to Administrative Courts. There is also the Ombudsman, but he is not a guarantor of social rights. He can however criticize how the case was handled (except for issues of proofs). If the citizen wants compensation due to a wrongful decision by the State he can turn to the Legal Chancellor. He is the legal representative of the State in such cases. A special ombudsman has been created regarding matters of discrimination and if there is a discrimination case, he shall help that person to get the same right as others. The Law on Discrimination states that discrimination is prohibited regarding, amongst others, the Health Care, the Social Care and services, the Social Insurance System, the Unemployment Insurance, and the Study Allowances. The Ombudsman for Discrimination will help to get compensation for discrimination in – amongst others – such cases. He will go to civil court if necessary. He has no power but will act as a lawyer for the discriminated person and the cost will be paid by the state.

Which is the most effective of these national bodies? Administrative Swedish Courts can be considered the most effective as they have more power. They can change a decision from first instance (for example, arising from local government). In addition, there is a stipulation in the law on social services (2001:453 chapter 16 Article 6a-d) according to which the state is empowered to fine any local government that does not, in due time, provide fixed social aid. Such a fine will be a minimum of 10.000 SEK (approx. 1000 Euro) and a maximum of 1.000.000 SEK (approx. 100.000 Euro). The Court will adjudicate the amount.

The legal technical approach in a legal positivistic tradition might also add to the effectiveness of the court. If legal philosophical ideas, influenced by Natural Law, were to be given importance, it is possible that the effectiveness of the Court would depend more on its reasoning. That might leave a space for others to object, that is not available through the

legal technical approach. The result can of course be questioned but it is more difficult for laymen to question the legal technical reasoning.

## 17.8 Social Rights and Comparative Law

Sweden has a long tradition as welfare state with social rights and it is not evident that we were influenced by other countries. The ideas rather came from the fact that misery was observed when industrialization changed the society and many people moved in to the cities. Social rights are not seen as some natural law or philosophical idea above the law. Scandinavian legal realism denied values such as rights. This has had influence on how legal scholars as well as the legislator regard social rights. The social rights exist in ordinary law but not (except for free basic school) in the constitution. The courts do not quote judgements or legislation from other jurisdictions when adjudicating on social rights.

# 18 Les droits sociaux en Suisse

*Maya Hertig Randall & Gregor T. Chatton*[*]

## 18.1 Introduction[1]

La Constitution fédérale suisse de 1999[2] exprime la conviction selon laquelle « la force de la communauté se mesure au bien-être du plus faible de ses membres »[3]. Elle prévoit, en tant que buts de l'Etat, de « favoriser la cohésion »[4] et de veiller « à garantir une égalité des chances aussi grande que possible »[5]. Dans quelle mesure ces aspirations et convictions sont-elles mises en œuvre dans l'ordre juridique helvétique? De quelle manière les droits sociaux y sont-ils consacrés? Ces questions se trouvent au cœur du présent rapport, qui entend établir une synopsis de la protection des droits sociaux fondamentaux en droit positif suisse.

Bien que certaines distinctions persistent entre, d'une part, les *droits fondamentaux* qui sont consacrés sur le plan national et, d'autre part, les *droits de l'Homme* que développe l'ordre juridique international[6], celles-ci ont tendance, davantage encore dans un système

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* Professeure ordinaire au Département de droit public de la Faculté de droit de l'Université de Genève, avocate, LL.M. (Cambridge). Les auteurs souhaitent vivement remercier Mme Stéphanie D**AHMEN**, avocate et assistante doctorale au Département de droit public de la Faculté de droit de l'Université de Genève, pour la minutie et l'engagement particuliers avec lesquels elle a relu et adapté le manuscrit aux exigences éditoriales. Dr. iur. et titulaire du brevet d'avocat (Genève), LL.M. (Saarbrücken), greffier juriste au Tribunal fédéral suisse (Lausanne), membre du Réseau académique de la Charte sociale européenne (Strasbourg). Les opinions exprimées dans cette contribution le sont à titre personnel.

1 Une version abrégée de la présente contribution a paru pour la première fois in *Rapports suisses présentés au XIXe Congrès international de droit comparé : Vienne, du 20 au 26 juillet 2014* [Institut suisse de droit comparé/H**ECKENDORN URSCHELER**, Lukas (éd.)], no 73, Zurich 2014, p. 289-348, et a été publiée par Schulthess Editions Romandes (http://www.schulthess.com). La publication de la présente version, actualisée et plus détaillée, de la contribution précitée a lieu avec l'accord de l'éditeur.

2 RS 101. Ci-après abrégée Cst.féd.

3 Préambule à la Cst.féd.

4 Art. 2 al. 2 Cst.féd.

5 Art. 2 al. 3 Cst.féd. Voir, à ce sujet, M**AHON**/**PULVER** (2002), 48 s.

6 Ces différences peuvent en particulier exister au niveau de la titularité d'un droit (par ex. réservé aux seuls citoyens d'un Etat), de la consécration d'un droit uniquement sur le plan national (par ex. la liberté économique prévue à l'art. 27 Cst.féd. ; arrêt 2C_283/2014 du 28 avril 2014 consid. 4) ou du degré de protection (par ex. protection minimale accordée par un droit conventionnel, que le droit constitutionnel correspondant est libre de dépasser).

moniste tel que la Suisse[7], à s'estomper de nos jours[8]. Partant, il sera indistinctement recouru au terme générique de « droits sociaux (fondamentaux) » aux fins de désigner les deux catégories précitées.

Pour les besoins de notre étude[9], les droits sociaux fondamentaux seront subdivisés comme suit :

(1) les *droits économiques* englobent l'ensemble des droits fondamentaux relatifs au travail, en ce compris les droits qui ont trait à la protection du travailleur et aux outils essentiels dont il dispose aux fins d'influer sur son activité. S'y ajoutent les libertés économique, contractuelle, d'entreprise et d'investissement[10].

(2) Les *droits sociaux stricto sensu* protègent l'individu qui, se trouvant face à un besoin socialement reconnu, n'est pas apte ou peine à se procurer, par lui-même (activité économique, propriété), les moyens nécessaires à sa subsistance ainsi qu'à sa participation régulière à la vie sociale de la communauté. Ils préservent également la liberté et l'égalité minimum réelles de cet individu « situé en société » et confronté aux différentes pressions et aux pouvoirs sociaux[11].

(3) Les *droits culturels* garantissent le droit de chaque être humain à acquérir, conserver, entretenir et développer un patrimoine particulier dans le but de sauvegarder et de développer son identité. Ces droits présentent ainsi tant une dimension de la culture comme valeur quasi-patrimoniale qu'une dimension ontologique se référant au besoin existentiel de racines, d'émancipation et d'appartenance que ressent tout individu[12]. En raison des spécificités qui caractérisent les droits culturels (double dimension, consécration fréquente dans des instruments ayant vocation de protéger des « droits civils et politiques »), il n'en

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7 Voir, pour la différence entre la conception moniste et l'applicabilité directe d'un traité ratifié par la Suisse, arrêt du TF 4C.422/2004 du 13 septembre 2005 consid. 3.1.2, non publié in ATF 132 III 122: « les traités internationaux (…) valablement conclus par les autorités fédérales lient la Suisse dès l'échange des instruments de ratification. Ils acquièrent alors validité immédiate dans l'ordre juridique suisse et s'incorporent au droit fédéral (…). Il suit de là que sont immédiatement valables en droit suisse tant les dispositions conventionnelles de ces traités qui sont directement applicables (self-executing) que celles qui ne le sont pas (non self-executing). Le problème de l'applicabilité directe d'une norme conventionnelle internationale, qui concerne le contenu de l'accord, apparaît lors de l'interprétation et de l'application de ce dernier *in concreto*. Il convient de se demander si l'accord ou certaines de ses dispositions sont directement applicables par les opérateurs juridiques internes, à telle enseigne que quiconque y a intérêt peut les invoquer à l'intérieur d'un Etat contractant ou bien si une activité d'intégration dans le droit interne doit être déployée de la part des organes nationaux ».

8 **Chatton** (2013), 357 n. 1864.

9 En effet, la notion de « droits sociaux » n'est pas fermement ancrée dans l'ordre juridique suisse et manque d'une définition qui fait l'objet d'un large consensus: **Meyer/Siki** (2010), 407.

10 **Chatton** (2013), 2. S'agissant d'un droit mixte, la garantie de la propriété, qui se rapporte non seulement à la maîtrise économique sur un objet, mais aussi aux fruits que l'individu peut en retirer, est susceptible de tomber dans cette acception ; cette interprétation demeure cependant controversée, notamment au vu de l'enracinement historique profond de ce droit dans le contexte des libertés (civiles).

11 **Chatton** (2013), 2.

12 Cf. **Chatton** (2013), 2, et les ouvrages cités.

sera fait mention qu'accessoirement ; l'on se limitera à les présenter au travers d'illustrations ou de principes applicables à leur ensemble.

La *première partie* de notre rapport établira un état des lieux des droits sociaux fondamentaux protégés en droit positif suisse. Elle présentera les sources de ces droits et les principes visant à coordonner les rapports entre les normes issues des différentes origines. La *deuxième partie*, consacrée à la titularité et à la portée des droits sociaux fondamentaux, permettra de mieux cerner la vision helvétique de cette catégorie de droits à travers l'analyse d'une série de questions : ces droits sont-ils conçus comme des véritables droits de l'Homme ou plutôt comme des droits des citoyens? Dans quelle mesure déploient-ils des effets dans les relations entre privés? Quels types d'obligations (négatives et/ou positives) imposent-ils à leurs destinataires? Peuvent-ils être restreints? Les réponses données à ces questions seront pertinentes en vue d'évaluer l'effectivité des droits sociaux fondamentaux dans l'ordre juridique helvétique. Cette problématique sera au centre des préoccupations de la *troisième partie* du rapport, qui sera consacrée à l'étude de la mise en œuvre judiciaire, législative et administrative des droits sociaux fondamentaux. Pour identifier les faiblesses de la réalisation effective de ces droits, les principales carences identifiées par les organes internationaux de contrôle seront également prises en compte. L'analyse de l'effectivité des droits sociaux fondamentaux trouvera son prolongement dans la *quatrième partie*. Celle-ci complètera l'analyse précédente en donnant un bref aperçu des autres fondements et mécanismes qui permettent de protéger ces droits dans l'ordre juridique du pays.

La protection des droits sociaux fondamentaux est un domaine dynamique et sujet à des controverses juridiques, politiques, économiques et sociales. Pour en tenir compte, les différentes parties de ce rapport intègreront des considérations sur l'évolution de ce domaine et les débats principaux qui l'entourent. Une autre thématique transversale qui a une incidence sur les questions analysées dans cette contribution est le fédéralisme : la structure fédérative de la Suisse injecte une dose de complexité, qu'il s'agisse des sources ou de la mise en œuvre des droits sociaux fondamentaux. Au défi commun à tous les Etats de définir les rapports entre le droit international et le droit interne s'ajoute en effet celui de coordonner les normes, compétences et politiques adoptées au niveau de l'Etat central (l'échelon fédéral), des vingt-six entités fédérées (appelées cantons)[13], et des 2'405 communes[14] qui composent ensemble l'Etat fédéral suisse.

13 Art. 1er Cst.féd.: « Le peuple suisse et les cantons de Zurich, de Berne, de Lucerne, d'Uri, de Schwyz, d'Obwald et de Nidwald, de Glaris, de Zoug, de Fribourg, de Soleure, de Bâle-Ville et de Bâle-Campagne, de Schaffhouse, d'Appenzell Rhodes-Extérieures et d'Appenzell Rhodes-Intérieures, de Saint-Gall, des Grisons, d'Argovie, de Thurgovie, du Tessin, de Vaud, du Valais, de Neuchâtel, de Genève et du Jura forment la Confédération suisse ».

14 Etat au 1er mars 2014, voir http://www.bfs.admin.ch/bfs/portal/fr/index/regionen/02/daten.html (consulté le 01.03.2015).

## 18.2 Les droits sociaux fondamentaux consacrés en droit positif suisse

La Confédération suisse connaissant une approche moniste vis-à-vis du droit des gens, les traités auxquels elle adhère sont donc directement incorporés à son droit interne dès leur entrée en vigueur sur le plan international, sans qu'il ne soit besoin pour le législateur fédéral de les transposer par le biais d'une loi ou d'une ordonnance. L'énonciation du catalogue des droits sociaux fondamentaux garantis par l'ordre juridique suisse doit ainsi non seulement prendre en compte la Constitution fédérale (B.) et les constitutions des entités fédérées (cantons) qui composent avec les 2'405 communes l'Etat fédéral suisse, nommé la Confédération suisse (C.), mais aussi le droit international accepté par la Confédération helvétique (A.). La multiplicité des sources soulève la question de leurs rapports (D.).

### *18.2.1 Le droit international applicable en Suisse*

Seules seront ici abordées les conventions internationales de protection des droits de l'Homme qui ont pour objet direct la protection des droits sociaux[15]. On distinguera entre les traités élaborés sous les auspices du système des Nations Unies (1) et ceux conclus au niveau régional (2).

#### 18.2.1.1 Sur le plan universel

*a Le Pacte ONU I et son nouveau protocole facultatif*

Sur le plan universel, la Suisse a adhéré au *Pacte international relatif aux droits économiques, sociaux et culturels* en date du 18 juin 1992; à l'instar du Pacte international relatif aux droits civils et politiques[16], le Pacte ONU I est entré en vigueur pour la Suisse le 18 septembre 1992[17]. La Suisse est par conséquent tenue de garantir, en particulier, (a) les droits économiques au travail (art. 6), à des conditions équitables de travail (art. 7), les droits et libertés syndicaux (art. 8), le droit à la sécurité sociale (art. 9); (b) les droits sociaux à un niveau de vie suffisant (art. 10), le droit à la santé (art. 11), (c) de même que les droits culturels à l'éducation (art. 13), de participer à la vie culturelle, de bénéficier du progrès scientifique ainsi que de la protection intellectuelle (art. 15). Il est toutefois intéressant de noter qu'au moment de ratifier le Pacte ONU I, les autorités helvétiques avaient, non sans

15 Voir, pour la protection indirecte des droits sociaux 18.5 infra.
16 Pacte ONU II; RS 0.103.2; RO 1993 750.
17 Pacte ONU I; RS 0.103.1; RO 1993 725.

légèreté, considéré que, contrairement à la CEDH[18] ou à la Charte sociale européenne[19], ce traité constituait avant tout un instrument de politique étrangère auquel il convenait d'adhérer par solidarité internationale[20]. Dans son Message sur l'adhésion de la Suisse aux deux pactes onusiens, le Conseil fédéral, soit le gouvernement collégial helvétique, avait en outre exprimé son opinion selon laquelle:

> « II découle du texte clair du Pacte I (…) que celui-ci a été conçu dans l'ensemble comme un instrument fixant des objectifs de politique des droits de l'homme dans le domaine social, qui impose aux Etats des obligations de droit international à caractère programmatoire, que les Etats s'engagent à réaliser progressivement, dans toute la mesure des ressources disponibles et par tous les moyens appropriés, en particulier l'adoption de mesures législatives (cf. art. 2, ch. 1, du Pacte I); il en résulte sans équivoque que les dispositions du Pacte I ne s'adressent en principe pas aux particuliers, mais aux législateurs des parties contractantes, qui doivent dès lors considérer ces dispositions comme des lignes directrices pour leur activité législative. Par conséquent, conformément à la jurisprudence constante du Tribunal fédéral, les dispositions du Pacte I ne créent en principe pas de droits subjectifs et justiciables, sauf d'éventuelles rares exceptions (cf. art. 8, par. 1, let. a: droit de former un syndicat); elles ne peuvent dès lors être directement invoquées par les particuliers devant les autorités administratives ou judiciaires suisses; tout au plus le juge pourrait-il s'inspirer, le cas échéant, de l'une de ces dispositions pour interpréter une loi »[21].

Durant les travaux d'élaboration du *Protocole facultatif* se rapportant au Pacte ONU I[22], tel qu'instaurant notamment un mécanisme de contrôle sur communications individuelles, la délégation suisse avait fini par se rallier au camp des Etats qui, tout en se déclarant favorables au principe de l'adoption d'un tel protocole, privilégiait néanmoins une approche « à la carte ou d'*opt-in* », permettant à chaque Etat de sélectionner les droits du Pacte ONU I à soumettre à la procédure de communications[23]. L'on peut dès lors regretter la volte-face qu'a opérée le gouvernement helvétique au jour de l'ouverture à la signature du

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18 RS 0.101 ; RO 1974 2151 ; traité entré en vigueur pour la Suisse le 28 novembre 1974.

19 Cf., par rapport au caractère à tout le moins partiellement justiciable de cet instrument, **WILDHABER** (1996), 489. Voir toutefois le Rapport du Conseil fédéral sur la Charte sociale européenne révisée, du 2 juillet 2014, FF 2014 5449.

20 **ALSTON** (1997), 188 s.

21 Message du Conseil fédéral sur l'adhésion de la Suisse aux deux Pactes internationaux de 1966 relatifs aux droits de l'homme et une modification de la loi fédérale d'organisation judiciaire, du 30 janvier 1991, FF 1991 I 1133, p. 1140.

22 Au niveau international, le PF/Pacte ONU I est entré en vigueur le 5 mai 2013.

23 **CHATTON** (2013), 466 et 490; **GOLAY** (2008), 4.

PF/Pacte ONU I: non seulement la Suisse s'est-elle (à l'heure actuelle) abstenue de même signer le protocole, mais le Conseil fédéral a de plus fait état de son avis – dépassé au regard de la conception actuelle du droit[24] – d'après lequel:

> « … pour de nombreux Etats, dont la Suisse, la mise en place d'un mécanisme de recours (appelé "communication individuelle") pour le Pacte I de l'ONU dans le cadre du Protocole facultatif a soulevé d'emblée des problèmes difficiles, en droit matériel comme en droit procédural. Le principal point litigieux réside dans la question fondamentale de la justiciabilité des droits économiques, sociaux et culturels. La question de savoir si le Pacte I de l'ONU fonde directement des prétentions individuelles pouvant être examinées dans le cadre d'une procédure quasi judiciaire était et reste controversée, aussi bien dans la pratique des Etats que dans la doctrine », de sorte qu'une ratification du Protocole facultatif par la Suisse ne paraissait pas envisageable[25].

*b Les conventions des droits de l'Homme de l'OIT*

La Déclaration de l'Organisation internationale du Travail relative aux principes et droits fondamentaux au travail, du 19 juin 1998[26], ainsi que son mécanisme de suivi ont eu pour effet de promouvoir la ratification par les Etats membres de cette Agence spécialisée onusienne de certaines des conventions élaborées en son sein et considérées comme particulièrement importantes pour garantir les droits de l'Homme[27]. Si l'énumération des conventions de droits de l'Homme de l'OIT à laquelle ladite Déclaration de Genève procède n'est de loin pas exhaustive, en tant qu'elle fait notamment l'impasse sur le droit à la sécurité sociale ou sur le droit à la santé, elle n'en fournit pas moins un point de départ utile[28].

La Suisse a ratifié l'ensemble des conventions des droits de l'Homme qui sont énumérées au sein de la Déclaration de Genève de 1998 et dont le respect par les Etats leur incombe

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24 **Chatton** (2013), 491.

25 Cf. réponse du Conseil fédéral à la motion parlementaire de la Conseillère nationale Evi **Allemann**, du 20 mars 2009, invitant celui-ci à signer le PF/Pacte ONU I ainsi qu'à engager le processus de ratification pour la Suisse: motion no 09.3279, rejetée par la chambre basse de l'Assemblée fédérale suisse le 24 novembre 2009, disponible sur le site Internet www.parlament.ch/f/.

26 Consultable sur le site Internet www.ilo.org/declaration/thedeclaration/textdeclaration/lang--fr/index.htm.

27 **Chatton** (2013), 46 ss; **Chatton** (2012b), 71-93.

28 Voir p. ex. en matière de *droit à la santé*, la Convention no C-14/1921 (RS 0.822.712.4; RO 51 30; entrée en vigueur pour la Suisse le 16 janvier 1935 et amendée par les C-80/1946 et C-116/1961) du 17 novembre 1921, concernant l'application du repos hebdomadaire dans les établissements industriels; ou en matière de *droit à la sécurité sociale*, notamment la Convention no 102/1952 (RS 0.831.102; RO 1978 1626; entrée en vigueur pour la Suisse le 18 octobre 1978) du 28 juin 1952, concernant la norme minimum de la sécurité sociale. Cf. ATF 126 V 353 consid. 5a p. 359; 121 V 40 consid. 2 p. 42 s.; 121 V 45 consid. 1 p. 46. Cf. **Chatton** (2013), 56.

de par la Constitution de l'OIT, à savoir: (i) en matière de *travail forcé*, les Conventions nos C-29/1930, du 28 juin 1930, concernant le travail forcé ou obligatoire, et C-105/1957, du 25 juin 1957, concernant l'abolition du travail forcé; (ii) en matière de protection des *droits syndicaux*, les Conventions nos C-87/1948, du 9 juillet 1948, concernant la liberté syndicale et la protection du droit syndical, et C-98/1949, du 1er juillet 1949, concernant l'application des principes du droit d'organisation et de négociation collective; (iii) en matière *d'égalité* de chances et de traitement, les Conventions nos C-100/1951, du 29 juin 1951, concernant l'égalité de rémunération entre la main d'œuvre masculine et la main d'œuvre féminine pour un travail de valeur égale, et C-111/1958, du 25 juin 1958, concernant la discrimination en matière d'emploi et de profession; (iv) en matière de *protection des enfants* et des adolescents, les Conventions nos C-138/1973, du 26 juin 1973, concernant l'âge minimum d'admission à l'emploi, et C-182/1999, du 17 juin 1999, concernant l'interdiction des pires formes de travail des enfants et l'action immédiate en vue de leur élimination[29].

*c Les conventions catégorielles élaborées sous les auspices des Nations Unies*

Dans le cadre des Nations Unies, les Etats ont élaboré plusieurs conventions de droits de l'Homme de nature catégorielle. Ces instruments ont pour vocation de protéger des catégories entières de personnes réputées vulnérables dans tous les domaines – civils, culturels, économiques, politiques et sociaux – auxquels ces dernières se trouvent confrontées[30].

En l'état, la Suisse n'a pas ratifié la Convention internationale du 18 décembre 1990 sur la protection des droits de tous les *travailleurs migrants* et des membres de leur famille (CTM). En revanche, elle est partie à la Convention du 20 novembre 1989 relative aux *droits de l'enfant* (CDE)[31]. Celle-ci contient également des droits sociaux, dont le traitement et les soins spéciaux à accorder aux enfants handicapés (art. 23), les droits à la santé (art.

29 C-29/1930 (RS 0.822.713.9; RO 56 1002; entrée en vigueur pour la Suisse le 23 mai 1941). C-87/1948 (RS 0.822.719.7; RO 1976 689; entrée en vigueur pour la Suisse le 25 mars 1976). C-98/1949 (RS 0.822.719.9; RO 2001 1360; entrée en vigueur pour la Suisse le 17 août 2000). C-100/1951 (RS 0.822.720.0; RO 1973 1602; entrée en vigueur pour la Suisse le 25 octobre 1973). C-105/1957 (RS 0.822.720.5; RO 1958 507; entrée en vigueur pour la Suisse le 18 juillet 1959). C-111/1958 (RS 0.822.721.1; RO 1961 824; entrée en vigueur pour la Suisse le 13 juillet 1962). C-138/1973 (RS 0.822.723.8; RO 2001 1427; entrée en vigueur pour la Suisse le 17 août 2000). C-182/1999 (RS 0.822.728.2; RO 2003 927; entrée en vigueur pour la Suisse le 28 juin 2001). Cf., pour un survol de ces conventions, **DUNAND/DREYER** (2014), 208 ss.

30 **CHATTON** (2012a), 132 ss.

31 CDE; RS 0.107; RO 1998 2055; entrée en vigueur pour la Suisse le 26 mars 1997. Cf. également les deux protocoles à cette convention, du 25 mai 2000, à savoir: le Protocole facultatif concernant l'implication d'enfants dans les conflits armés, et le Protocole facultatif concernant la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants (RS 0.107.1; RO 2002 3579; entré en vigueur pour la Suisse le 26 juillet 2002; respectivement RS 0.107.2; RO 2006 5441; entré en vigueur pour la Suisse le 19 octobre 2006). Une consultation a été ouverte en vue de l'éventuelle ratification par la Suisse du Protocole facultatif se rapportant à la CDE éta blissant une procédure de présentation de communications. Elle s'est terminée le 2 juillet 2015 (www.admin.ch/ch/f/gg/pc/preview.html, site consulté le 19 mars 2015).

24; cf. aussi art. 25), à la sécurité sociale (art. 26) et à un niveau de vie suffisant (art. 27), de même que le droit de l'enfant à une éducation adéquate (art. 28 et 29).

Par ailleurs, la Suisse a récemment adhéré à la Convention internationale du 13 décembre 2006 relative aux droits des *personnes handicapées* (CPH)[32]. Parmi les droits fondamentaux qu'il consacre, ce traité garantit notamment les droits sociaux *lato sensu* à l'éducation (art. 24), à la santé et à la réadaptation (art. 25 et 26), au travail et à l'emploi (art. 27), à un niveau de vie adéquat et à la protection sociale (art. 28), ainsi qu'à la participation à la vie culturelle (art. 30); la CPH vise en particulier à lever tous les obstacles (y compris les barrières architecturales) qui privent les personnes handicapées du plein exercice de leurs droits de l'Homme[33].

#### 18.2.1.2 Sur le plan régional

*Sur le plan européen*, la *Charte sociale européenne*, du 18 octobre 1961, respectivement la Charte sociale européenne révisée, du 3 mai 1996, qui met à jour et complète la CSE, constitue l'instrument principal de protection des droits sociaux fondamentaux. Ces deux traités prévoient un système « à la carte », qui permet aux Etats parties de se déclarer liés par un minimum de dispositions ou de paragraphes conventionnels[34]. Un organe composé d'experts internationaux indépendants, le Comité européen des droits sociaux, contrôle le respect de la CSE(R) en examinant des rapports nationaux périodiques, voire, lorsque les Etats y consentent, dans le cadre d'une procédure quasi-judiciaire entamée par le dépôt de réclamations collectives émanant d'organisations non-gouvernementales accréditées[35]. La Suisse fait partie, avec la Principauté du Liechtenstein, des deux seuls Etats membres du Conseil de l'Europe à ne pas avoir encore adhéré ni à l'une (pourtant signée par la Suisse le 6 mai 1976)[36], ni à l'autre de ces conventions, alors même que cet Etat s'était vu attester que sa situation juridique serait « à la hauteur des attentes de la Charte »[37]. La ratification de la Charte sociale européenne révisée est cependant actuellement à l'étude auprès des autorités fédérales. Chargé par l'Assemblée fédérale le 12 janvier 2010, respectivement le 8 mars 2010, de présenter un rapport sur la compatibilité de la Charte sociale européenne révisée avec l'ordre juridique suisse et sur l'opportunité de la signer et de la ratifier dans

32 CPH; RS 0.109 ; RO 2014 1119 ; entrée en vigueur pour la Suisse le 15 mai 2014. Cf. aussi Message du Conseil fédéral portant approbation de la Convention du 13 décembre 2006 relative aux droits des personnes handicapées, du 19 décembre 2012, FF 2013 601 (texte du Message), 661 (projet d'arrêté fédéral d'approbation), 663 (texte de la CPH). Pour une affaire récente relative à l'art. 13 CPH (accès effectif à la justice), dans laquelle le TF a toutefois laissé ouverte la question de sa justiciabilité, cf. arrêt du TF 6B_13/2015 du 11 février 2015 consid. 5.5.

33 **COPUR/PÄRLI** (2013), 2 et 6 ss; **ENNUSCHAT** (2012), 717 ss. Voir aussi **UEBERSAX** (2011), 17 ss.

34 Cf. **PANCRACIO** (2001), 185.

35 Cf. Protocole additionnel du 9 novembre 1995 prévoyant un système de réclamations collectives; art. D CSER.

36 Cf. **ZANETTI** (1984), 170 ss.

37 **BENELHOCINE** (2011), 85. Voir aussi **BERENSTEIN** (1990), 26; d'un autre avis : **HASLER** (1994), 23 s.

les meilleurs délais, le Conseil fédéral avait commandé un rapport détaillé auprès du Département fédéral des affaires étrangères, en coordination avec les autres départements concernés[38]. Dans son rapport sur la Charte sociale européenne révisée du 2 juillet 2014, le gouvernement suisse a, en résumé, considéré que l'ordre juridique suisse était à même d'accepter, sans modifications législatives, six des neuf articles du noyau dur de cet instrument « à la carte ». Poseraient en revanche problème les articles 12 (droit à la sécurité sociale), 13 (droit à l'assistance sociale et médicale) et 19 (droit des travailleurs migrants et de leurs familles à la protection et à l'assistance). En outre, le Conseil fédéral a estimé que la Charte revêtait « pour l'essentiel un caractère programmatoire », de sorte qu'en cas de ratification, la Suisse « maintiendrait son pouvoir de décision quant aux modalités de mise en œuvre des dispositions qu'elle aurait acceptées »[39]. Actuellement, le rapport est à l'étude auprès du parlement fédéral[40].

En tant qu'Etat partie à la *CEDH*, la Suisse est tenue de garantir un nombre restreint de droits fondamentaux dits mixtes, c'est-à-dire qui présentent à tout le moins une composante sociale marquée en sus de leurs caractéristiques en qualité de droits civils, ou qui ont été, pour des motifs historiques, d'emblée inclus au sein du catalogue des droits réputés civils et politiques[41], à l'instar de ce qui s'est fait au niveau du Pacte ONU II[42]. Il s'agit en particulier de l'interdiction de l'esclavage et du travail forcé (art. 4), du droit à l'assistance judiciaire découlant de l'art. 6 CEDH, ainsi que de la liberté syndicale englobée dans l'art. 11 CEDH. La Suisse n'a en revanche toujours pas ratifié le Protocole additionnel no 1 à la CEDH, du 20 mars 1952, qu'elle avait pourtant signé le 19 mai 1976 et qui contient les droits à l'instruction et à la propriété[43]. Or, comme on sait, l'évolution de la jurisprudence

38 Cf. postulat **Seydoux-Christe** no 10.3004, débattu in: BO CE 2010 127 ss; question **Leutenegger Oberholzer** no 11.1098 du 21 décembre 2011; rapport du Conseil fédéral sur la politique étrangère 2012 (objet no 13.009), du 9 janvier 2013, FF 2013 895, 987 s. ch. 2.4; **Girardet** (2012), 113.

39 Rapport précité du Conseil fédéral, du 2 juillet 2014, FF 2014 5449, p. 5450 s., p. 5457 ch. 5 & p. 5499 ch. 12.

40 Le rapport du Conseil fédéral a fait l'objet d'un débat lors de la séance de la Commission de politique étrangère du Conseil national (CPE-N) des 6-7 octobre 2014 et a été abordé lors de la séance de la Commission homonyme du Conseil des Etats (CPE-E) du 16 octobre 2014. L'accueil réservé par les parlementaires à l'idée de ratifier la CSER était mitigé, dans un contexte où les relations entre le droit national et le droit international sont remises en cause par certains partis politiques. La CPE-E s'apprêterait à auditionner des experts au sujet du fonctionnement de la CSER en vue de parfaire les connaissances des députés sur le sujet. Le 7 septembre 2015, le député UDC au Conseil national de COURTEN a déposé une motion (objet no 15.3804) visant à ce que le Conseil fédéral renonce à ratifer la CSE, au motif que cet instrument renforcerait les syndicats et la protection sociale des travailleurs migrants étrangers, qu'il serait contraire au fédéralisme et que le Comité d'experts l'interpréterait de façon extensive.

41 **Chatton** (2012a), 102 ss.

42 Cf., en particulier, art. 8 (interdiction de l'esclavage), art. 10 (conditions humaines de la détention), art. 11 (interdiction de la prison pour dettes), art. 14 par. 3 let. d et let. f (assistance gratuite d'un avocat ou d'un interprète), art. 22 (droits syndicaux), art. 24 (protection spéciale des enfants) Pacte ONU II.

43 L'interpellation **Gilli** no 13.3075 du 13 mars 2013 demande au Conseil fédéral pour quelle raison la Suisse n'a pas encore ratifié le PA/CEDH no 1. Dans sa réponse du 1er mai 2013, le gouvernement helvétique a exclu de ratifier ce protocole pour l'heure, notamment en raison de la jurisprudence extensive de la Cour

rendue par la Cour européenne des droits de l'Homme en lien avec la garantie de la propriété, telle que le cas échéant combinée avec la clause de non-discrimination prévue à l'art. 14 CEDH, a permis d'étendre la protection de la Convention à certains aspects du droit aux prestations du régime de sécurité ou d'assurance sociale[44].

Il convient, en dernier lieu, de signaler le *Code européen de sécurité sociale*, du 16 avril 1964, lequel est entré en vigueur pour la Suisse le 17 septembre 1978 et a la prétention tant d'harmoniser, dans une certaine mesure, les systèmes de sécurité sociale européens que de dépasser le seuil de protection minimal garanti par la convention de l'OIT no C-102/1952[45].

### *18.2.2 La Constitution fédérale de la Confédération suisse*

#### 18.2.2.1 Evolution

Un apport majeur de la Constitution fédérale suisse de 1999 a été celui de doter l'ordre juridique helvétique d'un catalogue détaillé et systématique de droits fondamentaux[46]. En effet, la première *Constitution fédérale de 1848* (révisée en 1874) se contentait d'énoncer les droits qui étaient jugés insuffisamment protégés par les constitutions cantonales et dont la protection s'avérait essentielle pour assurer l'intégration politique et économique de l'Etat nouvellement créé. En faisaient notamment partie l'égalité de traitement (art. 4 aCst.féd.), la liberté de conscience et de croyance et la liberté des cultes (art. 49 et 50 aCst.féd.), la liberté de la presse (art. 55 aCst.féd.), la liberté d'association (art. 56 aCst.féd.), la liberté d'établissement (art. 45 aCst.féd.), de même que la liberté du commerce et de l'industrie (art. 31 aCst.féd.)[47]. A ces garanties s'ajoutait l'obligation faite aux cantons de pourvoir à l'instruction primaire suffisante et gratuite dans des écoles publiques ouvertes aux élèves de toutes les confessions (art. 27 al. 2 et al. 3 aCst.féd.).

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EDH rendue au sujet de la garantie de la propriété en lien avec le principe de non-discrimination, en particulier dans le domaine des assurances sociales.

44 ACEDH *Gaygusuz c. Autriche*, § 41; cf. ATF 140 V 385 consid. 5.2 p. 397; 139 I 257 consid. 5.3.3 p. 263 s.; **CHATTON** (2012b), 377 ss; **SCHMIDT** (2003), 75.

45 RS 0.831.104; RO 1978 1518; cf. préambule.

46 Pour les droits fondamentaux protégés par la Constitution fédérale de 1999, voir notamment les ouvrages et les commentaires suivants: **MÜLLER/SCHEFER** (2008); **AUBERT/MAHON** (2003); **AUER/MALINVERNI/HOTTELIER** (2013b); **BELSER/WALDMANN** (2012); **BIAGGINI** (2007); **EHRENZELLER/SCHINDLER/SCHWEIZER/VALLENDER** (2014a); **KIENER/KÄLIN** (2013). Pour la genèse de la Cst.féd. et ses apports en matière des droits fondamentaux en comparaison avec la Constitution fédérale de 1848/74, voir par exemple **AUER/MALINVERNI/HOTTELIER** (2013a), 486 ss, nos 1425 ss et (2013b), 32 ss, nos 71 ss.

47 Conjointement à la liberté d'établissement, la liberté du commerce et de l'industrie a joué un rôle important pour l'intégration économique de la Suisse, comparable à celui des libertés fondamentales dans l'ordre juridique de l'Union européenne. Voir **COTTIER/MERKT** (1996).

Par la suite, la cour suprême helvétique (nommée Tribunal fédéral) a complété la garantie constitutionnelle fédérale des droits fondamentaux, jugée lacunaire et insuffisante, soit en déduisant toute une série de nouveaux droits des droits existants (en particulier de l'égalité de traitement), soit en reconnaissant des nouvelles garanties en tant que droits fondamentaux non écrits[48]. Ces droits reconnus de façon prétorienne comprenaient essentiellement des garanties de procédure et des libertés, y compris la liberté de la langue[49]. Dans un Etat pluriethnique comme la Suisse, cette dernière liberté, qui peut être qualifiée de droit culturel, joue un rôle essentiel pour l'identité des minorités et pour assurer la paix entre les différentes communautés linguistiques. Dans le domaine des droits sociaux, l'apport principal a cependant été la reconnaissance du droit à l'assistance juridique gratuite, en 1931[50], et celle du droit d'obtenir de l'aide dans des situations de détresse, en 1995[51].

Les travaux conduisant à l'adoption de la nouvelle Constitution fédérale en 1999 avaient essentiellement pour but de *mettre à jour* et de systématiser le droit constitutionnel fédéral, écrit et non écrit, sans apporter des innovations majeures d'un point de vue matériel[52]. Dans le domaine des droits fondamentaux, l'actualisation comportait trois volets, à savoir : (1) le regroupement des droits fondamentaux au sein d'un seul chapitre, droits qui se trouvaient jusqu'alors éparpillés dans les différentes parties de la Constitution; (2) la codification des droits fondamentaux prétoriens, et (3) la mise à jour du catalogue, principalement à l'aune des conventions internationales protectrices des droits de l'Homme ratifiées par la Suisse, en particulier la CEDH.

L'ambition limitée des auteurs de la Constitution de 1999 n'a, cela étant, pas permis d'éviter que des controverses éclatent au sujet des droits sociaux fondamentaux (en particulier, sur les droits sociaux *stricto sensu*), reflétant, sans surprise, des clivages idéologiques importants[53]. Pour schématiser, des partis occupant la droite sur le spectre politique et les représentants des milieux économiques étaient opposés à un renforcement du caractère social du texte constitutionnel. A l'inverse, les partis de gauche et les milieux syndicaux favorisaient l'inclusion de droits sociaux dans la charte fondamentale helvétique. S'inspirant d'une solution consacrée par plusieurs constitutions cantonales[54], et la doctrine[55], les auteurs de la Constitution fédérale de 1999 ont finalement opté pour une solution de compromis.

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48 Sur les droits fondamentaux non écrits, voir **ROSSINELLI** (1987); **CHIARIELLO** (2009), 21 ss.

49 ATF 91 I 480 consid. 2.1 p. 486.

50 ATF 57 I 337 consid 2. p. 346.

51 ATF 121 I 367 consid. 2b p. 371 ss.

52 Voir, à ce sujet, les travaux préparatoires, en particulier le Message du Conseil fédéral, du 20 novembre 1996, relatif à une nouvelle Constitution, in : FF 1997 I 1, p. 27 ss. Le Message est également disponible sur le site Internet : <www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10108877> (consulté le 22.11.2015).

53 FF 1997 I 1, p. 84 ss (résumant les réactions des différents partis politiques et d'autres organisations).

54 Voir FF 1997 I 1, p. 62.

55 Voir en particulier l'étude de **MÜLLER** (1981), qui approfondit et élargit son rapport présenté lors du Congrès de la Société suisse des juristes en 1973.

Celle-ci consistait en la création du nouveau concept constitutionnel des « buts sociaux »[56], lequel complète la catégorie connue des « droits fondamentaux ». Dans la perspective de montrer les affinités entre les deux concepts, orientés vers la protection et l'épanouissement de la personne humaine[57], la nouvelle Constitution les regroupe dans un seul et même titre, le Titre 2 intitulé « Droits fondamentaux et buts sociaux », qui consacre un chapitre à chaque catégorie[58]. La finalité commune des deux concepts ne saurait cependant dissimuler une différence fondamentale : alors que les droits fondamentaux désignent des normes dont les particuliers peuvent se prévaloir directement en justice, la Constitution fédérale exclut explicitement la justiciabilité des buts sociaux[59]. Compte tenu de cette distinction fondamentale opérée par le constituant helvétique, il ne surprend guère que le chapitre consacré aux droits fondamentaux contienne des dispositions beaucoup moins ambitieuses dans le domaine des droits sociaux *stricto sensu* que le chapitre voué aux buts sociaux. Un bref aperçu des droits sociaux consacrés en tant que droits fondamentaux étayera ces propos.

#### 18.2.2.2 Aperçu des droits sociaux fondamentaux

Le catalogue actuel de droits fondamentaux contient une série de droits qui peuvent être qualifiés de droits sociaux fondamentaux au sens de la présente étude[60]. La plupart de ces droits était déjà protégée, explicitement ou implicitement, par la Constitution fédérale de

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56 Sur les buts sociaux, voir **TSCHUDI** (1999); **MAHON** (1996), 388.

57 FF 1997 I 1, p. 139.

58 Le chapitre 1 (art. 7 à 40 Cst.féd.) est consacré aux droits fondamentaux, le chapitre 3 (art. 41 Cst.féd.) aux buts sociaux. L'art. 41 Cst.féd. a la teneur suivante :

1. La Confédération et les cantons s'engagent, en complément de la responsabilité individuelle et de l'initiative privée, à ce que:
   a. toute personne bénéficie de la sécurité sociale;
   b. toute personne bénéficie des soins nécessaires à sa santé;
   c. les familles en tant que communautés d'adultes et d'enfants soient protégées et encouragées;
   d. toute personne capable de travailler puisse assurer son entretien par un travail qu'elle exerce dans des conditions équitables;
   e. toute personne en quête d'un logement puisse trouver, pour elle-même et sa famille, un logement approprié à des conditions supportables;
   f. les enfants et les jeunes, ainsi que les personnes en âge de travailler puissent bénéficier d'une formation initiale et d'une formation continue correspondant à leurs aptitudes;
   g. les enfants et les jeunes soient encouragés à devenir des personnes indépendantes et socialement responsables et soient soutenus dans leur intégration sociale, culturelle et politique.
2. La Confédération et les cantons s'engagent à ce que toute personne soit assurée contre les conséquences économiques de l'âge, de l'invalidité, de la maladie, de l'accident, du chômage, de la maternité, de la condition d'orphelin et du veuvage.
3. Ils s'engagent en faveur des buts sociaux dans le cadre de leurs compétences constitutionnelles et des moyens disponibles.
4. Aucun droit subjectif à des prestations de l'Etat ne peut être déduit directement des buts sociaux.

59 Cf. 18.5.3.

60 L'aperçu des droits sociaux fondamentaux ci-dessous se fonde sur les ouvrages cités dans la note 46.

1848/74. La nouvelle Constitution contient cependant aussi des innovations ponctuelles. Parmi les droits sociaux fondamentaux se trouvent tout d'abord des droits qui font, selon la terminologie constitutionnelle suisse, partie des libertés (a). Y figurent ensuite des droits dont il est admis que la vocation première est celle de conférer aux particuliers le droit à des prestations étatiques (b). Enfin, il convient de mentionner une disposition sur la protection de la jeunesse (c).

En plus de ces catégories de droits sociaux fondamentaux, la Constitution fédérale consacre, à l'instar de la Loi fondamentale allemande et de la Charte des droits fondamentaux de l'Union européenne, la dignité humaine en tant que droit fondamental (art. 7 Cst.féd.). Codifiant la valeur fondatrice des droits fondamentaux, cette disposition sert de référence pour la concrétisation et l'interprétation des autres droits. Elle consacre à la fois aussi une garantie subsidiaire par rapport aux autres droits et susceptible d'avoir une portée propre[61]. Elle peut donc jouer un rôle supplétif, y compris dans le domaine des droits sociaux fondamentaux.

De par leur *nature transversale*, les principes d'égalité dans et devant la loi (art. 8 al. 1 Cst.féd.) et l'interdiction des discriminations (art. 8 al. 2 Cst.féd.) viennent aussi renforcer les droits (sociaux) fondamentaux, garantissant leur jouissance égale, et plus généralement, celle de tous les droits sur le terrain de la législation sociale[62]. Portant sur l'égalité entre les sexes, l'art. 8 al. 3 Cst.féd. consacre une vision matérielle (ou réelle) de l'égalité, complétant le principe d'égalité juridique par le mandat adressé au législateur de pourvoir en sus à l'égalité de fait, en particulier dans « les domaines de la famille, de la formation et du travail ». Cette même disposition introduit par ailleurs le droit de l'homme et de la femme à un « salaire égal pour un travail de valeur égale ». La réalisation d'une égalité matérielle est de plus visée à l'art. 8 al. 4 Cst.féd., qui confère un mandat au législateur en vue d'« éliminer les inégalités qui frappent les personnes handicapées ».

*a Les droits sociaux formulés en tant que libertés*

Parmi les droits sociaux fondamentaux faisant partie des libertés, il sied de relever notamment les droits suivants:

– *La liberté syndicale (art. 28 Cst.féd.).* En introduisant la liberté syndicale dans une disposition spécifique et distincte de la liberté d'association (art. 22 Cst.féd.), le constituant helvétique a eu l'intention de souligner l'importance pratique de cette garantie ainsi que son incidence sur les relations collectives du travail[63]. Sous l'égide de la liberté syndicale, la Constitution de 1999 traite pour la première fois explicitement de la grève,

61 Voir ATF 132 I 49 consid. 51 p. 54 s.

62 Dans ce sens, **MAHON/PULVER** (2002), 53 : « accorder aux plus faibles une protection de la société garantissant un minimum d'égalité sociale ».

