A General View on the European Union
Approach Towards Social Rights Issue in
Conjunction with the EU Constitution

Nihat Bulut*

I- Importance of Social Rights

Human rights are rights of individuals in society\(^1\) and given
to them simply for being human beings\(^2\). Notwithstanding the fact
that they were materialised through long historical struggles and
that they are classified in various forms, these rights always aspired
the same objective: Protection of dignity of human being.

The dignity of human being, as referred to by the Constitutional
Court, expresses “Requirement of meeting and observing the value
given to individuals simply for being human beings, disregarding
under any circumstances or condition that individual is in”. Ac-
cording to the High Court “This is a standard of behavioural form
that any action, treatment below this standard would make the
individual subjected something other than a human”\(^3\). As a con-
sequence, however classified, all rights and freedoms aim to have
the said value met and observed\(^4\). From this point of view there

---

\(^*\) Assoc. Prof. Dr., Erzincan University Faculty of Law, Department of General
Public Law.

\(^{1}\) Louis Henkin, “The Age of Rights”, *Human Rights*, Foundation Pres, New York,
1999, p.3.

\(^{2}\) Jack Donelly, *Teoride ve Uygulama Evrensel İnsan Hakları*, Transl. Mustafa


\(^{4}\) See, for the connection between the human dignity and human rights, Mehmet
Akad, *Teori ve Uygulama Açısından 1961 Anayasasının 10. Maddesi*, İUHF Y.,
is comprehensiveness between them and taking out one ruin this comprehensiveness. Accordingly the responsibility of the Government is to create an environment for the functioning of rights and freedoms as a whole. Providing observance for human dignity make this compelling.

Social rights (positive statute rights) provide the citizen to demand from the State behaviour in a constructive manner service and assistance (regarding right to health, right to education, social security rights etc.) and in contrast consign the State with the certain duties and functions in social sphere. The main distinctiveness of the social rights is that they are beneficial towards the individual from the society. Social rights are materialised by means of State measures or direct actions in order to provide the weak divisions within the society with a decent life according to the human dignity.

The conception that social rights envisage obligations for States is expressed both in national and international human rights documents. For instance Article 2/1 of the International Covenant on Economics, Social and Cultural Rights (ICESCR) articulates that each States party to the Covenant undertakes to take steps, by the use of the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the ICESCR, by all appropriate means. Yet again, through the The Committee on Economics, Social and Cultural Rights the Covenant aims to ensure that the State party to it are in comply with these obligations.

A comprehensive approach would demonstrate that social rights are imperative in order to genuinely practice individual and

---

6 Although this is how general features are, it could not be said that all social rights require a positive attitude from the State. For example the right to establish trade union could be examined in this sense. See, Bülent Tanör, Anayasa Hukukunda Sosyal Haklar, May Y., Istanbul, 1978, p.17-22.
8 Kaboğlu, Özgürlükler Hukuku, p.252.
political rights as the development process of the democracy and human rights in the West display. The concept of “freedom”, which was recognized as lack of pressure and being at liberty spiritually and bodily at the beginning, later on transformed to contain participation into state governance that was followed by understanding to salvage the individual according to social rights since the former perception turned the concept of freedom as being meaningless because of socio-economic conditions\textsuperscript{10}.

Indeed, as historical process reveals, social rights should be put in circuit if the intention is truly free individual as it is always a possibility that individual and political rights remain on paper for the individual trying to struggle against forcible conditions of economical situation. In this sense an example could be that for an individual living in poverty right to travel deem to be meaningless. Consequently, it could be articulated that social rights render other rights as meaningful and effective.

Certainly the importance of social rights is not limited to rendering other rights meaningful and effective. The relationship between governing and governed fractions of the society as well is directly relevant to the protection of the poor people within the society. Social rights are also important for the people living economically within the lower parts of the society to embrace the political system.

\textbf{II- Globalisation and Social Rights}

The reach of economical, social, political and cultural activities throughout the world and increase of inter-dependence of the states and societies creating modern world community is expressed with the concept of globalisation\textsuperscript{11}. It is acknowledged that as consequences of globalisation; the influence and power of the governments decreased within the nation state and that most of the supranational companies became more powerful than governments as well as many of the issues that conventionally fall under the national jurisdiction of the states started being coordinated within international sphere\textsuperscript{12}.

Two features of the process are significantly important regarding the present subject. First of all with the expansion of capitalism

\begin{flushright}
\end{flushright}
and impending power of bourgeoisie the nation state that was the main actor of the international relations began to get weaken, thus forcing states to leave their sovereignty to greater political organisations. The fact that the process left nation state weak caused the States to abandon some of their jurisdictional powers to super-sized supra national institutions. Multilateral agreements, such as those establishing NATO and OPEC, and supranational organisations such as UN, World Trade Organisation (WTO) and IMF are illustrative example of this situation. However, it must be stressed that the European Union is the most competent institution in this sense.

