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List of abbreviations used

| | |
|--------|---|
| ECHR | European Convention on Human Rights |
| EU | European Union |
| ICESCR | UN International Covenant on Economic, Social and Cultural Rights |
| ECB | European Central Bank |
| ICCPR | International Covenant on Civil and Political Rights |
| ECtHR | European Court of Human Rights |



EXECUTIVE SUMMARY

The identification of economic rights relates to the economic context in general (also referred to as ‘economic phenomenon’) on the one hand and to citizens’ liberties on the other. The deliverable is aimed at uncovering a definition of the concept ‘economic rights’, thereby identifying their specific nature. In each country economic rights deal with the regulation of the factors of production (labour and capital) and with limitations to private economic activities (business regulation), connected with their exploitation. More generally economic rights are concerned with property ownership and economic initiative. From these two main categories each legal system developed a broader list of rights connected to the economic phenomenon, focusing on market regulation, the protection of competition, and the interests linked to business (economic free initiative). Common trends in the historical evolution of the regulation of property and economic initiative have been observed across the Member States. From the industrial revolution to the more recent developments in the economies of the Member States, the need to protect citizens’ social and economic interests can be characterized by different legal solutions, which are first described from a broader perspective (sections 2.1, 2.2, 3.1, 4.1, 5.1) before turning to the different national experiences (2.3, 3.2, 4.2, 5.2).

These trends have determined to what extent in the respective Member States the freedom of initiative, social protection within the economic production process and the post-industrial economy are, irrespective of the differences between the various legal systems, regulated in a similar fashion, i.e. by means of codification, through the incorporation in the constitution or by means of legislation; however, legal tradition and political background have informed the unique and country-specific enforcement of these rights within the Member States.



1. INTRODUCTION

At the *level of the European Union*, economic rights of EU citizens are first and foremost based on the four freedoms – the free movement of persons, services, goods and capital -, which as being part of the internal market constituted the backbone of the European Economic Community and continue to do so for the European Union. That the original substantive provisions of the Treaty of Rome did not provide for a *general* right to free movement for *all* persons and companies resulted from the requirements that the individual or company should be a national of a Member State and should be engaged in an economic activity as a worker, self-employed person, service provider or service recipient. Economic rights also include the rights of consumers as purchasers of goods and services. As consumers play a vital role in the market place, consumer policy gradually became more important alongside internal market policy. (Reich and Micklitz 2003; Stuyck 2000; De Vries 2006; Weatherill 1997; Weatherill 2011).

It appears that from the outset the economic rights of EU citizens based on the four freedoms entail a right to equal treatment i.e. the right not to be discriminated against and the right to freedom of movement (O’Leary 2011). But the European Court of Justice (hereafter: ECJ) went even further by prohibiting all kinds of restrictions i.e. national rules, which restrict market access, thereby offering citizens a right to gain access to the market in another Member State (Snell 2010). Irrespective of the broad scope of economic rights, there are still obstacles, which make the exercising of these rights more difficult or even impossible. This is partly due to the possibility of restricting the freedom of movement for public policy reasons or because civil or social rights take precedence over conflicting economic rights (Barnard 2011; De Vries 2006 & 2011). For that matter, a new dimension to EU economic rights has been provided by the binding EU Charter, which contains a number of fundamental economic rights (Articles 15-17), in particular the right to property, the freedom to choose an occupation and the freedom to conduct a business, which, according to the ECJ, constitute a specific amplification of the four freedoms (Case C-390/12, Robert Pflieger and others (Pflieger), judgment of 30 April 2014). These ‘new’ Charter rights may not only have an impact on the laws of the Member States, particularly those states that have a rather ‘weak’ economic constitution, but also have consequences for the exercise of economic rights by EU citizens.

As economic rights constitute an indispensable aspect of EU citizenship – they have always been pivotal for the European Union - a study within the context of workpackage 5 of the rights and barriers citizens face when exercising their economic rights continues to be of imperative importance for the understanding of obstacles and opportunities for achieving EU citizenship. In order to further understand the obstacles that citizens face in exercising economic rights in specific areas, a *bottom up* approach is needed, which allows us to categorize economic rights in selected Member States according to their *national legal systems*: which economic rights can be identified in the EU Member States and how are these protected? This deliverable provides a theoretical legal framework for economic rights, which constitutes the starting point for the second deliverable of workpackage 5 focusing on three



specific areas of economic rights: professional qualifications, consumer protection and the economic rights of citizens in the digital era.

At the *national level* economic rights have traditionally been identified as those rights pertaining to market activities, and that are concerned with the regulation of factors of production (capital and labour) and business activities. Property, labour and economic enterprise are the three main areas in which economic rights can be recognized. But economic rights are not a 'stable' category of rights as their legal recognition and/or constitutional status very much depends on the economic order in the Member State and, related to this, historical developments. A categorization of economic rights in the different Member States makes it possible to analyse how in these States national markets are regulated, how access to and exercise of economic activities are being promoted or protected, at which levels and by whom.

The categorization of economic rights, however, appeared to be rather difficult, due to the different (cultural) approaches in the legal systems of the Member States. There are not only differences in the structure of the various legal systems, but also in the way in which legal data in respect of economic rights are gathered and exposed in the national reports.

With regard to economic rights, all the Member States under analysis encounter similar problems relating to e.g. determining which rights are regarded as 'core economic rights' or establishing the boundaries between social and economic rights. Furthermore, some countries are more (or less) attentive to the social profile of economic rights than others, although they belong to the same legal tradition (either civil or common law).

In order to identify, overcome and take these differences into account, a questionnaire has been drafted on which basis the respective country reports have been written. Through this method it has been possible to classify economic rights as a separate category, not only by reference to legal literature but also to the differences sources of law, including statutory law, the national constitution and case law. The results of this approach highlight that from a theoretical perspective, because of the above-mentioned pluralistic national views, economic rights cannot be defined as a *homogeneous* category. But looking at how economic rights have developed in legal practice, a high level of coherence and even some degree of convergence can be discerned. Furthermore, we see that due to the establishment of the EU Single Market, a more common approach has been adopted in respect of economic rights in the Member States. Economic integration spurs the adoption of similar legal solutions and the enactment of concrete provisions in all the Member States, which may sometimes be at odds with national (general) principles of law.

National differences in the legal approach to economic rights (and fundamental rights in general) cannot be ignored. Although the evolution of economic rights in the different Member States has due to the industrial revolution and the development of the post-industrial economy shown a similar pattern,



different legal traditions and political processes explain the different ways in which these rights have been recognized and applied in each Member State. Furthermore, whereas some of the economic rights surely belong to the category of 'old' fundamental rights, social rights – patrimonial rights - have only recently been recognized to a more or lesser extent as a separate category of fundamental rights. But as social rights have conditioned the application of economic rights, economic rights cannot be viewed in isolation anymore and must be read and understood in conjunction with social rights and interest. The different reception of social rights in the legal orders of the Member States also informs the identification and application of economic rights. This at least in part explains the different approaches in the country reports, which make them sometimes difficult to compare.

In the following the identification of economic rights is discussed first (section 2), whereafter the limits or boundaries of economic rights will be described (section 3), the internal and European legal sources of domestic economic rights (section 4) and the actors (section 5). A conclusion will be provided in the last section (section 6). The comparative perspective developed in the following sections derives from the country reports, which are attached to this general report. For an in-depth analysis of the regulation of economic rights in the respective Member States we therefore refer to the national reports in the Annex. The complexity of the regulation of economic rights in each Member State makes it impossible to reproduce all the references to legal sources and cases used as a basis for the comparison.



2. IDENTIFICATION AND NATIONAL SOURCES OF ECONOMIC RIGHTS

2.1 INTRODUCTION

The identification of economic rights in the different legal systems is related to the economic context in general (the 'economic phenomenon') and thus to the ideology that is at the base of the economic system on the one hand, and to citizen's freedoms and liberties on the other.

Moving from this conceptual basis, some national economic laws - whether they concern provisions in the constitution or in economic law in general - contain a fundamental distinction between the economy as a notion of public interest (i.e. all the provisions dealing with public budget and public finance) and the economy as a topic of private interest (i.e. all the provisions dealing with citizens economic initiatives and activities). In all countries, legal systems generally classify the economy from two distinct perspectives: the private sector (and private citizens') action in the field of economic production, and public sector management of finances (and its influence on the development and stability of national economy).

Both perspectives are relevant with a view to the classification of economic rights. Whereas the first focuses on the concept of economic liberty, fostering the private interest, the second looks into the possible public interventions in relevant economic sectors: either through the regulation of the market, or by means of direct management of economic initiatives in the context of public finance.

In identifying and defining economic rights, rules related to social rights are relevant as well (see in particular Work Package 6). Not only are economic and social rights generally referred to as just one category of fundamental rights (see the different country reports), rules regulating the rights to, for instance, work and housing tell us something about the way in which a country perceives and legally protects economic liberty.

This section will seek to define the concept of 'economic rights' and identify its specific nature. In every country, economic rights are concerned with the regulation of factors of production (labour and capital) and with regulating private economic activities (business regulation) connected with their exploitation. In most European legal systems the identification of economic rights is strongly connected to the enactment of the civil codes and to the liberal ideology that is at the base of the regulation of economic initiative and property.

All EU member States share a common history in the development of economic rights, but there are also important differences as to how economic rights have been defined and regulated at the national level. These differences relate to the variety of legal traditions that exist in the Member States and their (political) history. For example, the United Kingdom (UK) approach to the regulation of property and



private initiative relies on the implementation of traditional legal concepts gradually modified and updated in the course of the industrialization process. In other countries a similar result was achieved through the adoption of legislation, which was aimed at adapting the legal system to the needs of an industrial and post-industrial economy.

The several phases in the evolution of economic rights are indeed linked to the evolution of the national economic systems. The civil law codifications in the Member States corresponded to a liberal view prevailing during the industrial revolution. They provided the tools for a more flexible and predictable use of production factors. The further evolution of economic rights relates to the industrialization process in Europe and the growing importance of the services sector. Although these developments have had a different impact on the regulation of economic activities in the EU Member States, a general trend can be discerned in all Member States towards liberalization and deregulation. At the same time, partly due to the establishment of the EU Single Market Member States have aligned their competition laws – there has been a process of ‘spontaneous harmonisation’ and as a result of EU sectoral legislation, Member States have adopted laws to prevent the emergence of monopolies in important sectors of the economy, e.g. telecommunications, postal services or energy. For example, the need for more effective competition in a context, which was characterized by relatively strong dominant positions (e.g. barriers that professionals face in gaining access to an effectively open services market), has been recognized by the EU legislature, *inter alia* through the regulation of public procurement (Directives 2014/24/EU and 2014/25/EU) and public services. At the same time, the need to limit free economic initiative with a view to better market regulation and rules on consumer protection has led to the regulation of specific sectors of the economy at EU level, like the financial market (e.g. MIFID Directive - Markets in Financial Instruments Directive 2004/39/EC) and the above-mentioned markets in the field of public services and energy.

Next to the different legal traditions, which are relevant for the identification of the economic rights, political differences have also been important in identifying and defining economic rights and liberties. The social request for the protection of individuals inside the production process (workers and consumers) led to the development of welfare systems across the EU, seeking to guarantee basic social rights. Although this has been a common phenomenon for all Member States, the way in which the legal systems have accommodated social concerns differs and depends on *inter alia* the political system in the respective Member State. National laws regulating the exploitation of factors of production by citizens are thus relevant for the identification of economic rights. The codification of civil law has largely shaped and informed this regulation. As is generally known, as consequence of the industrial revolution, new civil codes were enacted in most Member States with a view to adapt their legal system to the needs of a changed society wherein economic rights and aims have to be balanced against increasing social demands.



The identification of economic rights is first and foremost concerned with property and economic initiative. Based on these two main categories a broader list of economic rights has developed within the national legal systems, focusing on market regulation, the protection of competition and on the interests generally linked to business (economic free initiative).

2.2 COMPARATIVE GENERAL FRAMEWORK OF THE SOURCES OF ECONOMIC RIGHTS IN THE EU MEMBER STATES

As noted above, the evolution of the regulation of property and economic initiative started with the industrial revolution. It is a continuous process, though, particularly because of the need to protect social and other public interests, and technological developments.

The Member States have chosen different legal instruments to regulate economic freedom: some countries particularly rely on the civil code as a source of law, based upon a more liberal ideology, other countries have adopted a constitutional approach to economic rights. In addition specific legislation or sector specific laws have been enacted with a view to regulate economic activities, e.g. in the field of intellectual property and in recently developed areas of the economy or in relatively new markets, e.g. the financial services market.

The different stages in the development of economic rights and regulation, i.e. private law and the freedom of economic initiative, rules on social protection inside the economic production process and post-industrial economic regulation, can all be found in the different legal systems of the Member States: by means of codification of private law arrangements, the enactment of a (economic) constitution and the adoption of (sector-specific) legislation. But different legal traditions and political models have informed the way in which these rights are implemented and enforced in the Member States.

The comparative study reveals that Member States have made different choices as regards the regulation of economic rights, which leads to a patchwork of legal sources across the EU. The comparative study also shows the differences and similarities that exist between the Member States in respect of the *degree* of protection of economic rights – whether economic rights are for instance constitutionally protected or not – and the quality of protection: are economic rights merely protected on a case-by-case basis or through generally applicable legislation?

In almost all the selected countries belonging to the civil law tradition a common trend can be identified: a process of constitutionalisation, which integrates the pre-existing codifications, the development of sector-specific legislation and, to a lesser extent, the elaboration of economic rights in case law. Hence, all countries share a tendency to lay down detailed rules on economic freedoms by means of legal instruments. Furthermore, the need for compliance with international and European treaties made the legal orders of the countries that developed a well-structured economic constitution



more flexible, legitimizing an evolutive interpretation of economic liberties. Hence, a comparative law methodology makes it possible to analyse the connections that exist between legislative rules, administrative regulations and judicial interpretations with a view to provide for a complete framework of economic rights protection.

For example, it is clear that the European model – mostly based on instruments such as codification and constitutionalisation – has been somehow ‘contaminated’ by common law approaches (specifically the United Kingdom); in the common law tradition a ‘problem solving’ approach has been preferred with regard to the codification and constitutionalization of the protection of economic rights. And this also goes true for the adaptation of the legal system to the evolution of economic and financial models.

Furthermore, the country reports show that the regulation of economic rights is characterized by a complex structure of sources of law and by a plurality of tools, which relates to a multi-layered system of regulation of property and economic initiative (for an in-depth analysis, see the following section as well as section 4 on International and supranational sources of law).

In addition, the already considerable number of legal sources has recently been increased due to the economic and monetary crisis (the so called ‘stability rules’). The EU approach to public finance stability has indeed also consequences for the regulation of private finance. The constitutionalisation of general legal clauses on public budget together with disciplinary rules for the banks, with a crucial role for the European Central Bank (ECB) as vigilance, are two examples of how the regulation of the ‘economic phenomenon’ has become fragmented in the sense that more and more use is made of specific sector legislation, for instance in the fields of insurance, investments and banking. This development is furthermore marked by the establishment of specialized supervisory and regulatory authorities in the Member States.

The sources of economic rights have therefore become gradually more dispersed and diverse, sectorial, complex and interconnected with other areas of EU and national law.

2.3 SUMMARY OF THE NATIONAL REPORTS ON IDENTIFICATION OF ECONOMIC RIGHTS

Italy

In the Italian legal system the economic rights are laid down in Title III ‘Economic Relations’ of the first part of the Italian Constitution, articles 35 – 47. The first provisions (articles 35 – 40) are also considered as having a strong social connotation by Italian scholars and in the case law; the subsequent articles 41 – 47 are regarded as purely economic rights.

With reference to Italy, the notion of economic rights falls within the scope of the provisions that mainly relate to property and economic initiative. Such rights are regulated by the Italian Constitution in articles 41 et seq. The content of these provisions are linked to the ‘factors of production’ (*fattori di*



produzione), namely capital – more than labour – and its exploitation by organized activities (in the first place, but not exclusively, entrepreneurial). Hence, the identification of legal provisions, which are connected to the notion of ‘economic rights’ in the Italian legal system, derives from the Constitution. ‘Economic rights’ are indeed identified by Italian scholars as the constitutional provisions that relate to the ‘economic phenomenon’, stated in Title III (economic relations) of the first part of the Constitution (‘Rights and duties of citizens’). Economic rights are a clear notion of positive law and are not merely defined in legal literature or developed in the case law of the courts.

Furthermore, not only the legislator but also the discourse by legal scholars and the case law have further informed the notion of economic rights: in this regard, the boundaries of the constitutional provisions have been clarified. More in particular, it has been established which provisions of Title III could be considered as strictly economic and which ones are differently characterized by a prevailing protection of social rights (the consequence of this different qualification is the impossibility for the legislator to ensure prevalence to the interests of private and economic initiative over workers protection). Economic rights relating to economic initiative and ownership enjoy a special status, although they are not absolute and need to be balanced with social rights.

More specifically, it is worth asserting that economic rights are certainly those resulting from article 41 of the Italian Constitution: “1. Private economic initiative is free. 2. It cannot be conducted in conflict with social utility or in a manner that could harm safety, liberty, and human dignity. 3. The law determines appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives’.”

Moreover, ‘ownership’ (art. 42) is strictly speaking an economic right from an Italian perspective. According to art. 42, ownership is qualified as public or private: consequently, economic goods could belong to the State, to entities, or individuals. Private property is recognized and guaranteed by the law, which prescribes the conditions for the acquisition, enjoyment and limitations in order to ensure its social function and make it accessible to everyone. In addition, private property may, in the cases provided for by law (and with a previous payment of compensation), be expropriated for reasons of general interest. Finally, only legislation enacted by Parliament can lay down the rules and limits of legitimate and testamentary rights and the rule of inheritance.

Articles 41 and 42 establish some general limits to economic initiative and property for social reasons. In addition, further articles (43-47) list some additional limitations to private property in specific areas: agricultural-land property, saving, etc. Article 43 of the Constitution deals with public monopolies. According to this provision ‘for the purposes of general utility the law may reserve or transfer in the public sphere (that’s to say: to the State, to public bodies, community workers or users) specific enterprises or categories of enterprises, which are related to essential public services or sources of energy or monopolistic situations, and which have the nature of primary interest; this can be done only



by means of expropriation and compensation'. Article 44 of the Constitution deals specifically with land ownership. It is expected that in order to achieve the rational exploitation of land and equitable social relationships, the law should impose obligations and constraints on private ownership of land, set limits to its extension by region and agricultural zone, encourage and impose land reclamation and the transformation of the bigger estates and the reorganization of production units; the Constitution therefore favors small and medium-sized holdings, and the law makes provisions in favour of disadvantaged areas (mountainous in particular), persecuting indirect social effects with a differentiated extension of economic rights. Other provisions, however, are only characterized by social intents and not by economic purposes. For example, article 45, which devotes particular attention to cooperation and crafts; article 46 concerning the participation of workers in business decisions. Finally, article 47 provides the promotion and protection of small monetary savings and credit.

What is clear from the above-mentioned provisions is that the Italian category of economic rights is bordered by rules on the protection of social interests. Economic and social rights are physiologically connected. Scholars and case law have, in identifying economic rights, distinguished between those rights (articles 41 and 42) that are not predominantly socially oriented (but are rather physiologically limited by this end) and other rights that are more socially relevant (labor, health, civil freedoms, etc.). Against this background, in the Italian legal system the so-called 'economic constitution' (*Costituzione economica*) refers to a terminology elaborated by scholars and case law, which provide for a definition of economic rights beyond the provisions of Title III.

Articles 41 and 42 of the Constitution have been subsequently developed by legislation and case law. The role of the courts is thus crucial in the evaluation of the economic rights' status in the Italian legal system.

Nowadays, Italian law is consistent with a regulatory approach in a competitive market; an approach that – usually by means of independent administrative authorities – is intended only to correct market failures, with a minor public intervention aimed at protecting effective fair competition (without direct State involvement).

In the field of economic rights it is worth mentioning the important role that is played by the independent administrative authorities (that are both empowered with regulation and adjudication functions). The most relevant administrative authorities in economic matters in the Italian system, are: Regulatory Authority of Transport (ART; <http://www.autorita-trasporti.it/>); Authority for Communications (AGCOM; <http://www.agcom.it/>); Authority for the Supervision of Public Contracts of Works, Services and Supplies (AVCP; <http://www.avcp.it/>); Authority for Competition and Market (AGCM; <http://www.agcm.it/>); Authority for Electricity and Gas (AEEG; <http://www.autorita.energia.it/>); National Commission for Companies and the Stock Exchange (CONSOB; <http://www.consob.it/>); Pension Funds Supervisory Commission (COVIP; <http://www.covip.it/>); Independent commission for the



evaluation, transparency and integrity of the government (CIVIT; <http://www.anticorruzione.it/>); Guarantee Commission of the Implementation of the Law on Strike in Essential Public Services (CGS; <http://www.cgsse.it/>); Italian Data Protection Authority (Garante della Privacy; <http://www.garanteprivacy.it/>); Institute for the supervision of insurance (IVASS; <http://www.ivass.it/>).

A general overview of the Italian legal system for the protection of economic rights certainly demonstrates the existence of a coherent body of rules, when evaluated from an abstract perspective (regulations); nevertheless some critical points must be made in respect of the concrete application of these rights (both in administrative practice and with regard to judicial remedies). The creation of an economy based on competition and social solidarity has placed Italy in line with those national systems that are characterized by a social market economy.

Economic rights regulation is strongly characterized by the role of independent administrative authorities and by a body of rules that was developed in the last decades. Therefore, it is important to highlight that, in this regard, quite a few reforms in the field of economic rights have gradually modified the Italian legal system. These relate to the process of strengthening the role of independent authorities and of liberalizing sectors of the economy. In light of the previous discussions, the basic trend that should be recorded in the Italian legal system in the area of economic rights is towards a 'strengthening of protection through specialization' and towards a de-politicization of the management of limitations of economic rights.

Belgium

The oldest Belgian economic right is the freedom of commerce and industry, dating back to 1795, when the *Decret d'Allarde* of 1791 after the French annexation became applicable in Belgium. Large parts of Belgian civil and commercial law date back to the Napoleonic codes of 1804 (Civil Code) and 1807 (Commercial Code). Many – if not most – Belgian lawyers are inclined to equal economic rights with the economic rights and freedoms laid down in the Code, as subsequently changed and broadened, under the denominator/denomination economic law.

To study the problems EU citizens face in exercising economic rights and liberties in areas such as property, labor and economic enterprise, and include all subjective legal situations identified in the so-called economic constitution, Belgian economic law sources alone do, however, not suffice, and fundamental rights and other constitutional freedoms must be taken aboard. Doing so cannot hide from view that the original Belgian 1831-Constitution in part markedly reflects French revolutionary (1789) and Dutch constitutional (1815) thinking. Since the first state reform in 1970, the constitutional developments in Belgium for their part reconnect to local autonomy, which has been around in differing degrees since the Middle Ages.



Nowadays, Belgian economic rights have multiple sources. The law applicable in Belgium finds its origin in international, European, national and subnational legislation. From a Belgian point of view, multilevel governance has been around for a very long time. The distinction between national sources of economic rights on the one hand, and international and European sources on the other, is therefore somewhat artificial.

At the national level, the right to property is constitutionally guaranteed (Article 16 Belgian Constitution) and regulated in article 544 Civil Code too, according to which “[n]o one can be deprived of property other than for reasons of public interest and in a manner provided for by law and in return for just compensation, paid in advance”. In positive terms, the right enables the owner to dispose of, exploit, and benefit from property and to make a profit from it. The related equally fundamental freedom of commerce and industry, as laid down in the French Revolutionary Decret d'Allarde of 2-17 March 1791 on the abolition of the medieval guilds and corporations, is part of the Belgian legal order ever since the French annexation of 1795. The subsequent Law Le Chapelier of 14 June 1791 strengthened the freedom of enterprise by prohibiting guilds, trade unions and *compagnonnage* (and the related right to strike), was replaced in Belgium on 25 May 1867 by Article 310 of the Criminal Code, and ultimately repealed by Law of 24 May 1921. Article 4 of the Law can to some extent be seen as a very early prohibition of price agreements in competition law terms.

The fundamental freedom of commerce and industry, as laid down in the French Revolutionary *Decret d'Allarde* of 2-17 March 1791 on the abolition of the medieval guilds and corporations, is part of the Belgian legal order ever since the French annexation of 1795, and can thus be described as an example of 'sustainable law'. This also applies to many Belgian economic provisions, which are to a greater or lesser extent rooted in the Napoleonic Code of Commerce of 1807. Yet, sustainable law does not equal constant law. As law is intrinsically evolutive, Belgian economic law and – rights have substantially developed and expanded since 1807. This has led to a myriad of federal rules and regulations – often inspired by and/or resulting from EU law obligations and Directives – in the obvious areas of commercial and company law, and the introduction and development of legislation in related areas such as services and establishment, financial law and regulation, legislation as to mortgage and consumer credit, insurance and tort law, competition law, consumer protection, social law, patients' rights, and privacy and non-discrimination law.

Finally, since the Law of 28 February 2013 on the introduction of the Code of Economic law, the codification results in the gradual adoption of the Code of Economic Law. The Code is of the building-block type, amounting to a gradual accrual and entry into force of its component 18 Books. Some books are in force at the time of writing, others will do so in the months to come. For present purposes, the structure of the new Belgian Code of Economic Law is more instructive than the technical details. Some Books do, however, deserve some closer, yet general, attention. The overall general principle of the Belgian Code of Economic Law is the freedom of economic activity (Article II-2 and Article II.3) so as to



guarantee 1) the freedom of economic enterprise, 2) the fairness of commercial transactions, and 3) a high level of consumer protection. Book III in essence contains the Belgian provisions implementing the Services Directive on market access, authorization procedures, and the general obligations of information and transparency. Book IV recasts the institutional setup of competition law enforcement in Belgium as it stood since the 2006-revision. In addition, Book IV attributes additional powers and instruments to the newly established Belgian Competition Authority. From a substantive law point of view, however, Belgian competition law keeps aligned to EU competition legislation. Book V does away with the remaining Belgian post war regime of price regulation and prior authorization in some sectors to introduce a system of price level supervision. A newly established Price Observatory will monitor markets to detect dysfunctions in the market and abnormal price levels as early as possible, with a view to (also) allow the Competition Authority to take provisional measures when needed. Most consumer protection law is regrouped in Book VI. Market practices legislation is recast, improved and amended to (also) implement the latest EU consumer Directives in the Belgian legal order. Book VI also covers (pre)-existing precontractual information rights (Article VI.2), EU consumer Directive implementing rules on consumer protection in distance contracts and sales outside business premises, rules as to the moment of transferring risk (Article IV.44), new rules as to liquidation sales (Article VI.22) and Belgian sales provisions (Article VI.25 et seq.), seemingly forever juxtaposing Belgian representatives of (self-employed) detail traders and (chain) retailers. Although financial law is not fully covered by the codification of the Code of Economic Law, Book VII does deal with consumer related financial rules such as credit and payment services, consumer and mortgage credit rules, rules as to the right to a basic bank service, and the rules allowing to protect credit providers and consumers against incurring too many credit-debts. The right to products and services of high quality is subject of Book VIII, bringing together the Belgian rules as to normalization, accreditation, certification and metrology. The safety of those products and services is dealt with in Book IX. The (intended retracted) concentration of Book XIII is dealt with infra sub Actors. Books XV to XVII have a particular consumer judicial protection focus, in that they strengthen the enforcement of consumer rights. Book XV does so in both criminal and administrative law proceedings. Book XVI does so by providing in Alternative Dispute Settlement procedures in consumer disputes outside courts, including their on-line settlement. Book XVII introduces collective consumer actions in the Belgian legal order, and strengthens the existing Belgian injunction procedure.

Greece

With respect to Greece, the 1975/1986/2001/2008 Constitution (henceforth: the Constitution) has, for the first time in Greek Constitutionalism, an express horizontal provision protecting economic freedom: Article 5(1). This provision sets out the principle of, and the limits to, private entrepreneurship. General grounds for limitation of economic freedoms are also to be found in Article 106(2) C. Next to these general provisions protecting economic activity as a whole, the Constitution also grants specific rights in



relation to economic activities considered of some importance. Then, Article 5(1) of the Constitution for the first time protects economic freedom as an autonomous value, independently from any individual right. Under the previous Constitutions, economic freedom was founded on the more general provision protecting personal freedom. Under the current Constitution, the provision on personal freedom is replicated as Article 5(3), but it is preceded by Article 5(1), stating that: “1. All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages”. Hence, despite some dissonant doctrinal voices, nowadays, economic freedom is generally accepted as being founded on Article 5(1). Therefore, private autonomy and freedom to contract founds a general legitimation in art. 5(1) C.; this can be connected also to other economic liberties, as freedom to create for-profit associations, companies, etc., some of them also provided with specific constitutional basis (e.g. freedom of advertisement (Article 14(1) C).

Moreover, a number of economic rights are specifically protected: the right to property (Article 17 (1) C); the right of association (Article 12 C); the right of intellectual creation and of teaching (Article 16(1) C); the freedom of mass communication (Art. 15 C).

In regard to the notion of economic constitution, it is worth mentioning that the introduction of Article 5(1) in the Constitution has nurtured two major doctrinal debates, still ongoing. From a political viewpoint, it is being disputed whether Article 5(1) C, together with the various sector-specific economic freedoms enshrined in the Constitution – may be said to found a liberal Economic Constitution or whether, on the contrary, Article 5(1) C and the sector-specific freedoms only set the outer limits to an essentially neutral Constitution.

Against the background of the above-mentioned constitutional framework, the Greek economy developed a dense web of measures restricting economic activity. Few economic studies had underlined the negative effects of these restrictions on economic activity and on economy as a whole, before the 2008 financial crisis. From a political science perspective, however, the weaknesses of a ‘rent-seeking’ society had been identified quite early. In the most recent years, a general trend of liberalization is can be discerned; in this perspective, the main examples of Greek legislation concerning economic rights are connected to the Troika’s liberalizing programme. The 2008 financial crisis, which hit Greece in 2009 and transformed itself into a sovereign debt, then a fully-fledged economic crisis, has been a braking point in Greece’s regulatory history. At this occasion economists both within Greece and from the outside world (mainly commanded by the Troika of international lenders, i.e. the IMF, the ECB and the EU Commission) identified and calculated (often in a hasty and questionable manner) the cost of existing restrictions. This work has been facilitated by the screening already effectuated in Greece in view of the implementation of the Services Directive, but went well beyond it.



The implementation of the Services Directive through Law 3844/2011 was designed to transpose the Directive in a single text basically copying the Directive's wording, while providing numerous legislative mandates for the various Ministries to adopt the necessary regulatory acts.

It is necessary to stress that some of those reforms, however, did not satisfy the Troika. Hence, the second and clearly more far-fetched effort to secure economic freedom in a horizontal manner was Law 3919/2011, bearing the title 'Principle of Professional Freedom, abolition of unjustified restrictions to the access the exercise of professions'.

Hungary

The term 'economic rights' is not widely used in Hungarian constitutional law. Some authors address matters of economic constitutionalism and refer to economic rights in their discussions. There are however disagreement as to their scope. Some, for example, would not consider the right to property as an economic right as such; others would treat the right to work as a social, and not an economic, right. The term 'economic right(s)' does not show up in the constitution. However, the Hungarian Constitutional Court (hereinafter HCC) recently gave in an obiter dictum, a relevant characterization of the economic constitution, as the complete set of rules related to the economic order, which stem from the constitution. The Hungarian Fundamental Law (the current constitutional text) provides for a comprehensive category which includes three components: i) the recognition of economic rights, covering the protection of property (Article XIII. FL), the freedom to choose one's work and occupation, the freedom of enterprise (Article XII. FL) and the protection of competition (Article M); ii) matters of public finances, such as taxation, budget, state debt, monetary system, and iii) the provision of social security (Article XIX).

After the 2010 election, a new government backed by a two-thirds majority in Parliament, and thus forming a constitution-amending majority, adopted a new constitution, the Fundamental Law, as well as hundreds of new laws. This major constitutional and legislative overhaul is not without effect on the protection of economic rights. Certain characteristics of the new constitutional text and recent constitutional case law cast doubts as to the effective protection of fundamental rights and the respect of the rule of law in Hungary. The Fundamental Law, which entered into force on 1 January 2012, contains a chapter entitled Freedom and Responsibility, which includes a catalogue of rights. It covers economic rights, and forms the general framework of rights protection in Hungary. Any legal norm must be compatible with the FL (Article T (1)). For what concerns economic rights, most of them are contained in this chapter (articles numbered by Roman numbers), some of them are spelled out in the foregoing chapter 'Foundation' (articles designated by capital letters), and other relevant provisions in the chapter on the state (articles with Arabic numbers). The Chapter entitled Freedom and Responsibility covers the right to property, the right to choose work, occupation or entrepreneurial activity, the cooperation between employers and employees, and social security including



unemployment benefits. Only the right to property and the right to (freely choose) work are expressly formulated as rights against the state.

As to the right to property, article XIII states that: *“(1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility. (2) Property may only be expropriated exceptionally, in the public interest and in the cases and ways provided for by an Act, subject to full, unconditional and immediate compensation;”* this right has been considered one of the core rights by the case law of the HCC until the new constitution. According to case law, property was meant to guarantee the material basis of personal autonomy. It was thus a freedom right *in essence*. With reference to Competition, freedom of contract and consumer protection article M was interpreted in some decisions since 2012. In general, the HCC noted that Article M (2) provided the constitutional bases for limiting economic competition to protect consumers; it nonetheless does not formulate specific consumer rights. Both economic competition and the protection of consumer rights are state duties, to which specifically stipulated fundamental rights relate (such as the right of enterprise in Article XII, and the right to property in Article XIII). Finally, Article M (1) is meant to be partly analogous to Article 9 of the 1989 Constitution, which declared Hungary a market economy, where ‘private and public property [were] of equal legal status and equally protected’, and recognized the ‘right of enterprise’. Article 9 was interpreted to protect the freedom of contract, although case law usually did not consider it as proper fundamental right, but as a simple constitutional right.

Spain

In Spain in October 1977 the main political parties signed the ‘Moncloa Pacts’, which explicitly stated that Spanish country would be shaped as a free-market economy. In fact, article 38 of the Spanish Constitution enshrines the freedom to conduct a business within the framework of a free market economy. In this regard, several constitutional provisions entitle state to intervene in the economy. Besides, according to Article 1, Spain is a welfare state. The Spanish Constitution indeed includes many welfare rights. Title III Part V of the Spanish Constitution (Economy and Finance) concerns the role that the public authority could play in the field of a free- market economy. Article 128.2 thus recognizes the public initiative in economic activity. Moreover, it states that “essential resources or services may be reserved by statute to the public sector especially in the case of monopolies. Likewise, public intervention in companies may be imposed when the public interest so demands.” In addition, according to article 129.2 authorities shall efficiently promote the various forms of participation in the enterprise and shall encourage cooperative societies by means of appropriate legislation. Finally, article 131 SC provides that the State shall be empowered to plan general economic activity y a statute in order to meet collective needs. In fact, article 38 of the Constitution itself seems to curtail the scope of the freedom to conduct a business by stating that public authorities guarantee and protect the safeguarding of productivity in accordance with the demands of the general economy and, as the case may be, of economic planning.



Both Spanish scholars and courts tended to consider freedom to conduct a business not as fundamental right but as an institutional guarantee of the freemarket. To sum up, the Spanish Constitution recognizes the freedom to conduct a business as a fundamental right. Originally it was deemed as an institutional guarantee but it has been strengthened. Moreover, several provisions related to the role of the public power in the economy marked had faded away.

Furthermore, according to most Spanish scholars the right to private property must be considered as a 'core' economic right of the Spanish Constitution. This right is recognized by article 33.1 of the Constitution; however the right to private property has in practice been a weaker right than the freedom to conduct a business. The reasons for this weaker position relate to the so-called 'social function' of the right to property ownership and the flaws in the formulation of the rules on property. Most legal scholars insist on the need to reformulate the understanding of private property in the Spanish legal system. According to them, the right to property is not particularly valued in the Spanish legal system for historical and religious reasons. In their opinion the legislature and the courts share this point of view, having diminished the role of the right to property in relevant cases (intellectual property included).

Art 33.1 states that the social function of the right to property shall determine the limits of its content. The scope of the social function has been determined by interpreting article 33.2 SC consistently with other constitutional provisions related to welfare rights and economic development.

To sum up, the Spanish Constitution enshrines the welfare state and the free market economy, which were developed and implemented almost simultaneously. EU integration enhances the free market economy, whereas the welfare state has always been weak. In this regard, the scope of labour rights has diminished over the years. Even the protection of the environment and consumers lacks effective guarantees with respect to entrepreneurial interests.

Denmark

The notion of economic rights cannot be said to be a consolidated notion of common use in the Danish legal system. The term is used in scholarly work dealing with fundamental rights at a constitutional level, without defining expressively the notion of 'economic right'. It may be seen as generally being used to refer to the relative category of rights established in the EU legal system.

The primary source of law in Denmark is the Constitutional Act or 'Grundlov', which could be translated into 'the fundamental law'. The Constitutional Act was adopted on 5 June 1849, and most recently amended in 1953. The 'Grundlov' contains only 5 provisions which could be considered as included into a broad definition of economic rights and freedoms, and these are: the right to property (including intellectual property), Article 73; the freedom to free and equal access to trade, Article 74; the right to work and to be supported by means of public assistance in case of need.



New types of rights that were not known – or viewed important – in the years 1848-1849 when the Constitutional Act was being drafted may fall under the protection of its very dated articles, which ‘with few words wanted to regulate many areas, and [whose] monosyllabic text has been kept essentially unchanged for more than hundred and a half years’. For instance, recent legal scholarly work has argued that a right to housing may fall under the concept of property included in Article 73 of the Constitutional Act (even when housing is only a rented dwelling), thus to be considered as a fundamental right whose protection against expropriation may be given constitutional status. Hence it is not at all possible to conclude that the Danish constitution is an ‘economic constitution’ in an EU-law derived meaning.

The Netherlands

In the Netherlands the right to property is one of the key principles and constitutes a foundational value of the Dutch society, even with reference to the definition of economic relationships. It is therefore striking to observe that the Dutch Constitution does not contain a right to protection of ownership as such, but rather a right against unlawful expropriation. According to Article 14(1) of the Constitution “expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament”. The conditions for expropriation are further elaborated in the expropriation act. Former constitutional texts, however, did contain an explicit right to property ownership, but the present constitution puts expropriation and compensation at the heart. Nevertheless, it is generally assumed that Article 14 at least implicitly recognizes a right to property ownership. Property does not only involve real estate but also movable property.

Another constitutional right that might be qualified as an economic right is the freedom of labour, which is laid down in Article 19(3) of the Constitution. This provision seeks to protect citizens in their interest to provide for the compensation of maintenance costs through labour. The freedom of labour dates back to the Constitution of the Batavian people of 1798 (Staatsregeling voor het Bataafse Volk), which abolished the guilds. Contrary to the other paragraphs of Article 19 of the Constitution on employment and the protection of the legal position of workers, the freedom of labour is considered as a ‘classic constitutional right’, which is judicially cognisable.

Considering the limited nature of the Dutch Constitution the term ‘economic constitution’ is generally avoided in legal literature. After all, a catalogue of clearly defined and well-developed economic constitutional norms is lacking in Dutch law. Economic freedom as fundamental right entails a number of economic rights, which are fragmented and dispersed and can first of foremost be found in Dutch civil law. Important principles of economic freedom are incorporated in the Dutch Civil Code guaranteeing the freedom of choice for citizens: consumer sovereignty, freedom of profession, freedom to pursue a business. Private property and contractual freedom constitute the legal core of the Dutch legal system.



Where, however, economic freedom for market participants is hampered by contracts or conduct that have negative economic consequences in the market place, the Dutch Competition Act provides for rules prohibiting cartels and restrictive practices. The main aim of the Competition Act is to combat unintended effects of competition restraints, to protect freedom of enterprise and the well-functioning of the market

The three basic principles underlying the Dutch market model, i.e. economic freedom, equality and solidarity, have shaped Dutch public economic law. A number of years ago, the Netherlands had been very active in reducing 'unnecessary' and 'burdensome' economic legislation. A major example of such a legislative initiative is the operation 'Marktwerking, Deregulering en Wetgevingskwaliteit' (Competition, Deregulation and Quality of Legislation). This large-scale operation drastically amended the regulation of economic activity with respect to services and economic activities in general. Furthermore, the Dutch government, for instance, initiated programmes specifically targeted at simplifying authorisation schemes, both on a central and a decentralised level. And, the 'Project Vereenvoudigend Vergunningen' aimed at simplifying authorisation procedures and concerns more in particular the necessity and costs of authorisations as an instrument. As a result, a number of authorisations for the performance of economic activities have been abolished, which facilitated the implementation of the later adopted EU Services Directive into Dutch law. The main legal document implementing the Services Directive in the Netherlands is the Services Act (Dienstenwet), which aim is to implement the key obligations from the Services Directive into national law.

France

The notions of 'economic rights' or 'economic constitution' do not exist in French positive law. French scholars use this terminology in reference to international instruments such as the International Covenant on the Economic, Social and Cultural Rights (ICESCR), in contrast to the civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR), or in the context of domestic law, in relation to the 1946 Preamble, which recognised political, economic and social rights. In both contexts, economic and social rights are grouped together under the label 'economic and social rights' or 'socio-economic rights', which confers to the notion a solidarity dimension. More practically oriented authors adopt classifications of rights based on the subjects of such rights, namely human beings, citizens, 'justiciables' or 'social and economic actors'.

The fundamental rights and freedoms recognized by the 1789 Declaration were *droits-libertés*, and included notably the economic right to property (article 2 and 17) and a general freedom right (Article 4). Shortly after, the 1793 Bill of Rights declared that 'society owes maintenance to unfortunate citizens either through procuring work for them, or assuming means of existence of those who are unable to work'. It enshrined the idea that the society 'is bestowed with an active responsibility or duty towards its citizens'. Similarly, the 1848 French Constitution provided for socio-economic rights, which are



rather social than economic rights, including the right to free education, the right to work or the 'right of the orphan, the infirm and the aged to be maintained by the state'. The 1946 Preamble, inspired by the Resistance ideals and socialist and communist ideologies, recognised a whole range of socio-economic rights, as *droits-créances* or collective rights, including the duty to work and the right to employment (para. 5), trade-union rights (para. 6), the right to strike (para. 7), the nationalization principle (para. 9), the obligation for the state to provide the individual and the family with the conditions necessary to their development (para. 10), the right to health, material security, rest and leisure and social security (para. 11), the right to free, public and secular education (para. 13), and the principle of solidarity and equality of all French people in bearing the burden resulting from national calamities (para 12).

Therefore, the 1958 Constitution does not contain any catalogue of rights. However, in the landmark 1971 (Freedom of Association) decision and subsequent ones, the *Conseil Constitutionnel* consecrated the 1789 Declaration of the Rights of the Man and the Citizen, and the Preamble of the 1946 Constitution (which includes 'political, economic and social principles necessary to our times' and 'fundamental principles recognised by republican laws') as constitutional norms of reference. It also gradually recognised other 'rights' or 'principles of constitutional value', which do not have a clear and explicit legal basis in any constitutional texts. The CC, when assessing the 1981 nationalisation programs, recognised the constitutional value of the right to property protected under Articles 17 and 2 of the 1789 Declaration, and contractual freedom, derived from the general freedom provision contained in Article 4 of the same Declaration, and as the freedom of enterprise ('*liberté d'entreprendre*') protected under republican laws.

As an example of non-constitutional law that has some consequences on the economic rights status it is worth mentioning that the law of 5 March 2007 declares the right to housing as a justiciable right and sets out administrative and judicial procedures to claim it.

Other relevant national legal experiences in brief: Germany & United Kingdom

Although no country reports on Germany and the United Kingdom are available, the following brief observations in respect of economic rights in these Member States can be made. The German legal system recognizes economic rights both at constitutional level and by means of ordinary legislation dealing with property and economic initiative. The regulation of economic rights in Germany takes account of the specific German model of social-market economy and thus of a legal system, which is sensible to both undistorted competition and limitation of economic liberty, whilst preserving individual dignity (art. 1 GG).

Some provisions containing general clauses, which address professional liberties and property rights, are enacted at constitutional level. In particular section 12, which deals with occupational freedom, states that all Germans shall have the right to freely choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant



to a law. No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.

In addition, § 14 provides for the general regulation of property, inheritance and expropriation. In the light of the BGB provisions, the GG confirms that the right to property and the right of inheritance must be safeguarded but their content and limits shall be further defined by law. Property entails obligations. Its use shall also serve the public good and expropriation is allowed, but it may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those who will be affected by it. In case of a dispute concerning the amount of compensation, the case will be brought before the ordinary courts.

With reference to economic rights protection, the United Kingdom system (a common law and non-constitutionalized legal system) is particularly interesting from a comparative law perspective. The regulation of human rights is, from a continental legal perspective, somewhat peculiar, due to its case-by-case approach. This means, for instance, that general clauses, such as the economic rights provisions that, as noted above, are the typical instruments enacted in the European civil law systems, are avoided. The protection of economic rights in the EK is instead characterized by a sector-based and non-constitutional approach.

Nevertheless, property (and economic freedom in general) is traditionally considered as one of the main interests in the fundamental charter, which constitutes the basis of the UK constitutional legal order: both the Magna Charta and the Bill of Rights have specifically incorporated the interests of the UK citizens as owners.

In addition, in 1998 the Human Rights Act was adopted, which makes a reference to the European Convention of Human Rights (ECHR): all the rights contained in the ECHR become, by means of the Human Rights Act, national rights. The property rights of art. 1, protocol 1 of the ECHR, can be enforced by UK judges in national cases. This mechanism might even challenge parliamentary legislation, if deemed in conflict with the ECHR.

Economic rights are therefore protected both at a sector-based level, by legislation that is particularly sensible to economic freedom (especially after the Act on liberalization in the Thatcher era), and by means of some general provisions and rights imported from the ECHR but used as national rules.

3. INTERNAL AND EXTERNAL BOUNDARIES OF ECONOMIC RIGHTS

3.1 COMPARATIVE GENERAL FRAMEWORK BETWEEN THE EU MEMBER STATES

The methodology of comparative law is particularly useful for an analysis of economic rights in the respective Member States and more specifically for an evaluation of the interaction between the provisions that are aimed at protecting individual economic rights (property, business etc.) and other policies (e.g. environment protection versus industrial development or landscape conservation vis-à-vis building property rights). Here the choice of the Member State as to how and the extent to which private property and freedom of economic initiative are regulated becomes relevant. The point at issue is not the classification of economic rights as such (see section 1) but an analysis of the *status* of the economic right in the different national legal systems.

Both the 'internal' and 'external' boundaries of economic rights are relevant: even if all the legal systems define property as an economic right, different EU Member States may adopt very different standards of protection, e.g. for building and other use of land (considering as a core right only the use of land that does not affect the environment), differentiating between different aspects of a single economic right, or limiting property for public interest purposes (balancing the citizen's economic interest with broader social goals, for example in case of expropriation). The various country reports show that national solutions in respect of procedures and compensation for, for instance, expropriation differ.

Looking at the internal boundaries of economic rights, the 'key question' is the definition of what constitutes 'core' economic rights. It is therefore necessary to evaluate how in the different national legal systems conflicting rights are balanced and to what extent economic rights can, for instance on the basis of the proportionality principle, be limited. Furthermore, it is necessary to analyze what the different EU Member States consider as non-derogable parts of each economic right.

Our research shows a great variety of solutions in the national legal systems (see section 3.2): whether an economic right is perceived as fundamental or not depends on legal traditions and the political context (see also section 1.1.). In some legal systems a greater degree of protection has been afforded to private enterprise, which seems fully consistent with a (neo-)liberal approach (e.g. the UK with a relatively strong emphasis on liberalization), whereas in others more protection is granted to social policy interests (e.g. France with its traditionally strong public sector).

In terms of general clauses (of a constitutional status), many national legal systems describe property and economic initiative either as 'fundamental' freedoms, or as 'simple' rights. Over time, however, a social market economy has developed, which has led to a more harmonized approach across the EU as regards what constitutes 'core' economic rights. The adoption of numerous directives and regulations within the context of the EU Single Market has strongly contributed to a gradual harmonization of the economic constitutions and economic laws of the respective Member States. There are national constitutions, which do not consider all economic rights as 'core' (and which allow for restrictions, if such restrictions are necessary to promote or



protect other constitutional interests), and national legal systems, which consider several aspects of economic rights as mandatory. But in practice there are many similarities. Examples are the right to be protected against expropriation with full compensation (which is now a standardized principle, deriving from the ECHR system, especially after the *Scordino* case), and the liberalization policies, which have been gradually implemented in all EU Member States.

The problem is thus how to define what is 'core' from the internal perspective, i.e. the content of the right to property and economic initiative. Such definition is useful, also with a view to solve the 'external' conflict between conflicting rights, for example, when property or economic initiative conflict with social policy interests.

Economic rights, like any fundamental right contained in the national constitution, are subject to limitations and a balancing exercise: a technique by which the legislator (and possibly administration) in the first place and the judges in the second round determine to what extent individual economic rights can be limited in order to allow for the pursuit of other interests, including the protection of public order, security, health and safety, general morality, etc.

Although there is often no hierarchy of rights in the constitutional systems, when conflicting constitutional rights need to be balanced the solidarity principle plays an important role (if coherent with the criterion of reasonableness): usually economic rights (property and economic initiative) are indeed considered as not prevalent to other constitutional interests (like the traditional civil and political rights (freedoms), or public interests). This balancing exercise, however, is conducted on a case-by-case base and it is therefore not possible to conclude that civil rights always take precedence over economic rights. The courts are required to evaluate the reasonableness of an interference with a fundamental right, including economic rights. In some cases, economic rights may be considered 'core' whereas in others they may not.

Against this background, a comparison of the different national legal systems reveals that it is impossible to identify a common approach to economic rights in all cases. But even though Member States have opted for different ways in regulating, protecting and promoting economic rights, the fact that EU Member States have developed into welfare states with some sort of 'social market economy' makes the national legal orders sufficiently comparable. In general, we can deduce from the country reports that property and economic initiative are highly protected. Furthermore, it is generally accepted throughout the EU that economic rights may be limited in order to protect labour (which is therefore considered as a right of social quality rather than an economic rights), but the level of protection of labour – in balancing labour rights with conflicting economic interests of companies – is increasingly determined at European level (compare, for example, the 'Laval and Viking judgments' and following cases; Case C-438/05, *Viking Line*, [2007] ECR I-10779; Case C-341/05, *Laval*, [2007] ECR I-11767), to some extent leading to a harmonization of the core part of economic initiative.



3.2 OUTLINE OF THE NATIONAL EXPERIENCES

Italy

In the Italian legal system the catalogue of economic rights is not characterized by a detailed list of typical hypotheses but by two very general provisions: articles 41 and 42 protect economic freedom and proprietary categories without introducing a graduation of the intensity of the protection of their specific profiles; indeed, such a task is left to the discretion of the legislator, which can otherwise ‘over-protect’ some situations covered by articles 41 and 42. Apart from articles 43-47 (protection of cooperation and economic rights pertaining to small business), then, a hierarchy among the economic rights is not present in the Italian Constitution, which offers a general protection and left to the legislator to privilege some economic initiatives (by means of discipline of economic aid or other special treatments).

It should also be noted that, in general, the economic rights *per se* are never ‘core’ in the sense that the technique of balancing of rights (allowing an attenuation of the protection of interests constitutionally relevant too) with regard to economic rights is particularly permissive. With a view to this balancing exercise, the two conditions – respecting the core of the rights provided by the Constitution and the principle of proportionality - that the Parliament must fulfill, will be complied with, if a social justification is present. The limitation of economic rights for social reasons is indeed prefigured by the Constitution itself. As a consequence, when the Constitutional Court is in charge balancing economic rights with social interests, it is usually required to ensure that social interests prevail. Beyond this, the cases of economic rights, which are to be considered ‘fundamental’, concern property and business activities. Articles 41 and 42 of the Italian Constitution are, indeed, directly aimed at regulating these activities. Alongside these two rights, however, the discretion of the legislator and that of the courts has interpretatively identified other dimensions of the protection of economic rights; dimensions that are only indirectly based upon Articles 41 and 42, but nonetheless enjoy constitutional protection.

More in detail, overlaps and interferences between different economic rights are from the outset present in the Constitution as well: labour, property and economic initiative are interconnected rights, and social utility is a perspective relevant in all of them. The role of the legislator is to implement economic laws, after having taken the decision which specific interest prevails; this decision is subject to political discretion, which is constitutionally acceptable as long as the core of economic rights is not affected. The conflict between economic rights is solved by the legislator through compliance with the general ‘social utility’ clause in the Constitution: articles 41 and 42 allow to limit economic rights, only if a social utility reason can be invoked.

In Italy there is a constant interaction between economic rights and social rights. Firstly, Title III of Part I of the Constitution includes both property and economic initiative, as well as economic provisions, which relate to ‘labour’ as a production factor. Secondly, articles 41 and 42 of the Italian Constitution, through the well-known ‘general clauses’, introduce severe limitations to economic rights, which leads to a partial functionalization of property and private initiative in order to the protect some social rights. The consequence is that in Italy the



technique of balancing rights – which is applied to all constitutional rights – has a particular role in the case of economic rights: such a technique is particularly pervasive because articles 41 and 42 explicitly refer to the limitation of property and economic initiative for social interest reasons. With regard to the proprietary situations (the ‘capital’ factor), article 42 provides for a constitutional reference to the social function of property, which derives both from the Catholic tradition and from the ideology of the socialist and communist parties, present inside the Constitutional Assembly. Thus, in Italy the social function of property has been the focus of specific legislation.

The ‘common core’ of the decisions of the Italian Constitutional Court is that ‘socially useful goods’ are not only those provided in a national statute, but include the values that enjoy direct protection and are safeguarded in the Constitution. This interpretation allows the national courts to consider other constitutionally protected interests or rights, as a direct limitation to economic rights; for example, health, the environment, the right to work can limit economic liberties, even without a Parliamentary provision (see the following decisions: Constitutional Court 111/1974; 36/1969; 27/1969; 237/1975; 21/1964; 196/1998; 190 /2001; 78/1958; 5/1962; 45/1962; 30/1965; 63/1991; 439/1991).

The tools to pursue social objectives are not primarily authoritative. More recent specific legislation operates with incentives, which do not affect the economic freedom of private individuals to act upon their own initiative and organize themselves.

Belgium

In the Belgian legal order economic rights are dealt with both at the federal and regional level(s), with economic competences being heterogeneous and fragmented. Exercising one's exclusively legislative competences is therefore relatively prone to impinge on another's exclusive competence. Possible conflicts between (economic) rights (granted by the different competent level-legislatures) are dealt with in both proactive and reactive ways. As in many other Member States, the Belgian Council of State has an important legislative limb. Once Belgium set out on its (rather peculiar) track of federalism, judicial supervision as to the exercise of the ensuing competences for the component/concurrent c.q. mutually conflicting legislative limbs was called for. This led to the establishment of the Belgian Court of Arbitration (now: Constitutional Court). In addition, in cases of real doubt as to the EU compatibility of Belgian legislative measures – at whatever level – Belgian judges are quite regularly and consistently calling upon the European Court of Justice.

Furthermore, the second state reform (1980) was set out to establish a Court to supervise the observance of the constitutional division of powers. Thus, in the present state of the law, the Constitutional Court is in charge of settling all conflicts of competence between, and the constitutionality of the legislative acts of multilayered Belgium (laws, decrees and ordinances), and rules on violations of the fundamental rights and constitutional principles mentioned above.



Finally, in Belgium, an extensive socialization of the national income goes hand in hand with the maintenance of free enterprise and free choice for citizens. Thus, the Belgian welfare system is, in theory and in fact, an optimal combination of freedom and solidarity. The Belgian social security system is of the so-called Bismarckian type. It is structured around job classification groups and provides social protection to the insured belonging to one of these groups. It comprises three separate systems: social insurance in the private sector organised through the general system for wage-earners; social insurance in the private sector for the self-employed, and a social protection system in the public sector for tenured civil servants.

Greece

With reference to Greece, the general/horizontal provision securing economic freedom, i.e. Article 5(1), is among these core constitutional provisions, which are non-amendable. This, however, does not mean that it does not suffer from restrictions.

The evaluation of which Greek economic rights are 'core' is not specifically carried out by legal scholarship; anyway, the special status of international law allows to qualify as core all the provisions that comply with the international and supranational human rights protection tools. The dominant case law holds that the supra-legislative status of international law is based on Article 28(1) C, and thus economic rights that can emerge also at the international level enjoy an intermediate, supra-legislative but infra-constitutional status. Hence, eventual clashes between norms stemming from international and national law are being resolved on the basis of hierarchy of norms. In the internal sphere, there is a clear hierarchy between the national norms, in the following order: Constitution, formal Laws, Presidential Decrees, Ministerial Decisions and, of course, circulars. In practice, however, in some areas of economic activity, in particular in relation to taxation, circulars play such an important role that the hierarchy of norms becomes theoretical, since the Administration tends to give systematic prevalence to them over any other source of law. All administrative acts are, by virtue of the Code of Administrative Procedure Article 6(2), subject to a general hierarchical review (*aitisi therapias*), where a more specific review procedure is not provided for by specific laws. Furthermore, all administrative acts are subject to judicial review before the administrative Courts.

Next to the above-mentioned 'horizontal' provision, several other constitutional rules protect specific manifestations of the economic freedom. As an example, the right to work (art. 22) has two facets, one as an individual right (freedom) and one as a social right (aspiration to work). While it is clear that the latter is protected under Article 22 C, the former is disputed as a right 'in between', between this provision and the general provision or Article 5(1).

Hungary

In Hungary, there are no particular core rights amongst those economic rights. However, human dignity has been traditionally granted a privileged constitutional position. It constitutes an inviolable right, which trumps every other conflicting interest, including economic rights. Therefore, economic rights cannot be assumed as



core when the dignity argument is invoked. Nevertheless, when a dignity issue is not under consideration, economic rights are 'core' to the extent that they represent constitutional rights. Rights are codified in the constitution, and the constitution is clearly at the top of the hierarchy of norms. Conflicts arising out of different sources are thus likely. As for conflicts between rights originating in the Constitution itself, Hungarian law, in line with the continental legal tradition, considers that rights can be limited by other rights, and relies on the idea of institutional protection or objective dimension of a right. Such conflicts are to be settled ultimately by the interpretation of the Constitutional Court, by way of balancing and proportionality analysis. Under the FL, the Hungary Constitutional Court has a new competence. Under the new constitutional complaint mechanism, it can review and annul ordinary court decisions.

Hungarian law traditionally grants a conflict-solving function to the Supreme Court (renamed Curia in the FL), in the so-called 'decision on the unity of law' ('jogegységi határozat') in which the highest ordinary court (earlier Supreme Court, now Curia) declares which of the competing interpretations of a given legal rule is to be adopted. The case law has developed its own interpretative approach in the context of property. For instance, this right can be limited in order to pursue a simple public interest that is without having to prove the existence of a constitutionally protected competing or conflicting right. The same happened with reference to the freedom of enterprise that might come into conflict with the rights of the employees.

Spain

The qualification of the economic freedoms as 'core' particularly aims to guarantee the position of owners and entrepreneurs against the *Comunidades Autonomas* legislators. Regional legislators are not free to regulate property and economic initiative, which constitute core economic rights in respect of regional competences, neither is the State, which will have to balance social needs with core economic freedoms.

Spanish legislation is rapidly adapting itself to a full but not flawless liberalized free-market economy, which includes more homogeneous rules that apply to the Spanish territory. Free competition is being encouraged, whereas labour rights have been reduced, and the powers of the regions have been restricted by the Unity Market Act. Unsolved issues are the property rights' safeguards with respect to expropriations and the balance between the property's social function and property as an individual right, although case law is developing in this respect. Regarding economic rights and important public interests, it has already been mentioned that there is controversy, which relates to the balance between political autonomy on the one hand and freedom to conduct a business on the other. Whereas free competition is being encouraged, the Regions are entitled to regulate economic affairs. Traditionally companies enjoy an equal status in the regional territory and throughout the State. This understanding has been challenged by EU law.

As regards the boundaries between economic and social rights, article 45 of the Spanish Constitution states that everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it. According to Article 51 SC "public authorities shall guarantee the protection of consumers



and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests”.

Denmark

Regarding Denmark, the ‘core’ economic rights are those included in the Constitutional Act, since this constitutes the primary source of law in the Danish legal system. In fact other provisions covering other economic rights or fundamental rights that are relevant to economic rights, e.g. the right to equal treatment in the workplace or the protection from gender discrimination on the labour market, are scattered in statutory laws over which the Danish Constitution takes precedence. Their origin might rather have been EU law than only Danish law. Nevertheless, it is our impression that it is not meaningful to prioritize a list of predominant economic rights in Danish law from either case law or scholarly debates, but only to identify the economic rights in a ‘multi-levelled’ sources of law-context (comprising statutory law, constitutional law, and international and EU law). On the basis of what has been stated above, it is probably not too surprising to unveil that the interaction between economic and social rights is blurred in the Danish legal system. The right to work could perhaps be considered a social right. The right to social security, if argued to be a modern economic right (and not a social right) is protected by the notoriously extended Danish welfare system but also Article 75 (subsection 2) in the Constitutional Act. The constitutional protection of social rights, if intended to be included in Article 73 on the right to property, is meant to develop in correspondence with the European Convention of human rights.

The economic rights contained in the ‘Grundlov’, having constitutional value/power, take precedence over legislative acts. However, traditionally, the interpretation of the rights protected by the Constitutional Act has been restrictive, as to say only invoked when there was no doubt for their application. This follows from the central role that the legislative power plays in Denmark in creating law, and from the view that the constitutionally protected right in fact restricts the democratic Parliament’s sphere of action. This is valid for proving the constitutionality of acts but also for administrative and judicial acts.

In case of inconsistency or conflict of economic rights deriving by the Constitutional act, which may indeed happen, the clash can be resolved by imposing limits or clarifications laid down in the law (an occurrence foreseen in the Constitutional Act); by considering in a relative manner one right against another and balancing the different rights at stake (the one expanding while the other is reduced); and finally by prioritizing the economic/fundamental right taking precedence in relation to the other sources of law, without quantifying the importance of either of the two. The protection afforded by especially the ECHR covers more areas than the Constitutional Act, but where there is overlap, the national courts in their rulings may resort to either as supporting one another.

France



French constitutional, administrative and civil law afford protection to a number of economic rights. None of them is core or absolute, and all can be balanced against other rights or objectives of general interest. Not only that, but even other important context as competition are even not constitutionalised. Thus, the entire legal system does not recognize a strong constitutional status to economic rights. Nevertheless the detailed regulations recognize a de facto mandatory protection to some of them, like the right to property and economic initiative (see Art. 544 Civil Code and the preamble of the Constitution: art. 2 of the Declaration of 1789). As an example, commercial and industrial freedoms are not explicitly protected in the 1958 constitution, but they had been qualified as fundamental rights by the republican legislator in 1791. The Civil Code mentioned the principle in its Article 544 on the right to property, articles 6 and 1134 on contractual freedom and articles 7 and 8 on equal enjoyment of civil rights. Since them, various laws have reformulated and fleshed out the principle in various contexts. The notion of freedom of trade and of industry has been adapted to include all professional activities (i.e. services). It covers the 'freedom of enterprise', the 'freedom of [commercial] exploitation' and the 'principle of fair competition' (see the national reports with regard of further examples of conflicts between rights that occurred in the French system).

The Netherlands

A catalogue of clearly defined and well-developed economic constitutional norms is lacking in Dutch law. As stated above, the right against unlawful expropriation – right to property - is a key principle in the Dutch constitution, however, most economic rights are fragmented and dispersed and can first and foremost be found in Dutch civil law. Furthermore, economic rights are generally considered to fall within the category of social rights, or seen as a broader group of economic, social and cultural rights. The notion of a separate group of economic rights has not really been consolidated in the Netherlands. And although the constitution offers the 'highest form of protection' in Dutch law, the constitution is of limited value for the protection of economic rights in the Dutch legal order, particularly due to the ban on judicial constitutional review and the limited character of the constitution.

A core constitutional right is definitely the right to equal treatment, or rather referred to as the principle of equality. Dutch law is strongly affected by this principle. The principle of equality is relevant for the exercise of economic rights, as it implies that in economic activities the legal conditions for competition in the market place are equal. In addition, where economic rights concern the freedom to pursue a trade or profession, the access to a profession or equal pay between men and women play are of utmost importance.

It is thus difficult to identify core economic rights, although the right to property (laid down in the constitution) and contractual freedom (Dutch civil law) are considered to constitute the core of the Dutch legal system.

4. INTERNATIONAL AND EUROPEAN SOURCES OF ECONOMIC RIGHTS

4.1 COMPARATIVE GENERAL FRAMEWORK BETWEEN THE EU MEMBER STATES

With respect to economic rights, international treaties and EU law are of immediate relevance. The EU Treaties, the European Convention on the Protection of Human Rights (ECHR) and the Charter of Fundamental Rights of the EU are, then, particularly crucial. These instruments do not only apply to the Member States but are directly relevant for citizens as some of their provisions create rights and duties for them. These provisions can (or must) be enforced by international and supranational courts, the Courts of Strasbourg and Luxembourg, but also by national judges.

As stated in the introduction, at the level of the European Union, economic rights of citizens are firstly based on the four economic freedoms. In addition, Articles 15, 16 and 17 of the The Charter of Fundamental Rights, respectively, safeguard the freedom to choose an occupation and right to engage in work, the freedom to conduct a business and the right to property (including intellectual property).

Regarding the ECHR, article 1 of Protocol 1 protects the right to property. Pursuant to this right the Strasbourg Court has also developed some aspects of credit and contracts protection.

In addition to these provisions many other international agreements are relevant for economic rights, even if not directly conferring rights and obligations upon citizens. These other treaties inform the approach of the state to the regulation of economic activities (liberalization, competition, etc.). Furthermore, treaties on issues of economic importance are not only bilateral but also multilateral; many of them concern very technical and specific issues, but some are of a more structural importance, since they create international organizations that oblige Member States to follow specific economic conventions (typical examples of those are the World Trade Organization, the World Bank or the International Monetary Fund). The UN International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 is of particular importance too, especially with regard to labour rights.

The ways in which rights contained in international treaties are incorporated within the national legal order differ. In some Member States, with reference to provisions of international (customary) law or because of the adoption of a monistic approach to international law (i.e. for instance the Netherlands), a system of automatic adjustment or direct applicability is provided for without the need for the adoption of a formal transformation act at national level. Other Member States follow a dualistic approach but this may not hamper the possibility that economic rights contained in international treaties prevail over national laws.

The effectiveness of international treaties to some extent depends on the national constitutions, which usually provide clauses of recognition of a special status for EU and international law. The blocking effect of EU law, though, makes it impossible to derogate from the EU Treaties or secondary legislation in the future through the adoption of national laws.



Finally, EU law enjoys a special status, as it, according to the case law of the European Court of Justice, constitutes a new and autonomous legal order, which allowed the Court to postulate the principles of supremacy and direct effect. Both primary law (Treaties) and secondary legislation (regulations, directives and decisions) prevail over domestic law (including constitutional) on the basis of the principle of primacy or supremacy (Case 6/64, *Costa v. Enel*, [1964] ECR 614). In case of conflict between national law and EU law, the national court will have set aside national conflicting provisions. In addition, sources of primary and derived law, as well as general principles, may have direct effect (Case 26/62, *Van Gend & Loos*, [1963] ECR I), and can thus be invoked by EU citizens before the national courts.

Furthermore, the adjustment of the national legal system to international law also takes place through an interpretation aimed at creating compatibility between national and International provisions. Moreover, the interaction between European law and national provisions on economic initiative has been crucial: EU legal principles and competition rules have influenced the national legal systems, even those of countries with relatively strict limitations on economic rights for social policy reasons. And after the acceleration of the process of European integration in the early nineties, the freedom of economic initiative has been interpreted in compliance with the principle of an open-market economy in all EU Member States.

At this point it is worth mentioning the Charter of Fundamental Rights of the EU, which since the Lisbon Treaty has gained binding force (Article 6 TEU). As a consequence, the economic rights contained in the Charter are now – formally and in substance – binding. Particularly Article 16 on the freedom to conduct a business has played an increasingly important role in the case law of the ECJ (e.g. Case C-70/10, *Scarlet Extended SA*, [2011] ECR I-11959. It is likely that these Charter rights will also have an impact on the definition and scope of economic rights in the Member States. This will be subject to Deliverable 2. The formalization of EU economic rights in the Charter is yet another step in this evolutionary process. The role played by the EU Charter is, however, limited by the so-called horizontal provisions (Article 51(1) on the scope of application and Article 52(5) on the distinction between rights and principles): The Charter can only be applied to a national measure, whenever it falls within the scope of EU law (Case C-617/10, *Åkerberg Fransson*, ECJ, 7 May 2013).

Not only EU law is relevant for the interpretation of national economic rights, also art. 1 of protocol 1 of the ECHR is of great importance. In the framework of international treaties, ECHR enjoys a special status as the case law of the Strasbourg Court is recognized as binding and helps to further define and shape the content of economic and other fundamental rights. But the special status of the ECHR does not meet the same level of pervasiveness that EU law grants. In any event national courts will have to try – where possible – to provide for a consistent interpretation of national law in the light of international treaties. Furthermore, citizens may appeal directly to the Strasbourg Court. The ECtHR is competent to judge on violations of (also) economic rights, once domestic remedies have been exhausted. The Member State must comply with pecuniary reparation measures committed by ECtHR, but also with individual or general measures provided to eliminate the Human rights violation. In this case, the Committee of Ministers of the Convention supervises the implementation of the decisions of the Court in Strasbourg.



Both EU and ECHR mechanisms for the protection of fundamental rights are thus relevant to economic regulation. Against this background, the relationship between the ECHR and the EU Charter of Rights is crucial. As already noted, EU and ECHR rights have a different status in the national legal systems (in every country, EU law is given effect upon its own motion and prevails over national law by means of the principle of primacy as formulated by the ECJ in its case law, while for ECHR violations we have different solutions depending on national law: for example, in the UK the Human rights Act 1998 provides for a 'bringing rights back home' strategy); as a consequence, it is pivotal to define where it is a question of application of ECHR law and not of EU law.

In the field of economic rights, possible conflicts between EU law and the ECHR arise when the ECJ and the Strasbourg Court come up with different solutions for the protection of the same economic right. An example is the protection of credit, which is considered as part of the concept of property in ECHR law, while the EU system introduced specific provisions (Directive 93/22/EEC). In these cases the Bosphorus case law may be relevant, wherein the ECtHR held that there is a presumption of compliance with the ECHR if a Member State has to comply with obligations arising out of EU law (ECtHR judgment 30 June 2005). The Strasbourg Court will then refrain from further review. However, when the Member State has discretion in adapting its legal system to the rights provided by the EU, a second check by ECHR will be possible.

Finally, it is important to bear in mind that the EU seeks to accede to the ECHR (Article 6(2) TEU), however, due to the Opinion of the ECJ (2/13) on the draft Accession Agreement, which it held to be incompatible with Article 6(2) TEU, it has become questionable if and when this will become the reality.

4.2 OUTLINE OF THE NATIONAL EXPERIENCES

Italy

The regime of incorporation of rights of an international or supranational origin in the Italian legal system follows different rules, depending on the nature of the source of international law at issue.

For customary international law article 10 of the Constitution provides for a system of automatic adjustment, without the need for the adoption of a formal act. Moreover, as recognized by the Constitutional Court in judgment 48/1979 (Russell), customary international law is hierarchically prevalent inside the system and takes precedence over any other provisions of national law (and the Constitution itself). As for the economic rights that arise from international treaties, article 117 co. 1 of the Constitution (as introduced by Constitutional Law 3/2001) recognizes them as prevailing over other sources of national law (Constitutional Court 10/1993). The government ratifies the treaties on the basis of the enabling law authorizing the ratification (article 80 of the Constitution), assuming an obligation for the Italian state at the international level. At the same time a national statute is usually needed to execute the dispositions inside the Italian legal system, to make them effective and binding directly for the citizens (and not only for the Government). Even if such a process of execution is made possible by statute, the effectiveness of the Treaties is connected to the rank of article 117 co. 1 Constitution



(which establishes the prevalence of international and EU law). Therefore it is not possible – for the future – to enact a different parliamentary decision and a divergent statute on the same issue covered by the Treaty.

As far as the European Convention of Human Rights position inside the Italian legal systems is concerned, two key judgments of the Constitutional Court are particularly relevant: the decisions 348 and 349/2007 on the amount of compensation for expropriation and the *occupazione acquisitiva* (or *accessione invertita*) recently focused on the topic of economic rights relating to the status of property in the European Convention. With regard to *occupazione acquisitiva* in the past the Constitutional Court allowed the public power to become owner of private property and to convert it to a public use, without setting up a full public responsibility for the damage caused to the owner. Initially, in the ECtHR case law such a situation was not considered as conflicting with the principles concerning the protection of the property, as enshrined in Protocol 1 to the aforementioned Convention. More recently, however, the Constitutional Court, following the case law of the Strasbourg Court (case Scordino: judgments of 29 July 2004 and 29 March 2006), admitted that the *occupazione acquisitiva*: (a) does not provide adequate protection of property rights, because the ECHR requires that damages will be paid out automatically in such cases, (b) does not qualify it as ‘expropriation’, but has to be qualified as untitled dispossession, contrary to article 42 Constitution as interpreted in the light of the findings of the ECHR, (c) does not guarantee compliance with the principle of legality (article 1 of the Protocol) in the absence of sufficient requirements of accessibility, accuracy and predictability of the procedural regime.

There is a different scope of protection of economic rights according to Italian law in the event of a conflict between supranational or international law. Depending on the origin of the right in question the court must disapply the incompatible internal provision if it contravenes EU law; if it is provided for in the ECHR (or in other international instruments), the court, however, cannot disapply the law but will have to raise the question of constitutionality for breach of article 117 co. 1. In any case national courts have to attempt – as much as possible – to provide for an interpretation of national law in conformity with international law, in order to save the conflicting domestic law.

As far as international and supranational level remedies are concerned, of main importance is the ability of individuals to appeal directly to the Strasbourg Court. The ECHR, indeed, as a subsidiary remedy, is competent to judge on violations of (also) economic rights once domestic remedies have been exhausted. The Member State must comply with pecuniary reparation measures committed by ECHR, but also with individual or general measures provided to eliminate the Human rights violation. In this case, the Committee of Ministers of the Convention supervises the implementation of the decisions of the Court in Strasbourg. Italy provides for the implementation of such supranational decisions by the activity of the Government, which promotes the collaboration of Parliament and of the judiciary power: Law 12/2006 (execution of ECHR Judgments), which modified article 5 Law 400/1988 (on the activity of the Government).



Belgium

The distinction between national sources of economic rights on the one hand, and international and European sources on the other, is not decisive in the Belgian legal context. Since the *Fromagerie Le Ski* judgment of the Court of Cassation of 27 May 1971, Belgium adheres to the monist theory, with European and international law applying automatically in the Belgian legal order and taking precedence in case of conflict. The *Le Ski* judgment, therefore effectively amounts to the Belgian equivalent of the equally fundamental *Costa v. Enel* case of the European Court of Justice. This also explains why the new Code of Economic Law does not explicitly refer to concrete international treaties, EU law or to the case law of the ECHR or ECJ.

With reference to possible conflict between economic rights as a result of the binding force of the EU Charter, it is worth remembering that the latter is an integral part of the Belgian legal order since the ratification of the Treaty of Lisbon. From a Belgian law point of view, its legal status differs not from other EU sources dealt with above.

Greece

The Greek legal system, like all dualistic systems, requires a national provision to ensure the application and enforcement of external acts and sources of law. The ratification process, which is at the basis of the international obligations, is shared by the executive power and the parliament, through the adoption of statutes and orders aimed at recognizing internal enforcement of international legal tools. Greece is party to all major international Treaties and Conventions protecting economic rights, both at international and regional levels. At the international level the following treaties may be cited: Universal Declaration of Human Rights (incorporated in the body of national law by Law 92/1967); the International Covenant on Economic, Social and Cultural Rights 1966 (ratified by Greece by Law 1532/1985); the International Covenant on Civil and Political Rights 1966 (ratified by Law 2462/1997). At regional level, particularly important to mention are: the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR) (ratified by Law 2325/1953; subsequently, the military junta in Greece (1967-1974) denounced the Convention in question in 1969, in view of the country's expulsion from the Council of Europe. Greece ratified the European Convention on Human Rights again by Legislative Order 53/1974, once the dictatorship ended); The European Social Charter (ratified by Law 1426/1984); EU Charter of Fundamental Rights (EUCFR) (ratified by Law 3341/2005).

Greek litigants become increasingly aware of the possibilities offered to them by international instruments for the protection of their rights. The invocation of such instruments, however, is typically made in order to complement a claim under national law and/or on a subsidiary basis to a main argument based on national law.

With regard to possible conflicts between rights resulting from the binding force of the EU Charter, according to Article 28(1) C the EUCFR enjoys a higher hierarchical ranking than ordinary legislation; it thus has quasi-constitutional status. To date, however, the question of primacy between the EUCFR and the corresponding



Constitutional provisions has not been raised. On the contrary, the provisions of the EUCFR, like the provisions of the ECHR, are being invoked by parties in judicial proceedings in order to solidify their arguments and to establish the level of protection, which should be granted to the corresponding rights. A brief research in the case law regarding the use of the EUCFR gives extremely few hits, thereby showing that the Charter has not been fully integrated in judicial proceedings. A reason for this may be the reluctance of the courts to accept arguments based on non-Greek legal provisions, and even less the EUCFR, in situations where the connection with EU law is not crystal clear.

Hungary

Starting with the international instruments to which Hungary is a party, it is worth citing the International Covenant on Economic and Social Rights (ICESR), and the European Social Charter. Hungary has not signed the Optional Protocol to the ICESR. Hungary is also party to all of the fundamental, and around one-third of the technical ILO conventions. As to the European Convention on Human Rights and its protocols they have been ratified, i.e. promulgated in an act of Parliament, except for Protocols 12, 15, and 16. Though the Convention – as ratified – is itself applicable law, what this means exactly is not clarified. The Supreme Court declared the Convention “to be applied, its provisions to be observed”. However, it is unclear whether it means direct applicability or simply that the Convention rights serve as ‘additional arguments in the interpretation of domestic law, through which the Convention takes effect’. The Constitutional Court in one case declared it will follow ECHR case law even if it diverges from its own interpretation; it however stated that international obligations which violate the Hungarian constitution may not be enforced apart from *ius cogens*. One would therefore situate the Convention in the hierarchy of norms between the Constitution and ordinary statutes (i.e. infraconstitutional, supranational status).

Until recently, courts were helpless in the face of a domestic law provision clearly conflicting with ECtHR interpretation, and in case of a direct clash, they ‘invariably applied Hungarian law’, as exposed by the ‘red star controversy’ (see *Vajnai v. Hungary* and *Fratanoló v. Hungary*). Though the courts needed to complement a criminal law provision with a specific intent, thereby narrowing its reach to conduct prohibited under ECtHR case law, such interpretation was perceived as being *contra legem* and thus impermissible by ordinary courts. The legal situation could only be modified by an annulment by the Hungarian Constitutional Court (hereinafter HCC) of problematic domestic provisions and the adoption by the legislator of new ones. The new Act on the Constitutional Court has somewhat improved this situation in that it now made possible for courts to suspend procedure and turn to the HCC in case a legislative provision conflicts with international law, and not just with constitutional provisions.

Spain

Article 10.2 of the Spanish Constitution establishes that “*Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain*”. Under this article, rights



proclaimed in the Universal Declaration of Human Rights (UDHR) of the United Nations in 1948 are binding for the Spanish authorities, although the UDHR is not an international treaty.

According to the Spanish Constitution, international treaties become binding domestically once they have been published in the *State Official Bulletin* (Article 96.1). The position of international treaties within the domestic legal system remains a subject of debate. From a constitutional standpoint, international treaties are placed above domestic legislation and below the Constitution. No constitutional provision enounces this in a clear way. The so-called 'supra-legality' of treaties is inferred from Article 96.1 of Constitution. This clause states that international treaty provisions may only be derogated, modified or suspended in the way provided for by the treaty itself or according to international law. Hence, domestic legislation may not, even if enacted subsequently, modify or derogate an international treaty.

Following article 10.2 of the Spanish Constitution, international instruments such as the European Convention on the Protection of Human Rights (ECHR), the Universal Declaration of Human Rights (UDHR) or the International Covenant on Civil and Political Rights have been frequently used, as interpretative, by the Constitutional Court and the Supreme Court, but it is necessary to keep in mind that only the rights and freedoms recognized by both, by these international treaties and agreements and by the Spanish Constitution, have this interpretative function of constitutional rank. In fact, rights that are recognized in international treaties or agreements and that are part of the internal legal system according to article 96, but are not included in the constitutional text, do not perform the interpretative function of constitutional rank; they have a *supralegal* and *infraconstitutional status*, according to the doctrine of the Supreme Court.

Besides, the Constitution that refers to the majority of the economic rights recognised by the EU Charter, there are also plenty of references to the EU Charter by the Spanish case law. This fact confirms the recognition of the Charter as interpretative principles of fundamental rights, including economic rights states that, although case law is the most propitious field to consider the EU Charter, Spanish legislation takes also into account this Charter when drawing up the statement of reasons of both, State and Autonomous Communities' laws, being the number of cases small but relevant.

Also the European Convention on Human Rights (ECHR) has the same status, but it is mainly focused on civil and political rights. Only three of the economic rights recognized by the United Nations, the EU Charter and the Spanish Constitution are included in this document: the right to form and to join trade unions -as a part of the freedom of assembly and association-, the protection of property and the right to education.

The Netherlands

Particularly due to the ban on judicial constitutional review and the monist approach to international law, Dutch law is traditionally open towards international treaties. Based in Dutch monism, fundamental rights form part of the 'land of the land' and can produce direct effect in the Dutch legal order. A distinction between national sources on the one hand and international sources on the other is thus not decisive in the Dutch legal



context. The key provisions in the Dutch Constitution are Articles 93 and 94, which respectively state that '[p]rovisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published', and '[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions'.

The ECHR has become increasingly important for the Netherlands due to a number of developments, such as the broad interpretation of open, or vague norms of the ECHR by the European Court of Human Rights. An increase in cases, where the rights contained in the EU Charter are invoked, can also be discerned, however, it is too early to say what the impact will be of the economic rights, like the freedom to conduct a business as contained in Article 16 of the EU Charter, on Dutch economic law, which does not know such a right.

Denmark

The European Convention on Human Rights (ECHR) that Denmark ratified in 1953 is the only international human rights instrument that has been incorporated in Danish law (in 1992). The ECHR is therefore part of the Danish legal system. However, it is worthy to mention that the Additional Protocol 12 on the principle of equality was not incorporated along with the convention. Denmark has also ratified, but not incorporated, the International Covenant on Economic, Social and Cultural Rights (ICESCR) since 1972, but not the related optional protocol giving access to the UN-complaints' system. The convention has entered into force in Denmark 3 January 1976. Denmark has delivered five reports in compliance with Article 16 and 17 of the ICESCR, but these are not considered as having relevance in the interpretation and use of the provisions in the convention. One of the conclusions of interest for the objective of this report was that the ICESCR should not be incorporated in Danish law, confirming the opinion given by a similar committee in 2001. Since the reference to the ICESCR in Danish case law is scarce.

The ECHR was incorporated in Danish law, more precisely, by Act no. 285 of 29 April 1992. As such, it has become part of the Danish legal system, and citizens and companies can invoke its protection in courts, administrative organs etc. The ECHR was not incorporated to have constitutional status, but it nevertheless takes precedence over national law; this fact and the development of the framework of the convention via the case law of its court give rise to many legal and political discussions about the convention's position in the Danish scheme of sources of law. As regards the application of the interpretation of the ECHR as deriving from the case law of the ECtHR, this is also a controversial topic in Danish academic legal studies. The ECtHR is viewed by some as being more of a political organ rather than a traditional court with a dynamic interpretation style and case law, which seems to exceed its original mandate. In the Danish legal tradition this is found to be in contradiction with the strong support for the principle of division of powers, where the Parliament assumes a more relevant role than courts in protecting democracy.

Following a dualist approach, international instruments such as the ICCPR and other international instruments that have been ratified but not incorporated in Danish law, can in principle not be considered in courts as



sources of law that can take precedence over national law, although they can be part of the legal material and thus be used as elements for interpretation of national legislation. In practice, they may offer limited protection, as the courts will be very cautious in referring to them and finding national regulations in breach of international law (this follows the separation of powers' theory as applied to the judiciary in the Danish legal system). It may be interesting to underline that Danish courts have never made a reference to the EU Court of Justice for a preliminary ruling on the EU Charter (for further references see the national report in the Annex).

France

France follows a monist approach to international law. International treaties must only be signed and ratified to become legally binding. France has signed most international and European instruments concerning economic rights, notably the 1948 Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, various ILO Conventions, the European Convention on Human Rights, the European Social Charter, and so on (see full list in the National report). But it did not, for example, sign the Additional Protocol No12 ECHR prohibiting discrimination.

Whilst France signed most relevant treaties, it may have not always have adopted the ratification instruments (legislative authorization to ratify and the actual ratification by decree of the President of the Republic) or done so with significant delay. Notably, the 1948 Universal Declaration on Human Rights is not considered as ratified because it was only published in the Official Journal. Furthermore, France has imposed reservations to some of the treaties.

The direct effect of the provisions of the ECHR, as well as those of the ICCPR, have been recognised without much controversies. The Conseil d'Etat also held that Article 6(1) of the ILO convention No. 97 of 1949 (the Migration for Employment Convention) is directly applicable before domestic courts: this provision prohibited any State party from treating immigrants lawfully residing within its territory less favourably than its own nationals in respect of, inter alia, accommodation and legal proceedings relating to accommodation.

Finally, whilst the case law of the CJEU makes it evident that measures adopted for the implementation of directives fall within the scope of application of the Charter under its Article 51, French courts are hesitant to apply the Charter to such domestic measures.

5. ACTORS

5.1 COMPARATIVE GENERAL FRAMEWORK WITHIN THE EU MEMBER STATES

There are several relevant actors or stakeholders involved in the formulation and implementation of economic rights. The relationship between these actors differs per Member State and has often not been formalized by law. Within the different national legal systems, a constant dialectic takes place between the public-political institutions on the one hand (Government and Parliament), and the social partners on the other, consisting of representatives of trade unions and the employers' organizations.

The country reports demonstrate how this relationship between political and private actors has been given shape and has been formalized, according to a certain structure and procedures, which guarantee that different economic interests are being protected. Furthermore, some actors have been granted the role of mediator. In particular, in the relation between trade unions and employers' organizations the role of the government has sometimes been institutionalized in the form of multilateral collective bargaining. In this way, it should be guaranteed that economic rights are sufficiently balanced with social policy interests and social rights

Therefore, economic rights involve the above-mentioned relationship between political bodies (that limit or regulate the economic interests) and private parties (that are directly interested in property and economic initiative regulation). Against this background, in the evolution of the market model – from an industrial one to a more complex services/financial context – the regulation of the private sector faces new challenges. With the privatization of several economic sectors (banks, insurances, fiscal services, etc.), there is less political control and an increasing need for more independent regulation, and for independent authorities, which are involved in the regulation and to supervision of the exercise of private economic rights.

For this purpose, a network of independent administrative authorities has been created in all Member States, to guarantee an independent view on how private economic initiative may be limited and how the behavior of companies in regulated sectors should be regulated (like natural monopolies, public services, etc.).

Considering this plurality of actors, tensions are likely to arise between politics, independent authorities and private associations, as well as with individual citizens: Judicial and administrative remedies are therefore crucial to guarantee that economic rights are not jeopardized; in addition, private associations are of particular importance for the protection of economic rights. Trade unions and employers' organizations (or other associations representing private economic interests) are able – in almost all EU Member States - when a locus standi of associations does exist – to activate a judicial remedy. This is usually very important for the protection of economic rights, because these actors can initiate class actions for the protection of weak economic interests, which would otherwise not be possible or effective on an individual right's basis.



5.2 OUTLINE ON THE NATIONAL EXPERIENCES

For further information with reference to the specific actors involved in the context of the economic rights, please see the national reports attached to this Deliverable

In particular, for the details on the interaction between different subjects involved in the economic rights protection and promotion it is worth referring to Question 6 of the each national report. From a comparative point of view, the huge number of actors emerges as a common trend. The nature of such actors sensibly changes from country to country, but in order to look for a categorization it is possible to divide them in public actors (both of political nature and independent public bodies) and private actors (in particular associations of citizens individually interested in the economic phenomenon: the individual nature of economic rights is therefore mitigated by a possible collective representation of economic liberties exercise, as in the trade unions role and so on).

6. GENERAL CONCLUSIONS

Identifying economic rights in the respective Member States has due to a variety of reasons not been an easy task. Although there seems to be some sort of common understanding in the European Union as to what constitutes an economic right, either categorized as an independent category but bordered by social rights or as a category of social or socio-economic rights, there are still differences which lead to fragmentation. In some Member States with a strong constitutional tradition, like Italy, it is easier to identify 'core' economic rights, whereas in others, like the Netherlands or Denmark, this is much more difficult. Economic rights are dispersed over various laws and can particularly be found in private law. But this report shows a number of trends in the development of economic rights that have resulted in a more coherent approach across the EU Member States.

First, looking at the evolution of economic rights regulation over time, we see that economic rights have, as a result of the development of the liberal democratic state, been codified in civil codes, national constitutions or specific economic regulations. Due to the emergence of the welfare state and the establishment of a social market economy, social rights have gradually gained importance and have defined and demarcated the scope of application of economic rights.

Second, turning to the boundaries inside and outside economic rights, we see that, although there are differences between the Member States as regards the definition of 'core' economic rights, which may pose difficulties for the exercise of EU economic rights by EU citizens, the country reports reveal that in defining the boundaries of economic rights, social rights are taken into account. And conflicts between rights are balanced by the national legislature and the (constitutional) courts.

Third, whereas some Member States adopt a dualistic system in respect of the incorporation of international legal norms, others adhere to a monistic system, making the incorporation of international and European law in the domestic legal system easier. EU law has, considering its autonomous status, adopted a special position, which has enabled a process of harmonization, particularly in the field of public economic law. But also the fundamental economic rights contained in the EU Charter and the ECHR are increasingly relevant for the domestic legal orders, although there are still only a handful of cases decided by the national courts wherein the Charter rights played a substantial role.

Fourth, with respect to the actors involved in the field of economic rights, we see a spectacular rise of independent administrative authorities having supervisory, regulatory and/or enforcement powers, which is partly due the liberalization of certain sectors of the economy and EU sector-specific regulation in fields previously dominated by state monopolies.

As a last point, the still existing fragmentation of economic rights in the respective EU Member States will offer challenges for the correct transposition of EU legislation and policies, which will be the subject of Deliverable 5.2.

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ANNEXES

Annex 1: Questionnaire WP5 – D.1

Annex 2: National reports

- Belgium
- Denmark
- France
- Greece
- Hungary
- Italy
- Spain
- The Netherlands

Introduction

The aim of WP5 is to study specific problems EU citizens face in exercising economic rights and liberties in areas, which fall within the scope of EU law, but also in areas beyond the scope of EU law.

Actually, the international and supranational legal systems as well as the national constitutions contain a set of basic rules to regulate economic phenomena, i.e. all the circumstances that are characterized by a relationship between persons and economic resources, involving goods as an extension of the individuals interests.

“Economic rights” are considered as the subjective legal situations identified in the so-called “economic constitution”.

In particular, the economic rights have traditionally been identified as those pertaining to the activities in which the market expresses itself, regulating both factors of production (capital and labour) and business activities implemented for their transformation.

Property, labour and economic enterprise are therefore the three areas in which economic rights are recognized. These areas are divided into a number of smaller themes, all linked to the three main interests (for the property right, for example: the right to housing, the right to save and the constitutional provisions on access to credit, the guarantees in the event of expropriation, the protection of copyrights, etc. For free economic initiative, for example: the regulation of competition and antitrust, the discipline of public monopolies, the access to public services, etc.).

Economic rights are not fully established as a stable category of rights, since the constitutional recognition of economic rights is strongly tied to the ideological approach of the framers of the constitution and to the historical consolidation of the catalogue of rights. Moreover, a number of legal systems with first generation constitutions do not provide for a complete catalogue of economic rights.

Not only at national level, but also at European and internal level a number of legal instruments contain clear references to economic rights. Examples are the UN International Covenant on Economic, Social and Cultural Rights of 1966 (especially for labour rights), the Council Of Europe art. 1, Protocol 1 of the European Convention on Human Rights (for the right to property), and articles 15, 16 and 17 of the Charter of Fundamental Rights of the European Union (respectively for: freedom to choose an occupation and right to engage in work; freedom to conduct a business; right to property).

Economic rights are therefore a category of subjective legal situations that, even if heterogeneous and historically determined, have been consolidated to a great extent in constitutional laws and in the case law of national and European courts; at the same time, as a special category of rights, it has always been open to new developments. For instance, in the evolution of constitutionalism the recognition of economic rights has been



accompanied by the emergence of social rights as a distinct category with which economic freedoms may even come into conflict.

Within this context, the market itself (considered as a legal and not only economic phenomenon) and the market pertaining to factors of production (ownership, labour, enterprise) are the central parameters for the definition of economic rights. Once such rights are identified in the national legal system it can be analysed how constitutional law (both based on legislation and on case law) relates to the regulation of the market.

EU law constitutes a legal system that is very much characterized by economic rights. Within this category of economic rights three areas are of particular relevance for our research and these involve professional qualifications, consumer rights and intellectual property rights. These areas will be studied from the perspective of Member States' laws and EU Single Market law.

Reports

The aim of the first deliverable of WP5 is to identify and critically assess the nature and scope of the economic rights European citizens are entitled to on the basis of, essentially, the relevant legal frameworks for these rights in selected Member States of the EU, including the International conventions (e.g. International Covenant on Economic, Social and Cultural Rights, 1966), the case law of the ECJ, the national constitutional traditions, the general principles of EU law.

This categorization will serve as a basis for the more specific rights, which are involved in the three case studies of WP5, thus the rights involved in the three areas a) Professional qualifications, in the wider scope of services, b) Consumer rights, c) Intellectual property rights (Task 5.3, numbers i, ii, iii).

The final deliverable (Del. 1) together with the categorization will offer an overview of these three areas, starting with a historical background of the rights in general, a description of the rights origins, the features and characteristics of each category, its evolution and some hints to the legal sources.

Such an approach would create a link between the general categorization and the content of the case studies – which need a more empirical approach – and represent a theoretical and institutional framework in which the content of the second deliverable (implementation of the economic rights in the Member states) could be inserted.

Given the above-mentioned approach it might be opportune to provide information about the rights involved in these three areas, with a conceptual – theoretical approach, leaving the aspect of the implementation in the Member states as the content of the second deliverable (implementation).

For the purpose of drawing up country reports, the following questionnaire has been drafted.



The text of country reports should give a general overview, and should be clear, easily accessible and easy to read.

Please note that language editing is the responsibility of each author.

Annexes

National provisions

Please provide a list of the most important national legal provisions (constitutional acts, legislation, regulations, etc) and a list of cases for your Member State (name, date and publication reference).

Bibliography

Please provide a list of what you consider the most relevant recent bibliographic sources with respect to your country. You can also suggest references to books or articles which in your view should be included in the bibliography concerning relevant EU law (limit your suggestions to a maximum of 5 references). Please mention the title in the original language and include a translation in English, in brackets.

For the bibliography only, rather than stating the foreign language title in italics, please use single quotation marks so as to distinguish it from the title of the journal.

Practical information and guidelines

Task leaders: Sybe de Vries & Elena Ioriatti

Please use the headings below for the structure of your answer.

Make sure to include precise references to constitutional, legislative and regulatory provisions, cases and other relevant policy and legal documents.

The national and final reports should be written in English. However, if certain concepts or notions can't be translated correctly in English², we recommend that you use both the original language as well as the most appropriate English translation the first time a concept is referred to. Later mention may be in either languages.

² The idea is to choose English concepts only when there is a coincidence of the two notions (original language notion and English notion) in the sense that they refer to legal institutes producing the same – or at least – similar effects in the two legal systems. E.g. the Italian concept “proprietà” does not coincide to the English notion “property”, as the first one does not include, for example, credits (chooses in action).



Please use the Kluwer author guidelines for references and citations:
<http://www.kluwerlawonline.com/files/COLA/COLAHOUSERUL2013.pdf>.

Question 1: Identification of economic rights

- ✓ Which rights are considered in your country as economic rights?
- ✓ Amongst those rights, which are considered 'core'?

The idea is to get an overview of what are considered (core) economic rights in EU Member States.

Specify whether the notion "economic right" is consolidated in your country and the sources of the categorisation (legal rules, case law, definition provided by legal scholars, praxis) and whether there are disagreements/developments in the notion of economic right and their core elements.

Please, keep in mind that the category of economic rights is not a stable one: it has to be identified by both the historical background that characterizes the national approach to the definition of economic rights, and the interaction between economic rights with social rights (that potentially make it difficult to define the boundaries of economic rights).

Question 2: National sources of economic rights

- ✓ Where are these rights laid down at national level (constitutions or constitutional instruments, special (ie. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

The idea here is to present the legal and policy framework which forms the basis of national economic rights protection in your country.

- Please describe the main legal sources of economic rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);
- Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of economic rights in your country, in terms of framework and substantial standards (not enforcement);
- Please indicate whether significant developments have recently taken place in this respect;



- Please, analyse the main trends in public law protection of economic rights, distinguishing the approaches both on the bases of the different role of legislation and case law, so as on the ground of the different macro-areas of property right, business regulation and labour market.

Question 3: International and European sources of economic rights

- ✓ To which international instruments for the protection of economic rights is your country a party?
- ✓ How are relevant international and European economic rights norms being incorporated in your country?
- ✓ To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?
- ✓ How and to what extent are international instruments for the protection of economic rights given effect in your country?

Question 4: EU Charter of fundamental rights

- ✓ To what extent have the EU Charter of fundamental rights as well as general principles of EU law protecting rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?
- ✓ How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of economic rights?

Question 5 : Jurisdictional issues

- ✓ Personal
 - **Who** is covered by (core) economic rights protection? Are both natural and legal persons covered? Are citizens of the particular state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?
- ✓ Territorial
 - What is the territorial scope of the protection of economic rights afforded by your Member states? Are there **territorial** limitations to such protection? Which?



- ✓ Material
 - Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)? How are economic rights balanced with other social rights? To what extent does the national legal system show a prevalence of a market-centric approach to a more social rights approach in regulating economic rights? In other words, which degree of functionalization of economic interests exists, and what are the tools used for such a limitation of economic freedoms (used to protect social interest by means of regulations or directly through public intervention)?
- ✓ Temporal
 - What is the temporal scope of protection afforded to economic rights? Have they been recent changes in the range and reach of economic rights protection?
- ✓ Please offer details as to how different rights are afforded to different **categories of persons** in **different location and policy contexts over time**.

Question 6 : Actors

- ✓ What is the involvement of private or public actors, such as private (e.g. National Bar Associations) and public entities and authorities (e.g. Patent Offices), agencies, NGOs, etc. – in defining and setting economic rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of economic rights norms.

Question 7 : Conflicts between rights

- ✓ How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?
- ✓ Are there, in your countries, notorious or problematic clashes between particular economic rights, or between rights and other rights, between individual economic rights and important public interests?
Please give examples, and illustrate how these conflicts are dealt with and resolved.

Categorization of Economic Rights: Belgium

*Anne-Marie van den Bossche*¹

INTRODUCTION TO THE BELGIAN REPORT

Belgium is a Member State of what is now the European Union since its conception as European Economic Community in 1957². The Kingdom of Belgium as we know it today only exists since the first King of Belgians Leopold von Saksen-Coburg-Gotha (d. 1865) on 21 July 1831 took the oath to rule in accordance with the Constitution drawn up by the National Congress after the September revolution of 1830. The Belgian Constitution was formally proclaimed by the National Congress on 11 February 1831 and established a constitutional monarchy, and a second – equally formal – time, after the first king of the new state had been found/identified and had taken the oath to the Constitution of the new state on 21 July³.

Belgium's past "offers a particularization and a mirror-image of European history and civilization. Belgium has, however, very distinct features and traits as well: without an appreciation of its history, modern Belgium does not seem understandable. In very different epochs indeed, Belgium came into existence as a name, as a country and as an independent state (...). History explains that Belgium's biculturalism is a recent phenomenon whereas the base of that ethnic diversity lies in Roman times. (...) Nearly all Belgian towns were founded between the 10th and the 14th centuries; these towns not only constitute an ancient tradition of commerce and industry but have been centres of great culture and promoters of democratic ideals as well."⁴

Belgium is, and has always been, a multilingual society, with the linguistic border between what we now refer to as Dutch resp. French dating back fifteen centuries. Although it took far too long for Dutch to be recognised as one of the official languages of the post 1830-Belgium⁵, it would be erroneous to equate language with culture: the French-speaking Belgians are not French, the Dutch-speaking are not Dutch, the (80.000) German-

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² That is, leaving aside the ECSC Treaty of 1952 establishing the European Community of Coal and Steel, which did not really provide citizens with broad economic rights.

³ Cf. infra for the 1830-1831 Belgian "royal imbroglio". There is nothing intrinsically laughable about the proclaiming of a Belgian constitutional monarchy both before (as a matter of principle) and after the actual new sovereign was known.

⁴ R. De Schrijver, "Belgium Until World War I", in: Boudart, M., Boudart, M. & Bryssinck, R. (Eds) *Modern Belgium*, Palo Alto, California, The Society for the Promotion of Science and Scholarship, 1990, 54-85 (hence: De Schrijver), at 72.

