

# **EUROPEAN PARLIAMENT**

Directorate General for Research

## **WORKING PAPER**

# **FUNDAMENTAL SOCIAL RIGHTS IN EUROPE**

**SOCIAL AFFAIRS SERIES**

SOCI 104 EN

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2-2000

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## Part I: Introduction

### 1. Aim and contents of the study

At its meeting in Cologne in early June 1999 the European Council decided to set up a body composed of representatives of the Heads of State or Government, the President of the Commission and Members of the European Parliament and national parliaments to draft a Charter of Fundamental Rights of the European Union. Once the Council, the Commission and Parliament have solemnly proclaimed the Charter, it will be decided if it is to be integrated into the EU Treaty. Europe may thus be on the eve of a new era that begins with its own bill of rights and perhaps leads to the creation of a European constitution<sup>1</sup>.

This working document is intended as a contribution to the debate on the creation of a bill of rights and on its contents. It considers the fundamental social rights that already exist at European level and especially those included in the constitutions of the Member States of the European Union. The constitutions of some candidate countries are also examined.

European Communities activity in the economic sphere and growing Member States' cooperation within the EU in internal affairs and law are such that almost all aspects of EU citizens' lives are now affected by EU legal acts. Thus there appears to be a need for the individual to identify his fundamental rights, by which these acts are gauged, not only in the constitution of his own country but also in EU primary law<sup>2</sup>. The present system, whereby the European Court of Justice develops general principles of Community law and references are made to the European Convention on Human Rights (ECHR)<sup>3</sup>, the European Social Charter (ESC) adopted by the Council of Europe in 1961 and the Community Charter of Fundamental Social Rights adopted in 1989<sup>4</sup>, does not ensure sufficient transparency<sup>5</sup> and is unlikely to increase public confidence in the EU.

The low turnout for the elections to the European Parliament in 1999 is a clear sign of poor public identification with Europe. A bill of rights is also important in the context of eastward enlargement, common foreign and security policy and development cooperation. The EU will seem more credible when demanding that other countries respect human rights and obey the rule of law if it itself clearly bases its activities on these principles.

It remains to be seen how far social rights will form part of an EU bill of rights since, unlike the classical liberal civil rights and liberties recognised in all constitutions, social rights are not regarded as fundamental rights in all Member States.

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<sup>1</sup> See Pernice, Vertragsrevision oder europäische Verfassungsgebung, *Frankfurter Allgemeine Zeitung*, 7 July 1999, p.7; Rengeling, Eine Charta der Grundrechte, *Frankfurter Allgemeine Zeitung*, 21 July 1999, p.13.

<sup>2</sup> Report of the Expert Group on Fundamental Rights, 'Affirming Fundamental Rights in the European Union – Time to Act', European Commission, p.13.

<sup>3</sup> This reference is to be found in Article 6(2) of the Treaty on European Union, but not in the EC Treaty.

<sup>4</sup> Article 136 of the EC Treaty and the fourth recital of the preamble to the Treaty on European Union.

<sup>5</sup> Report of the Expert Group on Fundamental Rights, op. cit. p.10.

## 2. Concept and definition of 'fundamental social rights'

Fundamental social rights in this context mean rights to which the individual citizen is entitled, which he can exercise only in his relationship with other human beings as a member of a group and which can be made effective only if the State acts to safeguard the individual's environment<sup>6</sup>. Social rights are a necessary complement to civil rights and liberties, since the latter cannot be enjoyed without a minimum of social security. In contrast to civil rights and liberties, this means that it is not freedom from the State that is achieved, but freedom with the State's help. These are, then, fundamental rights in the form of entitlements.

Although this would appear at first glance to indicate that they can be distinguished from the classical civil rights and liberties and the general principle of equality, there is considerable overlap. This study considers only those fundamental rights not included among the 'classical fundamental rights'. It does not therefore have anything to say on the right of freedom of occupation in the sense of freedom of occupational choice and the prohibition of forced labour or on the right to form associations and engage in collective bargaining or the right to strike. Nor will the study discuss in any depth fundamental rights which primarily concern equality and are generally recognised, such as the right to equal pay for men and women<sup>7</sup>.

Fundamental social rights in Europe should also be generally distinguished from European social policy, which cannot be considered in this context. It forms the basis of social rights, which are not, however, fundamental rights in the constitutional sense

## 3. General comments on the protection of fundamental rights at constitutional level

The theories adopted by the various legal systems of the Member States as regards the protection of fundamental rights are reviewed in the following.

### 3.1. Functions of fundamental rights

Fundamental rights may take the form of litigable or 'individual' rights, i.e. the individual may refer directly to such rights in courts of law. In principle, this may be true both of rights of self-defence, i.e. rights concerning freedom from the State, such as the inviolability of the home and freedom of opinion, and of rights to equal treatment as well as entitlements that justify a claim to State action.

Fundamental rights may also take the form of guarantees of establishment, which require the State to ensure the existence of a given legal institution (e.g. private ownership, universities). They may further be included in provisions defining objectives of the State that require all its authorities to observe them in any action they take and so have an impact on legislation and administrative action.

Fundamental rights may also be policy clauses in the sense that they instruct the legislator to ensure that a right is made effective by means of ordinary laws. The individual can enforce the

<sup>6</sup> H.-J. Wipfelder, Die verfassungsrechtliche Kodifizierung sozialer Grundrechte, *Zeitschrift für Rechtspolitik* 1986, p.140.

<sup>7</sup> This right is also recognised as a general principle of Community law; see European Court of Justice, Case 149/77 – Defrenne, ECR 1978, p.1379.

entitlements arising from this ordinary legislation – i.e. not from constitutional law – by applying to the ordinary courts or to special administrative or social courts provided the right takes the form of an individual right.

A further distinction needs to be made between a situation where a fundamental right is effective only vis-à-vis the State or third parties as well ('third-party effect'), i.e. where the individual may refer to his fundamental right only in a legal dispute with the State, and a situation in which it can also have a bearing in civil legal disputes, as in labour law. A distinction must then be made between direct and indirect third-party effect, depending on whether the fundamental right has a legal effect directly or simply indirectly in the form of, say, an interpretation of civil law or even an employment contract that upholds fundamental rights.

### 3.2. Social rights as fundamental rights?

All the Member States have social rights at the level of ordinary law. They are to be found in particular in labour law in the relationship between employees and employers, where they include, for example, rules on protection against dismissal, minimum wages, leave and safe working conditions. The social security systems are also governed by ordinary legislation that guarantees various social benefits in emergencies or where certain situations arise. The question is, however, whether social rights should be raised to the level of constitutional law.

Those who advocate that as many fundamental rights as possible be explicitly enshrined in the constitution claim this to be the only way to ensure that such rights are not eroded by ordinary legislation or the administration of justice, since constitutions are not as a rule as easy to amend as ordinary legislation and normally remain largely unchanged even after a change of government.

Critics, on the other hand, maintain that the inclusion of fundamental social rights in the constitution would result in the definition of a certain standard of living, which changing economic and financial circumstances might make it impossible to sustain, and in the inclusion of provisions inappropriate to future situations since they are based on current social conditions<sup>8</sup>.

Nor, according to the opponents of the inclusion of fundamental social rights in constitutions, should such rights be placed on a par with fundamental and inalienable human rights (such as the right to life, freedom and physical integrity), because most fundamental social rights cannot be guaranteed and do not have the same value. In a market economy, for example, the state is de facto unable to guarantee many rights, one such being the right to work because it cannot offer enough jobs. In contrast, it is able to guarantee rights to freedom, self-defence and equality, because all this usually entails is restraint on its part or the passing of legislation to bring about equality.

Where the EU is specifically concerned, another factor that must be considered in the debate is that the EU is not a State and has only the powers transferred to it by the Member States. As things now stand, therefore, it is able to protect its citizens' fundamental rights only where EU law applies, i.e. where the EU or one of the Communities acts or where national bodies take

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<sup>8</sup> Such as full-time employment by a single employer, which will not necessarily be the rule in the future; see Bognetti, Social Rights, a Necessary Component of the Constitution? The Lesson of the Italian Case, in: Bieber/Widmer (eds), *L'espace constitutionnel européen, Der europäische Verfassungsraum, The European Constitutional Area*, Zürich 1995, pp.85 ff.

action within the scope of the Treaties. Otherwise, the protection of fundamental rights is left to the Member States unless they transfer this task in its entirety to Europe and a European court. With opinions differing widely in some respects, this is unlikely and given the present structure of the Union, or Communities, hardly possible<sup>9</sup>. Nor is there at present any genuine level of constitutional law by which EU action must be gauged. The establishment of a common bill of rights should logically be followed by the creation of an EU constitution and constitutional court.

The constitutional lawyer Udo Di Fabio, who has just been appointed as a judge to the German Federal Constitutional Court, has proposed in the context of the debate on the charter of fundamental rights that the monitoring of such rights should not be entrusted to a European Court of Justice that is already overextended. Instead, a separate Union court should be set up for issues relating to fundamental rights on the model of the European Court of Human Rights, which does not form part of the European Union. A court of this kind would have no other task but to monitor, when requested by Union citizens, the exercise of Community power, taking European fundamental rights as its yardstick<sup>10</sup>.

Finally, it is important to realise that there is a rather tense relationship between the principles of democracy and the division of power on the one hand and the protection of fundamental rights on the other. If too many constraints are placed on the legislature by the constitution and especially the constitutional court, decisions will ultimately no longer be taken by the democratically legitimised parliament but by judges who have not been elected by the people<sup>11</sup>. The executive too needs some room for manoeuvre if it is to be able to act effectively and must not be totally restricted by the constitution and constitutional court.

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<sup>9</sup> This is also rejected by the Committee of Wise Men (Cassese/Lalumière/Leuprecht/Robinson) in the agenda *Leading by example: A human rights agenda for the European Union for the year 2000*, p.9.

