

# Social Policy and Human Rights

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## 1 Introduction

### 1.1 *Social Policy and Law*

All *modern* societies are advanced *welfare* states. Therein social policy plays a pivotal role to further distributive justice. Modern welfare states dispose of a multi-layered, complicated and complex system of social legislation. It encompasses welfare = social assistance and social security law = social insurance. Further elements are social compensation for victims of crime and war, as well as social subsidies for families, education, migrants, handicapped people or other members of vulnerable groups.

Modern societies are built on the rule of law. Legal rules and institutions are created by a legislative body. Social policy assumes, hence, a legal character: The welfare state of today represents the transition from a needs- to a rights-based system. It represents the development from charity to entitlement.<sup>1</sup>

Social legislation brought about institutions administered by independent public or private agencies operating on the basis of highly technical legal provisions and in full respect of the rule of law. So, welfare and social security stand for a substantial part of the law of today. The rules and institutions of social policy are not only created and structured by the law, but they also lead to corresponding *individual rights*. Therefore, a further question can be raised, on whether these rights have any substance and origin in the idea of *human rights*. *Albrecht Weber* devoted much energy on interpreting the developments initiated by social policy on the international level.<sup>2</sup> So, it is an honour and pleasure to contribute to a *liber amicorum* for a good and “old” friend.

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<sup>1</sup> Baldwin 1990, p. 32: “La justice d’aujourd’hui, c’est la charité d’hier!”.

<sup>2</sup> Weber 1975, p. 229; Weber 2004.

## 1.2 *International and European Guarantees*

Since the end of the Second World War the human rights to social security and social assistance have been widely acknowledged in international and European law as basic and fundamental human rights. Those rights are elaborated, acknowledged and figured out in various contexts, jurisdictions and legal frameworks.<sup>3</sup> They are established as rights to work, health care, social assistance, education and social security in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The Council of Europe stipulates in the European Social Charter a right to work, fair working conditions, social security and assistance.<sup>4</sup> Finally, the EU Charter of Fundamental Rights prescribes a right to work, social security and assistance as well as health care (Art. 15, 34 and 35). These rights are also stipulated by many national constitutions.<sup>5</sup>

Since the midst of the 20th century social security and social assistance have been established as fundamental human rights in international and European as well as national law. They are conceived as “human rights of the *second* generation”.<sup>6</sup> In the language of “generations” of human rights, social rights are located between the civil and political rights (as human rights of the “first generation”) and the ecological rights (as human rights of the “third generation”). This numbering unveils a historical perspective. Fundamental civil and political rights had been expressed in the late 18th century, whereas social rights had been envisaged in the 19th century and effectuated in the midst of the 20th century, while ecological rights had only been accepted in the late 20th century.

## 1.3 *Challenges*

Despite the multiplicity of legal provisions in different frameworks and at various levels of law, neither the *content*, nor the *structure* of social human rights became so far *clear*. Even more, it is not ascertained whether the notion of social rights indicates more than a mere political programme – without any substance in law! There is, hence, a persisting challenge on whether social human rights are *genuine* human rights.

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<sup>3</sup> van Langendonck 1998, p. 477; van Langendonck 2003, p. 613; van Langendonck 2008; Riedel 2007; Leisering (2008), p. 21 speaks of “welfare internationalism”; Eichenhofer 2012; Mikkola 2010.

<sup>4</sup> Council of Europe 1999.

<sup>5</sup> Iliopoulos-Strangas 2010; cf. § 75 of the Constitution of Denmark; Preamble of the French Constitution of the IV. Republic (1946); Art. 4, 31 of the Italian Constitution; Art. 45 II of the Constitution of Ireland; Art. 58 and the following Articles of the Constitution of Portugal; Westerschall 2010, p. 563; cf. Becker et al. 2010; as far as the right to education is concerned: Weber 2004, p. 693.

<sup>6</sup> Gearty and Mantouvalou 2011.

The main arguments in the academic as well as the political discourse are the following: As social rights are addressed to the legislator in order to oblige and not to restrict it, social rights “mean resources, not immunities”.<sup>7</sup> Can these entitlements ever become a content of a human right? If so, the Constitution limited the *sovereignty* of *Parliament*. Today, state deficits are high and public funds are scarce, the need to cut public expenditures prevails. Social rights might infringe the overall imperative of budget solidity and, thus, corrode the financial fundament of the state. Finally, a social right does not say much about its content as the concepts of welfare and social security are large, vague and open for competing interpretations and specifications. Under a guarantee of social policy institutions, it remains unclear, how they ever translate into specific social legislation.