⁵ Since the end of the Middle Ages, French was the official language of the Duke of Flanders. This remained so during the Burgundian and Austrian regime, and after 1830 until 1935. Dutch, for its part, was the only official language during the short reign of William I (1815-1830). In 1935, the legal and official language of Belgium was changed from French only, to both Dutch and French. It took, however, until 1967 resp. 1991 for the Belgian Constitution to become equally authentic in Dutch resp. German.



speaking are not Germans. Instead, the French-speaking Belgians are rather "the northernmost outpost of Latin civilisation", and the Dutch-speaking ones "the southernmost settlement of Germanic civilisation"⁶.

In addition, prior to the royal adherence to the Belgian Constitution of 1831– marked to this date by the Belgian official holiday on 21 July – the (political) history of what is now known as Belgium has been varied and diverse, and often described as basically, "a succession of foreign dominations"⁷, with Belgians passing "from one foreign regime to another – the Spanish regime, the Austrian regime, the French regime, the Dutch regime"⁸. This historical variation and diversity in political and territorial allegiances led to corresponding changes in applicable legal regimes, which have left marked and less marked, yet equally noticeable traces in present Belgian legal thinking and reasoning also with regard to core economic rights in/of Belgian law.

Cuius regnum, cuius ius. To correctly frame the economic rights currently considered as (core) economic rights c.q. the scope of economic law in Belgium⁹, some historians' account is called for¹⁰.

*Romanized Belgium and Germanic settlements*¹¹:

In its broadest sense, history in Belgium starts with the earliest human habitation on Belgian soil some 400.000 years ago (...). The expansion of the Celts, who originated in Central Europe, led to their settlements over present-day Belgium after the 7th century B.C. On the eve of the Roman invasion as from 57 B.C., all tribes in Belgium seem to have been Celtic or at least celticised. Among these were the Nervians, the Eburons, the Menapians and others. Julius Caesar called all the tribes living in northern Gaul between the Seine and the Rhine "Belgae", and their country occasionally was indicated as "Belgium". That Caesar described the Belgians as the toughest of all the peoples of Gaul did not prevent them from being subjugated by the Romans between 60 and 50 B.C., and around 15 B.C., their country became the Roman provincia Belgica. This province was later divided into several provinces, and each of them was subdivided into *civitates*, which more or less coincided with the territory of the various Belgian tribes. More profound Romanisation dates from Emperor Claudius on (...). The administrative language in Roman Belgium was, of course, Latin, and this language gradually supplemented the Celtic tongues among the Belgae.

⁶ H. Liebaers & Ph. Robert-Jones, "Conclusion", in: Boudart, M., Boudart, M. & Bryssinck, R. (Eds) *Modern Belgium*, Palo Alto, California, The Society for the Promotion of Science and Scholarship, 1990, 503-531, at 530.

⁷ De Schrijver, 70. This term is, however, not entirely accurate. Being ruled from a distance does not necessarily equal being "dominated". Many, yet not all rulers established c.q. enforced their power by brute military force alone.

⁸ J. Stengers, "Belgian national sentiment", in: Boudart, M., Boudart, M. & Bryssinck, R. (Eds) *Modern Belgium*, Palo Alto, California, The Society for the Promotion of Science and Scholarship, 1990, 86-97 (hence: Stengers), at 86, and infra.

⁹ Cf. infra on the relation between 'economic rights' and 'economic law' from a Belgian lawyers' point of view.

¹⁰ Unless otherwise indicated, this historical overview builds on different chapters of different contributors to: Boudart, M., Boudart, M. & Bryssinck, R. (Eds) *Modern Belgium*, Palo Alto, California, The Society for the Promotion of Science and Scholarship, 1990, 561 p. To not overburden the (indented) text, quotations marks are not used systematically when using larger parts.

¹¹ De Schrijver, 54-55.



From the middle of the 3rd century A.D. on, Frankish infiltrations or raids took place from Germania, anticipating the massive crossing of Germanic tribes on New Years' Eve 406. As a consequence of these events, Roman authority and civilization collapsed during the 5th century in the Belgian provinces and elsewhere in Gaul. (...) The northern part of present-day Belgium became an overwhelmingly germanised and Germanic- (Frankish) speaking area, whereas in the southern part people continued to be Roman and spoke derivatives of Latin. The linguistic border across Belgium today, from east to west, is the result of a complicated process in the early middle Ages. Roman and Germanic settlements constitute the distant base of the present-day Flemish-Walloon or Dutch- and French-speaking ethnic-division in Belgium.

The Frankish Monarchy (400 – 843 P.C.)¹²

For a while the centre of gravity of the Franks lay in Roman Belgium. (...) Yet, Clovis I (d. 511) defeated the last commander-in-chief in Gaul and extended his authority over nearly all of Gaul. Clovis' baptism in 506 marks the beginning of the Christianisation of the Franks and the re-Christianisation of other populations in Belgium during the 6th-8th centuries. (...) Dioceses were organised, mainly along Roman administrative borders, and mainly they were maintained within these limits until the reorganization in 1559 by the Spanish king Philipp II. (...)

Under the Merovingian dynasty, the Belgian territory constituted a border area. This changed under the new Carolingian dynasty, from the middle of the 8th century on, when an enlargement to the north and the east took place. The centre of this enlarged Frankish monarchy was between the Meuse and the middle Rhine, covering an important part of Eastern Belgium. The Carolingian empire was more Germanic than the Merovingian kingdom. On the other hand Charlemagne re-established in 800 the old Roman Empire, and he and his successors patronized a renaissance of arts and letters (the Carolingian Renaissance). (...).

Charlemagne's Frankish "Roman" empire was inherited by his son Louis; after the latter's death, it was divided into three parts by the Treaty of Verdun (843): Francia occidentalis, Francia media, and Francia orientalis. Some decades later, the northern part of the central empire was conquered by eastern Francia or Germany; it coincided largely with old Lotharingia. Most of present-day Belgium falls within Lotharingia, whereas a smaller part, between the Scheldt and the North Sea, was French territory.

Judicially and politically this situation – the Scheldt constituting the border between France and Germany in the north – was maintained until the early 16th century. During the 9th century the Scheldt valley was a main target for Norse invasions. These Norse-men, along with the gradual disintegration of central political power, promoted feudalism.

¹² De Schrijver, 55-56.



*Medieval Principalities*¹³

Administratively, the Frankish territory was divided into *pagi*, or counties. In the troubled half of the 9th century, the *comes* (count) of a small territory near the North Sea called Flanders (*pagus flandresis*) extended his authority, at the expense of the French king, over several *pagi* between the Scheldt and the North Sea. His successors continued to go southward to the Somme and eastwards, beyond the Scheldt, into the German empire. All these possessions constituted in the Middle Ages the powerful county of Flanders. This county continued to exist under this name and as a separate territory until the French annexation of 1794-95. However, its borders changed, mainly in the south. This Flanders coincides only partially with present-day Flanders; the latter constitutes the Dutch-speaking north of Belgium, the former only the actual Belgian provinces of West and East Flanders (...), along with French Flanders (in the north of France) and Zealand Flanders in the Netherlands.

Whereas the collapse of the central power in France from the 9th century on enabled the rise of powerful regional rulers such as the counts of Flanders, the East Francian, or German, kings and emperors at first maintained a better grip on local vassals, even in distant areas such as Lotharingia. In this territory, no principalities comparable to the Flemish county can be found in the 9th of 10th century. (...)

In the 11th century, some Lotharingian aristocratic families started to set up real principalities with their own dynasties. (...) The principalities, which came to bear names such as Hainaut, Brabant, Namur, and Luxembourg, did not develop before the end of the 11th century and were no longer threatened after imperial power was eliminated in the 12th century. These principalities constitute the origin of the historical provinces of Belgium, which lasted to the end of the 18th century; that past remains influential in the historic consciousness of modern Belgium. Most of the present-day Belgian provinces bear the names of the medieval principalities, but much more remains than just the names. There are political as well as cultural differences between Flanders and the Lotharingian principalities. (...), the Lotharingian principalities had strong cultural connections with the German empire. (...) In the Scheldt valley, French influence in cultural life was stronger. (...)

The principalities were involved in the late medieval interdynastic conflicts, the best known of which is the one between the French and the English kings. Juridically the counts of Flanders were vassals of the French kings, and the country was part of the French monarchy. Economically, however, the Flemings were highly dependent on wool imports from England. Mainly from King Philip Augustus (d. 1223) on, the French kings aimed at enlarging their crown lands. They directed their efforts mainly against Flanders, a county important for both political and economic reasons. (...) Flanders turned to England and joined with the Holy Roman Emperor and the duke of Brabant to form an anti-French coalition: their combined armies, however, were defeated at the Battle of Bovines (27 July 1214). The immediate consequence of this was increased influence by the French king

¹³ De Schrijver, 56-58.



in Flemish affairs in the 13th century; eventually it resulted in Flanders' annexation to the crown lands. The Flemish cities, however, did not accept this. The murder of royal garrison soldiers and Francophile patricians in Bruges on 17 May 1302 induced King Philip IV (the Fair) to send an expedition. On 11 July 1302, near Kortrijk a battle took place between the royal French army, which consisted of aristocrats and mounted knights, and a Flemish army basically composed of craftsmen and peasants, but under the direction of princes and knights of various neighbouring principalities. As a result of the Flemish victory, the annexation of the county of Flanders to the crown lands was undone¹⁴. Another consequence of the Battle of Kortrijk was the establishment of democratic government in the Flemish towns at the expense of the ruling patricians. Modern Flanders celebrates 11 July as its national holiday.

*The Communes of Medieval Belgium*¹⁵

Belgian medieval history and society are not only deeply marked by the rise and the development of principalities, they are no less strongly dominated, from the late 11th century on, by the "communal revolution". (...) the county of Flanders became a land of towns (...) Nowhere more than in Flanders, towns were the offspring of commerce. (...) The principalities of Hainaut, Namur and Luxembourg largely remained agricultural regions, but in Brabant and Flanders by the end of the Middle Ages one-third of the population is said to have lived in towns, which means to a large extent that the economy depended on industry and commerce. In Belgium most of the towns – and most of the villages as well – came into existence after the second half of the 11th century. These 11th century trading colonies, or *portus*, lacked legal sanction. For their transformation into towns with "burghers" and institutions, the intervention of the sovereign power was necessary. The city law – *keure* or *charte* – granted by the princes or extorted by the towns contained political, social, and financial privileges. The communal revolution led to real political and juridical autonomy and for the inhabitants of the towns to personal freedom. In Belgium, however, no more than elsewhere in the Low Countries, city-states did not come into existence.

(...) communalism undermined feudalism. After the 13th century, most of the peasants in the Belgian principalities were free, whereas in Germany, not to mention Eastern Europe, servitude still existed at the end of the middle Ages or in some places beyond. Communalism thus equals a process of personal and collective freedom and is the basis of a deep love of liberty and democracy. The internal political life of the principalities – at least in Flanders, Brabant, and Liège – was to a great extent dominated by the communes.

¹⁴ It is interesting, however, to note that the (historical) county of Flanders is the only part of medieval France that does not belong to present-day France.

¹⁵ De Schrijver, 59-60.



The Burgundian Netherlands¹⁶ (1384 – 1482)

The development of largely autonomous and often rival principalities (Flanders, Hainaut, Brabant and Limburg, Mechelen, Namur, Luxembourg, Liège) changed profoundly during a process that started about 1400 and lasted for nearly a century and a half. With the exception of the prince-bishopric of Liège, these principalities were all grouped within a dynastic and political union that received the name Low Countries (Pays-Bas, Nederlanden).

The starting point of the Burgundian regime was the marriage in 1369 of Margaret, daughter of the Flemish count, with Philip the Bold, son of the king of France and himself Duke of Burgundy. (...) The actual government of Philip and Margaret started in 1384 after the death of her father Louis of Male. Subsequently the reign of Philip the Bold's grandson, Philip the Good (d. 1465), was most important. To the inherited principalities, the new ruler added, by inheritance, purchase, or – to a lesser degree – military action, successively the counties of Namur, Hainaut, Zeeland, and the duchies of Brabant-Limburg and Luxembourg. All together these territories constituted ten Pays d'en Bas (Low Countries) along with some Pays d'en haut (High Countries: Burgundy, Franche-Comté). Moreover, Philip the Bold held a protectorate over three prince-bishoprics: Cambrai, Liège and Utrecht. The Burgundian state was not a unified or centralized state but rather a personal union; in spite of later centralizing measures that character of loose union was maintained throughout the Old Regime. (...) [To realise his] dream to restore Lotharingia, [Philip the Bold's son] Charles the Bold (...) occupied Liège, purchased Upper Alsace, and conquered Guelders, but these territories shook off Burgundian rule upon hearing of Charles' death before Nancy (1477).

The Burgundian 15th century is not only the era of a political union of large parts of the present-day Benelux countries, but also an age of great artistic and cultural achievements that constitutes a peak of Western civilization. (...) a series of luxury industries concentrated in the towns. (...) in the countryside (...) people improved agricultural techniques, produced more new specialized products such as butter, cheese, meat, and beer, and initiated rural industries, using cheaper Spanish wool to produce cheaper cloth or producing flax for the linen industry. (...)

The Hapsburg Seventeen Provinces¹⁷ (1482 – 1581)

The Burgundian heritage went to Charles the Bold's daughter Mary, who, however, died prematurely in 1482. As a consequence of this, the Burgundian Netherlands were governed first for a decade by her husband, Archduke Maximilian of Austria, then after his succession as German emperor (1493) by their son Philip I the Handsome (d. 1506), and then by the latter's younger sister. With that, Belgium became part of the Hapsburg dominions, which soon comprised the central European territories of the Hapsburgs, the Low Countries, Spain

¹⁶ De Schrijver, 60-61.

¹⁷ De Schrijver, 61-64.



and its Italian and overseas territories. The first and only ruler over all these territories was Philip the Handsome's son Charles, born in Ghent in 1500, the second of the name in Spain and Emperor Charles V in the Empire. (...)

The new Hapsburg rulers continued the political work of their Burgundian predecessors. [In the years 1524-43], the Hapsburg Low Countries were further enlarged, within the borders of the German empire, by the acquisition of Friesland, Utrecht and Overijssel, Groningen, and Guelders and by a protectorate over Cambrai. (...) Constitutionally, the Low Countries were declared an indivisible whole (1549). Besides Pays-Bas or Nederlanden, they were also called after Flanders, one of the powerful principalities, or the Seventeen Provinces. The usual Latin name was Belgium.

When Emperor Charles V abdicated in 1555, his brother succeeded him in the Austrian-Hapsburg dominions, and his son Philipp II inherited the Spanish part along with the Low Countries. For a century and a half, Belgian history remained closely connected with Spanish history¹⁸.

Like the Burgundian Netherlands, the Hapsburg Seventeen Provinces, with the duchy of Brabant as the centre of gravity, experienced another golden age of artistic and intellectual life. (...) Closely connected with political strength and cultural life was economic prosperity. The economic expansion of Belgium in the sixteenth century until about 1570 brought the late medieval economy to a brilliant close. During the Spanish Hapsburg era, the Low Countries constituted a dominant pole of growth in the world economy. (...) The economy, however, was seriously disturbed, first by Hapsburg tax pressure and fiscal policy, which led to revolts in Ghent and Antwerp and a clash between the Hapsburgs' world imperialism and provincial particularism: and second, by foreign competition, mostly German and English. The latter occurred mainly in the 1560's.

[After the rise of Lutheranism, in Belgium from 1518 onwards, and Calvinism], in 1522 the state inquisition was installed in the Netherlands. (...) In 1566 an iconoclast movement, starting in the Flemish town of Steenvoorde and spreading over various parts of the Low Countries (Tournai, Valenciennes, Flanders, Brabant, and Holland) had primarily religious motives, but the largely violent action of the iconoclasts was equally a release of political, economic, and social tensions and dissatisfaction.

In order to chastise his rebellious and "heretic" subjects, Philip II sent, in 1567, the Duke of Alva to Flanders. His action was harsh, repressive and despotic. In Antwerp, the *Spanish fury*, also known as the Sack of Antwerp, of November 1576 left some 8000 victims. About 1000 people were executed; among them were two members of the Council of State on 5 June 1568 in Brussels: Count Egmont and Count Horne. William, Prince of Orange, fled from the country. His first military action took place in 1568 in Groningen and marked the opening of the Eighty Years' war against the Spanish king. Alva's repression caused an emigration of about 20.000 people, and many more followed later on. In the provinces under Spanish control, the Catholic faith was re-established as the

¹⁸ The large principality of Liège, about one-fifth of present-day Belgium, however, politically never belonged to the Netherlands or Belgium in early modern times.



only legal religion, and an already weakened economy received fatal blows. Revolts broke out over Alva's tax reforms, and Philip II recalled him in 1573. After the sudden death of his successor in 1576, most of the Low Countries sided with William the Silent.

The real Spanish *reconquista* began in 1578 with the new governor Alexander Farnese, a great warrior and shrewd diplomat. By diplomacy or warfare, he reconquered almost all of the Low Countries south of the Big Rivers in the present-day Netherlands. Ultimately, however, the Spanish *reconquista* succeeded only partially. After the unilateral Plakkaat/Acte van Verlatinghe of 26 July 1581, disavowing Philip II's rights to the Northern part for not complying with his royal duties "mille et mille fois" – and after searching for some time (in vain) for a new sovereign or king¹⁹ –, the Republic of the United Provinces was equally unilaterally proclaimed on 26 July 1588, leading to the Seventeen Provinces' division into two parts of a similar size: the rebel-controlled and eventually independent Calvinist republic of the United Provinces in the north (Holland), and the Spanish Catholic Netherlands in the south (Belgium).

The formalisation of the demarcation line between the two camps at the end of a series of wars (1648, Peace of Westphalia) coincides with the present-day Belgian-Dutch border. After some intermediate truces, none of which lasted very long, the 1648 Peace Treaty marked the end of the Eighty years' war started in 1568 and the definitive Spanish confirmation of the independence of the Republic, proclaimed in 1588 some sixty years earlier²⁰ which would subsist till the French invasion in 1795. With a short interruption (during the French time) and from 1815 to 1830, the northern and southern Netherlands have had a separate history ever since. Once Antwerp surrendered after a siege of Farnese's troupes of more than a year (Fall of Antwerp, 17 August 1585), the point of gravity of the Low Countries, economically, politically and culturally, shifted from Flanders and Brabant to Holland; emigration from Belgium contributed greatly to Holland's golden 17th century.

*The Southern Netherlands (Spanish and Austrian) and the Principality of Liège in the 17th and 18th Centuries*²¹

Since he did not succeed militarily, in 1598 Philipp II of Spain transferred sovereignty over the Seventeen Provinces, actually only over the southern provinces, to his daughter Isabella (d. 1633); she married Archduke Albert of Austria, who had acted as a governor-general in the Spanish Netherlands since 1595. (...) At the death of the childless Archduke Albert (1621), Spain re-established sovereignty over the southern Netherlands and resumed its war with the rebels. (...) The Eighty Years' war ended in 1648: Spain recognized the independence of the Northern provinces, which, moreover, severed all ties with the German empire. The southern provinces continued to be Spanish but remained a loose member of the German empire as well. During that first half of the 17th century, there was an economic recovery in the southern Netherlands following the dramatic decline

¹⁹ M. Reynebeau, *Le rêve de Flandre ou les aléas de l'Histoire*, Paris, La Renaissance du Livre, 2004, 182 p. (hence: Reynebeau), 74-75. This not finding a king did not remain an isolated feature, cf. infra.

²⁰ Reynebeau, 80-88, and infra.

²¹ De Schrijver, 64-66.



during the last third of the 16th century; but that recovery was not comparable to the golden age before 1560. In the second half of the 17th century and in the early years of the 18th century, the economy declined again, primarily because of military events and international competition.

The Spanish-French war started in 1635 and ended in 1659 with the loss of Artois for Spain. Shortly afterwards Louis XIV started his long personal reign (1661-1715), which amounted to an uninterrupted struggle for hegemony in Europe and to a series of wars against the Hapsburgs and the sea powers (the Dutch Republic and Great Britain). In all these wars the Spanish Netherlands were Europe's main battlefield and Louis' main objective. (...) The last of these wars was the War of the Spanish Succession (1702-13), when initially the southern Netherlands came under the control of the Bourbon successor of the last Spanish Hapsburg Charles II. As a consequence of the Peace of Utrecht (1713), the territory of the onetime Spanish Netherlands returned to the Hapsburgs and became Austrian, and the Dutch Republic was allowed to install in these Austrian Netherlands an anti-French barrier, which remained for 65 years. The borders with France agreed in the Peace of Utrecht coincide almost exactly with the present-day Franco-Belgian border. (...) Catholicism continued to be the established state religion, and there was no room for Protestants in Belgium until Joseph II's Act of Tolerance in 1781.

The Austrian sovereignty over the southern Netherlands, which started after the Peace of Utrecht and the Barrier Treaty (1713, 1715), constituted a break with conservative Spain and a link to a more progressive Austria. During the 80 years of Austrian-Hapsburg sovereignty, Belgium suffered from only one foreign occupation (France, 1744-48). Empress Maria Theresa's reign exists in Belgium's historical consciousness as a particularly happy era. Peace went hand in hand with economic renewal following the old industrial and commercial traditions.

Maria Theresa (d. 1780) was a modern enlightened monarch²²; her son, Joseph II, who was sovereign over the Austrian Netherlands from 1780 until 1790, was an even more outspoken enlightened despot²³. (...) His reform policy, which can be considered a general rehearsal of the French Revolution, led among other things to the abolishment of "obsolete" local and corporatist privileges and institutions. Since this was not appreciated by large segments of the population, resistance resulted in the Brabant Revolution (1789-90). (...) With the exception of Luxembourg, all the provinces of the Austrian Netherlands denied Joseph II's sovereignty and proclaimed their independence. (...) Inspired by the United States' Articles of Confederation, the former Austrian Netherlands (without Luxembourg) formed a Confederation of the United Belgian States and set up a "congress". Since the revolutionaries were, however, strongly divided, the conservatives eliminated the

²² See on her reign and approach, also Reynebeau, 96-97.

²³ Or, in the wording of Marc Reynebeau, 94: "Régner ne lui suffisait pas, il voulait réellement gouverner", which led him in 1781 to come to visit 'his' Netherlands, as first sovereign since Philippe II left in 1559. See on his approach, quite different from and less prudent than his mother's, idem, 97-102.



progressives, whose leaders fled to France. Within one year, and until the French annexation in 1795, Austrian authority and the Old Regime were restored²⁴.

In the neighbouring prince-bishopric of Liège, revolution also broke out in 1789. Unlike the Brabant one, it was a progressive movement; it was directly influenced by the French Revolution and installed a democratic regime. But here too, one year later the Old Regime was reinstated and the progressives had to flee to France. From this country came a new, and lasting, revolution.

Annexation by France and Union with the Netherlands, 1795-1830²⁵

The decapitation of Louis XIV and his Austrian wife, Marie-Antoinette, provoked the first Coalition War of Austria and Prussia against France (1791-97). During this war France occupied and annexed the Austrian Netherlands and Liège. Unlike the situation under Hapsburg sovereignty, under French rule the provinces of the southern Netherlands and Liège lost their autonomy and identity. France wanted the Belges and Liègeois to become Frenchmen and aimed at assimilation.

Society was, indeed, profoundly changed: the institutions of the Old Regime were abolished, church property was expropriated, French became the only official language, and the former autonomous provinces were replaced by nine departments, administrative divisions of a unitary state that almost coincide with the present-day nine²⁶ Belgian provinces²⁷. These departments sent representatives to Paris, provided recruits for the never-ending French wars, and took advantage of the nascent Industrial Revolution and of all France as a market for Belgian products. Discontent was general, and conscription and religious persecution became the immediate causes of an anti-French uprising during the last months of 1798; this so-called Peasants War, confined almost entirely to the Flemish-speaking (agricultural) areas, was crushed in the early days of December and was followed by new persecutions. Relief came after Napoleon Bonaparte's coup: a concordance between state and church was signed in 1801²⁸.

Napoleon's administration and dictatorship ended in the catastrophes of Leipzig and Waterloo (1813, 1815), and France was restored to its borders of 1791. However, 20 years of revolutionary reforms and frenchification left a lasting impression. Moreover, for the first time, the southern Netherlands and Liège had had a common history. That new whole was more and more called Belgique, a name that as a matter of fact originally was just an adjective. (...) The Congress of Vienna, drawing a new political map of Europe, decided, without consulting the population or without taking notice of the wishes of the inhabitants, to form out of the former Republic of the United Netherlands (Holland) and the former Austrian Netherlands and Liège (Belgium) an anti-French

²⁴ See for more information on the Brabant Revolution, Reynebeau, 100-105.

²⁵ De Schrijver, 66-68.

²⁶ Note: Since the 1995 division of the old province of Brabant in the province of Flemish Brabant resp. Walloon Brabant the number of Belgian provinces has increased to ten.

²⁷ Yet bore little (geographical) resemblance with the pre-existing principalities, cf. Reynebeau, 110-111.

²⁸ This only accidentally coincides with the year of the introduction on the European continent, in Ghent to be precise, of industrial textile machine-technology after the successful industrial transfer espionage activities of Lieven Bauwens in England.



barrier: the United Kingdom of the Netherlands. This new kingdom was a constitutional monarchy and a unitary state. (...) Yet, there was no return to the Old Regime or to the boundaries of the old principalities. Moreover, the Belgians in the southern half of the kingdom never stopped causing troubles for the king, and large groups contested the amalgamation from the outset. (...)

*The Belgian Revolution and Belgium's Independence*²⁹

In the late 1820's, a new generation of Catholics (Liberal-Catholics) and liberals, in a common hostility to William and the Dutch, formed the so-called Union des oppositions (1828) aimed at a parliamentary regime and at the introduction of freedom of the press, association, religion, education, and language. King William gave in to the demands for liberty in education and language (1829-30), but refused to grant freedom of the press or to introduce parliamentary regime. The Belgian bourgeois discontent coincided in 1830 with a bad harvest and the negative consequences of industrialization. (...) Since Brussels remained a centre of unrest and radical agitation, William I ordered an attack on the capital. There was heavy fighting (...) during September 23-27 (the September Days); the royal army withdrew, and the whole south (including all of Limburg and all of Luxembourg) joined the revolution. A provisional government proclaimed Belgium's independence and called for the election of a congress on 10 November 1830. This congress confirmed independence and provided the country with a constitution. The Belgian Constitution of 1831 was influenced by the French Constitution of 1791, the Dutch one of 1814-15, and the French charter of 1830. Belgium became a parliamentary monarchy with ministerial responsibility and royal inviolability, and it was conceived as a unitary state composed of nine provinces, including, however, important features of *particularism* evidenced by substantial local autonomy³⁰; the constitution recognized the modern liberties of religion, education, association, meeting, press, and language. (...)

An international conference at London recognized Belgium's independence (20 December 1830), imposed a guaranteed and eternal neutrality (...) agreed upon the provisional control by Belgium of all of Limburg and all of Luxembourg, and asked Belgium to accept Leopold of Saxe-Coburg-Gotha as its first king. Leopold I took the oath to the constitution on 21 July 1831.

Not until 1838 did King William accept the loss of Belgium; in 1839 he agreed on the final peace treaty. According to this, Belgium had to cede to the Dutch king half of Limburg (present-day Dutch Limburg) and half of Luxembourg (the present-day Grand Duchy). This reduced Grand Duchy remained in a union with the king and the Netherlands until 1890; since then the Grand Duchy has been independent. Belgium (as well as Luxembourg since 1867) stuck to its imposed neutrality. The main threats to its independence came first from France (the Revolution of 1848, Napoleon III) and later from a unified Germany and pan-Germanism. In early

²⁹ De Schrijver, 68-70; Reynebeau, 116-123.

³⁰ See on the local autonomy of the communes, clearly limiting Leopold's royal powers and prerogatives from the start, Reynebeau, 128-130.



August 1914, the army of the German (Second) Reich, one of the guarantors of a neutral Belgium, invaded the country.

Belgium's 19th century history followed the same broad lines as its European neighbours: industrialization (Belgium was the first on the Continent), bourgeois rule, the rise of a working class, social legislation, and expanding democracy. (...) In 1885 the Belgian Workers party was founded. (...). Under socialist pressure, the first social legislation was introduced and a constitutional reform (1872-93) granted general male suffrage with multiple votes. (...) In 1846 half of the Belgian population still earned its living in the agrarian sector; in the second half of the 19th century this situation changed radically along with major growth of the population. Between independence and the outbreak of World War I, Belgium's population nearly doubled.

*Belgium since World War I*³¹

After the Armistice on 11 November 1918, Belgium was recognized as an independent nation. In the Treaty of Versailles (18 June 1919), neutral Mosenet and the districts of Eupen, Malmédy and Sankt-Vith were ceded by Germany to Belgium³².

The first elections under universal manhood suffrage were held in 1919. Since 1921, universal suffrage and proportional representation have been the two cornerstones of the Belgian electoral system (women only obtained voting rights in 1949).

In 1935, the legal and official language of Belgium was changed from French only, to both Dutch and French.

During the *Blitzkrieg* (the military campaign of May-June 1940), King Leopold III, after an eighteen-day campaign bowed to the inevitable and surrendered on 28 May 1940. The Germans established a military government in occupied Belgium, which initially was responsible for law and order only, and allowed the Belgian institutions to function normally, insofar as they did not harm German interests³³. In the autumn of 1940, a government-in-exile was set up in London. This decision contributed to Belgium's reintegration into the Allied camp. From 1942 on, the London government was able to prepare for the post-war period with genuine authority³⁴. On 19 September 1944, the government returned. Parliament convened on 20 September, and in the king's absence, appointed his brother Prince Karel, as regent³⁵. In 1950, the *royal question* was solved after a nonbinding referendum. The result was indecisive: 57 percent of the participants voted for Leopold III's return. In Flanders 72 percent were in favour, in Brussels 48 percent, and in Wallonia only 42 percent. Amid serious disturbances, Leopold III came home, but he soon asked parliament to vest his prerogatives in his son Baudouin. This reconciled all political tendencies with the crown³⁶. Baudouin ruled for more than 43 years, and

³¹ H. Balthazar, "Belgium since Word War I", in: M. Boudart, M. Boudart & R. Bryssink (hence: Baltazar), 73-85.

³² These territories are French and German speaking. The latter comprise some 80.000 people.

³³ Balthazar, 78.

³⁴ Balthazar, 79.

³⁵ Balthazar, 80.

³⁶ Balthazar, 83.



as time passed by saw the unitary state he inherited substantially transformed³⁷. After his sudden death in 1993, Albert I was king for twenty years, to abdicate in 2013 in favour of his son Philippe I.

³⁷ Cf. *infra*.



QUESTION 1: IDENTIFICATION OF ECONOMIC RIGHTS

The oldest Belgian economic right is the freedom of commerce and industry, dating back to 1795, when the Decret d'Allarde of 1791³⁸ after the French annexation became applicable in Belgium. Large parts of Belgian civil and commercial law date back to the Napoleonic codes of 1804 (Civil Code) and 1807 (Commercial Code). Many – if not most – Belgian lawyers are inclined to equal *economic rights* with the economic rights and freedoms laid down in the latter, as subsequently changed and broadened, under the denominator/denomination *economic law*³⁹.

To study the problems "EU citizens face in exercising economic rights and liberties" in areas such as property, labour and economic enterprise, and include all "subjective legal situations identified in the so-called *economic constitution*"⁴⁰, Belgian economic law-sources alone do, however, not suffice, and fundamental rights and other constitutional freedoms must be taken aboard⁴¹. Doing so cannot hide from view that the original Belgian 1831-Constitution in part markedly reflects French revolutionary (1789) and Dutch constitutional (1815) thinking⁴². Since the first state reform in 1970⁴³, the constitutional developments in Belgium for their part *mutatis mutandis* reconnect to local autonomy which has been around in differing degrees since the middle Ages⁴⁴.

Belgian citizens are free (**personal freedom**)⁴⁵. Feudalism and servitude disappeared after the 13th century⁴⁶. Civil death as a penalty, denying convicted persons all legal existence is abolished since the 1831-constitution and cannot be reintroduced⁴⁷. Citizens are protected against arbitrary detention and barbarous legal penalties (*nullum crimen sine lege*)⁴⁸, and entitled to a due process and judicial equal treatment⁴⁹. The freedom of the press bans censorship. Article 25 of the Belgian Constitution further elaborates the principle by setting up a system of vicarious liability from the author to the publisher, the publisher to the printer, and the printer to the distributor.

³⁸ Cf. *infra*.

³⁹ See for the further elaboration of economic rights flowing from Belgian economic law-sources, *infra*.

⁴⁰ Cf. Introduction to Questionnaire WP5, p. 1.

⁴¹ Many of these freedoms and principles have multiple sources. In this report, however, duplicating (international and EU) sources such as the ECHR and the Protocols thereto, the ICCPR or the EU Charter of Fundamental Rights, to name only some, are not separately referred to.

⁴² To facilitate reading, reference to constitutional provisions will, however, use the current Article-numbers, also when referring to rights and freedoms dating back to the 1831-Constitution.

⁴³ Cf. *infra*.

⁴⁴ See on the role of Principalities and Communes, *supra*.

⁴⁵ Article 12 Belgian Constitution.

⁴⁶ Cf. *supra*.

⁴⁷ Article 18 Belgian Constitution.

⁴⁸ Article 12 (3) and 14 Belgian Constitution.

⁴⁹ Article 13 Belgian Constitution.



The general principles of **equality before the law**⁵⁰ and **non-discrimination**⁵¹ ban the application of different rules to individuals in the same general, objective and impersonal situation. All distinctions of rank have been abolished⁵²; tax privileges of whatever nature are banned⁵³, as are extraordinary tribunals⁵⁴. Ideological and philosophical minorities are protected⁵⁵, and equal access of Belgians to state posts is guaranteed⁵⁶.

The inviolability of domicile protects citizens against domestic intrusions⁵⁷, and is complemented by the **right to privacy** (respect for private and family life)⁵⁸ and the protection of correspondence⁵⁹. Freedom of (political) opinion⁶⁰ and freedom of religion⁶¹ can be seen as additional expressions of the personal freedom one enjoys. This is also the case for the freedom of language use⁶². Language use can be governed only by the law and only as regards public authorities or judicial affairs⁶³.

In economic right's terms, personal freedom implies the **freedom of movement (and residence)**⁶⁴, and is part of the freedom of labour⁶⁵. Additional legal foundations of economic powers connect with the right to own property, the freedom of commerce and industry and the freedom of association.

The **right to property** is constitutionally guaranteed⁶⁶. No one can be deprived of property other than for reasons of public interest and in a manner provided for by law and in return for just compensation, paid in advance⁶⁷. In positive terms, the right enables the owner to dispose of, exploit, and benefit from property and to make a profit from it.

The related equally fundamental **freedom of commerce and industry**, as laid down in the French Revolutionary Decret d'Allarde of 2-17 March 1791 on the abolition of the medieval guilds and corporations, is part of the Belgian legal order ever since the French annexation of 1795⁶⁸. The subsequent Law Le Chapelier of 14 June 1791 strengthened the freedom of enterprise by prohibiting guilds, trade unions and *compagnonnage* (and the related right to strike), was replaced in Belgium on 25 May 1867 by Article 310 of the Criminal Code, and

⁵⁰ Article 10 Belgian Constitution.

⁵¹ Article 11 and 191 Belgian Constitution.

⁵² Article 10 Belgian Constitution.

⁵³ Article 172 Belgian Constitution.

⁵⁴ Article 146 Belgian Constitution.

⁵⁵ Article 11 Belgian Constitution.

⁵⁶ Article 11 Belgian Constitution.

⁵⁷ Article 15 Belgian Constitution.

⁵⁸ Article 22 Belgian Constitution.

⁵⁹ Article 29 Belgian Constitution.

⁶⁰ Article 19 Belgian Constitution.

⁶¹ Articles 20-21 Belgian Constitution.

⁶² Article 30 Belgian Constitution.

⁶³ Since the 1970 State reform, the parliaments of each linguistic community are competent to decide by decree on the use of languages for administrative affairs, education and relations with the public. See on the issue of state reform(s), *infra*, sub actors.

⁶⁴ Article 12(1) Belgian Constitution.

⁶⁵ Article 12 (1) Belgian Constitution; Article 23 (3), 1° Belgian Constitution, and *infra*.

⁶⁶ Article 16 Belgian Constitution. Also guaranteed in Article 544 Civil Code.

⁶⁷ Article 16 Belgian Constitution.

⁶⁸ See on the further elaboration of economic rights flowing from economic law-sources, *infra*.



ultimately repealed by Law of 24 May 1921⁶⁹. Article 4 of the Law can to some extent be seen as a very early prohibition of price agreements in competition law terms⁷⁰.

A noteworthy legal outcome of the freedom of commerce and industry is the freedom of association⁷¹, which also guarantees Belgians to be able to assemble peacefully, and without arms and in accordance with the laws that may govern the exercise of this right, without preliminary authorisation⁷². In political right terms, the **freedoms of assembly and association** laid down in Articles 26 and 27 of the Belgian Constitution imply the freedom to choose to join or not to join an association. In economic right terms, the freedom of association allows individuals to associate with others in order to engage in industrial or commercial transactions and activities, and conclude contracts to do so (contractual freedom)⁷³.

The **freedom of labour** is part of the constitutional right to a decent life⁷⁴. It amounts to workers being free to choose who they work for, and implies the consequent freedom to conclude an individual labour contract to engage in economic activity under the command, authority and control of his employer⁷⁵. "Protective labour laws and trade union activity, resulting from collective bargaining as well as from the direct intervention of the state in a mixed economy", have had a major impact in Belgium⁷⁶. The other rights enshrined in Article 23 relate to the right to social security, health protection and social, medical and legal assistance; the right to decent housing; the right to have the environment protected; and the right to cultural and societal development.

The **right to social security** – the Belgian welfare system.

Social security "has become a permanent feature of Belgian society, along with individual property rights, parliamentary democracy, liability for errors, universal suffrage, and so on, [and] is a stabilising factor in the social order"⁷⁷.

⁶⁹ Criminal Code of 8 June 1867. In France, the law was annulled on 25 May 1864 through the Loi Ollivier, which reinstated the right to associate and the right to strike. Mr. Le Chapelier himself outlived his law only by three years, and died under the guillotine in Paris on 22 April 1794.

⁷⁰ Article 1 prohibited the re-enactment of guilds for conflicting with the French constitution of the time. Article 8 in effect made striking illegal and a criminal offence. Article 4 prohibited associations any concertation with a view to agree on the prices that would be charged for labour, by declaring them unconstitutional and an intrusion of the (French) Declaration of human rights. In competition law terms, this can be seen as declaring price agreements between professionals illegal.

⁷¹ Article 26 Belgian Constitution.

⁷² Article 27 Belgian Constitution. Outdoor assemblies such as (political) manifestations are, however, subject to police laws, and basically require prior authorisation.

⁷³ The contractual freedom is since the Napoleonic Code Civil (1804) part of the Belgian legal order, cf. (still) Article 1123 of the Belgian Civil Code. In addition, the binding force of contracts between the parties thereto is considered as belonging to the Belgian public order since then. Cf. Article 1134 Belgian Civil Code.

⁷⁴ Article 23 Belgian Constitution.

⁷⁵ R. Blanpain, "Labor relations", in: Boudart, Boudart & Bryssinck, 303-309 (hence: Blanpain), 304.

⁷⁶ Blanpain, 304, who continues that "In the Belgian industrial relations system, employers and employees, enjoying a large degree of autonomy, settle their conflicts by means of industrial warfare. (...), to put it in another way, labor relations are, in Belgium, essentially power relations, whereby the decision-making power of the employer is challenged by the collective powers wielded by the workers." See on this concertation, also sub Actors, infra.

⁷⁷ R. Dillemans & D. Simoens, "Social Security", in: Boudart, Boudart & Bryssinck, 336-343 (hence: Dillemans & Simoens), at 336.



The Belgian welfare system that developed gradually during the post-war period is typical of the continental type of Western European welfare system⁷⁸. With the welfare system, the government guarantees basic social rights according to an extensive system of allowances, social goods, and services in such areas as guaranteed income, education, health, housing and culture. This requires a *system of income distribution*. The welfare status of a family is determined by income from labour; a large number of social benefits; free or quasi-free social goods and services; and high taxes and social security contributions to finance the above.

In Belgium, an extensive socialization of the national income goes hand in hand with the maintenance of free enterprise and free choice by the citizens. Thus, the Belgian welfare system is, in theory and in fact, an "optimal combination of freedom and solidarity"⁷⁹. The Belgian social security system is of the so-called Bismarckian type. It is structured around job classification groups and provides social protection to the insured belonging to one of these groups. It comprises three separate systems: social insurance in the private sector organised through the general system for wage-earners; social insurance in the private sector for the self-employed, and a social protection system in the public sector for tenured civil servants⁸⁰.

The right to an allowance depends on contributions made to the system during a certain period of working time, based on each employee's wages and on the earnings of the self-employed. In order to ensure a minimum income to those who slip through the social insurance network, the social security system extends protection through a residual system of social assistance benefits⁸¹.

For wage-earners, there are seven different schemes in the social security system: pensions, health care allowances, sickness and disability benefits, unemployment benefits, child allowances, compensation for employment-related accidents, and compensation for occupational diseases⁸².

Only four schemes exist for the self-employed: pensions, health care allowances, disability benefits, and child allowances.

Tenured civil servants are covered by statute for old age and disability pensions and for child allowances. Their health care coverage is equivalent to that of wage-earners in general.

The social insurance schemes are financed through employer and employee payroll deductions and through payments by self-employed individuals. In addition, they are subsidized by the government. Social assistance benefits, which provide only a safety net, are financed entirely by the government⁸³.

⁷⁸ H. Deleeck, "The Welfare system", in: Boudart, Boudart & Bryssinck, 324-335 (hence: Deleeck).

⁷⁹ Deleeck, 325.

⁸⁰ Deleeck, 327-328.

⁸¹ Deleeck, 327-328.

⁸² The most recent (2012) changes to the Belgian Constitution leads among other things to the introduction of the right to child allowances as a separate constitutionally guaranteed right. See on Belgian state reforms, *infra*.

⁸³ Deleeck, 328.



There are four different areas of social assistance benefits: the unquestionable right of each citizen to a guaranteed income necessary for survival; the right of the elderly to a guaranteed income, claimable by those who have a pension below the guaranteed income or who have no pension at all; the guaranteed income allowance for the handicapped, and the guaranteed child allowance for mothers of children who cannot claim child allowances within the social security system.

"Guaranteeing the financial security of citizens is predominantly a task for the state, as is education, medical care, and internal (state police) and external (army) security"⁸⁴. However, although a substantial percentage of GDP is spent on social security, a considerable part of the Belgian population keeps finding itself in a position of financial (social) insecurity⁸⁵. Overall, four elements in the Belgian social security system (do) prevent a serious degree of poverty: unemployment benefits without (for the time being) any time restrictions, universal and fairly generous child allowances, automatic cost-of-living adjustments, and, as a final safety net, the guaranteed minimum income. Because of this, the problem of poverty/inequality, even during times of crisis, is less acute in Belgium than in some other Western European countries⁸⁶.

Belgian **health care services** include⁸⁷: health care for the young – covering maternity care and child hygiene, concentrating on the medico-social support measures of children from birth to 3 years, prenatal clinics, young children's clinics, day-care centres (crèches and kindergartens), foster-parent services, crisis child-care centres, hostels for young mothers, and short-term day and night centres, compulsory (preventive) school health care services for all children in school (between the ages of 3 and 18), occupational medicine services, to be paid for by the employer who must either subscribe to an existing occupational medicine service or set up his own system, in accordance with the general regulations on the protection of labour, mental health care services, health care provided by doctors and nurses, and by professional groups such as pharmacists, dentists, and a number of paramedical professions, such as physiotherapists, speech therapists, and the like. The hospital sector finally, is undoubtedly, the most extensive health care service in Belgium.

In Belgium, **housing policy** is oriented toward private ownership of middle-sized dwellings, especially for moderate-and-low-income households. In 1981, some 61 percent of all dwellings were owner-occupied. This is by far the largest proportion of owner-occupied dwellings in the whole of Europe⁸⁸. Because of extensive building, strongly stimulated by the government, there has never been any lack of houses since the end of World War II. The most important support for this policy of *social housing* has been housing construction subsidized by semi-public housing societies and by subsidized private housing construction and acquisition. Since World War II, half of all new buildings have been directly subsidized⁸⁹. In the social rent sector, subsidies

⁸⁴ Dillemans & Simoens, 337.

⁸⁵ Deleeck, 330.

⁸⁶ Deleeck, 332.

⁸⁷ J. Bande-Knops & H. Nys, "Health care policy and services", in: Boudart, Boudart & Bryssinck, 369-374 (hence: Bande-Knops & Nys).

⁸⁸ Deleeck, 330.

⁸⁹ Deleeck, 330.



covered 14 percent of all rented dwellings⁹⁰. The 1948 De Taeye Act introduced three kinds of subsidies for promoting broad social ownership: building premiums for persons building their own home, purchase premiums for private individuals buying a dwelling built by a social housing society, and credit facilities such as low-interest mortgages and fiscal advantages. These three provisions are available under certain ceilings, depending on the type of dwelling and the maximum taxable income⁹¹. Psychologically, the ownership of a family home is a high priority for the great majority of Belgians⁹².

Educational freedom is provided for in Article 24 of the Constitution. In Belgium, the **right to education** is not taken lightly; education is compulsory from age six to age eighteen. The three levels of education comprise elementary (six years), secondary (six years), and higher education⁹³. On completion of elementary schools at age twelve, a pupil passes into the secondary education system; the successful completion of secondary education entitles a student to attend higher education courses either at the universities or at non-university schools of higher education. No fees are required for primary and secondary education (both public and private⁹⁴), and only modest fees are charged for higher education. Allowances are granted by the government to students in secondary and higher education depending on parental or family income below a defined minimum⁹⁵. In the area of adult education, one generally distinguishes between⁹⁶: Education for Social Promotion (basic adult education to remedy and/or complement an insufficient level of school education through basic adult education), Vocational Training and Continuing Professional Education (to maintain and/or reorient professional knowledge and skills), and the so-called Sociocultural Education (general adult education to impart a better understanding and a wider participation in the sociocultural life of the country, not to mention measuring the understanding and involvement of citizens in political life at all levels).

As indicated above, the fundamental **freedom of commerce and industry**, as laid down in the French Revolutionary Decret d'Allarde of 2-17 March 1791 on the abolition of the medieval guilds and corporations, is part of the Belgian legal order ever since the French annexation of 1795, and can thus be described as an example of 'sustainable law'. This also applies to many Belgian economic law provisions which are to a greater or lesser extent rooted in the Napoleonic Code of Commerce of 1807.

Yet, sustainable law does not equal constant law. As law is intrinsically evolutive, Belgian economic law and – rights have substantially developed and expanded since 1807.

⁹⁰ Deleeck, 330.

⁹¹ Deleeck, 330.

⁹² Deleeck, 330. Belgians are regularly referred to as having swallowed a brick which has nested permanently in their organism. This feature also partly explains the rather peculiar Belgian views on urban planning, and almost organically grown houses, with lots of extensions and annexes.

⁹³ Deleeck, 329.

⁹⁴ Private education is mainly provided for by private Catholic organisations, which have been embedded in the educational system, also in financial terms, since the 1958-School Pact. Other kinds of private initiative schools exist and are, once approved, equally included. Most of these employ different educational philosophies (Steiner, Montessori, f.i.). Overall, they remain, however, fairly limited in reach. As long as schools have not been approved, they depend entirely on parental and other private financing.

⁹⁵ Deleeck, 329.

⁹⁶ See for more details, G. Deurinck, "Adult Education", in: Boudart, Boudart & Bryssinck, 404-412.



This has led to a myriad of federal rules and regulations⁹⁷ – often inspired by and/or resulting from EU law obligations and Directives – in the obvious areas of commercial⁹⁸ and company law⁹⁹, and the introduction and development of legislation in related areas such as services and establishment¹⁰⁰, financial law and regulation¹⁰¹, legislation as to mortgage and consumer credit¹⁰², insurance and tort law¹⁰³, competition law¹⁰⁴, consumer protection¹⁰⁵, social law¹⁰⁶, patients' rights¹⁰⁷, and privacy¹⁰⁸ and non-discrimination law¹⁰⁹. The right to be compensated for damages inflicted by others has been part of the Belgian legal order since – at least – 1804. The principle led to the development of the precautionary principle in tort law and the subsequent emergence of insurance law covering personal, professional and economic risks alike¹¹⁰.

⁹⁷ The overview provided underneath only serves to illustrate the extent of Belgian economic rights. The list is, therefore, not (intended to be) limitative. Royal Decrees substantiating rights laid down by federal laws are not included. In addition, legislation adopted at the level of the Communities and Regions is not separately listed.

See on the division of competences between the federal and subnational level, *infra*, sub Actors, and for the major recent overhaul of Belgian Economic law, *infra*.

⁹⁸ Law of 13 April 1995 (on commercial agency), Belgian Official Gazette 2 June 1995; Law of 2 August 2002 (on payment arrears in commercial transactions), Belgian Official Gazette 7 August 2002; Law of 19 December 2005 (on precontractual information duties in commercial transactions), Belgian Official Gazette 18 January 2006, err. 13 February 2006.

⁹⁹ Law of 7 June 1999 (the Company Code), Belgian Official Gazette 6 August 1999; Law of 8 August 1997 (on insolvency of companies), Belgian Official Gazette 28 October 1997, err. 7 February 2001; Law of 31 January 2009 (on continuity of undertakings – with a view to preventing insolvency), Belgian Official Gazette 9 February 2009; Belgian Corporate Governance Code of 12 March 2009, Belgian Official Gazette 28 June 2010.

¹⁰⁰ Law of 26 March 2010 (implementing the Services Directive in the Belgian legal order), Belgian Official Gazette 30 April 2010.

¹⁰¹ Law of 22 March 1993 (on credit institutions and the supervision thereof), Belgian Official Gazette 19 April 1993; Law of 10 August 2001 (establishing the "Kredietcentrale", i.e. a system of linking credit providers, so as to provide insight in the credit obligations of credit applicants), Belgian Official Gazette 25 September 2001; Law of 2 August 2002 (financial Mifid-supervision), Belgian Official Gazette 4 September 2002; Law of 24 March 2003 (introducing a basic banc service), Belgian Official Gazette 15 September 2003; Law of 16 June 2006 (the "prospectus law"), Belgian Official Gazette 21 June 2006.

¹⁰² Law of 4 August 1992 (on mortgage credit), Belgian Official Gazette 19 August 1992; Law of 12 June 1991 (on consumer credit), Belgian Official Gazette 9 July 1991, err. 6 August 1991.

¹⁰³ cf. Article 1382 Belgian Civil Code, and *infra*.

¹⁰⁴ Fully fledged competition law was introduced in 1991, and amended in 1999 and 2006. Cf. the Coordinated law of 15 September 2006, Belgian Official Gazette 29 September 2006.

¹⁰⁵ Law of 6 April 2010 (on commercial practices and consumer protection), Belgian Official Gazette 12 April 2010.

¹⁰⁶ Providing an overview of this obviously related area of law would take us far too far, while, more importantly also risking to be so fragmentary as to render it completely superfluous.

¹⁰⁷ Law of 16 June 1990 (on the protection of mentally ill persons), Belgian Official Gazette 27 July 1990; Law of 22 August 2002 (on the rights of patients), Belgian Official Gazette 26 September 2002, err. 20 December 2002.

¹⁰⁸ Law of 29 July 1934 (prohibiting private militia), Belgian Official Gazette 6-7 August 1934; Law of 7 June 1969 (on allowed times for perquisitions in private homes), Belgian Official Gazette 28 June 1969; Law of 10 April 1990 (on private security), Belgian Official Gazette 29 May 1990; Law of 20 July 1990 (on habeas corpus), Belgian Official Gazette 14 August 1990; Law of 19 July 1991 (regulating the profession of private detectives), Belgian Official Gazette 2 October 1991, err. 11 February 1993; Law of 8 December 1992 (on privacy and private data protection), Belgian Official Gazette 18 March 1993; Law of 21 March 2007 (on the use of camera supervision in public and work places), Belgian Official Gazette 31 May 2007.

¹⁰⁹ Law of 30 July 1981 (on dealing with racism and xenophobic acts), Belgian Official Gazette 8 August 1981; Law of 10 May 2007 (on certain types of discrimination), Belgian Official Gazette 30 May 2007, add. 5 June 2007; Law of 17 May 2007 (on gender discrimination), Belgian Official Gazette 30 May 2007, add. 5 June 2007.

¹¹⁰ Law of 30 July 1979 (on fire insurance), Belgian Official Gazette 20 September 1979, err. 18 December 1979; Law of 21 November 1989 (compulsory insurance motor vehicles), Belgian Official Gazette 8 December 1989; Law of 14 July 1994 (on compulsory health insurance), Belgian Official Gazette 27 August 1994, err. 13 December 1994; Law of 28 April 2003 (on the so called group insurance, additional pensions and certain additional social security rights), Belgian Official Gazette 15 May 2003, err. 26 May 2003; Law of 1 April 2007 (on insurance for damages caused by terrorist attacks), Belgian Official Gazette 15 May 2007; Law of 31 March 2010 (on compensation of health damages caused by health professionals), Belgian Official Gazette 2 April 2010.



The preceding general overview also shows that economic freedom as a fundamental right¹¹¹ entails numerous economic rights, which are, however, fragmented and dispersed and, moreover, to be found in all corners of the Belgian legal system¹¹². Shortly before the *bicentenaire* of the Napoleonic Code of Commerce in 2007, the Federal Governmental Service Economy launched a evaluation with a view to modernising and codifying Belgian economic law at the federal level¹¹³ belonging to the competences of the Federal Minister for economic affairs, so as to provide citizens and companies with a global-transversal, coherent, rational and effective code of fundamental economic rights.

From the start, however, some areas have been excluded from its scope. This applies in particular to sectoral legislation such as transport and maritime law, to company law strictly speaking, and major parts of financial and insurance law. The exclusion of company law in essence flows from its relatively recent major codification in 1999¹¹⁴. Pure financial law is left aside, partly in view of the increasing impact of supervisory EU legislation in the field, whereas the marked sectoral orientation of insurance law led to its only partial coverage. These limitations have been deplored by some, calling for a more encompassing code not limited to economic law, thus embracing a more unitary and revolutionary approach based on general principles as to citizens' fundamental rights¹¹⁵. Seen from that angle, the resulting Code of Economic law does, indeed, not equal the Napoleonic codes of 1804 and 1807. At the same time, however, the new Belgian Code definitely amounts to much more than mere coordination and/or simple regrouping of previously existing legal rules. In particular Books IV, V, XI, XIII, XVI, XVII (partim) and XVIII, have effectively been described as amounting to small revolutions¹¹⁶.

Since the Law of 28 February 2013¹¹⁷ on the introduction of the Code of Economic law, the codification culminates in the gradual adoption of the Code of Economic Law¹¹⁸. The Code is of the building-block type,

¹¹¹ G. Horsmans, "Le droit économique. Quel contenu pour quels principes généraux? Ou: le cadre normatif de la démarche plurielle", in: *Handelingen van het Colloquium Codificatie van de economische wetgeving*, Brussel, 8-9 December 2008, FOD Economie, 330 p., 97-121 (hence: Horsmans). The text of the reports of this Conference (in their original languages) is available at: <http://economie.fgov.be>.

According to this author (p. 110), "La liberté économique est (...) à la fois une des facettes de la liberté que les femmes et hommes peuvent revendiquer comme *un de leurs droits les plus fondamentaux* et la voie et le mode les plus qualifiés des actions et des décisions dont l'économie de marché – le régime économique des démocraties – a besoin.", emphasis added.

¹¹² Critical on this fragmentation, Horsmans, 105: "Quel est le bilan des distinctions des spécialisations, des classifications et des catégories que dans les matières commerciales, économiques, financières et sociales, le monde juridique a créé et n'a cessé d'accentuer et de développer?"

¹¹³ Cf. *infra* sub Actors for the division of economic competences between the federal level, and the Regions.

¹¹⁴ Law of 7 June 1999 (the Company Code), Belgian Official Gazette 6 August 1999.

¹¹⁵ According to Horsmans, 99, one could wonder "si avant de réfléchir dans le seul cadre et sous la seule égide du droit économique, il ne s'impose pas en dépasser les limites et celles des classifications juridiques qui les consacrent. La plus belle modernité du droit économique ne serait-il pas de privilégier et de mettre en exergue la vision unitaire de la nature humaine et des actions des attentes, des espoirs et de rêves des femmes et des hommes?"

¹¹⁶ I. Verougstraete, "Wetboek Economisch Recht: overzicht en algemene beginselen", in: *proceedings Colloquium 25 March 2014*, FOD Economie, 106 p., pp. 13-26, at 16, and *infra* for the subjects covered in these books.

¹¹⁷ Belgian Official Gazette 29 March 2013.

¹¹⁸ See for an official general introduction of the Code per 22 May 2013 (in Dutch and French), <http://economie.fgov.be>. See on the codification operation also I. VEROUGSTRAETE, "Een Wetboek van Economisch Recht. Een codificatie van het economisch recht: een noodzaak?" (on the necessity of the codification of Belgian Economic law), *SEW* 2013-10, 406-413.



amounting to a gradual accrual and entry into force of its component 18 Books. Some books are in force at the time of writing, others will do so in the months to come¹¹⁹. For present purposes, the structure of the new Belgian Code of Economic Law is more instructive than the technical details. Some Books do, however, deserve some closer, yet general, attention (*infra*).

- Book I. Definitions (per 12/12/2013)
- Book II. General principles and aims (per 12/12/2013)
- Book III. Freedom of establishment and the provision of services, general obligations for undertakings (per 9/5/2014)
- Book IV. Protection of Competition (per 6/9/2013)
- Book V. Competition and price evolutions (per 12/12/2013)
- Book VI. Market practices and consumer protection (per 31/5/2014)
- Book VII. Payment and credit services
- Book VIII. Quality of products and services
- Book IX. Safety of products and services (per 12/12/2013)
- Book X. Economic contracts (per 31/5/2014)
- Book XI. Intellectual Property
- Book XII. The law of the electronic/digital economy (per 31/5/2014)
- Book XIII. Concertation (per 30/4/2014)
- Book XIV. Liberal professions
- Book XV. Sanctions (supervision and application of the Code) (per 12/12/2013)
- Book XVI. Alternative consumer dispute resolution
- Book XVII. Specific judicial procedures (per 31/5/2014)
- Book XVIII. Governmental economic measures called for in situations of major crisis (per 30/4/2014).

The overall general principle of the Belgian Code of Economic Law is the freedom of economic activity (Article II-2 and Article II.3) so as to guarantee 1) the freedom of economic enterprise, 2) the fairness of commercial transactions, and 3) a high level of consumer protection. Book III in essence contains the Belgian provisions implementing the Services Directive on market access, authorisation procedures, and the general obligations of information and transparency¹²⁰. Book IV recasts the institutional setup of competition law enforcement in Belgium as it stood since the 2006-revision. In addition, Book IV attributes additional powers and instruments to the newly established Belgian Competition Authority. From a substantive law point of view, however, Belgian competition law keeps aligned to EU competition legislation¹²¹. Book V does away with the remaining Belgian post war regime of price regulation and prior authorisation in some sectors to introduce a system of price level supervision. A newly established Price Observatory will monitor markets to detect dysfunctions in

On 25 March 2014, the FOD Economy organised a Colloquium on the Code of Economic Law. Its proceedings and presentations are accessible via <http://economie.fgov.be>

¹¹⁹ The date of entry into force is added in brackets. Some books have, however, not been adopted yet, while others await 'their' Royal Decree as to their entry into force.

¹²⁰ See on Market access, a.o. H. Swennen, "Toegang tot de markt", in: 207-243, in: FOD Economie, *Handelingen van het Colloquium Codificatie van de economische wetgeving, Brussel, 8-9 December 2008*, FOD Economie, 330 p., 207-243, and P. De Bandt, "Boek III WER: Toegang tot de markt", in: *Proceedings of the Brussels Colloquium of 25 March 2014 on the Code of Economic Law*, FOD Economie, 2014, 106 p., 37-43.

¹²¹ See on the institutional and enforcement changes brought about by Book IV, a.o. A.M. Van den Bossche, "Boek IV van het Belgisch Wetboek van Economisch Recht: bescherming van de mededinging" (on Book VI Code of the Code of Economic Law), *SEW* 2013-10, 414-429; B. Amory, "Comportements sur le marché: libre concurrence et pratiques du marché (Livres IV, V et VI) (on market behaviour – Books IV, V and VI of the Code of Economic Law), in: *Proceedings of the Brussels Colloquium of 25 March 2014 on the Code of Economic Law*, FOD Economie, 2014, 106 p., 47-72, and in particular 47-56.



the market and abnormal price levels as early as possible, with a view to (also) allow the Competition Authority to take provisional measures when needed¹²².

Most consumer protection law is regrouped in Book VI¹²³. Market practices legislation is recast, improved and amended to (also) implement the latest EU consumer Directives in the Belgian legal order¹²⁴. Book VI also covers (pre)existing precontractual information rights (Article VI.2), EU consumer Directive implementing rules on consumer protection in distance contracts and sales outside business premises¹²⁵, rules as to the moment of transferring risk (Article IV.44), new rules as to liquidation sales (Article VI.22) and Belgian sales provisions (Article VI.25 et seq.), seemingly for ever juxtaposing Belgian representatives of (self employed) detail traders and (chain) retailers.

Although financial law is not fully covered by the codification of the Code of Economic Law¹²⁶, Book VII does deal with consumer related financial rules such as credit and payment services, consumer and mortgage credit rules, rules as to the right to a basic bank service, and the rules allowing to protect credit providers and consumers against incurring too many credit-debts. The right to products and services of high quality is subject of Book VIII, bringing together the Belgian rules as to normalisation, accreditation, certification and metrology. The safety of those products and services is dealt with in Book IX. The (intended retracted) concertation of Book XIII is dealt with infra sub Actors. Books XV to XVII have a particular consumer judicial protection focus, in that they strengthen the enforcement of consumer rights. Book XV does so in both criminal and administrative law proceedings¹²⁷. Book XVI does so by providing in Alternative Dispute Settlement procedures in consumer

¹²² See on the changes brought about by Book V, a.o. H. Swennen, "Boek V van het Belgische Wetboek van economisch recht: de mededinging en de prijsevoluties" (on Book V: Competition and price evolutions), *SEW* 2013-10, 430-437, B. Amory, "Comportements sur le marché: libre concurrence et pratiques du marché (Livres IV, V et VI) (on market behaviour – Books IV, V and VI of the Code of Economic Law), in: *Proceedings of the Brussels Colloquium of 25 March 2014 on the Code of Economic Law*, FOD Economie, 2014, 106 p., 47-72, and in particular pp. 56-62.

¹²³ See for an early assessment of the changes brought about by Book VI, a.o. B. Amory, "Comportements sur le marché: libre concurrence et pratiques du marché (Livres IV, V et VI) (on market behaviour – Books IV, V and VI of the Code of Economic Law), in: *Proceedings of the Brussels Colloquium of 25 March 2014 on the Code of Economic Law*, FOD Economie, 2014, 106 p., 47-72, and in particular, pp. 62-72.

¹²⁴ Including, in particular, the newest important Directive on consumer rights, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 [2011] OJ L 304/64, to be implemented in all the Member States by the end of 2013.

¹²⁵ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in distance contracts [1997] OJ L 144/19.

¹²⁶ Cf. supra.

¹²⁷ See for more details on Book XV, a.o. K. Bijttebier & R. Feltkamp, "Marktregulering (Boeken XIII, XV, XVI en XVIII)" (on market regulation – Books XIII, XV, XVI and XVIII), in: *Proceedings of the Brussels Colloquium of 25 March 2014 on the Code of Economic Law*, FOD Economie, 2014, 106 p., 73-86, and in particular p. 80-82.



disputes outside courts, including their on-line settlement¹²⁸. Book XVII introduces collective consumer actions in the Belgian legal order, and strengthens the existing Belgian injunction procedure¹²⁹.

In the coming months and year(s) many academic and professional conferences and contributions will be devoted to the novelties c.q. the impact of the Belgian Code of Economic Law for citizens' economic rights. At this stage, it is, however, not possible to provide a comprehensive or full account thereof.

QUESTION 2: NATIONAL SOURCES OF ECONOMIC RIGHTS

Belgian economic rights have multiple sources. The law applicable in Belgium finds in origin in international, European, national and subnational legislation. From a Belgian point of view, multilevel governance has thus been around for a very long time. The distinction between national sources of economic rights on the one hand, and international and European sources on the other, is therefore somewhat artificial.

The Belgian Constitution of 1831 was a "model for liberal Europe"¹³⁰, in that it endowed the citizens of the newly established state with a substantial number of civil and political liberties¹³¹. Some of these have clearer economic (rights') implications than others, and have been around in Belgium long before one started to legally distinguish between first (civil and political) and second generation (economic and social) citizens' and human rights. Later amendments introduced a number of socioeconomic rights.

In addition, economic rights are enshrined in Belgian federal laws, and in the decrees of the Parliaments of Communities and Regions.

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF ECONOMIC RIGHTS

As indicated above, the distinction between national sources of economic rights on the one hand, and international and European sources on the other, is not decisive in the Belgian legal context.

Since the *Fromagerie Le Ski* judgment of the Court of Cassation of 27 May 1971¹³², Belgium adheres to the monist theory, with European and international law applying automatically in the Belgian legal order and taking precedence in case of conflict. The *Le Ski* judgment, therefore effectively amounts to the Belgian equivalent of the equally fundamental *Costa v. Enel* case of the European Court of Justice¹³³. This also explains why the new

¹²⁸ See for more details on Book XVI, a.o. K. Bijttebier & R. Feltkamp, "Marktregulering (Boeken XIII, XV, XVI en XVIII)" (on market regulation – Books XIII, XV, XVI and XVIII), in: *Proceedings of the Brussels Colloquium of 25 March 2014 on the Code of Economic Law*, FOD Economie, 2014, 106 p., 73-86, and in particular p. 77-80.

¹²⁹ See for more details on Book XVII, a.o. H. Boularbah, "Protection juridictionnelle: action en cessation et actions collectives (Livre XVII)" (on judicial protection, Book XVII), in: *Proceedings of the Brussels Colloquium of 25 March 2014 on the Code of Economic Law*, FOD Economie, 2014, 106 p., 87-98.

¹³⁰ Stengers, 91.

¹³¹ R. Senelle, "The current Constitutional system", in: Boudart, Boudart & Bryssink, 169-200 (hence: Senelle), 198-199. The 1831 Constitution influenced the constitutions of Spain (1837), Greece (1844-1864), Luxembourg (1848), Piémont-Sardinia (1848), Prussia (1850) and Bulgaria (1854).

¹³² Cass. 27 May 1971, *Arr.Cass.* 1971, 959.

¹³³ Case 6/64 *Costa v. Enel* [1964] ECR 1203.



Code of Economic Law does not explicitly refer to concrete international Treaties, EU law or to the case law of the ECHR or ECJ¹³⁴.

Belgium is a Member State of the European Union since its establishment in 1957. Treaty provisions, Regulations and Agreements are directly applicable in the Belgian legal order. Many of the national sources of economic rights have an EU origin. This applies in particular to national law implementing European Directives. This is certainly the case in the areas of consumer law and financial law. In addition, the implementation of the Services Directive led to major amendments to economic law instruments at all levels (national, regional and local).

As far as international sources are concerned, Belgium has been an early member and signatory state of most international legal instruments with economic rights' implications¹³⁵.

Belgium took the initiative in the Benelux Treaty (5 September 1944) and was one of the first signatories of the UN charter (26 June 1945). It participated in the Bretton Woods conference (July 1945), took part in the Marshall Plan, joined the Organization for European Economic Cooperation (16 April 1948), and was the host of, and a partner in, the Brussels Pact (17 March 1948). Thus Belgium was from the very beginning one of the moving forces behind the foundation in 1949 of the Council of Europe, the European Coal and Steel Community (ECSC) and NATO¹³⁶. Belgian was party to the 1947 General Agreement on Tariffs and Trade, and is a signatory state of the succeeding World Trade Organisation since its establishment in 1995. The ECHR is part of the Belgian legal order since 1955. Belgian signed the 1966 (UN) International Covenant on Civil and Political Rights (ICCPR) on 10 December 1968¹³⁷.

QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

The EU Charter of Fundamental Rights is an integral part of the Belgian legal order since the ratification of the Treaty of Lisbon. From a Belgian law point of view, its legal status differs not from other EU sources dealt with above.

QUESTION 5: JURISDICTIONAL ISSUES

All civil liberties of Belgian citizens are also granted to all foreigners on Belgian territory, apart from the exceptions provided for in law. This constitutional principle of equal treatment is guaranteed in Belgium since its 1831-Constitution¹³⁸. Whereas political activities by foreigners may be lawfully limited by Article 16 ECHR,

¹³⁴ In the view of the Minister, such references are, indeed, superfluous in view of their direct effect in the Belgian legal order. See discussion of the Draft Code in the Belgian Parliament, Doc.53 2543/001, p. 7. Along very similar lines, Verougstraete (2014) 21, qualifying even the general reference in Article I.1 of the Code of Economic Law to the primacy of international agreements and EU law as, in essence, "superfluous" (own translation).

¹³⁵ A full list is not provided. The instruments listed underneath do, however, illustrate the point made.

¹³⁶ See for more information on Treaties concluded by Belgium, <http://diplomatie.belgium.be/en/treaties/>

¹³⁷ Yet only ratified this ICCPR on 21 April 1983, see for a list of Signatory States and their ratifications, a.o. http://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights#Parties_to_the_covenant

¹³⁸ Article 128, 1831-Constitution, now to be found in Article 191.



the same does not hold true to the same extent in the EU context. Within the scope of application of the EU Treaties, Belgian and non-Belgian EU-citizens must be treated alike¹³⁹. Since the introduction of EU citizenship in the EU legal order (Treaty of Maastricht – 1991-1993), EU citizens cannot be precluded from taking part in municipal and European Parliament elections. Economic freedoms can be relied upon in Belgian courts and tribunals by all EU citizens.

QUESTION 6: ACTORS

When turning to the Belgian actors involved in defining and setting economic rights' standards, one must distinguish between the legislative actors in the Belgian constitutional system, and other actors.

The legislative institutional actors: Parliament, Government, and Political parties

Belgium is a parliamentary federal monarchy. At the federal level, parliament is – for the time being – of the bicameral type (Chamber and Senate¹⁴⁰). At the level of the Communities and Regions¹⁴¹, parliaments are mono-institutions. At all levels, the legislative supremacy of the legislature has altered over the course of time, in that the legislature has been losing ground to the executive branch, particularly to the government.

In addition, there has been considerable growth in de facto powers, alongside legal powers¹⁴². Political parties are the main force in this regard. Political parties are considered the holders of political power, as "permanent citizens' organisations, representative of the various different threads of public opinion"¹⁴³. The actual powers of political parties are, at the same time subject to the activities of a growing number of pressure and/interest groups. The most important of these are the 'social partners': business and large trade union organizations. These groups significantly influence social and economic matters. Other groups are more specialized: professional organizations such as those of pharmacists or doctors, farmers, women's rights movements, war veterans, the retired, young people, linguistic groups, or religious ones. The role of the press in political life is especially important¹⁴⁴.

Belgium is a representative constitutional monarchy¹⁴⁵. Political action by the king without the consent of the ministers is absolutely excluded. The king is informed by the prime minister of the agenda of cabinet meetings. His actual role is in fact, however, limited to put his ministers on their guard, to advise them and to warn them

¹³⁹ Article 7 EEC, now to be found in Article 18 TEU.

¹⁴⁰ The role of the Senate is, however, gradually changing. In the future, its role will transform from the present second chamber into an essentially "reflective" institution, with no automatic role in legislative activity.

¹⁴¹ Cf. infra.

¹⁴² Senelle, 172.

¹⁴³ Senelle, 172.

¹⁴⁴ Senelle, 172-173, and infra.

¹⁴⁵ After his sudden death in 1993, King Baudoin was succeeded by his brother. Albert II abdicated in favour of his son Philippe in 2013.



in case of necessity¹⁴⁶. This is particularly relevant during a governmental crisis or during the formation of a new government after elections. During his long reign (1950-1993), King Baudouin was only once not able to adhere to the long-established constitutional tradition of royally going along with, as in rubber-stamping/signing national-parliamentary approved laws. The openly royal unwillingness to sign the law conditionally allowing legal abortion was solved *à la belge*¹⁴⁷.

In Belgium, the government in essence assumes the role of "interface between the legal and the de facto powers. This is why, apart from a few rare exceptions, governments have increasingly become coalition or 'cabinet' governments"¹⁴⁸, representing the leading political parties brought to power by the electorate. Parliament's role has evolved accordingly, in that "parliamentary work is first of all prepared by the government, which must keep a watchful eye on the parliament if it is to successfully pass its policy program. Generally, the bills that stand a good chance of adoption are introduced by the government"¹⁴⁹. In Belgium, the government has "thus become the motor driving parliament and directing its work. Governmental stability [thus also] requires a disciplined majority, which, for important matters, often results in party-line voting"¹⁵⁰.

This is the case at both the federal and the regional level(s). This calls for some further elaboration of the evolution from unitary state to the present-day federal Belgium with parallel actors, all exclusively competent to legislate in their respective areas of competence¹⁵¹.

From unitary state to the emergence of Belgium as a federal country

The history of Belgium since the end of World War II is a typical example of the slow yet unavoidable transformation of a unitarian state into a state with a federal-type structure, culminating in the institutionalization of the cultural diversity of its component parts¹⁵². It has been advanced that "without the monarchy, the gradual transformation of the Belgian state would have been impossible"¹⁵³. In addition, "King Baudouin (d. 1993), in a rather strange return to the past, has assumed the same task as his Burgundian predecessors; namely, rallying and keeping together the component parts of a multicultural Belgium"¹⁵⁴.

Belgium has been divided into four linguistic regions by the laws of 2 August 1963 and 23 December 1970, on the official use of the different languages both of which pertain to the language used in administration. The linguistic regions are the Dutch-speaking Region, the French-speaking Region, the German-speaking Region, and the bilingual Brussels-Capital Region.

¹⁴⁶ Senelle, 175.

¹⁴⁷ The government declared the King temporarily unavailable to perform his royal duties for the time needed to approve the law on his behalf.

¹⁴⁸ Senelle, 173.

¹⁴⁹ Senelle, 173.

¹⁵⁰ Senelle, 174.

¹⁵¹ Cf. *infra* for the ways to solve eventual ensuing conflicts.

¹⁵² Senelle, 199.

¹⁵³ Senelle, 200.

¹⁵⁴ Senelle, 200, and *supra* for the Burgundian era.



The state reform of 1970-71 ended the unitary state, and led to the inclusion in the Constitution of three new territorial divisions: the linguistic Regions just mentioned, the Cultural Communities – responsible for cultural, educational, and linguistic matters – and three Regions: Flanders, Wallonia and Brussels¹⁵⁵, responsible for matters of socioeconomic importance¹⁵⁶: With the second state reform of 1980, the Cultural Communities were remodelled into three Communities - the Flemish, the French and the German-speaking Community¹⁵⁷, to take into account their new responsibilities for health and social services¹⁵⁸. More state reforms followed in 1988, 1993, and 2001. The sixth state reform (2011) is currently being implemented.

Since 1993, Article 1 of the Belgian Constitution defines Belgium as a federal State, composed by the Communities and the Regions. In reality, however, this *Belgian federalism* has more confederal than federal features. The Belgian federal State does not result from the classical centripetal evolution with previous separate entities/states regrouping in a federation – as in the United States, or Germany for that matter – but rather from a centrifugal evolution leading to the gradual dissolution of the unitary state set up in 1830, into a federal-type structure, with far-reaching autonomy for the composing parts. From a historical point of view, this evolution in essence reflects the long-standing feature of particularism and/or local autonomy¹⁵⁹. In legal terms, it has led to a complex system of parallel – exclusive, non-concurring – competences, as illustrated, for instance, by the absence of any formal hierarchy between federal laws and subnational legislation of Regions and Communities and/or the treaty making powers of all entities for the matters within their competence (*in foro interno, in foro externo*). The latter explains, for instance, why changes to the EU treaties have to be ratified by all (six) parliaments.

In the present state of the law, the Belgian state has a complex structure. The national territory is structured asymmetrically, and divided into ten provinces, four linguistic regions, three Communities and three regions. These different substructures overlap to varying degrees. The bilingual area of Brussel-Capital for instance, constitutes a Region, but not a Community¹⁶⁰, whereas the German linguistic area constitutes a Community, but not a Region¹⁶¹. The territorial asymmetry is complemented with organic asymmetry. The northern part of the country has one Flemish Parliament and government for matters pertaining to both the Flemish Community and the Flemish Region. The southern part of the country has a different council with an executive for each Community and Region. The Walloon Regional Council and Walloon Regional Executive deal with Walloon regional affairs, whereas matters concerning the French Community are dealt with by the French

¹⁵⁵ Vlaams Gewest, www.flanders.be; Région wallonne – Wallonische Region, www.wallonie.be; Brussels Hoofdstedelijk Gewest – Région de Bruxelles-Capitale, www.brussels.irisnet.be.

¹⁵⁶ Senelle, 180, and infra for the current competences of each layer.

¹⁵⁷ Vlaamse Gemeenschap, www.flanders.be; Communauté française, www.cfwb.be; Deutschsprachige Gemeinschaft, www.dglive.be.

¹⁵⁸ Senelle, 180.

¹⁵⁹ Dealt with earlier, cf. supra. Rather intriguingly, however, the Regional authorities engage in a fairly centralist approach as to the 'lower' levels of provinces and communes.

¹⁶⁰ The Flemish and the French Communities are responsible for institutions that, because of their occupation or their organization, are to be regarded as belonging exclusively to their respective Community.

¹⁶¹ The regional affairs of the area are overseen by the Walloon Region.



Community Council and the French Community Executive. Matters concerning the (small) German-speaking Community belong to the competence of the Council and Executive of the German-speaking Community¹⁶².

In terms of competence attribution, Communities and Regions have – for the time being – attributed competences, with the *Federal State* retaining residual powers¹⁶³. The sixth state reform (2011) amounts to a considerable number of additional transfers of federal competences to the Communities and Regions¹⁶⁴.

Since the state reform of 1970, the *Communities* have had jurisdiction over cultural affairs, language, international cultural cooperation, and the school system. In the case of the school system, however, the Communities' powers were initially restricted to responsibility for art education. Later state reforms enlarged the scope of the Communities' responsibilities, which now include audiovisual media, advertising on radio and TV and support of the press, education, health policy, assistance to individuals (such as protection of youth, social welfare, aid to families, immigrant assistance services, and social assistance to prisoners), and fundamental scientific research.

The implementation of the sixth state reform (2011) will complete and/or add (full or partial¹⁶⁵) competences in health policy (prevention, homes for the elderly, residential care, centres for day-care, revalidation, mental health and primary care-taking), family policy (child allowances, adoption and birth allowances, child day-care centres – crèches and kindergartens –), and in the areas of justice (judicial aid, youth protection), electronic communication, film rating, and exchange students.

The *Regions* are competent for socioeconomic matters. They are responsible for environmental and urban planning; agriculture, water supply and water distribution, housing and fiscal policy related thereto, public works, energy policy, transport, the environment, town and country planning, nature conservation, foreign trade and economic policy, and supervise the provinces, municipalities and intercommunal utility companies.

The implementation of the sixth state reform (2011) will complete and/or add (full or partial¹⁶⁶) competences in agriculture, labour market policy (unemployment policy, outplacement, economic migration, social economy), in traffic and mobility policy (traffic regulation, traffic safety, driving education and testing, inland waterways), local governance policy (provinces, cities, disaster relief), housing and planning (rental and lease law, expropriation), the area of economy and industry (permits,

¹⁶² The (even more) complex institutional setup of the bilingual area of Brussels-Capital Region is left aside in this overview.

¹⁶³ Article 35 of the Constitution leading to the reversal of this division, making the federal level only competent in attributed areas, has not entered into force yet, as the political parties have not been able to establish/decide upon the limitative list of competences which would remain federal. See for a general overview of the current distribution of competences below, and for more details, http://www.belgium.be/en/about_belgium/government/.

¹⁶⁴ Parliamentary approval of the political agreement as to this sixth state reform occurred on 19 December 2013. Since the implementation process is not completed (and will take most of the next legislature after the elections of 25 May 2014), the (gist of the) new competences will be mentioned separately.

¹⁶⁵ Partial competences is used here to denote the situation of fragmented competences, with a division between the federal level (framework, general conditions) and the subnational level(s). Cf. *infra*.

¹⁶⁶ Cf. previous note and *infra*.



entry to the professions, and price control in areas such as waste policy, parts of the electricity market, taxi services, teledistribution, renting of certain goods, the hotel function of residential care, public gas distribution and water policy) and the areas of energy and environment (distribution tariffs of gas and electricity, supervision of waste policy regulation).

Communities and Regions can enter into agreements with each other for cooperation in intercommunity – and interregional matters¹⁶⁷. The special law of 8 August 1988 provides for cooperation in the following interregional matters: hydrology and commerce on those waterways that cross the borders of a Region; harbours that extend over the territory of more than one Region; and works for common city traffic and local traffic and taxi companies that extend over more than one Region¹⁶⁸. Agreements are made between the Regions and the state to cover aid, usage, and development of telecommunications and telecontrol networks that cross regional boundaries in matters of commerce and security. Agreements are made between the Communities over the merchant marine training colleges in Ostend and Antwerp and their boarding schools¹⁶⁹.

The special law of 8 August 1988 further provides for advisory procedures pertaining to all supra-regional matters. The national/federal parliament is committed to discuss the outlines of national energy policy; technical safety measures for traffic; European and international institutions; air traffic; and the preparation of negotiations and the implementation of plans for European institutions insofar as they pertain to agricultural policy or to matters that belong to the specific fields of competence of the Regions¹⁷⁰.

To conclude this general overview, it must be stressed that, for the time being, the competence attributions to the Communities and Regions does not amount to the transfer of homogeneous packages of responsibilities.

In economic matters, the special law of 8 August 1988 limits the autonomy of the Regions to reflect the (Belgian) economic and monetary union. This enables the federal (Belgian) parliament to establish *general regulations* pertaining to the responsibilities of the authorities, consumer protection, the organisation of industry, and the optimal conditions for economic expansion. Parliament is also responsible for monetary policy; financial policy; conservation; regulation of and control over the savings, credit, and insurance agencies; banking and insurance law; prices and pay policy; the right of competition; trade practices; commercial and company law; residency requirements; industrial law; and social law. This explains in particular why the new Belgian Code of Economic law dealt with above is federal.

A similar fragmentation exists in the Community competence areas of education and health care policy. Although education became a genuine competence of the Communities since the State reform of 1988, a number of matters remain reserved to the federal level. These include the ages for

¹⁶⁷ Senelle, 191-192.

¹⁶⁸ Senelle, 191-192.

¹⁶⁹ Senelle, 191-192.

¹⁷⁰ Senelle, 192.



compulsory school attendance; the minimal conditions for the awarding of diplomas; and pension regulations for the staff. In the area of health care, both curative health care in and out of hospitals, and preventive health care, including health education, have been attributed to the Communities. There are, however, major exceptions, both explicit and implicit. Examples of the latter are the federal legislation on medication and the federal law governing the medical profession. Among the explicit exceptions one finds the so called organic provisions of the Hospitals Act, the financing of the operation of hospitals, health and disability insurance, the basic rules for the planning and financing of hospital construction, the installation of large-scale, high-cost medical equipment, the recognition of hospitals insofar as it has any financial effect, and the designation of university hospitals¹⁷¹.

Other actors: social partners and organisations

Decentralisation, pluralism, and liberty of choice are the most essential characteristics of the Belgian system of social and socioeconomic administration¹⁷². These are found to a lesser degree in other continental European countries¹⁷³.

Belgium has a long-standing practice of regulation and social pacification, and developed into a consultation economy. This involves the social partners – employers and unions – to a substantial extent in decision making. By 1972, the Central Economic Council, for instance, listed no less than 156 different socioeconomic bodies where management and workers met¹⁷⁴. Social organisations and associations of workers, employers, farmers and shopkeepers thus share responsibility for regulating, managing, and implementing the system by means of a network of councils providing consultation, advice, and administration¹⁷⁵.

Free collective bargaining is one of the major characteristics of Belgian labour relations. The fact that "collective agreements set only minimum conditions makes it possible to conclude collective agreements at different levels and to develop a system of cumulative bargaining: at the national interindustry level, at the sectoral level, at the regional level, and finally at the enterprise level"¹⁷⁶.

Membership in trade unions is free. Belgium has, however, traditionally one of the highest degrees of unionization in the EU¹⁷⁷, making the trade unions a major actor in the setting of economic rights norms, both directly and indirectly. Trade unions are organised along political family lines. The most important ones are the Confederation of Christian Trade Unions (ACV/CSC)¹⁷⁸ and the Socialist Trade Union Movement

¹⁷¹ Bande-Knops & Nys, 369.

¹⁷² Deleecq, 325.

¹⁷³ Deleecq, 324-325.

¹⁷⁴ Balthazar, 82.

¹⁷⁵ Deleecq, 324-325.

¹⁷⁶ Blanpain, 308.

¹⁷⁷ In 1990, almost 70% of Belgian workers belonged to trade unions, R. Blanpain, 305. Although the figure may have changed somewhat, the main feature has remained the same.

¹⁷⁸ www.acv-online.be



(ABVV/FGTB)¹⁷⁹. The Liberal Trade Union Movement (ACLV/CGSLB)¹⁸⁰ is a markedly smaller player. The principal association of employers is the Federation of Belgian Enterprises (VBO/FEB)¹⁸¹. The Belgian Business Association (Unizo) organises the small(er) firms¹⁸². As more economic competences have been/are being transferred from the national to the regional level, regional organisations such as the Flemish Employers' Association¹⁸³, the Walloon Employers' Association, and the Brussels Federation of Employers have gained in importance. The employers' organisations not only give legal, fiscal, economic, and other advice to their members, but also engage in collective bargaining at national, regional or sectoral level¹⁸⁴. The ensuing process of decision making, "in which the social partners (employers and employees organisations) set the tone and the government and parliament play only a subordinate role", has been defined as *democratic corporatism*, and clearly reinforced the excessive growth of social expenditure during the years of abundance¹⁸⁵.

Compulsory health insurance is implemented by welfare societies or mutual insurance funds, with again the Christian and socialist societies being by far the most important ones. Membership in a welfare society is compulsory, but the choice of which one to join is free¹⁸⁶. Unemployment benefits are paid out by the trade unions, dealt with above¹⁸⁷. At the national level, health care policy is to a great extent determined through the mechanisms of health and disability insurance. Such insurance is legally required for almost all inhabitants of Belgium, and implemented by the mutual insurance funds. They negotiate with health care providers concerning the prices the insured parties are to be charged for services provided. These negotiations are conducted by a committee of doctors and representatives of the mutual insurance funds¹⁸⁸. Another health insurance policymaking body is the technical-medical council, on which the medical faculties are represented along with the mutual insurance funds and organisations of doctors. This body advises on the 'nomenclature', the list of medical services reimbursed or paid for directly by the health insurance organizations. Inclusion in or exclusion from this list of certain services helps determine health care policy¹⁸⁹. This constant participation of those directly involved is in fact a leading characteristic of government health care policy. This can also be seen in the existence of a great number of official consultative committees and deliberating bodies, in both curative and preventive health care. Efforts are made on these committees to achieve a consensus of all interests involved; the government then enshrines this consensus in its decision¹⁹⁰. Within the framework of the Belgian

¹⁷⁹ www.abvv.be

¹⁸⁰ www.aclvb.be

¹⁸¹ http://vbo-feb.be/en/about_feb/

¹⁸² Belgian business association (UNIZO): <https://www.unizo.be/index.jsp>

¹⁸³ <http://english.voka.be/english/aboutvoka/Pages/default.aspx>

¹⁸⁴ Blanpain, 306.

¹⁸⁵ Deleeck, 333.

¹⁸⁶ Deleeck, 325.

¹⁸⁷ Deleeck, 325, and supra.

¹⁸⁸ Bande-Knops & Nys, 369-370.

¹⁸⁹ Bande-Knops & Nys, 369-370.

¹⁹⁰ Bande-Knops & Nys, 369-370.



welfare system, the social organisations of various ideologies also play an active part in the building and financing of housing through regional housing societies¹⁹¹.

Other actors of the Belgian consultation economy: organised consultation and concertation

A distinct feature of the Belgian consultation economy is its abundance of consultative organs. During the recent evaluation of Belgian economic law dealt with above, some 30 (!) distinct consultative organs and bodies have been identified. Although the ensuing prior consultation of all actors involved has been described as a fundamental Belgian principle of Belgian good economic law¹⁹², Book XIII of the Code of Economic Law sets out to substantially weed in this proliferation of consultative bodies, by reinforcing the steering role of the Central Economic Council (Centrale Raad voor het Bedrijfsleven/Conseil Central de l'Economie)¹⁹³.

At the same time, one cannot ignore that the formally organised social and professional concertation, is but one side of the Belgian consultation economy. Unfortunately, the (growing) EU good practice of wide and public consultations on the basis of Green or White Papers, is not standard (yet) in the Belgian legal system¹⁹⁴. Parliament(s) occasionally organise(s) public hearing sessions to be informed on experts' view with regard to planned legislation. In many cases, however, reactions of interested circles to intended legislation will either amount to unilateral declarations in the press, or result in (confidential) discussions with befriended and/or politically affiliated members of parliament¹⁹⁵. In a similarly informal, yet substantially important vein, interest groups such as Testaankoop (one of the major Belgian consumer organisations)¹⁹⁶, Gaia¹⁹⁷ (animal rights protection) or for that matter Belgian branches of international organisations such as Unicef or Amnesty International, obviously have their ways to make their points of view known to decision-makers at all levels, and can thus not be left unmentioned¹⁹⁸.

QUESTION 7: CONFLICTS BETWEEN RIGHTS

As indicated in the previous section, in the Belgian legal order, economic rights are dealt with both at the federal and regional level(s), with economic competences being heterogeneous and fragmented. Exercising one's exclusively legislative competences is therefore relatively prone to impinge on another's exclusive

¹⁹¹ Deleeck, 330.

¹⁹² Cf. Horsman, 104, "La consultation préalable de tous les milieux intéressés est un principe fondamental d'un bon droit économique, et son application doit se faire dans le même esprit."

¹⁹³ <http://www.ccerb.fgov.be>. See on the implications of Book XIII, a.o. K. Bijttebier & R. Felkamp, "Marktregulering (Boeken XIII, XV, XVI en XVIII)" (on market regulation – Books XIII, XV, XVI and XVIII), in: *Proceedings of the Brussels Colloquium of 25 March 2014 on the Code of Economic Law*, FOD Economie, 2014, 106 p., 73-86, and in particular pp. 76-77.

¹⁹⁴ It is, however, not entirely unheard of either. See for an recent illustration, the call for reactions by the Belgian competition authority as to its intended fully aligning of the calculation of fines to the EU system with reference to the Commission fining guidelines, press release 7/2013 of 22 November 2013, formally inviting comments to be submitted by 3 January 2014, <http://www.mededinging.be>. At the time of writing, no further steps have been made public.

¹⁹⁵ Along similar lines, Horsmans, 112: "Les milieux professionnels (...) ont de longue date l'habitude de réagir aux projets de loi qui les concernent mais ces travaux ont souvent lieu en vase clos et leur diffusion n'atteint pas toujours la population concernée."

¹⁹⁶ <http://www.test-aankoop.be>

¹⁹⁷ Global Action in the Interests of Animals, <http://www.gaia.be>

¹⁹⁸ Drawing a complete list of Belgian interest groups would, however, exceed the scope of this report by far.



competence. Eventual conflicts between (economic) rights (granted by the different competent level-legislatures) are dealt with in both proactive and reactive ways. As in many other Member States, the Belgian Council of State has an important legislative limb. Once Belgium set out on its (rather peculiar) track of federalism¹⁹⁹, judicial supervision as to the exercise of the ensuing competences for the component/concurrent c.q. mutually conflicting legislative limbs was called for. This led to the establishment of the Belgian Court of Arbitration (now: Constitutional Court). In addition, in cases of real doubt as to the EU-compatibility of Belgian legislative actions – at whatever level – Belgian judges – of whatever level – are quite regularly and consistently calling upon the European Court of Justice. Each of these mechanisms is shortly dealt with.

Preventing conflicts of rights

The Council of State (Raad van State, Conseil d'Etat, Staatsrat²⁰⁰) was set up in 1946, and is the most important administrative tribunal of the Belgian legal system. The Council is divided into two sections: one legislative, one administrative.

The legislative section is responsible for giving a reasoned opinion on all governmental or parliament's proposals for (federal) laws and (community and regional) decrees, and amendments thereto. Except for urgent cases with special justification and laws relating to budgets, accounts, borrowing operations, state operations, and armed forces quotas, ministers of national and sub-national governments at Community or Regional level must submit all draft legislation to the legislative section of the Council of State for a reasoned opinion²⁰¹. When draft legislation is deemed urgent, the opinion will concentrate on defining whether the preliminary draft concerned "deals with matters within the scope of the state, community or region"²⁰².

Challenging conflicts of rights at the Belgian level

The second state reform (1980) set out to establish a Court to supervise the observance of the constitutional division of powers²⁰³. The Court of Arbitration was officially inaugurated in the Senate on 1 October 1984, and rendered its first judgment less than a year later. The state reform of 1988 extended its competences to include the observance of the constitutional principles of equality, non-discrimination and the rights and liberties in respect of education. The special act of 9 March 2003 granted additional competences, so that the Court is now able to review compliance with all fundamental rights contained in Section II (Articles 8 to 32) as well as Articles 170, 172 and 191 of the Constitution²⁰⁴. When the Constitution was revised on 7 May 2007, the name of the Court of Arbitration was changed to *Constitutional Court*. In the present state of the law, the Constitutional Court is in charge of settling all conflicts of competence between, and the constitutionality of the

¹⁹⁹ Cf. supra.

²⁰⁰ <http://www.raadvanstate.be/?page=index&lang=en>

²⁰¹ Senelle, 197.

²⁰² Senelle, 197.

²⁰³ See Article 142 of the Belgian Constitution. An act of 28 June 1983 defined the composition, competence and functioning of this new court.

²⁰⁴ Dealing respectively with the fiscal legality principle (Article 170-172) and the extension of these rights to foreigners (Article 191, dealt with earlier).



legislative acts of multilayered Belgium (laws, decrees and ordinances), and rules on violations of the fundamental rights and constitutional principles mentioned above. The Court passes judgements on actions for annulment and on preliminary questions by courts and tribunals.

An action for annulment may be introduced by (1) the Council of Ministers or the government of a Community or Region; (2) any individual (Belgian as well as foreign) or institution (both private and public) with a vested interest; or (3) the president of the Parliament(s) when two-thirds of the members request it, and must normally be introduced within six months of the contested regulation's publication. If the action is well-founded, the challenged act will be entirely or partially annulled, with retroactive effect²⁰⁵. Judgments dismissing actions for annulment cannot be appealed and are binding on the courts in respect of the points of law settled by such judgments.

Preliminary questions either relate to doubt as to the correspondence of laws, decrees and ordinances with the rules laying down the division of competences, or to their conformity with fundamental rights and constitutional freedoms. All courts and tribunals may refer questions to the Constitutional court. The Court of Cassation and the State Council are, however, obliged to do so. The ruling of the Constitutional court is binding for other courts and tribunals ruling on the same problem, and cannot be appealed. If the Constitutional Court decides that the act concerned conflicts with the rules mentioned above, the referring judge must no longer take it into consideration in the further adjudication of the case. Such finding does, however, not amount to a formal annulment, thus leaving the act legally alive. Yet, when the Court finds a violation, a new six-month term commences in which an action for annulment of the regulation in question can be brought.

Raising questions as to the conflict of Belgian right(s) at EU level

Within the scope of application of EU law, all Belgian judges are – just as their counterparts in all Member States – called upon by Article 4(3) TEU to safeguard individuals' rights flowing directly or indirectly from EU law. They rule on directly applicable provisions, solve eventual conflicts between purely national rights and EU rights resp. between national implementation measures and Directives along conform interpretation and/or primacy-lines, and refer questions as to the interpretation of primary or secondary EU law and/or validity of secondary EU law whenever in sufficiently serious doubt. Belgium has police courts, justices of the peace, courts of first instance (including a civil court, a correctional court (penal) and a juvenile court), labour tribunals, commercial courts, courts of appeal, labour courts, criminal courts of first instance, military tribunals (courts martial and military court), one Court of Cassation (Hof van Cassatie, Cour de cassation), one Council of State (Raad van State, Conseil d'Etat), and one Constitutional Court (Grondwettelijk Hof, Cour constitutionnelle).

²⁰⁵ See for the possibilities to moderate the rule of retroactive effect, in essence in line with ECJ annulment judgments, <http://www.const-court.be/>



Belgian judges of all types and ranks make regular use of the 267-helpline to Luxembourg. In the context of competition law, for instance, the European Court of Justice has been invited to rule on preliminary questions of Belgian Justices of the peace²⁰⁶, of Belgian Courts of First Instance²⁰⁷, of Belgian commercial courts²⁰⁸, of Belgian courts of appeal²⁰⁹ and the highest courts alike²¹⁰.

In purely numerical terms, 'highest courts' represent some 25% of the overall number of Belgian questions. Between 1967 and 2013, Belgian judges referred in 739 cases, with 'other courts or tribunals' accounting for 553 (74, 8%) vs. 28 by the Constitutional Court, 90 by the Court of Cassation and 68 by the Council of State²¹¹. This Belgian breadth of referring judges from all layers and types is definitely not unusual, yet not common to all Member States.

'Other courts or tribunals' account for the (overwhelming) majority of national references in 17 other Member States. This is the case in Portugal (53,4%, 62/116); in Austria (58,2%, 250/429); in Slovenia (60%, 3/5); in Luxembourg (61,4%, 51/83); in Slovakia (62%, 15/24); in Greece (63,25%, 105/166); in Germany (66,3%, 1361/2050); in Estonia (66,6%, 10/15); in Hungary (75%, 63/84); in Sweden (72,9% 81/111); in France (78,4%, 695/886); in Denmark (78,7%); in the United Kingdom (78,9%, 443/561); in Italy (81,9%, 1005/1227); in Bulgaria (83%, 54/65); in Spain (84%, 263/313) and in Malta (100%, 2/2).

In Poland, the balance is perfectly even (30/60). Quite logically, for the time being, no questions have been referred yet from Croatia (0).

In eight Member States, however, other courts or tribunals seem to prefer leaving the referring of questions to the highest courts in rank. This is the case in Cyprus, with other courts or tribunals accounting for a mere 20% (1/5); in Lithuania (26%, 6/23); in Latvia (30%, 9/30); in Finland (30,1%, 25/83); in Ireland (36,1%, 26/72); in the Netherlands (34,5%, 304/879); in Romania (41,2%, 26/63) and in the Czech Republic (47%, 16/34).

²⁰⁶ See a.o. ECJ 21 September 1988, Case 267/86, *Van Eycke v. Aspe* [1988] ECR 4769 (< Vredegerecht Beveren).

²⁰⁷ See a.o. ECJ 30 January 1974, Case 127/73, *BRT v. Sabam I* [1974] ECR 51 (< Rechtbank van eerste aanleg te Brussel); ECJ 27 March 1974, Case 127/73, *BRT v. Sabam II* [1974] 313 (< Rechtbank van eerste aanleg te Brussel); ECJ 11 April 2000, Joined Cases C-51/96 and C-191/97, *Deliège and Pacqué* [2000] ECR I-2549 (< Tribunal de première instance de Namur); ECJ 13 April 2000, Case C-176/96, *Lethonen* [2000] ECR I-2681 (< Tribunal de première instance de Bruxelles).

²⁰⁸ See a.o. ECJ 12 December 1967, Case 23/67, *Haecht v. Wilkin I* [1967] ECR English Special Edition p. 407 (< Tribunal de commerce de Liège); ECJ 9 July 1969, Case 10/69, *Portelange v. Smith Corona* [1969] ECR 309 (< Tribunal de commerce de Bruxelles); ECJ 6 February 1973, Case 48/72, *Haecht v. Wilkin II* [1973] ECR 77 (< Tribunal de commerce de Liège); ECJ 11 December 1980, Case 31/80, *L'Oréal v. De Nieuwe Amck* [1980] ECR 3775 (< Rechtbank van Koophandel te Antwerpen); ECJ 18 January 2007, Case C-421/05, *City Motors v. Citroën Belux* [2007] ECR I-653 (< Rechtbank van Koophandel te Brussel).

²⁰⁹ See a.o. ECJ 1 February 1977, Case 47/76, *de Norre v. Brouwerij Concordia* [1977] ECR 65 (< Hof van Beroep Gent); ECJ 14 December 1977, Case 59/77, *De Bloos v. Boyer* [1977] ECR 2359 (< Cour d'appel de Mons); ECJ 15 December 1995, Case C-415/93, *Bosman* [1995] ECR I-4921 (< Cour d'appel de Liège); ECJ 7 December 2010, Case C-439/08, *VEBIC* [2010] ECR I-12471 (< Hof van Beroep Brussel).

²¹⁰ See a.o. ECJ 16 November 1977, Case 13/77, *GB Inno BM v. ATAB* [1977] ECR 2115 (< Hof van Cassatie).

²¹¹ The first Belgian reference took 15 years to materialise (1967). The very first preliminary question came from the Netherlands in 1961.

See for more details, the 2013 annual report of the European Court of Justice, table 20. General trend in the work of the Court (1952-2013) – New references for a preliminary ruling (by Member State and by court of tribunal), provisional version available at: http://curia.europa.eu/jcms/jcms/Jo2_7000/



Whereas most of these are relatively new Member States (2004, 2007), which could explain to a certain extent why lower courts have not been referring very often yet, it suffices to have a look at the first group – including a fair share of equally newer members – to realise that such rationalisation is clearly not comprehensive. In addition, it obviously does not explain the overwhelming lead of highest courts in the Netherlands (1957), Finland (1995) or Ireland (1973). More importantly, both from a legal protection as from a procedural economy point of view, this reservation of other courts or tribunals strikes as quite odd.



