

# Social Rights in Europe

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## Social Rights in European Constitutions

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## Abstract and Keywords

The aim of this chapter is to explore how European constitutions deal with social rights. It is a particularly urgent task in the present political and economic context. Whilst welfare states are a central plank of the European liberal and democratic model, they are currently under threat from the combined pressures of, amongst others, globalization, an ageing population, and (relatedly) ever expanding medical needs. Examining constitutional social rights in Europe enables one to see whether there are discrepancies between legal texts and local practices, and whether it is possible to challenge the latter in the light of the former. In a nutshell, most European constitutions, in their spirit if not always in their letter, claim that human beings have dignity, are equal to one another, and should all be treated accordingly — that is, should receive material help in the form of social assistance.

Keywords: European constitutions, social rights, globalization, social rights, dignity

## I. Introduction

Individuals, it is commonly argued within and without academic circles, have civil and political rights such as the rights not to be tortured, not to be detained and not to be tried without due process, as well as rights to freedom of speech, freedom of association, voting, and running for office. Those rights have defined democratic and liberal regimes for over two centuries, and are set out, sometimes in great detail, in many a constitution.

By contrast, as is often noted, social rights, which historically became part of liberal-democratic discourse at a later stage, are more controversial.<sup>1</sup> Some philosophers and policy-makers deny that the state should get into the business of redistribution; others maintain that the language of rights is not appropriate in that context. More numerous still are those who claim that, although individuals do have social rights, those rights should not be entrenched in the constitution of a democratic state. And yet, most democratic constitutions do have them. In fact, twenty-five out of the twenty-nine constitutions of the countries which now form the EU (or aspire to become members) have social rights: constitutional practice belies philosophical, juridical, indeed political discourse.<sup>2</sup>

My aim in this chapter is to explore how European constitutions deal with social rights—by which I mean rights to adequate income, education, housing, and health care, as well as rights in the workplace. It is a particularly urgent task in the (p.16) present political and economic context. Whilst welfare states are a central plank of the European liberal and democratic model, they are currently under threat from the combined pressures of, amongst others, globalization, an ageing population, and (relatedly) ever expanding medical needs. Examining constitutional social rights in Europe will enable us to see whether there are discrepancies between legal texts and local practices, and whether it is possible to challenge the latter in the light of the former. It will also enable us to contest the view that civil and political rights have primacy over social rights: as we shall see, not all European constitutions rank social rights below their historical predecessors. More broadly, the study of constitutional social rights in Europe is a lens through which we can perceive that there is a European culture of social justice—with some variations between countries of course, but a common culture nonetheless. In a nutshell, most European constitutions, in their spirit if not always in their letter, claim that human beings have dignity, are equal to one another, and should all be treated accordingly—that is, should receive material help in the form of social assistance.

In unearthing social rights in all twenty-nine European constitutions, we shall walk down the following road. We shall begin by examining, in Section II, which constitutions enshrine social rights, and how specific those constitutions are. We shall then look in Section III at the difficult issue of justiciability, and assess how, if at all, European courts can deal with constitutional social rights. Finally, we shall explore the two foundational ideas of fundamental equality and human dignity. In particular, we shall see

that the principle of fundamental equality to which they give rise, namely the principle whereby individuals should treat one another with equal concern and respect, simply cannot be proven. And that is a rather worrying thought: for if one cannot prove that principle, then the entire edifice of Western moral and political philosophy, from the 17th century onwards, and more specifically the European constitutional order which it underpins, rests on extremely shaky philosophical foundations. The question, which I shall address at the close of Section IV, is the extent to which that really matters.

Two caveats, before I begin. First, in order to get to grips with what I have called the European constitutional culture of social justice, one would also have to examine the role played by the European Social Charter in each of the countries which has adopted it. I shall not do so here: many of the contributions to this volume do precisely that. Rather, I shall restrict myself to the letter and spirit of the constitutions of the twenty-nine countries which are members of the EU or are aspiring to become so. To be sure—and this is my second caveat—the political and social context within which a country drafts and adopts a constitution matters a great deal to getting a full understanding of its constitutional fabric. A full comparative study of the European constitutions would require careful scrutiny of such context, of the debates—parliamentary and otherwise—leading up to the adoption of the constitution and of its amendments, and so on. To do so is beyond the scope of this chapter. Accordingly, I do not claim to engage in sophisticated comparative (p.17) constitutional law. My aim, rather, is to offer a broad and comprehensive overview of what those constitutions say. In so doing, I am merely scratching the surface of Europe's constitutional culture of social justice. Scratching the surface, however, can give us enough of an appetite for discovering what lies underneath it—a task I leave to those better qualified than I am.