<sup>10</sup> Udo Di Fabio, Für eine Grundrechtsdebatte ist es Zeit, *Frankfurter Allgemeine Zeitung*, 17 November 1999, p.11.

<sup>11</sup> In the United Kingdom no real level of constitutional law by which acts of parliament must be gauged is therefore recognised; see Part III, section 2.15, below.

## Part II: The recognition of fundamental social rights at European level

### 1. The European Social Charter

The European Social Charter (ESC) can be seen as the 'social counterpart' of the European Convention on Human Rights (ECHR). Like the ECHR, it emerged from the Council of Europe and since 1961 has been signed by 22 countries, though with reservations and derogations in some cases<sup>12</sup>.

The ESC requires the signatory states to take legal and administrative measures in the areas of working life and social security. Although it does not provide for any real sanctions for infringing the rules, it does obligate the signatory states to send a report every two years to the Committee of Experts, which then identifies infringements and submits proposals for changes. As a result, the ESC has had a major influence on the legislation of the signatory states, this being especially true of the first twenty years of its existence. In the 1970s, for example, the United Kingdom and Denmark amended their merchant shipping acts because they contravened the prohibition of forced labour referred to in Article 1(1) of the ESC.

The EU itself is not a party to the ESC. In the preamble to the 1987 Single European Act (SEA) the Member States of the Community nevertheless referred to the 'fundamental rights recognised in ... the European Social Charter, notably freedom, equality and social justice'<sup>13</sup>. This declaration is now also to be found in the preamble to the Treaty on European Union (fourth recital). The European Court of Justice has also referred to the ESC on several occasions in its judgements and uses it as a source of legal findings when establishing general principles of Community law<sup>14</sup>.

Articles 1 to 19 of the European Social Charter list the following fundamental rights:

- the right to work;
- the right to just, safe and healthy working conditions;
- the right to fair remuneration;
- the right to organise;
- the right to bargain collectively;
- the right of children and young persons to protection;
- the right of employed women to protection;
- the right to vocational guidance and training;
- the right to protection of health;
- the right to social security;

<sup>12</sup> The signatory states, with date of entry into force: Austria (28.11.1969), Belgium (15.11.1990), Cyprus (6.4.1968), Denmark (2.4.1965), Federal Republic of Germany (26.2.1965), Finland (29.5.1991), France (8.4.1973), Greece (6.4.1984), Ireland (26.2.1965), Iceland (14.2.1976), Italy (21.11.1965), Luxembourg (9.11.1991), Malta (3.11.1988), Netherlands (22.5.1980), Norway (26.2.1965), Poland (25.7.1997), Portugal (30.10.1991), Slovakia (22.6.1998), Spain (5.6.1980), Sweden (26.2.1965), Turkey (24.12.1989), United Kingdom (26.2.1965).

<sup>13</sup> See Irmgard Wetter, *Die Grundrechtscharta des Europäischen Gerichtshofes*, Frankfurt am Main 1998, pp.61 f.

<sup>14</sup> See, for example, Rutili, Case 36/75 (1975), ECR 1219; Hoechst, Case 227/88 (1989), ECR 2859; Gravier, Case 293/83 (1985), ECR 593; it is worth noting that the ESC has even been taken as the basis for judgments concerning countries that have not ratified it; see, for example, Defrenne, Case 149/77 (1978), ECR 1365. The European Court of Justice therefore clearly considers some of the fundamental rights set out in the ESC to be general principles of Community law.

- ❑ the right to social and medical assistance and to benefit from social welfare services;
- ❑ the right of disabled persons to vocational training and integration;
- ❑ the right of the family to protection;
- ❑ the right of mothers and children to protection;
- ❑ and rights relating to the freedom of movement, combined with the right to protection and assistance.

A question that has yet to be answered is whether the EU, or EC, should itself accede to the ESC (and to the ECHR). Parliament has always favoured this, but the Court of Justice takes the view that the EC lacks a legal basis for such action<sup>15</sup>. The two charters might, however, be incorporated into Community law without formal accession<sup>16</sup>. A particular problem with accession is that, as the two charters would rank higher than EU law, it would have to be possible for the case law of the European Court of Justice to be reviewed by the European Court of Human Rights in Strasbourg. These issues cannot, however, be considered in any greater depth here<sup>17</sup>.

## 2. The Community Charter of the Fundamental Social Rights of Workers

The Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 was signed at the time by all the EC Member States except the United Kingdom. It is neither a binding legal act of the EU, nor is it a treaty among the signatory states that is binding in international law. It is merely a solemn declaration by the Heads of State or Government of the Member States. It should nonetheless be used as an aid to the interpretation of the provisions of the EC Treaty, since it reflects views and traditions common to the Member States and represents a declaration of basic principles which the EU and its Member States intend to respect<sup>18</sup>. Together with the action programme for implementing the Community Charter, which has also been approved by the Heads of State or Government, it is therefore used by the Commission as a basis for justifying many of the directives it proposes<sup>19</sup>.

Title I of the Community Charter of the Fundamental Social Rights of Workers details rights in the following areas:

- ❑ freedom of movement;
- ❑ employment and remuneration;
- ❑ improvement of living and working conditions;
- ❑ social protection;
- ❑ freedom of association and collective bargaining;
- ❑ vocational training;
- ❑ equal treatment of men and women;
- ❑ information, consultation and participation of workers;
- ❑ health protection and safety at the workplace;
- ❑ protection of children and adolescents;

<sup>15</sup> See European Court of Justice 2/94, 28.3.1996.

<sup>16</sup> See de Witte, 'Protection of Fundamental Social Rights in the EU – The Choice of the Appropriate Legal Instrument', in: Betten/McDevitt, *The Protection of Fundamental Social Rights in the European Union*, pp.66 ff.

<sup>17</sup> For recent developments concerning the ESC and future prospects see: *The Social Charter of the 21<sup>st</sup> Century*, Council of Europe 1997.

<sup>18</sup> E. Lundberg, *The Protection of Social Rights in Europe*, in: Drzewicki/Krausse/Rosas, op. cit., p.183.

<sup>19</sup> It should be remembered, however, that binding acts cannot be based solely on the Charter; it may only be cited together with provisions of the EC Treaty.

- elderly persons;
- disabled persons.

Title II of the Community Charter makes it clear that the Member States are generally responsible for guaranteeing fundamental social rights in accordance with national practices. The EU takes action only inasmuch as Articles 29 and 30 of the Charter require the Commission to draw up an annual report on the application of the Charter and to forward it to the Council, Parliament and the Economic and Social Committee. As a consequence, it has already been stated in the literature that the ESC of the Council of Europe (see 1 above) affords better protection of fundamental social rights than the EU Member States' Community Charter<sup>20</sup>. Now that the Treaty of Amsterdam has helped fundamental social rights to find their place in the preamble to the EU Treaty, the Court of Justice might take greater account of them – as the 'driving force of integration' – in its case law on fundamental rights and so make them an important element of the system of fundamental rights<sup>21</sup>.

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<sup>20</sup> E. Lundberg, loc. cit., with a reference, inter alia, to B. Hepple, The Implementation of the Community Charter of Fundamental Social Rights, *The Modern Law Review*, Vol. 53, p.645, and P. Watson, The Community Social Charter, *Common Market Law Review*, Vol. 28, p.49.

<sup>21</sup> See Bergmann, in: Bergmann/Lenz (eds): *Der Amsterdamer Vertrag, Kommentar*, Cologne 1998, pp.35 f.

## Part III: Fundamental social rights in the constitutions of the Member States

### 1. Preliminary remarks

Comparing systems of fundamental rights is difficult because some similar concepts are apparently defined differently and an accurate comparison always requires an examination of the environment of the constitution as a whole, the dogmatics of constitutional jurisprudence and the judgments of the constitutional court, where it exists. In this context no more than an overview can therefore be given of the various approaches adopted in the Member States' constitutions.

### 2. The constitutions of the Member States

#### 2.1. Belgium

Compared to other recent constitutions, the Belgian constitution of 1994 refers to only a few fundamental social rights<sup>22</sup>. Despite this restraint, Belgium has extensive social legislation and is therefore a genuine welfare state, even though the latter has not been defined in any detail in the constitution<sup>23</sup>.

The most important social rights are based on Articles 23 and 24. Article 23 gives everyone the right to a decent life. This right is defined in paragraphs 1 to 5 and comprises both the right to work and the right to fair remuneration, social security, health protection, social, medical and legal assistance, adequate housing, a healthy environment and cultural and social self-fulfilment. According to paragraph 1, the state is responsible for guaranteeing these economic, social and cultural rights in that it is required to pass laws which enable the individual to lead a decent life. Although there is no instrument for enforcing social rights at constitutional level<sup>24</sup>, the legislature would be contravening the constitution if it failed to make appropriate arrangements or restricted fundamental rights contrary to the constitution.

Article 24 of the Belgian constitution gives everyone the right to free and neutral training, free education and a moral or religious upbringing.

It is noticeable that these rights are not reserved for Belgians, but may be exercised by anyone<sup>25</sup>. This is confirmed by Article 191 of the Belgian constitution, according to which any foreigner in principle enjoys the same protection of his person and his assets as any Belgian national.

#### 2.2. Denmark

The Danish constitution of 5 June 1953 contains two provisions that provide for fundamental social rights within the meaning of this study, namely sections 75 and 76.

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<sup>22</sup> Isabel Álvarez Véllez/Fuencisla Alcón Yustas, *Las Constituciones de los 15 estados de la Unión Europea*, p.145.

<sup>23</sup> *ibid.*, p.145.

<sup>24</sup> Aristovoulos Manassis, in: Julia Iliopoulos-Strangas (ed.), *Grundrechtsschutz im europäischen Raum - Der Beitritt der Europäischen Gemeinschaft zur Europäischen Menschenrechtskonvention*, p.33.

<sup>25</sup> *ibid.*, p.33.