ANNEXES

NATIONAL PROVISIONS

: Please note that many of the laws listed underneath have been amended subsequently. In addition one should keep in mind that after the full entry into force of the Belgian Code of Economic Law, the (amended) substance of several of the laws listed will be part of that Code.

Belgian Constitution (1831)

Belgian Civil Code (1804)

Belgian Commercial Code (1807)

Belgian Code of Economic Law (2013)

Decret d'Allarde of 2-17 March 1791 on the abolition of the medieval guilds and corporations.

Law Le Chapelier of 14 June 1791.

Law of 29 July 1934 (prohibiting private militia), Belgian Official Gazette 6-7 August 1934.

Law of 7 June 1969 (on allowed times for perquisitions in private homes), Belgian Official Gazette 28 June 1969.

Law of 30 July 1979 (on fire insurance), Belgian Official Gazette 20 September 1979, err. 18 December 1979.

Law of 30 July 1981 (on dealing with racism and xenophobic acts), Belgian Official Gazette 8 August 1981.

Law of 21 November 1989 (compulsory insurance motor vehicles), Belgian Official Gazette 8 December 1989.

Law of 10 April 1990 (on private security), Belgian Official Gazette 29 May 1990.

Law of 16 June 1990 (on the protection of mentally ill persons), Belgian Official Gazette 27 July 1990.

Law of 20 July 1990 (on habeas corpus), Belgian Official Gazette 14 August 1990.

Law of 12 June 1991 (on consumer credit), Belgian Official Gazette 9 July 1991, err. 6 August 1991.

Law of 19 July 1991 (regulating the profession of private detectives), Belgian Official Gazette 2 October 1991, err. 11 February 1993.

Law of 4 August 1992 (on mortgage credit), Belgian Official Gazette 19 August 1992.

Law of 8 December 1992 (on privacy and private data protection), Belgian Official Gazette 18 March 1993.

Law of 22 March 1993 (on credit institutions and the supervision thereof), Belgian Official Gazette 19 April 1993.



Law of 14 July 1994 (on compulsory health insurance), Belgian Official Gazette 27 August 1994, err. 13 December 1994.

Law of 13 April 1995 (on commercial agency), Belgian Official Gazette 2 June 1995.

Law of 8 August 1997 (on insolvency of companies), Belgian Official Gazette 28 October 1997, err. 7 February 2001.

Law of 7 June 1999 (the Company Code), Belgian Official Gazette 6 August 1999.

Law of 10 August 2001 (establishing the "Kredietcentrale", i.e. a system of linking credit providers, so as to provide insight in the credit obligations of credit applicants), Belgian Official Gazette 25 September 2001.

Law of 2 August 2002 (on payment arrears in commercial transactions), Belgian Official Gazette 7 August 2002.

Law of 2 August 2002 (financial Mifid-supervision), Belgian Official Gazette 4 September 2002.

Law of 22 August 2002 (on the rights of patients), Belgian Official Gazette 26 September 2002, err. 20 December 2002.

Law of 24 March 2003 (introducing a basic banc service), Belgian Official Gazette 15 September 2003.

Law of 28 April 2003 (on the so called group insurance, additional pensions and certain additional social security rights), Belgian Official Gazette 15 May 2003, err. 26 May 2003.

Law of 19 December 2005 (on precontractual information duties in commercial transactions), Belgian Official Gazette 18 January 2006, err. 13 February 2006.

Law of 16 June 2006 (the "prospectus law"), Belgian Official Gazette 21 June 2006.

Coordinated law of 15 September 2006 (Belgian Competition law Act), Belgian Official Gazette 29 September 2006.

Law of 21 March 2007 (on the use of camera supervision in public and work places), Belgian Official Gazette 31 May 2007.

Law of 1 April 2007 (on insurance for damages caused by terrorist attacks), Belgian Official Gazette 15 May 2007.

Law of 10 May 2007 (on certain types of discrimination), Belgian Official Gazette 30 May 2007, add. 5 June 2007.

Law of 17 May 2007 (on gender discrimination), Belgian Official Gazette 30 May 2007, add. 5 June 2007.



Law of 31 January 2009 (on continuity of undertakings – with a view to preventing insolvency), Belgian Official Gazette 9 February 2009.

Belgian Corporate Governance Code of 12 March 2009, Belgian Official Gazette 28 June 2010.

Law of 26 March 2010 (implementing the Services Directive in the Belgian legal order), Belgian Official Gazette 30 April 2010.

Law of 31 March 2010 (on compensation of health damages caused by health professionals), Belgian Official Gazette 2 April 2010.

Law of 6 April 2010 (on commercial practices and consumer protection), Belgian Official Gazette 12 April 2010.



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CATEGORIZATION OF ECONOMIC RIGHTS: DENMARK

Ulla Neergaard¹ and Silvia Adamo²

QUESTION 1: IDENTIFICATION OF ECONOMIC RIGHTS

- ✓ Which rights are considered in your country as economic rights?
- ✓ Amongst those rights, which are considered 'core'?

The idea is to get an overview of what are considered (core) economic rights in EU Member States.

Specify whether the notion "economic right" is consolidated in your country and the sources of the categorisation (legal rules, case law, definition provided by legal scholars, praxis) and whether there are disagreements/developments in the notion of economic right and their core elements.

Please, keep in mind that the category of economic rights is not a stable one: it has to be identified by both the historical background that characterizes the national approach to the definition of economic rights, and the interaction between economic rights with social rights (that potentially make it difficult to define the boundaries of economic rights).

The notion of economic rights cannot be said to be a consolidated notion of common use in the Danish legal system.³ The term is used in scholarly work dealing with fundamental rights at a constitutional level, without defining expressively the notion of 'economic right' but merely categorising under this label specifically the constitutionally protected right to property and the right to work and access to trade.⁴ Equally, the phrase is used in referral to the scope of protection of the Act on Copyright, but neither the article related⁵, nor the commentators to the act define explicitly what it is meant by the expression 'economic rights', except by contrasting it with the 'ideal rights' in Article 3 of the same act.⁶ However, the notion of economic rights may be seen as generally being used to refer to the relative category of rights established in the EU legal system⁷, and it may also be employed without specifying its content in respect of the obligations stemming by the

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³ The report has primarily been elaborated by Silvia Adamo, but supervised and/or commented upon throughout the process by Ulla Neergaard and Catherine Jacqueson.

⁴ Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag, pp. 181 et seq.; Werlauff, E. (2010) *Europæiske Menneskerettigheder – en praktisk indføring* [European Human Rights – a practical introduction], Gjellerup, pp. 18 et seq., pp. 59 et seq.

⁵ Article 2 in the Consolidated Act on Copyright no. 202 of 27 February defining copyright as 'the exclusive right to control the work by reproducing it and by making it available to the public, whether in the original or in an amended form, in translation, adaptation into another literary or artistic form or into another technique'.

⁶ Article 2 and Article 3 (protecting the right to be identified by name as the author on copies of the work as well as if the work is made available to the public) together define the 'Scope of Protection' of the act; see also Hasselbalch, O. and Rosenmeier, M. (2013) *Ansattes værker i krydsfeltet mellem ophavsret og ansættelsesret* [The employees' works between copyright and employment], *Ugeskrift for Retsvæsen* U.2013B.293; Rosenmeier, M. (2014) *Ophavsret for begyndere* [Copyright for beginners], Jurist- og Økonomforbundets Forlag, p. 67.

⁷ See e.g. Neergaard, U. and Nielsen, R. (2009), *EU-ret* [EU law], 5. reviderede udgave, Thomson Reuters, p. 186 et. seq.



reception of international instrument in the area, e.g. the International Convention on Economic Social and Cultural Rights.⁸

The primary source of law in Denmark is the Constitutional Act or 'Grundlov', which could be translated into 'the fundamental law'. The Constitutional Act was adopted on 5 June 1849, and most recently amended in 1953. The primary categories of rights therein are civil and political rights, thus the 'Grundlov' is not a comprehensive catalogue of all fundamental rights. Being a dated, 'non-modern' Constitutional Act, there is no mention or influence by contemporary formulations of human rights or fundamental values especially of economic, social and cultural character.⁹

The 'Grundlov' contains only five provisions which could be considered as included into a broad definition of economic rights and freedoms, and these are: the right to property (including intellectual property), Article 73; the freedom to free and equal access to trade, Article 74; the right to work and to be supported by means of public assistance in case of need, Article 75; the freedom of association, Article 78 and the freedom of assembly, Article 79.¹⁰ No provision against e.g. slavery or forced labour, or the right to strike (present in other European countries' constitutions) is contained in the Danish Constitutional Act.

New types of rights that were not known – or viewed important – in the years 1848-1849 when the Constitutional Act was being drafted may fall under the protection of its very dated articles, which 'with few words wanted to regulate many areas, and [whose] monosyllabic text has been kept essentially unchanged for more than hundred and a half years'.¹¹ For example recent legal scholarly work has argued that a right to housing may fall under the concept of property included in Article 73 of the Constitutional Act (even when housing is only a rented dwelling), thus to be considered as a fundamental right whose protection against expropriation may be given constitutional status.¹² Hence it is not at all possible to conclude that the Danish constitution is an 'economic constitution' in an EU-law derived meaning.

This sparse legal starting point may lead to assume that the 'core' economic rights are those included in the Constitutional Act, since that is the primary source of law in the Danish legal system. In fact other provisions covering other economic rights, e.g. the right to equal treatment in the workplace or the protection from gender discrimination on the labour market are scattered in statutory laws over which the Constitution takes precedence. Also, their origin might have been the European legal system rather than purely Danish. Nevertheless, it is our impression that it is not meaningful to prioritize a list of predominant economic rights in

⁸ Christoffersen, J. (2014) Kommentar til FN's Konvention om Økonomiske, Sociale og Kulturelle rettigheder [Commentary to the UN Convention on Economic, Social and Cultural Rights], in von Eyben, B. et al. eds., Karnovs lovsamling, 28. udgave, Karnov Group Denmark A/S.

⁹ Ketscher, K. (2007) Contrasting legal concepts of active citizenship: Europe and the Nordic countries. In Hvinden, B. et al. eds., *Citizenship in Nordic welfare states*, Routledge, New York, p. 141-154, p. 143.

¹⁰ See under question 2 for the wording of these provisions.

¹¹ Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag, p. 182 (our translation).

¹² Nielsen, N. (2011) *Retten til et hjem. Ejendomsret, privatliv og forsørgelse* [Right to a home. Property right, private life and public assistance] Jurist- og Økonomforbundets Forlag.



Danish law from either case-law or scholarly debates, but only to identify the economic rights in a 'multi-levelled' sources of law-context (comprising statutory law, constitutional law, and international and EU-law).¹³

On the basis of what has been stated above, it is probably not too surprising to unveil that the interaction between economic and social rights is blurred in the Danish legal system. The right to work could perhaps be considered a social right. The right to social security, if argued to be a modern economic right (and not a social right) is protected by the notoriously extended Danish welfare system but also Article 75 (subsection 2) in the Constitutional Act. The constitutional protection of social rights, if intended to be included in Article 73 on the right to property, is meant to develop in correspondence with the European Convention of human rights.¹⁴

QUESTION 2: NATIONAL SOURCES OF ECONOMIC RIGHTS

- ✓ **Where are these rights laid down at national level (constitutions or constitutional instruments, special (ie. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?**

The idea here is to present the legal and policy framework which forms the basis of national economic rights protection in your country.

- **Please describe the main legal sources of economic rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);**
- **Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of economic rights in your country, in terms of framework and substantial standards (not enforcement);**
- **Please indicate whether significant developments have recently taken place in this respect;**
- **Please, analyse the main trends in public law protection of economic rights, distinguishing the approaches both on the bases of the different role of legislation and case law, so as on the ground of the different macro-areas of property right, business regulation and labour market.**

The Constitutional provisions and acts mentioned hereafter¹⁵, which guarantee protection of the rights and freedoms and which could be considered as economic, are listed in what follows.

The right to property, Article 73 of the Constitutional Act:

¹³ The notion of multi-levelled protection of fundamental rights stems from Rytter, J. E. and Lauta, K. (2012) Report for the XXV FIDE Congress: Denmark. The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, p. 5.

¹⁴ The question is disputed in academia and case law, see Ketscher, K. (2008) *Socialret – Principper, Rettigheder, Værdier* [Social law – Principles, Rights, Values], Forlaget Thomson, 3. omarbejdede udgave.

¹⁵ For full references of the legislation see the list in the Annex I.



§ 73

(1) The right of property shall be inviolable. No person shall be ordered to surrender his property except when required in the public interest. It shall be done only as provided by statute and against full compensation.

(2) When a Bill has been passed relating to the expropriation of property, one third of the Members of the Folketing may, within three weekdays from the final passing of such a Bill, demand that it shall not be presented for the Royal Assent until new elections to the Folketing have been held and the Bill has again been passed by the Folketing assembling thereafter.

(3) Any question of the legality of an act of expropriation, and the amount of compensation, may be brought before the courts of justice. The hearing of issues relating to the amount of the compensation may by statute be referred to courts of justice established for such a purpose.

The freedom to free and equal access to trade/choose an occupation, Article 74 in the Constitutional Act:

§ 74

Any restraint on the free and equal access to trade, which is not based on the interest of the general public, shall be abolished by statute.

The right to engage in work and to be supported by means of public assistance in case of need, Article 75 in the Constitutional Act:

§ 75

(1) In order to advance the public interest, efforts shall be made to guarantee work for every able-bodied citizen on terms that will secure his existence.

(2) Any person unable to support himself or his family shall, when no other person is responsible for his or their maintenance, be entitled to receive public assistance, provided that he shall comply with the obligations imposed by statute in such respect.

The freedom of association, Article 78 in the Constitutional Act and Act on Freedom of Association in the Labour Market:

§ 78

(1) Citizens shall, without previous permission, be free to form associations for any lawful purpose.



(2) Associations employing violence, or aiming at the attainment of their object by violence, by instigation to violence, or by similar punishable influence on persons holding other views, shall be dissolved by court judgement.

(3) No association shall be dissolved by any government measure; but an association may be temporarily prohibited, provided that immediate proceedings be taken for its dissolution.

(4) Cases relating to the dissolution of political associations may, without special permission, be brought before the Highest Court of Justice of the Realm.

(5) The legal effects of the dissolution shall be determined by statute.

The freedom of assembly, Article 79 of the Constitutional Act:

§ 79

Citizens shall, without previous permission, be at liberty to assemble unarmed. The police shall be entitled to be present at public meetings. Open-air meetings may be prohibited when it is feared that they may constitute a danger to the public peace.

The right to intellectual property, Article 73 of the Constitutional Act and Consolidated Act on Copyright.

The right to a safe working environment, Consolidated Danish Working Environment Act.

The right to equality of treatment on the labour market, Act on Equal Treatment between Men and Women as regards Employment etc., Act on the Prohibition of Different Treatment in the Labour Market, Act on Equal Pay to Men and Women, Act on the Equality of Treatment in the Employment-related Social Security Systems, and Act on the Right to Maternity Leave and Benefits.

The right to consumer protection, Act on Consumer rights; Act on Services in the Information Society, including some aspects of electronic commerce; Act on Consumers' Complaints; Act on injunctions for the protection of consumers' interests; Act on Marketing Practices; Act on the Danish Travel Guarantee Fund.

In terms of significant developments, as it is the case with other fundamental/civil rights in Denmark, the economic rights protection seems to have been fuelled by EU law inputs on various areas such as e.g. equality of treatment on the labour market. This stems from the implementation of a number of directives¹⁶ that have undoubtedly influenced the shaping of legislation and thus the standard of protection of a number of economic rights in Denmark. Although for some commentators prioritizing the establishment of a Single Market in

¹⁶ See in the Annex for full references.



Europe and European harmonization processes in general may have weakened the high protection given in Denmark to e.g. the consumer protection system.¹⁷

As regards the strengths and weaknesses of the standards of economic rights in the Danish legal framework derived from international treaties, the protection of social and economic rights is more deemed to fall into the legitimate sphere of action of the Parliament. The protection of not clearly applicable economic rights (because they take the form of vague programme declarations) by judicial review is deemed to be exceeding the mandate of the courts in a democratic equilibrium of division of powers.¹⁸ This point of view seems to include also the relative provisions in the EU Charter, that seem to go further than the Danish Constitutional Act protection; in a recently delivered comment, a retired Supreme Court president foresees that the national courts cannot refuse to apply the Charter, but they will be reluctant in their scrutiny of whether the national law has respected the provisions in the EU Charter.¹⁹ Nevertheless the fact that the judicial review is not seen as suitable forum does not necessarily mean that their status is lower compared to other (e.g. political) fundamental rights.²⁰

In a broader view of main trends in public protection of economic rights, Denmark is often mentioned in the EU as a successful example of the 'flexicurity model', which in times of crisis has to be revisited but is nonetheless a mark of Danish quality abroad in ensuring a balance between a dynamic labour market and a high level of social security.²¹

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF ECONOMIC RIGHTS

- ✓ **To which international instruments for the protection of economic rights is your country a party?**

The European Convention on Human Rights (henceforth: ECHR) that Denmark ratified in 1953 is the only international human rights instrument that has been incorporated in Danish law (in 1992).²² The ECHR is

¹⁷ Dahl, B. (2002) Unfair Competition, Marketing Practices and Consumer Protection in Denmark, in Dahl, B., Melchior, T. and Tamm, D. eds., *Danish Law in a European Perspective*, 2nd Edition, Forlaget Thomson GadJura, p. 417.

¹⁸ Ministry of Justice ('Justitsministeriet') (2014) Betænkning nr. 1546. Betænkning om inkorporering mv. inden for menneskeretsområdet [Report on Incorporation etc. in the area of Human Rights], pp. 129-147, 263.

¹⁹ Melchior, T. (2011) Hvem bestemmer: Folketinget eller domstole? [Who decides: the Parliament or the courts?], *Ugeskrift for Retsvæsen* U.2011B.43, at 52.

²⁰ Rytter, J. E. (2000) *Grundrettigheder. Domstolenes fortolkning og kontrol med lovgivningsmagten* [Fundamental Rights. The Courts' interpretation and control with the legislative power], Thomson Jura, p. 359 et seq.

²¹ Ibsen, C. L. (2011) Strained Compromises? Danish Flexicurity During Crisis, *Nordic Journal of Working Life Studies*, Vol. 1 No. 1. See also the publications by the research centre FAOS - Employment Relations Research Centre at the Department of Sociology, University of Copenhagen, at <http://faos.ku.dk/english/publications/theme_-_flexicurity/>

²² Act no. 285 of 29 April 1992 on the European Convention on Human Rights ('Lov om Den Europæiske Menneskerettighedskonvention') entered into force the 1st of July 1992.



therefore part of the Danish legal system. However, it is worthy to mention that the Additional Protocol 12 on the principle of equality was not incorporated along with the convention.

Denmark has also ratified, but not incorporated, the International Covenant on Economic, Social and Cultural Rights (henceforth: ICESCR) since 1972, but not the related optional protocol giving access to the UN-complaints' system. The convention has entered into force in Denmark 3 January 1976.²³ Denmark has delivered five reports in compliance with Article 16 and 17 of the ICESCR, but these are not considered as having relevance in the interpretation and use of the provisions in the convention.²⁴

The ICESCR establishes legal obligations for the contracting States to 'the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized'.²⁵ This is interpreted by Danish commentators as being more an obligation to promote, rather than to fulfil the rights included in the Convention.²⁶ Obligations deriving from the convention can be invoked as elements of interpretation during legal proceedings, but due to its dualist approach, non-incorporated international treaties are not considered to be part of the Danish legal system. Thus they cannot directly invalidate conflicting national rules (see more in the next section).

In 2001 a committee nominated to evaluate whether the ICESCR could be ratified did not recommend ratification, as the convention was considered to be a list of policy statements that would render difficult their use in national courts.²⁷

As regards future international commitments it can be noted that in December 2012, the Ministry of Justice decided to establish an expert committee in order to review Denmark's compliance with its human rights obligations. The Committee on incorporation etc. in the human rights area ('Udvalget om inkorporering mv. inden for menneskeretsområdet') had the task to provide with recommendations to the Parliament regarding the following issues: a) Incorporation of the human rights instruments already ratified; b) Access the individual complaint system for more UN-committees; and c) Ratification of the 12th protocol to the ECHR on a general discrimination ban. As regards this last point, the committee was expressly requested to take into account the entry into force of the Lisbon Treaty in 2009 and the provision on non-discrimination in Article 21 of the now legally binding EU Charter of Fundamental Rights.²⁸

²³ Executive order ('Bekendtgørelse') no. 5 of 14 January 1976.

²⁴ Ministry of Justice ('Justitsministeriet') (2014) Betænkning nr. 1546. Betænkning om inkorporering mv. inden for menneskeretsområdet [Report on Incorporation etc. in the area of Human Rights], p. 132.

²⁵ Article 2 ICESCR.

²⁶ Christoffersen, J. (2014) Kommentar til FN's Konvention om Økonomiske, Sociale og Kulturelle rettigheder [Commentary to the UN Convention on Economic, Social and Cultural Rights], in von Eyben, B. et al. eds., Karnovs lovsamling, 28. udgave, Karnov Group Denmark A/S.

²⁷ Ministry of Justice ('Justitsministeriet') (2001) Udvalgsrapport om 1407/2001 om inkorporering af menneskerettigheder i dansk lovgivning [Report 1407 on the Incorporation of Human Rights Conventions into Danish Legislation].

²⁸ Danish Government, Regeringen (2012) Kommissorium for Udvalget om inkorporering mv. inden for menneskeretsområdet [Terms of Reference for the Committee on Incorporation etc. in the area of Human Rights], p. 3.



The committee has very recently delivered its report²⁹ on the 14th of August 2014 and the report is now sent into parliamentary hearing.

One of the conclusions of interest for the objective of this report was that the ICESCR should not be incorporated in Danish law, confirming the opinion given by a similar committee in 2001. Since the reference to the ICESCR in Danish case law is scarce³⁰, incorporation would have provided a legal basis for applying the convention.³¹ Nevertheless, the convention's provisions that are formulated in a vague manner were found less suitable to be incorporated; their formulation would entail a more active role in the interpretation by the Danish courts, inter alia on issues of redistributive policy which are traditionally left to the discretion of the Parliament.³² Incorporation could delude the expectations of citizens, since the convention does not include rights having a sufficient clear basis to be applied in concrete cases and therefore the relevance for their practical application is 'more or less illusory'.³³ Thus the committee opted for not recommending the incorporation of the ICESCR.

✓ **How are relevant international and European economic rights norms being incorporated in your country?**

Denmark follows a dualist approach or tradition, which considers the national legal system as a separate entity from the international legal system.³⁴ By virtue of this, any international rule, treaty or convention that is ratified does not automatically enter into force or becomes part of the Danish legal order, but must be incorporated first within the national legal system before assuming force of law. This can happen, as it was the case with the ECHR, by means of adopting an act that allows the international treaty or convention to become a part of the Danish legal system.³⁵ International treaties can be accessed via a simple majority vote in the Parliament in light of the procedure in Article 19 of the Constitutional Act. International cooperation that requires a transfer of sovereignty of some degree to supranational authorities – such as the EU – is entered in

²⁹ Ministry of Justice ('Justitsministeriet') (2014) Betænkning nr. 1546. Betænkning om inkorporering mv. inden for menneskeretsområdet [Report on Incorporation etc. in the area of Human Rights].

³⁰ See under Annexes.

³¹ Ministry of Justice ('Justitsministeriet') (2014) Betænkning nr. 1546, p. 144 et seq.

³² Ministry of Justice ('Justitsministeriet') (2014), *ibid.*

³³ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, p. 263.

³⁴ Spiermann, O. (2006) *Moderne Folkeret* [Modern International Law], 3rd edition, Jurist- og Økonomforbundets Forlag, p. 130 et seq.

³⁵ Lorenzen, P. (2006) Den Europæiske Menneskerettighedskonventionens retlige stilling i Danmark [The legal position of the European Convention on Human Rights in Denmark] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, p. 33.



virtue of another, more complicated legislative procedure, as stated in Article 20 of the Constitutional Act (requiring 5/6 of the majority in the Parliament, or a referendum).³⁶

Compliance with international law derived instruments in Denmark can happen by means of incorporation by reference ('henvisning')³⁷ or by rewriting ('omskrivning')³⁸ and at times by merely ascertaining that the national law is already in line with the international obligations ratified ('normharmoni').³⁹

Especially EU-directives that regulate economic issues are implemented by a combination of rewriting and incorporation, while in relation to other international conventions the practice of implementation by incorporation has not been used very often.⁴⁰

The consequences of incorporation entail an increased impact for the international rule in the national legal system, as in a case of conflict between the two an incorporated convention will be considered as a source of law and independent rule.⁴¹ When incorporated, international conventions may take precedence over national law and therefore national rules not complying with international obligations can be overridden; however this does not imply that the incorporated conventions have a constitutional status.⁴²

As regards the impact of non-incorporated international conventions, they can only be employed by the national courts as elements of interpretation of national law and treaty obligation.⁴³ The literature on this topic has not come to a definitive result, but it has nonetheless developed three notions that can help in describing the use of non-incorporated international instruments in the Danish legal system: the interpretation-rule ('fortolkningsregel'); the presumption rule ('formodningsregel') and the instruction rule ('instruktionsregel').⁴⁴

The interpretation rule dictates that in case of doubt, a national rule can be interpreted to maximum possible extent in conformity with Denmark's international obligations, whether older or newer than the rule itself.⁴⁵ Following the presumption rule the national courts and other authorities that apply the law shall take as a starting point that the legislator cannot be presumed to having acted in contradiction of Denmark's

³⁶ On Article 20 and Denmark's participation in the EU see Spiermann, O. (2008) Grundlovens § 20 og det danske medlemskab, in Olsen, B. E. and Sørensen, K. E., *Europæiseringen af dansk ret* [Europeanisation of Danish Law], Jurist- og Økonomforbundets Forlag. On the different constitutional procedures and their interpretation in the aftermath of the Supreme Court case ruling on Denmark's accession to the Lisbon Treaty, see Krunke, H. (2013b) Lissabon-sagen – Med magt følger ansvar [The Lisbon-case – Power comes with responsibility], *Juristen* no 5, 216–225.

³⁷ Act no. 285 of 29 April 1992 that incorporated the ECHR into Danish law is an example of incorporation via reference.

³⁸ Spiermann, O. (2006) *Moderne Folkeret* [Modern International Law], 3rd edition, Jurist- og Økonomforbundets Forlag, pp. 152 et seq. Rewriting can necessitate that a national rule is repealed and replaced with a new one. An example of re-writing presented by Spiermann is the formulation of Article 60, section 2 of the Danish Criminal Code on the inability of judges in criminal cases, rewritten after the ECtHR judgement in the Hauschildt v. Denmark-case, ECtHR Series A no. 154 (1989).

³⁹ Taksø-Jensen, P. (2006) Kommentar til § 19 [Commentary to Article 19] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, pp. 186-188.

⁴⁰ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, p. 34.

⁴¹ Spiermann, O. (2006), *ibid.*, p. 154.

⁴² On the legal status of the ECHR in the Danish legal system see Rytter, J. E. (2013) *Individets grundlæggende rettigheder* [The Individual's Fundamental Rights], Karnov Group, p. 50; Spiermann, O. (2006), *ibid.* pp. 152 et seq.

⁴³ Spiermann, O. (2006), *ibid.*

⁴⁴ Spiermann, O. (2006), *ibid.*, pp. 159 et seq., Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, pp. 34 et seq.

⁴⁵ Spiermann, O. (2006), *ibid.*, p. 160.



international obligations. Thus the courts and other authorities have to apply national rules so that a breach of international obligations is avoided.⁴⁶ Finally the instruction rule is aimed at administrative authorities that have to make a decision on a discretionary basis in an area where an international convention may have relevance. In these cases the national rules applied shall be interpreted to a maximum possible as being in conformity with Denmark's international obligations.⁴⁷

In case of conflict between a non-incorporated convention and a national rule, when this latter was in fact meant to contradict the international rule, the international convention will not be employed by the courts as taking precedence over the national rule.⁴⁸ Also, a non-incorporated convention cannot constitute a legal basis for a public authority's decision over an individual case.

The issue of incorporation is therefore especially delicate when the international conventions create positive obligations for Denmark, e.g. concerning granting of benefits that the citizens could then seek fulfilled in the courts.⁴⁹ In this optic, as regards the European economic rights laid down in the Charter, the issue of their incorporation in the Danish legal system is somewhat controversial. The problem is set in terms of separation of powers, since it is found reasonable to leave out of the courtrooms and to the discretion of the Parliament and a consequence of a democratic debate that listens to many parties involved the solution of economic and social issues that can have an impact on the protection of economic rights – the general discrimination ban in Article 21 of the Charter would render impossible to maintain differential/beneficial treatment for particular vulnerable categories.⁵⁰

✓ **To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?**

The ECHR was incorporated in Danish law by Act no. 285 of 29 April 1992.⁵¹ As such, it has become part of the Danish legal system, and citizens and companies can invoke its protection in courts, administrative organs etc. The ECHR was not incorporated to have constitutional status, but it nevertheless takes precedence over national law; this fact and the development of the framework of the convention via the case-law of its court

⁴⁶ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*

⁴⁷ Spiermann O. (2006), *ibid.*, p. 161.

⁴⁸ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, pp. 39-45.

⁴⁹ Ministry of Justice ('Justitsministeriet') (2014), *ibid.* Chapter 4 in the report presents a number of cases where non-incorporated conventions have been employed in the case law of the national courts.

⁵⁰ Melchior, T. (2014) EU's charter om grundlæggende rettigheder – en ændret magtfordeling? [The EU Charter of fundamental rights – a changed separation of powers?] in Krunke, H. et al., *Rettenns Magt – Magtens Ret* [The Power of the Law – The Law of the Power], Jurist- og Økonomforbundets Forlag.

⁵¹ The act was based on report 1220/1991 on the European Convention on Human Rights and Danish law.



give rise to many legal and political discussions about the convention's position in the Danish scheme of sources of law.⁵²

The incorporation act is built on the assumption that the legislative power will play a major role in ensuring that Danish law is in line with the ECHR. The national legislator has therefore adopted new regulations in respect of Denmark's human rights commitments, and the statutory laws and administrative orders are revised on a continuous basis in case of amendment of acts, complaint cases or decisions made by the organs of the convention (this happens also as regards obligations stemming from non-incorporated conventions).⁵³

The jurisdiction of the European Courts of Human Rights (henceforth ECtHR) was recognized long before this had been made obligatory.⁵⁴ As a matter of fact already before its incorporation the Danish Supreme Court ('Højesteret') in three judgements from 1989 established that the national courts and other authorities had the duty to apply the convention (as interpreted and applied in the case law of ECtHR) in the interpretation of national law.⁵⁵

Nevertheless, the government is at times challenged as regards compliance with human rights treaties that Denmark has ratified. This has often happened as regards the status of rights of third country nationals permanently living in Denmark, who have challenged e.g. in the context of civil fundamental rights the strict family reunification rules for spouse and children in light of the ECHR or the CRC. In these cases usually the Ministry of Justice in its own evaluation of its administration does not find that any infringement has been taken place.⁵⁶

The very strong position assumed by the Danish Parliament in ensuring that Denmark lives up to its international obligations leaves very little space to the courts' own interpretation of the convention; in the scholarly discussion many authors have criticized the practice of leaving a very narrow interpretation freedom to the courts in their proceedings.⁵⁷ The ECHR may not be applied only in cases where a particular legal issue is

⁵² Rytter, J. E. (2006) *Den Europæiske Menneskerettighedskonvention - og dansk ret* [The European Human Rights Convention – and Danish Law], Forlaget Thomson, 2. udg., pp. 34 et seq.

⁵³ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, p. 5.

⁵⁴ Lorenzen, P. (2006), *ibid.*

⁵⁵ Cases U1989.928H, U1990.181H, and U1990.13H.

⁵⁶ Cf. the concerns expressed in the Report by Mr. Alvaro Gil-Robles on his visit to Denmark, p. 6-12. The consequent Memorandum by the Ministry of Refugee, Immigration and Integration Affairs from 22 September 2004 concluded that Danish law did not violate international obligations on human rights issues.

⁵⁷ Among others Christoffersen, J. (2000) *Højesteret og Den Europæiske Menneskerettighedskonvention* [The Supreme Court and the European Human Rights Convention], *Ugeskrift for Retsvæsen* U.2000B.593, and Christoffersen, J. (2002) *Højesterets prøvelse af folkeretlige diskriminationsforbud* [The Supreme Court's verification of the international prohibition of discrimination] *Ugeskrift for Retsvæsen* U.2002B.407; Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag, p. 43; Spiermann, O. (2002) *Tilbageholdenhed i anvendelsen af internationale menneskerettighedskonventioner* [Restraint in the application of international human rights conventions], *Ugeskrift for Retsvæsen* U.2002B.412 and (2009) *Om ikke at fortolke internationale menneskerettigheder – med negativ foreningsfrihed som eksempel* [On the non-interpretation of international human rights – with the negative freedom of association as an example] in Christoffersen, J. and Madsen, M. R., *Menneskerettighedsdomstolen – 50 års samspil med dansk ret og politik* [The Court of Human Rights – 50 years of interaction with Danish law and politics], Thomson Reuters Professionals.



considered as exhaustively regulated in the national law.⁵⁸ In fact, after 1992, even if the Supreme Court has provided for ample room for the application of international human rights in Danish law, some commentators evaluate the use of international conventions as ‘extraordinary cautious’⁵⁹ or even ‘reluctant’.⁶⁰ Thus in the national case law one can observe a wary use of both the ECHR case law and of the preliminary reference procedure to the ECtHR, but again viewed as ‘very reluctant’.⁶¹

In the academic debates regarding the interpretation of the ECHR by the national courts, there is a notable scholarly view which advocates that the courts should interpret the Constitutional Act in light of the ECHR.⁶² Another reader takes distance from this standpoint and sustains that the case law of the Danish Supreme Court (‘Højesteret’) does neither indicate that the interpretation of the Danish Constitutional Act shall be in accordance with the ECHR, nor that the interpretation by the ECtHR shall ‘automatically calibrate’ the interpretation of the Danish Constitutional Act.⁶³ The Constitutional Act has to be interpreted on its own (albeit dated) preconditions, but this does not prevent that the Supreme Court may indeed perform an up-to-date interpretation.⁶⁴ The influence of international conventions on the interpretation of the Constitutional Act was described recently by a Supreme Court judge as ‘none’, as the ECHR and the Constitutional Act are kept ‘keenly separated’ in the court’s decisions.⁶⁵ According to another scholarly opinion the ECHR suffers the signs of the time and its interpretation should therefore be supplemented by a reference to more recent UN conventions, such as the CEDAW or the CRC.⁶⁶

As regards the application of the interpretation of the ECHR as deriving from the case law of the ECtHR, this is also a controversial topic in Danish academic legal studies. The ECtHR is viewed by some as being more a political organ rather than a traditional court, with a dynamic interpretation style and case law which seems to exceed its original mandate.⁶⁷ In the Danish legal tradition this is found to be in contradiction with the strong support for ensuring the principle of division of powers, where the Parliament assumes a more relevant role

⁵⁸ See U1990.13H, mentioned also in Christoffersen, J. (2006) Internationale menneskerettigheder i dansk ret [International human rights in Danish law] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, p. 18.

⁵⁹ Rytter, J.E. and Lauta, K., *ibid.*, p. 7.

⁶⁰ Krunke, H. (2013a) Formal and informal methods of constitutional change in Denmark, in Contiades, X. ed., *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Routledge.

⁶¹ Rytter, J. E. and Wind, M. (2011) In need of juristocracy? The silence of Denmark in the development of European legal norms, *International Journal of Constitutional Law*, Vol. 9 No. 2, p. 471.

⁶² Rytter, J. E. (2006) *Den Europæiske Menneskerettighedskonvention - og dansk ret* [The European Human Rights Convention – and Danish Law], Forlaget Thomson, 2. udg., p. 36.

⁶³ Christoffersen, J. (2004) Anmeldelse af Jens Elo Rytter: *Den Europæiske Menneskerettighedskonvention - og dansk ret* (2003), Forlaget Thomson [Review of Jens Elo Rytter: The European Human Rights Convention – and Danish Law], *Ugeskrift for Retsvæsen* U.2004B.38.

⁶⁴ Christoffersen, J. (2004b), *ibid.*

⁶⁵ Christensen, J. P. (2013) Internationale konventioners betydning for Højesterets grundlovsfortolkning [The relevance of international conventions for the Supreme Court interpretation of the Constitutional Act], *Ugeskrift for Retsvæsen* U.2013B15, at 15-16.

⁶⁶ Ketscher, K. (2007) Contrasting legal concepts of active citizenship: Europe and the Nordic countries. In Hvinden, B. et al. eds., *Citizenship in Nordic welfare states*, Routledge, New York, p. 141-154, p. 145.

⁶⁷ Krunke, H. (2013a) Formal and informal methods of constitutional change in Denmark, in Contiades, X. ed., *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Routledge, pp. 82-84.



than courts in protecting democracy.⁶⁸ Some legal scholars advocate for another methodical approach, which acknowledges that an international court cannot and should not pass the same legitimacy tests that are normally applied to national courts.⁶⁹ Others find that the preliminary works to the bill on incorporation of the ECHR in Denmark clearly state that the intention of the legislator with the incorporation was to ensure the necessary adjustment of Danish law to the interpretation of the ECHR given by the organs of the conventions, today the ECtH.⁷⁰

✓ **How and to what extent are international instruments for the protection of economic rights given effect in your country?**

As mentioned above, following a dualist approach, international instruments such as the ICCPR and other international instruments that have been ratified but not incorporated in Danish law can in principle not be considered in courts as sources of law that can take precedence over national law, although they can be part of the legal material and thus be used as elements for interpretation of national legislation. In practice, they may offer limited protection as the courts will be very cautious in referring to them and finding the national regulation in breach of international law (this follows the separation of powers' theory as applied to the judiciary in the Danish legal system⁷¹).

However, Denmark has of course an obligation to follow the international conventions that it has ratified. This means that regulations and acts adopted in Danish law have to comply with the international obligations stemming from the ratified treaties.⁷²

⁶⁸ Krunke, H. (2013a), *ibid.*

⁶⁹ See the debates in part 2 of Christoffersen, J. and Madsen, M. R. (2009) *Menneskerettighedsdomstolen – 50 års samspil med dansk ret og politik* [The Court of Human Rights – 50 years of interaction with Danish law and politics], Thomson Reuters Professionals; Spiermann, O. (2006) *Moderne Folkeret* [Modern International Law], Jurist- og Økonomforbundets Forlag.

⁷⁰ E.g. Vedsted-Hansen, J. (2013) *Menneskerettighedskonventioner som bestanddel af landets indre retsorden* [Human rights' conventions as a component part of the country's internal legal system], in Danielsen, J. H. (ed) *Max Sørensen 100 år* [Max Sørensen 100 years], Jurist- og Økonomforbundets Forlag, p. 273.

⁷¹ Melchior, T. (2002) *The Danish Judiciary*, in Dahl, B. Melchior, T. and Tamm, D. eds. *Danish Law in a European Perspective*, 2nd edition, Forlaget Thomson.

⁷² Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag, p. 40.



QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

- ✓ **To what extent have the EU Charter of fundamental rights as well as general principles of EU law protecting rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?**
- ✓ **How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of economic rights?**

The EU Charter of Fundamental rights is addressed to the Member States when they are implementing EU law (Article 51, 1 of the Charter) and it is now legally binding (Article 6 TEU); furthermore, 'the requirement to respect fundamental rights ... is only binding ... when they act in the scope of Union law'.⁷³ In the Danish context it seems to be still unclear how its entry into force will affect the balance of powers between the Parliament and the courts in the future; as the Charter also covers fundamental rights of social and economic character that traditionally are left to the competence of the Parliament, the Danish courts may be called upon to decide on issues that were so far precluded to them.⁷⁴

The opinions on the range of the protection afforded by the Charter are various. The official view of the Ministry of Justice is that the Charter is a mere compilation of existing fundamental rights that does not affect the competences or the jurisdiction of the Union.⁷⁵ Others view the Charter's guarantees of fundamental rights as adding to the list of rights contained in the 'Grundlov' or in other instances going further than these.⁷⁶ This point relates especially to the general discrimination ban in Article 21 (1) which may expand the area of the equality of treatment.⁷⁷ Various Danish governments have refused along the years to ratify the 12th protocol to the ECHR, but since Article 21 reflects the protocol's range of protection, it is now open to speculation how this will affect the realisation of a general principle of non-discrimination in Danish law.⁷⁸ Also, the Charter (taking precedence over national law after Lisbon) has given 'constitutional status' to some administrative and procedural legal principles in a way that was unknown in classic Danish public law.⁷⁹

⁷³ Explanations relating to the Charter of Fundamental Rights, EUT 2007 C303/17, at Art. 51 referring to the EU Court of Justice case law.

⁷⁴ Melchior, T. (2011) Hvem bestemmer: Folketinget eller domstole? [Who decides: the Parliament or the courts?], *Ugeskrift for Retsvæsen* U.2011B.43.

⁷⁵ See the description in Rytter, J. E. and Lauterbach, K. (2012) Report for the XXV FIDE Congress: Denmark. The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, p. 17.

⁷⁶ Fenger, N. (2010) Den forvaltningsretlige teoris udfordringer i starten af det 21. århundrede [The challenges to the theory of administrative law in the beginning of the 21. century], *Juristen* no. 10 2010, pp. 275-284

⁷⁷ Rønsholdt S. and Abkenar, A. T. (2013) Om den almindelige lighedsgrundsætning i dansk ret og EU-ret [On the general equality principle in Danish and EU law], *Juristen* 1, 2013, p. 12-23.

⁷⁸ Fenger, N. (2012) Unionens Charter om grundlæggende rettigheder og dets betydning for dansk offentlig ret [The Unions Charter on fundamental rights and its meaning for Danish public law] in Baumbach, T. and Blume, P. eds., *Retskildernes kamp. Forholdet mellem national offentlig ret og udefra kommende ret* [The battle of the sources of law. The relationship between national public law and the law coming from outside], Jurist- og Økonomforbundets Forlag, pp. 120-126.

⁷⁹ Fenger, N. (2012), *ibid.*, p. 106 et seq.



The Danish courts have started to refer to the Charter in recent case law.⁸⁰ Moreover, the national courts are presented with an increasing number of allegations based on the provisions of the Charter, although no infringement of the Charter was proven in the judgements decided so far.⁸¹

In a decision from 2011 the Supreme Court affirmed that the competences of the Union were not broadened by either the Charter or the European Union's accession to the ECHR.⁸² Thus, the application of the Charter by the national courts is not necessarily a sufficient indication of the fact that the Danish Courts will from now on use the Charter as a 'benchmark' for the interpretation of the national law or Constitutional Act, in the same way as the ECHR has not influenced the interpretation of the Constitutional Act.⁸³ However, for some commentators the Danish courts can still be 'somewhat vaguely' inspired by CJEU's case law on the Charter, in the same way a foreign source of law can inspire the development of national law.⁸⁴

After the entry into force of the Lisbon Treaty, the legal status of the protection of fundamental rights is seen as being constituted by three sources: The EU Charter, the ECHR and the EU law general principles on fundamental rights. However, their mutual interaction is not yet completely clear, thus more CJEU's case law is auspicated in order to clarify, what measure will be applied to the evaluation of national legislation and courts' decisions.⁸⁵

So far and to our knowledge, the Danish courts have never made a reference to the EU Court of Justice for a preliminary ruling about the EU Charter.

In the context of protection of EU law-derived rights by the Ombudsman, on the one hand scholarly analysis has pointed out that the Ombudsman has adopted a narrow interpretation of EU-derived rights, rarely (if ever) engaging with the question on whether the authorities were acting in compliance of EU-law, and thereby in practice limiting the protection of EU citizens.⁸⁶ On the other hand another commentator finds that it is possible to verify that international rules have little relevance in the majority of the cases, while EU-law is

⁸⁰ E.g. U.2007.1519H (Art. 21 of the Charter); U2009.504Ø (Art. 1 and Art. 3 of the Charter); U2011.184V (Art. 7 of the Charter), U.2011.1788H, U2011.1794H, U2011.1800H (all of them regarding Art. 47 of the Charter), U2013.3098H (Art. 21 of the Charter), U.2014.2286Ø (Art. 21 and Art. 23 of the Charter).

⁸¹ To the knowledge of a commentator from the Legal Adviser to the Danish Government, see Holdgaard, R. (2012) EU-charteret – en fodlænke eller nyt konstitutionel brændstof? [EU charter – a fetter or new constitutional fuel?], *Advokaten* 7 2012, 18 Sept. 2012.

⁸² U2011.984H, referred to in Rytter, J. E. and Laut, K. (2012), *ibid.*

⁸³ Fenger, N., (2012), *ibid.*, pp. 133-134.

⁸⁴ Fenger, N. (2012), *ibid.*, p. 134.

⁸⁵ Holst-Christensen, N. (2013) EU-Domstolens anvendelse af EU's Charter om grundlæggende rettigheder efter Lissabon-Traktatens ikrafttræden [EU Court of Justice's application of the EU Charter of Fundamental Rights after the entry into force of the Lisbon Treaty] in Danielsen, J. H. (ed) *Max Sørensen 100 år* [Max Sørensen 100 years], Jurist- og Økonomforbundets Forlag.

⁸⁶ Gøtze, M. (2009) Ombudsmandens inddragelse af EU-retigheder [The Ombudsman's inclusion of EU-rights], *Juristen* no. 4 2009, and (2010) The Danish ombudsman. A national watchdog with selected preferences, *Utrecht Law Review*, volume 6, Issue 1 (January). Gøtze remarks that up until 2009, the Danish Ombudsman only took up 4 cases relating to European Union law (Gøtze 2010, p. 44).



directly applicable and therefore it has been intensively reviewed since the middle of the 1980'es.⁸⁷ In the last five years (from 2009-2014) the Ombudsman has been more proactive in controlling the authorities' respect for Union citizens' rights.⁸⁸ This can be the result of an adjustment of the Ombudsman's practice pointing towards a more intensified control of the respect of EU-law. The 'development potential' of this control could be sustained by a more accessible register over the Ombudsman's decisions that could better inform the citizens about their rights.⁸⁹ The Ombudsman has recently mentioned the EU Charter as part of the legal basis in one of its reports on the inspections to the public institutions in 2013 – 2014.⁹⁰

QUESTION 5: JURISDICTIONAL ISSUES

✓ **Personal**

- **Who is covered by (core) economic rights protection? Are both natural and legal persons covered? Are citizens of the particular state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?**

As a starting point, the protection of the economic rights in the Constitutional Act is valid for all persons, although the text uses different notions: some of the rights are valid for 'all' (e.g. Article 73 and Article 75) while others only for 'citizens' (e.g. Article 78 and Article 79), although even these last provisions are found to be covering foreigners as well.⁹¹ The only article that for historic reasons is exclusively valid for 'Danish citizens' is Article 71 (section 1, subsection 2) on the right to physical freedom (not at focus in this report).⁹²

As regards the ECHR, the protection afforded in the convention covers all 'persons' including legal persons, civil servants, military personnel, inmates etc. Also asylum seekers, long and short term residents and family members are in principle under the personal scope of the convention. Nonetheless, some of the rights there included are only valid for citizens of the state, e.g. the right not to be expelled from the country in the optional

⁸⁷ Andersen, J. (2013) Ombudsmandens anvendelse af internationale regler [The Ombudsman's application of international rules], *EU-ret og Menneskeret*, 6.2013, p. 241.

⁸⁸ Gøtze, M. (2012) På sporet af den tabte EU-ret i dansk ombudsmandspraksis [Tracking of the lost EU law in the Danish Ombudsman's case law] in Baumbach, T. and Blume, P. eds., *Retskildernes kamp. Forholdet mellem national offentlig ret og udefra kommende ret* [The battle of the sources of law. The relationship between national public law and the law coming from outside], Jurist- og Økonomforbundets Forlag.

⁸⁹ Gøtze, M. (2012), *ibid.*, p. 152.

⁹⁰ See Rapport om Folketingets Ombudsmands tilsynsbesøg, Dok.nr. 12/02887-113 [Report on the Parliamentary Ombudsman's inspection visit], <http://www.ombudsmanden.dk/om/formidling_og_viden/publikationer/tilsynsrapport1/> (last visited Sept. 05, 2014).

⁹¹ Rytter, J. E. (2013) *Individets grundlæggende rettigheder* [The Individual's Fundamental Rights], Karnov Group, pp. 65 et seq.

⁹² Rytter, J. E. (2013), *ibid.* p. 66.



protocol 4, Article 3. Legal persons (companies, organisations, religious communities, etc.) are also covered, as long as the protection is relevant for these subjects.⁹³

As a point of departure, the ECHR only creates obligations for states, so the convention does not have legal force among privates; nevertheless the state has a kind of positive obligation to make sure that the rights in the convention are also protected from private's intervention.⁹⁴ As regards the possibility of extending the protection of other human rights in a horizontal relationship (e.g. the freedom of expression of private employees), the issue is not *whether* that is possible, but *how* – though this follows from a careful analysis of the particular situation at stake and not assuming that the human rights protection is automatically extended to the private sphere.⁹⁵

The economic rights stemming from statutory law are extended to all residents in Denmark, temporary and permanent, who have a link to the Danish labour market.

✓ **Territorial**

- **What is the territorial scope of the protection of economic rights afforded by your Member states? Are there *territorial* limitations to such protection? Which?**

As regards the temporal scope of economic rights in Denmark it is worth noting that some of the acts covering the issue of economic rights (e.g. the Act on Competition) are not valid in Greenland and the Faroe Islands, which are autonomous regions in the Danish Realm. Their status is that of autonomous provinces, regulated by the Self Government and Home Rule Acts⁹⁶ ('Selvstyrelov' and 'Hjemmestyrelø') and by the Danish Constitutional Act. The constitutional unity of the realm comprehends therefore three equally standing parts: Denmark, Greenland and the Faroe Islands ('Grundloven', Article 1). As such, the economic rights and freedom laid down in the Constitutional Act are also applicable in Greenland and the Faroe Islands.⁹⁷ Also important to

⁹³ Rytter, J. E. (2006) *Den Europæiske Menneskerettighedskonvention - og dansk ret* (2003), Forlaget Thomson, p. 51.

⁹⁴ Rytter, J. E. (2013) *Individets grundlæggende rettigheder* [The Individual's Fundamental Rights], Karnov Group, p. 70 and p. 70 et seq.

⁹⁵ Zahle, H. (1995) Ytringsfrihed for private ansatte [Freedom of expression for private employees], *Ugeskrift for Retsvæsen* U.1995B.361.

⁹⁶ Act on Greenland's Self Government ('Lov om Grønlands Selvstyre') no. 473 of 12/06/2009; Act on the Faroe Islands' Home Rule Government ('Lov om Færøernes Hjemmestyre') no. 137 of 23/03/1948. See also Spiermann, O. (2007) *Danmarks Rige i forfatningsretlig belysning* [The Danish Realm in a constitutional perspective], Jurist- og Økonomforbundets Forlag.

⁹⁷ In virtue of the Self Government and Home Rule systems, Greenland and the Faroe Island have exclusive competence to legislate and administer only on the matters listed in the acts: these can be municipal issues; healthcare; the social security system; the education system; territorial and fishing matters; labour market organisation; social policies; tax regulations and other subjects listed in the Acts. The Home Rule was introduced in 1979, while the introduction of self-government on



be noted is that neither Greenland nor the Faroe Islands are part of the European Union and thus not subject to EU law.⁹⁸ However Greenland has had the associated status of Overseas Countries and Territories (OCT) since 1985.⁹⁹

It follows from being a part of the realm of Denmark that the Danish parliament in light of Article 19 of the Constitutional Act can undertake international obligations stemming from its competence in foreign affairs that are also valid in its autonomous provinces. Foreign affairs are namely excluded from the Self Government and Home Rule systems.

The ICESCR was ratified in Greenland at the same time it was ratified in Denmark, while the ECHR was incorporated in Greenland in 2001 and in the Faroe Islands in 2000.¹⁰⁰

✓ **Material**

- **Are rights protected differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? How are economic rights balanced with other social rights? To what extent does the national legal system show a prevalence of a market-centric approach to a more social rights approach in regulating economic rights? In other words, which degree of functionalization of economic interests exists, and what are the tools used for such a limitation of economic freedoms (used to protect social interest by means of regulations or directly through public intervention)?**

On the basis of the description and discussions mentioned above, one cannot argue that the Danish Constitutional Act has a market-centric approach to the detriment of social rights. Indeed, the dated Constitution only contains a few provisions which can be labelled under the terms of ‘social’ and ‘economic’ rights without any hierarchical ranking. Yet, if one looks at the right to work, legislative developments witness of a more market-centric approach in regulating this economic right. Indeed the right to work might now be seen as an obligation to work, an obligation to accept jobs offers and activation programmes, since active labour market policies since the 1990’s have made it a condition for obtaining public support. On the other

21 June 2009 allowed additional fields of responsibility to be assumed by the Greenland Self-Government authorities, excluding e.g. citizenship, foreign, security and defence policy as well as exchange and monetary policy.

⁹⁸ Spiermann, O. (2007), *ibid.*, p. 121.

⁹⁹ Harhoff, F. (2006) Kommentar til § 1 [Commentary to Article 1] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, p. 119.

¹⁰⁰ See Royal Decree no. 814 of 18. September 2001 on coming into force for Greenland of the act on the European Convention on Human Rights; and Royal Decree no. 136 of 25 February 2000 on the coming into force for the Faroe Island of the European Convention on Human Rights. Furthermore, there are a number of ILO conventions that Denmark has ratified and that are also valid in Greenland: see Question to the Minister of Employment by the Parliamentary Employment Committee <<http://www.ft.dk/samling/20121/almdel/beu/spm/252/svar/1044520/1236430/index.htm>> (last visited Sept. 05, 2014).



hand, the case-law of the ECtHR on property rights as encompassing acquired social security benefits might lead to an interpretation of economic rights in a social light. Yet, Danish courts have so far been reluctant in limiting the powers of the Parliament to decide freely on economic policies and thereby their discretion to amend legislation concerning public financed pensions and other benefits.¹⁰¹

✓ **Temporal**

- **What is the temporal scope of protection afforded to economic rights? Have they been recent changes in the range and reach of economic rights protection?**

The Danish Constitutional Act is only rarely amended and there is no plan in the future of changing it.¹⁰² In fact, as aforementioned, the last time it was revised was in 1953, and the highly complicated constitutional procedure for amendments discourages the thought about imminent future amendments. Therefore, the only developments possible are those coming from the European level, e.g. stemming from the Charter of Fundamental Rights or from the future incorporation into Danish law of international treaties and conventions that Denmark has ratified (see above).¹⁰³

The trend in Danish law in the range and reach of economic rights protection can thus be said to be influenced by the general evolution of economic rights in the European context.

- ✓ **Please offer details as to how different rights are afforded to different *categories of persons* in different location and policy contexts over time.**

In general one could say with a lot of right that different categories of citizens have experienced different protection of their civil rights in different policy contexts over time. Consequently, EU citizens have been granted a more favourable legal position following the pace of the adoption of EU legal instruments protecting their Union citizenship rights. By means of example, the legislative acts introducing the right to equal treatment

¹⁰¹ See further Ketscher, K. (2008) *Socialret – Principper, Rettigheder, Værdier* [Social law – Principles, Rights, Values], Forlaget Thomson, 3. omarbejdede udgave, pp. 214-236.

¹⁰² Although efforts in this direction have been repeatedly made in recent years, see Krunke, H. (2013a) Formal and informal methods of constitutional change in Denmark, in Contiades, X. ed., *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Routledge, pp. 88-90.

¹⁰³ Christoffersen, J. and Madsen, M. R. (2011) The End of Virtue? Denmark and the Internationalisation of Human Rights, *Nordic Journal of International Law* 80 (2011) 257–277.



of men and women, the right to equal treatment of all people irrespective of their ethnic origin all derive from the implementation of European directives in Danish law. They now though cover all individuals residing in Denmark, and not only EU citizens.¹⁰⁴

QUESTION 6: ACTORS

- ✓ **What is the involvement of private or public actors, such as private (e.g. National Bar Associations) and public entities and authorities (e.g. Patent Offices), agencies, NGOs, etc. – in defining and setting economic rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of economic rights norms.**

At least the following public and private actors are involved in defining and setting economic rights' standards in Denmark. Some of these actors are involved in the hearing process during the passing of a bill in the Parliament, which in the Danish legal system is particularly well-developed. Other actors are involved in the setting of standards by fulfilling their role as complaints boards or supervisory authorities.

The Danish Competition and Consumer Authority ('Konkurrence- og Forbrugerstyrelsen')¹⁰⁵ covers an array of areas relating to the well-functioning of the Danish markets. The Authority works as a secretariat for the Competition Council ('Konkurrencerådet')¹⁰⁶, the Council for Public-Private Cooperation ('Rådet for Offentlig-Privat Samarbejde')¹⁰⁷, the Energy Supply Complaint Board ('Ankenævnet på Energiområdet')¹⁰⁸, the Consumers' Ombudsman ('Forbrugerombudsmand'), and the Consumer Complaints Board ('Forbrugerklagenævnet').¹⁰⁹

The Authority also considers complaints from private consumers related to goods, work and services purchased from traders and provides advice about common consumer related questions. Moreover, among its duties is also: to produce market analyses based on both competition and consumer aspects; to advice relevant public authorities through the formulation of guidance notes on legal and practical matters; and to contribute to the

¹⁰⁴ Union citizens have a distinctively favourable legal status vis-à-vis third country nationals in the field of social right that are not examined in this report.

¹⁰⁵ See <<http://en.kfst.dk/>> (last visited Sept. 05, 2014).

¹⁰⁶ See <<http://en.kfst.dk/Competition>> and <<http://www.kfst.dk/Om-os/Raad-og-naevn/Konkurrenceraadet>> (last visited Sept. 05, 2014).

¹⁰⁷ See <<http://www.rops.dk/>> (last visited Sept. 05, 2014).

¹⁰⁸ See <<http://www.energianke.dk/>> (last visited Sept. 05, 2014).

¹⁰⁹ The Danish Competition and Consumer Authority also acts as a secretariat for the Danish Storm Council, the Danish Complaints Board for the Funeral Services Industry and the Danish Complaint Board for Veterinary Surgeons.



development of new politics and regulation, putting forward recommendations and communicate to the consumers and the companies.¹¹⁰

The Authority also operates the website [Forbrug.dk](http://forbrug.dk), the Public Consumer Portal, which lists advices about relevant topics and products in order to make consumers better equipped to make the right choices based on individual preferences and needs. The portal offers a hotline for advice about consumers rights (though only in Danish) both before and after making a purchase (e.g. about electronic commerce or banking); it also offers guidance as to how to submit complaints to the Consumer Complaints Board and other relevant complaints bodies. Finally, the Danish Competition and Consumer Authority also funds the European Consumer Centre Denmark ('Forbruger Europa')¹¹¹ that gives advice to consumers about purchases in the EU.

Still in the area of consumer protection, the Danish Consumer Ombudsman ('Forbrugerombudsmand')¹¹² carries out supervisory and regulatory tasks, also ensuring that the legislation on the Danish Marketing Practices develops with a view on protecting the consumers' rights. The Danish Consumer Ombudsman is also the appointed central enforcement authority and national liaison office under the EU regulation on consumer protection cooperation ('CPC').¹¹³ Moreover, the Danish Consumer Ombudsman delivers statements and observations on different consumer related topics, such as e.g. ethics and marketing, internet and e-commerce, children/young people and marketing practice, and also on its own jurisdiction.¹¹⁴

The Danish Business Authority ('Erhvervsstyrelsen')¹¹⁵ works to create growth and has the stated goal of improving 'the competitiveness of Denmark and to make it more attractive to run a business in the country'. To this scope the authority is organized into five major departments for different policy areas: Business Conditions and Regulation; Analysis and Telecommunications; Business Development and International Relations; Digitization, Communication, and Business Support; and independent regulatory body in the area of telecommunications (not taking instructions from the Ministry for Business and Growth, under which the Authority otherwise belongs). The Authority devotes a special section to EU and international cooperation.¹¹⁶

Under the Danish Business Authority, the website Business in Denmark¹¹⁷ is a public service website that provides information to foreign companies on public authorities, competent actors in the Danish labour market and relevant rules and registration in Denmark.

The Danish FSA ('Finanstilsynet')¹¹⁸ works in three major areas: supervision of financial undertakings and of the securities market; legislation on matters related to financial companies, drafting of financial laws and issuing of

¹¹⁰ See <<http://en.kfst.dk/About-us>> (last visited Sept. 05, 2014).

¹¹¹ See <<http://www.consumereurope.dk/>> (last visited Sept. 05, 2014).

¹¹² See <<http://www.consumerombudsman.dk/>> (last visited Sept. 05, 2014).

¹¹³ See more at <<http://www.consumerombudsman.dk/About-us/intcooperation/eu>> (last visited Sept. 05, 2014).

¹¹⁴ See <<http://www.consumerombudsman.dk/Public-Relations/so>> (last visited Sept. 05, 2014).

¹¹⁵ See <<http://danishbusinessauthority.dk/>> (last visited Sept. 05, 2014).

¹¹⁶ See <<http://danishbusinessauthority.dk/eu-and-international/>> (last visited Sept. 05, 2014).

¹¹⁷ See <<http://businessindenmark.danishbusinessauthority.dk/>> (last visited Sept. 05, 2014).

¹¹⁸ See <<https://www.finanstilsynet.dk/en.aspx>> (last visited Sept. 05, 2014).



executive orders; and information, by collecting and publishing key figures and statistics regarding the financial sector. The Danish FSA is part of the Ministry of Business and Growth and acts as secretariat for the Financial Business Council, the Danish Securities Council and the Money and Pension Panel.

The Danish Working Environment Authority ('Arbejdstilsynet')¹¹⁹ is the Danish authority that monitors the respect of the act on the working environment, acting in order to promote a safe, healthy and developing working environment. Among the goals of the authority are the reduction of work accidents and the prevention of sick leaves and exclusion from the labour market.

The Mediation and Complaints-Handling Institution for Responsible Business Conduct ('Mægling- og Klageinstitutionen for Ansvarlig Virksomhedsadfærd')¹²⁰ is the OECD's Contact Point in Denmark and is responsible for raising awareness on responsible business conduct, providing information on legislation and international guidelines, and on issue such as transparency and due diligence. The institution also deals with cases relating to non-compliance of the OECD Guidelines for Multinational Enterprises.

In the area of copyright, the Danish Patent and Trademark Office, DKPTO ('Patent- og Varemærkestyrelsen')¹²¹ is a patent authority that provides services on patent search and trademark and design search, assisting companies by offering know-how and guidance about their intellectual property rights. It provides information on IP law and policy, including international patenting and international and national IP policy, so as to promote companies' knowledge on and use of the Intellectual Property Rights ('IPR') system.¹²² In order to improve the framework conditions for companies' use of IPR as part of reaching a strong competitiveness in Denmark, be innovative and create growth, the DKPO is in continuous dialogue with Danish companies and IPR advisors regarding new legislative initiatives. The knowledge gained from these dialogues is converted into concrete political initiatives. The DKPTO also participates in international IPR forums and cooperations, and contributes to shaping the IPR legislation, so the interests of the Danish businesses are taken into account. The DKPTO also works during the process of implementation of international legislation into the Danish legislation.

The Danish Energy Regulatory Authority, DERA ('Energitilsynet')¹²³ regulates the Danish markets for electricity, natural gas and district heating. It focuses on the network companies in the electricity and natural gas markets, i.a. setting the allowed price for electricity and natural gas companies with an obligation to supply and ensuring that these companies are run efficiently and with a high degree of consumer protection. In the district heating market, both production and network companies are monopolies and regulated as non-profit undertakings, and here the DERA monitors their prices and delivery terms, taking regulatory action if the prices and terms of the network companies are not in line with the non-profit regime. The DERA participates in international and

¹¹⁹ See <<http://engelsk.arbejdstilsynet.dk/>> (last visited Sept. 05, 2014).

¹²⁰ See <<http://businessconduct.dk/>> (last visited Sept. 05, 2014).

¹²¹ See <<http://www.dkpto.org/>> (last visited Sept. 05, 2014).

¹²² About the many initiatives on this last point, the DKPTO has set up an IP Tradeportal, an IP Marketplace, Cost Benefit Guides, IPR Mentorship programme, Databases, and other online tools. See more at <<http://www.dkpto.org/ip-law-policy/national-ip-policy/enterprise-policy.aspx>> (last visited Sept. 05, 2014).

¹²³ See <<http://energitilsynet.dk/tool-menu/english/>> (last visited Sept. 05, 2014).



European cooperation, e.g. the European Agency for the Cooperation of Energy Regulators ('ACER') cooperation, the Council of European Energy Regulators ('CEER') and the European Regulators Group for Electricity and Gas ('ERGEG').

The Environmental Board of Appeal ('Natur- og miljøklagenævnet')¹²⁴ is an independent administrative appeal board for rulings relating to planning, nature and the environment, reviewing the practical application of the law. In addition to the processing of appeals, the Environmental Board of Appeal provides information on its rulings so that citizens, authorities and other interested parties can benefit from the corpus of settlement decisions. The purpose of the work of the board is to assist citizens and enterprises in clarifying as quickly as possible their situation with regard to use of land, pollution of soil, industrial cases and permits for livestock farms.

The Equality of Treatment Board ('Ligebehandlingsnævnet')¹²⁵ treats complaints of discrimination on the labour market on grounds of sex, race, colour, religion or belief, political opinion, sexual orientation, age, disability, national origin, social, and ethnic origin. As the legal basis for the decisions of the board is derived by EU directives, the board has a special focus on EU law and its interpretation, and is among other things member of the European Network of Equality Bodies ('Equinet').¹²⁶

The Danish Institute for Human Rights (henceforth: DIHR) is often involved in the discussion of implementation of the rights stemming from international conventions in Danish law. The DIHR works to 'further and promote human rights in Denmark and abroad', and this is carried out by a series of different activities.¹²⁷ In the national context, the DIHR monitors Danish legislation to ensure that it is in accordance with human rights. This is done by contributing to the media debate but also providing expertise during implementation of international conventions and EU legislation. In practice, the DIHR serves as advisor to the government and parliament by writing legal briefs and recommendations (ca. 150 a year) and by being heard e.g. during the adoption of new legal acts or at times intervening in court. The DIHR is also by law the designated institute to provide assistance to victims of discrimination in pursuing their complaints about discrimination; the institute is also designated to 'conducting independent surveys concerning discrimination and publishing reports and making recommendations on any issue relating to such discrimination'.¹²⁸ The key areas for the DIHR's work in Denmark are equal treatment regardless of gender, race or ethnic origin; promotion of the implementation of the UN convention on rights for people with disabilities in Denmark; human rights education; and counselling in discrimination cases.

¹²⁴ See <<http://www.nmkn.dk/om-naevnet/in-english/>> (last visited Sept. 05, 2014).

¹²⁵ The current act regulating its work is Act no. 905 of 03 September 2012, 'Bekendtgørelse af lov om Ligebehandlingsnævnet'. See <<http://ast.dk/naevn/ligebehandlingsnaevnet>> (last visited Sept. 05, 2014).

¹²⁶ See <<http://www.equineteurope.org/>> (last visited Sept. 05, 2014).

¹²⁷ See <humanrights.dk and <http://humanrights.dk/our-work/our-work-denmark>> (last visited Sept. 05, 2014).

¹²⁸ Art. 10 in the Act on Ethnic Equal Treatment, Act no. 438 of 16 May 2012 ('Bekendtgørelse af lov om etnisk ligebehandling').



The Parliamentary Ombudsman ('Folketingets Ombudsmand')¹²⁹ is elected by the 'Folketing' (i.e. the Parliament) to carry out investigations regarding complaints from citizens about the public administration. Within its powers, the Ombudsman may state criticism and recommend that the authorities reopen a case in view of a possible change of the outcome of the decision. The Ombudsman may also take up cases on his own initiative, if for example a particular issue has been the focus of media attention.

QUESTION 7: CONFLICTS BETWEEN RIGHTS

- ✓ **How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?**
- ✓ **Are there, in your countries, notorious or problematic clashes between particular economic rights, or between rights and other rights, between individual economic rights and important public interests?**

Please give examples, and illustrate how these conflicts are dealt with and resolved.

The economic rights contained in the 'Grundlov', having constitutional value/power, take precedence over legislative acts. However, traditionally, the interpretation of the rights protected by the Constitutional Act has been restrictive, as to say only invoked when there was no doubt for their application. This follows from the central role that the legislative power plays in Denmark in creating law, and from the view that the constitutionally protected right in fact restricts the democratic Parliament's sphere of action.¹³⁰ This is valid for proving the constitutionality of acts but also for administrative and judicial acts.

In case of inconsistency or conflict of economic rights deriving by the Constitutional act, which may indeed happen, the clash can be resolved by imposing limits or clarifications laid down in the law (an occurrence foreseen in the Constitutional Act); by considering in a relative manner one right against another and balancing the different rights at stake (the one expanding while the other is reduced); and finally by prioritizing the economic/fundamental right taking precedence in relation to the other sources of law, without quantifying the importance of either of the two.¹³¹

The protection afforded by especially the ECHR covers more areas than the Constitutional Act, but where there is overlap, the national courts in their rulings may resort to either as supporting one another. In practice, also due to the very stringently formulated Supreme Court judgments, it is very difficult to ascertain in legal

¹²⁹ See <<http://www.en.ombudsmanden.dk>> (last visited Sept. 05, 2014).

¹³⁰ Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag, pp. 52 et seq.

¹³¹ Zahle, H., (2003), *ibid.*, pp. 33 et seq.



research if there was a ranking, or what procedure was set into place to overcome the inconsistencies. It might be that the Danish courts' approach consists in weighing the rights against each other and in light of the circumstances of the cases, arrive to a decision that does not significantly impinge on any of the two.¹³²

As mentioned before, the national courts are expected to work under the presumption that a national law is in line with the ECHR, so there would normally be a case where the courts investigate whether the international obligations are complied with. The parties in a civil case must point out that there can be a conflict.¹³³ The court cannot proceed to an independent interpretation of the ECHR and refrain from applying a clear national rule; moreover, up until now the courts have not carried out an independent interpretation of the ECHR that does not have a clear support in the case law of the ECtHR.¹³⁴

A couple of examples of clashes of economic rights:

In Danish constitutional theory it is assumed that only the positive freedom of association is protected by Article 78. Thus the negative freedom of association (of stepping out of a particular association) is not considered as protected, as it is the case with the ECHR and the EU Charter.¹³⁵ This is because the negative freedom of association collides with the exclusivity-agreements that in the Danish liberal employment market stipulate that only members of a particular association can be employed in a particular company or start a particular trade. This limitation may then be disputed from a human rights perspective.¹³⁶

Another example of conflict of rights is the deposit and return system for cans that in Denmark highlighted the collision of environmental protection with the principle of free movement of goods in the EU.¹³⁷

Finally, Danish legal scholarship has recently addressed in the area of competition law the novel issue of advertising law, as it can be argued that the protection of the commercial freedom of expression puts pressure on the contemporary marketing and advertising rules, which in turn have to comply with, and be interpreted in accordance to, (international and national) rules on freedom of expression.¹³⁸

¹³² Rytter, J. E. and Lauta, K. (2012) Report for the XXV FIDE Congress: Denmark. The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions.

¹³³ Christoffersen, J. (2008) Kommentar til Den Europæiske Menneskerettighedskonvention [Commentary to the European Convention on Human Rights], *Karnovs lovsamling*, vol.1, Thomson Reuters (updated 2010).

¹³⁴ Christoffersen, J. (2008), *ibid.*

¹³⁵ Kristiansen, J. (2006) Kommentar til § 78 [Commentary to Article 78] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Kingdom's Constitution with commentaries], Jurist- og Økonomforbundets Forlag, pp. 567-569.

¹³⁶ Heide-Jørgensen, C. (2001) Den negative foreningsfrihed og de danske liberale erhverv – statslig organisationstvang i strid med grundrettighederne? [The negative freedom of association and the Danish liberal trade – state obligation of organization in contravention of fundamental rights?], *Ugeskrift for Retsvæsen* U.2001B.266; Heide-Jørgensen, C. (2002) Negativ foreningsfrihed og de liberale erhverv – igen [The negative freedom of association and the liberal trades – again] *Ugeskrift for Retsvæsen* U.2002B.160.

¹³⁷ See further in Loftlund, K. (2008) Pant- og retursystemet [The deposit and return system] in Egelund Olsen, B. et al. eds. (2008) *Europæisering af dansk ret* [Europeanisation of Danish law], Jurist- og Økonomforbundets Forlag.

¹³⁸ Heide-Jørgensen, C. (2013) *Advertising Law. Marketing Law and Commercial Freedom of Expression*, Jurist- og Økonomforbundets Forlag.



ANNEXES

RELEVANT NATIONAL PROVISIONS

- The Danish Constitutional Act of 5 June 1953, 'Danmarks Riges Grundlov af 5. Juni 1953' <http://www.thedanishparliament.dk/Publications/The_Constitutional_Act_of_Denmark.aspx> (last visited Sept. 1, 2014)
- Act no. 626 of 29 September 1987 on the Prohibition of Difference of Treatment on Grounds of Race etc., 'Lov om forbud mod forskelsbehandling pga. race mv. - Racediskriminationsloven'
- Consolidated Act no. 1257 of 20 December 2000 on injunctions or the protection of consumers' interests, 'Lov om forbud til beskyttelse af forbrugernes interesser'. The Act implements Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.
- Act no. 775 of 29 August 2001 on the Equality of Treatment in the Employment-related Social Security Systems, 'Bekendtgørelse af lov om ligebehandling af mænd og kvinder inden for de erhvervstilknyttede sikringsordninger'
- Act no. 227 of 22 April 2002 on Services in the Information Society, including some aspects of electronic commerce, 'Lov om tjenester i informationsområdet, herunder visse aspekter af elektronisk handel' ('E-handelsloven'). The act implements Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)
- Act no. 424 of 08 May 2006 on Freedom of Association in the Labour Market, 'Bekendtgørelse af Lov om foreningsfrihed på arbejdsmarkedet, Foreningsfrihedsloven'
- Consolidated Act no. 1349 of 16 December 2008 on the Prohibition of Different Treatment in the Labour Market, 'Bekendtgørelse af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v. (forskelsbehandlingsloven)'. The act partly implements Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation
- Consolidated Act nr. 1192 of 08 December 2009 on the Danish Travel Guarantee Fund, 'Lov om en rejsegarantifond'.
- Consolidated Act on Copyright no. 202 of 27 February 2010, 'Bekendtgørelse af lov om ophavsret' (incorporating a number of European directives in the area) English translation available at <http://kum.dk/uploads/tx_templavoila/Lovbekendtgørelse%20af%20ophavsretsloven%202010%20engelsk.pdf> (last visited 10 Sept. 2014)
- Consolidated Act no. 1095 of 08 September 2010 on Consumers' Complaints, 'Lov om forbrugerklager (forbrugerklageloven)'
- Consolidated Danish Working Environment Act no. 1072 of 07 September 2010 ('Bekendtgørelse af lov om arbejdsmiljø – Arbejdsmiljøloven'), implementing a series of EU directives on the area
- Consolidated Act no. 365 Of 26 April 2011 on Payment Services and Electronic Money, 'Lov om betalingstjenester og elektroniske penge', implementing a number of EU directives in the area



- Act no. 645 of 08 June 2011 on Equal Treatment between Men and Women as regards Employment etc., 'Bekendtgørelse af lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v. (ligebehandlingsloven)' implementing a series of EU directives on the area
- Act no. 905 of 03 September 2012 on Equal Pay to Men and Women. 'Bekendtgørelse af lov om lige løn til mænd og kvinder (ligelønsloven)'. The act implements The European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
- Consolidated Act on Competition no. 700 of 18 June 2013, 'Bekendtgørelse af konkurrenceloven' – to highlight is especially chapter 9 on EU competition rules
- Act no. 872 of 28 June 2013 on the Right to Maternity Leave and Benefits, 'Bekendtgørelse af lov om ret til orlov og dagpenge ved barsel (barselloven)'. The act implements art. 8 and art. 9 in the Council Directive no. 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Moreover the act contains rules that implements Council Directive no. 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC
- Consolidated Act no. 1216 of 25 September 2013 on Marketing Practices, 'Lov om markedsføring' ('Markedsføringsloven'). The act implements Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Commercial Practices Directive)
- Consolidated Act no. 1457 of 17 December 2013 on Consumer Rights, 'Lov om forbrugeraftaler'. The act implements Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

SALIENT CASE LAW

The case law is mainly accessed via the 'Ugeskrift for Retsvæsen' [Danish weekly law gazette]. Selected human rights case law (national and international) is commented in legal journals such as 'EU-ret og menneskeret' [EU-law and human rights law], 'Juristen' [The Jurists' Journal], 'Advokaten' [The Lawyers' Journal], etc.

The website of the Supreme Court also offers the possibility to research its case law with the search terms 'EU-law' and 'Human Rights' in its online database.¹³⁹

In the following judgements the courts have evaluated the compliance of national law with the ICESCR, or whether the convention could be applicable in the case at hand, also as regards the recognition of foreign professional qualifications:

¹³⁹ 'Højesterets afgørelsesdatabase' [Supreme Court case law database] available via <http://www.hoejesteret.dk/hojesteret/Pages/default.aspx>



U.1998.1664/2H

U.2002.2591Ø

U.2006.2083H

U.2011.221H

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CATEGORIZATION OF ECONOMIC RIGHTS: FRANCE

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1. Introduction – the framework of economic rights protection in France

French constitutional history has been a tormented one which has seen 15 constitutions since 1791. The current constitution, which marked the birth of the Vth Republic, was adopted on 4 October 1958 (hereinafter the 1958 Constitution, or Constitution), with the return to power of the General De Gaulle. It broke away with the parliamentary regime tradition which had prevailed since the 1870s, and created instead a “semi-presidential” regime; it however remained at first very “legicentrist”, with only a minimalist constitutional review mechanism.

Judicial aspects

The 1958 Constitution entrusted a new institution, the *Conseil Constitutionnel* (hereinafter CC), with the task of controlling, *in abstracto* and *a priori* (i.e. before promulgation), the conformity of most laws (but not constitutional laws or referendums laws) with the Constitution.² However, the CC has consistently refused to extend its powers to controlling whether national legislative acts are compatible with EU law or the ECHR (*controle de conventionnalite*).³

The initial purpose of the new constitutional control mechanism was by and large aimed at keeping the parliament under control and limiting its interference with governmental action, a probleme which had plagued the previous regimes.⁴ Originally restricted to a limited number of political personalities (ie President of the Republic, Prime Minister, presidents of the National Assembly and the Senate), the right to submit a legislative act to the control of the CC was eventually extended to the opposition (ie 60 members of the Senate or the General Assembly) through a 1974 constitutional revision.⁵ Combined with the expansion of the constitutional norms of reference in the 1971 Freedom of Association Decision⁶ of the CC (see below), and the increased political alternance, this extension gave new dynamics to constitutional review. Finally, in 2008, a constitution revision added an *a posteriori* review mechanism (new Article 61-1 of the Constitution), through a

¹ Kozep-Europai Egyetem.

² The control covered ordinary laws, as well as budget laws, regulatory laws, social security financing laws, laws ratifying international agreements; it however excluded adopted laws (although the CC at times controlled them by checking amending laws; see Decision No 85-187 DC “Emergency State in New Caledonia Law”), constitutional laws (Decision No 2003-469 DC “Devolution Law”), referendums laws (Decision No 62-20 DC “President of the Republic Election”)

³ Decision No75-54 DC [Abortion Law] Rec. Cons. Const. 19; Decision 2010-4/17 QPC *M. Alain C.*, Rec. Cons. Const. 156.

⁴ It was designed as a “weapon against parliamentary deviance” (M. Debre, “Discours devant le Conseil d’Etat, 27 Aout 1958” in *Document pour servir a l’histoire de l’elaboration de la Constitution du 4 Octobre 1958* (Documentation Francaise, Volume III, 1991, 260), cited by J.-E. Gicquel “La dimension constitutionnelle des droits et libertes fundamental” in Cabrillac (ed) (Daloz, 2014) 95, 96.

⁵ Constitutional Law of 29 October 1974.

⁶ Decision No 71-44 DC Liberté d’Association, RJC I-24



Priority Question on Constitutionality, in French “*Question Prioritaire de Constitutionnalité*” (hereinafter QPC).⁷ The QPC is subject to conditions⁸ and filtering⁹ by the supreme judicial and administrative courts (“*Cour de Cassation*”, hereinafter C.Cass.; a “*Conseil d’Etat*” hereinafter CE). Since the first QPC came into force (2010), the CC has received 368 such constitutional conformity questions, questioning the constitutional conformity of legislative provisions which had gone unchallenged in the past for political reasons,¹⁰ a lack of anticipation of their impact of protected rights, or simply the fact they had been adopted before the constitutional recognition of the relevant rights. The CC found total or partial incompatibility with the Constitution, or imposed interpretative reservations, in more than one third of them (139).¹¹ In the space of half a century, the CC has gradually become a central institution, whose decisions are expected and commented upon (e.g. recent decision on gay-marriage law, or fracking legislation). It is worth noting that the procedure before the CC is fast, as it must deliver its decision within one month in a priori control (eight days in case of emergency) and three months in the a posteriori procedure (QPC).

The absence of a more fully fledged constitutional review system prior to 2008 did not mean that fundamental rights did not receive protection. First of all, ordinary courts could give effect to constitutional norms, and annul, ignore or interpret in a constitutionally conformed manner public or private measures which conflicted with constitutionally protected rights and freedoms. Administrative courts could invalidate sub-legislative (ie regulatory, administrative) acts) where they failed to comply with constitutional norms (often protected also as general principles of administrative law, or by legislative acts themselves),¹² as long as legislative provisions did not stand firmly in the way (the “*loi-écran*” doctrine).¹³ The introduction in 2000 of the *refere-liberte*,¹⁴ a judicial procedure allowing the administrative judge to adopt in emergency any measures against administrative acts which interfered in a manifest and grave manner with fundamental rights, introduced an effective and dynamic mechanism for the protection of fundamental rights, even if the success rate of such claims is low (1/10).¹⁵ In the context of such freedom preservation procedure, the CE recognized the right to property; the right of someone to dispose of his goods; the freedom of enterprise and contractual freedom.¹⁶ Where the administrative judge finds in favour of the applicant, they can order effective measures to preserve

⁷ Constitutional Law of 23 July 2008; Organic law related to the implementation of Article 61-1 of the Constitution.

⁸ The law must be relevant and applicable to the case before the ordinary court; the legislative provision in question should not have been already declared in conformity with the Constitution (except where constitutional norms of reference have changed in the meanwhile, or other relevant changes in fact or law); and the question “must not be deprived of a serious nature.” Article 23-2 of the 7 November 1958 Ordinance.

⁹ Within 3 months, the supreme courts must assess whether the question is novel or serious (Article 23-4 of the 7 November 1958 Ordinance)

¹⁰ E.g. the 2004 legislation on the wearing of religious symbols in schools.

¹¹ Since its first QPC delivered on 28 May 2010, the CC have taken 368 QPC decisions; in more that a third (139), it found total or partial incompatibility, sometimes with temporal limitations, or included interpretative reservations). See <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-type/les-decisions-qpc.48300.html>

¹² For example on equal access to public service jobs, CE 2 March 1988 *Blet et Sabbiani* App. No 61534.

¹³ CE ass 11 Avril 2012 GISTI Appl No 322326. CE sect 6 November 1986 Arrighi Lebon 966; CE 1 July 2010 Mme Djamilla D App. No 319993.

¹⁴ Law 2000-597 of 30 June 2000.

¹⁵ Favoreu et al, p. 201.

¹⁶ CE 29 March 2000, *SCI Stephaux*; CE 29 March 2001, *Ste Lidl*; CE ord., 12 November 2001, *Commune de Montreuil Bellay*.



fundamental freedoms, such as, for example, the suspension of an prefectoral decision to request private clinic strikers to work.¹⁷ Judicial courts would also sanction private law measures which did not respect constitutionally protected rights and freedoms.¹⁸ Moreover, the introduction of the QPC in 2008 mutated the two supreme courts into “negative” constitutional judges, in that they must decide whether a question is novel or serious enough to be referred to the CC.¹⁹ Furthermore, ordinary courts could invalidate, set aside or interpret national measures in conformity with international instruments or European human rights instruments, as well as EU treaty provisions and secondary legislation which protect economic rights (see below for further explanations).

Substantive issues

The 1958 Constitution, unlike some of the preceding constitutions, contains no fundamental rights provisions. Its preamble does however specifies that “the French people declares its commitment to the rights of the man ...as defined in the 1789 Declaration, confirmed and completed by the preamble of the 1943 Constitution”. In a famous 1971 decision on the freedom of association, the CC expanded the constitutional norms of reference, and integrated *fundamental rights* into what scholars call the “*bloc de constitutionnalité*” (L. Favoreu). It thereby also extended its review power to checking the compatibility of French legislative acts with fundamental rights, as protected in a range of constitutional sources.²⁰ A recent constitutional reform also granted the 2004 Charter of the Environment constitutional status

The notions of “economic rights” or “economic constitution” do not exist in French positive law. French academics use this terminology in reference to international instruments such as the ICESCR, in contrast to the civil and political rights enshrined in the ICCPR,²¹ or in the context of domestic law, in relation to the 1946 Preamble, which recognised political, economic and social rights. In both contexts, economic and social rights are grouped together under the label “economic and social rights” or “socio-economic rights”, which confers to the notion a solidarity dimension.

More practically oriented authors adopt classifications of rights based on the subjects of such rights, namely human beings, citizens, “*justiciables*” or “social and economic actors”.²² Under this later classification, we find usually the following economic rights: the right to property, contractual freedom, commercial and industrial

¹⁷ Right to strike, CE 9 December 2003, *Aguillon*.

¹⁸ Soc. 28 June 1951 *Societe d'impression sur etoffes du Grand Lemps c Geoffroy et Maiseries de la Medditerannee c/ Dame Roth D.S.* 1951, 532. The Court of Cassation develops its own “constitutional” case law, with or without reference to constitutional document (eg freedom to work, C.Cass., Soc. 19 November 1996, Bull. Civ V No 392.)

¹⁹ J.-E. Gicquel (2014) in Cabrillac, 108-110. Before deciding to send a QPC, the Supreme Courts often carry out substantial review of the contested legislation. For example, the Cour de Cassation will check in detail whether the legislator correctly balanced the freedom of enterprise and the safeguarding of public order (Crim 9 March 2011, No 10-87.542), whether a legislative derogation to the principle of equality of debtors is justified by a public interest and doesnot undermine the freedom of undertaking (Com, 20 March 2012, No 11-23.822) or the respect of the right to property in “acquisitive prescription” (Civ. 2e, 12 October 2011, No 11-40.055.)

²⁰ Decision No 71-44 DC Liberté d'Association, RJC I-24.

²¹ Guinchard and Debard, *Lexique des termes juridiques 2014*, (Paris, Dalloz-Sirey, 2013, 21st ed.), p. 367.

²² R. Cabrillac (ed), “Libertes et Droits Fondamentaux” (20th ed., Dalloz, 2014)



freedoms, the freedom to work.²³ Moreover, one of the citizen's right, the right to create, also has a strong economic dimension.

French constitutional scholars, like others, follow Jellinek's distinction between "*droits-libertés*" (or negative rights, or 1st generation rights) and "*droits-créances*" (or positive rights, or 2nd generation rights). The later "confer[s] on the individual a legal prerogative to demand access to certain benefits or services from public authorities"²⁴ and entails positive action by public authorities,²⁵ whilst the former calls for non-interference by the state.²⁶ We find rights of economic nature under both categories (e.g right to property as a *droit-liberté*, and the rights to work, housing, health, education or social security as *droits-créances*).

The fundamental rights and freedoms recognized by the 1789 Declaration were *droits-libertés*, and included notably the economic *right to property* (article 2 and 17) and a general freedom right (Article 4). Shortly after, the 1793 Bill of Rights declared that "society owes maintenance to unfortunate citizens either through procuring work for them, or assuming means of existence of those who are unable to work".²⁷ It enshrined the idea that the society "is bestowed with an active responsibility or duty towards its citizens".²⁸ Similarly, the 1848 French Constitution provided for the right to free education, the right to work or the "right of the orphan, the infirm and the aged to be maintained by the state".²⁹ The 1946 Preamble, inspired by the Resistance ideals and socialist and communist ideologies, recognised a whole range of socio-economic rights, as *droits-créances* or collective rights, including *the duty to work and the right to employment* (para. 5), *trade-union rights* (para. 6), *the right to strike* (para. 7), the nationalization principle (para. 9), *the obligation for the state to provide the individual and the family with the conditions necessary to their development* (para. 10), *the right to health, material security, rest and leisure and social security* (para. 11), *the right to free, public and secular education* (para. 13), and *the principle of solidarity and equality of all French people in bearing the burden resulting from national calamities* (para 12).

2. Identification and national sources of economic rights

As mentioned before, the 1958 Constitution does not contain any catalogue of rights. However, in the landmark 1971 [Freedom of Association] decision and subsequent ones, the CC consecrated the 1789 *Declaration of the Rights of the Man and the Citizen*, and the *Preamble of the 1946 Constitution* (which includes "political, economic and social principles necessary to our times" and "fundamental principles recognised by

²³ R. Cabrillac (ed), "Libertés et Droits Fondamentaux" (20th ed., Dalloz, 2014) 783-896

²⁴ Pech, op. cit., p. 269; Pelloux, "Vrai et faux droits de l'homme, problèmes de définition et de classification" ["True and false human rights, problems of definition and classification"], *Revue du droit public*, 1981, p. 54.

²⁵ Pech, op. cit., p. 268 ; Chagnollaude and Drago (eds.), *Dictionnaire des droits fondamentaux [Dictionary of Fundamental Rights]*, (Paris, Dalloz, 2007), p. 280.

²⁶ L. Favoreu et al, "Droit des Libertés fondamentales" (Dalloz, 2012) 476.

²⁷ Para. 21 of the Preamble of the French Constitution of 1793.

²⁸ Pech, op. cit., p. 268.

²⁹ Art. 9, 13 of the 1848 Constitution, available at the website of the Conseil constitutionnel, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1848-ii-republique.5106.html> .



republican laws”³⁰) as constitutional norms of reference. It also gradually recognised other “rights” or “principles of constitutional value” which do not have a clear and explicit legal basis in any constitutional texts.

The CC, when assessing the 1981 nationalisation programs, recognised the constitutional value of the *right to property* protected under Articles 17 and 2 of the 1789 Declaration,³¹ and *contractual freedom*,³² derived from the general freedom provision contained in Article 4 of the same Declaration, and as the *freedom of enterprise* (“*liberté d’entreprendre*”)³³ protected under republican laws. However, other important economic rights have not (yet) been conferred constitutional status. For example, the CE refused arguments brought in the context of individuals’ request for QPC invoking violation of the principle of competition,³⁴ or legitimate expectations and the non-retroactivity of fiscal laws,³⁵ since these were not constitutionally protected rights. The 1971 freedom of association Decision,³⁶ already mentioned, has been interpreted as recognizing the legally binding character of economic and social rights guaranteed by the 1946 Preamble.³⁷ Yet, the CC never established the constitutional value of the right to work for example, even though it had numerous opportunities to do so.³⁸

Although there is no formal hierarchy amongst constitutional rights, there are noticeable variations in the degree of protection afforded to certain rights. Scholars have noted, in particular, the relatively weak protection granted to the freedom of enterprise. Whilst the CC established the constitutional status of that freedom, it would normally accept that it can be interfered with to pursue a wide range of public interests (fight against unemployment, protection of public health, right to rest and leisure, right to work, public order).³⁹

In any case, the recognition of rights as constitutional ones does not determine their effectiveness. The dominant academic view holds that the *droits-libertés* contained in the 1789 Declaration are subjective rights which can be relied on in courts (direct effect), but that the economic and social *droits-créances* such as those listed in the 1946 Preamble do not have such effect, unless they are implemented through legislation (in French, *concrétisation législative*).⁴⁰ They thus cannot be relied on to claim access to public services or social benefits, for example. Legislative action has nonetheless contributed to the justiciability of socio-economic rights. One interesting example concerns the right to a decent housing, held by several legislative acts as a “fundamental right”.⁴¹ A law of 5 March 2007 declares the right to housing as a justiciable right and set out administrative and judicial procedures to claim it. Moreover, such constitutional norms could also be relied on to interpret domestic provisions (indirect effect). However, the lack of doctrinal distinction between

³⁰ Decision 77-87 DC Liberté d’enseignement.

³¹ Decision No 81-132 DC (Nationalisations), and 82-139.

³² Decision No 9 8-401 DC, Decision No 99-423, Decision No 2000-437 DC.

³³ Decision No 81-132 DC (Nationalisations); Decision No 55 QPC 19 October 2010

³⁴ CE 2 March 1991, Ste Manyris, App. No 345288.

³⁵ CE 25 June 2010, M. Francois A. App. No 326363.

³⁶ Decision No 71-44 DC Liberté d’Association, RJC I-24

³⁷ Decision of 16 July 1971, Conseil constitutionnel, no. 71-44 DC, para. 2.

³⁸ E.g. Decision No 83-156 DC [cumulation of pension and professional activities].

³⁹ J.-E. Gicquel (2014) p. 116. More on this point in the section on freedom of enterprise.

⁴⁰ Pech, op. cit., p. 272.

⁴¹ E.g. Act No. 89-462, 6 July 1989, Article 1: “Le droit au logement est un droit fondamental” [“The right to decent housing is a fundamental right”].



justiciability (direct effect) and invocability (indirect or interpretative effect) of constitutional norms creates uncertainties as to how one can rely on economic and social rights listed in the 1946 preamble.⁴²

Whilst socio-economic rights may not always be relied on against legislative measures, they can still be activated against sub-legislative (ie regulatory or administrative) acts and private measures.⁴³ For example, the CE did not exclude the possibility of ruling on the legality of administrative acts limiting health-related public spending in the light of the right to health, guaranteed by para. 11 of the 1946 Preamble.⁴⁴ It also annulled administrative acts that violated the principle of material security guaranteed by para. 11 of the 1946 Preamble.⁴⁵ It referred to para. 13 of the Preamble of the 1946 Constitution on the right to education on several occasions, reminding the government of its duty to take this right fully into account.⁴⁶ The Rioms administrative Court of Appeal referred to the constitutional case law and para. 11 of the 1946 Preamble to annul a private body's implementation of a legislative act excluding settled foreigners from disability benefit.⁴⁷ The Versailles Court of Appeal annulled a provision of a collective agreement between employees and management on the basis of para. 5 (right to employment) of the Preamble of the 1946 Constitution on the grounds that it excluded the recruitment of people above the age of thirty-five.⁴⁸ Still, without legislative implementation of the constitutionally guaranteed social rights, French supreme courts tend to be reluctant to consider the 1946 Preamble socio-economic rights as directly constituting legal obligations enforceable against public authorities or private parties.

There are interesting constitutional debates around the idea of a *fundamental rights acquis*, and “regressive” legislation. In 1984, the CC banned legislation that aimed at diminishing the level of protection previously accorded to a fundamental right, and considered that a legislative act could regulate the exercise of fundamental rights only in order to raise their effectiveness (progressive legislation) or to conciliate it with other rules or principles of constitutional value.⁴⁹ Many commentators however suggest that such a doctrine was already abandoned in 1986,⁵⁰ and conclude that governments are not precluded from diminishing the threshold of protection in the field of social rights.⁵¹ However, in 1995, the CC seemed to extend the application of this so-called “*effet cliquet*” (L. Favoreu) to social rights. Indeed, it held that the 1946 Preamble provided for the protection of the dignity of the human being against all forms of degradation as “a principle of

⁴² Pech, p. 273.

⁴³ Pech, *op. cit.*, p. 274.

⁴⁴ Decision of 30 April 1997, Conseil d'Etat, no. 180838, 180839, 180867; Decision of 27 April 1998, Conseil d'Etat, no. 185645, 185675, 185693, 185695.

⁴⁵ Decision of 6 juin 1986, Conseil d'Etat, n° 57618.

⁴⁶ *Confédération syndicale des familles*, Decision of 6 February 1980, Conseil d'Etat, no. 09857.

⁴⁷ *Drissi v. CAF du Puy-de-Dôme*, Cour d'appel de Riom (Chambre sociale), Arrêt du 29 janvier 1996, RG : no. 2749/95.

⁴⁸ Decision of 11 march 1985, Court of Appeal of Versailles, cited by Pech, *cabp.* 274, note 46.

⁴⁹ Decision of 11 October 1984, Conseil constitutionnel, no. 84-181 DC, para. 37.

⁵⁰ See the 2006 speech of the president of the Conseil constitutionnel, Mazeaud, “L'erreur en droit constitutionnel” [“The Error in Constitutional Law”], speech at the Institut de France, 25-26 October 2006, p. 8, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/erreur.pdf.

⁵¹ Pech, *op. cit.*, p. 273.



constitutional value”.⁵² This led some scholars to claim that the constitutional protection of social rights, whether in the form of positive fundamental rights or constitutional objectives, would prohibit any “regressive” legislation that would suppress social standard, such as housing benefits for low-income families, social security, family welfare benefits or the right to free education.⁵³

Beyond constitutional sources, economic rights are, obviously, also protected and promoted by international and European instruments and legislative acts, national legislations and regulatory measures, and supported by various policy mechanisms, such as the organization and provision of public services, the creation of and access to social benefits, etc. These will be exposed below when looking at the international and European dimension and the review of specific economic rights.

Boundaries inside and outside of economic rights

French constitutional, administrative and civil law afford protection to a number of economic rights. None of them is core or absolute, and all can be balanced against other rights or objectives of general interest. The rights exposed below are the most significant rights of an economic nature which benefit from a particular protection under French constitutional provisions, legislative instruments and case law. In Annex 1, one finds a table which sums up those rights and their legal basis. Note however that certain rights (ie principle of competition, right to work, etc) have not been conferred constitutional status.

The right to property

According to Article 544 of the Civil code, “[o]wnership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.” Article 2 of the 1789 Declaration considers the right to property, alongside liberty, surety and resistant to oppression as a natural and “imprescriptible” right of the man, whilst its Article 17 establishes property as an “inalienable and sacred right, of which no one can be deprived, unless public necessity, legally ascertained, obviously requires it, and just and prior compensation has been paid”.

The CC came to define the value, nature and scope of the right to property first in the context of nationalization laws which had been adopted following the election of F. Mitterand as President in 1981.⁵⁴ In a statement of principle, it declared that the principles of the 1789 Declaration « have *full constitutional value* in that they concern the *fundamental character of the right to property*, the protection of which constitutes one of the objectives of the political society and which has *the same rank as liberty, security and resistance to oppression*,

⁵² Decision of 19 January 1995, Conseil constitutionnel, no. 94-359 DC, para. 6.

⁵³ Guy Braibant, “L’environnement dans la Charte des droits fondamentaux de l’Union européenne” [“The Environment in the Charter of Fundamental Rights of the European Union”], *Cahiers du Conseil constitutionnel*, n° 15 (Dossier : Constitution et environnement), January 2004, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-15/l-environnement-dans-la-charte-des-droits-fondamentaux-de-l-union-europeenne.52002.html>.

⁵⁴ Decisions No 81-132 DC of 16 January 1982 and No 82-139 of 11 February 1982.



and in that they concern the *guarantees granted to the beneficiaries* of this right and the prerogatives of the public power”.⁵⁵

The Conseil constitutionnel considers that « limits placed on [the right to property] must be justified by a reason of general interest and be proportionate with the objective pursued ».⁵⁶ However, the CC tends to tolerate extensive limitations of its exercise as long as they are not of such « a serious nature that the interference with the right to property undermines [*dénature*] its meaning and scope and would thus be contrary to the Constitution ».⁵⁷ Moreover, whilst compensation is required for deprivation of property (ie nationalization or privatization), it is not for limitations of owners’ powers.⁵⁸

Overall, despite strong statement of principle on the protection of the right to property, the protection actually afforded to property owners could be perceived as relatively weak. Scholars observed a gradual « depreciation » over the last century of the right to property, and a shift from an individualist right of the owner to do what he or she wants into a right with a social function.⁵⁹ In 1982, the CC led the nationalization programme go ahead, based on a legally admitted public necessity derived from the nationalization clause of the 1946 preamble (« all good, all companies the exploitation of which has or has acquired the character of a national public service or a de facto monopoly must become property of the collectivity »), although it established the principle of “prior and just” compensation for such deprivation of property.⁶⁰ Authorization regimes are acceptable,⁶¹ and so is the regulation of the conditions of use of property by local authorities.⁶² Moreover, the legislator can legislate to regulate the exercise of the right to property, and not just to protect or reinforce it. Scholars thus tend to consider it a second rank right.⁶³ Overall the CC is deferential to the determination of public interest objective by the legislator ; however, it did declare contrary to the Constitution hunting legislation affecting property rights which did not pursue a clearly identified public interest.⁶⁴ Furthermore, civil law, despite its emphasis on owner’s right, also allows for limitations to the exercise and use of one’s property, as well as considerations related to the social context of property (see second part of Article 544 C.Civil, and also Article 545 of the same code which provides for the possibility to force someone to sell property for a public utility cause, or Articles 640, 643, 642, 645 related to the duties of owners).⁶⁵

⁵⁵ Decision of 16 January 1982, Conseil constitutionnel, no. 81-132 DC, para. 16.

⁵⁶ Decision of 13 May 2011, Conseil constitutionnel, no. 2011-126 QPC, para. 11; Decision of 11 April 2013, Conseil constitutionnel, no. 2013-666, para. 23.

⁵⁷ Decision No 84-172 DC of 26 July 1984.

