SOCIAL RIGHTS IN THE DRAFT CONSTITUTIONAL TREATY

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I. The controversy over the consolidation of social rights in the Charter of Fundamental Rights and the Draft Constitutional Treaty of the European Union

1. The arguments regarding the expediency of constitutionalising social rights...

The most controversial issue posed in the Convention which elaborated the Charter of Fundamental Rights of the European Union was undoubtedly the extent to which provisions consolidating social rights should be included in the Charter. When reviewing the minutes of the sessions of the Convention in April and May 2000 an intense controversy is evident, in the context of which most of the traditional arguments used since the middle-war period reappear, enriched and renewed as every time that the issue of consolidating or interpreting social rights in national Constitutions has been posed.[1]

The controversy concerning the consolidation of social rights in the Charter of Fundamental Rights was not only due to the disagreement over their legal content, but mostly to the fact that (contrary to individual and civil rights) both the social state principle as well as the mechanisms and the organizational structure of the social state have taken varying forms in the different legal orders of the Member States.[2] It is indicative that during the sessions which focused on social rights[3] the liberal/conservative positions of Lord Goldsmith, representative of the British Government, came in direct conflict with the socialdemocratic views of Jürgen Meyer and Guy Braibant, representatives of the German Parliament and the French Government respectively, thus highlighting two completely different viewpoints concerning the function of the Constitution and the structure of the social state;[4] the residual Anglo-Saxon

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1 Regarding the argumentation on social rights see *E. Löbenstein*, Soziale Grundrechte und die Frage ihrer Justiziabilität, in: FS H. Floretta, 1983, p. 209 ff., *F. Matscher,* La mise en oeuvre des droits economiques et sociaux, in: *G. Matscher (Ed.)*, Die Durchsetzung wirtschaftlicher und sozialer Grundrechte, 1991, p. 11 ff., *B. Schulte,* Wohlfahrtsstaatlichkeit in Europa, in: *P. Clever/B. Schulte (Hrsg.),* Bürger Europas, 1995, p. 62 ff.

2 See *J. Iliopoulos-Strangas (Ed.),* La protection des droits sociaux fondamentaux dans les Etats membres de l'Union européenne, 2000, passim, as well as the contributions to the volume: *Bundesministerium für Arbeit und Sozialordnung/Max-Planck-Institut für ausländisches und internationales Sozialrecht/Akademie der Diözese Rottenburg Stuttgart (Hrsg.),* Soziale Grundrechte in der Europäischen Union, 2001, especially p. 105 ff.

3 See the sessions of the Convention for the Charter of Fundamental Rights on April 3-4th and June 5th.

4 See *J. Meyer,* Rückblick und Ausblick auf die Arbeiten des Konvents zur Erarbeitung einer europäischen Grundrechtscharta im Hinblick auf soziale Grundrechte, in: *Bundesministerium für Familie, Senioren, Frauen und Jugend (Hg.)*, Soziale Grundrechte als europäisches Anliegen – Vorschläge für eine europäische Grundrechtscharta, 2000, p. 25 ff., *Lord P. H. Goldsmith,* A Charter of Rights, Freedoms and Principles, CMLRev. 2001, p. 1201 ff.

model on the one hand and the continental model which predominantly relies on the tradition of a strong social state on the other.[5]

The main argument in favor of the consolidation of social rights is the argument of real freedom, which supports the institutionalization and the constitutional consolidation of the redistributive functions of the social state based on the complementarity and the equal status of fundamental rights; Second, the argument of the legitimizing and unifying function of social rights, functions which contribute to the "integration" of the state and provide a solid basis for the exercise of social policy; last but not least, comes the argument highlighting the significance of enriching the judicial control of constitutionality on the basis of the social principle, as a result of the inevitable expansion of the fields of intervention of the judicial function in contemporary states.[6] To contradict these arguments doubts have been expressed regarding the compatibility of the social principle with the principle of the rule of law and fundamental freedoms in constitutional texts; furthermore, the negative impact of provisions with an eminent economic character on the legitimizing basis of the state and the reliability of the Constitution have been highlighted, while finally reservations extend also to the judicial control of social rights in as far as interventions from the judicial power entail a reformulation of economic policy and particularly on the basis of balancing political and social conflicts by a non competent state organ.[7]

Almost all previous sets of arguments were posed in the discussion carried out at the Convention that elaborated the Charter of Fundamental Rights. Furthermore, and besides this "traditional" argumentation, the specific problem of the expediency and the consequences of consolidation of social rights in fields where the European Union lacks competencies, according to the subsidiarity principle, was emphatically posed.[8] Seen from this perspective, it was pointed out that the inclusion of a list of social rights in the Charter of Fundamental Rights could be considered to indirectly expand the competencies of the European Union assigning to it new powers through the normative function of social rights.[9]

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5 The different opinions expressed by Goldsmith and Meyer over social rights confirmed that different views on crucial issues concerning the European Union do not stem from the differentiation between right and left governments or ideologies but instead from the distinction between „right" and „left" states. In this particular case, the representatives of Ireland, the Netherlands, Denmark and Great Britain were supportive of the anglosaxon positions, while representatives of France, Germany, Belgium, Greece and the socialdemocratic wing of the Spanish representatives were supportive of the centraleuropean positions. See also *M. Poiares Maduro,* We still haven't found what we have been looking for. Balance between Economic Freedom and Social Rights in the European Union, Faculdade De Direito da Universidade Nova de Lisboa Working Paper 4/99.

6 See *R. Alexy,* Theorie der Grundrechte, 1985, p. 455 ff., *P. Häberle,* Grundrechte im Leistungsstaat, VVDStRL 30, p. 140 ff., *J. Lücke,* Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsaufträge, AöR 107, p. 15 ff., *F. Michalman,* The constitution, social rights and liberal political justification, International Journal of Constitutional Law 1/2003, p. 13 ff.