63 FF 1997 I 1, 180. Voir aussi ATF 140 I 257 consid. 5.2 p. 263.

tout en optant pour une formulation ambiguë[64]. La Constitution ne consacre en effet pas explicitement un *droit* de grève. Elle se contente de déclarer le lock-out et la grève comme étant licites « quand ils se rapportent aux relations de travail et sont conformes aux obligations de préserver la paix du travail ou de recourir à une conciliation » (art. 28 al. 3 Cst.féd.) et stipule que « la loi peut interdire le recours à la grève à certaines catégories de personnes » (art. 28 al. 4 Cst.féd.). La teneur de l'art. 28 al. 3 Cst.féd. se distingue du libellé des dispositions figurant dans le chapitre sur les droits fondamentaux, lesquelles se réfèrent en général à des « droits », « protégés » ou « garantis » par la Charte fondamentale helvétique. La formulation du texte constitutionnel au sujet de la grève reflète des vives controverses au sujet de l'existence, et de la portée d'un droit de grève en droit positif suisse, ainsi qu'une jurisprudence hésitante du Tribunal fédéral dans la période antérieure à la nouvelle Constitution fédérale[65]. Les juges fédéraux n'ont pas encore entièrement levé l'ambiguïté entourant le droit de grève dans l'ordre juridique helvétique. Ils ont certes reconnu l'existence d'un droit de grève en tant que droit protégé par la législation en matière de droit de travail[66] et ont qualifié la disposition au sujet du caractère licite de la grève de « garantie constitutionnelle »[67], sans toutefois clairement confirmer son statut de droit *fondamental*. Malgré les réticences des auteurs de la Constitution fédérale et de la cour suprême helvétique, la doctrine majoritaire considère que l'art. 28 al. 3 Cst.féd. consacre un droit de grève qui possède bel et bien le statut d'une liberté *fondamentale* opposable à l'Etat[68]. Les particuliers peuvent donc se prévaloir de cette garantie constitutionnelle pour contester des mesures visant à interdire ou limiter des grèves licites au sens de la Constitution. Il n'empêche que la licéité d'une grève reste soumise à des conditions strictes : (1) elle doit se « rapporter aux relations de travail », ce qui exclut des grèves qui ont des buts purement politiques ; (2) elle ne doit pas violer une obligation, fondée sur la loi ou une convention collective de travail, « de préserver la paix du travail ou de recourir à une conciliation » ; (3) la grève doit être mise en œuvre par une organisation syndicale, ce qui exclut les grèves dites « sauvages », décidées par des travailleurs non organisés, et (4) elle doit

64 Voir **AUER/MALINVERNI/HOTTELIER** (2013b), 720 s., nos 1632 ss.

65 **AUER/MALINVERNI/HOTTELIER** (2013b), 720, no 1634 ; le Tribunal fédéral avait laissé ouverte la question de savoir si le droit positif suisse consacre un droit de grève (ATF 111 II 245 consid. 4a p. 253). Cet arrêt avait suscité une âpre controverse doctrinale entre **BUCHER** (1987a et b) et **RHINOW** (1987), portant sur l'existence même d'un droit de grève ainsi que sur l'effet horizontal direct qu'il convenait de lui accorder. Pour un aperçu de ce débat, voir **KLEY** (2011), 230 s.; sur l'effet horizontal direct des droits fondamentaux sociaux, voir ci-dessous chap. III let. b 1).

66 ATF 125 III 277 consid. 2e et 2f p. 282 s.

67 ATF 132 III 122 consid. 4.4.1 p. 133.

68 Voir **MÜLLER/SCHEFER** (2008), 1091 et 1095 ; **KIENER/KÄLIN** (2013), 390 s.; **BELSER/WALDMANN** (2012), 230.

respecter le principe de proportionnalité[69]. Ces conditions reflètent la vision instrumentale du droit de grève qui prévaut en Suisse[70]. La grève est protégée en tant que moyen ayant pour but de rééquilibrer les rapports de force entre les (représentants des) travailleurs et les employeurs auquel l'on ne peut recourir qu'en tant qu'*ultima ratio*, dans l'hypothèse où les tentatives d'aboutir à un accord par d'autres moyens (la négociation, la médiation ou la conciliation) se seraient soldées par un échec.

- *La liberté économique (art. 27 Cst.féd.)*[71]. Ce droit constitue, avec la garantie de la propriété, un pilier d'un système économique fondé sur la libre concurrence et l'économie de marché (cf. art. 94 Cst.féd.)[72]. Il protège en particulier le libre choix, le libre accès et le libre exercice d'une activité lucrative dépendante ou indépendante, y compris le droit de ne pas exercer une activité lucrative[73]. Reflet de la doctrine libérale, ce droit protège le droit au travail (art. 6 Pacte ONU I), mais uniquement dans sa dimension de liberté. Il garantit aux individus de pouvoir exercer un travail « librement choisi et accepté » (art. 6 par. 1 Pacte ONU I) sans pour autant leur conférer le droit à un travail ou à une formation. La Constitution fédérale appréhende ces deux derniers aspects uniquement sous l'angle des buts sociaux[74].
- *La liberté de la langue (art. 18 Cst.féd.)* garantit le droit individuel de s'exprimer dans la langue de son choix. Ce droit fait partie de la « constitution linguistique » de la Suisse et coexiste avec des dispositions constitutionnelles, fédérales et cantonales, concernant les langues nationales et officielles[75], la représentation équitable de celles-ci au sein des organes des autorités fédérales[76], et les mesures encourageant la compréhension et les échanges entre les communautés linguistiques ainsi que le soutien des cantons plurilingues[77].
- *La liberté de la science (art. 20 Cst.féd.) et la liberté de l'art (art. 21 Cst.féd.)* sont, à l'instar de la liberté de la langue, des libertés qu'on peut qualifier de droits culturels, la première étant liée au droit à l'éducation, la seconde à l'expression et à la préservation de l'identité culturelle.

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69 Pour les conditions du droit de grève, voir ATF 132 III 122 consid. 4.4.1 p. 132 ; **MAHON**, in : **AUBERT/MAHON** (2003), ad art. 28 Cst.féd., nos 11 ss ; **MÜLLER/SCHEFER** (2008), 1096 ss, adoptant une perspective critique et considérant les conditions comme étant trop restrictives.

70 **MÜLLER/SCHEFER** (2008), 1093 s.

71 La liberté économique correspond à la liberté du commerce et de l'industrie protégée par la Constitution fédérale de 1848/74, voir 1.

72 Cf. ATF 138 I 378 consid. 6.1 p. 385.

73 Par ex. ATF 137 I 167 consid. 3.1 p. 172. Pour des études consacrées spécifiquement à la liberté économique, voir notamment **HOFMANN** (2005) ; **REICH** (2011) ; **GRISEL** (2006) ; **VALLENDER/HETTICH/LEHNE** (2006).

74 Voir art. 41 al. 1 let. d et f Cst.féd.

75 Voir les art. 4 et 70 al. 1 et 2 Cst.féd.

76 Voir les art. 175 al. 4 Cst.féd. (pour le Conseil fédéral) et 188 al. 4 Cst.féd. (pour le Tribunal fédéral).

77 Voir l'art. 70 al. 3 à 5 Cst.féd.

*b Les droits sociaux formulés en tant que droits à des prestations*

Cette catégorie englobe des droits sociaux fondamentaux que la doctrine helvétique a qualifiés de « petits droits sociaux »[78], dans le but de souligner qu'ils ne confèrent aux particuliers que des prétentions à des prestations *minimales* à la charge de l'Etat. Trois droits en font partie.

- *L'assistance judiciaire gratuite* (art. 29 al. 3 Cst.féd.) confère un droit à des prestations pécuniaires de la part de l'Etat afin de garantir aux personnes indigentes un accès effectif à la justice et le droit à un procès équitable. Ce droit est soumis à la condition que la cause ne soit « pas dépourvue de toute chance de succès ». Il concerne toute procédure, contentieuse et non contentieuse, et comprend, d'une part, le droit de se voir dispenser des frais et dépens, et d'autre part, le droit à un défenseur d'office, dans la mesure où ce soutien est nécessaire.
- *Le droit à un enseignement de base suffisant et gratuit* (art. 19 Cst.féd.) fonde une garantie fondamentale destinée à garantir l'égalité des chances. Ce droit confère « à chaque enfant une formation de base gratuite et correspondant à ses capacités pendant une période d'enseignement obligatoire d'au moins neuf années »[79]. La formation doit être suffisante d'un point de vue quantitatif et qualitatif aux fins de « préparer les élèves d'une manière adéquate à une existence indépendante dans la vie quotidienne moderne »[80]. Cette garantie suppose que l'école ne soit pas trop éloignée du domicile des élèves[81] ou qu'elle soit à tout le moins rendue accessible par l'Etat[82], et que l'enseignement soit adapté aux aptitudes individuelles des enfants, y compris des élèves handicapés[83]. La notion d'enseignement de base ne s'étend cependant, selon le Tribunal fédéral, pas aux filières pré-gymnasiales, même lorsque ces dernières sont intégrées dans la période de scolarité obligatoire[84]. A plus forte raison, la formation (notamment professionnelle ou universitaire) ne relève pas du champ d'application de l'art. 19 Cst.féd. Elle est prise en compte uniquement en tant que but social[85].
- *Le droit à des conditions minimales d'existence* (art. 12 Cst.féd.) correspond au droit à l'assistance dans des situations de détresse (également connu sous l'appellation de droit à l'aide d'urgence ou au minimum d'existence) ; le Tribunal fédéral suisse l'a consacré

78 Voir par exemple **MEYER/SIKI** (2010), 62.
79 ATF 129 I 35 consid. 7.4 p. 39.
80 ATF 129 I 35 consid. 7.3 p. 37.
81 ATF 130 I 352 consid. 3.2 p. 354.
82 Cf. ATF 140 I 153 consid. 2.3.3 s. p. 157. Cf. aussi l'arrêt du Tribunal administratif bernois 100.2013.433U du 15 juillet 2014 consid. 5, qui applique conjointement les art. 19 Cst.féd. et 13 Pacte ONU I.
83 Voir ATF 138 I 162, consid. 3.1. p. 164; 141 I 9 consid. 3.2 ss p. 12 s.
84 ATF 133 I 156 consid. 3.3. p. 159.
85 Art. 41 al. 1 let. f Cst.féd. (voir chap. 18.5.3 infra.

en tant que droit fondamental non écrit en 1995[86], comme indiqué précédemment. Le texte constitutionnel stipule que « quiconque est dans une situation de détresse et n'est pas en mesure de subvenir à son entretien a le droit d'être aidé et assisté et de recevoir les moyens indispensables pour mener une existence conforme à la dignité humaine ». D'après la jurisprudence du Tribunal fédéral, ce droit « ne garantit pas un revenu minimum, mais uniquement la couverture des besoins élémentaires pour survivre d'une manière conforme aux exigences de la dignité humaine, tels que la nourriture, le logement, l'habillement et les soins médicaux de base »[87]. Il a pour but d'éviter qu'un être humain ne soit « abandonné à la rue et réduit à la mendicité ».[88] Ces prestations minimales constituent « un filet de protection temporaire pour les personnes qui ne trouvent aucune protection dans le cadre des institutions sociales existantes »[89] et ont une vocation subsidiaire. Elles ne reviennent d'une part qu'à des personnes qui se trouvent « dans une situation de détresse », étant précisé que la cause de l'indigence est indifférente[90]. D'autre part, elles sont soumises à la condition que la personne ne soit « pas en mesure de subvenir à ses besoins », notamment en acceptant un travail convenable. En vertu du principe de la subsidiarité, l'octroi des prestations peut être soumis à des charges ou des conditions visant à assurer un usage conforme à leur finalité et à permettre à la personne de mettre fin à son indigence. Les charges et conditions doivent cependant avoir un lien direct avec la situation de détresse. Tel est le cas notamment de la participation à un programme d'occupation et d'intégration[91], étant donné qu'elle permet de réduire la dépendance de l'aide de la collectivité en procurant un gain à l'individu ou en améliorant ses chances sur le marché du travail. En revanche, le Tribunal fédéral a souligné à plusieurs reprises que « (…) la suppression de l'aide d'urgence ne saurait être motivée par le refus de l'intéressé de coopérer avec les autorités en vue de son expulsion du territoire. Elle ne saurait être utilisée comme un moyen de contrainte pour obtenir l'expulsion ou pour réprimer des abus en matière

86 ATF 121 I 367. Pour des études consacrées spécifiquement au droit à l'aide d'urgence, voir **AMSTUTZ** (2002); **TSCHUDI** (2005).

87 ATF 135 I 119 consid. 5.3 p. 123 ; arrêt du TF 8C_239/2014 du 14 mai 2014 consid. 4.3. L'art. 12 Cst.féd. comprend aussi le droit à un soutien social et psychologique. En effet, la version allemande de cette disposition utilise les termes « Hilfe und *Betreuung* (aide et encadrement) pour définir les prestations. (**MAHON**, in : **AUBERT/MAHON**, ad art. 12 Cst.féd., 119, no 3).

88 Voir notamment ATF 135 I 119 consid. 5.3 p. 123. En raison de ce filet social, l'interdiction de la mendicité sur le domaine public a été jugée admissible, cf. AFT 134 I 214.

89 ATF 135 I 119 consid. 7.2 p. 126.

90 ATF 134 I 65, concernant une personne qui s'est dessaisie volontairement d'une part de sa fortune par des avancements d'hoirie en faveur de ses enfants.

91 ATF 130 I 71 consid. 5.4 p. 79 s.; ATF 139 I 218 consid. 3.3 ss p. 221 s. et 5.2 ss p. 227 ss.

de droit des étrangers »[92]. La jurisprudence illustre que le droit à l'aide d'urgence est tout particulièrement pertinent dans le domaine du droit des étrangers. Ceci s'explique par la tendance, amorcée il y a une décennie, d'exclure certaines catégories de non nationaux du système de l'aide sociale. Une modification législative, intervenue en 2004, a ainsi porté sur les requérants d'asile ayant fait l'objet d'une décision de non entrée en matière (« NEM »),[93] une autre, datant de 2008, sur les demandeurs d'asile déboutés[94]. Depuis l'entrée en vigueur de ces mesures, les personnes concernées peuvent uniquement prétendre à l'aide d'urgence, qui consiste en des prestations sensiblement moins étendues que l'aide sociale[95]. Au-delà de la protection offerte de l'art. 12 Cst.féd., cette aide ne comprend pas uniquement le *minimum vital* (c'est-à-dire les moyens indispensables à la survie)[96], mais également un droit à un minimum *social*, destiné à permettre la participation à la vie active et sociale[97]. Ces différences montrent que l'art. 12 Cst.féd. mérite d'être qualifié de « petit droit social ». Il ne vise qu'un soutien minimal, une protection censée être temporaire. Des prestations davantage protectrices (comme l'aide sociale), ne relèvent, dans le cadre de la Constitution fédérale, pas des droits fondamentaux et sont mentionnés en tant qu'objectifs de politiques sociales dans le chapitre consacré aux buts sociaux[98].

*c Le cas particulier du droit à la protection de la jeunesse*

L'art. 11 Cst.féd. tient compte de la vulnérabilité de certaines catégories de personnes et va au-delà d'une conception purement juridique de l'égalité. Cette disposition s'adresse aux enfants et aux jeunes, et reconnaît leur « droit à une protection particulière de leur intégrité et à l'encouragement de leur développement »[99]. Selon le Tribunal fédéral, elle a eu pour but d'ancrer de façon générale les droits prévus dans la Convention relative aux

92 ATF 131 I 166 consid. 4.5 p. 175 s. ; ATF 135 I 119 consid. 5.4 p. 123 ; cf. aussi, par rapport au retrait de l'effet suspensif à un recours cantonal ayant pour effet de supprimer l'aide d'urgence : arrêt du TF 8C_239/2014 du 14 mai 2014 consid. 4.3.

93 Voir la loi fédérale du 19 décembre 2003 sur le programme d'allégement budgétaire (RO 2004 1633; voir le Message du Conseil fédéral, du 2 juillet 2003 concernant le programme d'allégement 2003 du budget de la Confédération (PAB 03, in : FF 2003 5091, p. 5166 ss) ; sur cette modification, voir aussi ATF 130 II 377 consid. 3.2.1 p. 381 s.

94 Voir l'art. 82 de la loi du 26 juin 1998 sur l'asile (LAsi ; RS 142.31, telle que modifiée par la loi sur l'asile). Modification du 16 décembre 2005 (RO 2006 4745), entrée en vigueur le 1er janvier 2008.

95 Ce, malgré le fait que les requérants d'asile bénéficient d'une aide sociale plus réduite que les personnes qui possèdent une autorisation de séjour. Une autre différence consiste dans le fait qu'elle doit être fournie dans la mesure du possible sous la forme de prestations en nature ; voir l'art. 82 al. 3 LAsi et arrêt du TF 8C_102/2013 du 10 janvier 2014 consid. 2, 4.1 et 4.4.

96 Le TF relève les différences entre l'aide d'urgence et l'aide sociale, soulignant que l'aide sociale donne droit à des prestations plus étendues (voir ATF 138 V 310 consid. 2.1 p. 312).

97 Voir les informations disponibles sur le site de la Conférence suisse des institutions d'action sociale, www.csias.ch (consulté le 22.11.2015).

98 Voir l'art. 41 Cst.féd. (note 58 *supra*). Cf. toutefois la portée de l'art. 11 Pacte ONU I.

99 Art. 11 al. 1 Cst.féd.

droits de l'enfant (CDE) dans la Constitution fédérale. La finalité de la disposition constitutionnelle et de la Convention étant identique, il convient, selon les juges fédéraux, de se référer à la jurisprudence relative à la CDE pour concrétiser le contenu de l'art. 11 al. 1 Cst.féd.[100]. Bien que la disposition sur la protection de la jeunesse soit placée dans le chapitre des droits fondamentaux, la question de savoir dans quelle mesure elle garantit des nouvelles prétentions justiciables a donné lieu à des controverses doctrinales[101]. Indépendamment de cette question, la disposition n'est, d'après le Tribunal fédéral, pas redondante par rapport aux dispositions consacrées aux enfants et adolescents dans le chapitre des buts sociaux. En effet, en tant qu'objectifs de politique sociale, les buts sociaux s'adressent en premier lieu au législateur, tandis que l'art. 11 al. 1 Cst.féd. vise principalement les autorités d'application du droit, en leur imposant le devoir de dûment tenir compte des besoins de protection particuliers des enfants et des adolescents. Cette obligation prend toute son importance lorsque la loi laisse aux autorités une grande marge d'appréciation ou lorsqu'elle comporte des lacunes[102].

### *18.2.3 Les constitutions des cantons suisses*

En vertu de l'art. 3 Cst.féd., les vingt-six cantons « sont souverains en tant que leur souveraineté n'est pas limitée par la Constitution fédérale et exercent tous les droits qui ne sont pas délégués à la Confédération »; la nature « souveraine », soit quasi-étatique, des cantons a pour corollaire que les entités fédérées jouissent d'une autonomie portant, entre autre, sur leur organisation propre[103]. Dans le but d'organiser sa collectivité territoriale ainsi que la répartition et l'exécution des tâches en son sein, chacun des cantons s'est doté d'une loi fondamentale[104], laquelle comprend le plus souvent, lorsqu'il n'est pas simplement renvoyé au catalogue de droits fondamentaux consacré dans la Constitution fédérale[105],

100 ATF 126 II 377 consid. 5d p. 391.

101 Pour un aperçu des positions doctrinales, cf. ATF 126 II 377. Sur cette question, cf. 18.4.3.4.b.1.

102 ATF 126 II 377 consid. 5c p. 390.

103 Voir l'art. 47 Cst.féd. :
« 1 La Confédération respecte l'autonomie des cantons.
2 Elle laisse aux cantons suffisamment de tâches propres et respecte leur autonomie d'organisation. Elle leur laisse des sources de financement suffisantes et contribue à ce qu'ils disposent des moyens financiers nécessaires pour accomplir leurs tâches »

104 En effet, en vertu de la Constitution fédérale (art. 51 Cst.féd.), les cantons sont tenus d'adopter une constitution écrite. Comme la Charte fondamentale helvétique ne pose que très peu d'exigences quant au contenu des constitutions cantonales, les cantons jouissent d'une grande autonomie à cet égard (voir **AUER/MALINVERNI/HOTTELIER** (2013a), 60 ss, no 189 ss.

105 § 10 al. 2 Cst.LU ; § 10 Cst.SZ ; art. 7 Cst.GR ; cf. **EHRENZELLER/NOBS** (2009), 12.

un riche *catalogue de droits fondamentaux*[106]. La plupart des constitutions cantonales de date plus récente, issues d'un processus de révision totale[107], énoncent non seulement des buts sociaux programmatiques[108], mais également bon nombre de droits sociaux fondamentaux au sens propre du terme[109]. En effet, le dépoussiérage des constitutions cantonales qui s'est opéré au cours de ces dernières décennies reflète les changements progressifs (apparus aussi en Suisse) quant à la manière de percevoir les droits sociaux fondamentaux et leur justiciabilité.

Sans prétendre à l'exhaustivité, on signalera les droits sociaux cantonaux suivants[110]:

– *Droits économiques* : droit au travail; droit de gagner adéquatement sa vie par un travail[111]; interdiction du travail forcé[112]; liberté de choisir et d'exercer une profession[113]; droit à des conditions de travail équitables (salaire égal pour travail égal; congés payés; repos)[114]; liberté et droits syndicaux[115]; droit de grève[116]; liberté de commerce et d'industrie; liberté économique[117].
– *Droits sociaux (stricto sensu)* : droit à l'assistance judiciaire gratuite[118]; droit à l'aide des victimes d'infractions graves[119]; droit au minimum d'existence; aide en cas de détresse[120];

106 Pour les rapports entre les droits fondamentaux garantis par la Constitution fédérale et une constitution cantonale, cf. 18.2.4 *infra*. Pour un commentaire des droits sociaux protégés par la Cst.FR, cf. **GÖKSU/PETRIG** (2005), 123 ss.

107 Cf., notamment, **HOTTELIER** (2010), 93 s. ; **NUSPLIGER** (2000), 66 ss.

108 Cf., s'agissant des buts sociaux consacrés par la Cst.féd., chap. V, let. C *infra*. Voir déjà: **MAHON** (1996), 388; **HOTTELIER** (2015), 191 s.

109 **UEBERSAX** (1998), 7.

110 Cf. aussi **HOTTELIER** (2010), 106-115.

111 § 17 let. b Cst.BL; art. 19 al. 1 Cst.JU: à noter que ce droit, bien que formulé en tant que droit fondamental, figure au nombre des tâches de l'Etat.

112 § 11 al. 1 let. d Cst./BS.

113 Art. 23 Cst.BE; art. 12 let. k Cst.UR; art. 15 Cst.GL; art. 26 al. 2 Cst.FR; art. 17 Cst.SO; § 11 al. 1 let. s Cst.BS; § 6 al. 2 let. k Cst.BL; art. 19 Cst.AR; § 20 Cst.AG; § 6 ch. 7 Cst.TG; art. 26 al. 2 Cst.VD; art. 35 al. 2 Cst.GE; art. 8 let. j Cst.JU.

114 § 17 let. c Cst.BL.

115 Art. 23 Cst.BE; art. 27 Cst.FR; art. 12 al. 1 let. h Cst.SH; art. 19 Cst.AR; art. 2 let. v Cst.SG; art. 23 Cst.VD; art. 27 Cst.NE; art. 36 Cst.GE.

116 Art. 27 al. 3 Cst.FR; art. 8 al. 2 let. f Cst.TI; art. 23 al. 4 Cst.VD; art. 27 al. 3 Cst.NE; art. 37 Cst.GE; art. 20 let. g Cst.JU.

117 Art. 23 Cst.BE; art. 12 let. k Cst.UR; art. 13 let. h Cst.OW; art. 1 al. 2 ch. 8 Cst.NW; art. 15 Cst.GL; § 13 Cst.ZG; art. 26 Cst.FR; art. 17 Cst.SO; art. 12 al. 1 let. j Cst.SH; art. 19 Cst.AR; art. 2 al. 2 Cst.AI; art. 2 let. u Cst.SG; § 20 Cst.AG; art. 8 al. 2 let. i Cst.TI; art. 26 Cst.VD; art. 10 Cst.VS; art. 26 Cst.NE; art. 35 Cst.GE; art. 8 let. k Cst.JU.

118 Art. 26 al. 3 Cst.BE; art. 11 al. 4 Cst.OW; art. 3 al. 3 Cst.NW; art. 16 al. 4 Cst.GL; § 7 Cst.ZG ; art. 29 al. 4 Cst.FR; art. 18 al. 3 Cst.SO; § 12 let. c Cst.BS; § 9 al. 1 Cst.BL; art. 18 al. 2 Cst.SH; art. 20 al. 2 Cst.AR; art. 4 let. d Cst.SG; § 22 al. 2 Cst.AG; art. 10 al. 3 Cst.TI; art. 27 al. 3 Cst.VD; art. 28 al. 3 Cst.NE; art. 40 al. 3 Cst.GE; art. 9 al. 4 Cst.JU.

119 Art. 29 al. 3 Cst.BE; art. 36 al. 2 et al. 3 Cst.FR; art. 16 Cst.SH; art. 24 al. 3 Cst.AR.

120 Art. 29 al. 1 Cst.BE et art. 33 Cst.VD (y compris droit au logis); art. 36 al. 1 Cst.FR; § 11 al. 1 let. t Cst.BS; § 16 Cst.BL; art. 13 Cst.SH; art. 24 al. 1 Cst.AR; art. 2 let. f Cst.SG; art. 13 al. 1 Cst.TI; art. 13 Cst.NE.

droit à un niveau de vie suffisant[121] ; droit à la santé; droit aux soins médicaux nécessaires; droit à la protection de la santé[122]; droit à un environnement sain[123]; droit au logement[124]; droit d'accès des personnes handicapées aux prestations et aux installations, sites et bâtiments publics[125]; droit à la protection des enfants et des jeunes[126]; droit à des prestations en cas de maternité[127]; droit des parents à l'obtention d'un lieu d'accueil de jour public ou privé pour leurs enfants (crèches)[128]; droit à la protection des personnes âgées[129].

– *Droits culturels* : liberté d'étude et d'enseignement[130]; liberté de la culture, de l'art, de la science et de la recherche[131]; droit à la formation[132]; droit de participer à la vie culturelle[133]; liberté de la langue (y compris langage des signes)[134].

La nouvelle *Constitution genevoise* du 14 octobre 2012, qui est entrée en vigueur le 1er juin 2013, mérite une mention particulière ; de par son adoption récente, elle intègre un certain nombre de concepts modernes des droits fondamentaux, y compris des droits sociaux. Premièrement, elle énonce un catalogue important de droits sociaux, dont le droit au logement ou le droit à un niveau de vie suffisant. Deuxièmement, elle ne distingue point

121 Art. 39 Cst.GE : la protection de ce droit dépasse tant quantitativement que qualitativement celle offerte par le droit à un minimum d'existence.

122 Art. 29 al. 1 Cst.BE; art. 5 al. 1 Cst.GL; art. 36 al. 1 Cst.FR, art. 24 al. 1 Cst.AR et art. 13 al. 1 Cst.TI (soins médicaux essentiels); art. 34 al. 1 Cst.VD; art. 13 Cst.NE.

123 Art. 19 Cst.GE : le droit à un environnement sain pourrait aussi être qualifié de droit de la « troisième génération » ; il contient toutefois, notamment, des aspects du droit à la santé.

124 § 17 let. d Cst.BL; art. 38 Cst.GE (dont le caractère justiciable a cependant été laissé indécis : ATF 141 I 1 consid. 5.4 p. 8; arrêts du TF 8D_2/2014 du 4 février 2015 consid. 6.4 et 8C_799/2011 du 20 juin 2012 consid. 4.4 (concernant l'art. 10B aCst.GE); arrêt de la Cour de justice genevoise (Chambre administrative) ATA/10/2015 du 6 janvier 2015 consid. 12b ; voir cependant arrêt du TF 8C_605/2013 du 17 juin 2014 consid. 2.3, au titre duquel la Haute Cour semble reconnaître la justiciabilité de ce droit constitutionnel cantonal, mais retient, à juste titre, qu'il ne confère pas le droit de se voir attribuer un appartement dans un immeuble déterminé); art. 22 al. 1 Cst.JU: ce droit figure au nombre des tâches de l'Etat.

125 Art. 11 al. 4 Cst.ZH; art. 3 let. b Cst.SG; art. 16 Cst.GE.

126 Art. 29 al. 2 Cst.BE; art. 34 Cst.FR; § 11 al. 1 let. f Cst.BS; art. 14 Cst.SH; art. 24 al. 2 Cst.AR; art. 2 let. e et art. 3 let. b Cst.SG; art. 13 al. 2 Cst.TI; art. 13 Cst.VD; art. 14 al. 1 Cst.NE; art. 23 Cst.GE.

127 Art. 33 Cst.FR; art. 35 Cst.VD.

128 § 11 al. 2 let. a Cst.BS.

129 Art. 35 Cst.FR.

130 Art. 15 Cst.ZH; art. 21 Cst.BE; art. 12 let. i Cst.UR; art. 13 let. i Cst.OW; art. 11 Cst.GL; § 6 al. 2 let. e Cst.BL; art. 12 al. 1 let. f Cst.SH; art. 13 Cst.AR; art. 2 let. n Cst.SG; § 6 ch. 6 Cst.TG; art. 13 al. 3 Cst.VS; art. 22 Cst.NE; art. 30 Cst.GE; art. 8 let. h Cst.JU.

131 Art. 21 et 22 Cst.BE; art. 12 let. i Cst.UR; art. 10 Cst.GL; art. 21 et 22 Cst.FR; art. 14 Cst.SO; § 11 al. 1 let. p et q Cst.BS; § 6 al. 2 let. e Cst.BL; art. 12 al. 1 let. g Cst.SH; art. 13 et 14 Cst.AR; art. 2 let. n et o Cst.SG; § 14 Cst.AG; § 6 ch. 6 Cst.TG; art. 18 et 19 Cst.VD; art. 22 et 23 Cst.NE; art. 29 et 30 Cst.GE; art. 8 let. i Cst.JU.

132 Art. 14 Cst.ZH; art. 29 al. 2 Cst.BE (droit à la formation scolaire gratuite); § 11 al. 1 let. n Cst.BS; § 17 let. a Cst.BL; art. 15 Cst.SH, art. 24 al. 2 Cst.AR et art. 13 al. 2 Cst.TI (formation scolaire); art. 2 let. m Cst.SG; art. 3 let. c Cst.SG (aide scolarité post-obligatoire); art. 36 et 37 Cst.VD; art. 14 al. 2 Cst.NE; art. 24 Cst.GE ; art. 40 al. 1 Cst.JU: ce droit figure au nombre des tâches de l'Etat.

133 § 17 let. a Cst.BL.

134 Art. 12 Cst.ZH; art. 15 Cst.BE; art. 17 Cst.FR; art. 2 let. l Cst.SG; art. 24 Cst.NE; art. 16 al. 3 Cst.GE.

entre « droits fondamentaux (civils et politiques) » et « droits sociaux »[135]. Troisièmement et dernièrement, elle applique la théorie moderne des strates, dont il sera question au titre des obligations engendrées[136], à tous les droits fondamentaux, y compris aux droits sociaux qu'elle garantit. Ainsi, l'art. 41 Cst.GE concernant la mise en œuvre des droits fondamentaux cantonaux prévoit :

« Les droits fondamentaux doivent être respectés, protégés et réalisés dans l'ensemble de l'ordre juridique (al. 1). Quiconque assume une tâche publique est tenu de respecter, de protéger et de réaliser les droits fondamentaux (al. 2). Dans la mesure où ils s'y prêtent, les droits fondamentaux s'appliquent aux rapports entre particuliers (al. 3). L'Etat dispense une éducation au respect de la dignité humaine et des droits fondamentaux (al. 4) ».

### *18.2.4 Le rapport entre les différentes sources*

Des droits (sociaux) fondamentaux issus du droit international, du droit constitutionnel fédéral et des constitutions cantonales coexistent au sein de l'ordre juridique suisse. Entre ces droits, il n'existe pas de rapport de subordination, mais un rapport de complémentarité[137]. Formant un tout, ils doivent être coordonnés[138] dans le but d'assurer aux particuliers la protection la plus étendue possible de leurs droits. Dans cet ordre d'idées, de nombreuses conventions protectrices des droits de l'Homme[139], y compris le Pacte ONU I[140], consacrent une disposition selon laquelle les droits ne doivent pas être interprétés de façon à abaisser le niveau de protection au sein des Etats parties. Ce principe découle de la subsidiarité des droits de l'Homme, qui n'ont pas vocation à supplanter les droits fondamentaux nationaux mais à instaurer un standard minimal de protection. La même vision prévaut en Suisse au sujet du rapport entre les droits fondamentaux de rang fédéral et les droits de rang cantonal. Les droits fondamentaux issus de la Constitution fédérale forment un standard national minimum qui s'impose à tous les cantons, sans pour autant empêcher ceux-ci d'instaurer des garanties plus étendues dans leurs constitutions cantonales. De la nature subsidiaire et contraignante des droits consacrés sur un échelon supérieur par rapport à ceux consacrés à un échelon inférieur découle le principe dit de faveur en tant qu'« arbitre des droits fondamentaux ».[141] Ce principe « veut qu'en cas de concours de

135 Cf. notamment Cst.BE, FR, TI ; voir toutefois Cst.NE ; **Buser** (2011), 202 ; **Nuspliger** (2000), 72 s.

136 Ci-dessous 18.3.3.

137 **Hottelier** (2007), 195.

138 Cf. **Hottelier** (2007), 195.

139 **Hottelier** (2007), 172.

140 Art. 5 par. 2 Pacte ONU I : « Il ne peut être admis aucune restriction ou dérogation aux droits fondamentaux de l'homme reconnus ou en vigueur dans tout pays en vertu de lois, de conventions, de règlements ou de coutumes, sous prétexte que le présent Pacte ne les reconnaît pas ou les reconnaît à un moindre degré. »

141 **Hottelier** (2007).

garanties protégées simultanément par divers instruments (…), seule celle qui assure la protection la plus étendue à son titulaire doit être mise en œuvre »[142].

Dans le domaine des droits (sociaux) fondamentaux, le principe de faveur n'a jusqu'à présent eu qu'un impact limité. Ce constat s'explique par l'hégémonie des garanties issues de la Constitution fédérale par rapport aux droits sociaux ancrés à l'échelon international ou cantonal. La prépondérance des droits sociaux de rang fédéral vis-à-vis des garanties internationales dérive en grande partie de l'approche restrictive dont la cour suprême helvétique fait preuve au sujet de l'applicabilité directe des traités contenant des droits sociaux. En particulier, le Tribunal fédéral considère que la plupart des droits protégés au sein du Pacte ONU I sont, à la différence des droits sociaux fondamentaux protégés dans la Constitution fédérale, dépourvus de justiciabilité[143]. Par ce biais, les garanties du Pacte ONU I sont reléguées au second plan. Même si elles sont plus généreuses que les droits sociaux protégés dans la Constitution fédérale (ce qui est fréquent), elles se voient privées de la possibilité de déployer une portée propre. A titre d'exemple, en matière d'éducation, les droits (sociaux) fondamentaux se limitent en réalité à l'enseignement de base (protégé par l'art. 19 Cst.féd.), les justiciables ne pouvant pas obtenir la mise en œuvre de la garantie plus généreuse de l'art. 13 Pacte ONU I, laquelle s'étend pourtant également à l'instruction secondaire et supérieure.

A la différence de la plupart des droits protégés dans le Pacte ONU I (tant que perdure la jurisprudence du Tribunal fédéral à leur sujet), les dispositions de droit cantonal sont susceptibles d'acquérir une portée juridique distincte[144] lorsqu'elles garantissent une protection plus élevée que celle offerte par le droit fédéral (ce qu'il incombe au particulier de démontrer)[145], voire qu'elles consacrent des droits fondamentaux supplémentaires ne figurant pas dans la Constitution fédérale. Pour autant qu'elle soit dûment motivée et étayée, leur violation pourra en effet être utilement invoquée tant devant les instances administratives et judiciaires cantonales, que devant la cour suprême helvétique[146]. Pendant longtemps, les droits fondamentaux consacrés au niveau cantonal ont cependant souffert d'un manque d'intérêt de la part du Tribunal fédéral et des juridictions cantonales, de sorte à être réduits au rang de principes symboliques[147] voire de sources d'inspiration utiles au développement futur des droits fondamentaux sur le plan fédéral (laboratoire constitution-

142 **HOTTELIER** (2013), 247 s.

143 Voir 18.4.3.4.b.3.c.

144 **BUSER** (2011), 205 s.; **HOTTELIER** (2001a), 21; **HOTTELIER/TANQUEREL** (2014), 360 ss; **MALINVERNI** (2003), 298; **UEBERSAX** (1998), 7. Cf. ATF 129 I 12 consid. 5.3 p. 18.

145 Cf., par ex., ATF 137 I 167 consid. 7.2.1 p. 182; arrêts du TF 2C_116/2011 du 29 août 2011 consid. 4.2; 2D_30/2008 du 21 mai 2008 consid. 4.1.

146 Cf. art. 189 al. 1 let. d Cst.féd.; art. 95 let. c et art. 106 al. 2 LTF (RS 173.110; RO 2006 1205); **BUSER** (2011), 208.

147 **HOTTELIER** (2001a), 22 ; **MALINVERNI** (2003), 298 s.

nel)[148]. Il n'existe ainsi que peu d'exemples où la cour suprême helvétique a reconnu une portée propre à un droit social fondamental de rang cantonal.

Par rapport à la *Constitution cantonale bernoise*, le Tribunal fédéral a ainsi admis que l'art. 29 al. 2 Cst.BE[149] étendait le droit à un enseignement gratuit à toutes les écoles publiques pendant la scolarité obligatoire de neuf ans au moins, tandis que l'art. 19 Cst.féd. ne garantissait la gratuité qu'au stade de l'enseignement de base[150]. En outre, cette disposition fondait simultanément un droit plus large de l'enfant à une protection, à une assistance et à un encadrement, qui n'était que partiellement couvert par l'art. 11 Cst.féd., un autre versant n'étant érigé qu'en tant que but social non justiciable au niveau fédéral (art. 41 Cst.féd.), quoiqu'il fût largement concrétisé et rendu justiciable à travers les dispositions idoines du Code civil suisse[151]. Sous l'angle de l'ancienne Cst.féd., soit avant que ne fût consacré le droit exprès d'obtenir de l'aide dans des situations de détresse (art. 12 Cst.féd.)[152], le Tribunal fédéral a jugé conforme au droit l'interprétation des instances judiciaires bernoises selon laquelle l'art. 29 Cst.BE[153] hissait au niveau constitutionnel les standards d'assistance usuelle et allait de ce fait au-delà du droit au minimum d'existence[154]. En revanche, les mesures de réorganisation hospitalière dont se plaignait une association recourante, et qui affecteraient en principe la composante institutionnelle des droits fondamentaux, n'ont pas été considérées comme entrant dans le champ de protection de l'art. 29 Cst.BE[155].

Dans une autre contestation relative au montant d'un émolument de justice, le Tribunal fédéral a abordé séparément, d'une part, les garanties générales de procédure visées par l'art. 29 Cst.féd. et, d'autre part, le droit, spécifique à l'art. 18 al. 1 de la *Constitution cantonale zurichoise*, de toute personne à ce que sa cause soit traitée rapidement et *à des coûts raisonnables* (« *wohlfeile Erledigung des Verfahrens* ») dans une procédure judiciaire ou administrative. Etablissant des parallèles avec les principes de droit fiscal de l'équivalence et de la couverture des frais[156], et compte tenu de la marge d'appréciation dont disposaient les autorités judiciaires cantonales, les juges fédéraux sont arrivés au constat que l'art. 18

148 BUSER (2011), 205 ; HOTTELIER (2010), 106; ATF 121 I 367 consid. 2b p. 371 (concernant la reconnaissance de libertés non-écrites, inhérentes à l'ordre juridique suisse).

149 Voir l'art. 29 al. 2 Cst.BE : « Tout enfant a droit d'être protégé, assisté et encadré. Il a droit à une formation scolaire gratuite qui corresponde à ses aptitudes. »

150 Il sied de rappeler que l'enseignement de base au sens de l'art. 19 Cst. ne s'étend pas aux filières prégymnasiales (voir 18.2.2.2.b).

151 ATF 129 I 12 consid. 5.2 à 5.4 p. 17 s.

152 Voir 18.2.2.2.b).

153 Art. 29 al. 1 Cst.BE : « Toute personne dans le besoin a droit à un logis, aux moyens nécessaires pour mener une existence conforme aux exigences de la dignité humaine ainsi qu'aux soins médicaux essentiels. »

154 Arrêt du TF 2P.254/1999 du 8 novembre 1999 consid. 2c.

155 Arrêt du TF 2P.5/2000 du 15 août 2000 consid. 3b/aa.

156 Cf., pour ces deux notions, arrêt du TF 2C_519/2013 du 3 septembre 2013 consid. 5.1, et les références citées.

al. 1 Cst.ZH n'avait pas été violé[157]. Interprétant l'art. 17 al. 2 de la *Constitution cantonale fribourgeoise*, le Tribunal fédéral a reconnu aux individus le droit de s'adresser au tribunal cantonal, y compris au niveau du mémoire de recours, dans la langue cantonale officielle de leur choix, à savoir en allemand ou en français[158]. En guise d'ultime exemple, il sied de citer l'art. 37 de la *Constitution vaudoise* concernant l'aide à la formation professionnelle initiale, garantie qui ne connaît pas d'équivalent dans la Constitution fédérale. Le Tribunal fédéral a jugé que cette disposition ne conférait pas un droit à l'octroi inconditionnel d'une bourse d'étude « à tout étudiant – d'où qu'il vienne et quelle que soit sa situation – qui prétend (…) poursuivre des études » en terres vaudoises; il a en effet, à demi-mot, considéré que le refus de la bourse qu'avait sollicitée un ressortissant étranger non domicilié dans le canton reposait sur les conditions d'octroi fixées par le droit cantonal infra-constitutionnel, tel qu'adoptées en application de ce droit fondamental et qui s'avéraient donc conformes à ce dernier[159].

Ces exemples jurisprudentiels illustrent que le principe de faveur a jusqu'à présent eu un effet relativement limité. L'adoption récente de nouvelles constitutions cantonales pourrait cependant donner une nouvelle impulsion et une portée accrue aux droits (sociaux) fondamentaux garantis au niveau cantonal, étant rappelé que ceux-ci ont pendant trop longtemps souffert d'un manque d'intérêt de la part du Tribunal fédéral et des juridictions cantonales, qui les avaient relégués au rang de principes symboliques[160].

## 18.3 La titularité et la portée des droits sociaux fondamentaux

### *18.3.1 La titularité*

Selon la conception helvétique, les droits fondamentaux sont (exception faite des droits politiques, qui reviennent en principe aux seuls citoyens) très majoritairement conçus comme des droits de l'Homme[161]. Cette affirmation vaut aussi pour les droits sociaux fondamentaux examinés plus haut[162], y compris les « petits droits sociaux ». Le Tribunal fédéral a souligné ce principe dans sa jurisprudence portant sur le droit à des conditions

157 Arrêt du TF 1C_156/2012 du 12 octobre 2012 consid. 8.2.2.

158 ATF 136 I 149 consid. 6.1 s. p. 154 s. et consid. 8 p. 158.

159 Arrêt du TF 2C_121/2007 du 17 août 2007 consid. 3.2.

160 HOTTELIER (2001a), 22 ; MALINVERNI (2003), 298 s.

161 Il ne sera pas entré en détail sur les spécificités liées, notamment, aux droits de l'Homme que peuvent invoquer des personnes morales ou autres entités. Cf., p. ex., pour la liberté syndicale collective : ATF 140 I 257 consid. 5.1 p. 261. Cf. aussi, p. ex., MARTENET (2006), 503 s.

162 Une nuance s'impose concernant la liberté économique, dont la titularité est limitée aux étrangers disposant d'un droit de présence stable en Suisse (voir AUER/MALINVERNI/HOTTELIER (2013b), 439 no 939, avec une critique).

minimales d'existence. La titularité de l'art. 12 Cst.féd. revient, selon les juges fédéraux, à toute personne dans le besoin, indépendamment de sa nationalité et de son statut au regard de la police des étrangers[163] ; il s'agit, en d'autres termes, de « protéger les moins favorisés »[164]. Ainsi, même des personnes séjournant illégalement en Suisse peuvent prétendre à l'aide d'urgence[165]. En outre, les enfants en situation irrégulière à la lumière de la police des étrangers peuvent se prévaloir du droit à un enseignement de base suffisant et gratuit[166].

En ce qui concerne l'aide d'urgence, le Tribunal fédéral admet cependant que le statut de la personne au regard du droit des étrangers puisse avoir une incidence sur la portée dudit droit. Pour les personnes sans droit de rester en Suisse, comme les requérants d'asile déboutés ou frappés d'une décision de non entrée en matière (« NEM »), les juges fédéraux estiment que les prestations peuvent être davantage réduites dans la mesure où « aucun intérêt d'intégration n'est à poursuivre et aucun contact social durable ne doit être garanti au regard du caractère en principe temporaire de la présence de l'intéressé sur le territoire suisse. L'octroi de prestations minimales se justifie aussi afin de réduire l'incitation à demeurer en Suisse »[167]. En admettant une différenciation en fonction du statut juridique des étrangers[168], la Cour suprême helvétique remet partiellement et implicitement en question la nature de droit de l'Homme du droit à l'aide d'urgence. En effet, l'ampleur des prestations découlant d'un droit social fondamental reconnu à toute personne en vertu de sa qualité d'être humain devrait se déterminer uniquement en fonction des besoins individuels dans le cas concret. Ceux-ci doivent être évalués en fonction de considérations personnelles et factuelles[169], comme la santé, l'âge de la personne concernée, et la durée effective de l'indigence et du séjour en Suisse. Celle-ci ne dépend dans la réalité que partiellement de la situation juridique des étrangers, compte tenu des difficultés liées au renvoi de certains requérants d'asile déboutés, frappés d'une décision de NEM ou admis d'une façon provisoire[170]. Le souci de rendre les prestations « peu attrayantes » risque par ailleurs,

163 ATF 121 I 367 consid. 2d p. 374.

164 **Hottelier** (2010), 92.