⁵⁸ Decision No 2011-201 QPC para 4.

⁵⁹ As predicted by L. Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (1912) p 156.

⁶⁰ Decision of 16 January 1982, Conseil constitutionnel, no. 81-132 DC, paras. 13, 44, 46, 49, 61.

⁶¹ Decision No 84-172 DC Structure des exploitations agricoles.

⁶² Decision 85-189 DC Amendement Tour Eiffel.

⁶³ Favoreu et al. 353.

⁶⁴ Decision No 200-434 DC Loi sur la chasse

⁶⁵ Libchaber 2014 p. 797-798



The CC considers property as including private property and, on an equal footing, State property and the property of public entities.⁶⁶ It also extended its scope beyond real estate, to other properties such as movable (eg shares) or immaterial property,⁶⁷ including brand of commercial products or services,⁶⁸ and intellectual property rights.⁶⁹

However, taxi drivers licences, licences granted for the exploitation of public transport services,⁷⁰ or pension rights granted for retired public servants are not considered as property.⁷² Similarly, constitutional case law did not apply the right to property to the following economic legislations: the suppression of a tax benefit which entailed for certain taxpayers a tax increase;⁷³ the extension of a tax for taxpayers who were exempted from that tax before;⁷⁴ the suppression of a professional privilege that certain professions enjoyed;⁷⁵ the substitution of a contractual insurance regime by the social security system prescribed by law which is not followed by any dispossession,⁷⁶ etc.

In other words, the Conseil constitutionnel refuses to extend the guarantee of the right to property to claims and debts, avoiding an interpretation which would treat any “right of economic character” as property, as the ECtHR does.⁷⁷ However, the influence of the ECHR is changing this case law, at least in the administrative court system. The Conseil d’Etat applied Article 1 of Protocol no. 1 to the ECHR on the protection of property to pension rights.⁷⁸ It held that “pension is a financial, personal and life annuity allowance, granted for civil and military public servants and, after their death, for their heirs designated by the law, as a remuneration of the services completed until the regular termination of their functions”.⁷⁹ Moreover, the Conseil d’Etat recognized that “reversion pensions constitute claims which must be regarded as possession in the sense of Article 1, cited above, of the Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental

⁶⁶ Decision no. 86-217 DC of 18 September 1986, para. 47.

⁶⁷ Decision of 16 January 1982, Conseil constitutionnel, no. 81-132 DC, para. 20; generally on this extension in the constitutional case law, see Decision of 8 January 1991, Conseil constitutionnel, no. 90-283, para. 7; Decision of 27 July 2006, Conseil constitutionnel, no. 2006-540, para. 15; Decision of 27 July 2006, Conseil constitutionnel, no. 2006-541 DC, para. 15 etc.

⁶⁸ Decision of 8 January 1991, Conseil constitutionnel, no. 90-283 DC, paras. 7, 9; Decision of 25 January 1992, Conseil constitutionnel, no. 91-303 DC, para. 7.

⁶⁹ Decision of 28 September 2006, Conseil constitutionnel, no. 2006-541 DC, para. 8; Decision No2009-r40 DC HADOPI I.

⁷⁰ Decision of 23 June 1982, Conseil constitutionnel, no. 82-125 L.

⁷¹ Decision of 30 December 1982, Conseil constitutionnel, no. 82-150 DC, para. 3.

⁷² Decision of 16 January 1986, Conseil constitutionnel, no. 85-200 DC; Favoreau, op. cit., p. 299.

⁷³ Decision of 29 December 1989, Conseil constitutionnel, no. 89-268 DC, para. 41.

⁷⁴ Decision of 30 December 1991, Conseil constitutionnel, no. 91-302 DC, para. 14.

⁷⁵ Decision of 10 January 2001, Conseil constitutionnel, no. 2000-440 DC, para. 5; Decision of 20 January 2011, Conseil constitutionnel, no. 2010-624 DC, para. 16.

⁷⁶ Decision of 27 November 2001, Conseil constitutionnel, no. 2001-451 DC, para. 16.

⁷⁷ *Code constitutionnel et des droits fondamentaux 2014 [Constitutional code and fundamental rights 2014]*, (Dalloz, 2014, 3^e éd.), p. 310.

⁷⁸ Decision of 27 May 2005, Conseil d’Etat (Ass.), no. 277975.

⁷⁹ Decision of 6 December 2006, Conseil d’Etat, no. 262096.



Freedoms”.⁸⁰ Similarly, an invalidity pension granted for militaries was considered a “possession” to which Article 1 of Protocol no. 1 was applied.⁸¹

Among immaterial property rights, the Conseil constitutionnel considered electricity as an asset with a special nature to which it applied the constitutional guarantees of property: it reviewed whether the challenged legislative provisions cause any violation to the right of ownership guaranteed under Articles 2 and 17 of the 1789 Declaration.⁸²

The recognition of immaterial property rights, especially literary and artistic works or technical inventions such as industrial property, have led to the recognition of real enjoyment of these rights by their “owner” and his or her power to dispose of the property.⁸³ Within the category of immaterial things, one should make a distinction between objectively created things and things woven from the personality of the right holder, such as the right to one’s name, to one’s image or to one’s sound, one’s labour force and works of art or even one’s customer base. The property of such personalized things is characterized by two features: their inaccessibility for others without the consent of the right holder and a kind of moral right of the concerned person to revise the contracts of which object is the given right.⁸⁴

As for intellectual property rights, the CC considered it as a property right as protected under Articles 2 and 17 of the 1789 Declaration.⁸⁵ Intellectual property rights are defined by law as follows: “The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons. This right shall include attributes of an intellectual and moral nature as well as attributes of an economic nature, as determined by Books I and III of this Code.”⁸⁶ The CC interpreted it for copyright holders and holders of related rights to enjoy their intellectual property rights.⁸⁷ Whereas authors enjoy copyright over their works, neighbouring rights on copyright benefit performers, phonogram producers, videogram producers, audiovisual communication companies (neighbouring rights relate to the satellite broadcasting of a performer’s performance, a phonogram, a videogram or the programs of an audiovisual communication enterprise).⁸⁸

Concerning internet domain names, the CC held that even the “supervision, both as regards private individuals and commercial concerns, of the choice and use of internet domain names affects intellectual property rights, freedom of communication and freedom of enterprise”.⁸⁹ It held that Article 45 of the Postal and Electronic

⁸⁰ Ibid. ; in the same sense see e.g. Decision of 29 October 2012, Conseil d’Etat, no. 32964, paras. 11-12.

⁸¹ Decision of 17 March 2009, Conseil d’Etat, no. 307596.

⁸² Decision of 11 April 2013, Conseil constitutionnel, no. 2013-666, paras. 23-24.

⁸³ Libchaber, p. 789.

⁸⁴ Ibid., pp. 789-790.

⁸⁵ Decision of 10 June 2009, Conseil constitutionnel, no. 2009-580, para. 13.

⁸⁶ Code of intellectual property, Article L111-1(1)-(2).

⁸⁷ Decision of 27 July 2006, Conseil constitutionnel, no. 2006-541 DC, para. 40; Decision of 10 June 2009, Conseil constitutionnel, no. 2009-580, para. 13.

⁸⁸ Code of intellectual property, Part I, Book I and Book II.

⁸⁹ Decision of 6 October 2010, Conseil constitutionnel, no. 2010-45 QPC.



Communications Code is unconstitutional, since it has entirely delegated the power to supervise the conditions in which domain names are assigned, refused or withdrawn, without providing for guarantees against any infringement of freedom of enterprise and Article 11 of the Declaration of 1789.⁹⁰ Although the CC referred to intellectual property rights, it did not invoke property as such and thus, left open the legal nature of internet domain names. It was satisfied to conclude that the choice and the use of an internet domain name “affect” intellectual property rights that the legislative power must protect.⁹¹

In an interesting case before the Conseil constitutionnel on the constitutionality of the Act transposing the Biotechnology directive,⁹² the authors of the petition claimed that the provision according to which “the human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions” was contrary to Article 11 of the 1789 Declaration (“the free communication of ideas and opinions”).⁹³ They argued that the exclusion of elements of the human body from the scope of patentable inventions runs against the requirement of pluralism, namely that of scientific knowledge. Although the CC did not rule finally on the question since the disputed provisions merely drew the necessary conclusions from the unqualified and precise provisions of Article 5 of the Directive, it is remarkable that it cited a relevant CJEU decision, which held that the provisions of the Directive “d[id] not allow the discovery of a DNA sequence to be patentable “as such”; the protection of inventions envisaged by the Directive cover[ed] only the result of inventive, scientific or technical work, and extends to biological data existing in their natural state in human beings only where necessary for the achievement and exploitation of a particular industrial application”.⁹⁴ In this case the definition of patentable works was inspired by the case law of the Court of Justice of the EU, according to which work on the sequence is patentable, but not the mere partial sequence of human genes.

Commercial and industrial freedoms

Commercial and industrial freedoms are not explicitly protected in the 1958 constitution, but they had been qualified as fundamental rights by the republican legislator in 1791.⁹⁵ The Civil Code mentioned the principle in its Article 544 on the right to property, articles 6 and 1134 on contractual freedom and articles 7 and 8 on

⁹⁰ Ibid., para. 6.

⁹¹ Manara, “« Tout citoyen peut parler, écrire, imprimer librement », ainsi qu'enregistrer et utiliser des noms de domaine ! Décision rendue par Conseil constitutionnel” [“« Each citizen can speak, write and print freely », and register and use domain names as well ! Decision rendered by the Conseil constitutionnel”], Recueil Dalloz, 2010, 6 October 2010, p. 2285.

⁹² Legislative Act no. 2004-800 of 6 August 2004 on the bioethics (transposing Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions).

⁹³ Decision of 29 July 2004, Conseil constitutionnel, no. 2004-498 DC.

⁹⁴ See Judgment of 9 October 2001, Court of Justice of the European Union, Case C-377/98, as cited by Decision of 29 July 2004, Conseil constitutionnel, no. 2004-498 DC, para. 5.

⁹⁵ Decret d'Allarde 2-17 March 1791; Loi Le Chapelier, Legislative Act of 14-17 June 1791.



equal enjoyment of civil rights. Since then, various laws have reformulated and fleshed out the principle in various contexts.⁹⁶

The notion of freedom of trade and of industry has been adapted to include all professional activities (ie services). It covers the “freedom of enterprise”, the “freedom of [commercial] exploitation” and the “principle of fair competition”.⁹⁷

The freedom of enterprise concerns the right to access to a desired independent activity, the possibility for legal and natural persons to establish themselves by creating, buying and organizing a company,⁹⁸ and to exercise an activity of their choice.⁹⁹ A range of policy measures may also be adopted to incentivise company creations and developments (tax rebates, loans, etc).¹⁰⁰ The notion of freedom of enterprise integrates in the domestic legal system the free movement of goods (Articles 28-29 TFEU), of persons (Articles 45 TFEU), of services (Articles 56-57 TFEU), the right of establishment and the right to take up and pursue activities as self-employed persons and to set up and manage undertakings (Article 49 TFEU) and the freedom to conduct a business (Article 16 CFR).

The freedom of commercial exploitation enables entrepreneurs to manage their company as they wish, to choose their commercial strategy or policy,¹⁰¹ to choose their partners, suppliers or clients, to borrow or self-finance, to choose employees, to decide on the company’s internal organizations,¹⁰² whilst respecting and benefitting from the fair competition principle.¹⁰³

The freedom of competition is closely connected to the freedom of enterprise.¹⁰⁴ The Conseil d’Etat recognized in 1914 that freedom of enterprise supposes not only the freedom to exercise a professional activity, but also the freedom to exercise it in a context of fair competition.¹⁰⁵ The principle of fair competition has a particular importance among the declared aims of the European Union.¹⁰⁶ The Commercial Code provides for various aspects of fair competition: it declares that the prices of goods, products and services shall be determined by the free play of competition (Article L410-2 C.Com); it prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it (Articles 101-102 TFEU; Article L420-2 C.Com) and concerted actions, agreements, express or tacit undertakings or coalitions “when they have the aim or may have the effect of preventing, restricting or distorting the free play of competition” in the national

⁹⁶ Royer Law on commerce and workmanship 27 December 1973 (Art 1); Law on local authorities 22 July 2007 which imposes respect for commercial freedom, Law on social dialogue and continuity of public services, which grants the principle of commercial and industrial freedom constitutional value, etc.

⁹⁷ Ferrier, “La liberté du commerce et de l’industrie” [“Freedom of trade and of industry”], in : Cabrillac (ed.), *Libertés et droits fondamentaux 2013* [Fundamental rights and liberties 2014], 19th ed. (Dalloz, 2014), p. 836-837

⁹⁸ C.Const. No2000-436 DC [SRU Law]; C.Const No 84-181 DC [Press Enterprises].

⁹⁹ CE 23 June 1963 *Synd. Du personnel soignant de la Guadeloupe*, Lebon 386.

¹⁰⁰ Ferrier 2014, p. 837

¹⁰¹ TGI Paris 8 Jan 2008, CCC 2008.

¹⁰² Cons.Const 20 July 1988, No1988-244 DC.

¹⁰³ Ferrier 2014, 837.

¹⁰⁴ Cons Const 19 October 2010 No2010-55 QPC and 3 December 2010 No2010-73 QPC, AJDA 2001, 649

¹⁰⁵ CE 6 March 2014 *Synd de la boucherie*, Lebon 308.

¹⁰⁶ TFEU, Preamble, para. 4.



market (Article L420-1 C.Com.); it even prohibits conducts not affecting necessarily the rules of competition in the market, such as sales or services with premiums, sale at a loss or the imposition of resale prices (Article L442-1C.Com.).

The freedom of enterprise apply to public and private actors. EU law does not prejudice national rules “governing the system of property ownership” (Article 345 TFEU), thus public entities shall be free to intervene in the market provided that they do not distort, by using special public privileges or prerogatives and without economic justification, the rules of free competition. Similarly, under the French Commercial code, the provisions on pricing freedom and competition apply to both private and public persons, “in particular in the context of public service delegation agreements” (Article L410-1).

Public authorities must not limit or restrict the economic freedoms of private actors.¹⁰⁷ However, as strictly economic freedoms, commercial and economic freedoms must be reconciled with other fundamental liberties and values, to avoid the domination of economic considerations over other social interests (eg environmental protection).¹⁰⁸

The Conseil constitutionnel has not recognised the freedom of trade and industry as a constitutional norm, but it recognises constitutional value to the freedom of enterprise, derived from the general freedom Article 4 of the 1789 Declaration.¹⁰⁹ One would expect the introduction of the QPC to see the rise of litigation arguing violations of economic freedoms.¹¹⁰ Among administrative jurisdictions, the Conseil d’Etat very early affirmed that the freedom of trade and of industry is a public liberty and an element of the freedom of enterprise.¹¹¹ Within the ordinary judicial system, the Cour de cassation has recognized that the right to exercise freely a professional activity is a “fundamental principle”, which must be protected.¹¹²

As clarified by the Conseil Constitutionnel, commercial and industrial freedoms are neither general, nor absolute ones. They must be exercised within legal limits.¹¹³ International agreements may also impose limitations on economic freedoms, as long as they not undermine competition and in particular that they do not require general prohibition.¹¹⁴

Legislative measures can thus limit the freedom of enterprise, if justified by a public interest (eg state economic policy) or the rights and interests of others.¹¹⁵ In the definition of the general interest that could restrict the freedom of enterprise, the legislative branch has a wide margin of appreciation: it can determine objectives

¹⁰⁷ Decisions CE ass, 22 June 1951 *Federation nationale des photographes-filmeurs et Daudignac*, Lebon D 1951 589.

¹⁰⁸ *Ibid.*, p. 813.

¹⁰⁹ Cons.Cons 16 January 1982 D. 1983.

¹¹⁰ S. Nicinski “Actualite de droit de la concurrence et de la regulation” AJDA 2011 650.

¹¹¹ Ferrier, *op. cit.*, p. 817.

¹¹² Judgment of 10 July 2002, Cour de cassation (Ch. soc.), no. 00-45.135; Judgment of 10 July 2002, Cour de cassation (Ch. soc.), no. 00-45.387; Judgment of 10 July 2002, Cour de cassation (Ch. soc.), nos 99-43.334 à 99-43.336.

¹¹³ Cons Const 27 July 1982.

¹¹⁴ Cass., Civ., 23 March 1928 DP 1930, 1.145.

¹¹⁵ Favoreu, *op. cit.*, p. 306.



such as the provision of public transport services, the fight against unemployment, the preservation of archaeological patrimony etc.¹¹⁶ Under this framework, regimes of declarations (eg alcohol sales, insurance companies and banks, press companies, etc.), authorizations (chemists, transport companies, travel agents, supermarkets, medical labs, environmentally damaging activities, etc.), agreements, or prior qualification regimes (eg artisans) are all acceptable.¹¹⁷ Prohibitions of various types are also accepted, such as the interdiction of brothels, smuggling activities, or fraudulent entrepreneurs (based the preservation of public order, and good morale); incompatibility measures for certain professions (eg civil servants. Ministers, parliamentarians, etc) to avoid compromise; state monopolies on gun powder, certain postal services,¹¹⁸ justified by the general interest; limitations to protect a public service when it is exploited by on the public domain.¹¹⁹ Moreover, “where the exercise police powers is likely to affect the activities of production, distribution and services, the fact that the measures pursue the objective of protection of public order or the safeguard of special interests does not exonerate the authority invested with these powers to take into account also commercial and industrial freedoms and competition rules”.¹²⁰

Arbitrary or abusive restrictions of commercial and industrial freedoms should nonetheless be avoided.¹²¹ The Conseil constitutionnel verifies whether the legislative objectives do not constitute a disproportionate restriction of the freedom of enterprise.¹²² The threshold is however quite high. The 1980s nationalizations were found to have reconciled the freedom of enterprise and the public interest of nationalization as expressed in paragraph 9 of the 1946 Preamble (“[a]ll property and all enterprises that have or that may acquire the character of a public service or *de facto* monopoly shall become the property of society.”).¹²³ Similarly, the regulation of tobacco and alcohol advertisements was harmonizing the freedom of enterprise and the protection of health as a constitutional value, derived from paragraph 11 of the 1946 Preamble.¹²⁴ Whilst the reduction of working hours interfere with the freedom of enterprise, it was justified based on para. 11 of the 1946 Preamble, on the constitutional protection of rest and leisure.¹²⁵ Dismissal for economic reasons, a growing phenomenon, must take account of the right of everyone to a job as provided for in para 5 of the 1946 Preamble.¹²⁶

In its decision 2000-436 DC of 7 September 2000 (*Loi SRU*), the Conseil constitutionnel found for the first time that the freedom of enterprise had been unconstitutionally restricted: it found that the possibility for the local

¹¹⁶ Favoreu, *op. cit.*, p. 307.

¹¹⁷ For a review, see Ferrier 2014, 841-842.

¹¹⁸ To the extent acceptable under Article 37 TFEU.

¹¹⁹ For a detailed review, see Ferrier 2014, 842.

¹²⁰ CE 26 January 2007, *Syndicat professionnel de la géomatique* CCC 2007, No 127.

¹²¹ Decision of 16 January 1982, Conseil constitutionnel, no. 81-132 DC, para. 16; Favoreu, *op. cit.*, p. 306.

¹²² Decision of 16 January 2001, Conseil constitutionnel, no. 200-439 DC, para. 13.

¹²³ Decision of 16 January 1982, Conseil constitutionnel, no. 81-132 DC, para. 17.

¹²⁴ Decision of 8 January 1991, Conseil constitutionnel, no. 90-283 DC, para. 8.

¹²⁵ Decision of 13 January 2000, Conseil constitutionnel, no. 99-423 DC, para. 27.

¹²⁶ Favoreu, *op. cit.*, p. 307; Decision of 12 January 2002, Conseil constitutionnel, no. 2001-4 DC, paras. 45-46; Decision of 13 January 2005, Conseil constitutionnel, no. 2004-509 DC, paras. 22-24, 28; Decision of 22 July 2005, Conseil constitutionnel, no. 2005-521 DC, para. 3.



urban plans in Paris, Lyon and Marseille to subordinate to an administrative authorization procedure every change in commercial or artisans' premises was a disproportionate burden on the freedom of enterprise.¹²⁷ He accepted that the legislator could impose necessary restrictions on the freedom of enterprise, as long as these were not of such a gravity that would be disproportionate with regard to the legitimate aim pursued.¹²⁸ The possibility and the relatively liberal authorization of such restrictions of the freedom of enterprise is reminiscent of the "social" nature of the French republic.¹²⁹

The freedom of commercial exploitation can also be legally restricted, to protect the national economy or economic actors. For long, the protection of the economy was about justifying price fixing;¹³⁰ however over the recent years, it is more concerned about the protection against abusive dominant position (Article 102 TFEU, C.Com .430-1).¹³¹ As for economic actors, the main concerns used to be the protection of employees and involved social regulations (e.g Sunday closing);¹³² however, increasingly, attention is shifting to the protection of consumers, and involve regulations related to sales (C.Com L.310-2), door-step selling (C.Consom. L.121-1), distance selling (C.Consom. L.121-16) and other regulations derived from EU Directives, concerning abusive clauses (Directive 93/13/EC, C.Consom. L.132-1), etc.

Free competition does not prevent the direct intervention of public actors in the market, but these must respect certain modalities.¹³³ In addition to actions based on legislation, public actors interventions in the market, accepted in the name of freedom of enterprise, when they are genuinely legitimate. The modalities of public actors interventions have loosen of the years. At first, they had to be justified by exceptional or extraordinary circumstances ;¹³⁴ then particular circumstances of time and place (eg lack of private initiative) or public interest sufficed.¹³⁵ Nowadays, public actors are recognised a natural sphere of legitimate intervention.¹³⁶ They are only prevented to carry out activities which are « totally estranged » to the general interest.¹³⁷ Whenever a private actor and a public entity intervene in the same conditions, "a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators".¹³⁸

As mentionned earlier, conventional limitations of the freedom of enterprise are traditionally accepted provided that the given contract does not affect the rules of free competition in the market and do not

¹²⁷ Decision of 7 September 2000, Conseil constitutionnel, no. 2000-436 DC, para. 20.

¹²⁸ Decision of 12 January 2002, Conseil constitutionnel, no. 2001-455 DC, paras. 44, 46.

¹²⁹ Favoreau, *op. cit.*, p. 308 ; Th. S. Renoux, M. de Villiers, Code constitutionnel [Constitutional Code], commenté et annoté par M. de Villiers et Th. S. Renoux, 2000, p. 21

¹³⁰ Ord 30 June 1945; Ord. 1 Dec 1986; C.Com L.410-2)

¹³¹ Ferrier 2014, 843

¹³² C.Trav, art. L. 3132-29;

¹³³ Ferrier 2014, 839

¹³⁴ CE 29 March 1901, Casanova et a, Lebon 333; CE 20 January 1901 Agent d'assurances de Belfort, Lebon 82.

¹³⁵ CE 30 May 1930 Chabre Syndicale du Commerce en detail de Nevers , Lebon 583; CE 31 Mai 2006 Ordre des avocats du barreau de Paris, RLC 2006.

¹³⁶ Eg CE 5 July 2010 Sund nationale des agences de voyages, JCP Adm 2010, No 42, 2304. For more, see S.Nicinski, "Les services sociaux devant le Conseil d'Etat: la construction d'une exception française" AJDA 2008 , 185.

¹³⁷ G. Pellisier RJE 2010, No 678, comm 44, cited in Ferrier 2014, 839 fn 52.

¹³⁸ *France v. Commission*, Judgment of 19 March 1991, CJEU, Case no. C-202/88, para. 51.



constitute an absolute prohibition. The freedom of enterprise is often restricted by so-called “non-installation”, “non-reestablishment”, “non-competition” or “non-affiliation” conventional clauses which prohibit an ex-partner or a potential investor from exercising a given activity or providing for the conditions under which the investor may exercise that activity.¹³⁹ Such clauses are intended to protect the economic actor against the capture of his or her customer base or employees by a potential competitor: they guarantee the non-competition or the non-solicitation by an employee, a franchisee or an associated partner etc. during the execution of the contract, sometimes even after its termination. These limitations are considered conform to the Constitution if their scope is limited and if they serve a legitimate interest.¹⁴⁰

Conventional clauses may also limit the freedom to exploit: numerous contracts, such as exclusive purchase, supply, concession or franchise agreements include exclusivity clauses of purchase, of supply, of quotas etc. Under Article 1134 of the Civil code, such agreements lawfully entered into take the place of the law for those who have made them. However, certain legislative provisions intend to reduce the effects of such clauses: for example Article L330-1 of the Commercial code limits the period of validity of any exclusivity clause of purchase to a maximum of ten years. Especially competition law restrict the scope of such exclusivity clauses in order to prevent any abuse by one or more undertakings of a dominant position within the market. The competition authorities must evaluate whether an exclusivity agreement may be exonerated from the general prohibition of abuse by one or more undertakings of a dominant position under Article L420-4 of the Commercial code or Article 101(3) of the TFEU. The latter provisions allow for the conclusion of exclusivity clauses restricting the freedom to exploit provided that they contribute to improving economic progress and the consumers’ position.¹⁴¹

Right/freedom to work (may be covered under the WP on social rights)

Like the freedom of enterprise, the freedom to work is protected under Article 1315 of the Code Civil. Its legislative protection goes back to the anti-corporatist d’Allarde Decree of 2-17 March 1791; its article 7 guarantees “everyone’s freedom to trade or exercise a profession, job or art that he/she find good”. Although listed in the 1946 Preamble, the right to obtain a job and the freedom to work have not been conferred constitutional status, and this despite the CC having many opportunities.¹⁴² The Cour de Cassation does however treat the freedom to work as a constitutional principle.¹⁴³ The freedom to work can conflict with the right to strike. In 2004, the Cour de Cassation considered that the fact that strikers had forbidden access to the

¹³⁹ See Champalaune, Le principe de la liberté du commerce et de l’industrie et de la libre concurrence [The principle of the freedom of trade and of industry and of the free competition], Report of the Cour de cassation, La Documentation française, 2002, p. 83.

¹⁴⁰ Ferrier 2014 p. 844-845

¹⁴¹ Ferrier 2014, 845-846.

¹⁴² Cons Const. No 83-156 DC of 28 May 1983 [pension-work cumulation].

¹⁴³ Cass. Soc. 20 Octobre 2004 No 02-41.860; Cass., Soc. 19 November 1996, No 94-19.404 Bull Civ. V No 392.



work place to non-strikers despite a court decision and without any fault on the part of the employer, constituted a serious fault.¹⁴⁴

It is possible that the introduction of the QPC mechanism could force the Constitutional Council to reconsider its position. Indeed, a question was asked regarding the compatibility with the Constitution of forced retirement (based on article L. 1237-5) of the Labor Code because of discrimination based on age and interference with the right to obtain a job. The CC however declared the legislative text conform to the Constitution.¹⁴⁵ Recently, the Cour de Cassation refused to refer for violation of the freedom to work questions related to the 2 month waiting period between two fixed term jobs, aimed at avoiding abuse of such contract by employers.¹⁴⁶ Contractual freedoms generally prevails, with the consequence that the freedom to work is merely a formal one, which does not take into account concrete difficulties in obtaining work.¹⁴⁷

Freedom to work implies restrictions on prohibition to work and the freedom not to work or to refuse a job. Whilst the basic principle is that of free choice, there are any circumstances in which the freedom to work can be restricted. The freedom to work may come into conflict with human dignity. In a famous decision on dwarves-throwing attractions, the Conseil d'Etat considered this practice contrary to the principle of human dignity, even if the subject voluntarily engaged in this activity (to earn a living).¹⁴⁸ There may also be limits based on the general interest related to public health or security (minimum age, work permits, diploma requirement, competitions for access to public service jobs, habilitation requirements, etc.). One may actually wonder whether there is any such thing as the freedom to exercise a job.¹⁴⁹ There are also numerous contractual limitations (eg duty to follow instructions, non-competition clauses, exclusivity clauses) although Article L.1121-1 of the Labor Code specifies that no one can impose on the rights of persons and individual and collective freedoms restrictions which are not justified by the nature of the task to be accomplished or not proportionate to the objective pursued".

Forced labor is prohibited under various international agreements (ILO conventions No 29, 105; the ECHR, the ICCPR, etc). Individuals are free to reject job offers, or refuse contractual obligations. However, employers may abuse of someone's material need of a job to impose unfair work obligations, and this will not be qualified as moral violence.¹⁵⁰ Article 4 of the ECHR against forced labor have been rarely involved before French courts.¹⁵¹ However, in a case brought against France, the ECtHR found a violation of the Convention in the case of a foreign woman, who was at the time minor and not legally resident, who had been forced to work for a couple

¹⁴⁴ Cass. Soc 17 December 2002, No 00-42.870.

¹⁴⁵ Cons Const 4 February 2010, No 2010-98 QPC.

¹⁴⁶ Cass. Soc. 11 July 2012 QPC No 12-40.041 and 10 May 2012, QPC No 12-40.018.

¹⁴⁷ P.Y. Verkindt, "La Liberté du travail" in Cabrillac (2014) 873, 876.

¹⁴⁸ CE, 27 octobre 1995, *Commune de Morsang-sur-Orge*.

¹⁴⁹ Y Guyon "Que reste-t-il du principe de la liberté du commerce et de l'industrie? In Dix ans de droit de l'entreprise, Litec, 1978 p. 5.

¹⁵⁰ But see T. Civ Nantes 6 January 1956, *Gaz du Palais* 1956. 161.

¹⁵¹ CE 3 May 2005, RJS 2005, No858 (regarding a challenge to fixing Solidarity Day on Pentecost date).



who threatened her and lure her by the promise of residency documents.¹⁵² Article 225 of the Criminal Code sanctions with 2 year imprisonment and 75 EUR fine ‘the fact of obtaining from someone, by abusing of their vulnerability or their dependency situation, the provision of services which are not remunerated or remunerated in proportion of the work done’. There is, moreover, no obligation to work.¹⁵³ However, the duty to look for, and accept reasonable job offer (taking into account the nature and characteristics of the job, the geographical location and the remuneration, as well as the duration of unemployment), are required to obtain unemployment benefits.¹⁵⁴

Everyone also has the right to stop working (art. 1780 Code civil); notice conditions should however be respected (imposed usually by collective agreement or in the contract), unless the employer committed a serious fault or in case of force majeure, or the employee could be asked to pay damages. Also, when an employee has benefitted from a training course paid for by the employer beyond their legal obligations, employers can oblige him or her to stay on the job for a particular period or reimburse the costs of the training.¹⁵⁵

Effective access to a decent job with suitable remuneration derives from the notion of human dignity and the right to life. It is a *droit-créances*. Institutions have been put in place to promote decent employment for everyone, such as the former ANPE (assistance in job search) and ASSEDIC (unemployment benefits), now brought together under the Pole-Emploi. The Cour de Cassation has developed a jurisprudence to promote the realisation of this right. It imposed an obligation on employers to adapt their employees to the evolution of the job,¹⁵⁶ or to reclassify them;¹⁵⁷ it also annulled economic dismissal in case of absence or deficiency of the redundancy plan.¹⁵⁸ The right to work can justify the priority given to certain categories of workers (eg disabled, parents, etc.).¹⁵⁹ Civil and criminal sanctions can be imposed for interference with the freedom to work (eg blockades, or lock-out in the context of strikes; threats or violence, etc).¹⁶⁰

Contractual freedom

Contractual freedom is derived from the principle of autonomy, enshrined in Article 1134 of the Civil Code.¹⁶¹ This autonomy, or free will of the parties, can nonetheless be limited for the protection of public interest, as Article 6 of the Civil code provides.¹⁶² Contractual freedom has a long theoretical history, going from an individualist approach to a ‘contractual solidarity’, which seeks to better protect the weaker party to a

¹⁵² ECHR 2 sect, 26 July 2005, X v France Appl No 73316/01 JCP 2005.II.10142.

¹⁵³ P.Y. Verdinkt 2014, 886.

¹⁵⁴ C. Trav. Art. L. 5411-6-2.

¹⁵⁵ Verdinkt 2014, 888.

¹⁵⁶ Cas Soc. 25 feb 1992, Dr Soc. 1992. 379.

¹⁵⁷ Cass., Soc. 8 April 1992 JCP E 1992.II. 360.

¹⁵⁸ Cass. Soc., 13 February 1997 Dr Soc 1997. 255.

¹⁵⁹ C. Trav art. L.5212-2s;L.3142-60; etc.

¹⁶⁰ For an analysis, see Verdinkt 2014, p. 893-894.

¹⁶¹ ‘Agreements lawfully entered into take the place of the law for those who have made them.’

¹⁶² ‘Statutes relating to public policy and morals may not be derogated from by private agreements.’



contract. This evolution has influenced the content and interpretation of the Civil Code.¹⁶³ Contractual freedom consists primarily in the freedom to contract, to undertake voluntarily obligations.¹⁶⁴ It has however been extended to the freedom to adopt legal acts, creating legal effects (eg inheritance wills).¹⁶⁵ It covers the freedom to contract or not, to choose one's pre-contractual position, to choose one's partner, to fix the duration of the contract, to determine the destination of the good which is object of the contract, to choose sanctions in case of non-execution, to formalise the parties' agreement, etc.¹⁶⁶

As for the Conseil constitutionnel's interpretation of the constitutional value and content of contractual freedom, it has evolved over time. At first, in 1997, in a case concerning a law on pension saving accounts, it refused to grant it constitutional value.¹⁶⁷ However, the following year, in a decision concerning the controversial 35h/week law, it declared that the legislative power could not "undermine the 'economy' of conventions and contracts so seriously that it would manifestly disregard the freedom enshrined in Article 4 of the [1789] Declaration".¹⁶⁸ The decision however stressed the gravity of the interference and the impact on Article 4 of the 1789 Declaration, not the importance of contractual freedom as such. In 2000, the CC accepted to examine the interference of the law related to the negotiated reduction of working hours with contractual freedom and recognized the principle of intangibility of conventions on the basis of Article 4 of the 1789 Declaration and the eighth paragraph of the preamble of the 1946 Constitution (provisions enshrining the idea of autonomy).¹⁶⁹

It is in another decision of 2000 on the constitutionality of the act on financing the social security that the Conseil Constitutionnel finally expressly recognized constitutional value to contractual freedom in that it results from Article 4 of the 1789 Declaration.¹⁷⁰ However, it found that the challenged measure did not violate contractual freedom. The constitutional value of contractual freedom was confirmed in later decisions.¹⁷¹ It is now a constitutional norm of reference, which must nonetheless be conciliated with other rights and liberties.

The freedom of contract is often perceived in the case law as an expression of the freedom of enterprise.¹⁷² The Conseil Constitutionnel recognized that the legislative branch cannot restrict legally concluded contracts in a manner that would not be justified by a sufficient public interest.¹⁷³ For example, it declared unconstitutional a legislative provision which determined the destination of social housing properties contrary to negotiated

¹⁶³ Matthieu 2014, 813-814.

¹⁶⁴ Mathieu, "La liberté contractuelle" ["Contractual freedom"], in : Cabrillac (ed.), *Libertés et droits fondamentaux 2013* [Fundamental rights and liberties 2014], 19th ed. (Dalloz, 2013), p. 811

¹⁶⁵ This is accepted by the Cour de Cassation (Cass., Civ., 3e, 23 May 2012, No 11-13.202, *Maison de la poésie*, D. 2012, 1934. See also Law of 23 June 2006, reforming inheritance; For further explanations, see Matthieu 2014, p. 811.

¹⁶⁶ Matthieu 2014, 821.

¹⁶⁷ Decision of 20 March 1997, Conseil constitutionnel, no. 97-388 DC, para. 48.

¹⁶⁸ Decision of 10 June 1998, Conseil constitutionnel, no. 98-401 DC, para. 29.

¹⁶⁹ Decision of 13 January 2000, Conseil constitutionnel, no. 99-423 DC, para. 40.

¹⁷⁰ Decision of 19 December 2000, Conseil constitutionnel, no. 2000-437 DC, para. 37.

¹⁷¹ Decision of 13 January 2003, Conseil constitutionnel, no. 2002-465 DC, para. 4; Decision of 18 December 2003, Conseil constitutionnel, no. 2003-487 DC, para. 28.

¹⁷² Favoreu, *op. cit.*, p. 309.

¹⁷³ Decision of 27 December 2002, Conseil constitutionnel, no. 2002-464 DC, paras. 24, 30.



contracts.¹⁷⁴ More controversially, in a QPC procedure, it recently considered that a system of retroactive inclusion of a property in a condominium did not violate contractual freedom.¹⁷⁵

As a constitutional norm, contractual freedom has been invoked in a QPC procedures. The Cour de cassation nonetheless effectively filters requests. In 2011, it refused to refer a case in which an insurer challenged the act on assurances for not having sufficiently defined the conditions of the exercise of the right of withdrawal in favour of the insured party under a life assurance contract. The law provided that in lack of a special notice provided by the subscriber for the insurer, the period of withdrawal shall be automatically extended. The Cour de cassation rejected the claim, holding that the challenged provision is “deemed to guarantee a larger access to insurance products”, thus protecting the contractual freedom of consumers rather than that of insurers.¹⁷⁶

The Cour de cassation also refused to refer cases for a QPC in concerning rent ceiling for commercial leases: the Cour de cassation held that since the challenged legislative provision could be excluded by the parties at the time of the conclusion of the contract, “the question does not have a serious character”.¹⁷⁷ More generally, one can conclude that any default rule in contractual matters cannot violate contractual freedom.¹⁷⁸

Despite its constitutional recognition, contractual freedom is subject to a range of legislative and judicial limitations, to protect public or others’ interests, in particular those of the weaker parties to the contract. For example, it is mandatory to contract car insurance (Act of 27 February 1958. C.assur. L.211-1). Banks are obliged, under certain conditions, to grant loans (C.consom. art. L.311-8). A flat-owner must also offer first choice to his or her tenants if he or she wants to sell the property (art. 10 of of Act of 31 December 1975; article 15-II of Loi of 6 July 1989). Courts however generally protect the free choice of contracting parties, within the respect non-discrimination rules.¹⁷⁹ Contractual freedom can however not justify against a contract provisions which would prevent a tenant from hosting close relatives, as this would be contrary to article 8-1 ECHR.¹⁸⁰ Finally, increasingly, legislative provisions require written agreement, and determine the format and content of the agreement through templates (formalist trends).¹⁸¹

In its decision confirming the constitutionality on the Act strengthening the protection of consumers, the Conseil constitutionnel recognized, that similarly to the right to property, which can be limited in order to protect certain general interests, “in the domain of the commercialisation of goods or services, this kind of limitation aims at ensuring the loyalty of commercial transactions and at promoting the defence of consumers’ interests”.¹⁸² It recognized the constitutional conformity of “comparative advertising”, as it is “intended to

¹⁷⁴ Decision of 7 December 2000, Conseil constitutionnel, no. 2000-436 DC, paras. 49, 50.

¹⁷⁵ Cons. Cons 7 October 2011, No 2011-177 QPC.

¹⁷⁶ Judgment of 13 January 2011, Cour de cassation (2ème chambre civile), no. 10-16.184

¹⁷⁷ Judgment of 13 July 2011, Cour de cassation (3ème chambre civile), no. 11-11.072; Judgment of 28 September 2011, Cour de cassation (3ème chambre civile), no. 11-13.879.

¹⁷⁸ Mathieu, *op. cit.*, p. 803.

¹⁷⁹ Cass., Com., 7 April 1998, Bull. Civ. IV, No 126.

¹⁸⁰ Cass. Civ., 6 March 1996; Bull. civ. III No60.

¹⁸¹ Matthieu 2014, 823-825.

¹⁸² Decision of 15 January 1992, Conseil constitutionnel, no. 91-303 DC, para. 10.



improve the information of consumers and to stimulate competition while respecting clearly established rules.”¹⁸³

Fundamental rights of workers

Trade-union freedom

Trade-union freedom includes at the same time the freedom of trade-unions and the freedom of employees.¹⁸⁴ The freedom of trade-unions entails that trade-unions can be created and function without hindrance by the company’s leadership.

The freedom of trade-unions is guaranteed by the Labour code.¹⁸⁵ A trade-union can neither pursue an illegal cause or objective, nor an essentially political objective, nor can it act contrary to the non-discrimination provisions guaranteed in the Labour code (Art. L. 1132-1 to 3), constitutional norms and international instruments to which France is State party.¹⁸⁶ The protection of the exercise of the functions of trade-union representatives is a constitutional requirement.¹⁸⁷

The other aspect of the trade-union freedom is the freedom of employees. The Conseil constitutionnel has recognized that no legislative provision can directly or indirectly oblige employees of a company to become a member of a trade-union.¹⁸⁸ The freedom to adhere to a trade-union does not entail that all trade-unions be recognized as representative independently of their members.¹⁸⁹ Legislation imposes minimum qualitative and quantitative representativeness criteria, which have been redefined in 2008.¹⁹⁰ Legislative acts may attribute for trade-unions special rights and privileges.¹⁹¹ The Conseil d’Etat held that Article 6 of the 1946 Preamble entails the right of trade-unions to participate in collective negotiations provided, that they fulfil the conditions of representativeness as enshrined in the agreement or convention to be discussed.¹⁹²

¹⁸³ Ibid., paras. 11-13.

¹⁸⁴ Favoreau, op. cit., p. 320.

¹⁸⁵ Labour Code, Art. L. 2141-4.

¹⁸⁶ *Synd. Le Front National de la Police c. Synd. National des policiers en tenue*, Cour de Cassation (ch. mixte), judgment of 10 April 1998, no. 97-17.870.

¹⁸⁷ Decision of 20 July 1988, Conseil constitutionnel, no. 88-244 DC, para. 24.

¹⁸⁸ Decision of 20 July 1983, Conseil constitutionnel, no. 83-162 DC, para. 85.

¹⁸⁹ Decision of 7 October 2010, Conseil constitutionnel, no. 2010-42 QPC, para. 6.

¹⁹⁰ C.trav art. L2121-1.

¹⁹¹ Favoreau, op. cit., pp. 324-325.

¹⁹² *Ministre des Affaires sociales, du travail et de la solidarité et Syndicat national des huissiers de justice*, Conseil d’Etat (ass.), Decision of 16 December 2005, no. 259584.



Representation of personnel

Legislation provides for elected representatives of personnel (10-50 employees) and for “comites d’entreprise” (>50 employees), which participate in the collective determination of working conditions and company management.¹⁹³ They are protected against dismissal, or transfer, in that such decision must be approved by the Work Inspectorate. Employers cannot use common contract law (eg dismissal for contractual fault) to dismiss personal representatives. In fact, if they try to do so, they will face criminal charges for “delit d’entrave”.¹⁹⁴

Personnel representatives, in the form of “comites d’entreprise” (ie work councils) have extensive information rights;¹⁹⁵ more over, in stock companies, they have right similar to that of minority shareholders, such as whistle blowing right, the right to request an audit, the right to ask for a general shareholders’ meeting or the right to present resolutions to the general shareholders’ meeting. Since 2014, employees must be represented on the board of directors or the supervisory boards of large companies. In case of an insolvency procedure initiated against the company, the works council is granted substantial rights; it can act before the tribunal and may have a real impact on the judicial decision about the future of the company.

The right to strike

The right to strike means the right to stop working in a collective and concerted manner in order to press for a professional demand.¹⁹⁶ In France, unlike in many other constitutional systems, the right to strike and the right of collective bargaining are not considered as a collective, but primarily as individual rights, exercised collectively. Therefore, for a strike to be legal, it does not have to be approved by the trade union or the majority of employees. The Cour de cassation asserted that a collective agreement could not limit the constitutionally guaranteed right to strike, enshrined under paragraph 7 of the 1976 Preamble, and that only a legislative act may impose a period of notice on the employees.¹⁹⁷ It is a constitutional right of workers and it must be in harmony with other constitutional principles. The Conseil constitutionnel recognized for the first time the right to strike in the domain of broadcast and television and annulled certain provisions of a law allowing for the presidents of the broadcast and television companies to assure a “normal service” even during a strike.¹⁹⁸ The action of striking does not break the work contract; it only suspends it. Dismissals following strike actions will be void, save in case of serious fault.¹⁹⁹

¹⁹³ Cons.Const. 20 July 1998, No 88-244 DC. D. 1989, 269.

¹⁹⁴ Cass. Plén. 28 January 1983, D. 1983.

¹⁹⁵ Law of 13 June 2014.

¹⁹⁶ Favoreau, op. cit., p. 325.

¹⁹⁷ Judgment of 12 March 1996, Cour de cassation (Ch. soc.), no. 93-41.670.

¹⁹⁸ Decision of 25 July 1979, Conseil constitutionnel, no. 79-105 DC.

¹⁹⁹ C. Trav. Art L.2511-1; Cass., Soc. 22 January 1992.



The Conseil constitutionnel confirmed that the right to strike constitutes a “principle of constitutional value”, although the legislative power may generally restrict its exercise in order to assure the continuity of public services. The limitation may go as far as to prohibit the right to strike in the case of agents whose presence is indispensable for public services the interruption of which would violate the essential needs of the population.²⁰⁰ The classical example is militaries having neither the right to strike, nor trade union freedom.²⁰¹ Similarly, the right to strike may be limited by law in order to assure the protection of health and security of persons and of goods, having also the character of “principles of constitutional value”.²⁰² The threshold of “minimum” or “normal service” to be guaranteed during any strike is constantly disputed: for example the legislative act on social dialogue and the continuity of public services in public land transports of passengers²⁰³ does not determine a minimum service, but aims at preventing conflicts and at reducing their effect, for example by imposing an obligation on the striking employees to inform the head of the transport company 48 hours in advance. The legislative act on the organization of service and information of passengers in air transport companies enshrines a similar solution.²⁰⁴

The right of collective bargaining and the right to participate in the management of the work place

Another individual right, the right of collective bargaining is understood as the right of participation in the collective determination of working conditions and in the management of the work place. As paragraph 8 of the Preamble of the 1946 Constitution recognized, “[a]ll workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place.” The Conseil d’Etat qualified the right of collective bargaining as one of “the fundamental principles of labour right”,²⁰⁵ although it is not “a principle of constitutional value”.²⁰⁶

For the first time, in 1996 a collective agreement concluded by European social partners was introduced in the French legal system through the implementation of an EC directive.²⁰⁷ French law now witnesses a multiplication of provisions imposing obligations to negotiate. There are annual obligations to negotiate real wages, effective working hours and the organization of the working time; quinquennial obligation to negotiate, within the sector, wages and classifications etc.²⁰⁸ Since collective agreements are more and more concluded within the enterprise and not at the sector’s level, such collective agreements tend to derogate to provisions of

²⁰⁰ Decision of 30 December 1982, Conseil constitutionnel, no. 82-155 DC.

²⁰¹ Gaudu, “Droits sociaux” [“Social rights”], in : Cabrillac (ed.), *Libertés et droits fondamentaux 2013 [Fundamental rights and liberties 2013]*, 19th ed. (Daloz, 2013), p. 891.

²⁰² Decision of 22 July 1980, Conseil constitutionnel, no. 80-117 DC, para. 4.

²⁰³ Legislative Act no. 2007-1224 of 21 August 2007.

²⁰⁴ Legislative Act no. 2012-375 of 19 March 2012.

²⁰⁵ Decision of 21 July 1970, Conseil d’Etat, no. 72780.

²⁰⁶ Gaudu, op. cit., p. 892.

²⁰⁷ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

²⁰⁸ Gaudu, op. cit., p. 892.



public order in favour of the interests of the company, the right of collective bargaining seems to prevail over labour rights.²⁰⁹

Right to Social Security (WP on social rights?)

Legislation does implement the right to social security recognised by the 1946 Preamble (eg 1945 Law creating Social Security; 1946 Law on family benefits, 1946 Law on Basic Pension, 1978 Law on Health Insurance, 1999 Law on universal health coverage. There are also minimum solidarity benefits.

Conflicts: examples

Many conflicts between rights, based in different international, European and domestic sources have been already exposed above in the context of the balancing operated by legislators and judges between economic rights and other rights. In this section, we would like to highlight a few particularly interesting ones.

First, in 1995, the CC established the right to a housing, not as a fundamental right but as a “objective of constitutional value”, based on para 10 and 11 of the 1946 Preamble, and on the principle of human dignity, which can be used to set limitations to the exercise for the right to property (as long as these are not disproportionate or affecting the essence of the right).²¹⁰ The CC tries to reach a balance between the objective of providing decent housing to all and the right to property. Following its 1995 decision, ordinary judges followed suit, and afforded greater importance to the constitutional objective. They have, for example, stayed the execution of expulsion orders,²¹¹ or condemned local maires for failing to offer suitable areas for travellers communities.²¹² This solidarity-based approach was endorsed by the ECHR which refused to condemn French authorities for their failure to proceed to the expulsion 16 families with small children.²¹³ Whilst at first French ordinary courts were reluctant to rely in the constitutional objective to establish rights to occupy vacant or empty spaces,²¹⁴ they are now enclined to develop particular obligations based on this constitutional objective. The CE recently held that the non-respect of the right to housing constitutes a “manifestly illegal serious interference with a fundamental freedom”,²¹⁵ which could be considered as a recognition of justiciable right to housing, in specific circumstances. Moreover, legislative instruments are providing for the requisition of vacant accommodation (against compensation).²¹⁶

Second, the Conseil constitutionnel has held that the freedom of employees must be reconciled with the freedom of trade unions: the legislation may allow for representative trade-unions to bring a lawsuit before tribunals in order to defend an employee and at the same time to promote a collective action through an

²⁰⁹ Ibid.

²¹⁰ Decision No. 94-359 DC; Decision N0 98-403 DC; Decision of 30 September 2011, No 2011-169 QPC .

²¹¹ Orleans Court of Appeal 19 June 1996 JCP 1996.

²¹² TGI Montauban 3 Mai 2002; CAA Nancy 4 December 2003

²¹³ ECHR 12 October 2010, Sté Cofinfo c France App. 23516/08.

²¹⁴ See cases exposed in Libchaber 2014, p. 970-971,

²¹⁵ CE ord. 19 February 2012, Fofana req No 356456.

²¹⁶ Law of 29 July 1998.



individual case, provided that the interested employee consented while being aware of the case and that he or she can conserve the freedom to conduct his or her defence personally or to terminate the lawsuit.²¹⁷

Third, in respect to the right to strike, the Conseil constitutionnel has recognized the creation of a “minimum service” in public transport and the restriction of the right to strike with a view to assure the continuity of the public service.²¹⁸ It held, however, that the institution of a reception service taking care of the students in schools cannot be considered as an unjustified restriction of the right to strike.²¹⁹ There is no profession which could not enjoy the right to strike, be it in the public or the private sector.²²⁰ However, “the restrictions imposed by the legislation may prohibit the exercise of the right to strike for agents whose presence is indispensable for the functioning of public services of which interruption would violate the essential needs of the country”.²²¹ These services are called “constitutional public services” such as police, justice, defence or other essential State functions.²²² The right to strike can also be restricted in order to guarantee the protection of health and security of persons and goods, another constitutional value.²²³ Finally, in the private sector, the right to strike can be restricted with a view to reconcile it with the principle of equality and the civil liability for the prejudice caused.²²⁴ The Conseil constitutionnel assumed that it is the legislator which can determine the limits of the right to strike; however, it also recognized that the Parliament can use decrees or to collective bargaining to specify the manner in which rules laid down by it for the exercising of the right to strike are to be applied”.²²⁵ The Conseil d’Etat has consistently held that it is the government, responsible for the functioning of public services, which may govern the limitation imposed on the right to strike.²²⁶ This competence of regulation of the Government on the right to strike seems contrary to the Constitution since the Preamble of the 1946 Constitution grants this competence the legislative power, especially if one thinks on cases where the Conseil d’Etat even accepted that the strike could be limited by each head of service by mere circulars.²²⁷ The Cour de cassation has clearly confirmed that in this domain that no collective agreement can restrict or regulate the right to strike, but only a legislative act can have such an effect and determine a mandatory deadline for the strike notice.²²⁸

Fourth, in several cases, contractual freedom was in clash with other fundamental rights and liberties, including economic rights. In the *Chassagnou and Others v. France* case, the ECtHR had to decide on the clash between contractual freedom and freedom of association: the applicants' complaints concerned a breach of their right

²¹⁷ Decision of 25 July 1989, Conseil constitutionnel, no. 89-257, para. 24.

²¹⁸ Decision of 16 August 2007, Conseil constitutionnel, no. 2007-556 DC, paras. 9-11.

²¹⁹ Decision of 7 August 2008, Conseil constitutionnel, no. 2008-569 DC, paras. 8-10.

²²⁰ Favoreau, *op. cit.*, p. 329.

²²¹ Decision of 18 September 1986, Conseil constitutionnel, no. 86-217 DC, para. 78.

²²² Favoreau, *op. cit.*, p. 330.

²²³ Decision of 22 July 1980, Conseil constitutionnel, no. 80-117 DC, para. 4.

²²⁴ Decision of 22 October 1982, Conseil constitutionnel, no. 82-144 DC, para. 8.

²²⁵ Decision of 16 August 2007, Conseil constitutionnel, no. 2007-556 DC, paras. 7-8.

²²⁶ Dehaene, Decision of 7 July 1950, Conseil d’Etat (ass.), no. 01645; Union syndicale de l’aviation civile CGT, Conseil d’Etat, Decision of 13 November 1992, no. 83177, 83702; Decision of 17 March 1997, Conseil d’Etat, no. 160684.

²²⁷ Favoreau, *op. cit.*, p. 331; Fédération CFTC des personnels de l’environnement, Decision of 4 February 1981, Conseil d’Etat, no. 18482; Ministre du Budget, Decision of 25 September 1996, Conseil d’Etat, no. 149284, 149285, 149293.

²²⁸ *SA Transports Séroul*, Cour de cassation, Decision of 7 June 1995, no. 2480 P+F.



to freedom of conscience and association as well as to their right to respect for their property due to the obligation imposed on them as landowners to join approved hunting associations (ACCA) and to authorise hunting on their land. Contrary to the French jurisdictions (including the Cour de cassation), the ECtHR condemned the legislation forcing the landowners to join the ACCA.²²⁹ Other aspects of contractual freedom, such as the freedom to terminate a contract, are based on or reinforce other fundamental rights and liberties. The Cour de cassation held for example that “except for cases provided for by the law, nobody is obliged to join an association governed under the Act of 1 July 1901, or, if he or she joined it, to remain a member”, while recognising that any member of the association which runs sporting facilities of a housing estate was free to withdraw provided that he or she gives up his/her share.²³⁰ In this case, the freedom to terminate the contract was in conformity with the fundamental right to property.²³¹

Fifth, the Conseil constitutionnel concluded that it is for the legislative power to find a reconciliation between the right to property and the exercise of constitutional freedoms such as the freedom of movement, the right to private life and the inviolability of domicile.²³² Even administrative authorities can restrict the enjoyment of the right to property.²³³ As the Conseil constitutionnel has held, restrictions on the right to property must serve a public interest,²³⁴ but the legislative or executive power does not have to prove it and is not obliged to compensate the owner.²³⁵ The Conseil constitutionnel annulled certain provisions of the Act on hunting restricting the right to property since they were not justified by the public interest.²³⁶ The Conseil constitutionnel verifies whether the restriction imposed on the right to property has a “denaturing” effect : an excessive regulation may distort the constitutional value of the right to property which is unconstitutional.²³⁷ It held for example that a system of preliminary authorization for the control of agricultural exploitation does not reach such a gravity that would distort the ordinary sense and the scope of the right to property.²³⁸ In the exceptional case of the expropriation of an undeveloped land property, the Conseil constitutionnel allowed for the prompt occupation of the property by the expropriating authority.²³⁹ Similarly, the possibility for the minister for Economics to oppose the increased participation of one or several persons in a privatised company does not reach such a gravity that would distort the ordinary sense and the scope of the right to property.²⁴⁰

²²⁹ *Chassagnou v. France* [GC], Appl. nos. 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999.

²³⁰ Judgment of 9 February 2001, Cour de cassation (Ass. plen.), no. 99-17.642.

²³¹ Mathieu, *op. cit.*, p. 805.

²³² *Ibid.*

²³³ *Code constitutionnel et des droits fondamentaux 2014 [Constitutional code and fundamental rights 2014]*, (Dalloz, 2014, 3^e éd.), p. 310.

²³⁴ Decision of 16 January 1991, Conseil constitutionnel, no. 90-287 DC, paras. 21-22.

²³⁵ *Code constitutionnel*, *op. cit.*, p. 311.

²³⁶ Decision of 20 July 2000, Conseil constitutionnel, no. 2000-434 DC, paras. 23, 31, 34.

²³⁷ Favoreau, *op. cit.*, p. 302.

²³⁸ Decision of 26 July 1984, Conseil constitutionnel, no. 84-172 DC, para. 3; in the same sense: Decision of 29 July 1998, Conseil constitutionnel, no. 98-403 DC, paras. 7, 31.

²³⁹ Decision of 25 July 1989, Conseil constitutionnel, no. 89-256, para. 21.

²⁴⁰ Decision of 4 July 1989, Conseil constitutionnel, no. 89-254 DC, para. 10.



On the other hand, the Conseil constitutionnel has effectively annulled several legislative acts for denaturing the right to property.²⁴¹

Sixth, intellectual property rights benefit from a particular protection in eventual clashes with other economic rights and freedoms, due to their personalized character. When the Conseil constitutionnel had to decide on the constitutionality of a legislative act transposing an EU directive, it held that the restriction of the copyright or related rights in the interest of "interoperability" of materials and software, a measure promoting the harmonisation of certain aspects of copyright and related rights, shall respect the strict constitutional conditions of expropriation, under Article 17 of the 1789 Declaration, i.e. "only on condition that the owner shall have been previously and equitably indemnified".²⁴² When intellectual property rights clash with civil rights and liberties, such as the right to private life, it is for the domestic authorities to ensure a reconciliation that is not "manifestly unbalanced". For example in the case of copyrights and related rights, the societies for the collection and distribution of authors' royalties and the royalties of performers and phonogram and videogram producers and bodies for professional defence have the right to participate in the treatment of personal data on offences, convictions and security measures related counterfeiting practices – the Conseil constitutionnel held that this provision reflected a general interest related to the protection of intellectual property which the legislation did not reconcile with the right to private life in a "manifestly unbalanced" manner.²⁴³

3. International and European sources of economic rights and their domestic effects

France follows a monist approach to international law. International treaties must only be signed and ratified to become legally binding. France has signed most international and European instruments concerning economic rights, notably the 1948 Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, various ILO Conventions, the European Convention on Human Rights, the European Social Charter, and so on (see full list in Annex 2). But it did not, for example, sign the Additional Protocol No12 ECHR prohibiting discrimination.

Whilst France signed most relevant treaties, it may have not always have adopted the ratification instruments (legislative authorization to ratify and the actual ratification by decree of the President of the Republic) or done so with significant delay. Notably, the 1948 Universal Declaration on Human Rights is not considered as ratified because it was only published in the Official Journal.²⁴⁴ Furthermore, France has imposed reservations to some of the treaties.²⁴⁵

²⁴¹ See Decision of 21 July 1994, Conseil constitutionnel, no. 94-346 DC; Decision of 9 April 1996, Conseil constitutionnel, no. 96-373 DC; Decision of 28 July 1998, Conseil constitutionnel, no. 98-403 DC.

²⁴² Decision of 27 July 2006, Conseil constitutionnel, no. 2006-541 DC.

²⁴³ Decision of 29 July 2004, Conseil constitutionnel, no. 2004-499 DC.

²⁴⁴ CE 1951 Election de Nolay

²⁴⁵ For example, it has placed a reservations aimed at preserving emergency powers under Article 16 of the Constitution; it has also placed reservation to Protocol 7 to protect the special status of New Caledonia, Mayotte, and Wallis-and-Futuna,



Once international treaties are signed and ratified, Article 55 of the Constitution confers them a supra-legislative value in the domestic hierarchy of norms, with the condition of reciprocity. However, human rights agreements are not subject to this condition.²⁴⁶

Since its famous Abortion decision,²⁴⁷ the Conseil Constitutionnel refuses to control the compatibility of laws and international agreements, leaving this task to ordinary courts. However, recently, the CC accepted that it review the compatibility of domestic measures implementing secondary EU laws (ie Directives) where they run counter to expressed provisions of the Constitution,²⁴⁸ or the constitutional identity of France.²⁴⁹

Whilst French judicial courts (Cour de Cassation) admitted early the primacy of international agreements over legislation adopted both before and after their ratification,²⁵⁰ administrative courts, and in particular the Conseil d'Etat, referring to the "loi-écran" theory, refused that international agreements (in this case EC law) could prevail over posterior legislative acts.²⁵¹ Eventually, in 1989, in its famous Nicolo decision,²⁵² it accepted the supremacy of EU law over all legislative acts, therefore removing the "loi-écran" as far as rights protected under EU law were concerned. This supremacy, which is also accepted in relation to the ECHR, however only concerns legislative measures (including organic and referendums laws) but not constitutional provisions.²⁵³

Beyond supremacy, one must also consider the effects of international or European norms. These norms can produce direct effect, when they confer rights to individuals (subjective element) and are complete and precise enough (self-executing) and not requiring further implementation measures (objective element). Whilst the first dimension can be more easily recognised, in particular in relation to droits-libertes, the second conditions may be more difficult to achieve in relation to droits-creances, which usually require legislative implementation. This is determined in a casuistic manner.

The direct effect of the provisions of the ECHR,²⁵⁴ as well as those of the ICCPR,²⁵⁵ have been recognised without much controversies. The Conseil d'Etat also held that Article 6(1) of the ILO convention No. 97 of 1949 (the Migration for Employment Convention) is directly applicable before domestic courts: this provision

and the application of muslim law to family relations (e.g. polygamy, and inheritance rights).²⁴⁵ It specified that the ECHR could not affect the right to abortion. It also excluded the application of Article 30 ECHR related to minority children because it conflicted with the Constitution.

²⁴⁶ Decision No 98-408 DC Statute of the International Criminal Court.

²⁴⁷ Decision No 75/54 [Abortion law]; see also decision 2006/535 DC [Law of Equality of Opportunities]; Decision 12 May 2010, "online gaming".

²⁴⁸ Decision 2004/5059 DC [e-commerce law].

²⁴⁹ Decision 27 Juillet 2006 [Copyright law].

²⁵⁰ Cass. Ch. Mixte, 24 May 1975, Societe des Cafes Jacques Vabre.

²⁵¹ CE 1 March 1968 Syndicat National des Fabricants de Semoule

²⁵² CE 20 October 1989,

²⁵³ CE 30 October 1998 Sarran et Levacher; C.Cass ass. Plen. 2 June 2000, Melle Fraisse Gaz Pal 2000, No 359-363. But see slight inflection in Cass, ass. Plen. 15 April 2011.

²⁵⁴ Crim 3 June 1975 Respino

²⁵⁵ Civ 1er 13 December 1989



prohibited any State party from treating immigrants lawfully residing within its territory less favourably than its own nationals in respect of, inter alia, accommodation and legal proceedings relating to accommodation.²⁵⁶

However, other instruments have posed more difficulties. This is the case of the ICESCR and the ESC.²⁵⁷ The CE denied direct effect the ESCR,²⁵⁸ because its provisions lacked self-executing capacity. The Cour de Cassation has displayed a mixed attitude. It is generally reluctant to afford direct effect to these two instruments, but the positions of the different chambers (criminal, commercial, social, etc.) differ. Its criminal chamber seemed to implicitly recognise the direct effect of certain provisions of the ICESCR,²⁵⁹ but its commercial chamber refused such effect to Article 11 ICESCR in case brought by taxpayers affected by the ISF (Tax on Wealth),²⁶⁰ and its social chamber seemed to deny direct effect to the entire ESC. However, after it admitted the direct effect of provisions of the New York Convention on the Rights of the Child,²⁶¹ the social chamber adopted a more sympathetic position towards the direct effect of social rights protected in international instruments. It invalidated measures concerning “First Hire Contract” based on their incompatibility with ILO convention No 158,²⁶² and recognised the direct effect of Article 6 para 1 ICESCR, which provides for the right to work and guarantees the right of all person to earn a living through a freely chosen and accepted job.²⁶³ Following this shift, the social chamber afforded direct effect to some of the ESC provisions, such as article 5 (trade union rights) and article 6 (right to collective agreement) of the revised Charter,²⁶⁴ or Article 24 (right to protection in case of dismissal).²⁶⁵ The social chamber of the Cour de Cassation thus affords direct effect to a range of economic and social provisions of international and Council of Europe instruments. However, it also missed opportunities. In particular, it failed to use articles 2,3 and 11 of the ESC to undermine measures which provided for “daily-pass” for employees in management positions (*cadres*) to work up to 78 h/week. The chamber referred to the relevant provision of the ESC because it was cited in a relevant EU Treaty provision (Article 151 TFEU),²⁶⁶ but eventually constrained the use of extensive working hours mechanisms based on domestic constitutional norms.

The unpredictability in the determination of direct effect led the CE to define the conditions for granting direct effect in two plenary judgments, GISTI and FAPIL.²⁶⁷

²⁵⁶ Judgment of 11 April 2012, Conseil d’Etat, no. 322326.

²⁵⁷ Carole Nivard, « L’effet direct de la Charte sociale européenne devant les juridictions suprêmes françaises », RDLF 2012, chron. n°28 (www.revuedlf.com).

²⁵⁸ *Melle Valton et Melle Crépeaux* (CE, 20 avril 1984, n° 37772 et 37774)

²⁵⁹ Cass., Crim., 15 octobre 1991, n° 90-86791 ; 17 mai 2000, n° 99-86606 ; 25 septembre 2001, n° 00-82341 ; 30 janvier 2001, n° 00-83775.

²⁶⁰ Cass., Com., 25 janvier 2005, n° 03-10068

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²⁶² Cass, Soc., n° 07-44124

²⁶³ (Cass., Soc., 16 décembre 2008, n° 05-40876)

²⁶⁴ (Cass., Soc., 14 avril 2010, n° 09-60426 et 09-60429 ; 10 novembre 2010, n° 09-72856 ; 1er décembre 2010, n° 10-60117 ; 8 décembre 2010, n° 10-60223 ; 16 février 2011, n° 10-60189 et 10-60191 ; 23 mars 2011, n° 10-60185 ; 28 septembre 2011, n° 10-19113 ; 14 décembre 2011, n° 10-18699)

²⁶⁵ Cass., Soc., 12 janvier 2011, n° 09-41904).

²⁶⁶ Cass. Soc., 29 juin 2011, n° 09-71107,

²⁶⁷ CE ass 11 April 2012.



“Except for cases which concern a treaty for which the CJEU has exclusive competence to determine direct effect, a provision should be recognised direct effect by the administrative judge when, taking into account the intentions of the parties and the general ‘economy’ [context] of the treaty involved, as well as its content and its wordings, it does not have as an exclusive object the regulation of relationship between states and does not require the intervention of any complementary act to produce effects with regard to individuals; that the absence of such effects can not be deduced only based on the fact that the provision designates state parties as the subjects of the obligations that it defines”.

By adopting this general approach, the CE rejects the notion that human rights treaties have a special status, by which they could benefit from a direct effect presumption.²⁶⁸ Moreover, it did not alter the position of the CE on the lack of direct effect of the ESC; the CE even mixed the two objective and subjective criteria when arguing that it was the fact that the provision require further implementation by state parties (objective criteria) that prevents it from conferring rights to individual (subjective criteria).²⁶⁹

In any case, even if provisions of international and European instruments lack direct effect, and cannot be invoked before a court to seek annulment of measures which interfere with their provisions (justiciability), they may still deploy other types of effect. First, national judges may simply set aside domestic norms which conflict with international agreements (exclusion invocability). For example, the CE accepted to examine the legality of an ordinance creating the “First Hire Contract” in the light of ILO Convention No 158, and Article 24 of the ESC.²⁷⁰ It also considered that the impossibility to seize pension income under a legislative provision of the Pension Code contrary to Article 14 of the ECHR and Article 1 Protocol 1, and could not be applied.²⁷¹

Second, where there is room for interpretation of domestic measures, these should be interpreted in the light of provisions of relevant international instruments (Invocability of conform interpretation, or indirect effect, in EU law terminology). For example, the Cour de Cassation approved a lower court’s interpretation which removed the discriminatory character of attribution of social benefits.²⁷²

Third, since the *Gardedieu* ruling by the Conseil d’Etat, state liability can be engaged for violation of international human rights norms, including by the legislator.²⁷³ This case concerned a 1994 law which had retroactively validated a system of pension contribution to a special old-age insurance scheme. The CE found that this legislative intervention, which occurred during litigation on the issue, violated Article 6 ECHR and was

²⁶⁸ A. Rouyere, “Le juge administrative et les regles garantissant les libertes” J.-Cl Liberte fasc 250, No 26, cited in Gicquel p 46.

²⁶⁹ CE 4 juillet 2012, *Confédération française pour la promotion sociale des aveugles et des amblyopes (CFPSAA)*, n° 341533,

²⁷⁰ CE 19 October 2005 App No 283471.

²⁷¹ Civ 2em, 3 May 2007, Bull Civ II No 121

²⁷² Cass, ass. Plen. 16 April 2004, No 02-30.157.

²⁷³ CE 8 Feb 2007 *Gardedieu*.



not justified by a general interest. It is however doubtful that this liability regime would apply to the lack of adoption of legislative provisions to implement international and European human rights standards.²⁷⁴

Overall, high jurisdictions such as the Cour de Cassation and the Conseil d'Etat, as well as the Conseil Constitutionnel, rarely invoke ILO conventions, the ESC or the ICESCR. Even if they do cite them as sources of interpretation, they still tend to apply primarily domestic sources. The Cour de cassation renders in average 7 judgments per year referring to an ILO convention, and in most of the cases it is one of the parties who invoke the instrument.²⁷⁵ The same applies to the case law of the Conseil d'Etat. The ECHR is however featuring better, at least in the case law of the CE, which cited the Convention between 1323 times in 2003, with a gradual decrease in the yearly citations down to 355 in 2013. The drop over the recent years may be linked to the introduction of the QPC, which refocuses fundamental rights litigation on constitutional norms. Indeed, until the introduction of a posteriori review, the ECHR was playing a constitutional substitute role, which has lost its *raison d'être* with the QPC. The Court de Cassation seems to be less inclined to refer to the ECHR. Based on its case law classification,²⁷⁶ it referred/relied on the ECHR in just over 20 decisions since 1978, with only ten of them concerning challenges to legislation.

Charter

Despite its legally binding nature since the entry into force of the Lisbon Treaty, French courts are still hesitant to apply the CFR.²⁷⁷ However, even before the Charter became legally binding, the Cour de Cassation had admitted the indirect effect (interpretative invocability) of Article 31 of the Charter related to just and equitable working conditions.²⁷⁸

Whilst the case law of the CJEU makes it evident that measures adopted for the implementation of directives fall with the scope of application of the Charter under its Article 51, French courts are hesitant to apply the Charter to such domestic measures. For example, the Paris Administrative Court²⁷⁹ considered that a provision of the Foreigners and Asylum Code relating to the expulsion of illegal migrants is a domestic norm which do not fall with the scope of application of the Charter and does not have to comply with Article 41 of the Charter (good administration) and its particular is right to a hearing, even though the provision was adopted in transposition of the Directive 2008/115/EC. A local Administrative Tribunal send a preliminary ruling to the CJEU on this point.²⁸⁰

²⁷⁴ Gicquel 2014, p. 48

²⁷⁵ de Quenaudon, "L'application par le juge français des droits sociaux fondamentaux affirmés par l'OIT et l'ONU. Quelques données (seconde partie)" ["The Application of Fundamental Social Rights Affirmed by the ILO and the UN by the French Judge (Second Part)"], *Revue de droit du travail*, 2007, pp. 315 et s.

²⁷⁶ Its website does not offer a key word search system.

²⁷⁷ A. Jaureguiberry, "L'influence des droits fondamentaux européens sur le control a posteriori" RFDA 2013, p. 10.

²⁷⁸ Cass. Soc., 29 juin 2011, n° 09-71107,

²⁷⁹ CAA Paris, No 12PA04396.

²⁸⁰ TA Melun, Mme Mukarubega No 1301686/12. Pending before the ECJ (C-166/13) 2PA04396.



Concerning the horizontal effect of the Charter,²⁸¹ the Cour de Cassation has send a request for preliminary ruling to the CJEU, concerning Article 27 of the Charter on the right to information and consultation of workers,²⁸² and its implementation in Directive 2002/14/EC. It had also, in parallel, send a QPC, in which the CC decided that the labor law provision at stake was conform with the Constitution.²⁸³ The Cour de Cassation asked whether Articles 51 and 52 of the Charter precluded the horizontal effect of the Charter (ie its application in disputes between private parties) and if it precluded certains types of contracts (such as professionalization or apprenticeships) in the calculation of the employment rates of a company. The CJEU, when deciding on the reference,²⁸⁴ declined to grant horizontal effects to the Charter's "principles".

4. Jurisdictional Issues

Personal

Certain economic rights are granted to all human beings, others to citizens or justiciables or ecomic and social actors.²⁸⁵ The addressees of certain fundamental rights, such as the freedom of trade-unions, are by definition legal persons, whereas the case law of the Cour de cassation holds consistently that the right to strike is enjoyed not by trade-unions, but by individual workers.²⁸⁶ However, sometimes the Conseil constitutionnel establishes a close link between the right to strike and the trade-union freedom.²⁸⁷ Furthermore, the Conseil constitutionnel considered that even if the legislative power granted the most representative trade-unions a monopole of a strike notice, each employee enjoys his or her freedom to decide to participate or not to participate in the strike.²⁸⁸

Economic rights addressed to "workers" are enjoyed not only by employees in the private sector, but also by public servants and agents of the public sector.²⁸⁹ However, university students do enjoy the right of participation in the collective determination of working conditions and in the management of the work place.²⁹⁰

Fundamental rights listed in the 1789 Declaration, the Preamble of the 1946 Constitution, the 1958 Constitution) do not require citizenship, but are granted to everyone except for political rights (Article 6 of the 1789 Declaration). The following foreign citizens need a work permit and a medical certificate for the exercise a professional activity in France: 1. Foreigners who are not nationals of an EU member State, of a member State

²⁸¹ See A. Siefert, "L'effet horizontal des droits fondamentaux. Quelques reflexions de droit europeen et de droit compare" RTDE 2013, p. 801.

²⁸² C. Cass, Soc., No 11-21609 (pending before the CJEU C-176/12).

²⁸³ Decision N0 2011-122 QPC, C.Cass No 10-40062.

²⁸⁴ C-176/12 Association de Mediation Sociale [2014] ECR I-2.

²⁸⁵ Cabrillac 2014.

²⁸⁶ Judgment of 9 November 1982, Cour de cassation (ch. Soc.), no. 80-13.958 80-14.046 80-14.097.

²⁸⁷ Decision of 22 October 1982, Conseil constitutionnel, no. 82-144 DC; Decision of 20 January 1981, Conseil constitutionnel, no. 80-127 DC, paras. 17-20.

²⁸⁸ Decision of 16 August 2007, Conseil constitutionnel, no. 2007-556 DC, para. 13; Decision of 7 August 2008, Conseil constitutionnel, no. 2008-569 DC, para. 17.

²⁸⁹ Decision of 20 July 1977, Conseil constitutionnel, no. 77-83 DC, para. 5.

²⁹⁰ Decision of 17 July 1980, Conseil constitutionnel, no. 80-120 DC.



of the European Economic Area or of Switzerland; 2. Foreigners who are nationals of an EU member State during the transitory period after the accession when the free movement of workers is subject to certain limitations.²⁹¹ EU long term resident are allowed to work and reside in France.

Territorial

The Conseil Constitutionnel, referring to the preamble of the Constitution, has recognized that “the 1958 Constitution distinguishes the French people from overseas peoples, whose right to free determination is recognized”.²⁹² The Constitution’s provisions indicate a presumption for the applicability of all right and liberties in their territory. Article 73(1) provides that “[i]n the overseas departments and regions, statutes and regulations shall be automatically applicable. They may be adapted in the light of the specific characteristics and constraints of such communities.” Furthermore, Article 73(4) declared that the power of overseas communities “to determine themselves the rules applicable in their territory in a limited number of matters” ... “may not concern nationality, civic rights, the guarantees of civil liberties”.²⁹³ As mentioned above, the constitutional case law and scholars interpret these provisions as guaranteeing uniform application of fundamental freedoms throughout the national territory.²⁹⁴

The provisions of the Treaties funding the European Union (TEU, TFEU), including the free movement of workers and of capital apply to overseas departments (Guadeloupe, French Guyana, Martinique, Réunion Island, St. Barthélémy, Saint-Martin, and from 2014, Mayotte).²⁹⁵ The EU *acquis* does however not apply to overseas countries and territories (OCTs: French Polynesia, French Southern and Antarctic Territories, New Caledonia and Dependencies, St. Pierre and Miquelon, Wallis and Futuna Islands); instead, the detailed rules and procedures for Association are provided for by the Council Decision 2013/755/EU on the Association of the OCTs with the European Union, adopted on 25 November 2013. Working conditions in the OCTs are governed by special legislative acts and government ordinances: the New Labor Code of French Polynesia,²⁹⁶ the Labor Code of New Caledonia,²⁹⁷ the Labor Code of Mayotte²⁹⁸ and other governmental ordinances.²⁹⁹

Material

²⁹¹ Labor code, Article R5221-1; Code of entry and of residence of foreigners and of the right of asylum, Article R313-1.

²⁹² Decision of 9 May 1991, Conseil constitutionnel, Decision no. 91-290, para. 12.

²⁹³ Constituion of 1958, Art. 73(5).

²⁹⁴ Armand – Fouquet-Armand, *op. cit.*, p. 26.

²⁹⁵ Decision 2012/419/EU of the European Council.

²⁹⁶ New Labor Code of French Polynesia, adopted under the Act of the Country no. 2011-15 of 4 May 2011.

²⁹⁷ Labor Code of New Caledonia, adopted under the Act of the Country no. 2008-2 of 13 February 2008.

²⁹⁸ Labor Code of the department of Mayotte.

²⁹⁹ E.g. Ordinance no. 2012-792 of 7 June 2012 on the legislative part of the Labor Code of Mayotte; Ordinance no. 2008-205 of 27 February 2008 on the labor law applicable in St. Barthélémy and Saint-Martin; Decree no. 86-133 of 28 January 1986 on the employment of foreign workers in New Caledonia.



Several provisions allow for exceptional limitations of civil rights and liberties under the 1958 Constitution. In a state of emergency, under Article 16 of the Constitution, the President of the Republic shall take measures required by these circumstances which may restrict fundamental rights and liberties. The measures shall be designed to restore constitutional public authorities as swiftly as possible, with the means to carry out their duties. The measure taken by the President of the Republic during the state of emergency is considered as “*acte de gouvernement*”, not subject to any review by administrative courts.³⁰⁰ However, the Constitution provides also review of the measures by the Constitutional Council.³⁰¹

A second exceptional limitation of civil rights and liberties is, under Article 36 of the 1958 Constitution, the *etat de siege* which has been never applied so far. It must be adopted by decree in the Council of Ministers and the extension thereof after a period of twelve days may be authorized solely by Parliament.

A third exceptional limitation of fundamental rights and liberties is the state of emergency, as foreseen under a legislative act of 3 April 1955: it can be ordered “either in case of imminent danger resulting from serious breaches of public order or in case of events presenting [...] a character of public disaster”.³⁰² Although this exceptional emergency period is defined by a law and not under the Constitution, the Conseil d’Etat held that the 1958 Constitution did not abrogate the Act of 3 April 1955.³⁰³ However, the Conseil constitutionnel set the limit of all restrictions of constitutional rights and liberties.³⁰⁴

✓ Temporal

Details related to change in the protection of economic rights over time have been outlined in the examination of individual rights in the previous sections.

5. Actors

In addition to the EU and French legislators, and French judicial, administrative and constitutional courts, other organs and bodies and private actors contribute to the protection and promotion of economic rights.

The Defender of Rights, which has taken over a number of previous bodies, has been enshrined in the Constitution by the constitutional amendment of 23 July 2008, and was established by Organic Law No. 2011-33 and Ordinary Statute No. 2011-334 of 29 March 2011. This new independent institution took over the functions of Ombudsman (in French, *Médiateur de la République*), the Children’s Ombudsman, the High Authority for the Fight against Discrimination and Equality Promotion (HALDE) and the National Safety and Ethics Committee (CNDS). Besides dealing with individual complaints, it makes proposals for legal or regulatory

³⁰⁰ Decision of 2 March 1962, Conseil d’Etat (Ass.), no. 55049.

³⁰¹ Constitution of 1958, Article 16(5).

³⁰² Legislative Act no. 55-385 of 3 April 1955 on the state of emergency, Article 1.

³⁰³ Decision no. 85-187 DC, Conseil constitutionnel, Decision of 25 January 1985, para. 4.

³⁰⁴ *Ibid.*, para. 3.



amendments and recommendations to both public and private authorities. It conducts and coordinates studies and research.³⁰⁵

The National Consultative Commission of Human Rights (Commission nationale consultative des droits de l'homme, CNCDH) is an independent administrative authority responsible which performs consultative functions towards the executive and legislator in matters related to human rights. Its functioning is based on the principles of independence, plurality (64 high personalities and representatives of the civil society) and vigilance (a responsibility in the observance of the implementation of human rights). It regularly publishes its opinions on draft legislations. It is also involved in the negotiation, ratification procedure, transposition and implementation of international human rights law instruments. Among other international sources, it supervises the implementation of the EU Charter.³⁰⁶

In consumers' rights, the most important consultative body is the National Council of Consumption (Conseil national de la consommation, CNC),³⁰⁷ a tri-party body with representatives of consumers and service users, a college of professionals representing the main economic sectors and *ex officio* members such as the presidents of consumers' institutions or specialized consultative bodies, etc. The CNC is consulted by State authorities in matters of consumer policy, while its consultation is mandatory prior the publication of any decree in matters of prices or of the publicity of prices.

6. General Conclusions

List of references

Right to Property

J. Carbonnier "Le droit de propriété depuis 1914" Flexible droit, 10 ed, LGDJ 2001, 352

P. Devolvé "Droit de Propriété et Droit Public" in Melanges Braibant, 419

R. Libchaber "La propriété, droit fondamental" in Cabrillac (ed) Libertés et Droit Fondamentaux (20th ed., Dalloz, 2014) 783

³⁰⁵ Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Fifth periodic report, France, UN Doc. CCPR/C/FRA/5 (31 January 2013), paras. 11-13.

³⁰⁶ See the website of the Commission, <http://www.cncdh.fr/fr/instruments-internationaux> (visited on 4 May 2014).

³⁰⁷ See Decree of 12 July 1983, no. 83-642 on the creation of a National Council of Consumption.



ANNEX 1 – The domestic sources of economic rights

| Right | Domestic source – constitutional level | Domestic sources – infra-constitutional level |
|-----------------------|--|---|
| Right to property | Declaration of the Rights of Man and of the Citizen of 1789, Article 2; | Civil code, Article 544 <i>et s.</i> ; Code of expropriation for public utility On intellectual property: Code on intellectual property Legislative Act no. 2014-315 of 11 March 2014 strengthening the fight against counterfeiting; Legislative Act no. 2009-1311 of 28 October 2009 on the criminal protection of intellectual property right on the internet; Legislative Act no. 2009-669 of 12 June 2009 on the promotion of the diffusion and protection of the creation on the internet; Legislative Act no. 2009-258 of 5 March on audiovisual communication and the new public service of television |
| Freedom of enterprise | No express clause in the Constitution. The Conseil constitutionnel derived it from Article 4 of the Declaration of | Civil code; Commercial code; Labour code; Consumer code |



| | | |
|---------------------|--|--|
| | the Rights of Man and of the Citizen of 1789 ³⁰⁸ | Numerous sector-specific statutes, e.g.: Legislative Act no. 2000-108 of 10 February 2000 on the modernisation and the development of the public service electric; Legislative Act no. 2006-1357 of 7 December 2006 on the energy sector |
| Contractual freedom | No express clause in the Constitution. Article 4 of the Declaration of the Rights of Man and of the Citizen of 1789; para. 8 of the preamble of the 1946 Constitution, (personal autonomy) | Civil Code, Articles 6, 1134 |
| Consumer rights | | Civil code; Consumer code ; Tourism code ; Legislative Act no. 78-23 of 10 January 1978 on the protection and the information of the consumers of products and services; Legislative Act no. 2014-344 of 17 March 2014 on consumption; Decree of 16 November 1999 on the indication of unit prices for certain prewrapped products offered to consumers; Decree No.94-490 on the conditions to exercise the activities relating to the organisation and the sale of packages or journeys; Regulation No. 2001-741 of 23 August 2001 implementing EC Directives on |

³⁰⁸ "Liberty consists in the freedom to do everything which injures no one else [...]". Decision of 16 January 1982, Conseil constitutionnel, no. 81-132, para. 16.



| | | |
|---|--|--|
| | | Consumer Law |
| Fundamental rights of workers: | | |
| Trade-union freedom | Para. 6 of the Preamble of the 1946 Constitution. | Labour Code, Art. L. 2141-4 |
| The right to strike | Para. 7 of the Preamble of the 1946 Constitution (“The right to strike shall be exercised within the framework of the laws governing it.”). | Labour code, Article L2511-1 Act no. 63-777 of 31 July 1963 on certain modalities of the strike in public services |
| The right of collective bargaining and the right to participate in the management of the enterprise | Para. 8 of the Preamble of the 1946 Constitution= The right of participation in the collective determination of working conditions and in the management of the work place | Labour code, Articles L2321-1, L2322-1 <i>et s</i> |

ANNEX 2 International and European instruments protecting economic rights which France signed and/or ratified.

| Instrument | Adoption | Ratification by France |
|--|----------------------------|------------------------|
| UN instruments: | | |
| International Covenant on Economic, Social and Cultural Rights | New York, 16 December 1966 | 4 November 1980 |
| Optional Protocol to the International Covenant on | New York, 10 December 2008 | 11 December 2012 |



| | | |
|--|----------------------------|------------------|
| Economic, Social and Cultural Rights | | |
| Convention on the Rights of the Child | New York, 20 November 1989 | 7 August 1990 |
| Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography | New York, 25 May 2000 | 5 February 2003 |
| Optional Protocol to the Convention on the Rights of the Child on a communications procedure | New York, 19 December 2011 | - Not signed. |
| Convention on the Rights of Persons with Disabilities | New York, 13 December 2006 | 18 February 2010 |
| Optional Protocol to the Convention on the Rights of Persons with Disabilities | New York, 13 December 2006 | 18 February 2010 |
| ILO instruments : | | |
| Forced Labour Convention (No. 29) | ILO, 1930 | 24 June 1937 |
| Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) | ILO, 1948 | 28 Jun 1951 |
| Right to Organise and Collective Bargaining Convention, 1949 (No. 98) | ILO, 1949 | 26 Oct 1951 |
| Equal Remuneration Convention, 1951 (No. 100) | ILO, 1951 | 10 Mar 1953 |
| Abolition of Forced Labour Convention, 1957 (No. 105) | ILO, 1957 | 18 Dec 1969 |



| | | |
|--|-------------------------------------|------------------|
| Discrimination (Employment and Occupation) Convention, 1958 (No. 111) | ILO, 1958 | 28 May 1981 |
| Minimum Age Convention, 1973 (No. 138) | ILO, 1973 | 13 Jul 1990 |
| Worst Forms of Child Labour Convention, 1999 (No. 182) | ILO, 1999 | 11 Sep 2001 |
| Council of Europe instruments : | | |
| Convention for the Protection of Human Rights and Fundamental Freedoms | Rome, 4 November 1950 | 3 May 1974 |
| Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms | Paris, 20 March 1952 | 3 May 1974 |
| Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto | Strasbourg, 16 September 1963 | 3 May 1974 |
| European Interim Agreement on Social Security Schemes Relating to Old Age, Invalidity and Survivors | Council of Europe, 11 December 1953 | 18 December 1957 |
| European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors | Council of Europe, 11 December 1953 | 18 December 1957 |
| European Convention on Social and Medical Assistance | Council of Europe, 11 December 1953 | 30 October 1957 |
| European Social Charter | Council of Europe, 18 October | 9 March 1973 |



| | | |
|--|--|--|
| | 1961 | |
| European Code of Social Security | Council of Europe, 16 April 1964 | 17 February 1986 |
| Protocol to the European Code of Social Security | Council of Europe, 16 April 1964 | Signed on 4 October 1976, not ratified |
| European Convention on Social Security | Council of Europe, 14 December 1972 | Signed on 14 December 1972, not ratified |
| Supplementary Agreement for the Application of the European Convention on Social Security | Council of Europe, 14 December 1972 | Signed on 14 December 1972, not ratified |
| Additional Protocol to the European Social Charter | Council of Europe, 5 May 1988 | Signed on 22 June 1989, not ratified |
| European Code of Social Security (Revised) | Council of Europe, 6 November 1990 | Signed on 6 November 1990, not ratified |
| Protocol amending the European Social Charter | Council of Europe, 21 October 1991 | 24 May 1995 |
| Protocol to the European Convention on Social Security | Council of Europe, 11 May 1994 | - Not signed. |
| Additional Protocol to the European Social Charter Providing for a System of Collective Complaints | Council of Europe, 9 November 1995 | 7 May 1999 |
| European Social Charter (revised) | Council of Europe, 3 May 1996 | 7 May 1999 |
| European Union instruments: | | |
| Charter of Fundamental Rights of the European Union | Charter proclaimed on 7 December 2000, and replaced as a binding instrument from the date of entry into force of the Treaty of Lisbon, 1 December 2009 | 14 February 2008 |

CATEGORIZATION OF ECONOMIC RIGHTS: GREECE

Vassilis Hatzopoulos¹

Introduction

Greece's democratic system in its current form has been set up after the demise of a colonel-led military junta, in 1974. After this dramatic experience, and in order to protect democratic institutions from further instability, a) the Greek people in a referendum held in 1974 ousted the King and the Royal family in favour of a Presidential Democracy and b) the Parliament approved the 1975 Constitution.

This Constitution, which follows from a series of older ones going back to the Greek independence from the Ottoman Empire (1822-3, 1844, 1864, 1927, 1952), has been amended at three occasions. In 1986, essentially in order to curfew some the President's powers and render the *regime* a genuine Parliamentary democracy. In 2001, in order to add technology-led 'modern' fundamental rights (privacy, genetic identity), recognize the role of Independent Regulatory Authorities, impose transparency obligations on political parties and on the award of public contracts, organize the decentralization of several state functions and rationalize justice. And in 2008, in order to foresee favourable measures for the periphery and to increase the Parliament's powers over the adoption and the execution of the Budget.² The current Parliament has a mandate for amending the Constitution, in the sense that it can decide which provisions are to be amended by the forthcoming Parliament.

Question 1: Identification of economic rights – Constitutional protection

I. Which rights are considered in your country as economic rights?

The 1975/1986/2001/2008 Constitution (henceforth: the Constitution) has, for the first time in Greek Constitutionalism, an express horizontal provision protecting economic freedom, Article 5(1). This provision sets the principle of, and the limits to, private entrepreneurship. General grounds for limitation of economic freedoms are also to be found in Article 106(2) C. Next to these general provisions protecting economic activity as a whole, the Constitution also grants specific rights in relation to economic activities considered of some importance.

A. General protection of economic freedom: Articles 5(1) and 106(2) C

Article 5(1) of the Constitution for the first time protects economic freedom as an autonomous value, independently from any individual right. Under the previous Constitutions, economic freedom was founded on

¹ Democritus University of Thrace.

² The text of the Constitution as it currently stands, in English, may be found at <http://www.hri.org/docs/syntagma/>.



the more general provision protecting personal freedom. Under the current Constitution, the provision on personal freedom is replicated as Article 5(3), but it is being preceded by Article 5(1) stating that

“1. All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages”.

Hence, despite some dissonant doctrinal voices, nowadays, economic freedom is generally accepted as being founded on Article 5(1).³ This vision is broadly followed by the case law of the highest administrative Court, the *Symvoulío Epikrateias*.⁴

The introduction of Article 5(1) in the Constitution has nurtured two major doctrinal debates, still ongoing. From a political viewpoint, it is being disputed whether Article 5(1) C, together with the various sector-specific economic freedoms enshrined in the Constitution – may be said to found a liberal Economic Constitution⁵ or whether, on the contrary, Article 5(1) C and the sector-specific freedoms only set the outer limits to an essentially neutral Constitution.⁶

From a legal/judicial viewpoint it is unclear how Article 5(1) C relates to Article 22 C securing the right to work (for which see below). For one thing, it is clear that Article 22 C establishes a social – and hence unenforceable – right to work having a *status positivus*. It is less clear, however, whether the individual right to take up and pursue any economic activity and its enforceable *status negativus* implications also stem from Article 22 C, or whether they ensue from the general – but clearly intended to procure the enjoyment of individual rights – Article 5 C. While the former view is based on the idea that a specific Constitutional provision should be given prevalence over a generic one,⁷ the latter view looks more on the nature and systematic arrangement of the different Constitutional provisions in order to determine their actual content.⁸

While both visions find support at the lower courts level, the *Symvoulío Epikrateias* clearly favours the latter.⁹ This same Court also holds that in any event Article 22C does not apply in the absence of an employment relationship, independent professionals being only covered by Article 5(1).¹⁰ The Supreme Court for civil matters (*Areios Pagos*), which hears employment-related cases wherever the employer is not the State but a

³ Dagtoglou, *Syntagmatiko Dikaio, Atomika Dikaiomata*, 4th ed (Athens/Komotini: Ant. Sakkoulas, 2012) para. 1296.

⁴ See eg StE 1149/88, ToS (1988) 325; StE 771/88, ToS (1988) 462; although some judgments are based on Article 5 C, without distinguishing between the various paragraphs, see eg StE 1149/88, ToS (1988) 325, 326.

⁵ In this sense Pararas, *Syntagma Corpus I*, (forthcoming 2014) Comment on Article 5 C; this is an updated version of the 1981-85 edition by Ant. Sakkoulas.

⁶ In this sense Dagtoglou paras 1336-1338, who points out to the lack of a systematic relation between the various Constitutional provisions.

⁷ In this sense Dagtoglou *op.cit* para 1087.

⁸ In this sense Pararas *op.cit*; also Chrysogonos, *Atomika kai Koinonika Dikaiomata*, 2d ed (Ant. Sakkoulas, 2002) II para 4By.

⁹ See eg StE 392/93, ToS [1994].

¹⁰ Ste 1446/2003, D/NH (2005), 745.



private party, broadly shares the vision of the *Symvoulio Epikrateias*, but draws less of a hard line between Articles 5(1) and 22, as it usually refers jointly to both.¹¹

If the position in relation to the specific right to work remains unclear, it is generally accepted that the other economic freedoms explicitly protected in the Constitution come under the specific provisions (for which see below under B) while Article 5(1) C only serves as a subsidiary source of protection, essentially for those economic freedoms which are not explicitly mentioned in the Constitution, i.e. private autonomy and freedom to contract, freedom to associate in view of realising profits (cooperatives are specifically protected under the Constitution) and the right to unfettered competition.¹² Also the right of advertising could partly come under Article 5(1), while partly being protected by the Constitutional provision protecting the freedom of expression (Art. 14).

1. *Private autonomy and freedom to contract.*

This principle, being at the basis of the Civil Code, finds its Constitutional foundation in Article 5(1) C.¹³

It breaks down in the freedoms to decide a) whether to enter or to brake a contractual relationship, b) with whom and c) with what content. It follows that the State's intervention to limit private autonomy before any contract is concluded is subject to a necessity and proportionality test, while any intervention altering the bearing of a contract already concluded may only exceptionally be accepted, as it jeopardises legal certainty.

2. *Freedom to create for-profit associations, companies etc.*

This freedom allows individuals the free choice of corporate form to follow and prohibits the State from favouring some corporate forms over others or from imposing restrictive participation rules. In practice, however, this freedom may be curbed by virtue of other Constitutional provisions (such as Article 25 C which justifies public intervention in order to promote social justice and freedom) as well as by the invocation of an, often ill-defined, general interest.¹⁴

3. *Freedom of competition.*

The freedom of every person to compete into the market entails the obligation for the State to secure both unfettered market access and unfettered competition within the market. Hence, this is the Constitutional basis for regulating unfair commercial practices and for securing free competition. This latter objective is also pursued by virtue of Articles 101 and 102 TFEU.

4. *Freedom of advertisement.*

As stated above, this freedom is half-way connected to the economic freedom and half-way to the freedom of expression (Article 14(1) C). It is being debated in doctrine whether a distinction should be drawn between commercial and non-commercial advertisement (such as eg for religious, political, environmental and other

¹¹ See eg AP 1337/2002, CrID (2002), 1013.

¹² Dagtoglou *op.cit* para 1297.

¹³ See eg AP 2/98, ToS 1999, 120.

¹⁴ Dagtoglou *op.cit.* para 1308 and the abundant case law cited.



purposes), thereby separating their Constitutional status.¹⁵ Under either heading, nonetheless, it is common ground that restrictions to advertising may be imposed both location- and content-wise, as well as in view of the need to protect specific categories of addressees (such as children).

B. Economic freedoms specifically protected

Next to the above 'horizontal' provision, several other Constitutional rules protect specific manifestations of the economic freedom. Depending on the classification criterion selected, these may include the following.

1. The right to work: Article 22

As stated above, the right to work has two facets, one as an individual right (freedom) and one as a social right (aspiration to work). While it is clear that the latter is protected under Article 22 C, the former is disputed between this provision and the general provision or Article 5(1).¹⁶ For reasons of clarity of the analysis, both facets are presented under the specific rather than the horizontal provision.

a. The right to work as an individual freedom: freedom to work and to exercise a profession

As an individual freedom, reflecting a *status negativus* from the State, the right to work encompasses several sub-rights:

- The freedom to chose and to change one's profession, which means that the number/type of professions may not be determined in advance and that the State may not impose and/or prohibit specific professions (but for exceptions, for which see below). Also prohibited is the organization of professions in the form of 'closed shops' and of regulated professions linked to qualities which are inherent to the person and may not be acquired by third parties (due to succession etc). The imposition of *numerus clausus* or of an economic test for any given profession may also come under this heading.
- The freedom to exercise any profession, in respect of manner, geographic location and time. The flip side of this freedom is that of receiving services from any professional. The freedom to exercise a profession is subject to more numerous limitations than the freedom to chose one.
- The freedom of acquiring professional qualifications and following vocational training.
- The freedom not to work.

The above freedoms are available primarily to natural persons present on national territory, irrespective of nationality, and by extrapolation also to legal persons who exercise some economic activity.

b. Right to work as a social right

Contrary to the restraint obligations imposed by virtue of the individual right to work (above), which cover all persons present on national territory irrespective of nationality, the positive 'obligations' imposed by work as a social right only benefit Greek citizens.

The precise content of such 'right to work', however, is difficult to ascertain: it imposes a theoretical obligation on the State to create the conditions for employability, probably by pursuing full employment policies.¹⁷ The effectiveness of this constitutional provision has been tested before the *Symvoulío Epikrateias*, as a means to

¹⁵ For the relevant debate see Dagtoglou *op.cit.* para 1314.

¹⁶ See above n. 4-9 and the corresponding text.

¹⁷ Dagtoglou *op.cit.* para 1117.



challenge the Constitutionality of the socially harsh terms of the MoU signed between Greece and its creditors (also known as the Troika), to no avail.¹⁸

What is certain, however, is that this same Constitutional provision grounds the welfare state and the obligation of equal pay for equal work (Article 21(1)), as well as the obligation of the State to make sure that the population is insured (Article 21(2)). On the contrary, Article 22 C does not grant a right for workers to participate to the management of the company which employs them.¹⁹

2. *The right to participate in Trade Unions: Article 23(1)*

This right is also guaranteed by several texts both at the International level (such as eg the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966)) and at the European level (ECHR and Social Charter under the Council of Europe and the EUCFR under the EU) to which Greece is signatory.

It supposes an employment relationship and covers both employers and employees, both in the private and the public sector. It concerns natural persons as well as Trade Unions, Worker's Associations etc, irrespective of whether they are having legal personality. Natural persons are covered by Article 23(1) by virtue of the fact that they are working within national territory, irrespective of their nationality.²⁰

The right to unionize, is both an individual human right, in the sense that individuals are free to create and participate in Unions, and a collective right, in the sense that the rights of Unions themselves are being protected.

The right to strike is protected autonomously by Article 23(2) C. This right has been limited solely to employees by Law 1426/1984²¹, but the Troika has been pushing hard for it to be restored also in favour of employers (lock out),²² a requirement still pending.

3. *The right to property: Article 17 (1)C*

The right to property is also protected by the Universal Declaration of Human Rights (Article 17) and by the First Additional Protocol of the ECHR, as well as the EUCFR (Article 17), to which Greece is a party. Contrary to the general provision of Article 5(1) C, however, Article 17 C does not figure among the 'non amendable' ones. What is more, the right to property is protected in a non-absolute manner, since the very paragraph which states the principle immediately thereafter makes clear that property rights 'may not be exercised contrary to the public interest'. The following paragraphs of this same provision, ie Articles 17(2) to 17(7) C in a quite extensive and technical manner regulate expropriation, but this is deemed irrelevant for the present study.

From its history and its precise wording, Article 17(1) C is considered to protect material property but not contractual claims. This restrictive interpretation of Article 17(1) C, associated to the old-fashioned perception

¹⁸ See below n. 56.

¹⁹ Dagtoglou *op.cit.* para 1120a.

²⁰ Law 1264/1982, art 7(1)2.

²¹ FEK A 32.

²² See eg <http://www.enet.gr/?i=news.el.article&id=372197>; see also the daily *Eleftherotypia* (30/4/14) <http://news247.gr/newspapers/Afternoon/eleftherotypia/eleytherotypia.2763303.html?ref=news247.gr>.



of property as consisting of material/tangible goods, has been corrected by the case law of both the civil and the administrative courts. Indeed, *Areios Pagos*²³ followed by the *Symvoulío Epikrateias*²⁴ have accepted that contractual claims are protected by the First Additional Protocol of the ECHR, which has supremacy over regular laws by virtue of Article 28(1) C, and thus enjoy protection equivalent to the one afforded by Article 17(1) C. The right to acquire (future) property, as opposed to the right to enjoy (existing property), is not covered by Article 17(1) C, but by the horizontal provision of Article 5(1) C.