7 See *J. Isensee,* Verfassung ohne soziale Grundrechte?, Der Staat 1981, p. 371 ff., *J. Lücke,* Soziale Grundrechte als Staatszielbestimmungen, op. cit., p. 37 ff. Also *R. Alexy,* Theorie der Grundrechte, op. cit., p. 460 ff., *R. Häussler,* Der Konflikt zwischen Bundesverfassungsgericht und politischer Führung, 1994, p. 219 ff.

8 See *J. Meyer/M. Engels,* Aufnahme von sozialen Grundrechten in die Europäische Grundrechtscharta?, Zeitschrift für Rechtspolitik 2000, p. 368 ff., *G. Braibant,* Die aktuelle Diskussion um den Entwurf der Grundrechtscharta, in: Soziale Grundrechte in der Europäischen Union, op. cit., p. 259 ff.

9 *G. Papadimitriou*, The binding force of the Charter of Fundamental Rights, in: FS für D. Tsatsos, 2003, p. 468 ff., *G. de Burca*, The drafting of the European Union Charter of Fundamental Righs, ELRev 2001, p. 126 ff.

From an opposite viewpoint, it could be maintained that the explicit exclusion of the previous possibility, which was finally ensured through the provisions of Article 51 paragraph 2 of the Charter, would result in the restriction of the regulatory content of those social rights which concern fields in which the European Union is void of powers and consequently, the normative deficit of social provisions could potentially undermine the legally binding nature of the Charter. Indeed, the explicit provision that the Charter 'does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties' (article 51, par. 2)[10] entails that a particular interpretative approach is required in order to define the normative content of at least certain social rights that were consolidated in the Charter. Undoubtedly, this problem would have been of limited practical significance provided that the Charter of Fundamental Rights had remained a text of programmatic character. However, after the incorporation of the Charter in the Draft Constitutional Treaty, the matter of normative content of social rights acquired particular importance and interest.

2. … and the conciliatory decision of the Convention for the Charter of Fundamental Rights

The final decisions concerning the inclusion of social provisions in the Charter of Fundamental Rights have been the result of a compromise between the extreme negative positions of Lord Goldsmith and the maximalist proposals of G. Braibant. The decision of the Convention to eliminate the proposal of the Presidium to include a provision differentiating between rights and principles in the field of social rights was significant.[11] Seen under this light, a broad but not exhaustive list of social provisions was laid down in the Charter, based on the initial mandate of the Cologne European Council, which set out that 'in drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (article 136 TEC), insofar as they do not merely establish objectives for action of the Union'. The mandate of the Cologne European Council leads to the conclusion that social provisions with purely programmatic content were not desirable, nor was their a priori classification within those that possess or not a dense normative content.[12]

Finally, the social principle was laid down in the Charter of Fundamental Rights at three levels: firstly, in the preamble through an explicit reference to solidarity as a fundamental value governing the Charter; secondly, in the reference to the Social Charters adopted by the

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[10] See *S. Griller,* Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten, in: *A. Duschanek/S. Griller (Hrsg.),* Grundrechte für Europa, 2002, p. 131 ff., *F. J. Lindner,* EG-Grundrechtscharta und gemeinschaftsrechtlicher Kompetenzvorbehalt: Probleme und Thesen, DöV 2000, p. 543 ff., *L. Rossi,* „Constitutionnalisation" de l' Union Européenne et des Droits Fondamentaux, RTDeur, 2002, p. 39 ff.

[11] See *J. Meyer,* Rückblick und Ausblick auf die Arbeiten des Konvents, op. cit., p. 27 ff., *J. D. de La Rochére,* La Charte des Droits fondamentaux de l'Union Européenne: Quelle valeur ajoutée, quel avenir?, Revue du Marché Commun et de l'Union Européenne, 443/2000, p. 674 ff.

[12] See *H. Kleger/I. P. Karolewski/M. Munke,* Europäische Verfassung, 2002, p. 222 ff., where it is stressed that "der im Laufe der Verhandlungen weiter ausgearbeitete Ansatz ist auch deshalb als Kompromissvorschlag anzusehen, da selbst die Befürworter weitgehender sozialer Rechte diese nicht als individuelle Rechte, sondern als Prinzipien verankert sehen wollten". See also *I. Pernice,* The Charter of Fundamental Rights in the Constitution of the European Union, WHI Working Paper 14/02 <www.whi-berlin.de/pernice-fundamental-rights.htm>.

Community and the Council of Europe as necessary interpretative tools for the application of the Charter, as is made clear both from the preamble and article 53 of the Charter; and thirdly, in a number of provisions consolidating social rights, which can be found both in the specific chapter titled "Solidarity" as well as in other chapters of the Charter. It could be claimed that scattering social rights in the different chapters of the Charter implies their equivalence towards individual and civil rights.

More specifically, the right to education (article 14), the freedom to choose an occupation and the right to engage in work (article 15), the rights of the child and the elderly (articles 24 and 25), the right to integration of persons with disabilities (article 26), the workers' rights to information and consultation within the undertaking (article 27), the right of collective bargaining and action (article 28), the right of access to placement services (article 29), the right to protection in the event of unjustified dismissal (article 30), the right to fair and just working conditions (article 31), the prohibition of child labour and protection of young people at work (article 32), the right to protect family and professional life (article 33), the right to social security (article 34), the right to health care (article 35) and the right to environmental protection (article 37) have been consolidated.

As becomes evident from the explanations incorporated in the Charter, the majority of provisions consolidating social rights had as source of inspiration the European Social Charter and the Community Charter of the fundamental social rights of workers while occasionally reference is also made to specific EC directives. The wordings adopted use the term 'right' selectively, without this fact being decisive for the determination of the normative content of each provision.[13] Undoubtedly, in certain provisions the wording clearly discourages the interpreter from attempting to identify a judiciable subjective right. The most crucial parameter however for the identification of the normative density of each provision consists in clarifying the scope of the competencies of the European Union in each field in question.