Section 75(1) refers to a right to work in that it states that 'to further public welfare, the aim shall be to ensure that every citizen capable of work is able to work under conditions that secure his existence.' The wording itself makes it clear that this is not an individual right but a policy clause.

Section 75(2), on the other hand, is worded as an individual right: 'Anyone who is unable to support himself or his dependants and for whose welfare no one else is responsible shall be entitled to public assistance provided, however, that he enter into the obligations for which the law provides.' Whether this is indeed an individual right or a policy clause, however, is disputed in legal theory<sup>26</sup>.

According to section 76, all children of school age are entitled to free elementary education. This is likely to be an individual right since it is so worded and the state has no difficulty in making it effective.

Fundamental social rights do not, then, feature very strongly in the constitution. One of the reasons for this is that the constitution was originally drawn up in 1849 and has largely remained liberal in nature. The Scandinavian countries also have a legal tradition of judicial restraint, the courts being wary of declaring acts of the legislature unconstitutional in their desire to respect the will of the democratically elected parliament<sup>27</sup>. The Scandinavian welfare states are able to manage without a detailed list in their constitutions mainly because social rights frequently emerge from agreements between trade unions and employers and from consensus in politics and society.

In Denmark the social rights of the citizen therefore enjoy effective protection primarily under ordinary laws, and the ordinary courts are in principle there for decisions by the administration to be contested<sup>28</sup>.

### 2.3. Germany

Unlike the Weimar constitution of 1919, the German Basic Law of 1949 does not generally refer to fundamental social rights. The only reference to an individual right is to be found in Article 6(4) of the Basic Law, under which every mother is entitled to protection and care. The main reason for this restraint is that the authors of the constitution wanted to avoid the need for such rights to be constantly adjusted to changing economic and social conditions<sup>29</sup>.

Articles 20(1) and 28 describe the Federal Republic as a democratic and social federal state. All acts of the public authorities must comply with the welfare state principle. Although fundamental social rights, unlike the classical fundamental rights, are not specifically referred to in the German constitution, or Basic Law, they are nonetheless covered by the welfare state principle<sup>30</sup>. This principle is thus the overriding concept for the various social rights, and

<sup>26</sup> See Rosas, *The Implementation of Economic and Social Rights: Nordic Legal Systems*, in: Matscher (ed.), *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte – eine rechtsvergleichende Bestandsaufnahme*, p.231, with further references.

<sup>27</sup> Katrougalos, *The Implementation of Social Rights in Europe*, *Columbia Journal of European Law* 1996, p.277; *ibid.*, p.295.

<sup>28</sup> Rosas, *op. cit.*, p.233.

<sup>29</sup> Luis María Díez-Picazo/Marie-Claire Ponthoreau, *The Constitutional Protection of Social Rights: Some Comparative Remarks*, p.18.

<sup>30</sup> Kittner, in: *Kommentar zum GG für die BR Deutschland*, Vol. I, Articles 1-37, lit. 64.

although this has the disadvantage that these rights are not specified, the shift in emphasis to ordinary laws has the advantage that the latter can be adjusted to requirements more quickly.

There are some references to fundamental social rights in the constitutions of the *Länder*. However, they are virtually unenforceable since the Federal Government has assumed almost total responsibility for social matters.

In 1994 Article 20a was inserted into the constitution to protect the environment. It is worded as a provision defining a state objective and therefore transfers to all three organs of state the responsibility for protecting the natural foundations of life for future generations. The need for this provision was due less to deficient protection than to a need for clarification, since such protection could be deduced from the fundamental rights even before Article 20a was inserted into the Basic Law. Just as a right to a minimum social subsistence level ensues from the first sentence of Article 2(2) in conjunction with Article 1(1) of the Basic Law, a right to a 'minimum ecological subsistence level' can, by analogy, be deduced<sup>31</sup>. A decent life is possible, after all, only in a decent environment. A fundamental environmental right was nonetheless eschewed since it proves extremely difficult to specify what is to be protected and it would be impossible to make a right of this kind litigable<sup>32</sup>. Nor, then, can an enforceable entitlement of the individual to a fundamental right be inferred from this; it is more in the nature of an objective value decision by the constitution that commits the public authorities<sup>33</sup>.

#### 2.4. Greece

The part of the Greek constitution of 9 June 1975 as amended on 12 March 1986 that concerns fundamental rights (Part II, Articles 4-25) is very long and defines individual and social fundamental rights in detail.

The nine paragraphs of Article 16, for example, require the state to develop and promote art and science, research and teaching (paragraph 1), stipulate that education is a basic task of the state (paragraph 2), thus giving all Greeks the right to free education at all stages in state educational establishments (paragraph 4, first sentence) and the universities the right to financial assistance (paragraph 5, second sentence). Paragraph 4 also provides for assistance for students who distinguish themselves but need help or special protection. Under paragraph 9 the state has overall responsibility for sport and is required to subsidise all confederations of sports clubs.

Article 21(2) states that large families, persons disabled in war or peace, war victims, orphans and widows of persons killed in the war and persons suffering from incurable diseases are entitled to special state care. Paragraph 3 requires the state to ensure the health of its citizens and to take special measures to protect young people, the elderly, the disabled and persons unable to pay for care. Under paragraph 4 the provision of housing for persons with no or inadequate accommodation is a matter of particular concern for the state.

Article 22(1) recognises a right to work and places it under the protection of the state, which is required to ensure full employment and to provide the working rural and urban population with moral and physical support. Paragraph 4 also requires the state to ensure the social insurance of the working population, further details to be set out in a law.

<sup>31</sup> Scholz, in: Maunz/Dürig, Article 20a GG I, lit. 28.

<sup>32</sup> *ibid.*, Article 20a GG I, lit. 12.

<sup>33</sup> *ibid.*, Article 20a GG I, lit. 33.

Despite these detailed provisions, fundamental social rights in Greece cannot be enforced by law, and the state cannot be required by a court of law to take action<sup>34</sup>. Social reality in Greece is also different. This is especially true of the right to free education, there being insufficient university places on many courses in Greece.

## 2.5. Spain

The Spanish constitution of 1978, like Portugal's, occupies a prominent position among European constitutions. This is primarily due to the fact that in these young constitutions an attempt has been made to take account of today's social problems rather than to exclude them. After 40 years of dictatorship the aim was to bring an end to lawlessness and allot to the individual as comprehensive a list of rights as possible<sup>35</sup>.

The preamble refers to a desire to ensure democratic co-existence on the basis, *inter alia*, of a fair economic and social system. The Spanish constitution was guided by the German Basic Law<sup>36</sup> and emphasises in Article 1 that Spain is a social and democratic state based on the rule of law, the order in which the adjectives appear in this phrase revealing the importance of social rights in Spain<sup>37</sup>. The institutions for which the constitution provides and the ordinary administration of justice must conform to this welfare state clause<sup>38</sup>. However, the Spanish constitution differs significantly from Germany's in that it includes an unusually long list of social rights.

Fundamental rights in the Spanish constitution are divided into three groups<sup>39</sup>. The first group (Articles 14 to 29) comprises the classical fundamental rights, including the right to education (Article 27). The second group (Articles 30 to 38) is primarily concerned with citizens' rights and obligations, including the right to work (Article 35), while the third group (Articles 39 to 52) is largely devoted to the protection of rights arising from the economic and social policies.

The principles governing the last group mainly concern the social sphere of interest here:

- Under Article 39 the state affords the family legal and social protection.
- Article 40 requires the public authorities to improve the conditions for the fairer distribution of incomes and conditions relating to continuing education and training and protection at the workplace and to guarantee leave and limited working hours.
- Article 41 guarantees a public system for the social security of the public that provides them with adequate help in emergencies and especially when they are unemployed.
- Article 43 recognises a right to health protection, paragraph 2 requiring the public authorities to organise this protection and paragraph 3 requiring them to promote health education<sup>40</sup>.

<sup>34</sup> P. Spyropoulos, *Constitutional Law in Hellas*, p.139.

<sup>35</sup> José Vida Soria in Matscher, op. cit., p. 290, Manassis, op. cit., p.47.

<sup>36</sup> Díez-Picazo/Ponthoreau, op. cit., p.20.

<sup>37</sup> Vida Soria, op. cit., p.292.

<sup>38</sup> Díez-Picazo/Ponthoreau, op. cit., p.20.

<sup>39</sup> *ibid.*, p.21.

<sup>40</sup> The same applies to physical education, sport and the suitable use of leisure time pursuant to Article 43(3).

- Article 44 guarantees the individual access to culture, paragraph 2 also requiring the public authorities to promote culture.
- Article 45 entitles everyone to the enjoyment of nature and also requires the state to use its influence to ensure the preservation and restoration of the environment (paragraph 2).
- Article 47 grants all Spaniards the right to housing, the necessary conditions to be promoted by the public authorities.
- Article 48 requires the public authorities to create the conditions for the involvement of young people in social development.
- Article 49 is devoted to the integration and protection of disabled people.
- Article 50 guarantees adequate provision for old age and support for the elderly with respect to health, housing, culture and leisure.

The protection of these rights is governed by Article 53. Under Article 53(1) and (2) the rights of the first two groups can be claimed before the ordinary courts, and all legislation must respect the essential substance of these rights. As regards enforceability, rights are graded in such a way that those in the first group – which include the right to education – may be claimed, pursuant to Article 53(1) in conjunction with Article 161(b) in conjunction with Article 53(2), before the constitutional court after all other legal means have been exhausted. These are, then, individual and also litigable fundamental rights.

The particularly topical right to work is, pursuant to Article 53(1), binding on the public authorities and may be claimed before the ordinary courts. The opposite conclusion to be drawn from Article 53(3), however, shows that only the rights it lists enjoy protection to be obtained by appealing to the constitutional court. As the right to work cannot be claimed before the constitutional court, it is not a litigable fundamental right.