This latter provision, however, has not prevented the adoption of laws that restricted the participation of foreign nationals in the capital of specific undertakings (eg a TV broadcasting company, see Law 1866/1989²⁵, which limited foreign participation to 25%) or the acquisition of land and property in specific (border) areas. Both these restrictions have been waived in relation to EU citizens, the latter only after Greece got condemned by the CJEU.²⁶

Therefore, Article 17(1) C accounts for the right to a) maintain and conserve property, b) transform and process property c) use and enjoy property and its fruits, but not to abuse of it, d) move movable property and e) dispose of property both in the course of living and at death.²⁷

The Constitution makes no distinction between tangible and intellectual property. The latter, however, is also protected under the Civil Code, as it corresponds to the creative activity of the person and is considered to be an attribute of the personality.

Intellectual Property and neighbouring rights are protected under Law 2121/93²⁸, which grants a proprietary right, a moral right and a *droit de suite*. The proprietary right is freely transferable, while the moral right may only be inherited. Protection is offered for the creators' lifetime and for seventy years thereafter. Several exceptions are being foreseen, as for example for a) private reproduction, b) partial reproduction, c) schoolbooks and anthologies, d) educational purposes, e) judicial purposes etc.

Trade-marks are being protected on the basis of a registration system, but use-marks may also be recognised provided they enjoy important notoriety. Trade-mark protection, organized by Law 2239/1994²⁹, has been recently reshuffled by Part 3 of Law 4072/12³⁰, which ia a) implements Directive 2004/48, b) generalises the e-submission of marks for registration and abolishes the monopoly of lawyers to act in this respect, c) simplifies the procedure leading to registration, d) clearly states the principle of EU exhaustion of trade-marks and e) facilitates the transfer of trade-marks etc.

²³ AP 86/98, Dike (1998) 1312 and AP 40/98 ToS (1999) 103 = DtA (1999) 431.

²⁴ StE 542/99, DtA (1999) 956.

²⁵ FEK A 222.

²⁶ Case C-305/87, *Commission v Greece (immovable property)* [1989] ECR 1461.

²⁷ Article 109 C specifically foresees the possibility to donate one's succession in favour of the State.

²⁸ FEK A 25.

²⁹ FEK A 152.

³⁰ FEK A 86.



Patents and Industrial Designs are being protected following a registration system. Responsible for this task is the Industrial Property Organisation (IPO, Organismos Biomichanikis Idioktisias)³¹ a private body whose competences and powers are being described by Law 1733/87.³²

The right to property is protected both for natural and for moral persons, irrespective of their nationality. However, moral persons owned by the State do not qualify for protection in relation to their public property;³³ the Constitution affords protection to private parties *from* the State. Protection from other individuals is provided by civil and criminal laws, not the Constitution itself.

4. *The right of association: Article 12 C*

Contrary to Article 12 TFEU and Article 11 ECHR, the right of assembly protected under Article 12 C is limited to non-profit associations. The right to create and to participate in profit-seeking associations, such as commercial companies or corporations, is guaranteed under the general provision of Article 5(1) C.³⁴

5. *The right of intellectual creation and of teaching*

Article 16(1) C guarantees the right of artistic expression. This means that any restriction to the creation, production, exhibition or performance of works for art, is in principle prohibited. By the same token, censorship is also forbidden. Moreover, the promotion and development of artistic creation is an obligation of the State. This, in turn creates an obligation for the state a) to pursue a policy in favour of the arts and of civilization in general and b) to adopt measures for the protection of intellectual property.

The same Constitutional provision grants the freedom of science, scientific research and scientific opinion, as well as the freedom of teaching. The freedom of education and academic freedom are further secured by Articles 16(2), 16(5) and 16(6).

6. *The freedom of mass communication*

This freedom corresponds more to a fundamental individual freedom than to an economic right. Since, however, under the Greek Constitution this freedom comprises various facets having an important economic dimension it is being mentioned here for the seek of completeness. Hence Article 14 C guarantees the freedom of press, Article 15(1) the freedom of cinematography and audio production, while Article 15(2) sets radio and television under the direct control of the State and founds, for that purpose, the National Radio and Television Council (Ethniko Symvoulío Radiotileorassis, ESR) as an independent authority.

7. *Consumer rights?*

Consumer rights do not enjoy, as such, Constitutional protection. Consumers, however, do come in in an indirect manner, as they make part of the 'others' whose rights should not be infringed by the exercise of the economic freedoms (see the following heading, 'Core rights? Grounds for exceptions'). Therefore, consumer

³¹ See <http://www.obl.gr/obl/Default.aspx?tabid=71>.

³² FEK A 171.

³³ Dagtoglou *op.cit.* 1202 and 1214.

³⁴ See above text preceding n 14.



protection may be invoked as a limitation to the economic freedom of others. Law 2251/94³⁵, amended several times, is the main legislative instrument incorporating all the relevant EU Directives. Consumers may get support for their claims and/or ask for mediation from the Consumer Ombudsman, created as an independent authority by Law 3297/2004³⁶.³⁷ They may also find support in the various consumer protection associations such as INKA,³⁸ ΚΕΠΚΑ,³⁹ etc.

II. Core rights ? Grounds for exceptions

The general/horizontal provision securing economic freedom, ie Article 5(1) is among these core constitutional provisions which are non-amendable. This however, does not mean that it does not suffer restrictions. According to the terms of this very provision the rights thereby secured are protected 'insofar as they do not infringe the rights of others, or violate the Constitution or the good usages'. To this 'trilogy' of exceptions, taken from the German Fundamental Law and commonly applicable to most Constitutional provisions,⁴⁰ Article 106(2) C, of Italian descent,⁴¹ adds that 'private entrepreneurship' is protected 'to the extent that it respects the individual rights of freedom and dignity and is not prejudicial to the national economy'.

This last ground of limitation, concerning the protection of the national economy, may be pregnant with all sorts of restrictions, connected ia with combating inflation, securing monetary stability,⁴² strengthening the banking system⁴³ and the like. Such restrictions are deemed to be acceptable provided that a) the test of proportionality is respected and b) the essence of the economic right is not affected. Very often, however, this ground is taken together with the protection of the rights of others and of good usages, to form broad ground of exception connected to the 'general interest'.⁴⁴ This, in turn, allows for an ill-defined proportionality control, under which both paternalism and liberalism may find shelter to the detriment of legal certainty.

Indicative of the malaise of the *Symvoulío Epikrateias* in relation to the application of the proportionality test to restrictions to Article 5(1) are the recent judgments of its Grand Chamber, delivered in January 2014, concerning the territorial restrictions for pharmacies: first the Court stated that the restrictive measures should be capable of attaining the pursued objective and should not go beyond what is necessary, then it stressed that the need for the adoption of the measures should be apparent and clearly identifiable from the very restrictive provision itself, especially where the restriction affects the access, as opposed to the exercise, of a given activity; then, however, it went on to state that its own control should only be restricted to manifest error. It becomes apparent, therefore, that three years into the Troika's programme of structural reforms and

³⁵ FEK A 191.

³⁶ FEK A 259.

³⁷ http://www.synigoroskatanaloti.gr/stk_Mission.html .

³⁸ <http://www.inka.gr/>.

³⁹ <http://www.kepka.org/>.

⁴⁰ See Art 1(2) Grundgesetz.

⁴¹ See Art 42(2) of the Italian Constitution.

⁴² See eg StE 2125/77, ToS (1977) 633.

⁴³ See eg StE 598/53.

⁴⁴ Dagtoglou *op.cit.* 1328.



liberalisation, the Highest Administrative Court while spelling out a strong proportionality control, remains in actual fact reluctant to substitute its own judgment to the regulator's.

Question 2: National sources of economic rights – application of the economic rights

Against the above Constitutional framework, and in view of the margin of regulatory/administrative discretion opened by the ill-defined proportionality described above, Greek economy developed a dense web of measures restricting economic activity. Few economic studies had underlined the negative effects of these restrictions on economic activity and on economy as a whole, before the 2008 crisis.⁴⁵ From a political science perspective, however, the weaknesses of a 'rent-seeking' society had been identified quite early.⁴⁶

The 2008 financial crisis, which hit Greece in 2009 and transformed itself into a sovereign debt, then a fully-fledged economic crisis, has been a braking point in Greece's regulatory history. At this occasion economists both within Greece and from the outside world (mainly commanded by the Troika of international lenders, ie the IMF, the ECB and the EU Commission) identified and calculated (often in a hasty and questionable manner) the cost of existing restrictions. This work has been facilitated by the screening already effectuated in Greece in view of the implementation of the Services Directive,⁴⁷ but went well beyond it.

The Troika's liberalizing programme extended to service activities not covered or excluded by the Services Directive,⁴⁸ and also covered goods, and most importantly, taxation, insurance and labour conditions. The liberalization programme imposed by the Troika was much more compelling than any other liberalization requirement imposed to Greece so far, since it came complete with a conditionality clause: if the programme were not carried out fully, the Troika would withhold the bailout funds promised to Greece and Greece would default on its debt.

After the 2010 MoU, two more MoUs followed. While the legal status and hierarchic ranking of the successive MoUs is being hotly debated between Constitutional and International Lawyers,⁴⁹ the fact is that these have been published in Greek (the first MoU with parts reproduced in English) in the form of laws: Law 3845/2010⁵⁰,

⁴⁵ For an early economic assessment see Centre of Planning and Economic Research (ΚΕΠΕ) on reserved professions (see in brief <http://www.tovima.gr/finance/article/?aid=130660>).

⁴⁶ See eg Mitsopoulos & Pelagidis, 'Vikings in Greece: Kleptocratic Interest Groups in a Closed, Rent-Seeking Economy' *Cato Journal* (2009) 29:3, 399-416.

⁴⁷ European Parliament and Council Directive 2006/123/EC on services in the internal market [2006] OJ L376/36.

⁴⁸ Even in the areas covered by the Services Directives, where the Directive did not impose an outright ban on specific restrictions but required Member States to screen and evaluate them (such as eg minimum prices), the Troika typically circumvented the discretion left to Member States and required their immediate abolition.

⁴⁹ G. Katrougalos, *Krissi kai Diexodos*, (Athens: Livani, 2012) Chapter 5.

⁵⁰ FEK A 65.



4046/2012⁵¹ and 4093/2012⁵², respectively. All three MoUs consist of texts which are very long, complex, badly structured, difficult to follow and even more difficult to decipher.⁵³

Many Constitutional lawyers have claimed that the successive MoUs imposed by the Troika of international lenders on Greece, have *de facto* emptied the relevant Constitutional provisions of all their content (briefly described above) without the corresponding procedure for Constitutional revision having been followed; in any event, the argument goes, a formal amendment could not have touched the essence of Article 5(1) C which is non-amendable.⁵⁴ Populist political parties have even claimed that a constitutional *coup d'état* has taken place.⁵⁵ Of course, it is this same Constitution which tolerated the development of all the distortions which led to the crisis.

This strong incoming liberalizing thrust was met at the internal arena both by enthusiasm for, and resistance to, reform. The former was explained by the fact that a section of the society, and with it parts of the Government (typically the 'productive' ministries) for the first time realized the depth and width of distortions imposed on market forces and found a window of opportunity to rationalize the situation. The latter was explained by the fact that most (if not all) affected interest groups and professional associations, as well as political parties based on clientelism, tried to resist any curtailment of their 'acquired' rights and benefits.

Resistance to the MoUs and to ensuing liberalization

One of the core initiatives of those who opposed the MoU-induced liberalization (and cuts on salaries, grants and other advantages) was to challenge the constitutionality of the first MoU before the *Symvoulío Epikrateias*. This Court, in the absence of a proper Constitutional Court, has competence to incidentally control the constitutionality of laws, at the occasion of annulment proceedings against administrative measures adopted for their implementation. In annulment proceedings brought by no less than 32 complainants, among which the Athens Bar Association, the Technical Chambers of Greece and other major professional and social security organizations as well as major Trade-Unions, the Full Chamber of the Highest Administrative Court held the first MoU to violate neither any Constitutional provision nor the First Additional Protocol of the ECHR.⁵⁶ It is true that the main arguments put forward in this procedure concerned the financial, rather than the structural aspects of the MoU, but the self-restraint of the Court and the crisis-led enlarged concept of proportionality

⁵¹ FEK A 28.

⁵² FEK A 222.

⁵³ Indicatively, a) from the political debate which followed after the adoption of the first MoU, it became clear that many MPs who voted in its favour had either not read it or, at any rate, not understood the breadth of its content and b) the second MoU was adopted in the form of a single article, long of 123 pages, which amends, completes etc almost a hundred texts of pre-existing legislation.

⁵⁴ See eg Katrougalos <http://www.enet.gr/?i=news.el.article&id=404279>.

⁵⁵ <http://www.rodiaki.gr/article.php?id=53842&catid=2&subcatid=12>.

⁵⁶ StE 668/2012 NOMOS (2012), 564750, NoB (2012) 384, ARM (2012) 624, EDKA (2012) 516, available in Greek at http://dikastis.blogspot.gr/2012/02/blog-post_5910.html ; the MoU have also been challenged, to no avail, as to their compatibility with the Constitution, the 1st Additional Protocol of the ECHR, the European Social Charter and the EUCFR, by pensioners claiming that the reductions to their pensions and other benefits violated the above provisions, see StE 1286/2012, NoB (2012) 2121.



put forward, constitute strong signals that any Constitutional challenge is unlikely to make the judiciary mingle with the technically complex and politically sensitive engagements undertaken by the Greek Government.

The second way in which MoU-induced reforms have been resisted has been more subtle but at the same time more spread out, as for every liberalizing measure/initiative brought forward by the Government, the affected parties, often with the support of the immediately relevant ministries (eg civil servants have been seconded by the Ministry of Public Administration, lawyers by the Ministry of Justice and University Professors by the Ministry of Education) have tried to oppose reform and, occasionally, even pass some counter-measure.

Examples of counter-measures opposing liberalization efforts include ia :

a) while the Troika has required the abolition of minimal fees for lawyers, the new Lawyer's Code (Law 4194/2013⁵⁷) replaces *mandatory* minimal fees with *indicative* minimal fees, which however serve as a basis for the imposition of lawyers, thus becoming *de facto* mandatory as no lawyer is willing to be imposed on revenue they have not earned;

b) while minimal fees for engineers have been abolished by Law 3919/2011⁵⁸, Presidential Decree 100/2010 as it has been subsequently implemented, reintroduced minimal fees in relation to the issuance of Certificates of Energy Efficiency foreseen by Directive 2002/91, later to be abolished;

c) while the third MoC, Law 4093/12, strived ia to align the Greek legislation on 'Colleges' which offer University degrees in cooperation with foreign Universities (Law 3696/08⁵⁹) to the requirements stemming from the EU Treaty, as expressed by the EU Commission in a reasoned opinion, this same law counter-intuitively concluded that 'the degrees delivered by Colleges ... are *not* equivalent to the degrees delivered within the national educational system'(art 0(7)1); this aberration, which somehow slipped in the very text of the third MoC signed by the Troika (proving that even the authors of this document did not have a full grasp of its content) was eventually corrected by Law 4011/93⁶⁰ (article 30(23)γ).

Liberalization efforts

Despite all the above, serious efforts to disentangle economic activity, to abolish unnecessary restrictions and, more generally, to promote 'structural reform' have taken place during the last four years. While the first MoU was quite programmatic in nature, the two subsequent ones extensively consist of pragmatic provisions. These together with their implementing legislation tend to be sector-specific and extremely detailed, as they directly amend or replace preexisting legislation. Next to this myriad of sector-specific new rules and amendments, two major horizontal efforts to liberalize economic activity have taken place as part of the effort to implement structural reform in Greece.

⁵⁷ FEK A 208.

⁵⁸ FEK A 32.

⁵⁹ FEK A 177.

⁶⁰ FEK A 200.



The first such effort was the implementation of the Services Directive through Law 3844/2011.⁶¹ This was designed to transpose the Directive in a single text basically copying the Directive's wording, while providing numerous legislative mandates for the various Ministries to adopt the necessary regulatory acts. Hence, the transposition of the Services Directive was an imperfect effort to implement its rules: not only did it consist of a formal 'reproduction' of the Directive's text in the form of a national Law, but also its substantial implementation would come at a later stage through regulatory acts enjoying reduced authority in the hierarchy of norms (Presidential Decrees or, even worse, Ministerial Decisions). What is more, in the screening exercise carried out by the Greek Government in view of the implementation of the Services Directive,⁶² only 56 measures were found to violate Article 15 of the Directive and all but one were deemed to be justified. This notwithstanding, several Presidential Decrees and Ministerial Decisions were adopted in the months which followed the publication of Law 3844/2010⁶³ and the initial reluctance of the Greek Government to liberalize on the basis of the Directive was, in view of the obligations contracted through the first MoU, giving way to measured reforms.⁶⁴

Measured reforms, however, would not satisfy the Troika. Hence, the second and clearly more far-fetched effort to secure economic freedom in a horizontal manner was law 3919/2011⁶⁵, bearing the title 'Principle of Professional Freedom, abolition of unjustified restrictions to the access the exercise of professions'. The title is, however, misleading, since the actual scope of application of the law is wider than the mere 'exercise of professions' and encompasses all economic activities: this may be verified both from the legal basis of the law, which is Article 5(1) C and from its actual content. Law 3919/2011 consists of two parts, the second stipulating profession-specific exceptions to the rules of Part I.⁶⁶ The first 'general' part of Law 3919/2011 foresees two very important rules. First it states that after the lapse of a transitional period of four months from the publication of the law (i.e. as from July 2, 2011), all restrictions to the access and to the exercise of any economic activity are abolished. New restrictions in relation to specific professions may be introduced by fresh acts, in the form of Presidential Decrees proposed by the Ministerial Council (thus curtailing unilateral actions by individual Ministries) only during this same transitional period; such restrictions need be justified by reasons of general interest, be proportional and may not introduce any direct or indirect discrimination based on nationality. A list of ten prohibited kinds of restrictions is provided: a) numerous clausus, b) economic needs test, c) geographical restrictions, d) territorial restrictions, e) single seat requirements, f) restricted activities, g) specific corporate form or reservation of given activities only to natural persons, h) shareholding restrictions, i) minimal prices/fees, j) tying of various activities.

⁶¹ By ironic coincidence, Law 3844/2010 (FEK A 63) on the Services Directive was the last piece of formal legislation adopted before the first MoU, which was published as Law 3845/2010 (FEK A 65).

⁶² Before the crisis had effectively hit Greece.

⁶³ FEK A 63.

⁶⁴ For a detailed evaluation of the implementation of the Services Directive in Greece see Hatzopoulos & Malamataris, Country Report by Milieu Ltd on behalf of the EU Commission, available at http://ec.europa.eu/internal_market/services/services-dir/implementation/implementation_report/index_en.htm

⁶⁵ FEK A 32.

⁶⁶ The only professions for which special rules are foreseen are: notaries, lawyers and law firms, engineers and legal purveyors.



The second important rule of Law 3919/2011 is that, at the end of the four-month transitional period, it abolishes all prior authorization requirements in all the circumstances where the authorization delivered does not entail the exercise of administrative discretion (but is limited to the verification of various documents). According to the new system put into place professionals may ‘announce’ their activity and submit the relevant paperwork to the competent authority and, unless opposed, start operating within three months; the authorization thus ‘delivered’, however, may be revoked at any time by the competent authority if it appears that it should not have been issued at the first place. Therefore, although the procedure is simplified and the time constraints are clearer, the abolition of authorizations is not as spectacular a development as it may appear.

This law, which clearly draws inspiration from the Services Directive, has a virtually unlimited material scope of application – but for the four professions specifically excluded in Part II thereof. It is extremely ambitious as it is supposed to abolish, with a single stroke, thousands of accumulated restrictive measures in the various areas of economic activity. So much so that the Troika itself proposed to the Ministry of Economics to restrict the Law’s scope of application solely to the ‘regulated professions’ in the sense of Directive 2005/36,⁶⁷ a recommendation which Greece refused to follow, thus ‘goldplating’ its obligations under the MoUs. The wide material scope of the Law combined to the highly disperse, overlapping and often contradictory content of accumulated restrictive legislation and regulatory measures, has created great uncertainty as to the applicable rules. This has been alleviated first by a long series of circulars issued by the competent Ministries and,⁶⁸ at a later stage, by a so called ‘omnibus law’ which contains the freshly adopted restrictions for several – though not all – the professions.⁶⁹ During the four-month transitional period set by the Law only one Presidential Decree was adopted, re-establishing restrictions for Pharmacists. The need to regulate more professions, however, has led to an extension of this ‘transitional’ period for several more months, with the difference that all the fresh restrictions adopted after the transitional period, needed be evaluated as to their economic/competitive impact by the Competition Commission;⁷⁰ this extended transitional period was formally brought to an end by Law 4038/2012⁷¹. These freshly imposed restrictions a) are more rational and, hence, less restrictive than those previously applicable b) are easy to identify since they are not spread over an indefinite number of texts adopted over an long period of time⁷² and c) have been evaluated as to their

⁶⁷ European Parliament and Council Directive 2005/36/EC on the recognition of professional qualifications [2005] OJ L255/22.

⁶⁸ The issuance of all these circulars has raised the question whether these could prevail over prior laws and regulations, to which the Legal Service of the State replied in the affirmative in Opinion n 145/2012.

⁶⁹ Law 4093/2012 (FEK A 222). Other laws which are relevant for the application of Law 3919/2011 (FEK A 32) are, in chronological order: Law 4038/2012 (FEK A 14) which confirms that all measures contrary to Law 3919/2012 have been abolished and contains rules on Engineers; Law 4046/2012 (FEK A 28) which contains rules for 20 professions such as accountants, temporary employment agencies, tourist guides, real estate agents etc; Law 4070/2012 (FEK A 82) which contains rules for taxi services; Law 4111/2013 (FEK A 18) which contains rules for Energy Efficiency Inspectors and tourist guides; Law 4152/2013 (FEK A 107) which contains rules on some of the professions above.

⁷⁰ All these opinions which are legally non-binding but have been followed to a very large extent are available in Greek at <http://www.epant.gr/gnomodotiseis.php?Lang=gr&id=31>

⁷¹ FEK A 14.

⁷² It is worth noting that an important mass of restrictions to economic activity had been imposed by the military junta which governed Greece during the 1934-1941 period and remained into force until the adoption of Law 3919/2011.



restrictive effects in a pragmatic way according to the principles of economic analysis and have had their risks evaluated.

From all the above it becomes clear that, historically, economic rights in Greece have suffered from the existence of multiple layers of (often contradictory) regulation and from a very loose proportionality control of the restrictions imposed to Article 5(1) and the other Constitutional provisions guaranteeing economic rights. Law 3919/2011 marks an important legal breakthrough on both these fronts. It remains to be seen, however, whether this *legal* breakthrough will transform itself to a) a *political* breakthrough and will manage to contain the rent-seeking attitude of the various interest groups which has largely been at the origin of restrictions previously imposed and b) an *administrative* breakthrough and will tame the well-established paternalistic and state-centered attitude to economic activity.

Further, it is unclear to what extent the language and logic of Law 3919/2011 will be reflected on the judiciary's application of the proportionality test. The two series of judgments delivered by the *Symvoulío Epikrateias* on the basis of this Law, so far, send mixed messages. In Cases 3747, 3748 and 3749/2013⁷³ the Dentists' Association and others contested the decision by the Minister of Health not to propose fresh restrictive legislation concerning the exercise of their profession, under Law 3919/2011. The Court upheld the Minister's decision by applying a quite detailed proportionality test, weighing economic freedom against the protection of public health. In Cases 228 and 229/2014,⁷⁴ on the other hand, where various pharmacists were contesting the re-introduction, by Presidential Decree, of territorial restrictions to the opening of pharmacies, the Court, while enunciating a detailed proportionality control, only exercised to control manifest error.

Question 3: International and European sources of economic rights

I. To which international instruments for the protection of economic rights is your country a party?

Greece is party to all major international Treaties and Conventions protecting economic rights both at international and regional level.

A. International level

1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (hereinafter UDHR) of December 10, 1948 includes provisions that protect economic rights, as defined above. More specifically, Article 17 protects the right to property, while Article 22 concerns the right to social security. Article 23 recognizes the right to rest and leisure, including reasonable limitation of working hours and periodic paid holidays. Last but not least, Article 25 (1) UDHR recognizes that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right

⁷³ NOMOS (2013), 615619, 615620, 615621 respectively.

⁷⁴ NOMOS (2014), 615466, 614732 respectively.



to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'.⁷⁵

Even though the UDHR is not legally binding in a direct way, it represents core principles of the international human rights regime. It was ratified by Greece and incorporated in the body of national law by Law 92/1967.⁷⁶

2. The International Covenant on Economic, Social and Cultural Rights 1966

The International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) of December 19, 1966, which came into force on January 3rd 1976, was ratified by Greece by Law 1532/1985⁷⁷.

The *individual* right to work is protected by Article 6(1) ICESCR, while the *social* right to work by 6(2) thereof. The signatory parties of the Covenant recognize in Article 7 the right of everyone to the enjoyment of just and favourable conditions of work. Article 8 ensures the right of everyone to form trade unions and join the trade union of their choice, as well as the right to strike, provided that it is exercised in conformity with the laws of the particular country. Moreover, Article 9 recognizes the right of everyone to social security, including social insurance. Article 11 recognizes 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing'.

3. The International Covenant on Civil and Political Rights 1966

The International Covenant on Civil and Political Rights (ICCPR) of December 19, 1966, which came into force on the 23rd of March 1976, was ratified by Greece 30 years later, by Law 2462/1997.⁷⁸

Art. 22 of the ICCPR recognizes everyone's right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

4. Under the framework of the International Labour Organization

- a. ILO Convention No 11/1921 concerning the Rights of Association and Combination of Agricultural Workers. Ratified by Law 2077/1952.⁷⁹
- b. ILO Conventions No 29/1930 and 105/1957 concerning the Abolition of Forced Labour. Ratified by Law 2079/1952⁸⁰ and Legislative Order 422/1961.⁸¹
- c. ILO Convention No 87/1948 on the Freedom of Association and Protection of the Right to Organize. Ratified by Law 4204/1961.⁸²
- d. ILO Convention No 98/1949 on the Right to Organize and Collective Bargaining Convention. Ratified by Legislative Order 4205/1961.⁸³
- e. ILO Convention No 100/1951 concerning Equal Remuneration. Ratified by Law 46/1975.⁸⁴

⁷⁵ See the full text of the UDHR here: <http://www.un.org/en/documents/udhr/>

⁷⁶ FEK A 139.

⁷⁷ FEK A 45.

⁷⁸ FEK A 25.

⁷⁹ FEK A 109.

⁸⁰ FEK A 108.

⁸¹ FEK A 173.

⁸² FEK A 174.

⁸³ FEK A 174.

⁸⁴ FEK A 105.



- f. ILO Convention No 103/1952 on Maternity Protection. Ratified by Law 1302/1982.⁸⁵
- g. ILO Convention No 111/1958 on Discrimination (Employment and Occupation); Ratified by Law 1424/1984.⁸⁶
- h. ILO Convention No 135/1971 concerning Workers' Representatives. Ratified By Law 1767/1988.⁸⁷
- i. ILO Convention No 156/1981 concerning Workers with Family Responsibilities. Ratified by Law 1576/1985.⁸⁸
- j. ILO Convention No 138/1975 'Minimum Age Convention'. Ratified by Law 1182/1981.⁸⁹
- k. ILO Convention No 182/1999 'Worst Forms of Child Labour'. Ratified by Law 2918/2001.⁹⁰

5. Intellectual Property

- a. The Berne Convention (Berlin) for the Protection of Literary and Artistic Works of 9.9.1886. Signed on 27.10./9.11.1920 and ratified by Royal Order 16/31.3.1921.
- b. The Berne Convention for the Protection of Literary and Artistic Works (Brussels 1948). Signed in 1956 and ratified by Legislative Order 3565/1956.
- c. The Universal Copyright Convention (Geneva 1952). Ratified by Legislative Order 4254/1962.⁹¹
- d. The Berne Convention (Paris 1971) on the Protection of Literary and Artistic Works. Ratified by Law 100/1975.⁹²
- e. The Brussels Convention (1974) relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite; ratified by Law 1944/1991.⁹³
- f. The Rome Convention (1961) on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Ratified by Law 2054/1992.⁹⁴
- g. Geneva Convention (1971) on the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonogram. Ratified by Law 2148/1993.⁹⁵
- h. The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Ratified by Law 2290/1995.⁹⁶
- i. WIPO Copyright Treaty adopted in Geneva on 20 December 1996. Ratified by law 3184/2003.⁹⁷
- j. WIPO Convention on Performances and Phonograms Treaty adopted in Geneva on 20 December 1996. Ratified by Law 3183/2003.⁹⁸

B. At regional level

1. The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR)

⁸⁵ FEK A 133.

⁸⁶ FEK A 29.

⁸⁷ FEK A 63.

⁸⁸ FEK A 218.

⁸⁹ FEK A 193.

⁹⁰ FEK A 119.

⁹¹ FEK A 166.

⁹² FEK A 162.

⁹³ FEK A 56.

⁹⁴ FEK A 104.

⁹⁵ FEK A 96.

⁹⁶ FEK A 28.

⁹⁷ FEK A 228.

⁹⁸ FEK A 228.



Greece ratified the ECHR (along with the 1st Additional Protocol, which protects, *inter alia*, the right to property) by Law 2325/1953.⁹⁹ Subsequently, the military junta in Greece (1967-1974) denounced the Convention in question in 1969, in view of the country's expulsion from the Council of Europe. Greece ratified the European Convention on Human Rights anew by Legislative Order 53/1974,¹⁰⁰ once the dictatorship ended.¹⁰¹

2. The European Social Charter

The European Social Charter of 1961 was ratified by Greece with Law 1426/1984.¹⁰² On 21.10.1991 the Charter was complemented by an amending Protocol, which was ratified by Law 2422/1996.¹⁰³ On 5.5.1988 an Additional Protocol to the European Social Charter was added, which was incorporated to national law by Law 2595/1998.¹⁰⁴ However, Greece has not ratified the revised European Social Charter of 1996.

3. EU Charter of Fundamental Rights (EUCFR)

The European Charter of Fundamental Rights was proclaimed in 2000 and has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. The Charter in question includes the protection of the right to work, the workers' right to information and consultation, the right of collective bargaining and action. The EUCFR was ratified by Greece and incorporated in the body of national law by Law 3341/2005.¹⁰⁵

II. How are relevant international and European economic rights norms being incorporated in your country?

The 1975 Constitution in Article 28(1) provides that 'the generally recognized rules of international law, as well as international conventions, as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of pre-existing national law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.'

International conventions constitute an integral part of domestic law, on the condition of their promulgation by law, when and if required according to Article 36(2), according to which 'conventions on trade, taxation, economic cooperation and participation in international organizations or unions and all others containing concessions for which, according to other provisions of this Constitution, no provision can be made without a statute, or which may burden the Greeks individually, shall not be operative without ratification by a statute

⁹⁹ FEK A 68.

¹⁰⁰ FEK A 256.

¹⁰¹ See Dagtoglou, *op.cit.* paras 71 and 71a.

¹⁰² FEK A 32.

¹⁰³ FEK A 146.

¹⁰⁴ FEK A 63.

¹⁰⁵ FEK A 115.



voted by the Parliament'. Legislative and executive authorities have the occasion to interpret the international treaties during the procedure of its promulgation into domestic law.

In Greece, international conventions constitute a direct source, 'either by judicial practice or by constitutional requirement'.¹⁰⁶ Where the provisions of an international treaty are complete, clear and precise, or they recognize rights to individuals, the treaty can be applied by national courts, as a self-executing source of law. Hence, individuals may invoke before national courts the international conventions concerning economic rights that Greece is a party of. An example of such conventions that recognize individuals' rights and are characterized as 'self-executing' are the international labour conventions, since most of their provisions are clear, complete and produce direct effects in the domestic legal order, without the need of further complementary domestic measures.¹⁰⁷ Other examples of self-executing international and European norms concerning economic rights are the European Convention on Human Rights along with the First Additional Protocol and the Paris Convention for the Protection of Industrial Property of 1883.¹⁰⁸

III. To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?

As mentioned above, Greece has ratified the European Convention on Human Rights (along with the 1st Additional Protocol) by Law 2325/1953¹⁰⁹ and once again by Legislative Order 53/1974¹¹⁰, once the dictatorship ended. The second, the third and the fifth Protocols were ratified by Greece by Legislative Order 215/1974.¹¹¹ Greece has not ratified the fourth Protocol of the ECHR. The sixth Protocol was ratified by Law 2610/1998,¹¹² while the seventh was ratified by Law 1705/1987.¹¹³ Greece incorporated the eighth Protocol into domestic law by Law 184/1989¹¹⁴ for it to come into force on January 1st, 1990. Greece ratified the 13th Protocol on 1.2.2005 with Law 3289/2004¹¹⁵ and the 14th Protocol on 5.8.2005 with Law 3344/2005.¹¹⁶ The 9th, 10th, 12th, the 15th and the 16th Protocols have not been yet ratified by Greece.

In the last decade, litigants have been increasingly invoking, and courts increasingly using, the rules of the ECHR. The function and application of these rules has become better and more thorough. As a result, the

¹⁰⁶ See Shelton (ed), *International Law and Domestic Legal Systems, Incorporation, Transformation and Persuasion*, ed (Oxford: OUP, 2011), Chapter 10, *Greece*.

¹⁰⁷ See Yokaris, *International Law as applied by international and national Courts*, 2nd ed. (Athina/Komotini: Ant. Sakkoulas, 2008), p.163.

¹⁰⁸ *Ibid.*, pp.166-173

¹⁰⁹ FEK A 68.

¹¹⁰ FEK A 256.

¹¹¹ FEK A 365, 369 and 365 respectively.

¹¹² FEK A 110.

¹¹³ FEK A 89.

¹¹⁴ FEK A 94.

¹¹⁵ FEK A 227.

¹¹⁶ FEK A 133.



national jurisprudence in the field rises up to the standards set by the Convention.¹¹⁷ It is to be noted, however, that ECHR rules are typically invoked together with other rules of national or EU origin and, the present author has never come across a judgment based exclusively on the ECHR.

Apart from the national jurisprudence, national legislation, occasionally triggered by ECtHR convictions against Greece, has also been transformed in order to meet the criteria of the Convention. A good example is that following a long series of Greece's convictions for long delays in the delivery of justice (a violation of art.6 of the Convention),¹¹⁸ Parliament has recently approved a series of laws in order to ensure the right of everyone to a fair trial¹¹⁹. Indeed, the Code of Administrative Procedure has been amended by Law 3900/2010¹²⁰ not only in order to speed-up the procedure, but also in order to allow the re-opening of a trial before the national court, where the ECtHR rules that the judgment of the national court was made in violation of the right to fair procedure or another provision of substantive law of the Convention.

IV. How and to what extent are international instruments for the protection of economic rights given effect in your country?

As stated above, Greek litigants become increasingly aware of the possibilities offered to them by international instruments for the protection of their rights. The invocation of such instruments, however, is typically made in order to complement a claim under national law and/or on a subsidiary basis to a main argument based on national law. This is partly due to the courts' reluctance to adjudicate exclusively on the basis of international law and to always seek a legal basis for their judgment within the internal legal order. Similarly, whenever there is an opposition between national law and some international norm, unless such opposition is crystal clear and already identified by some international institution/body, Greek courts will invariably give prevalence to national law. A striking example is given by judgment 691/2013¹²¹, delivered by the Full Chamber of the *Symvoulío Epikrateias*, in relation to the compatibility of Law 3696/08 on Colleges (which offer degrees in Greece in collaboration with EU Universities) with Articles 43, 49 and 56 TFEU. The Court refused to examine the compatibility between the two, and thus upheld the national provision despite it being so replete with restrictions to the aforementioned TFEU provisions that the EU Commission had already served Greece with a Reasoned Opinion; the Court held that the Greek complainants bore no connection with the EU Universities and lacked, therefore, any legal standing.

¹¹⁷ See in *The Greek courts and the European Court of Human Rights jurisprudence*, (minutes of an open discussion held in Athens, 2011, available at http://www.kinisispoliton.gr/UserFiles/File/public/125219_APEDDA.pdf Athens, March 2011, 22-24.

¹¹⁸ See eg. *Glykantzi v. Greece* [application no. 40150/09] (concerning the length of pay-related proceedings in the civil courts that lasted more than twelve years).

¹¹⁹ Laws 3900/2010 (FEK A 213) and 4055/2012 (FEK A 51).

¹²⁰ FEK A 213.

¹²¹ NOMOS (2013) 594013, NoB (2013) 808.



Question 4: EU Charter of fundamental rights

- I. **To what extent have the EU Charter of fundamental rights as well as general principles of EU law protecting rights so far been recognized and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?**

It makes no doubt, under Article 28(1) C, that the EUCFR enjoys a higher hierarchical rank than normal legislation, it has quasi-constitutional status. To date, however, the question of primacy between the EUCFR and the corresponding Constitutional provisions has not been raised. On the contrary, the provisions of the EUCFR, like the provisions of the ECHR, are being invoked by parties in judicial proceedings in order to solidify their arguments and to establish the level of protection which should be granted to the corresponding rights.¹²²

A brief research in the case law for the use of the EUCFR gives extremely few hits exclusively in lower jurisdictions, thus showing that this new instrument for the protection of rights has not been fully integrated in judicial proceedings. A reason for this may be the reluctance of the courts to accept arguments based on non-Greek legal provisions, and even less the EUCFR, in situations where the connection with EU law is not crystal clear. Thus, in case StE 1286/2012 (NoB (2012) 2121) the *Symvoulio Epikrateias* held the Charter not to be applicable on the national measures transposing the first MoU in view of the fact that the EU Commission and the ECB had not directly partaken in the adoption of the contested measures by the Greek Government – an interpretation which may seem over-formalistic in view of the CJEU's case law in *Fransson* and *Melloni*.¹²³ It is worth noting that in this same judgment the *Symvoulio Epikrateias*, while setting aside the EUCFR did appreciate the compatibility of the contested measures with the First Additional Protocol of the ECHR.

- II. **How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of economic rights?**

From all the above it may safely be deduced that, at least at the judicial level, the EUCFR may not yet rival or even replace the ECHR as a means of protecting economic rights – and rights in general. What is true for the EUCFR is also true for the unwritten General Principles of EU Law.

Interestingly enough, even the Greek Ombudsman, one of the most European-minded public bodies in Greece, in its yearly reports makes very few, if any, allusions to the EUCFR, while it does allude several times to the ECHR and other international treaties securing rights. The Ombudsman is also the body responsible for overlooking the implementation of the equal treatment obligations stemming from Directives 2000/43 and

¹²² See for example cases StE 4413/2012, NOMOS (2012), 596258, 4414/2012, NOMOS (2012), 596259 1161/2013, NOMOS (2013), 598468 1164/2013, NOMOS (2013), 608339, 1503/2013 NOMOS (2013), 600101 and 1823/2013, NOMOS (2013), 604556 where Article 37 EUCFR is being combined to Art 24(1) C, to ground a general right to environmental protection.

¹²³ Case C-617/10 *Aklagaren v Fransson* [2013] nyr and Case C-399/11 *Melloni* [2013] nyr.



2000/78¹²⁴ as transposed by Law 3304/05¹²⁵ (is the National Equality Body) and publishes a special yearly report on this issue.

What is more, on its own initiative, the Ombudsman in 2013 has published a special report on ‘The Promotion of Entrepreneurship’ as well as a report on ‘The Improvement and the Simplification of Administrative Procedures’, both of which are relevant for the economic freedoms. In these special reports, however, the Ombudsman does not seem to make any use of the EUCFR.¹²⁶

Question 5 : Jurisdictional issues

I. Personal

The horizontal Constitutional provision securing economic freedom, Article 5(1) C, like most other economic freedoms specifically protected under the Greek Constitution, apply to all people within the national territory, without distinction of nationality. These freedoms apply to natural and to moral persons alike, irrespective of (private or public) shareholding. Some nuances do exist, however, such as eg a) publicly-owned legal persons do not qualify for the protection of their public property under Article 17(1) C; employers do not (as yet) have the right to strike.

This large personal scope of Constitutional provisions guaranteeing economic rights could be misleading, however, as to the existence of discrimination on the basis of nationality; reasons both internal and external to the economic rights, account for the existence of such discrimination.

Internally, if it is true that in principle the economic rights are recognized equally to all, the same is not necessarily true for exceptions admitted thereto. Hence, the protection of ‘good usages’ (Article 5(1) C) or, even worse, that of ‘the national economy’ (Article 106(2)) may justify restrictions to the economic activity of non-nationals. What is more, the proportionality test applied to such restrictions may be of different intensity where non-nationals are involved.

Externally, this tentative inequality is not made any better by the general equality clause, Article 4(1) C, which foresees that ‘all *Greeks* are equal before the law’. This implies that non-Greeks who suffer discrimination in the enjoyment of some economic right lack a general Constitutional fall-back clause.

Thus, restrictions to the acquisition of immovable property in border areas have been in force for several decades, until Greece got condemned by the CJEU on this account.¹²⁷ Similarly, restrictions to foreign participation of capital of utility companies have been in force, either directly, or indirectly through minimal holding rules in favour of the State or through the creation of ‘golden shares’. Moreover, several (few)

¹²⁴ Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

¹²⁵ FEK A 16.

¹²⁶ For the texts of all these reports see <http://www.synigoros.gr/?i=stp.el.reports>.

¹²⁷ See above n 26.



activities, such as eg notaries public and maternity schools (!) are still today reserved only to nationals. This, however, should not mask the fact that, while historically the distinction was drawn between Greeks and non-Greeks, gradually the realization that EU citizens should be treated on the same footing as Greeks has been dawned.

Lacking any prior experience on immigration issues, Greece has been proverbially bad and extremely slow in recognizing rights to non-EU nationals, even to those established on a long term basis. It is only at the occasion of the implementation of the relevant EU directive that their rights and those of their families have been systematized and brought closer to those recognized to EU citizens.¹²⁸ Refugees do enjoy economic rights comparable to those of EU citizens, but the number of formally recognized refugees in Greece is extremely small since the acceptance rate of asylum claims is lower than 0,5%.¹²⁹ Prospective claimants are typically held in retention camps close to the border areas where they have entered Greece, while those whose claim is pending (which may be the case for several years) get a document securing that they are not expelled, but have no rights whatsoever (but for primary healthcare which is provided to them for free).

II. Territorial

Greece is a unitary (non-federal) state and there are no territorial limitations to the economic rights conferred to individuals.

Historically there have been some territorial differentiations in the enjoyment of economic rights, but none seems to be in force any more. Hence, eg, the sale of goods in the Dodecanese has been subject to a preferential tax treatment, thus fostering import, export and retail activities.¹³⁰ On a different front, until 1993, the minority of ethnic Pomaks living in Mount Rodopi, on the Bulgarian border of Greece did not have the right to move and/or work outside a designated territory consisting of few mountainous villages. On the same vein, and until the same date, the Muslim minority of the northern provinces of Rodopi and Xanthi, had a right of usage but not of property on land and immovable property. Last but not least, the limitations on acquiring immovable property in border areas has already been discussed.

III. Material

Although Greece has been a free market economy since its constitution as a modern state after 1825, World War II and the painful civil war which followed made capitalism, open profit-seeking and individualism seem as necessary evils. At the same time, heavy industry and the corresponding culture and values never developed in Greece. These factors, among others, had the effect that collective and social rights have historically been seen as more sacrosanct than individual economic ones. A caricatural illustration of this prevalence is the fact that during the period from May 8, 2010 to March 28, 2014 (the MoU Period), in the whole of Greece 20.210

¹²⁸ Council Directive 2003/109/EC concerning the status of third country nationals who are long term residents [2004] OJ L16/44.

¹²⁹ See the relevant diagram published by the Greek Police Department, for the years 2005-2012. <http://www.astynomia.gr/images/stories//2012/statistics2012/06032012-apatelasmata.jpg>.

¹³⁰ See in this respect Joined Cases C-485/93 and C-486/93 *Simitzi v Kos* [1995] ECR I-2655.



demonstrations, manifestations etc took place,¹³¹ typically at the expense of economic activities related to production, retail and tourism, fields where many undertakings have had to shut down during the relevant period. This attitude, however, is in the process of changing in the public opinion and in the judiciary's attitude alike, with the effect that less and less people participate in proclaimed collective actions while, at the same time, more and more collective actions are declared abusive.

IV. Temporal

Please refer to the answer to Question 2, above.

Question 6 : Actors

A. Public Actors

Internal

It has been explained above that several public actors determine the content and quality of economic rights. At the national level the central government is supposed to play the central role with the adoption of Laws and Presidential Decrees. The effect of such legislation, however, is often being altered by Ministerial Decisions, occasionally adopted in a non-coordinated, if not unilateral, manner by individual Ministries. Although the adoption of Ministerial Decisions is, in principle, subject to strict devolution criteria and may only occur upon specific legislative mandate, the way in which formal Laws are adopted by Parliament, makes such mandates unavoidable. In this respect Law 3919/2011 innovated in the sense that all executory acts for its implementation were to be adopted in the form of Presidential Decrees, not Ministerial Decisions. The former typically require the signatures of several Ministers, have to go through the legal scrutiny of the consultative formation of the *Symvoulío Epikrateias*, before being counter-signed by the President of the Republic. Ministerial Decisions, on the other hand, are subject to much fewer procedural requirements and do not present equivalent guarantees of quality. Even if the pattern of Law 3919/2011 were to be replicated for major legislative acts and Ministerial Decisions were displaced by Presidential Decrees (which would not be generally practicable), individual Ministries would still enjoy an important margin of discretion as to the actual application of the various rules: in a highly bureaucratic system of governance like the one of Greece, circulars issued by the Ministries occupy a determinant role.

Therefore, the traditional actors for the determination of economic rights, at the national level, are

- a) the Parliament, which adopts legislation and gives legislative mandates to the various Ministries
- b) the various Ministries which i) propose and adopt Presidential Decrees, ii) adopt Ministerial Decisions and iii) issue Circulars

¹³¹ See the news agency NEWS247 (24.10.2014) available at http://news247.gr/eidiseis/koinonia/kaname_20_210_sygkentwseis_sta_xronia_twn_mnhmoniwn.2754068.html.



- c) and the *Symvoulío Epikrateias* which i) *ex ante* gives its opinion on proposed Presidential Decrees and ii) *ex post* exerts direct control of legality of Presidential Decrees and Ministerial decisions, as well as incidental control of constitutionality of Laws.

Moreover,

- d) the Legal Council of the State (*Nomiko Symvoulío tou Kratous*), which is often called to interpret specific pieces of legislation and whose Opinions may/may not be accepted by the relevant Ministries, does play an important role in the implementation of economic freedoms.

Further,

- e) the Competition Commission does play a role in determining the extent of specific economic rights both i) *ex ante* through its consultative, but to date highly respected, competence and ii) *ex post* through its traditional role of controlling concerted practices, mergers and acquisitions and abuses of dominant position.

To the above actors, should be also be added

- f) the sector-specific regulatory authorities active in the field of posts and telecommunications (*Ethniki Epitropi Tachydromeion kai Tilepikoinonion, EETT*), energy (*Rythmistiki Arhi Energeias/Regulatory Authority for Energy, RAE*), capital markets (*Epitropi Kefalaiagoras*) and broadcast (*Ethniko Symvoulío Radiotileorassis, ESR*); all of them belong to the wider public sector, but are organized in the form of independent authorities and enjoy variable degrees of autonomy.¹³²

Finally,

- g) especially in relation to employment in the public sector, the High Council for the Selection of Personnel (*Anotato Symvoulío Epilogis Prosopikou, ASEP*), an independent authority, enjoys the monopoly of organizing and setting the conditions for recruitment and evaluation of personnel.

All these internal actors, however, do not operate alone: several *external actors* should be taken into account, some having a permanent role and some conjectural.

External

Since Greece's accession to the EU, the EU has always been the single most important external actor in determining the framework for the exercise of economic activity in Greece. The EU has been shaping the rules for economic activity in all its Member States – it started off as an 'economic' Community after all – but in Greece its impact has been more important than in most other Member States, for at least three reasons. First, because Greece has been a net recipient of EU (structural and other) funds and a big part of its economic activity has been funded and, to some extent, shaped, by the EU. Second, this EU money had to reach the market in a transparent and competitive manner. Hence, the EU rules on state aids and public procurement have increasingly had a dominant role in Greece's legal order and, by the same token, have allowed the EU Commission an important monitoring role. Third, and in a more general way, Greece is a small jurisdiction with relatively fresh institutions and limited regulatory resources. Hence it is a net 'importer' of fresh regulatory

¹³² It is worth noting, however, that in Case C-53/03 *SYFAIT v Glaxosmithkline* [2005] ECR I-4609, the Court held one of the most 'independent' authorities, the Competition Commission, not to be independent enough to qualify as a jurisdiction for the purposes of submitting a preliminary question to the Court.



ideas and techniques coming from the EU, both in the form of legal obligations stemming from directives (such as eg the separation of competitive from reserved activities in the network industries) and in the form of best practices exchanged in the course of the application of the Stability and Growth Pact and the Lisbon Strategy (such as eg efforts for regulatory reform, reduction of red tape and simplification of the business environment and increased transparency).

The economic crisis and the international bail-out of Greece have put to the fore an original actor exercising a temporary but decisive impact on the rules applicable to economic activity: the Troika, consisting of representatives from the IMF, the EU Commission and the ECB. During the four years during which the Troika has been operating in Greece most rules affecting economic activity have been originated by it and not a single rule or regulation has been adopted without the Troika's approval. Hence, during this period the Troika has been by far the most important driver in shaping economic activity in Greece. It is interesting to note that the three members of the Troika would not always speak with a single voice (the IMF often pursuing a slightly different agenda from the EU) but given that the application of the conditionality clause for the disbursement of the successive tranches of bail-out funds required a unanimous approval by all three members, the most demanding agenda has regularly prevailed.

At the intermediate level between the Troika and the Greek Government, and in order to assist the latter to conform itself to the obligations imposed by the former, another *sui generis* body has been set up by the EU Commission: the EU Commission Task Force for Greece.¹³³ This body based in Athens consists of sixty people, mainly detached officials of the EU Commission and other international organizations, and is supposed to consult and help the Greek Government to carry out the necessary reforms. Although the Task Force has been perceived by public opinion as the long hand of the Troika, in actual fact it has, in many occasions, taken sides with the Greek Government.

B. Private Actors

Self-regulation

Although self-regulation has gone almost unnoticed by Greek legal literature,¹³⁴ it does occupy a quite important role in core areas of economic activity. Hence, the Technical Chamber of Greece (*Techniko Epimelitirio Ellados, TEE*),¹³⁵ has for a long time fixed - and even perceived on behalf of its members - minimal prices for every single technical activity performed by them (membership being mandatory by law for all technical professions for University graduates). Moreover, the TEE has also developed technical norms and standards for most technical activities. Similarly, the Bar Associations have been fixing minimal fees for lawyers' services and have drafted the 'Lawyers' code' complete with deontology rules.¹³⁶ Minimal fees have now been abolished but deontological regulation still is in place. The Panhellenic Medical Association (*Panellinios Iatrikos*

¹³³ For a brief presentation of the Task Force for Greece see http://europa.eu/rapid/press-release_MEMO-13-920_en.htm ; for its latest activity report see http://europa.eu/rapid/press-release_IP-14-235_en.htm.

¹³⁴ For one of the rare studies dedicated to it see Kamtsidou ea *Aftorythmissi* (Athina/Thessaloniki: P. Sakkoula, 2005).

¹³⁵ www.tee.gr .

¹³⁶ For its latest version see Law 4194/13 (FEK A 208).



Sylogos, PIS) and its members the Local Medical Associations,¹³⁷ have also developed an important code of conduct and pursue disciplinary action against members who transgress it. These professional bodies have a public law status and are supposed to 'express their opinion' on proposed legislation on issues of their competences. The same public law status, compulsory affiliation of all professionals and advisory function towards the State, has been claimed and achieved by a multitude of professional bodies in areas much less sensitive and/or bearing less relation to the protection of general interest. Examples constitute the Economic Chamber of Greece (*Oikonomiko Epimelitirio Elladas, OEE*)¹³⁸ for economists and accountants (chartered accountants being also subject to a separate specific body) and the Panhellenic Association of Physiotherapists of Greece (*Panellinos Sylogos Physiotherapefton, PSF*).¹³⁹ All these professional associations or chambers play an active role in the relevant professions as they typically have some say on the conditions of exercise and, occasionally, access thereto.¹⁴⁰ Even those professional bodies which lack the status of public law and compulsory affiliation may impact on the exercise of the profession; hence, for instance the Federation of Real Estate Agents of Greece (*Omospondia Messiton Astikon Symvaseon Ellados*)¹⁴¹ by including in their standard form contract a commission of 2% have succeeded for a long time to 'impose' this as a general practice.¹⁴²

Social dialogue

In Greece social dialogue is a means of achieving collective agreements concerning working conditions. The social partners partaking in this dialogue are: Hellenic Federation of Enterprises (*Syndesmos Epeichiriseon kai Viomichanion, SEV*),¹⁴³ the General Confederation of Greek Workers, *Geniki Synomospondia Ergaton Elladas, GSEE*)¹⁴⁴, the Hellenic Confederation of Professionals, Craftsmen & Merchants, *Geniki Synomospondia Epaggelmaton Viotexnon Emporon Ellados, GSEVEE*),¹⁴⁵ the National Confederation of Hellenic Commerce (*Ethniki Synomospondia Ellinikou Emporiou, ESEE*),¹⁴⁶ and, since January 2013, the Association of Greek Tourism Enterprises (*Syndesmos Ellinkon Touristikon Epichiriseon, SETE*).¹⁴⁷ The role of the Social Partners has been negatively affected by the crisis and the Troika requirements concerning the 'liberalization' of labour markets. This notwithstanding, a post-Troika national collective agreement has been reached among the Social Partners on May, 2013, but one to which the Hellenic Federation of Enterprises refused to participate.¹⁴⁸

¹³⁷ <http://www.pis.gr/index.php> .

¹³⁸ www.oeeg.gr .

¹³⁹ <http://www.psf.org.gr/>.

¹⁴⁰ It is worth noting that both the Bar Associations and the Technical Chamber of Greece organize their own examinations opening access to the corresponding professions.

¹⁴¹ www.omase.gr/.

¹⁴² Practice which the professionals themselves have voluntarily abandoned during the economic crisis, which hit badly real estate.

¹⁴³ <http://www.sev.org.gr/online/index.aspx?lang=en>.

¹⁴⁴ <http://www.sev.org.gr/online/index.aspx?lang=en>.

¹⁴⁵ <http://www.gsevee.gr/>.

¹⁴⁶ <http://www.esee.gr/>.

¹⁴⁷ <http://sete.gr/EN/Home/>.

¹⁴⁸ See eg the daily Express http://www.express.gr/news/finance/709337oz_20130515709337.php3.



Question 7 : Conflicts between rights

- I. **How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?**

Greece (as briefly explained above, under question 3) is half-way between the monist and the dualist systems for the incorporation of international law. Hence, international norms which are promulgated through a text of internal law, enjoy a supra-legislative status; while the dominant legal doctrine supports that such norms enjoy the same status as constitutional law,¹⁴⁹ the dominant case law holds that the supra-legislative status of international law is based on Article 28(1) C, and thus only enjoys an intermediate, supra-legislative but infra-constitutional law.¹⁵⁰ Hence, eventual clashes between norms stemming from international and national law are being resolved on the basis of hierarchy of norms.

In the internal sphere, there is a clear hierarchy between the national norms, in the following order: Constitution, formal Laws, Presidential Decrees, Ministerial Decisions and, of course, circulars. In practice, however, in some areas of economic activity, in particular in relation to taxation, circulars play such an important role that the hierarchy of norms becomes theoretical, since the Administration tends to give systematic prevalence to them over any other source of law. All administrative acts are, by virtue of the Code of Administrative Procedure Article 6(2),¹⁵¹ subject to a general hierarchical review (aitisi therapias), where a more specific review procedure is not provided for by specific laws. Further, all administrative acts are subject to judicial review before the administrative Courts.

- II. **Are there, in your countries, notorious or problematic clashes between particular economic rights, or between rights and other rights, between individual economic rights and important public interests? Please give examples, and illustrate how these conflicts are dealt with and resolved.**

A. Clashes between economic rights

As already mentioned a great tension exists between the extensively perceived right to strike and to demonstrate and the right to pursue one's economic activity. This tension is more of a political than of a legal nature, although, as stated above, an increasing number of strikes is being declared abusive by courts. A less visible, but more important (since of a structural nature) tension exists, between the individual right to exercise an economic activity and the collectively 'vested rights', often representing the result of some rent-seeking effort. Thus, for instance, professionals already in place tend, through their associations or chambers, to exclude fresh professionals from entering into the market; Professors of public Universities have violently

¹⁴⁹ See *International Law and Domestic Legal Systems, Incorporation, Transformation and Persuasion*, ed. by Shelton D., (Oxford University Press Pub., 2011), Chapter 10, *Greece*.

¹⁵⁰ See eg AP 1781/2008, NOMOS (2008), 472022, D/NH (2011), 1344 , AP 3/2012, NOMOS (2012), 574540, EFAD (2012), 482, CrID (2012), 418, NoB (2012), 855, AP 191/2012, NOMOS (2012), 575317 .

¹⁵¹ Law 2690/1999 (FEK A 45).



opposed any form of private education or even any contact of public universities with the private sector (for sponsoring etc); and the list may be expanded...

B. Economic rights vs other rights

Restrictions to economic rights resulting from intellectual property, consumer protection, competition and state aids rules as well as public procurement rules are all harmonized at the EU level. Hence such other rights affect economic rights in a way broadly defined by EU law itself. A notorious exception to this general trend has been the introduction, at the occasion of the Constitutional revision of 2001, of Article 14(9) C introducing a ground for exclusion from public tenders not foreseen by the relevant EU directives, allegedly in order to protect the freedom of press. This Constitutional requirement, vehemently opposed by the Commission, has had its implementing law repealed and has remained without any legal effect. The CJEU, however, in a preliminary judgment delivered many years after the controversy had ceased, has not issued an outright condemnation of the said Constitutional provision.¹⁵²

C. Individual economic rights vs important public interests

The economic crisis and the need to balance the budget has led the Government, under the pressure of the Troika, to impose very heavy ordinary and extra-ordinary taxes, to raise VAT at the highest level allowed under EU law and to cut down on pensions and healthcare expenses; by the same token, unemployment has soared to almost 30%.¹⁵³ Hence, the general interest to balance the budget, pay off outstanding debts and re-establish Greece's credibility towards its creditors and the financial markets, has been priming over the individual rights for decent work and working conditions, healthcare and the like. As stated above, however, the efforts judicially to overturn the (first) MoU have failed. On the other hand, however, several judgments of the *Symvoulío Epikrateias* have held wage cuts for specific professions to violate their respective economic rights.¹⁵⁴

¹⁵² Case C-213/07 *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Ergasias* [2008] ECR I-9999.

¹⁵³ On the impact of the crisis on all these areas see *inter alia* Caritas Europa, "The impact of the European crisis: A study of the impact of the crisis and austerity on people, with a special focus on Greece, Ireland, Italy, Portugal and Spain" (2010), available at <www.caritas-europa.org/module/filelib/caritascrisisreport_web.pdf>; and more recently, Petmesidou, "Austerity and the spectre of 'immiseration' on the periphery of Europe", CROP Poverty Brief (2013), available at <www.crop.org/viewfile.aspx?id=479>; by the same author, "Is social protection in Greece at a crossroads?", 15 *European Societies* (2013), 597–616; for a more normative explanation of why this has happened, see Degryse, Jepsen and Pochet, "The euro crisis and its impact on national and European social policies", 5 ETUI Working Paper (2013), available at <www.etui.org/Publications2/Working-Papers/The-Euro-crisis-and-its-impact-on-national-and-European-social-policies>. For a human rights perspective see Council of Europe press release (4 Dec.13), "Austerity measures across Europe have undermined human rights", <hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1677553&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=0> and the relevant research paper "Safeguarding human rights in times of economic crisis. Issue paper published by the Commissioner for Human Rights" (2013/2), available at <swcd.coe.int/ViewDoc.jsp?id=2130915>.

¹⁵⁴ See eg <http://www.tanea.gr/news/greece/article/5075817/antisynthagmatikes-oi-perikopes-stoys-enstoloys/>.



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Main Legislative Acts

Law 3919/2011 on Economic Freedom (FEK A @@@)

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CATEGORIZATION OF ECONOMIC RIGHTS: HUNGARY

Marie-Pierre Granger & Orsolya Salat¹

1. IDENTIFICATION OF ECONOMIC RIGHTS

The term ‘economic rights’ is not widely used in Hungarian constitutional law. Some authors address matters of economic constitutionalism,² and refer to economic rights in their discussions. There are however disagreement as to their scope. Some, for example, would not consider the right to property as an economic right as such;³ others would treat the right to work as a social, and not an economic, right.⁴

The term ‘economic right(s)’ does not show up in the constitution. However, the Hungarian Constitutional Court (hereinafter HCC) recently gave in an obiter dictum, a relevant characterisation of the economic constitution, as the complete set of rules related to the economic order, which stem from the constitution. The Hungarian Fundamental Law (the current constitutional text) provides for a comprehensive category which includes three components: i) the recognition of economic rights, covering the protection of property (Article XIII. FL), the freedom to choose one’s work and occupation, the freedom of enterprise (Article XII. FL) and the protection of competition (Article M); ii) matters of public finances, such as taxation, budget, state debt, monetary system, and iii) the provision of social security (Article XIX.).⁵

This report focuses on the few (economic) rights explicitly recognised as such by the HCC, whilst mentioning other elements of the economic constitution, where necessary.

There are no particular core rights amongst those economic rights. However, Hungarian law has traditionally given the right to human dignity a privileged constitutional position. It constitutes an inviolable right, which trumps every other conflicting interest.

The HCC interpreted the right to human dignity in conjunction with the right to life. It considered their inviolability as inherent to the human status.⁶ Given its status as general personality right, any interference with the right to human dignity is automatically unconstitutional, without even having to perform a proportionality test. Human dignity also constitutes the core of every other fundamental right, with the consequence that the essential content of rights cannot be limited by statute.

¹ Central European University, Budapest.

² See especially Tímea Drinóczi, *Gazdasági alkotmány és gazdasági alapjogok [Economic constitution and economic fundamental rights]* (Dialóg Campus, Pécs, 2007).

³ See, e.g. László Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* (Osiris, Budapest, 2001), Pál Sonnevend, “A tulajdonhoz való jog [The right to property]” in Gábor Halmi-Gábor Attila Tóth, eds., *Emberi Jogok [Human Rights]* (Osiris, Budapest 2003),

⁴ E.g., Gábor Juhász-Katalin Tausz, *Szociális Jog [Social Law]* (2012).

⁵ 8/2014. (III. 20.) AB határozat, [81]-[82].

⁶ 23/1990. (X. 31.) AB határozat abolishing the death penalty.



Moreover, human dignity is the source of a number of derived rights. It is the anchor for the right to self-determination, understood as an individual right (e.g. the protection of personal data, refusal of medical treatment, abortion, etc), or the right to physical integrity, the right to privacy or the general freedom of action.⁷ It also provides a basis for the protection of contractual freedom (which is also covered by the freedom to conduct a business/entrepreneurial freedom, as an element of the right to choose an occupation). Unlike the ‘mother right’ human dignity, derived rights may be subject to necessary and proportionate limitations.

The state is bound by the so-called ‘institutional protection’ of the subjective right to dignity and the associated right to life.⁸ Consequently, every fundamental right receives institutional protection for at least its ‘dignity core’. Such ‘institutional protection’ is less extensive than the one accorded to the subjective right, and varies depending on the right at stake. For example, the institutional protection of the right to property requires that the system of private property shall not be abolished, but this does not prohibit the nationalization of particular firms or sectors, as long as the conditions of expropriation are observed.

Some rights only possess an institutional dimension. This is the case of the right to a healthy environment. Provisions formulated as state objectives (e.g. “Hungary shall strive...”) might be understood as realizations of the objective side or institutional side of a right whose subjective side is not under constitutional protection: this is the case⁹ with what are commonly called social rights.

Human dignity has a further function; it serves as the anchor for the principle of equal treatment and non-discrimination. The equality of human dignity is considered a conceptual element of human dignity. Discrimination (be it negative or positive) is judged by standards depending on whether the discrimination affects a fundamental right or not. A strict proportionality test applies in the former case, and a reasonable connection test in the latter.

These doctrines were elaborated by the HCC in in the years following the regime change (1989), on the basis of the pre-existing constitution, which had, nonetheless, been almost totally rewritten. It is common knowledge that the only part which had not been amended was the name of the capital. This report refers to the fully amended document as the 1989 constitution, although formally speaking it was not a ‘new’ constitution. In 2011, following the electoral victory of the FIDESZ government led by Viktor Orbán, a new constitution was formally adopted, entitled ‘Fundamental Law’ (FL), which has been modified five times since then.

⁷ Kinga Zakariás –Miklós Szirbik, “Commentary to Article 54 [right to human dignity]”, in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009) 1899-1947. 1904-1905, [8]-[25].

⁸ Thus, e.g. though the foetus is not considered a person, thus not having a subjective right to life, the state is bound to protect life within its institutional obligation. That is why (and because the pregnant woman’s claim was constructed to mean only a right to self-determination, not a right to human dignity) abortion can be limited, but not banned entirely according to previous jurisprudence.

⁹ It is not always clear if a state aim is an institutional obligation of a right, or a simple institutional obligation.



In many regards, the jurisprudence related to the 1989 constitution has been written into the text of the FL. This is the case with Article I and II of the Chapter on Freedom and Responsibility. Article II declares the inviolability of human dignity, and Article I (3) confirms the proportionality standard by which the HCC judged limitations of fundamental rights under the 1989 constitution.

Accordingly, Article I (3) FL declares that

The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

This is a general limitation clause which also applies to economic rights. The right to property is special though in that it has been understood as a socially bound right, where not only a constitutional value, but a simple public interest is considered sufficient to justify (proportionate) restrictions. Despite the general language of Article I (3) FL, the HCC has so far not diverted from the jurisprudence of the 1989 constitution (in this regard).

2. National sources of economic rights

2.1. Introductory remarks highlighting significant recent developments in the Hungarian constitutional framework and system

As already mentioned, since 1989, Hungary had a written, democratic constitution, nominally Act 20 of 1949 (the so-called “Stalinist constitution”), which was nonetheless completely rewritten during the regime change. Before 1949, Hungary had a “historical” uncodified/unwritten constitution with a debated and changing content and scope of application, which did not include a fully-fledged bill of rights.

After the 2010 election, a new government backed by a two-thirds majority in Parliament, and thus forming a constitution-amending majority, adopted a new constitution, the Fundamental Law, as well as hundreds of new laws. This major constitutional and legislative overhaul is not without effect on the protection of economic rights. Certain characteristics of the new constitutional text and recent constitutional case law cast doubts as to the effective protection of fundamental rights and the respect of the rule of law in Hungary.

The Fundamental Law, which entered into force on 1 January 2012, contains a chapter entitled Freedom and Responsibility, which includes a catalogue of rights. It covers economic rights, and forms the general framework of rights protection in Hungary. Any legal norm must be compatible with the FL (Article T (1)).



Article I proclaims that “the inviolable and inalienable fundamental rights of man shall be respected. It shall be the primary obligation of the State to protect these rights.”¹⁰ Paragraph (2) adds that Hungary shall recognise the fundamental individual and collective rights of man.

According to the Hungarian constitutional tradition, fundamental rights are conceptualized as human rights. They are not created by the stipulation of the FL, but exist independently of the state, which has a duty of recognition and protection. However, some of the constitutional judges, the more positivistic, pro-executive or supporters of parliamentary supremacy, do however not endorse this understanding.¹¹

The FL calls for the further adoption of numerous so-called cardinal laws, to be adopted by an enhanced majority, i.e. two-thirds of Members of Parliament present. “Two-third laws” already formed part of the previous constitutional system, to regulate the exercise of many fundamental rights and for other matters where a broader political consensus was perceived as necessary. A law adopted by two-thirds majority can only be amended by a two-thirds majority, but it does not enjoy higher status in the hierarchy of norms.

The new FL, in contrast to the previous constitution, does not impose resorting to cardinal laws adopted by an enhanced majority to regulate the exercise of certain fundamental rights, such as freedom of assembly and association. The laws on the media, freedom of information, religion and churches, election and right to vote, and on parties must however go through a two-thirds adoption. Furthermore, most institutional laws (relating to Parliament, status of MPs, president of the republic, courts, constitutional court, ombudsman, local governments, freedom of information authority, Audit Court, National Bank, police, prosecution, national security, etc.) are also entrenched in the two-thirds system.¹² In some fields, such as family law or the “bases of tax and pension regulation”, traditional parliamentary competences are now entrenched in cardinal laws. The Venice Commission argued that this extensive use of cardinal laws puts “the principle of democracy itself at risk”.¹³

The current political context needs to be outlined in order to understand the actual functioning of the constitutional order. Since 2010, the governing coalition has a two-thirds majority in Parliament. The system thus contributes to the entrenchment of the current government’s policy and value preferences, as these could not be changed even if the current majority would lose later elections, unless the winning party or coalition

¹⁰ Note that Hungarian is a gender-neutral language which differentiates between persons and things, but not between he and she. The noun translated here as ‘man’ is in Hungarian ‘ember’, without gender connotation. The translation of the FL provided by the foreign ministry uses the male form to refer to the Hungarian gender-neutral noun, but uses ‘he or she’ for the third person singular pronoun. This report follows the terminology used in this quasi-official translation, in particular as it is the only one which has all the five amendments consolidated in the text. Available here: <http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>

¹¹ See, e.g., Imre Juhász’s concurring opinion to the decision on the Fourth Amendment, or regularly Béla Pokol’s view on the global constitution-oligarchy which should not be let put a limit on the per definitionem unlimited power of the constitutional majority (2/3) to amend the constitution. See the opinions of Imre Juhász and Béla Pokol in 12/2013. (V. 24.) AB határozat.

¹² A list can be found here: <http://www.parlament.hu/fotitkar/sarkalatos/sarkalatosvekjegyzeke.pdf>

¹³ Par. 24, OPINION ON THE NEW CONSTITUTION OF HUNGARY Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).



secures a two-thirds majority. The new Constitution, and all new (cardinal and ordinary) legislation, as well as significant office holders – constitutional justices, Supreme court justice and chief administrator of justice, chief prosecutor, members of the Audit Court, members of the Budget Council, ombudsman, president of the National Bank, president of the Republic - were the products of this two-thirds system,¹⁴ and not the result of consensual decision-making. In this context, the two-thirds majority requirement for constitutional amendments and the adoption of important legislation did not fulfill its original function of forcing opposing political sides to reach consensus. This is particularly problematic with regard to situations in which the governmental majority should be subject to monitoring by independent bodies.

The two-thirds majority is nonetheless constrained by the requirement to respect EU law as well as constitutional amendments (Article E, para (4)).

The status of the pre-2012 constitutional jurisprudence is a matter of controversies. In May 2012, the HCC declared that it would take into account its earlier reasoning, unless the applicable FL provision contradicts or departs from the relevant provision in the former constitution.¹⁵ In the case of substantively equivalent provisions, the HCC “shall provide justification not for following the principles laid down in previous jurisprudence but for departing from those principles.”¹⁶

However, since then, a Fourth Amendment to the FL was adopted, which “repealed” constitutional rulings handed down prior to the entry into force of the FL, though “without prejudice” to their legal effect.¹⁷ This cast into doubt the status of the whole body of prior constitutional case law. The HCC reacted by reversing its earlier approach, and claiming that the reference to previous case law in case of substantively equivalent provisions is still possible, but needs to be justified in detail. Earlier arguments, legal principles and established constitutional logic might be – though need not necessarily be – relied upon, if (i) the two constitutional texts are substantively overlapping, and this overlap is undermined by (ii) neither different contexts under the FL, (iii) nor specific interpretative rules contained in the FL, (iv) nor the particular circumstances of the case.¹⁸ In the future, the influence of previous jurisprudence might loosen even further, as judges elected by the current government now constitute a majority in the court.¹⁹

¹⁴ One telling exception is one constitutional justice, Imre Juhász, who was supported also by the extreme right wing Jobbik Party – to the lesser pride of constitutionalism and human rights.

¹⁵ Decision Nr. 22/2012 (V. 11.) AB, ABH 2012/2, 94, 97, as translated in Miklós Bánkúti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom, “Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary”, April 2013, available at http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment4.pdf, p. 80, fn. 144.

¹⁶ Id.

¹⁷ Article 19 of the Fourth Amendment to the FL, point 5 of the Closing and Miscellaneous Provisions, effective from 1 April 2013. In English translation available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2013\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)014-e).

¹⁸ Decision Nr. 12/2013. (V. 24.) AB határozat.

¹⁹ In one case with the support of the extreme right wing: <http://www.politics.hu/20130326/mps-in-secret-vote-approve-new-top-court-judge-endorsed-by-fidesz-jobbik/>. But this will not affect the point here on the generally deferential approach of the new judges (except maybe one judge regularly) towards the current government.



The Fourth Amendment furthers the “superconstitutionalization” trend, which consists in writing into the text of the constitution rules previously found unconstitutional by the HCC. According to the Venice Commission’s observations, the Fourth Amendment “amount to a threat to constitutional justice”. It “endangers the constitutional system of checks and balances”, and “is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics.”²⁰

The FL is problematic in other regards too. One of them is Article R, which requires that the National Avowal (i.e. the preamble) and achievements of the historical constitution be taken into consideration in the interpretation of the FL. This is problematic, as the preamble sets out a conservative Christian world view which is not shared by many (if not most) Hungarians. It also contains technical improprieties (e.g. the inapplicability of the statute of limitations to “inhuman crimes”, a concept which differs from crimes against humanity or war crimes). The historical constitution – apart from being a wholly uncertain concept – also included anti-constitutionalist traditions,²¹ and its achievements might well depend on arbitrary interpretation.

Now moving to economic rights, most are contained in a chapter entitled Freedom and Responsibility (articles numbered by Roman numbers), some of them are spelled out in the foregoing chapter “Foundation” (articles designated by capital letters), and other relevant provisions in the chapter on the state (articles with Arabic numbers).

2.2 Provisions in the Fundamental Law’s constitution’s chapter on “Freedom and Responsibility”

2.2.1. Overview

The Chapter entitled Freedom and Responsibility covers the right to property,²² the right to choose work, occupation or entrepreneurial activity,²³ the cooperation between employers and employees,²⁴ and social security including unemployment benefits.²⁵ Only the right to property and the right to (freely choose) work are expressly formulated as rights against the state. However, Article XVII on employment relations includes a right to working conditions which respects health, safety and the dignity of the employee, a right to daily and weekly rest periods and to an annual period of paid leave.

²⁰ Conclusions 145-147 of OPINION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) CDL-AD(2013)012 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)

²¹ See Gábor Schweitzer, “Fundamental Law – Cardinal Law – Historical Constitution: The Case of Hungary since 2011”, *Journal on European History of Law*, 2013/1. 124-128.

²² Article XIII.

²³ Article XII.

²⁴ Article XVII.

²⁵ Article XIX.



The social security provision is formulated as a state aim (“Hungary shall strive”); benefits are formulated as entitlement to assistance. However, it is worth noting that social assistance may be conditioned upon “the usefulness to the community of the beneficiary’s activity”. Controversially, this provision served as a basis for an extensive public work program, which required unemployed people to work for a wage below the minimum wage or else lose entitlement to social benefits.

The provision on cooperation of employees and employers is curious in that they should aim to “ensure jobs and the sustainability of the national economy, and other community goals” (Article XVII). This approach does not project a vision where autonomous independent actors are protected in their endeavours by the state, but a perspective according to which actors are obliged to perform functions the state deems valuable to the community, like creating and preserving jobs, and sustaining the national economy.

Economic rights recognised as such tend to be formulated in a weak form. The right to property entails social responsibility, the right to work only grants the choice of work, occupation or the engagement in entrepreneurship. However, in Hungary, the FL makes it an obligation to “contribute to the enrichment of the community through work, in accordance with one’s abilities and possibilities” (Article XII).

2.2.2 Right to property

Article XIII

- (1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility.
- (2) Property may only be expropriated exceptionally, in the public interest and in the cases and ways provided for by an Act, subject to full, unconditional and immediate compensation.

2.2.2.1 General characteristics

The right to property had been among the core rights in the jurisprudence of the HCC before the new constitution, and especially before the limitation of its competences on reviewing financial/budget legislation (see below under jurisdictional issues). According to this jurisprudence, property was understood to guarantee the material bases of personal autonomy. It was thus a freedom right in essence.

The “constitutional property protection”²⁶ is a notion different from property in private law in two senses. Firstly, it includes not only *ius reale/ius in rem*, but might also extend to all kinds of entitlements stemming

²⁶ Elaborated in 64/1993. (XII. 22.) AB határozat.



from contractual and tort relations, and public law entitlements.²⁷ Secondly, the constitutional property protection, unlike the real right in private law, is not absolute, and can be limited.

2.2.2.2 Applicable test

Property is different from other fundamental rights in that the test applicable to its limitations is a looser one: property can be limited also in pursuance of a simple public interest, subject to a proportionality test.²⁸ This corresponds to a socially bound concept of property, like in the German doctrine.²⁹ The proportionality test was always understood to fall within the review jurisdiction of the HCC,³⁰ but there were uncertainties as to the power of the HCC to review the material existence of a public interest.³¹

2.2.2.3 Scope of protection

On the doctrinal basis outlined above, the HCC extended the scope of property protection to all kinds of material interests to which a particular subject has a “doubtless entitlement,” namely a relation to either one’s own property (wealth) or work which creates value. Social security benefits,³² if they are based on insurance,³³ such as pensions,³⁴ are also protected by the right to property. Similarly, permits required to practice professions, for example for architects³⁵ or public notaries,³⁶ the so-called “practice right” of the family doctor, or concessions, qualify as property. Non-insurance based social benefits, i.e. where there is no consideration, do however not fall under property right protection, but are subject to the requirement flowing from the rule of law, such as legal certainty, whereby a transitional period is required to allow preparation for the change.³⁷

The legislator is entitled, although not required, to compensate for past injustices (e.g. killings or expropriations) by way of *ex gratia* benefits. These *ex gratia* benefits do not create a property right. The

²⁷ See Orsolya Salát-Pál Sonnevend, “Commentary to Article 13 [the right to property]”, in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009), 451-485.

²⁸ 64/1993. (XII. 22.) AB határozat.

²⁹ Drinóczi, op.cit.

³⁰ E.g., Pál Sonnevend, “A tulajdonhoz való jog [The right to property]” in Gábor Halmai-Gábor Attila Tóth, eds., *Emberi Jogok [Human Rights]* (Osiris, Budapest, 2003).

³¹ See 42/2006. (X. 5.) AB határozat.

³² The HCC has been criticized for its activist judgments in relation to the 1995 austerity package which affected redistributive systems. In English, see András Sajó, “How the Rule of Law Killed Hungarian Welfare Reform” *East European Constitutional Review* 5 (1), 31-41, András Sajó, “Social Welfare Schemes and Constitutional Adjudication in Hungary” in Jiří Přibáň and James Young eds., *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Ashgate, 1999).

³³ 43/1995. (VI. 30.) AB határozat, Orsolya Salát-Pál Sonnevend, “Commentary to Article 13 [the right to property]”, in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009), 451-485, 468, [54].

³⁴ 56/1995. (IX. 15.) AB határozat.

³⁵ 40/1997. (VII. 1.) AB határozat.

³⁶ 27/1999. (IX. 15.) AB határozat.

³⁷ 43/1995. (VI. 30.) AB határozat, 56/1995. (IX. 15.) AB határozat.



legislator, when it selects the groups to be compensated, is bound by simple reasonableness standards and not a proportionality test.³⁸

The protection of property requires taking into account legitimate expectations. In this regard, the old HCC had ruled that maternity benefits could not be curtailed unless they entered into force more than 9 months (i.e. pregnancy length) later than the publication of the law.³⁹

However, in a recent case, the Court found that the significant drop in the value of the Hungarian forint vis-à-vis the Swiss franc, in which many households were indebted, had not been foreseeable, thereby not creating a property-like legitimate expectation on the part of banks. The early repayment scheme imposed by the government according to which banks were obliged to allow debtors to pay remaining loans taken in foreign currency at a fixed exchange rate in one sum thus did not violate the property rights of banks.⁴⁰

Furthermore, legitimate expectations in relation to property rights received limited protection under the recent reorganization of tobacco retailing. All previous permits for tobacco licenses were revoked, and new permits issued under questionable circumstances and based on unclear criteria.⁴¹ This measure deprived many people of their main source of income. The ombudsman (who only issues recommendations) found that the re-regulation in itself did not violate either the right to property or the freedom of enterprise, as limitations were justified by the state interest in protecting children. However, he considered that the procedure for issuing the concession was capable of violating the right to a fair procedure.⁴² The tobacco retail regulation is currently under consideration by the European Commission.⁴³

Another relevant case, which earlier could have been decided under property rights, should also be mentioned, which involved gambling machines. A new law was adopted which called for the immediate termination of the operation of gambling machines elsewhere than in casinos. The majority in the HCC found no property issue involved, considering the legislator was free to regulate the gambling market, whilst dissenting judges understood the measure as interfering with acquired rights. The fact that the legislator did not provide any transitional period in which the operators could prepare for the termination of the source of their living was

³⁸ This can be quite dysfunctional for coming to terms with the past, see András Sajó, “Legal Consequences of Past Collective Wrongdoing after Communism” 6 German Law Journal 425-437 (2005), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=566>

³⁹ 43/1995. (VI. 30.) AB határozat.

⁴⁰ 3048/2013. (II. 28.) AB határozat.

⁴¹ The conditions under which the new retail shop would operate were not clearly defined (e.g. what kind of products they could sell, margin levels, etc.); there were serious allegations that licenses were granted based on political affiliation (only to supporters of the governmental party), etc.

⁴² Report of the ombudsman in case AJB-3466/2013 http://www.ajbh.hu/documents/10180/111959/201303466.pdf/709766d4-5bdd-4cd7-b90c-98f058979113?version=1.0&redirect=http%3A%2F%2Fwww.ajbh.hu%2Fjelentesek-inditvanyok-allasfoglalasok%3Fp_id%3D3%26p_p_lifecycle%3D0%26p_p_state%3Dmaximized%26p_p_mode%3Dview%26_3_groupId%3D0%26_3_keywords%3D2012.%2B%25C3%25A9vi%2BCXXIV.%26_3_struts_action%3D%252Fsearch%252Fsearch%26_3_redirect%3D%252Fjelentesek-inditvanyok-allasfoglalasok%253Bjsessionid%253D347D95EDDFCC62BECA0D22FF61DA303F%26_3_y%3D16%26_3_x%3D5

⁴³ http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/bycountry/index_en.htm#hungary



also “problematic” from the point of view of legal certainty. It was, however, found to be justified for reasons of urgency due to national security concerns (which remained unrevealed by the government...).⁴⁴

Finally, under both the old and new jurisprudence, the acquisition of property is not included in the scope of constitutional protection. This is one reason why limitations on acquiring land property (e.g. by foreign companies) were ruled constitutional.⁴⁵

2.2.2.4 Limitation of property

The old HCC, whilst it expanded the scope of protection afforded to constitutional property, also accepted broad limitations, as common in modern regulatory states. The right to property may be limited to pursue a simple public interest, a concept which covers interest or utility for the community, but also direct benefit for selected individuals, to solve specific social problems.⁴⁶

Whether a specific restriction is constitutional depends on all circumstances of the case (casuistic approach).⁴⁷ Generally, the provision of compensation will not make a limitation constitutional, but such compensation might be necessary for the measure to be proportionate.⁴⁸

Similarly to international trends, taxation is not perceived in general as a limit on property rights. It was addressed (before the HCC’s competence to address tax matters was largely taken away) on the basis of the clause on taxation.⁴⁹ An interesting example concerned the imposition of 98% retroactive severance tax. Shortly after coming into power, the FIDESZ government got an act through parliament which aimed at rectifying the immorality of “outrageous severance payments” allocated to public officials and servants under the previous government. The HCC had annulled the law for violation of property rights.⁵⁰ This was the *casus belli* for parliament to introduce the limitation of the competence of the HCC (through a modification of the previous constitution), to prevent it from reviewing fiscal and budget legislation for violation of acquired rights and the right to property (see below). Since then, the ECtHR also found the severance tax violated the right to property.⁵¹

2.2.2.5 Expropriation

Under both the old and the new constitution, expropriation is only possible if it is exceptional, required by public interest, and accompanied by immediate compensation. Where a restriction burdens the enjoyment of

⁴⁴ 26/2013. (X. 3.) AB határozat.

⁴⁵ 35/1994. (VI. 24.) AB határozat.

⁴⁶ 64/1993. (XII. 22.) AB határozat.

⁴⁷ Salát-Sonnevend op.cit.

⁴⁸ Id. and Salát-Sonnevend op. cit. [99]

⁴⁹ E.g. 61/2006. (XI. 15.) AB határozat.

⁵⁰ 184/2010. (X. 28.) AB határozat

⁵¹ N.K.M. v. Hungary, application nr. 66529/11, judgment of the court of 14 May 2013.



property to an extent that its use becomes economically empty, if only *nudum jus* remains with the owner, then such a limitation (according to traditional interpretation) qualifies as expropriation and needs to be compensated.⁵²

2.2.3 Right to free choice of work, occupation and freedom of enterprise

Article XII

(1) Everyone shall have the right to freely choose his or her work, occupation and to engage in entrepreneurial activities. Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities.

(2) Hungary shall strive to create the conditions ensuring that everyone who is able and willing to work has the opportunity to do so.

The right to work was a prominent “right” under the pre-1989 socialist constitution. However, it was only granted in its social right aspect, on a par with the duty to work, and without guaranteeing the right to freely choose work or occupation, or protection from forced labour.⁵³

The 1989 Constitution guaranteed the right to work, the right to freely choose work and occupation, equal pay without discrimination, the right to rest, free time, and regular paid holiday, and income adequate to the quantity and quality of the work done. This latter provision (bearing the air of socialism) is all the more curious as Hungary has not undertaken to guarantee fair remuneration under Article 4 of the European Social Charter.⁵⁴

Despite clear language, these wide-ranging provisions of the 1989 Constitution were interpreted to constitute only state aims, and not subjective rights, except for the right to choose an occupation.⁵⁵ As state aim or positive duty, the legislator has “not unlimited, but considerable” leeway in creating the conditions for the right to work.⁵⁶ Only the freedom right thus remained.⁵⁷ Its social aspects do not confer subjective right claim.

The current wording in the FL about the right to choose work is in line with the previous jurisprudence. Neither the old, nor the new constitution declared the prohibition of forced labour, though that can be derived from

⁵² Salát-Sonnevend, op.cit.

⁵³ Gábor Juhász, “Commentary to Article 70/B. [right to social security]” in András Jakab ed., *Az Alkotmány kommentárja* [Commentary of the Constitution] (Századvég Kiadó, Budapest, 2009), 2548

⁵⁴ <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=163&CM=8&DF=&CL=ENG&VL=1>

⁵⁵ 21/1994. (IV. 16.) AB határozat.

⁵⁶ 327/B/1992. AB határozat.

⁵⁷ 21/1994. (V. 16.) AB határozat.



the right to freely choose work.⁵⁸ The FL grants the right to freely choose work, but leaves out the principle of equal pay for equal work without any distinction (as well as the provision on adequate remuneration, incompatible with the notion of market economy). Equal pay for equal work might be derived from the general equality provision, as was basically the case in the jurisprudence of the 1989 Constitution.⁵⁹

The comprehensive nature of the freedom right as granted in the FL, in that it refers to work, occupation and entrepreneurial activities in para. (1) is a codification of previous jurisprudence, which merged the separate provisions on the freedom of enterprise with the right to work. The freedom of enterprise in its relation to freedom of contract and consumer protection will be discussed below under Section 3.

It is worth noting that the second sentence of para. (1) appears to establish a duty to work, although determined by everyone's abilities and possibilities. As such, the provision is certainly incompatible with the nature of a freedom right. To our knowledge, this sentence has so far not been interpreted.

2.2.4 Protection of employees, collective action

Article XVII

(1) Employees and employers shall cooperate with each other with a view to ensuring jobs and the sustainability of the national economy, and to other community goals.

(2) Employees, employers and their organisations shall have the right, as provided for by an Act, to negotiate with each other and conclude collective agreements, and to take collective action to defend their interests, including the right of workers to discontinue work.

(3) Every employee shall have the right to working conditions which respect his or her health, safety and dignity.

(4) Every employee shall have the right to daily and weekly rest periods and to an annual period of paid leave.

Article XVII contains three provisions.

The first, interestingly, subjects the economic cooperation of employers and employees to the interest of the national economy and other community goals, and not to their own interests. The second provision formulates the right to form unions and other organizations on both sides of the labour relations, and to conclude

⁵⁸ Gábor Juhász, "A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben", *Fundamentum*, 2012/1. 35, 37.

⁵⁹ The HCC basically considered the equal pay principle redundant. Id. at 37.



collective agreements. The new Labour Code raised many issues in this respect.⁶⁰ It generally aimed at increasing the flexibility of the labour market,⁶¹ even though the Hungarian labour market was, comparatively, quite a flexible one.⁶² The reform led to a reduction of employees' and trade union's protection,⁶³ despite the introduction of the constitutional protection of economic bargaining (para. (2)). Collective bargaining autonomy, however, increased. Under the new Code, collective agreements (and individual labour contracts) may derogate from the rules of the Code *to the benefit of the employer*, to motivate employers to engage in negotiations and conclude collective agreements.⁶⁴ As small and medium sized enterprises provide the bulk of the employment in Hungary, collective agreements were rare. Under the new Code, in the absence of such agreements, alternative agreements are concluded between employers and works councils.⁶⁵ Works councils cannot take part in strikes, which means their bargaining power is limited. Overall, power has shifted from the unions to works councils, which in effect decreases protection, as works councils are meant to act impartially. Other trade union prerogatives were abolished.⁶⁶

As to individual employees, the FL stipulates their right to working conditions which are respectful of health, safety and dignity (para. (3)), and the right to daily and weekly rest, and paid annual leave (para. (4)). Arguing on the basis of human dignity, the HCC found laws which would allow the dismissal of civil servants without a reason unconstitutional;⁶⁷ but it did not provide for a remedy.⁶⁸

In the new Labour Code, the individual employee's protection has been diminished in several ways. For example, mandatory overtime work might be increased, mandatory lump sum at dismissal decreased, probationary period extended, a guarantee deposit required from employees handling money, employee dismissed while on sick leave, etc. So far – since the Code has entered into force in 2013 – there has been no constitutional litigation which would give the opportunity for the HCC to address these matters.

⁶⁰ For a more detailed overview see Clauwaert, S. and Schömann, I., The crisis and national labour law reforms: a mapping exercise. Country report: Hungary, Last update: January 2013, European Trade Union Institute, http://www.etui.org/content/download/7457/71636/file/Hungary+January+2013_final.pdf.

⁶¹ A research examining the first year of the new Code in force could not confirm that in fact the labour market became more flexible, but the authors considered it might be due to the short period of time. In contrast, the worsening of the situation of individual employees and trade unions was clearly shown. Laki Mihály–Nacsa, Beáta–Neumann, László, Az új Munka Törvénykönyvének hatása a munkavállalók és a munkáltatók közötti kapcsolatokra. Kutatási zárójelentés, MT-DP – 2013/2 <http://mek.oszk.hu/11400/11439/11439.pdf>

⁶² Cazes, S. – Nesporova, A., Flexicurity: a relevant approach in central and Eastern Europe. (ILO, Geneva, 2007) 147; Wallace, C., "Work Flexibility in Eight European Countries: A Cross-national Comparison" Czech Sociological Review, 2003, Vol. 39, No. 6. as cited by Tamás Gyulavári, Gábor Kártyás, "The Hungarian Labour Law Reform. The Great Leap Towards Full Employment?" Dereito – Vol.21, n°2: 167-188 (Xullo-December, 2012), <https://jak.ppke.hu/uploads/Article/12417/file/TG%20-%20Dereito.pdf>

⁶³ In English, see, e.g., Tóth, András, "The New Hungarian Labour Code - Background, Conflicts, Compromises" Working Paper Friedrich Ebert Stiftung, and Gyulavári-Kártyás, op.cit.

⁶⁴ Gyulavári-Kártyás, id.

⁶⁵ Id.

⁶⁶ In more detail, see Tóth, op.cit., supra note 54.

⁶⁷ 8/2011. (II. 18.) AB határozat

⁶⁸ Naszladi Georgina, "Veszélyben az alkotmányjogi panasz jogorvoslati jellege. Kommentár az Alkotmánybíróság 3042/2013. (II. 28.) AB végzéséhez", Fundamentum, 2013/1, 78.



An issue that gained salience in the last years was the question of the forced early retirement of hundreds of senior judges (among them 20 judges on the Curia, the Hungarian Supreme Court), which threatened to undermine the independence of judges. This was achieved through legislation that decreased the judges' retirement age from 70 to 62 without transitory measures. The divided Constitutional Court (where at the time the newly elected judges were still not in majority) found, by the decisive vote of the chief justice, that the law violated the constitution. Yet, again, it provided for no remedy.⁶⁹

The right to strike (guaranteed in para. (2)) was also re-regulated at the legislative level. Similarly to the Labour Code, the modified law on strikes reduced the protection of employees, as severe limitations were built into the system of industrial action."⁷⁰ There has been no authoritative constitutional ruling on this yet.

2.2.5 Social security

Article XIX

(1) Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to assistance in the case of maternity, illness, disability, handicap, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.⁷¹

(2) Hungary shall implement social security for the persons referred to in Paragraph (1) and for other persons in need through a system of social institutions and measures.

(3) The nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity.

(4) Hungary shall contribute to ensuring the livelihood for the elderly by maintaining a general state pension system based on social solidarity and by allowing for the operation of voluntarily established social institutions. The conditions of entitlement to state pension may be laid down in an Act with regard to the requirement for stronger protection for women.

The previous constitution formulated the provision of social security as an individual right, but the HCC interpreted it to be only a state aim. In this regard, the strictly aspirational language of the FL in Article XIX does not necessarily reduce the level of constitutional protection as previously granted. However, similarly to the

⁶⁹ 33/2012. (VII. 17.) AB határozat.

⁷⁰ Edit Kajtár, Attila Kun, "Right to Strike in a Changing Regulatory Environment." Pázmány Law Working Papers, Nr. 2013/03, <http://plwp.jak.ppke.hu/images/files/2013/2013-03-Kajtar-Kun.pdf>.

⁷¹ Amended by Article 21(1)h) of the Fourth Amendment to the Fundamental Law (25 March 2013).



provision on the right to work and the provision on economic cooperation, constitutional protection is burdened by a constitutional obligation: social assistance might be conditioned by “the usefulness to the community of the beneficiary’s activity.” This might create a tension with the right to human dignity, which, at least under the previous constitution, was interpreted to require the state to guarantee to everyone a minimum.⁷²

Furthermore, under the Closing provisions, one can find a further rule on social security:

Article 19. (5)

The third sentence of Section 70/E(3) of Act XX of 1949 on the Constitution of the Republic of Hungary in force on 31 December 2011 shall, until 31 December 2012, apply to benefits which qualify as pension benefits under the rules in force on 31 December 2011 with respect to any change in their conditions, nature or amount, to their conversion to other benefits or to their termination

This provision enables parliament to curb pension rights. This already happened with regard to previous MPs who were entitled to retire earlier than the general retirement age. Their pensions were transformed into social benefits, and their amount decreased by the amount of personal income tax. The Court found the general scheme of the relevant law constitutional.

Article 19 (5) keeps in force the previous constitution’s rule (added in 2011) allowing for the change of pension rights, especially to convert social (quasi-)insurance rights into social benefits (as mentioned above, the former was interpreted to fall under property protection as an acquired right, while the latter only as one element in a broader institutional mechanism which has to live up to the state aim of social security).⁷³

Moreover, the bases of the pension system are entrenched in a cardinal law, which means that no future simple majority can change it. Article 40 proclaims that “in the interest of predictable contributions to common needs and of a secure livelihood for the elderly, basic rules for the sharing of public burdens and for the pension system shall be laid down in a cardinal Act.”

2.2.6 Housing and Unlawfulness of Homelessness

Article XXII⁷⁴

(1) Hungary shall strive to ensure decent housing conditions and access to public services for everyone.

⁷² 32/1998. (VI. 25.) AB határozat,

⁷³ 23/2013. (IX. 25.) AB határozat.

⁷⁴ Supplemented by Article 8 of the Fourth Amendment to the Fundamental Law (25 March 2013).



(2) The State and local governments shall also contribute to creating decent housing conditions by striving to ensure accommodation for all persons without a dwelling.

(3) In order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in a public space as a habitual dwelling shall be illegal.

In accordance with the overall approach of the FL, decent housing is not formulated as a right, but as a state aim, without further operationalization. Thus, based on the constitution, homeless persons can be banned from public areas with reference to a vague public interest; what is more, such rules do not need to be laid down in an act of Parliament, but can be issued by local governments (note that a number of local governments are dominated by Jobbik, an extreme right wing party, a trend which is likely to intensify following the Autumn 2014 local elections).

The unlawfulness of homelessness was incorporated into the constitution after the HCC found it unconstitutional (“superconstitutionalization”). The HCC had indeed ruled that making the *condition* of homelessness illegal violated human dignity.⁷⁵

2.3. Provisions in the part on “Foundation”

The FL contains further provisions relating to economic rights in the first operative part, entitled Foundation (i.e. not in the Chapter on Freedom and Responsibility).

Article M

(1) The economy of Hungary shall be based on work which creates value, and on freedom of enterprise.

(2) Hungary shall ensure the conditions of fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers.

2.3.1 Competition, freedom of contract and consumer protection

Article M was interpreted in a few decisions since 2012. In general, the HCC noted that Article M(2) provided the constitutional bases for limiting economic competition to protect consumers; it nonetheless does not formulate specific consumer rights. Both economic competition and the protection of consumer rights are

⁷⁵ 38/2012. (XI. 14.) AB határozat.



state duties, to which specifically stipulated fundamental rights relate (such as the right of enterprise in Article XII, and the right to property in Article XIII).⁷⁶

Article M (1) is understood to be partly analogous to Article 9 of the 1989 Constitution, which declared Hungary a market economy, where “private and public property [were] of equal legal status and equally protected”, and recognized the “right of enterprise”. Article 9 was interpreted to protect the freedom of contract, although jurisprudence usually did not consider it as proper fundamental right, but as a simple constitutional right (thus allowing for greater limitation than if it was categorised as a fundamental right).

The HCC conferred protection to contractual freedom on the basis of Article M,⁷⁷ without this resulting, however, in strong protection, as exposed in a couple of recent cases concerning the so-called rescue program for those indebted in foreign currency (especially Swiss francs).

The first concerned a constitutional complaint about the measure obliging banks to allow debtors to pay all the remaining credit at a fixed exchange rate in one sum (early repayment scheme).⁷⁸ The HCC found the act conform to the FL. Relying on previous jurisprudence, the Court found in analogy to the principle of *clausula rebus sic stantibus* that there was a significant, unforeseeable change (of currency rates, due largely to the global economic crisis) affecting essential lawful interests of the parties, and this mandated the legislator to intervene to offer a general solution to a mass of individual contracts. As mentioned earlier, it was found not to violate the right to property of banks either. The fact that the scheme in fact benefitted those debtors who were relatively well-off and able to repay the loan in one sum, while it left the most vulnerable without any help, and that the law included distinctions in some respects (e.g. including only homes and not commercial estates) was considered irrelevant. As explained earlier, the legislator’s discretion in setting up the scheme, as an *ex gratia* benefit, and not a right, meant that the choice of beneficiaries was only restricted by “the principled limit of positive discrimination”: discrimination between groups of persons not affecting their rights is permissible as long as it is not arbitrary, or unreasonable.⁷⁹

The other decision concerns the request by the government for an interpretation of Article M in relation to the question of whether foreign currency credit loans based on a floating exchange rate could trigger the state duty to protect consumers’ rights and justify *ex post facto* intervention into contractual relations between banks and individuals.⁸⁰ The government specifically asked whether the FL, in that it did not include a reference to market economy, afforded lesser protection to market economy and freedom of contract than the previous constitutional. The Court found that the reference to the “rights of the consumers” in para. (2) should not be understood as a guarantee of an individual fundamental right, but rather a state obligation to set up, through

⁷⁶ 3175/2013. (X. 9.) AB határozat

⁷⁷ 3192/2012. (VII. 26.) AB határozat

⁷⁸ 3048/2013. (II. 28.) AB határozat

⁷⁹ The equality test requires strict proportionality only when the discrimination affects a fundamental right, otherwise the test is simple rationality.

⁸⁰ 8/2014. (III. 20.) AB határozat



legislative means, mechanisms and institutions to protect consumer and prevent the abuse of a dominant position. A wide range of legislative solutions might thus be considered constitutional, the arrangement and selection being within the power and responsibility of the legislature, not the HCC. It also found that Article M was not directly applicable to private contractual relations. As to legislative intervention into existing contracts, the Court affirmed its previous jurisprudence relating to the essence of market economy, freedom of contract, and intervention into existing contracts, and the application of the constitutional equivalent of *rebus sic stantibus*, thus implying that freedom of contract did not enjoy lesser constitutional protection than under the previous constitution.