The second feature of the process is that as it caused a weakening in certain peculiarities of the State it brought in the argument that social rights and welfare state is over. It could be argued that globalisation weakened social rights for two reasons. The first one is that the process dominated the idea that economical function is more important than social and political functions and forcing States to act in a certain manner in terms of the economical realities. Accordingly, while the developed countries aiming to maintain their technological dominance, opening new routes through profit acquiring areas and facilitating cross border functioning of capital during the process of globalisation; the developing countries want to pave the way for the foreign capital by increasing its profit. This state of affairs that push States to get involve in intense competition force them to act according to the principles imposed by the capital and especially initiate them to abandon measure and expenditure towards social policies, which is best illustrated with the decrease in the labour wages.

The second reason that weakens the social rights during the globalisation process, in combination with the first reason, mainly is that substitution of welfare state concept with concept of neoliberal state. This conception claims that free and just society

---

13 Nihat Bulut, *Feodaliteden Küreselleşmeye Ekonomik İktidar Siyasal İktidar İlişkisi*, Seçkin Y., Ankara, 2003, p.43 et seq...


18 *Id*, p.189.
is merely possible through an order that is a spontaneous consequence of market mechanism. Within this order human behaviour and relationship will be formed on the basis of rules based on private property and freedom of contract. Thus the role of State will be limited to domestic and external security as well as rendering the superiority of law.  

III- European Union’s General Approach Towards Social Rights

The EU, which was established in order to avoid war between the European States, for a long time merely aimed for economical integration but later on put political integration on its agenda, as it was understood that protecting the interests of the capitalist class was to difficult as long as economical plenitude was not transformed into a politically unified entity.

Today, the EU is a supranational organisation that possesses its own legal system and it could use some of the jurisdictional powers belong to Member States in the areas enabled by the integration and enforce the decision it has taken through its organs, notwithstanding with the fact that the Member States to the EU are still main actors in the international arena. It therefore cannot be argued that Member States have lost all of their jurisdictional powers. However, even with its present form, it represents a new formation regarding the nation state model and, instead of returning to absolutism, it forces Member States to act and shape a new structure in accordance with the to new terms. This clearly means erosion of powers of State and restriction of its jurisdictional sphere.

The nation states in Europe have surpassed the weakening position created by the globalisation process with courtesy of the EU. But how the shortcomings again generated by the globalisation within the social welfare practice will be death with? Overcoming these insufficiencies would certainly empower the EU’s legality in front of the mass populations.

The European integration process mainly started aiming for economical grounds but not for social grounds, and was based on neo-classical economical theory according to which extension of markets beyond the national borders would bring forward better

---


economical efficiency and production as well as success\textsuperscript{21}. Indeed, with its liberal approach the Treaty of Rome that established the European Economical Community (EEC), attached the “social” dimensions to the market, or to say in other words, to gained economical integration and within this scope believed that social integration would follow automatically if economical integration is successful\textsuperscript{22}. This process is described as a period during which social policies remained under the shadow of the economical policies\textsuperscript{23}.

Consequently, a cautious view was brought forth and thus social policy remained as a marginal area until 1970s\textsuperscript{24}. However, the militant labour movement and tendencies towards equality were instrumental on the change of the EEC’s social policy. Thus the low profile social policy approach was replaced with more interventionist manner\textsuperscript{25}. The 1972 Paris Summit was a stage for the call to form a common social policy and a Working Paper on the subject was adopted in 1974. Issues such as creating high employment rate and improving working and living conditions were the main objectives of the Paper\textsuperscript{26}. Nevertheless, this period did not last long and after the 1980s, the Keynesian economical policies and social conciliation based on these policies were abandoned\textsuperscript{27}.

The 1992 Treaty of Maastricht, which represent a irreversible step regarding the European integration and was signed during a period that liberal tendency was prevailing, was not able achieve the anticipated European Social Union because of the negative attitude of United Kingdom and therefore the provisions of the Treaty of Rome regarding social policy could not be amended. On the other hand, due


\textsuperscript{22} Gülmez, p.3; Çelik, p. 74.

\textsuperscript{23} Tekinalp/Tekinalp, \textit{Avrupa Birliği Hukuku}, Beta Y., İstanbul, 2000, p.620.

\textsuperscript{24} Çelik, p.74.

\textsuperscript{25} Tuncay, p.94.

\textsuperscript{26} Tekinalp/Tekinalp, p.621.