3. The crucial additions to the Draft Constitutional Treaty

If, however, the Charter of Fundamental Rights in its original formulation allowed to some extent to the implementer a "creative" interpretation of social rights, its incorporation in the draft Constitutional Treaty was accompanied by certain additions that restricted this interpretive potential.

More specifically, in article 51 paragraph 1 of the Charter, an emphatical provision was added stating that the recipients of the commitments deriving from the Charter (namely institutions, bodies and agencies of the Union and the Member States when implementing Union law) should implement the provisions 'respecting the limits of the powers of the Union', whereas in paragraph 2 of the same article it was added that the Charter 'does not extend the field of application of Union law beyond the powers of the Union'. The main alteration in relation to the original text of the Charter though unquestionably lies in the addition of a fifth paragraph to article 52, where a differentiation is introduced regarding the implementation of the provisions of the Charter containing principles since they 'may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member-States when they are implementing Union law, in the exercise of their respective powers'.

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[13] See *I. v. den Burg,* Social rights in the EU, in: Soziale Grundrechte in den Europäischen Union, op. cit., p. 263 ff. See also below under II 2.

This new provision explicitly precludes the direct justiciability of provisions containing principles, since it provides that 'they shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality'.

In this way, the Convention for the Constitution of Europe attempted to end the dialogue regarding the scope of application of the provisions of the Charter consolidating social rights and to avert the possibility that their implementation expands the powers of the Union against those of the Member-States in the field of social protection, especially through judicial rulings implementing the Charter.[14] In effect, this fact constitutes nothing less than an a posteriori reversal of the compromise achieved during the Convention that drafted the Charter of Fundamental Rights, since from that point on social rights appear to be considered as provisions with a limited normative content. The questions raised by this choice concern initially the specification of the social provisions which come under the heading of principles and thus have a limited scope and, secondly, the specific 'legal value' attributed to them.[15]

II. The normative content of social rights in the Draft Constitutional Treaty

1. Interpretative obstacles in approaching social rights in the Draft Constitutional Treaty

The process of consolidation of social rights in the Draft Constitutional Treaty predisposes as to the complex problems related to their interpretation. At first level, the Cologne mandate included in the tasks of the Convention that drafted the Charter of Fundamental Rights the formulation of social rights with the explicit prerequisite that they would not simply constitute political aims of the Union.[16] At second level, a sufficiently broad list of social rights was elaborated by the Convention for the Charter of Fundamental Rights, leaving though unsettled the matter of their normative content. At a third level, the Convention for the European Constitution attempted to restrict their legally binding power in order not to extend the powers of European Union at the expense of the Member-States.[17] The original mandate for consolidating social rights with legally binding status thus resulted in the explicit restriction of their legal function.

This regression, but further also the interpretative obstacles posed when attempting to analyse the normative content of social rights in the Draft Constitutional Treaty, relate to a number of intertwining complex factors, which cause bewilderment both to the political and the scientific dialogue. Initially, the traditional problem of "subjectivity" of social rights has to be dealt with, an issue that has troubled scientists for a long time and continues to make the

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14 *J. D. de La Rochére,* La Charte des Droits fondamentaux de l'Union, op. cit., p. 676 ff., *E. Riddel,* Solidarität, in: *J. Meyer (Hrsg.),* Kommentar zur Charta der Grundrechte der Europäischen Union, 2003, p. 323 ff.

15 See also *R. Knöll,* Die Charta der Grundrechte der Europäischen Union, NVwZ 2001, p. 392 ff., *Lord P. H. Goldsmith,* A Charter of Rights, Freedoms and Principles, op. cit., p. 1201 ff., *N. Bernsdorff,* Soziale Grundrechte in der Charta der Grundrechte der Europäischen Union, VSSR 2001, p. 1 ff.

16 The mandate of the Cologne European Council has been used as a basis for argumentation both from the supporters and the adversaries of consolidation of social rights in the Charter, see *H. Kleger/I. P. Karolewski/M. Munke,* Europäische Verfassung, op. cit., p. 221 ff.

17 See above under I 2.

constitutional legislators of certain European States reluctant to legislate them.[18] However, this typical problem of constitutional theory is posed now under a different light, namely within the context of a text asserting the nature and function of a Constitution, possessing elements of 'constitutional quality',[19] being yet enacted as a Treaty regulating a peculiar confederate entity, possessing limited competencies in the field of social protection and being characterized by a 'social deficit.[20] Even if we agree that on the issue of normative content of social rights an interpretive approach could be selected, which could find wide support within the scientific community and jurisprudence – something not yet achieved in all Member-States of the European Union, taking into account the various organizational models of social protection in each of them[21] – however, particular obstacles would be presented in an attempt to transfer one interpretative version concerning social rights from the level of the national state to the level of the institutional edifice of the Union.

The enactment of a Charter of Fundamental Rights and its incorporation in the draft Constitutional Treaty was intended to reinforce the democratic legitimization of the European Union through a list of fundamental rights emanating from the common constitutional traditions of the Member-States, thus constituting their protection more effective and more visible at Union level. On the contrary, the decision to deal with the deficit in the protection of fundamental rights would be incomplete if it excluded social rights from the Charter, especially if one takes into account that such a choice would have been considered as consolidating at constitutional level the social deficit of the Union. After all, it cannot be ignored that during the Cologne European Council, besides the decision to draft a Charter of Fundamental Rights with explicit reference to legally binding social rights, the European employment strategy was consolidated and the need for controlled wage development consistent with productivity was highlighted. In the European Employment Pact, known as the Cologne process, the Union's individual measures for reinforcing employment were incorporated in an overall strategy.

The inclusion of social rights in the Charter of Fundamental Rights and further in the Constitutional Treaty was a decision of great symbolic significance, which undoubtedly enhances the legitimizing basis of the integration process, while confirming at the same time the complementarity and the equivalence of individual, civil and social rights.[22] The inclusion of social rights at the level of constitutional texts of the European Union proves the social dimension of the Union as well as the political will to maintain the European social model,[23]

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18 See above under I 1.