The issue of foreign currency loans is also litigated in ordinary and EU courts. The Curia, the Hungarian Supreme Court, found that loan contracts not specifying the amount of monthly payments due are invalid, and as such, cannot form a basis for the creditor to exercise the right of option and buy the mortgage guarantee (typically a real estate).⁸¹

Furthermore, the Curia turned to the CJEU inquiring whether EU law allowed for the Hungarian courts to declare a term unfair and modify private contracts to remove unfairness. The CJEU gave a green light, declaring that Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, “as regards a contractual term such as that at issue in the main proceedings, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.” The CJEU also stated that “Article 6(1) of Directive .. must be interpreted as meaning that, in a situation ... in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.”⁸² It remains to be seen how the Curia will react to this decision.

2.3.2 Obligation of a balanced budget

Article N

(1) Hungary shall observe the principle of balanced, transparent and sustainable budget management.

⁸¹ Pfv.I.20.728/2013.

⁸² Case C-26/13, Judgment of the Court of 30 April 2014.



(2) The National Assembly and the Government shall have primary responsibility for the observance of the principle referred to in Paragraph (1).

(3) In performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle referred to in Paragraph (1).

This article, especially para. (3), could pose a threat to fundamental rights protection, in particular economic and social rights, if understood as affecting the constitutional balancing between fundamental rights and the constitutional value of a balanced budget.⁸³ The decision on the pension rights of parliamentarians, already discussed, mentions Article N, including the obligation of the Court itself to observe the principle of balanced budget. However, it does not give further detail about that obligation, basing the decision largely on other provisions, thus suggesting that the reference to Article N might be obiter.⁸⁴

2.3.3. 'Article U'

Article U is a special provision which was introduced in the constitution by the Fourth Amendment, and includes a long list of diverse issues, including statements of facts and interpreted facts, as well as legal norms. They are related to each other in that each of them is connected with the pre-1989 communist dictatorship.

Two "provisions" are of special interest for economic rights.⁸⁵ The first one states that "[p]olitical organisations having gained legal recognition during the democratic transition as legal successors of the Hungarian Socialist Workers' Party continue to share the responsibility of their predecessors as beneficiaries of their unlawfully accumulated assets." The legislative consequences of this provision are unclear.⁸⁶ They could range from allowing the confiscation of the assets of such parties' legal successors to purely symbolic sanctions. In any case, it is possible that this provision will be interpreted as derogating from the conditional expropriation provision in Article XIII.

The second rule affecting economic rights is para. (5) of Article U, which declares that

⁸³

CDL-AD(2011)016-e
Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e)

⁸⁴ 23/2013. (IX. 25.) AB határozat, see supra text accompanying note 56.

⁸⁵ It is questionable whether these sentences foresee or provide for anything in the legal sense, as their wording is deliberately obscure. Still, it is certainly not a coincidence that Article U is located in a clearly operative part of the FL, not in the National Avowal (the preamble).

⁸⁶

CDL-AD(2013)012
Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)



[t]he pensions or any other benefits provided by the State under legal regulations to leaders of the communist dictatorship specified in an Act may be reduced to the extent specified in an Act; the arising revenues shall be used to mitigate the injuries caused by the communist dictatorship and to keep alive the memory of victims as provided for by an Act.

This provision has not yet been litigated, but the scope of application of the law has been declared constitutional in decision 23/2013. (IX. 25.) AB határozat (discussed above under social security), concerning the pensions of members of the pre-1989 parliament.⁸⁷

2.3.4 Taxation and the Limitation of the competence of the Hungarian Constitutional Court

The FL has a separate chapter entitled “Public finances” (Arts. 36- 44 in the section on “The State”), with various provisions to secure transparency and responsible state budget management. As already mentioned, the bases of the taxation system, along with the pension system, are entrenched in cardinal acts,⁸⁸ with the consequence that no future simple majority can amend these laws affecting social and economic policy (e.g. to abolish the flat tax, and return to progressive taxation).

More directly relevant for all economic (in fact all fundamental) rights is Article 37(4) about the limitation of the competence of the Hungarian Constitutional Court (HCC) in reviewing tax and budget legislation, which significantly undermines the actual protection given to property and entrepreneurial activities:

Article 37 (4)

As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court’s power to review the conformity of acts *on the central budget and its implementation, central taxes, duties and contributions, customs duties and the central conditions for local taxes* with the Fundamental Law is limited to controlling the respect of a restricted set of fundamental rights, namely the *right to life and human dignity, the protection of personal data, freedom of thought, conscience and religion, or rights related to Hungarian citizenship*.⁸⁹

As a consequence, the Court can no longer invalidate such acts when they breach *other* constitutional provisions, such as the right to property, or legal certainty (these two provisions used to be the most frequent grounds on which the HCC invalidated such laws).⁹⁰

⁸⁷ 23/2013. (IX. 25.) AB határozat, see supra text accompanying note 56.

⁸⁸ Article 40.

⁸⁹ The paragraph continues by allowing the HCC to review such legislation for formal unconstitutionality: “The Constitutional Court shall have the unrestricted right to annul also Acts having the above subject matters, if the procedural requirements laid down in the Fundamental Law for the making and promulgation of those Acts have not been met.”

⁹⁰ Salát-Sonnevend, op. cit.



The Court nonetheless interpreted provisions curbing its competences in a narrow sense, and gave a broad interpretation of the exceptional grounds on which review is possible.⁹¹ For instance, it ruled that discrimination was a violation of human dignity, that way allowing for the review of fiscal laws which discriminated between natural persons.⁹² This however does not protect legal persons, as they do not have human dignity. This provision therefore allows the government to levy extra taxes on banks, or telecommunications and media businesses, or to nationalize of private pension funds, leading them close to economic collapse.

2.4 Main trends

As mentioned at the outset, recent and current trends of fundamental rights protection and constitutionalism in general are worrying in Hungary in many regards. Issues that came up in relation to economic rights offer indications as to the character and general direction of developments in this field.

Economic rights have never received strong constitutional protection in Hungary; yet, current legislative trends, targeted against the banking, telecommunications and media sectors, characterised by strong foreign presence, come into conflict with economic rights.

Still the European Commission withdrew infringement proceedings in relation to the telecom tax,⁹³ and did not bring action against the financial sector's special taxes; as for the HCC, it would not have jurisdiction to rule on such legislation because of its now limited competence on the matter.

This limitation of judicial checks creates serious gaps in the scope of protection afforded to economic rights. The government is putting together schemes which could further erode them. The program of reduction of utility costs has significant economic effects on the utilities sector, largely owned by foreign companies. It imposes a lowering of 10% of household electricity, gas, and other utility costs. There are plans to expand the scheme to industrial consumers as well, and to render all public utility services non-profit. So far, no legal action questioning its constitutionality has been reported. There are rumours in the media about an infringement procedure to be launched in Brussels. The government – which won again a constitution-amending majority in the April 2014 election⁹⁴ – is ready to amend the constitution in order to make sure the program is legal (“superconstitutionalization”).⁹⁵

⁹¹ 1/2011. (VI. 21.) számú Tü. állásfoglalás (as cited by Péter Tilk, “The Constitutional Court and the possibility of review of finance-related laws”, *Fundamentum*, 2014, forthcoming, manuscript on file with the author - OS.)

⁹² 1132/D/2007. AB határozat.

⁹³ http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/bycountry/index_en.htm#hungary Case No 2012/2103.

⁹⁴ For the problems related to the election, see the OSCE's Preliminary conclusions at <http://www.osce.org/odihr/elections/117205?download=true>

⁹⁵ <http://mno.hu/ahirtvhirei/hogyha-kell-alkotmanyos-vedelmet-kap-a-rezsicsokkent-es-1189458>



The FL appears to decrease both social protection and the protection given to property and business (in particular foreign businesses). The current policy framework seems to follow neither a social welfare state, nor a market economy, but rather a nationalist-protectionist law and order agenda.

3. INTERNATIONAL AND EUROPEAN SOURCES OF ECONOMIC RIGHTS

3.1. International instruments to which Hungary is a party

These are mainly the International Covenant on Economic and Social Rights (ICESR), and the European Social Charter.⁹⁶ Hungary has not signed the Optional Protocol to the ICESR.⁹⁷ Hungary is also party to all of the fundamental, and around one-third of the technical ILO conventions.⁹⁸

3.2 Incorporation

The FL contains the foundation for Hungary's participation in the international community in the following way.

Article Q

- (1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.
- (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.
- (3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.

Generally recognised rules of international law include customary law and general principles of law. The HCC interpreted the previous constitution's similar provision as having realized a "general transformation" of such rules, while for other sources, such as treaties, the constitution has foreseen a "special transformation" in law or ordinance. Under both the old and the new constitution, the HCC has a competence to rule – before and after incorporation – on the harmony of an international treaty with the constitution.⁹⁹

⁹⁶ 1999. évi C. törvény - az Európai Szociális Karta kihirdetéséről

⁹⁷ https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en

⁹⁸ http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102679

⁹⁹ Dec. 53/1993. (X. 13.) AB.



International human rights treaties are incorporated through a formal act of Parliament.¹⁰⁰ Before 1989, some treaties were incorporated not by Parliament, but by an organ called the Presidential Council of the People's Republic. The ICESR was promulgated in such a way.¹⁰¹ These so-called "ordinances having the force of law" remained in effect after the 1989 constitution came into force.

The government majority since 2010 has shown a certain disregard for international human rights standards and constitutionalism. The HCC has been hardly able to counter this phenomenon, since the parliamentary majority regularly rewrites the constitution to 'legalise' measures which the HCC has found unconstitutional. When asked to rule on the constitutionality of constitutional amendments, the HCC declined competence. However, it emphasized that limits stemming from the system of mutually intertwined fundamental rights, Hungary's international and European obligations as noted in Article E and Article Q, entitled the Court

to interpret and apply the FL as a coherent system and will consider and measure against one another, every provision of the Fundamental Law relevant to the decision of the given matter. The Court will also take into consideration the obligations Hungary has undertaken in its international treaties or those that follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them. These rules constitute a unified system of values which are not to be disregarded in the course of framing the Constitution or legislation or in the course of constitutional review.¹⁰²

However, if the Fourth Amendment did not disregard these values, then what else would? The HCC thus pronounced a standard and omitted to apply it to a case most clearly qualifying under that standard.¹⁰³

3.3. European Convention on Human Rights

The 1950 Convention and its protocols are ratified, i.e. promulgated in an act of Parliament,¹⁰⁴ except for Protocols 12, 15, and 16. Though the Convention – as ratified – is itself applicable law, what this means exactly is not clarified. The Supreme Court declared the Convention "to be applied, its provisions to be observed".¹⁰⁵

¹⁰⁰ Article 7. (3) of Law L/2005 on the procedure relating to international treaties.

¹⁰¹ 1976. évi 9. törvényerejű rendelet

¹⁰² 12/2013. (V. 24.) AB határozat. Summary available in English
<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

¹⁰³ Similarly, Attila Vincze, "Odahull az eszme és a valóság közé: az árnyék az szuverenitás-átruházás az alkotmánybíróság esetjogában", MTA Law Working Papers, 2014/23, http://jog.tk.mta.hu/uploads/files/mtalwp/2014_23_Vincze.pdf at 8.

¹⁰⁴

| | | | |
|-------|-----|-------|---------|
| 1993. | évi | XXXI. | törvény |
| 1998. | évi | XLII. | törvény |
| 2004. | évi | III. | törvény |

2005. évi CXXIV. törvény

¹⁰⁵ Judgment Pfv.V.20.485/2008/4. (15 May 2008) of the Supreme Court and the judgment Kfv.VI.37.232/2011/13. (6 February 2012) of the Curia as cited by Máté Mohácsi, "Enforceability of the European Convention on Human Rights by Ordinary Courts in Hungary" in 1 Hungarian Yearbook of International and European Law (2014), 433.



However, it is unclear whether it means direct applicability or simply that the Convention rights serve as “additional arguments in the interpretation of domestic law, through which the Convention takes effect.”¹⁰⁶ The Constitutional Court in one case declared it will follow ECHR case law even if it diverges from its own interpretation;¹⁰⁷ it however stated that international obligations which violate the Hungarian constitution may not be enforced apart from *ius cogens*.¹⁰⁸ One would therefore situate the Convention in the hierarchy of norms between the constitution and ordinary statutes (i.e. infraconstitutional, supranational status).¹⁰⁹ The HCC has, however, traditionally interpreted the constitution in conformity with the Convention and the case law of the European Court of Human Rights (ECtHR) as much as possible,¹¹⁰ even if it did not base its decision clearly or exclusively on ECtHR case law.¹¹¹ Ordinary courts should also follow, in principle, ECtHR rulings, but they were notorious for disregarding or ignoring European human rights law.¹¹² This may well have evolved in recent years,¹¹³ though no exact data and detailed analysis are available.

Until recently, courts were helpless in the face of a domestic law provision clearly conflicting with ECtHR interpretation,¹¹⁴ and in case of a direct clash, they “invariably applied Hungarian law”,¹¹⁵ as exposed by “red star controversy”.¹¹⁶ Though the courts needed to complement a criminal law provision with a specific animus, thereby narrowing its reach to conduct prohibited under ECtHR case law, such interpretation was perceived as being *contra legem*, and thus impermissible, by ordinary courts. The legal situation could only be modified by an annulment by the HCC of problematic domestic provisions and the adoption by the legislator of new ones.

The new Act on the Constitutional Court has somewhat improved this situation in that it now made possible for courts to suspend procedure and turn to the HCC in case a legislative provision conflicts with international law,¹¹⁷ and not just with constitutional provisions.

¹⁰⁶ See in more detail Mohácsi, *op.cit.*

¹⁰⁷ Dec. 61/2011. (VII. 13.) AB.

¹⁰⁸ Dec. 30/1998. (VI. 25.) AB.

¹⁰⁹ Dec. 161/2011. (XII. 20.) AB annulled statutory provisions for violation of the Convention.

¹¹⁰ Examples (to the contrary as well) are provided in English by Gábor Halmai, *Perspectives on Global Constitutionalism*, Eleven, 2014, 92-94.

¹¹¹ See, e.g., 75/2008. (V. 29.) AB, overruling previous jurisprudence after the decision of the ECtHR in *Bukta v. Hungary* appl. Nr. 25691/04, without relying solely on the ECtHR ruling, in fact treating the ruling as a new fact which mandates the admissibility of the request which otherwise were barred for reasons of *res iudicata*.

¹¹² See Balázs D. Tóth, Krisztián Enyedi, Gábor Halmai, Attila Németh, Eszter Polgári, Péter Sólyom, “Alkotmányos és nemzetközi emberi jogi követelmények a rendes bíróságok gyakorlatában” In: Zoltán Fleck ed., *Bíróságok mérlegben Vol. II.* (Pallas Kiadó, 2008) 75-184.

¹¹³ This is the impression e.g. of Mohácsi, *op.cit.* supra note 20.

¹¹⁴ The situation would be clear if judgments of the ECtHR, with regard Hungary, were to be published in the Official Journal. This is, however, only the case with regard to international judgments in inter-state procedures. See Pál Sonnevend, “Report on Hungary” in Martinico Giuseppe, Pollicino Oreste eds., *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Groningen; Amsterdam: Europa Law Publishing, 2010) 251-269, 253.

¹¹⁵ Gábor Halmai, *Perspectives on Global Constitutionalism*, Eleven, 2014, 92.

¹¹⁶ See *Vajnai v. Hungary* and *Fratanoló v. Hungary*.

¹¹⁷ Article 32, Law on the Constitutional Court, also Article 155/B. of the Law III/1952. about the Code of Civil Procedure.



3.4 Effect of international instruments for the protection of economic rights

The ICESR is not directly applicable law,¹¹⁸ and many of its provisions do not have an equivalent in the FL either. However, and in contrast to the previous constitution's wording (though in accordance with the previous jurisprudence), where it does provide for social and economic rights, the FL applies the weak language of the ICESR (the state aspires, strives, etc.), rather than guaranteeing a formal claim right.

4. THE EU CHARTER OF FUNDAMENTAL RIGHTS (CFA)

The FL contains in Article E the foundation for Hungary's participation in the European Union:

Article E

(1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.

(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.

(3) The law of the European Union may, within the framework set out in Paragraph (2), lay down generally binding rules of conduct.

(4) For the authorisation to recognise the binding force of an international treaty referred to in Paragraph (2), the votes of two-thirds of the Members of the National Assembly shall be required.

The Charter was ratified and promulgated in the law ratifying the Lisbon Treaty.¹¹⁹ According to a search in an up-to-date legal database (CompLex legal database published by Wolter Kluwers), the Charter is referred to in

¹¹⁸ This was one of the criticisms of the Committee on Economic and Social Rights, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLES 16 AND 17 OF THE COVENANT HUNGARY, Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/HUN/CO/3, 16 January 2008.

¹¹⁹ 2007. évi CLXVIII. Törvény az Európai Unióról szóló szerződés és az Európai Közösséget létrehozó szerződés módosításáról szóló lisszaboni szerződés kihirdetéséről



the five following normative acts: the act ratifying the Lisbon Treaty, the act ratifying Ireland's opt-out from the Charter,¹²⁰ the act ratifying a convention between Bulgaria, Croatia, Hungary, and Austria on road safety,¹²¹ and two government ordinances on the National Education Plan.¹²²

General principles of Community law, Union law, or European law are not referred to in any normative acts according to the same database.

The ombudsman (previously, the ombudsmen) has traditionally been actively referring to international and European instruments of rights protection, including the Charter, in every case and report possible.¹²³

Courts generally disregarded European human rights case law,¹²⁴ but this could have changed over the last few years, although evidence is missing. The search engine of Hungarian courts displays between 17 and 19 decisions (depending on search terms) from 2009 till 2013 referring to the Charter of Fundamental Rights.¹²⁵

To our knowledge, the relationship between the EU Charter and the ECHR has not been addressed by domestic acts or judgments.

5 : JURISDICTIONAL ISSUES

5.1 Personal

Under the FL, fundamental rights are granted to everyone, without condition of citizenship or other status. Article I (4) adds that “[f]undamental rights and obligations which by their nature apply not only to man shall be guaranteed also for legal entities established by an Act,”¹²⁶ thus affording legal persons corresponding

¹²⁰

2013. évi CVI. Törvény az ír népnek a Lisszaboni Szerződéssel kapcsolatos aggályairól szóló jegyzőkönyv kihirdetéséről

¹²¹ Act CLXX/2012 on Agreement between the Republic of Bulgaria, the Republic of Croatia, Hungary and the Republic of Austria on Facilitating Cross-border Enforcement of Road Safety Related Traffic Offences The Republic of Bulgaria, the Republic of Croatia, Hungary and the Republic of Austria

¹²² Government ordinance Nr. 110/2012. (VI. 4.) Korm. Rendelet a Nemzeti alaptanterv kiadásáról, bevezetéséről és alkalmazásáról, and Government ordinance Nr. 243/2003. (XII. 17.) Korm. Rendelet a Nemzeti alaptanterv kiadásáról, bevezetéséről és alkalmazásáról.

¹²³ See, e.g. the results of a search for “charter of fundamental rights of the Union” on the website of the Ombudsman’s office

at http://www.ajbh.hu/kezdolap?p_p_id=3&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_3_struts_action=%2Fsearch%2Fsearch&_3_redirect=%2F&_3_keywords=uni%C3%B3+alapjogi+chart%C3%A1ja&_3_groupId=0&x=0&y=0

¹²⁴ See Balázs D. Tóth, Krisztián Enyedi, Gábor Halmay, Attila Németh, Eszter Polgári, Péter Sólyom, “Alkotmányos és nemzetközi emberi jogi követelmények a rendes bíróságok gyakorlatában” In: Zoltán Fleck ed., *Bíróságok mérlegen* Vol. II. (Pallas Kiadó, 2008) 75-184.

¹²⁵ <http://www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>

¹²⁶ FL Article I (4) <http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>



rights to the extent possible. However, the HCC considered that legal persons do not have a right to human dignity, with the result that they cannot challenge fiscal legislation which violates their right to property in a discriminatory manner (see above).¹²⁷

Furthermore, a provision authorizes limits and conditions based on nationality for the acquisition of ownership and for the use of arable land and forests.¹²⁸ This provision forms the constitutional basis for the new land law which is currently under consideration by the European Commission, in that it may constitute an unjustified restriction to the free movement of capital.¹²⁹

For foreigners, the right to choose an occupation is traditionally dependent on a work permit. However, EEA-citizens, refugees and other protected persons do not need a work permit, and asylum seekers have a right to work if their case is pending for more than a year.

Assistance in case of maternity, illness, disability, handicap, widowhood, orphanage and unemployment for reasons outside of his or her control, are provided only to Hungarian citizens according to Article XIX of the FL. This constitutional restriction on benefits to citizens does not mean that the legislator cannot introduce such assistance to non-citizens (e.g. EU citizens), but it is *constitutionally* not required to.

5.2 Territorial

There are no explicit territorial limitations, i.e. the territorial scope of economic rights equals the jurisdiction of the Hungarian state.

5.3 Material

5.3.1 Emergency powers

Emergency powers are regulated in the last part of the new constitution dealing with special legal orders. “Special legal orders” is a comprehensive term including: (i) a national crisis, meaning war or danger of war; (ii) a state of emergency (internal armed conflict), (iii) a state of preventive defence; (iv) an unexpected attack; (v) a state of danger.

¹²⁷ 807/B/2007. AB határozat; 361/B/2008. AB végzés; 821/B/2009. AB határozat; 3/B/2008. AB végzés, see also Tilk, op.cit..

¹²⁸ Article P

(1) Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations.

(2) The limits and conditions for acquisition of ownership and for use of arable land and forests necessary for achieving the objectives referred to in Paragraph (1), as well as the rules concerning the organisation of integrated agricultural production and concerning family farms and other agricultural holdings shall be laid down in a cardinal Act.

¹²⁹ http://www.bbj.hu/politics/ec-officially-announces-assessment-of-hungarian-land-law_76040



According to Article 54, under a special legal order, the exercise of fundamental rights may be suspended or may be restricted beyond the extent specified in Article I(3), the provision requiring that the restriction are necessary and proportionate to the aim pursued. However, this suspensory effect is limited. The following rights cannot be suspended even under special legal orders: human dignity and the right to life; the prohibition against torture, of inhuman or degrading treatment or punishment, of servitude, of human trafficking, of experimentation on humans without their consent, of eugenics, and of human cloning; and fair trial rights including the right to a fair trial, presumption of innocence, right to defence, nullum cimen, nulla poena sine lege, ne bis in idem (but not the right to a remedy).¹³⁰ The application of the Fundamental Law cannot be suspended, nor can the operation of the Constitutional Court be restricted under special order.

This provision is problematic in that it allows for limitation beyond what is strictly necessary. This possibility of limiting rights beyond the measure foreseen in Article I (3) collides with Article 15 ECHR.¹³¹

5.3.2 Limited HCC competence in the field of tax and budget legislation

Perhaps the most obvious element of the FL which goes blatantly counter to standards of constitutionalism and violates economic rights is the limited competence of the HCC to review tax and budget legislation. Though Article XIII guarantees the right to property in terms acceptable in a constitutional state, Article 37 (4) deprives the HCC from reviewing a wide spectrum of legislation potentially violating the right to property (see above).

5.3.3. Balancing of economic rights with “other social rights”, a general outlook

The previous constitution - which entailed a reference to the transition to social market economy in the preamble, and market economy in the operative part - was explicitly interpreted to be neutral in terms of economic policy, the references to market economy barring full nationalization and other extreme measures.¹³²

Generally, the HCC applied a market-centred approach, in that it interpreted social rights provisions as only state aims. However, the broadening of the scope of property protection, and the constitutional protection conferred to acquired rights and legitimate expectations, suggested that the HCC carved out certain areas of social security, and basically reinstalled them as quasi-rights (see above under property). This, however, has not directly affected economic rights, as these entitlements are welfare entitlements vis-à-vis the state.

¹³⁰ These cover the rights provided for in Article II and III, and Article XXVIII(2) to (6).

¹³¹ Jeremy McBride, “Trees in the Wood” in Gábor Attila Tóth ed., *Constitution for a Disunited Nation* (CEU Press, Budapest, 2012), 367.

¹³² 33/1993. (V. 28.) AB határozat.



As to the balancing of economic rights with “other social rights”, the situation became clarified at the level of the text with the entering into force of the FL. The FL does not contain social rights, only state aims. This could be read as Hungary’s endorsement of a strong market economy, to the detriment of social concerns; yet, the general context for business is affected by the lack of legal security and the weakening of the institutional protection of economic rights.

5.4 Temporal

There are no formal restriction in terms of temporal scope, except for the transition between the old and new constitution, already exposed.

6. ACTORS

Statutory provisions provide a framework for civil society and all affected actors to participate in the elaborations of legal rules. Its application is, however, problematic. Participation in law-making activities is regulated by the law “on social participation in the preparation of legal rules”.¹³³ This makes forms of social consultation mandatory in the case of acts (statutes adopted by parliament), and cabinet and ministerial ordinances. Consultation is either done with designated “strategic partners” or with expert body or persons affected by the planned legislation or ordinance. In case of mandatory consultation, the plan of ordinance or the bill is to be displayed on the website of the ministry, and anyone (with name) can send in his or her or their organization’s view on the plan. The deadline during which the plan is open for such consultation is not set in the law, however. Sometimes the deadline is on the same day as the day of publication of the bill on the website, or only a few days later (e.g. a 45-page bill amending the law on misdemeanours - administrative offenses - was open for 3 days for consultation, the 95-page bill on the prosecution for 1 day).¹³⁴

Even where the government explicitly invites some organizations for a consultative meeting, sometimes too little time is left for them to form an opinion. In other cases, the ministry does not take the legislative duty to consult seriously.¹³⁵ And sometimes, such as with the media laws, the obligation to consult (Article 8 of the

¹³³ 2010. évi CXXXI. törvény a jogszabályok előkészítésében való társadalmi részvételről

¹³⁴ <http://helsinkifigyelo.hvg.hu/2013/04/09/torvenygyari-capriccio-1-ora-hatasvizsgalatra-72-egyezettetre/>

¹³⁵ An infamous incident came during the preparation of the act on land acquisition, when the ministry called a consultative meeting for a Monday in an email sent out on Friday at 5 pm. When representatives of agrarian organizations appeared, it turned out the bill was changed in the meantime, but the official present did not have authorization to disclose the new plans to the participants. Then a new meeting was called for Friday 9 a.m. (consider that this is the “ministry for rural development” which puts the burden on farmers and others to get to Budapest by 9 a.m in the morning.) This meeting was



law) was simply ignored: the media laws were not open to “general consultation”, their bills were not displayed on the governmental website to invite comments from the general public.¹³⁶

Some legislative acts and ordinances are taken out of the scope of the law. These include payment obligations (e.g. taxes), state subsidies, the state budget and its implementation, subsidies from EU and international funds, the promulgation of international treaties, the establishment of new organizations or institutions (Article 5 (3)). Though civil society suggested only exempting state subsidies under a certain amount (HUF 50 million), it was not taken into account in the final law.¹³⁷

The regulatory conceptions and the general legislative plan of the government can, but do not have to be opened for general consultation, despite the fact that this was requested by civil society organizations before the law on participation was adopted.¹³⁸

Similarly problematic might be that consultation *cannot be held* if the consultation “endangered particularly important interests of national defense, national security, financial, foreign affairs, or protection of nature, environment or national heritage of Hungary” (Article 5 (4)). Consultation *does not have to be held* if the *urgent adoption* of the law or ordinance furthers a significant public interest. (Article 5 (5)).

Furthermore, the law on participation is completely circumvented by a technique recently regularly applied, that a bill is not introduced by the government, but in the form of a private member’s bill. This is how the previous constitution was amended in 2010 and 2011 seven times out of nine, and the FL was also amended this way since it came into force, for example in relation to the media laws. Many laws, including the nationalization of private pension funds, or the amendments on the right to strike were initiated by private members, and thus without consultation.

Instead, the government resorts to so-called “national consultations”, whereby short questionnaires – with often populist, misleading or irrelevant questions - are sent out to citizens.¹³⁹ The (now abolished) ombudsman for data protection had found the way the consultation handled sensitive data (political opinion) unconstitutional.¹⁴⁰ However, his legal successor, the head of the newly formed freedom of information authority, stopped court proceedings which would have finally settled the dispute in this regard,¹⁴¹ amended and partly vacated the decision of the ombudsman.¹⁴²

again held without the minister having sent a person authorized to negotiate.

http://lmv.hu/foldtv_VM_civil_egyeztetes_botrany

¹³⁶ http://tasz.hu/files/tasz/imce/tasz_mediav_modositas_allaspont110228.pdf

¹³⁷ http://www.niok.hu/allasmutat.html?all_azon=18

¹³⁸ http://www.niok.hu/allasmutat.html?all_azon=18

¹³⁹ To get a glimpse of the nature of the questions, see the translated consultation questions on the new constitution here: <http://hungarianspectrum.wordpress.com/2011/03/02/national-consultation-questions-on-the-constitution/>.

¹⁴⁰ http://abi.atlatszo.hu/index.php?menu=aktualis/allasfoglalasok/2011&dok=ABI-1642-9_2011_H

¹⁴¹ <http://www.naih.hu/files/Tajekoztato-a-szocialis-konzultacioval-kapcsolatos-jogvitarol.pdf>

¹⁴² <http://www.naih.hu/files/A-szocialis-konzultacio-adatkezelesevel-kapcsolatos-adatvedelmi-biztosi-hatarozatot-modosito-hatosagi-hatarozat.pdf>



The new constitution itself was adopted without any participation of relevant civil society actors, nor affirmed by referendum. In parliament even, it was only debated for nine calendar days.¹⁴³ The Venice Commission also criticized the opaque, non-inclusive and rushed process of adoption of the Fundamental Law in two opinions.¹⁴⁴

7. CONFLICTS BETWEEN RIGHTS

7.1 Conflicts in general

Rights are stipulated in the constitution, and the constitution is clearly at the top of the hierarchy of norms. Conflicts arising out of different sources are thus likely. As for conflicts between rights originating in the Constitution itself, Hungarian law, in line with the continental legal tradition, considers that rights can be limited by other rights, and relies on the idea of institutional protection or objective dimension of a right. Such conflicts are to be settled ultimately by the interpretation of the Constitutional Court, by way of balancing and proportionality analysis.

7.2 Mechanisms

Under the FL, the HCC has a new competence. Under the new (i.e. “real”) constitutional complaint mechanism, it can review and annul ordinary court decisions. Earlier, it could annul the underlying legal norm for non-conformity with the constitution. However, it could only act against the unconstitutional interpretation of a constitution-conform legal norm, if the interpretation was so settled – generally petrified in practice - that it could be considered “living law” [see analogous doctrine of “diritto vivente”]. Thus, no constitutional remedy was open for cases when ordinary courts gave a legal norm an unconstitutional interpretation, unless the norm itself was unconstitutional. Under the FL, complaint is now possible against an alleged unconstitutional interpretation or application of a law (which is in itself not unconstitutional). Such a complaint may be raised by a private person party to a legal proceeding. The interpretation of the admissibility criteria in this new competence are however widely criticized for being narrow, thus not providing a suitable remedy for fundamental rights violations.

¹⁴³ For more details, see, Opinion on the Fundamental Law of Hungary, Amicus Brief to the Venice Commission, eds. Andrew Arató, Gábor Halmi, János Kis, available <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbXhjbWlidXNlcmllZmh1bmdhcnl8Z3g6NjVjYzBmNjg3NzRmOThhMA>.

¹⁴⁴ See OPINION ON THREE LEGAL QUESTIONS ARISING IN THE PROCESS OF DRAFTING THE NEW CONSTITUTION OF HUNGARY Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), CDL-AD(2011)001, [14]-[19] and OPINION ON THE NEW CONSTITUTION OF HUNGARY Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), CDL-AD(2011)016 at [11]-[12].



Furthermore, ordinary courts are obliged to suspend proceedings and refer matters to the HCC if they perceive that applicable laws are unconstitutional. In addition, the Government, a quarter of MPs and the ombudsman can request abstract a posteriori constitutional control if they perceive any unconstitutionality.

Hungarian law traditionally grants a conflict-solving function to the Supreme Court (renamed Curia in the FL), in the so-called ‘decision on the unity of law’ (‘jogegységi határozat’) in which the highest ordinary court (earlier Supreme Court, now Curia) declares which of the competing interpretations of a given legal rule is to be adopted. Theoretically, such a mechanism could help resolve conflict between rights incidentally; however, it is meant to resolve issues of private, criminal or administrative law and not fundamental rights. If the resolution by the Curia does not conform to the interpretation of the Constitutional Court, the latter has the final say, under both the old and new constitution.

7.3 Examples of conflict with regard to specific economic rights

7.3.1. Right to property, freedom of contract vs. public interests, freedom of information

As already noted, the right to property can be limited in order to pursue a simple public interest, that is without having to prove the existence of a constitutionally protected competing or conflicting right.

In Hungary, contracts with the state qualify as data of public interest (“közérdekű adat”) and data public on grounds of public interest (“közérdekből nyilvános adat”).¹⁴⁵ The main difference between the two kinds of data is that the data of public interest is always connected to a governmental or other state actor, authority, while data public on grounds of public interest are data of private persons (natural or legal), which need to be published in the public interest (such as the data of contractors with the state).

Concerning the tobacco retail affair, the court established that the concessions were considered data public on grounds of public interest in May 2014.¹⁴⁶ However, a year earlier (when it factually mattered most), the government had disregarded the opinion of the Freedom of Information Authority to release such

¹⁴⁵ Data of public interest’, according to the law, shall mean information or data other than personal data, registered in any mode or form, controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation, concerning their activities or generated in the course of performing their public tasks, irrespective of the method or format in which it is recorded, its single or collective nature; in particular data concerning the scope of authority, competence, organisational structure, professional activities and the evaluation of such activities covering various aspects thereof, the type of data held and the regulations governing operations, as well as data concerning financial management and concluded contracts. Article 3, point 5 of Act Nr. CXII of 2011. On the other hand, ‘data public on grounds of public interest’ shall mean any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public, English translation (of not the most up-to-date text with regard to other provisions) Article 3, point 6 of Act Nr. CXII of 2011. Act available on the website of the Freedom of Information Authority http://www.naih.hu/files/Privacy_Act-CXII-of-2011_EN_201310.pdf

¹⁴⁶ See <http://propeller.hu/itthon/2921879-nyilvanossagra-kell-hozni-trafikpalyazatokat> Text of the judgment not yet available.



information.¹⁴⁷ Similarly, data related to the decision on the nationalization of the E.On gas storage facilities were recently ruled public data.¹⁴⁸

According to the law on freedom of information (Article 27 (1) h), intellectual property rights can limit freedom of information if provided for by law. However, such limitation cannot be disproportionate (Article 27 (3)-(3a)). No constitutional ruling is available yet on this issue.

Property rights can also come into conflict with each other due to the extended notion of constitutional property protection. As the HCC noted, tenant protection might limit the property rights of real estate owners, though it did not explicitly conceptualize the tenant's right as a constitutional property right.¹⁴⁹

In sum, though conflicts arise, they are conceptualized largely not as conflicts between rights, but rights on the one hand, and public interests (constitutional values, except for property) on the other. Perhaps the most problematic recent decision in this regard has been the termination of permits to operate gambling machines outside casinos, which was held to be constitutional for reasons of national security, which were, however, undisclosed, even to the HCC.¹⁵⁰

7.3.2. Right to freely choose work, occupation, engage in enterprise: complex limits

The right to choose work is special in that – along the lines of German doctrine (Pharmacy case),¹⁵¹ and according to the doctrine of the HCC enounced under the previous constitution – constitutional standards depend on whether the restriction establishes an objective or a subjective limit on the choice, or regulates the practice.

As to regulation on the practice, the constitution allows basically all reasonable limitations. In this regard, the HCC ruled that taxi owners can be required to give a deposit to serve as a guarantee for possible damages caused, to make sure the cab adheres to certain technical and safety standards, to protect the interests of consumers (although these are not formulated as subjective rights).¹⁵²

However, restrictions which affect or limit objective access to an occupation are judged by the strictest standard: such measures are only constitutional if they are strictly necessary to some overarching constitutional value which could not be achieved by a less intrusive means. In this way, the limitation of the number of taxi permits for a given area has been declared unconstitutional.¹⁵³

¹⁴⁷ Case NAIH-1169-2/2013/V. <http://naih.hu/files/Infoszab-NAIH-1169-2-2013-V-trafik.pdf>

¹⁴⁸ <http://blog.atlatszo.hu/2014/05/14/e-on-allamositas-ujabb-pert-nyert-az-atlatszo-hu/>

¹⁴⁹ 64/1993. ((XII. 22.) AB határozat.

¹⁵⁰ See above gambling machines decision, 26/2013. (X. 3.) AB határozat.

¹⁵¹ BVerfGE 7, 377 (1958).

¹⁵² 21/1994. (IV. 16.) AB határozat.

¹⁵³ Id.



The subjective conditions to enter into a profession (occupation, work, enterprise) are in principle open to everyone. The legislator thus has leeway in regulation. For instance, taxi operators can be required to undergo medical fitness and driving exams, etc.¹⁵⁴

7.3.3 Freedom of enterprise vs. rights of employees (right to strike, personality right, data protection)

The freedom of enterprise might come into conflict with the rights of the employees. A few particular employee rights are discussed next in this regard.

7.3.3.1. Data protection, personality rights of the employee

The new Labour Code bill was criticized for allowing the employer to control the private data of employees;¹⁵⁵ the bill was consequently modified. In its current version, the Code only allows the employer to control the employee's conduct with regard to labour relations, and respecting human dignity. It explicitly excludes control over the employee's private life.¹⁵⁶ It also regulates the manner in which the personality right of the employee might be limited by the employer. It allows such limits only for reasons directly relevant for the function of the labour relationship, to the extent absolutely necessary and proportionate to the aim pursued, and if the employee is previously informed and consents to it in writing.¹⁵⁷

In relation to the personality rights of employees, the HCC recently struck down the Labour Code's rule which only granted protection against dismissal during pregnancy if the woman had declared the pregnancy to the employer before dismissal. The HCC annulled this provision for violation of the right to private and family life.¹⁵⁸

7.3.3.2. Right to strike

"Strike is a temporary work stoppage of a group of workers aiming at the advancement of their own (or other group of workers') economic and social interests."¹⁵⁹ The strike is accordingly a right afforded to workers (and not only to trade unions).

¹⁵⁴ 21/1994. (IV. 16.) AB határozat.

¹⁵⁵ http://tasz.hu/files/tasz/imce/2010/munka_torvenykony_tasz_0.pdf

¹⁵⁶ Article 10 of Act I/2012.

¹⁵⁷ Article 9 of Act I/2012.

¹⁵⁸ Case nr. II/3716/2012, decision not yet numbered, decision of the HCC of 27 May 2014. <http://mkab.hu/download.php?h=842>

¹⁵⁹ Id. at 1.



The right to strike, by definition, comes into collision with the freedom of enterprise. The balance struck by Hungarian law between these two rights has evolved in favour of the employer in the new strike regulation.¹⁶⁰ Unlike in Germany, where a strike is prohibited from causing “disproportionate” damage to the employer,¹⁶¹ Hungarian law does not require proportionality in strike regulation, but it can be derived from provisions requiring good faith in exercising the right, and forbidding the abuse of the right.¹⁶²

The previously ambiguous wording in Article XVII FL was modified;¹⁶³ consequently, lock-out is not protected under Hungarian law. The Supreme Court affirmed the possibility of the employer to order non-striking workers to work overtime in order to reduce the damages caused by the strike.¹⁶⁴

Political strikes are not allowed. The possibility of strike breaking was not included in the amended act, though suggested by employers’ organizations.¹⁶⁵

A strike is forbidden in certain sectors (e.g. National Defense, Judiciary, etc.). Essential services are required to be maintained in essential sectors, such as public transport and public utility providers. What qualifies as essential is largely left to the labour courts to decide in the industrial conflicts brought before them. Courts, however, may lack expertise and evidence and call for further relevant data.¹⁶⁶

¹⁶⁰ In more detail see Kajtár-Kun, supra note 61.

¹⁶¹ Edit Kajtár, Hungarian Strike Law In The Light Of International And European Regulations, Doctoral Thesis, PTE Állam- és Jogtudományi Karának Doktori Iskolája, Pécs 2011, 173.

¹⁶² Article 1 (3) of the Act VII/1989 on the Strike.

¹⁶³ This being among the very few modifications introduced by the Fourth Amendment which brought improvements to the text.

¹⁶⁴ BH 2002.160. as cited by Kajtár-Kun, supra note 61 at 5.

¹⁶⁵ Edit Kajtár, Hungarian Strike Law In The Light Of International And European Regulations, Doctoral Thesis, PTE Állam- és Jogtudományi Karának Doktori Iskolája, Pécs 2011, 183.

¹⁶⁶ Kajtár-Kun, supra note 61 at 8.



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OMBUDSMAN



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CATEGORIZATION OF ECONOMIC RIGHTS: ITALY

Elena Ioriatti, Paolo Guarda, Flavio Guella¹

QUESTION 1: IDENTIFICATION OF ECONOMIC RIGHTS

Question 1: Identification of economic rights

✓ Which rights are considered in your country as economic rights?

The identification of legal provisions that in the Italian legal system are connected to the notion of economic rights moves from the Constitution.

“Economic rights” are indeed identified by the scholars as referred to all of the constitutional provisions relating to the economic phenomenon, stated in Title III (economic relations) of the first part of the Constitution (“Rights and duties of citizens”).

Therefore, in Italy “economic rights” is a notion of positive law and not merely a scholarly or case-law definition.

However, not only the legislator, but scholars and case law too, have elaborated this concept in greater detail: in this regard, the boundaries of the constitutional provisions relevant in the economic sphere have been clarified. Particularly, it has been established which provisions of Title III could be considered as strictly economic and which ones are differently characterized by a prevailing protection of social rights. The definitions elaborated by scholars and case law thus lead to the identification of a so called “economic Constitution” (*Costituzione economica*), which defines the economic rights beyond the provisions of Title III: first of all, the catalogue of economic rights is enlarged beyond the original intent of the draft of Title III because of the influence of European law and of national statutes; on the other hand, the notion of economic rights does not coincide with the list of rights of the entire Title III (original intent), as the labour provisions mainly refer to the only sphere of social rights.

Therefore, the notion of economic law falls within the provisions mainly relating to property and economic initiative (articles 41 et seq.). The content of these provisions are properly linked to the “factors of production” (*fattori di produzione*), namely capital – more than labour – and its exploitation by organized activities (in the first place, but not exclusively, entrepreneurial). On the contrary, the provisions relating to employment (articles 35-40) are of a prevalently social nature: the fact that the Constitution qualifies the Italian system as a “Republic founded on work” (article 1) and the fact that other provisions ensure that the work is a social right (article 4), change the economic nature of this second factor of production - employment - in the Italian legal

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system. As a consequence, statute law and case law that consider labour as a factor of production, alongside capital, have been regarded as qualitatively different (i.e. socially relevant) from legislation and judicial decisions referring to other economic rights, properly understood.

Economic rights relating to economic initiative and to ownership enjoy a special status: they are - as well as constitutional law – explicitly limited by a balance with social rights. This nature is rather alien to the structure of the labour provisions, whose content is clearly and mostly socially relevant (and are structurally directed to restrict economic rights).

While falling under Title III of Part I, therefore, articles 35-38 (“guarantees work”), article 39 (“freedom of association in trade unions”) and article 40 (“on the right to strike”) are only partially qualified as economic rights, and they are mainly characterized as social rights.

Differently, economic rights are certainly those resulting from article 41, according to which private economic initiative is free, although it cannot be held contrary to the common good or in a manner that could damage safety, liberty or human dignity (the law determines appropriate planning and controls to guarantee such protection, so that the public and private economic activity may be directed and coordinated towards social ends).

Moreover, ownership (art. 42) is strictly speaking an economic right in the Italian perspective. According to art. 42, ownership is qualified as public or private: consequently, economic goods could belong to the State, to entities or individuals. Private property is recognized and guaranteed by the law, which prescribes the conditions for the acquisition, enjoyment and limitations in order to ensure its social function and make it accessible to everyone. In addition, private property may, in the cases provided for by law (and with a previous payment of compensation), be expropriated for reasons of general interest. Finally, only legislation enacted by Parliament can lay down the rules and limits of legitimate and testamentary rights and the rule of inheritance.

Other provisions of the Italian Constitution outline the framework for completing those two main dimensions of economic rights (i.e. rights relating to a prevalent economic dimension, not characterized by the simultaneous presence of profiles of social protection).

Article 43 of the Constitution deals with public monopolies. According to this provision “for the purposes of general utility the law may reserve or transfer in the public sphere (that’s to say: to the State, to public bodies, community workers or users) specific enterprises or categories of enterprises, which are related to essential public services or sources of energy or monopolistic situations, and which have the nature of primary interest; this can be done only by means of expropriation and compensation”.

Article 44 of the Constitution deals specifically with land ownership. It is expected that in order to achieve the rational exploitation of land and equitable social relationships, the law should impose obligations and constraints on private ownership of land, set limits to its extension by region and agricultural zone, encourage and impose land reclamation and the transformation of the bigger estates and the reorganization of



production units; the Constitution therefore favours small and medium-sized holdings, and the law makes provisions in favor of disadvantaged areas (mountainous in particular), persecuting indirect social effects with a differentiated extension of economic rights.

Other provisions, however, are characterized by explicit social intents. In particular, article 45, which devotes particular attention to cooperation and crafts; article 46 concerning the participation of workers in business decisions. Finally, article 47 provides the promotion and protection of small monetary savings and credit.

What is clear from the abovementioned provisions, is that the Italian category of economic rights is located on the border with the issues of protection of social dimensions. Economic and social rights are physiologically connected. What scholars and case law have correctly operated, by identifying economic rights, is the separation between the relevant rights (articles 41 and 42) which are not prevalently socially oriented (but rather are physiologically limited by this end) and the other more socially relevant situations (labour, health, civil freedoms, etc.).

Starting from the ownership rights and from the private economic initiative, then, other derived disciplines have also been developed (through statutes and judicial interpretations too). Therefore, the legal basis of the economic relations is the Constitution, but the extension of these concepts should be further clarified in the light of the operative application of articles 41 and 42; those two provisions have originated a detailed corpus of rights which was not originally and directly specified in the Constitution.

In particular, three specific areas are outlined in art. 41 and 42 of the constitution:

A) Rules on professional qualifications. Economic freedom is confused on the one hand with the protection of work activities and, on the other hand, with the protection of clients and of a fair competition system.

B) Rules on consumers rights. In this regard, ownership and the economic initiative must respect the dignity and the interests of the consumers, as a general category of vulnerable subjects, when involved in a contract with a professional counterpart).

C) Rules on intellectual property. Here the economic approach of an “owner paradigm” comes into conflict with other interests, as well as with cultural and social dimensions (e.g. article 9 of the Constitution).

✓ Specify whether the notion “economic right” is consolidated in your country and the sources of the categorisation (legal rules, case law, definition provided by legal scholars, praxis) and whether there are disagreements/developments in the notion of economic right and their core elements.

As noted above, the first source of identification and classification of the Italian economic rights is in the Constitution; nevertheless this category is shaped by further elements.



It is important to emphasize that in Italy the Civil Code was enacted in 1942, six years before the Constitution (1948). Therefore, the precise content of articles 41 and 42 of the Constitution has to be read in connection with the previous approach of the Civil code to the issue: since the Code was the main source of the already existing legal order, the code provisions, as well as their interpretation by scholars and judiciary, were the framework on which the Constitution was built.

On the other hand, articles 41 and 42 of the Constitution, although indirectly deriving from the Civil Code, have been subsequently developed by legislation and case-law.

In this regard, administrative practice plays an important role too.

Hereinafter, a brief overview of the Constitution (1948), the Civil Code (1942), statutes, case law and administrative practice will be offered.

As already noted, the 1942 Civil Code provided on ownership, freedom of contract and freedom of enterprise. That was the basis on which the Constitution started to operate. More specifically, the Constitution operates by selecting the profiles that are so important as to require a strong safeguard (as core values). These profiles – instead – even if traditionally introduced in the civil code have to be relativized by the new constitutional approach, for social reasons (thus limiting the civil code economic rights, considered as a projection of nineteenth-century bourgeois freedoms).

Therefore the Constitution has made more complex the system of property rights, as initially outlined by the Civil Code (articles 832 et seq.).

Since the enactment of the 1865 (first) Italian Civil Code, ownership – and particularly private property - has played a central role in the Italian legal system. This character has been maintained in the 1942 (second) Civil Code, in which private property is still qualified as an inviolable and fundamental right. However, the Constituent Assembly has introduced in the text of the new Constitution the principle of “economic and social function of property”; the consequence of this decision - of Catholic inspiration - was to consider private property as an expression of a “right of the human person”, but to assign to this right a key role in the social system too, as well as in that of protection of collective aspirations.

Therefore, the Italian constitutional provision blends three objectives: the acknowledgment of a constitutional nature of the right of property; the connection of a constitutionally protected property rights to work and to save money; the development of a model of ownership alternative to that provided by the civil code, aimed at creating a social economic management of public and private resources.

However, this model integrates the concept of “ownership” of the civil code, but it does not replace it. Nowadays, Italian economic law relating to the protection of proprietary situations (and then to the “capital” production factors) enjoys a plural status in the Italian legal system: there are many types of properties, and proprietary rights consist of a plurality of legal faculties and limits.



In this context, a huge number of different law sources coexist next to the Constitution and the Civil Code, like statutes and regulations, both of state and regional origin, as well as administrative practices. The latter plays an important role in the management of capital and economic initiative, e.g. by the Government general functions and the local authorities' role in planning land ownership, or by the new role for independent administrative authorities in the regulation of the economic phenomenon (CONSOB, the Bank of Italy and the ECB today, antitrust authorities, etc.).

The need, perceived in the Constituent Assembly, to regulate ownership in relation to specific objectives of economic and social nature has –therefore – been well implemented in a rich and complex regulatory activity.

In Italy the constitutional protection of ownership provided in article 41 et seq., as implemented by special legislation, is posed as a prerequisite for an economic order that accepts a social market economy. The content of the legislation can be understood only in this perspective: as a concrete declination of the conflict between constitutional values; legislative and administrative authorities (local or independent) monitor and plan the necessary limitations to economic rights, to achieve such a balance.

The normative production of the legislation relating to property (and thus to the “capital” economic factor) is thus very complex (See for further details section 1 of the 2 questionnaire).

As far as the freedom of economic initiative is concerned, it is important to note that the constitutional basis of article 41 recognizes it as a liberty ‘autonomous’ from the right of ownership.

The legal bases of article 41 are founded in classical liberal thought, and this article has precedents in the idea of freedom of contract of the Civil Code (article 1321 et seq.) and inside the concept of freedom of enterprise (article 2082 et seq.).

The *Statuto Albertino* (1848) which can be qualified as the first Italian constitutional text recognizing and protecting “all properties” (within the limits of respect for the public interest legally established; article 29). Thus, together with the “classic” civil liberties (individual freedom, freedom of residence, freedom of the press), property was at the centre of protection too. Moreover, on the basis of art. 29, the famous scholar Santi Romano developed one more “liberty”: the “freedom of activity”, a concept which was later expressly recognized by positive law at the beginning of 1900 in the *Carta del Lavoro* (Labour Charter), drawn up in order to develop Fascist corporatism (21 April 1927).

The text of article 41 is the final result of a strong debate among the drafters of the Italian 1942 Constitution, who had two different visions of the economic activity: some of them supported the philosophy of a broad public interventionism, while others entrusted private autonomy.

In the final formulation of the Constitution “economic activity” is not aimed at the exclusive pursuit of collective well-being (and therefore it does not entirely incorporate a functionalist approach): on the contrary,



even if free, economic activity is prevented from harming the public interest. Therefore, it is only partially meant to achieve a public profit.

Therefore, the final choice of the drafters was in favour of the recognition of private economic initiative in terms of freedom (1 par. of present article 41). In this regard, the influence of the 1942 Civil Code provisions “on contractual freedom and enterprise” (art. 1321 ss. and 2082 ss. c.c.) is clear in the Constitution; nevertheless, at the same time, art. 41 is the constitutional basis that justifies a number of limitations to private economic initiative, all connected to the so called “social utility”.

In this framework, the Italian legislators established a series of programmes with the purpose of controlling and coordinating economic initiatives for social purposes, by imposing limits to government intervention in private economic initiative or to ensure social usefulness.

A first implementation of the social provisions of article 41 was focused on public interventionism; today, on the contrary, the European Union approach softens such an implementation of article 41. Nevertheless, in EU law still many social rules on protection of weaker parties of the economic relationships (first of all, consumers) are still present, but the main approach is not that of direct public intervention.

Nowadays, Italian law is consistent with a regulatory approach, in a competitive market; an approach which – usually by means of independent administrative authorities – is intended only to correct market failures, with a minor public intervention aimed at protecting only effective fair competition (without direct state involvement).

In this context of “mixed economy” only one Italian experience of statute providing for a general programme existed; an experience that was no longer followed by the subsequent special legislation. The only law of general economic programming (Law 685/1967, containing the first Five-Year Plan) was in fact defined by scholars as a “book of dreams”, and the implementation of article 41 followed by subsequent special legislation was surely less dirigist.

Among the above mentioned statutes, those that secure competition and the regulated markets (insurances, banks, etc.) should be mentioned.

In order to make the above described picture complete, it should be stressed that administrative practices by the State, by local authorities and independent administrative authorities play an important role too.

At the same level, the role of the courts is crucial in the evaluation of the economic rights status in the Italian legal system. Judicial control is realized by both *ordinary* judges (*giudice ordinario*) and administrative judges (*giudice amministrativo*), who respectively protect the rights or legitimate interests (*diritti soggettivi* and *interessi legittimi*). Economic rights are by their constitutional nature *diritti soggettivi*, but their limitation for public interest can determine (in a particular easy way) a degradation to the level of *interesse legittimo*.



Finally, fundamental is the role of the Constitutional Court. Constitutional adjudication is a system of control of economic rights implementation, often stopping some incorrect applications of the above mentioned constitutional provisions and consolidating some important interpretations (on this issue, see the cases cited below).

✓ The interactions with social rights

As mentioned above, in Italy the interaction between economic rights and social rights is consistent.

Firstly, Title III of Part I of the Constitution include in the same context property and economic initiative, as well as economic provisions which relate to “labor” as a production factor. Secondly, in the same articles 41 and 42, there are clauses of limitation of the economic rights determining a partial functionalization of property and private initiative to the protection of social rights.

The consequences of this discipline is that in Italy the technique of balancing rights – which is applied to all constitutional rights – has a particular role in the case of economic rights: such a technique is particularly pervasive because articles 41 and 42 explicitly refer to the limitation of property and economic initiative for social interests.

With regard to the proprietary situations (the “capital” factor), article 42 provides for a constitutional reference to the social function of property, which derives both from the Catholic tradition and from the ideology of the socialist and communist parties inside the Constitutional Assembly.

Thus, in Italy the social function of property has been the focus of special legislation, introducing rules for the conformation of property rights. Moreover, it has legitimized the extensive application of the provisions of the Civil Code establishing a series of limits to private property, in apparent contradiction with the statement of “the general freedom to enjoy and dispose of the owner” provided in art. 832 of the same Code.

The Constitution assigns to the Italian Republic the task of the achievement of so-called “substantial” equality (see e.g. art. 3, 2nd par., Constitution). Art. 42 of the Constitution must be read according to this general principle.

In this regard, the strong functionalization pursued in the early decades of the Italian Republic (‘50s and ‘60)s with the passing of time evolved towards a mere balance of economic rights with social rights: the recent national legislation does not provide a “strict” functionalization, but a mitigation of economic purposes aiming at a social defence. The final aim is that of making economic purposes compatible with the so-called “social market economy”.

Moreover, art. 41 2nd. par. introduces specific limits to the protection of social rights. These limits correspond to the recognition of many constitutional principles, such as freedom, security, human dignity and social utility.



According to scholars and to the Constitutional Court, they have to be enacted through statutes (*“riserva di legge”*, that is to say a “statute monopoly” imposed by the Constitution to regulate specific subjects).

Therefore, the vagueness and indefiniteness of the clause of “social utility” has been reduced by the legislator. In this regard, the Italian Parliament moved from a strong private functionalization of the protection of social rights, in the first decades of the Republic, to a more flexible guarantee of the social issues in a competitive market, coherent with the European approach.

Since 1964 (C. cost., 14/1964), the Constitutional Court has established its own competence in evaluating the purposes of social utility pursued by the legislature on the grounds of reasonableness. The Court has elaborated an evaluation of proportionality, in order to balance social rights and private economic freedom (the so called “three-step test” of proportionality, present in German and EU case law too).

However, a precisely defined notion of “social utility” cannot be inferred from constitutional case law: on one side the Constitutional Court operates a sort of “negative” control, declaring unconstitutional only the statute containing provisions which do not correspond to a “social utility”. On the other side, case law of the Constitutional court shows a variety of different purposes that – from time to time – may be suited to configuring the aforementioned social utility.

However, the “common core” of constitutional decisions in this field is that “socially useful goods” are not only those provided in a national statute, but include the values that have direct protection and guarantee in the Constitution, allowing the judges to consider other constitutionally protected interests or rights, as a direct limitation to economic rights; for example, health, the environment, the right to work are therefore used by the law to limit the economic liberties even without a Parliamentary decision (judgments on this topic: Constitutional Court 111/1974; 36/1969; 27/1969; 237/1975; 21/1964; 196/1998; 190/2001; 78/1958; 5/1962; 45/1962; 30/1965; 63/1991; 439/1991).

The Constitutional Court, on the other hand, has also certified the transition from a dirigistic approach (of direct State intervention), aiming to limit the economy and to protect the social dimension, to a less intense public limitation of economic freedoms, consisting in only exceptional and isolated limitations, and in a general recognition – as a rule – of the private economic actors’ autonomy (as already highlighted in special legislation).

Interpretations of article 41 have moved from a functionalist approach in the 60s (which valued the provisions on monopolies, article 43, now more problematic in comparison with the EU rules on state aid), to interpretations that enhance the regulation: the law has the task (the faculty) of determining the programmes and controls so that public and private economic activity may be directed and coordinated towards social ends, but without compromising the nature of economic freedom itself (Constitutional Court 78/1958, 5/1962, 30/1965).

The tools to pursue social ends are therefore not mainly authoritative, but the more recent special legislation operates with incentives (thus not affecting the freedom of privates to determine their own initiatives and to



organize themselves). On this ground, the Constitutional Court stated that the “programmes” and “controls” mentioned in article 41 must not be implemented to abolish private initiative, but only to direct it and to condition the private sphere (see the following case law: Constitutional Court 548/1990; 279/1983; 94/1976; 78/1970)

✓ Amongst those rights, which are considered ‘core’?

The catalogue of Italian economic rights is not characterized by a detailed list of individual hypotheses but by two very general provisions, that – in more detail – can bring a number of less general rights. Articles 41 and 42 protect economic freedom and proprietary categories without making a graduation of the intensity of the protection of their specific profiles; indeed, such a task is left to the discretion of the legislator, which can otherwise over-protect some situations covered by articles 41 and 42, and no other.

Apart from the express provisions in articles 43-47 (protection of cooperation and economic rights of small size), then, a hierarchy among the economic rights does not exist; the Constitution provides a general protection, and simply it is up to the legislator to privilege some economic initiatives (by means of discipline of economic aid or other special treatments).

It should also be borne in mind that, in general, the economic rights *per se* are never “core”, in the sense that the technique of balancing of rights (which always allows the attenuation of protection of interests also constitutionally relevant) in economic rights is particularly permissive. Therefore, in order to grant this balance among economic rights, the two limits that the Parliament has to respect (core of the rights provided by the Constitution, and proportionality) are physiologically observed if a social justification is discovered and considered: the compressibility of economic rights for social reasons is indeed prefigured by the Constitution itself, so no more balancing is required.

Beyond this, the cases of economic rights to be considered “fundamental” are the “classic” ones of property (protected in its liberal extension, against expropriations, etc.) and business activities. Articles 41 and 42 are, indeed, directly aimed at these activities.

Alongside these two cases however, the discretion of the legislator and of the courts has interpretatively identified other dimensions of the protection of economic rights; dimensions that are only indirectly founded on the grounds of 41 and 42, but nonetheless enjoy constitutional protection. This way, even more general values derived from these articles, and then are recognized by the legislator.

Thus, not only the Constitutional Court has extended the warranty for private property belonging to other situations (not coincident with the right of ownership: Constitutional Court 3/1976.). More in general some broad values can be included in the economic Constitution, the principal of which are the protection of competition and the freedom of contract; both these profiles of economic phenomenon, for the protected



interests, combine article 41 with other provisions of the Constitution (competition is in fact founded also on article 117, while contractual freedom is covered not so much by 41, but has to be linked to the different individual rights case by case).

Scholars have long argued that from art. 41 it was possible to infer the constitutional foundation of the freedom of competition; this right can be defined as the equal chance to all individuals to activate materially and legally in the same industry. Nevertheless, only with the access to the European Union the Italian legal system has been provided with robust legal instruments for the protection of competition.

Today such value is also provided by article 117, as amended by Constitutional law 3/2001 (Constitutional Court 223/1982). On that basis, in case law 14/2004 the Constitutional Court affirms, first of all, that the national notion of competition cannot reflect a different vision than the one used within the EU; therefore, such a notion includes regulatory actions, antitrust measures and measures to promote an open and free competitive market. In addition, the Court also states that the protection of competition is one of the competences of State economic policy; therefore it cannot be understood only in a static sense, as a guarantee of regulatory measures to restore a lost balance, but also in a dynamic sense, well-known to EU law; therefore, protection of competition can justify public measures aimed at reducing imbalances, to foster the conditions for an adequate development of the market or to establish a competitive structure of the market.

The second value only faintly traced back to article 41 is that of freedom of contract. As noted above, this value was already provided for in the 1942 Civil Code.

However, an autonomous foundation of freedom of contract is not immediately traceable in the provision of article 41. In fact the Constitutional recognition of such principle may be seen only in the broad concept of private economic initiative, corresponding to each activity which may bring an economic benefit to those involved. Otherwise, the constitutionalization of contractual freedom has to be established only when it is instrumental to the realization of another subjective situation expressly protected by the Constitution (Constitutional Court 30/1965, 241/1990).

This value – even if inferred by article 41 – has therefore an attenuated protection if compared to the traditional freedom of enterprise, since it must be bound to other constitutionally relevant interests.



QUESTION 2: NATIONAL SOURCES OF ECONOMIC RIGHTS

Question 2: National sources of economic rights

- ✓ Where are these rights laid down at national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?
- ✓ Please describe the main legal sources of economic rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);

The most relevant provisions are in the **Constitution** and in the **Civil Code**:

(a) Articles 41-47 of the Constitution:

for the analysis of these rules, see the previous paragraphs.

(b) Articles 832 et seq., 1321 et seq. and 2082 of the Civil Code:

see the previous paragraphs.

I) Most relevant legislation.

a) **Property (art. 42 Constitution)**

- Eminent domain: Law 2359/1865, Law 2892/1885, Law 458/1988, Law 549/1995, dPR 327/2001.
- Housing and urban planning: r.d.l. 981/1931, Law 10/1977, Law 865/1971, Law 396/1990, dPR 380/2001.
- Environmental protection and landscape: Law 1089/1939, Legislative Decree 152/2006, Legislative Decree 42/2004.
- Agricultural contracts: Law 11/1971.
- Leases of urban property: Law 392/1978.
- Copyright and industrial property: Law 633/1941; Legislative Decree 30/2005.
- Amendments to the regulations of condominium buildings: Law 220/2012.



b) Economic freedoms (article 41 Constitution).

- Ministry of State Shareholdings: Law 1589/1956.
- Five-year national economic plan: Law 685/1967.
- Standards for the protection of competition and the market: Law 287/1990.
- Rules to protect consumers: Legislative Decree 206/2005.
- Liberalisation: Law 248/2006.
- Competition: Law 40/2007, Legislative Decree 1/2012.
- Insurance: Legislative Decree 209/2005.
- Banking and Finance: Legislative Decree 385/1993, Legislative Decree 58/1998.

II) Most relevant administrative practice.

i) National level.

In the field of economic rights it is worth mentioning the important role played by the independent administrative authorities (that are both empowered with regulation and adjudication functions). The most relevant administrative authorities in economic matters in the Italian system, are:

- Regulatory Authority of Transport (ART; <http://www.autorita-trasporti.it/>)
- Authority for Communications (AGCOM; <http://www.agcom.it/>)
- Authority for the Supervision of Public Contracts of Works, Services and Supplies (AVCP; <http://www.avcp.it>)
- Authority for Competition and Market (AGCM; <http://www.agcm.it/>)
- Authority for Electricity and Gas (AEEG; <http://www.autorita.energia.it/>)
- National Commission for Companies and the Stock Exchange (CONSOB; <http://www.consob.it/>)
- Pension Funds Supervisory Commission (COVIP; <http://www.covip.it/>)
- Independent commission for the evaluation, transparency and integrity of the government (CIVIT; <http://www.anticorruzione.it/>)



- Guarantee Commission of the Implementation of the Law on Strike in Essential Public Services (CGS; <http://www.cgsse.it/>)
- Italian Data Protection Authority (*Garante della Privacy*; <http://www.garanteprivacy.it/>)
- Institute for the supervision of insurance (IVASS; <http://www.ivass.it/>)

ii) Regional level:

The most important responsibilities of territorial authorities in the field of economic rights:

Some regional legislative powers have a significant connection with economic matters, and are listed in article 117, para. 3 and 4, of the Constitution (eg. regulation of professions).

Above all, the local authorities (municipalities and regions) play a central role in (land) property management and its regulation; urban planning is indeed implemented at the territorial levels of government (see the legislation on planning law and building cited above, and the many regional laws on housing and urban planning).

✓ Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of economic rights in your country, in terms of framework and substantial standards (not enforcement);

A general overview of the Italian legal system for the protection of economic rights certainly proves the existence of a satisfactory body of rules, if evaluated from an abstract perspective (regulations); nevertheless some critical points are to be underlined in the concrete functioning (both inside the administrative practice and the judicial remedies). The creation of an economy based both on competition and social solidarity, indeed, has placed Italy in the framework of the national systems characterized by a social market economy. This is confirmed by the legal profiles of this model too, which is in harmony with the EU approach.

However, it is important to realize that regardless of the provisions enacted, a more competitive “national system” exists. In particular, the problems relating to the protection of economic rights seem to fit in great prevalence at the practical, operative level, rather than at the level of the rules. The reason is that rules are usually consistent with an extensive protection of individual positions, while the problems emerge at the implementation level.

With regard to the freedom of economic initiative (and its corollaries), the two main critical points seem to lie in the poor implementation in practice of the process of so-called liberalizations (increased competitiveness in the field of public services and the professions), which even if prefigured several times by the legislature (with



clear procedures to achieve such goal) remained largely un-actuated, in the transitional phase. A second point concerns the efficiency and impartiality of the independent administrative authorities, given their central role in modern economies (and in the solutions to the current financial crisis); this is a structural problem in all western countries, which is also present in Italy.

With regard to proprietary situations, in the same way, it is especially the practical management of the limitations that could be sometimes inconsistent with an adequate protection of economic rights. In particular, although it has experienced a substantial increase in the level of protection (see below for expropriations), the role of urban planning remains problematic in the absence of an effective urban equalization, and the level of exploitation of the land (even in the context of illegal exploitation) varies greatly among the different regions. Even for the non-land property problems exist of protection of investors and shareholders, relating to the structural difficulties of making efficient and effective action by the independent administrative authorities; in addition, with respect to the more “recent” new forms of property, related to technologies, the topic of the copyright regulation is a not specifically Italian problem, but it also involves the Italian system.

✓ Please indicate whether significant developments have recently taken place in this respect

Moving from the framework outlined above, and from the structural issues already mentioned, it is important to highlight that many reform processes in the field of economic rights have gradually modified the Italian legal system.

The plurality of the sectors involved does not allow an exhaustive analysis; therefore, just the most significant and most recent evolutionary processes will be examined. Firstly, an important starting point is the process of massive strengthening of independent authorities, with the attribution of increasing skills and resources. This evolution is parallel to the process of privatization (started in the 90s), which made public intervention in the economy in Italy no longer a direct affair (with management of public enterprises) but mainly an indirect mediation (with regulation and adjudication).

The process of liberalization is also relevant, and it is consistent with the evolution described. Both in public services and – potentially – in private ones (professions), liberalization is indeed strictly connected with economic freedoms. With regard to the discipline and management of public services, it is important to mention a progressive reform in accordance with the aim of protecting competition (in a gradual opening to private initiative); such a reform trend is mainly based on the general rule of the need for public tender in the adjudication of the service, also in public-private mixed situations.

Later, various amendments to article 113 TUEL (law on local government, *testo unico enti locali*, Legislative Decree 267/2000) have consolidated the abovementioned trend.



Apart from the TUEL, some other provisions have been of central importance in the field of services, and in particular article 13 of Decree Law (legislative decree) 223/2006, converted into Law n. 248/2006, which regulates regional and local direct award. This provision includes in particular a high degree of exclusivity in the possibility of using public companies, in order to avoid that their position of strength – if used in the market – could distort competition.

The legislation on local public services of economic importance (art. 23-bis Decree Law 112/2008 converted with amendments by Law 133/2008 and by art. 15 Decree Law 135/2009 providing limitations for the companies that are characterized by a mixed public and private participation) should be mentioned too. The law provides a general discipline to improve competition prevailing on the provisions of the single economic sectors. Because of Decree Law 112/2008 and subsequent amendments the so called in-house providing of public services is now a regressive model with respect to the principles of competition, transparency and non-discrimination; therefore, it is allowed only under certain strict conditions (ECJ judgments *Teckal*, *Parking Brixen*, etc.).

The last stage of this process (in which numerous other milestones could be listed) was marked by the so-called referendum on the liberalization of water, which was followed by the most recent changes in the field of public services: article 4 Decree Law 138/2011 reintroduced some of the rules repealed by referendum however, the Italian Constitutional Court 199/2012 has judged this provision to be unconstitutional.

Even the access to the professions has often been reported as an area in need of radical liberalization (see as an example the recent law on the reform of the legal profession: Law 247/2012).

Copyright law is an area of Italian law in evolution, in the run-up of technological developments; dating back to the 40s, law 633/ 1941 (coeval with the Civil Code), has been crossed by the most recent technology acquisitions, and integrated by the European Union discipline too. Many problems in this field are solved on the basis of new and complex rules, sometimes anticipated by case law.

Another area of Italian law recently touched by a deep revision is that of expropriation (Presidential Decree 327/2001), which has many profiles relating to urban equalization. In this field, the protection of private economic rights has been greatly enhanced by interventions of the Strasbourg Court, particularly in terms of compensation for expropriation and of *accessione invertita* (on which more details below question 5, number 4 on the point “different categories of persons in different location and policy contexts over time”). Finally, in the most recent evolutions in the field of economic rights it is important to note the developments of the so-called problems of Justice “in” the contract, and – in this field – the protection of the consumer (Legislative Decree 206/2005) is certainly the main hypothesis (besides some minor ones, like subcontractor legislation, cf. Law 192/1998).



✓ Please, analyse the main trends in public law protection of economic rights, distinguishing the approaches both on the bases of the different role of legislation and case law, so as on the ground of the different macro-areas of property right, business regulation and labour market.

In light of all of the previous discussion, the basic trend that should be recorded in the Italian legal system in the area of economic rights is apparently towards a “strengthening of protection through specialization” and towards a de-politicization of the management of limitations of economic rights.

This trend, in other words, characterizes the reforms as these are seen as a progressive evolution towards systems of special rules, of special administrative bodies and of specific procedural rules. In the first case, we refer to the legislative power, and the rules of consumers is the best significant example; the second case, concerning the systems of special administrative bodies, refers to the executive power and the important example of independent administrative authorities; the third case, about the systems of specific procedural rules, is focused on the judiciary, and again a good example is in the consumer law class action (article 140 *bis* Legislative Decree 206/2005). The tendency, therefore, is to specialize the system of protection of economic rights, in all its aspects.

This trend, in particular, is consistent with the new domain of technology and science on the policy on issues: due to the complexity of the technology society, the specialization is a common trend in all areas of government, but the field of economic rights is particularly significant because inside its space the modernization provides more and more opportunity to transform political decisions into technical ones.

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF ECONOMIC RIGHTS

Question 3: International and European sources of economic rights

✓ To which international instruments for the protection of economic rights is your country a part?

In the area of economic rights, the international treaties are of immediate relevance, being sources of the law providing rules directly relevant to citizens; the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the EU are particularly relevant. These two instruments do not extend their effects only in the relations between the States and the international order but, more radically, also directly create rights and duties for the people (therefore, they can be protected before supranational courts, the Court of Strasbourg and Luxembourg, but also in front of national judges).

Regarding the ECHR, article 1 of Protocol 1 protects the right to property, and starting from this disposition the Court in Strasbourg has also developed some profiles of credit and contracts protection. Italy has signed and ratified it with Law 848/1995.



The Charter of Fundamental Rights, articles 15, 16 and 17, respectively safeguard: freedom to choose an occupation and right to engage in work, freedom to conduct a business, right to property. The Charter has become binding after the Lisbon Treaty, ratified by Italy with Law 130/2008.

In addition to these provisions many other international agreements ratified by Italy have relevance to the economic rights, even if not directly conferring legal claims to the citizens. These other treaties, indeed, affect the approach of the State towards economic issues (liberalization, competition, etc.), and are therefore indirectly relevant. In particular, Treaties on issues of economic importance are not only bilateral but also multilateral; many of them concern very technical and specific issues, but some have a more structural importance because they create international organizations that obligate Italy to follow certain economic conventions (typical examples are the WTO, the World Bank or the IMF).

In this multiplicity of agreements, also the general tool consisting of the UN International Covenant on Economic, Social and Cultural Rights of 1966 is of main importance, especially for labour rights. Italy has joined with Law 881/1977.

✓ How are relevant international and European economic rights norms being incorporated in your country?

The regime of incorporation of rights of international or supranational origin inside the Italian legal system follows different rules, depending on the nature of the source of international law at issue.

For customary international law article 10 of the Constitution provides for a system of automatic adjustment, without need for any formal act. Moreover, as recognized by the Constitutional Court in judgment 48/1979 (Russell), the ranks of the customary international law are hierarchically prevalent inside the system, and take precedence over any other provisions of national law (and the Constitution itself).

As for the economic rights that arise from international treaties, article 117 co. 1 of the Constitution (as introduced by Constitutional Law 3/2001) recognizes them as prevailing over other sources of national law (Constitutional Court 10/1993). The treaties are ratified by the Government, after the possible law authorizing the ratification (article 80 of the Constitution), assuming the obligation on the international level; at the same time a national statute is usually needed to execute the dispositions inside the Italian legal system, to make them effective and binding directly for the citizens (and not only for the Government). Even if such a process of execution is made by statutes, the effectiveness of the Treaties is connected to the rank of article 117 Constitution. Therefore it is not possible – for the future – to enact a different parliamentary decision and a divergent statute on the same issue covered by the Treaty.



Finally, EU law enjoys a special status. Both primary law (treaties), and derived law (regulations, directives and decisions) prevail over domestic law (including constitutional) according to the “supremacy principle”. In addition, sources of primary and derived law, as well as general principles might have direct applicability (or direct effects), and are therefore often directly productive of rights for citizens. In this case national courts, in case of conflict between EU economic rights and national law, are required to dis-apply the second one (see Constitutional Court 170/1984, *Granital*).

Furthermore, the adjustment of the national legal system to international law also takes place largely through an interpretation aimed at creating compatibility between internal and international provisions (*interpretazione adeguatrice*). Of particular importance is the impact of interpretation on the interaction between European law and article 41 Constitution: inspired by the EU principles, competition values and horizontal subsidiarity were considered implicit in the Italian legal system even before the Constitutional law 3/2001.

After the acceleration of the process of European integration which occurred in the early nineties, article 41 was interpreted in compliance with the principles of an open-market economy.

In line with the EU affirmation of the centrality of the protection of competition, by means of Law 287/1990 the Italian legal system evaluated the competition profiles “hidden” in the 1st co. of article 41: freedom of competition was considered a natural expression of the progress of freedom of economic initiative (and since 2001 the competition law is mentioned inside an express constitutional provision, article 117, 2nd co., as substituted by Constitutional Law 3/2001).

✓ To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?

In the framework of international treaties, ECHR enjoys a special status as the case law of the Strasbourg Court is recognized as binding and helps to define the content of the rights.

This ECHR special status does not extend up to the same level of pervasiveness recognized for the EU law. It is indeed impossible to have non-application of internal rules in contrast with the ECHR, as it is in the EU system. In such cases national courts must provoke a question of constitutionality in front to the Constitutional Court; the parameter for constitutional adjudication is the abovementioned article 117, co. 1, of the Constitution, of which the ECHR is a parameter external to the Constitution, but indirectly constitutionally relevant (“interposed parameter”, *parametro interposto*).



This attitude was reinforced by two key judgments of the Constitutional Court, which recently focused on issues of economic rights: the decisions 348 and 349/2007 on the amount of compensation for expropriation and the *occupazione acquisitiva* (or *accessione invertita*).

With regard to *occupazione acquisitiva* in the past the Constitutional Court allowed the public power to become owner of private property and to convert it to a public use, without setting up a full public responsibility for the damage caused to the owner. Initially, in the ECtHR case law such a situation was not considered as conflicting with the principles concerning the protection of the property, as enshrined in the Protocol 1 to the aforementioned Convention.

More recently, however, the Constitutional Court, following the case law of the Strasbourg Court (case Scordino: judgments of 29 July 2004 and 29 March 2006), admitted that the *occupazione acquisitiva*: (a) does not provide adequate protection of property rights, because ECHR requires that the damages will be paid out automatically in such cases, (b) does not qualify it as “expropriation”, but has to be qualified as untitled dispossession, contrary to article 42 Constitution as interpreted in the light of the findings of the ECHR, (c) does not guarantee compliance with the principle of legality (article 1 of the Protocol) in the absence of sufficient requirements of accessibility, accuracy and predictability of the procedural regime.

✓ How and to what extent are international instruments for the protection of economic rights given effect in your country?

As mentioned in the previous paragraphs, there is a different scope of protection available in the event of a conflict between supranational or international law in the protection of economic rights and domestic law. Depending on the origin of the right in question, indeed, the court must un-apply the incompatible internal provision if contrasting with EU law; on the contrary, if it is provided for in the ECHR (or in other international instruments), the court cannot un-apply the law, but has to raise the question of constitutionality for breach of article 117 co. 1.

In any case, however, national courts have to attempt – where possible – an interpretation in conformity with international law, in order to save the apparently conflicting domestic law.

As far as international and supranational level remedies are concerned, of main importance is the ability of individuals to appeal directly to the Strasbourg Court. The ECHR, indeed, as a subsidiary remedy, is competent to judge on violations of (also) economic rights once domestic remedies have been exhausted. The Member State must comply with pecuniary reparation measures committed by ECHR, but also with individual or general measures provided to eliminate the Human rights violation. In this case, the Committee of Ministers of the Convention supervises the implementation of the decisions of the Court in Strasbourg. Italy provides for the



implementation of such supranational decisions by the activity of the Government, which promotes the collaboration of Parliament and of the judiciary power: Law 12/2006 (execution of ECHR Judgments) which modified article 5 Law 400/1988 (on the activity of the Government).

QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

Question 4: EU Charter of fundamental rights

✓ To what extent have the EU Charter of fundamental rights as well as general principles of EU law protecting rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?

The Charter of Fundamental Rights of the EU is peacefully recognized in the Italian legal system as a binding set of rules, as well as the general principles of the EU.

The provisions of the Charter used to be applied by case law already at the time when its only value was that of soft law; as everybody knows the Treaty of Lisbon introduced the recognition of the normative value of the Fundamental rights in the EU treaties system; as a consequence, the Charter of economic rights is now also considered – formally and in substance – as binding.

With specific regard to economic rights, the EU Charter has therefore contributed to the scope of articles 41 and 42 of the Constitution: those articles were reinterpreted in the light of European integration, even before the treaty of Nice, but the formalization of EU economic rights inside the Charter gives new reference to this evolutionary process. Such a role played by the Charter, it should be noted, is limited by the so-called horizontal dispositions of the same Charter of Fundamental Rights: it has to be applied in respect of the EU competences and only inside the boundaries of EU attributions.

✓ How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of economic rights?

The aspect of the relationship between the ECHR and the EU Charter of Rights is crucial and perceived as central in the Italian legal system. As already noted, indeed, EU and ECHR rights have a different status in the Italian legal system; as a consequence, it is essential to define where it is a question of application of ECHR law and not of EU law. Such a problem, despite some attempts to extend the disapplication also to the ECHR system (Council of State 1220/2010; contra, see Constitutional Court. 80/2011), was solved on the ground of



constitutional adjudication, without un-application. In fact, only the rights provided for by the Charter of Fundamental Rights of the EU benefit from the un-application power.

In the area of economic rights, possible overlaps between the EU and the ECHR provisions do not arise on the literal level, but on the interpretative one: the conflict arises when the ECJ and the Strasbourg Court case law contain different solutions for protecting the same economic right. One example is the protection of credit, which is considered in the property paradigm in ECHR law, while the EU system introduced specific provisions. In these cases the Italian legal system does not assume an original position in the European framework, but it follows the well-established set of *Bosphorus* case (ECtHR judgment 30 June 2005). It is then assumed (without specific demonstration case by case) that EU law respects the rights of the ECHR, if the possible conflict arises in an area of EU competence, and – therefore – the Strasbourg Court will refrain in all those cases from further controls. However, when the Member state had no discretion in adapting its legal system to the rights provided by the EU, a second check by ECHR will be possible.

Moreover, it is important to remember that the accession of the EU to the ECHR is currently pending and a draft of the Treaty to accession is already available. As a consequence, some of the above mentioned crucial issues might find a final solution.

QUESTION 5: JURISDICTIONAL ISSUES

Question 5: Jurisdictional issues

✓ Personal

➤ **Who** is covered by (core) economic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?

The Italian constitutional dispositions in the field of economic rights have a neutral formulation, looking at property and economic initiative in itself rather than to the user; such an approach, as mentioned above (answer to question 1), is a symptom of the non-social character of articles 41 and 42.

Thanks to the literal formulation of these rules, citizens are not strictly the only beneficiaries of these rights, as is the case for other rights recognized by the Italian Constitution. As an example, immigrants are not physiologically excluded in the enjoyment of economic rights.

The exclusion of immigrants from the enjoyment of economic rights is not prospected by the Constitution, and even foreigners enjoy fully – in principle – property and freedom of enterprise. Nevertheless, according to the general rules on the private international law principle of reciprocity some limitations can be admitted: “civil



rights” for the purpose of article 16 of the preliminary provisions of the Civil Code have in fact to be considered – among other things – also (and mainly) the “economic rights”. The limitations of protection of rights for the reciprocity purposes, indeed, is typically pertaining to the economic relations (e.g. ability to contract, to be owner, etc.).

As regards the subjective extension of the legal protection of economic rights, in the Italian legal system legal persons are beneficiary too; economic rights, indeed, by their nature are often exercised in corporate form, and so the possibility of recognizing it also to non-physical persons is considered obvious. In fact, the projections of the individual entities are expressly protected under article 2 of the constitution, for the so-called social bodies (*formazioni sociali*).

Even the Constitutional Court stated that the “protection of the 1st par. article 41 concerns not only the initial choice of an economic activity, but also the successive stages of its development” (Constitutional Court 35/1960 v. C. also cost. 54/1962), therefore considering also the way of management of enterprises: business activities can be constitutionally guaranteed individually or in corporations (article 2082 of the Civil Code). Moreover, article 41 covers with a constitutional protection also self-employment and intellectual professions (Constitutional Court 13/1961, 17/1976, 59/1976; more problematically, Constitutional Court 89/1984.).

- ✓ Territorial
- What is the territorial scope of the protection of economic rights afforded by your member states? Are there **territorial** limitations to such protection? Which?

In the Italian legal system a discrimination in the enjoyment of economic rights cannot occur on territorial bases. The principle of equality (article 3, and more specifically article 120 of the Constitution) that follows the same logic as the EU free movement liberties inside the Italian territory requires in fact an equal protection throughout the Italian regions.

This does not exclude the possibility of supporting territorially selective measures: such measures have to be considered positive actions (aid or favorable tax regimes), which today, however, are frequently in tension with the EU rules on state aid. The EU system, nevertheless, in order to develop positive actions provides its own structural funds and sometimes admits tax systems selectively in favour of a specific territory (see judgment on the Sardinian luxury-tax, C-169/08). Such interventions, however, do not discriminate with a restriction of some economic rights; more simply, they are intended to expand the effectiveness of those rights also in the territorial areas where the implementation is more difficult (as it is indeed in the logic of the so called “positive actions”).



✓ Material

➤ Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)? How are economic rights balanced with other social rights? What is the approach of the national legal system towards the prevalence of a Market view instead of a social rights view in the regulation of economic rights?

The balancing of social and economic rights is a crucial topic and determines the more macroscopic compressions in the enjoyment of economic rights in some specific areas (e.g. rental of residential property, freedom of enterprise and labor protection, environmental protection and production activities, etc. For a more detailed analysis of the role of social rights in the compression of economic rights, in the single specific policy areas, please refer to the answer to question 1 and particularly to case law and legislation quoted).

As noted above, the EU regulation approach has reduced the national possibilities to balance economic and social policies in some sensitive areas, when such limitation of private initiative is contrary to competition; this evolution is indeed important, but the realization of the Single market – however – admits that some faculties of free movement of factors of production are to be limited for reasons of public interest (health, protection of the public order and the social policies).

The EU law therefore permits in some specific areas a plurality of admissible public interventions on which bases the enjoyment of economic rights is compressed: for consumer, environment, workers or health protection, etc.

✓ Temporal

➤ What is the temporal scope of protection afforded to economic rights? Have they been recently changed/Have there been recent changes in the range and reach of economic rights protection?

As already mentioned, over time, in Italy the interpretation of economic rights has changed: this concept has gone from a friendly setting to a certain state dirigisme, to an approach that with priority preserves the competitive market (with a limited role of public powers: essentially in regulation and adjudication). The interpretation of articles 41 and 42, compared to the many options available, is then concentrated – from time to time – on the interpretations compatible with EU law and its social market (competitive) economy. If the provisions of the Italian Constitution were originally open to various interpretations, gradually – in parallel with European integration – the Italian practice, legislation and case law have gone converging on the size of the EU economic market. This trend will be evident in the following section, particularly with regard to the cases highlighted there.



Evolution has not, however, been traumatic, but gradual. Such a characteristic explains why the reform of article 41, even if sometimes proposed, was never approved. The Italian economic Constitution has proved to be sufficiently flexible and adaptable to changes in the economy and in the European integration evolutions. Scholars refer to a change of the economic Constitution as an evolution from protection of individual freedoms (limited for social purposes) to the protection of an economic system (EU competitive market) and such evolution is particularly evident in the interpretation of article 43 (on the topic of collectivization of economic activities), that now takes into consideration EU policy in the field of State aid.

The trend is therefore mainly towards a more market friendly approach, compared to the first interpretations of the Italian Constitution. The three sectors analyzed confirm this tendency: both the liberalization of professions, even if with particular difficulties, and the treatment of intellectual property are characterized by the purpose of develop more competition. The issue of consumer protection, however, marks a different sensitivity to the defence of a European dimension of social interests: in this field economic rights are not limited but, rather, regulated to ensure an effectively “fair” competition. The competition is not replaced by a government intervention, but the State becomes – in fact – a guarantor of fair competition (protecting the weaker part of the contracts, with a special regulation and administrative checks).

➤ Please offer details as to how different rights are afforded to different **categories of persons** in **different location and policy contexts over time**.

Hereinafter some of the most significant cases of different application of the economic rights are listed: over time and for different categories, more or less protected (landowners, landlords), of persons and situations. The following list shows the main references of five cases commonly considered as some of the most significant in Italian legislation and case law on economic rights.

1) Leases:

Article 42, 2nd co., of the Constitution has been the foundation of all the limitative regimes of property, pertaining to the operation of commercial or artisanal activities (within the meaning of Law 1115/1971; Constitutional Court 30/1975). On such a basis, the Constitutional Court decided for the constitutionality of the block of the fees for the lease of municipal property used for residential purposes (within the meaning of Law 1444/1963 and subsequent modifications; Constitutional Court 3/1976.).

After the introduction of law 392/1978 on “fair rent” in leases (*equo canone*), the Court has intervened several times, always believing the contested provisions to be legitimate (both if limitative or not of economic rights): for example, those that allow the owner/landlord to regain or not the availability of the property (Constitutional Court 58/1980; see also article 73, Law 392/1978 and C. cost.. 116/1987). In 1988, the fair rent



discipline (l. 392/1978) was again considered by the Court as legitimate, as the compression of the right of ownership of the lessor would have been justified by the need, still present, to guarantee the conductors to ensure an adequate stability on the enjoyment of a primary good, so that the legislation is intended by the Court as the achievement of a balanced protection of the conflicting interests of the conductors and lessors (C. cost.. 1028/1988). Some provisions in Italian law were however considered a non-irrational protraction only because exceptional and temporary, and the ordinary full extension of economic rights was therefore not compressed (Constitutional Court 108/1986).

The weaker party (the lessee) is then protected with a discipline that is special if considered in comparison with the Civil Code dispositions. At the same time, landlords are treated differently depending on whether they are considered a weak part themselves in the economic relation (and if they have to use their properties for a socially beneficial, and equitable, purpose).

2) Agrarian relations:

The discipline of agrarian relations (with reference, first, to Law 11/1971 laying down the new rules of the rustic funds rental regime) has been subjected to the scrutiny of the Constitutional court. The provisions which do not provide the periodic revaluation of rent, as well as the extent of the criteria to determining the fee, were held unconstitutional; indeed, the compression of the property right would have resulted in almost a complete canceling, reducing significantly the income (Constitutional Court 155/1972). The contested legislation especially violated the reasonableness principle, due to the inadequacy of the revaluation coefficients: articles 42, 2nd co., and 44, 1st co, of the Constitution – indeed – require a balancing between owner and enterprise interests (Constitutional Court 301/1983).

The owners of rustic funds then enjoy their economic rights in a more constrained way than other landlords, as they are balanced with the needs of socially sustainable agricultural production (small businesses included).

3) Planning and landscape restrictions:

For landscape and planning restrictions there is a close connection with case law on expropriation (which will be referenced in a following section), but they are also a factor that differentiates profoundly the enjoyment of economic rights connected to property: compressing some fundamental faculties, such as the *jus aedificandi*.

The Constitutional Court has always considered the right to build (*jus aedificandi*) connatural to the right of ownership and, therefore, the constraints imposed by the regulations – of various kinds – in relation to urban planning and construction have to be exceptional (Constitutional Court 64/1963). Some important decisions (55/1968 and 56/1968) have sanctioned the legitimacy of the limits to urban development: the immutability of



those can be constitutional, if such a limit is intended to transfer the land to public property, in view of a future transformation for public interest.

Among the limitations to the use of land, admissible for planning law, a major role is played by the rules of the building permit that, without separating the property right by *jus aedificandi*, require the owner to pay a contribution for build, considered reasonable in principle and in tune with the fulfillment of the mandatory duties of economic and social solidarity.

Moreover, the protection of the landscape, according to article 9 of the Constitution, is placed in relation to the constraints to the economic right of article 42, especially relating to the rights on the lands included in the parks or reserves, and in general if classified as of public interest (Constitutional Court 391/1989). The planning activity in such cases can reasonably limit the building activity and the above mentioned balancing test is rarely in favour of the economic right.

Even in this case, rules have changed over time, becoming more precise and pressing; nevertheless, the discipline on such issues (limitation on building activity) is by nature strongly unequal on the territory (in fact, not from a legal regime perspective): according to the destination given to the soils on the basis of technical-political choices, the protection of this economic rights depends mainly on the local political decisions.

4) The so-called *occupazione acquisitiva*, or *accessione invertita* (obtaining property right by illegitimate occupation):

The provisions of this mechanism have undergone radical changes: at the origin, rules provided a mere compensation in case of public illegitimate occupation of private property. Therefore, the economic rights of the owners unjustly dispossessed were strongly compressed, treating them as the owners expropriated but without procedural safeguards. Only with the evolution of the interpretation in case law (up to the decisions of the Strasbourg Court cited above) the enjoyment of the landowners' rights was fully guaranteed also for these situations.

This mechanism was developed by the Italian courts, and later it was codified in article 3 Law 458/1988: there was a right to compensation for damages caused if the expropriation has been declared illegal, with the exception of returning the goods (Constitutional Court 384/1990). The Constitutional Court thus intervened in 1995 to establish the constitutionality of such a mechanism (Constitutional Court 188/1995).

In 1996, the Court again intervened on the regime provided by the new article 1, par. 65, Law 549/1995 (which modified the 6th par. article 5-bis, DECREE LAW 333/1992) stating that these provisions do not have to be applied when the price was not definitively determined, and the Court underlined the problem of distinguishing a compensation regime (for legitimate situations) and a damages regime (for illegitimate situations; Constitutional Court 269/1996.). The Court recognized, with regard to the legislative provision which



stated for the equivalence of the damages and the compensation, that such an identical regime for legitimate expropriation and *occupazione acquisitiva* was in breach of the precept of equality, given the radical structural diversity of the two situations (Constitutional Court 188/1995).

Here, the different treatment of economic rights consists in attributing the same protections to radically different subject positions; and such an identical regime for different situations violates the principle of equality. Only the recent interventions of the Strasbourg Court – cited above – have introduced a remedy to that inequality (Constitutional Court 349/2007).

5) Expropriations, urban limitations and compensations:

Expropriation represents the best known example of structural differentiation in the protection of economic rights in the Italian legal system. Over time, indeed, rules on compensation have dramatically changed, depending on the public finance context and conditioned by ideological and political perspectives. Only recently a sufficient degree of stability in the regime has been provided.

Article 42 (subsection 3) of the Constitution is the constitutional foundation of the discipline of expropriation for public interest. The three conditions granting the legality of the expropriation are: (a) the provision by law, (b) the existence of a public interest, (c) the obligation to pay compensation.

The “non-translational expropriation” (*espropriazione non traslativa*) is the limits (or planning restrictions) to the building activity. Such limits may be an expropriation when their imposition would lead to the absolute ban on *jus aedificandi*, lacking of compensation (Constitutional Court 55/1968).

The consequence of a chaotic regime of urban limitations to property rights, and characterized by sufficiently participative procedures is a profound difference in the enjoyment of property rights.

In a first phase – in the mid-sixties – the Constitutional Court (Constitutional Court 6/1966) excluded an expropriation and, therefore, the need to pay compensation in the event of restrictions relating to general categories of goods. The law could therefore identify *a priori* some goods, on the basis of certain characteristics, as not fully protected for what concerns the possible economic rights; so for example in relation to the unused flats in big cities, where a need for more leaseholds does exist (Constitutional Court 20/1967.).

In the same period the exclusion of an expropriation in relation to the constraints of landscape protection was decided by the Constitutional Court (Constitutional Court 56/1968.), as it also was considered an original hypothesis of public interest. The same has to be applied to the limitations imposed on the property owners for historic, artistic and archaeological reasons (l. 1089/1939, Constitutional Court 202/1974).



The enjoyment of some economic rights (*edificabilità*: buildability, i.e. suitability for building) relating to specific categories of goods (those that incorporated generic public interests) was so limited in very general ways.

The subsequent evolution of Italian law began with the requirement of an appreciable proportionality between the public interest and the legal instrument chosen to protect it, which implies the minimal sacrifice for the owners (e.g. Constitutional Court 155/1995).

The Constitutional Court had also stated (Constitutional Court 90/1966.) that in order to be justified, expropriation must be guided by specific, and concretely explained, purposes of general interest; therefore, the system of Law 2359/1865 underlined the necessity for an indication of the objectives, the means and the time of the expropriation procedure (as an essential guarantee for the private interest). The grounds of the protection is therefore connected to the necessity to demonstrate that the compressions of the economic rights related to whole categories of goods are reasonable.

Another guarantee representing a differentiating factor in the enjoyment of economic rights of property, and that has evolved over time, relates to the quantification of compensation.

Law 2359/1865 had governed expropriation compensation, providing that it will be done to the right price, that is to say the price the land would be paid in a free negotiation (article 39).

If the rule was the actual market value, in the following decades for individual areas of the territory, or specific categories of goods, the opportunity was provided to compensate with smaller amounts, thus differentiating negatively the enjoyment of the right to property. Symptomatic of this trend was the Law 2892/1885 (known as the “law on the reorganization of the city of Naples”), article 13.

When referring to compensation, the 3rd par. of article 42 of the Constitution does not require to pay the market value of the asset (Constitutional Court 61/1957), but the only requirement is that the compensation has to be not “apparent or purely symbolic” (Constitutional Court 5/1980).

The Constitutional Court 5/1980 stated that article 16, Law 865/1971, (*Legge Bucalossi*), which provided for compensation at agricultural value, is unconstitutional, as causing a compression of the right of property: to the compensate owner at the agricultural value was considered in violation of the principle that the extent of the compensation shall be referred to the value of the property, determined by its essential characteristics and the real economic purpose. It was a violation of equality to compensate rural and urban land at the same value.

As an immediate consequence of this decision (5/1980) Law 385/1980 was enacted by Parliament. This new Law provisionally liquidated the owner in accordance with the criteria laid down by the previous Law 865/1971 (as amended by Law 10/1977).

The Court stated that – in the absence of specific provisions – the Italian legal system was making reference back to the market value (pursuant to article 39, Law 2359/1865). The Constitutional Court (judgments



355/1985 and 530/1988) tried to rationalize the system of compensations, but the legislator (article 5-bis, Decree Law 333/1992) introduced again a new system of calculation of compensation, less proximal to market value.

On the bases of this last legislative decision, the enjoyment of the economic rights to property or to build (*jus edificandi*) were therefore again limited by urban constraint or by expropriation, both compensated at less than market value. Only the more recent case law of the Constitutional Court above mentioned (348/2007), implementing the ECHR decisions, has put an end to this regime by requiring for all property rights a compensation coherent with the real value.

QUESTION 6: ACTORS

Question 6: Actors

✓ What is the involvement of private or public actors, such as private (e.g. National Bar Associations) and public entities and authorities (e.g. Patent Offices), agencies, NGOs, etc. – in defining and setting economic rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of economic rights norms?

There are several relevant stakeholders in the formulation and implementation of economic rights, and the relationships between them are extremely differentiated and not entirely formalized by law. In particular, under Italian law, it should be noted the development of a constant dialectic between the Government, the trade unions and the employers' organizations has been institutionalized in the forms of collective bargaining (*contrattazione collettiva*: in Italy the sources are in the inter-confederation agreements of 1993 and in the Protocol of 23 July 1993); in this way, the free economic dynamics have been rationalized to protect workers with collective agreements that remain private, but with a particular relevance in the system of sources of law.

As for other rights, in general, for economic rights too there is a similar tension between politics, independent authorities and private associations and individuals (as for the independent authorities, see the above mentioned references). The private associations are in particular of main importance to the development of the three areas here specifically treated: consumer associations, associations of authors, and professional associations – in fact – play a role in in those economic fields (all protecting general or particular interests). An analysis of the prevalence of anti-competitive trend or guarantee of rights attitude in the action of associations requires – in practice – a case-by-case examination (and the case law on such issues is very important, also for the issue of *locus standi* of associations).



QUESTION 7: CONFLICTS BETWEEN RIGHTS

Question 7: Conflicts between rights

- ✓ How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?

As already noted (answer to the question 1), overlaps and interferences between different economic rights are originally present in the Constitution: work, property and economic initiative are interconnected rights, and social utility is a perspective relevant in each one.

The role of legislation is to implement one or other economic law, deciding for the prevalence of specific interests time to time: such a decision has to be assumed according to the political discretion constitutionally admissible, without damaging the core of the economic rights. The Constitutional Court therefore checks the reasonableness and proportionality on sacrifices of economic right decided by the Parliament, and – according to the technique of balancing of interests – verifies if the core of the right is not affected and if the principle of proportionality is respected (applying the theory of the three steps, developed in the German case law, and then in the EU one). Even the other national courts, on this basis, are entitled to resolve conflicts between economic rights – when EU law comes into consideration – eliminating the possible conflicts with domestic provisions.

- ✓ Are there, in your countries, notorious or problematic clashes between particular economic rights, or between rights and other rights, between individual economic rights and important public interests?

- Please give examples, and illustrate how these conflicts are dealt with and resolved.

The cases of structural conflict among different economic rights are absorbed into the Italian legal system by the notion of “social utility” (see above answer to question 1): usually a link with its social preferability is set off, in order to permit an economic interest to prevail over the other. Looking in more detail at the main cases, the most obvious conflict is of course the problem of tensions between labour and capital interests, and therefore the problem of industrial relations and collective bargaining (as already noted above).

In addition, a second case of textural contrast in the field of economic rights is linked to the economic exploitation of resources and environmental protection requirements. All the Italian environmental laws (e.g. the most important Legislative Decree 152/2006) are the sources of a conflict of economic rights with other utilities, otherwise valuable (positive and negative externalities).



Turning to the specific issues that have been encountered in this questionnaire, the issue of liberalization (and within it, the one of professions) is particularly topical in Italy: the tensions between the established economic actors and the interest of the incumbents to find an environment favourable to competition. In this sense, the whole issue of competition law is applied in a setting of different economic interests of a multiplicity of actors (Law 287/1990).

Other classic themes that deserve attention (also present in Italy, but not only) is then certainly that of consumers (Legislative Decree 206/2005), in which the economic interests of the weaker party clashes with the professional interest in maximizing profit (see above).

Finally, in the area of intellectual property rights, a strong contrast is present between the authors'/inventors interest in the exclusiveness on their work/idea and the collective interest to cultural enjoyment, linked to article 9 Constitution. In particular, there does exist a socio-economic conflict of considerable proportions, focused on the free flow of information and knowledge (see, for instance, the "Open Source" phenomenon). This problem, however, is much more complex and cannot fully be faced with a "property/owner paradigm" (eventually, article 42 Constitution). The EU (but not explicitly the Italian Constitution) protects intellectual property, and this made the issue of relation between legal orders particularly interesting in this matter. The complexity of the legal sources that have been raised in relation to copyright, for instance, (especially with reference to the Internet), indeed, is linked to EU directives which outline a system of intellectual property protection not only very different from the Italian one from 1941, but also in constant evolution.