Similarly, the rights to health, a healthy environment and adequate housing are worded as individual rights. Under Article 53(2), however, they are principles which are binding on the three organs of state and so take the form of a provision defining a state objective without providing the foundations for an individual right<sup>41</sup>.

## 2.6. France

The French constitution of 1958 was drawn up in 'great haste because of the Algerian crisis'<sup>42</sup>. It contains no more than a minimum of fundamental rights<sup>43</sup> and no social rights at all. It pivots on the preamble, in which reference is made to the 1946 constitution and the 1789 Declaration of Human and Civil Rights to the extent that they refer to human rights and the principles of national sovereignty<sup>44</sup>. The 1946 constitution was influenced by the experience of totalitarianism

<sup>41</sup> Díez-Picazo/Ponthoreau, p.22.

<sup>42</sup> Marco Itin, *Grundrechte in Frankreich*, p.6.

<sup>43</sup> They concern the principles of equality and religious freedom (Article 2(1)), the freedom to form political parties and groupings (Article 4) and the freedom of movement (Article 66).

<sup>44</sup> Marco Itin, *op. cit.*, p. 12. Owing to the broad interpretation of the term 'human rights', the problem of the scale of reference along these lines hardly arises, since the 1789 Human Rights Declaration and the 1946 preamble contain few statements that concern neither human rights nor the principles of national sovereignty.

and is geared primarily to the protection of workers, the structure of the economy and the social order.

The reference in the 1958 preamble results in the rights arising from the 1946 preamble also being enshrined in the constitution. It also means that the 1789 Human Rights Declaration has constitutional force<sup>45</sup>. It remains to be seen what form these rights take and whether an individual right arises from them. The 'classical' rights referred to in the 1789 Human Rights Declaration, which are 'inalienable and sacred', are recognised as forming the basis of French public law<sup>46</sup> and are also actionable.

The situation is different where the social rights arising from the 1946 preamble are concerned. Thus although everyone has not only a duty to work but also a right to employment under paragraph 5 of the preamble, this is, despite the wording, an instruction to the legislator to find solutions to unemployment rather than an individual right<sup>47</sup>. The tenth section requires the nation to lay the necessary foundations for the individual and his family to develop, the wording itself revealing that it is for the state to decide how this is to be achieved. The same is true of the eleventh section, which requires children, mothers and older workers to be assisted in the areas of health, physical security, rest and leisure. Anyone incapable of working is entitled to adequate resources, the question of adequacy again leaving considerable scope for interpretation. The right to education and training in the thirteenth section is similarly so worded as to oblige the state to make the necessary provisions, to which the individual has an undisputed fundamental right<sup>48</sup>, although its form is determined by the state.

Social rights are thus not recognised in the constitution in the same way as the classical fundamental rights, which are protected by the 1789 declaration. They have a complementary effect and require the legislature to create appropriate laws, but are not themselves litigable<sup>49</sup>.

## 2.7. Ireland

Ireland adopted its first constitution in 1922, but as it was based on a treaty between Ireland and Britain, it was not widely recognised. A new constitution intended to put Ireland's actual independence to the test was therefore introduced in 1937<sup>50</sup>.

The Irish constitution clearly reflects the deep religious convictions of the Irish people. This finds expression primarily in the preamble, but also in the fundamental rights. Thus the family is recognised in Article 41 as a moral institution of society, and in the second sentence of paragraph 1 the state guarantees to protect it. Paragraph 2 in particular requires the state to support mothers so that they need not go out to work and are able to devote themselves to their families and so contribute to the public welfare. This is a particularly clear illustration of the highly traditional attitude of the Irish state on the woman's role.

Article 42, which concerns education, again makes it clear how far the Irish constitution is devoted to religious values. Under Article 42(1) the family is responsible for bringing up

<sup>45</sup> *ibid.*, p. 17; Díez-Picazo/Ponthoreau, *op. cit.*, p.14.

<sup>46</sup> Itin, *op. cit.*, p.14.

<sup>47</sup> Díez-Picazo/Ponthoreau, *op. cit.*, p.16.

<sup>48</sup> Itin, *op. cit.*, p. 112. The right to secular and free education is undisputed and even an obligation.

<sup>49</sup> Díez-Picazo/Ponthoreau, *op. cit.*, p.16. This is confirmed by Article 34 of the constitution, according to which the law defines the principles for labour law, trade union law and social safeguards.

<sup>50</sup> Byrne/McCutcheon, *The Irish Legal System*, p.8.

children, and, according to paragraph 3, the state cannot force parents to send their children to school if this is incompatible with their conscience. The second sentence, however, requires the state to ensure that every child receives a minimum of moral, spiritual and social education. It also emerges from paragraph 4 that the state is obliged to provide free primary education.

Under the heading 'Directive Principles of Social Policy' Article 45(2)(i) states that the policy is to be directed in particular towards ensuring that citizens have the right to earn a living through their occupations. In paragraph 4 the state also pledges itself to protect and support financially the weaker sections of the community. It will also endeavour to ensure that workers are not exploited and no one is forced by economic necessity to undertake activities unsuited to their gender, age or strength.

The wording clearly reveals that the authors of the constitution preferred policy clauses to specific fundamental rights.

Other fundamental social rights arise from Article 40(III), although they are not explicitly enumerated<sup>51</sup>, the words 'in particular' showing that Article 40(III) covers other rights as well as those referred to<sup>52</sup>. It is generally acknowledged that these rights include the right to work and the right to health protection<sup>53</sup>. However, the right to work does not go so far as to oblige the state to provide the citizen with a job. It comprises rather his right freely to decide how to use his labour and the freedom to choose and pursue a given occupation<sup>54</sup>. The fundamental rights referred to are also effective as they stand, without further action on the part of the legislature<sup>55</sup>. However, it is also true to say that the rights which are not explicitly referred to are not absolute, but must be taken into account by the public authorities insofar as they are able<sup>56</sup>.

## 2.8. Italy

The Italian constitution of 27 December 1947 as amended in 1993 refers to a number of fundamental social rights, some of which are also individual rights. In Article 4 of the section headed 'Basic principles' the Republic recognises the right of all citizens to work and promotes such conditions as will make this right effective.

Article 31 requires the state to facilitate, by means of economic and other provisions, the formation of the family and the fulfilment of the tasks connected therewith, with particular consideration for large families, and to protect mothers, children and young people by promoting and encouraging institutions necessary for this purpose.

Article 32 requires the Republic to provide health safeguards as a basic right of the individual and in the interests of the community and to grant free medical assistance to the indigent.

<sup>51</sup> Duncan S.J. Grehan, in: Eberhard Grabitz (ed.), *Grundrechte in Europa und USA*, p.294.

<sup>52</sup> Article 40(3), first sentence: 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'

Article 40(3), second sentence: 'The State shall, *in particular*, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'

<sup>53</sup> Grehan in: Grabitz, op. cit., pp.295 f.

<sup>54</sup> *ibid.*, p.295.

<sup>55</sup> James Casey, *Constitutional Law in Ireland*, p.309.

<sup>56</sup> *ibid.*, pp.316, 329; see also footnote 40: '*as far as practicable*'.

Article 34 stipulates that at least eight years of elementary education are to be compulsory and free and gives capable and deserving pupils the right to attain the highest grades of learning even if they lack financial resources. The Republic is required to give effect to this privilege by means of scholarships, contributions to the families of pupils and other provisions, to be awarded by competitive examination.

The right to work – arising from Article 4 – is complemented by Article 36, which stipulates that everyone is entitled to remuneration which is in proportion to the quantity and quality of his work and is sufficient to provide him and his family with a free and dignified existence. Article 36 also provides for any employed person to have a weekly day of rest and annual paid leave.

Besides the principle of equal remuneration for women, Article 37 rules that conditions of work must make it possible for women to fulfil their essential family duties and provide for the adequate protection of mothers and children.

Article 38 guarantees a right to social security by granting a right to private and social assistance to anyone unable to work who does not have the resources necessary for life and to all workers a right to adequate insurance for their requirements in the event of accident, illness or disability, in old age and when unemployed. The State is required to designate or set up institutions to perform these tasks. The same is true of the right to education and vocational training for citizens completely or partly unable to work.

In the opinion of the Italian Constitutional Court, however, this list is not complete. In its judgements it has recognised other fundamental social rights, which it gleans from the constitution, especially a right to adequate housing<sup>57</sup> and a right to a healthy environment. The Court arrives at the latter right from a broad interpretation of the right to health (Article 32) and the protection of the environment (Article 9). The Constitutional Court has added various facets to the right to health, including a right to sexual identity as part of the right to mental and physical integrity<sup>58</sup>.

The Court generally plays an important role in the protection of fundamental rights in Italy, since it has recognised some of the fundamental rights referred to above as individual rights. In Italian constitutional law a distinction is made between 'unconditional' and 'conditional' fundamental rights. Unconditional fundamental rights are those for which provision is made in the constitution and which are effective in themselves, without requiring legislation. Conditional rights, on the other hand, require some kind of 'infrastructure' to become effective<sup>59</sup>.

The right to health, for example, is an unconditional, enforceable right inasmuch as it entails a right to mental and physical integrity, but a conditional right inasmuch as it represents a right to benefit from the health system<sup>60</sup>. The right to housing is similarly not recognised as an unconditional right<sup>61</sup>.

In various cases the Constitutional Court and Supreme Court of Appeal have accepted that unconditional fundamental rights are effective in themselves in relation both to the State and to

<sup>57</sup> Sciarra, *From Strasbourg to Amsterdam*, p. 12, with a reference to Decision 404/1988; de Vergiottini, in: Matscher, op. cit., p.330, with a reference to Decisions 49/1987, 217/1988, 404/1988 and 252/1985.

<sup>58</sup> de Vergiottini, op. cit., p.330.

<sup>59</sup> de Vergiottini, op. cit., p.237; Díez-Picazo/Ponthoreau, *The Constitutional Protection*, p.11.

<sup>60</sup> *ibid.*, p.11.