165 Voir l'ouvrage de **Petry** (2013), consacré au statut des étrangers en situation illégale en Suisse à l'aune des droits fondamentaux. A noter que l'étranger qui peut demeurer provisoirement en Suisse par suite de la suspension de l'exécution du renvoi, du fait qu'une procédure (extraordinaire) est pendante devant la Cour EDH, n'est pas pour autant replacé dans la même situation que des requérants dont la demande d'asile est en cours d'instruction et ne peut donc prétendre à l'octroi de l'aide sociale : arrêt du TF 8C_706/2013 du 3 novembre 2014 consid. 5.1.

166 **Kiener/Kälin** (2013), p. 462.

167 ATF 135 I 119 consid. 5.4 p. 123; voir aussi ATF 131 I 166 consid. 8.2 p. 182 s.

168 Pour une critique, voir **Müller/Schefer** (2008), 769.

169 **Müller/Schefer** (2008), 769.

170 Voir à ce sujet, l'étude, mandatée par l'Office fédéral suisse des migrations, de **Bolliger**, Christian/**Féraud**, Marius, Langzeitbezug von Nothilfe durch weggewiesene Asylsuchende. Schlussbericht, Berne 2006, disponible sur <https://www.sem.admin.ch/dam/data/sem/asyl/sozialhilfe/ber-langzeitbezueger-faavu-d.pdf> (état au 01.03.2015). Pour un exemple parlant, voir aussi ATF 138 I 246, rendu en 2012, et portant sur un requérant

à notre sens, d'instrumentaliser un droit fondamental à des fins de politique migratoire; ce, au détriment de la finalité première de l'art. 12 Cst.féd., qui consiste à permettre à toute personne de mener une vie conforme à la dignité humaine[171]. En conclusion, bien qu'affirmant que le droit à l'aide d'urgence revient à toute personne humaine, la jurisprudence du Tribunal fédéral peine à aller jusqu'au bout et à tirer toutes les conséquences du principe posé[172].

Dans la réalité politique et sociale, la reconnaissance de droits sociaux fondamentaux en tant que véritables droits de l'Homme se heurte à davantage de difficultés encore. La perception selon laquelle les droits à des prestations sociales sont des droits réservés aux citoyens trouve son expression régulièrement dans des initiatives politiques visant à supprimer ou réduire les prestations dues à certaines catégories d'étrangers[173]. Lors d'un projet mené sur les droits des personnes « roms » en situation précaire dans le canton de Genève, il a pu être constaté que la réalisation de l'art. 12 Cst.féd. se heurtait à un manque de connaissances au sujet de leur situation. Une bonne partie des acteurs de la société civile ignorait ainsi tout simplement l'existence d'un droit fondamental à des prestations minimales ou doutait de sa pertinence pour une catégorie de personnes sans droit à un séjour stable en Suisse[174].

### *18.3.2 Les destinataires*

Selon la conception helvétique, les droits (sociaux) fondamentaux sont principalement dirigés contre l'Etat (1). Ils peuvent cependant également déployer des effets juridiques entre particuliers, l'effet horizontal indirect étant la règle (2a), l'effet horizontal direct l'exception (2b).

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d'asile se trouvant depuis 1995 en Suisse et vivant des prestations de l'aide d'urgence depuis 2008. Dans cet arrêt, le Tribunal fédéral tient compte de la situation factuelle sous l'angle de l'art. 8 CEDH, estimant que l'interdiction de travailler était, dans le cas d'espèce, contraire à cette disposition, compte tenu du fait qu'elle avait duré treize ans et que l'exécution du renvoi ne paraissait pas réaliste dans un proche avenir.

171 Pour une vision critique, voir aussi **MÜLLER/SCHEFER** (2008), 769, note 44.

172 Voir cependant ATF 138 I 246 consid. 2 et 3 p. 247 ss.

173 A titre d'exemples, rappelons l'exclusion des requérants d'asile déboutés ou faisant l'objet d'une décision NEM de l'aide sociale (voir 18.2.2.2 b) ; des propositions plus radicales, visant à exclure des requérants d'asile déboutés ou frappés d'une décision NEM, n'ont jusqu'à présent pas abouti (voir à ce sujet, notamment, **SCHÜRER**, Stefan, Kantone wollen Nothilfe für Asylbewerber stoppen, in : Tages-Anzeiger, du 10.10.2011, disponible sur http://www.tagesanzeiger.ch/schweiz/standard/Kantone-wollen-Nothilfe-fuer-Asylbewerber-stoppen/story/13923638, consulté le 22.11.2015).
Au-delà du domaine de l'asile, la fourniture de l'aide sociale aux étrangers suscite régulièrement des oppositions politiques.

174 Des informations sur le projet sont disponibles sur https://www.facebook.com/pages/Law-Clinic-sur-les-droits-des-personnes-vulnerables-Universite-de-Geneve/117860045056402?ref=stream (état au 22.11.2015).

### 1 Quiconque assume une tâche de l'Etat

En vertu de l'art. 35 al. 2 Cst.féd., « quiconque assume une tâche de l'Etat est tenu de respecter les droits fondamentaux et de contribuer à leur réalisation ». Le critère de rattachement choisi par le constituant n'est pas d'ordre personnel, mais *fonctionnel*; il s'oriente par rapport à la prise en charge de tâches de l'Etat par une entité ou un individu de droit public ou privé[175]. Ce critère tient compte de la réalité socio-constitutionnelle qui prévaut actuellement en Suisse et d'après laquelle il est possible au législateur ordinaire (fédéral, cantonal ou communal) de confier des tâches de l'administration à des organismes ou à des personnes de droit public ou de droit privé qui sont extérieurs à l'administration[176]. Cette définition a donc pour effet d'étendre notablement le cercle des destinataires des obligations qu'engendrent les droits (sociaux) fondamentaux.

Traditionnellement et en premier lieu, les droits (sociaux) fondamentaux se dirigent contre *l'Etat*. En dépit des menaces qui peuvent également émaner de groupes sociaux ou d'intérêts privés, voire de certaines entités multi- ou transnationales[177], le potentiel de nuisance ou d'immixtions provenant de l'Etat reste en effet très important, de par les moyens et ressources à sa disposition[178]. La notion d'Etat *stricto sensu* englobe, d'une part, toutes les collectivités publiques territoriales, à savoir la Confédération, les cantons et les communes, d'autre part, l'ensemble des organes constitutifs de ces dernières collectivités, soit, en Suisse, le parlement, le gouvernement, le pouvoir judiciaire, de même que le corps électoral[179].

En deuxième lieu, les droits (sociaux) fondamentaux doivent être garantis non seulement par l'administration centrale propre aux collectivités sus-indiquées, mais également par toute forme d'*administration décentralisée*[180]. Celle-ci peut prendre les apparences – plus ou moins autonomes du centre et placées sous sa surveillance – les plus variées: établissements, fondations de droit public, commissions, corporations, etc.[181].

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175 **Schweizer**, ad art. 35 Cst.féd, in : **Ehrenzeller/Schindler/Schweizer/Vallender** (2014a), 810.

176 Cf. par ex., pour l'échelon fédéral, art. 178 al. 3 Cst.féd.; ATF 137 II 409 consid. 4.3 p. 411 et consid. 6.3 p. 413. La disposition constitutionnelle précitée reflète un principe général du droit public et s'applique donc également aux autres collectivités publiques: ATF 138 I 196 consid. 4.4.3 p. 201 (délégation d'une parcelle d'*imperium* à des traducteurs-jurés cantonaux).

177 Cf. **Chatton** (2012a), 73 et 75 ss.

178 **Auer/Malinverni/Hottelier** (2013b), 55.

179 **Auer/Malinverni/Hottelier** (2013b), 55; **Schweizer** ad art. 35 Cst.féd, in : **Ehrenzeller/Schindler/Schweizer/Vallender** (2014a), 810; cf. **Naguib** (2012), 917. Concernant le corps électoral, cf. notamment ATF 135 I 265 consid. 4.2 p. 265; 130 I 140 consid. 4 146 s.

180 **Schweizer**, ad art. 35 Cst.féd, in : **Ehrenzeller/Schindler/Schweizer/Vallender** (2014a), 810.

181 Voir, par ex., ATF 136 II 23 consid. 4.3.2 p. 32; arrêt du TF 2A.605/2002 du 29 janvier 2003 consid. 2. Pour plus de détails sur la décentralisation de l'administration suisse, cf. par ex.: **Tschannen (2012); Poltier** (2008).

En troisième et dernier lieu, les droits (sociaux) fondamentaux doivent être observés par l'ensemble des *personnes de droit privé* assumant, du moins dans un certain secteur de leur activité, une tâche étatique. Là encore, les formes juridiques que peuvent prendre ces acteurs sont très diverses: société anonyme, fondation de droit privé, partenariats publics-privés, certaines banques cantonales, caisses d'assurance-maladie obligatoire, entreprises spécialisées à qui revient la responsabilité d'effectuer des contrôles de sécurité technique, entreprises concessionnaires chargées de tâches de service public minimal, etc.[182].

En application des principes susmentionnés, le Tribunal fédéral a, par exemple, jugé qu'une fondation privée chargée de l'accueil des requérants d'asile exerçait une tâche de l'Etat au sens de l'art. 35 al. 2 Cst.féd.[183]. Tel n'était en revanche pas le cas d'une compagnie d'assurance-maladie, dans la mesure où le litige portait sur l'assurance complémentaire de droit privé[184]. Cela avait pour conséquence qu'un assureur pouvait, en vertu de sa liberté contractuelle, refuser de conclure un contrat d'assurance avec une personne handicapée. En effet, selon la conception helvétique, seul le régime de l'assurance de base est considéré comme relevant d'une tâche étatique, les couvertures complémentaires étant quant à elles régies par l'autonomie privée[185].

## 2 L'effet horizontal des droits fondamentaux (« *Drittwirkung* »)

### *a La règle: l'effet horizontal indirect*

D'après l'art. 35 al. 1 Cst.féd., « les droits fondamentaux doivent être réalisés dans l'ensemble de l'ordre juridique ». L'alinéa 3 de cette disposition précise que « les autorités veillent à ce que les droits fondamentaux, dans la mesure où ils s'y prêtent, soient aussi réalisés dans les relations qui lient les particuliers entre eux ». Il découle de ces formulations que le constituant helvétique a certes voulu que les droits (sociaux) fondamentaux puissent également s'appliquer aux relations entre particuliers, et donc au-delà du rapport ambivalent ayant toujours existé entre le particulier et l'Etat à la fois fossoyeur et pourvoyeur des libertés; toutefois, il n'a en principe pas prévu que les privés puissent se prévaloir de façon immédiate des droits fondamentaux afin de résoudre leurs différends avec d'autres particuliers, par exemple leur employeur[186], leur bailleur, leur créancier ou telle puissante société agro-alimentaire. Il est au contraire nécessaire que les organes et autorités de l'Etat interviennent dans ce processus pour *transposer* ou concrétiser les droits fondamentaux dans les relations entre privés. Ce, que ce soit au travers de la loi (le législateur prévoit des

182 Voir, pour ces exemples, SCHWEIZER, ad art. 35 Cst.féd, in : EHRENZELLER/SCHINDLER/SCHWEIZER/VALLENDER (2014a), 810 s. Cf. ATF 136 I 158 consid. 3.2 p. 165 s.

183 ATF 133 I 49 consid. 3.2.3 p. 55 s.

184 Arrêt du TF 5P.97/2006 du 1er juin 2006 consid. 3.3.

185 Au sujet de l'assurance maladie, voir aussi *infra* 18.4.1.3.

186 Cf., à ce titre, VISCHER (2012), 45 ss.

normes protectrices, notamment, en faveur des personnes handicapées, par rapport aux transformations d'immeubles aux fins de lutter contre la pénurie du logement, en droit du bail, en droit du travail, en droit des assurances privées ou en matière de crédit à la consommation)[187], au travers de l'interprétation conforme, par le juge ou l'administration, d'une norme déterminée avec les droits (sociaux) fondamentaux[188], ou au travers d'autres formes d'action encore, dont l'intervention ponctuelle des forces de l'ordre en vue de préserver les droits fondamentaux mis en péril par autrui[189].

*b L'exception: l'effet horizontal direct*

Il a été vu qu'en règle générale, les droits (sociaux) fondamentaux ne déployaient pas d'effet horizontal direct entre les particuliers, mais qu'il incombait à l'Etat, en sa qualité de « courroie de transmission », de les réaliser dans tout l'ordre juridique suisse. Cela étant, une partie de la doctrine admet un effet horizontal direct au cas où une norme de droit privé ou pénal ne transposerait pas ou qu'imparfaitement, voire contredirait un droit fondamental, et lorsque celui-ci revendiquerait de par sa formulation un tel effet[190].

Parmi les rares droits fondamentaux auxquels un effet horizontal direct est actuellement reconnu en Suisse[191], il y a lieu de mentionner l'art. 8 al. 3 Cst.féd. *in fine*, en vertu duquel « l'homme et la femme ont droit à un *salaire égal* pour un travail de valeur égale ». Cette concrétisation du principe d'égalité en matière de droit du travail peut ainsi être, notamment, invoquée par tout(e) employé(e) du secteur privé à l'encontre de son employeur, auquel il serait reproché de pratiquer une politique salariale contraire à l'égalité des sexes[192].

En revanche, la question de savoir si le *droit de grève*, qui est garanti à l'art. 28 al. 3 Cst.féd. dans le contexte des droits syndicaux, déploie un effet horizontal direct dans les relations entre les employés et leur employeur, demeure controversée[193]. La tendance

187 Cf., par ex., ATF 138 I 475 consid. 3.3 p. 480 s.; 134 II 249 consid. 3.1 p. 252 s.; 125 III 277 consid. 3c p. 284 s.; 116 IV 31 consid. 5a p. 39 s.; 107 Ia 277 consid. 3a p. 280 ; cf., pour le droit au logement, **Gaide/Défago Gaudin** (2014), p. 29.

188 Cf., par ex., ATF 130 III 353 consid. 2.2 p. 355; 127 I 164 consid. 3b p. 171; arrêt du TF 1C_225/2012 du 10 juillet 2013 consid. 3.3. Pour un exemple au titre duquel le TF semble avoir refusé (sans le dire clairement) de faire prévaloir la CEDEF sur une loi fédérale consacrant une différence de traitement entre les sexes (congé de maternité réservé aux femmes, le droit suisse n'octroyant pas de congé parental ; conformité avec les art. 8 et 14 CEDH) : ATF 140 I 305 consid. 7.4 p. 314 ; à ce sujet : **Perrenoud** (2014), 1670 s.

189 Voir, pour plus de détails, **Auer/Malinverni/Hottelier** (2013b), 58-64; **Schweizer**, ad art. 35 Cst.féd, in : **Ehrenzeller/Schindler/Schweizer/Vallender** (2014a), 814-821.

190 **Auer/Malinverni/Hottelier** (2013b), 682.

191 Outre les droits sociaux qui seront cités, en particulier: art. 10 al. 2 Cst.féd. (protection de la liberté personnelle du patient médical); art. 10 al. 3 Cst.féd. (interdiction de la torture et de tout autre traitement ou peine cruels, inhumains ou dégradants); art. 17 al. 3 Cst.féd. (garantie du secret de rédaction).

192 Voir ATF 133 III 167 consid. 4.2 p. 172 s.; 131 I 105 consid. 3.6 p. 109; 126 II 217 consid. 4a p. 219; 125 III 368 consid. 3 p. 371; 118 Ia 35 consid. 2b p. 37.

193 ATF 132 III 122 consid. 4.4.1 p. 133 (effet horizontal indirect); 125 III 277 consid. 2 (aussi sous l'angle de l'art. 8 ch. 1 let. d Pacte ONU I [considéré comme en partie directement applicable: cf. ATF 126 I 240 consid.

actuelle semble nier cette possibilité[194]. A notre sens, un effet horizontal direct devrait néanmoins revenir à l'art. 28 al. 3 Cst.féd. ainsi qu'aux autres composantes de la liberté syndicale reconnues à l'art. 28 Cst.féd., étant donné que ces droits ont pour vocation primordiale, de par leur fonction et leur but, de gouverner les relations entre les partenaires sociaux. A tout le moins, un effet horizontal direct restreint devrait-il leur être accordé dans le contexte de leur invocation conjointement aux dispositions législatives et réglementaires idoines du droit des relations collectives de travail ou du code du travail. Ce, dans la mesure où ces règles infra-constitutionnelles ne réglementent pas toujours dans le détail, respectivement ne recouvrent pas entièrement les facettes des droits syndicaux.

### *18.3.3 Les obligations découlant des droits sociaux fondamentaux*

D'après la conception moderne des droits fondamentaux, influencée par le travail d'exégèse du Comité du Pacte ONU I, qu'ils soient civils, culturels, économiques, politiques ou sociaux, il est admis que chacun d'eux engendre, en schématisant, trois niveaux d'obligations (« *to respect* »; « *to protect* »; « *to fulfill* ») à la charge des Etats. Tel que le résument les Professeurs **AUER**, **MALINVERNI** et **HOTTELIER**:

> « l'obligation de respecter un droit fondamental exige des Etats qu'ils s'abstiennent d'en entraver, directement ou indirectement, l'exercice. L'obligation de protéger les droits fondamentaux requiert des Etats qu'ils adoptent toutes les mesures qui s'imposent pour faire en sorte que la jouissance et l'exercice de ces droits ne soient pas entravés du fait du comportement d'autres individus. L'obligation de mettre en œuvre les droits fondamentaux suppose que l'Etat adopte les mesures appropriées, d'ordre législatif, administratif ou autre, dans le but d'assurer à chacun l'exercice plein et entier de ces droits. Il est généralement admis que les deux premières obligations sont d'applicabilité directe »[195].

L'approche des obligations stratifiées est de plus en plus fréquemment relayée par la *doctrine juridique suisse*, dont font notamment partie plusieurs professeurs helvétiques ainsi que des juges et greffiers juristes au Tribunal fédéral[196]. Fait remarquable, le *Conseil fédéral* a récemment signalisé, en se référant aussi à la théorie des strates, qu'il était prêt à

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2c p. 243 ; voir **DE VRIES REILINGH** (2001), 846-850] et de la C-87/1948; reconnaissance d'un effet horizontal direct).

194 **AUER**, **MALINVERNI** et **HOTTELIER** (2013b), 726.

195 **AUER/MALINVERNI/HOTTELIER** (2013b), 682.

196 Cf., entre autres, **AUER/MALINVERNI/HOTTELIER** (2013b), 682 s.; **CHATTON** (2013), 300-306; **EICHENHOFER** (2014), 17 s.; **HUGI YAR** (2012), 5 s.; **KIENER/KÄLIN** (2007), 34 ss; **KÄLIN/KÜNZLI** (2013), 103 ss; **KRADOLFER** (2013), 527 ; **WILSON** (2014), 249 ss; **ZÜND** (2013), 1354 s.

reconsidérer sa position défavorable à la justiciabilité des droits sociaux, mais qu'il y avait jusqu'à présent renoncé au regard de la jurisprudence restrictive du Tribunal fédéral. Alors que le gouvernement et la plus haute juridiction suisses tiraient jadis à la même corde pour dénier tout caractère directement applicable aux (parties de) conventions garantissant des droits sociaux, le gouvernement se désolidarise à présent du juge et renvoie la balle dans le camp de ce dernier afin de l'inciter à repenser sa position[197].

Dans un arrêt de principe récent, prenant notamment appui sur l'approche duale de l'art. 35 Cst.féd. (obligations de respect et de réalisation des droits fondamentaux)[198], le Tribunal fédéral semble avoir finalement entrepris un (encore timide) revirement de sa jurisprudence. La Haute Cour a en particulier admis qu'il fallait, en cas de conflit de libertés, « établir des distinctions selon que l'invocation des droits fondamentaux (qui ne connaissent certes aucune hiérarchie entre eux) dans une situation donnée a pour but d'obliger l'Etat (cf. art. 35 Cst.) à s'abstenir de porter atteinte à un droit fondamental particulier (*"Unterlassungspflicht"*), à protéger activement ce droit (*"Schutzpflicht"*) et/ou à mettre en œuvre des stratégies en vue de le réaliser pleinement au sein des institutions et de la société (*"Gewährleistungspflicht"*). En fonction du type d'obligation en cause, la marge de manœuvre dont disposera l'autorité pour mettre en œuvre un droit fondamental et, par voie de conséquence, la possibilité de choisir, parmi les mesures envisageables, celle qui porte le moins atteinte à d'autres droits et principes fondamentaux, sera en effet plus ou moins grande »[199].

Hormis la grille de lecture qui est donnée par la théorie des trois strates, il est intéressant de signaler la *méthode interprétative qualitative*, elle-même empruntée à la notion du service public. A ce titre, la doctrine part du principe qu'en vue de garantir la pleine réalisation de chaque droit social fondamental, l'Etat doit veiller à en garantir les caractéristiques suivantes: la disponibilité (« *availability* »), l'accessibilité physique, économique et informationnelle, sans discrimination (« *accessibility* »), l'acceptabilité et la qualité intrinsèque (« *acceptability/quality* »), enfin, l'adaptabilité du droit afin qu'il puisse répondre adéquatement aux mutations sociales (« *adaptability* »)[200]. Ces concepts ont contribué à une meilleure compréhension du contenu des droits sociaux[201].

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197 Cf., avec plus ou moins de clarté : Message du Conseil fédéral, du 19 décembre 2012, portant approbation de la Convention du 13 décembre 2006 relative aux droits des personnes handicapées, in : FF 2013 601, ch. 2.2, p. 613 ss. Voir aussi le Rapport sur la politique extérieure de la Suisse en matière de droits de l'Homme (2003 à 2007), du 31 mai 2006, in : FF 2006 5799, ch. 4.2.6, p. 5823.

198 **SCHWEIZER**, ad art. 35 Cst.féd, in : **EHRENZELLER/SCHINDLER/SCHWEIZER/VALLENDER** (2014a), 799 s.

199 ATF 140 I 201 consid. 6.7.3 p. 214 s.

200 **CHATTON** (2013), 284-290, et les références citées ; **KRADOLFER** (2013), 541 s.

201 Cf., par rapport au droit à la santé : **KABENGELE MPINGA** (2014), 791; par rapport au droit à l'alimentation : **SOMA** (2014), 773.

En parallèle à ces types d'obligations, a été forgé le concept des *obligations immédiates*, soit des devoirs par rapport auxquels il est en principe d'emblée évident (présomption) que leur non-respect entraîne un constat de violation de la part de l'organe (quasi-) juridictionnel appelé à examiner un litige[202]. En font, en particulier, partie le principe de non-discrimination dans la jouissance des droits (sociaux) fondamentaux, l'interdiction des mesures régressives, de même que l'obligation de protéger le contenu essentiel de chaque droit[203], en particulier en faveur des groupes de personnes vulnérables[204]. L'impact de ces concepts sur la justiciabilité objective et une meilleure compréhension du contenu des droits sociaux fondamentaux ne saurait être sous-estimé.

### *18.3.4 Les restrictions aux droits sociaux fondamentaux*

Dans quelle mesure les droits sociaux fondamentaux garantis par la Constitution fédérale sont-ils soumis à des *restrictions* [205]? Les débats suscités par cette question s'expliquent largement par le fait que le constituant helvétique s'est contenté d'énoncer les droits fondamentaux garantis sans préciser, pour chaque disposition matérielle, les limites qui peuvent y être apportées. Partant, les restrictions sont régies par une disposition générale : l'art. 36 Cst.féd. soumet les atteintes admissibles aux droits fondamentaux à quatre conditions cumulatives. Pour être conforme à la Constitution fédérale, une mesure portant ingérence dans un droit fondamental doit (1) reposer sur une base légale, (2) être justifiée par un intérêt public ou par la protection d'un droit fondamental d'autrui, (3) être conforme au principe de la proportionnalité, et (4) respecter l'essence du droit fondamental en question.

Le *champ d'application* de l'art. 36 Cst.féd. prête à discussion. Selon certains auteurs, la clause générale de restriction aurait été conçue uniquement pour les libertés[206] ; selon d'autres, elle a un champ d'application plus large et s'étend à davantage, voire à tous les droits fondamentaux[207]. Dans le domaine des droits sociaux fondamentaux, ces controverses doctrinales portent surtout sur les « petits droits sociaux », en particulier le droit à l'aide d'urgence et le droit à un enseignement de base gratuit et suffisant.

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202 Cf. **KRADOLFER** (2013), 527.

203 **CHATTON** (2013), 306 ss. Comparer avec l'art. 36 al. 4 Cst.féd., qui déclare inviolable l'essence des droits fondamentaux (noyau intangible), voir 18.3.4.

204 Cf. **KABENGELE MPINGA** (2014), 800.

205 Sur cette question voir notamment **HERTIG RANDALL** (2011).

206 **AUER/MALINVERNI/HOTTELIER** (2013b), 65, no 138; **WEBER-DÜRLER** (2000), 151 ss ; **KIENER/KÄLIN** (2013), 90 et 126 ; **SCHWEIZER**, ad art. 36 Cst.féd., in : **EHRENZELLER/SCHINDLER/SCHWEIZER/VALLENDER** (2014a), 827 no 5.

207 **SCHEFER** (2007), 145 no 8 ; **VERNIORY** (2005), 109 s.

Concernant le premier droit, le Tribunal fédéral s'est clairement rallié à l'opinion selon laquelle la garantie de l'art. 12 Cst.féd. ne pouvait pas subir de restrictions[208]. Cette disposition ne contenant qu'une garantie minimale, le champ d'application et l'essence du droit (art. 36 al. 4 Cst.féd.) se confondent[209]. Dès lors, les prestations qui en découlent ne peuvent pas être réduites ou supprimées en application de l'art. 36 Cst.féd. Bien que ne pouvant pas faire l'objet de restrictions, le droit à l'aide d'urgence est cependant soumis à des conditions découlant de la subsidiarité de cette garantie constitutionnelle. Comme mentionné précédemment, elle ne revient qu'aux personnes qui se trouvent dans une situation de détresse et qui ne sont pas en mesure de pourvoir à leur entretien par leurs propres efforts et moyens[210].

Le Tribunal fédéral a opté pour une approche différente dans des affaires portant sur *l'enseignement de base gratuit et suffisant*[211]. Appelé à statuer sur des cas d'exclusion de l'école pour des motifs disciplinaires, les juges fédéraux ont confirmé les opinions doctrinales selon lesquelles l'art. 36 Cst.féd. a été conçu pour fixer des conditions de restriction des libertés et n'a pas vocation à s'appliquer aux droits sociaux qui confèrent un droit à des prestations étatiques. Il relève toutefois que les droits sociaux doivent en règle générale être concrétisés par le législateur et le juge. Pareilles concrétisations vont selon les juges fédéraux nécessairement de pair avec certaines restrictions[212]. Les « concrétisation[s] comportant des restrictions » (« *einschränkende Konkretisierungen* ») doivent cependant être conformes au contenu minimal du droit prévu par la Constitution fédérale. Pour savoir si tel est le cas, il se justifie d'appliquer (partiellement) par analogie les conditions de restrictions prévues à l'art. 36 Cst.féd[213]. Ce raisonnement conduit le Tribunal fédéral à consacrer une partie importante de son raisonnement à l'examen de la proportionnalité de la sanction disciplinaire et d'admettre que l'exclusion de l'école peut se justifier comme *ultima ratio*. Cependant, la mission d'éducation et de soutien de l'enfant à charge de la collectivité publique subsiste durant la période de la mesure disciplinaire. Partant, le droit de l'enfant exclu à une prise en charge adaptée à son épanouissement pendant toute la période de la scolarité obligatoire doit être pris en considération, ce qui implique, en règle générale, que l'élève concerné soit suivi par des personnes ou des institutions appropriées[214].

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208 Le Tribunal fédéral avait laissé la question ouverte dans un premier temps, voir ATF 122 II 193 consid. 3a p. 199.

209 ATF 130 I 71 consid. 4.1 p. 75 ; ATF 131 I 166 consid. 5.2 et 5.3. p. 176 s.

210 La question de savoir si l'aide d'urgence peut être refusée dans l'hypothèse d'un abus de droit est controversée. Certains arrêts du Tribunal fédéral semblent l'admettre (voir p.ex. ATF 122 II 193 consid. 2c/cc p. 198). Jusqu'à présent, la jurisprudence du Tribunal fédéral n'a cependant jamais retenu l'abus de droit en lien avec l'art. 12 Cst.féd. (pour un aperçu des positions doctrinales et jurisprudentielles, voir **KIENER/KÄLIN** (2013), 475 ss).

211 Pour une analyse de cette jurisprudence, voir **HERTIG RANDALL** (2011), 190 ss.

212 ATF 129 I 35 consid. 8.2. p. 42.

213 ATF 129 I 12 consid. 6.4. p. 20; ATF 129 I 35 consid. 8.2 p. 42.

214 ATF 129 I 12 consid. 9.5, 10.4 et 10.5 p. 26, 30 ss. ATF 129 I 35 consid. 11.2 p. 47.

## 18.4 L'effectivité des droits sociaux fondamentaux

La réalisation des droits sociaux fondamentaux, à l'instar de l'ensemble des droits fondamentaux, nécessitant le concours de tous les organes de l'Etat, la présente section esquissera leur mise en œuvre législative (18.4.1), administrative (18.4.2) et judiciaire (18.4.3). Afin d'évaluer l'effectivité de cette catégorie de droits dans l'ordre juridique suisse, les carences identifiées par les organes internationaux de contrôle en matière de droits de l'Homme fourniront des repères utiles (18.4.4).

### *18.4.1 La mise en œuvre législative*

La mise en œuvre législative des droits sociaux fondamentaux est fortement empreinte par la structure fédérative de l'Etat suisse : en fonction des domaines concernés, la compétence législative est partagée entre les différents échelons de l'Etat fédéral ou revient principalement, voire exclusivement soit à l'échelon fédéral, soit à l'échelon cantonal. Pour comprendre le système actuel en place, un bref aperçu des principes régissant le partage des compétences au sein de la Confédération helvétique s'impose.

#### 18.4.1.1 Les principes applicables

De prime abord, en vertu du *principe dit d'attribution*, la Confédération (c'est-à-dire l'échelon fédéral) ne dispose que des compétences qui lui ont été attribuées par la Constitution fédérale[215]. Les compétences résiduelles reviennent aux cantons[216]. De surcroît, la Constitution fédérale garantit explicitement l'autonomie des cantons (art. 47 al. 1 Cst.féd.), également en matière législative. En effet, l'art. 47 al. 2 Cst.féd. stipule que la Confédération « laisse aux cantons suffisamment de tâches propres ». De pair avec le principe de subsidiarité (art. 6a Cst.féd.), la garantie de l'autonomie des cantons reflète la conviction selon laquelle il faut éviter une centralisation excessive des tâches qui confinerait les cantons au seul rôle d'exécutants de la volonté fédérale.

Ensuite, la Suisse se caractérise par le *fédéralisme d'exécution*. La Constitution prévoit qu'il revient aux cantons d'exécuter le droit fédéral (art. 46 al. 1 Cst.féd.) et précise que la Confédération leur laisse « une marge de manœuvre aussi large que possible en tenant compte de leurs particularités » (art. 46 al. 3 Cst.féd.). Comme les cantons sont chargés de l'exécution des lois fédérales et censés bénéficier d'une marge de manœuvre pour ce faire, certaines disparités dans la mise en œuvre du droit fédéral sont inhérentes au fédéralisme

215 Il sied de préciser que les buts sociaux ne sont pas des normes attributives de compétences (cf. FF 1997 I 1, p. 139).

216 Voir art. 3 Cst.féd. (18.2.3), et 42 al. 1 Cst.féd. : « La Confédération accomplit les tâches que lui attribue la Constitution. »

suisse[217]. Pour éviter que ces différences n'entravent le bon fonctionnement de l'Etat fédéral, la Constitution fédérale prévoit que « la Confédération et les cantons s'entraident dans l'accomplissement de leurs tâches et collaborent entre eux » (art. 44 al. 1 Cst.féd.). La collaboration comporte une dimension tant verticale qu'horizontale, englobant la coopération entre les cantons et la Confédération, d'une part, et celle entre les cantons, d'autre part. La seconde forme de coopération permet d'assurer une harmonisation minimale dans des domaines relevant de la compétence législative des cantons par le biais d'accords intercantonaux (également nommés concordats), qui sont généralement négociés et conclus sous l'égide de la Conférence des gouvernements cantonaux (CdC) ou d'autres conférences réunissant les ministres cantonaux[218]. En dépit de ces mécanismes, il n'est pas aisé d'assurer la réalisation effective des droits (sociaux) fondamentaux tout en respectant la diversité inhérente au fédéralisme suisse. D'après une étude récente effectuée par le Centre suisse de compétence pour les droits humains, les mesures de coordination et d'information nécessitent d'être améliorées[219].

La structure fédérative suisse, ainsi que les principes qui régissent le partage des compétences entre la Confédération et les cantons, ont pour conséquence que la mise en œuvre législative des droits sociaux fondamentaux se caractérise par une diversité d'approches et d'instruments. Trois exemples permettent d'illustrer ces propos. Ils portent sur la mise en œuvre législative (2) du droit à l'éducation[220], (3) du droit à la santé[221] et (4) du droit à la sécurité sociale et à un niveau de vie suffisant[222].

#### 18.4.1.2 Exemple no 1 : le droit à l'éducation

Dans le domaine de l'éducation[223], l'art. 62 al. 1 Cst.féd. pose le principe selon lequel « [l]'instruction publique est du ressort des cantons »[224]. Cette disposition vise toutes les

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217 Cf., notamment, arrêt du TF 2P.74/2004 du 1er avril 2005 consid. 2.2.

218 Fondée en 1993, la CdC réunit les vingt-six gouvernements cantonaux. Elle vise à favoriser la collaboration entre les cantons dans les domaines qui relèvent de leur compétence propre et sert de plate-forme à la formation de l'opinion politique des cantons.

219 **Egbuna-Joss** et al. (2013), 10 et 12.

220 Art. 13 Pacte ONU I.

221 Art. 12 Pacte ONU I.

222 Art. 9 et 11 Pacte ONU I. L'analyse du droit à un niveau de vie suffisant se limitera à l'aide sociale, sans examiner, entre autres, le droit au logement ou les garanties plus étendues découlant de cette disposition conventionnelle. S'agissant de la mise en oeuvre du droit au travail, surtout à travers le Code (fédéral) des obligations et la législation fédérale sur le travail, cf. notamment **Vischer** (2012), 37 ss.

223 Ce domaine a fait l'objet d'une réforme importante en 2006, conduisant à la révision de la Constitution fédérale (voir l'Arrêté fédéral, du 16 décembre 2005, modifiant les articles de la Constitution sur la formation (RO 2006 3033) ainsi que le Rapport de la Commission de la science, de l'éducation et de la culture du Conseil national, du 23 juin 2005, portant sur l'initiative parlementaire no 97.419 : article constitutionnel sur l'éducation (FF 2005 5159).

224 Il s'agit d'une norme constitutionnelle atypique qui a une portée essentiellement déclaratoire, étant donné qu'elle ne fait que confirmer ce qui découle du principe de l'attribution des compétences (art. 3 et 42 al. 1 Cst.) : dans la mesure où la Constitution fédérale n'attribue pas de compétences à la Confédération dans ce

écoles publiques des niveaux inférieur et moyen[225]. La mise en œuvre du droit à l'instruction de base (art. 19 Cst.féd.) relève ainsi de la compétence des cantons. A la Confédération revient la compétence de régler le début de l'année scolaire (art. 62 al. 5 Cst.féd.). La Constitution fédérale limite cependant l'autonomie des cantons dans le domaine de l'instruction de base de deux manières : *primo*, elle introduit quelques règles matérielles qui s'imposent aux cantons dans l'exercice de leurs compétences. L'enseignement doit être conforme au standard minimum prescrit par l'art. 19 Cst.féd., ce qui implique qu'il soit gratuit, suffisant et ouvert à tous les enfants (art. 62 al. 2 Cst.féd.). La Constitution impose également le caractère obligatoire de l'instruction de base et stipule qu'elle soit placée « sous la direction ou la surveillance des autorités publiques (art. 62 al. 2 Cst.féd.). Les cantons doivent en outre pourvoir « à une formation spéciale suffisante pour les enfants et adolescents handicapés, au plus tard jusqu'à leur 20ème anniversaire » (art. 62 al. 3 Cst.féd.)[226]. *Secundo*, la Constitution fédérale reconnaît le besoin d'une certaine harmonisation dans le domaine de l'instruction primaire. Pour assurer la perméabilité du système éducatif au niveau national, elle prévoit une disposition visant à inciter à la coopération intercantonale. L'art. 62 al. 4 Cst.féd. prévoit une compétence conditionnelle de la Confédération de légiférer « dans la mesure nécessaire (…) [s]i les efforts de coordination n'aboutissent pas à une harmonisation de l'instruction publique concernant la scolarité obligatoire, l'âge de l'entrée à l'école, la durée et les objectifs des niveaux d'enseignement et le passage de l'un à l'autre, ainsi que la reconnaissance des diplômes ». Donnant suite au mandat prévu par le constituant en ce qui concerne la *scolarité obligatoire*, les cantons ont conclu un accord intercantonal (dénommé concordat HarmoS), qui est entré en vigueur le 1er août 2009[227]. Cet accord réglemente de façon uniforme les principaux objectifs et la durée des degrés d'enseignement, ainsi que le passage de l'un à l'autre.

A la différence de l'enseignement de base, la *formation professionnelle* est du ressort de la Confédération, qui dispose d'une compétence générale en la matière (art. 63 al. 1 Cst.féd.) et est appelée à prendre des mesures pour encourager « la diversité et la perméabilité de l'offre » (art. 63 al. 2 Cst.féd.). Le domaine de l'enseignement supérieur dépend

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domaine, celles-ci reviennent aux cantons (voir **BIAGGINI** (2007), ad art. 62 Cst.féd., no 3, 383 s.; **MAHON** in : **AUBERT/MAHON** (2003), ad art. 62 Cst.féd., no 4, 510 s.; **EHRENZELLER**, ad art. 62 Cst.féd., in : **EHRENZELLER/SCHINDLER/SCHWEIZER/VALLENDER** (2014a), no 9, 1302).

225 Le niveau inférieur se réfère à « l'enseignement de base, la scolarité obligatoire, primaire et secondaire », le niveau moyen notamment aux gymnases, lycées, écoles de commerce et aux écoles du degré diplôme (voir **MAHON**, in : **AUBERT/MAHON** (2003), ad art. 62 Cst.féd., no 3, 510).

226 Il est controversé si l'art. 62 al. 3 Cst.féd. se limite à imposer un mandat aux cantons ou si cette disposition confère en plus des droits subjectifs aux particuliers dont ils pourraient se prévaloir en justice (voir **BIAGGINI** (2007), ad art. 62 Cst.féd., no 10, 385).

227 Accord intercantonal, du 14 juin 2007, sur l'harmonisation de la scolarité obligatoire. Des informations sur HarmoS sont disponibles sur <www.edk.ch/dyn/11737.php>. Le concordat a été ratifié par 15 cantons (état: novembre 2015; voir **KIENER/KÄLIN** (2013), 460.

dans une large mesure de la coopération de la Confédération et des cantons[228]. La Confédération gère les deux écoles polytechniques fédérales, alors que les universités et les hautes écoles sont des établissements publics cantonaux, qui bénéficient cependant également du soutien de la Confédération et se voient reconnaître une autonomie constitutionnelle[229]. Pour assurer « la qualité dans l'espace suisse des hautes écoles », la Constitution prévoit que la Confédération et des cantons veillent ensemble à la coordination, notamment par la conclusion d'accords et la création d'institutions communes. Elle incite à la coopération intercantonale en conférant, comme dans le domaine de l'enseignement de base, des compétences législatives conditionnelles à la Confédération[230].

#### 18.4.1.3 Exemple no 2 : le droit à la santé

Comme le domaine de l'éducation, la politique de la *santé* relève, dans une large mesure, de la compétence cantonale[231]. La politique hospitalière, notamment, est du ressort des cantons, lesquels coopèrent entre eux par le biais de nombreux concordats[232]. La Constitution fédérale charge la Confédération de réglementer essentiellement trois secteurs segmentaires[233], à savoir: (1.) les denrées alimentaires, agents thérapeutiques, etc. ; (2.) la lutte contre les maladies transmissibles et (3.) la protection contre les rayons ionisants[234]. Elle lui confère aussi la compétence de légiférer sur l'assurance-maladie et sur l'assurance-accidents[235] et lui donne le pouvoir de déclarer les deux types d'assurances obligatoires,

228 L'art. 63a Cst.féd. a la teneur suivante : « Art. 63a Hautes écoles
1. La Confédération gère les écoles polytechniques fédérales. Elle peut créer, reprendre ou gérer d'autres hautes écoles et d'autres institutions du domaine des hautes écoles.
2. Elle soutient les hautes écoles cantonales et peut verser des contributions à d'autres institutions du domaine des hautes écoles reconnues par elle.
3. La Confédération et les cantons veillent ensemble à la coordination et à la garantie de l'assurance de la qualité dans l'espace suisse des hautes écoles. Ce faisant, ils tiennent compte de l'autonomie des hautes écoles et des différentes collectivités responsables, et veillent à l'égalité de traitement des institutions assumant des tâches de même nature.
4. Pour accomplir leurs tâches, la Confédération et les cantons concluent des accords et délèguent certaines compétences à des organes communs. La loi définit les compétences qui peuvent être déléguées à ces organes et fixe les principes applicables à l'organisation et à la procédure en matière de coordination.
5. Si la Confédération et les cantons n'atteignent pas les objectifs communs par leurs efforts de coordination, la Confédération légifère sur les niveaux d'enseignement et sur le passage de l'un à l'autre, sur la formation continue et sur la reconnaissance des institutions et des diplômes. De plus, la Confédération peut lier le soutien aux hautes écoles à des principes de financement uniformes et le subordonner à la répartition des tâches entre les hautes écoles dans les domaines particulièrement onéreux. »

229 Cf. arrêt du TF 2C_421/2013 du 21 mars 2014 consid. 1.2.1, non publié in ATF 140 I 201.

230 Voir Art. 63a al. 5 Cst.féd. (supra, note 228).

231 **BIAGGINI** (2007), ad art. 118 Cst.féd., no 2, 555. Pour un ouvrage sur la politique suisse en matière de santé, voir par ex. **ROSSINI/LEGRAND-GERMANIER** (2010).

232 Voir **FLEINER/HERTIG** (2010), 342.

233 Cf. ATF 138 I 435 consid. 3.4.1 p. 448.

234 Art. 118 Cst.féd.

235 Art. 117 al. 1 Cst.féd.

« de manière générale ou pour certaines catégories de personnes »[236]. Dans l'exercice de ces compétences, l'Assemblée fédérale a opté pour un système d'une assurance-accidents obligatoire pour l'ensemble des travailleurs occupés en Suisse (mais non pour les indépendants)[237]. Dans le domaine de l'assurance-maladie, la loi rend, depuis le 1er janvier 1996[238], obligatoire l'assurance pour les soins médicaux et instaure un système de couverture universelle pour les soins de base. Toute personne domiciliée en Suisse est tenue de s'assurer pour les soins de base auprès de l'une des caisses maladie figurant parmi les assureurs privés admis à pratiquer à la charge de l'assurance obligatoire ; ces caisses doivent accepter toute personne qui est tenue de s'assurer[239]. Des soins et prestations complémentaires relèvent par contre de la liberté contractuelle. Il en va de même de l'assurance d'une indemnité journalière, qui est en tant que telle facultative[240]. S'agissant du financement, le montant des primes d'assurance est fixé indépendamment du revenu ; il dépend de facteurs notamment personnels, géographiques[241] et de la franchise choisie par l'assuré. Des subsides destinés aux personnes disposant de moyens financiers modestes permettent de prendre en charge la totalité ou une partie des primes[242]. Il revient aux cantons de déterminer le cercle des bénéficiaires et d'accorder des réductions de prime. Ils bénéficient à cette fin de subventions de la part de la Confédération[243].

#### 18.4.1.4 Exemple no 3 : les droits à la sécurité sociale et à un niveau de vie suffisant

Dans le domaine des *prestations sociales*, il convient de distinguer trois systèmes complémentaires :

236 Art. 117 al. 2 Cst.féd.

237 Loi fédérale du 20 mars 1981 sur l'assurance-accidents (LAA), RS 832.20 ; RO 1982 1676.

238 Loi fédérale du 18 mars 1994 sur l'assurance-maladie (LAMal), entrée en vigueur le 1er janvier 1996 (RS 832.10 ; RO 1995 1328).

239 Art. 4 al. 2 LAMal.

240 Voir art. 1a al. 1 et 67 ss LAMal.

241 Les primes varient d'un canton, voire d'une commune à l'autre ; pour les différences entre les cantons, cf. le document intitulé « Primes moyennes cantonales pour 2015/2016 de l'assurance obligatoire des soins (avec accident) », qui contient une liste, établie par le Département fédéral de l'intérieur, des primes moyennes dans tous les cantons, disponible sur http://www.bag.admin.ch/themen/krankenversicherung/00261/index.html?lang=fr (état au 24 septembre 2015, consulté le 22 novembre 2015).

242 Art. 65 ss LAMal.

243 Art. 66 LAMal.

(1a) un système d'assurances sociales[244] qui est causal, dans le sens que les prestations dépendent de la survenance d'une éventualité (vieillesse et survivance[245], invalidité[246], chômage[247], maternité[248], service militaire[249]). Un autre trait distinctif de ce système réside dans le fait qu'il est cofinancé par des contributions des employeurs et des employés, qui sont calculées essentiellement en fonction du revenu. Conformément à la Constitution fédérale, les assurances sociales sont régies par le droit fédéral[250], lequel est mis en œuvre par les cantons.

(1b) Les prestations servies en vertu de la loi fédérale sur les prestations complémentaires à l'AVS et à l'AI (LPC)[251] revêtent un caractère hybride. Elles ont pour but de garantir le minimum d'existence du droit des assurances sociales (cf. art. 112a Cst.féd.); ce dernier est supérieur au minimum vital découlant de l'aide d'urgence concrétisant l'art. 12 Cst.féd., ainsi que du minimum du droit des poursuites. La LPC instaure une protection sous condition de ressources ou sélective dans le but d'éviter la pauvreté liée à l'âge ou au décès du soutien de famille. Les prestations complémentaires à l'AVS, qui appartiennent à la sécurité sociale et ne font pas partie de l'assistance, reposent à la fois sur la LPC et sur les lois adoptées par les cantons, qui en fixent certains éléments particuliers, désignent les organes d'application et peuvent aller au-delà du standard fédéral (cf. art. 2 al. 2 LPC)[252].

