

The place and recognition of socio-economic rights in France

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1 INTRODUCTION

As in many other countries in Europe and all over the world, France only recognised socio-economic rights belatedly when compared with civil and political rights. Indeed, socio-economic rights as human rights only enjoyed their full constitutional status since 1971 when the French Constitutional Council granted them this status. Even today the content of these rights and their level of protection are still being discussed.¹

Socio-economic rights in France cannot be understood without the constitutional background which is characterised by a tradition of no protection for human rights. If the French revolution of 1789 brought the idea of the *Declaration of the Rights of Man and Citizen*, this text has been for years only a declaratory one without constitutional and even legal value. The French post-revolutionary Constitutions – especially the 1875 and the 1946 ones and in a sense the 1958 one currently applicable – were just texts establishing public organs and providing for a sharing of powers between them. The reason for the absence of protection of human rights is found in the sovereignty of Parliament. This idea was so powerful that parliamentary Acts were excluded from judicial review.

This practical situation did not mean a complete lack of interest in socio-economic questions. Since the end of the 19th century, many statutes were aimed at protecting individuals' socio-economic relations with their employers or public authorities: the right to strike, social protection of workers, paid leave, to name but a few. However, these statutory rights were granted without guarantees which meant the possibility of their legislative amendment or repeal.² Only the development of constitutional litigation early in the 1970s revealed the key issue of their place and recognition and the importance of their protection.

There are three main questions to address. The first is to identify the status of socio-economic rights: what is the level of their protection? Are

1 Terneyre 1990: 339, Prétot 1991: 197.

2 For instance, until its constitutional and statutory protection in 1946, the right to strike has been denied to civil servants as violating the principle of *"necessary permanent functioning of public service"*. See *Winkell* case (Council of State) [1907] Rec 826; *Dehaene* case (Council of State) [1950] Rec 426.

all socio-economic rights equally protected constitutionally? The second question is to define their content and constitutional regime: which rights could be considered as "socio-economic"? What protection is offered to them? Are they protected as a category or individually? The third question is to determine the boundaries of socio-economic rights: concretely how to distinguish socio-economic rights from other rights? Will the beneficiaries of socio-economic rights be groups or individuals? What are the rights and duties of those who will get this benefit?

Socio-economic rights have been recognised nearly by accident in the French legal system. Unlike the 1996 South African Constitution where these rights are constitutionally protected in the Bill of Rights,³ the French Constitution is nearly silent regarding the protection of human rights. The current text of the 1958 Constitution only deals with a few provisions related to human rights. Consequently, the protection of human rights as a whole has not been as a result of the intention of the Constitution's drafters but of the Constitutional Council's interpretation.

A list of socio-economic rights is found in the Preamble of the 1946 Constitution⁴ which refers to *political, economic and social* principles.⁵ This

3 Chapter 2.

4 Constitution of the French Republic of 27 October 1946. This Preamble is a text which not only recognises socio-economic rights but also refers in its art 1 to the 1789 *Declaration of the Rights of Man and Citizen* illustrating that socio-economic rights and rights of individuals have to be combined. This preamble is the result of a first attempt to adopt a new Constitution after World War II. A first constitutional proposal was rejected on 5 May 1946 mainly because the new Bill of Rights favoured socio-economic rights.