19 See *D. Tsatsos*, Die Europäische Uniongrundordnung, 2002, p. 33 ff.

20 On the social deficit of the European Union see *P. Maillet*, La politique social européenne: myth ou realité? Revue du Marché Commun et de l' Union Européenne 439/2000, p. 364 ff., *N. Burrows/J. Moure*, European Social Law, 1996, p. 4.

21 See the contributions in: *J. Iliopoulos-Strangas (Ed.),* La protection des droits Sociaux fondamentaux, op.cit., passim.

22 See *K. Lenaerts/M. Desomer*, Bricks for a Constitutional Treaty of the European Union: values, objectives and means, ELRev. 2002, p. 380 ff.

23 On the European social model see *P. Flynn,* A Social Model for the new Millennium: American or European?, Brussels 1999, passim, White Paper on European Social Policy, COM (94) 333 final of 27.7.1994, *G. Vobruba,* Welfare States within the Globalisation Dilemma: The US and the European Social Model in Comparison, in: *D. Pieters (Ed.),* European Social Security and Global Politics, 2003, p. 189 ff.

guided by the principle of social solidarity as an integral component of the European constitutional culture.[24]

Seen under this light, it would be inconceivable for the Draft Constitutional Treaty not to include social rights, even in the form of provisions of a programmatic nature. On the other hand, however, the inclusion of social rights in the Draft Constitutional Treaty does not simply pose a new question of interpretation, which could eventually be resolved by reproducing the traditional scientific dialogue and the corresponding jurisprudence from the level of the national state to the level of the Union as certain supporters of their incorporation in the Charter readily predicted. On the contrary, the issue of interpreting social rights at the level of the Constitutional Treaty could very well constitute a major issue in dealing with the social deficit of the European Union but also could affect the distribution of powers between Union institutions and Member-States, as well as the role of the Court of Justice, especially when intervening directly in the integration process by means of decisions pertaining to the budget of the Union, given that they could eventually produce additional financial burdens.

If a first, visible consequence of the consolidation of legally binding social rights in the Draft Constitutional Treaty is that the dynamic content of social rights could lead to an increase in the necessary community resources, further consequences could relate to the issue as to who decides on the directions of the integration process and who is competent for defining the distribution of powers between the Union and the Member-States.

The interpretative peculiarities in approaching social rights arise, first of all, from their economic nature, their innate elasticity and political-transformative function.[25] At the level of national Constitutions, the recognition of the legally binding nature of social rights could entail the enhancement of the role of the judiciary compared to that of the legislative power in the exercise of social policy. However, at the level of the Constitutional Treaty their recognition could influence the very development of European integration, leading in an unanticipated redistribution of the roles between Union institutions, as well as the relation between the European Union and the Member-States. The political rationale that dictated the careful differentiation of the legal function of social rights vis à vis individual and civil rights within the framework of the Constitutional Treaty is thus made all the more evident. The cautious wording and especially the general provisions on the interpretation and application of the Charter further serve this rationale. This does not imply however that social rights are merely declaratory-programmatic principles, or in other words essentially the result of a 'compromise' (dilatorischer Formelkompromiss) aiming to hand over to the political power the exclusive potential to shape the final decisions. Nonetheless, the formulation of their legal content presupposes awareness of the consequences of their potentially "overflowing normative content". The identification of these particular obstacles when approaching social rights in the European Constitution constitutes an interpretative pre-requisite for analysing them.

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24 On the principle of solidarity at the level of the European Union see *R. Bieber,* Solidarität als Verfassungsprinzip der Europäischen Union in: *A. von Bogdani/S. Kadelbach (Hrsg.),* Solidarität und Europäische Integration, 2002, p. 42 ff., *C. Callies,* Subsidiaritäts-und Solidaritätsprinzip in der Europäischen Union, 1996, p. 167 ff.

25 *H.-F. Zacher,* Verrechtlichung im Bereich des Sozialrechts, in: *F. Kübler, (Hrsg.),* Verrechtlichung von Wirtschaft, Arbeit und soziale Solidarität: Vergleichende Analysen, 1985, p. 48 ff., *E. Löbenstein,* Soziale Grundrechte und die Frage ihrer Justiziabilität, op. cit., p. 213 ff.

2. The distinction between principles and rights in the Charter incorporated in the Draft Constitutional Treaty

The starting-point in the search for the normative content of the social rights set out in the Constitutional Treaty is the distinction between "rights" and "principles" made both in the preamble and in Article 51 paragraph 1. In particular, the preamble mentions the recognition of 'rights, 'freedoms' and 'principles', whereas in article 51 paragraph 1, which refers to the field of application of the Charter, it is pointed out that the recipients of the provisions of the Charter 'respect the rights' and 'observe the principles'. In constitutional theory, principles (Prinzipien) are differentiated to rules stricto sensu (Regeln).[26] The criterion for this distinction is the degree of generality of the provision or, from a different viewpoint, the degree of dependence of their application on concrete legal or real possibilities[27]. According to this criterion, rules stricto sensu are provisions obeying the dogma 'all or nothing'; the available options are either to make the fulfillment of their content feasible or not. On the contrary, principles are provisions whose content is implemented to the fullest degree possible, depending on the actual legal and real possibilities. This means that based on given legal and real facts, rules stricto sensu will be either applied or not, while principles contain an argument that suggests a specific direction to the interpreter without entailing necessarily a specific decision.[28] The application and specification of principles presupposes balancing the prima facie arguments they contain against opposing arguments contained in other principles or real facts.