In spite of all this criticism, one might legitimately ask in the defence of social rights: Can legal doctrine set aside the variety of provisions on social human rights at the various levels of human rights legislation, and, above all, can welfare and social security law be adequately understood at all without referring to individual social human rights?

Three items are controversial when discussing social human rights. These are the topics of natural law (2), parliamentary sovereignty (3), and justiciability (4). The answers to these questions can help to grant a deeper insight into the characteristics of both social rights and human rights. When analysing the subject matter, it is also necessary to observe the common features of the human rights of all generations (5).

## 2 Human Rights and Natural Freedom

### 2.1 Human Rights as Immunities?

Social rights are opposed to civil and political rights. This is based upon the assumption that human rights are expressions of *natural freedom*. In this regard, social human rights are said to mark a deep contrast to civil and political human rights – as the former neither limit, nor supersede the state’s power. Social human rights are about resources and not about immunities. They are to create the “*positive freedom*” and not to protect the “*negative freedom*”.<sup>8</sup> So indeed, social rights are not part of the “natural law”.

In the political rhetoric as well as the academic doctrine “natural law” stems from a “natural” status of the human being, i. e. being free of any *state intervention*. Social rights, however, depend and rely on the state’s ability to establish a framework which allows organising social life. So, if the overall purpose of human rights is conceived as being the protection of the personal sphere of freedom *against* any

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<sup>7</sup> Plant 1998, p. 57.

<sup>8</sup> Berlin 1997.

*state intrusions*, social rights could never be protected as human rights as they only become *effective* within *social life*, which on its part is regulated by the state.

But is the underlying assumption of this argument correct? All civil and political rights assume their relevance in a societal context. The freedom of belief became a constitutional issue after the Reformation brought about different denominations and emerging religious conflicts among them. Thus, differences in belief became an issue for the individuals and the society at large. The freedom of belief has to solve conflicts in a society that is based on different confessions.

The freedom of expression lacks any importance in the absence of an audience. Hence, the freedom to express one's views is a means to enable individuals to take part in public debates. And the right to marry requires a partner. All civil and political rights are made for humankind, whereby the individuals are not to be understood as natural beings, but as members within a given society. "Human rights are not the rights of humans in a state of nature: they are rights of humans in society [...] they are rights of humans vis-à-vis each other."<sup>9</sup>

## 2.2 *Human Rights and State Intervention*

Human rights are made to hinder the state from intervening into the sphere of the individual.<sup>10</sup> This is an important, albeit an *instrumental* and *not* a *substantial good*.<sup>11</sup> In order to adequately determine the core of fundamental civil and political rights, one must also emphasise their salient influence on leading legislative actions of public authorities. Freedom does not characterise a status of natural independence, but is more appropriately explained "as effective power to achieve what one would choose is an important part of the general idea of freedom".<sup>12</sup> Thus, each kind of freedom is embedded in legal and social structures. The freedom of marriage does not imply the right to marry without state formalities, but that these formalities are adapted to the freedom of marriage. The freedom of association does not require that associations are not publicly registered, but that this registration does not depend on the composition, purpose or by-laws of the association. The freedom of belief is safeguarded, when practical life in accordance with one's religion is not publically or privately embarrassed. So, the human rights discourse is about the individual's role in a society based on rights. To determine this status by legal action means "a way of thinking about the *principles of human existence*, as well as a legal way of categorising recognition of and access to such principles".<sup>13</sup>

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<sup>9</sup> Hunt 2007, p. 21.

<sup>10</sup> Tushnet 2008, p. 168.

<sup>11</sup> MacCormick 1982, p. 1, 10.

<sup>12</sup> Sen 1992, p. 69.

<sup>13</sup> de Búrca 2005, p. 3.

### 2.3 *The Liberty-Ability Divide*

The classical human rights are not adequately understood as immunities or negative freedoms. Each freedom is to be embedded into a legal framework in order to be effectuated. To protect negative rights, “a positive right to the protection of negative rights”<sup>14</sup> is required. A negative freedom is not to be epitomised as a sphere of *dispensing the individual* from the *prevailing world of law*, but as a guaranteed and limited sphere defined and determined within the law.

Therefore, it leads to paradoxical consequences to distinguish between *liberty* – guaranteed as a “negative freedom” – and *ability* – conceived as a “positive freedom” – as both concepts could never be separated in theory or reality: “If there is no possibility of performing an action, that is, we are clearly unable to do it [...], then the question of whether we are free to do it does not rise. If this is accepted then it cannot be true that liberty and the ability are categorically different. Rather the possibility of doing X is a necessary condition of whether we are free or unfree to do X.”<sup>15</sup> So, the idea of immunities, liberties or the negative freedom as fundamental rights becomes only relevant to enable the human being to pursue her or his life in self-determination, to enjoy the “positive freedom”. The negative freedom is an important means and not an end in itself.