(2) L'aide sociale se caractérise par sa nature subsidiaire et finale : elle constitue un filet de secours visant à obvier aux lacunes et insuffisances des assurances sociales et dépend uniquement du besoin des bénéficiaires. Selon la Constitution fédérale, « les personnes dans le besoin sont assistées par leur canton de domicile » (art. 115 Cst.féd.). Les compétences de la Confédération se limitent essentiellement à établir des règles de conflit sur les exceptions au principe de l'assistance à domicile[253]. Les compétences matérielles reviennent aux cantons, qui assurent le financement par le biais de leurs ressources générales. Il

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244 Pour des études sur la sécurité sociale en Suisse, voir par ex. **GREBER/KAHIL-WOLFF/FELLAY/MOLO** (2010) ; **MAURER/SCARTAZZINI/HÜRZELER** (2009) ; **WIDMER** (2013).

245 Loi fédérale du 20 décembre 1946 sur l'assurance-vieillesse et survivants (LAVS), RS 831.10 ; RO 1963 843, étant précisé que l'assurance vieillesse et invalidité (note 246) ne forme qu'un des trois piliers sur lesquels repose la prévoyance vieillesse, survivant et invalidté en Suisse. Il est complété par un système de prévoyance professionnelle et l'épargne individuelle, encouragé par des mesures fiscales (voir art. 111 al. 1 Cst.féd. pour le modèle des trois piliers, 113 Cst.féd. pour la prévoyance professionnelle ; et art. 111 al. 4 pour la prévoyance individuelle).

246 Loi fédérale du 19 juin 1959 sur l'assurance-invalidité (LAI), RS 831.20 ; RO 1959 857.

247 Loi fédérale du 25 juin 1982 sur l'assurance-chômage obligatoire et l'indemnité en cas d'insolvabilité (Loi sur l'assurance-chômage, LACI), RS 837.0; RO 1982 2184.

248 Voir note 288.

249 Loi fédérale du 25 septembre 1952 sur les allocations pour perte de gain en cas de service et de maternité (Loi sur les allocations pour perte de gain, LAPG), RS 834.1; RO 1952 1046.

250 Voir les art. 112 ss Cst.féd.

251 Loi fédérale du 6 octobre 2006; LPC; RS 831.30; RO 2007 6055.

252 Cf. ATF 138 II 191 consid. 5.3 p. 205 s., et les jurisprudences citées.

253 Voir l'art. 115 al. 2 Cst.féd. et la loi fédérale du 24 juin 1977 sur la compétence en matière d'assistance des personnes dans le besoin [(LAS), RS 851.1 ; RO 1978 221].

incombe ainsi aux vingt-six entités fédérées de déterminer l'étendue et les conditions des prestations, de même que les aspects procéduraux, ce qui conduit à des disparités parfois importantes entre les cantons. Les normes établies par la Conférence suisse des institutions d'action sociale (CSIAS)[254] assurent une coordination minimale. Il s'agit cependant de simples recommandations émanant d'une association privée.

(3) L'aide d'urgence, en tant que dernier filet de secours, est subsidiaire à l'aide sociale, et se réfère aux prestations dues en vertu du droit fondamental à des conditions minimales d'existence (art. 12 Cst.féd.). A l'instar de l'aide sociale, l'aide d'urgence est du ressort des cantons. En l'absence de législation fédérale ou d'indications jurisprudentielles précises sur l'ampleur et les modalités des prestations, il existe selon des études menées par des ONG, de fortes disparités entre les cantons[255].

### *18.4.2 La mise en œuvre administrative*

La question de la mise en œuvre des droits sociaux fondamentaux dans le domaine administratif est un vaste sujet, dont l'analyse détaillée dépasserait le cadre du présent rapport, qui se contentera donc d'en esquisser quelques aspects. De manière liminaire, l'on retiendra que le Pacte ONU I oblige les Etats parties, dont la Suisse, de veiller à ce que leur droit interne soit interprété, par le juge tout comme par l'administration:

> « (…) autant que faire se peut d'une manière conforme aux obligations juridiques internationales de l'État. Ainsi, lorsqu'un organe de décision interne doit choisir entre une interprétation du droit interne qui mettrait l'État en conflit avec les dispositions du Pacte et une autre qui lui permettrait de se conformer à ces dispositions, le droit international requiert que l'on choisisse la deuxième »[256].

Cette obligation se retrouve également au niveau des obligations découlant de l'art. 35 al. 1 et 2 Cst.féd., lorsqu'il y est rappelé que les droits fondamentaux doivent être réalisés dans l'ensemble de l'ordre juridique suisse, et que les autorités doivent veiller à ce que ces

254 Ces normes sont accessibles via le site de la CSIAS, http://csias.ch/, lequel contient également des liens vers la législation cantonale en matière d'aide sociale.

255 Voir « La face cachée de l'aide d'urgence », in : Le Temps, du 22 février 2011, ainsi que les informations disponibles sur http://www.humanrights.ch/fr/Suisse/interieure/asile/NEM-aide-durgence/idart_6312-content.html (consulté le 22 novembre 2015); **SUTTER, MICHAEL**, Aide d'urgence pour les requérant-e-s d'asile débouté-e-s. Pratique de l'aide d'urgence dans quelques cantons – Mise à jour du rapport sur l'aide d'urgence 2008, Berne 2011, disponible via le site http://www.osar.ch/droit-dasile/procedure-dasile/aide-durgence.html (consulté le 22 novembre 2015).

256 Comité du Pacte ONU I, Observation générale no 9 de 1998 sur l'application du Pacte au niveau national, E/1999/22, para. 15.

droits, dans la mesure où ils s'y prêtent, soient aussi réalisés dans les relations qui lient les particuliers entre eux. Il sera rappelé à cet égard que ces obligations s'adressent à tous les pouvoirs de l'Etat, y compris à l'exécutif, à tous les échelons de l'Etat fédéral helvétique[257].

En appliquant la méthodologie des trois strates, on pourra ainsi retenir qu'à chaque fois qu'ils interviennent vis-à-vis d'un particulier, le pouvoir exécutif et ses services devront s'abstenir de s'immiscer dans les relations entre les particuliers, voire de limiter les possibilités de ceux-ci de réaliser les droits sociaux par leurs propres moyens et actions (par exemple, en déployant une activité potentiellement nocive à la santé des administrés sans prendre les mesures de protection idoines, ou en adoptant une pratique d'autorisations administratives propre à décourager les personnes d'ouvrir un commerce). L'administration devra, en outre, veiller, dans les limites de ses compétences, à protéger les groupes vulnérables contre les menaces émanant de groupes privés (par exemple, en édictant des directives détaillées [ordonnances administratives], qui garantissent que les logements construits respectent les standards minimaux en matière d'hygiène et de sécurité, et en en vérifiant la conformité par l'envoi d'inspecteurs sur le terrain; en intervenant auprès d'un maître d'apprentissage qui ne formerait pas suffisamment son jeune apprenti ou exploiterait sa condition). Enfin, l'administration devra faire en sorte que sa pratique décisionnelle protège les administrés contre tout arbitraire et formalisme excessif, et qu'elle les mette à l'abri de conséquences néfastes par rapport à la jouissance de leurs droits sociaux élémentaires (par exemple, en veillant à ce que les nécessiteux ne passent pas entre les mailles du filet des prestations sociales versées par l'Etat, notamment en raison de barèmes excessivement sévères, que les conditions d'incarcération des détenus correspondent aux standards minimaux d'humanité, que les travailleurs, les personnes démunies, les étudiants puissent s'adresser à un service compétent pour les aider et les conseiller dans leurs démarches de travail ou leurs revendications et projets, le cas échéant en intervenant directement, ou encore par l'ouverture des dortoirs dans certaines infrastructures publiques durant l'hiver afin d'y héberger et nourrir les sans-abris).

On le voit: les tâches de l'administration sont multiformes et doivent s'adapter aux diverses circonstances de la vie quotidienne et en fonction des besoins en protection ou des urgences. De manière schématique, on y découvre toutefois plusieurs constantes:

Premièrement, l'Etat, lorsqu'il uniformise sa pratique dans un domaine affectant potentiellement les droits (sociaux) fondamentaux, devra activement tenir compte de l'impact de son activité quant à leur respect (en particulier à l'égard des plus vulnérables) et par avance élaborer des méthodes protectrices, quitte à permettre à ses employés de déroger à ladite pratique en la présence d'un cas-limite ou de rigueur.

257 Chap. 18.3.2; **Schweizer**, ad art. 35 Cst.féd, in: **Ehrenzeller/Schindler/Schweizer/Vallender** (2014a), 799 s.

Deuxièmement, l'Etat devra veiller à ce que tout recours administratif soit « accessible, abordable, rapide et suivi d'effets »[258] ; on y retrouve notamment les critères de l'accès égal aux prestations et services de l'Etat, le principe de la célérité et l'effectivité de l'activité étatique (concertée et planifiée), sans quoi la protection des droits fondamentaux ne serait qu'un tigre de papier.

Troisièmement, l'administration dispose d'un fort potentiel de promotion des droits (sociaux) fondamentaux, dont elle doit faire usage afin de favoriser leur essor, notamment à l'aide de campagnes d'information (cf. une campagne de prévention contre les violences domestiques, la sensibilisation contre les infections sexuellement transmissibles, l'éducation à la tolérance et à une meilleure coexistence avec des minorités dans les enceintes scolaires et universitaires)[259].

Quatrièmement et dernièrement, et dès lors que l'administration a recours à de nombreux spécialistes ainsi qu'à des ressources personnelles, informationnelles, budgétaires et autres, c'est à elle que reviendra la part du lion s'agissant de l'élaboration de projets législatifs et réglementaires respectueux des droits sociaux (« *streamlining* »), voire de programmes stratégiques et plans de coordination spécifiquement axés sur la réalisation de ces droits et se fixant des objectifs concrets (« *scoping* »). De même, c'est à l'administration qu'il reviendra, le cas échéant en faisant appel à des experts externes, de récolter les informations et indicateurs qui lui permettront ensuite d'évaluer l'effectivité des mesures prises aux fins de faire respecter, de protéger et de mettre en œuvre les droits sociaux dans l'ensemble de l'appareil étatique ainsi qu'entre les privés; si elle découvre des déficits ou perçoit des obstacles, il lui appartiendra, de plus, d'adapter (critère de la mutabilité ou de la flexibilité; « *Nachbesserungspflicht* »)[260] ses politiques pour corriger et rendre plus efficace la mise en œuvre desdits droits fondamentaux (s'agissant de la problématique du développement de stratégies, de la récolte et évaluation des indicateurs d'effectivité [« monitoring » et « scoping »).[261] On notera, au titre de ces devoirs informationnels et planificateurs, que leur non-respect est susceptible, dans un système admettant la justiciabilité des droits sociaux, d'entraîner la condamnation de l'Etat soit sur le fond (la violation matérielle étant présumée en l'absence de données étatiques réfutant les allégués des parties), soit pour violation de cette obligation procédurale distincte par l'Etat[262].

En Suisse, la structure fédérale marque aussi la mise en œuvre administrative des droits sociaux fondamentaux. En effet, le fédéralisme d'exécution[263] va de pair avec une certaine

258 Comité Pacte ONU I (note 256), para. 9.

259 Cf. notamment **Domenighetti** (1990), 177 : « La salute è essenzialmente informazione ».

260 **Morand** (2002), 361 s.

261 Cf. notamment **Chatton** (2013), 264-273; **Forbes** (1992), 143 ; **Knoepfel** (2005), 115-128.

262 Pour des exemples concrets tirés de la pratique quasi-judiciaire, voir **Chatton** (2013), 267 s.

263 Voir 18.4.1.1.

diversité dans la réalisation de ces droits[264]. Dans la mesure où les instruments internationaux (comme le Pacte ONU I) et la Constitution fédérale laissent une certaine marge de manœuvre lors de la concrétisation des droits, l'absence d'uniformité n'est pas en soi problématique[265]. Elle peut même avoir des effets bénéfiques, permettant aux entités fédérées d'aller au-delà de ce qui est requis par les garanties ancrées à l'échelon supérieur ou de 'tester' des nouvelles approches de mise en œuvre. La liberté du choix des moyens n'est cependant pas illimitée et ne justifie pas l'inexécution des normes fédérales et internationales. Assurer la réalisation effective des droits (sociaux) fondamentaux tout en respectant la diversité inhérente au fédéralisme suisse n'est pas aisé et nécessite des mesures de coordination et d'information qui restent à améliorer selon une étude récente du Centre suisse de compétence pour les droits humains[266].

### *18.4.3 La mise en œuvre judiciaire*

#### 18.4.3.1 Contexte général

L'effectivité des droits (sociaux) fondamentaux dépend en bonne partie de leur « prise en main par le juge constitutionnel »[267]. Le contrôle judiciaire du respect des droits fondamentaux a une longue tradition en Suisse[268]. Plongeant ses racines au 19ème siècle, la juridiction constitutionnelle s'est développée principalement dans l'optique de protéger les droits constitutionnels des citoyens, garantis dans les constitutions cantonales et la Constitution fédérale, à l'encontre de la puissance publique des cantons. Le transfert progressif de compétences du niveau cantonal vers le niveau fédéral a graduellement conduit à l'extension de la protection judiciaire contre les actes fédéraux. Comme dans d'autres Etats européens, les attributions du pouvoir judiciaire suisse ont été élargies en raison de l'internationalisation de la protection des droits fondamentaux : à la mission classique du juge constitutionnel de veiller au respect de la Constitution est venue s'ajouter la tâche de contrôler la conformité du droit interne aux conventions protectrices des droits de l'Homme[269]. Tant le *contrôle de constitutionnalité* que le contrôle de *conventionnalité* s'exercent en Suisse de manière diffuse. A la différence des ordres juridiques qui ont opté pour un système du contrôle concentré, la cour suprême helvétique ne possède ainsi pas le monopole de sanctionner

264 Voir à ce sujet l'étude conduite sous l'égide du Centre suisse de compétence pour les droits humains par EGBUNA-JOSS/HILTBRUNNER/BELSER (2013).

265 Voir EGBUNA-JOSS/HILTBRUNNER/BELSER (2013), 3 et 6.

266 EGBUNA-JOSS/HILTBRUNNER/BELSER (2013), 10 et 12.

267 AUER/MALINVERNI/HOTTELIER (2013b), 23.

268 Pour la juridiction constitutionnelle suisse, voir notamment AUER (1983) ; KÄLIN (1994); AUER/MALINVERNI/HOTTELIER (2013a), no 1914 ss, 647 ss; MÜLLER (1981) ; HERTIG RANDALL (2010).

269 Voir HERTIG RANDALL (2010), 278 ss, avec une comparaison avec la France et les Etats du Benelux.

des normes jugées contraires à la Constitution fédérale ou au droit international. Les tribunaux ordinaires, voire toute autorité d'application du droit, ont le pouvoir, et le devoir, d'examiner à titre préjudiciel des actes normatifs, cantonaux ou fédéraux[270], et de les priver d'effets s'ils s'avèrent contraires au droit supérieur. En Suisse, la juridiction constitutionnelle est exercée par une multiplicité d'acteurs et « se dissout littéralement dans les juridictions ordinaires, civiles, pénales, administratives ou autres »[271]. Tel n'est pas uniquement le cas des instances judiciaires inférieures, mais également au niveau du Tribunal fédéral. Le contrôle de constitutionnalité et de conventionnalité peut être soulevé, à l'échelon national en dernière instance, dans le cadre de la juridiction ordinaire du Tribunal fédéral[272], à savoir à l'occasion de recours en matière civile, pénale et de droit public, illustrant le double rôle joué par la cour suprême helvétique : celui de juridiction d'appel suprême pour assurer l'application uniforme du droit fédéral, et celui de juge constitutionnel, visant à protéger les droits constitutionnels.

En raison de sa *nature diffuse*, le contrôle de constitutionnalité et de conventionnalité s'exerce à l'occasion d'un litige concret. Le contrôle abstrait (de constitutionnalité et de conventionnalité) est cependant ouvert à l'encontre des actes normatifs cantonaux et intercantonaux, qui peuvent être portés devant le Tribunal fédéral dans un délai de trente jours à partir de leur publication selon le droit cantonal[273].

Comparé aux droits dits de la première génération, le contrôle judiciaire de la mise en œuvre des droits sociaux fondamentaux par le biais du contrôle de constitutionnalité (2) et du contrôle de conventionnalité (3) a une effectivité moindre. Ce constat tient en bonne partie à la question épineuse de la justiciabilité (4).

#### 18.4.3.2 Le contrôle de constitutionnalité

La portée du contrôle de constitutionnalité diffère selon qu'il porte sur un acte cantonal ou un acte fédéral. A l'égard des *actes cantonaux*, la juridiction constitutionnelle suisse assure une protection complète, englobant tant les actes individuels que des actes normatifs[274], y compris les actes adoptés par les parlements cantonaux. Reflétant la structure

270 Exception faite du contrôle de constitutionnalité des lois fédérales (voir 18.4.3.2) supra.

271 **AUER/MALINVERNI/HOTTELIER** (2013a), 643, no 1903.

272 Selon l'art. 95 LTF, le Tribunal fédéral peut statuer, entre autres, sur les griefs de la violation du droit fédéral (let. a), ce qui inclut la Constitution fédérale, et le droit international (let. b).

273 Voir art. 82 let. b et 101 LTF. Le recours est directement recevable auprès du Tribunal fédéral s'il n'existe pas de voie de recours au niveau cantonal (art. 87 al. 1 LTF).

274 Un régime particulier s'applique aux constitutions cantonales dont le contrôle judiciaire est doublement restreint comparé aux autres actes normatifs cantonaux : d'une part, les dispositions constitutionnelles cantonales ne peuvent pas faire l'objet d'un contrôle abstrait ; d'autre part, le contrôle préjudiciel concret est limité, dans la mesure où le Tribunal fédéral n'examine que leur conformité avec les normes fédérales postérieures. En effet, la compatibilité des constitutions cantonales avec le droit fédéral (y compris le droit international) fait partie d'une procédure de contrôle (dite procédure de garantie art. 51 al. 2 Cst.féd.), à laquelle toute révision d'une constitution cantonale est soumise. L'organe compétent étant l'Assemblée

fédérale de la Suisse, le contrôle de constitutionnalité des actes cantonaux ne se limite pas à l'examen de la conformité avec la Constitution fédérale mais s'étend également aux droits fondamentaux consacrés dans les constitutions cantonales[275]. Leur violation peut être invoquée non seulement devant les autorités cantonales (y compris, pour certains cantons, une cour constitutionnelle cantonale), mais également devant le Tribunal fédéral.

Il s'ensuit que l'étendue des droits (sociaux) fondamentaux n'est pas uniforme en Suisse. Elle est susceptible de varier en fonction des cantons, dans la mesure où les constitutions cantonales peuvent contenir des droits fondamentaux qui vont au-delà de ceux garantis par la Constitution fédérale. Comme indiqué précédemment[276], certaines constitutions cantonales (en particulier celles adoptées récemment) offrent une protection plus généreuse des droits sociaux fondamentaux que la Constitution fédérale. Cependant, la juridiction constitutionnelle ne leur a jusqu'à présent pas encore conféré leur plein effet utile en reconnaissant, et concrétisant leur portée propre.

Les droits (sociaux) fondamentaux consacrés dans les constitutions cantonales ne sont, en vertu du principe de la *primauté du droit fédéral* (art. 49 al. 1 Cst.féd.), pas opposables aux *actes fédéraux*. Plus réduit quant aux normes de référence, le contrôle des actes fédéraux l'est aussi, et surtout, quant à l'objet : il ne s'étend pas aux lois adoptées par le Parlement fédéral (nommé Assemblée fédérale). En effet, exprimant l'idée de la suprématie du législateur ordinaire[277], l'art. 190 Cst.féd. prévoit que « [l]e Le Tribunal fédéral et les autres autorités sont tenus d'appliquer les lois fédérales et le droit international ».

En vertu de cette disposition, nommée « clause d'immunité », les autorités d'application du droit sont en mesure de censurer l'inconstitutionnalité des actes fédéraux du niveau réglementaire[278] mais ne peuvent pas refuser d'appliquer les lois ordinaires ou urgentes adoptées par le Parlement fédéral. La « clause d'immunité », plonge ses racines au 19ème siècle, une époque où la suprématie parlementaire et une vision stricte de la séparation des pouvoirs étaient dominantes sur le continent européen[279].

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fédérale (art. 172 al. 2 Cst.féd.), le Tribunal fédéral se montre soucieux de ne pas désavouer le parlement subséquemment (**AUER/MALINVERNI/HOTTELIER** (2013a), no 1711, 582, 705 ss et 2075 ss).

275 Selon l'art. 95 let. c LTF, le recours au Tribunal fédéral est également ouvert pour violation « de droits constitutionnels cantonaux », terme qui inclut les droits fondamentaux (pour la notion de droits constitutionnels cantonaux, voir **SPÜHLER**, in : **SPÜHLER/AEMISEGGER/DOLGE/VOCK** (2013), ad art. 95 LTF, no 6, 509.

276 Voir 18.2.4.

277 Dans l'ordre juridique suisse, le législateur ordinaire n'est pas seulement l'Assemblée fédérale mais aussi le peuple, étant donné que les lois fédérales sont soumises au référendum facultatif (voir art. 141 al. 1 let. a et b Cst.féd.).

278 Les ordonnances du Conseil fédéral et de l'Assemblée fédérale sont sujettes à un contrôle concret et incident, cf. **AUER/MALINVERNI/HOTTELIER** (2013a), no 1956 ss, 665 ss.

279 Pour une étude consacrée à la clause d'immunité, voir **SCHERRER** (2001).

Des tentatives visant à abolir la clause d'immunité ou d'en *relativiser la portée* se sont avérées infructueuses. En raison des échecs des divers projets de réforme[280], le contenu et les contours de la clause d'immunité ont principalement évolué grâce à la jurisprudence et à la doctrine[281]. Un tempérament est de nature temporelle : l'immunité ne s'étend pas aux lois antérieures à une disposition constitutionnelle ; dans le conflit entre une loi fédérale et la Constitution, la volonté postérieure du constituant l'emporte ainsi sur celle du législateur[282]. Un premier tempérament jurisprudentiel à l'immunité des lois fédérales est ensuite le principe de l'interprétation conforme à la Constitution. Cette stratégie d'harmonisation repose sur la présomption que le législateur « ne propose pas de solution incompatible avec la Constitution, à moins que le contraire ne résulte clairement de la lettre ou de l'esprit de la loi »[283]. Son importance n'est pas à sous-estimer, étant donné qu'il n'existe aucune cloison étanche entre une interprétation très créative et l'inapplication d'une norme[284]. Un deuxième tempérament de la clause d'immunité peut découler de certaines garanties et de principes élémentaires de l'Etat de droit (comme la protection de la bonne foi, l'égalité dans l'illégalité), qui peuvent justifier le refus d'appliquer une loi en raison des circonstances spécifiques du cas d'espèce[285]. Un troisième tempérament consiste à interpréter la clause d'immunité comme consacrant uniquement l'interdiction du refus d'appliquer une norme immunisée, et non celle d'examiner sa conformité à la Constitution (« *Anwendungsgebot* » au lieu d'un « *Prüfungsverbot* »). Par ce biais, les juges fédéraux peuvent mettre en exergue l'inconstitutionnalité d'une loi et inviter le législateur à y remédier dans le cadre d'un *Appellentscheid*[286].

Malgré ces tempéraments, la clause d'immunité affaiblit la protection juridictionnelle des droits (sociaux) fondamentaux. A titre d'exemple, la suppression de l'aide d'urgence pour certaines catégories d'étrangers, telle qu'envisagée par l'Assemblée fédérale en 2005, n'aurait pas pu être sanctionnée par le juge constitutionnel malgré l'incompatibilité manifeste d'une telle disposition législative avec le droit à des conditions minimales

280 Pour une analyse détaillée des différents projets de réforme, voir **SCHERRER** (2001), 47 ss, étant précisé que la dernière tentative visant la suppression de l'art. 190 Cst.féd. s'est soldée par un échec en 2012, après que les deux chambres de l'Assemblée fédérale ont refusé d'entrer en matière (voir BO CE 2012 432 pour le Conseil des Etats et BO CN 2012 1968 pour le Conseil national).

281 Pour les principales étapes de cette évolution, voir **AUER/MALINVERNI/HOTTELIER** (2013a), no 1937 ss, 654 ss.

282 **HANGARTNER/LOOSER**, ad art. 190 Cst., in : **EHRENZELLER/SCHINDLER/SCHWEIZER/VALLENDER** (2014b), no 16, 3055.

283 ATF 130 II 65 consid. 4.2 p. 71.

284 Pour un exemple célèbre d'une interprétation créative d'un texte légal, voir ATF 109 II 8.

285 Voir par ex. **MAHON**, ad art. 190 Cst.féd., in : **AUBERT/MAHON** (2003) no 15, 1462.

286 Pour des lois fédérales jugées inconstitutionnelles mais appliquées conformément à l'art. 190 Cst., voir par ex. ATF 125 III 209; 131 II 697 ; 131 II 710.

d'existence (art. 12 Cst.féd.)[287]. En raison de l'art. 190 Cst.féd., la juridiction constitutionnelle ne permet pas non plus d'apporter une réponse à l'éventuelle inactivité du Parlement fédéral[288].

La situation des justiciables est plus favorable en ce qui concerne *l'inaction du législateur cantonal*. Dans un important arrêt rendu le 21 novembre 2011[289], le Tribunal fédéral a été amené à se prononcer sur cette problématique. Statuant sur un recours dirigé contre le refus du Parlement du canton de Zoug de prolonger le mandat de la commission cantonale d'égalité, les juges fédéraux ont examiné la question – laissée ouverte dans la jurisprudence antérieure – de savoir si, et à quelles conditions ils pouvaient statuer sur des recours alléguant le refus ou le retard excessif concernant l'adoption d'un acte législatif[290]. Passant en revue sa jurisprudence, le Tribunal fédéral souligne qu'il a par le passé eu l'occasion de se prononcer sur l'inaction du législateur cantonal face au mandat fait au législateur de pourvoir à l'égalité de droit et de fait entre les sexes (art. 8 al. 3, 3ème phrase, Cst.féd.), mandat impliquant l'obligation d'éliminer les inégalités prévues dans la législation, d'une part, et le devoir de prendre des mesures adéquates pour réaliser l'égalité matérielle, d'autre part. Sept ans après l'adoption du mandat constitutionnel, les juges fédéraux avaient admis des recours et ont annulé des décisions fondées sur des lois cantonales contraires à l'égalité entre les sexes. Par ce biais, ils ont par exemple admis un recours visant à obtenir une rente de veuf, faisant abstraction des conditions discriminatoires prévues dans la législation cantonale[291]. Cependant, la complexité de la matière, les implications financières parfois considérables ainsi que la diversité des options de réglementer une matière ont amené le Tribunal fédéral dans d'autres affaires à se contenter de constater l'inconstitutionnalité imputable à l'inaction du législateur cantonal dans les considérants de l'arrêt, sans aller jusqu'à imposer dans le dispositif au législateur cantonal l'obligation de remédier à l'inaction dans un délai déterminé[292].

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287 Voir l'avis de droit du DFJP, Office fédéral de la justice, du 23 février 2005, sur la révision partielle de la loi sur l'asile – Aide d'urgence, JAAC 2008.1, 1-14.

288 Un exemple connu est le retard de cinq décennies pris par l'Assemblée fédérale dans l'exécution de son mandat d'instaurer une assurance maternité. Ce mandat a été prévu par le constituant en 1945 (art. 34 quiniquies aCst.féd.) et figure à l'art. 116 al. 2 Cst.féd. Le législateur fédéral l'a exécuté en 2004, en introduisant un congé minimal de quatorze semaines donnant droit à 80% du salaire (voir l'art. 329f du Code suisse des obligations, RS 220, et l'art. 16e LAPG, introduits par la loi fédérale sur le régime des allocations pour perte de gain en faveur des personnes servant dans l'armée, dans le service civil ou dans la protection civile du 3 octobre 2003, RO 2005 1429, en vigueur depuis le 1er juillet 2005). Depuis le 1er janvier 2011, l'indemnité journalière est plafonnée à un montant maximal de CHF 196.- (voir art. 16f LAPG et RO 2010 4577).

289 ATF 137 I 305.

290 ATF 137 I 305 consid. 2.1 p. 310.

291 ATF 116 V 198 consid. 3a p. 213 s. Pour des exemples portant sur d'autres domaines, voir ATF 116 Ia 359 consid. 10b et c 380 s. (concernant le droit de vote des femmes dans le canton d'Appenzell Rhodes-Intérieures) ; 123 I 56 (concernant la taxe d'exemption du service du feu) ; 129 I 265 consid. 5 p. 274 ss (portant sur la règle de conflit intercantonal en matière de paiement d'allocations familiales).

292 ATF 119 V 277 consid. 4b 282 ; ATF 117 V 318 consid. 5b et 5c p. 334 s.; ATF 112 Ia 311 consid. 2c p. 313 s.

Le Tribunal fédéral établit, dans son arrêt du 21 novembre 2011, un lien entre l'inaction du législateur et la violation des obligations positives, précisant que les droits fondamentaux peuvent imposer des obligations de protection dirigées principalement à l'encontre du pouvoir législatif. Le mandat du législateur peut découler explicitement ou implicitement (par le biais de l'interprétation) du droit fédéral ou du droit international[293]. Pour prévenir une intervention excessive de la part du pouvoir judiciaire, le Tribunal fédéral subordonne la recevabilité d'un recours dirigé contre la prétendue inaction du législateur à la condition que le mandat soit suffisamment clair et précis, non seulement quant à l'existence d'un devoir d'agir, mais également quant au contenu d'une telle obligation[294]. Appliquant ces principes au cas d'espèce, le Tribunal fédéral conclut qu'un devoir de prendre des mesures ciblées pour réaliser l'égalité matérielle entre les sexes et pour combattre les stéréotypes fondés sur le genre découle de la Constitution fédérale, la Constitution du canton de Zoug, et la CEDEF. Ces instruments n'imposent cependant pas la création d'une commission d'égalité, laissant aux autorités une *marge de manœuvre* quant aux mesures concrètes à adopter afin de remédier à la carence constatée. Pour cette raison, le simple fait de ne pas prolonger le mandat de la commission d'égalité n'est pas contraire au droit. Nonobstant le manque de précision des normes internes et internationales, le Tribunal fédéral souligne, cependant, que c'est la suppression de la commission d'égalité, *sans aucune mesure compensatoire*, qui met en péril la réalisation de l'égalité matérielle entre les sexes et serait dès lors inconstitutionnelle et contraire à la CEDEF[295]. Il conclut que les autorités cantonales sont tenues, en vertu des instruments précités, de prévoir une solution alternative et de déterminer quelles autorités seront chargées, par quels instruments et quels moyens, de la mise en œuvre du mandat de réaliser l'égalité entre les sexes[296].

Les possibilités et les limites de cette jurisprudence pour la réalisation des droits sociaux fondamentaux restent à déterminer. L'arrêt du 21 novembre 2011 s'annonce à cet égard prometteur, reflétant la volonté des juges fédéraux de pallier l'inaction du législateur cantonal pour assurer *l'effectivité* des droits fondamentaux, indépendamment de leur source nationale ou internationale. Comme le montrent les références à la CEDEF dans l'arrêt du 21 novembre 2011, le Tribunal fédéral soumet les actes internes non seulement à un contrôle de constitutionnalité mais procède également à un contrôle de conventionnalité.

#### 18.4.3.3 Le contrôle de conventionnalité

L'ordre juridique helvétique se caractérise par une longue tradition d'ouverture au droit international. Le monisme, ainsi que le principe de la primauté du droit international sur

293 ATF 137 I 305 consid. 2.4. et 2.5 p. 315.
294 ATF 137 I 305 consid. 2.5 p. 315.
295 ATF 137 I 305 consid. 5.5 p. 323.
296 ATF 137 I 305 consid. 5.5 p. 323.

le droit interne[297] plongent leurs racines au 19ème siècle et ont été un terrain fertile en vue de l'émergence du contrôle de conventionnalité. La tradition fédéraliste de la Suisse a également été un facteur favorable à ce nouveau mode de contrôle. Contrairement aux cours constitutionnelles d'Etats unitaires, la cour suprême helvétique était habituée de longue date à la coexistence de différentes sources de droits fondamentaux au sein d'un seul ordre juridique. De ce point de vue, les garanties conventionnelles sont simplement venues compléter les droits garantis par les constitutions cantonales et la Constitution fédérale[298]. Comme pour le contrôle de constitutionnalité, l'examen de la conventionnalité des actes cantonaux et des actes fédéraux de niveau réglementaire n'a pas posé des difficultés majeures.

Le contrôle de conformité des *lois fédérales* avec le droit international a en revanche été un sujet plus délicat, même si la Constitution fédérale n'excluait pas explicitement ce type de contrôle. En effet, la clause d'immunité prévue à l'art. 190 Cst.féd. ne s'oppose explicitement qu'au contrôle de constitutionnalité et non au contrôle de conventionnalité des lois fédérales. Soulignons que cette disposition impose aux autorités non seulement d'appliquer les lois fédérales *mais aussi le droit international*. Elle ne précise cependant pas comment appréhender le conflit entre deux actes immunisés (une loi fédérale, d'une part, et un traité international, d'autre part).

En dépit de nombreuses objections, le contrôle de conventionnalité s'est progressivement imposé en Suisse. Comme dans d'autres Etats attachés à la primauté du parlement, le système européen de la protection des droits fondamentaux a favorisé cette évolution, poussant les juridictions suprêmes nationales à intervenir en amont et à remédier à des violations des droits de l'Homme au niveau interne pour échapper à la censure internationale des juges de Strasbourg. Face à des lois fédérales contraires à la CEDH, le Tribunal fédéral a, dans un premier temps, refusé d'entrer en matière[299]. Dans un deuxième temps, il a laissé entendre qu'il serait disposé à sanctionner la violation d'un droit conventionnel par le législateur, mais a réussi à harmoniser la loi fédérale et le droit conventionnel par le biais de l'interprétation conforme au droit international[300]. Confrontés à un conflit irréductible entre une loi fédérale et la CEDH, les juges fédéraux ont franchi une étape de plus en 1995. Dans l'arrêt *PKK*[301], ils se sont ralliés au courant doctrinal favorable au contrôle de conventionnalité, confirmant que la clause d'immunité n'apporte pas de réponse au conflit entre

297 Sur le statut et le rang du droit international dans l'ordre juridique suisse, voir p. ex. **Auer/Malinverni/Hottelier** (2013a), no 1344 ss, 456 ss ; **Cottier/Hertig** (2000); **Meyer** (2013), 63.

298 **Hottelier** (2004), 342 ; **Thürer** (2007), 35.

299 Arrêt du TF non publié, du 11 février 1985, partiellement reproduit in : *ASDI* 1986, p. 127 ; TF, arrêt non publié, 18 octobre 1984, partiellement reproduit in : *ASDI* 1985, p. 250 ; TF, arrêt non publié, 14 juin 1983, partiellement reproduit in : *ASDI* 1984, p. 203 s. Voir **Malinverni** (1998), 51 s.

300 Voir surtout ATF 117 Ib 367 consid. 2 ss p. 369 ss.

301 ATF 125 II 417.

une loi fédérale et un traité international, qui sont tous deux au bénéfice de l'immunité[302]. Les juges fédéraux relèvent ensuite que la réponse à un conflit entre une loi fédérale et une disposition de droit international est à rechercher dans les principes découlant du droit international, lesquels s'appliquent à toutes les autorités étatiques, non seulement au législateur. Cette conclusion s'impose d'autant plus, indique le Tribunal fédéral, « quand la primauté est accordée à une norme de droit international public, qui tend à protéger les droits de l'Homme »[303]. Pour finir, il a laissé ouverte la question de savoir si, « dans d'autres cas », « des solutions divergentes » seraient envisageables. Cette précision prend toute son importance compte tenue d'une ligne jurisprudentielle connue sous le nom de pratique « *Schubert* », d'après l'arrêt qui l'a consacrée[304]. Cette jurisprudence controversée reflète la vision du camp doctrinal opposé à la primauté absolue du droit international. En effet, selon l'arrêt *Schubert*, la loi fédérale doit prendre le pas sur un traité international lorsque, en présence d'un conflit entre ces deux sources normatives, l'Assemblée fédérale a adopté de manière consciente et volontaire une loi qui contrevient au traité. Dans l'arrêt *PKK*, le Tribunal fédéral ne spécifie pas s'il maintient sa jurisprudence *Schubert*, fortement critiquée, mais confine son éventuelle pertinence à des domaines autres que les droits de l'Homme[305]. Bien que les arrêts rendus après 1995 ne soient pas toujours exempts d'hésitations et de contradictions[306], la jurisprudence *PKK* fournit une assise solide au contrôle de la conventionnalité des lois fédérales en Suisse et comble (au moins partiellement) une lacune dans le système de protection des droits fondamentaux, en agissant comme un substitut fonctionnel au contrôle de constitutionnalité.

Dans un arrêt rendu en 2012, les juges fédéraux ont signalé leur volonté d'étendre l'emprise des droits conventionnels même à l'égard de la Constitution fédérale et de laisser inappliquées des dispositions constitutionnelles contraires à la CEDH[307]. Dans le contexte politique et constitutionnel helvétique, marqué par son attachement à la démocratie directe, cette jurisprudence a eu un grand retentissement. Elle permet, en effet, de censurer des normes constitutionnelles proposées et approuvées par les citoyens[308].

L'évolution de la jurisprudence du Tribunal fédéral montre que le contrôle de conventionnalité s'est progressivement imposé dans l'ordre juridique helvétique. Pour les droits

302 ATF 125 II 417 consid. 4d p. 424.

303 ATF 125 II 417 consid. 4d p. 425.

304 ATF 99 Ib 39.

305 Cf. **SEILER** (2014), 265-368.

306 Voir surtout ATF 136 III 168 consid. 3.3.4 p. 172 s. (laissant ouverte la question de savoir si la jurisprudence *Schubert* s'applique dans le domaine des droits de l'Homme) ; voir aussi **HERTIG RANDALL** (2010), 251 ss. Pour l'impact de l'arrêt *PKK* sur la jurisprudence *Schubert*, voir aussi **SCHÜRER** (2015).

307 ATF 139 I 16 consid. 5.2.2 ss p. 30 s.

308 Voir art. 139 Cst.féd. (initiative populaire permettant à 100'000 citoyens de déclencher la procédure de révision de la Cst.féd.) et art. 140 al. 1 let. a Cst.féd. (soumettant les révisions de la Constitution au référendum obligatoire) ; sur la procédure de révision de la Constitution fédérale, voir par ex. **AUER/MALINVERNI/HOTTELIER** (2013a), no 1462 ss, 496 ss.

fondamentaux dits de la première génération (en particulier la CEDH), la pertinence pratique est double : d'une part, elle favorise, d'un point de vue matériel et procédural, l'interpénétration entre les droits fondamentaux, indépendamment de leurs sources : les justiciables peuvent se prévaloir devant les autorités judiciaires, tant des droits garantis par la Constitution que des droits consacrés à l'échelon international. D'autre part, à l'égard des lois fédérales, le contrôle de conventionnalité comble (au moins partiellement) une lacune dans le système de protection des droits fondamentaux en agissant comme un substitut fonctionnel au contrôle de constitutionnalité.

Comme la section suivante l'indiquera, dans le domaine des droits sociaux fondamentaux, l'effectivité du contrôle de conventionnalité est cependant fortement réduite en raison de l'approche restrictive adoptée par la cour suprême helvétique au sujet de la justiciabilité des droits économiques, sociaux et culturels.

En outre, il convient de souligner qu'aujourd'hui, les acquis du système juridique suisse précités sont mis en péril par des mouvances populistes, dont l'agenda politique met de plus en plus fréquemment en cause la pratique des droits de l'Homme sur le plan international, en particulier celle de la Cour EDH. Ainsi, le 10 mars 2015, sous l'impulsion et avec l'appui de l'influent parti de l'Union démocratique du centre (UDC), un comité a entamé la récolte de signatures tendant au lancement d'une initiative populaire fédérale intitulée « Le droit suisse au lieu de juges étrangers (initiative pour l'autodétermination) ». Le comité dispose d'un délai jusqu'au 10 septembre 2016 pour récolter les 100'000 signatures requises (art. 139 al. 1 Cst.féd.) en vue, entre autres modifications, d'insérer les nouvelles dispositions suivantes à l'art. 5 al. 4 Cst.féd. (« La Confédération et les cantons respectent le droit international. La Constitution fédérale est placée au-dessus du droit international et prime sur celui-ci, sous réserve des règles impératives du droit international »), respectivement à l'art. 56a al. 2 Cst.féd. (« En cas de conflit d'obligations, [la Confédération et les cantons] veillent à ce que les obligations de droit international soient adaptées aux dispositions constitutionnelles, au besoin en dénonçant les traités internationaux concernés »)[309].

#### 18.4.3.4 La justiciabilité des droits sociaux fondamentaux

La *justiciabilité* (ou applicabilité directe ou effet direct)[310] d'une norme de droit international, tout comme de droit interne, se définit par l'aptitude de cette norme, lorsqu'elle est invoquée par le justiciable devant une instance d'application dotée de pouvoirs (quasi-) judiciaires, à servir de base dans la décision destinée à trancher les questions juridiques soulevées par le cas d'espèce. Pour ce faire, la norme est suffisamment claire, ou déter-

309 Cf. FF 2015 1831. Voir aussi l'« édition spéciale de l'UDC » (édition mars 2015, <www.udc.ch>), 1 – 3, distribuée aux ménages suisses. Inutile de rappeler que l'aboutissement de cette initiative risquerait de conduire, à terme, à la dénonciation de la CEDH et d'autres traités de protection des droits de l'Homme par la Suisse. Pour une critique, cf. MÜLLER/THÜRER (2015).

310 Pour cette notion, voir aussi arrêt cité sous la note 7 ci-dessus.

minable par le biais de l'interprétation (critère de la densité normative ou autosuffisance); la décision à rendre peut résoudre le litige en se servant des instruments et méthodes propres à la fonction juridictionnelle (critère de l'implémentabilité); enfin, l'autorité est légitimée à rendre une telle décision d'application et de concrétisation au regard des principes inhérents à un Etat de droit démocratique (critère de la séparation des pouvoirs)[311].

Le Tribunal fédéral suisse part d'une définition semblable, bien que moins précise et au vocabulaire parfois fluctuant:

> « Les particuliers sont autorisés à invoquer en justice les dispositions d'un traité international lorsqu'elles sont directement applicables (*self-executing*), ce qui suppose qu'elles aient un contenu suffisamment clair et précis pour servir de fondement à un jugement dans une cause déterminée. Tel n'est pas le cas d'une disposition qui énonce un programme ou bien fixe les lignes directrices qui s'adressent au législateur et non aux autorités administratives et judiciaires. Il en va de même des normes qui se bornent à esquisser la réglementation d'une matière ou qui confèrent à l'Etat contractant un pouvoir d'appréciation considérable »[312].

Dans la présente section, l'on rappellera sommairement que, de nos jours, plus rien ne s'oppose, d'un point de vue objectif ou technique[313], à la reconnaissance de la pleine justiciabilité des droits économiques, sociaux et culturels qui sont garantis tant aux niveaux national qu'international (a). Sera ensuite abordée l'attitude souvent conservatrice et réservée des autorités suisses vis-à-vis de la justiciabilité de ces droits fondamentaux, laquelle a toutefois quelque peu évolué et varie selon les instruments et les droits considérés (b).

*a La justiciabilité objective des droits sociaux*

Au plus tard depuis le 5 mai 2013, date d'entrée en vigueur sur le plan international du *Protocole facultatif* se rapportant au Pacte international relatif aux droits économiques, sociaux et culturels, qui introduit entre autres mécanismes une procédure de plaintes individuelles[314], la possibilité pour les droits sociaux fondamentaux d'être invoqués dans la majeure d'un syllogisme juridique destiné à trancher un litige individuel et concret ne

311 **CHATTON** (2013), 440 et 495 s.

312 Arrêt du TF 4C.422/2004 du 13 septembre 2005 consid. 3.1.2, non publié in ATF 132 III 122; voir aussi ATF 131 III 418 consid. 3.2.2 p. 427; 126 I 240 consid. 2b p. 242; **HANGARTNER** (2007), 137. Cf. aussi **SOMA** (2014), 776 s.

313 **MARAUHN** (2003), 256 s.

314 Voir à ce sujet, notamment, **CHATTON** (2013), 468 ss; **GOLAY** (2008), 483 ss; **GROSBON** (2012), 58 ss; **LEBRETON** (2010), 1 ss; **WILSON** (2009), 295 ss.

devrait faire plus l'ombre d'un doute[315], même si les autorités helvétiques s'obstinent à prétendre le contraire[316].

Au-delà de cette démonstration formelle, fondée sur le droit positif, force est de retenir que les droits sociaux, et les instruments qui les consacrent, remplissent – dans la même mesure que tout autre droit fondamental – les trois critères principaux permettant de déterminer si une norme est ou non directement applicable, à savoir ceux de la déterminabilité de la norme, de son implémentabilité et du respect de la séparation des pouvoirs.

