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Minimal Social Standards in EU Primary Legislation

Thank you!

Changes in social standards resulting from the Lisbon Treaty have proven severe. In decades prior, essentially only jurisdictional standards existed and those had always been employed in a specific, socio-political manner. The prevailing courses of action were limited in scope. On the one hand, equal protection before the law was codified and a piece of anti-discrimination legislation passed which in many ways surpasses the American model on which it was based. The equal treatment of migratory labourers too is an undeniable part of the "acquis communitaire". Provisions of this sort have the "advantage", that they avoid making any sort of declaration about absolute protection levels. Wage parity and racial discrimination prohibitions can be practiced based on the Lithuanian standard and the Luxembourgian standard in equal measure. Furthermore, procedural rights have been established; especially rules guaranteeing elected employee representatives the provision of information and consultation. This applies, for instance, to the Collective Redundancy Directive and to the Framework Directive on labour protection as well as to the European Works Council Directive. Even Directive 91/533/EEC on employers' obligation to inform employees says next to nothing about the content of employment contracts, delineating which subjects are to be addressed in an employment contract instead. There were few exceptions, one of which was the safeguarding of acquired rights in the event of transfers of undertakings. Another was the four weeks of annual paid vacation, which are guaranteed via the Working Time Directive.

The Treaty of Lisbon did not modify responsibilities so much as it made specifications with regard to content for the first time. This happened, in part, through the Charter of Fundamental Rights, which was declared a component of legally binding primary legislation. Alongside the Charter are the "horizontal social clauses", whereby the subject of Article 9 TFEU is social protection. Furthermore, beyond the traditional wage parity guarantees for men and women (now codified in Article 157 TFEU), the Charter establishes a series of relevant specifications that can be found in both the TEU and TFEU Agreements. Data protection, which is guaranteed in Article 39 TEU and then again in Article 18 TFEU and in Article 8 of the Charter of Fundamental Rights in an almost identical form, is a prime example. Whether or not this level of multiplicity, which seems to be based on the mantra "make assurance triply sure", actually promotes data protection is another question entirely.

A further, only seldom observed manifestation of primary legislation are the international treaties ratified by the EU. These include the UN Convention on the Rights of Persons with Disabilities, for example. It features relatively precise language - rather unusual for a document from the UN - and could therefore garner increased practical significance. The European Union itself is bound to adhere to this convention by virtue of ratification, there is not only a general principle of law of it having been ratified by each of the Member States.

After all, we must not allow ourselves to forget the basic values reflected in the treaties which extend far beyond the socio-political realm. Since there is a large extent to which they express the ephemeral nature of the EU, I will allow myself to quote Article 2 verbatim. "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." If all of these values had already been realised, then paradise would be right around the corner.

To put these precepts in concrete terms, the Charter of Fundamental Right contains an entire separate title under the heading "Solidarity". It includes, for instance, the right of workers to prior information and consultation when it comes to important worker-related decisions being made within a company. Article 28 codifies the right of collective bargaining and in cases of conflicts of interest, the right of workers to take collective action to defend their interests, including strike action. If my reading is correct, this was the first time that the word "strike" was explicitly named in EU Law. Considering that the most that employees could previously expect in terms of having their interests represented was a form of "consultation", this certainly represents a barrier, perhaps even a taboo, being broken. Article 31 goes on to delineate the right to healthy, safe and dignified working conditions. That such a propitious legal instrument would also prohibit child labour, protect families and guarantee access to the various social security systems is essentially self-evident.

A widely known characteristic of human rights guarantees is that they are often so generically worded that you can only break them down to the level of concrete applicability with copious amounts of good will. Just consider Article 9 TEU which addresses the principle of equality. "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies." In some way this is a gratifying formulation but admittedly, it occasionally has a connotation for me which is a bit out of the ordinary. I cannot help but think of a person receiving social assistance under German, Greek or French law, who goes to their local EU office and asks to be received in "equal audience" with an investor, for example. That level of social fantasy is not usually required and accepting things at face value has been a fool's errand since time immemorial (which - much like with children - does not preclude them from telling the truth). Indeed, it is certainly possible that it will become apparent to average citizens that these were mainly just nice words with no enforceable claim backing them up.

Aside from the problem of guarantees being abstracted, there are explicit exceptions and breaches. Traditionally, these are located in the second paragraph of the article in question, at least this is the arrangement prevailing in the Basic Law of Germany and in many other constitutions. The Charter of Fundamental Rights goes a different route. Article 52(1) contains a global authorisation, which places all rights and freedoms und legal reservation while prohibiting infringements upon their essence. The latter feature is known to us from German law, although I cannot name a single example of case law in which even far-reaching interference has actually been regarded as an infringement. Very significant in terms of legal practice is the principle of proportionality, which itself hearkens back to certain legal traditions of the Union.