### 2.4 *The Naturalistic Component of Social Rights*

Additionally, there is a component enshrined in all social rights which is only rarely sufficiently identified: All of them possess a genuinely *naturalistic component*, which civil and political rights lack! In the context of the right to social assistance and social security human beings are addressed as natural beings, who deserve food and shelter or who suffer from diseases and handicaps and, thus, are in urgent need of treatment and assistance. Social risks and social needs are to be jointly addressed as physical shortcomings. The right to work is addressed to give room for the activities of individuals, who are conceived as active by their nature and interested in taking part in social life. Again, human beings are conceptualised as natural beings that are in need of societal support. This is what the social right is all about. So, one can also emphasise a strong natural law component within the internationally acknowledged social rights. This also shows, why a theoretical split in a negative and a positive freedom cannot explain a social right, which has a factual basis in a status of personal suffering due to social shortcomings.

So, if *natural law* is supposed to be the conceptual basis of *human rights in general*, this feature is more to be found in social rather than civil rights. Their guarantees – belief, marriage, expression, collective action in corporations, associations and assemblies – are more related to an advanced and refined social culture

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<sup>14</sup> Plant 1998, p. 57, 64.

<sup>15</sup> Plant 1998, p. 67 et seq.

than a natural status of humankind. In the end, one can define social human rights as means to empower the beneficiaries to overcome the shortcomings stemming from their existence as natural beings by social means.

### 3 Sovereignty

#### 3.1 *The State as Addressee of Social Rights*

*Social rights are addressed towards the public.* But this addressee is *not* primarily the *state*, but other *individuals*, who are quite often organised in social intermediaries such as social insurances, local communities or members of the workforce of a country. This direction and determination of a social right becomes obvious by looking at the right to work. As the right to work entails a freedom of choice in regard to employer,<sup>16</sup> this requires that a worker can find an employer, who is willing to employ her or him and to collaborate. The rights to decent housing or good health care do not imply that the state owns houses or operates health-care facilities. These rights mean, however, that if these items are under the disposition of private owners due to property rights, private house-owners, hospitals or medical doctors are also bound to see that the guaranteed social rights become effective.

The right to social security depends on solidarity established within the corporation organised as a social security institution. This is constituted apart from the solidarity prevailing in a state. Those who are covered by social security are not identical with the citizens of a given state, as in the context of social security also non-nationals are covered due to their work or residence in the competent state. This difference is very important, because it unveils a profound lacuna in the prevailing theory on “social citizenship”, which is very popular in the English-speaking world. Above all, this difference clarifies that social security does not coincide with the idea of national solidarity. It has much more to do with the solidarity among those who are working and living in the same country. This difference matters in an internationally open society.

Coverage in a national social security system creates and establishes a context and framework of distribution and redistribution among all the insured persons. Social rights are based on obligations and commitments imposed on the citizens of a given society: this commitment derives from existence as a member of society, embedded not in nationality but in residence and work within the boundaries of a national state. This integration not only provides for entitlements, but in doing so, it imposes at the same time commitments in relation to financing and facilitating the system so as to fulfil its protective function and make, thus, social life effective and productive.<sup>17</sup>

<sup>16</sup> Art. 23 of the Universal Declaration of Human Rights; Rittich 2007, p. 107; Craven 1995, p. 194.

<sup>17</sup> van Langendonck 2009, p. 311, 320.

As *social rights* are intended to give *entitlements* to be ensured by the state, it is to be observed: “The importance of rights to welfare [...] lies not only in the guarantee of a basic standard of living per se, but also, [...], in the fact that the fullest enjoyment of the civil rights of citizenship is dependent on welfare if these rights are to be more than formal and remote guarantees.”<sup>18</sup>

In this respect, social rights are important to create the preconditions under which the civil society and democracy can flourish.<sup>19</sup> Social rights enable the human being to make use of civil rights and the idea of *social citizenship* gives *democracy* an “*added potency*”.<sup>20</sup> “The idea of rights of welfare has also become linked with the idea of social justice” and, hence, “confer a social and economic state outside the market”.<sup>21</sup> It “involves the idea of a just distribution of resources and, therefore, a correction of the market outcomes. It also entails that citizens have to cooperate and not only rely on mutual non-interference into individual rights”.<sup>22</sup>