5 The text reads as follows:

- "§2 The people furthermore proclaim, as particularly necessary to our time, the following political, economical and social principles:
- §3 The Law shall guarantee women equal right to men in every sphere.
- §4 Anyone persecuted because of his pursuit of liberty has the right to asylum within the territories of the Republic.
- §5 Everyone has a duty to work and the right to obtain work. In the course of his employment or work, no-one shall be disadvantaged because of his origins, opinions or beliefs.
- §6 Every individual shall be allowed to defend his rights and interests by trade unionist activities and to join the trade union of his choice.
- §7 The right to strike may be exercised within the framework of the laws which regulate it.
- §8 Every worker shall, through his delegates, participate in the collective determination of working conditions and in the management of the firm.
- §9 Every property or concern, whose management has acquired or acquires the characteristics of a public national service or a monopoly in fact, shall pass into public ownership.
- §10 The Nation shall assure to every individual and family the conditions necessary for their development.
- §11 The Nation shall guaranteed to all, notably children, mothers and aged workers, health care, material security, rest and leisure. Any human being who by reason of age, mental or physical state, or the economic situation, is incapable of working, has the right to obtain means of subsistence from the community.
- §12 The Nation declares that French people are jointly and equally responsible for the burdens resulting from national disasters.
- §13 The Nation guarantees equal access for children and adults to education, professional training and culture. The State has a duty to organise free and secular education at all levels.
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text was, however, at that stage of no constitutional value. It was the will of the Constitutional Assembly after the end of World War II to reaffirm its belief in human rights, including not only the classical ones but also the so-called second generation rights. However, for years it has also been considered as a declaratory text as there was no (Constitutional) Court to enforce its provisions. The situation was contradictory; there was a list of socio-economic rights in the preamble of the Constitution but without an enforcement mechanism.

Initially under the 1958 Constitution the situation did not change dramatically. There are some provisions referring to socio-economic rights but without giving them a specific value. For instance, article 34 establishes the competencies of Parliament in which *labour law, the right to join a trade union and social security rights* are directly mentioned. This article, however, was not aimed at specifically protecting these rights but at preventing the executive from acting unfettered in these fields.⁶

From 1946 to 1971 the 1946 constitutional text was considered as not being directly enforceable. Its legal status was equivalent to a source of interpretation. For instance, during the implementation of the 1946 Constitution, only the Council of State⁷ referred in a few cases to the Preamble,⁸ considering that socio-economic rights were only general principles of law.⁹ This status of the Preamble to the 1946 Constitution was understandable. Socio-economic rights were not entrenched in the main text of the Constitution and the Preamble of a constitutional text can be used to play a substantive role in the interpretation of the Constitution¹⁰ as opposed to creating or recognising rights. Moreover, this text was unable to be directly enforced against Acts of Parliament as no constitutional review existed.

§14 The French Republic, faithful to its traditions, shall observe the rules of Public International Law. France will not engage in any war of acquisition and will never use its force against the liberty of every people.

§15 Subject to reciprocity, France will consent to such limitations of sovereignty as are necessary for the realisation of the defence of peace.

§16 France forms with the peoples from the overseas territories a Union founded on equal rights and duties, without distinctions based on race and religions.

§17 The French Union is composed of nations of peoples who share or co-ordinate their resources and efforts in order to develop their individual civilisations, increase their welfare and assure their security.

§18 Faithful to her traditional mission, France intends to lead the people under her care towards the aim of self-administration of their affairs according to democratic principles. Rejecting any system of colonisation founded on arbitrary rules, France guarantees everyone equal access to public functions and the individual or collective exercise of the rights and liberties proclaimed or confirmed above."

One must notice that other political rights are also included in that text, like the right of asylum, but they cannot be classified as political rights truly speaking.

6 In these matters, the executive only gets a delegated legislative power.

7 Which is the equivalent of the Supreme Court in administrative matters.

8 Council of State *Dehaene* [1950] Rec 426, *Teissier* [1953] Rec 133, *Amicale des annamites de Paris* [1956] Rec 317, *Soc. Eky* [1960] Rec 101.

9 This is principles which can be overruled by the legislature and can be compared to common law principles.

10 Powell 1998: 32.

The situation changed under the 1958 Constitution, largely as a result of the role played by the French Constitutional Council.¹¹ For more than ten years, the Council only reviewed Acts on the basis of the constitutional text. But in 1971 the Council expanded the grounds of review in the groundbreaking freedom of association case.¹² The Council held that statutes would no longer be reviewed solely on the grounds of the 1958 constitutional text but would also have to comply with the 1789 Declaration of the Rights of Man and Citizen and the Preamble to the 1946 Constitution. Clearly, the Constitutional Council added these two texts to the Constitution – one on civil and political rights and the other on socio-economic rights – thereby transforming their function from an interpretative one to a substantive one. This decision has been regarded as the French version of the *Marbury v Madison* case.¹³ The reasoning of the Council is noteworthy. The 1958 Constitution refers in its preamble to the two texts of 1789 and 1946. As these texts were not only related to the circumstances and reasons which have induced the Constitution but included substantive rights not protected in the Constitution itself, the Council added them to the applicable constitutional norms known as the *Constitutional Block*. This decision transformed the French constitutional review into a system which could effectively protect human rights – the result of creative interpretation on the part of the Council.