*1 Le critère de la déterminabilité*

De nos jours, les droits sociaux fondamentaux revêtent, pour la plupart, un contenu suffisamment clair ou, à tout le moins, aisément déterminable. Ils peuvent, pour ce faire, s'appuyer sur le *travail d'exégèse* détaillé, – et initié il y a plusieurs décennies déjà, voire il y a près d'un siècle pour ce qui a trait aux droits défendus au sein de l'OIT –, qu'ont opéré (en résumant parfois leurs analyses dans des observations générales ou la partie introductive de leurs conclusions) les organes de contrôle du respect des droits de l'Homme, tels que le Comité onusien des droits économiques, sociaux et culturels ou le Comité européen des droits sociaux. S'ajoutent à ces interprétations de nature authentique ou persuasive la pratique quasi-judiciaire (nationale et internationale) ayant été ponctuellement amorcée, de même que les commentaires et analyses effectués par la doctrine juridique nationale tout comme internationale[317]. Au vu de cette remarquable entreprise interprétative, l'on ne saurait plus désormais, tel que s'y étaient jadis essayés certains auteurs ou Etats, interpréter les droits sociaux au pied de la lettre comme équivalant à la fourniture par l'Etat d'un travail, d'un logement et des conforts quotidiens aux individus ; le travail d'interprétation réalisé permet en effet de préciser que le rôle des droits sociaux fondamentaux vise le plus souvent non pas à fournir directement des prestations matérielles, mais à faciliter l'accès à ces biens, par exemple en aidant l'individu à mener une existence autonome et en ôtant les barrières factuelles ou juridiques qui l'entravent dans la poursuite de ses aspirations socio-économiques ou culturelles[318].

*2 Le critère de l'implémentabilité*

Le critère de l'« *implémentabilité* » suppose que le juge soit apte à trancher un litige au moyen des instruments et techniques traditionnels (notamment à travers le syllogisme) propres à sa profession. En d'autres termes, le juge doit être à même de donner son plein effet à une norme invoquée, sans qu'il ne lui soit, par exemple, nécessaire de développer

315 **Wilson** (2014), 255.

316 Cf. la réponse précitée du Conseil fédéral à la motion parlementaire de la Conseillère nationale Evi **Allemann**, du 20 mars 2009.

317 **Chatton** (2013), 476 ss.

318 **Chatton** (2013), 348.

tout un programme de mise en œuvre, ni de redéfinir les priorités budgétaires préalablement décidées par le législateur avec le concours du gouvernement[319]. L'aptitude objective du juge à se saisir d'un litige concret dépend en grande partie de la strate obligationnelle en cause et, partant, des prétentions concrètes que le particulier fait valoir en justice.

Les affaires mettant en cause des obligations d'abstention de l'Etat (*respect;* « *Abwehrpflichten* ») ne posent aucune difficulté en termes de justiciabilité; elles font en effet appel au fonctionnement historique ou conceptuel classique des libertés, lesquelles mettent l'individu à l'abri des immixtions arbitraires de l'autorité, à qui elles commandent ainsi de ne pas envahir l'espace privé. S'agissant des devoirs de *protection* (« *Schutzpflichten* »), qui engagent l'autorité à intervenir afin de protéger l'individu contre le pouvoir et les comportements nuisibles émanant de tiers privés, il s'agit là encore d'une notion dont l'application au cas particulier ne pose guère de problèmes à l'ère des « obligations positives » développées par la Cour de Strasbourg et par d'autres juridictions, nationales comme internationales[320]. Tout au plus, le juge pourra, voire devra-t-il faire preuve de retenue en examinant la proportionnalité et le caractère raisonnable de la mesure que l'individu lui demande d'imposer à l'Etat[321].

Un constat plus nuancé s'impose à l'égard de la strate de réalisation des droits (sociaux, ou civils) fondamentaux, sachant que la *mise en œuvre* (« *Gewährleistungspflichten* ») de certains aspects davantage institutionnels par le juge peut s'avérer problématique ou, à tout le moins, exiger une plus grande réserve de sa part[322]. Un constat différencié s'impose, en effet, en fonction des trois sous-obligations dans lesquelles se décline l'obligation de *mise en œuvre*.

La première sous-obligation – de *fourniture* - consiste en une aide directe, en nature ou en argent, accordée aux personnes qui sont durablement ou passagèrement vulnérables; les prestations se confinent en principe à la garantie du minimum d'existence et coïncident partant largement avec la protection qui découle de l'art. 12 Cst.féd., disposition que le Tribunal fédéral a déclarée d'application directe[323].

La deuxième sous-obligation – de *facilitation* – oblige, quant à elle, l'Etat à prendre des mesures propres à autonomiser les personnes; elle présuppose l'adoption tant de mesures concertées ou programmatoires que celle de mesures concrètes et individuelles; le degré de la justiciabilité dépendra en conséquence de la nature des mesures dont le déploiement est requis.

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319 **CHATTON** (2013), 436 s.

320 **BESSON** (2003), 58 s.; **ZÜND** (2013), 1354. Voir également 18.5.1.

321 **CHATTON** (2013), 455 s.; **SPIELMANN** (1998), 141.

322 **ALSTON/SCOTT** (2000), 242, rappellent, à juste titre, que le « judicial involvement is not an on-off switch: just because a court cannot legitimately or competently deal with all – or even many – aspects of a case does not mean it should deal with none ».

323 Cf. aussi **ZÜND** (2013), 1354.

Finalement, la troisième sous-obligation – de *promotion* – est sans doute celle qui se prête le moins à l'application directe, en ce sens qu'elle vise le plus souvent, par le biais de programmes, de campagnes d'information, de plans budgétés et de réajustements politiques, à donner sens à l'obligation de mise en œuvre progressive des droits; l'exemple sud-africain démontre néanmoins que même ce degré obligationnel n'est pas complètement soustrait – à une intensité de cognition certes limitée et parcellaire – à la possibilité d'un contrôle juridictionnel[324].

*3 Le critère de la séparation des pouvoirs*

La question de la légitimité du pouvoir judiciaire à trancher des différends mettant en scène des droits sociaux fondamentaux ne soulève aucune difficulté particulière pour ce qui est des première et deuxième strates obligationnelles, ou encore de la sous-obligation « *de fourniture* » afférente à la troisième strate. De tels pouvoirs s'inscrivent parfaitement dans la conception moderne du *rôle du juge* et de la séparation des pouvoirs; ils font – n'en déplaise à certains auteurs braqués sur le concept utopique et puriste du « juge, bouche de la loi » jadis élaboré par **MONTESQUIEU**[325] – partie intégrante du répertoire ordinaire des Etats de droit démocratiques modernes, et contrebalancent l'extension, au cours de ces dernières décennies, des formes, instruments et domaines d'intervention de l'administration dans la vie socio-économique des personnes physiques comme morales[326]. Pour ce qui est des strates davantage programmatiques, il siéra au juge, dans la mesure où un contrôle judiciaire s'avérerait raisonnablement possible, de faire preuve d'une bonne dose de « *judicial self-restraint* » ou de déférence, notamment en réduisant sa cognition au caractère proportionné, voire raisonnable ou limitée à l'arbitraire de la mesure discutée[327].

*b La méfiance des autorités suisses à l'égard de la justiciabilité des droits sociaux*

La doctrine, les instances internationales de contrôles (en particulier le CDESC) et la pratique des Etats ont évolué vers une approche plus favorable et nuancée à l'égard de la justiciabilité des droits sociaux fondamentaux[328]. L'adoption, en 2008, et l'entrée en vigueur, cinq ans plus tard, du Protocole facultatif au Pacte ONU I permettant au CDESC de statuer sur des communications individuelles illustre cette tendance. En dépit de ces développements, les autorités suisses continuent néanmoins à réserver à ces droits un accueil pétri

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324 **CHATTON** (2013), 449 ss.

325 Par ex., **GONIN** (2013), 240-259; **SEILER** (2010), 512 s.

326 **CHATTON** (2013), 438 ss, et les références citées.

327 **CHATTON** (2013), 396 ss, 405 ss et 481 ; **KRADOLFER** (2013), 534.

328 Cf., pour des exemples tirés de la pratique nationale et internationale plus récente, **GHAI/COTTRELL** (2004); **SEPULVEDA** (2003). Au centre de ce revirement se trouve la théorie moderne (depuis lors élargie conceptuellement) des trois strates (18.3.3). (**CHATTON** (2013), 284-290, et les références citées ; **KRADOLFER** (2013), 541 s.).

de méfiance[329], qui s'est, de manière plus générale, manifesté par leur refus de ratifier le Protocole facultatif au Pacte ONU I[330]. Il conviendra toutefois de nuancer ce constat selon que les autorités ont affaire aux droits sociaux ancrés dans la Constitution fédérale, le Pacte ONU II ou la CEDH (1), dans une constitution cantonale (2), ou encore dans une convention internationale spécifiquement consacrée à la protection de ladite catégorie de droits de l'Homme (3).

*1 La justiciabilité des droits sociaux protégés par la Constitution fédérale*

A la différence des buts sociaux[331], les droits sociaux qui sont garantis par le catalogue des droits fondamentaux inséré dans la Constitution fédérale sont considérés par le Tribunal fédéral comme étant pleinement *justiciables*. En témoigne la jurisprudence, souvent abondante, rendue à leur propos par la cour suprême helvétique. Il en va en particulier ainsi des droits sociaux qui ont été formulés à la façon de libertés, tels que la liberté de la langue (art. 18 Cst.féd.)[332], la liberté de la science et de la recherche (cf. art. 20 Cst.féd.)[333], la liberté de l'art (art. 21 Cst.féd.)[334], la liberté économique (art. 27 Cst.féd.)[335], ou la liberté syndicale (art. 28 Cst.féd.)[336]. S'y ajoutent la garantie pluriséculaire de la propriété (art. 26 Cst.féd.)[337], de même que le droit à un enseignement de base gratuit et suffisant (art. 19 Cst.féd.)[338]. Bien qu'ils engagent a priori l'Etat à fournir des prestations, certes minimales

329 FERCOT (2011), 229 et 235 s.; HOTTELIER (2013), 248.

330 Cf. 18.2.1.1.a a) ci-dessus.

331 Cf. 18.2.2.1 ci-dessus.

332 Par ex. ATF 139 I 229 consid. 5.4 p. 234 et consid. 5.7 p. 236 ss. (enseignement de l'idiome « romanche » à l'école primaire) ; arrêt du TF 8C_90/2014 du 19 décembre 2014 consid. 2 (droit de l'assuré d'obtenir une traduction, dans la langue de la procédure, d'un rapport médical établi par la Caisse nationale suisse d'assurance en cas d'accidents – CNA).

333 Par ex. ATF 127 I 145 consid. 4b p. 153 et 4d/aa p. 156 (accès à des dossiers archivés pendant la période de protection); arrêt du TF 1C_448/2008 du 13 mars 2009 consid. 4.2 (communication d'une sanction prononcée à l'égard d'un expert et portant atteinte à sa réputation).

334 Par ex. ATF 135 III 145 consid. 4.3 p. 150 (atteinte d'une personne dans sa considération en raison des similitudes qu'elle présente avec un personnage décrit dans un roman) ; 140 II 33 consid. 5.6-5.8 p. 43 (limitation d'immissions provenant de décorations lumineuses).

335 Par ex. ATF 139 II 173 consid. 6.1 p. 180 (limites de la publicité pour un avocat) ; 137 I 167 consid. 4 p. 176 ss (exigence de l'accord écrit du propriétaire pour héberger un commerce de prostitution dans son immeuble) ; arrêt du TF 2C_889/2013 du 20 octobre 2014 consid. 6.2 (retrait des diplômes d'un enseignant coupable de pédo-pornographie).

336 Par ex. ATF 140 I 257 consid. 5 p. 261 ss (conditions de reconnaissance d'un syndicat de la fonction publique comme partenaire social); 134 IV 216 consid. 5.1 p. 222 ss (barrage d'une autoroute par des grévistes, délit de contrainte) ; arrêt du TF 6B_758/2011 du 24 septembre 2012 consid. 1.3-1.3.4 (droit d'accès des syndicats aux locaux d'une entreprise; voir, au sujet du conflit de libertés soulevé par cet arrêt, HOTTELIER, Michel, Commentaire de l'arrêt du TF 6B_758/2011, in: Pratique Juridique Actuelle, no 3, Lachen/St-Gall 2013, 450-457).

337 Par ex. ATF 139 II 28 consid. 2.7.1 p. 33 (mesures d'assainissement des débits d'eau). Il sera rappelé que la catégorisation de la garantie de la propriété parmi les droits sociaux est controversée.

338 Par ex. ATF 138 I 162 consid. 3.1-3.3 p. 164 ss (enseignement spécialisé pour enfants handicapés dans une école ordinaire).

mais immédiates, aux plus démunis, le droit constitutionnel d'obtenir de l'aide dans des situations de détresse (art. 12 Cst.féd. ; « couverture des besoins élémentaires »)[339], ainsi que le droit à l'assistance judiciaire gratuite (art. 29 al. 3 Cst.féd.)[340] se sont eux aussi vu reconnaître le statut de droits (sociaux) fondamentaux directement applicables ; que la mise en œuvre – à savoir la concrétisation – de l'art. 12 Cst.féd. incombe aux cantons[341], lesquels sont libres de fixer la nature et les modalités précises des prestations à fournir au titre de l'aide d'urgence, n'y change rien mais confirme qu'il n'est pas nécessaire, pour qu'un droit fondamental soit justiciable, qu'il présente d'emblée des contours clairement délimités et qu'il ne requière plus aucune spécification.

La position jurisprudentielle par rapport à la justiciabilité de l'*art. 11 Cst.féd.*, qui est souvent abordé conjointement aux articles idoines de la CDE, est moins tranchée[342]. Dans une partie des décisions de justice rendues à ce jour, la protection spéciale due aux enfants et aux jeunes n'a été citée qu'à titre ancillaire ou interprétatif, en vue de renforcer d'autres dispositions de nature constitutionnelle ou législative[343]. D'autres arrêts admettent cepen-

339 Par ex. ATF 139 I 272 consid. 3.2 p. 276 (aide d'urgence accordée à une personne sous le coup d'une décision de renvoi, hébergement dans un abri de protection civile), jurisprudence notamment confirmée in arrêts du TF 8C_466/2013 du 3 juin 2014 consid. 4.3; 8C_221/2013 du 11 mars 2014 consid. 4.2, non publié in ATF 140 I 141 ; cf. aussi l'arrêt du Tribunal cantonal vaudois (Cour de droit administratif et public) PS.2014.0100 du 15 janvier 2015 consid. 3b. Le Tribunal fédéral a affirmé la justiciabilité de ce droit avant sa codification dans la Constitution fédéral, dans l'ârret qui reconnaît l'aide d'urgence comme un droit fondamental non-écrit. Les juges ont raisonné en les termes suivants : (ATF 121 I 367 = JT 1997 I 278 consid. 2c) : « (…) il faut encore examiner si un tel droit peut être mis en œuvre par voie judiciaire. Alors que les droits de défense ne posent pas de problème sur ce plan, le droit à des prestations présuppose qu'il soit suffisamment précisé dans une norme juridique et que le juge puisse le concrétiser et le reconnaître grâce à une procédure et aux moyens qui sont à sa disposition (…). Le juge doit alors respecter les limites fonctionnelles de sa compétence. En raison de la précarité des ressources étatiques, il n'a pas la compétence de statuer sur les priorités en matière de répartition des moyens financiers. Ce qui est directement imposé par un droit fondamental et fixé par le juge ne peut jamais être qu'un minimum de prestations étatiques (…). Le droit à des conditions minimales d'existence satisfait ces exigences. Il vise un minimum : l'assistance en cas d'indigence. Les tâches étatiques qui en découlent sont reconues par les cantons dans leur législation en matière d'assistance sociale ; elles n'ont plus besoin d'une décision de base en matière de politique financière. Ce qui constitue la condition indispensable à une vie conforme à la dignité humaine est clairement reconnaisssable et peut être obtenu dans une procédure judiciaire. »

340 ATF 139 I 206 consid. 3.3 p. 214 s. (en matière de détention administrative d'un étranger) ; 139 I 138 consid. 4 p. 144 s. (dans une procédure de contrôle abstrait portant sur une norme cantonale augmentant la taxe pour les étudiants en médecine humaine).

341 Pour l'aide d'urgence, voir 18.2.2.2.c et pour sa mise en œuvre 18.4.1.4.

342 Pour rappel, cette disposition constitutionnelle prévoit : « Les enfants et les jeunes ont droit à une protection particulière de leur intégrité et à l'encouragement de leur développement (al. 1). Ils exercent eux-mêmes leurs droits dans la mesure où ils sont capables de discernement (al. 2) ».

343 Cf., par ex., ATF 129 IV 216 consid. 1.2.1 p. 219 et consid. 2.3 p. 221 (en lien avec le code pénal suisse du 21 décembre 1937 [311.0 ; RO 54 781], qualité de victimes d'enfants subissant des voies de fait ; dépassement illicite de l'éventuel droit de correction parental) ; ATF 126 V 70 consid. 4c p. 73 s. (en lien avec la non-discrimination fondée sur l'âge et l'art. 35 al. 1 et 2 Cst.: inconstitutionnalité d'une ordonnance réservant aux assurés majeurs le droit à la transformation de véhicules à moteur nécessitée en raison d'une invalidité) ; arrêts du TF 2C_738/2012 du 27 novembre 2012 consid. 3.1 (en lien avec la CDE et avec l'art. 5 de la loi fédérale du 24 mars 2006 sur la radio et télévision [RS 784.40 ; RO 2007 737] intimant aux diffuseurs de

dant implicitement (ou laissent ouverte) l'invocabilité de l'art. 11 Cst.féd., tout en précisant le plus souvent qu'aucun droit ne peut en être déduit *in casu* pour résoudre un litige particulier ou obliger l'Etat à (ne pas) agir dans un sens donné[344]. La non prise en compte, dans le cadre d'un jugement de divorce et d'attribution de l'autorité parentale, de l'intérêt supérieur de l'enfant découlant de l'art. 11 Cst.féd. a conduit à l'annulation partielle de cette décision par le Tribunal fédéral et au renvoi de la cause pour instruction plus détaillée de la situation familiale[345]. Finalement, le Tribunal fédéral a, dans un certain nombre d'arrêts à la teneur encore hésitante, tantôt globalement nié le caractère « *self-executing* » de l'art. 11 Cst.féd. en raison de sa formulation programmatique[346], tantôt opéré une distinction entre les différentes composantes de cette disposition : selon cette approche, le droit à la protection particulière de l'intégrité pouvait être d'effet direct, dans quel cas toutefois elles n'offrait pas, le plus souvent, une protection qui dépasserait celle déjà accordée, notamment, par la liberté personnelle (art. 10 al. 2 Cst.féd.)[347] ; le droit à l'encouragement, par contre, serait dépourvu d'applicabilité directe et revêtirait une portée programmatique.

Les garanties de la *CEDH* et du *Pacte ONU II* étant fréquemment (mais à condition d'avoir été spécifiquement invoquées par la partie recourante) examinées conjointement aux dispositions constitutionnelles correspondantes, elles ne soulèvent en principe pas de difficultés en termes d'applicabilité directe[348].

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veiller « à ce que les mineurs ne soient pas exposés à des émissions susceptibles de porter préjudice à leur épanouissement », et permettant de restreindre la liberté des médias ; voir aussi ATF 133 II 136 consid. 5.1 p. 142) ; 2P.7/2001 du 5 décembre 2001 consid. 1d (qualité pour recourir admise en lien avec l'art. 19 Cst.féd.) : ATF 128 IV 154 consid. 3.5 p. 162 s. (en lien avec l'art. 8 CEDH et la CDE, protection des liens d'un enfant avec sa famille de fait).

344 ATF 133 I 156 consid. 3.6.4 p. 167; arrêts du TF 2C_495/2007 du 27 mars 2008 consid. 2.4 ; 2P.150/2003 du 16 septembre 2003 consid. 4.2 s. (pas de droit à pouvoir fréquenter un établissement scolaire plus proche ou à obtenir la prise en charge par une école offrant un programme spécifique, ni la couverture des frais de transport nécessaires à la fréquentation du prégymnase) ; ATF 126 II 377 consid. 5d p. 391 s. ; arrêts du TF 2C_795/2008 du 25 février 2009 consid. 6 ; 2C_135/2007 du 26 juin 2007 consid. 4.2 ; 2A.563/2002 du 23 mai 2003 consid. 1.2 et 2.5 (pas de droit à l'octroi d'une autorisation de séjour) ; arrêt du TF 2C_31/2007 du 27 juillet 2007 consid. 2.5 (la restriction à l'invocation de ses droits fondamentaux par un enfant incapable de discernement est justifiée au regard de l'art. 11 al. 2 Cst.féd.).

345 ATF 129 III 250 consid. 3.4.1 p. 255 s. Pour le droit supérieur de l'enfant, cf. aussi ATF 132 III 359 consid. 4.4.2 p. 373.

346 Arrêt du TFA I 267/04 du 18 mars 2005 consid. 2.5.

347 ATF 126 II 377 consid. 5c et 5d p. 390 ss; arrêt du TF 2P.324/2001 du 28 mars 2002 consid. 4.2. Cf. aussi **Reusser/Lüscher**, ad art. 11 Cst.féd, in : **Ehrenzeller/Schindler/Schweizer/Vallender** (2014a), 319 s.

348 Cf., pour des exemples, ATF 139 I 180 consid. 1.5 p. 183; arrêt du TF 2C_221/2009 du 21 janvier 2010 consid. 3.1 (art. 4 CEDH) ; arrêt du TF 6B_482/2007 du 12 août 2008 consid. 21.2 (art. 6 par. 3 let. c CEDH ; art. 14 par. 3 let. d Pacte ONU II); ATF 129 I 113 consid. 3 p. 120 ss et consid. 5 p. 125 ss (art. 11 CEDH) ; arrêt 1A.43/2006 du 6 avril 2006 consid. 3.1 (art. 10 Pacte ONU II) ; ATF 130 I 169 consid. 2.2 p. 171 (art. 11 Pacte ONU II). Voir cependant l'ATF 129 I 12 consid. 5.3 p. 18 concernant l'art. 24 Pacte ONU II, qui semble éviter d'appliquer directement cette disposition au motif qu'elle se trouverait d'ores et déjà mise en oeuvre

*2 La justiciabilité des droits sociaux protégés par une constitution cantonale*

Il est possible de recourir auprès du Tribunal fédéral suisse, qui en examine librement le respect[349], pour violation de ses « droits constitutionnels cantonaux » (art. 95 let. c LTF). Le particulier devra toutefois, s'agissant d'un « droit fondamental », invoquer et motiver son grief de violation de façon précise (art. 106 al. 2 LTF; principe d'allégation ou « *Rügeprinzip* »), ce qui signifie notamment que l'acte de recours devra, à peine d'irrecevabilité, contenir un exposé succinct des droits constitutionnels ou des principes juridiques violés et préciser en quoi consiste la violation[350]. Il incombera par ailleurs au recourant d'établir – rarement, le Tribunal fédéral y procède d'office – en quoi ledit droit, issu de la constitution cantonale applicable, lui conférerait une *protection plus étendue* ou spécifique que, en particulier, un droit similaire garanti par la Constitution fédérale, voire par un instrument conventionnel. Sans cela, le Tribunal fédéral appuiera son raisonnement uniquement sur ces derniers instruments[351].

La cour suprême n'est en revanche pas compétente – à l'opposé, en principe, des tribunaux (constitutionnels) cantonaux – pour contrôler l'interprétation et l'application de l'ensemble du droit constitutionnel cantonal. En d'autres termes, seules les dispositions constitutionnelles cantonales qui garantissent des droits individuels aux citoyens et sont, à ce titre, *directement applicables* peuvent faire l'objet d'un examen au fond devant le Tribunal fédéral[352]. Cette acception restrictive a non seulement pour effet, du moins sur le plan fédéral, de priver les particuliers de la possibilité de se prévaloir directement (à défaut d'invocation conjointe avec un droit fondamental spécifique) de normes organisationnelles ou attributives de compétences ancrées dans la constitution du canton considéré[353]. La limitation du recours aux seules dispositions d'effet direct est, de surcroît, susceptible d'entraîner le déni de la justiciabilité des droits sociaux fondamentaux, au vu de la concep-

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par les dispositions du Code civil suisse. S'agissant de la relation entre ces dispositions conventionnelles et les dispositions constitutionnelles de contenu similaire, cf. 18.2.4.

349 ATF 138 I 171 consid. 1.5 p. 176 s.

350 ATF 139 I 229 consid. 2.2 p. 232; 136 II 489 consid. 2.8 p. 494; 134 II 349 consid. 3 p. 351; arrêts du TF 2C_272/2012 du 9 juillet 2012 consid. 1.3; 6B_118/2009 du 20 décembre 2011 consid. 3.1, non publié in ATF 138 I 97.

351 Cf., par ex., ATF 139 I 218 consid. 3.1 p. 220 (droit d'obtenir de l'aide dans des situations de détresse garanti par la Cst.BE; cf. aussi arrêt du TF 2P.147/2002 du 4 mars 2003 consid. 3.2; 136 I 254 consid. 4.2 p. 258 (droit à l'aide d'urgence selon la Cst.VD); 130 I 71 consid. 4.2 p. 75 (droit d'obtenir de l'aide dans des situations de détresse garanti par la Cst.SH); 127 I 185 consid. 3 p. 188 s. (droit à une indemnisation pour cause d'expropriation d'après la Cst.VS); arrêts du TF 2C_433/2011 du 1er juin 2012 consid. 3.2 (droit à l'éducation primaire suffisante et gratuite selon la Cst.SZ); 1C_412/2007 du 18 juillet 2008 consid. 3 (droits politiques selon la Cst.SG); 1P.202/2004 du 4 octobre 2004 consid. 2.2 (garantie de la propriété au sens de la Cst.AG); 2P.305/2003 du 6 septembre 2004 consid. 4.3 (liberté économique garantie par la Cst.TI).

352 Cf. ATF 136 I 241 consid. 2.2 p. 248; arrêt du TF 2C_272/2012 du 9 juillet 2012 consid. 2.1.

353 ATF 137 I 77 consid. 1.3.1 p. 79 s.; 136 I 241 consid. 2.3 p. 248; 133 I 110 consid. 4.5 p. 117 (droit, prévu à l'art. 178B de l'ancienne Cst.GE, de ne pas être exposé à la fumée du tabac); 131 I 366 consid. 2.4 p. 369 s. (prise en considération des sensibilités politiques lors de la désignation des membres d'autorités publiques selon la Cst.SO).

tion – difficilement défendable – que les juridictions helvétiques nourrissent encore fréquemment à leur sujet, et quand bien même certains d'entre eux offriraient des garanties supérieures à celles prévues dans la Constitution fédérale, voire inconnues à ce dernier échelon. Malgré ces obstacles, il sied de rappeler qu'à plusieurs reprises déjà, le Tribunal fédéral a reconnu que des droits fondamentaux de rang constitutionnel cantonal étaient non seulement justiciables, mais consacraient en sus un niveau de protection exorbitant ou supérieur à celui offert par la Constitution fédérale.

### *3 Les droits sociaux garantis par une convention internationale topique*

#### a. La CDE

Au cours de ces dernières années, la *Convention relative aux droits de l'enfant* s'est frayé un chemin de plus en plus large au sein de la jurisprudence rendue par la cour suprême helvétique, notamment via l'interprétation du droit suisse des étrangers et/ou à travers la prise en compte récurrente de l'intérêt ou du bien supérieur de l'enfant[354]. Les juges suprêmes ont d'ailleurs expressément reconnu que certaines des garanties consacrées dans la CDE présentaient un contenu justiciable[355]. Pour réjouissante que soit cette ouverture relative, il y a lieu de déplorer que la grande retenue dont fait généralement preuve le Tribunal fédéral par rapport aux droits sociaux fondamentaux se perpétue au niveau du volet « social » des garanties contenues dans la CDE. C'est ainsi que, dans un arrêt de l'ancien Tribunal fédéral des assurances datant de 2005, maintes fois confirmé depuis, il a été retenu que, de par leur formulation insuffisamment concrète, les art. 23 (droits des enfants handicapés) et 26 CDE (droit à la sécurité sociale) ne renfermeraient que des principes programmatoires et ne conféreraient aucune prétention directe à des prestations légales de la part de l'Etat[356]. En lien avec des conclusions tendant à l'octroi de prestations de l'assurance-invalidité, cette « liste noire » des droits sociaux non directement applicables a encore été étendue au droit à la santé consacré à l'art. 24 CDE[357], ainsi que, toutefois sans

354 Cf., par ex., ATF 136 II 120 consid. 3.3.1 p. 126; 136 II 78 consid. 4.8 p. 87. A noter que, dans l'ATF 136 I 297 consid. 8.2 p. 308 (confirmé in ATF 137 V 167 consid. 4.8 p. 174), le Tribunal fédéral a qualifié le bien supérieur de l'enfant (art. 3 CDE) de principe directeur ou de maxime d'interprétation dont les autorités doivent tenir compte dans le cadre de leur pratique.

355 Cf. ATF 133 I 286 consid. 3.2 p. 291 (justiciabilité des art. 12 et 37 CDE) ; 128 I 63 consid. 3.2.2 p. 70 (art. 7 al. 1 CDE); 124 III 90 consid. 3a p. 91 (art. 12 CDE); arrêt du TF 8C_295/2008 du 22 novembre 2008 consid. 4.2 (art. 7 al. 1 et art. 12 CDE) ; **Reusser/Lüscher**, ad art. 11 Cst.féd, in : **Ehrenzeller/Schindler/Schweizer/Vallender** (2014a), 322.

356 Arrêt du TFA I 267/04 du 18 mars 2005 consid. 2.5, qui se réfère à l'arrêt du TF 2P.7/2001 du 5 décembre 2001 consid. 1d. Voir aussi ATF 137 V 167 consid. 4.8 p. 175; 136 I 297 consid. 8.2 p. 308; arrêt du TF 8C_295/2008 du 22 novembre 2008 consid. 4.2.2. et 4.2.3. (caractère non « self-executing » des art. 23, 24 et 26 CDE).

357 Arrêt du TF 8C_295/2008 du 22 novembre 2008 consid. 4.2, traitant également des art. 23 et 26 CDE. Déni de la justiciabilité également par rapport aux art. 9, 10, 18 al. 1 CDE, octroi d'autorisations de séjours en matière de droit des étrangers : ATF 126 II 377 consid. 5d p. 392 ; 124 II 361 consid. 3b p. 367 ; arrêts du TF

motivation hormis celle fondée sur l'obligation des Etats d'assurer ce droit « progressivement », au droit de l'enfant à l'éducation (art. 28 CDE)[358].

**b. Les conventions de l'OIT**

A l'égard des conventions élaborées sous les auspices de *l'OIT*, bien que leur contenu soit le plus souvent formulé à la fois de manière plus technique et détaillée, la jurisprudence fédérale a dans un premier temps adopté une position réservée. Il sied, à cet égard, de signaler l'arrêt *Courtet*, qui portait sur un conflit entre les normes contenues dans la Convention de l'OIT no C-128/1967, du 29 juin 1967[359], et dans le Code européen de sécurité sociale[360], d'une part, et celles de la loi fédérale sur l'assurance-invalidité (LAI), d'autre part : alors que les dispositions conventionnelles ne permettaient la réduction de la rente d'invalidité qu'en cas de faute intentionnelle de l'assuré, la LAI l'admettait à l'époque également en cas de négligence grave. Dans le cadre de cet arrêt, le TFA a jugé que les normes internationales en question n'étaient pas de caractère « *self-executing* » et a donc appliqué la LAI[361]. L'on soulignera toutefois que la terminologie choisie dans cet arrêt prête à confusion : en réalité, le débat ne portait pas tant sur la justiciabilité (objective ou intrinsèque) desdites normes, que le TFA semblait au demeurant implicitement admettre puisqu'il percevait un conflit normatif avec le droit interne, que sur une question de hiérarchie (dans l'application) des normes au niveau national, voire sur une question de « justiciabilité subjective »[362] ; en d'autres termes, l'arrêt adoptait une conception qui s'inscrivait dans le prolongement de la jurisprudence *Schubert*[363], affirmant qu'en adoptant a posteriori une loi nationale contraire aux engagements pris sur le plan du droit international, le parlement helvétique avait *in casu* délibérément choisi « de donner la prééminence au droit national » par rapport au droit international.

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2C_135/2007 du 26 juin 2007 consid. 4.2 ; 5C.265/2004 du 26 janvier 2005 consid. 3.1 ; 2A.563/2002 du 23 mai 2003 consid. 1.2 et 2.5.

358 ATF 133 I 156 consid. 3.6.4 p. 167; arrêt du TFA I 472/02 du 10 février 2003 consid. 2.3.

359 RS 0.831.105 ; RO 1978 1493, entrée en vigueur pour la Suisse le 13 septembre 1978.

360 RS 0.831.105 ; RO 1978 1393, entrée en vigueur pour la Suisse le 13 septembre 1978.

361 ATF 111 V 201 consid. 3 p. 205.

362 Le versant subjectif de la justiciabilité traduit la volonté explicite ou clairement reconnaissable des Etats parties ou du législateur national de permettre ou d'interdire aux particuliers d'invoquer utilement une norme devant les organes et autorités compétentes en vue de leur application directe. Selon l'interprétation retenue par le TFA, il résultait des circonstances que le législateur fédéral aurait, en adoptant une législation sociale contraire aux engagements internationaux de la Suisse, clairement marqué son intention de dénier tout effet direct aux normes internationales en cause, quand bien même ces dernières seraient intrinsèquement justiciables. Cf., à ce sujet, **Chatton** (2012b), 426 s.

363 ATF 99 Ib 39 ; sur la jurisprudence *Schubert*, voir 18.4.3.3.

Le TFA a cependant procédé, quelques années plus tard, à un revirement spectaculaire de jurisprudence[364], en jugeant que les normes invoquées au titre de la convention no 128/1967 et du Code européen de sécurité sociale, instruments contenant à la fois des principes directeurs et des règles à caractère « *self-executing* », étaient en l'occurrence directement applicables et interdisaient la pratique de la réduction des rentes précédemment admise[365].

A la suite de ce changement de jurisprudence, le TFA a aussi reconnu le caractère directement applicable d'une disposition de la convention de l'OIT no 102/1952 concernant la norme minimum de la sécurité sociale[366] et, à tout le moins implicitement, celle de la convention no 168/1988, du 21 juin 1988, sur la promotion de l'emploi et la protection contre le chômage[367]. De manière générale, l'on peut affirmer que le Tribunal fédéral fait désormais preuve d'une attitude *plus pragmatique* à l'égard des conventions de l'OIT, qu'il n'hésite plus à appliquer et dont il se sent libre de s'inspirer pour interpréter certaines normes de droit interne[368]. On peut en revanche déplorer l'interprétation trop restrictive faite par le Tribunal fédéral selon laquelle l'art. 2 de la convention fondamentale no C-98/1949 serait dénué d'applicabilité directe[369], qui ne tient pas compte de la jurisprudence très précise notamment rendue par le Comité de la liberté syndicale de l'OIT.

**c. Le Pacte ONU I**

De manière critiquable et critiquée[370], le Tribunal fédéral demeure, encore de nos jours, réticent à reconnaître la justiciabilité de principe des droits économiques, sociaux et culturels qui sont insérés dans le *Pacte ONU I*. Dans une affaire récente, le Tribunal fédéral a même invalidé un jugement de la Cour d'appel des prud'hommes du canton de Genève (juridiction d'appel en droit privé du travail) qui avait, selon nous à bon droit, retenu que la rémunération des jours fériés puisait sa source « *self-executing* » dans l'art. 7 let. d du Pacte

364 Cf. les revirements et précisions mineurs qui avaient été effectués en amont déjà, par ex. : arrêt du TFA U 85/87 du 22 août 1988 consid. 4b, non publié in ATF 114 V 315; ATF 113 V 273 consid. 2b p. 278; arrêts du TFA I 416/95 du 30 juin 1997 consid. 2c-e, et U 261/98 du 8 juillet 1999 consid. 3a.

365 ATF 119 V 171 consid. 4b p. 177 s.

366 ATF 120 V 128 consid. 2b p. 131.

367 Arrêt du TFA C 76/00 du 10 mai 2001 consid. 3a. Voir aussi arrêts du TF 8C_1009/2012 du 27 mars 2013 consid. 2; 8C_606/2010 du 20 août 2010 consid. 2.

368 Conformément au rappel utile de **WILDHABER** (1996), 501 : « Jedem sozialen Grundrecht gebührt die ihm gemässe Gestalt, und jedes ist einzeln zu prüfen ».

369 Cf. arrêt du TF 4C.422/2004 du 13 septembre 2005 consid. 3.2.2, non publié in ATF 132 III 122; s'agissant du Comité de l'OIT, cf. **CHATTON** (2012b), 202 ss, et les références citées. Curieusement, le TF serait disposé à considérer les droits syndicaux consacrés par le Pacte ONU I comme justiciables, alors même que la C-98/1949 est formulée de façon plus détaillée et que, dans les domaines d'application communs, les dispositions correspondantes du Pacte ONU I s'interprètent à l'aune des conventions idoines, plus techniques et concrètes, de l'OIT; **DUNAND/DREYER** (2014), 216.

370 Voir, pour certaines critiques, 18.4.4. Cf. déjà **CHATTON** (2013), 501 s.; **HUGI YAR** (2012), 5; **SCHMID** (2011), 983 s.

ONU I. Réitérant leur *credo* selon lequel les dispositions du Pacte ONU I énonceraient un programme, s'adresseraient au législateur et ne conféreraient en principe pas aux particuliers des droits subjectifs invocables en justice[371], les juges fédéraux ont considéré que l'art. 7 let. d du Pacte ONU I ne faisait pas exception à cette prétendue « règle générale » et qu'il incombait donc au législateur national de le concrétiser au préalable, en priorité dans le domaine de l'économie privée[372]. De même, Mon-Repos a dénié tout caractère justiciable, notamment, aux art. 9, 11 al. 1 (dans un premier temps seulement) ainsi que 13 al. 2 let. a, b et c, du Pacte ONU I[373].

Encore moins défendable apparaît l'approche qu'adopte le Palais de Mon-Repos face à l'individu qui invoquerait les principes de *non-discrimination* garantis aux art. 3 et 2 par. 2 Pacte ONU I[374]. S'il est un comportement ou une situation qu'un juge ou une autorité sont à même de comprendre et de déceler avec précision, à l'aide du répertoire juridique classique, c'est bien le traitement inégal, voire discriminatoire d'une personne par ses congénères ou par l'Etat. La question de la justiciabilité du principe de non-discrimination, qu'il soit garanti par la Constitution fédérale, la CEDH, ou le Pacte ONU II, n'est d'ailleurs pas controversée[375]. Or, en tant que garantie transversale, l'interdiction des discriminations est susceptible de s'appliquer dans tous les domaines, y compris en matière de droits sociaux fondamentaux[376]. Le principe de non-discrimination fait du reste partie des obli-

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371 Voir également: ATF 135 I 161 consid. 2.2 p. 163; 130 I 113 consid. 3.3 p. 123; 126 I 240 consid. 2c p. 242 s.; 123 II 472 consid. 4d p. 478; 122 I 101 consid. 2a p. 103; 121 V 246 consid. 2a et 2c p. 248 s.; 120 Ia 1 consid. 5c p. 11 s.; arrêt 2P.77/2000 du 30 novembre 2000 consid. 5c-e, jurisprudence se fondant à l'origine sur l'interprétation politique, juridiquement non contraignante, du Conseil fédéral suisse (Message précité, in: FF 1991 I 1133, 1140).

372 ATF 136 I 290 consid. 2.3.1 et 2.3.3 p. 293 ss.

373 ATF 139 I 257 consid. 6 p. 264; 135 I 161 consid. 2.2 p. 163; 121 V 229 consid. 3a p. 232; 121 V 246 consid. 2e p. 250; arrêts du TF 8C_295/2008 du 22 novembre 2008 consid. 6; 2P.77/2000 du 30 novembre 2000 consid. 5e (art. 9 Pacte ONU I; voir cependant ATF 140 V 385 consid. 5.3 p. 398); ATF 133 I 156 consid. 3.6.4 p. 166 s.; 130 I 113 consid. 3.3 p. 123 s.; 126 I 240 consid. 2 et 3 p. 241-249; 120 Ia 1 consid. 5d p. 13; arrêts du TF 2C_491/2012 du 26 juillet 2012 consid. 4; 2P.7/2001 du 5 décembre 2001 consid. 1d [question laissée ouverte] (art. 13 Pacte ONU I; voir cependant ATF 129 I 35 consid. 7.6 p. 41; arrêts du TF 2C_132/2014 du 15 novembre 2014 consid. 4.2; 2C_433/2011 du 1er juin 2012 consid. 3.2; 2C_686/2011 du 25 janvier 2012 consid. 2.3.5; 2C_738/2010 du 24 mai 2011 consid. 3.2.4); ATF 122 I 101 consid. 2a p. 103 (art. 11 Pacte ONU I).

374 Cf., en ce sens, **KÜNZLI/KÄLIN** (1997), 115.

375 On relèvera que la Suisse a pour l'heure renoncé à ratifier le Protocole no 12 à la CEDH (interdiction générale de la discrimination) : « En raison du petit nombre de jugements rendus par la Cour, la portée d'une ratification de ce protocole et les conséquences de sa mise en œuvre pour l'ordre juridique suisse demeurent encore difficiles à apprécier » (40 ans d'adhésion de la Suisse à la CEDH : Bilan et perspectives – Rapport du Conseil fédéral en exécution du postulat **STÖCKLI** 13.4187 du 12 décembre 2013, in FF 2014 p. 353 ss, 364, ch. 2.3).

376 Cf. aussi **KRADOLFER** (2013), 544. A noter que le Comité des droits de l'Homme a donné une interprétation large au principe de non-discrimination (article 26 Pacte ONU II); possédant une portée autonome, celui-ci s'applique également aux domaines relevant du Pacte ONU I (voir Const./CDH, *Vos c. Pays-Bas*, no 218/1986, du 29 mars 1989, portant sur des prestations sociales). Dans le même ordre d'idées, les principes d'égalité garantis par la Cst.féd. s'appliquent dans le domaine du droit social, sans que cela remette en cause

gations immédiates et justiciables de l'instrumentaire des droits de l'Homme, y compris en matière de droits sociaux fondamentaux, soit des « hypothèses de justiciabilité manifeste »[377].

Envers et contre tout, la jurisprudence du Tribunal fédéral s'évertue à dénier tout effet direct aux principes de non-discrimination et d'égalité entre femmes et hommes, au motif que les dispositions correspondantes du Pacte ONU I ne peuvent être invoquées qu'en lien avec (et sont donc, techniquement, accessoires par rapport à) une garantie matérielle dudit Pacte; or, dépourvu de portée indépendante, le principe de non-discrimination suivrait le sort de la garantie de fond programmatique[378]. Pour corroborer son propos, le Tribunal fédéral se réfère notamment au fonctionnement de l'art. 14 CEDH[379]; ce faisant, il établit toutefois l'inanité de sa théorie. En effet, s'il est incontestable que l'art. 14 CEDH, tout comme les art. 3 ou 2 par. 2 Pacte ONU I (ou l'art. 2 par. 2 Pacte ONU II), n'a pas d'existence indépendante et « représente un élément particulier (non-discrimination) de chacun des droits protégés par la Convention », cette disposition peut « entrer en jeu même sans un manquement à leurs exigences et, dans cette mesure, possède une portée autonome, mais il ne saurait trouver à s'appliquer si les faits du litige ne tombent pas sous l'empire de l'une au moins desdites clauses »[380]. Transposé au domaine des droits sociaux garantis par le Pacte ONU I, cela signifie qu'il suffit qu'un comportement entre dans le champ d'application d'une garantie au fond dudit instrument, peu importe que celle-ci soit elle-même violée, pour que l'individu s'estimant lésé puisse se prévaloir du principe de non-discrimination et que le juge doive entrer en matière sur son grief; le caractère directement applicable ou non de la garantie au fond n'est ainsi pas pertinent s'agissant de l'invocabilité du principe de non-discrimination, question que le Tribunal fédéral s'est d'ailleurs posée, mais qu'il a laissée indécise dans un cas particulier[381].

Indépendamment de ces *a priori* jurisprudentiels négatifs, le Tribunal fédéral a précisé – et là réside sans doute, sauf revirement de pratique peu probable à court terme, le potentiel d'ouverture de sa jurisprudence dans l'immédiat – qu'il n'excluait pas « que l'une ou l'autre des normes du Pacte ONU I puisse être considérée comme directement applicable », notamment l'art. 8 al. 1 let. a (liberté syndicale) et let. d (droit de grève)[382]. Les juges

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leur justiciabilité (voir p.ex. ATF 114 Ia 1 jugeant qu'une norme cantonale refusant aux seuls travailleurs demandeurs d'asile des allocations familiales pour les enfants domiciliés à l'étrangers violait le principe d'égalité de traitement).

377 Cf. aussi **Kradolfer** (2013), 544 ; **Soma** (2014), 778 ; **Wilson** (2014), 245.

378 ATF 139 I 257 consid. 6 p. 264; 135 I 161 consid. 2.2 p. 163; 121 V 229 consid. 3a et b p. 232 s.; 121 V 246 consid. 2 p. 248 ss; arrêt du TF 8C_295/2008 du 22 novembre 2008 consid. 6 ; cf., toutefois, ATF 140 V 385 consid. 5.2 p. 397.