### 3.2 *Social Rights as Rights of Action and Recipience*

Social rights encompass *rights of action* and *rights of recipience*. Thus, giving benefits as well as imposing burdens implies questions of distributive justice. This is a common feature of all social protection systems. In the *Beveridge Report* the observation had already been made that “social security must be achieved by co-operation between the state and the individual”.<sup>23</sup> “Rights of action are the absences of obligation. On the other hand, rights of recipience of a person are rights which correspond to the duties of another person or people [...] All moral rights of recipience can be expressed in terms of duties, not all duties are expressible in terms of rights.”<sup>24</sup>

As a further characteristic social rights unveil the necessary interrelation between *rights* and *duties*. This context is pointed out by Art. 29.1 of the Universal Declaration of Human Rights: “Everyone has duties to the community in which alone the free and full development of his personality is possible.” So, “all human rights of recipience correspond to duties of other human individuals”.<sup>25</sup>

The right to social security precisely outlines this context. There, a *conditionality* of social rights is to be found in a *double sense*. Firstly, these rights depend on qualifying conditions elaborated by law and to be fulfilled by the beneficiary’s living circumstances and assessed as being fulfilled by the administration. Secondly, the beneficiary is exposed to a series of actions in order to receive benefits, for example

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<sup>18</sup> Harris 2000, p. 3, 23.

<sup>19</sup> Harris 2000, p. 23.

<sup>20</sup> Harris 2000, p. 31.

<sup>21</sup> Plant 1998, p. 57, 58.

<sup>22</sup> Plant 1998.

<sup>23</sup> McKeever 2009, p. 139, 141; William 2007, p. 333.

<sup>24</sup> McLachlan 2005, p. 30.

<sup>25</sup> McLachlan 2005, p. 53.

as an unemployed person to actively search for work, or as an injured person to be open to medical treatment, rehabilitation or vocational training. Benefits depend on administrations, which are capable of effectively charging insured persons through the payment of contributions. So, social rights are characterised by a societal and a collective component. More precisely, social rights go hand in hand with social responsibilities – “No rights without responsibilities!”<sup>26</sup>

In contrast to ecological rights social rights are the rights of individuals, whereas ecological rights are primarily addressed to certain groups of human beings. The intention of social rights is to safeguard the well-being of each individual. This is clearly illustrated by social security. In the case law of the European Court of Human Rights, the right to *social security assumes* the legal character of *property*.<sup>27</sup> This shows that social and civil rights are similar.

### 3.3 Social Rights and Social Legislation

The conditions for social rights are to be created by acts of *legislation*. The first and most fundamental prerequisite is to make social rights feasible; this requires the establishment by acts of legislation of *institutions* to *administer* social rights. From these circumstances stems a series of requirements, which are to be respected in order to ensure that the right be adapted to the needs of the beneficiaries. The *stakeholders* – trade unions, employers’ associations and non-governmental organisations – should be integrated in the legislative process to give them a *voice*. The debate on social legislation should be profound and accompanied by a public discourse in order to raise awareness of the rights that are to be enacted amongst both the public and the beneficiaries.

Moreover, social rights depend on a multitude of social and institutional conditions. The right to work is bound to a whole range of potential *employers* and a *public* system of placement, a policy directed towards full employment with many instruments on training, assistance and – if necessary – public employment and labour legislation. The same is true for the rights to decent housing or health care. All these human rights are built on the organisational capacity of the state to regulate the labour market, housing and health care. The right to social security is built upon organisations. Establishing a relationship between a huge number of individuals confronted with the same social risk, borne by and the protection is based on *sol-*

<sup>26</sup> Giddens 1994, p. 65.

<sup>27</sup> European Court of Human Rights, Application no. 40892/98, *Koua Poirrez v. France* (ECtHR 30 September 2003); Application no. 17371/90, *Gaygusuz v. Austria* (ECtHR 16 September 1996); Application no. 65731/01 and 65900/01, *Stec and Others v. United Kingdom*, (ECtHR 6 July 2005), para 51, 41 E.H.R.R., 295 Stec: “in the modern, democratic state, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid- subject to the fulfilment of the conditions of eligibility – as of right”: Cousins 2009, p. 120.



idity. “Solidarity is the child of interdependence, although not interdependence alone.”<sup>28</sup>

A law that strengthens social solidarity constructs “a realm of social rights, of moral equality and identity among all citizens, created by modern society’s interconnectedness”.<sup>29</sup> Social rights thus give shape to this interdependence among the protected persons, working or living in a given state. Because of this they depend on institutions that have to be established by acts of state legislation; these are to be brought forward by the state and are accompanied by a bureaucracy, which attributes to the entitled a fair share of the outcome of the social product.<sup>30</sup> So, the welfare state cannot be adequately understood without *accepting bureaucracy* as its backbone. In this respect, fundamental social rights can be analysed as provisions to institute and establish institutional administrative frameworks, capable of making individual social rights effective.