Debates then followed to determine whether these texts were enforceable *in toto* or whether only certain provisions thereof were enforceable. The Constitutional Council made no distinction on their enforceability. The Preamble of the 1946 Constitution was applied for the first time in the *Abortion* case in 1975,¹⁴ where the Constitutional Council held that statutory provisions authorising abortion did not violate the right to health care.¹⁵ Eversince this decision, the Preamble of the 1946 Constitution has been applied in many of the Constitutional Council's decisions but in only three cases it was held that the preamble had been violated.¹⁶

11 Created in 1958, the French Constitutional Council is only able to review statutes before their implementation (between their adoption and their enactment by the President of the Republic). The review exercised is an abstract review (close to the system entrenched in sections 79(4) & (5) and 80 of the 1996 South African Constitution), which offers the President of the Republic, the Prime Minister, the Speakers of the two Houses and 60 MP's from one Chamber or another to refer the matter to the Council for constitutional review. No concrete review can be exercised.

12 CC 44 DC *Freedom of Association* [1971] Rec 29. The decision in itself contains no justification for the integration of these two texts as constitutional norms. The whole decision is less than one page which means that it is impossible to follow the legal reasoning of the court.

13 Haimbaugh 1974: 910, Beardsley 1972: 431.

14 CC 54 DC *Free Termination of Pregnancy* [1975] Rec 19.

15 The Council considered that the bill authorising termination of pregnancy violated neither the right to life, nor the freedom of individuals. The Council refused to review if the bill violated a treaty (European Convention on Human Rights) considering such a question as falling outside the scope of constitutional review.

16 Right to strike: CC 105 DC *Right to strike in the Radio and Television Sector* [1979] Rec 33, 230 DC *Right to strike in Private Sector* [1987] Rec 48; right to lead a normal family life: CC 325 DC *Immigration Act* [1993] Rec 224.

The recognition and protection of socio-economic rights in France could be summarised as follows. These rights are constitutionally protected after having (only) been protected in terms of statutes. This constitutional status is the result of creative interpretation of the Constitutional Council which integrated human rights texts as a feature of the Constitution.

However, it is difficult to deal with all socio-economic rights in exactly the same manner. For instance, some of these rights are subject to progressive realisation while others are subject to immediate implementation. Some are subject to resource availability while others are not. Furthermore, the core content of some socio-economic rights are clearly defined while others are defined vaguely and are open to diverse interpretations.

Several issues come up for discussion in the determination of the content of socio-economic rights. In France these issues impact directly on the implementation of such rights.

One of the problems with socio-economic rights relates to legal definition. The traditional divide between civil and political rights and socio-economic rights fails to provide an indication of its content and the level of protection these rights confer on its beneficiaries. Statutes relating to social or economic matters can be implemented without recognising the existence of a fundamental right. For instance, before and since the end of World War II, many statutory provisions protected socio-economic rights but without giving them – at that stage – full constitutional protection.¹⁷ There were statutory provisions granting individuals some rights but they were subject to the whim of the legislature.

When one refers to socio-economic rights in France, one refers to rights which deal with social or economic matters and which are guaranteed by constitutional texts. Two elements can be identified from this definition. First, the Preamble to the 1946 Constitution enumerates a list of social and economic matters which would confer on a beneficiary a right to claim from the State some or other positive action. Second, these rights are constitutionally protected, which means the legislature must implement, may limit or interpret them but cannot simply ignore them.

The list of the Preamble of the 1946 Constitution is not a mere statement concerning socio-economic rights. It is a precise list which is very similar to a chapter of a Bill of Rights. It is clear that socio-economic rights represent a wide range of rights and duties with no apparent links between them. The one factor they share is the requirement that public authorities intervene to implement them either vertically or horizontally. Unlike civil and political rights which mostly require state organs to desist from a particular act, socio-economic rights relate mostly to some form of positive state action. That is why they have also been called '*droits créance*' (credit rights) while first generation rights were known as '*droits liberté*' (freedom rights).