<sup>61</sup> de Vergiottini, op. cit., p.332.

third parties<sup>62</sup>. They include the right to paid leave (Article 36), the right to fair remuneration (Article 36) and the right to social security (Article 38). It would thus seem that the distinction between conditional and unconditional fundamental rights has not been consistently maintained, since the right to social security also calls for action on the part of the legislature to create the necessary institutions.

A peculiarity in Italy is that the citizen has no means of appealing directly to the Constitutional Court. The individual may, on the other hand, appeal directly to the ordinary courts for the recognition of unconditional fundamental rights.

*Bognetti*<sup>63</sup> is highly critical of fundamental social rights being made individual rights, especially by the Constitutional Court. He points out that this has done the Italian State enormous damage since it has taken it to the brink of financial ruin. He claims that this is because the provisions of the constitution were used by trade unions and Marxist parties in the 1970s and 1980s to mobilise public opinion against the government by accusing it of not doing enough to achieve the social objectives of the constitution. The subsequent increase in government expenditure led to inflation and heavy public indebtedness, which the constitution seeks to prevent (Articles 47 and 81) and which harmed the country's economic situation<sup>64</sup>.

## 2.9. Luxembourg

The Luxembourg constitution dates back to 1868 and was last amended in 1998. Like its predecessor, which was adopted in 1841, it is very closely aligned with the Belgian constitution and with the constitutional law of other neighbouring countries. In the interpretation of its constitution Luxembourg has again always been guided by its neighbours' constitutional doctrine, partly because the absence of a law faculty of their own has forced Luxembourg lawyers to acquire their knowledge abroad<sup>65</sup>.

The constitution refers to very few fundamental social rights. Under the heading 'Luxembourgers and their rights' Article 11 states that the law guarantees the right to work and ensures that every citizen may exercise this right. The aim of this constitutional provision, which was amended in 1948, was to provide a constitutional guarantee for rights hitherto protected only by ordinary laws<sup>66</sup>. This was intended to prompt the legislature to give wider form to social rights and to adapt them to the economic environment<sup>67</sup>.

Article 11 also provides for workers' social security, health protection and recreation. Article 23 requires the state to ensure that every Luxembourger receives free and compulsory primary education. It also states that medical and social assistance are regulated by law. However, it is generally recognised that these rights are not fundamental rights of the individual, but rather legislative programmes for whose organisation the state is responsible<sup>68</sup>.

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<sup>62</sup> *ibid.*, p.327.

<sup>63</sup> Giovanni Bognetti, Professor at the University of Milan, *op. cit.*, pp.90 ff.

<sup>64</sup> *ibid.*, pp.92 f.

<sup>65</sup> Manassis, *op. cit.*, p.35; Danny Pieters in: Grabitz (ed), *op. cit.*, p.447.

<sup>66</sup> Álvarez Véllez/Alcón Yustas, *op. cit.*, p.441.

<sup>67</sup> Pieters, *op. cit.*, p.467.

<sup>68</sup> *ibid.*, pp.467, 469.

In addition, fundamental rights of a social nature can be deduced from the third paragraph of Article 11, which guarantees the natural rights of the individual and of the family<sup>69</sup>. However, this is a very vague legal basis since it can be seen as a principle under which the ensuing rights must be viewed and may also represent an authorising basis for the practical creation of further rights<sup>70</sup>. So far, however, no advantage has been taken of the latter.

### 2.10. *The Netherlands*

Until the early 1980s the Netherlands had one of the oldest constitutions in Europe. It was only in 1983 that the 1815 constitution was completely revised and brought up to date<sup>71</sup>.

To establish the welfare state constitutionally, the Netherlands constitution has defined social rights as a mandate for the state<sup>72</sup>. Article 19(1) calls on the state to provide sufficient employment. The authors of the Netherlands constitution opted against wording that granted an individual right, since they were aware that the state does not allocate jobs on its own and can therefore improve the labour market situation only by taking certain measures<sup>73</sup>. Article 20(1) also makes it the state's responsibility to secure the individual's means of subsistence and to distribute wealth. This again is an instruction to the state to take appropriate measures.

As Article 20(2) requires the adoption of legislation on social security, the legal basis for the citizen is ordinary law.

Article 20(3) grants needy Dutch nationals a right to public assistance, but as this is to be governed by a law, the constitution again fails to grant the citizen a fundamental right in this respect.

Article 21 specifies that it is for the state to protect and improve the environment.

Article 22 requires the state and the other public authorities to take steps to promote public health, the creation of sufficient housing and social and cultural development, including leisure activities.

Article 23 makes education the government's responsibility and stipulates that it is free, though supervised by the authorities. Under Article 23(4) it is the municipalities' responsibility to ensure that school education is provided.

The Netherlands constitution does not, then, grant citizens any individual rights and has instead opted to instruct or require the state to take action.

It should also be noted that the constitution does not refer to any means for its own protection or for the enforcement of rights and that Article 120 even goes so far as explicitly to prohibit reviews of the constitutionality of acts of parliament.

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<sup>69</sup> *ibid.*, p.463.

<sup>70</sup> *ibid.*, pp.463 f.

<sup>71</sup> Manassis, *op. cit.*, p.37.

<sup>72</sup> Álvarez Vélez/Alcón Yustas, *op. cit.*, p.463.

<sup>73</sup> van der Pot, *Handboek van het Nederlandse Staatsrecht*, p.293.

### 2.11. Austria

The Austrian constitution does not refer to any fundamental social rights, only to 'classical' liberal fundamental rights, such as the right to work (Article 6 of the Basic State Law) and the right freely to choose and practise an occupation (Article 18).

However, a debate on whether fundamental social rights should be enshrined in the constitution has been in progress since the 1980s. Building on the deliberations of a working party of experts, a political fundamental rights commission has listed in two drafts the various rights that are conceivable and defined the form in which each of these rights should be made effective in the constitution<sup>74</sup>. The following fundamental social rights (within the meaning of the study) were referred to in this context:

The right to work (including aspects of vocational guidance, government employment policy and protection against dismissal), the right to appropriate remuneration (guarantees of a minimum wage and equal pay for men and women), the right to fair conditions of employment (working hours, appropriate rest periods, employee participation), the right to the protection of children, young people and mothers (including the prohibition of child labour, the exclusion of women from certain occupations), the right to housing (including government promotion of housing construction), the right to education (including free education), the right to social security (above all, a guarantee of the social insurance system and public assistance).

According to Article 1(4) of the second draft, there should also be an individual right to free placement and vocational guidance.

According to the draft that followed the fundamental rights reform inquiry, the institution of social insurance for illness, accidents, disability, old age and unemployment should be enshrined in the constitution, and it should also be possible for the Constitutional Court to review the right to equal participation in the social insurance system. After all, even the chairman of the commission of inquiry believed this concern to enshrine fundamental social rights in the constitution sought nothing other than an improved guarantee of the continued existence of the welfare state, the substance of which, he claimed, was already set out in numerous conventions and agreements between the two sides of industry<sup>75</sup>.

However, no fundamental social rights have yet been enshrined in the constitution. Despite this, Austria ranks among the Member States with the most extensive social security.

### 2.12. Portugal

The Portuguese constitution, which dates back to 1976, was last revised extensively in 1997. It describes fundamental rights in even greater detail than the Spanish constitution. Like the latter, the Portuguese constitution was intended to safeguard democracy as far as possible after the period of dictatorship, and economic and social rights as well as fundamental civil rights and liberties are therefore guaranteed<sup>76</sup>.

<sup>74</sup> Okresek, in: Matscher, op. cit., p.195.

<sup>75</sup> Quoted in Okresek, op. cit., p.196.

<sup>76</sup> José Vida Soria, in: Matscher, op. cit., p.304; Manassis, op. cit., p.44.

Article 2 of the constitution defines Portugal as a democratic state based on the rule of law and having economic, social and cultural democracy as its goal. Accordingly, the constitution distinguishes between economic, social and cultural rights. The first category includes the right to work, which is covered by Article 58. Article 59 guarantees not only regular and paid leave but also an entitlement to unemployment benefit and fair remuneration.

The social rights comprise the right to social security (Article 63), the right to health protection (Article 64), the right to appropriate housing that meets adequate standards of hygiene (Article 65), the right to a healthy environment (Article 66) and the right of the family (Article 67), parents (Article 68), children (Article 69), young people (Article 70), the disabled (Article 71) and the elderly (Article 72) to protection.

The cultural rights include not only the right to education and culture (Article 73) and to school and university education (Articles 74 and 76) but also the right to participate in cultural life (Article 78) and to physical training and sport (Article 79).

This list shows how the Portuguese constitution has endeavoured to cover as much of the sphere of concern to the citizen as possible. The rights are all worded as individual rights, creating the impression that they are also enforceable. However, the second section of the various rights regularly instructs the State on how rights are to be made effective. The right of the citizen is thus always accompanied by a specific duty of the State<sup>77</sup>.

The right to work, for example, is complemented by the State's duty to use certain economic and social policy plans<sup>78</sup>.

The entitlement to social security is defined by the State's obligation to develop a social insurance system that covers the citizen in the event of illness, old age, disability, the death of a spouse and of parents and in all other cases in which an individual becomes incapable of working.

The State has a duty to implement an appropriate housing policy and to ensure medical care throughout the country.

These rights are protected by Articles 17 and 18. Article 17 explains the application of the system of rights, freedoms and guarantees to the rights referred to in Section II and to fundamental rights of a similar nature. Article 18 stipulates that the provisions of the constitution concerning rights, freedoms and guarantees are directly applicable and are binding on public and private bodies.

Like Spain's constitution, Portugal's faces the problem of 'eternal effectiveness' as regards the protection of social and economic fundamental rights<sup>79</sup>. However, the preferential treatment of fundamental rights under Article 17 applies only to the rights referred to in Section II. On the other hand, as the fundamental social rights described above are covered by Section III, they are not protected<sup>80</sup>. The possibility of analogous application referred to in Article 17 is not exploited in practice, evidently owing to a fear of too broad an interpretation of analogous rights.