These rights impose many commitments on the legislator. Insofar, the primary addressee of social rights is *Parliament*. It is *free to decide* on how the social goal is best achieved; but a guaranteed social right does not mean that one is *free to abstain from action*. Thus, it has to make sure, that individuals entitled to social rights can achieve a societal position in line with the given legal provision. If these commitments are based on international law, the implementation of specific measures is imposed on the state. This leads to the impression that international social rights might undermine both democracy and sovereignty. But this is a double misconception: firstly, as all human rights limit democracy, as they identify spheres of action beyond the discretion by the majority; and finally, in the post-World War II order of states, all states are deeply embedded in international and European law. Hence, all states have definitely lost their sovereignty.

The observation that all human rights are based on social circumstances and that they depend on legal provisions giving them shape and structure shows clearly that not only social human rights but all fundamental civil and political human rights have state power as their implicit precondition. Civil rights aim to create individual autonomy within a political community and political rights intend to give the individual a say in forming and executing the state power. The latter are not meant to establish a political order separate from the state, but to integrate the citizens into the making of state policy in the framework of a democratic government within a given state.

So again, civil and political rights cannot be conceived as the legal status of an isolated individual living apart from both state and society, but as a means to frame – shape, limit and legitimate – the execution of state power in relation to individuals living in a given society. In this context the state is not bound to abstain from action, but to take measures. Already in the 1793 French Version of the Declaration of Human and Civil Rights it was definitely expressed: “La Déclaration des

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<sup>28</sup> Baldwin 1990, p. 32, 33.

<sup>29</sup> Baldwin 1990, p. 35.

<sup>30</sup> Habermas 1998, p. 104 et seq.

droits contient les obligations des législateurs” (The *declaration of rights implies* the obligation to *enact laws!*).

Parliament is, however, not bound by these rights as such, but it is bound to find the proper ways and means to make these rights become administratively and financially effective. So, the burden imposed by human rights on the state is not independent from political decisions – quite the contrary, *state policy* and *polity* is primarily based upon *how* to make human rights both *effective* and *protective*.

## 4 Justiciability

### 4.1 Prevailing Scepticism

What about the second topic? “Scepticism directed against the potential justiciability of economic, social and cultural rights is commonplace, not only in the international law sphere, but also in many domestic law systems.”<sup>31</sup> “A standard objection to social rights is that they rest on the concept of needs, which is notoriously difficult to grasp, mostly because they are impossible to distinguish from preferences, so that one cannot determine with precision what really counts as needs.”<sup>32</sup>

Do the various social rights give entitlements in *substance*? Could one ever imagine having a right to work in a *specific* workplace, or that the right to health means a right to have *good health for life*, or what about a right to welfare for the able-bodied: Are they entitled to live on the dole for life? So, one cannot only ask: “Do economic and social rights only exist on paper as part of treaties and constitutions to which governments often pay lip services at international fora?”<sup>33</sup> Are, at the same time, social rights in the last instance expressions of a *utopian thinking*, which is not appropriate to the brutish world of competition and markets – hence, in short, the world we are living in?

A characteristic of human rights is that they are abstract and therefore vague; this is quite common. “Human rights are difficult to define, but in general terms, they are regarded as fundamental and undeniable claims or entitlements which are essential for life as a human being.”<sup>34</sup> It is true that when it comes to defining the *concept* of *welfare*, the latter assumed *different forms* in history and from a comparative perspective a plethora of legal organisations of welfare can be observed. The same is true, when it comes to social security, among which the conventional doctrine discerns an egalitarian Nordic, a conservative central European as well as a liberal, British approach.<sup>35</sup>

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<sup>31</sup> Shany 2007, p. 77, 78.

<sup>32</sup> Fabre 2000, p. 33.

<sup>33</sup> Coomans 2006, p. 1.

<sup>34</sup> Ssenyonjo 2009, p. 9.

<sup>35</sup> Esping-Andersen 1990.

There is no doubt about the open and abstract character of human rights guarantees. This is not peculiar to social rights, but it characterises all the provisions on human rights. This feature is, however, not special to social rights, but identifies human rights legislation in general. What does belief, marriage, or art mean? Human rights are vague and consequently difficult to grasp indeed. This stems from the *legal character* of all human rights, which are both fundamental and abstract definitions of rights. As a further implication of what has been said, one can conclude that “all human rights are ‘social’ by nature”.<sup>36</sup> The social nature of all human rights brings about that incrementalism of the implementation of human rights becomes a central topic in the context of social human rights.<sup>37</sup> Incrementalism is the reaction of the legal system to the distributive strand of social rights. This makes it necessary to counterbalance human rights of different human beings. In this process court rulings, legislative measures and a series of administrative initiatives are to be taken in order to further social rights in the context of human rights legislation.