17 That was, for instance, the case of the "right to strike" which was a criminal offence before 1864. After this date (Act of 25 May 1864), this right was not constitutionally guaranteed but was applicable to workers in the private sector. This was not a "right" properly speaking but merely a tolerance.

The real difficulty in determining the content of socio-economic rights lies in the distinctions between categories of rights. This leads to a more complex legal regime for socio-economic rights. Three main issues are pertinent.

First, a distinction must be drawn between indirectly applicable and directly applicable socio-economic rights. Indirectly applicable rights are those which impose on the State an obligation to act positively to implement them. For instance, the right to health care, the right to education or the right to nationalise undertakings cannot be realised without State action. Moreover, there is a margin of discretion for public authorities to determine which type of action is suitable. For instance, when the French Government decided to nationalise all the banking activities in 1982, it was accepted by the Constitutional Council as a consequence of the right entrenched in the Preamble of the 1946 Constitution.¹⁸ In other words, the limits of these rights will be defined most of the time by the policies of each government. This means that the level of protection of the right may vary. As a matter of fact, a privatisation programme in banking activities was launched in 1986 which was held to comply with the constitutional requirements.¹⁹ At the same time, there are other socio-economic rights which are directly applicable in their relationship with individuals.²⁰ These socio-economic rights are in fact individual rights exercised collectively. For example, the right to strike or the right to join a trade union can be exercised without State intervention. These directly applicable rights are similar in content and legal regime to civil and political rights. However, it is true that public authorities have to ensure that socio-economic rights between individuals are enforceable and their intervention only relates to the regulation of the right. Between civil and political rights and these directly applicable socio-economic rights, State intervention may differ in degree but not in nature.

Second, another distinction can be drawn between socio-economic rights with regard to the precision in terms of which a right is framed. When the objective and means are well defined and does not depend on external conditions, the right can be implemented quite easily. Things are more complicated when the implementation of socio-economic rights is defined in terms of a government programme. In such a case, socio-economic rights are called *programme rights* which means that their implementation is dependent on the capacity of public authorities.²¹ For example, the right to get a job is entrenched in constitutional provisions.²² Such a right will obviously be applied and interpreted in the light of the efforts by public authorities to facilitate its implementation. But that does

18 S 9 of the Preamble.

19 CC *Privatisations* [1986] Rec 61.

20 This is the application of the horizontal effect of socio-economic rights, deriving from the German doctrine of *Drittwirkung*.

21 This can be compared to the 1996 South African Constitution where some provisions of the Bill of Rights relate to socio-economic rights providing that the State must take reasonable legislative and other measures, *within its available resources*, to achieve progressive realisation of this right (see s 26).

22 S 5 of the Preamble of the 1946 Constitution.

not mean that each individual can claim a violation of this right if he or she is unemployed or loses his or her job due to bad economic conditions. These *programmatic rights* are quite difficult to manage as their content are fluid as a result of a continuously changing environment. Furthermore, the implementation of some apparently “directly applicable socio-economic rights” could be postponed until the legislature provides a statutory framework as they imply a political decision. This was the case when the court had to deal with the principle of participation, which allowed each worker to participate in the collective determination of working conditions.²³ The Council of State denied the petition against a refusal from the government to present a bill to implement such a principle.²⁴ This means that the legislature is bound by the right but has a discretionary power regarding the time-table for its implementation. On the other hand, individuals are not entitled to act against the state authorities if they do not implement it. The main reason for that lies in the political character of such an implementation. The explanation is simple. When the implementation of socio-economic rights leads to an increase in public expenses, it calls for a political decision by the legislature.²⁵ However, this question must be approached from a dynamic perspective, which means that these rights must be able to evolve as a result of the interpretation given by the Constitutional Council.²⁶

Third, socio-economic rights, like other types of rights, are only granted to individuals as members of a group and not to a group as a whole, irrespective of their direct or indirect applicability.²⁷ This is a consequence of Constitutional Council decisions considering individuals as the holders of socio-economic rights. In that regard, socio-economic rights are similar to civil and political rights. Of course, socio-economic rights can be applied to a group but if so, each member of the group is considered by himself or herself and not through the group as a whole.