ANNEXES

National provisions

Constitutional and Civil Code legislation:

The most relevant legislation of constitutional level and inside the system of the Civil Code:

- Articles 41-47 of the Constitution
- Articles 832 et seq., 1321 et seq. and 2082 of the Civil Code

Ordinary legislation:

The most relevant legislation in the field of proprietary situations (article 42 Constitution):

- eminent domain: l 2359/1865, Law 2892/1885, Law 458/1988, Law 549/1995, dPR 327/2001
- housing and urban planning: r.d.l. 981/1931, Law 10/1977, Law 865/1971, Law 396/1990, dPR 380/2001
- environmental protection and landscape: Law 1089/1939, Legislative Decree 152/2006, Legislative Decree 42/2004
- agricultural contracts: Law 11/1971
- leases of urban property: Law 392/1978
- copyright and industrial property: Law 633/1941; Legislative Decree 30/2005
- amendments to the regulations of condominium buildings: Law 220/2012



The most relevant legislation in the field of economic freedoms (Article 41 Constitution):

- Ministry of State Shareholdings: Law 1589/1956
- Five-year national economic plan: Law 685/1967
- Standards for the protection of competition and the market: Law 287/1990
- Rules to protect consumers: Legislative Decree 206/2005
- Liberalisation: Law 248/2006
- Competition: Law 40/2007, Legislative Decree 1/2012
- Insurance: Legislative Decree 209/2005
- Banking and Finance: Legislative Decree 385/1993, Legislative Decree 58/1998

Constitutional case law:

Constitutional case law on property rights (article 42):

- locations: judgments 30/1975, 3/1976, 58/1980, 116/1987, 1028/1988, 108/1986
- agricultural leasing: judgments 155/1972, 301/1983
- building activity and distances: judgment 120/1996
- urban and landscape building limitations: judgments 64/1963, 6/1966, 55/1968, 56/1968, 188/1972, 97/1982, 9/1983, 233/1983, 391/1989, 417/1995, 167/1999
- expropriation and compensation: judgments 61/1957, 67/1959, 5/1980, 231/1984, 355/1985, 530/1988; 348/2007; 24/2009; 338/2011
- *occupazione appropriativa*: judgments 384/1990, 188/1995, 296/1996, 148/1999; 349/2007

Constitutional case law on freedom of economic initiative (article 41):

- limits to private economic activity: judgments 78/1958; 5/1962; 45/1962; 4/1962; 40/1964; 30/1965; 27/1969; 237/1975; 548/1990; 63/1991; 439/1991; 427/1995; 196/1998; 190/2001; 27/2003



- protection of competition: judgments 223/1982; 241/1990; 14/2004
- freedom of contracts: judgments 30/1965; 241/1990
- discrimination of business activity on territorial ground: judgments 64/2007; 391/2008



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CATEGORIZATION OF ECONOMIC RIGHTS: SPAIN (I)

Maribel González Pascual¹

Question 1: Identification of economic rights

The Dictatorship-regime sought to provide for Spain's well-being by adopting a policy of economic self-sufficiency. Autarchy was rooted for more than half a century in the advocacy of important economic pressure groups. This autarchy was softened by the Spanish Stabilization plan adopted in 1959, which converted Spain's economic structure into one more closely resembling a free-market. However, this new economic structure had several structural flaws, which were deepened during the 70s economic crisis.

Therefore, one of the major challenges of the new constitutional system was the economic structure. In this regard, the main decision was adopted by the democratic political parties even before the draft of the new Constitution. On October 1977 the main political parties signed the "*Moncloa Pacts*", which explicitly stated that Spain would be shaped as a free-market economy.

In fact, article 38 Spanish Constitution (SC) enshrines the freedom to conduct a business within the framework of a free market economy. During the Constituency it was proposed to enshrine a "Social market economy" but it was disregarded without much debate. On the one hand, the "*Moncloa Pacts*" had been signed by the two main political parties at that time, on the other hand, it was thought that within the Constitution there were several provisions which could allow for a more "social understanding" of the economical system.

In this regard, several constitutional provisions entitle the public power to intervene in the economy. Besides, according to Article 1 SC, Spain is a Welfare State. The Spanish Constitution enshrines indeed many welfare rights

Title III Part V Spanish Constitution (Economy and Finance) rules on the role that the public power could play in the field of a free-market economy. Article 128.2 SC recognises the public initiative in economic activity. Moreover, it states that "essential resources or services may be reserved by statute to the public sector especially in the case of monopolies. Likewise, public intervention in companies may be imposed when the public interest so demands". In addition, according to article 129.2 SC authorities shall efficiently promote the various forms of participation in the enterprise and shall encourage cooperative societies by means of appropriate legislation. Finally, article 131 SC provides that the State shall be empowered to plan general economic activity by a statute in order to meet collective needs.

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In fact, article 38 SC itself seems to curtail freedom to conduct a business' scope by stating that public authorities guarantee and protect [...] the safeguarding of productivity in accordance with the demands of the general economy and, as the case may be, of economic planning".

These articles lead many scholars to consider that fully different economic systems could be constitutional. However, none of these articles had a real impact in practice and nowadays it is generally stated that the Spanish Constitution foresees a free-market economy. Actually, any statute has ever been passed relying on article 131 SC. In fact, the above mentioned provisions are interpreted as a reminder of the Welfare State. Therefore, their actual meaning is that the Welfare State must not be hampered by freedom to conduct a business. This statement is important from the point of view of the social rights which may determine the real scope of the freedom to conduct a business.

In this regard article 45 SC establishes that everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it. According to Article 51 SC "public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests"

In addition, Spanish Constitution recognises several labour rights and empowers workers to participate in the economy actively In this regard, article 7 SC states that trade unions and employers' associations contribute to the defence and promotion of the economic and social interests which they represent. This provision is included in the Constitution preamble; therefore it is in practice almost impossible to amend it.

Furthermore, article 28 SC enshrines the right to strike and several trade unions' rights. Article 37 SC recognises the right to collective bargaining and the legal binding of collective agreements whereas article 40 SC enumerates several rights related to labour conditions². Finally, according to article 129.2 SC public authorities must facilitate access by workers to ownership of the means of production.

However, the labour relation model is characterised by high rates of coverage by collective negotiation but with low labour union affiliation rates. This high coverage is explained as a labour union conquest in exchange for the redirection of social conflict towards agreement scenarios via negotiations between government and union leaders at times of democratic fragility. Nevertheless, this model is particularly unstable in legal terms as it is based on eventual political agreements.

On the long run freedom to conduct a business has gained power and it can be defined as a core economic fundamental right. However, it was not deemed as such fundamental right till the 1990s by the Constitutional Court.

² Art. 40.2 SC "public authorities shall promote a policy guaranteeing professional training and retraining; they shall ensure labour safety and hygiene and shall provide for the need of rest by limiting the duration of working day, by periodic paid holidays, and by promoting suitable centres".



Both scholars and courts tended to consider freedom to conduct a business not as fundamental right but as an institutional guarantee of the free-market³. Such an understanding implied that, in principle, public measures impinging upon freedom to conduct a business were constitutional, if they did not jeopardise the main features of the free-market. Nevertheless, the Constitutional Court eventually asserted that freedom to conduct a business is but a fundamental right⁴. Thus, any public measure which might affect it has to be not only reasonable but proportional⁵.

Scholars have wondered whether this shift derived from the role of freedom to conduct a business within the EU. In this regard, it must be pointed out that the constitutional evolution has curtailed the restrictions that the State may impose on freedom to conduct a business. Therefore, by changing its approach the Constitutional Court avoided the conflict with the EU Law, which had a functional and wider conception of the freedom to conduct a business.

Spanish Supreme Court has indeed relied on freedom to conduct a business to evaluate decisions made by the government in the framework of the market liberalization⁶. In fact, the former Constitutional Court's reasoning could have impaired the liberalization process instigated by the EU. Unluckily, Constitutional Court overruled its own case law without further argumentation, and then it is impossible to ascertain to what extent EU law influenced on its new approach.

To sum up, the Spanish Constitution recognises the freedom to conduct a business as a fundamental right. Originally it was deemed as an institutional guarantee but it has been strengthened. Moreover, several provisions related to the role of the public power in the economy marked had faded away. Nevertheless, environmental and consumers' protection are recognised as limits to the freedom to conduct a business. Labour Rights are also a limit to this fundamental right but their scope has been weakened along the years.

Finally, it is worth mentioning that article 35 SC enshrines the right to freely choose the profession. However, this right has been comprised by the freedom to conduct a business. In fact free choice of profession as fundamental right has been quite underdeveloped by both Courts and scholars. Nevertheless, Constitutional Court and National Competition Commission have relied on it to restrict Regions' powers on the ruling of professional qualifications⁷.

In addition, article 35 SC has to be linked to article 36 SC, according to which a statute shall regulate the legal status of Professional Bodies. Constitutional Court has clearly stated that the legislator has room to decide the

³ See the following judgments of the Constitutional Court *SSTC 83/1984, 123/1991, 136/1991 y 225/1993*.

⁴ Judgments of the Constitutional Court 227/ 93 and 112/2006

⁵ It is worth mentioning that most Spanish Scholars and Courts follow the so-called German proportionality test

⁶ See Judgments Spanish Supreme Court (Administrative Chamber) 2.04.2002 and 7.11.2005

⁷ Judgment Constitutional Court 201/2013



structure and powers of Professional Bodies, because art. 36 SC does not establish a fundamental right but an institutional guarantee. Professional Bodies must endure but they can be shaped in several ways⁸.

Nowadays, is being drafted by the Government a new statute of Professional Bodies, whose main goal is to reduce their competences to reinforce the freedom of access and exercise of profession⁹. In this regard, it has been quite often stated that Professional Bodies in Spain have a negative impact on free competition because the reserves of activity and mandatory membership are not proportionate. Therefore, important constraints on effective competition in this market probably remain in place¹⁰. Nevertheless, the Bill on Professional Bodies is being quite controversial and the new statute has not even been tabled.

According to most Spanish Scholars right to private property must be considered also a core economic right of the Spanish Constitution. This right is recognised by article 33.1 SC. However this right has been weaker than the freedom to conduct a business in practice, being the reasons for that on the one hand the understanding of the so-called “social function” of the property and, on the other, the flaws of the taking rules. Most scholars indeed insist on the need to reformulate the understanding of private property in the Spanish legal system. According to them; property right is not particularly valued by the Spanish society for historical and religious grounds. In their view, this approach is shared both by the legislators and the courts and it has diminished the right in all the cases (intellectual property included).

Art 33.1 SC states that social function of the right to property shall determine the limits of their content. Social function’s scope has been determined by interpreting article 33.2 SC consistently with other constitutional provisions related to welfare rights and economic development. Therefore, the social function is established in accordance with the land uses.

In this regard, for instance, rural land’s social function has been determined by taking into account four general goals. These are the following: promotion of favourable conditions for social and economic progress and for a more equitable distribution of regional and personal income within the framework of a policy of economic stability (Art. 40 SC); right to enjoy an environment suitable for the development (art. 45 SC); the subordination of the entire wealth of the country, irrespective of ownership, to the general interest (Art. 128.1 SC); and the modernization and development of all economic sectors and, in particular, of agriculture, livestock raising, fishing and handicrafts, in order to bring the standard of living of all Spaniards up to the same level (Art. 130 SC).

⁸ Judgment Constitutional Court 330/1994

⁹ THIS STATUTE HAS BEEN REPEATEDLY RECOMMENDED BY THE TROIKA IN THE FRAMEWORK OF THE FINANCIAL ASSISTANCE FOR THE RECAPITALISATION OF FINANCIAL INSTITUTIONS IN SPAIN. SEE FINANCIAL ASSISTANCE PROGRAMME FOR THE RECAPITALISATION OF FINANCIAL INSTITUTIONS IN SPAIN. FIRST REVIEW - AUTUMN 2012 AND SPAIN - POST PROGRAMME SURVEILLANCE SPRING 2014 REPORT

¹⁰ See the reports of the National Competition Commission and its predecessor, the former Spanish Competition Tribunal. “Report on the free exercise of professions. Proposal to adapt the provisions on self-regulated professions to the rules of free competition prevailing in Spain” (1992). “Competition in Spain. Current state and new proposals” (1995) Report on the professional services sector and professional associations” (2008) Report on professional colleges after the transposition of the services directive (2012). See also Commission Staff working Documents related to Spain National Program Reforms (2012 and 2013)



This reasoning has been generally shared by scholars. However, its reach is profoundly disputed because it might be undermining owner's individual rights, inasmuch as these are fully comprised by the social function. The limitations to the owner's rights are evaluated by applying a simple reasonable test in almost every case. This understanding of the property right was supported over the years by the Constitutional Court. In this regard, it might have been influenced by the so-called "Rumasa case", which engendered a complicated and disputed case law¹¹.

It is worth mentioning that Spanish Constitution allows private assets to be declared public property by statute (art. 132 CE). This provision has entitled public authorities to declare public property what might be called environmentally sensitive lands, such as wetlands, coastal zones and habitats for endangered species. These declarations have been controversial for the flaws of the Takings Law 1954¹². Takings remain indeed as an unresolved matter in Spain

Art. 33.3 establishes that no-one may be deprived of his property and rights, except on justified grounds of public interest against proper compensation and in accordance with the provisions of the law- Three main doubts arise regarding the interpretation of this provision. Firstly, must the compensation be paid before the taking? Secondly, might the law might be applicable only to a single case? Finally, which is the meaning of "proper compensation??"

Constitutional Court has established that compensation might be paid after the taking but the amount must be foreseen before it by law. However, it can be established by a single-case-rule. Moreover, it has not equated proper compensation with market value compensation.

Scholars have pointed out that takings are normally foreseen on single-case-rule or even implicit within the Town Planning. What is worse, if the taking has been decided by a statute, the owner cannot challenge it directly and if it has been implicitly established by a Town Planning, the owner must also challenge it. In other words, the taking itself cannot be challenged separately in most of the cases. Moreover, in many cases the taking is serviced by public notice. As a result many owners are not aware of the taking till the challenge deadline is already over.

To sum up, the Spanish Constitution enshrines the right to property right but it has not been properly guaranteed. The Taking Act should be amended and the case law should apply a proportionality test instead of a reasonableness test.

¹¹By a legislative decree of 23 February 1983 the Government ordered the taking in the public interest of all the shares in the companies comprising the RUMASA group, including those of the parent company. The State, which was the beneficiary of this measure, was to take immediate possession of the expropriated property. The royal decree law was confirmed on 2 March 1983 by the Chamber of Deputies. Later on it was replaced by Law 7/1983 of 29 June 1983. They gave rise to two appeals to the Constitutional Court, which dismissed the appeals (Judgments 38/1983 and 166/1986). These judgments were very controversial particularly because the taking was made by a Real Decree Law, accepting both the power of the government and a single-case rule to decide on an expropriation.

¹² Actually the Spanish Ombudsman recommended a full review and amendment of the Taking Act. Such recommendation has not been attended yet. Spanish Ombudsman. Annual Report. 2001



It must be bear in mind that both freedom to conduct a business and private property are fundamental rights according with article 53 Spanish Constitution. The fundamental rights that figure in Chapter II SC (arts 14-38) are binding on all public authorities. This means that there is no need for rules to be enacted to guarantee them. Furthermore, only statutes may regulate their exercise. This means that the Parliament must intervene to determine the scope of the right and to lay down the pertinent restrictions. Administrative regulations are only admissible if the play a marginal role. Finally, the legislator must respect the “essential content” of the right. This intricate expression means at least that the legislature is not free to impose any limitations it wishes.

Nevertheless, neither private property nor freedom to conduct a business can be protected by an individual complaint (*recurso de amparo*) before the Constitutional Court. Therefore, individuals are not allowed to bring cases related to these rights in principle to the Constitutional Court¹³, although laws regulating them can be challenged before Constitutional Court. In addition, they are fully guaranteed by ordinary judges. The decision to establish different regimes of legal protection may lead to consider that some rights are intrinsically more relevant than others. Such an interpretation has been disregarded by most of Spanish scholars.

However, rights enlisted in Chapter three are weaker. According to article 53.3 SC the principles recognised in Chapter Three of the Constitution, may only be invoked before ordinary courts in accordance with the legal provisions for implementing them¹⁴. Constitutional Court may be asked to review the validity of a piece of legislation that is claimed to disregard the social and economical goals the Constitution sets forth, but it will be extremely deferential to the legislature in such cases.

Last but not least, it is necessary to analyse briefly the constitutional provisions related to the Regions (*Comunidades Autónomas*), because they are entitled to rule on economic matters. In fact, the constraints on the single market imposed by Regional statutes and Regulations are one of the most controversial issues nowadays on the freedom to conduct a business. Key economical players may differ among Regions and seek for a different economic policy.

In this regard, the agricultural reform played a very important role in Regions such as Andalucía and Extremadura during the 1980s and both Regions took well-known takings measures. Currently, the main conflict arises regarding free competition and retail distribution sector. Regions such as Cataluña tend to

¹³ There are strong connections between fundamental rights that happen to have different guarantees. Right to a fair trial, for instance, can be protected by an individual complaint before the Constitutional Court. Therefore, if a limitation either on private property or on freedom to conduct a business impinges upon right to a fair trial, the Constitutional Court will address the matter in the frame of an individual complaint procedure.

¹⁴ As a matter of fact several welfare rights are enshrined in Chapter Three. Nevertheless, rights to belong to trade unions, to strike and to collective bargaining are subject to the general regime of full protection



protect the small enterprises¹⁵, which are particularly strong in its territory, whereas Regions such as Madrid prefer a totally free competition on this sector¹⁶.

Title VII Spanish Constitution enumerates the Powers allocated to the State, whereas Statutes of Autonomy set out Regions' powers. Therefore, Constitution and Statutes of Autonomy have to be put together. Statutes of Autonomy express the common will of the region that asks for self-government and the national Parliament that finally grants it. Both enactment and amendment of Statutes of Autonomy require the consent of the Spanish Parliament. However, once the Statute of Autonomy is enacted, the Region's parliament has to consent any modification of it.

Currently there are 17 Regions in Spain. The Constitution distinguished two ways to achieve autonomy: a slow one and a fast one. There were thus stark differences in the way Regions were formed. However, in the 1990s the Regions that have been awarded fewer competences amended their Statutes of Autonomy to expand their sphere of self-government. This equalization was not complete. Moreover, since 2006 seven Regions have amended their Statute of Autonomy. Consequently, important differences among Regions remain.

Unity, autonomy and solidarity are laid down in the Spanish Constitution as general principles ruling also the power's decentralization. Particularly important for the aim of this report is the principle of economic unity, connected to the principle of equality.

Article 139.1 proclaims that all Spanish citizens have the same rights and obligations in any part of the territory of the State. Obviously, this clause has been read restrictively. Besides, it is consistent with article 149.1.1 which empowers central State to regulate the basic conditions that guarantee the equality of all Spanish citizens in the exercise of constitutional rights and the fulfilment of constitutional duties. Both articles have played a key role, for instance, to safeguard equal access and exercise of the right to freely choose the profession

Article 139.2 SC provides that no authority can adopt measures that directly or indirectly create obstacles to the free movement of persons and goods in the national territory. The Constitutional Court has had to strike a balance here: on the one hand the Regions are authorized to enact their own legislation on economic matters; on the other hand, limits need to be established to prevent the national market from being fragmented. The Constitutional Court has relied on the equality principle and on the distribution of powers between State and Regions on economic matters.

¹⁵ It is remarkable that, according to article 45.5 Cataluña Statute of Autonomy, the Regional Government shall protect in "particular the productive economy and the activity of self-employed entrepreneurs, and of small and medium-sized enterprises"

¹⁶ Report on conditions of competition in the retail distribution sector (National Competition Commission 2007)- Report on the retail distribution sector's structure and its impact on prices in the eurozone. (2012 Banco de España)



In this regard, focusing on the development of a Spanish single market, the main powers of the State rely on article 149.1.13 SC, which empowers the State to establish the general ordering of the economy, and on the above mentioned Article 149.1.1 SC.

However, Regions have also important economic powers. In this regard, even Regions with fewer competences on the field are empower to rule on internal trade, promotion economic activity within the Region, tourism, cooperatives, etc¹⁷. Regions with more competences are entitled to rule also on promotion and defence of competition¹⁸.

¹⁷ Statute of Autonomy Principado de Asturias (Art. 10.14, Art. 10 15, Art. 10.22, Art. 10.27)

¹⁸ Statute of Autonomy Cataluña Article 154



Moreover, their competences on trade include in any case the determination of the administrative conditions for exercising the activity; the administrative regulation of all forms of sales and supply in relation to commercial activity, and promotional sales and sale at loss; the regulation of trading hours, while respecting the constitutional principle of market unity; the classification and territorial planning of commercial facilities and regulation of the requirements and the system for installation, extension and change of activity of the said commercial facilities; the establishment and implementation of norms and quality standards related to commercial activity and the adoption of administrative policing measures in relation to market discipline¹⁹.

Unsurprisingly, these regional competences have provoked differences on the freedom to conduct a business in practice²⁰. In fact, there have been several conflicts and legal developments requested by the EU which will be briefly analysed in Questions 2, 6 and 7

To sum up, Spanish Constitution enshrined the Welfare State, the free market economy, and the Regional State, which were developed and implemented almost simultaneously. EU integration enhanced the free market economy, whereas the welfare State has always been weak. In this regard, labour rights' scope has been reduced along the years, and environment and consumer's protection lack an effective guarantee when faced with entrepreneurial interests. The violation of environment and consumer's protection in the frame of Town planning and House ownership, for instance, has been blatant and well-known. Therefore, it can be said that freedom to conduct a business has become a particularly strong right, whose necessary limits have been surpassed.

However, it has struggled with an incomplete single market within Spain. Regions' powers over commercial activities might have been curtailing this freedom in practice. Nevertheless, several laws have been enacted recently and their implementation in practice remains to be seen. In any case, this new trend might have impacted on the Spanish case law, as it will be briefly explained in question 7

Finally, private property is considered a core economic fundamental right by Spanish scholarship. Nevertheless, the lack of a "private-property culture" has undermined their scope. This short understanding of private property might be the explanation to the difficulties that intellectual property regulation usually faces in Spain. Besides, the taking's provisions should be fully reviewed by the legislator.

¹⁹ Statute of Autonomy Cataluña Article 121

²⁰ Regions have also competences on takings, intellectual property or consumer's protection, however up to now they have not been questioned from the perspective of the enjoyment of an equal economic right within the territory



Question 2: National sources of economic rights

National Legal instruments of economic rights

Freedom to conduct a business

1. Article 38 CE
2. Civil Code and Commerce Code
3. Competence: Law 3/1991 Law 20/2013
4. Liberalization: Law 15/2009, Law 25/2009, Law 1/2010 Law 2/2011, Real Decree Law 8/2011, Law 12/2012, 14/2013, 20/2013
5. Banking and Finance: Law 10/2014, Law 2/1962
6. Environment protection: Law 9/2006, Law 42/2007, Law 45/2007, Law 4/2011, Law 2/2013,
7. Consumers protection Legislative Decree 1/2007

Right to property

1. Art. 33 CE
2. Civil Code
3. Takings Law 16 December 1954
4. Tenancy Law 29/1994, Law núm. 49/2003
5. Intellectual property Legislative Decree 1/1996
6. Town Planning Legislative Decree 2/2008

Regional Legal instruments of economic rights

Regions have legislative powers on consumer and environment protection, internal trade, takings and competence. In this regard several Regional Laws have been approved on these sectors. Regarding intellectual property Regions are entitled to implement the national rules, therefore they have enacted many regulations on the field.



Question 1 dealt with the main trends regarding economic rights in Spain. It must be reminded the particularly weak safeguard or property right, and the challenges faced by the right to freely choose a profession in the framework of the Professional Bodies' powers. It has been explained also the trends in freedom to conduct a business' interpretation. However, it is worth dealing with three current and important issues on the matter; the role of regulatory agencies, the enhancement of liberalization and the changes in labour rights

Nevertheless, it must be pointed out the doubts arising regarding the regulatory agencies and also the deep changes in the liberalization of the economy instigated by the EU.

The independent agencies have played an important role regarding economic rights. The first such agency was the Council of Nuclear Security. Other example is the National Stock Exchange Commission. However the policy on independent agencies in Spain has been recently criticised even by the European Commission²¹.

On 2013 the Spanish Government decided to merge into a single commission all the sector-based regulatory councils which had until then monitored the conditions of free competition in such sensitive markets as telecommunications and energy. The new National Commission on Regulation and Competition has been called into question, among other reasons, because it lacks independence safeguards. Both its financial autonomy and its capacity to hire its own staff are lower than the ones that the former agencies enjoyed. Regarding its competences its powers to watch over free competition has been widened but its *ex post* regulation power has been assigned to a large extent to the Government. Regardless of EU Commission criticisms, the independence of the Agencies has been clearly undermined.

Regarding labour rights' scope it is generally stated that it has been dramatically reduced. The unemployment rate has always been particularly high in Spain but currently it hovers around 25%. As already mentioned, labour relationships has been characterised in Spain on the one hand by the high coverage of collective bargain, on the other, by the dialogue between political and trade unions' leaders. However, this dialogue has rapidly decreased in Spain. In addition, labour policy traditionally has been used as an economic policy in Spain, thus in times of crisis the labour rights' standards tend to be undermine. This trend has implied a steady reduction of labour rights. In a nutshell, the balance between workers and enterprisers has been changed in favour of the later through several labour law reforms.

Among those reforms Decree-Law 3/2012²² bears highlighting. Regarding collective bargain²³, it established the absolute priority of to company-level decisions on working hours, tasks and wages. It also made it easier for

²¹ JOINT LETTER SENT TO THE SPANISH GOVERNMENT BY THE DEPARTMENTS (DIRECTORATES-GENERAL) OF COMPETITION, ENERGY, COMMUNICATION AND ECONOMIC AND FINANCIAL AFFAIRS (29.11.2012). LETTER TO SPANISH INDUSTRY MINISTER JOSE MANUEL SORIA SENT BY NEELIE KROES (11.2.2013)

²² A comprehensive reform of the collective bargain process was encouraged by the Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Spain and delivering a Council opinion on the updated Stability Programme of Spain, 2011-2014 (2011/C 212/01). Much more demanding was the ECB, which explicitly recommended the reinforcement of collective bargaining at company level. Letter sent by Chairman of the ECB and the Governor of the Bank of Spain to the President of Spain (5.8.2011)

²³ It also extended employer's capacity to modify working-time, geographical mobility and functional mobility.



firms to opt out of sectoral agreements²⁴ and it put an end to the practice of extending collective agreements, given that after that one year period of “ultra-activity”, the collective agreements decays and less favourable conditions of higher level agreements, and in their absence (most of the cases), minimum wage and minimum standards of the Labour Law start applying. This reform weakened even more trade unions as collective bargain has clearly lost terrain. Hence, freedom to conduct a business is not constrained by labour rights as in the past, although this should be a temporary state in the framework of a deep economic crisis. In fact, workers’ participation on social and economic decisions is enshrined by the Spanish Constitution as already explained.

Finally, free competition and full liberalization are being encouraged in the framework of the Excessive Deficit Procedure initiated in April 2009. Ever since, among the several recommendations, it is repeated the need to put an end to the low levels of competition in sheltered sectors such as professional services and retail. As already explained, Professional Bodies’ reform has not taken place, however the Support Entrepreneurs (Law 14/2013) has reduced administrative restrictions on administrative requirements and facilitated a fresh start of freelancers. Moreover, it has been deepened the liberalization of the retail sector (Law 12/2012), even the Constitutional Court has supported this trend by imposing it to Regions (see question 7). Last but not least, it has been passed the Market Unity Act, (Law 20/2013), inspired by the EU's Services Directive, but it is broader in scope. Once in force, all legal texts enacted at local, regional and central government level that may be considered inconsistent with the market unity law will have to be amended in the following six months

Question 3: International and European sources of economic rights

International Treaties Ratified by Spain related economic rights (in broad sense)

- International Covenant on Economic, Social and Cultural Rights (and also the optional Protocol)
 - European Social Charter (Spain has not ratified the Additional Protocol to the European Social Charter providing for a system of collective complaints)
 - Convention on the Rights of Persons with Disabilities (and also the optional Protocol)
 - Convention on the Rights of the Child
 - Convention on the Elimination of All Forms of Discrimination against Women (and also the optional Protocol)
-

²⁴ Around 90% of Spanish firms have fewer than 10 employees



- International Convention on the Elimination of All Forms of Racial Discrimination
- 55 Conventions of the OIT

According to the Spanish Constitution, international treaties become binding domestically once they have been published in the *State Official Bulletin* (Article 96.1). The position of international treaties within the domestic legal system remains a subject of debate. From a constitutional standpoint, international treaties are placed above domestic legislation and below the Constitution. No constitutional provision enounces this in a clear way. The so-called 'supra-legality' of treaties is inferred from Article 96.1 of Constitution. This clause states that international treaty provisions may only be derogated, modified or suspended in the way provided for by the treaty itself or according to general international law. Hence, domestic legislation may not, even if enacted subsequently, modify or derogate an international treaty.

The relationship between international treaties and the Constitution engenders further confrontation. The 'infra-constitutionality' of treaties is derived from the clause stating that before ratifying a treaty incompatible with the Constitution, the Constitution requires amendment. This clause is meant to safeguard the supremacy of the Constitution. In any event, the validity of domestic legislation is not affected by international treaties, or conversely the validity of international treaties by domestic norms. As such, the incompatibility of domestic legislation with an international treaty would make the former inapplicable, but not invalid.

Besides, Article 10.2 requires that constitutional fundamental rights be interpreted in conformity with the Universal Declaration on Human Rights and other human rights treaties ratified by Spain. The main human rights treaty used by the Spanish Constitutional as a source of interpretation is without doubt the ECHR. On the basis of this constitutional mandate, the ECHR becomes a source for the interpretation of constitutional fundamental rights

The Constitutional Court has repeatedly rejected human rights treaties as an autonomous parameter with which to assess the validity of domestic legislation. At the same time, the TC has admitted that to an extent, as a result of Article 10.2, the ECHR integrates the content of constitutional rights. Hence, formally, the ECHR has not been awarded a different status from other international treaties, but it is clear from the constitutional case-law that it has special relevance for the interpretation of constitutional rights

Usually, the TC refers to ECHR law to reinforce its own interpretation (*ad abundantiam*). On occasions, the TC incorporates new contents or interpretive criteria from the ECHR and ECtHR case-law, by doing so it widens the Spanish fundamental rights' scope. However, the ECHR has had a very limited impact on economic rights, out of the need to enforce environmental health.



ECtHR had a tremendous impact on the Spanish case law related to environmental health. In this regard ECtHR condemned Spain for allowing excessive noise in its seminal case *Lopez Ostra*²⁵. The Constitutional Court rushed to the reception of this case law through a broad interpretation of the constitutional protection of the home in connection with the protection granted to family and personal privacy (Art.18SC), however it required to establish a direct link between the noise to the damage alleged²⁶.

Later on, the ECtHR held Spain liable again on the basis that it has allowed excessive noise, and the Constitutional Court widened the reach of article 18 SC²⁷. Nevertheless, the Spanish Constitutional Court considered that there was not violation of the fundamental right because public authorities they have attempted to put an end to the nuisance²⁸. This was an inconsistent reading of ECtHR's case law. Actually, Spain was condemned in 2011 on similar grounds²⁹

Therefore, the ECtHR has influenced the Spanish case-law regarding health environment as limitation to commercial activities by demanding the enforcement of the environmental laws. In fact in all these cases the domestic legislation has been breached. Thus, ECtHR declared that the State had not taken all the appropriate measures to minimize the environmental harm.

Nevertheless, the ECtHR has not been fully echoed by the Spanish Constitutional Court but it remains to see whether there will be further developments in the case law. In fact, Constitutional Court's decisions show a trend when dealing with pollution cases and the protection of the environment is being gradually amplified.

Finally, it should be mentioned the Judgment of the Constitutional Court 48/2005, related to property right. The Court dealt with a Law passed by Canarias Island Parliament which provided for the taking of three buildings to broaden Parliament's seat. Constitutional Court deemed it unconstitutional. According to the Court it had violated proportionality principle. This is indeed the judgment of the Constitutional Court declaring unconstitutional a taking. Interestingly the Constitutional Court built its reasoning on the ECtHR's case-law related to Protocol 1 ECHR.

Question 4: EU Charter of fundamental rights

It is difficult to appraise in what extent Spanish public authorities tend to rely on EU fundamental Rights. However, it is worth taking into account on the one hand the statutes which do explicitly quote the EU Charter of fundamental rights, on the other hand the case law of the Constitutional Court on the subject

²⁵ Judgment ECtHR *López Ostra v. España* 9.12.1994

²⁶ Judgment Spanish Constitutional Court 119/2001

²⁷ Judgment ECtHR *Moreno Gómez*, de 16 de noviembre de 2004

²⁸ Judgment Spanish Constitutional Court 150/2011

²⁹ Judgment ECtHR *Martínez Martínez v. España*, 18.10.2011



Firstly, it is remarkable that the Statutes of Autonomy of Baleares, Valencia, Cataluña and Andalucía explicitly state that citizens do enjoy the rights listed in the EU Charter of Fundamental Rights. These Statutes of Autonomy have been recently amended and integrate in their citizens' status the rights enshrined by Spanish Constitution, ECHR, and the EU Charter of Fundamental Rights.

Secondly, several national and regional Statutes state that their aim is, among others, to fulfil the rights listed in the EU Charter of Fundamental Rights. The main fields have been equality and social rights

Equality between men and women

Law 30/2003. National statute (Need to evaluate the impact on the gender)

Law 12/2007 Regional statute Andalucía (Equality between men and women)

Law 13/2007 Regional statute Andalucía (Gender violence)

Law 12/2010 Regional statute Castilla- La Mancha (Equality between men and women)

1/2010 Regional statute Canarias (Equality between men and women)

Law 12/2010 Regional statute Castilla LA Mancha (Gender violence)

Law 8/2011 Regional statute Extremadura (Gender violence)

Law 2/2011. Regional statute Asturias (Equality between men and women)

Law 5/2012 Regional statute Valencia (Gender violence)

Minor protection

Law 12/2008 Regional statute Valencia (minor protection)

Law 14/2010, Regional statute Cataluña (minor protection)

Integration of persons with disabilities

Law 51/2003, National statute (Non discrimination persons with disabilities)

Decree Law 67/2006 La Rioja (employment persons with disabilities)



Law 22/2007. National statute (Sign Language)

Law 2/2013 Regional statute Castilla León (Equal opportunities persons with disabilities)

Social Rights

Law 4/2002 Regional Statute Andalucía (Free placement service)

Law 4/2005 Regional Statute Andalucía (Minimum social salary)

Law 7/2009 Regional statute La Rioja (Social Services)

Law 22/2010 Regional statute Cataluña (Consumer's protection Code)

Law 36/2011 National statute (Labour procedure)

Law 4/2012 Regional Statute Valencia (Social Rights Charter)

Law 4/2013 Regional Statute Andalucía (Right to housing)

Miscellaneous

Law 4/2006 Regional Statute Galicia (transparency)

Law 11/2008 Regional Statute Valencia (Citizens participation)

Law 16/2009 Regional Statute Cataluña (freedom of religion)

Law 5/2010 Regional Statute Canarias (Citizens participation)

Law 2/2014 Regional Statute Galicia (Sexual freedom)

EU fundamental rights have received specific consideration by the Constitutional Court. On the basis of Article 10.2, the Constitutional understood that EU fundamental rights needed to be taken into account in order to interpret constitutional rights. This was not to mean, however, that EU fundamental rights constituted an autonomous parameter of validity of domestic legislation. The cases in which EU fundamental rights have had a major impact on constitutional rights concern the equality principle, particularly sex discrimination at workplace. Increasingly, the Constitutional Court has referred to several sources of EU law, including the EC Treaty, Directives, and ECJ decisions.



In addition, the Constitutional Court quoted the EU Charter of fundamental rights even before the Charter was proclaimed in Nice. In that case, the Constitutional Court reinforced its conclusion about the need to recognize the right to data protection, which lacked explicit textual basis in the Constitution, by referring to the Charter (Article 8). Typically, the Charter has been quoted as a complementary argument, after the Constitutional Court has already reached a conclusion (*ad abundantiam*). It has been pointed out, however, the incorporation of EU fundamental rights through the interpretive channel of Article 10.2 might have not been consistent with the ECJ's primacy claim³⁰. In fact, Spanish scholars do not share this interpretation and do not equate the European Charter of Fundamental Rights with the ECHR. However, Spanish Courts tend to put them together blurring the differences among them in practice.

In the field of economic rights, EU law has been particularly important lately to widen the scope of consumer's protection when faced with credit entities³¹. There have been extremely important developments regarding mortgage contracts and consumer's protection, which will be explained in question 6. Ordinary courts, Supreme Court among them, have relied on EU law to safeguard consumer's rights. However, even though article 17 EU Charter of Fundamental Rights have been repeatedly alleged as a tool to ease the flaws of the Takings Act, the Supreme Court has not drawn any legal consequence from these allegations³².

Finally, ECJ has clearly impacted upon right to intellectual property and equal freedom to conduct a business, encouraging not only legal amendments but new trends on case law. These cases will be also analysed in questions 6 and 7.

Question 5: Jurisdictional issues

✓ Personal

All rights and liberties recognised in Title I, with the exception of those provided by article 23 SC³³, are applicable to foreigners (Art. 13 SC). Constitutional Court has made clear that Laws and Treaties may establish a different treatment but they cannot deny foreigners those rights³⁴. It is, therefore, irrelevant whether the clauses embodying fundamental rights refer to Spanish citizens or to all persons. However, distinctions

³⁰ Dissenting opinion judgment Constitutional Court 26/2014

³¹ General principles of EU law protecting rights have been extremely important regarding labour rights, particularly to safeguard the principle of equality and no discrimination on this field. Spanish Courts, among them the Constitutional Court, has relied on EU law in many cases to widen the labour rights' protection

³² See Spanish Supreme Court judgments 21.10.2011, 13.02.2012, 12.03.2013, 23.07.2013. Paradoxically before the entry into force of the EU Charter it was encouraged its application to taking cases by a Judge the Supreme Court. Judgments 3.04.2001 and 11.06.2001 (Dissenting opinion)

³³ Right to vote and equal access to Civil Service Article 23SC

³⁴ Judgment Spanish Constitutional Court 107/1984



between Spaniards and foreigners may be drawn if they are reasonable. In any case a distinction is not allowed since the right at stake is connected to human dignity.

Spanish legislator has tried repeatedly to link the enjoyment of fundamental rights to the legal residence in Spain. Nevertheless, the Constitutional Court declared unconstitutional a law that required to be legally resident in Spain to exercise the rights of assembly, association, trade union, free legal assistance and education³⁵. Regarding economic rights, the only constraint has been provided, articles 36 and 37 Immigration Act which required that foreigners over 16 years who want to become freelancer as, must obtain a residence permit³⁶.

There is no general clause in the Spanish Constitution that addresses whether legal persons are also covered by Fundamental Rights. Constitutional Court has drawn inspiration from article 19.3 Basic Law Federal Republic of Germany that extends fundamental rights to legal persons if the nature of the right permits it. Regarding economic rights it is generally stated that legal persons must be covered by them.

✓ Territorial

- What is the territorial scope of the protection of economic rights afforded by your member states? Are there **territorial** limitations to such protection? Which?

Fundamental Rights are guaranteed and protected throughout the territory. Moreover, inasmuch they are safeguard by a Constitutional Court the definition of the main elements may not vary among Regions. Furthermore, State has the power to rule fully on fields such as Labour Law, Procedural and also Commercial Law. However, Regions are entitled to rule on economic matters affecting thereby the exercise of several fundamental rights. In fact, as already explained (question 1), they have competences that may impact upon both freedom to conduct a business and property right.

Nevertheless, the Central State is entitled regulate the basic conditions that guarantee the equality of all Spanish citizens in the exercise of constitutional rights and the fulfilment of constitutional duties (art. 149.1.1.SC). Constitutional Court's case law has relied on this competence in many occasions. In fact, it has been used to empower the State to pass a statute (or even a regulation), to restrict a regional regulation's scope or even determine other competences' scope. Regarding freedom to conduct a business, for instance, regional administrative requisites cannot impinge upon equality on the exercise of commercial activities³⁷. Article 149.1.1 SC has even a wider scope regarding right to private property. On the one hand it has been

³⁵ Judgment Spanish Constitutional Court 236/2007

³⁶ However entrance and residence is even facilitated to the foreigners considered entrepreneurs, high-qualified professionals, investors and researchers. Article 61 Support Entrepreneurs Act

³⁷ Judgment Spanish Constitutional Court 82/1986



linked to Article 132.2 SC³⁸ related to public property, on the other Constitutional Court has build on it to consider that the State is empowered to rule on Town Planning³⁹, although Autonomy Statutes grant the competence to Regions and Councils. Regions powers on professions' rules have also been constrained by this article (See question 1)

Finally the Market Unity Act lays down a general principle of 'mutual recognition', whereby any goods or services that have been authorised in one region can be marketed anywhere else. Consequently Regions cannot require additional administrative conditions to the firms and freelancers.

To sum up, the Spanish Constitution guarantee an equal minimum standard in the enjoyment and safeguard of Fundamental Rights. Regions' entitlements on economic matters have been softened by Constitutional Courts' case law on equality.

o Material

Spanish Constitution provided for a strong social rights approach, which could have restrained economic rights' scope. However, out of the private property issues already explained, the Spanish system is characterised by a clear market view. In this regard, social rights must be developed by statutes, which have not fully developed them. In fact, even social rights traditionally held as fundamental rights (such as collective bargain) have been profoundly weakened. Moreover, several problems related the enforcement of both environmental and consumers' safeguard have arisen. In fact, consumers' protection is particularly weak when faced with key entrepreneurial interests (see examples quoted at the end of this question=

✓ Temporal

Economic rights' protection has been clearly strengthened along the years. In fact, even traditional and constitutional restrictions such as labour rights have been diminished. Regarding the changes in economic rights protection it must be pointed out that freedom to conduct a business has been particularly strengthened. Regarding this trend it has to be reminded on the one hand the case law evolution and on the other the legal reforms, most of them related to liberalization and free competition. These legal reforms have been speed up by the European institutions and organism since the beginning of the eurocrisis.

✓ Please offer details as to how different rights are afforded to different **categories of persons** in **different location and policy contexts over time**.

³⁸ Judgment Spanish Constitutional Court 227/1988

³⁹ Judgment Spanish Constitutional Court 61/1997



Consumers' protection and Financial Services.

Doubtlessly, one of Spain's major challenges is its housing market. Spain's economic growth was based on a housing bubble, characterized by an oversized construction sector, home purchasing incentives, inflated prices and low interest rates.

The interest rate increase led to the doubling of mortgages rates. Simultaneously, unemployment and taxes rose while social allowances and salaries decreased. This led to mass evictions. Beyond that, current home prices are often lower than the amount owed on mortgages. Even after a home has been surrendered in settlement of the mortgage, part of the debt may still remain. In fact, private insolvency in the Spanish legal system does not release the individual from the residual debt.

Moreover, both the Spanish Code of Civil Procedure and the Spanish Mortgage Act limited a debtor's possibilities to raise objections in mortgage enforcement, even though Human Bodies Reports have repeatedly stressed the big amount of abusive terms within most of the Mortgage Contracts in Spain⁴⁰.

In fact, a ruling on an unfair contractual term had to be assessed in legal proceedings separate from foreclosure proceedings. Thus, if a contractual term was considered abusive, compensation could be granted but, by then, the home had likely already changed hands. Therefore, one key question was whether a Spanish court was able to grant interim relief in the course of foreclosure proceedings. Ordinary Courts raised this question before the Spanish Constitutional Court and the ECJ.

The Spanish Constitutional Court simply declared the question inadmissible. Even more, the court stated that the ordinary court was trying to shape a hypothetical legal order while such an order could only be set out by the legislative power. The ECJ, from its side, dealt with the compatibility of such a procedure with Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts.

On the one hand, the Spanish court asked whether the Spanish Code of Civil Procedure was an impediment to consumers exercising rights of action or judicial remedies. On the other hand, it was asked whether several clauses in mortgage contracts could imply a significant imbalance to the detriment of the consumer.

On 24 March 2013, the ECJ stated that Directive 93/13 precluded any legislation which does not allow the competent court to assess whether a contractual term is unfair to grant interim relief.⁴¹ Furthermore, the ECJ did not establish whether the terms at stake in the main proceeding should be considered unfair. However, it pointed out that Directive 93/13 was applicable to mortgage contracts. Thus, ordinary courts have jurisdiction in determining whether the terms are unfair, in accordance with EU law. Therefore, the ECJ empowered ordinary courts in a way that the national legislation and the Constitutional Court had failed to do, thanks to the application of EU consumer law to mortgage contracts.

⁴⁰ See, Ombudsman Reports on Economic crisis and Mortgage debtor (2012 and 2013)

⁴¹ Case C-415/11, *Mohamed Aziz v. CatalunyaCaixa*, Judgment of the Court of Justice (First Chamber) of 14 March 2013.



This judgment had a tremendous impact on the Spanish legal system. On the one hand, the Supreme Court declared void the contractual terms that established a minimum interest rate regardless of the Euribor, whenever such contractual terms lacked transparency. Indeed, it declared void the contractual terms of mortgages contracts made by three major banks and established a series of parameters for dealing with further cases.⁴²

On the other hand, the ECJ's judgment influenced the reform of the Mortgage Act passed on 14 May 2013. The new law establishes that ordinary courts may grant interim relief whenever they must decide on the fairness of a term in a mortgage contract. However, fourteen more preliminary rulings related to the new law are pending before the ECJ. The majority of them are related to the second transitional provision of Law 1/2013, regarding pending foreclosure proceedings, which establishes that the court registrar or notary must allow the party seeking foreclosure the possibility to recalculate the interest.⁴³

Another controversial provision is the new Art. 695.4 Spanish Code of Civil Procedure. According to this provision, in the course of mortgage foreclosure proceedings, the right to appeal to a higher court does not exist if the non-application of a contractual term on the grounds that is unfair is dismissed. Ordinary Courts have asked the Constitutional Court whether this article is compatible with the right to a fair trial in conformance with the right to housing⁴⁴. Unfortunately, the Constitutional Court has declared the question inadmissible.⁴⁵ Thus, it is up to the ECJ to decide on compatibility of this provision with EU Law.⁴⁶

Property right and urban tenancy

The tenant's legal protection under the Urban Tenancy Act enacted in 1964 has been particularly problematic. Along the years a great number the tenants have remained under the old (unexpensive) tenancy agreements. The issue was tackled twice by the Spanish Constitutional Court.⁴⁷ According to the Court the social function justified the limitations on the owner rights, who have to bear a tenancy's price well below the market prices. Constitutional Court took into account the right to housing (art. 47 SC) and the protection to the family (art. 39) of the tenants to declare constitutional these provisions. Regarding commercial premises it declared the tenancy's agreements also constitutional relying on the already mentioned articles 35 SC, 38 SC and 40 SC.

⁴² See Spanish Supreme Court judgment 9 May 2013

⁴³ Unicaja Banco Case C-482/13 (Joined Cases [C-482/13](#), C-483/13, C-484/13, C-485/13, C-487/13), Caixabanc (C-58/13), Banco Bilbao Vizcaya Argentaria (C-602/13), Banco de Caja España de Inversiones, Salamanca y Soria, SA (C-75/14), Banco Grupo Cajatres S.A. (C-90/14)

⁴⁴ Other ordinary Courts have declared abusive several terms by relying on the ECJ Judgment, for instance, Judgment 5.05.2014 (Juzgado de lo Mercantil Barcelona)

⁴⁵ Spanish Constitutional Court Decision 71/2014, (10.3.2014)

⁴⁶ Cajas Rurales Unidas (C-645/13)

⁴⁷ See judgments Spanish Constitutional Court 89/1995 and 106/1994



Eventually several legal reforms softened the impact of this rule on private property⁴⁸, although the tenancy contracts signed before 1985 still kept on being ruled by the former Urban Tenancy Act. In any case, Law 29/1994 establish that those rules would be applicable to commercial premises until 1st January 2015, although it will be still applicable to housing tenures

Intellectual Property

Intellectual property has been a very controversial topic in Spain. It could be said that the most problematic one has been the understanding of 'fair compensation'⁴⁹ (Article 5(2)(b) of Directive 2001/29/EC). The definition of this concept implied a preliminary ruling, several domestic courts' decisions and a legal reform. In fact, currently the Spanish parliament is discussing a new rule on the field.

The Spanish law established the duty to pay compensation with respect to manufacturers established in Spain, where they operated as commercial distributors, and persons who acquired outside Spanish territory, the equipment, devices and media appropriate to create reproduction with a view to their commercial distribution or use there. The distributors, wholesalers and retailers, as subsequent purchasers of the equipment, devices and media, must pay compensation jointly and severally with the debtors who supplied them for the products concerned, unless they proved that that compensation had in fact been paid for them.

Padawan marketed CD-Rs, CD-RWs, DVD-Rs and MP3 players, and it was required payment of the 'private copying levy' provided for the years 2002 to 2004. Padawan refused on the ground that the application of that levy to digital media, indiscriminately and regardless of the purpose for which they were intended (private use or other professional or commercial activities), was incompatible with Directive 2001/29. The Audiencia Provincial de Barcelona raised a preliminary ruling

On 21 October 2010 the ECJ delivered its judgement⁵⁰. Firstly, it stated that 'fair compensation' is an autonomous concept of European Union law which must be interpreted in a uniform manner in all Member States. This fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception.

Secondly, it encouraged a 'fair balance' between the rights and interests of the right-holders and those of the users of protected works. However, "given the practical difficulties in identifying private users and obliging them to compensate right-holders for the harm caused to them, and bearing in mind the fact that the harm

⁴⁸ Decree- Law 2/1985 and Urban Tenancy Act 29/1994

⁴⁹ Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned'.

⁵⁰ Case C -467/08, Padawan, S.L., Judgment of the Court of Justice of 21 October 2010.



which may arise from each private use, considered separately, may be minimal [...] it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them'⁵¹.

However, it held that such a system for financing fair compensation was compatible with EU Law if there is a link between the application of the private copying to the digital reproduction equipment, devices and media and their use for private copying. As a consequence an indiscriminate application of the levy to digital equipment, devices and media unrelated to private copy was not compatible with the Directive.

Domestic Courts struggled with the application of ECJ's judgment until the legislator amended the law. Real Decree Law 20/2011 cancelled the duty to pay the compensation of manufacturers and commercial distributors. Instead, the compensation is being paid by the Spanish State. Still, many scholars hold that this provision is not compatible with the Directive inasmuch the burden of the levy is being assumed also by those who do not use the protected works. However, the intellectual property bill maintains this provision.

Question 6: Actors

Spanish Constitution enshrines the involvement in setting economic rights' standards of several institutions and organisations. In this regard it must be mentioned that it explicitly quoted the role of key players such as trade unions (art. 7 SC), workers (129 SC), and consumers' organizations (art. 51). IN fact, article 9.2 SC established the duty of public authorities to facilitate the participation of all citizens in political, economic, cultural and social life.

Besides, as already mentioned, Professional Bodies and regulatory agencies have played also a key role in the development in practice of economic rights.

Question 7: Conflicts between rights

⁵¹ Case C-467/08, Padawan, S.L, par. 46



Spanish legal system provides for the integration of international human rights law in a consistent manner. Article 10.2 SC has been interpreted as an obligation to read national human rights law in accordance with International and European Law. This article has avoided inconsistencies inasmuch Constitutional Court tends to rely on it. In fact, as already explained, Spanish case law has shifted when necessary to avoid any inconsistency. In this regard, it should be borne in mind the changes in freedom to conduct a business' interpretation (question 1). Rights embodied in Autonomy Statutes could have been more controversial but on the one hand they are but a few, and on the other Constitutional Court has emptied them in practice⁵².

Moreover, Spanish legislation is rapidly adapting itself to a full but not flawless liberalization free- market, which homogeneous rules in the territory. Free competition is being encouraged, labour rights have been lowered and Regions' powers' have been restricted by the Unity Market Act (question 2) The unsolved issue is the property rights' safeguards regarding takings, and the balance between property's social function and property as an individual right, although there could be new trends on Spanish case law already mentioned (question 3)⁵³.

Regarding economic rights and important public interests is has already mentioned the controversy related to the balance between political autonomy and freedom to conduct a business. On the one hand free competition has been encouraged, on the other Regions are entitled to rule on economic matters. Traditionally it has been considered that firms are equal within each territory (regional territory) whereas they have a basic status equal throughout the State. This understanding is being challenged firstly and foremost by EU law. This issue is particularly important and complex, that is why I am giving the well-known example of the kind of conflicts that are arising in this issue.

Trading establishments

Regional Rules on trading establishments established several restrictions on the location and size of large retail establishments in Cataluña. In fact, it prohibited the opening of large retail establishments outside consolidated urban areas of a limited number of municipalities. Moreover, they required the application of ceilings as regards market share and the impact on existing retail trade.

European Commission held that these rules were violating freedom of establishment and lodged a complaint before the ECJ. The State alleged that the provisions contended pursued objectives relating to town and country planning and environmental protection. On 24 March 2011 ECJ stated, firstly, that the specific restrictions laid down in the contested legislation affected the possibility of opening large retail establishments

⁵² Judgment Constitutional Court 31/2010

⁵³ There has been only a case before Constitutional Court, still Supreme Court seems reluctant to a change its case law. Therefore, it is too soon to find out whether property right's understanding is likely to change in Spain in a near future.



on the territory of Cataluña. Secondly, Spain had not sufficiently explained why those restrictions were necessary to achieve the objectives pursued. Consequently, Commission's complaint was upheld⁵⁴.

Later on the Spanish constitutional Court dealt with the compatibility of Economic Activity Promotion Act, passed by catalan Parliament to transpose the Directive 2006/123/CE, of 12 December. This statute contained several restrictions on the location of 'large' and 'medium-sized' trading establishments. According to the statute, those restrictions pursued town and country planning and environmental protection.

Constitutional Court, though, held that the Region had not proved sufficiently that the contended rules were necessary to achieve the objectives already mentioned. In the Court's view the Regional Law implied in fact a constriction on the access to the retail distribution. Consequently, it declared the regional provisions unconstitutional⁵⁵. Doubtless this judgment draw inspiration on the above mentioned ECJ's judgment. In fact, Constitutional Court has accepted regional rules on economic matters on the basis of political autonomy. However, Constitutional Court has changed its approach and it accepts restrictions on free competition in the same cases as the ECJ does⁵⁶.

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⁵⁴ Case Case C-400/08, European Commission v. Kingdom of Spain., Judgment of the Court of Justice

⁵⁵ Judgment Constitutional Court 193/2013

⁵⁶ See also Judgment Constitutional Court 26/2012



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CATEGORIZATION OF ECONOMIC RIGHTS: SPAIN (II)

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QUESTION 1: IDENTIFICATION OF ECONOMIC RIGHTS

Question 1: Identification of economic rights

- ✓ Which rights are considered in your country as economic rights?
- ✓ Amongst those rights, which are considered 'core'?

The idea is to get an overview of what are considered (core) economic rights in EU Member States.

Specify whether the notion "economic right" is consolidated in your country and the sources of the categorisation (legal rules, case law, definition provided by legal scholars, praxis) and whether there are disagreements/developments in the notion of economic right and their core elements.

Please, keep in mind that the category of economic rights is not a stable one: it has to be identified by both the historical background that characterizes the national approach to the definition of economic rights, and the interaction between economic rights with social rights (that potentially make it difficult to define the boundaries of economic rights).

- ✓ **Which rights are considered in your country as economic rights?**

Economic rights can be found in the Spanish Constitution in its Title I, named "*Fundamental Rights and Duties*"; concretely in Chapters 2 and 3, dedicated to "*Rights and Freedoms*" and to "*Principles governing Economic and Social Policy*" respectively. The inclusion of these rights within Chapter 2 or Chapter 3 is important because the rights included in Chapter 2 are considered justiciable rights, whereas the rights included in Chapter 3 are considered as directive principles of State policy. This different level of guarantee is set up in the constitutional

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text in article 53 (Chapter 4): Guarantee of Fundamental Rights and Freedoms⁴. Moreover, there is also a different level of guarantees between rights included in Chapter 2. Actually, the Chapter is divided in two sections, with the rights included in the first Section showing the highest legal guarantees. For this reason, the Constitutional Court has stated that only the rights included within Section 1 of Chapter 2 of the Spanish Constitution (articles 15 to 29), together with the principle of equality (article 14) can be defined as “fundamental rights” (Jimena Quesada, L., 2009).

In relation with the first fundamental economic rights considered by the UN and the EU the right to an adequate standard of living- (see Table 1), the Spanish Constitution makes an explicit mention to three basic components of this right: the rights to education, health protection and adequate housing. Article 27 recognizes the right of all Spanish citizens to education, being elementary education compulsory and free, and establishes that the public authorities must guarantee this right⁵. As the right to education is included in Chapter 2, Section 1 of the Constitution, it is a justiciable fundamental right. This is not the case for the rights to health protection and to enjoy a decent and adequate housing, that are included within Chapter 3 of the Spanish Constitution, in articles 43 and 47 respectively⁶.

(TABLE 1)

The second fundamental economic right considered by the UN and the EU legislation (see Table 1) is the right to work. This right is recognized in article 35 of the Spanish Constitution, including the right to the free choice of a profession and to the advancement through work. Moreover, according to the Spanish Constitution, workers must receive a sufficient remuneration and cannot be discriminated because of their sex⁷. The rights

⁴ Article 53, Chapter 4

1. The rights and freedoms recognized in Chapter 2 of the present Part are binding on all public authorities. Only by an act which in any case must respect their essential content, could the exercise of such rights and freedoms be regulated, which shall be protected in accordance with the provisions of section 161(1) a).

2. Any citizen may assert a claim to protect the freedoms and rights recognized in section 14 and in division 1 of Chapter 2, by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection (recurso de amparo) to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognized in section 30.

3. Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by the public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them.

⁵ Article 27, Chapter 2

1. Everyone has the right to education. Freedom of teaching is recognized.

4. Elementary education is compulsory and free.

5. The public authorities guarantee the right of all to education, through general education programming, with the effective participation of all sectors concerned and the setting-up of educational centres.

⁶ Article 43, Chapter 3

1. The right to health protection is recognized.

2. It is incumbent upon the public authorities to organize and watch over public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all in this respect.

Article 47, Chapter 3

All Spaniards have the right to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation. The community shall have a share in the benefits accruing from the town-planning policies of public bodies.

⁷ Article 35, Chapter 2



of the workers to set up or to join a trade union, to go on strike and to collective labour bargaining are presented in articles 28 and 37⁸ of the Constitution. These articles are set up in Chapter 2 and therefore are justiciable rights and, in the case of the right to set up or to join a trade union and to go on strike, it is also a fundamental right, but this is not the case of other rights related to work and also included in the Constitution and that are part of article 40, Chapter 3: the rights to professional training and retraining guarantee, to labour safety and hygiene and to rest⁹.

The third fundamental economic right set up by the UN and the legislations, the right to a BIG, is guaranteed by means of the Social Security systems, set up in the Spanish Constitution in article 41. Additionally to this, a concrete mention to guarantee an adequate income for old age people it is made in article 50¹⁰. These rights, included in Chapter 3, are not justiciable, but directive principles of State policy.

Regarding other economic rights, the right to private property is recognized as a justiciable right by the Spanish Constitution, article 33¹¹, and the right to intellectual property, included in article 20¹², is both, justiciable and

1. All Spaniards have the duty to work and the right to work, to the free choice of profession or trade, to advancement through work, and to a sufficient remuneration for the satisfaction of their needs and those of their families. Under no circumstances may they be discriminated on account of their sex.

⁸ Article 28, Chapter 2

1. All have the right to freely join a trade union. The law may restrict or except the exercise of this right in the Armed Forces or Institutes or other bodies subject to military discipline, and shall lay down the special conditions of its exercise by civil servants. Trade union freedom includes the right to set up trade unions and to join the union of one's choice, as well as the right of trade unions to form confederations and to found international trade union organizations, or to become members thereof. No one may be compelled to join a trade union.

2. The right of workers to strike in defence of their interests is recognized. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services.

Article 37, Chapter 2

1. The law shall guarantee the right to collective labour bargaining between workers and employers' representatives, as well as the binding force of the agreements.

2. The right of workers and employers to adopt collective labour dispute measures is hereby recognized. The law regulating the exercise of this right shall, without prejudice to the restrictions which it may impose, include the guarantees necessary to ensure the functioning of essential public services.

⁹ Article 40, Chapter 3

2. Likewise, the public authorities shall promote a policy guaranteeing professional training and retraining; they shall ensure labour safety and hygiene and shall provide for the need of rest by limiting the duration of working day, by periodic paid holidays, and by promoting suitable centres.

¹⁰ Article 41, Chapter 3

The public authorities shall maintain a public Social Security system for all citizens guaranteeing adequate social assistance and benefits in situations of hardship, especially in case of unemployment. Supplementary assistance and benefits shall be optional.

Article 50, Chapter 3

The public authorities shall guarantee, through adequate and periodically updated pensions, a sufficient income for citizens in old age. Likewise, and without prejudice to the obligations of the families, they shall promote their welfare through a system of social services that provides for their specific problems of health, housing, culture and leisure.

¹¹ Article 33, Chapter 2

1. The right to private property and inheritance is recognized.

2. The social function of these rights shall determine the limits of their content in accordance with the law.

3. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law.

¹² Article 20, Chapter 2

1. The following rights are recognized and protected:

a) the right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction



fundamental. Within the right to intellectual property, the Spanish Constitution includes the right to literary, artistic, scientific and technical production and creation. Thus, intellectual property is protected by the constitutional text, as far as “production” is understood as the outcome of those creative activities.

Another justiciable economic right is the freedom to conduct a business, recognized within the framework of the market economy in article 38 of the Spanish Constitution¹³. Finally, the protection of citizens as consumers and users can be found in the Constitutional text, in article 51. This protection is not considered a justiciable right, but a directive principle of state policy¹⁴ (see Table 1).

✓ **Amongst those rights, which are considered ‘core’?**

As already mentioned, the Spanish Constitution differentiates between the rights included in Chapters 2 and 3, granting the first ones higher legal guarantees than the second ones. Consequently, justiciable economic rights, those set up in Chapter 2, are considered the core economic rights in the constitutional text, while the rights included in Chapter 3 are not. Thus, the following rights are considered as core or central rights, :

- The right to education;
- The rights to work and to the free choice of employment, no discrimination by sex, just remunerations and equal opportunities for all to be promoted;
- The right to form and join trade unions, to collective labour bargaining and to go on strike in order to defend workers interests.
- The right to own private property and the freedom to conduct a business, rights that define the economic model;

b) the right to literary, artistic, scientific and technical production and creation

c) the right to academic freedom

d) the right to freely communicate or receive truthful information by any means of dissemination whatsoever. The law shall regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms

¹³ Article 38, Chapter 2

Free enterprise is recognized within the framework of a market economy. The public authorities guarantee and protect its exercise and the safeguarding of productivity in accordance with the demands of the general economy and, as the case may be, of economic planning.

¹⁴ Article 51, Chapter 3

1. The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests.
2. The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them on those matters affecting their members, under the terms established by law.
3. Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic trade and the system of licensing commercial products.



QUESTION 2: NATIONAL SOURCES OF ECONOMIC RIGHTS

Question 2: National sources of economic rights

✓ Where are these rights laid down at national level (constitutions or constitutional instruments, special (ie. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

The idea here is to present the legal and policy framework which forms the basis of national economic rights protection in your country.

➤ Please describe the main legal sources of economic rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);

➤ Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of economic rights in your country, in terms of framework and substantial standards (not enforcement);

➤ Please indicate whether significant developments have recently taken place in this respect;

➤ Please, analyse the main trends in public law protection of economic rights, distinguishing the approaches both on the bases of the different role of legislation and case law, so as on the ground of the different macro-areas of property right, business regulation and labour market.

✓ **Where are these rights laid down at national level (constitutions or constitutional instruments, special (ie. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?**

Former Question 1 shows the economic rights recognized by the Spanish Constitution (see also Table 1). All the aspects set within this Question 2 are answered regarding the three economic rights object of a deeper analysis within WP5: recognition of professional qualifications, intellectual property and consumers' protection.

Recognition of professional qualifications



Royal Decree 1837/2008 incorporates to the Spanish legislation the Directive 2005/36/EC of the European Parliament and of the Council, and the Directive 2006/100/EC of the Council, relative to the recognition of professional qualifications and to certain aspects related to the pursuit of the law profession. The aim of this national law is the establishment of rules to allow the practice of a regulated profession in Spain, through the recognition of professional qualifications obtained in other member States of the European Union. This recognition has, exclusively, professional effects, that is: the beneficiaries of it are professionals, not students.

The recognition of professional qualifications is applied to the nationals from:

- The Member States of the European Union
- The three signatory States of the European Economic Area (Norway, Island and Liechtenstein)
- Switzerland, by means of a bilateral agreement with the European Union

The Ministry of Education, Culture and Sports, through the Sub-directorate General for Degrees and Recognition of Qualifications, is the coordinator body in Spain for the implementation of the Directive 2005/36/EC on the recognition of professional qualifications. The administrative bodies with competence to recognize foreign professional qualifications are different, depending on the degrees (the Ministry that has a relation with the concrete profession or the Autonomous Communities¹⁵).

The transposition of the EU directives about recognition of professional qualifications into the national legislation can be considered a strength of the Spanish legal framework. As it is indicated above, there is also a procedure for the performance of this recognition, where the competence exercised by the Ministries and Autonomous Communities. We have not found any evidence of weaknesses in the legal protection of this economic right.

Intellectual property

In Spain, intellectual property rights are recognized by the Constitution (see Table 1) and by the Legislative Royal Decree 1/1996, which approves the Restated Text of the Law on Intellectual Property. This legal text has undergone several modifications through subsequent laws. Among them, Law 5/1998, which incorporates to the Spanish legislation the Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, and Law 23/2006, modifying the Restated Text of the Law on Intellectual Property, must be highlighted.

Industrial property is also regulated by three Spanish laws: Law 11/1986, on Patents, Law 17/2001, on Trademarks and Law 20/2003, on Legal Protection of the Industrial Design.

¹⁵

<http://www.mecd.gob.es/educacion-mecd/areas-educacion/universidades/educacion-superior-universitaria/titulos/homologacion-titulos/reconocimiento-titulos/Solicitud-y--rganos-competentes.html>



Both the Restated Text of the Law on Intellectual Property and the legal texts on patents, trademarks and industrial design protection were modified by Law 19/2006, which enlarged the means of enforcing intellectual and industrial property rights and established procedural rules to facilitate the implementation of several Community regulations.

Articles 148 and 149 of the Spanish Constitution set up, respectively, which matters can be assumed by the Autonomous Communities and which other belong to the State. Article 149 establishes that legislation on intellectual and industrial property is an exclusive competence of the State; the Autonomous Communities only have executive powers, recognized in their respective Statutes.

The instrument to implement the intellectual property policy in Spain is the Sub- directorate General for Intellectual Property, attached to the Directorate General for Cultural Policy and Industries of the Ministry of Education, Culture and Sports. The functions of this Sub directorate General are:

- Communication with the professional and industrial sectors that produce and disseminate creative works
- Proposal of adequate measures to defend and protect intellectual property
- Intellectual property registry
- Relations with the collective societies of intellectual property rights

Additionally, the Commission for Intellectual Property¹⁶, a collegiate body attached to the Sub-directorate General for Intellectual Property, has mediation, arbitration and safeguarding functions in relation with intellectual property rights. It works through two sections:

- ✓ Section One makes solution proposals in the negotiations between intellectual property rights holders or their collective societies and the users of their repertoires, including cable-operators (mediation) and solves conflicts among these actors (arbitration).
- ✓ Section Two safeguards intellectual property rights from infringement by information society services, when the latter cause or can cause property damage to the rights holders.

The main strength related with the legal protection of this economic right is the approval of the Legislative Royal Decree 1/1996, containing the Restated Text of the Law on Intellectual Property, and all the subsequent modifications made in order to transpose EU directives and improve its content.

One of these changes was introduced in 2011 by the Sustainable Economy Law, popularly known in Spain as “Ley Sinde” because of the surname of the Spanish Minister of Culture at that moment. This law pursued to prevent internet downloads and, more concretely, the linking web sites. Since 2008 to 2011, Spain

¹⁶ The Law 2/2011, on Sustainable Economy, has modified Article 158 of the Restated Text of the Law on Intellectual Property in order to introduce the creation of this Commission.



was included with other “pirate countries” in the List 301 of the International Intellectual Property Alliance (IIPA)¹⁷. Thanks to the “Ley Sinde”, it managed to leave this list in 2012.

However, the initial strength that supposed the introduction of this intellectual property law in 2011 has become a weakness in practice because of several reasons:

- Internet users go on downloading
- Increase of P2P, because some link web sites have ceased their activities and, as a reaction, users have revitalized files exchange among them
- The Supreme Court has partially eliminated the regulation of the Section Two of the Commission for Intellectual Property
- Judges do not agree: their position is that linking web sites do not infringe any law: they usually establish that linking is not the same that publicly communicating and, consequently, there is no infringement of intellectual property rights.

As Section Two of the Commission for Intellectual Property (“Comisión Sinde”) has not been able to avoid internet downloads and linking web sites activities, the Spanish Government has promoted a new law that aims to reinforce the power of this Commission. This draft law, not approved yet, known as “Ley Lassalle” making a reference to José María Lassalle, Secretary of State for Culture, aims to modify the Restated Text of the Law on Intellectual Property, approved by Legislative Royal Decree 1/1996, and the Law 1/2000, on Civil Procedure.

The “Ley Lassalle” contains three main elements: greater control on collective societies of intellectual property rights, higher protection for the copyright in Internet through the reinforcement of the Commission for Intellectual Property capacities and a redefinition of the concept of private copy.

The reinforcement of the Commission for Intellectual Property is mainly established in Section Two of the draft law, the one that regulates the procedures to fight infringements of copyrights in Internet. Proposed actions to prevent this include the obligation for Internet service providers to identify the users at the request of a judge and several measures to asphyxiate, economically, the infringers. Besides, the “Ley Lasalle”, only considers private copies, copies made from originals that have been purchased, not rented or borrowed, by the user. Besides, the user must make the copy by his/her own means, without the assistance of a third person. Recordings of contents broadcasted on TV or radio channels are only legal if they are temporal; keeping permanently these copies is forbidden.

¹⁷ The International Intellectual Property Alliance (IIPA) is a private sector coalition of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other markets access barriers. IIPA’s seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software, entertainment software (interactive games for videogame consoles, handheld devices, personal computers and the Internet), and educational software; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.



Consumers' protection

Spanish consumers' rights are regulated by the Constitution (see Table 1) and by Legislative Royal Decree 1/2007, which approves the Restated Text of the General Law for the Defense of Consumers and Users and other complementary laws. This restated text incorporates the Law 26/1984, General Law for the Defence of Consumers and Users, and other Spanish laws transposing European directives on this matter:

- Law 26/1991, incorporating to the Spanish legislation the Directive 85/577/EEC, to protect the consumer in respect of contracts negotiated that do not respect business premises
- Law 47/2002, reforming the Law on Retail Commerce, for the transposition of the Directive 97/7/EC, on the protection of consumers in distance contracts
- Law 23/2003, for the transposition of the Directive 1999/44/EC, on certain aspects related to the sale of consumer goods and associated guarantees
- Law 22/1994, that adapts the Spanish legislation to the Directive 85/374/EEC, concerning liabilities for defective products
- Law 21/1995, that incorporates to the Spanish normative the Directive 90/314/EEC, on travel, holidays and tours packages

In the Spanish Constitution, consumers' protection is not included either in article 148 or article 149, which means that it is not explicitly allocated neither to the Autonomous Communities nor to the State. Thus, consumers' protection is a residual competence that can be assumed by the Autonomous Communities within their Statutes if they wish, as it is indicated in article 149.3¹⁸.

Most of the Spanish Autonomous Communities (Andalucía, Aragón, Canarias, Cataluña, Comunidad Valenciana, Extremadura, Galicia, Baleares, Navarra and País Vasco) have been conferred by their Statutes an exclusive competence on defense of consumers and users; they have complete legislative, regulatory and executive powers and their legislations have preferential application in their territories, being State legislation of a supplementary nature in these cases. The other Communities (Asturias, Cantabria, Castilla-La Mancha, Castilla y León, Madrid, La Rioja and Murcia) have been also conferred competences on legislative development and executive powers, but within the framework of the State basic legislation on this matter. Finally, the Autonomous Cities of Ceuta and Melilla only have executive powers to implement the legislation of the State. Regional laws regulating consumers' protection in all the Autonomous Communities are included in Table 2.

(TABLE 2)

¹⁸ Article 149.3 of Spanish Constitution:

Matters not expressly assigned to the State by this Constitution may fall under the jurisdiction of the Self-governing Communities by virtue of their Statutes of Autonomy. Jurisdiction on matters not claimed by Statutes of Autonomy shall fall with the State, whose laws shall prevail, in case of conflict, over those of the Self-governing Communities regarding all matters in which exclusive jurisdiction has not been conferred upon the latter. State law shall in any case be supplementary of that of the Self-governing Communities.



The instrument to implement the consumers' protection policy at the State level is the recently created Spanish Agency for Consumption, Food Security and Nutrition (Agencia Española de Consumo, Seguridad Alimentaria y Nutrición-AECOSAN), an Institution created by merging the former Spanish National Institute for Consumption and Spanish Agency for Food Security and Nutrition.

AECOSAN is an autonomous organism attached to the Ministry of Health, Social Services and Equality through the General Secretariat for Health and Consumer Affairs. One of its functions, in accordance with article 51 of the Constitution and the Restated Text of the General Law for the Defense of Consumers and Users, is the promotion of consumers and users rights within the Central State Administration's sphere of competence. AECOSAN's unities with competences on consumer affairs are the Sub-directorate General for Coordination, Quality and Cooperation in Consumer Affairs and the Sub-directorate General for Arbitration and Consumer Rights.

All the Spanish Autonomous Communities implement the consumers' protection policy in their respective territories by means of the Directorates General for Consumer Affairs and the Consumer Arbitration Systems.

The Directorate General for Consumer Affairs is the organism responsible for the implementation and coordination of the actions to protect consumers' rights in every Community. It has some peripheral autonomous organisms, with offices in the provinces belonging to the Autonomous Community (Andalucía, Castilla y León, Cataluña, Extremadura, Galicia, Baleares, Canarias y la Comunidad Valenciana).

The Consumer Arbitration System is a voluntary out-of-court procedure whose aim is to attend and solve, with executive and binding character, consumers' complaints and reclamations related with their legally recognized rights, and without prejudice of administrative and court protection. Withing the Consumer Arbitration System, two kind of organisms work: the Consumer Arbitration Boards, which handle the arbitration proceedings, and the Arbitral Tribunals, which solve concrete controversies and issue the awards.

The territorial scope of the Consumer Arbitration Boards may be the Autonomous Community, the province and the municipality (or even an association of municipalities). Every Autonomous Community and City has a Consumer Arbitration Board. Additionally, these Boards exist in ten provinces, forty municipalities and two associations of municipalities. When the territorial scope of the controversies and of the requests for arbitration exceeds an Autonomous Community, the competence lies at the National Consumer Arbitration Board.

Finally, within the instruments to implement consumers' protection policy, we must refer to the Consumer Information Offices and Services. They may be public –as the Municipal Consumer Information Offices (the public organism closer to the citizens)- or private – as the consumers' associations.



Although, as it was remarked above, the Spanish legislation has been modified to transpose the European directives related with consumers and users protection, there are yet some weaknesses in this field and, especially, in the case of distance contracts.

Recently, a directive aimed to deal with these aspects has been approved in the European Union. This is the Directive 2011/83/EU, on consumer rights, amending Directive 93/13/EEC and Directive 1999/44/EC and repealing Directive 85/577/EEC and Directive 97/7/EC. The European norm looks for higher legal certainty in distance contracts for both, consumers and sellers, introducing measures to avoid consumers' lack of protection.

In order to adapt the Spanish normative to the Directive 2011/83/EU, the Government has approved a draft law to modify the Restated Text of the General Law for the Defense of Consumers and Users and other complementary laws. The main elements of this draft are:

- More and better pre contractual information for consumers and users, particularly for distance contracts
- New guarantees for distance contracts cancellation will be introduced. The time limit is increased until 14 calendar days (it is 7 working days now) and it will be automatically extended to 12 months if firms do not inform to the consumers
- New rights for consumers and users, for example regarding delivery times or the loss or damage of purchased goods. This is a relevant aspect, taking into account the growth of e-commerce in Spain
- Higher control of distance payments: consumers must know, from the beginning, what the price will be at the end of the purchase process
- To put a limit to the cost of phone calls to customer services in order to avoid unfair tariffs. This cost will not be higher than the cost of the basic tariff
- Contracts drawn up by phone must also be formalized in writing to be binding. The customer has to sign the offer or to send his/her written agreement on paper, by fax, e-mail or SMS.

It should also be noted that a remarkable weakness of the Spanish normative on consumers' protection is the incorrect transposition of article 6.1 of the Directive 93/13/EEC on unfair terms in consumer contracts, as the EU Court of Justice has established. In the Spanish transposition, the Restated Text provides in article 83 that national judges will declare null and void the unfair terms of the contracts and may modify the content of these unfair terms. The EU Court of Justice considers that this interpretation of the European directive does not discourage firms from the use of these terms and therefore the long term aim of the norm is not achieved. For this reason, the draft law that will modify the Restated Text of the General Law for the Defence of Consumers and Users modifies article 83 stating that national judges may declare null and void unfair terms of contracts and eliminate them.



QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF ECONOMIC RIGHTS

Question 3: International and European sources of economic rights

- ✓ To which international instruments for the protection of economic rights is your country a party?
- ✓ How are relevant international and European economic rights norms being incorporated in your country?
- ✓ To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?
- ✓ How and to what extent are international instruments for the protection of economic rights given effect in your country?

✓ **To which international instruments for the protection of economic rights is your country a party?**

Article 10.2 of the Spanish Constitution establishes that *“Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain”*. Under this article, rights proclaimed in the Universal Declaration of Human Rights (UDHR) of the United Nations in 1948 are binding for the Spanish authorities, although the UDHR is not an international treaty.

According to this compromise with human rights, stated in the constitutional text, Spain has signed and ratified all the international treaties whose aim is to guarantee human rights. This process, that goes on nowadays, was initiated in 1977 with the ratification of the International Covenants of New York, and it continued with the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in 1979, and the European Social Charter, in 1980.

Table 3 shows the dates of ratification of UN and Council of Europe’s treaties that refer to economic rights by Spain.

(TABLE 3)

✓ **How are relevant international and European economic rights norms being incorporated in your country?**



Taking into account the three concrete economic rights analysed in WP5, the right to intellectual property is the right recognized by one of the International Treaties signed by Spain, specifically by article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is also recognized in article 27 of the Universal Declaration of Human Rights (UDHR).

Within the Spanish Constitution, as formerly mentioned, intellectual property is considered a justiciable fundamental right, therefore the constitutional protection of this freedom is of the highest rank: regulation of its exercise only by law (article 53.1); status as an organic law (article 81); jurisdictional oversight through an expeditious priority procedure, review by the Constitutional Court (articles 53 and 161.1.a); and enhanced protection against constitutional amendment through the special procedure (article 168) (UN Committee on Economic, Social and Cultural Rights, 2011). The Spanish legislation that relates to this right has already been analysed within Question 2.

Besides, it is worth mentioning, that article 6 of the Lisbon Treaty establishes that *“the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”* and *“fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”*.

✓ **To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?**

The position of the European Convention on Human Rights (ECHR) of 1950 is usually highlighted as the most emblematic agreement on the *European Law of Human Rights* and, of course, as the regulation that leads the political democracy of the European Council. Fortunately, the perception of the European Social Charter (ESC) as the "little sister" of the CEDH has been overcome to a great extent, emphasizing the development of the ESC as an emblematic expression of the *European Law of Social Law of Human Rights*, and as the bastion of the European social democracy (Carmona Cuenca, 2006).

Despite its relevance to build up the social democracy in Europe, the ESC is still barely known in Spain. The lack of political will to ratify the Revised European Social Charter has actually been criticized, being the justification argued by the State that these social rights are already recognized and guaranteed by the EU legal framework.

Although the European Convention of Human Rights (ECHR) is mainly focused on civil and political rights, some economic rights are in fact included in this Convention. Anyway, the ECHR does not mention any of the economic rights studied in depth by WP5. The same holds for the European Social Charter.



✓ **How and to what extent are international instruments for the protection of economic rights given effect in your country?**

As already mentioned, all the economic rights recognized by the International Covenant on Economic, Social and Cultural Rights (ICESCR) are also recognized by the Spanish Constitution: as justiciable rights, either as justiciable and fundamental rights or as directive principles of State policy (see Table 1).



QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

Question 4: EU Charter of fundamental rights

- ✓ To what extent have the EU Charter of fundamental rights as well as general principles of EU law protecting rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?
- ✓ How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of economic rights?

- ✓ **To what extent have the EU Charter of fundamental rights as well as general principles of EU law protecting rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?**

Following article 10.2 of the Spanish Constitution¹⁹, international instruments such as the European Convention on Human Rights (ECHR), the Universal Declaration of Human Rights (UDHR) or the International Covenant on Civil and Political Rights have been used frequently, as interpretative, by the Constitutional Court and the Supreme Court, but it is necessary to keep in mind that only the rights and freedoms recognized by both, by these international treaties and agreements and by the Spanish Constitution, have this interpretative function of constitutional rank. In fact, rights that are recognized in international treaties or agreements and that are part of the internal legal system according to article 96²⁰, but are not included in the constitutional text, do not perform the interpretative function of constitutional rank; they have a *supralegal* and *infraconstitutional status*, according to the doctrine of the Supreme Court.

This could be the case of some fundamental rights included in the UE Charter but not in the Spanish Constitution. For example, the protection against unjustified dismissal or the access to free placement services. Nevertheless, the Constitutional Court may decide that these rights deserve constitutional protection,

¹⁹ Article 10.2, Spanish Constitution

Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain

²⁰ Article 96, Spanish Constitution

1. Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.

2. The procedure provided for in section 94 for entering into international treaties and agreements shall be used for denouncing them.



subsuming them into some constitutional precepts, as for example the right to work (article 35 of the Spanish Constitution). Article 10.2 does not allow the creation of rights and freedoms not included in the constitutional text, but it allows the introduction of new profiles or categories of fundamental rights into the existent constitutional articles (Marín Aís, 2010).

As shown in Table 1, the rights recognized in the Spanish Constitution are also in the United Nations documents: the Universal Declaration of Human Rights (UDHR) and/or the International Covenant on Economic, Social and Cultural Rights (ICESCR). When comparing economic rights recognized in the EU Charter of Fundamental Rights (The EU Charter) and in the Spanish Constitution, some aspects are worth mentioning. Firstly, most of the economic rights are recognized by both the EU Charter and the Spanish Constitution. This is the case of the main elements corresponding to the right to an adequate standard of living; to the right to work and some questions related to labour conditions, including to form and join trade unions and to go on strike; to the right to Social Security; to the right to property and intellectual property; to the freedom to conduct a business and consumers protection. So, two of the economic rights analysed by WP5, consumers' protection and intellectual property rights, are recognized in both documents. Secondly, there are two rights related to labour conditions that are recognized in the Spanish Constitution but not in the EU Charter: the rights to receive a fair remuneration for work and the right to have equal opportunities to be promoted. Both are recognized by the ICESCR. Finally, there are rights recognized in the EU Charter and not in the Spanish Constitution, most of them relate to the labour market. None of these rights are considered by the ICESCR of the United Nations and two of them, free labour movement and services of general economic interest, are intrinsically related to the European Common Market.

Besides, the Constitution that refers to the majority of the economic rights recognised by the EU Charter, there are also plenty of references to the EU Charter by the Spanish case law. This fact confirms the recognition of the Charter as interpretative principles of fundamental rights, including economic rights (Carmona Ruano, 2006). Moreover, Andrés Sáenz de Santamaría (2008) states that, although case law is the most propitious field to consider the EU Charter, Spanish legislation takes also into account this Charter when drawing up the statement of reasons of both, State and Autonomous Communities' laws, being the number of cases small but relevant.

Nevertheless, for the concrete case of the Spanish normative for intellectual property and consumers' protection, we have found no reference to the EU Charter in the State laws. As consumers and users protection is also a competence assumed by the Autonomous Communities, all of them have their own legislation about this matter, but only the Law 22/2010, on the Consumer Code of Cataluña, refers to the Charter in its preamble, remarking how the EU Charter explicitly establishes that the UE policies must guarantee a high level of consumers' protection.

Property and consumers' rights are also considered by the Spanish Ombudsman. Concretely, in 2012 the Spanish Ombudsman handled 85 proceedings about data and intellectual property protection and 167 on consumption (Defensor del Pueblo, 2013).



✓ **How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of economic rights?**

The European Convention on Human Rights (ECHR) is mainly focused on civil and political rights. Only three of the economic rights recognized by the United Nations, the EU Charter and the Spanish Constitution are included in this document: the right to form and to join trade unions -as a part of the freedom of assembly and association-, the protection of property and the right to education. Thus, the ECHR is not perceived as a document for the protection of economic rights (besides, it does not mention any of the economic rights that are studied in depth by WP5).



QUESTION 5: JURISDICTIONAL ISSUES

Question 5: Jurisdictional issues

- ✓ Personal
 - **Who** is covered by (core) economic rights protection? Are both natural and legal persons covered? Are citizens of the particular state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?
- ✓ Territorial
 - What is the territorial scope of the protection of economic rights afforded by your Member states? Are there **territorial** limitations to such protection? Which?
- ✓ Material
 - Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)? How are economic rights balanced with other social rights? To what extent does the national legal system show a prevalence of a market-centric approach to a more social rights approach in regulating economic rights? In other words, which degree of functionalization of economic interests exists, and what are the tools used for such a limitation of economic freedoms (used to protect social interest by means of regulations or directly through public intervention)?
- ✓ Temporal
 - What is the temporal scope of protection afforded to economic rights? Have there been recent changes in the range and reach of economic rights protection?
- ✓ Please offer details as to how different rights are afforded to different **categories of persons** in **different location and policy contexts over time.**

✓ Personal

The holders of the economic rights recognized by the Spanish Constitution are, in the first place, the Spanish nationals. For the case of non-Spanish nationals, it is crucial the interpretation of article 13.1 of the



constitutional text²¹ that establishes the enjoyment of rights and freedoms recognized in Title I of the Constitution will take place under the terms laid down by international treaties and the Spanish legislation, in accordance with conditions and contents provided for by these norms. Thus, it is a constitutional provision that the equality or inequality in relation with the ownership and exercise of such rights and freedoms will rely on the free will of the Treaty or the Law. Consequently, the ownership and exercise of rights and, more concretely, the equality in the exercise of them is not the same for all the rights. There are rights that apply for Spanish and non-Spanish nationals, and whose regulation must be also equal for both (these are universal rights inherent to human dignity); there are rights that do not apply to non-nationals (the ones recognized in article 23 of the Constitution, as it is stated in article 13.2 and with the exception mentioned there)²²; and there are rights that will apply or not to non-nationals depending on treaties and laws, being legitimate here the existence of differences in the exercise of the right between Spaniards and foreigners.

In Spain, the rights of the non-nationals are regulated by the Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration. In article 3.1, this law includes the content of the constitutional article 13.1 and also states that “(...) as a general interpretative criterion, foreigners enjoy the rights recognized by this Law in the same conditions as Spaniards do”. An explicit reference to the nationals of other EU member States is made by article 1.3, stating that, for them, the EU regulations apply, and that this Organic Law will only apply if it is more advantageous for them.

Referring now to the economic rights, the Organic Law 4/2000 recognizes to the non-Spanish nationals the following rights: the right to education (article 9); the right to work and to have access to the Social Security system (article 10); the right to join trade unions and to go on strike (article 11); the right to health care (article 12); the rights related to housing (article 13); and the right to Social Security services (article 14).

- The right to education is guaranteed to non-adults’ foreigners without restrictions: foreigners under 16 years old have the duty and the right to education, which includes the access to a free and compulsory elementary education, and foreigners under 18 have the right to post-compulsory education. All of them have the right of access to public grants under the same conditions as the Spanish nationals.

²¹ Art. 13. 1. of Spanish Constitution

Aliens in Spain shall enjoy the public freedoms guaranteed by the present Part, under the terms to be laid down by treaties and the law.

²² Art. 23 of Spanish Constitution

1. Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage.

2. They also have the right to accede under conditions of equality to public functions and positions, in accordance with the requirements laid down by the law.

Art. 13.2 of Spanish Constitution

2. Only Spaniards shall have the rights recognized in section 23, except in cases which may be established by treaty or by law concerning the right to vote and the right to be elected in municipal elections, and subject to the principle of reciprocity.



Foreigners over 18 years of age may also enjoy this right according to the education normative. The Organic Law guarantees the access to post-compulsory education stages and to public grants under the same conditions as the nationals, explicitly and without restrictions, to the foreigners over 18 when they are *residents*.

- The exercise of an economic activity, either as employee or as self-employed worker, and the access to the Social Security system are rights recognized to the *resident* foreign nationals that comply with the necessary regulatory requirements. In the case of public employment, foreign nationals may access it under the terms established in the Law 7/2007, on the Basic Statute of Public Employees.
- Foreign workers enjoy the rights to join trade unions or professional organizations and to go on strike under the same conditions as Spanish workers.
- Article 12 of the Organic Law 4/2000 has been modified recently by the Royal Decree-law 16/2012, in the next way: “*Foreign nationals have the right to health care in the terms established in the health normative in force*”.

This Royal Decree-law, on urgent measures to guarantee the sustainability of the National Health System, states that public health care will be guaranteed to persons that fulfill the requirements to be considered as insured. Spanish nationals, nationals from other EU member State, from the European Economic Area (EEA) or from Switzerland that are *residents*, and other foreigners with an authorization to reside in Spain, will be considered as insured, even not fulfilling those requirements, if they do not exceed an established limit of income.

Foreign nationals neither registered nor authorized to be residents will enjoy public health care only in case of urgency for severe illness or accident or in the case of pregnancy, childbirth and postpartum. Foreigners under 18 years of age will enjoy health assistance in the same conditions as Spaniards at any case.

It is worth noting that this Royal Decree-law has received several appeals of unconstitutionality.

- The access to public systems of housing support for non-nationals is recognized, under the same conditions as for Spanish nationals, to the *long-term resident* foreign nationals. If they are *residents*, but not *long-term residents*, they may have access to these benefits under the terms established by the laws and the competent administrations.

The status of *resident* is again the characteristic that defines the right of foreigners to enjoy the different Social Security services. Resident foreign nationals have the right to both, basic and general and specific social services, on an equal basis with Spanish nationals, while non-residents are just recognized the right to basic social services.

Regarding the three specific economic rights subject of analysis within WP5, the Organic Law 4/2000 does not refer to them, and therefore this legislation does not differentiate between nationals and non-nationals and specific norms apply. In the case of consumers and users protection, the Spanish normative defines them as “*the natural or legal persons that act in a sphere different from a business or professional activity*” (Legislative Royal Decree 1/2007, article 3). In relation with the intellectual property protection, the beneficiaries of it are



the authors, that is, the natural persons that create a literary, artistic or scientific work, although this protection can also be extended to legal persons in some cases specified in the law (Legislative Royal Decree 1/1996, article 5). Articles 155 to 158 of LRD 1/1996 establish the scope of application of the Law on Intellectual Property. This law shall protect the rights of authors when they are nationals from Spain or from other EU member States (established in Spain or in the other EU countries, in the case of firms), nationals from third countries with habitual residence in Spain or, in other cases, following a territorial criterion: the publication or interpretation of the work takes place within the Spanish territory.

The recognition of professional qualifications is also not included in the Organic Law 4/2000. For the EU member State nationals, this matter is regulated in Spain by Royal Decree 1837/2008, which incorporates the correspondent EU Directives to the Spanish legislation. This regulation is applied to the nationals of EU member States²³ who wish to exercise a regulated profession in Spain, as self-employees or employees, through the recognition of their professional qualifications obtained in another member State. This recognition by the competent Spanish authority will allow to the beneficiaries the exercise of the profession with the same rights as the Spanish nationals.

Unlike what happens with non-nationals physical persons, the Spanish Constitution does not contain any general statement about the ownership of rights by legal persons, but the Constitutional Court has introduced, on a jurisdictional way, the content of article 19.3 of the Bonn Basic Law: legal persons are owners of basic rights to the extent that the nature of such rights allows for it. Besides, social groups should also be considered as far as they are owners of rights as recognized by the constitutional text (article 9.2). One of the most characteristic cases of social groups as owners of economic rights relates to the right of association (article 22 of the Constitution), and, within it, to the right to create and to join trade unions and employers associations (articles 7 and 28.1 of the Constitution) (Cruz Villalón and Pardo Falcón, 2000).

✓ **Territorial**

In principle, the territorial scope of the rights recognized by the Spanish constitutional text, which obviously includes the economic rights, is the territory of the State, and there are no territorial limitations to the exercise of such rights within it.

Besides, the Constitutional Court's doctrine holds that the Spanish public authorities must always guarantee constitutional rights and, in the same way, foreign public authorities must also guarantee them when acting within the Spanish territory.

²³ In this regulation, the expression "EU member States" includes the rest of the countries signatories of the Agreement on EEA: Norway, Island and Liechtenstein. The recognition of professional qualifications is also applied to the nationals from Switzerland by means of a bilateral agreement with the European Union.



In the case of the right of freedom of enterprise within the framework of a market economy (article 38 of the Constitution), Spanish and EU legislations on the market system will be applied when the Spanish and European markets are concerned. The Spanish normative regulating entrepreneurs typologies (capital companies, partnerships...) will be applied when the entrepreneur, either natural or legal person, has the Spanish nationality (article 9.11 of the Spanish Civil Code and article 15 of the Commerce Code).

Spanish legislation on the right to private property and inheritance (article 33 of the Constitution) is applied when the property is situated within Spanish territory, according to article 10.1 of the Civil Code (principle of territoriality).

The normative regulating the right to literary, artistic, scientific and technical production and creation (article 20.1.b of the Constitution) is also based on the principle of territoriality, which establishes that intellectual and industrial rights in Spain will be protected according to Spanish legislation within the Spanish territory (article 10.4 of the Spanish Civil Code and article 8 of the Regulation (EC) 864/2007).

The Spanish normative regulating the recognition of professional qualifications to the EU, Norway, Iceland and Liechtenstein nationals allow non-nationals of those States the exercise of a regulated profession in Spain, being the territorial scope, the Spanish territory.

✓ **Material**

Article 55 of the Spanish Constitution states which fundamental rights, and in what circumstances, can be suspended. Two possibilities of suspension are established. The first one is the suspension of rights associated to the declaration of a state of emergency or siege (martial law). The rights that may be suspended in this case are: individual freedom, home and communications inviolability, free choice of residence, freedom of expression and assembly and the right to go on strike. The second possibility relates to the “individual” suspension of rights, by means of an organic act, in connection with investigations about activities of armed bands or terrorist groups. In this case, specific individuals can be deprived of the right to be set free or handed over to judicial authorities within seventy two hours, and also deprived of the right to home and communications inviolability. In any case, the rights that may be suspended are clear and explicitly enumerated in the Constitution and are, but the right to go on strike, not related to economic rights.

As already mentioned, a large part of the rights and freedoms recognized in the Title I of the Spanish Constitution have an economic nature. But, as it has already seen, the legal guarantees are not the same in all the cases (see Annex II). Among the rights considered as justiciable, contained in Chapter 2, the right to property (article 33) and the freedom to conduct a business (article 38) are found²⁴. On the opposite, economic

²⁴ Free enterprise is recognized in article 38 of the Spanish Constitution “*within the framework of a market economy*”. It is also stated there that the public authorities must guarantee and protect the exercise of this right “*in accordance with the demands of the general economy and, as the case may be, of economic planning*”. This double mention to the free enterprise, on the one hand, and to the economic planning, on the other hand, has been initially understood as the wishes of leaving space in the new Spanish democratic political system for both, liberal and social democrat economic policies.



rights with a social content as, for example, Social Security assistance (article 41), housing (article 47) or work conditions -working day limit, paid holidays- (article 40) are not justiciable rights, but only directive principles of economic and social policy. Thus, economic rights linked to social rights may be considered weak rights compared to other basic rights. Pisarello (2009) remarks that, besides this consideration of social rights as *weak* rights, there is a second obstacle for their widespread: the subordination of social rights to an absolutist understanding of some economic rights, as the right to private property and the freedom to conduct a business, especially in the present context of crisis. Following this argument, the latter two rights may be considered “civil” rights, similar to the freedom of expression or the freedom of ideology. The protection of human rights under this perspective would imply two actions: a) to strengthen civil freedoms through the expansion of business freedom and an effective protection of private property, as both are part of those civil freedoms; b) to subordinate social rights’ guarantee to such an expansion.

Following with this line of reasoning, the inexistence of obstacles to the free market is a *sine qua non* requirement for a greater economic effectiveness, and consequently higher growth and competitiveness, and for the subsequent possible redistribution of the goods and resources, which is a basic requirement or basis for the existence of social rights. For example, the enlargement of the right to work would need of a previous relaxation of laws regulating relations between employees and employers, making easier the dismissals; or the expansion of the right to housing would need of the relaxation of the link between owners and tenants, making easier evictions. The underlying message is always similar: to stimulate the exercise of economic, property rights in order enlarge, indirectly and in the long run, social rights.

✓ **Temporal**

There are no restrictions for the temporal protection of economic rights.

Anyway, the Constitutional Court made clear, that every economic policy has a precise and impassable limit: the free enterprise, defined as a basic and justiciable right (Cruz Villalón and Pardo Falcón, 2000).



QUESTION 6: ACTORS

Question 6: Actors

✓ What is the involvement of private or public actors, such as private (e.g. National Bar Associations) and public entities and authorities (e.g. Patent Offices), agencies, NGOs, etc. – in defining and setting economic rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of economic rights norms.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is subject to a control mechanism exposed in its articles 16 and 17. This mechanism consists of the elaboration, by the States, of regular reports on the measures that they have adopted and the progress made in achieving the observance of the rights recognized in the Covenant. Until now, Spain has submitted five regular reports –the last one in 2011. The social actors affected by the Covenant issued afterwards in 2012²⁵ a Report that has served us as a first basis for defining actors involved in drafting or setting economic rights in Spain. These actors were:

- **The Center for Economic and Social Rights (CESR).** CESR is a non-profit international human rights organization.
- **The Observatory of ESCR (Economic, Social, and Cultural Rights).** It is a group of individuals and organizations which have the objective to show that civil and politic rights -freedom of speech, the right to life, to vote, etc- are not the only fundamental rights, but that economic, social, cultural, environment rights -the right to housing, work, education, health, food- are also fundamental.
- **The Association for Coexistence ASPACIA.** It is a Spanish non-profit organization that aims to eradicate violence in all its forms, protecting victims, promoting equality in relationships and defending human rights with the purpose of achieving an abuse-free society.
- **The Spanish Society for International Human Rights Law (AEDIDH).** This is a pluralistic and independent organization aimed to build bridges of permanent communication among academia, public institutions, international organizations and civil society, in order to promote and implement the international human rights law (IHRL) values within Spain and other Spanish-speaking countries, thus ensuring States' compliance with decisions and recommendations adopted by the international human rights bodies and mechanisms.

²⁵ *Informe Conjunto al Comité de Derechos Económicos, Sociales y Culturales.* Con motivo del examen del 5º informe periódico de España, 48ª sesión del CESCR, 2012.



- **The Spanish Committee of Representatives of Persons with Disabilities (CERMI).** It is the Spanish umbrella organisation representing the interests of more than 3.8 million women and men with disabilities in Spain. The mission of CERMI is to guarantee equal opportunities of women and men with disabilities and to protect their human rights, ensuring they are fully included in society.
- **The Spanish Confederation of Groups of relatives and persons with mental illness (FEAFES).** Its aims are to improve the quality of life of persons with mental illness and their families, to defend their rights and to represent the association movement.
- **NGO Coordinator of Spain Development.** International cooperation and humanitarian aid. Its general aim is to contribute to the building, in a participatory and environmentally sustainable manner, of a global development model focused on the enlargement of people' opportunities to develop a decent standard of living and to exercise their rights with equity.
- **Positive Creation.** This is a NGO that works to pay a holistic attention to the persons with HIV from a gender perspective, being health promotion and the defense of human rights the core of its action.
- **The Federation of entities supporting homeless (FEPSH).** It is an association made up of entities and natural persons that work to help and support homeless. Coordinating and supporting the different organizations that work with this group of people at national level are among their aims.
- **The Gypsy Secretariat Foundation (FSG).** It is an intercultural social non-profit organization that provides services for the development of the Roma community in Spain and in Europe. The objective of the FSG is the integral promotion of the Roma community on the basis of respect and support for their cultural identity. That means to promote the access of Roma to rights, services, goods and social resources on an equal footing with the rest of the citizenry. To this end, the FSG develops all kinds of actions that contribute to achieving the full citizenship of Roma, to improving their living conditions, to promoting equal treatment and to preventing any form of discrimination, while promoting the recognition of the cultural identity of the Roma community.
- **The Triangle Foundation.** It is a non-profit organization whose objective is the social equity of lesbian, gay, bisexual and transgender people, that is to say: that everybody receives the same treatment regardless of their sexual orientation or gender identity.
- **Médicos del Mundo (Doctors of the World).** This Spanish NGO is an independent, volunteer-based, international humanitarian aid organization that promotes human development through its defense of all peoples' right to health and human dignity.
- **Movement Fourth World Spain.** The aim of this non-profit organization is to guarantee the exercise of their rights to those people in situation of extreme poverty and, thus, to move forward to the eradication of it. To reach this goal, the affected persons themselves must be actors in the fight against poverty and in the building of the society they belong to. This is made concrete through their participation in the neighborhood, associative, political, union, cultural and religious life.
- **The Unitary Platform of Encounter for Democratization of the ONCE (PUEDO).** This participative, plural and democratic association carries out its activity within the scope of action of the Spanish National



Organization of the Blind (ONCE), in relation to blind and other people with vision problems. This organization is also concerned with the problems of the other groups of disable people.