## 4.2 *Enforceability of Social Rights*

Social rights are based upon state power, as they depend on the ability of the state to build legal institutions by political measures and legal action. Social rights need public support, as they create individual rights by imposing obligations on others. Paying social contributions has been made mandatory in order to allow social rights to become effective.

So, in the first place, it is up to state legislation to bring about and make *enforceable* the social human rights that are enshrined in international, European and national constitutional law. In a legal system based upon the rule of law each entitlement on social welfare or social security has to be submitted to a revision by independent tribunals, which have to assess whether an administrative decision has been taken in accordance with the legal provisions.

In an *interventionist state* role, social commitments are becoming leading *imperatives for legislative actions*. Hence, the state is also committed to protecting those people, who cannot take part in the market due to individual restraints or deficits. The *decommodification* of social services or goods and the payment of cash transfers is the sociological expression of delivering these items by means of law, instead of purchasing them on the market. The rationale behind the social strategy is to help those, who cannot help themselves.

This is very often done by virtue of utilising market forces to meet social ends. So, the state guarantee of social rights is possible in market economies under the assumption that each market economy is embedded in a publicly created legal order, determined to facilitate said market forces to cooperate and to protect the needy who cannot actively participate in the market process.

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<sup>36</sup> Barak-Erez and Gross 2007, p. 7.

<sup>37</sup> King 2012, p. 289.

### 4.3 *Enforceability in the International and National Context*

As to the European or international guarantees of social human rights, specific enforcement procedures are developed in the context of the United Nations,<sup>38</sup> the Council of Europe<sup>39</sup> and the European Union (above all by the case law of the European Court of Justice).

Finally, it is a matter of the respective national Constitutions to safeguard that legislation keeps pace with human rights guarantees. For example, in Germany, the role of the Federal Constitutional Court is extremely strong. It sanctioned<sup>40</sup> a law on the determination of *social assistance* entitlements for *children*, which was taken as a percentage of the subsistence level for adults, as *inappropriate* and, hence, void under the Constitution, because, when doing this the legislator did not consider that the needs of children are not the same as those of adults.

There are many examples of judgments like this in many jurisdictions.<sup>41</sup> These examples clearly illustrate that social human rights are not only enforceable, but quite often have also been enforced! International and European provisions not only impose commitments due to their status in international or European law, but these guarantees also matter in the internal legislation of each Member State, as these guarantees are to be transformed and incorporated into national law as binding to whomever it may concern.

## 5 Social Rights as Human Rights

### 5.1 *Respect, Protection and Fulfilment of Social Human Rights – Three Dimensions of Human Rights*

Social rights, hence, are not fundamentally different to civil and political rights, and they cannot be opposed to ecological rights. Social rights have a collective component. It should be underlined “that the separation and division between the different sorts of rights should be rejected and that all rights are social”.<sup>42</sup> Because of the lack of acknowledged social human rights, social rights are addressed in the context of civil rights.

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<sup>38</sup> Langford 2008.

<sup>39</sup> Mikkola 2010.

<sup>40</sup> German Federal Constitutional Court (Bundesverfassungsgericht), 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 (9 February 2010).

<sup>41</sup> Langford 2008.

<sup>42</sup> Barak-Erez and Gross 2007, p. 8.

The German Constitution is an example of such an approach: it guarantees social rights in the framework of civil law guarantees such as property,<sup>43</sup> equality<sup>44</sup>, or human dignity.<sup>45</sup> The most prominent example of this trend can be found in the case law of the European Court of Human Rights. It extends a series of provisions on civil human rights to social rights.<sup>46</sup>

The distinction between civil and political rights on the one side and social rights on the other reproduced the split in humankind during the *Cold War*. For decades this conflict embarrassed each debate on human rights.<sup>47</sup> “Today there is agreement that both sets of rights require abstention and intervention. Whether states need to commit resources for the realization of human rights does not depend on whether the right is civil, cultural, economic, political or social”.<sup>48</sup> Since 1990 the “idea of the *interdependence* and *indivisibility* of the different kinds of rights has gained broad recognition”.<sup>49</sup> So, in 1993 the Vienna World Conference on Human Rights laid down in its Final Declaration: “all human rights are universal, indivisible and interdependent and interrelated”,<sup>50</sup> both social as well as civil rights.<sup>51</sup>

Social rights also concur with the *modern* understanding of *human rights*. A. Sen underlines that the right to development is justified to improve the substantive freedom of the individual<sup>52</sup>. In line with his<sup>53</sup> and M. C. Nussbaum’s argument<sup>54</sup>, human rights are a legal expression to safeguard the capabilities of each person to acquire and play a substantive role under the conditions of the social division of labour and life as an individual being, whose position is based upon respect and human dignity. This position cannot be achieved as long as human rights are guaranteed in a restricted manner to only a partial guarantee of human rights and does not envisage them in the multiplicity of their various dimensions.