Socio-economic rights in France are applied as individual rights as opposed to group rights and this is mainly for practical reasons. These rights must be able to provide grounds for judicial review in order for them to be concretely applied. Legislation therefore concretises the right and the individual would seek redress in terms of a law and this is the case irrespective of whether the beneficiary of the right is an individual or a

23 “Participation” also means “participation in the management of the firm”. This principle was conceived by General De Gaulle after World War II, entrenched in § 8 of the Preamble of the 1946 Constitution. It has been implemented through a 1967 statute. The Council of State denied any constitutional or even legal status to this principle. Only the Constitutional Council (CC 92 DC *Participation Principle* [1978] Rec 21) granted this text its constitutional status.

24 Council of State *Tallagrand* [1968] Rec 607.

25 Article 40 of the 1958 Constitution.

26 Indeed, the Constitutional Council held in most of the cases related to socio-economic rights that their interpretation is related to the *current circumstances*. This implies that changes of circumstances could lead to a different interpretation.

27 See for instance CC 290 DC *Status of Corsica* [1991] Rec 50. In this decision the Council held that the mention by the legislature of the “Corsican People”, as a component of the “French People” is contrary to the Constitution, which only recognises the French People, comprising all French citizens regardless of origin, race or religion (at § 13).

group. This can be considered as a practical approach as these rights are implemented through statutes or subordinate legislation.

The content of socio-economic rights is dependent upon how it is defined and the manner of its implementation. However, an even more fundamental issue is the fact that the distinction between socio-economic rights and other rights is becoming increasingly blurred.

These days it serves no purpose to contrast socio-economic rights with civil and political rights due to the interrelatedness of these rights. Civil and political rights were classically defined as rights which prohibited or restricted state action and further governed the individual's relationship with the state. This definition has, however, lost most of its relevance. Currently, the interrelation between so-called first and second generation rights has increasingly come to the fore in statutes and Constitutional Council decisions. An illustration hereof is the linkage by the Constitutional Council of the right of access to housing to the right to human dignity.²⁸ Another example is the right to property which, in France, is a civil and political right²⁹ but in most other modern constitutions, a socio-economic right.³⁰ Despite this dual character inherent in human rights, there remains a difference in the implementation between the generations of rights. It may be concluded that each right is able to gain a socio-economic dimension, especially when applied and interpreted through the equality clause.

It deserves to be mentioned that the interrelation between first and second generation rights presents a few problems of its own. First, the statutory regime of socio-economic rights is not unique and consequently there is no typical definition flowing from its legal regime. Indeed, socio-economic rights are quite often mentioned together with other rights in the Bill of Rights. Even in France where the equivalent of the Bill of Rights is split into several texts,³¹ the Preamble of the 1946 Constitution is not only dedicated to socio-economic rights, but also to civil and political rights. Second, rights and duties regarding socio-economic rights vary with regard to their framework of implementation. In the French legal system, socio-economic rights are usually concretised through statutes. For their application, then, the constitutional basis will not be used but the legislative one. Consequently, it is very seldom to get a referral to courts based on the direct violation of constitutional provisions relating to socio-economic rights. This is also the result of the French constitutional review

28 CC 359 DC *Basic Conditions of Housing* [1995] AJDA 455. The Council held that whereas both principles (right to a normal family life and right to human dignity) are providing for the possibility for everybody to get a basic right to housing and is therefore recognised as a constitutional objective.