Based on the afore-mentioned, fundamental rights as a whole (both individual and social rights) are principles to the degree that their application is not subject to the formula application/non-application depending on the fulfillment of the given presuppositions[29]. Fundamental rights do not establish definitive mandates, but rather contain mandates whose consequences are graded depending on specific legal and real facts. It is precisely this characteristic of fundamental rights that the principle of proportionality between the limitations of rights and the aims of these restrictive measures serves.[30] At least in those fundamental rights where the principle of proportionality is applied their nature as principles is clearly evident. Through their application and specification, principles take the form of specific rules, which could be either of a definitive or of a prima facie nature. The correspondence of principles to prima facie mandates and that of rules stricto sensu to definitive mandates does not necessarily involve linking principles to objective rights and rules stricto sensu to subjective rights. Both mandates consolidating objective rights as well as mandates consolidating subjective rights can be considered as principles.[31]

From the previous observations it can be concluded that the distinction between rights and principles as formulated in the Charter of Fundamental Rights is not clear. In constitu-

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26 See *R. Dworkin,* Taking Rights Seriously, 1986, p. 19 ff., *R. Alexy,* Theorie der Grundrechte, op. cit., p. 72 ff., *K. Larenz,* Richtiges Recht, 1979, p. 25 ff., *A. Rüssmann,* Juristiche Begründungslehre, 1982, p. 96 ff.

27 See *R. Alexy,* Zum Begriff des Rechtsprinzips, in: Rechtstheorie, Beiheft 1, 1979, p. 79 ff.

28 See *R. Alexy,* Theorie der Grundrechte, op. cit., p. 87-88, where it is noted that „Prinzipien gebieten, dass etwas relativ auf die rechtlichen und tatsächlichen Möglichkeiten in möglichst hohem Maße realisiert wird", while „Regeln enthalten eine Festsetzung im Raum der rechtlichen und tatsächlichen Möglichkeiten".

29 See *R. Alexy,* Theorie der Grundrechte, op. cit., p. 89 ff.

30 See *R. Alexy,* Grundrechte als subjektive Rechte und als objektive Normen, Der Staat 1990, p. 54 ff.

31 See *R. Alexy,* Grundrechte als subjektive Rechte, op. cit., p. 56, where it is noted that „die Unterscheidung zwischen Regeln und Prinzipien ist gegenüber der zwischen einer subjektiven und einer objektiven Dimension neutral".

tional theory principles are considered to be provisions with a more general wording compared to rules, which provide the basic guidelines and hence present arguments to justify legislative regulations. Evidently, the social rights in the Charter incorporated in the Constitutional Treaty are not called upon to carry out such a function, given that this possibility is explicitly ruled out in the name of the subsidiarity principle. Social rights do not constitute, within the context of the Draft Constitutional Treaty, provisions aiming at legislative initiatives by the community legislator and therefore do not function as constitutional mandates (Verfassungsaufträge), in other words as provisions that authorize and oblige the common legislator to proceed with regulating a certain issue. Should such a legal function of social rights at the level of the Constitutional Treaty be accepted, then the principle of subsidiarity would be directly and overwhelmingly violated. [32]

Above all, the specification of principles presupposes balancing the prima facie arguments contained therein with antithetical arguments found in other principles. Consequently, they supersede ineluctably all cases where the law requires evaluations from the part of the institution applying it.[33] Yet the Charter of Fundamental Rights and further the Draft Constitutional Treaty, do not seem to allow this function to the principles by clearly differentiating them from rights; such a function of principles would broaden the interpretative margins of the institutions implementing social rights or other provisions of the Charter that fall under this concept, thus jeopardizing the principle of subsidiarity or stimulating the judicial activism of the Court of Justice in the "sensitive" field of social policy.[34] It becomes evident however that the differentiation between rights and principles, which primarily has to do with social rights, aims at harnessing and not at further legitimizing the judicial activism of the Court of Justice in the fields of employment and social protection. It would be exceptionally risky to deal with the social deficit in the European Union through judicial intervention instead of attempting to achieve it through negotiation between the 'political organs' of the European Union and the Member-States.

3. The legal functions of social rights in the Draft Constitutional Treaty

The choice of the term 'principles' in the Charter of Fundamental Rights appears rather inappropriate as a concept aiming to attribute to certain provisions – primarily to those consolidating social rights – a reduced or, in any event, different normative content vis à vis the provisions that safeguard 'rights' or 'freedoms'. The special Working Group II (having as task to incorporate the Charter and to explore the possibility of the Union acceding to E.C.H.R.) of the Convention on the European Constitution came to the conclusion that the term 'princi-

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32 See *A. v. Bogdandy,* Grundrechtsgemeinschaft als Integrationsziel?, in: *A. Duschanek/S. Griller (Hrsg.),* Grundrechte für Europa, 2002, p. 69 ff., *C. Engel,* The European Charter of Fundamental Rights, ELJ 2001, p. 151 ff., *P. Hector,* Die Charta der Grundrechte der Europäischen Union, in: *J. Bröhmer (Hrsg.),* Der Grundrechtsschutz in Europa, 2002, p. 180 ff., *P. Tettinger,* Die Charta der Grundrechte der Europäischen Union, NJW 2001, p. 1010 ff.

33 See *C.-W. Canaris,* Systemdenken und Systembegriff in der Jurisprudenz, 1969, p. 52 ff., *R. Alexy*, Theorie der juristischen Argumentation, 1991, p. 299 ff., 319 ff.

34 On the judicial activism of the European Court of Justice see *T. Hartley,* The European Court, Judicial Objectivity and the Constitution of the European Union, Law Quarterly Review 1996, p. 95 ff., *T. Tridimas,* The Court of Justice and Judicial Activism, ELR 1996, p. 199 ff., *F. Jakobs,* Human Rights in the European Union: the role of the Court of Justice, ELRev. 2001, p. 331 ff.

ples' does not facilitate the interpretation of the Charter of Fundamental Rights and further nor that of the Constitutional Treaty.[35]

According to the Report of the Working Group, in order to confirm the distinction between 'principles' and 'rights' and at the same time 'increase the security of law within the framework of the prospect of a legally binding Charter with a constitutional status', the great majority of its members proposed an additional general provision (article 52 § 5), which would clarify the meaning attributed to principles during the proceedings of the Convention'.[36] The meaning attributed during the proceedings to the term 'principles' was based on their differentiation from subjective rights and furthermore, in accordance with article 52 § 5 of the incorporated Charter, on the recognition of the possibility of their judicial exploitation only for the interpretation of the legislative and executive acts of the Union institutions or the acts of Member-States issued when implementing Union Law.[37]

Consequently, the differentiation between 'principles' and 'rights' attempted in the incorporated Charter essentially concerns their justiciability and the extent to which they can be justicially cognisable. Even so, certain other issues still remain unsettled, such as the question whether other legal functions of the provisions containing 'principles' are precluded or the question concerning which organ is responsible to ascertain whether a provision contains 'principles' or 'rights'. Regarding the latter, the Special Working Group II refers to the wording of each provision as well as to the explanations of the Presidium of the Convention to the Charter of Fundamental Rights.[38] Nonetheless, neither the formulations nor the explanations seem adequate for the classification of the provisions especially those consolidating social rights.