The Charter of Fundamental Rights has a limited range of application. Much like the "horizontal provisions", it only applies to the Union's own institutions and to the Member States, insofar as these administer European Law. What does this mean in practice? Let us take the implementation of the Collective Redundancies Directive as an example. It is evidently the instrument of EC/EU Law by which the information and consultation procedure are determined. Does this mean that it is possible to appeal to Article 30 of the Charter of Fundamental Rights, which guarantees adequate protections against dismissal, in cases of collective redundancy? Or is EU Law limited to the statutory "collective redundancy procedure"? I suspect that jurisprudence will choose the latter alternative and ignore Article 30 of the Charter. I am not sure however and the question is certainly up for discussion. We might also consider keeping in mind that the people whose names are on one of these lists and who therefore find themselves clutching at straws might well evoke Article 30 of the Charter in their own favour. They did, after all, come to rack and ruin via a procedure based on collective redundancy.

The bans on discriminatory practices contained in Article 21 of the Charter - going far beyond the ones included in Article 12 of the old EC Treaty and in the German AGG (General Act on Equal Treatment) - continue to warrant our interest. To date, we have heard little about how a person can no longer be discriminated against on the basis of their social background, genetic characteristics, language or their political (or any other) outlook. Likewise, making distinctions according to wealth, descent or nationality is not permitted either. Although these prohibitions too are only applicable to the conduct of EU institutions and to the implementation of EU law, the question of whether or not EU-financed cultural and scientific projects and development policies ever actually do justice to these standards certainly presents itself. Shouldn't a streamlined science occasionally be fostered, considering

the fact that neither political orientation nor any other outlook should be a factor? Is it permissible to concede local workers lower levels of remuneration than their posted counterparts without violating the ban on discrimination on the basis of nationality in the process?

The problem of the social guarantees contained in the primary legislation of the European Community is not only one of being able to deduce specific claims and directions for action or of lines only ever being drawn in cases of absolute necessity. In fact, the problem is not about the scope of application of EC Law either. Much more importantly, there exists something like an unwritten general caveat. Dagmar Schiek has already touched on this issue. Today's EU Law guarantees what are known as fundamental economic liberties just as its predecessors did. They comprise: The free movement of goods, workers, services and capital as well as the right of establishment. Originally, these rights were purely bans on discrimination. A French service provider was not allowed to be treated any different legally than a German service provider, for example. No one had a problem with this - it was impossible to oppose, really. Over time, the CJEU's jurisprudence transformed these into what are known as "bans on restrictions". Not just discrimination based on one's Member State background is now prohibited. Every single restriction to activities in the single market requires justification, even if they apply to foreign nationals and locals in equal measure.

A clear example of this new principle was the CJEU's review of the British ban on work on Sundays. The Court of Justice remarked in length about the question of justifying government interference with with the free movement of goods. This freedom can indeed be interpreted as having been interfered with, since goods were no longer allowed to circulate freely on Sundays. In plain language: The pursuit of profit was being put on hold. Justification of the policy had to be found in the treaty, which it quickly was. If the free movement of goods had merely been a discrimination ban, the whole issue could have been settled in span of one sentence: The law affects English citizens and non-English citizens equally. While it is possible to imagine situations where there are absolutely no points of cross-border reference, these are becoming ever rarer and do not change the basic issue. The ban on restrictions is tantamount to a comprehensive guarantee of entrepreneurial liberty, insofar as any current or potential point of cross-border reference exists. A new collection of fundamental entrepreneurial rights that can only be restricted in particular circumstances was created in a "smoke-filled room", so to speak, without there having been any real discussion of the consequences. The question of whether it will ever be possible to undo these rights is a difficult one and cannot be answered at the present moment.

In the "Viking" and "Laval" cases, the CJEU vested the freedom of economic activity with a third-party effect, ascribing to it what is known as a "horizontal direct effect". Tangibly, this means that an employer or an employers' association can invoke this basic liberty during conflicts with workers or with trade unions. The latter would then find themselves restricted to referring to the grounds of justification and could only pursue those socio-political goals deemed permissible by the Court of Justice. The "Viking" case was not about the CJEU weighing the right to strike against the freedom of establishment. Rather, it was about the court weighing the objectives of the announced strike against the freedom of establishment. Should the need arise, it is acceptable to strike in pursuit of "good" objectives, such as defence of one's own job. Striking was not permitted, however, if the objective was considered less "good". In the end, it is the CJEU who determines which objectives are "good" and which are "not so good". It appears doubtful that an act of solidarity would be considered "good", for example. Applied to domestic circumstances, this would mean that engaging in collective bargaining or even going on strike would only be allowed in order to obtain a 3 % wage increase. A 5 % wage hike, however, might mean that a strike or even the threat of strike represented unjustifiable interference with entrepreneurial liberties. If the Federal Labour Court (BAG) was truly interested in producing this kind of (unconstitutional) jurisprudence, we can presume that even employer associations would raise a hue and cry: They are not interested in compulsory arbitration either.