<sup>77</sup> Vida Soria, *op. cit.*, p.308.

<sup>78</sup> They include the implementation of a policy of full employment, equality of opportunity in the choice of occupation or employment and the cultural, professional and vocational training of workers.

<sup>79</sup> Vida Soria, *op. cit.*, p.308.

<sup>80</sup> *ibid.*, p.308; the preferentially protected rights, however, include the right to protection against dismissal and to participation in the employer's decision-making.

The Portuguese constitution does not provide for the possibility of a complaint to the Constitutional Court in the event of an infringement of fundamental rights. This is most certainly true of social rights<sup>81</sup>. Pursuant to Article 283, however, the Constitutional Court may rule that there has been failure to comply with the constitution by omission on the part of the necessary legislative acts.

### 2.13. Finland

Section 15 of the Finnish constitution of 17 July 1919 as amended on 1 August 1995 not only recognises the right to freedom of occupation and calls for the 'protection of labour' but also stipulates that the public authorities are to promote employment and to strive to secure the right to work for everyone. It also requires the legislature to enshrine the right to vocational training in appropriate laws.

These are not litigable fundamental rights, as is evident from the wording. However, the literature also includes the opposite view that there is a legal right to work, although this should not be understood as a right to the 'immediate' allocation of a job<sup>82</sup>.

At the level of ordinary law Finland had something like an individual right under a 1987 Employment Act for people under 20 years of age and the long-term unemployed<sup>83</sup>. This has since been so amended, however, that only people under 25 have an individual right to further training if they are unemployed and cannot find a training place.

Section 15a of the Finnish constitution states that anyone unable to obtain the security needed for a decent life has a right to essential assistance and care. Paragraph 2 defines this as a right to the provision of the basic needs for life at times of unemployment, illness, incapacity, advanced age, confinement or loss of the provider.

Paragraph 3 requires the public authorities to secure for everyone, 'in the manner stipulated in greater detail by Act of Parliament, ... adequate social welfare and health services ... . Public authorities shall also support the abilities of families and others charged with the care of children to provide for their welfare and individual growth.' Paragraph 4 specifies that it is the task of the public authorities to promote the right to housing and to support the individual in any attempt to find accommodation by his own efforts. The wording of the first sentence of paragraph 3 indicates that there is an individual right to the social benefits referred to in accordance with the legal provisions. Otherwise, these are policy clauses.

At the level of ordinary law there is a clear tendency to make social benefits individual public rights that can be enforced before the administrative courts, examples being the right to social assistance, accommodation for children under the age of 3, support for and the provision of housing for children and their families in emergencies and certain kinds of assistance for seriously disabled people<sup>84</sup>.

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<sup>81</sup> Vida Soria, op. cit., p.310.

<sup>82</sup> See C. Tomuschat, 'The Right to Work', in: Rosas & Helgesen (eds): *Human Rights in a Changing East-West Perspective*, 1990, pp.181 ff.

<sup>83</sup> See Rosas, op. cit., p.230.

<sup>84</sup> Rosas, op. cit., p.234.

Outside the part of the constitution concerning fundamental rights (Part II) fundamental social rights are to be found in Part XIII, which concerns education. Section 78, for example, requires the State to promote research and higher education in technology, agriculture and commerce and the other applied sciences and the pursuit of the fine arts. If these subjects are not taught at the universities, the State is to maintain special colleges and support private institutions established for these purposes (second sentence). This provision can be seen as an institutional guarantee.

Under section 79 institutions of higher general education and higher elementary education are to be maintained or, if necessary, assisted at the State's expense. In the view of Parliament's Constitution Committee it cannot be inferred from the words 'if necessary, assisted' that any institution facing financial crisis is entitled to individual assistance<sup>85</sup>.

Pursuant to section 13, everyone has the right to free primary education, and the second sentence of section 80 reiterates that primary school education is free for everyone. Section 81 requires the state to maintain the teaching establishments for the technical occupations, for agriculture and ancillary trades, for commerce and seafaring and for the fine arts or to support them with government resources if the need arises. This provision is intended to safeguard vocational training.

The fundamental rights that can be deduced from this part of the constitution are again not individual rights but institutional guarantees and policy clauses. Nonetheless, they are very important for constitutional reality in Finland, since the State does indeed guarantee many social benefits in the sphere of education in accordance with these provisions. Thus higher education is not only free but also includes meals, health care and, in some cases, free transport to school and accommodation. This depends on the local authorities, which are responsible and meet the cost jointly with central government. Vocational school pupils enjoy the same advantages. University attendance is also free; scholarships and loans are available to meet the cost of living<sup>86</sup>.

#### 2.14. Sweden

In the constitution of the Kingdom of Sweden of 1 January 1975 as amended on 1 January 1980 Article 2(2) of Chapter 1 – headed 'Basic Principles' – states that the personal, economic and cultural welfare of the individual is the fundamental aim of public activity. According to the second sentence of this paragraph, it is, in particular, incumbent upon the public administration to secure the right to work, housing and education and to promote social care and security and a good living environment.

It is noticeable that reference is made to these fundamental social rights not in Chapter 2 (Fundamental Rights and Freedoms) but among the basic principles of the constitution. This reflects the fact that the Kingdom of Sweden sees itself as a welfare state. The fundamental social rights referred to can therefore be seen as provisions defining the state's objectives, by which any public activity is to be guided. It is also clear from this, however, that these fundamental rights are not litigable<sup>87</sup>.

<sup>85</sup> Pentti Arajärvi: The Right to Education in Finland, in: Drzewicki/Krause/Rosas (eds), op. cit., p.282.

<sup>86</sup> *ibid.*, pp.282 f.

<sup>87</sup> Rosas, op. cit., p.229, with a reference to the official commentary by Petren & Ragnehalm, Sveriges grundlagar och tillhörande författningar med förklaringar, Stockholm 1980, p. 20; Katrougalos, op. cit., pp.294 f.

As in the other Scandinavian countries, the many social rights of the citizen are defined in ordinary legislation and, where they are individual rights, they are enforceable before administrative courts<sup>88</sup>. The administration of justice in social matters has not been left to the ordinary courts in Sweden because there has traditionally been some scepticism about the judiciary, with its largely conservative background. It has been feared that their judgments would erode social rights<sup>89</sup>.

Sweden considers it particularly important that social assistance from the State does not lead to the stigmatisation of individuals. In principle, everyone is therefore entitled to a wide range of State benefits regardless of his financial background<sup>90</sup>. This reveals the image of a State which not only guarantees a minimum of security for the citizen and gives everyone the same rights but also seeks to achieve real social equality.

### 2.15. *United Kingdom*

To understand how fundamental rights are protected in the United Kingdom's legal system, it must first be remembered that Britain has no written constitution in the form of a comprehensive document and that there is no list of fundamental rights. Instead, various texts, such as the Magna Carta of 1215, the Petition of Rights of 1627, the Act of Habeas Corpus of 1679 and the Bill of Rights of 1689 form a kind of 'constitution'.

In principle, however, there is no formal distinction between constitutional law and ordinary law, owing to the fact that it is not the people but parliament that is the sovereign power. Its laws cannot therefore be unconstitutional and must be applied by the courts. Nor is there a system of constitutional courts to enable acts of the public authorities to be examined for their constitutionality<sup>91</sup>. Instead, it is for the judges in ordinary courts of law to interpret the acts of parliament and to develop law in the form of common law. The individual's fundamental rights must therefore be deduced from ordinary acts of parliament and from common law. This is made particularly difficult by the fact that parliament does not as a general rule formulate any positive rights along the lines of 'Everyone shall have the right to ...', but that the various spheres are covered by detailed rules from which the protection of fundamental rights can be deduced. In simple terms, this means that the individual has any right as long as it is not explicitly restricted<sup>92</sup>.

This concept results in civil rights and liberties playing a major role, whereas fundamental social rights in the sense of participatory rights have not yet, by and large, been recognised in British jurisprudence. Fundamental rights are here equated with freedom from the State. Gaining freedom and security as fundamental rights with the help of the State is inconceivable for most British lawyers<sup>93</sup>.

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<sup>88</sup> Rosas, *op. cit.*, p.233.

<sup>89</sup> Katrougalos, *op. cit.*, p.295.

<sup>90</sup> *ibid.*, pp.293 f.

<sup>91</sup> Ridley: 'The British Constitution and Constitutional Reform in Britain', in: Bieber/Widmer (eds), *L'Espace constitutionnel européen – Der europäische Verfassungsraum – The European constitutional area*, Zürich 1995, pp.30 ff.

<sup>92</sup> Dicey, Introduction, p.197.

<sup>93</sup> Trautwein, *Der Schutz der bürgerlichen Freiheiten und der sogenannten sozialen Grundrechte in England*, pp.189 ff.

British lawyers point out in particular that extending fundamental rights to include fundamental social rights would mean sacrificing individual freedoms and that there is no point in putting rights that are not for the most part directly enforceable but represent policy clauses on a par with traditional civil rights and liberties. This would simply dilute the idea of fundamental rights<sup>94</sup>.

A right to work, for example, is recognised only insofar as the individual has a right to practise his chosen occupation without being unjustifiably excluded from it<sup>95</sup>.

A constitutional right to social security does not exist in the United Kingdom. Despite this, there are, of course, various social benefits comparable with those in other Member States and a national health service to which everyone has free access<sup>96</sup>.

There is also an individual right to enjoy these social benefits in accordance with the provisions of law. This is not, however, a constitutional right. Disputes with the administration can be referred to 'administrative tribunals'. Appeals may then be lodged with the 'social security commissioners'<sup>97</sup>. In contrast, the ordinary courts and common law play virtually no part in the protection of social rights, since the courts have generally refused to develop social rights<sup>98</sup>.