*Human dignity* is not safeguarded in a world, where *only political* and *civil rights* are upheld, while social and ecological rights are completely absent or neglected. Human rights cannot be separated from one another. Even more, civil and political rights are inhibited in their real effectiveness as long as social and economic rights

<sup>43</sup> German Federal Constitutional Court (Bundesverfassungsgericht), 1 BvL 17/77 et al. (28 February 1980); 1 BvR 995/95, 1 BvR 2288/95, 1 BvR 2711/95 (14 July 1999).

<sup>44</sup> German Federal Constitutional Court (Bundesverfassungsgericht), 1 BvR 323/51 et al. (17 December 1953); 1 BvL 97/78 (13 June 1979); 1 BvR 562/78 (27 January 1982); 1 BvR 35/82, 1 BvR 356/82, 1 BvR 794/82 (31 October 1984).

<sup>45</sup> German Federal Constitutional Court (Bundesverfassungsgericht), 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 (9 February 2010); 1 BvL 10/10, 1 BvL 2/11 (18 July 2012).

<sup>46</sup> Tomuschat 2007, p. 837, 840; Kapuy et al. 2007; Brems 2007, p. 135; Shany 2007, p. 77; Fredman 2008.

<sup>47</sup> Feyter 2005, p. 42 et seq.

<sup>48</sup> Feyter 2005, p. 43.

<sup>49</sup> Barak-Erez and Gross 2007, p. 5.

<sup>50</sup> Coomans 2006, p. 1, 2.

<sup>51</sup> Ssenyonjo 2009, p. 4.

<sup>52</sup> Sen 1999, p. 3: “Development can be seen as a process of expanding the real freedoms that people enjoy”.

<sup>53</sup> Sen 1999; Sen 1992.

<sup>54</sup> Nussbaum 2000.

are not guaranteed. In A. Margalit's<sup>55</sup> concept of a decent society a key target of all legal systems is to safeguard the respect of everyone. It refrains from discriminating against others and abstains from each humiliation. A decent society is built upon a political and social order based on the complete guarantee of all human rights for each individual. These rights cannot be guaranteed partially, but only entirely! A partial respect of human rights lacks the respect in substance!

As all human rights social rights are submitted and exposed to obligations to *respect*, to *protect* and to *fulfil* them.<sup>56</sup> The obligation to *respect* social rights "entails obligations not to interfere with the enjoyment of economic and social rights". The obligation to *protect* social rights "requires states to take measures that prevent non-state actors (third or private parties) [...] from interfering in any way with economic and social rights". The obligation to *fulfil* "requires states to adopt appropriate legislative, administrative, budgetary, promotional and other measures, including relevant politics to secure the goal of full realization of economic and social rights to those who cannot receive rights through their personal efforts". In accordance with these obligations, Art. 2 of the International Covenant on Economic, Social and Cultural Rights impose on states the commitment to "take steps [...] by all appropriate means"<sup>57</sup> in order to make economic, social and cultural rights effective.

## 5.2 *Human Rights and Economic Resources*

First, in order to make *human rights* effective one has to create individual rights by *legislation*. But this necessity is not restricted to social policy. The right to free assembly requires legislation in relation to the use of streets and squares for manifestations, because protesting as a human right means acquiring a privileged status as to the use of squares and streets. The right to association makes laws on the conditions and consequences of associating and the rights of the members of the association an urgent need. In order to give a corporation the status of a legal personality a register has to be installed. Marriage without legal forms and status is not different to the joint life in a non-marital relationship. "The right to a fair hearing is largely a positive right requiring significant expenditure of state resources on courts, prison systems and legal aid [...] All rights, and not only social rights, are public goods rendered possible by public institutions".<sup>58</sup>

As *social rights* are to be embedded in a system of *economic exchanges* they always and foremost have deep economic implications. As social rights are means of *decommodification*,<sup>59</sup> they are established beyond the market. They are excluded

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<sup>55</sup> Margalit 1998.

<sup>56</sup> Ssenyonjo 2009, p. 25.

<sup>57</sup> Ssenyonjo 2009, p. 52.