## II. WHICH SOCIAL RIGHTS IN WHICH CONSTITUTIONS?

Reviewing each European constitution one by one would be both cumbersome and not particularly interesting. Instead, let me make six general observations. For a start, although social rights are rights which individuals have against those who are in a position to help them, generally welfare assistance is financed from tax proceeds and provided by the state. In so far as bills of rights are thought to enshrine the rights of individuals and citizens against the state, as opposed to against one another, it is not surprising that the constitutions of European countries should adopt a very state-centrist, and national, language when delineating social rights. To

many, this is a dated view of conceiving of social rights, since the latter are more often than not respected, or rather violated, by private actors such as firms and corporations, and by foreign actors such as foreign states and international institutions. There is a sense, then, in which European constitutions have failed to take on-board some of the most important causes of deprivation.

Secondly, many European constitutions specify that such rights should be respected to an adequate standard. But what does constitute an adequate standard of provision? Consider, for example, the right to a minimum income. Whatever income we get helps meet subsistence needs, such as food, water, clothing, as well as socially determined needs—that is, needs which we have by virtue of living in a particular society, such as, in Europe, the cost of using public transport, a television, and so on. If those latter needs are not met, we lack well-being, and are not in a position to frame, revise, and pursue our conception of the good life—we are not, in short, autonomous, and therefore do not lead a minimally decent life. An *adequate* income must thus be calculated by taking into account both kinds of needs, and to that extent will vary from country to country and, within a country, over time.<sup>3</sup> Accordingly, when entrenching social rights, constitution-makers must be careful not to be too specific, since levels of provision may have to vary depending on the country's level of economic and social development. However, they must also be careful not to be too vague, so as to give courts a sense of how best to respect the constitution when adjudicating those rights.<sup>4</sup>

**(p.18)** When assessing how European constitutions deal with social rights, and in particular which rights they enshrine and in which terms, we shall need to bear those considerations in mind. However, there is no need to do so as far as Austria, Germany, and the United Kingdom are concerned, since they (alone out of twenty-nine constitutions) do not enshrine social rights as such. I say as such' because both the German and the British constitutions (such as the latter is) mention the right to education; they do not, however, enshrine it as a *social right*—that is, as a right the fulfilment of which is grounded in the importance of ensuring that a basic need is met. Rather, the German Basic Law of 1949 stipulates a right to set up private schools, and is rather detailed on the role of religion in education. It thus sees the right to education as part of the broader civil right to religious freedom. As to the British Human Rights Act of 1998, which incorporates some provisions of the European Charter on Human Rights in British law, it explicitly grants individuals a right to education, but as part of what is necessary for the

effective exercise of (political) citizenship. On those views, then, education is not to be valued for its contribution to individual welfare alongside minimum income, housing, and health care; rather, it is to be valued for its connections to those long-standing elements of bills of rights, to wit, civil and political rights.

Whereas the aforementioned three countries are silent on social rights, at the other end of the scale, the Portuguese Constitution is very detailed, without falling into the trap of being too specific. It lists all social rights under study, distinguishes between various categories of people who might need, and deserve, material assistance: the young, the elderly, the disabled, workers, the unemployed. In that it is not alone, as we shall see. But it is unusual in that it suggests a number of ways in which the state can meet its obligations to the needy. For example, Article 64 states that all individuals have a right to health care, and goes on to specify that such a right can be respected through preventive, curative, and rehabilitative care, and that the state ought to supervise private medicine. Article 60, which deals with consumers' rights, notes that consumers' health must be protected through ensuring the quality of goods of consumption. When dealing with the right to housing, at Article 65, again this Constitution lists various measures which the state can take: setting a housing policy based on urban planning sensitive to the importance of transport networks; promoting housing cooperatives as well as individual buildings; introducing a system of rent compatible with family income and individual ownership of dwelling', and so on.

All other twenty-five countries fall somewhere in between: some enshrine all social rights, others focus on one or two. Some use rather terse language; others take greater care to elucidate the content of those rights. For example, the Constitution of Cyprus merely stipulates at Article 9 that individuals have a right to 'decent existence and social security', without specifying further what that could mean. Nor does it mention housing or health care. Sweden's Instrument of Government also rather succinctly states, at Article 2 of Chapter [One](#), 'that it shall be incumbent upon the public administration to secure the right to work, housing **(p.19)** and education, and to promote social care and social security': no mention of the right to health care, one may note. By contrast, to name a few, Italy, the Netherlands, France, Spain, and Malta are fairly expansive on the rights to be secured, the categories of people to whom they are granted, and the levels at which they are granted. On the latter point, the Italian Constitution at Article 34 and the Constitution of Malta at Articles 10–11

specify that education shall be free at primary level and that deserving pupils at subsequent levels should get financial assistance. The Dutch Constitution states at Article 22 that individuals should have 'sufficient living accommodation'. In a similar vein, Article 47 of the Spanish Constitution provides for the right to 'decent and adequate housing', and Article 41 asks for 'adequate social assistance'.