### 3. Overview of existing rights

#### 3.1. Table

The following table is an overview of the contents of the Member States' constitutions. It shows what fundamental social rights are enshrined in the constitutions. It is impossible, however, to forge a link between the existence of fundamental social rights and the existence and level of social benefits and institutions in the Member States concerned<sup>99</sup>. This is clear primarily from Austria and the United Kingdom, their columns being empty whereas they do, of course, have social rights.

The symbol ■ in the table means that the right concerned is referred to in the constitution. The symbol □ means that, though not explicitly enshrined in the constitution, it is recognised.

<sup>94</sup> *ibid.*, pp.191 f.

<sup>95</sup> *ibid.*, p.195, with a reference to *Nagler v Feilden* (1966), 1 All E.R. 689, 693; *Quinn v Letham* (1901), A.C. 495, 534.

<sup>96</sup> The national health insurance scheme is governed by the National Health Reorganisation Act 1973, the provision of housing by the public authorities by the Housing Act 1957, social assistance by the National Security Act 1975; see *Kingston/Imrie: 'Vereinigtes Königreich von Großbritannien und Nordirland'*, in: *Grabitz (ed): Grundrechte in Europa und USA*, Kehl, Strasbourg, Arlington, 1986.

<sup>97</sup> *Harris in: Matscher, op. cit.*, p.218.

<sup>98</sup> *ibid.*, pp.218, 201; for the situation in Scotland, which differs in some respects, see *Kingston/Imrie, op. cit.*, pp.833 ff.

<sup>99</sup> See *Arbeitskreis 'Europäisches Sozialrecht', Soziale Rechte in der EG*, Berlin 1990, p.24.



### 3.2. *The three models*

The table shows that social rights are enshrined in the constitutions of almost all the Member States. They are all welfare states that have set themselves the goal of eliminating excessive social differences. A comparison of the Member States does, however, reveal different approaches to incorporating social rights in the constitution. In the final analysis, a constitution always reflects a country's traditions and economic and political experience. Fundamental rights can be divided into various 'generations'. The first generation comprises the classical civil rights and liberties. Social rights did not emerge at constitutional level until the late 19th or early 20th century and were consolidated after the Second World War. The third generation consists of the fundamental rights that concern culture and the environment. Here again, it is clear that developments in society always have an influence on the constitution. Unlike the civil rights and liberties, which are directly applicable, what the second- and third-generation rights have in common is that the reference to them in the constitution is not enough on its own for them to be effective: this depends on the goodwill of the legislature<sup>100</sup>. As regards incorporation in constitutions, a rough distinction can be made between three systems: a liberal model, a southern European model and a moderate model, although they overlap to some extent.

#### 3.2.1. *The liberal model*

It must first be remembered the United Kingdom and Austria occupy a special position among the Member States in that both have forgone the inclusion of social rights in their constitutions. For one thing, there is no constitution in the United Kingdom in the conventional sense of the term, and for another, the liberal attitude to the economy and politics is difficult to reconcile with the adoption of specific social rights<sup>101</sup>. Although the United Kingdom paved the way in social legislation with the introduction of the poor laws<sup>102</sup>, the judiciary has always been very restrained in granting entitlements<sup>103</sup>. Like the USA, the United Kingdom prefers market-oriented solutions that emerge regardless of any influence the state may bring to bear. From the wide-ranging social safeguards in Austria and the United Kingdom, however, it is clear that fundamental social rights do not need to be enshrined in the constitution for the public to be assured of basic social services.

#### 3.2.2. *The southern European model*

The 'southern European model' is characterised by the fact that extensive fundamental social rights have been included in the constitution. The authors of such constitutions endeavoured to cover every sphere of life and to provide as comprehensive protection as possible for the citizen in their constitutions. The countries concerned include Italy, Greece, Spain and Portugal. The words 'Everyone shall have the right to ...' are frequently to be found in their constitutions, creating the impression that they are individual fundamental rights. Despite the choice of words, such rights are rarely enforceable. In some cases the constitutions do not even provide for

<sup>100</sup> Iliopoulos-Strangas, op. cit., p.19.

<sup>101</sup> *ibid.*, p.279.

<sup>102</sup> *ibid.*, p.279.

<sup>103</sup> The poor laws were met with fierce criticism since they were seen as granting state assistance not as a right but as charity. At the beginning of this century the foundation stone was laid for today's social legislation. The system was expanded after the Second World War, when it began to be guided by the principles of universality, equality and justice. These principles were primarily intended to prevent the exclusion of poorer sections of the population, who depend on the solidarity of the rest of society.

complaints to be lodged with a constitutional court. The individual right is ultimately treated as an instruction to the State to initiate measures that enable the citizen to exercise the right concerned.

### 3.2.3. *The moderate model*

The constitutions of the other countries combine liberal tendencies with the definition of rights, whether as individual rights, as objectives of the State or as policy clauses.

The authors of these constitutions were aware, however, that the opportunities for exercising influence in a market economy are limited and, in particular, that it is difficult to make the fundamental right to work effective. Nevertheless, almost all countries have included it in their constitutions, at least as a policy clause, in order to obligate governments to stimulate the labour market.

An exception is the German Basic Law, which protects social rights through the welfare state clause which the public authorities are required to respect in any action they take. It is also worth mentioning that in Scandinavia, unlike the other countries, there has always been a cross-party consensus on the need for social safeguards in a market economy system.

## **Part IV: The constitutions of the Central and Eastern European candidate countries**

### **1. Preliminary remarks**

Given the impending enlargement of the EU, the position of the first countries to accede should be considered in the debate on a bill of rights. The constitutions of the Central and Eastern European countries are therefore considered in the following.

All the former Communist countries of Central and Eastern Europe have adopted new democratic constitutions in recent years, often guided by western models. The market economy is accepted everywhere as the basic system for the economy, and in some cases the principle of the 'social market economy' on the German model is explicitly enshrined in the constitution, as in Article 20 of the Polish constitution and in the preamble to the Hungarian constitution. The role of the State in the redistribution of wealth is no longer explicitly mentioned. Fundamental social rights played an important role in the socialist theory of constitutional law and were regarded as the main element of individual rights and freedoms<sup>104</sup>. Despite some criticism<sup>105</sup>, they have been retained or reinstated in the new constitutions, albeit in varying degrees of detail.

### **2. Czech Republic**

In the Czech Republic's constitutional system fundamental rights are to be found not in the constitution of 16 December 1992 itself, but in a separate declaration of fundamental rights and freedoms. Pursuant to Article 3 of the constitution, this forms part of the constitutional order. Its Chapter 4 contains an extensive list of fundamental social rights within the meaning of this study.

Pursuant to Article 26(3), everyone has the right to earn his living by work, and the state is required to provide an adequate level of material security for those citizens who are unable, through no fault of their own, to exercise this right. Pursuant to the fourth sentence of Article 6(3), further details will be set out in laws. This wording is also to be found in Articles 28, 29, 30, 31, 32, 33, 34 and 35. Fundamental social rights are thus to be accurately defined in ordinary legislation.

Article 28 gives employees the right to fair remuneration and satisfactory working conditions. Article 29(1) gives women, adolescents and persons with health problems the right to increased protection of their health at work and to special working conditions. According to Article 29(2), adolescents and persons with health problems also have the right to special protection in labour relations and to assistance in vocational training. Otherwise, Article 31 gives everyone the right to health protection: citizens have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law. Under Article 30(1) citizens have a right to material security in old age, during periods of work incapacity and in the event of the loss of their provider. Article 30(2) refers to the right to assistance in the event of material need to the extent necessary to ensure a basic standard of living.

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<sup>104</sup> Kedzia, *Social Rights in the (Draft) Constitutions of Central and Eastern Europe*, in: Drzewicki, Krause, Rosas, pp.203 f.

<sup>105</sup> Katrougalos, *op. cit.*, p.300.

Under Article 32(1) parents, families, children and young people enjoy the particular protection of the law. Article 32(2) guarantees pregnant women special care, protection in labour relations and suitable working conditions.

Article 33 concerns the right to education, defining it as a right to free school and university education. Under conditions defined by law citizens have a right to assistance from the state during their studies.

Article 34(2) grants the right of access to the nation's cultural wealth under the conditions set by law, while Article 35(1) gives everyone the right to a favourable environment and Article 35(2) the right to timely and complete information on the state of the environment and natural resources.

The Czech constitution thus includes one of the most detailed lists of fundamental social rights in Europe, most of them being formulated as individual rights.

### **3. Estonia**

The Estonian constitution of 28 June 1992 is less detailed in its definition of fundamental social rights than the Czech constitution. Article 27 refers to special protection for the family, parents and children. Under Article 28 everyone has a right to health protection and to state assistance in old age, when unable to work, in the event of the loss of the provider and in emergencies. Article 29(3) requires the state to provide for vocational training and to assist job-seekers. On the other hand, there is no right to work. The right to education is guaranteed by Article 37. It includes the right to instruction in Estonian and to free education in state schools.

### **4. Hungary**

The Hungarian constitution of 20 August 1949 as amended in 1997 is generally very precise and contains only three brief provisions that refer to fundamental social rights, Articles 16, 17 and 18. They require the Republic of Hungary to pay particular attention to the economic security, education and upbringing of young people and to protect their interests (Article 16), to provide for extensive social measures for the needy (Article 17) and to safeguard the right of each individual to a healthy environment (Article 18).

### **5. Poland**

The new Polish Basic Law was adopted by the National Assembly on 2 April 1997 and confirmed in a referendum held in October 1997. The very first chapter concerning the republic sets out the obligation to abide by the principle of social justice (Article 2), to ensure equal access of the people to cultural assets (Article 6(1)) and to assist Poles living abroad so that they may retain their links with their national cultural heritage.