29 CC 132 DC & 139 DC *Nationalisations I & II* [1982] Rec 18 & 31.

30 See the Spanish and the Portuguese Constitutions.

31 One of 1789, one of 1946, one of 1958 plus Constitutional rights derived from the fundamental statutes of the different French Republics (this is a specific category which allows the Constitutional Court to identify as constitutional norms, principles which have been systematically recognised through the different statutes of the various Constitutions between 1789 and 1940, such as the freedom of association or of education).

which is an abstract one against Acts of Parliament before their enactment. An individual is consequently unable to refer to court the argument that a statute violates a constitutional provision.³² This differs with the South African system where constitutional provisions can be directly invoked before courts to challenge all types of rules of law. However, it must be added that most of the statutes implementing socio-economic rights are referred to the Constitutional Council. Since 1975, the Council delivered more than thirty decisions on socio-economic rights, covering all the different fields of the Preamble of the 1946 Constitution, illustrating the full implementation of the 1946 text. Third, when constitutional provisions on socio-economic rights are invoked, they are often used not as the main but as a subsidiary ground for judicial review. This must be emphasised because constitutional provisions are used to add arguments to the referral. However, that does not change the constitutional protection of socio-economic rights. Moreover, the implementation of socio-economic rights through statutes often presents the advantage of providing more precise grounds to challenge the implementation of these rights. Fourth, an academic debate is raging about the requirements needed for the infringement of socio-economic rights. Some legal scholars think that the level required is higher than for individual rights³³ as the courts will first protect the latter rights. However, no constitutional or legal arguments can sustain this assertion but statistically, it is true that only a minority of decisions from the Constitutional Council held a statute unconstitutional as a result of a violation of a socio-economic right.

Can socio-economic rights in France be protected on a basis other than on a constitutional one? One has to remember that France is also a part of the European Union and of the Council of Europe. Consequently, European Community Law (or today European Union Law) and the European Convention on Human Rights are applicable texts which also protect socio-economic rights. European Community Law has developed precisely defined economic freedoms amongst members of and individuals in the European Community. Social aspects have also been added and developed later clearly indicating the links between economic and social rights. As European Community Law is guided by the principles of *direct effect* and *supremacy over municipal sources*,³⁴ there is today more than a complementary source of protection of socio-economic rights. That clearly means that quite a number of socio-economic rights are today not only defined by the interpretation of the Constitutional Council but also by the European Court of Justice. The same type of reasoning can be applied to the European Convention on Human Rights, even if this convention is mainly dedicated to individual rights. In the *Airey* case,³⁵ the European Court of Human Rights stated that if most of the rights entrenched in the Convention were individual rights, they have economic and social consequences and dimensions

32 However, the Constitution can be invoked against delegated legislation and all types of decisions made by the executive.

33 Favoreu and Philip 1995: 468-476.

34 See Hartley 1998: 187.

35 [1979] ECHR A Series no 32.

which must not be excluded from the Convention as its main purpose is to protect *concrete and effective rights*. Basically, what has been observed in terms of the constitutional protection of rights can also be applied to the European Convention on Human Rights. Moreover, Protocols added to the Convention are dealing more specifically with socio-economic rights, even if they are not often used.

The consequence of this situation for France lies in the direct applicability of these texts before courts. As France integrates them into its municipal order, they can be used to challenge any type of decisions including statutes. In other words, when one speaks of socio-economic rights, they must be considered in both the constitutional and international dimensions. Concretely, attorneys, advocates and legal advisors must take into consideration these sources. Obviously, the question is whether the constitutional protection and the European protection are complementary or in conflict. Until now, both systems are used without major problems. But there could be difficulties between the systems of protection. This is may be a new challenge for the implementation of socio-economic rights.

Sources

- Beardsley JE "The Constitutional Council and constitutional liberties in France" (1972) *American Journal of Comparative Law* 431
- Delvolvé P *Droit Public de l'Économie* (1998) Dalloz
- Favoreu L & Philip L *Les Grandes Décisions du Conseil Constitutionnel* 9th ed (1997) Dalloz
- Haimbaugh G "Was it France's Marburg v Madison?" (1974) *Ohio State Law Journal* 910
- Hartley TC *The Foundations of the European Community Law* 4th ed (1998) Oxford
- Mescheriakoff A-S *Droit Public Économique* (1994) PUF
- Pactet P *Droit Constitutionnel et Institutions Politiques* (1994) Masson
- Prétot X "Les bases constitutionnelles du droit social" (1991) *Droit Social* 197
- Terneyre P "Droit constitutionnel social – inventaire en guise d'ouverture" (1990) 2 *RFDC* 339
- Terneyre P "La Constitution devant le progrès économique et social" *LPA* 27/12/1991