379 ATF 123 II 472 consid. 4d p. 479.

380 ACEDH *Airey c. Irlande*, § 30; *Sejdic et Finci c. Bosnie-Herzégovine [GC]*, § 39.

381 Arrêt 2P.77/2000 du 30 novembre 2000 consid. 5e.

382 ATF 136 I 290 consid. 2.3.1 p. 293; 125 III 277 consid. 2e p. 282 s.; 121 V 246 consid. 2e p. 250; arrêt du TF 6B_498/2007 du 3 avril 2008 consid. 5.1.

fédéraux semblent en outre avoir (implicitement) admis le caractère justiciable de l'art. 7 Pacte ONU I consacrant le droit à des conditions de travail équitables. Dans une affaire où des occupants illicites (squatters) contestaient une décision ordonnant aux propriétaires des immeubles occupés de procéder aux travaux nécessaires pour remédier à l'état de dégradation, le Tribunal fédéral n'a en outre pas d'emblée exclu l'applicabilité directe de l'art. 11 Pacte ONU I, dans sa composante du droit au logement; il a toutefois jugé, au stade de l'examen de la recevabilité du recours, qu'en tant qu'ils ne démontraient nullement leur impossibilité d'accéder légalement à un logement suffisant, les squatters ne pouvaient pas se prévaloir de cette disposition conventionnelle[383]. Par ailleurs, Mon-Repos a examiné au fond, avant de les rejeter au regard de l'art. 13 Pacte ONU I, des prétentions en lien avec un potentiel droit à l'éducation privée à domicile d'un enfant (« *homeschooling* »)[384]. En conséquence, la Haute Cour de Lausanne se déclare disposée à reconsidérer sa position quant à la justiciabilité défaillante de ces garanties onusiennes à l'issue d'un *contrôle ad hoc* d'une (partie de la) disposition conventionnelle particulière[385]. Dans ce dernier contexte, l'application auxdites garanties de la théorie des trois strates[386] ainsi que de la grille d'analyse qualitative devrait –, à terme et en se rappelant la maxime *pacta sunt servanda* et la circonstance qu'en tant que traité garantissant des droits de l'Homme, le Pacte ONU I doit être interprété à la lumière des conditions évolutives d'aujourd'hui (« *instrument vivant* »; doctrine de l'effet utile)[387] –, permettre au Tribunal fédéral de qualifier de justiciables au moins certains aspects de chacune d'entre elles.

**d. Une percée: la justiciabilité de l'obligation de mise en œuvre institutionnelle**

Outre la progression à tâtonnements que nous venons de décrire dans la jurisprudence du Tribunal fédéral, ainsi que la consécration prétorienne, sous l'ancienne Constitution fédérale, du droit fondamental à des conditions minimales d'existence[388], la jurisprudence a récemment opéré une véritable percée dans le domaine de la justiciabilité (« institutionnelle » ou objective)[389] de l'obligation « de mettre en œuvre », en liaison avec l'interdiction des mesures régressives. Dans un arrêt exposé en détail plus haut – l'ATF 137 I 305 portant sur la décision prise par le législateur zougois de discontinuer le mandat conféré à la

383 Arrêts du TF 1C_453/2008 du 12 février 2009 consid. 1.4; 2A.221/2006 du 27 avril 2006 consid. 2.

384 Arrêts du TF 2C_738/2010 du 24 mai 2011 consid. 3.2.4; 2C_686/2011 du 25 janvier 2012 consid. 2.3.5 (question laissée ouverte); voir aussi **Chatton** (2013), 500; **Hugi Yar** (2012), 12; **Zünd** (2013), 1355.

385 Cf., dans ce sens, **Fercot** (2011), 246.

386 Cf. **Zünd** (2013), 1356.

387 Art. 26 de la Convention de Vienne du 23 mai 1969 sur le droit des traités (CVDT; RS 0.111; RO 1990 1112), entrée en vigueur pour la Suisse le 6 juin 1990: « Tout traité en vigueur lie les parties et doit être exécuté par elles de bonne foi »; art. 31 et 32 CVDT; s'agissant des termes « instrument vivant » en lien avec la CEDH (ATF 139 I 16 consid. 5.2.2 p. 30; 137 I 284 consid. 2.1 p. 288) et la CSE (DCEDS [RC 14/2003, fond], *FIDH c. France*, § 27 ss).

388 ATF 125 III 277 consid. 2f p. 283; 121 I 367 consid. 2e p. 374.

389 Cf. **Kradolfer** (2013), 521; **Naguib** (2012), 918.

commission cantonale pour l'égalité entre femmes et hommes – l'instance fédérale a considéré que le législateur pouvait être tenu par le juge de prévoir une solution de remplacement équivalente pour la commission cantonale supprimée, charge audit législateur (le juge faisant à cet égard preuve de retenue[390]) de réglementer concrètement par qui (quel organe spécifique), comment et par quels moyens efficaces la tâche d'égalité serait mise en œuvre à l'avenir[391]. Ce raisonnement est remarquable et novateur à deux égards : d'une part, les juges fédéraux précisent que la problématique sort de la pensée binaire distinguant le justiciable de l'injusticiable[392] ; par là ils signalent être disposés à sanctionner la violation d'obligations *institutionnelles* (découlant de l'ordre juridique objectif); d'autre part, le fait que le législateur dispose d'un pouvoir d'appréciation sur la (meilleure) manière de mettre en œuvre leurs obligations constitutionnelles et conventionnelles visant à garantir l'égalité effective entre les sexes ne les rend pas inopérantes. Les normes sont en effet formulées de façon suffisamment univoque pour faire obstacle à l'inactivité totale du législateur ou à une mesure régressive, prise sans aucune compensation. A l'aune de cette jurisprudence et au-delà de la position individuelle des étudiants touchés, se justifie-t-il encore de déclarer irrecevables des recours portant, comme par le passé[393], sur la compatibilité de l'augmentation des taxes universitaires avec le droit à l'éducation consacré dans le Pacte ONU I? Le libellé de l'art. 13 Pacte ONU I laissant aux Etats le choix des moyens pour tendre vers l'objectif d'un enseignement supérieur gratuit ne devrait-il pas être considéré comme suffisamment clair pour permettre au juge d'évaluer une mesure régressive, comme l'augmentation des taxes sans mesures compensatoires facilitant l'accès aux études[394]?

### *18.4.4 L'appréciation de la mise en œuvre par les instances internationales*

Les organes internationaux de contrôle en matière de droits de l'Homme (en particulier le Comité du Pacte ONU I), fournissent un éclairage intéressant sur la réalisation des droits sociaux fondamentaux en Suisse. Les critiques et recommandations portent principalement sur les points suivants, parmi lesquels figurent plusieurs problèmes déjà relevés dans cette contribution

390 KÄGI-DIENER (2012), 34.

391 Cf. ATF 137 I 305 consid. 2 p. 310 ss. En d'autres termes, les cantons disposent d'un pouvoir d'appréciation non pas sur le « si » ou l'opportunité de la mesure dictée par le droit international, mais sur le «comment » de son exécution concrète.

392 ATF 137 I 305 consid. 3.3 p. 319.

393 Voir ATF 120 Ia 1 ; ATF 126 I 240 ; ATF 130 I 113.

394 Cf., à ce sujet, EHRENZELLER (2012), 118-121.

- L'approche restrictive des autorités helvétiques (en particulier du Tribunal fédéral) au sujet de la justiciabilité des dispositions consacrées dans le Pacte ONU I[395], dans la CDE (« volet social ») et dans la CEDEF[396].
- L'absence d'une institution nationale des droits de l'Homme conforme aux Principes de Paris[397].
- La disparité et le manque de coordination découlant de la *structure fédérative* de la Suisse: ce point est mis en exergue par plusieurs organes de contrôle[398] ; il est également implicite dans la recommandation du Comité du Pacte ONU I de fixer des règles communes sur l'accès et le droit à l'aide sociale[399].
- La portée trop étroite de certains droits protégés dans la Constitution fédérale: le Comité met en exergue que le Pacte confère un niveau de protection supérieur en ce qui concerne le droit à l'éducation ou à la culture et le droit au travail, précisant que ce dernier droit ne se limite pas au droit d'exercer une activité lucrative[400] (protégé en Suisse par la liberté économique)[401].
- Le *droit de grève et la liberté syndicale*: le Comité du Pacte ONU I se préoccupe d'une interprétation trop restrictive du caractère licite de la grève par les tribunaux et invite la Suisse à s'assurer de ce que le droit interne soit interprété en conformité avec le droit international[402]. Il considère également que le droit suisse n'offre pas une protection suffisante contre des licenciements de syndicalistes en raison de leurs activités syndicales, étant donné que des personnes congédiées de façon abusive n'ont pas droit à être réintégrées dans leur emploi et ne peuvent prétendre qu'à des dommages-intérêts

395 Voir Comité du Pacte ONU I, Observations finales du 7 décembre 1998, E/C.12/Add.30, para. 10 ; Comité du Pacte ONU I, Observations finales du 26 novembre 2010, E/C.12/CHE/CO/2-3, para. 5. Des recommandations au sujet de la justiciabilité des droits économiques et sociaux ont aussi été adressées à la Suisse dans le cadre de l'examen périodique universel (EPU) en 2012. Elles ont été rejetées par la Suisse. Voir Rec. 124.4 invitant la Suisse à « garantir des procédures judiciaires efficaces en cas de violation » de ces droits et la Rec. 123.3. invitant la Suisse à ratifier le Protocole additionnel au Pacte ONU I. Les deux recommandations ont été rejetées par la Suisse (voir Recommandations EPU adressées à la Suisse en 2012 et la Réponse de la Suisse concernant les recommandations de l'EPU du 27 février 2013).

396 Comité CEDEF, Observations du 7 août 2009, CEDAW/C/CHE/CO/3, para. 15.

397 Sur ce point, voir 18.5.5 ; voir Comité du Pacte ONU I, Observations finales 2010 (note 395), para. 6 ; Comité CEDEF, Observations finales 2009 (note 396), para. 45 ; CDH, Observations finales du 3 novembre 2009, CCPR/C/CHE/CO/3, para. 7 ; CEDR, Observations finales du 23 septembre 2008, CERD/C/CHE/CO6, para. 10. Voir aussi **Schoder** (2004), 1519 s.

398 Voir Comité CEDR, Observations finales 2008 (note 397), para. 8 : « le Comité reste préoccupé par le fait que l'application de la Convention n'est pas uniforme et que les lois, politiques et décisions des cantons et des communes pourraient être contraires aux obligations de l'Etat partie en vertu de la Convention. » ; voir aussi Comité CEDEF, Observations générales 2009 (note 396), para. 19.

399 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 12.

400 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 11.

401 Voir 18.2.2.

402 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 10, étant précisé que la condition qui pose problème est celle de la proportionnalité (voir 18.2.2.2.a), la licéité de la grève étant subordonnée à son caractère raisonnable.

s'élevant à six mois de salaire au maximum[403]. Ces observations emboîtent le pas à un rapport sur plainte condamnant la Suisse, établi en 2004 par le Comité de la liberté syndicale de l'OIT[404].

- *L'absence d'une loi globale* visant à combattre et à prévenir les discriminations[405] et l'insuffisance des mesures prises concernant des groupes de personnes vulnérables: les recommandations portent sur des problématiques comme les violences contre les femmes (en particulier les femmes migrantes)[406], l'exploitation sexuelle des enfants, les mariages forcés[407], le chômage des personnes appartenant à des groupes défavorisés[408], l'hébergement des requérants d'asile, en particulier des familles et des enfants non-accompagnés[409], la protection et la promotion de la culture et du mode de vie des Roms, des Sintis et des Yéniches[410] et la protection de ceux-ci contre la discrimination, en particulier dans le domaine du logement et de l'éducation[411].
- L'absence d'une stratégie globale pour la lutte contre le sexisme et pour réaliser *l'égalité entre les sexes*[412] : dans ce domaine, les organes de contrôle relèvent également la sous-représentation des femmes dans la vie politique[413] et dans les postes de direction et à responsabilité[414], les écarts de salaires entre femmes et hommes pour un travail de valeur égale[415] et l'insuffisance des places d'accueil pour la petite enfance[416].
- *L'aide sociale et l'aide d'urgence* : le Comité du Pacte ONU I note avec préoccupation « que les personnes en situation irrégulière sont exclues de l'aide sociale dans certains cantons et doivent se tourner vers l'aide d'urgence »[417] et recommande à la Suisse de faire bénéficier, à titre d'ultime filet de sécurité sociale, toutes les personnes vivant sur son territoire de l'aide sociale au lieu de l'aide d'urgence. L'insuffisance de l'aide

403 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 11.

404 Rapport du Comité de la liberté syndicale de l'OIT sur la plainte de *l'Union syndicale suisse (USS) c. Suisse*, concl. intérimaires, no 335, cas no 2265, vol. LXXXVII, 2004, Série B, no 3, § 1263 ; cf. aussi la plainte en cours d'instruction du *Syndicat des services publics (SSP-VPOD) c. Suisse*, cas no 3023, concernant le licenciement pour activité syndicale.

405 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 7 ; Comité CEDR, Observations finales 2008 (note 397), para. 9 (au sujet de la discrimination raciale).

406 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 13 et 15 ; CDH, Observations finales 2009 (note 397), para. 11.

407 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 16.

408 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 9.

409 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 19.

410 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 23. Cf., pour une étude récente sur le droit à l'éducation des enfants Roms, B**OERO**-**GIANINAZZI** (2014), 1660 s.

411 Comité CEDR, Observations finales 2008 (note 397), para. 19.

412 Comité CEDEF, Observations générales 2009 (note 396), para. 21.

413 Comité CEDEF, Observations générales 2009 (note 396), para. 33.

414 Comité CEDEF, Observations générales 2009 (note 396), para. 33.

415 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 8.

416 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 22 ; au sujet des enfants, voir aussi Comité des droits de l'Homme, Observations finales du 17 mars 2006, CRC/C/COPAC/CHE/CO/1, para. 10.

417 Comité Pacte ONU I, Observations finales 2010 (note 395), para. 12.

d'urgence a aussi fait l'objet de critiques de la part du Comité onusien des droits de l'Homme. Celui-ci qualifie les conditions de vie des requérants d'asile déboutés mis au bénéfice de l'aide d'urgence de « mauvaises »[418] et s'inquiète de l'accès restreint aux soins de santé[419]. Dans le même ordre d'idées, le Rapporteur spécial sur le racisme se montre alarmé par la « précarité extrême » des requérants d'asile déboutés exclus de l'aide sociale[420]. Ces préoccupations mettent le doigt sur une critique articulée aussi dans la doctrine suisse. En effet, l'aide d'urgence a été conçue comme une aide *temporaire* et *ponctuelle*, censée intervenir dans les rares cas où les personnes ne pouvaient pas bénéficier d'autres prestations. La tendance d'exclure des requérants d'asile déboutés ou NEM de l'aide sociale a eu pour conséquence que l'aide d'urgence soit devenue une solution à long terme pour des catégories entières de personnes, jouant un rôle pour lequel elle n'a pas été conçue à ses origines. Cette évolution met en exergue que la fixation de normes minimales peut entraîner un effet pervers: les standards arrêtés ont tendance à se transformer d'un minimum en un maximum. Les voix critiques, qui soulignent que l'aide d'urgence ne correspond pas au droit à un niveau de vie décent prévu par le Pacte ONU I, peinent ainsi à se faire entendre[421].

## 18.5 Les droits sociaux protégés en vertu d'autres fondements et mécanismes

En dehors des sentiers battus de la protection par le truchement de la Constitution ou de traités internationaux topiques, il existe d'autres sources et systèmes susceptibles de venir renforcer les droits (sociaux) fondamentaux, voire d'en protéger indirectement certaines facettes. Sans prétendre à l'exhaustivité, nous étudierons brièvement le phénomène de la justiciabilité indirecte (18.5.1), les conventions internationales transversales (18.5.2), les buts sociaux constitutionnels (18.5.3), la protection par le biais de certains principes ou

418 CDH, Observations finales 2009 (note 397), para. 19.

419 CDH, Observations finales 2009 (note 397), para. 19, relevant que l'entrave à l'accès aux soins provient du fait que les personnes concernées perdent le bénéfice de l'assurance maladie. Un arrêt du Tribunal fédéral rendu le 21 août 2012 vise à remédier à cette problématique. Les juges fédéraux y soulignent que les requérants d'asile déboutés ou frappés d'une décision NEM restent couverts par l'assurance maladie jusqu'à leur départ de la Suisse et que les primes doivent être prises en charge par la collectivité publique (ATF 138 V 310 consid. 4.2 ss p. 316).

420 Rapport soumis par le Rapporteur spécial sur les formes contemporaines de racisme, de discrimination raciale, de xénophobie et de l'intolérance qui y est associée, Doudou Diène, Mission en Suisse, du 30 janvier 2007, A/HRC/4/19/Add. 2, para. 82. L'exclusion des requérants d'asile déboutés a aussi fait l'objet de critiques de la part du Comité CEDR (voir Observations finales de 2008 (note 397), para. 17.

421 Voir l'avis de droit de droit de KÄLIN/ACHERMANN/KÜNZLI (2012) au sujet d'un projet législatif visant à exclure les requérants d'asile pendant toute la durée de la procédure d'asile de l'aide sociale. Les auteurs concluent (p. 5 et 12) que cette mesure est problématique à la lumière Pacte ONU I.

droits constitutionnels (18.5.4), ainsi que la protection institutionnelle via certains organismes nationaux (18.5.5).

### *18.5.1 La protection prétorienne indirecte*

Le phénomène de la *justiciabilité indirecte* « promeut l'extension ou la réinterprétation des garanties matérielles ou procédurales appartenant à la 'première génération' des droits dits civils et politiques dans le but d'y protéger des facettes des droits de cette 'deuxième génération' »[422]. La protection offerte est d'origine prétorienne. Sa dynamique s'étant intensifiée au cours de cette dernière décennie, il n'est pas rare, surtout au niveau de la jurisprudence rendue par la Cour européenne des droits de l'Homme qui lie la Suisse, d'observer de quelle manière des droits dits civils et politiques étendent leur champ d'application à certains domaines traditionnellement associés aux droits sociaux fondamentaux[423], la Cour ayant depuis 1979 précisé que « nulle cloison étanche ne sépare [la sphère des droits économiques et sociaux] du domaine de la Convention »[424].

Il serait oisif que de vouloir énumérer la multitude de cas d'application de ce phénomène. Pour prendre l'exemple le plus parlant de la CEDH, la « matière sociale » (droit du travail, droit à des prestations sociales, accès à l'enseignement, etc.) peut tout d'abord se voir protégée grâce à l'interprétation large que la Cour de Strasbourg donne à la notion de « caractère civil » prévue à l'art. 6 par. 1 CEDH[425] ; il sera ajouté que l'ensemble des garanties substantielles de la CEDH s'est vu implicitement reconnaître un volet de protection procédural dans la perspective d'en renforcer l'effet utile[426]. Lorsqu'il peut se raccrocher à une garantie matérielle susceptible d'incorporer des aspects sociaux, le principe de l'égalité de traitement ou de la non-discrimination pourra lui aussi contribuer à une protection parcellaire des droits sociaux[427]. En outre, la Cour européenne des droits de l'Homme reconnaît que des garanties substantielles, tels que le droit à la vie (art. 2 CEDH), l'interdiction des traitements inhumains ou dégradants (art. 3 CEDH), le droit à un procès équitable (art. 6 CEDH) et le droit au respect de la vie privée et familiale (art. 8 CEDH), puissent inclure certaines composantes des droits sociaux ; on pensera notamment au droit

422 **CHATTON** (2012b), 349 s.

423 Voir **MEYER/SIKI** (2009), 9 s.

424 ACEDH *Airey c. Irlande*, § 26.

425 Par ex. ACEDH *Schlumpf c. Suisse*, § 55 ss, s'agissant du refus de l'assureur-maladie suisse de couvrir l'opération de conversion sexuelle en faveur d'une personne transexuelle avant l'échéance d'un délai de traitement hormonal et psychothérapeutique de deux ans; *Emine Araç c. Turquie*, § 24 (enseignement primaire).

426 **HOTTELIER** (2007), 575 ss.

427 Par ex. ACEDH *Petrovic c. Autriche*, § 26 s. (discrimination entre femme et homme alléguée en rapport avec l'art. 8 CEDH et l'octroi d'une allocation pour congé parental).

à la santé[428], au droit à un environnement sain[429], aux conditions humaines de détention[430], à l'abandon d'une personne à une situation d'indigence particulièrement avilissante[431], à l'extension de l'assistance judiciaire au volet civil[432], au droit au logement[433], à la protection de certains éléments du droit au travail et de la liberté économique[434], de même qu'à la protection des personnes handicapées[435].

Notons que le phénomène européen précité a suscité des critiques parfois virulentes de la part de certains juges suprêmes suisses. A l'instar de leurs collègues originaires d'autres Etats, ils reprochent en particulier à la cour de Strasbourg de violer le principe de subsidiarité en réduisant à peau de chagrin la marge d'appréciation nationale et en multipliant la mise à la charge des collectivités de nouvelles obligations positives tant procédurales que substantielles[436].

Dans un mouvement inverse au sens pris par lesdites critiques, toutefois, le Tribunal fédéral semble reprendre de son propre mouvement les différentes méthodes de la « justiciabilité des droits sociaux par ricochet » : en matière d'égalité de traitement en droit de la sécurité sociale, le Tribunal fédéral a jugé, en se basant notamment sur les art. 27 Pacte ONU II et 8 CEDH, que le recours aux données économiques statistiques afin d'évaluer le revenu d'invalide d'une personne appartenant à la communauté des gens du voyage, en tant qu'il contribuait à assimiler cette personne à la majorité de la population, constituait une discrimination indirecte de cette minorité[437]. Dans une autre cause, les juges fédéraux ont précisé que, dans la mesure où il existait un droit à la fourniture d'électricité et que sa coupure – lourde de conséquences pour les foyers – en raison de retards de paiement était une mesure susceptible d'être planifiée, le droit constitutionnel d'être entendu (garantie procédurale) devait être garanti à toutes les personnes concernées, y compris les locataires, afin qu'ils puissent faire valoir à temps leurs objections[438]. Mentionnons enfin l'affaire dans laquelle un requérant d'asile débouté et sous le coup d'un renvoi de Suisse (mais que les

428 Par ex. ACEDH *Calvelli et Ciglio [GC]*, § 49.
429 Par ex. ACEDH *Fadeïeva c. Russie*, § 123 ss.
430 Par ex. ACEDH *Dougoz c. Grèce*, § 48.
431 Par ex. ACEDH *M.S.S. c. Grèce et Belgique [GC]*, § 254 ss.
432 Par ex. ACEDH *Airey c. Irlande*, § 26 ss ; *Gnahoré c. France*, § 38-42.
433 Par ex. ACEDH *Wallova et Walla c. République tchèque*, § 76 ss. Voir cependant, en droit d'asile, l'arrêt du TAF E-226/2015 du 22 janvier 2015 p. 6.
434 Par ex. ACEDH *Vitiello c. Italie*, § 62 ; *Sidabras et Dziautas c. Lituanie*, § 47 ss.
435 Par ex. DCEDH *Zehnalova et Zehnal c. République tchèque*, pt 1 in fine.
436 Voir, notamment, les contributions récentes de **Pfiffner/Bollinger** (2011), 4 ss, surtout en réaction à l'ACEDH *Schlumpf c. Suisse* mentionné précédemment et qui remet en cause le système d'assurance-maladie national vis-à-vis de personnes transsexuelles ; **Meyer** (2013), 70 ss; **Seiler** (2011), 517 ss. Pour un exemple d'obligations positives toutefois approuvé par le TF, cf. ATF 140 II 315 consid. 4.8-4.9 p. 329 ss (obligations positives découlant de la protection des droits fondamentaux, en lien avec l'exploitation d'une centrale nucléaire dans le voisinage des recourants).
437 ATF 138 I 205 consid. 6.2 p. 214 s.
438 ATF 137 I 120 consid. 5.5 p. 125 s.

autorités n'avaient pas été en mesure de renvoyer dans son pays) s'est vu reconnaître, sous l'angle de l'art. 8 CEDH, le droit à ce que son statut en Suisse soit régularisé, alternativement à ce qu'une autorisation de travail lui soit délivrée ; en effet, si l'interdiction qui lui avait été faite d'exercer une activité en Suisse s'avérait en principe conforme à l'art. 8 CEDH, cette dernière disposition lui conférait, dans les circonstances exceptionnelles entourant son cas, en particulier son long séjour en Suisse et le recours à l'aide d'urgence, le droit qu'il y fût dérogé[439].

### *18.5.2 Les conventions internationales transversales*

Hormis les conventions catégorielles, qui garantissent une large palette de droits fondamentaux matériels à l'égard de groupes de personnes réputés particulièrement vulnérables[440], le droit international public connaît aussi la catégorie des conventions transversales. Ces dernières n'entrent en contact avec les droits fondamentaux, – qu'ils soient du reste considérés comme civils, culturels, économiques, politiques ou sociaux –, qu'au travers de l'interdiction générale de toute *discrimination* à l'encontre d'une personne ou d'un groupe dans la jouissance de ses droits de l'Homme, voire par le biais de *l'égalité de traitement substantielle*[441]. Ne consacrant point *per se* des droits (sociaux) fondamentaux matériels, ces dispositions visent en d'autres termes à aplanir les inégalités de fait et, le cas échéant, celles de droit persistant entre les personnes vulnérables et d'autres groupes sociaux ou la majorité[442].

Au titre des engagements souscrits par la Suisse, l'art. 5 let. e de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale proscrit toute forme de *discrimination raciale* en relation avec les droits au et dans le travail, les droits syndicaux, le droit au logement, les droits à la santé et aux services sociaux, le droit à l'éducation et à la formation professionnelle, ainsi que le droit de prendre part, dans des conditions d'égalité, aux activités culturelles[443]. L'art. 5 let. f CEDR mérite une attention spéciale au regard de l'effet horizontal indirect des droits sociaux[444], dans la mesure où il oblige les Etats parties à garantir l'accès non discriminatoire « à tous lieux et services destinés à l'usage du public, tels que moyens de transport, hôtels, restaurants, cafés, spectacles et parcs ».

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439 ATF 138 I 246 consid. 2 et 3 p. 247 ss.

440 18.2.1.1.c c) *supra*.

441 CHATTON (2013), 63; CHATTON (2012a), 133. Cf. aussi NAGUIB (2012), 917.

442 CHATTON (2012a), 133.

443 Cf., toutefois, la mise en doute bancale de la justiciabilité de cette disposition (question laissée ouverte) dans l'ATF 123 II 472 consid. 4e p. 479 s.

444 18.3.2.2.a 2) a) *supra*.

Les art. 10 à 14 de la Convention sur l'élimination de toutes les formes de *discrimination à l'égard des femmes* consacrent un catalogue encore plus détaillé de droits sociaux fondamentaux, en relation avec lesquels les Etats doivent garantir un traitement égal entre femmes et hommes[445].

Les « mesures temporaires spéciales », à savoir les *actions positives*, que les Etats peuvent être amenés à adopter afin d'accélérer l'instauration d'une égalité de fait réelle entre les hommes et les femmes ou les groupes ethniques[446] sont, quant à elles et selon les circonstances, susceptibles de justifier la mise en place de programmes ou l'offre de prestations directement axées sur la garantie de droits sociaux fondamentaux matériels dont, précisément, ces groupes défavorisés se verraient systématiquement privés. Dans cette optique, les conventions transversales peuvent engendrer des obligations substantielles à la charge des Etats et, par là-même, rejoindre la protection des droits sociaux prévue par le Pacte ONU I ou d'autres conventions topiques de protection des droits sociaux.

Signalons encore qu'au moment de ratifier le Pacte ONU II, la Suisse a émis une réserve (à la validité qui plus est douteuse) ayant pour résultat de convertir la *clause d'égalité indépendante* de l'art. 26 Pacte ONU II[447] en un principe de non-discrimination ancillaire destiné à ne s'appliquer, tout comme l'art. 2 par. 1 Pacte ONU II ou l'art. 14 CEDH, qu'en lien avec les garanties matérielles énoncées dans cet instrument[448]. Ce choix, notamment dicté par la volonté politique de mettre la législation sociale fédérale à l'abri des critiques du Comité onusien des droits de l'Homme, est regrettable ; en effet, l'art. 26 Pacte ONU II a permis à cet organe quasi-juridictionnel de connaître de nombreux litiges portant sur la discrimination (dans ou devant la loi) dans le domaine des droits sociaux fondamentaux, en particulier en matière de droit à des prestations sociales[449]. Par ailleurs, il a été vu que la Suisse s'est jusqu'à présent refusée à adhérer au Protocole additionnel no 12 à la CEDH, qui a été adopté le 4 novembre 2000 et est entré en vigueur sur le plan européen le 1er avril

445 Art. 10 (éducation et formation professionnelle); art. 11 (droits au travail, dans le travail et à la sécurité sociale); art. 12 (droit à la santé); art. 13 (droit d'accès aux prestations familiales, prêts et activités culturelles et sportives); art. 14 CEDEF (droit à la protection particulière des femmes en zone rurale). A noter, toutefois, que, dans son ATF 139 I 257 consid. 6 p. 264, le Tribunal fédéral suisse interprète, à tort, ces garanties contre toute forme de discrimination en tant que des normes programmatiques non directement applicables. La Haute cour semble toutefois avoir opéré un revirement partiel dans l'ATF 140 I 201 consid. 6.4.2 p. 209, à l'issue duquel il a cependant – dans l'optique de résoudre un conflit de libertés – fait prévaloir la liberté d'association (obligation d'abstention/de prestation) en lien avec l'égalité de traitement sur l'égalité entre les sexes (obligation de promotion) ; cf., pour une critique de cet arrêt : **Buser** (2014), 1715-1721; **Riemer** (2014), 233 s.

446 Art. 1 ch. 4 CEDR; art. 4 CEDEF.

447 « Toutes les personnes sont égales devant la loi et ont droit sans discrimination à une égale protection de la loi (…) ».

448 **Chatton** (2012b), 380 ss ; **Malinverni** (1997), 100 s. Voir aussi ATF 121 V 229 consid. 3b p. 233 s.

449 Const./CDH *Vos c. Pays-Bas* (1999), communication no 786/1997, § 7.6 et 8 ; *Broeks c. Pays-Bas* (1987), communication no 172/1984, § 14 s. Cf. les autres constatations du Comité des droits de l'Homme citées in **Chatton** (2012b), 381 s.

2005 ; à l'instar de l'art. 26 Pacte ONU II, cet instrument instaure une véritable clause indépendante d'égalité et est susceptible de combattre toute forme de discrimination survenant dans la jouissance des droits sociaux fondamentaux garantis par l'ordre juridique d'un Etat[450].

### *18.5.3 Les buts sociaux constitutionnels*

Comme indiqué précédemment, la Constitution fédérale prévoit, un catalogue étendu de *buts sociaux* à son art. 41 Cst.féd.[451]

De nos jours, de nombreuses constitutions cantonales se sont également dotées d'un tel catalogue de buts sociaux[452]. Rappelons que les buts sociaux sont, à la différence des droits (sociaux) fondamentaux, *dépourvus de justiciabilité individuelle* conférant des droits subjectifs aux particuliers. Sans étendre eux-mêmes, à l'égal de tâches de l'Etat, les compétences attribuées à chacune des collectivités publiques, les buts sociaux « impartissent à l'Etat des objectifs programmatiques dont celui-ci doit tenir compte dans l'exercice » de ses compétences préexistantes[453]. Leur réalisation requiert « l'adoption de mesures d'exécution de la part des pouvoirs publics en vue de définir la nature et l'ampleur des prestations spécifiques, ainsi que la manière de les financer et d'en répartir la charge, avant de donner lieu, le cas échéant, à des prétentions concrètes. Les buts sociaux n'en présentent pas moins, dans ce contexte, un caractère contraignant »[454].

Ainsi, bien qu'un individu ne puisse s'en prévaloir directement devant un juge, les buts sociaux obligent tant le législateur que le pouvoir exécutif, à tous les échelons de l'Etat fédéral, à *les concrétiser* lors de l'adoption de normes juridiques ; quant au juge, il lui incombe de s'en inspirer pour l'interprétation de la législation ou quand il dispose d'une marge d'appréciation[455]. S'ajoute à cela que la formulation générale des buts sociaux traduit fréquemment la composante objective, respectivement la dimension institutionnelle d'un droit fondamental ancré au niveau constitutionnel ou international; à titre ancillaire, il devrait ainsi pouvoir être possible d'invoquer ces buts conjointement à un droit fondamental subjectif particulier, en vue d'en expliciter, voire d'en étendre la portée protectrice[456].

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450 CHATTON (2012b), 383 ss ; HOTTELIER (2001b), 261; SUDRE (2003), 770.

451 Pour la teneur de l'art. 41 Cst.féd., voir note 58.

452 Cf., par ex., § 14 Cst.BS ; art. 3 Cst.NE ; art. 22 Cst.SH ; art. 14 Cst.TI ; EHRENZELLER/NOBS (2009), 14 s.

453 HOTTELIER (2010), 101; MASTRONARDI (2008), 778.

454 HOTTELIER (2001a), 13 ; HOTTELIER (2010), 102, et les sources citées ; cf. AUER/MALINVERNI/HOTTELIER (2013b), 684; MAHON/PULVER (2002), 56, précisent, concernant la force normative des buts sociaux, que ceux-ci obligent le législateur à agir.

455 Dans ce sens : AUER/MALINVERNI/HOTTELIER (2013b), 683 ; BIAGGINI (2007), 278.

456 Dans ce sens, BUSER (2011), 210 ; SCHEFER/ZIEGLER (2008), 124 s., en rapport avec les droits constitutionnels cantonaux.

La jurisprudence du Tribunal fédéral comporte plusieurs mentions aux buts sociaux listés à l'art. 41 Cst.féd.[457]. Fréquemment, la cour suprême helvétique a déclaré irrecevables (voire a écarté, notamment pour défaut de justiciabilité) les griefs tirés de cette disposition[458], même quand ils accompagnaient une garantie constitutionnelle justiciable, tel que le droit au minimum d'existence figurant à l'art. 12 Cst.féd.[459]. Il est toutefois également arrivé que la haute juridiction tienne compte desdits buts pour interpréter une mesure ou une norme de politique sociale[460], de manière à leur conférer un effet utile et à prendre en compte la constitution sociale helvétique[461]. Une protection indirecte des droits sociaux ou de certaines de leurs facettes au travers des buts sociaux demeure ainsi (sporadiquement) envisageable. Selon le gouvernement suisse et une partie de la doctrine, dont la proposition ne semble à ce jour pas avoir été mise en application par le Tribunal fédéral, les buts sociaux revêtiraient un caractère juridiquement contraignant également dans la mesure où ils interdiraient aux autorités d'abaisser le niveau de protection sociale d'ores et déjà atteint[462]; les parallèles entre cette conception et celle de *l'interdiction des mesures régressives*, développée (en lien avec l'obligation de progression continue) par le Comité onusien veillant sur la correcte application du Pacte ONU I, sont manifestes[463].

### *18.5.4 La protection par le biais de certains droits ou principes constitutionnels*

Le droit constitutionnel suisse met une pluralité d'instruments directement invocables à la disposition des particuliers, qui peuvent avoir pour corollaire de favoriser ou de protéger également des droits sociaux fondamentaux. Nous en citerons ici quelques exemples, à

457 Cf., notamment, arrêts du TF arrêt 8D_2/2014 du 4 février 2015 consid. 6.5; 5A_288/2011 du 19 mai 2011 consid. 5.1.

458 Arrêts du TF 5A_284/2012 du 10 septembre 2012 consid. 6.6; 9C_736/2011 du 7 février 2012 consid. 2.3; 2C_782/2008 du 30 octobre 2008 consid. 2.2 ; arrêt du TFA U 203/01 du 27 novembre 2001 consid. 4b. Voir aussi l'arrêt de la Cour de justice genevoise (Chambre administrative) ATA/10/2015 du 6 janvier 2015 consid. 11.

459 Arrêts du TF 6B_702/2011 du 21 novembre 2011 consid. 1; 2C_705/2009 du 17 septembre 2009 consid. 1.4 (motivation insuffisante); 1C_309/2008 du 28 janvier 2009 consid. 2.4 ; 2P.73/2005 du 17 juin 2005 consid. 2.2 (*cum* art. 12 Cst.féd.).

460 Arrêt du TF 2C_864/2010 du 24 mai 2011 consid. 4.4 (loi zurichoise sur les soins de santé) ; cf. aussi ATF 133 I 206 consid. 7.4 p. 220 (taxation selon la capacité contributive); 129 I 12 consid. 4.3 s. p. 17 (exclusion disciplinaire de l'école).

461 Pour ce terme, cf. notamment **UEBERSAX** (1998), 3 ss.

462 Message du Conseil fédéral relatif à une nouvelle constitution fédérale, du 20 novembre 1996, FF 1997 I 1, 202: « il ne s'agit pas d'une simple déclaration solennelle de politique sociale, mais d'une norme juridique ayant, dans une certaine mesure, force limitative: un recul en-deçà d'un niveau minimal de protection signifierait indubitablement un conflit avec l'article » en cause; **MASTRONARDI** (2008), 778, et les références y citées.

463 **CHATTON** (2013), 225-234, et les références citées.

savoir la protection de la confiance (1), les droits acquis (2), le principe d'imposition selon la capacité contributive (3), l'égalité de traitement (4), de même que la proportionnalité (5).

### 1 La protection de la confiance

Selon l'art. 9 Cst.féd., « toute personne a le droit d'être traitée par les organes de l'Etat (…) conformément aux règles de la bonne foi ». La garantie de la bonne foi fait partie des droits constitutionnels dont les individus peuvent se prévaloir devant les juridictions nationales suisses[464]. Ce droit « protège le citoyen dans la confiance légitime qu'il met dans les *assurances reçues des autorités*, lorsqu'il a réglé sa conduite d'après des décisions, des déclarations ou un comportement déterminé de l'administration »[465]. Il est tout à fait envisageable que, dans un cas particulier, le principe de la bonne foi oblige une autorité à fournir des prestations de nature sociale (par exemple, en matière d'assurances sociales ou d'accès aux études supérieures) à un individu, alors même que celui-ci n'y aurait pas eu droit d'un point de vue légal[466]. Les conditions restrictives auxquelles une autorité peut être contrainte à honorer une promesse faite sont énoncées par la jurisprudence constante du Tribunal fédéral comme suit : a) l'autorité est intervenue dans une situation concrète à l'égard de personnes déterminées ; b) elle a agi ou est censée avoir agi dans les limites de ses compétences et c) l'administré n'a pas pu se rendre compte immédiatement de l'inexactitude du renseignement obtenu. L'administré s'est par ailleurs fondé sur les assurances ou le comportement dont il se prévaut pour d) prendre des dispositions auxquelles il ne saurait renoncer sans subir de préjudice, et e) la réglementation n'a pas changé depuis le moment où l'assurance a été donnée[467].

### 2 Les droits acquis

Le droit public helvétique connaît une catégorie de droits hétéroclite et aux contours incertains, que la jurisprudence du Tribunal fédéral tend, du reste, de plus en plus souvent à analyser sous l'angle de la protection constitutionnelle de la bonne foi[468] : il s'agit des droits acquis (en all. « *wohlerworbene Rechte* »). Dans l'une des acceptions retenues par la doctrine, il s'agit d'un ensemble de droits au régime spécifique, lesquels se caractériseraient à travers leur non-mutabilité. Cela les mettrait – à l'instar de droits de propriété (art. 26

464 Cf. ATF 122 I 328 consid. 3 p. 333.

465 ATF 131 II 627 consid. 6.1 p. 636.

466 Voir, dans ce sens, ATF 129 II 409 consid. 2 p. 411 (droit des victimes d'infractions graves à une indemnisation) ; **KRADOLFER** (2013), 532.

467 ATF 137 II 182 consid. 3.6.2 p. 194 ; 131 II 627 consid. 6.1 p. 637; arrêt du TF 9C_568/2013 du 9 janvier 2014 consid. 4.2.

468 ATF 133 I 149 consid. 3.3 p. 154 s.; 132 II 485 consid. 9.5 p. 513 ; **MOOR/POLTIER** (2011), 24.

Cst.féd.) – à l'abri des convoitises et des ingérences arbitraires de l'Etat[469]. Cela étant, le Tribunal fédéral a eu l'occasion de préciser que la garantie des droits acquis n'était pas absolue, notamment quand elle risquait de créer des inégalités de traitement inadmissibles vis-à-vis d'autres catégories de personnes (en l'occurrence, il s'agissait des bénéficiaires des prestations de l'assurance de prévoyance professionnelle [LPP]). Tel serait le cas si une péjoration essentielle intervenait par rapport aux bases du financement de l'assurance et conduisait à ce qu'un autre groupe d'assurés non-privilégiés appartenant à la même communauté solidaire fût contraint de participer d'une façon notable au financement de privilèges dont lui-même ne bénéficierait pas, voire a fortiori si cette obligation mettrait en danger la pérennité des avoirs de vieillesse de la classe d'assurés non privilégiée[470]. L'utilité de ces droits pour la protection effective des droits sociaux présentant des similitudes avec la protection offerte par le principe de la confiance, il est pour le surplus renvoyé à ce dernier concept[471].

### 3 Le principe d'imposition fiscale selon la capacité contributive

Le principe d'imposition selon la capacité contributive ou économique en droit fiscal est ancré à l'art. 127 al. 2 Cst.féd. et peut, en tant que droit constitutionnel, être directement invoqué par un justiciable devant les tribunaux[472]. Il est considéré comme une concrétisation du principe de l'égalité de traitement (art. 8 Cst.féd.)[473]. D'après le principe d'imposition selon la capacité économique, « toute personne doit contribuer à la couverture des dépenses publiques, compte tenu de sa situation personnelle et en proportion de ses moyens; la charge fiscale doit être *adaptée à la substance économique* à la disposition du contribuable »[474] ; il requiert donc qu'une réglementation fiscale n'aboutisse pas de façon générale à une charge sensiblement plus lourde ou à une inégalité systématique à l'égard de certaines catégories de contribuables[475]. Le Tribunal fédéral a précisé qu'il incombait en premier lieu, « du point de vue démocratique, au législateur fiscal (…) d'aménager le système fiscal, d'arbitrer les conflits de valeurs et de concrétiser les principes d'imposition

469 **MOOR/POLTIER** (2011), 24, donnent les exemples de la révocation d'une décision autorisant une activité dont l'intéressé avait déjà fait usage (ATF 92 I 226 consid. 5e p. 235), d'une exonération fiscale consentie (ATF 94 I 446 consid. 2 p. 450) et d'une promesse de subventionnement (ATF 93 I 666 consid. 4 p. 675) ; cf. également **RIVA** (2007), 37.

470 Cf. ATF 138 V 366 consid. 6.3.1 p. 375.

471 Cf. 18.5.4.1 1).

472 Cf. ATF 114 Ia 221 consid. 2c p. 224; arrêt du TF 2C_162/2010 du 21 juillet 2010 consid. 2.3 ; **VALLENDER/WIEDERKEHR** ad art. 127 Cst.féd, in : **EHRENZELLER/SCHINDLER/SCHWEIZER/VALLENDER** (2014b), 2293.

473 Cf., par ex., arrêts du TF 2C_820/2008 du 23 avril 2009 consid. 6.1; 2A.4/2006 du 26 juin 2006 consid. 6.

474 ATF 140 II 157 consid. 7.1 p. 160 s.; 133 I 206 consid. 6 et 7 p. 215 ss; 122 I 101 consid. 2b p. 103; 99 Ia 638 consid. 9 p. 652 s. En matière de taxes causales, où l'art. 127 Cst.féd. ne s'applique pas, cf. ATF 139 III 334 consid. 3.2.4 p. 337 (frais judiciaires disproportionnés).

475 ATF 133 II 305 consid. 5.1 p. 310.

de façon à conférer précision, prévisibilité et sécurité à la réglementation fiscale », y compris dans un but de créer une concordance pratique entre les principes constitutionnels en lice[476]. Ainsi, les déductions sociales et les barèmes prévus dans certaines lois fiscales avaient pour but d'adapter, non sans un certain schématisme, la charge d'impôt à la situation personnelle et économique particulière de chaque catégorie de contribuables[477]. En conséquence, en tant qu'il combat toute forme de taxation inégale ou confiscatoire[478], ce principe constitutionnel afférent au droit fiscal protège le droit social fondamental au minimum d'existence[479], si ce n'est qu'il contribue à la réalisation du droit de chacun à des conditions dignes d'existence.

### 4 L'égalité de traitement

L'art. 8 Cst.féd. dispose :

« al. 1 Tous les êtres humains sont égaux devant la loi.

al. 2 Nul ne doit subir de discrimination du fait notamment de son origine, de sa race, de son sexe, de son âge, de sa langue, de sa situation sociale, de son mode de vie, de ses convictions religieuses, philosophiques ou politiques ni du fait d'une déficience corporelle, mentale ou psychique.

al. 3 L'homme et la femme sont égaux en droit. La loi pourvoit à l'égalité de droit et de fait, en particulier dans les domaines de la famille, de la formation et du travail. L'homme et la femme ont droit à un salaire égal pour un travail de valeur égale.

al. 4 La loi prévoit des mesures en vue d'éliminer les inégalités qui frappent les personnes handicapées ».

De par leur *nature transversale*[480], les principes d'égalité dans et devant la loi (art. 8 al. 1 Cst.féd.) et l'interdiction des discriminations (art. 8 al. 2 Cst.féd.) garantissent la jouissance égale des droits fondamentaux sociaux, et plus généralement, de tous les droits sur le terrain de la législation sociale[481]. Portant sur l'égalité entre les sexes, l'art. 8 al. 3 Cst.féd. consacre une vision matérielle (ou réelle) de l'égalité, complétant le principe d'égalité juridique par le mandat adressé au législateur de pourvoir en sus à l'égalité de fait, en particulier dans les domaines de la famille, de la formation et du travail. Cette même disposition introduit

476 ATF 140 II 157 consid. 7.2 et 7.3 p. 161 s.

477 ATF 133 II 305 consid. 5.1 p. 309. Cf. aussi, mais sous l'angle des déductions fiscales admissibles, l'ATF 137 II 328 consid. 4.1 p. 331, selon lequel l'exonération de l'impôt fédéral direct des subsides provenant de fonds publics ou privés a « pour fondement des motifs socio-politiques tendant à ce que les prestations qui sont versées dans le but d'écarter une situation d'indigence ou de besoin (…) parviennent dans leur intégralité à leur destinataire ».