Since certain social provisions of the incorporated Charter are explicitly prevented from taking the form of justiciable subjective rights, while, as previously mentioned, it would be incompatible with the principle of subsidiarity for the latter to function as constitutional mandates, the legal forms in which the provisions in question demonstrate their normative function can be identified in the aspects of their objective dimension.[39] Seen under that light, even if the judicial power were assigned the role to control legislative and executive acts in application of social rights, this still would not hinder a preventive control of each Union or national legislative and executive act by the organs competent for their enactment on the basis of the consolidated social rights. The restriction of judicial control only in specific legislative and executive acts does not correspondingly restrict the exercise of preventive political control based on criteria and guidelines stemming from social rights. From a practical point of view, this means that each competent organ responsible for legislating or issuing a legal act falling in the ambit of community law is obliged to examine whether it is in agreement with the provisions that safeguard social rights.

Likewise, social rights become a necessary guide for the interpretation of all legal acts enacted by Union or national organs. All provisions of secondary Union law as well as provi-

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35 The Working Group II submitted its Report on 22.10.2002 (CONV 354/02).

36 Ibidem.

37 It is notable that Working Group II refers to the field of social law as the main field where also at the level of the Member-States a differentiated judicial use of provisions containing principles is applied.

38 Ibidem.

39 On the objective dimension of fundamental rights see *R. Alexy,* Theorie der Grundrechte, op.cit., p. 467 ff., *J.-P. Müller,* Zur sog. subjektiv- und objektivrechtlichen Bedeutung der Grundrechte, Der Staat 1990, p. 37 ff., *E.-W. Böckenförde,* Grundrechte als Grundsatznormen, Der Staat 1990, p. 1 ff.

sions of national law must be interpreted in the light of the provisions of the Charter consolidating social rights. It could be maintained that even constitutional provisions safeguarding fundamental rights should be implemented in accordance with the provisions of the incorporated Charter, irrespective of whether the former contain 'rights' or 'principles'. Nevertheless, the provisions of the national Constitutions find themselves in a reciprocal relation with the provisions of the incorporated Charter; they enrich their content by taking into account the incorporated Charter while at the same time as part of the 'common constitutional traditions of the Member States' they contribute to the definition of the content of the Charter's provisions.

Regarding the judicial control of the legal acts falling under community law on the basis of social rights, a crucial issue is whether the preservation of minimum stability of the protected good, in the form of a social acquis or an institutional guarantee, is used as a criterion. One interpretative approach dictates that each social right guarantees a minimum standard of protection, which cannot be violated by legal acts falling under community law. It is advisable not to rule out a priori this possibility and to accept that the answer to this question depends on the type and the content of each social right. Consequently, a classification of the social rights included in the incorporated Charter seems to be necessary.

III. Classification of social rights in the Draft Constitutional Treaty

1. Criteria for the classification of social rights

The analysis of the normative content of social rights consolidated in the Draft Constitutional Treaty presupposes the identification of the peculiarities of each social right, based particularly on the object they regulate, their wording and the clarification of the scope of the competencies that the European Union possesses in each field. Taking into account the afore-mentioned, the differentiation between provisions that contain 'principles' and 'rights' is also crucial.

Upon a first reading of the provisions of the incorporated Charter it appears from the titles, the wordings and the explanations to the provisions in the chapters 'Dignity' and 'Freedoms' (articles 1 to 19) that their recognition as subjective rights is undeniable, with the exception of article 14 that safeguards the right to education in the form of a social right covering also free compulsory education. In this case, whereas both the title and the formulation of the provisions refer to a 'right', the explanation refers for the first time to a 'principle'. Moreover, out of the three significant social rights consolidated in the chapter 'Equality', namely, the rights of children, the elderly and persons with disabilities (articles 24 to 26), only the latter is characterized as a 'principle' while the titles, the wording and the explanations of the two previous articles imply that they are recognized as 'rights'. The fact that the provisions concerning children, the elderly and persons with disabilities were incorporated in the chapter on equality, could predispose one to think that these provisions interpreted in combination with the principle of equality could provide a legal basis for the application of favorable regulations to those population groups. It is nevertheless completely questionable whether such a legal function of these social rights could be accepted, considering the general provisions for the application of the Charter.

On the other hand, in the chapter 'Solidarity', where the main corpus of social rights can be found (articles 25 to 38), whereas in the wording of the provisions reference is predominantly made to 'rights', in the majority of explanations reference is made to 'principles'. Based

on the previous observations, it becomes evident that both the classification of social rights in the chapters of the incorporated Charter as well as their formulation and the explanations, which occasionally contradict the wording, do not facilitate their classification as 'principles' or 'rights' nor highlight their normative content.

In the theory of social rights various classifications have been attempted, either on the basis of their content or on the basis of their status. For instance, a classification on the basis of content identifies social rights concerning the broader right to engage in work, rights pertaining to social security and rights concerning the social and cultural development of one's personality.[40] On the basis of the status of rights as a classification criterion, the distinction lies between rights providing social benefits in the narrow sense or demands for funding and subsidies on the one hand and between demands within the context of general obligations of the state for the prosperity of citizens and demands to participate in public affairs on the other.