The case law surrounding the "basic economic liberties" reflects a political trend toward a greater demand for free markets and market liberalism. You can also find it reflected in the public procurement law and especially in the Rüffert decision. To date, scholars of European Law have essentially been passive observers of this trend. No critical voices have emerged to oppose the redefining of discrimination bans as bans on restrictions because no critical scholarship of the issue existed. There were, of course, people committed to social policy but their

arguments all stayed within the bounds of prevailing thought. Compared with civil law and national labour law, hardly anyone approached European trends with a critical perspective. Instead, there seemed to be something approaching a universal consensus that "The European project is good". Perhaps a person could find this or that point to be critical of, even make some suggestion to improve one thing or another, but always through the lens of the "better" Europe, of the Europe that presupposed total economic liberty. A veritable prohibition of autonomous thinking had become established that was only breached with rendering of the Viking and Laval decisions, since these cases made it plain to see where this voyage was headed. In the meantime, there are actually critics - as Dagmar Schieck already pointed out - who argue that more Europe is not necessarily always best. They believe that preserving the current state of things is preferable and even necessary. This means that Member States should continue to decide upon their own social policy and to adjudge how best to react to market trends themselves. It goes without saying that this demand for increased autonomy can easily be expanded to include economic autonomy - this too is now a tenable position to hold.

The question then arises if and how it will be possible to make any advancement in this realm. The jurisprudence emerging from Viking and Laval and Rüffert decision came as a shock to so many people precisely because of the fact that, technically, no change will be possible until the CJEU itself thinks better of it. In theory, the treaties could be modified but such an action would require unanimity which is effectively impossible considering the number of Member States and the volatile nature of social policy. It is not realistic to expect that these fundamental liberties will be reduced to their former status as discrimination bans or that a general social proviso will be inserted into the treaty. As it is, we can only hope that one day in the not all-too-distant future, the judges in Luxembourg will decide to dissociate themselves from their hitherto existing legal practice. That is not very likely and, to be frank, I do not believe it will happen. That is due, in part, to the fact that the political orientation of the national governments is decisive in determining which judges end up in Luxembourg. In this respect, a judge's particular political preconceptions are a quintessential factor in their being elected again and again. Basic conditions would have to change pretty drastically for a different mindset to prevail at the CJEU.

First of all, we have to come to terms with the fact that the existence of European socio-political objectives is tenuous at best. Developments in Southern Europe make clear just how little we can expect from the EU in terms of social policy. After all, the Troika - which is forcing the Greeks, the Spaniards, the Portuguese and others not only to cut spending but also to dismantle social standards - includes a representative from both the EU Commission and the European Central Bank. Consequently, representatives of the EU constitute an obvious majority, thereby raising the question whether all of the EU institutions, regardless of their function, are bound by the Charter on Fundamental Rights or not. I have no fundamental objection, especially since we are talking about finding solutions to problems that arose from European (Monetary) Union policy in the first place.

The full extent to which the social systems of the South have been dismantled is poorly understood in this country. Some examples pertaining to Spain have already been mentioned. I would like to take a moment now to address the Greek situation. Not long ago, Greek pensioners stormed the health ministry in Athens because, henceforth, they were supposed to pay for their own prescription medication, on the basis of a pension level which had been cut by 30 % mind you. The Charter on Fundamental Rights does guarantee human dignity, however, and if a fellow citizen is no longer capable of purchasing necessary medication it is no doubt being violated.

Furthermore, Article 35 of the Charter ensures access to medical treatment. Can treatment be denied because a person cannot afford to pay for it? Presumably, the protesters were neither sufficiently well-informed nor sufficiently naive to invoke this provision. In truth, the Fundamental Rights Charter of the EU should have recognised as being authoritative in this context as well. Greece is an EU Member State and the people who went there not to "impose" but rather to coercively "recommend" corrective measures are simply EU functionaries acting in their official capacities. That, allow me to infer, is what the social reality of the EU looks like.