\textsuperscript{27} Although towards the end of 1980’s, or to be exact in 1989, European Union Social Charter was prepared, it has never become a binding document due to the United Kingdom’s attitude. See, Erika Szyszczak, “Social Rights as General Principles of Community Law”, \textit{The European Union and Human Rights}, Edited by Nanette A. Neuwahl, Martinus Nijhoff Publishers, 1995, p.212; Tekinalp/Tekinalp, p.623. For he Social Charter, also see, Mehmet Semih Gemalmaz, “Ulusalüstü Hukuk Düzeni: Avrupa Topluluğu ve İnsan Hakları”, \textit{AÜSBFD, Prof. Dr. Muammer Aksoy’a Armağan}, Cilt XLVI, Ocak-Haziran 1991, p.222.
to the persistency of the EU on the subject the Treaty of Amsterdam, which included the Social Charter, was signed in 1997\textsuperscript{28}.

It could be argued that during the period that European Union’s priority was political integration, theoretically, there were two major attitudes regarding the social policy objective contending: the social protective approach advocating decision taking processes and social policies be dealt with on European scale and neo-liberal approach opposing the strengthening of social policies\textsuperscript{29}. Vital actions after year 2000 are good evidences of the approach advocating the importance of the social policies championed by the Union. Indeed, the Charter on Fundamental Rights\textsuperscript{30} that contains social rights such as freedom of association, right to strike, collective negotiation agreements for workers, participation in government and job security as well as classical rights, and the EU Constitution that transfers the Charter in whole into its second chapter displays how the social policy became important during the European integration.

\textbf{IV- Social Rights in the Constitution of European Union}

At the beginning of the 21\textsuperscript{st} Century the EU enters into a constitution making process in order to simplify its dispersed legislation, to determine clearly the use of powers between the Member States and the Union and to clarify the legal status of the Charter of Fundamental Rights of the European Union\textsuperscript{31}. A draft is prepared as a result of the works conducted between 2002 and 2003, the full name of which is Treaty establishing a Constitution for Europe.

\textsuperscript{28} Within the Treaty, references were made both to the 1961 Social Charter of the Council of Europe and 1989 European Union. During this period, The EU has taken a more active role than before regarding social policies. Tekinalp/Tekinalp, p. 625.

\textsuperscript{29} Çelik, p.74.

\textsuperscript{30} European Union (EU) leaders meeting in Cologne in June 1999 agreed that fundamental rights should be consolidated at EU level into a charter to make them more visible. They entrusted the task of drafting the charter to a convention, which met for the first time in December 1999. The convention adopted a draft charter on 2 October 2000. The Member States approved the draft at the European Council in Biarritz on 13 and 14 October 2000. The European Parliament gave its approval on 14 November 2000 and the European Commission on 6 December 2000. The Parliament, Council and Commission signed and proclaimed the charter on 7 December 2000 in Nice. See, http://ec.europa.eu/justice_home/fsj/rights/charter/fsj_rights_charter_en.htm. (27.03.2007).

This text, shortly called as “Constitution of Europe”, is of utmost importance with respect to social rights.

Although the results of the referendums in France and Netherlands were “no”, which means de-facto rejection of the Text and delay of the expectations for an uncertain period of time, there is always hope and when materialised, a huge step would be taken concerning the supranational protection of social rights\textsuperscript{32}.

As stated above, the EU Constitution transfer the Charter of Fundamental Rights that was adopted in Nice Summit in 2000, into its second chapter as it is. Before enumerating these rights, it would be constructive to examine the general attitude of the Constitution on the subject.

Before all else it must be pointed out that the provisions on the aim and scope of the EU Constitution define the EU as an organisation respecting the human rights. Correspondingly, the Constitution states that the EU was founded based on human dignity and freedom. The phrase “strengthening social justice”, which is articulated within Article 3 of the Constitution, is significant in terms of reflecting the importance given to social policy and social rights by the Union.

Following this general explanations, the Constitution enumerate social rights within Part IV. of Second Chapter, under heading “Solidarity”. In this sense, the first right specified is labour’s right to information and the covering article is read as “Workers or their representatives must, at the appropriate levels, be guaranteed in formation and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices”. (Article II-87)

The second right specified within this section is right to collective negotiation and action for workers that is articulated as “Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action”. (Article II-88)

Another right envisaged within the Constitution is the right to benefit from replacement services that is expressed as “Everyone has the right of access to a free placement service”. (Article II-89)

\textsuperscript{32} It should be added that, even if the approval of the EU Constitution is impossible, by giving binding force to the Charter of Fundamental Rights of European Union the conciliation reached could be implemented.
Right to protection against unjustified dismissal for the workers is also specified and is read as “Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices”. (Article II-90)

Providing fair and appropriate working conditions is another issue dealt with by the Constitution and put across as “(1) Every worker has the right to working conditions which respect his or her health, safety and dignity. (2) Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave”. (Article II-91)

Prohibition of employing child workers is one of the most meaningful rights foreseen within the Chapter. This right is envisaged by the Constitution as “The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education”. (Article II-92) It should be noted that this regulation is even more progressive then the ILO Convention No. 182, the relevant international instrument, since the ILO Convention No. 182 does not prohibit the child labour completely and merely “target the child labour under bad conditions”33. However, within the EU Constitution child labour is prohibited.