478 VALLENDER/WIEDERKEHR, ad art. 127 Cst.féd, in : EHRENZELLER/SCHINDLER/SCHWEIZER/VALLENDER (2014b), 2295.

479 Cf. ATF 122 I 101 consid. 2b p. 103.

480 Cf. 18.5.2 *supra*.

481 Dans ce sens, MAHON/PULVER (2002), 53 : « accorder aux plus faibles une protection de la société garantissant un minimum d'égalité sociale ».

par ailleurs le droit de l'homme et de la femme à un salaire égal pour un travail de valeur égale. La réalisation d'une égalité matérielle est de plus visée à l'art. 8 al. 4 Cst.féd., qui confère un mandat au législateur en vue d'« éliminer les inégalités qui frappent les personnes handicapées » ; en revanche, cette disposition ne consacre pas un droit individuel justiciable à l'instauration d'une égalité de fait[482].

### 5 La proportionnalité

La Constitution fédérale suisse érige la proportionnalité, d'une part, en tant que *principe directeur* pour toute l'activité de l'Etat (art. 5 al. 2 Cst.féd.)[483] et, d'autre part, en tant que *frein au pouvoir* quand ce dernier entend imposer des restrictions aux droits fondamentaux de la personne (art. 36 al. 3 Cst.féd.)[484]. Le Tribunal fédéral y voit un principe général de l'Etat de droit démocratique, de même qu'une valeur fondamentale de l'ordre constitutionnel helvétique, qui nécessite en particulier que toute restriction aux droits fondamentaux fasse l'objet d'une pesée globale des intérêts en présence, compte dûment tenu de l'ensemble des circonstances du cas d'espèce[485].

Pour être conforme au principe de la proportionnalité, « une restriction d'un droit fondamental doit être apte à atteindre le but visé – règle d'aptitude –, lequel ne peut pas être obtenu par une mesure moins incisive – règle de nécessité –; il faut en outre qu'il existe un rapport raisonnable entre les effets de la mesure sur la situation de la personne visée et le résultat escompté du point de vue de l'intérêt public – proportionnalité au sens étroit »[486].

De façon générale, ces critères jouent un rôle central en vue de protéger le titulaire d'un droit fondamental, y compris social, « contre une activité étatique limitant démesurément ses droits »[487], voire, en présence d'obligations positives, dans l'optique de prémunir celui-ci contre le défaut ou le refus de l'Etat d'intervenir pour venir au secours d'un droit fondamental menacé; dans ce dernier cas, il conviendra en effet de se demander si les autorités devaient prévoir qu'un droit protégé était en danger ou que des mesures s'imposaient pour remédier à une situation déterminée, et, dans l'affirmative, si ces mêmes autorités ont pris les mesures qui, d'un point de vue raisonnable, auraient sans doute obvié à ce risque ou réparé cette atteinte, l'examen de la proportionnalité intervenant en particulier au niveau

482 ATF 139 II 289 consid. 2.2.1 p. 293 s.; arrêt du TF 2C_782/2014 du 26 novembre 2014 consid. 2.2.

483 « L'activité de l'Etat doit répondre à un intérêt public et être proportionnée au but visé ».

484 « Toute restriction d'un droit fondamental doit être proportionnée au but visé ». Voir également la clause de restriction prévue à l'art. 4 Pacte ONU I, qui implique ce principe *in fine*: « Les Etats parties au présent Pacte reconnaissent que, dans la jouissance des droits assurés par l'Etat conformément au présent Pacte, l'Etat ne peut soumettre ces droits qu'aux limitations établies par la loi, dans la seule mesure compatible avec la nature de ces droits et exclusivement en vue de favoriser le bien-être général dans une société démocratique ».

485 ATF 139 I 16 consid. 4.3.2 s. p. 26 s.

486 ATF 138 I 331 consid. 7.4.3.1 p. 346; 137 I 167 consid. 3.6 p. 175 s.; arrêt du TF 2C_721/2012 du 27 mai 2013 consid. 6.2, non publié in ATF 139 II 384.

487 **AUER/MALINVERNI/HOTTELIER** (2013b), 114.

du caractère *raisonnable* du devoir de protection[488]. Par ailleurs, depuis 1971, la jurisprudence de la cour suprême helvétique admet que les droits fondamentaux puissent, dans certaines limites, faire l'objet de restrictions pour des motifs de politique sociale[489], lesquels sont donc pris en considération dans le cadre de la pesée des intérêts sus-évoquée[490].

### *18.5.5 La protection institutionnelle par le biais d'organismes nationaux*

Il n'existe en Suisse pas d'institution nationale avec la mission spécifique de veiller à la protection et à la mise en œuvre des droits sociaux fondamentaux[491], voire plus généralement des droits de l'Homme. Comme mentionné précédemment, la Suisse n'a pas encore créé une institution nationale des droits de l'Homme qui soit conforme aux Principes de Paris[492], malgré les critiques de la part des organes de contrôle internationaux en matière des droits de l'Homme[493]. Jugeant la création d'une institution nationale comme étant prématurée, mais reconnaissant le besoin d'appui et d'expertise supplémentaire, le Conseil fédéral a décidé en 2009 de lancer un appel d'offres auprès des universités suisses pour conférer le mandat à une institution universitaire de fournir des prestations dans le domaine des droits humains. Cette décision a conduit à la création, en 2011, du Centre de compétence suisse pour les droits humains (CSDH)[494], mandaté pour une période de cinq ans. A la suite d'une évaluation externe du CSDH en avril 2015, le Conseil fédéral a décidé, le 1er juillet 2015, de reconduire le mandat dudit centre pour une durée maximum de cinq ans, jusqu'a la création d'une institution nationale qui réponde aux Principes de Paris.

Hormis la CSDH, certaines commissions fédérales extraparlementaires facilitent la mise en œuvre des droits sociaux fondamentaux dans le domaine de leurs activités respectives. Il sied de mentionner notamment la Commission fédérale contre le racisme (CFR), la Commission fédérale pour les questions féminines (CFQF), de même que la Commission fédérale pour les questions de migration (CFM).

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488 **CHATTON** (2013), 455 s., et les sources citées; cf. ACEDH *Osman c. Royaume-Uni [GC]*, § 116; *Stec et al. c. Royaume-Uni [GC]*, § 66.

489 ATF 130 I 279 consid. 2.3.1 p. 284; 97 I 499 consid. 4c p. 506. Cf. **AUER/MALINVERNI/HOTTELIER** (2013b), 459, s'agissant de la liberté économique; **BIGLER-EGGENBERGER** (2008), 789. Cf. aussi **ROUILLER** (1989), 75 ss.

490 Cf., par ex., ATF 129 I 12 consid. 10.4 p. 29; 124 I 107 consid. 3c p. 114.

491 A noter que le projet de créer un service de médiation en matière de droits de l'Homme, débattu au niveau de l'Assemblée fédérale, a échoué : http://www.parlament.ch/ab/frameset/d/n/4611/46137/d_n_4611_46137_46196.htm (consulté le 22 novembre 2015).

492 Résolution 48/134 de l'Assemblée générale du 20 décembre 1993, Institutions nationales pour la promotion et la protection des droits de l'homme.

493 Voir 18.4.4. Pour une étude consacrée aux institutions nationales des droits de l'Homme et une analyse des différentes options ouvertes à la Suisse, voir **SCHODER** (2004).

494 Des informations sur ce centre sont disponibles sous http://www.csdh.ch/frz/home.html (consulté le 22 novembre 2015).

## 18.6 Conclusion

Dans notre contribution, nous avons pu constater qu'en Suisse, les droits sociaux fondamentaux sont garantis sur trois échelons, qui coexistent et se complètent mutuellement, à savoir aux niveaux international, fédéral ainsi que cantonal.

S'agissant de la Constitution fédérale helvétique, elle reste la clef de voûte du système de protection des droits sociaux en Suisse. En sus des droits sociaux qui sont formulés en tant que libertés (par exemple, les libertés syndicale ou de la langue), le catalogue des droits fondamentaux comprend également des droits qui sont rédigés sous la forme de droits à des prestations: il s'agit des droits à l'assistance juridique gratuite, à l'enseignement de base suffisant et gratuit, ainsi que du droit d'obtenir de l'aide dans des situations de détresse, qui a été dans un premier temps reconnu en tant que droit fondamental non écrit par le Tribunal fédéral suisse, avant d'être codifié dans la Constitution fédérale de 1999. Ce dernier droit illustre particulièrement bien la volonté du constituant de limiter le niveau de protection les droits sociaux à des prestations minimales ; il a en effet été conçu comme un filet de secours à la fois subsidiaire et temporaire (dans la perspective de l'autonomisation de la personne)[495] couvrant les seuls besoins élémentaires. Au-delà de ces quelques droits, la Constitution fédérale appréhende d'autres garanties, qui sont consacrées sous la forme de droits de l'Homme au niveau international, en tant que buts sociaux certes dépourvus de justiciabilité, mais engageant l'Etat à les réaliser.

Pour ce qui est des droits sociaux fondamentaux qui sont consacrés par les constitutions cantonales, la pratique les a jusqu'à peu relégués à une existence de seconde zone, sans portée distincte des droits consacrés au niveau fédéral. Cela étant, les révisions récentes concernant une bonne partie des constitutions cantonales ont exprimé la volonté des constituants cantonaux d'offrir une protection plus étendue des droits sociaux. Ces avancées reflètent une plus grande acceptation des droits sociaux en tant que droits fondamentaux pleinement réalisables dans l'ordre juridique des cantons. Cette évolution marque un double potentiel : d'une part, la consécration de nouveaux droits sociaux de rang cantonal est susceptible de servir de source d'inspiration au Tribunal fédéral. Ainsi, ces droits pourraient enrichir l'interprétation des garanties fédérales, notamment dans le sens d'une extension matérielle des garanties existantes, voire – en présence d'un consensus suffisant parmi les cantons – justifier la consécration de nouveaux droits fondamentaux en tant que garanties non écrites. D'autre part, les innovations récentes ainsi que la volonté affichée par les constituants cantonaux de conférer à ces droits un sens utile, pourraient amener le Tribunal fédéral à reconnaître et concrétiser leur portée propre dans le cadre d'un recours.

Reste la portée plus épineuse des droits sociaux contenus dans des conventions internationales ratifiées par la Suisse. Jusqu'à présent, la pratique des autorités suisses s'est

495 Cf. EICHENHOFER (2014), 8 s.

montrée réticente à reconnaître l'applicabilité directe, du moins de la plupart des garanties prévues dans ces instruments, les privant par là-même de leur effectivité. L'exemple du Pacte ONU I est révélateur de cette tendance : en effet, tant l'opinion du gouvernement que la jurisprudence de la cour suprême helvétique ont souligné la portée programmatique de cet instrument, niant en bloc la justiciabilité de ses dispositions[496]. Un infléchissement peut toutefois être observé durant ces dernières années ; bien que demeurant globalement restrictive, la jurisprudence du Tribunal fédéral adopte une approche plus nuancée ou pragmatique, consistant à examiner chaque droit individuellement. De même, le gouvernement fédéral est désormais moins catégoriquement opposé à ces droits ; il semble même faire sienne la théorie des trois strates, laquelle trouve un appui croissant dans la doctrine suisse et a pour corollaire logique la reconnaissance de la justiciabilité d'une partie au moins des facettes qui composent les différents droits sociaux fondamentaux. En dernier lieu, un arrêt de 2011, rendu par le Tribunal fédéral et portant sur la suppression de la commission cantonale d'égalité entre femmes et hommes, pourrait augurer de changements encore plus prononcés par rapport à la dimension institutionnelle des droits (sociaux) fondamentaux, tels que permettant au juge de sanctionner l'inactivité totale, voire la prise de mesures régressives par le législateur. En se distanciant explicitement de la logique binaire « justiciable/injusticiable », cette jurisprudence innovante ne pourra être que bénéfique au dépassement du scepticisme qui habite encore trop souvent le juriste suisse (de plus en plus isolé au milieu des nouvelles approches que d'autres Etats et organismes sont en train de mettre en pratique) à l'égard des droits sociaux.

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496 Cf. **FRÉSARD** (2014), no 11, 1377.

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*B. Abréviations spécifiques*

| | |
|---|---|
| ACEDH | Arrêt(s) de la Cour européenne des droits de l'Homme |
| all. | En langue allemande |
| angl. | En langue anglaise |
| ATF | Recueil officiel des arrêts du Tribunal fédéral suisse |
| BO CE / CN | Bulletin officiel du Conseil des Etats / Conseil national suisse |
| CdC | Conférence des gouvernements cantonaux |
| CDE | Convention relative aux droits de l'enfant, du 20 novembre 1989 |
| CEDEF | Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, du 18 décembre 1979 |
| CEDH | Convention de sauvegarde des droits de l'Homme et des libertés fondamentales, du 4 novembre 1950 |
| CEDR | Convention internationale sur l'élimination de toutes les formes de discrimzination raciale, du 21 décembre 1965 |
| Const./CDH | Constatations du Comité des droits de l'Homme (Pacte ONU II) |
| CPH | Convention internationale relative aux droits des personnes handicapées, du 13 décembre 2006 |
| CSDH | Centre de compétence suisse pour les droits humains |
| CSE / CSER | Charte sociale européenne, du 18 octobre 1961 / Charte sociale européenne révisée, du 3 mai 1996 |
| Cst.AG | Constitution du canton d'Argovie, du 25 juin 1980 |
| Cst.AI | Constitution du canton d'Appenzell Rhodes-Intérieures, du 24 novembre 1872 |
| Cst.AR | Constitution du canton d'Appenzell Rhodes-Extérieures, du 30 avril 1995 |
| Cst.BE | Constitution du canton de Berne, du 6 juin 1993 |
| Cst.BL | Constitution du canton de Bâle-Campagne, du 17 mai 1984 |
| Cst.BS | Constitution du canton de Bâle-Ville, du 23 mars 2005 |

| | |
|---|---|
| Cst.féd. | Constitution fédérale de la Confédération suisse, du 18 avril 1999 |
| Cst.FR | Constitution du canton de Fribourg, du 16 mai 2004 |
| Cst.GE | Constitution de la République et canton de Genève, du 14 octobre 2012 |
| Cst.GL | Constitution du canton de Glaris, du 1er mai 1988 |
| Cst.GR | Constitution du canton des Grisons, du 18 mai 2003 |
| Cst.JU | Constitution de la République et canton du Jura, du 20 mars 1977 |
| Cst.LU | Constitution du canton de Lucerne, du 17 juin 2007 |
| Cst.NE | Constitution de la République et canton de Neuchâtel, du 24 septembre 2000 |
| Cst.NW | Constitution du canton de Nidwald, du 10 octobre 1965 |
| Cst.OW | Constitution du canton d'Obwald, du 19 mai 1968 |
| Cst.SG | Constitution du canton de Saint-Gall, du 10 juin 2001 |
| Cst.SH | Constitution du canton de Schaffhouse, du 17 juin 2002 |
| Cst.SO | Constitution du canton de Soleure, du 8 juin 1986 |
| Cst.SZ | Constitution du canton de Schwyz, du 24 novembre 2010 |
| Cst.TG | Constitution du canton de Thurgovie, du 16 mars 1987 |
| Cst.TI | Constitution de la République et canton du Tessin, du 14 décembre 1997 |
| Cst.UR | Constitution du canton d'Uri, du 28 octobre 1984 |
| Cst.VD | Constitution du canton de Vaud, du 14 avril 2003 |
| Cst.VS | Constitution du canton du Valais, du 8 mars 1907 |
| Cst.ZG | Constitution du canton de Zoug, du 31 janvier 1894 |
| Cst.ZH | Constitution du canton de Zurich, du 27 février 2005 |
| CTM | Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille, du 18 décembre 1990 |
| CVDT | Convention de Vienne sur le droit des traités, du 23 mai 1969 |
| DCEDS | Décision(s) du Comité européen des droits sociaux de la Charte sociale européenne |
| FF | Feuille fédérale de la Confédération suisse |
| LTF | Loi fédérale sur le Tribunal fédéral, du 17 juin 2005 |
| Pacte ONU I | Pacte international relatif aux droits économiques, sociaux et culturels, du 16 décembre 1966 |
| Pacte ONU II | Pacte international relatif aux droits civils et politiques, du 16 décembre 1966 |

| | |
|---|---|
| PF/Pacte ONU I | Protocole facultatif se rapportant au Pacte international relatif aux droits économiques, sociaux et culturels, du 10 décembre 2008. |
| RC | Réclamation(s) collective(s) |
| RO | Recueil officiel du droit fédéral |
| RS | Recueil systématique du droit fédéral |
| TAF | Tribunal administratif fédéral |
| TF | Tribunal fédéral suisse |
| TFA | (ancien) Tribunal fédéral suisse des assurances |

# 19 Social Rights in Turkey

*Rüçhan Işik & G. Zeynep Kiliçkaya*[*]

## 19.1 Social Rights in National Legal Scholarship

The issue of social rights appears as a newly developing area of legal scholarship. When the existing materials on this issue are observed, it seems that most of the authors are not legal scholars but labour economists. Among those limited number of legal scholars who actually include social rights in their work, most are labour law specialists and some, constitutional law specialists. This is also the reason why there is not any significant and original contribution of the Turkish legal scholarship to the study of social rights. Therefore, there is a need for promoting research and study on social law in the Turkish legal scholarship.

The existing limited number of legal scholarship, in general, finds the question of protection social rights rather restricted, as a result of Article 65 of the Turkish Constitution and the interpretation of the Constitutional Court. According to Article 65 of the Constitution: "The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties".[1] Without question, this provision is applicable only for positive rights that require positive actions by the state. In other words, negative rights, which require negative performance, i.e. non-interference, by the state are not subjected to the restriction of "within the capacity its financial resources"; whereas rights that require positive performance by the state do not provide its subjects subjective rights that are claimable before courts. These rights are claimable only in cases where they are explicitly regulated under the law, which means that the provisions of the Constitution that stipulate these rights are not directly applicable.[2] Yet, these rights not being directly applicable does not alter the fact that they are constitutional norms. The financial capacity measure only indicates the extent to which these rights can be granted.[3]

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* Prof. Dr. Rüçhan Işık is a Labour Law Professor at Bilkent University Faculty of Law. G. Zeynep Kılıçkaya is a doctoral candidate in the area of law at Bilkent University.

1 For official English translation of the Turkish Constitution, see: <http://global.tbmm.gov.tr/docs/constitution_en.pdf>.

2 Ergun Özbudun, *Türk Anayasa Hukuku* (Ankara: Yetkin, 2011), 148-149.

3 Yavuz Sabuncu, *Anayasaya Giriş* (Ankara: İmaj, 2005), 168-169.

The Turkish Constitutional Court's views on Article 65 seem to always follow the same direction. According to the Court's approach, Article 65 is an integral part of the principle of social state governed under the rule of law, and it in fact materialises this principle.[4] It is observed in its decisions that the Court considers this article as a "just limitation" to the state's duties concerning the social and economic rights, even if they are explicitly stipulated in the Constitution. Therefore, when reviewing the constitutionality of a legislation concerning social and economic rights, the Court makes an assessment on the extent of the violation of the relevant article of the Constitution in terms of Article 65. This is the case particularly in cases where the assessment revolves around the adequacy of a right provided under the law in ensuring the social and economic rights in the Constitution.

The Court's approach concerning Article 65 is highly criticised among scholars. It is perceived that the Court maintains its exact view that it pursued before the 2001 amendments. The former version of the article stipulated that: "The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the protection of the economic stability". With the 2001 amendments, the consideration changed from the protection of the economic stability to "the priorities appropriate with the aims of the duties". However, it is argued among scholars that this amendment in favour of social and economic rights did not result in any changes in the Constitutional Court's judgements, as expected. The Court continues to pursue a state-based approach that prioritises economic stability.[5]

Within the framework of the above-mentioned Constitutional provision, it is argued by some legal scholars that this article of the Constitution provides the state a way to avoid its duties by restricting justiciability of the economic and social rights, which require a positive action by the state. Others, on the other hand, indicate that this provision is necessary in order to establish a realist limitation to the fulfilment of duties regarding positive rights by the state.[6]

4 AYMK. 11.03.2003, E. 2001/351, K. 2003/10. R.G. 16.12.2003.

5 İbrahim Kaboğlu, "Anayasa'da Sosyal Haklar: Alanı ve Sınırları," in *Sosyal Haklar Ulusal Sempozyumu II: Bildiriler*, ed. Mesut Gülmez et al. (Istanbul: Can Matbaacılık, October 2010), 45-46.

6 For more views and discussions on the issue see: Murat Özveri, "Türk Hukukunda Sosyal Hakların Dava Yoluyla Gerçekleştirilmesi," in *Sosyal Haklar Uluslararası Sempozyumu III: Bildiriler*, ed. Kocaeli Üniversitesi İktisadi ve İdari Bilimler Fakültesi Çalışma Ekonomisi ve Endüstri İlişkileri Bölümü (Istanbul: Can Matbaacılık, September 2011), 145-150.

## 19.2 Constitutional Protection of Social Rights

The normative structure of constitutional social rights varies from other fundamental rights and freedoms under the Turkish Constitution. Accordingly, the fundamental rights and freedoms in the Turkish Constitution are categorised as follows: Part Two: Fundamental Rights and Freedoms: Chapter 1: General Provisions; Chapter 2: Rights and Duties of the Individual; Chapter 3: Social and Economic Rights and Duties; Chapter 4: Political Rights and Duties. This categorisation indicates that the Turkish Constitution adopts the categorisation of "protective rights", "claim rights" and "participatory rights", which indicates that the state has a negative, a positive or an active position against the individual.[7]

Economic and social rights and duties are regulated under Part Two, Chapter 3 of the Turkish Constitution. This part of the Constitution covers the following social rights and duties, among other economic rights: protection of family and children's rights; the right to education and the right to learn; freedom to work and freedom of contract; the right and duty to work; working conditions and the right to rest; the right to form workers' and employers' organisations; the right to conclude collective agreements; the right to strike and lockout; fair remuneration; protection of health and environment; the right to housing; protection of youth; promotion of sports activities; the right to social security; social securities of vulnerable groups; ensuring family union, children's education, cultural needs and social securities of Turkish citizens living abroad; protection of historical, cultural and environmental assets; protection of art and artists. In order for these rights to be protected, they shall also be regulated under the law. Within this system, perhaps the most important and original characteristic of the Turkish Constitution regarding the protection of social rights is that, unlike many other Constitutions of the world, the Turkish Constitution explicitly grants and regulates individual union rights in detail. Although it leaves many issues to the follow-up laws, the general framework of the system and the main principles regarding collective labour rights and freedoms are stipulated under the Constitution.

As a rule, the subjects entitled to protection are defined as "everyone", meaning that all individuals, regardless of their nationality are entitled to these rights. Furthermore, the subjects of these rights also cover legal persons, groups and institutions. However, due to their nature, certain rights are granted to certain groups. In this respect, labour rights are provided to workers and employers and a distinction is made between public servants and other workers. Furthermore, various economic and social rights are granted merely to those working in given sectors, such as the forestry peasants.

7 Tekin Akıllıoğlu, *İnsan Hakları: Kavram, Kaynaklar ve Koruma Sistemleri* (Ankara: İmaj, 2010), 156.

With regard to the provision of social rights, the debtor of these rights is explicitly defined as the state. The individual is protected against the three functions of the state: legislation, execution and judiciary.[8] These rights generally give obligations to the state to establish necessary facilities or take necessary measures to provide the full realisation of these rights. In this respect, the legislator is obliged to enact necessary legislation and the administration is obliged to establish relevant institutions. When liability is concerned, the following articles of the Constitution appear significant: Article 40 on protection of fundamental rights and freedoms which states:

> Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities. (…) Damages incurred to any person through unlawful treatment by public officials shall be compensated for by the State as per the law.

Article 125 on judicial review, which states: "Recourse to judicial review shall be available against all actions and acts of administration." and Article 129/V on duties and responsibilities, and guarantees in disciplinary proceedings regarding public servants, which states:

> Compensation suits concerning damages arising from faults committed by public servants and other public officials in the exercise of their duties shall be filed only against the administration in accordance with the procedure and conditions prescribed by law, as long as the compensation is recoursed to them.

However, these articles on state liability, as a rule, only refer to the acts of the executive body and exclude most acts of the legislative (only in certain specific situations, the damages incurred as a result of an action by the legislative are accepted to be claimable) and all acts of the judiciary.

Within the Turkish constitutional system, there is the Constitutional Court as the general supervisory body of the legislator. The Constitutional Court examines the constitutionality, in terms of both form and substance, of laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey, conducts the judicial review of constitutional amendments only in terms of form and decides on constitutional complaints. However, there is not any instrument in the Turkish constitutional system that ensures protection against inaction by the legislator.

8 Ibid., 315.

As previously explained, most economic and social rights are considered as positive rights that create a burden on the state. Therefore, the method of protecting these rights is more restrictive when compared to negative rights, because the protection of the former is limited to "within the capacity of its financial resources".

The efficiency of social rights protection offered by the Constitution and the constitutional justice is generally poor, particularly at the Constitutional Court level. However, there seems to be improvement in other High Courts, such as the Court of Cassation and the Council of State, which will be further explained in the following sections. Constitutional complaints lodged before the Constitutional Court against violations of fundamental rights and freedoms governed under the Constitution and which are also regulated under the European Convention on Human Rights and additional Protocols, which Turkey has ratified, entered into the Turkish legal system in 2010 and came into force in 2012. This application may be made against public authority acts which are claimed to have violated fundamental rights and freedoms. However, even this form of remedy does not cover acts of the legislative and the regulatory acts of the administration.

## 19.3 Protection of Social Rights under Other Constitutional Rules and Principles

As repeatedly mentioned, the most important principle regarding social rights which also appear as positive rights is regulated under Article 65 of the Turkish Constitution. In addition to this principle, the restrictions on social rights are also subject to the following measures:

1. Article 13 of the Turkish Constitution: "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principles of proportionality".

2. Article 90/V of the Turkish Constitution: "International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".

3. General principles of law, including protection of legitimate expectations, protection of vested rights, precision of legislation, non-retroactivity of legislation, due process. It shall be indicated that the principle of protection of legitimate expectations became more significant in the Turkish legal system as a result of the *European Court of Human Rights* judgements. Accordingly, the individuals are granted compensation for their damages when they have acted upon a legitimate expectation and suffered a loss.[9]

## 19.4 Impact of International Protection of Social Rights

Many international treaties that involve social rights have been ratified by Turkey. In this respect, Turkey has signed and ratified, among others, most United Nations and International Labour Organisation instruments, the European Convention on Human Rights and the European Social Charter. The following is a short list of fundamental conventions on social rights, which Turkey has signed and ratified:

1. United Nations: International Covenant on Economic, Social and Cultural Rights of 1996: siged on 15.08.2000 and ratified on 23.09.2003

2. International Labour Organisation: All fundamental conventions of the ILO are signed and ratified by Turkey. Convention No. 87: ratified in 1993; Convention No. 98: ratified in 1952; Convention No. 29: ratified in 1998; Convention No. 105: ratified in 1961; Convention No. 100: ratified in 1967; Convention No. 111: ratified in 1967; Convention No. 138: ratified in 1998; Convention No. 182: ratified in 2001.

3. Council of Europe: European Convention on Human Rights of 1950: signed on 04.11.1950 and ratified on 18.05.1954.

4. Council of Europe: Revised European Social Charter of 1996: signed on 06.10.2004 and ratified on 27.06.2007. All provisions except the following have been accepted: Articles 2/III, 4/I, 5 and 6. Turkey also has not signed and ratified the Additional Protocol on Collective Complaint.

According to Article 90 of the Constitution,

> The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey shall be subject to adoption

9 Tekin Akıllıoğlu, "Avrupa İnsan Hakları Mahkemesi Kararlarında Mülkiyet Hakkı ve Kazanılmış Hak Üzerine Bazı Gözlemler," *İdare Hukuku ve İlimler Dergisi*, Issue 2, Vol. 15 (2012): 26.

> by the Grand National Assembly of Turkey by a law approving the ratification. (…) International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Despite this explicit article of the Constitution, there is an absence of direct application of the international instruments by the courts,[10] although in the last five years there appears to be a tendency of "referring" to these international conventions by the High Courts. Among these international instruments, the most effective and influential one is the European Convention on Human Rights and its supervisory body, the European Court of Human Rights. As a result of countless convictions, High Courts have started taking into consideration the international documents in their judgements, although their direct application is still being resisted.

Due to the fact that the European Court of Human Rights is the most influential and effective supervisory body among the international supervisory bodies which Turkey recognises, the most significant cases brought before the international platform are mainly European Court of Human Rights cases. Accordingly, the following may be considered as the household cases brought against Turkey:

- *Öneryıldız v. Turkey* (2005, ECtHR), in which the Court established a general meaning and understanding of "possession" that parts from a legally established one. Regarding a dwelling built illegally on the land of the Treasury, the Court held that "the dwelling built by the applicant and his residence there with his close relatives represented a substantial economic interest and that the interest, which the authorities had allowed to subsist over a long period of time, amounted to a 'possession'' within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1".[11]
- *Demir and Baykara v. Turkey* (2008, ECtHR) where the Court interpreted Article 11 of the European Convention on Human Rights on freedom of association as to cover the right to collective bargaining. The Court reached this conclusion in the light of other international law instruments, particularly focusing on Articles 5 and 6 of the Revised European Social Charter, which Turkey had not ratified. In opposition to the Turkish Government's objections claiming that the Court may not establish a broad-

10 Özveri, "Türk Hukukunda Sosyal Hakların Dava Yoluyla Gerçekleştirilmesi," 154-155.
11 *Öneryıldız v. Turkey*, no. 48939/99, § 121, ECHR 30.11.2004.

ening interpretation of freedom of association by referring to articles that were not ratified, the Court held that "it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies".[12]

– *Enerji Yapı-Yol Sen. v. Turkey* (2009, ECtHR) which is a complementary judgement of the above *Demir and Baykara v. Turkey* Case. Bu using the same methodology, the Court extends its interpretation of freedom of association to the right to collective action.

Among the developments regarding the influence of international conventions on fundamental rights and freedoms, including social rights, the most significant one is the introduction of the constitutional complaint system to the Constitutional Court by the individuals. This process is introduced in order to reduce the number of applications to the European Court of Human Rights with claims of violations of fundamental rights and freedoms. This way, the Constitutional Court hears such claims as the final domestic remedy to be exhausted before applying to the European Court of Human Rights.[13]

As a result of the above-indicated points, it becomes clear that Turkey recognises the European Court of Human Rights as the essential supervisory body regarding fundamental rights and freedoms, including social rights. The collective complaint procedure of the Revised European Social Charter and the United Nations Committee of Economic, Social and Cultural Rights as a way of communicating individual claims are not recognised by Turkey and their relevant Protocols are not signed or ratified. Therefore, there seems to be an absence of an effective international remedy which merely focuses on social rights and which actually accepts individual complaints.

## 19.5 Social Rights in Ordinary Legislation

The ordinary legislation on social rights is a rather controversial issue in Turkey. The existing 4857 numbered Labour Act of 2003 falls short in satisfying all groups of workers. Article 4 of this Act excludes the following workers groups from the scope of application:

12 *Demir and Baykara v. Turkey*, no. 34503/97, § 86, ECHR 12.11.2008.

13 Cem Duran Uzun, "Anayasa Mahkemesine Bireysel Başvuru Yolu: Başlarken Beklentiler ve Riskler," *Çankaya University Journal of Law* 9(1) (May 2012): 78-79.

a. Sea and air transport activities,
b. In establishments and enterprises employing a minimum of 50 employees (50 included) where agricultural and forestry work is carried out.
c. Any construction work related to agriculture which falls within the scope of family economy,
d. In works and handicrafts performed in the home without any outside help by members of the family or close relatives up to 3rd degree (3rd degree included),
e. Domestic services,
f. Apprentices, without prejudice to the provisions on occupational health and safety,
g. Sportsmen,
h. Those undergoing rehabilitation,
i. Establishments employing three or fewer employees and falling within the definition given in Article 2 of the Tradesmen and Small Handicrafts Act.

Concerning collective labour rights, a distinction shall be made between workers and public servants. In November 2012, a new collective Labour Rights Act of 6356 came into force, as a result of establishing compliance with the 2010 Constitutional amendments. Although there appears to be improvements, the previous controversial issues, including the double threshold requirement for concluding collective agreements, which were also subjected to international criticisms, are not satisfied with this new Act. In this sense, certain provisions of this Act appear to be against the collective labour rights provisions of the Constitution and only a few were found unconstitutional by the Constitutional Court, none of which included the provisions on the threshold requirements for concluding collective agreements.[14]

The problem of collective labour rights of public workers, on the other hand, is an even more complicated issue. For years, Turkey has been criticised for its laws and regulations regarding public servants by many international organisations, including the ILO and the European Committee of Social Rights and was convicted by the European Court of Human Rights.[15] This however did not alter Turkey's position regarding the issue, although Constitutional amendments were made. In the light of the respective Constitutional provisions and Article 90 of the Constitution, it will be safe to say that there are serious violations of collective labour rights of public servants, particularly as a result of an absence of a distinction between different levels of public servants.

14 "Anayasa Mahkemesi, 6356 sayılı Sendikalar ve Toplu İş Sözleşmesi Kanunu'nun m.25/4, 5; m.60/6 ve m.62/1 hükümlerindeki bazı ibarelerin Anayasaya aykırı olduğuna ve iptaline karar vermiştir." MESS, accessed December 25, 2014, <www.mess.org.tr/ti.asp?eid=5199&icid=0>.

15 *Demir and Baykara v. Turkey*, no. 34503/97, ECHR 12.11.2008; *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, ECHR 06.11.2009.

## 19.6 Justiciability of Social Rights

The issue of justiciability of social rights is assessed by various legal scholars in Turkey. As previously stated, a distinction shall be made between positive social rights and negative social rights. Positive social rights are subject to the limitation of Article 65 of the Constitution. The fact that these rights are regulated under the Constitution does not make them directly justiciable. In order for them to be justiciable, they shall be regulated by law and not merely by the Constitution.

The negative social rights, together with the positive social rights which are also regulated by law, are justiciable before ordinary courts. There is not an original mechanism for hearing disputes arising from social rights. The only specific characteristic of the Turkish judicial system regarding social rights is that labour and social security disputes, whether individual or collective, are heard before the Labour Courts and Social Security Courts, the former specialised in the area of labour law and the latter in social security law. The role of the judge, whether an ordinary courts judge or a labour court judge, is to resolve individual cases and bring laws which it finds unconstitutional before the Constitutional Court. Since the cases are filed and heard at individual level, the courts provide resolution and remedy only for the individual sufferer. These judgements do not have general effect.

Although the social rights cases filed before the national courts are subject to the same procedure as any other dispute, the most successfully brought social rights cases are generally regarding trade union rights which are supported through public voices and mass actions. In fact, the national history shows that the masses, from time to time, even have effect on the legislative, preventing or promoting a legislative action. The most historically significant one is the Great Workers' Resistance of 15-16 June 1970 against a legislation that infringed freedom of association, in which thousands of workers throughout Turkey participated. The legislation which had passed was brought before the Constitutional Court, which annulled the same in favour of the workers' demands.

## 19.7 Institutional Guarantees of Social Rights

All three functions of the state, i.e. the legislative, the executive and the judiciary, have a role in guaranteeing social rights in Turkey. Among these, the primary institutional guarantee of social rights is naturally the judiciary, which actually acts within the scope of legislative acts. Article 90 of the Constitution generates an even more essential guarantee and provides a means of direct applicability of international conventions on fundamental rights and freedoms by the national courts.

Beside the national ordinary courts and the labour courts, another special institution created particularly for the protection of social rights is the Economic and Social Council. This Council is a consultative body founded for the purpose of determining common views by realising social reconciliation and cooperation and a permanent environment in creating economic and social policies. Since this Council is merely a consultative body, it is not perceived as a significant institution of the state and it may not be considered effective because it falls short in even meeting at a regular basis as determined under the relevant legislation. It is currently inefficient and does not serve its purpose.

## 19.8 Social Rights and Comparative Law

The Turkish legal system on social rights is highly influenced by the European Union legislations, as a consequence of Turkey's accession process. The Labour Act, despite its deficiencies, is adopted as part of Turkey's accession policy and, although it does not serve its purpose in practice, the Economic and Social Council can be referred to in terms of being an institution that is inspired by the EU. Furthermore, the international conventions on social rights, which Turkey has signed and ratified, establish the foundations of the principles stipulated in the Constitution. Despite the fact that it is only recently becoming more frequent, domestic courts have a tendency to refer to judgements of international bodies, particularly the European Court of Human Rights and the European Social Charter.[16] This current trend is a result of a training programme for the judges on international instruments and judgements that have direct effect on the Turkish legal system. However, there are hardly any judgements where the domestic courts go beyond referring and actually quote a judgement or apply directly under Article 90 of the Constitution an international convention on fundamental rights and freedoms, including social rights.

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# 20 Social Rights in the USA

*Francesca Bignami & Carla Spivack*[*]

*This report uses the definition of "social rights" in "The Toronto Initiative for Economic and Social Rights," and focuses on two of these rights which have been litigated in the United States: the right to social security, at the federal level, and the right to education at the state level. We note that the U.S. Constitution does not expressly recognize any of the social rights listed in the introduction to this national report and that U.S. courts are generally skeptical about protecting social rights. The limited exception to this skepticism appears in the imposition of certain requirements that states protect the indigent from discrimination, at least with respect to the exercise of "fundamental rights" like the right to travel. All fifty state constitutions guarantee the right to education to varying degrees, although only some deem it a fundamental right. While some state courts consider challenges to educational schemes to be non-justiciable, and defer to the legislature, others have heard such cases, most of which are based on equal protection or educational quality rationales. We conclude, however, that the United States is likely not in total compliance with the education component of the International Covenant on Economic, Social, and Cultural Rights.*[1]

## 20.1 Introduction

Since there is no generally accepted definition of social rights under either international or U.S. law, this report begins from the definition employed in the academic project "The Toronto Initiative for Economic and Social Rights" (TIESR).[2] This project compares the existence and enforcement of economic and social rights in constitutions throughout the world and has identified seventeen separate economic and social rights. In the social rights category are:

1. The right to social security not related to employment
2. The rights of children
3. The right to health care
4. The right of access to land

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* George Washington University Law School. Oklahoma City University School of Law.

1 DOI: http://dx.doi.org/10.5131/AJCL.2013.0036.

2 *See* Courtney Jung, Coding Manual: A Description of the Methods and Decisions Used to Build a Cross-National Dataset of Economic and Social Rights in Developing Country Constitutions (2010), *available at* <www.tiesr.org/TIESR%20Coding%20Manual%208%20March%202011.pdf>.

5. The right to housing
6. The right to food and water
7. The right to education
8. The right to development
9. The right to a safe or healthy environment
10. The right to state protection of the environment

These rights overlap significantly with those identified in another large-scale academic initiative, The Comparative Constitutions Project[3] and is largely an elaboration of the social rights guaranteed in the International Covenant on Economic, Social, and Cultural Rights. As reported by the TIESR, these rights are not expressly guaranteed under the U.S. Constitution; only a few of them are expressly guaranteed under the constitutions of the fifty U.S. states. We have therefore decided to focus our report on two sets of rights, which have been at the heart of some of the most significant American debates in the area of social rights and which are afforded some measure of constitutional protection. At the federal level, we examine the right to social security and the material goods necessary for subsistence, which is indirectly (and fairly minimally) protected under the Fourteenth Amendment to the U.S. Constitution. At the state level, we examine the right to education, which is recognized in all fifty state constitutions to some extent and has been the object of a significant amount of litigation in the courts.

## 20.1 Social Rights in National Legal Scholarship

> How does the national legal scholarship see the question of protection of social rights?
> Is the need to protect social rights questioned?
> Are social rights perceived as a different from other types of rights?
> Are social rights perceived as limitations or threats to the "first-generation" rights?
> hat are the most important questions of social rights protection discussed by the national legal scholarship?
> What do you consider as the most original contribution of your national legal scholarship to the study of social rights?

Although it is difficult to generalize, both because of the diverse nature of social rights and the variety of approaches that characterize American academia, American legal scholarship is on the whole skeptical of protecting social rights through constitutional law. During the

3 *See* comparitve constitutions project, <http://comparativeconstitutionsproject.org> (last visited October 18, 2013).

1960s and the early 1970s, there were a few prominent members of the legal academy who advocated including welfare rights in the Fourteenth Amendment, as part of the right of equal treatment and the right to government respect for "life, liberty, or property" (so-called "substantive" and "procedural" due process).[4] This coincided with both the heyday of the progressive Warren Court and the height of the welfare rights social movement. Scholarly interest in the topic, however, stalled in the 1980s and the 1990s, again in tandem with the political and legal climate of the times – this time a conservative Supreme Court and an increasingly right-leaning political culture, epitomized by the repeal in 1996 of the Aid to Families with Dependent Children Act, one of the pillars of the American welfare state. As the legal historian William Forbath put it, writing in 2001:

> [L]ike Banquo's ghost, the idea of constitutional welfare rights will not die down, but it is not exactly alive, either. No fresh or even sustained arguments on its behalf have appeared for over a decade; only nods and glancing acknowledgments. Some liberals, like Ronald Dworkin, now use the idea to affirm their steely distance from heedless activism and free-form interpretive methods; poverty has become the paradigmatic social wrong they would not dream of viewing as a constitutional wrong.[5]

Over the past decade, there has been renewed interest in the subject, at least in part because of developments in comparative constitutional law and the importance of social rights in the jurisprudence of constitutional courts in other parts of the world.[6] Interestingly, however, even scholars on the liberal end of the political spectrum have sounded a fairly cautious note when considering the arguments for social rights in American constitutional law. Important examples of this attitude can be found in two fairly recent and influential monographs by Mark Tushnet and Cass Sunstein.

In *Weak Courts, Strong Rights*, Mark Tushnet suggests that constitutional courts, including the U.S. Supreme Court, can effectively and legitimately protect social rights by pairing a

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4 *See* Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); *see generally* Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L. J. 1245 (1965).

5 William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1825 (2001).

6 *See, e.g.*, Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006); Katharine Young, *Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States*, 4 NORTHEASTERN U. L. J. 323 (2012).

strong constitutional commitment to welfare rights with a weak form of remedy for the violation of those rights.[7] He identifies three types of so-called "weak-form review," which contrast with the injunctive remedies traditionally associated with judicial review in American constitutional law and which accord the legislative and executive branches a substantial role in constitutional interpretation and lawmaking: a mandate to interpret statutes consistent with fundamental rights (New Zealand); a mandate to interpret statutes consistent with fundamental rights and, if not possible, to issue a declaration of "incompatibility," leaving it to the legislative branch to decide whether to repeal the offending piece of legislation (the United Kingdom); and a "dialogue" model in which judgments of a constitutional court can be construed not as a definitive statement on the constitutionality of statutes but as an invitation to the political branches to respond with better justifications or future action. Tushnet argues that the experience of South Africa's Constitutional Court, which has held in favor of social rights, but has allowed the political branches considerable discretion in how it designs public programs to accommodate those rights, suggests that an approach that combines welfare rights with weak-review is a productive one that warrants consideration in the United States.[8]

In *The Second Bill of Rights*, Cass Sunstein argues, based on the intellectual history and political and institutional developments of the New Deal, that social and economic rights are a fundamental part of the American political tradition.[9] He highlights Roosevelt's commitment to social and work-based rights, outlined most exhaustively in Roosevelt's 1944 speech on "a second Bill of Rights," and canvasses the various New Deal programs which gave effect to this vision and which have persisted, in one shape or another, to this day. These rights, in particular the right to some type of social security, the right to education, and the right to be free from monopoly form part of what Sunstein calls America's "constitutive commitments."[10] By constitutive commitment, however, Sunstein means something that falls short of a constitutional right that can be enforced by the Supreme Court. It is a form of right and duty that is recognized by popular consensus to be fundamental to the political community and therefore cannot be eliminated by a simple legislative vote, but nevertheless cannot serve as the basis for challenging or demanding government action before the courts. They are values that should guide the democratic process, rather than explicit rights that can be invoked before the courts, at least not rights that go any

7 Mark Tushnet, Weak Courts, Strong Rights (2008); *see also* Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1918 (2004).

8 For a recent challenge to this position, albeit in the comparative and not American context, *see* David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L. J. 189 (2012).

9 Cass Sunstein, The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need it More than Ever (2004).

10 *Id.* at 99-100.

further than the existing and very limited Supreme Court jurisprudence discussed in the next section. Although, like Tushnet, Sunstein writes favorably of the South African experience, he does so because of the Constitutional Court's use, in Tushnet's words, of weak-form judicial review and, at least for the time-being, he does not appear to believe that such an approach would be consonant with American constitutional culture.[11]

Although there are certainly many reasons for this academic caution, at least one seems to be a heightened sensitivity to the institution limitations of the judicial branch, at least as compared to other legal cultures. There are two types of limits that figure in the scholarship. The first is a pronounced concern for what the constitutional scholar Alexander Bickel called the counter-majoritarian difficulty: the danger that the least democratic branch of government, namely the Supreme Court, will override the will of the people as expressed through popular elections and the work of the legislature.[12] In the realm of social rights, given the broad fiscal implications of guaranteeing certain minimum entitlements to housing, healthcare, food, and other elements of subsistence, the counter-majoritarian difficulty has loomed large and most scholars have concluded that the resource allocation decisions at the core of social welfare programs are best left to democratically elected legislatures. The second type of limit is technical. Perhaps because of the extensive powers and activism of American courts, especially during the 1960s and 1970s with court-supervised desegregation of public institutions, there is a substantial literature pointing to difficulties of making policy through litigation and to the limited capacity of courts to effect the broad and complex social change often called for in their decisions.[13] In these analyses, the legislative and executive branches are generally pitted as the most appropriate venues for policymaking given their ability to dedicate the resources, political will, and technical expertise often necessary to accomplish large-scale social, political, and economic change. These limitations, of course, are particularly pronounced in the area of social welfare, which is further removed from the traditional realm of courts as compared to areas such as, say, equal rights or criminal procedure, and since the success of entitlements programs is closely tied to their ability to finely calibrate basic needs, fiscal resources, and human incentives so that such programs are sustainable and politically feasible in the long-run. Both the democratic legitimacy and effectiveness concerns are evident in the recent American scholarship on social rights, including the two monographs presented earlier.[14]

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11 *Id.* at 229.

12 *See generally* Alexander Bickel, The Least Dangerous Branch (1962).