Part IV of Chapter 2 contains a list of economic, social and cultural rights. Where work is concerned, Article 65(4) merely requires a minimum wage or the manner in which it is determined to be specified by law. Paragraph 5 requires the state to pursue a policy geared to full

employment by implementing programmes that combat unemployment, by creating jobs in the public sector and by intervening in the economy. Thus, although it includes a right to work for the individual, it sets out broad lines of labour market policy in the context of fundamental rights. A right to healthy and safe working conditions is required by Article 66(1), and Article 66(2) covers the right to a minimum amount of leave in accordance with more detailed provisions to be set out in a law.

Article 67 refers to the right of citizens to social security in the event of invalidity and in old age. According to Article 68(1), everyone has the right to health protection. Article 68(3) requires the State to take particular care of children, pregnant women, disabled persons and the elderly.

Article 70 grants the right to education. Education in state schools is free, according to Article 70(2). Detailed provisions on the protection of families and children are included in Articles 71 and 72. Particularly worth noting in this context is that Article 72 gives everyone the right to require the organs of state to protect children against violence, brutality, exploitation and acts that endanger their morals.

Article 74 requires the state to ensure the ecological security of the present and future generations with the policy it pursues. As in the Czech constitution, Article 74(3) defines a right to information on the quality of the environment and its protection. Article 74(4) requires the state to support activities undertaken by the public to protect the environment.

The state is also required to pursue a policy that takes account of the public's housing requirements and to protect the rights of tenants by law (Article 75).

The Polish Basic Law thus contains numerous policy clauses that require the state to pass laws and take practical measures.

## 6. Slovenia

Article 2 of the Slovenian constitution of 23 December 1991 includes a clause on the welfare state, which is explained in greater detail in Articles 50 et seqq.

The right to social security under the law exists for all citizens in accordance with Article 50, the right to health protection in accordance with Article 51. Security and vocational training for disabled persons are guaranteed by Article 52. Article 56 provides for the special protection and care of children and Article 57 for free education and for the state to ensure appropriate education for all citizens. Article 66 requires the state to provide for employment, while Article 72 gives everyone the right to a healthy environment pursuant to more detailed provisions of laws. Article 78 instructs the State to create the necessary conditions for everyone to be adequately housed.

The Slovenian constitution thus details few fundamental social rights.

## 7. Summary

To some extent, it can be inferred from the wording of fundamental rights, the general nature of their protection and the granting of the right of access to the courts in these countries that

fundamental social rights are protected by the same means as other rights, i.e. they may be claimed before the courts<sup>106</sup>. However, as it is usually left to ordinary legislation to determine in more precise terms what form fundamental social rights are to take, the enjoyment of rights largely depends, of course, on the economic situation and on the political will of the country's leaders.

As in the EU countries, the constitutions of the candidate countries in no way reflect social reality but, at best, the strength of the political will to guarantee the citizen's fundamental social rights. Although the Commission stated in its 1998 reports on progress towards accession by the various candidate countries<sup>107</sup> that economic, social and cultural rights are respected, it calls for improvements in the health sector, health protection and safety at the workplace and in the social dialogue in almost all the countries.

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<sup>106</sup> Kedzie, op. cit., p.207.

<sup>107</sup> Commission of the European Communities, Regular report from the Commission on progress towards accession by the Czech Republic in 1998; idem, Regular report from the Commission on progress towards accession by Estonia in 1998; idem, Regular report from the Commission towards accession by Hungary in 1998; idem, Regular report from the Commission on progress towards accession by Poland; idem, Regular report from the Commission on progress towards accession by Slovenia in 1998; published under <http://europa.eu.int.comm/dg1a/enlarge/report>. Similar reports have been drawn up exist on all the other candidate countries.

## Part V: The European Parliament's position in the past

The European Parliament (EP) first adopted a resolution on respect for the fundamental rights of citizens in the Member States in the development of Community law<sup>108</sup> on 4 April 1973. This was followed by a resolution on the precedence of Community law and the protection of fundamental laws, which was adopted on 15 June 1976<sup>109</sup>. The EP submitted a draft European constitution on 14 February 1984.

The most important EP document is the Declaration of Fundamental Rights and Freedoms of 12 April 1989<sup>110</sup>. This contains a comprehensive list of fundamental rights that includes fundamental social rights and state objectives as well as the classical fundamental rights:

- 'Article 7: The family shall enjoy legal, economic and social protection.'
- 'Article 13(1): Everyone shall have the right to just working conditions.'
- 'Article 13(2): The necessary measures shall be taken with a view to guaranteeing health and safety in the workplace and a level of remuneration which makes it policy to lead a decent life.'
- 'Article 14(3): Workers shall have the right to be informed regularly of the economic and financial situation of their undertaking and to be consulted on decisions likely to affect their interests.'
- 'Article 15(1): Everyone shall have the right to benefit from all measures enabling them to enjoy the best possible state of health.'
- 'Article 15(2): Workers, self-employed persons and their dependants shall have the right to social security or an equivalent system.'
- 'Article 15(3): Anyone lacking sufficient resources shall have the right to social and medical assistance.'
- 'Article 15(4): Those who, through no fault of their own, are unable to house themselves adequately, shall have the right to assistance in this respect from the appropriate public authorities.'
- 'Article 16(1): Everyone shall have the right to education and vocational training appropriate to their abilities.'
- 'Article 24: The following shall form an integral part of Community policy: the preservation, protection and improvement of the quality of the environment; the protection of consumers and users against the risks of damage to their health and safety and against unfair commercial transactions. The Community institutions shall be required to adopt all the measures necessary for the attainment of these objectives.'

Even before the intergovernmental conferences that led to the Treaty of Maastricht, Parliament had called for the list of fundamental rights it had adopted to be included in the Treaties, but with as little success as it had before the intergovernmental conferences in 1996, which led to the Treaty of Amsterdam<sup>111</sup>.

The 1998 Declaration is nonetheless tremendously important, since it was adopted by the European Parliament, the only institution at European level to have direct democratic legitimation. It represents an expression of the 'popular will' of the European peoples. The EU's

<sup>108</sup> OJ C 26, 1973, pp.7 f.

<sup>109</sup> Reproduced in EuGRZ 1976, pp.246 f.

<sup>110</sup> OJ C 120, 16.5.1989, pp. 51 ff.

<sup>111</sup> See 'Martin report' of 20 November 1990 (EP Doc A3-270/90) and the resolution of 13 March 1996, reproduced in EuGRZ 1996, p.167.

own bill of rights will not therefore come into being without the explicit approval of the European Parliament, whatever its status in law may be.

## Part VI: Summary

In early June 1999 the European Council meeting in Cologne decided to set up a body to draft a charter of fundamental rights for the European Union. As decisions by the EU now affect almost all areas of the lives of the Union's citizens, it is time to develop a bill of rights as a yardstick for the institution's actions. Only then can it be ensured that the citizen is aware of his fundamental rights, since the present system of references to the ECHR, ESC and Community Charter of Fundamental Social Rights of Workers does not ensure sufficient transparency.

Fundamental social rights in this context are the rights to which the individual is entitled as a member of a group and which can be made effective only if the State takes action to safeguard the individual's environment. They do not give effect to freedom from the State but to freedom with the State's assistance. Particular reference should be made in this context to the right to work, the right to education and training, the right to housing, the right to health, the right to social security, the right to culture and the right to a healthy environment.

They are to be found in various forms in constitutions. On the one hand, they may take the form of individual rights. This means that the individual may appeal directly to courts for such rights to be respected. Many constitutions also refer to fundamental social rights in the form of policy clauses and provisions defining the State's objectives. The legislature and all public authorities are then required to make the rights concerned effective.

Whether or not social rights should be enshrined in constitutions is a contentious issue. On the one hand, it ensures that such rights cannot be eroded by legislation and case law. On the other hand, a certain standard of living is then specified in the constitution, and it may not be possible to ensure it is respected in the future because of economic and social changes.

Another problem arising in connection with the creation of a bill of rights for the EU is that the EU is not a State and derives its competence from the Member States. It can therefore protect fundamental rights only to the extent that EU law is applied.

At European level there are two charters setting out fundamental social rights. The Community itself is not a party to the European Social Charter, and the Community Charter of Fundamental Social Rights of Workers is no more than a solemn declaration by the Heads of State or Government of the Member States. It is primarily through the case law of the European Court of Justice, however, that the two charters influence Community law.

In the Member States' constitutions various courses have been charted in enshrining fundamental social rights. Owing to the liberal basic attitude in Austria and the United Kingdom, for example, there are no constitutional social rights in these countries. The German Basic Law does not specify any fundamental social rights apart from the right of mothers to special protection. Germany nonetheless sees itself as a welfare state and, by defining state objectives, requires the public authorities to base all their actions on the welfare state principle. The Benelux countries, France and the Scandinavian countries have fundamental social rights in the form of individual rights, policy clauses or provisions defining the state's objectives, but tend to be restrained when it comes to detail, leaving this to ordinary legislation.

The southern European countries all have extensive bills of rights, which also include detailed fundamental social rights, formulating them primarily as individual rights. Despite the wording,

however, they are not as a rule enforceable rights but instructions to the legislature to make them effective.

Three of the candidate countries, Estonia, Hungary and Slovenia, tend to adopt a moderate approach in the wording of fundamental social rights, while the Czech Republic and Poland follow the southern European model.

It is impossible, however, to forge a link between the existence of fundamental social rights in a constitution and social reality in the country concerned.

The European Parliament has always advocated the creation of a Community bill of rights. The most important document is the Declaration of Fundamental Rights and Freedoms of 1989, which also includes a number of fundamental social rights. The particular value of this declaration is its democratic legitimation.

In a resolution on the establishment of the Charter of Fundamental Rights the European Parliament 'draws attention to the need for an open and innovative approach to shaping the Charter, the nature of the rights to be featured in it, and the part it will play and the status it will command in the constitutional development of the Union'<sup>112</sup>.

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<sup>112</sup> Resolution B5-0110/99 of 16 September 1999, not yet published in the Official Journal.

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