I purposely began with the flowery proclamations so that the contrast would be sufficiently stark. Admittedly, there is always some discrepancy between law and reality. Students of law understand this and recognise that not all points will be adopted at par value. On the other hand, once the social guarantees have been whittled away to the point that they no longer offer any protect to the majority of the population, the patience of those friendly to Europe will have come to an end. At that point, fundamental social rights will become pure ideology, mere promises meant to make the dark skies over Europe appear brighter while having little or no effect in reality. I am reminded of the creed included in documents from the former GDR. It declared that all the creative abilities of mankind should be developed to the full. This laudable principle was quickly brought to ruin, however, by the reality of endless proscriptions posted on every corner of every street. This contradiction is similarly vast to the one confronting the EU today. The main difference is that there is major variation in the way people across Europe are affected: Not everyone feels the immediate effects of the EU's very real shortcomings in the same way.

Viewed in terms of their practical effect, the minimum social standards contained in European Union Law are in truth political declarations. You can demand their implementation all you want but will only have a reasonable chance of success if you are able to marshal more than just a single insightful legal interpretation. You need a comprehensive vision of Europe and the arguments to back it up. In this respect, some of the approaches currently being pursued have a lot of development potential. A political constellation conducive to implementation is required. How could such a constellation come into existence?

Today, the EU is confronted with deeper problems of legitimacy than it was twenty years ago. The attempt to establish a constitution failed as a result of national referendums held in both France and the Netherlands. The Treaty of Lisbon, which is almost identical to the text of the defeated constitution was not forced to undergo any additional democratic "acid test". A further failure would have had unforeseeable consequences. When the former Greek Prime Minister Papandreou spoke of holding a referendum on the "economic reforms", he suddenly encountered such fierce resistance that he was no longer able to stay in office. David Cameron, head of the British government, also got bad publicity when he asked whether it should be left up to the people of Britain, as the ultimate font of sovereignty, to decide whether the United Kingdom should continue to be part of the EU. Fear of the public clearly signalises problems of legitimacy. In the past, these problems would have been overcome via the power of a substantive argument. Politics were capable of reaching a consensus and appeared to bring with it a number of advantages. Brussels issued additions to labour and social law that were especially useful for people who were dependently employed. This lead to the EU being held in high esteem, by members of the trade union movement in particular.

If the EU were to now change its policy and dismantle national social standards (instead of carefully cultivating them), it would undermine its own foundation. It is no longer capable of convincing people via substantive argument. Under these circumstances, the deficiencies inherent to the democratic process are brought fully to bear once more. The lack of transparency of numerous processes, which has become even more profound through EU enlargement, is beginning to register with people more strongly once again.

This is not merely conjecture. Numerous conversations have made manifest that, for the first time, a fundamentally critical attitude toward the EU is starting to prevail among workers, members of trade unions and works councils. Ten years ago, you were basically only allowed to criticise the bureaucratese used by EU authorities. Fundamental critiques of the project itself or about how the project was designed were essentially taboo. That has changed.

These shortcomings in legitimacy have to be made plain to EU policy-makers time and time again. Considering the peculiar structure of the European Union and the limited extent to which it is actually democratic, it is difficult to imagine the Commission seeing reason on its own, for example. Inadequate social and of spatial proximity are not the only decisive factors at play here. More vitally, Europe lacks a vibrant public sphere. Instead, there are numerous public spheres on the national level. This results in segmentation and ineffectiveness. If we want to avoid jeopardising the entire European project, the EU must gain credence among the majority of the population once again. We cannot expect this to happen until it begins to stand for relatively cautious social progress and not for massive social cutbacks and social restructuring at the expense of its weakest citizens.

I believe that shortcomings in legitimacy are the main issue. Its significance is highlighted by the fact that there are individual Europe-wide actions. Let me name a few positive experiences. Recall the strike action against the port services directive, for example, in addition to the actions taken against the original version of the provision of services directive. In both cases, the Commission had to comply: the project for the port services directive was abandoned and the provision of services directive was significantly mitigated. In my opinion, all this – just like many resolutions – only has a supportive function. Far more serious than a (so far utopian) European general strike is the risk that the employees, who represent the vast majority of the EU population, no longer identify with this project. European Now transferred to the judicial level, jurists must re-qualify as legal historians if this becomes a permanent situation. Their research area is a thing of the past and the battles will only be fought when the veterans get together for reunions.

I do not consider this perspective more likely because I continue to have faith in political reason. Of course, after experiencing the manner in which the sovereign debt crisis was handled, it is possible to have a completely different perspective. Where has political reason gone if austerity policies which only serve to exacerbate the crisis or which lead to a 30% decline in national product can be forced upon particular national economies, as in the case with Greece?

So much for that! I presume that some provocative assumptions will encourage a debate.
I thank you kindly for your attention!