Nonetheless, the reference to the concept of participatory rights (Teilhaberechte) or rights offering benefits in the wider sense appears more useful when attempting to identify the normative content of the social rights consolidated in the incorporated Charter.[41] Participatory rights are not necessarily linked to material benefits provided from the State in the form of services, money or benefits in kind but could also consist in demands for protection by the State (Schutzansprüche) or participation in institutionalized procedures. Another useful distinction is the one between rights concerning material benefits and normative benefits (faktische und normative Leistungen) and the classification of social rights in the narrow sense within the first category.[42] The distinction between provisions ensuring material benefits and provisions concerning demands for participation in institutionalized procedures or, in a broader sense, for normative benefits may substantially facilitate the clarification of the content of the social rights consolidated in the incorporated Charter. A second criterion, which complements the first one, consists in the clarification of the scope of the Union's powers in each field. Finally, in addition to the above, it is necessary to take into consideration the wordings and the explanations to each provision.

2. Categories of social rights in the incorporated Charter

Using the criteria mentioned above, a first category of rights related to the protection of the institutionalized status of workers is made evident, including the right of workers to information and consultation within the undertaking,[43] the right to negotiations and collective action,[44] the right to protection in the event of unjust dismissal, [45] the right to healthy, safe and

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40 See *T. Tomandl,* Der Einbau sozialer Rechte in das positive Recht, 1967, p. 7 ff., *G. Brunner,* Die Problematik der sozialen Grundrechte, 1971, p. 11 ff.

41 See *D. Murswiek,* Grundrechte als Teilhaberechte, soziale Grundrechte, in: *J. Isensee/P. Kirchhof,* HbdStR, Bd. V, p. 246 ff.

42 See. *R. Alexy,* Theorie der Grundrechte, op. cit., p. 179 ff.

43 See *U. Zachert,* Die Arbeitnehmergrundrechte in der Europäischen Grundrechtscharta, NZA 2001, p. 1041 ff., *A. Vitorino,* La Charte des droits fondamentaux de l'Union Européenne, Revue de Droit de l'Union Européenne 2001, p. 27 ff., *E. Riedel,* Solidarität, op. cit., p. 345 ff.

44 See *U. Zachert,* Die Arbeitnehmergrundrechte, op. cit., p. 1045 ff., *A. Vitorino,* La Charte des droits fondamentaux, op. cit., p. 54 ff., *E. Pache,* Die Europäische Grundrechtscharta – ein Rückschritt für den Grundrechtsschutz in Europa?, EuR 2001, p. 475 ff.

just working conditions[46] and the protection of children and young people at work.[47] These rights do not confer concrete material benefits, but guarantee instead – in the form of public subjective rights – minimum standards in the exercise of the right to work. The right for protection of family and professional life can be added in this last category as well[48] After all, most of these rights correspond to a significant community acquis.[49]

A second category of rights according to the previously mentioned criteria includes the right to social security and assistance,[50] the right to health care,[51] the right to access services of general economic interest[52] and the right to environmental protection.[53] The previous provisions, without consolidating justiciable subjective rights, provide the basis for corrective interpretation, especially from the Court of the European Communities when applying legal acts that specify their content, thus constituting 'principles' under the meaning given to the term by article 52 paragraph 5 of the incorporated Charter.[54] The provisions concerning the social protection of children, the elderly and persons with disabilities may be included in the same category, although regarding the first two (articles 24 and 25), reference is made to 'rights'.[55] The same stands for the right to education[56] and the right of access to placement services[57], taking into account the limited powers of the European Union in these fields.

Two more specific examples on the differentiation of the legal content of social rights in the Charter are the following: on the one hand art. 31 of the incorporated Charter consolidates the right of every worker to fair and just working conditions, namely working conditions that respect his health, safety and dignity (par. 1). The right concerns the institutional status of workers and a normative rather than a material benefit is consolidated. Additionally, this field is highly regulated by Community law, therefore resulting in a high degree of harmonization in national legislations[58]. The wording of this specific provision does not contra-

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45 See *E. Pache,* Die Europäische Grundrechtscharta, op. cit., p. 477 ff., *B. Zwanziger,* Der Einfluss des europäischen Rechts auf das Kündigungsschutzrecht, Arbeit und Recht 2001, p. 384 ff.

46 See *E. Riedel,* Solidarität, op. cit., p. 370 επ., *U. Zachert,* Die Arbeitnehmergrundrechte, op. cit., p. 1045 ff., *G. Braibant,* La Charte des Droits Fondamentaux de l' Union Européenne, 2001, p. 171 ff.

47 See *A. Vitorino,* La Charte, op. cit., p. 51 ff., *U. Zachert,* Die Arbeitnehmergrundrechte, op. cit., p. 1046 ff.

48 See Directives 92/85 EC and 96/34 EC as well as the critical remarks of *C. Mc Glynn*, Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the status quo?, EL-Rev 2001, p. 590 ff.

49 Especially in the rights consolidated in articles 27 and 31 of the incorporated Charter.

50 See *N. Bernsdorf,* Soziale Grundrechte in der Grundrechtecharta der Europäischen Union, op. cit., p. 3 ff., *D. Triantafyllou*, The European Charter of Fundamental Rights and the Rule of Law: Restricting Fundamental Rights by reference, CMLRev, 2002, p. 61 ff.

51 *N. Bernsdorf*, Soziale Grundrechte, op. cit., p. 3 ff.

52 See *E. Riedel,* Solidarität, op. cit., p. 417 ff., *G. Braibant*, La Charte des Droits Fondamentaux, op. cit., p. 177 ff.

53 See *H.-J. Koch (Hrsg.),* Umweltrecht, 2002, p. 93 ff.

54 See above under II 2.

55 Contra *S. Hölscheidt,* Gleichheit, in: *J. Meyer (Hrsg.),* Kommentar zur Charta der Grundrechte der Europäischen Union, 2003, p. 311 ff., where it is maintained that the right of the child is differentiated in relation to the rights of other vulnerable groups in the Charter and constitutes a complex right.