<sup>58</sup> Langford 2008, p. 3, 30; Hepple 2011.

<sup>59</sup> Esping-Andersen 1990.

from the economic transaction, as they do not represent an object of economic acquisition – at least not for the entitled person. So, those persons that are entitled to social benefits are not required to buy the services or to acquire the means necessary to assume the part of beneficiary.

The rights, however, dispose of an enormous economic relevance, because the whole burden of financing is to be borne by the social security institutions. Social rights have – in other words – many financial and economic implications, as they give economic values free of charge to the beneficiary and impose the costs on the social security institutions. This explains their extraordinary financial and economic relevance.

Guaranteeing social rights does not imply that all workplaces, services and goods are owned by the state. Otherwise, only an orthodox communist society would be able to maintain fundamental social rights. This was the argument made by communist leaders, but there is no evidence that their position was correct, as equal distribution materialised on the basis of general scarcity and mass poverty. Social rights are to be *safeguarded* by the state; but the state is not addressed as the owner nor the organiser of workplaces, services and goods, but as the legislator and, therefore, as the organiser of societal life – a role it cannot abandon as long as the state is obliged to organise the market.

### 5.3 *Social Rights and Social Justice*

Thus, when analysing elementary assumptions on which social human rights are based, one can easily identify their function and structure, when conceiving social legislation as a legal means to give shape to *social rights*. Social rights are cornerstones to build *social justice*.<sup>60</sup> Social rights as rights “mean resources, not immunities”,<sup>61</sup> “the idea of rights of welfare has also become linked with the idea of social justice”,<sup>62</sup> they “confer a social and economic state outside the market”.<sup>63</sup> “The importance of rights to welfare [. . .] lies not only in the guarantee of a basic standard of living per se, but also [. . .] in the fact that the fullest enjoyment of the civil rights of citizenship is dependent on welfare if these rights are to be more than formal and remote guarantees.”<sup>64</sup>

Social justice is about *equality*. This is also a key dimension of human rights. So, in contrast to a wide-spread assumption<sup>65</sup> social justice does not mean emphasising equality to the detriment of liberty, but to safeguard the human rights of each individual in order to establish all the liberties of each one on the basis of equal-

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<sup>60</sup> Plant 1998, p. 57.

<sup>61</sup> Plant 1998, p. 57.

<sup>62</sup> Plant 1998, p. 58.

<sup>63</sup> Plant 1998, p. 58; Harris 2000, p. 3.

<sup>64</sup> Harris 2000, p. 23.

<sup>65</sup> William 2007, p. 354: “taking liberty seriously thus provides good reason to restrict the extent of distributive principles”.

ity. As social human rights deal with people in need, envisage individuals as sick, thirsty, hungry, workless or neglected, the nature of humankind becomes a leading dimension of legislation. Insofar, social rights are based upon a naturalistic vision of humankind, which explains their natural law background.

*Social rights* identify and demonstrate the target of *social policy* as they are based on the idea of common burden sharing and mutual help. Social rights and obligations, hence, go hand in hand. The beneficiary's right is embedded in the previous commitment to pay contributions; and the right to benefits can be made conditional on the willingness of the beneficiary to take part actively in measures to overcome the individuals' fate.

## 6 Conclusion

Thus, when social legislation creates individually enforceable social rights, these rights are human rights and, hence, to be respected, protected and fulfilled. These three commitments illustrate the target and destination of social legislation. In the context of respect, social legislation has to create institutions and single out legal social rights. In the context of protection, social legislation has to strengthen social rights and to defend them against interventions from third parties. In the context of fulfilment, social legislation is required to improve the status of beneficiaries in accordance with the progress of economy. In doing so, social policy substantially contributes to building a law, which is embedded in human rights principles and imperatives. But it is, however, "needless to say, human rights are still *easier* to endorse than enforce".<sup>66</sup>

Finally, social rights are relational and not substantial as they are meant to make people take part in the achievement of a given society. So, the content of social rights is defined by the cultural, economic and social level of a given society. All the *objections* against the concept and the idea of social human rights turned out to be "*extremely weak*".<sup>67</sup>

Social rights are integral parts of human rights. Today, social legislation is also an integral part of the law in general. As all branches of law are deeply interrelated<sup>68</sup>, social rights are only one component of human rights in general as they are the fundament upon which the law of today is built. Welfare and social security represent a cornerstone in a world that has to prove that all the acknowledged human rights become a reality in society.

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<sup>66</sup> Hunt 2007, p. 208.

<sup>67</sup> Plant 1998, p. 57, 63.

<sup>68</sup> Eichenhofer 2009, p. 181.



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