- **Prohousing.** It is a NGO aimed to promote the right to decent and adequate housing, especially in the case of the most socially vulnerable people.
- **The ACTIVAS Network.** It is a network of organizations that defends, in collaboration with other entities from both the Global North and the South, respect for health and sexual and reproductive rights, supporting and promoting necessary legal, political and social changes in order to ensure the full enjoyment of these rights in Spain and the rest of the world.
- **The European Anti Poverty Network (EAPN) Madrid.** It is the largest European network of national, regional and local networks, involving anti-poverty NGOs and grass root groups as well as European organizations, active in the fight against poverty and social exclusion. The membership of EAPN is involved in a variety of activities aimed at combating poverty and social exclusion, including education and training activities, service provision and activities aimed at the participation and empowerment of people experiencing poverty and social exclusion.

In addition, the membership of EAPN aims to put the fight against poverty high on the agenda of the EU and to ensure cooperation at EU level aimed at the eradication of poverty and social exclusion.

EAPN has consultative status with the Council of Europe and is a founding member of the Social Platform (Platform of European Social NGOs).

- **The Spanish Network against Trafficking in Persons.** This network, made up by national and international organizations, works in the field of fight against human trafficking in Spain. Some of the organizations that began with the preliminar work to create this Spanish Network against Trafficking in Persons are Accem, Project Hope, Amnesty International, Doctors of the World, Women's Link Worldwide, CEAR, Spanish Red Cross, OIM and the Spanish Delegation of ACNUR (United Nations High Commissioner for Refugees). Nowadays, more than 20 NGOs and international organizations participate and collaborate.

The Spanish Network against Trafficking in Persons fights against this trafficking from a global perspective, according to the national and international legal instruments applicable in Spain. Everybody that suffers this trafficking for purposes of sexual exploitation, labour exploitation, servile marriages, begging, situations of slavery, and so on, is considered a victim in accordance with the definition established in the Palermo Protocol.

- **Save the Children.** This non-profit NGO, plural and independent from a political and religious point of view, is mainly aimed to the active defense of children's interests, especially in the case of the most disadvantaged ones.

The report prepared by the social actors enumerated above has a clearly social content and, regarding to the economic rights recognized in the ICESCR, makes no reference to the intellectual property right (article 15), that is one of the rights analyzed by WP5. Besides, the Report does not include some actors that are specifically involved with the rights that WP5 studies. Next, we refer specifically to the actors involved with the economic rights that are the object of WP5 study.



The actors involved with the definition and recognition of professional qualifications include:

- **The Spanish General Council of Vocational Education and Training.** It is a specialized body, which advises the Government on the field of Vocational Education and Training. It depends on the Ministry of Work and Social Affairs and is organized on a tripartite basis, with the participation of the Public Administrations (the participation of representatives from the Autonomous Communities, including the Autonomous Cities of Ceuta and Melilla, is allowed), the employers' organizations and the trade unions.
- **The National Institute of Qualifications (INCUAL).** It is a technical instrument, endowed with capacity and independence, to support the Spanish General Council of Vocational Education and Training in the achievement of the following objectives:
 - To observe qualifications and their evolution.
 - To determine qualifications.
 - To accredit qualifications.
 - To develop the integration of professional qualifications.
 - Follow-up and assessment of the National Program of Vocational Training.
- **Professional Associations.** The Law 2/1974 on Professional Associations sets up the main objectives of these bodies in article 3, and refers to the national normative regulating the access to the professions. These aims stated in the Law are: the organization of the exercise of professions; the exclusive institutional representation of professions, when becoming a member of the respective professional association is obligatory; the defense of the members' professional interests; and the protection of the consumers and users who use the services of the professional associations' members. *Cabe señalar aquí que existe un Anteproyecto de Ley (en fase de alegaciones).*

The role played by the Professional Associations is relevant insofar as their performance can result in barriers to the free access and exercise of the regulated professions.



- **Red SOLVIT Spain.** Effective Problem Solving in the Internal Market²⁶

SOLVIT is an online network of problem solving in which EU Member States work together to solve, without legal proceedings, problems caused by the misapplication of Internal Market legislation by public authorities. SOLVIT deals, in principle, of any cross-border problem between a business or a citizen and a national public authority. Among the areas addressed SOLVIT is the recognition of diplomas and professional qualifications. There is a SOLVIT centre, that is part of the national administration, in each Member State of the European Union (plus Norway, Iceland and Liechtenstein).

The actors involved with the protection of consumers and users rights include the consumers and users associations and federations in Spain²⁷:

- Asociación de Usuarios de Bancos, Cajas y Seguros (ADICAE)
- Asociación General de Consumidores (ASGECO)
- Asociación de Usuarios de la Comunicación (AUC)
- Confederación Española de Organizaciones de Amas de Casa, Consumidores y Usuarios (CEACCU)
- Confederación de Consumidores y Usuarios (CECU)
- Consumidores en Acción (FACUA)
- Consejo de Consumidores y Usuarios (CCU)
- Federación de Usuarios - Consumidores Independientes (FUCI)
- Confederación Española de Cooperativas de Consumidores y Usuarios (HISPACOOOP)
- Organización de Consumidores y Usuarios (OCU)
- Unión de Consumidores de España (UCE)
- Federación Unión Nacional de Consumidores y Amas de Hogar de España (UNAE)

The actors involved with the protection of intellectual property rights include relevant social actors related to the protection of intellectual property rights that are the collecting societies.

The copyright collecting societies are regulated by the Legislative Royal Decree 1/1996, which approves the Restated Text of the Law on Intellectual Property. They can be defined as non-profit, partnership-based, private organizations that, under its own or another party's name, manage intellectual property rights on behalf of their legal owners.

²⁶ Ministry of Education, Culture and Sport of the Spanish Government. Webpage: <https://www.mecd.gob.es/educacion-mecd/areas-educacion/universidades/educacion-superior-universitaria/titulos/homologacion-titulos/reconocimiento-titulos/Red-SOLVIT.html>

²⁷ AECOSAN. Ministry of Health, Social Services and Equality of the Spanish Government. Webpage: http://aesan.msssi.gob.es/AESAN/web/rincon_consumidor/seccion/asociacion_consumidores.shtml



Subject to administrative supervision, they need the authorization from the Ministry of Education, Culture and Sport in order to carry out their tasks, among which we find the next ones:

- To manage the intellectual property rights conferred, subject to applicable laws and to their statutes. These entities exercise the intellectual property rights acting either by delegation of their legal owners or by a legal mandate (mandatory collective management rights); pursue violations of these rights by controlling their uses; establish an adequate remuneration, according to the type of exploitation that is performed; and perceive such remuneration as it is stipulated.
- In the field of mass uses, to hold general contracts with associations of users of their repertoire, and set general fees for their use.
- To allow the enforcement of rights (for example, the compensation for private copying).
- To perform the distribution of the net proceeds to the right holders.
- To provide assistance and promotion services to authors and to performers or performing artists.
- To protect the intellectual property rights against infringements, using courts if appropriate.

The collective societies for the protection of intellectual property rights in Spain are divided according to the characteristics of the holders of the rights. Thus, they include²⁸:

1. Collective societies for the protection of intellectual property rights of authors:
 - Sociedad General de Autores y Editores (SGAE)
 - Centro Español de Derechos Reprográficos (CEDRO)
 - Visual, Entidad de Gestión de Artistas Plásticos (VEGAP)
 - Asociación Derechos de Autor de Medios Audiovisuales (DAMA)
2. Collective societies for the protection of intellectual property rights of performers or performing artists:
 - Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE)
 - Artistas Intérpretes, Sociedad de Gestión (AISGE)
3. Collective societies for the protection of intellectual property rights of producers:
 - Asociación de Gestión de Derechos Intelectuales (AGEDI)
 - Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA)

²⁸ Intellectual Property Area, Ministry of Education, Culture and Sport of the Spanish Government. Webpage: <http://www.mcu.es/propiedadInt/CE/GestionColectiva/DireccionesTarifas.html>



Regarding industrial property, the public body responsible for the registration and granting of the different kinds of industrial property is the Spanish Patent and Trade Mark Offices (OEPM).



QUESTION 7: CONFLICTS BETWEEN RIGHTS

Question 7 : Conflicts between rights

✓ How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?

✓ Are there, in your countries, notorious or problematic clashes between particular economic rights, or between rights and other rights, between individual economic rights and important public interests?

Please give examples, and illustrate how these conflicts are dealt with and resolved.

✓ **How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?**

The first part of this Question has been answered taking as a base the contents of a document published by the Office of the United Nations High Commissioner for Human Rights (2008), the HCHR from now on.

The Universal Declaration of Human Rights includes a comprehensive range of civil, cultural, economic, political and social rights in a single international human rights instrument, without making any distinction between them. However, in 1966, States adopted two different Covenants related to human rights: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Mendiola (2009) says that the main differences between both Covenants clearly stem from the political instrumentalization of the rights made by the States, and that some of these differences can be appreciated in the terminology used.

For example, the ICCPR states that *“All persons have the right of”* or *“No one shall be”*, while in the ICESCR the expression used is *“The States Parties recognize the right of”*, what makes the owner of the right invisible. This establishes, in principle, **a difference regarding the individual or collective nature of the rights**: in the case of civil and political rights, their individual character is clear; in the case of economic, social and cultural rights, it is not.

According to the HCHR (2008), economic, social and cultural rights are individual rights; like other human rights, they are also the birthright of every human being. While these rights can affect many people and may have a collective dimension, they are also individual rights. For example, regarding a right studied here, an



artist whose work is publicly altered, distorted or mutilated is suffering a violation of his/her *individual* right to intellectual property.

Although there are some important exceptions to the individual nature of economic, social and cultural rights (such as the rights of trade unions to establish national federations and to function freely, that are essentially collective), it may not be considered that economic, social and cultural rights are only collective in nature. This confusion derives in part from the fact that redressing these rights often requires a collective public effort through the provision of resources and the development of rights-based policies, but they are individual rights.

Once again, **the expressions used in both Covenants to outline the obligations of States are different**: the ICESCR asks for the States *“to achieve progressively the full realization of the rights”*, while the ICCPR requests to the States *“to respect and to guarantee human rights”*.

In the past, there has been a tendency to speak of economic, social and cultural rights as if they were fundamentally different from civil and political rights, what is considered by the HCHR (2008) as artificial and even self-defeating.

One of the reasons that have led to this categorization is that: economic, social and cultural rights have been seen as requiring high levels of investment, while civil and political rights are said simply to require the State to refrain from interfering with individual freedoms. But this argument can be refuted. Although it is true that many economic, social and cultural rights sometimes require high levels of investment -both financial and human- to ensure their full enjoyment, they also require the State to refrain from interfering with individual freedoms (for instance, trade union freedoms or the right to seek work of one’s choosing). Similarly, civil and political rights, although comprising individual freedoms, also require investment for their full realization. For example, civil and political rights require infrastructures such as a functioning court system, prison respecting minimum living conditions for prisoners, legal aid, free and fair elections, and so on (HCHR, 2008). In the same line of thought, Aparicio Wilhelmi (2009) asserts that the rights traditionally considered as “first generation”, civil rights -as the rights to life, to physical and moral integrity or to freedom and security- cannot be simply considered as “freedom” rights, as mere obligations of respect and no interference by the State; they necessarily carry onerous obligations for the States. Thus, the supposed structural differences among civil and economic rights disappear.

Coming back to the different mandates made by the two Covenants to the States (*“to achieve progressively the full realization of the rights”*, in the case of the ICESCR, and *“to respect and to guarantee human rights”*, in the case of the ICCPR), Mendiola (2009) says that “a part of the doctrine” makes the next distinction between both categories of rights: **while measures to achieve economic, social and cultural rights may have a progressive character, obligations regarding civil and political rights are “immediate”**.

The concept of “progressive realization” describes a central aspect of States’ obligations in connection with economic, social and cultural rights. The obligation to take appropriate measures towards the full realization of



these rights to the maximum of their available resources is at its core²⁹. The reference to “resource availability” reflects a recognition that the realization of these rights can be hampered by a lack of resources and can be achieved only over a period of time. Equally, it means that a State’s compliance with its obligation to take appropriate measures is assessed in the light of the resources -financial and others- available to it. Many national constitutions also allow for the progressive realization of some economic, social and cultural rights (HCHR, 2008).

However, the difference between progressive and immediate obligations, depending on the kind of right, becomes diluted if we follow the arguments stated by the HCHR (2008). This Office of the United Nations remarks that, sometimes, the concept of “progressive realization” is misinterpreted as if States did not have to protect economic, social and cultural rights until they have sufficient resources. On the contrary, the treaties impose an “immediate” obligation to take appropriate steps towards the full realization of economic, social and cultural rights: a lack of resources cannot justify inaction or indefinite postponement of measures to implement these rights.

States must make every effort to improve the enjoyment of economic, social and cultural rights, even when resources are scarce. Under the ICESCR, there are obligations considered to be of immediate effect to meet the “minimum essential levels” of each of the rights (minimum core obligations). If a State fails to meet them because it does not have the resources, it must demonstrate that it has made every effort to use all available resources to satisfy, as a matter of priority, these core obligations. Even if a State has clearly inadequate resources at its disposal, the Government must still introduce low-cost and targeted programmes to assist those most in need so that its limited resources are used efficiently and effectively.

Additionally, States must also take “immediate” action, irrespective of the resources they have, in the next areas regarding economic, social and cultural rights:

- The elimination of discrimination. States must prohibit discrimination in, for instance, health care, education and the workplace immediately. Discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, disability or other status must be prohibited.
- The economic, social and cultural rights not subject to progressive realization. Some economic, social and cultural rights do not require significant resources. For example, the right to form and join trade unions and to strike or the obligation to protect children and young persons from economic and social exploitation do not require significant resources and should be respected immediately. Other rights do require resources, but are formulated in such a way as not to be subject to progressive realization. For example, States parties to the

²⁹ Article 2.1 ICESCR:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.



International Covenant have a strict limit of two years to develop a plan of action to ensure the provision of free and compulsory primary education for all.

The World Conference on Human Rights in Vienna in 1993 affirmed that “all human rights are universal, *indivisible and interdependent and interrelated*” and that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”. Until now, we have seen differences established between civil and political rights, on the one side, and economic, social and cultural rights, on the other side, and we have also shown arguments against these distinctions. But we have not yet made a reference to another difference between both groups of rights, highlighted as the most remarkable one by Mendiola (2009): **the different systems of protection guarantees given to the Covenants by the Human Rights Commission.**

The ICCPR incorporated the creation of the Human Rights Committee, an organism made up by independent experts to supervise the fulfillment of this Covenant, but the ICESCR only had the Economic and Social Council of the UN (ECOSOC), made up by States, as supervisory body. In 1985, the ECOSOC itself, being aware of its lack of capacity to develop its function, created the ESCR Committee, a body made up by independent experts similarly to the Human Rights Committee.

The ICCPR had the Optional Protocol 11 since the beginning. This Protocol allowed the Human Rights Committee for receiving and reviewing communications from individuals alleging violations of any one of the rights included in the Covenant. On the contrary, the ICESCR did not give this competence to the ECOSOC. The ESCR Committee was also not conferred of this function when it was later created, in 1985. Mendiola (2009) asserts that the “progressive” condition attributed to the economic, social and cultural rights by the States was the best argument to hamper the concept of “violation” of these rights and, consequently, make it impossible a system of individual complaints.

In 2008, the UN General Assembly adopted the Optional Protocol to the ICESCR, **the mechanism to determine how economic, social and cultural rights should be addressed.** The recent approval of this text supposes a historic opportunity for the enforceability of these rights, equating the victims of human rights violations. Besides, it brings the creation of a new space for demanding accountability if a State fails to comply with its obligations, voluntarily assumed by signing and ratifying the ICESCR.

This Protocol, together with the work developed by the ESCR Committee and the international civil society in the last decades, is giving to the economic, social and cultural rights the same level of obligation for the States than civil and political rights. Thus, the indivisibility already proclaimed in the UDHR becomes respected and implemented.

As Wilhelmi (2009) remarks the concept of indivisibility is directly linked with the one of interdependence. It is difficult to understand the different rights as “watertight compartments”: the effectiveness of a right results in the effectiveness of the rest ones; the breach of a right affects directly the conditions to exercise the others.



For instance, the enjoyment of decent housing influences the effectiveness of other rights, as to freely choose the place of residence, to freely move about or personal and family privacy; every restriction of the right to health assistance can affect to the right to physical integrity and even to the right to life; or it is often harder for individuals who cannot read and write to find work, to take part in political activity or to exercise their freedom of expression. All of them lead to the HCHR (2008) to conclude that categories of rights such as “civil and political rights” or “economic, social and cultural rights” make little sense, and it is increasingly common to refer to civil, cultural, economic, political and social rights.

Following Pisarello (2009), a consistent defence of the indivisibility and interdependence of civil, political, social and cultural rights involves, at the same time, not to minimize **possible conflicts** among them. There can be conflicts between civil rights –for instance, between the right to honour and to the right to privacy- or between civil and social rights –for example when the right to freely move about of persons with diseases conflicts with the right to health of other people.

The expansion of rights, far from being an evolutionary or linear phenomenon, necessarily presupposes the idea of conflict. The guarantee of a right often comes accompanied by the limitation or elimination of some privileges. This is especially true when social rights are involved. To ensure the rights of the weakest or most vulnerable people versus the strongest or most powerful means to assume a “conflict dimension” of social relations, in which the attempts to distribute power find resistances. The equal guarantee of certain rights may require the removal of material and symbolic barriers linked to privileges not yield spontaneously (Pisarello, 2009).

✓ **Are there, in your countries, notorious or problematic clashes between particular economic rights, or between rights and other rights, between individual economic rights and important public interests?**

Please give examples, and illustrate how these conflicts are dealt with and resolved.

In Spain, problematic cases regarding economic rights may be found, for example regarding the rights, to work, to a decent housing or to health. According to the objectives of WP5, the analysis relates to the conflicts of interests that relate to one or at least one of the following economic rights: professional qualifications, consumer rights and intellectual property rights.

Examples of conflicts of interest between intellectual property and fundamental rights

As Fuentes (2010) argues, the protection of intellectual property *interferes with* of free speech and freedom of information and protection of citizens’ privacy in Internet. In fact, finding measures that impede the



transmission through Internet of products by copyright without authorization of the rights' owners is at the core of the debate about the necessity of reaching a balance between intellectual property protection and citizens' fundamental rights. International law has responded to the demands for higher protection of intellectual property through the elaboration of the "Internet Treaties" in 1996. In the EU, two directives were approved on this subject: Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society, and Directive 2004/48/EC, on the enforcement of intellectual property rights.

These legal instruments state the validity of the exclusive copyright in Internet and the obligation for the States of giving legal protection to the technological measures adopted by the rights owners against digital copies and unauthorized distribution or communication of works protected by copyright. The conflict arises here because these technological measures give to the rights owners a complete control over all possible uses of the works, even over the so-called "free uses" or exceptions to the intellectual property, although the latter respond to the need of protection of public interests such as the defense of free speech and freedom of information or the citizens' right of access to culture.

The consequent proliferation of sites providing links for the unauthorized exchange of files containing works protected by copyright has led to attempting to get the suspension or closure of these services without a previous judicial decision. In Spain, initially the draft of the Sustainable Economy Law (Ley Sinde) authorized a Sub- committee, within the Committee for Intellectual Property, to order the necessary measures to discontinue services or to remove contents infringing the intellectual property right: an administrative procedure that is incompatible with the constitutional guarantee for the freedom of communication, which requires a judicial decision to seize media³⁰. This issue was afterwards rectified in the bill finally approved, requiring a previous judicial authorisation in order to implement measures agreed by the administrative body. But the decision about requesting, or not, the judicial authorisation is left to the Sub commission itself, when it considers that the implementation of its measures can affect the rights and freedoms of article 20 of the Constitution.

In summary, at the core of the important criticisms to this law there are two elements:

- The equalization of intellectual property rights with other public, fundamental interests for whose protection, according to law, measures against Internet services can be adopted –criminal investigation and national security, public health, dignity of the human person and childhood protection-.
- The consideration of an administrative intervention procedure to defend the intellectual property rights in Internet, although it is true that it has been added, to the text of the initial draft, a possible summary judicial intervention.

³⁰ Article 20.5 of the Spanish Constitution

The seizure of publications, recordings and other means of information may only be carried out by means of a court order.



The Spanish Government has recently promoted a new law, “Ley Lasalle”, to modify the Restated Text of the Law on Intellectual Property, approved by Legislative Royal Decree 1/1996 (see Question 2). One of the main objectives of this law is to get higher protection for the copyright in Internet through the reinforcement of the Committee for Intellectual Property assignments and power. This reinforcement is mainly focused to the section of the Commission in charge of fighting, by administrative procedures against infringements of copyrights in Internet. One of the actions proposed to achieve this aim is the obligation for Internet service providers to identify the users at the request of a judge.

The European Data Protection Supervisor (EDPS) finds that the supervision of Internet users and the compilation of their IP addresses interfere in their right to privacy; interference that it is not proportionate with respect to the pursued aim of intellectual rights protection. As an alternative, it proposes a selective supervision on a limited number of suspected persons, into the framework of legal proceedings preparation and relying on judges to order Internet services providers to supply personal information about the alleged infringers. But even with the guarantees indicated by the EDPS, the inherent necessities in the treatment of personal data -for which the copyright owners have been allowed- can lead to force the conditions of data retention by the Internet services providers; a matter that is regulated in detail in order to guarantee the right to the confidentiality of communications and to the personal data protection, and that only has exceptions in the fight against terrorism and organized crime in the cases provided for in the directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

Conflicts between industrial property rights and the right to health

Another example of conflicts between rights is the conflict between patent rights and the right to health, in the case of the pharmaceutical industry.

In Spain, the complaint submitted by the pharmaceutical company Pfizer against the manufacturers of generics of Viagra accusing them of violating industrial property rights and of unfair competition, in October 2011, is an illustrative case of this conflict (Garcia, 2012; Navas, 2012). The competition between the generic medicaments and the original Viagra caused a reduction in the sales of the original medicament of a 20% in Spain. Consequently, Pfizer requested the adoption of precautionary measures in order to withdraw the generics from the market. A judge of Barcelona agreed with the American pharmaceutical company and ordered fifteen manufacturers (seven of which were already marketing the generics in Spain) not to distribute their products because their active ingredient was the sildenafil, a substance whose patent is exclusively owned by Pfizer. Following data from Pfizer included in the Court order, this exclusive patent right did not expire until June 2013, although some sources from the sector asserted that the patent protection in Spain was not the same as the European one; and allowed that generics could enter the Spanish market even three years before.

This is a very interesting kind of conflict between rights because, sometimes, in order to block or to delay the access of generic medicaments to the market and, consequently, the entry of new competitors, the



pharmaceutical companies make a “misuse” of the patent systems, which is actually one of the objects of analysis of the competition policy (article 102 of the Treaty on the Functioning of the European Union).

Resolution of conflicts: Out-of-court procedures as an alternative

Additionally to the Court procedures, the new Spanish Mediation Law which entered into force in March 2012 as a consequence of Royal Decree-Law 5/2012, on mediation in civil and commercial matters that incorporated into the Spanish legislation the Directive 2008/52/EC, on certain aspects of mediation in civil and commercial matter, recognizes that the mediation agreements reached in the field of the EU may be executed in Spain. The EU State members have made similar provisions, favouring this way the use of mediation in civil and commercial matters in Europe.

The new Spanish Mediation Law does not exclude, specifically, the matters related to intellectual and industrial property, and therefore they should be considered as included. Besides, although in some industrial property cases the possibility of using mediation to solve conflicts is not clear (for example, for the declaration of invalidity of a trade mark or a patent), in other cases it is (for example, for the resolution of a trademark license agreement).

Another relevant aspect of this Mediation Law is the approval of a set of minimum standards to drive mediation for cross-border disputes regarding certain civil and commercial matters. This is especially interesting for the field of industrial property, taking into account that many trademarks conflicts have an impact in several States, as in the case of the Community trademarks, whose legal effects spread across the whole EU territory (Devaureix, 2012).



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Table 1. Economic rights recognized by UN and EU legislation and by the Spanish Constitution

| RIGHTS | | UDHR | ICESCR | The EU Charter | Spanish Constitution |
|--|--|---------|---------|----------------|------------------------------------|
| The right to an adequate standard of living | Food, clothing and housing | Art. 25 | Art. 11 | Art. 34 | Art. 47 (Directive) |
| | Medical care | Art. 25 | Art. 12 | Art. 35 | Art. 43 (Directive) |
| | Social services | Art. 26 | Art. 13 | Art. 14 | Art. 27 (Justiciable, fundamental) |
| | Education | Art. 25 | Art. 9 | n. a. | n. a. |
| | Right to work / Free choice employment | Art. 23 | Art. 6 | Art. 15 | Art. 35 (Justiciable) |
| | Safe and healthy working conditions | Art. 23 | Art. 7 | Art. 31 | Art. 40 (Directive) |
| | No discrimination | Art. 23 | Art. 7 | Art. 23 | Art. 35 (Justiciable) |
| | Just remunerations | Art. 23 | Art. 7 | n. a. | Art. 35 (Justiciable) |
| | Rest and leisure | Art. 24 | Art. 7 | Art. 31 | Art. 40 (Directive) |



| | | | | | |
|--------------------------------|---|-------------|------------|---------------------|------------------------------------|
| The right to employment | Equal opportunities for all to be promoted | n. a. | Art. 7 | n. a. | Art.35 (Justiciable) |
| | To form and to join trade unions | Art. 23 | Art. 8 | Art. 12 | Art. 28 (Justiciable, fundamental) |
| | To go on strike | n. a. | Art. 8 | Art. 28 | Art. 28 (Justiciable, fundamental) |
| | Collective Labour bargaining | n. a. | n. a. | Art.28 | Art. 37 (Justiciable) |
| | Information and consultation within the undertaking | n. a. | n. a. | Art. 27 | n. a. |
| | Free placement services | n. a. | n. a. | Art. 29 | n. a. |
| | Protection against unjustified dismissal | n. a. | n. a. | Art. 30 | n. a. |
| | Special protection young people | n. a. | n. a. | Art. 32 | n. a. |
| | Family protection | n. a. | n. a. | Art. 33 | n. a. |
| | Free Labour Movement * | n. a. | n. a. | Art. 15 | n. a. |
| The right to a BIG | Social security | Art. 22, 25 | Art. 9, 10 | Art. 34, 24, 25, 26 | Art. 41 (Directive) |

| | RIGHTS | UDHR | ICESCR | The EU Charter | Spanish Constitution |
|------------------------------|------------------------|-------------|---------------|-----------------------|------------------------------------|
| The right to Property | Property | Art. 17 | n. a. | Art. 17 | Art. 33 (Justiciable) |
| | Intellectual Property* | Art. 27 | Art. 15 | Art. 17 | Art. 20 (Justiciable, fundamental) |



| | | | | | |
|--|--|-------|-------|---------|-----------------------|
| The freedom to conduct a business | | n. a. | n. a. | Art. 16 | Art. 38 (Justiciable) |
| Economic rights within EU common market | Services of general economic interest* | n. a. | n. a. | Art. 36 | n. a. |
| | Consumers protection* | n. a. | n. a. | Art. 38 | Art. 51 (Directive) |

(n. a. not applicable)

UDHR: Universal Declaration of Human Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

The EU Charter: Charter of Fundamental Rights of the European Union

*Economic rights that will be subject of specific analysis within WP5.



Table 2. Consumer's protection legislation by the Spanish Autonomous Communities

| Autonomous Communities with Exclusive Competence | |
|---|---|
| Autonomous Community | Normative |
| Andalucía | Law 13/2003, on Defence and Protection of Consumers and Users from Andalucía |
| Aragón | Law 16/2006, on Protection and Defence of Consumers and Users from Aragón |
| Canarias | Law 3/2003, on the Consumers and Users Statute of the Autonomous Community of Canarias |
| Cataluña | Law 22/2010, on the Consumer Code of Cataluña |
| Comunidad Valenciana | Law 1/2011, of the Generalitat, approving the Consumers and Users Statute of the Comunitat Valenciana |
| Extremadura | Law 6/2001, on the Consumers Statute of Extremadura |
| Galicia | Law 2/2012, on general protection of consumers and users |
| Baleares | Law 1/1998, on the Consumers and Users Statute of the Autonomous Community of Baleares Islands |
| Navarra | Regional Law 7/2006, on Defence of Consumers and Users |
| País Vasco | Law 6/2003, on the Consumers and Users Statute |
| Autonomous Communities with Legislative Development and Executive Powers | |
| Autonomous Community | Normative |
| Asturias | Law of the Principality of Asturias 11/2002, on Consumers and Users |
| Cantabria | Law of Cantabria 1/2006, on Defence of Consumers and Users |
| Castilla La Mancha | Law 11/2005, on the Consumer Statute |
| Castilla y León | Law 11/1998, on Defence of Consumers and Users from Castilla y León |



| | |
|----------|--|
| Madrid | Law 11/1998, on Protection of Consumers from the Community of Madrid |
| La Rioja | Law 5/2013, on Defense of Consumers from the Community of La Rioja |
| Murcia | Law 4/1996, on the Consumers and Users Statute of the Region of Murcia |



Table 3. Spanish Ratification of International Treaties that relate to economic rights

| | Signature's Date | Ratification's Date |
|--|-----------------------------|--------------------------------|
| United Nations' Treaties | | |
| International Covenant on Economic, Social and Cultural Rights | 28 Sep 1976 | 27 Apr 1977 |
| Optional Protocol to the International Covenant on Economic, Social and Cultural Rights | 24 Sep 2009 | 23 Sep 2010 |
| Council of Europe's Treaties | | |
| Convention for the Protection of Human Rights and Fundamental Freedoms (art. 11) | 24 Nov 1977 | 4 Oct 1979 |
| Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Arts. 1 and 2) | 23 Feb 1978 | 27 Nov 1990 |
| European Social Charter (*) | 23 Oct 2000 | 6 May 1980 |

(*) The European Social Charter may be considered a soft-law and not an "international treaty".

The **date marked in grey** corresponds to the date of ratification of the 1961 Charter. The other date corresponds to the signature of the 1996 revised Charter. (*Situation at date 26th March 2013*. Source: Council of Europe).



CATEGORIZATION OF ECONOMIC RIGHTS: SPAIN (III)

Andrea C. Bianculli and Jacint Jordana¹

Question 6: Actors

What is the involvement of private or public actors, such as private (e.g. National Bar Associations) and public entities and authorities (e.g. Patent Offices), agencies, NGOs, etc. – in defining and setting economic rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of economic rights norms.

This report looks specifically into the role of public and private actors in the drafting and setting of economic rights norms in Spain. Building on the guidelines provided by the coordinators, focus is placed on one of three particular areas of relevance for the research, namely consumer rights.

In this respect, it is worth highlighting that Spain is one of the few countries having made express provisions in the constitution for the protection and enhancement of consumer rights (Art. 51). Apart from their recognition as fundamental rights, in this country consumer rights follow a legal framework or pattern characterized by two main dimensions. On the one hand, the existence of a general law of the defence of consumers and users, and a set of specific laws and regulations aimed at protecting consumers in particular sectors, on the other. Additionally, and given the political structure of the country, competences in this area are distributed across the national, regional and local levels, while also promoting the direct involvement of non-state actors in the design and elaboration of policy norms and regulations in the field of consumer rights.

The actors

The state actors involved in consumer policy-making comprise agencies and public offices at the national and sub national levels as detailed below, but also a number of non-state organizations at these various domestic levels, but also in the international arena.

State actors

¹ Institut Barcelona d'Estudis Internacionals.



Competences in the area of consumer rights protection are distributed across the national and sub national levels of government. Based on the quasi-federal structure of Spain, whereas competences in the area of civil and procedural legislation rely exclusively in the hands of the national government, legislative competences are shared by the national government and the various Autonomous Communities. Based on this, the latter have enacted regional laws related to consumer rights and legal conventions on the defense of consumers. In turn, this had led to the multiplication of norms and standards, both general and sector specific ones.

More precisely, and in terms of the elaboration and setting of norms and standards in the area of consumer rights, these stem from the European Parliament and Council, the Spanish Parliament and executive power, regional parliaments and governments, and though to a lesser extent, town assemblies and majors.

Though only formally regulated in 2006, the Sectoral Conference of Consume was established in 1987 to promote collaboration and coordination between national and regional authorities in the area of consume. To this end, the Sectoral Conference of Consume brings together the regional counselors in the area of consume within the Autonomous Communities, the public officials at the National Institute of Consume (INC by its Spanish acronym), the Ministry of Agriculture, Fishing and Food (later on denominated Ministry of Environment, Rural and Marine Affairs) under the Health and Social Policy Ministry.² This body is responsible for the promotion of new legislation in the area of consume, and of the reform of existing norms and standards, together with the elaboration of strategic plans.

At the administrative level, two autonomous agencies were directly involved in the regulation of health protection and safety of consumers and users, namely the Spanish Agency of Food Security and Nutrition (AESAN) and the INC. Both agencies were responsible for administrative and research tasks in this policy field.

Nevertheless, a substantial transformation was introduced early this year. In January 2014 (Royal Decree 19/2014, 17 January 2014) the INC and the Spanish Agency of Food Safety and Nutrition were merged into a new autonomous agency: the Spanish Agency of Consume, Food Safety and Nutrition (AECOSAN). This new agency is now responsible for the competences and responsibilities previously deployed by these two agencies in an attempt to ensure uniform standards, and promote greater efficiency and effectiveness. Among other functions, this agency is responsible for the promotion of new regulatory developments, and the simplification and unification of standards, as well as for evaluating draft standards and norms.

² Representatives of other public agencies are also part of this body, including those in the Ministry of Foreign Affairs and Cooperation, among others.



At the state level, the Spanish Patent and Trademark Office (OEPM) is an autonomous agency, attached to the Ministry of Industry, Energy and Tourism, to promote and support technological and economic development. It provides legal protection to all types of industrial property by awarding patents and utility models (inventions), industrial designs and trademarks and trade names, apart from disseminating information on the various ways in which industrial property can be protected. In relation to this, the OEPM is also involved in consumer rights given that the main function of trademarks and trade names is to enable consumers to identify and differentiate a product or service. To this end, the OEPM has recently conducted research on consumer behavior towards consumption. Through a survey that allowed collecting data directly from consumers regarding their performance against counterfeiting, the OEPM thus intended to obtain information that will serve to future campaigns aimed at raising awareness among the social groups most affected by this phenomenon.

At the regional level, Autonomous Communities have implemented specific public agencies to guarantee citizens' rights as consumers of goods and products of services, and to inform both consumers and companies about their rights and duties regarding consumer affairs. These agencies provide thus relevant information to consumers, business actors and professionals both in the public sector and in consumer associations by means of seminars and training courses, apart from their direct involvement in the resolution of conflict through mediation and other arbitration mechanisms. Annex I provides a complete list of existing consumer public agencies at the regional level in Spain.

Finally, municipalities also rely on a Consumer Information Office (OMIC) to assist consumers and users in the defence of their rights through the provision of prior information, advice and the processing of claims and complaints. Local authorities are responsible for the inspection of products, goods and services to ensure their compliance with relevant consumer regulations, the enforcement of regulations on pricing, labelling together with the presentation and advertising and other requirements or external signs related to hygiene, health and safety. They also implement information and training activities aimed at consumers, and collaborate and participate within the local arbitration system.

In the case of Barcelona, for example, the OMIC is placed within the Trade and Consumer Services Department of the city council. Created in 1983, under the name of Servicio de Información, Defensa y Educación del Consumidor (SIDECE), OMIC offers personalized consultancy services, and receives, processes and resolves claims and complaints of consumers within the administrative boundaries of Barcelona, and collaborates with Consumer Arbitration Boards and with consumer organizations.³ Similar offices can be found all over Spain.⁴

³ For further details, see http://w110.bcn.cat/portal/site/OficinaMunicipalConsumidor/menuitem.546e937b805386cae3bf6af520348a0c/?vgnextoid=1000001013013389VgnV6CONT0000000000RCRD&lang=en_GB, last accessed 28 April 2014.

⁴ See <http://aplicaciones.consumo-inc.es/cidoc/Consultas/dirMapas.aspx?tabla=omic>, last accessed 29 April 2014.



Non-state actors

In terms of the promotion of civil society, the Act 1/2007, of 16 November, that passes the codified text of the General Law for the Defense of Consumers and Users and other complementary laws (Royal Decree Leg.1/2007) clearly establishes the responsibility of promoting consumers and users associations, and includes their funding by the government.⁵ Thus, while Spanish legislation promotes the articulation of consumers and users associations, it also authorizes their participation in consultative bodies, as in the case of the Sectoral Conference of Consume.

More specifically, consultation between the government and consumer associations takes place via the Council of Consumers and Users (CCU).

Exclusively made up of representatives of the eleven national associations,⁶ the CCU works within the Ministry of Health, Social Services and Equality, through the INC where 313 organizations are registered. Out of these, only those under the CCU are of national scope.⁷ These organizations are selected according to their representativeness that is based primarily on the criterion of territorial jurisdiction: organizations have to be of national scope. A second criterion refers to these organizations' technical and policy capabilities, which include the provision of services to both member and non-members in terms of information and advice, and their active involvement in Consumer Arbitration Boards, and the defense of the interests of consumers in court and the filing of collective demands, among others.

Formally speaking, the Ministry for Health and Consumer Affairs furnishes the CCU with the human resources and materials it needs, and provides that the Council's head office shall be at the INC and that its secretary shall be appointed from among its officials (Royal Decree 825/1990 of 22 June 1990).

The functions of the CCU are to propose to the public administration, through the INC, all those issues that may be of interest to consumers and users and to present relevant regulatory proposals in the area of consumers' rights and their defense. Additionally, the CCU is to collaborate through the provision of technical advice in the various public initiatives implemented to protect consumers and users, and to offer the INC and other public agencies information and reports when required. The CCU also aims to

⁵ This is also the case in Germany and the United Kingdom in the European Union (EU).

⁶ These institutions include Asociación de Usuarios de Bancos, Cajas y Seguros (ADICAE), Asociación General de Consumidores (ASGECO), Asociación de Usuarios de la Comunicación (AUC), Asociación de Usuarios de Servicios Bancarios (AUSBANC CONSUMO), Confederación Española de Organizaciones de Amas de Casa, Consumidores y Usuarios (CEACCU), Confederación de Consumidores y Usuarios (CECU), Consumidores en Acción (FACUA), Federación de Usuarios - Consumidores Independientes (FUCI), Confederación Española de Cooperativas de Consumidores y Usuarios (HISPACOO), Organización de Consumidores y Usuarios (OCU), Federación Unión Nacional de Consumidores y Amas de Hogar de España (UNAE). Available at <http://www.consumo-ccu.es/representacion/organizaciones.asp>, last accessed 28 April 2014 (see Annex II for a detailed description of these various organizations).

⁷ We believe that the specific ways and the extent to which these subnational associations of consumers and users are involved in the formulation of new regulations and standards at the regional level is a question that deserves further scrutiny and one that could be covered when developing the case study.



strengthen collaboration and dialogue among consumer and user organizations at the sub national, national and international levels, to promote thus social dialogue.

The CCU works hence as an organization of representation and consultation at the national level. Standing for the different national consumers organizations, the CCU is intended to protect the interests of consumers and users and influence the decision making process in the area of consumer policy in an attempt to deepen the participation of civil society and to promote broad social consensus in the policymaking process. Additionally, the CCU carries out a wide range of activities aimed at promoting awareness and knowledge in the area through the elaboration of reports, studies and policy briefs in relation to issues having an impact on consumer's rights.

This translates, as shown by the CCU Activity Report for 2012, in meetings with ministers, as in the case of the one with the Minister of Health, Social Affairs and Equality, who informed them on the government's policy towards consume. During the meeting, the CCU claimed the implementation of the Law on Consumer Affairs Services. Furthermore, the CCU financed several training programs and activities implemented by the member associations to inform and promote the protection and defense of consumer rights, apart from the activities developed to detect and identify unlawful advertisements, which entailed petitions, complaints and claims to private companies, among others.

Consequently, while the CCU has to be consulted during the preparation of general legislation pertaining to consumers (Royal Decree 825/90 of 20 June 1990, as amended by Decree 2211/1995 of 28 December 1995), the CCU stands for all consumers and users' interests on other consultative bodies. These include bodies or commissions on which the administration, industry and trade unions are represented. Participation at the national level is complemented with their active involvement in international forums and networks at the EU level (see Annex III).

In fact, one of the functions of the CCU is to propose and nominate civil society representatives to council bodies, agencies and offices, both public and private, and operating at the national and international levels as well. These representatives are selected based on their qualification and capacity, and the experience required to adequately perform their tasks within the specific body, their involvement in one of the organizations under the CCU or to have an employment or service relationships with one of these organizations. Therefore, the CCU is actively involved in the elaboration of legislation in relation to products and services in a wide array of policy areas, including housing, health, telecommunications, energy and electricity, among many others.

The Consejo General de la Abogacía Española works as the representative and coordinating agency of the 83 lawyers associations in Spain to promote more agile, modern and effective justice duties. Furthermore, it provides relevant services to citizens in terms of their consumer rights, as in the case of the special office that has been set up to provide free assistance to consumers having problems with their mortgages. Information and training seminars are part of its agenda and in this respect, it is worth



mentioning the organization of a workshop to analyze the reform of the “Law of Consumers and Users”, which can be attended either personally or online. Activities also include the legal and technical analysis of norms and regulations, and how these affect the rights of citizens as consumers, as in the case of the draft bill setting the provision of free legal aid.⁸

More recently, other societal organizations have emerged to promote responsible and mindful consumption. Though it is still not clear which role they play in the process of policy formulation and the drafting of new norms, regulations and standards in terms of consumer rights, they offer a new space for the analysis of public policy and legal standards while also conducting research on alternative agendas. In this respect, the Centro de Investigación e Información en Consumo (CRIC) was established in 1996, to disseminate consumption awareness through a set of activities that include a magazine, talks and seminars, and research projects in joint collaboration with other organizations.⁹ Similar associations include the Red de Redes de Economía Alternativa y Solidaria, Ecologistas en Acción and various social markets in Aragón, Madrid and the Basque Country. In turn, these various organizations are part of the Asociación de Redes de Mercado Social, which has established Konsumo Responsable, a web portal offering information, news and other resources in the area of fair trade, ecological consume, social inclusion and international cooperation.

In sum, the picture of state and non-state actors with an interest in the field of consumer rights in Spain presents a complex pattern based on the formal distribution of competences, on the one hand, and the widening of the agenda and the ways in which consumer rights and consume are thought of, on the other.

Some final remarks

This report builds mainly on available legal documents and the information provided in the institutional WebPages of both state and non-state actors involved in the area of consumer rights. While this is certainly relevant to describe and analyze the role of these actors in the process of policy formulation, further research is required to assess how these various mechanisms work in practice. Additionally, the paper will identify and look into other public actors having responsibilities in the area of consumers’ rights and regulations in different sectoral areas, as in the case of telecommunications and audiovisual.

In sum, this report is to be complemented with a detailed case study on consumer rights based on a qualitative case-study method and data collection process, which will combine interviews together with an extensive review of secondary written sources and relevant literature. However, and based on the

⁸ Information retrieved from <http://www.abogacia.es/>, last accessed 29 April 2014.

⁹ See <http://opcions.org/es/cric>, last accessed 29 April 2014.



preliminary literature search we have conducted so far, consumer rights and the role of the various actors involved in this policy field seem to be a rather under researched area.

Building on the information and data collected so far, we believe that the proposed case study on Spain and the protection of consumer rights will constitute a timely contribution to both the academic literature and the policy debate as it aims to unravel how formal and informal processes in the area of policy formulation work after this relevant institutional change. Additionally, it can shed light on how and to what extent this has affected the preferences and strategies of both state and non-state actors at the domestic level, but also at the EU.

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- Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias
- Real Decreto 2211/1995, de 28 de diciembre, por el que se modifica el Real Decreto 825/1990, de 22 de junio, sobre el derecho de representación, consulta y participación de los consumidores y usuarios a través de sus asociaciones
- Real Decreto 825/1990, de 22 de junio, sobre el derecho de representación, consulta y participación de los consumidores y usuarios a través de sus asociaciones



Annex I

- Agència Catalana del Consum
- Agencia Española de Consumo, Seguridad Alimentaria y Nutrición
- Agencia Regional de Sanidad Ambiental y Consumo de Asturias
- Consejería de Bienestar Social y Sanidad de Melilla
- Dirección General de Comercio y Consumo Cantabria
- Dirección General de Comercio y Consumo de Valencia
- Dirección General de Consumo de Andalucía (Almería)
- Dirección General de Consumo de Aragón
- Dirección General de Consumo de la Comunidad de Madrid
- Dirección General de Consumo de Murcia
- Dirección General de Consumo Islas Canarias (Las Palmas)
- Dirección General de Consumo Islas Canarias (Tenerife)
- Dirección General de Ordenación y Desarrollo de La Rioja
- Dirección General de Salud Pública, Drogodependencias y Consumo de Castilla-La Mancha
- Dirección General de Salud Pública y Consumo de Castilla y León
- Dirección General de Salud Pública y Consumo Islas Baleares
- Instituto de Consumo de Extremadura
- Instituto Galego de Consumo
- Instituto Vasco de Consumo (Kontsumobide)
- Servicio de Consumo de Ceuta



Annex II

1. Asociación de Usuarios de Bancos, Cajas y Seguros (ADICAE)

This association was created in 1988 to protect, inform and claim the rights of the users of banking and insurance services in Aragon. Later on, as the association grew, its activities went well beyond the frontiers of this Autonomous Community, and became ADICAE in 1990. In time, it has consolidated as one of the leading and largest consumer associations relying on more than 30 branches across Spain. Since 1996, ADICAE is member of the CCU and stands for consumers in the consultative council of the Spanish Stock Market Commission and of the Advisory Board of the Directorate-General for Insurance. Additionally, it has promoted relevant projects within the European Commission and has led cooperative activities in Latin America.

<http://www.adicae.net/>

2. Asociación General de Consumidores (ASGECO)

Established in 1980, ASGECO brings together numerous organizations and associations of consumers, including more than 300 offices open to the public and over 350,000 members throughout the country. Building on a multidisciplinary team, the organization provides free services to consumers in terms of the provision of information, but also regarding receiving and processing complaints. ASGECO elaborates guides, brochures and reports. It organizes workshops, seminars and lectures, apart from their role in different councils and consumer arbitration boards.

<http://asgeco.org/index/>

3. Asociación de Usuarios de la Comunicación (AUC)

AUC is a nonprofit and independent organization, whose main aim is to defend the interests of citizens as users of the mass media, receivers of the messages disseminated by them and possible “targets” of their content. Based on this, the association develops different activities to monitor and report, when necessary, the violations of norms and regulations in the area of communication, including advertising, television, telecommunications and Internet, among others. Additionally, they have deployed activities and projects in the field of education to raise social awareness, apart from preparing reports and research papers related to the contents promoted by different social media. Finally, AUC is actively involved in different consultative or arbitration boards at the national and sub national levels, and at the EU level.



<http://www.auc.es/>

4. Asociación de Usuarios de Servicios Bancarios (AUSBANC CONSUMO)

AUSBANC CONSUMO was established in 1986, to defend and consolidate the rights and interests of consumer and users through the articulation of case law and a legal corpus to effectively ensure the rights of its members and users and consumers at large, on the one hand, and through the promotion of norms and standards to ensure effective protection, on the other.

<http://www.ausbanc.es/web/home.asp>

5. Confederación Española de Organizaciones de Amas de Casa, Consumidores y Usuarios (CEACCU)

CEACCU is the first consumer organization in Spain, which builds on the previous experience of the Federación Nacional de Asociaciones Provinciales de Amas de Casa, Consumidores y Usuarios established in Madrid in 1968. In 1970, it assumed the first representation of consumers in a public body.

CEACCU relies today on more than 400.000 members in the 46 member organizations. It has offices in 1.100 Spanish municipalities in 16 Autonomous Communities and Ceuta and Melilla. The organization has always worked in the training, representation and defense of consumers by means of different activities.

<http://www.ceaccu.org/>

6. Confederación de Consumidores y Usuarios (CECU)

CECU was established in 1983 as the first Spanish confederation of consumer organizations. The organization provides legal assistance; training and information, with a special focus on particularly vulnerable groups, namely, women, elderly people and migrants, and promotes different activities in the area of development cooperation. It is member of the CCU, the European Consumer Organisation (**BEUC**), Consumers International, apart from its participation in various national and sub national consultative and normalization boards in Spain.

<http://www.cecuc.es/>



7. Consumidores en Acción (FACUA)

FACUA is a non-governmental organization created in 1981 to defend consumer rights, and promotes a progressive agenda based on democratic, plural and participatory principles. It dates back to the Spanish transition and builds on the experience of the neighbourhood movement and its defence of the rights of the citizens as consumers. In 1980, they promoted a national association of consumers to encourage in turn, the establishment of a network of offices across the country. In 2003, FACUA was established as an organization of national scope and relying on a confederal structure, made up of a large number of organizations and territorial delegations across different levels – Autonomous Communities, provinces and municipalities.

<http://www.facua.org/>

8. Federación de Usuarios - Consumidores Independientes (FUCI)

FUCI was established in 1986 to endorse and develop consumer and user rights, to diffuse and claim these rights, while also promoting sustainable consume and environmental responsibility. To this aim, the association has developed a wide array of activities, namely, the provision of information, training workshops, conferences and seminars, consumer defence, the implementation of specific activities related to environmental protection, and the promotion of health and safety, among others. FUCI is member of the CCU, and is involved in Consumers International, the International Association for Consumer Law, and the Association Européenne des Consommateurs (A.E.C.), among others.

<http://www.fuci.es/>

9. Confederación Española de Cooperativas de Consumidores y Usuarios (HISPACOOOP)

HISPACOOOP brings together and coordinates 171 consumer cooperatives in Spain, standing thus for over 3.434.100 members and over 51.170 workers. Its activities are organized in two main axes. One is directed towards the cooperative model of enterprise by standing for the interests of consumer cooperatives in institutions and national and international fora, and a second axis is veered towards the development of activities in the area of consumer rights through the provision of information and training, and the defense of consumers.

<http://www.hispacooop.es/>

10. Organización de Consumidores y Usuarios (OCU)



OCU is one of the first consumer organizations established in Spain. Its creation dates back to 1975. In 1987, it signed an association agreement with the organization Test-Achats in Belgium, through which OCU received a grant to strengthen its technical capabilities.

<http://www.ocu.org/>

11. Federación Unión Nacional de Consumidores y Amas de Hogar de España (UNAE)

Federación UNAE builds on the previous experience of the Asociaciones de Amas de Hogar de Barcelona y León. In 1979, the Unión Cívica Nacional de Consumidores y Amas de España (UNAE) is founded, and in 1985, it turns into the current Federación UNAE, which brings together 170 associations and territorial delegations in 12 Autonomous Communities. The organization relies on 180.000 members, and is dynamically involved in both national and European networks.

Its activities are based on the promotion of health and safety, the provision of information on consumer rights, the active participation in the arbitrational system for consumers, and the provision of information and training to consumers through workshops, conferences and seminars, among others.

<http://www.federacionunae.com/>



Annex III

- Agencia española de protección de datos (Consejo Consultivo)
- Agencia española de consumo, seguridad alimentaria y nutrición (Consejo de Dirección)
- Agencia española de consumo, seguridad alimentaria y nutrición (Consejo Consultivo)
- Asamblea general de ANEC
- Comisión de denominaciones comerciales de especies pesqueras
- Comisión de seguimiento del códigos PAOS
- Comisión del código técnico de la edificación
- Comisión para el seguimiento de la transición a la TV digital terrestre
- Comisión mixta de seguimiento del código de autorregulación sobre contenidos televisivos e infancia
- Comisión nacional de reproducción humana asistida
- Comité consultivo de la comisión nacional del mercado de valores
- Comisión nacional de la energía, consejo consultivo de la electricidad
- Comisión nacional de la energía, consejo consultivo de hidrocarburos
- Comisión de supervisión de los servicios de tarificación adicional
- Comisión técnica para la seguridad de productos
- Consejo Económico y Social
- Comité económico y social de la Unión Europea
- Comité consultivo del organismo autónomo para el mercado de tabacos
- Comité de medicamentos uso humano (CMH)
- Consejo estatal de responsabilidad social de las empresas
- Consejo asesor de telecomunicaciones y para la sociedad de la información (CATSI)
- Consejo general del sistema arbitral de consumo
- Consejo nacional del clima
- Consejo asesor de medio ambiente
- Consejo general de organizaciones interprofesionales agroalimentarias
- Consejo nacional de transportes terrestres
- Consejo nacional de seguridad ciudadana
- Consejo de participación del instituto de gestión sanitaria (INGESA)
- Consejo de participación del instituto de gestión sanitaria (INGESA), comisión ejecutivo de Ceuta
- Consejo de participación del instituto de gestión sanitaria (INGESA), comisión ejecutiva de Melilla
- Consejo superior de estadística
- Consejo superior de seguridad vial



- Corporación RTVE (consejo asesor)
- Junta consultiva de seguros
- Observatorio de la cadena alimentaria
- Observatorio de la publicidad del comité asesor
- Observatorio de la distribución comercial
- Grupo consultivo europeo de los consumidores
- Comisión para el seguimiento de la calidad en la prestación de los servicios de telecomunicaciones
- Comisión intersectorial para actuar contra las actividades vulneradoras de los derechos de propiedad intelectual
- Comisión intersectorial para actuar contra las actividades vulneradoras de los derechos de la propiedad intelectual
- Comisión interministerial para la ordenación alimentaria
- Observatorio de la delegación del gobierno para violencia de género
- Observatorio de pagos con tarjeta electrónica
- Observatorio para la prevención del tabaquismo
- Consejo del plan estatal de vivienda
- Comisión seguimiento acuerdo de colaboración entre el MISACO y representantes de los sectores de la creación, producción y distribución de prendas de vestir
- Comisión de calificación de películas cinematográficas
- Consejo estatal para el patrimonio natural y la biodiversidad
- Comisión de seguimiento del convenio entre el CCU, la ONCE y CERMI
- Consejo interministerial de organismos modificados genéticamente (CIOMG)
- Agencia española de medicamentos y productos sanitarios (consejo rector)
- Consejo superior postal
- Foro nacional multilateral sobre facturación electrónica
- Observatorio de la nutrición y el estudio de la obesidad
- Comisión de control de buenas prácticas para la reestructuración viable de las deudas con garantía hipotecaria sobre la vivienda habitual



CATEGORIZATION OF ECONOMIC RIGHTS: THE NETHERLANDS

Sybe A. de Vries¹

Introduction

The Netherlands has been a Member State of the European Union (hereafter: EU) since its conception as European Economic Community (hereafter: EEC) in 1957. Before the establishment of the EEC, the Netherlands had joined five other European states (Belgium, Luxembourg, France, Germany and Italy) in signing the Treaty of Paris (1951), which constituted the European Coal and Steel Community (ECSC). And already in 1948 the Netherlands, together with Belgium and Luxembourg, had formed the Benelux Customs Union, which was later replaced by the Benelux Economic Union.

This longstanding membership of these European economic organizations has had an important impact on Dutch (public) economic law. European economic law – the law of the EEC - has penetrated national law from the beginning of the 1960s. The relative openness of the Netherlands towards European and international sources of economic law can perhaps best be explained by the historical development of the Netherlands. In the so-called ‘golden age’ (1600-1700), just after it had broken away from the larger Netherlands ruled by Spain and became independent (1579), the Dutch Republic’s wealth was considerably augmented by its role in *world* trade.² And it was during this time, due to the harsh, repressive and despotic rule of the Duke of Alva in Flanders, that ‘Holland’ (the northern Netherlands) was confronted with a large influx of migrants from Belgium, who greatly contributed to the Dutch Republic’s golden age.³

The first Constitution of the Kingdom of the Netherlands dates from 1814. As a matter of fact the northern Netherlands during the time of the so-called ‘Bataafsche Republiek’ (1795-1801) already knew ‘a Constitution’ (Staatsregeling 1798). After the defeat of Napoleon the Congress of Vienna decided to form a new unitary state, the United Kingdom of the Netherlands, comprising Belgium, Luxembourg and the Netherlands, and headed by King William I. The Constitution has been revised ever since with a substantial revision in 1848 (Constitution of Thorbecke) after Belgium and Luxembourg had become independent (recognized by the King of the Netherlands in 1839).

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² M. Prak, *The Dutch Republic in the Seventeenth Century: The Golden Age* (Cambridge University Press 2005). See with regard to the wealth in the Dutch Republic: S. Schama, *The Embarrassment of Riches: an interpretation of Dutch culture in the Golden Age* (Alfred A. Knopf 1987).

³ See also A. Van den Bossche, ‘bEUCitizen: Belgian Report’ (21 May 2014).



Question 1; Identification of economic rights

Question 1: Identification of economic rights

Which rights are considered in your country as economic rights?

Amongst those rights, which are considered 'core'?

Enjoying constitutional status?

In the Netherlands economic rights are generally considered to fall within the category of 'social rights', or seen as part of the broader group of economic, social and cultural rights. The notion of economic rights as a separate group of rights has not really been consolidated in the Netherlands. The constitutional fundamental rights are laid down in the first Chapter of the Dutch constitution, which are distinguished in classical fundamental rights and freedoms on the one hand and social rights on the other. As will be seen hereafter, a number of economic rights can be brought under the umbrella of classical fundamental rights.

Considering the rather limited character of the Dutch constitution, fundamental rights in general and economic rights in particular have multiple sources. And Dutch economic rights are generally viewed from an international and European perspective, in relation to various Treaties that specifically protect economic rights. This is reinforced by the prohibition on judicial constitutional review and the monist approach to international law. According to Article 120 of the Dutch Constitution judicial review of the constitutionality of primary legislation (Acts of Parliament) is explicitly banned, which implies that "the value of the Dutch Constitution as a source of fundamental rights protection by the judiciary is [...] rather limited [...]" (see also hereafter).⁴

Dutch economic law

It should be observed that Dutch economic law is founded on the 'market model', which is first and foremost characterised by important principles of *economic freedom*, such as consumer sovereignty, freedom of profession and freedom to conduct a business. The legal core of the judicial system supporting the market model involves private property and contractual freedom (see hereafter).⁵ Point of departure is that these economic principles should provide citizens with sufficient leeway to pursue

⁴ M. Claes & J. Gerards, 'FIDE Report The Netherlands' in: J. Laffranque (ed), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: (FIDE XXV Congress Tallinn 2012, Vol.1, Estonian Lawyers Association 2012), 613-677, at 617.

⁵ K. Hellingman and K.J.M. Mortelmans, *Economisch Publiekrecht: rechtswaarborgen en rechtsinstrumenten*, (Kluwer 1989) 303.



economic activities upon their own motion and according to their own views.⁶ The market model is furthermore supported by a second important principle, the *principle of equality*. A formal concept of equality entails that the government, without distinguishing between citizens, enforces the market model with a view to protect equal conditions of competition for all market participants. This formal notion of equality is accompanied by a material or substantial conception of equality, which centres around the factual inequalities that may justify a difference in treatment between citizens.⁷

This brings us to the third and last principle underlying the Dutch market model: the *principle of solidarity*. Civil law incorporates solidarity by introducing the concept of liability, which induces citizens to act responsibly. But, next to rules of civil law, the Dutch government intervenes in the economy by guaranteeing basic social rights, which include allowances, guaranteed income, education, housing, healthcare and culture. The Dutch welfare system that developed after the second World War is a continental type welfare system similar to other European states.

Constitutional fundamental rights relevant for the exercise of economic rights

Before turning to more specific economic rights, it should be noted that some economic rights are ‘built-in’ in basic constitutional fundamental rights. Or, in other words, although most constitutional fundamental rights are not as such categorized as economic rights, they are relevant for the *exercise* of economic rights. The first category of fundamental rights, Articles 1 to 17, contain classical rights and freedoms mainly restricting acts of state authorities.⁸

The first Article of the Constitution lays down **the principle of equality**, or the right to equal treatment and non-discrimination and reads as follows:

“All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.”

In 1887 the phrase ‘residents or aliens in the Netherlands’ in this provision, indicating those persons who had the right to equal treatment, was removed.

Dutch law is strongly affected by the principle of equality. It is reflected by the legality principle, which implies that the freedom and property of citizens cannot be violated save as otherwise provided by law, which in turn applies equally to all citizens. Equality between market participants implies that in economic activities the legal conditions for competition in the market place are equal.⁹ It is furthermore relevant for the exercise of economic rights, for instance, where they concern the freedom to pursue a

⁶ *ibid* 306.

⁷ *ibid* 307.

⁸ Claes & Gerards (n 4) 614.

⁹ Hellingman and Mortelmans (n 5) 304.



trade or profession, the access to a profession or equal pay between men and women. In relation to this, the right to access to public service, or rather the right for each Dutch citizen to be appointed in the public service enshrined in Article 3 of the Constitution should be mentioned.

Civil, criminal and administrative law are all founded on the idea or principle of equal treatment of all citizens.¹⁰ Irrespective of the firm roots of equality in Dutch law, it does not seem to have played a special role in court practice.¹¹

Constitutional economic rights

Where more in particular economic rights are concerned, the **right to property** is one of key principles. It constitutes a foundational value of Dutch society in that it defines economic relationships.¹² It is therefore striking to observe that the Dutch constitution does not contain a right to protection of property ownership as such, but rather a relatively weak right against *unlawful expropriation*.¹³

Article 14(1) of the Constitution stipulates:

“[E]xpropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament”. The conditions for expropriation are further elaborated in the expropriation act.

Former constitutional texts, however, did contain an explicit right to property ownership, but the present Constitution puts expropriation and compensation at the heart.¹⁴ Nevertheless, it is generally assumed that Article 14 at least implicitly recognizes a right to property ownership. Property does not only involve real estate but also movable property.¹⁵ Article 6(2) of the Financial Supervision Act constitutes the power for the Minister of Finance to expropriate *inter alia* the assets of the company concerned. Expropriation usually means that property is being transferred from a private law body to a public body, but that is not necessarily the case. State institutions with a private law status could also be confronted with expropriation for the benefit of companies, private bodies, according to Article 1(2) of the Expropriation Act.¹⁶

¹⁰ S.C. van Bijsterveld, ‘Commentaar op artikel 1 van de grondwet’ in E.M.H. Hirsch Ballin and G. Leenknecht (eds), *Artikelsgewijs commentaar op de Grondwet*, web edition 2014 <www.Nederlandrechtsstaat.nl> 4.

¹¹ Hellingman and Mortelmans (n 5) 308.

¹² T. Peters, ‘Commentaar op artikel 14 van de grondwet’ in E.M.H. Hirsch Ballin and G. Leenknecht (eds), *Artikelsgewijs commentaar op de grondwet*, web edition 2014 (www.Nederlandrechtsstaat.nl) 1.

¹³ C.A.J.M. Kortmann, *Constitutioneel recht* (Kluwer 2008) 456.

¹⁴ *ibid* 3.

¹⁵ Kortmann (n 13) 455.

¹⁶ Peters (n 12) 2.



Article 14(3) contains a provision regulating the possibility to impose restrictions on the unlimited use of property or the destruction of property by the state. Particularly the possibility for the government to restrict the use of property for specific purposes, for instance, not to allow the owner to build on his land, is frequently used.

Another constitutional right that could be considered as an economic right is the **freedom of labour**, which is laid down in Article 19(3) of the Constitution. This provision seeks to protect citizens in their interest to provide for the compensation of maintenance costs through labour. The freedom of labour dates back to the Constitution of the Batavian people of 1798 (Staatsregeling voor het Bataafse Volk), which abolished the guilds. Contrary to the other paragraphs of Article 19 of the Constitution on employment and the protection of the legal position of workers, the freedom of labour is considered as a 'classic constitutional right', which is judicially cognisable.¹⁷

Economic rights in other legislation

Considering the limited nature of the Dutch constitution the term 'economic constitution' is generally avoided in legal literature.¹⁸ After all, a catalogue of clearly defined and well-developed economic constitutional norms is lacking in Dutch law. Economic freedom as fundamental right entails a number of economic rights, which are fragmented and dispersed and can first of foremost be found in Dutch civil law. Important principles of economic freedom are incorporated and/or inherent in the Dutch Civil Code guaranteeing the freedom of choice for citizens but these do not necessarily coincide with economic constitutional rights: consumer sovereignty, freedom of profession, freedom to pursue a business. And as stated above, private property and contractual freedom constitute the legal core of the Dutch legal system.¹⁹

The Dutch Civil Code, which is largely revised in 1992, is classified in ten different books:

- Book 1 Persons and Family Law
- Book 2 Legal Persons
- Book 3 Property Law in General
- Book 4 Succession (Inheritance)
- Book 5 Real Property Rights
- Book 6 Obligations and Contracts
- Book 7 Particular Contracts
- Book 7a Particular Contracts

¹⁷ M. Houwerzijl and N. Zekic, 'Commentaar op artikel 19 van de grondwet' in E.M.H. Hirsch Ballin and G. Leenknecht (eds), 'Artikelsgewijs commentaar op de grondwet', web edition 2014 (www.Nederlandrechtsstaat.nl) 2.

¹⁸ Hellingman & Mortelmans (n 5) 302.

¹⁹ *ibid* 303.



Book 8 Transport Law

Book 9 Intellectual Property

Book 10 Private International Law

Where, however, economic freedom for market participants is hampered by contracts or conduct that have negative economic consequences in the market place, the Dutch Competition Act provides for rules prohibiting cartels and restrictive practices.²⁰ The main aim of the Competition Act is to combat unintended effects of competition restraints, to protect freedom of enterprise and the well-functioning of the market.²¹

Question 2: National sources of economic rights

Question 2: National sources of economic rights

Where are these rights laid down at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

Please describe the main legal sources of economic rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);

Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of economic rights in your country, in terms of framework and substantial standards (not enforcement);

Please indicate whether significant developments have recently taken place in this respect;

Please, analyse the main trends in public law protection of economic rights, distinguishing the approaches both on the bases of the different role of legislation and case law, so as on the ground of the different macro-areas of property right, business regulation and labour market.

²⁰ Act of 22 May 1997, laying down new rules on economic competition (Competition Act) <http://wetten.overheid.nl/BWBR0008691/geldigheidsdatum_20-06-2014> accessed 23 January 2015.

²¹ See also explanatory memorandum (Memorie van Toelichting), Tweede Kamer, session year 1995–1996, 24 707, nr. 3, 9.



As explained above, economic rights are contained in various sources of law. Next to national law, including constitutional provisions that are relevant for economic rights, civil law and competition law, Dutch law finds its origin in international and European law and legislation, which was already mentioned in the introduction.

Focusing on the national sources of economic rights here, various rights have been elaborated in subnational laws and decrees. In addition to the laws referred to above, it is particularly relevant to mention the principle of equality as laid down in Article 1 of the Constitution, which is elaborated by the **Dutch Equal Treatment Act**. This act seeks to protect citizens against discrimination on the grounds of religion, belief, political opinion, race, sex, heterosexual or homosexual orientation or civil status, in order to promote equal participation in the life of society. With respect to economic rights, Article 7(1) is significant and reads as follows:

“It shall be unlawful to discriminate in offering or permitting access to goods or services, in concluding, implementing or terminating agreements on the subject, and in providing career orientation and advice or information regarding the choice of educational establishment or career if such acts of discrimination are committed:

- a. in the course of carrying on a business or exercising a profession;
- b. by the public service;
- c. by institutions which are active in the field of housing, social services, health care, cultural affairs or education or
- d. by private persons not engaged in carrying on a business or exercising a profession, in so far as the offer is made publicly.”

By means of Article 7(1) of the Equal Treatment Act a great number of contracts is subjected to the principle of equal treatment.²²

Whereas rules on property ownership and contracts can be found in the **Dutch civil code**, the right against unlawful expropriation by the State as contained in Article 14 of the Constitution is expounded by the **Expropriation Act**, which provides rules for expropriation for public purposes for the benefit of the State,

²² J.M. Smits, ‘Constitutionalisering van het Vermogensrecht: Preadvies Nederlandse Vereniging voor Rechtsvergelijking 2003’ (Kluwer 2003) 30.



provincial or municipal authorities of Water Boards. Expropriation may be effected on rights of ownership of real property or other rights relating to property such as hereditary tenure of public land, servitudes or usufruct.²³

The possibility to impose restrictions on property ownership is regulated in a number of laws, for instance, the Environmental Protection Act, the Spatial Planning Act and the Monument Act 1961.²⁴ These restrictions are sometimes so far-reaching that their effects are similar to expropriation. It is therefore essential that a right to damages arises, whenever the government decides to restrict property ownership for public interest reasons. The Constitution speaks of ‘full compensation’ in case of expropriation, rather than of a right to damages, indicating that in case of expropriation the owner will be fully compensated. If, however, restrictions are imposed on property ownership a right to damages exists, which does not always imply the right to compensation.²⁵

*Regulation of economic activities – Competition, Deregulation & Legislative Quality*²⁶

The three basic principles underlying the Dutch market model, i.e. economic freedom, equality and solidarity, have shaped Dutch public economic law. Twenty years ago, the Netherlands started to become very active in reducing ‘unnecessary’ and ‘burdensome’ economic legislation. A major example of such a legislative initiative is the operation ‘Marktwerking, Deregulering en Wetgevingskwaliteit’ (Competition, Deregulation and Quality of Legislation – hereafter: MDW programme), which was launched in 1994 and was accompanied by the proposal to adopt a competition law and the initiative to expose the public sector to market forces.²⁷ The Regulatory Reform had a three-fold objective:

- To strengthen the functioning of the market;
- To minimize the administrative burden, which is the result of legislation and regulations, for companies;
- To improve the quality of legislation and regulations.

Initiatives to improve the quality of national regulation had been underway before. In 1984, a report presented by the Commission on Deregulation of Governmental Institutions (Commissie Geelhoed) concluded “that characteristics of the Dutch institutional system structure bore major responsibility for an excessively complex, heavy, and far reaching legislative structure”.²⁸ The report questioned the regulatory effects of the Dutch administrative and legal system. It was an important starting point for initiating reforms in social, labour and competition policies. This led the Dutch government to seek a

²³ Act of 28 August 1851 regulating expropriation for public purposes (Expropriation Act) < http://wetten.overheid.nl/BWBR0001842/geldigheidsdatum_30-01-2015 > accessed 31 January 2015.

²⁴ Peters (n 12) 3.

²⁵ Peters (n 12) 4.

²⁶ This part is largely based on a study by S. Prechal, S. de Vries and F. van Doorn, ‘The implementation of the Services Directive in the Netherlands’ in U. Stelkens and others (eds), *The Implementation of the EU Services Directive. Transposition, Problems and Strategies* (T.M.C. Asser Press 2012) 435-474.

²⁷ See also H. van Meerten, ‘The Netherlands’, in: H.F. Koeck, M.M. Karollus (eds), *The New Services Directive of the European Union* (FIDE XXIII Congress Linz 2008, Vol 3, Congress Publications, Nomos, Vienna) 251-252; *Kamerstukken II* 2007/08, 31 579, nr. 3, 24.

²⁸ Source: OECD (1999b), *Regulatory Reform in the Netherlands*, Paris.



“new balance between protection and dynamism” based on competition policy, regulatory reform, and market openness.

The Dutch government, for instance, initiated programmes specifically targeted at simplifying authorisation schemes, both on a central and a decentralised level.²⁹ And, the ‘Project Vereenvoudiging Vergunningen’ aimed at simplifying authorisation procedures and concerns more in particular the necessity and costs of authorisations as an instrument.³⁰

As a result, unnecessary authorisations for the performance of economic activities have been abolished, which facilitated the implementation of the later adopted EU Services Directive into Dutch law.³¹ The main legal document implementing the Services Directive in the Netherlands is the Services Act (Dienstenwet), which aim is to implement the key obligations from the Services Directive into national law.³² According to the Dutch legislator these are:

- The obligation of administrative simplification as well as the establishment of Points of Single Contact;
- The transposition of general rules concerning authorisation schemes, insofar as there are not yet incorporated in Dutch law;
- The protection of service recipients by imposing information obligations on service providers and ensuring that this information is available at the Points of Single Contact and
- The promotion of cross-border administrative cooperation and information exchange between competent authorities.³³

These requirements are met through either individual provisions in the Services Act or – when it was decided to extend the provisions of the Services Directive to purely domestic situations – in general laws such as the General Administrative Law Act (Algemene wet bestuursrecht, Awb) and the Dutch civil code (Burgerlijk Wetboek).

This large-scale operation drastically amended the regulation of economic activity with respect to services and economic activities in general. Although the general opinion seemed to be that the positive effects of the MDW programme on Dutch law and the Dutch economy outweigh the ‘costs’ of the Regulatory Reform, there is still disagreement as to whether this goes true for all initiatives and all economic sectors involved.³⁴

Consumer protection rules

The history of Dutch consumer protection law started with the adoption of the Butter Act in 1889. But the Butter Act intended to protect the reputation of Dutch butter in England rather than Dutch

²⁹ *Kamerstukken II* 2007/08 (n 27) 24.

³⁰ Van Meerten (n 27) 252.

³¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

³² Act of 12 November 2009 on the implementation of European legislation on the free movement of services in the internal market (Services Act) (2009) Staatsblad 503.

³³ *Kamerstukken II* 2007/08 (n 27) 18.

³⁴ E.E.C. van Damme, ‘MDW tegen het licht’ (2001) 3(3) *RegelMaat* 87-97.



consumers against butter of bad quality.³⁵ Even so, for a long period of time there were no specific consumer protection rules.

In the '50s and '60s a consumer movement ('consumerism') arose that believed that consumers should have more influence on, for instance, the quality of goods and services and on the contractual terms and conditions. As a result of this movement different consumer organizations were established. These organizations lobbied for the adoption of consumer protection laws. In 1974 the Dutch government finally established an Interdepartmental Coordinating Committee for Consumer Affairs (Interdepartementale Coördinatiecommissie voor Consumentenzaken – ICC).³⁶

In 1992 the term 'consumer' was introduced in the Dutch Civil Code. However, this was seen as unnecessary since the 'corresponding' term 'citizen-merchant' was deleted while a similar term came into its place.³⁷

In the area of consumer protection and consumer rights, a variety of laws, decrees, ministerial decrees and guidelines have been adopted ever since, most often implementing requirements of EU legislation. No general law on consumer protection exists. Consumer protection requirements are rather incorporated in other laws, most notably the Dutch Civil Code, the Services Act (see above), the Telecommunications Act, the Electricity Act (1998) or Gas Act (2000).³⁸ Besides there are a number of governmental decrees, ministerial decrees and policy guidelines that also touch upon or regulate consumer affairs.

In 2006 the Act on the Enforcement of Consumer Protection (*Wet handhaving consumentenbescherming*) was adopted, partially pursuant to Regulation 2006/2004/EC.³⁹ This Act created a public supervisor, the Netherlands Consumer Authority, which was responsible for the enforcement of private consumer protection rules⁴⁰ and was involved in both national and transnational violation of consumer protection law. In addition, the Netherlands Consumer Authority had to prevent

³⁵ E.H. Hondius, *Consumentenrecht* (Kluwer 2013) 4.

³⁶ E.H. Hondius and G.J. Rijken, *Handboek Consumentenrecht* (Uitgeverij Paris 2011) 21-22.

³⁷ Hondius (n 35) 1.

³⁸ Act of 19 October 1998 containing provisions on the telecommunications (Telecommunications Act), http://wetten.overheid.nl/BWBR0009950/geldigheidsdatum_25-01-2015; Act of 2 July 1998 laying down provisions on the generation, transmission and supply of electricity (Electricity Act), http://wetten.overheid.nl/BWBR0009755/geldigheidsdatum_25-01-2015. Act of 22 June 2000, containing provisions on the transport and supply of gas (Gaswet), http://wetten.overheid.nl/BWBR0011440/geldigheidsdatum_02-02-2015.

³⁹ Act of 20 November 2006 containing provisions on concerning authorities responsible for the enforcement of consumer protection (Act on enforcement of consumer protection) <http://wetten.overheid.nl/BWBR0020586/geldigheidsdatum_09-06-2014>.

⁴⁰ Hondius (n 35) 3.



violations by informing consumers on their rights.⁴¹ In 2013 the Netherlands Consumer Authority merged into the Netherlands Authority for Consumers and Markets.

Since its establishment in 1970, the Dutch Foundation for Consumer Complaints Boards (the Stichting Geschillencommissies voor Consumentzaken – SGC) has the special task to assess complaints that has been filed with one of its boards. As the decisions of the complaint boards haven't been published since 1992, they don't create external legal precedence.⁴²

Question 3: International and European sources of economic rights

Question 3: International and European sources of economic rights

To which international instruments for the protection of economic rights is your country a party?

How are relevant international and European economic rights norms being incorporated in your country?

To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?

How and to what extent are international instruments for the protection of economic rights given effect in your country?

Relevant international legal instruments and their incorporation in Dutch law

As stated above, particularly due to the ban on judicial constitutional review and the monist approach to international law, Dutch law is traditionally open towards international treaties. Based in Dutch monism, fundamental rights form part of the 'land of the land' and can produce direct effect in the Dutch legal order.⁴³ A distinction between national sources on the one hand and international sources on the other is thus not decisive in the Dutch legal context. The key provisions in the Dutch Constitution are Articles 93 and 94, which respectively state that "[p]rovisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published", and "[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions."

⁴¹ Hondius and Rijken (36) 30.

⁴² *ibid* 28.

⁴³ Claes & Gerards (n 4) 618.



The Netherlands has signed most international legal instruments with implications for economic rights. Other international legal instruments to which the Netherlands has become a party and which are relevant for the protection of fundamental (civil) rights, will be referred to in Work Package 7.

The first Treaty to be mentioned here is the Benelux Treaty between Belgium, Luxembourg and the Netherlands (1944). Furthermore, the Netherlands belonged to the group of contracting states setting up the European Coal and Steel Community (1951), the European Economic Community (1957) and the European Atomic Energy Community (1957). The economic freedoms and competition rules contained in the Treaties (now in the TFEU) have ever since been a binding source of economic rights in the Netherlands. Since the Treaty of Lisbon entered into force, this also goes true for the economic rights contained in the Charter of Fundamental Rights of the EU (Article 6 (1) TEU).

On 11 March 1979 the International Covenant on Economic, Social and Cultural Rights entered into force in the Netherlands. Furthermore, the Netherlands was one of the founding States of the Council of Europe, which established the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 (hereafter: ECHR). The Convention entered into force on 3 September 1953. In 1966 the Netherlands signed the International Convention on the Elimination of All Forms of Racial Discrimination, it was ratified on 10 December 1971 and entered into force on 9 January 1972. Since 22 August 1991 the Convention on the Elimination of All Forms of Discrimination against Women entered into force in the Netherlands. On 22 August 2002 the Optional Protocol to CEDAW entered into force as well. The Convention on the rights of persons with disabilities was signed by the Netherlands on 30 March 2007, but the Convention has not been ratified yet.

A list of 'core' Treaties, which the Netherlands have so far signed and ratified and which are relevant for economic rights:

International level (United Nations)

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women, including the Optional Protocol
- Convention on the Rights of Persons with Disabilities (not yet ratified)
- Convention on the Right of the Child

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has neither been signed nor ratified by the Netherlands yet.



Council of Europe

- Convention for the Protection of Human Rights and Fundamental Freedoms, including a number of protocols that are ratified separately, such as Protocol 1 on the protection of property

Article 1 of the first Protocol to the ECHR reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The importance of the ECHR

At the early days of the ECHR's existence the Dutch government was of the strong opinion that the Convention would not have any practical significance for the Netherlands. One thought it simply unthinkable that violations of human rights would occur in the Netherlands. However, some 30 years later – as from the 1980s and onwards – the ECHR has become increasingly important for the Netherlands due to a number of developments, such as the broad interpretation of open, or vague norms of the ECHR by the European Court of Human Rights (hereafter: ECtHR), the increasing amount of case law, the growing attention for the ECHR in legal literature and the fact that the Netherlands in the eyes of the ECtHR did not and still does not always comply with the standards as laid down in the Convention.⁴⁴ The ECHR has therefore become of crucial importance to the protection of fundamental rights in the Dutch legal order. For Dutch administrative law the first Protocol to ECHR on the protection of property is particularly relevant. Although there are important parallels between Article 14 of the Dutch Constitution (protection against expropriation) and Protocol 1 to the ECHR as both provisions put the right to property into perspective by allowing (severe) restrictions in the public interest,⁴⁵ Protocol 1 has played an important role in Dutch legal practice for a number of reasons. Firstly, due to the prohibition of constitutional judicial review, recourse is taken to international law, including the first Protocol on the protection of property, to challenge legislation. Furthermore, the first Protocol

⁴⁴ See also T. Barkhuysen, *Het EVRM als integraal onderdeel van het Nederlandse materiële bestuursrecht*, Preadvies VAR 2004, 16-17.

⁴⁵ Peters (n 12) 5.



nevertheless appears to grant wider protection and seems to apply to a broader range of categories of cases wherein property rights are at issue.⁴⁶

Question 4: EU Charter of fundamental rights

To what extent have the EU Charter of fundamental rights as well as general principles of EU law protecting rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?

How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of economic rights?

Since the EU Charter got binding force (Article 6 TEU) in 2009, the amount of judgments of Dutch courts wherein the EU Charter has been referred to, has grown substantially. Particularly in the field of (im)migration law the Charter has played a dominant role. And, Article 47 of the EU Charter on effective judicial protection has been the most frequently referred to provision.⁴⁷

But also Article 17 on the right to property has played a role in case law of the Dutch courts. Particularly interesting is that Article 17(2) of the EU Charter explicitly incorporates the protection of intellectual property, which is not mentioned by Protocol 1 to the ECHR. Article 17 was used in a case by the Supreme Court on copyright law and the rights of libraries to prolong the term of borrowing books without having to pay fees to the right holders.⁴⁸

The freedom to conduct a business, as contained in Article 16 of the Charter, is probably the most interesting provision from a Dutch perspective, as the Dutch Constitution does not recognize a similar provision. Article 16 has played a significant role in a number of cases of the European Court of Justice (ECJ). In *Scarlet Extended*, for example, the ECJ having to decide on the compatibility of the requirement for an internet service provider to install a filtering system in response to infringements of intellectual property rights and to combat piracy with EU fundamental rights, held '[...] that the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright

⁴⁶ T. Barkhuysen and M.L. van Emmerik, 'De eigendomsbescherming van artikel 1 van het Eerste Protocol bi het EVRM en het Nederlandse Bestuursrecht' (2013) *Jurisprudentie Bestuursrecht Plus* 13. See also J. Sluysmans and R. de Graaff, 'Ontwikkelingen in het Eigendomsbegrip onder artikel 1 Eerste Protocol' (2014) 3 *NTM/NJCMbulletin* 255-271.

⁴⁷ See H. van Harten and others., 'Doorwerking van het Handvest van de Grondrechten van de Europese Unie in de Nederlandse rechtspraak: een kwantitatieve stand van zaken' (2014) 2 *NTM/NJCMbulletin*.

⁴⁸ HR 23 November 2012, ECLI:NL:HR:2012:BX7484, NJ 2013/381, m.nt. P.B. Hugenholtz (Stichting Leenrecht/Vereniging van Openbare Bibliotheken). See also H.J.Th.M. van Roosmalen and A. Pahladsingh, *Het Handvest van de grondrechten van de Europese Unie: beweging in de rechtspraak* (2013) 3 *Nederlands tijdschrift voor Europees Recht* 88.



holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as ISPs'.⁴⁹

In the *Alemo-Herron* case the ECJ was asked to interpret Article 3 of Council Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.⁵⁰ According to the ECJ, this provision of the Directive had to be interpreted in accordance with Article 16 of the Charter, which implies that the social aims of the Directive – employment protection - and the flexibility for Member States to deviate from the Directive in this respect were being subsumed under the employers' freedom to conduct a business.⁵¹ We will have to wait and see what the effects will be of Article 16 of the Charter and the Court's case law on Dutch legal practice in the field of public economic law.

Furthermore, the ECJ has made clear that the economic Treaty freedoms on free movement could also be seen as a specific amplification of the Charter.⁵² In that sense a number of Charter provisions, ie Article 15(2) on the freedom of every EU citizen to exercise the right of establishment and to provide services in any Member State, Article 16 on the freedom to conduct a business and Article 17 on the right to property, may reinforce the free movement rules and thus the market integration process. This does probably not mean that the four freedoms have gained more importance at the expense of other fundamental rights enshrined in the Charter. Normally, where the Charter provisions can be applied alongside the free movement rules, the Court will focus on the latter.⁵³ And, with respect to restrictions on one of the Treaty freedoms, the Court held in *Pfleger* that 'an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter. It follows that [...] an examination of the restriction represented by the national legislation at issue [...] from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.'⁵⁴

This strong relationship between the economic rights of the Charter and the four freedoms may further

⁴⁹ Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (Scarlet Extended)* [2011] ECR I-11959, para 49.

⁵⁰ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16. Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisures Ltd* (ECJ, 18 July 2013).

⁵¹ See for a critical assessment of this case: S. Weatherill, 'EU Case Note: Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract' (2014) 10 *European Review of Contract Law* 167–182.

⁵² Case C-233/12 *Simone Gardella v Istituto Nazionale della Previdenza Sociale (INPS) (Gardella)* (ECJ, 4 July 2013) para 39: '[...] Article 12(2) of the Charter reiterates inter alia the free movement of workers guaranteed by Article 45 TFEU [...]'; case C-367/12 *Susanne Sokoll-Seebacher (Sokoll-Seebacher)* (ECJ, 13 Februari 2014) para 22: '[...] Article 16 of the Charter refers, inter alia, to Article 49 TFEU, which guarantees the fundamental freedom of establishment.'

⁵³ Case C-390/12 *Robert Pfleger and others (Pfleger)* (ECJ, 30 April 2014).

⁵⁴ *ibid* paras 59 and 60.



inform Dutch public economic law.

Question 5 : Jurisdictional issue

Personal

Who is covered by (core) economic rights protection? Are both natural and legal persons covered? Are citizens of the particular state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?

Territorial

What is the territorial scope of the protection of economic rights afforded by your Member states? Are there **territorial** limitations to such protection? Which?

Material

Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)? How are economic rights balanced with other social rights? To what extent does the national legal system show a prevalence of a market-centric approach to a more social rights approach in regulating economic rights? In other words, which degree of functionalization of economic interests exists, and what are the tools used for such a limitation of economic freedoms (used to protect social interest by means of regulations or directly through public intervention)?

Temporal

What is the temporal scope of protection afforded to economic rights? Have there been recent changes in the range and reach of economic rights protection?

Please offer details as to how different rights are afforded to different **categories of persons** in **different location and policy contexts over time**.

Personal scope: natural persons versus legal persons

Depending on the specific right contained in the Constitution Dutch citizens as well as non-Dutch citizens living in the Netherlands are covered by constitutional rights protection. Article 1 of the Constitution (principle of equality) is open for all citizens living in the Netherlands. The same goes true for most other rights, such as the right to be protected against expropriation, as contained in article 14. However, the right to be appointed in the public service as enshrined in article 3 of the Constitution only applies to citizens having the Dutch nationality. According to Article 2, section 5 of the Dutch Equal



Treatment Act, the prohibition on discrimination on the grounds of nationality contained in this Act shall not apply:

- a. If the discrimination is based on generally binding regulations or on written or unwritten rules of international law and;
- b. In cases where nationality is a determining factor.⁵⁵

The Dutch legislator has determined that for an appointment in a number of public services the Dutch nationality is required. Examples are the appointment as a judge, royal commissioner, major, military civil servant or an appointment in the Council of State. For ministers and state secretaries the requirement of possessing the Dutch nationality is regarded as self-evident. It is, however, not excluded to have a double nationality.

Regarding legal persons, the point of departure is that the relationship between legal persons and human rights on the one hand and natural persons and human rights on the other is different. It has not always been self-evident that legal persons can rely on fundamental rights. But as legal persons also act in the interest of natural persons, their right to be protected by fundamental rights should not be denied at the outset.

With the entry into force of the Constitution of 1983 it was noted that a number of constitutional rights intend to grant legal persons and other organizations without legal personality rights.⁵⁶ In the case law of the Dutch courts, the Council of State and Supreme Court and the ECtHR and now also the ECJ, it is clear that legal persons enjoy the protection of certain fundamental rights, including the rights to equal treatment, fair trial, privacy, freedom of religion, freedom of association and the freedom of speech.⁵⁷

Material

As mentioned before, economic rights fall within the category of social rights or economic, social and cultural rights. However, where these rights are not specifically categorized as *economic* rights, 'economic law' or public economic law are (separate) legal disciplines that particularly focus on the

⁵⁵ E.M.H. Hirsch Ballin, 'Commentaar op artikel 3 van de grondwet' in E.M.H. Hirsch Ballin en G. Leenknecht (eds), *Artikelsgewijs commentaar op de Grondwet*, web edition 2014 (www.Nederlandrechtsstaat.nl), 1. An unofficial translation of the Act of 2 March 1994 laying down general rules providing protection against discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status (Dutch Equal Treatment Act) is available at <https://www.wcwonline.org/pdf/lawcompilation/Netherlands%20-equal%20treatment.pdf> accessed 3 January 2015.

⁵⁶ Explanatory memorandum (Memorie van Toelichting), Handelingen Tweede Kamer, session year 1975-1976, 13872, nr. 3, 11.

⁵⁷ Van der Pot (Bewerkt door D.J. Elzinga & R. de Lange), *Handboek van het Nederlandse Staatsrecht* (Kluwer, Deventer 2006), 261.



interaction between economy and law, and between national and internal law. The term public economic law serves to distinguish socio-economic law from corporate law and social law.⁵⁸

Temporal

The Constitution dates from 1814 and is the most important state document in the Netherlands. The current version of the Constitution has been in force since 1983. It combines the rules governing the Dutch system of government and fundamental rights.⁵⁹

Question 6 : Actors

What is the involvement of private or public actors, such as private (e.g. National Bar Associations) and public entities and authorities (e.g. Patent Offices), agencies, NGOs, etc. – in defining and setting economic rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of economic rights norms.

SER

In the Dutch market model, the Social and Economic Council 'SER' plays an important role. Established in law by the 1950 Industrial Organisation Act (Wet op de bedrijfsorganisatie), the SER is the main advisory body to the Dutch government and the parliament on national and international social and economic policy. The SER is financed by industry and is wholly independent from the government. It represents the interests of trade unions and industry, advising the government (upon request or at its own initiative) on all major social and economic issues.

The SER also has an administrative role. This consists of monitoring commodity and industrial boards, which perform an important role in the Dutch economy. Industrial boards are responsible for representing the interests of particular branches of industry, and are made up of employers' representatives and union representatives. In addition, the SER helps the government to enforce the Works Councils Act (Wet op de ondernemingsraden). Its main responsibilities are:

- Advising government and parliament
- Supervising commodity and industrial boards

⁵⁸ Hellingman & Mortelmans (n 5) 52-53.

⁵⁹ To be found at: <http://www.government.nl/issues/constitution/constitution-and-charter> accessed 23 September 2014.



- Enforcing laws
- Supervising conduct in mergers
- Promoting business/consumer self-regulation

The Netherlands Authority for Consumers and Markets (ACM – Autoriteit Consument & Markt)

The Netherlands Consumer Authority, the Netherlands Competition Authority (NMa) and the Netherlands Independent Post and Telecommunications Authority (OPTA) joined forces on April 1st 2013, creating a new regulator: the Netherlands Authority for Consumers and Markets (ACM). The Netherlands Authority for Consumers and Markets is an independent authority that creates opportunities and options for businesses and consumers alike.

In its strategy document, the ACM states the following: “Consumer protection and market oversight are now housed in a single authority. This consolidation lays the foundation for effective and efficient oversight on well-functioning markets with the purpose of optimizing consumer welfare.”⁶⁰

Within the Netherlands, ACM works together with ministries, other regulators, government agencies, scientific institutions, complaints boards, and organizations that protect the interests of businesses and consumers.

Internationally, ACM regularly works together with fellow regulators and other agencies outside the Netherlands. According to ACM “in an open economy, consumer and business problems do not stop at the border”.⁶¹

Domestic Courts

Although the role of the domestic courts is to apply the law, to enforce the law and to promote legal unity and the development of law (rechtsbescherming, rechtshandhaving, rechtseenheid en rechtsonwikkeling), mainly the first two tasks are relevant with regard to economic rights. The domestic courts have to assure that the government uses its competences in accordance with the law. There are only few cases in which the Courts made a fundamental decision because the Dutch legislature often amends the law after a decision has been made by the court.⁶²

District court of Rotterdam (Rechtbank Rotterdam)

⁶⁰ To be found at: <<https://www.acm.nl/en/publications/publication/11993/Strategy-Netherlands-Authority-for-Consumers-and-Markets/>> accessed 23 June 2014.

⁶¹ To be found at: <https://www.acm.nl/en/about-acm/collaboration/> > accessed 2 February 2015.

⁶² J. Luijendijk (ed), *Inleiding tot het economisch publiekrecht* (2005) 113-114.



The District court of Rotterdam is the only court in The Netherlands that has the special competence to rule on conflicts in the field of economic administrative law. These conflicts for instance related to decisions by the Netherlands Competition Authority (NMa), the Netherlands Independent Post and Telecommunications Authority (OPTA), which are now merged into the Authority for Consumers and Markets (ACM), the Netherlands Authority for Financial Markets and De Nederlandsche Bank (DNB).⁶³

Trade and Industry Appeals Tribunal (CBb - College van Beroep voor het bedrijfsleven)

The Trade and Industry Appeals Tribunal is known as Administrative High Court for Trade and Industry and is based in the Hague. This specialized administrative court rules on disputes in the area of social-economic administrative law as well on specific laws, such as the Competition Act and the Telecommunications Act.⁶⁴

Netherlands Institute for Human Rights

The Netherlands Institute for Human Rights (College voor de Rechten van de Mens) is the successor of the Equal Treatment Body and explains, monitors and protects human rights, promotes respect for human rights (including equal treatment) in practice, policy and legislation, and increases the awareness of human rights in the Netherlands. It was established in 2011 also with a view to implementing Resolution A/RES/48/134 of the General Assembly of the United Nations of 20 December 1993 concerning national institutions for the promotion and protection of human rights, Recommendation R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997 on the establishment of independent national human rights institutions, Directive 2000/43/EC of the Council of the European Union of 29 AVT11/BZ102005A 2 June 2000 implementing the principle of equal treatment between persons irrespective of

racial or ethnic origin (OJ L 180), Directive 2004/113/EC of the Council of the European Union of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373) and Directive 2006/54/EC of the European Parliament and the Council of the European Union of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204).⁶⁵

It has the following statutory tasks:

⁶³ To be found at: <http://www.rechtspraak.nl/Organisatie/Rechtbanken/Rotterdam/OverDeRechtbank/Rechtsgebieden/Pages/TeamBestuur.aspx> accessed 21 September 2014.

⁶⁴ To be found at: <http://www.rechtspraak.nl/English/Judicial-System/Special-Tribunals/Pages/default.aspx> accessed 21 September 2014.

⁶⁵ Amended Bill - Establishment of the Netherlands Institute for Human Rights (Netherlands Institute for Human Rights Act), 19 April 2011.



- “The Institute will investigate possible (systematic) violations of human rights and the protection of those rights in a specific area. The Institute will conduct independent research and report the findings.
- To produce reports and to make recommendations in the field of human rights, including an annual report on the human rights situation in the Netherlands.
- To advise on (draft) legislation and policy which is directly or indirectly related to human rights.
- To provide information in the field of human rights and to promote and coordinate human rights education.
- To encourage research into the protection of human rights.
- To cooperate structurally with civil society organisations and national, European and international institutions, by for instance organising activities in partnership with civil society organisations.
- To urge the government to ratify, implement and observe human rights treaties as well as to urge to remove the provisions in such treaties.
- To urge the government to implement and observe binding resolutions of international institutions on human rights.
- To urge the government to observe European and international recommendations on human rights.⁶⁶”

Netherlands Enterprise Agency (Rijksdienst voor ondernemend Nederland)

Netherlands Enterprise Agency is part of the Ministry of Economic Affairs. The organisation has been in existence since 2014 and is the result of a merger between NL Agency and the Dienst Regelingen. Some activities of the Commodities Boards are also included.

Netherlands Enterprise Agency focuses on providing services to entrepreneurs. It aims to make it easier to do business using smart organisation and digital communication. The Agency works in The Netherlands and abroad with governments, knowledge centres, international organisations and countless other partners.⁶⁷

Question 7 : Conflicts between rights

How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?

⁶⁶ To be found at: <http://mensenrechten.nl/mission-and-ambition>> last consulted, 2 February 2015.

⁶⁷ To be found at: <<http://english.rvo.nl/home/about-rvonl>> accessed 21 September 2014).



Are there, in your countries, notorious or problematic clashes between particular economic rights, or between rights and other rights, between individual economic rights and important public interests?

Please give examples, and illustrate how these conflicts are dealt with and resolved.

As mentioned previously the Dutch constitution explicitly prohibits judicial review of the constitutionality of Acts of Parliament. Therefore the protection of economic rights by the Dutch constitution is rather limited.

According to Articles 93 and 94 of the Dutch Constitution, international law is part of domestic law and can produce direct legal effect. In cases of conflicts between international and national economic law, the latter will be declared inapplicable by the domestic court. The general view is that when it comes to a conflict between EU law and national law, Articles 93 and 94 of the Dutch Constitution have become irrelevant as the supremacy of EU law derives from its own, new autonomous legal order upon which the principle of supremacy is based.

Regarding conflicts between fundamental rights within the Dutch legal order, particularly due to a number of developments, these conflicts are generally perceived as increasingly difficult to solve and problematic. The more active involvement of the government to protect and further fundamental rights – rather than to abstain from taking action that might undermine fundamental rights of citizens – the problem of horizontal application of fundamental rights, the pluralistic Dutch society and the increasing focus on the equality principle have triggered a number of questions in this respect. There is no *communis opinio* as to how these conflicting rights need to be balanced.⁶⁸

Example: conflicts between economic rights within the context of the Equal Treatment Act

Article 2(3) of the Dutch Equal Treatment Act, which constitutes an exception to the prohibition of direct discrimination,⁶⁹ introduces preferential treatment with regard to women and ethnic minorities in the field of employment, the liberal professions and the access to goods and services.⁷⁰ This kind of temporal positive measure is defined as ‘the use of an initially suspicious criterion, such as race or gender, in order not to exclude a category of people (which happens in case of “negative” discrimination) but to put them in a more advantageous position (i.e. “positive discrimination”)⁷¹.

⁶⁸ Van der Pot (Bewerkt door D.J. Elzinga & R. de Lange) (n 57) 296-297.

⁶⁹ Article 1 of the Dutch Equal Treatment Act.

⁷⁰ Articles 5 to 7 of the Dutch Equal Treatment Act.

⁷¹ T. Loenen, *Gelijkheid als juridisch beginsel* (Boom Juridische uitgevers 2009) 96.



In the *TU Delft* case⁷², for instance, the Netherlands Institute for Human Rights (hereafter: Institute) has decided that a recruitment policy, which directly discriminates men, could be justified under some circumstances. In this case the Delft University of Technology (hereafter: university) excluded men from the recruitment of its academic staff because of the massive backlog of female scientist. The university considered this temporary measure necessary because the numerous measures it had taken before had little influence so far. The Institute considered that under the upper circumstances the measure is proportionate, i.e. limited to what is necessary to reduce deprivation of female scientist and create equality between man and woman.

Although this preferential treatment is justified by law, it still restricts the right of freedom of labour of men that is laid down in Article 19(3) of the Constitution.

⁷² CRM 18 December 2012, 2012-195 (*TU Delft*) < <http://www.mensenrechten.nl/publicaties/oordelen/2012-195/detail>> accessed 25 January 2015.



ANNEXES

Relevant national provisions and EU legislation

Act of 22 May 1997, laying down new rules on economic competition (Competition Act) < http://wetten.overheid.nl/BWBR0008691/geldigheidsdatum_20-06-2014> accessed 23 January 2015.

Act of 2 July 1998 laying down provisions on the generation, transmission and supply of electricity (Electricity Act) < http://wetten.overheid.nl/BWBR0009755/geldigheidsdatum_25-01-2015> accessed 25 January 2015.

Act of 2 March 1994 laying down general rules providing protection against discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status (Dutch Equal Treatment Act) is available at < <https://www.wcwonline.org/pdf/lawcompilation/Netherlands%20-equal%20treatment.pdf>> accessed 3 January 2015.

Act of 28 August 1851 regulating expropriation for public purposes (Expropriation Act) < http://wetten.overheid.nl/BWBR0001842/geldigheidsdatum_30-01-2015 > accessed 31 January 2015.

Act of 12 November 2009 on the implementation of European legislation on the free movement of services in the internal market (Services Act) (2009) Staatsblad 503.

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Case C-233/12 *Simone Gardella v Istituto Nazionale della Previdenza Sociale (INPS) (Gardella)* (ECJ, 4 July 2013) para 39: '[...] Article 12(2) of the Charter reiterates inter alia the free movement of workers guaranteed by Article 45 TFEU [...]'].

Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisures Ltd* (ECJ, 18 July 2013).

Case C-367/12 *Susanne Sokoll-Seebacher (Sokoll-Seebacher)* (ECJ, 13 Februari 2014) para 22: '[...] Article 16 of the Charter refers, inter alia, to Article 49 TFEU, which guarantees the fundamental freedom of establishment.'

Case C-390/12 *Robert Pflieger and others (Pflieger)* (ECJ, 30 April 2014)

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