56 See *C. Grabenwarter,* Die Charta der Grundrechte für die Europäische Union, DVBl 2001, p. 3 ff., *T. Schmitz,* Die EU-Grundrechtscharta aus grundrechtsdogmatischer und grundrechtstheoretischer Sicht, JZ 2001, p. 833 ff., *N. Bernsdorff,* Freiheiten, in: *J. Meyer (Hrsg.),* Kommentar zur Charta der Grundrechte der Europäischen Union, 2003, p. 214 ff.

57 See *E. Riedel,* Solidarität, op. cit., p. 358 ff.

58 See also art. 140 EC Treaty and the Directive 89/391 EC

dict the previous arguments, namely that in article 31 a subjective right and a social acquis could be consolidated. On the other hand, in article 34 of the Charter the Union recognizes the right to social and housing assistance (par. 3). Contrary to the first example, this article concerns a material benefit in a field where the European Union has no competencies, and the wording confirms that no legally binding right is consolidated.

The categorization of provisions consolidating social rights could, alternatively, be attempted as follows:[59] A first category could comprise provisions referring to labour relations but essentially constituting individual rights or rights of collective action, such as the right to negotiations and collective action. A second category could comprise the rights including demands for institutionalized protection, such as protection in the event of unjust dismissal, fair and just working conditions, prohibition of child labour and the protection of young people at work, as well as the protection of family and motherhood. A third category could include participatory rights dealing with issues such as access to services, as provided by articles 29 and 36 in the Charter.[60] The explicit reference in Article 53 of the incorporated Charter that its provisions cannot be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized either in international texts, such as the European Social Charter, or the Constitutions of Member-States is of particular significance. Moreover, it is recognized that the interpretation of the rights incorporated in the Charter guarantee the community acquis.[61]

IV. Concluding Remarks

It is important to stress that the discussion over social rights has been transferred at european level without having been decisively concluded in national constitutional theory and practice. Furthermore, the discussion concerning social rights becomes even more complex at european level for three main reasons: First, because the concept and practice of social rights differs significantly both in the context of the four prevailing welfare regimes but also between the european nation states; and consequently, it is not possible to discern — as in other fundamental rights — a common european constitutional tradition. The second reason of complexity relates to the social deficit of the European Union and the lack of substantial competencies on social protection; in other words a "European social state" which would be obliged to safeguard social rights is inexistent. Finally, the recognition of enforceable social rights at european level would possibly lead not only to a redistribution of competencies between the European Union and the Member-States, but also to a redefinition of the roles of the institutions of the European Union, especially the role of the European Court of Justice in the unification process.

The incorporation of the Charter of Fundamental Rights, and especially the incorporation of social rights in the Draft Constitutional Treaty lays new foundations for the role of the Court of Justice, which has until now demonstrated greater self-restriction than the constitutional and supreme courts of Member-States. The normative content of the social rights consolidated in the Constitutional Treaty shall be highlighted through the jurisprudence of the

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59 See *C. Grabenwarter,* Die Charta, op. cit., p. 9 ff.

60 See above under II 2.

61 See *J. B. Liisberg,* Does the EU Charter of Fundamental Rights threaten the Supremacy of Community Law?, CML Rev. 2001, p. 1171 ff., *P.-C. Müller-Graff,* Grundfreiheiten und Gemeinschaftsgrundrechte, in: *H.-J. Cremer (Hrsg.),* Tradition und Weltoffenheit des Rechts: FS H. Steinberger, 2002, p. 1281 ff.

Court of Justice, fuelling the dialogue on the relation of justice and politics, judicial and political organs at Union level.

Another equally significant question to be answered in practice is the degree to which the consolidation of social rights in the Constitutional Treaty will constitute a driving force in dealing with the social deficit, undoubtedly in a latent manner, given that the expansion of the Union's powers has been precluded according to article 51 of the Charter. However, social rights are expected to lead to a more intense control of the community legislator in the fields of employment and social protection. More specifically, the relation of social rights and the incorporated Charter with Part III of the Draft Constitutional Treaty and secondary community law can be described in the following way: Social rights function as interpretative indicators in the implementation of both primary and secondary community law and as a stimulus for enhancing community competencies. Additionally, social rights guide the community legislator when producing secondary law. Finally, they restrict provisions of secondary law or national law which specify social rights, in the form of a social acquis.

From a procedural point of view it is doubtful whether the legal or substantial imperfections of the Charter[62] could undergo a new formulation before the finalization of the Constitutional Treaty. These imperfections however do not restrict the immense legal and political significance of the inclusion of all the categories of fundamental rights into one single text of constitutional nature. Moreover, as the Report of the European Parliament adopted at 24.9.2003 indirectly implied, a contestation of the content of the Charter would reopen an issue on which a hard compromise was achieved, and this fact would constitute a meaningless or dangerous drawback concerning the position of fundamental rights in the Treaty.

It is worth noting, that beyond the legal-normative function they perform, the social rights included in the Charter possess an exceptionally symbolic power; they correspond to a system of values that determines the confederate and social life at the level of the European Union; they reaffirm and enhance the European social model; they contribute to the legitimization of the decisions of the Union institutions and to the process of constructing a European "demos". If we thus agree with J. Weiler that 'what Europe needs is a ethos and a telos',[63] then the inclusion of social rights in the incorporated Charter makes a significant contribution to covering this deficit.

Finally, the normative content of the social rights included in the Charter is not formulated in vitro but largely depends on the progress of European unification, and especially on the choice towards federalization and convergence of social policies or instead towards a flexible confederation model opting for neo-liberal policies aiming at the deregulation of the social state.

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62 See *E. Pache,* Die Europäische Grundrechtscharta, op. cit., p. 479 ff.

63 See *J. Weiler,* European Neo-Constitutionalism. In Search of Foundations for the European Constitutional Order, in: *R. Bellamy/D. Castiglione (Eds.),* Constitutionalism in Transformation: European and Theoretical Perspectives, 1996, p. 106.