13 *See generally* Gerald N. Rosenberg, The Hollow Hope (1991); Donald L. Horowitz, The Court and Social Policy (1977).

14 *See* Sunstein, *supra* note 9, at 210, 228; *see generally* Tushnet, Strong Courts, *supra* note 6.

## 20.3 Constitutional Protection of Social Rights

Does the national Constitution of your country provide for protection of social rights?

What are the rights protected?

How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family, or a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?

How is the debtor of social rights defined? Is it the State, public authorities, public bodies, private bodies?

What is the content of the rights? What are the obligations of the legislator? What are the obligations of the administration? What are the obligations of other actors?

Does the national Constitution differentiate the scope and methods of protection of social rights and other rights?

Does the normative structure of constitutional social rights vary? Is it possible to distinguish different types of constitutionally protected social rights?

Is there a constitutional mechanism of protection vis-à-vis the legislator? How does it operate? Are there any an instruments that ensure protection against the inaction of the legislator?

How do you evaluate the efficiency of social rights protection offered by the Constitution and the constitutional justice?

What do you consider as the most original contribution of your national Constitution to the protection of social rights?

The U.S. Constitution does not expressly recognize any of the social rights listed in the introduction to this national report. Furthermore, even though in theory, social rights could have been recognized as a form of "liberty" under the Fourteenth (and Fifth) Amendment's Due Process Clause, the Supreme Court has never done so. The furthest that the Court has gone is to find that in some cases, the states must afford special treatment for the indigent because the failure to do so would lead to impermissible discrimination under the Equal Protection Clause: in certain contexts the state is required to provide assistance to poor, or at least is barred from imposing certain fee requirements, in order to enable them to exercise certain core rights connected to the right to a fair trial, voting, and the right to travel. These holdings are based on the Equal Protection Clause, given the discrimination against the poor that would result if such requirements were imposed or remedial measures refused, as well as the other fundamental right at stake in the case. These cases were mostly decided in the 1960s, by the liberal Warren Court, and many believed that they boded well for a general right to subsistence, but, by the early 1970s, the Court had become far less receptive to welfare rights, and there have been very few developments in the case law since that time.

The line of cases in the fair trial area begins with *Griffin v. Illinois*.[15] That case involved an Illinois law that required defendants appealing their criminal conviction to pay for a copy of their trial transcript. The Court held that by imposing a fee, which the indigent were not in a position to pay, the state "discriminates against some convicted defendants on account of their poverty" and denies their citizens "equal justice";[16] the state, therefore, was under a duty to provide the transcript to the indigent at no cost. This was followed by *Douglas v. California*, in which the Court found, based on the right to a fair trial ("procedural" due process) and equal protection, that the indigent had a right to be provided with counsel on their first appeal from a criminal conviction.[17] In 1971, the Court extended this logic to the civil context. In *Boddie v. Connecticut*,[18] it held that it was a denial of due process to require welfare recipients, seeking a divorce in state court, to pay fees and costs in order to obtain access to the judicial process. This holding, however, rested on the fundamental interest of marriage and the monopoly of the state courts over dissolution of marriage, and therefore it has been extended in some civil contexts[19] but not others.[20]

The lead case in the voting rights area is *Harper v. Virginia State Bd. of Elections*.[21] There the Supreme Court struck a poll tax (voters were required to pay $ 1.50 to cast their ballot) imposed by the State of Virginia. The holding was based both on the Equal Protection Clause and the finding that the right of suffrage in state elections was a "fundamental political right," protected under the previous case law of the Court even though nowhere expressly guaranteed in the Constitution. The Court found that the poll tax discriminated between those able to pay the fee and those unable to pay the fee and that discriminating between voters on such grounds "as a measure of a voter's qualifications is to introduce a

15 351 U.S. 12 (1956).

16 *Id.* at 17-19. In a number subsequent cases, the Court has required that other types of fees related to the criminal process be waived for indigent defendants seeking to appeal their convictions. *Burns v. Ohio*, 360 U.S. 252 (1959); *Douglas v. Green*, 363 U.S. 192 (1960); *Smith v. Bennett*, 365 U.S. 708 (1961); *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Long v. District Court*, 385 U.S. 192 (1966); *Gardner v. California*, 393 U.S. 367 (1969).

17 372 U.S. 353 (1963). Some consider the Court's famous decision in *Gideon v. Wainwright* to be part of this doctrinal trajectory. There the Court found a constitutional right to have the state pay for defense counsel in criminal trials, but the Court's finding rested on the requirements of due process and what it considered essential to a fair trial, and not also on the Equal Protection Clause.

18 401 U.S. 371 (1971).

19 *Little v. Streater*, 452 U.S. 1 (1981) (right of indigent to have state pay for blood grouping test in paternity suit); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (right of indigent parent to state-appointed counsel in state proceedings seeking the termination of parental status).

20 *United States v. Kraus*, 409 U.S. 434 (1973) (no right of indigent to have filing fees waived to obtain discharge of his debts in bankruptcy court); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (no right of indigent to have filing fees waived to obtain court review of state administrative agency decision reducing or terminating public assistance).

21 383 U.S. 663 (1966).

capricious or irrelevant factor."[22] Several years later, this line of reasoning was used to strike state laws that imposed fees, this time not on voters but on individuals wishing to stand as candidates for office.[23]

The final category of equal protection cases, attached to the right to travel, touches upon social rights more directly than the either the fair trial or voting rights cases. The principal federal welfare statute of the time, the Aid to Families with Dependent Children (AFDC) Act, relied entirely on state implementation and many states imposed a minimum residence requirement before individuals could apply for benefits, so as not to become magnets for the poor. In *Shapiro v. Thompson*,[24] the Court held that the one-year waiting period written into the laws of a number of states was unconstitutional based on the Equal Protection Clause and the right to interstate travel, which, like the right to suffrage, was not recognized in a specific constitutional provision but was well established the jurisprudence of the Court. In this situation, the discrimination was not between rich and poor, but between indigents that had and had not resided in the state for one year, the former of which qualified for benefits and the latter of which did not. The Court found that the policy justifications offered by the states for the discrimination, many of which were specifically designed to discourage the poor from traveling to the state so as to reduce the burden on the state budget, were constitutionally impermissible because they burdened the constitutional right to travel. On these same grounds, the Court in a later case struck a one-year residence requirement for receiving nonemergency medical care.[25]

In the early 1970s, the Court rejected a number of attempts to extend this equal protection law to areas not associated with historically important fundamental rights, and there have been very few developments in the constitutional law on social rights since then. In *Dandridge v. Williams*,[26] the litigants claimed that the State of Maryland's rules for administering (AFDC) benefits were unconstitutional because they imposed an absolute maximum on welfare grants, thereby discriminating between children in large families and children in small families (those in large families could expect to receive lower per capita benefits under the program) and depriving them of the satisfaction of their basic needs. Absent the connection with the right to travel, however, the Supreme Court reviewed the Maryland regulation under the permissive rational basis test and found that the state's justification for the regulation was plausible, and therefore, the statutory maximum was permissible.

22 *Id.* at 668.
23 *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974).
24 394 U.S. 618 (1969).
25 *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).
26 397 U.S. 471 (1970).

In *San Antonio School District v. Rodriguez*,[27] the litigants challenged a state funding scheme for education based on local property taxes, which was (and is) common to most states, and which led to far higher expenditure per student in rich localities. Although the Court recognized that the state scheme did lead to unequal expenditure for students residing in different districts, it again used the rational basis test to find that the discrimination was justified by the state's goal of promoting local control over education. In doing so, it expressly declined to engage in the more searching scrutiny of the earlier cases because it held that there was no absolute deprivation of the benefit, since all children received some education, and that there was no fundamental right to education. In *Maher v. Roe*, the Court rejected on similar grounds a claim to state-funded abortions for indigent mothers.[28]

To consider briefly the question of why, outside of these limited areas, the Supreme Court has been hostile to social rights, there are at least three explanations in the scholarly literature. Cass Sunstein has put forward a political explanation based on the changing composition of the Supreme Court: in the late 1960s the Court was on the verge of recognizing social and economic rights but it was stopped in its tracks by the appointment of a number of conservative justices after the election of the Republican President, Richard Nixon.[29] The legal historian William Forbath has suggested that the discourse of the welfare rights movement, which was responsible for bringing many of the important cases to the Supreme Court, ran counter to a longstanding (American) republican tradition of work-based citizenship, and that political and legal advocacy framed in terms of work, both opportunities to work and compensation for work, might be more successful.[30]

Lastly, the political scientist Elizabeth Bussiere has argued that the reasons are to be found in the previous jurisprudence of the Court and the doctrinal legacy of *Lochner*.[31] Her thesis is as follows: As is well known, in *Lochner*, the Supreme Court found that the "life, liberty, or property" protected by the Constitution included "liberty of contract" and struck a state law regulating working time as an interference with liberty of contract. This conservative jurisprudence, however, increasingly came under political pressure during the New Deal and, in 1938, the Supreme Court reversed course and declared that it would henceforth presume that legislation impinging upon economic rights was constitutional and would

27 411 U.S. 1 (1973).

28 432 U.S. 464 (1977).

29 **SUNSTEIN**, *supra* note 9, at 162-71.

30 William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 **FORDHAM** L. **REV**. 1821, 1825 (2001).

31 Elizabeth Bussiere, (Dis)Entitling the Poor: The Warren Court, Welfare Rights, and the American Political Tradition 99-101 (1997); *see also* Elizabeth Bussiere, *The Supreme Court and the Development of the Welfare State: Judicial Liberalism and the Problem of Welfare Rights*, *in* Supreme Court Decision-Making: New Institutionalist Approaches (Cornell W. Clayton & Howard Gillman eds., 1999).

engage in more exacting judicial review only in the case of rights protected by the Bill of Rights, rights affecting the integrity of the democratic process, and rights of "discrete and insular" minorities which, if unprotected, might be excluded from the democratic process.[32] This put into place a "double-standard" of judicial review, a permissive standard of review for government action that infringed upon economic rights and a more exacting one for government action that infringed upon constitutionally enumerated rights and rights essential to the democratic process. When, in the late 1960s, the Warren Court expanded legal guarantees for welfare recipients, it did so not on the basis of a fundamental right to welfare – an economic right which it found received virtually no protection under the post-*Lochner* "double-standard" – but on a variety of alternative constitutional and statutory grounds that have proven to be unsatisfactory substitutes.

This section now turns to state constitutional law and the right to education. Although the U.S. Supreme Court has held that education is not a fundamental (federal) right,[33] all fifty states guarantee, to some extent, the right to education in their constitutions.[34] The language of these provisions varies. At a minimum, most call for a system of "free public schools."[35] Many go into more detail, adding such language as "general, suitable and efficient,"[36] "thorough and uniform,"[37] "uniform, efficient, safe, secure, and high quality,"[38] "quality basic education,"[39] "free from sectarian control," and "nonsegregated and nondiscriminatory."[40] The Florida constitution goes so far as to specify class size limits.[41] The state of Mississippi provides the lowest level of protection for education, making the state's provision and funding of schools discretionary.[42] In general, state courts have construed the words "thorough" and "efficient" to require basic quality and equality in the educational experience of the children of the state.[43]

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32 *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938).

33 *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973) (holding that for a right to be fundamental, it must be protected either explicitly or implicitly in the text of the Constitution, and that such protection does not exist for education as a right).

34 Roger J. Levesque, *The Right to Education in the United States: Beyond the Lure and Lore of the Law*, 4 ANN. SURV. INT'L & COMP. L. 205 (1997).

35 *See, e.g.*, ARK. CONST. art. 14, § 1; COLO. CONST. art. 9, § 2; GA. CONST. art. 8, § 1.

36 ARK. CONST. art. 14, § 1.

37 COLO. CONST. art. 9, § 2.

38 FLA. CONST. art. 9, § 1.

39 VT. STAT. ANN. tit. 16, § 1.

40 IND. CODE. § 2-33-1-1.

41 FLA. CONST. art. 9, § 1(a) (1)-(3).

42 "It shall be the duty of the Legislature to encourage by all suitable means, the promotion of intellectual . . . improvement, by establishing a uniform system of free public schools. The legislature may, in its discretion, provide for the maintenance and establishment of free public schools." MISS. CONST. art. VIII, § 201.

43 Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory*, 32 GA. L. REV. 543, 572-77 (1998).

In interpreting these various constitutional provisions, some state courts have found education to be a fundamental right while others, following the Supreme Court's lead, have declined to do so.[44] The states that have determined education to be a fundamental right subject any discriminatory practices in education to strict scrutiny, the highest level of scrutiny available to courts to analyze the disparate treatment of groups of similarly situated people with respect to a fundamental right. By way of contrast, many state courts construe the legislature's power under broad plenary grants such as "to establish and maintain a system of public education" as precluding the judicial branch from intervening in the decision making process at all.[45] State constitutions which use the strongest language to protect education and which call it a fundamental right do not necessarily in practice offer greater protection for it than states which do not use this language.[46]

## 20.4 Protection of Social Rights under Other Constitutional Rules and Principles

Are there other constitutional or jurisprudential principles used as tools for the protection of human rights?

> Is there a protection offered by the following constitutional principles:
> protection of legitimate expectations,
> protection of vested rights,
> precision of legislation,
> non-retroactivity of legislation,
> due process, and
> other general constitutional principles?

Probably more significant than the (federal) substantive rights described above are the (federal) procedural rights established by the Warren Court for recipients of public benefits. In *Goldberg v. Kelly*, the Court decided that welfare (AFDC) benefits, and by extension other types of social benefits, were "property" deserving of procedural protection under the Due Process Clause.[47] The Court found that once an individual establishes his or her eligibility for benefits, the government must abide by the Due Process Clause in terminating

44 *See, e.g.*, *Lujan v. Colorado*, 649 P.2d 1005, 1022 (Colo. 1982).

45 Allen W. Hubsch, *The Emerging Right to Education under State Constitutional Law*, 65 TEMPLE L. REV. 1325, 1328 (1992).

46 Roger J. Levesque, *The Right to Education in the United States: Beyond the Lure and Lore of the Law*, 4 ANN. SURV. INT'L & COMP. L. 205, 217 (1997).

47 397 U.S. 254 (1970).

those benefits. The procedural guarantees afforded by the Due Process Clause are not absolute but depended on the "grievousness" of the loss. In a subsequent case, *Mathews v. Eldridge*, the Court said that it would weigh three different factors to determine the procedure due:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirement would entail . . . .[48]

These seminal cases have been followed by a number of others involving the issue of when there is a "legitimate claim of entitlement"[49] giving rise to a property interest and, once a property interest is recognized, what type of procedure is due. In the social rights arena, it is clear that once an individual has been found to qualify for a benefit, whether that be housing, medical care, subsistence payments, or food vouchers, he or she has a right to procedure before (and after) the state can terminate the benefit. The nature of that procedure, however, varies considerably: in the seminal cases, the Supreme Court decided that termination of subsistence (AFDC) benefits requires a pre-termination oral hearing at which the individual could be represented by an attorney (but not a state-funded attorney), while termination of medical disability benefits only requires the agency to build a paper record, to which the recipient has an opportunity to respond in writing, without an oral hearing. These procedural due process rights are significant, especially because they extend to most government social assistance programs.

By contrast with procedural due process, non-retroactivity is of little use to recipients of government benefits. The doctrine of non-retroactivity (sometimes spoken of in conjunction with vested rights and legitimate expectations, neither of which, however, constitute separate legal grounds) is relevant when benefits being paid are revoked. Benefits granted under a government scheme can be threatened under a number of circumstances: (1) a wrong benefit determination was made under the existing law and regulations and the government agency wishes to recoup monies already paid or to offset the amount against future payments; (2) a government agency issues a regulation that reduces or eliminates benefits in the future or with retroactive effect; (3) the legislature enacts a law that reduces or eliminates the benefit, often with retroactive effect in the sense that worker contributions were paid

48 424 U.S. 319, 335 (1976).

49 *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

to a social security scheme with the expectation of a certain level of future benefits, which were then disappointed by a change in the law. In the case of an individualized agency determination (1) or a congressional law (3), non-retroactivity principles are of no assistance. Although the government statute might limit recoupment of the benefit to, say, cases of fraudulent behavior, as opposed to agency mistake, at the constitutional level, apart from the procedural due process rights discussed above, there is no right related to substantive fairness that will assist the individual.[50] In the case of legislative changes to social security programs, the Court has found that individuals that participate in such programs do not acquire a property right, but rather are recipients of "public benefits." As a result, legislation is scrutinized under a lax standard of "arbitrariness" (which economic legislation of this nature is almost certain to satisfy) and neither substantive due process and takings law[51] nor equal protection law,[52] which considers the difference in treatment between different classes of beneficiaries, affords protection to individuals. Only in the case of agency regulations may constitutional concern for non-retroactivity and preserving expectations as to what is and is not owed by the federal government be of some aid to individuals. In *Bowen v. Georgetown University Hospital*,[53] the Court examined an administrative rule setting down the formula for calculating wages for purposes of calculating overall reimbursement to medical providers under the federal old-age health insurance program (Medicare). The rule applied to services that had been provided prior to the issuance of the rule and that had already been reimbursed according to a different formula. Because the rule changed the amount of the benefit, presumably requiring that medical providers repay the amounts in excess of the new benefit formula, the Court saw this as a particularly troubling form of retroactivity and found that the agency had exceeded its statutory power in promulgating the rule. The finding was based on both the terms of the congressional statute delegating rulemaking power to the agency and a canon of statutory construction containing a presumption against retroactivity. Based on *Bowen*, an agency rule retroactively reducing welfare and other forms of subsistence benefits, without strong authorizing language in the statute, would likely fail judicial review.

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50 *See generally* Marie A. Failinger, *Contract, Gift or Covenant? A Review of the Law of Overpayments*, 36 LOY. L. REV. 89 (1990).

51 *Flemming v. Nestor*, 363 U.S. 603 (1960). On the differences between the protection of property under procedural due process, substantive due process, and takings law, *see generally* James Y. Stern, *Property's Constitution*, 101 CAL. L. REV. 277 (2013).

52 *Richardson v. Belcher*, 404 U.S. 78 (1971).

53 488 U.S. 204 (1988).

## 20.5 Impact of the International Protection of Social Rights

Did your state ratify international treaties that pertain to social rights? Are they directly applicable in your domestic legal order?

Do these treaties have an impact on the national legal system? Did they trigger any changes in national legislation or practice?

Does the case law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights?

In particular, did the case law of the European Court of Human Rights and other regional human courts have an impact on national law in the field of social rights?

What are the most important social rights cases brought from your country to international rights protecting bodies?

What are the lessons you draw from the international litigation (pertaining to social rights) started by applicants from your country?

International law on social rights has very little, if any, effect on U.S. law.[54] The United States has signed, but not ratified, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. As a member of the United Nations and as a party to the International Covenant on Civil and Political Rights (ICCPR), the United States' record on rights is subject to review by the Human Rights Committee (the compliance body established under the ICCPR) and the Human Rights Council (responsible for the UN's Universal Periodic Review of states' human rights records). Social rights, however, have not yet been squarely addressed in these reviews, at least in part because they are only tangentially included in the ICCPR (incidental to the right of equal protection) and because the United States contests that the social and economic rights listed in the Universal Declaration of Human Rights are part of international customary law.

## 20.6 Social Rights in Ordinary Legislation

To which extent does the ordinary legislation in your country ensure the protection of social rights?

Is this legislation in conformity with the national Constitution and the international instruments ratified by your country?

Are there any original legislative tools or mechanisms of protection of social rights created in your country?

54 *See generally* Young, *supra* note 6, at 336-38.

There are a multitude of federal statutes that protect social rights in the United States. They are generally believed to have been introduced in three waves: during the New Deal, with legislation such as the Social Security Act which provides for old-age pensions, unemployment insurance, and assistance to needy widows and children; as part of Lyndon B. Johnson's Great Society, with programs such as Medicare and Medicaid, which afford medical care to the old and the poor; and most recently, the Affordable Care Act which guarantees universal healthcare for all citizens.[55] However, given the absence of social rights in the U.S. Constitution and the United States' non-ratification of international instruments guaranteeing social rights, none of these statutes are designed to give effect to such rights.[56]

## 20.7 Justiciability of Social Rights

> Are social rights considered justiciable in your country? To which extent?
> What is the role of the judge?
> What are the practical effects of such justiciability?
> What are the most prominent examples of social rights cases successfully brought to courts by the litigants?

To address the justiciability issue, this section analyzes the right to education at the state level, which is a particularly vibrant area of social rights litigation. In both the civil law and the common law, to say that a right is justiciable means that an individual has a right to go to court and sue to enforce that right. A right has little meaning if it is not justiciable. Some constitutions or laws, however, may provide for "aspirational guarantees," which direct governments to implement certain measures or programs but which do not give individuals the right to sue for enforcement. Such a guarantee, for example, might appear in a treaty calling for an international right to peace and security, which does not contemplate an individual's cause of action to enforce it.[57] This is a particularly salient question in the matter of the right to education, because not all state constitutions refer to education as a right: some, as noted above, instead grant the legislature broad plenary grants over the area, such as granting them the power to "to establish and maintain a system of public education." Such language has led some state courts, also as noted above, to deem the

55 Lance Gable, *The Patient Protection and Affordable Care Act, Public Health, and the Elusive Target of Human Rights*, 39 J. L. MED. & ETHICS 340, 340-42 (2011).

56 Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 15, 23 (2005).

57 Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciablity in Colombia and South Africa*, 26 HARV. HUM. RTS. J. 179, 179 n. 2 (2013).

financing of public education a matter beyond the jurisdiction of the courts; in such instances, we would say that funding discrepancies among schools is non-justiciable. Such plenary language, however, does not always lead courts to defer to legislative decision-making; many state courts have heard education funding cases even when the state constitution contains this wording.

This section examines litigation over the following issues which arise in the context of education: discriminatory school funding, the education of juveniles in detention, the rights of homeless children, the children of undocumented workers, children receiving welfare, and the rights of disabled children.

### *20.7.1 Funding*

Under the Supreme Court's analysis of the Federal Constitution, the fact that state constitutions mention education suggests that it at least potentially has the status of a fundamental right under state law. Many states, however, have rejected the *Rodriguez* "explicit or implicit" test in this context.[58] If education lacks status as a fundamental right, discrepancies in state education funding are subjected to rational basis review, which has usually resulted in the upholding of state funding schemes.[59] Other states have found education to be a fundamental right and subjected discriminatory funding claims to strict scrutiny.

The issue of school funding has been litigated in all fifty states; some have experienced many years of litigation.[60] Many of the state cases dealing with the right to education have presented claims that school financing is unequal and discriminatory,[61] or that the state constitution requires that school funding be sufficient to provide a minimum level of educational quality for all students.[62] The difficulty of defining "minimum quality," however, has led many state supreme courts to defer to legislative decisions about what constitutes

58 Hubsch, *supra* note 45, at 1331.

59 *See, e.g.*, *Lujan v. Colorado*, 649 P.2d 1005, 1022-23 (Colo. 1982) (constitution and interpretive case law support implicit objective of local control of school financing system); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 788 (Md. 1983) (historical financing of public schools evidenced purpose of establishing local control over such schools); *Board of Educ. v. Nyquist*, 439 N.E.2d 359, 367 (N.Y. 1982) (state public school financing system ensured local control over educational expenditures and services in community), *appeal dismissed*, 459 U.S. 1138 (1983); *Board of Educ. v. Walter*, 390 N.E.2d 813, 820-22 (Ohio 1979) (applying local taxes to school financing system satisfies purpose of local control of education) (quoting *Wright v. Council of Emporia*, 407 U.S. 451, 478 (1972) (Berger, J., dissenting), *cert. denied*, 444 U.S. 1015 (1980)); *Olsen v. State*, 554 P.2d 139, 146-48 (Or. 1976) (objective of school financing system is to ensure control by local voters); *Buse v. Smith*, 247 N.W.2d 141, 150-55 (Wis. 1976) (constitutional provision that town and city taxes will be applied to local district education system is proof of objective of local control over school system).

60 John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2355 (2004).

61 Hubsch, *supra* note 45, at 1325.

62 *Id.*

an adequate education.[63] Other courts, however, have sustained equal protection or education quality claims and have delegated to the legislature the implementation of the judicial definition announced. The Washington Supreme Court, for example, has asserted that it has "ample power" to enforce state educational rights.[64]

Funding issues in state education cases arise because public schools are paid for by local property taxes, which results in better schools in districts with the highest property values. Most state courts, however, have held that poverty is not a suspect classification and that these funding schemes are therefore not subject to strict scrutiny.[65] Many courts have held that education in this respect is no different from other government services such as fire and police, which are also funded through local taxation and not subject to equal protection analysis.[66]

There are some notable exceptions to this trend, however: both the California and Wyoming courts have held disparate funding of education to trigger strict scrutiny analysis.[67] In the landmark case of *Serrano v. Priest*,[68] the California Supreme Court ruled that the quality of a child's education must be a function of the wealth of the state as a whole, not of the wealth of the school's local community.[69] The Court held that education was a fundamental right in California, and held that strict scrutiny would apply to the state's system of public school funding.[70] It then noted that the Supreme Court had already protected the right to vote and the right to defense in criminal cases from unequal protection based on wealth, and determined that education was a right deserving of the same level of protection.[71] It concluded the state's system of education financing discriminated against people on the basis of wealth in violation of the equal protection clause of the Federal Constitution.[72]

Some other state courts followed suit in strengthening the right to education. In 1972, the New Jersey Supreme Court ruled that state's system of school funding was unconstitu-

63 *See, e.g.*, *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981).

64 *Seattle School District v. State*, 585 P.2d. 71 (Wash. 1971).

65 *See, e.g.*, *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1019-22 (Colo. 1982) (wealth rejected as suspect classification); *Thompson v. Engelking*, 537 P.2d 635, 645-46 (Idaho 1975) (same).

66 *See, e.g., Robinson v. Cahill*, 303 A.2d 273, 283 (N.J.), *cert. denied*, 414 U.S. 976 (1973).

67 *Serrano v. Priest*, 487 P.2d 1241, 1250-55 (Cal. 1971) (school financing system based on district tax collection created suspect classifications where wealth differed between districts); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 334 (Wyo.) (unequal distribution of state funds to school districts on basis of wealth created unconstitutional suspect classification) (citing *Serrano*, 487 P.2d at 1250), *cert. denied*, 449 U.S. 824 (1980)).

68 487 P.2d 1241 (Cal. 1971).

69 *Serrano*, 487 P.2d at 1244.

70 *Id.* at 1257.

71 *Id.* at 1258.

72 *Id.*

tional based on the state's education mandate.[73] This approach became the new model for litigants pushing states to overturn unequal state funding of education.[74]

In 1979, the West Virginia Supreme Court declared that education was a fundamental right in that state, subject to strict scrutiny, and in passing sharply criticized the holding in *Rodriguez* with respect to the Federal Constitution: it observed that even the General Assembly of the United Nations "appears to proclaim education to be a fundamental right of everyone, at least on this planet."[75]

The Kentucky Supreme Court ruled in 1989 that the state's school funding system was unconstitutional because:

> Without exception, [witnesses] testified that there is great disparity in the poor and the more affluent school districts with regard to classroom teachers' pay; provision of basic educational materials; student-teacher ratio; curriculum; quality of basic management; size, adequacy and condition of school physical plants; and per year expenditure per student . . . . . The quality of education in the poorer school districts is substantially less in most, if not all, of the above categories.[76]

In 1993, Tennessee determined that its school funding system failed even a rational basis test. Recognizing a "direct correlation between dollars expended and the quality of education a student receives," the state Supreme Court found that funding inequity caused educational harm to students in economically disadvantaged districts.[77]

Implementing rights requires money; school funding based on local property taxes is inherently unequal. Some states have been willing to intervene in this issue, while others defer to the legislature.

### *20.7.2 Juveniles in Detention*

Many institutions for juvenile offenders in the United States fail to provide even basic educational services; in others, the classes that are available meet irregularly, fail to satisfy state-mandated minimum requirements for instructional time, and follow no coherent

73 *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973).
74 Dayton & Dupre, *supra* note 60, at 2365.
75 *Pauley v. Kelly*, 255 S.E.2d 859, 864 n. 5 (W. Va. 1979).
76 *Rose v. Council for Better Ed.*, 790 S.W.2d 186, 190 (Ky. 1989).
77 *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 144 (Tenn. 1993).

curriculum.[78] Yet these juveniles are not exempt from coverage of state constitutional guarantees of the right to education. In fact, this population is arguably in particular need of the state's education resources: juveniles in detention are much more likely to have learning disabilities than those in the overall population.[79] Among other things, jurisdictional confusion adds to their plight: in many states, it is unclear whether the state education agency or the department of juvenile justice has oversight of the education of children in detention.[80]

Judicial decisions and state correctional facilities offer little assurance of education to incarcerated youth. For example, Pennsylvania law provides that an expelled minor under the age of seventeen has a right only to very minimal education, about five hours per week, and one older than seventeen has no right to education at all.[81] Maryland's correctional statutes make no provision for the education of youth whatsoever.[82] And the Supreme Court of the State of Washington recently ruled that incarcerated children over the age of 18 have no right to basic education, holding that the state's "Basic Education Act" (requiring that all children between five and twenty-one years old have access to basic education) did not apply to incarcerated youth.[83]

### *20.7.3 Homeless Children*

The education of homeless children is another issue implicating the implementation of education as a right. Due to transportation, legal, social, bureaucratic and familial barriers, less than fifty percent of homeless children in the United States attend school.[84] To the extent that these barriers are part of the state apparatus, and to the extent that the state

78 Human Rights Watch, High Country Lockup: Children in Confinement in Colorado 46 (1997) (reporting observations of Human Rights Watch visit to facility and audit conducted by Colorado Division of Youth Services).

79 Harriet R. Morrison & Beverly D. Epps, *Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System*, 71 J. Negro Educ. 218, 220-21 (2002).; OPEN SOCIETY INSTITUTE, RESEARCH BRIEF NO. 2, Education as Crime Prevention 2-3 (1997), *available at* <www.prisonpolicy.org/scans/research_brief__2.pdf>.

80 *See* Bruce I. Wolford, Juvenile Justice Education: "Who is Education the Youth" 4 (2000), *available at* <www.edjj.org/Publications/educating_ youth.pdf>; Juvenile Justice Educational Enhancement Program, 2004 Annual Report to the Florida Department of Education 84 (2004), *available at* <www.criminologycenter.fsu.edu/jjeep/research-annual-2004.php>.

81 *Brian B. v. Commonwealth of Pennsylvania Dep't of Educ.*, 230 F.3d 582 (3rd. Cir. 2000) (citing 22 Pa. Code § 12.6(e)).

82 Michael Bochenek, *No Minor Matter: Children in Maryland's Jails*, Human Rights Watch, <www.hrw.org/reports/1999/maryland/Maryland-08.htm> (last visited Nov. 17, 2015).

83 *Tunstall v. Bergeson*, 5 P.3d 691, 697 (Wash. 2000).

84 H.R. CONF. REP. NO. 174, 100th Cong., 1st Sess. 93 (1987), *reprinted in* 1987 U.S.C.C.A.N. 441, 472; *see also* Jonathan Kozol, *A Reporter at Large, The Homeless and Their Children*, 63 New Yorker, Jan. 25, 1988, at 65, 80 (asserting that the "transient existence [of homeless children] cuts them from the rolls").

has failed to take measures to alleviate them, they implicate the state's enforcement of this right.

Legal barriers stem from state residency and documentation (for example immunization records) requirements for school attendance. Some school districts in which homeless shelters are located designate families as non-residents to prevent the children from attending school.[85]

In 1987, Congress passed the McKinney-Vento Act to address the problem of homelessness; Title VII of the Act addresses the problems of homeless children in enrolling in school and receiving an education. Its intent is "to ensure that all homeless children and youth have access to the same free, appropriate public education, including a public preschool education, as provided to other children and youth."[86] The Act was reauthorized as part of the No Child Left Behind Act of 2001.[87] The Act requires that each state educational agency establish an Office of State Coordinator for the Education of Homeless Children and Youth. This office is responsible for supervising the implementation of the Act, including "providing technical assistance, resources, coordination, data collection and overseeing compliance for all local educational agencies."[88] The Act also requires local educational agencies (school districts) to appoint staff liaisons to ensure that homeless students are properly identified, enrolled, and attending schools.[89] Problems such as lack of funding, inadequate monitoring of state compliance, and state and school district opt-out options, however, have impaired the Act's effectiveness.[90] Moreover, "the extent of the right to sue for enforcement remains unclear."[91] In addition, several states have also adopted statutes or regulations to ensure access to education for homeless young people.[92]

### *20.7.4 Children of Undocumented Workers*

The seminal case with respect to undocumented children is *Plyler v. Doe*,[93] which stemmed from the fact that in May, 1975, the Texas legislature voted to withhold funds from school districts in the state which paid for the education of children "not legally admitted" into

85 National Coalition for the Homeless, Broken Lives: Denial of Education to Homeless Children 5 (1987).
86 United States Dep't of Educ., report to Congress, Fiscal Year 2000: Education for Homeless Children and Youth 4 (2000).
87 No Child Left Behind Act, Pub. L. No. 107-110, Tit. X, § 1032, 115 Stat. 1425 (2002).
88 Barbara J. Duffield et al., American Bar Association, Educating Children Without Housing 7-8 (Amy E. Horton-Newell et al. eds., 3rd ed. 2009).
89 *Id.* at 13.
90 Comment, *For Better or for Worse?: A Closer Look at the Federal Government's Proposal to Provide Adequate Educational Opportunities for Homeless Children*, 51 HOW. L. J. 863, 880 (2008).
91 Clifton S. Tanabe & Ian Hippensteele Moblee, *The Forgotten Students: The Implications of Federal Homeless Education Policy for Children in Hawaii*, 2011 B.Y.U. EDUC. & L. J. 51, 58 (2011).
92 *See, e.g.*, Colo. Rev. Stat. §§ 22-1-102, 22-1-102.5, 22-33-103.5 (2002).
93 *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

the United States and authorized local school districts to deny school enrollment to these children.[94] Plaintiffs, a class of school-age children of Mexican origin who could not establish that they had been legally admitted to the United States, filed suit in federal court, claiming violations of Equal Protection through the Fourteenth Amendment. In granting a permanent injunction, the U.S. Supreme Court acknowledged that education was not an enumerated fundamental right, but went on to say that neither was it "some governmental 'benefit' indistinguishable from other forms of other so-called social welfare legislation."[95] The Court ascribed education's "elevated importance" to its fundamental role in maintaining the fabric of our society and described its denial to some isolated groups of children as an "affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers to presenting unreasonable obstacles to advancement on the basis of individual merit."[96] The *Plyler* decision established the right to an education for the children of undocumented residents. Nonetheless, since this decision, several states have tried to undermine the ruling and sought ways to turn these children away from public schools.[97]

There are an estimated two million school age children of undocumented parents in the United States today.[98] The fight for their educational rights has consisted largely of the fight to enforce *Plyler* at the local level.[99] In 1994, for example, California voters passed Proposition 87, which, among a host of other restrictions on the lives of the undocumented, banned undocumented children from public education.[100] Although a federal judge found almost all aspects of the law unconstitutional on either *Plyler* or preemption grounds, and although the plaintiffs settled the case before the Ninth Circuit could rule on the substantive issues, Proposition 87 set off a wave of laws in several other states restricting the rights of undocumented and their children. Many of the biggest obstacles to the right to education appear at the local school district level, because schools themselves administer the law.[101] Several schools, for example, have tried to require social security numbers and parents' driver's licenses as a way to uncover lack of documentation.[102]

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94 *Id.*

95 *Id.* at 221.

96 *Id.* at 222.

97 Maria L. Ontiveros & Joshua R. Drexler, *The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe*, 42 U.S.F. L. REV. 1045, 1046 (2008).

98 Jeffrey S. Passel, Pew Hispanic Ctr., Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey (2007) (estimating that according to the 2005 census, 1.8 million undocumented children resided in the United States).

99 Michael A. Olivas, *Immigration Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, U. CHI. LEGAL F. 27, 36-45 (2007).

100 California Ballot Pamphlet: General Election November 8, 1994, at 92 (1994) (adding Cal Educ. Code § 48215(a)).

101 Ontiveros & Drexler, *supra* note 97, at 1055.

102 Olivas, *supra* note 99, at 39.

Other approaches have been less systemic: in Illinois, for example, a school refused to enroll a student whose B-2 Tourist visa had expired;[103] in 1992, INS authorities in El Paso, Texas, harassed a group of students suspected of being undocumented by "driving over the football practice field and baseball diamond, entering the football locker rooms, surveilling with binoculars from the football stadium, and using binoculars to watch flag girls practicing on campus";[104] In 2004, administrators at a school in northern New Mexico turned three of its own students over to the Border Patrol when it found the students just beyond school grounds.[105]

Other communities, notably those in border states, however, have supported the rights of undocumented children to go to public school. A recent survey of school personnel in six Arizona public school districts found that the vast majority with an opinion on the issue supported the law established by Plyler and believed "a law prohibiting undocumented students from attending public schools would have a negative (36%) or very negative (35%) impact on the relationship between their school and the community."[106]

### *20.7.5 Children Receiving Welfare*

Many state laws make it difficult or impossible for children over a certain age who depend on welfare to complete their high school education.[107] New York law, for example, requires that children age sixteen or older who rely on welfare benefits be assigned to placements with the "Work Experience Program;" while the law requires that those nineteen or under who are in secondary school receive work assignments which do not interfere with their schoolwork, those over nineteen who have not finished high school receive no such accommodation.[108] Thus, the work assignments which are required for their receipt of benefits often take these children away from school during class times and conflict with class schedules.[109] Because they depend on state assistance to meet their basic needs, foregoing benefits to stay in school is not a realistic option.[110]

The state of the law is not completely clear. In 1998, a group of high school students in New York City sued the city and the state seeking to enjoin them from assigning those

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103 Rosalind Rossi, *State Strips Schools of $ 3.5 million: District Following Law, It Claims, by Refusing to Enroll Immigrant*, CHI. SUN-TIMES, Feb. 24, 2006, at News-8.

104 *Murillo v. Musegades*, 809 F. Supp. 487, 490-96 (W.D. Tex. 1992).

105 Amy Miller, *APS Safe for Migrant Students*, ALBUQ. J., June 2, 2006, at A1.

106 Nina Rabin, Mary Combs & Norma Gonzalez. *Understanding Plyler's Legacy: Voices from Border Schools*, 37 J. L. & EDUC. 15, 17 (2008).

107 *See, e.g.*, Sarah Fleisch Bodack, *Can New York City Prevent Welfare Recipients From Finishing High School?*, 34 COLUM. J. L. & SOC. PROBS. 203 (2000).

108 N.Y. Jur. 2d Public Welfare and Old Age Assistance, § 79, Public assistance employment programs (2013).

109 *See, e.g.*, *Matthews v. Barrios-Paoli*, 676 N.Y.S.2d 757 (Sup. Ct. 1998).

110 Bodack, *supra* note 107, at 204.

who attended school work placements that interfered with their class and study requirements.[111] Although the trial court judge granted a preliminary injunction, the Appellate Division reversed on the grounds that the plaintiffs had not exhausted their administrative remedies;[112] by the time the case made its way back to the appellate court, the plaintiffs had either dropped out of school or graduated, making the case moot.[113] The New York Constitution, however, may limit the discretion of state officials to impose welfare requirements which interfere with the recipient's ability to attend school.[114]

On the other hand, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) passed in 1996[115] imposes school attendance requirements on some at-risk groups of young people: for example, it requires teen mothers to attend school in order to receive welfare and does not impose time limits or work requirements while they are full-time students. The Act left many implementation details to the states, however, and the states vary considerably in their support of school attendance, especially for those over eighteen who have not finished high school.

### *20.7.6 Children with Mental and Physical Disabilities*

At the federal level, the Individuals with Disabilities Education Act (IDEA), guarantees to all disabled children (who live in states that choose to receive the associated federal funds) a right to a "free, appropriate, public education" (FAPE)[116] The definition of a "FAPE" has been the source of considerable litigation;[117] parents and school officials often disagree about what constitutes an "appropriate" education.[118] The law itself defines FAPE as "special education and related services that have been provided at public expense meet the standards of the state educational agency include an appropriate preschool, elementary school, or secondary school education and are provided in conformity with [an] individualized education program"[119] but fails to define "appropriate."

The terrain for the legal debate was laid out by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.[120] In *Rowley*, the Court held that

111 *Matthews*, 676 N.Y.S.2d *at* 757.
112 *Matthews v. Barrios-Paoli*, 270 A.D.2d 152 (N.Y. App. Div. 2000).
113 Bodack, *supra* note 107, 211 n. 69 (2000).
114 Don Friedman, An Advocate's Guide to the Welfare Work Rules, Empire Justice Center (2000).
115 42 U.S.C. § 652(k).
116 20 U.S.C. §§ 1400-1482 (2006).
117 *See, e.g.*, Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J. L. & EDUC. 367, 377-78 (2001).
118 David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L. J. 71, 76 (2010).
119 20 U.S.C. § 1401(9) (2006) (emphasis added).
120 458 U.S. 176 (1982).

the "appropriate" standard did not require a school district to offer a hearing disabled child a sign language interpreter, employing instead a minimalist interpretation of the law which required only that the disabled child receive "some educational benefit."[121]

Some courts have adhered to this minimalist interpretation. For example, the First Circuit held that a school was not required to implement a curriculum specially designed for a child with autism because the school's regular curriculum was "adequate" in giving the child *some* educational benefit, and refused to address the parent's claim that the specialized curriculum would better serve the child's needs.[122] This "some or adequate benefit" test has been adopted by the First, Eighth, Tenth, Eleventh and D.C. Circuits.[123]

Other courts, however, have read the law less minimally, and have ratcheted up the FAPE standard to a "meaningful benefit" standard, under which FAPE requires "significant learning" and calls for "more than trivial educational benefit."[124] In an autism case paralleling the First Circuit's, for example, the Sixth Circuit compared school's curriculum for autistic children with one preferred by the parents and stated that "there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to a denial of a FAPE."[125] The Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits have adopted this interpretation.[126]

While it has not expanded the definition of a FAPE since 1975, Congress has passed several amendments to IDEA and added considerably to its funding over the years; this, combined with evolving standards for special education in the years since IDEA first became law, have together led most commentators to agree that the "meaningful benefit standard" reflects the underlying meaning and purpose of the law.[127]

All of these regimes conform to the requirements of the Federal Constitution; as discussed, the state constitutions often provide more protection for this right. The International Covenant on Economic, Social, and Cultural Rights, which the United States has signed but not ratified, recognizes the right of everyone to free education for the primary level and calls for "the progressive introduction of free education" for the secondary and higher

121 *Id.* at 200.

122 *L.T. T.B. ex rel. N.B. v. Warwick School Committee*, 361 F.3d 80, 86 (1st Cir. 2004).

123 Philip T.K. Daniel & Jill Meinhardt, Commentary, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of a Free Appropriate Public Education?*, 222 ED. L. REP. 515, 519 (2007) (summarizing range of approaches in the courts).

124 *See, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3rd Cir. 1999) (stating IEP must provide "meaningful benefit"); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 861-62 (6th Cir. 2004) ("The IDEA requires an IEP to confer a 'meaningful educational benefit' . . . gauged in relation to the potential of the child at issue.").

125 *Deal*, 392 F.3d at 862.

126 Daniel & Meinhardt, *supra* note 123, at 519. (summarizing range of approaches in the courts).

127 Ferster, *supra* note 118, at 76, 86.

levels.[128] It also calls on signatory states to take specific steps to achieve these goals, including providing "free, universal and compulsory primary education, generally available and accessible" secondary education, including vocational training, and accessible higher education, all of which are to be available to all without discrimination.

The United States is not bound by the Covenant, and, as the above discussion indicates, may fail to comply fully in certain respects. While primary education in all the states is free, compliance issues may arise with respect to the access of several disadvantaged groups to an education which, as the Covenant requires, is "directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms" and enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups."[129] As noted above, homeless children, children of the undocumented, and those dependent on welfare may have their access to a fully effective education affirmatively impaired by state or local laws and regulations, or simply undermined by the failure of local school authorities to accommodate them by identifying them, providing transportation, or by monitoring local school compliance.

## 20.8 Institutional Guarantees of Social Rights

> Which national bodies are the institutional guarantors of social rights?
> Are there any specific bodies created especially for the protection of social rights? What are their powers?
> How do you evaluate the effectiveness of these national bodies?

To the extent that social rights exist in U.S. law, they are mostly guaranteed by courts. Individual federal agencies responsible for administering social programs operate pursuant to elaborate procedural requirements and, like all government agencies, they have Inspector Generals who are responsible for conducting audits designed to protect both the public interest and individuals. However, in contrast with other legal systems, there are no "ombudsmen" dedicated to protecting social rights generally or specific social rights such as the rights of the child. State law follows the same pattern as federal law: the sites for the enforcement of social rights are the courts of law.

128 International Covenant on Economic, Social, and Cultural Right Art. 13, § 1.
129 *Id.*

## 20.9 Social Rights and Comparative Law

Did your national legal system influence foreign legal systems in the area of social rights?

Did other foreign legal systems influence your national legal system in the area of social rights?

Can you give examples of provisions, principles or institutions (in the area of social rights) borrowed from other legal systems?

Do your domestic courts rights quote judgments or legislation from other jurisdictions when adjudicating on social rights?

The United States' skeptical attitude towards social rights has influenced other jurisdictions in at least two ways. First, the feeble social rights in federal constitutional law and the United States' opposition to international instruments on social and economic rights have undermined the status of social rights in international law.[130] Second, U.S. constitutional law and legal scholars have been influential in the drafting of new constitutions in democratizing nations and the lack of social rights in the U.S. constitutional template, as well as the ambivalent attitude of many legal scholars, may have discouraged some jurisdictions from including strong, or strongly enforceable, social rights.[131]

130 *See* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990).

131 *See, e.g.*, Cass R. Sunstein, *Against Positive Rights*, *in* Western Rights?: Post-Communist Application 225, 225-32 (ANDRÁS SAJÓ ed., 1996).