The Chapter also contains a provision regarding family and working life that is read as “(1) The family shall enjoy legal, economic and social protection. (2) To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child”. (Article II-93)

The importance and position amongst the social rights of the right to social security and social benefits is indisputable and it is dealt with by the Constitution as “(1) The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employ-

ment, in accordance with the rules laid down by Union law and national laws and practices. (2) Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. (3) In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices”. (Article II-94)

Another right that is arranged for by the Constitution is right to benefit from health services, which in envisaged as “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”. (Article II-95)

In addition, access to services of general economic interest (Article II-96), environmental protection (Article II-97) and consumer protection (Article II-98) are other rights included within the Chapter.

It has been mentioned above that social rights are dealt with under the “SOLIDARITY” heading in Part IV within Second Chapter of the Constitution. It should be pointed out that the rights included within the Constitution are not limited to those examined above. Although not within the same Chapter, the Constitution also deals with right to education and right to trade union. It is well-known that the right to trade union has a privileged position amongst social rights34 and is envisaged by the Constitution as “(1) Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form

---

34 Owing to this peculiarity the right to trade unions occupies a very important place within the international instruments that regulate the working life. In this context ILO Covenants No. 87, 98 and 151 are of vital importance and they are of legal value for the EU as well. since the EU is bound by principle of “the respect for human rights and fundamental freedoms”, which is a treaty rule and covers the right to trade unions, since it is a human right no doubt, and thus the relevant ILO covenants. See, Mesut Gülmez, “Üyum Düzenlemelerinin Üvey Evladi: Sendikal Haklar”, www.barobirlik.org.tr/yayinlar/makaleler/ABUYUM%20Mesut%20GFCLmez.Doc. (28.05.2007) In the meantime it should be stated that the ILO rules regarding the right to trade unions are part of the Turkish law pursuant to Article 90 of the Constitution. See, Mesut Gülmez, Sendikal Haklarda Uluslararası Hukuka ve Avrupa Birliği'ne Uyum Sorunu, Belediye-İş Y., Ankara, 2005, p.99-100.
Right to education, in this sense, especially at a certain level, for example at the primary school level, occupy an utmost important position amongst other social rights and is regulated by the Constitution as “... This right includes the possibility to receive free compulsory education”. (Article II-74)

As explained above, the Constitution includes many specified social rights and thus expresses a very important expansion regarding social policies in supranational level. However, it is not possible to reckon the Constitution as a perfect document in respect of social rights as it still contains some important shortages. From this point of view, the Constitution, for example, does not deal with the issue of the protection of orphans and disabled persons in a clear and adequate way.

**V- Conclusion**

The social rights arise from the struggle of the working class against the unconstructive consequences of the functioning of the capitalist system and mainly are protection of poor sections of the society oriented. They aspire to overcome the disadvantages caused by the social inequalities, while protection of the human dignity is a must to be observed.

Recognition of the social rights is the outcome of conciliation within the liberal state, due to which the smooth prolongation of existence of the liberal state was possible. Nevertheless, with the process of the globalisation that pushes states into a harsh economical competition this conciliation appears to be deteriorating. As a typical consequence of competition states attempt to get rid of the economical burdens generated by social rights.

It must be stressed out that this situation is particularly important for Continental Europe since it is known as the homeland for the social rights. While the nation states in Europe has overcome the weaknesses caused by the globalisation thanks to the EU, it is still wondered how they are going to deal with the weakening of social rights, another result of globalisation.

This paper demonstrates that although not following social rights oriented policies at the beginning, the EU started to focus on social rights by the course of time. Indeed, the EU made its sensiveness to the issue obvious by adopting the Charter of Fundamental Rights of European Union. The Charter that contains important
provisions regarding social rights was then transferred into the EU Constitution that is a sign of the determination concerning the subject. Regrettably, the Constitution could not put in force and an important opportunity was missed on EU level. Notwithstanding, this development should be regarded as important since these efforts are encouraging and revealing that it is possible to put social rights effectively in practice on supranational level. Beside, even though it is not a proximate possibility, the EU Constitution could again be put on the agenda and attempts for its approval are likely. In addition, even if the approval of the EU Constitution is impossible, by giving binding force to the Charter of Fundamental Rights of European Union the conciliation reached could be implemented.