So far, I have mentioned only those social rights the promotion of which is incumbent on governments. It is worth noting, though, and thirdly, that many European constitutions enshrine a number of rights in the workplace—in other words, rights which ought to be protected by law, but which it is incumbent upon employers to respect. Thus, Articles 22 and 37 of the Greek and Spanish Constitutions respectively make it very clear that working conditions and labour conflicts should be solved through collective bargaining; Article 56 of the Croatian Constitution stipulates not only that workers should be granted weekly rest and paid holidays, but also that they should be given rights to take part in firms' decision-making procedures. The point is worth noting precisely because constitutions are thought, generally, to regulate the relationship between citizens and their governments, not to set the rules of citizens' interaction *qua* employees and employers. European constitutions thus display awareness that individuals' fates depend, not merely on governmental decisions, but also on their employers'. To put the point differently, the European culture of social justice is, as it were, 'complete', delineating as it does principles for individuals' status as citizens and workers.

As we have seen, European constitutions vary considerably in their degree of precision, the kind of social provision they mention, and the categories of individuals they cater for. But—and this is my fourth general observation—they also vary in the ways in which they conceive of social provision. The majority clearly state that they are a matter of rights; others do not use rights discourse, in keeping with the view, often held in the past but not so prevalent nowadays, that the only rights are those which only impose on others, including the state, a duty of noninterference, not those which impose on them a positive duty to act. One may think that whether or not the language of rights is used is irrelevant, that what matters is that the constitution guarantees that individuals' needs will be met. And yet, it does matter (as indeed other contributions in this volume note). For to say that someone, P, has a right to something, A, is not merely to say that it would be good or desirable for P to get A. It amounts to the much stronger claim that P *must get* A, and that third parties, upon whom it is incumbent to



respect the right, do not have a choice in the matter (unless P releases them from their obligation). More deeply, it makes it clear that whatever obligation the right imposes is owed **(p.20)** to P, and is grounded in P's interests, and not in some other value. Rights discourse, in short, rests on the view—rooted in Judæo-Christian thought—that the individual matters, that his or her interests are the primary focus of our concern. Accordingly, those constitutions which unambiguously assign social rights to individuals are more faithful, or so it seems, to the moral and political traditions of our continent than those which do not.

A fifth interesting point about social rights in European constitutions is their importance relative to civil and political rights. In the Anglo-American tradition, bills of rights are bills of civil and political rights. Indeed it is no coincidence that the British Human Rights Act of 1998 should be one of three constitutional texts, in Europe, which do not mention social rights. By contrast, as should be clear by now, European constitutions easily incorporate social rights. But some of them nevertheless do subscribe to the widely held view that those rights are subordinate to civil and political rights—that the right not to be killed, for example, is more important, more central, than the right not to be left to die of hunger. Thus, most of them list civil and political rights first, social rights last (in fact, not a single one of them begins with social rights). But some of them, interestingly, begin with a few civil rights (such as the right not to be killed or tortured), carry on with social rights, and end with other civil rights which are thus, implicitly, considered as less important.

Finally, many European constitutions (for example, the Danish and Finnish Constitutions) tend to rely, sometimes explicitly, sometimes implicitly, on the distinction between those who are needy through no fault of their own, and those who are responsible for their predicament. The phrases 'those who cannot work', or 'those who cannot secure the means for their own subsistence' are often used in connection with the right to a minimum income. In so doing, European constitutions strongly distinguish between the deserving and the undeserving poor. That they should do so is worth noting. For in drawing that distinction, they are not in keeping with a still marginal, but growing number of European philosophers and policy-makers who, instead of according individual responsibility the place it currently has in contemporary welfare states, advocate that *all* individuals, whether they want to work or not and regardless of the reasons why they do not work, be given an *unconditional* basic income.<sup>5</sup> In fact, European constitutions are

firmly anchored in the Christian ethical norms of individual responsibility and work ethics.

Moreover, the distinction between the deserving and the undeserving poor is a cornerstone of 'right-wing' thinking on welfare policies (alongside the view that the state should intervene as little as possible in the economic and social life of the nation). By contrast, left-wing parties and movements have been charged for being too lenient with the undeserving poor. However, the fact that those parties, when (p.21) in power, have endorsed the view that, at constitutional level, some poor individuals deserve to be helped, whilst others do not, suggests that the European left has more common ground with its foes than is usually acknowledged. Not that this should be surprising: the view that individuals are able to make the decisions that affect them most and should be left free to do so is central to liberalism—Europe's dominant ideology, whether left or right. In so far as its correlate is, precisely, that individuals should be held responsible for such decisions, not only is it politically expedient for the left to restrict constitutional social rights to those who are not responsible for their predicament, it is also in keeping with some of its core values.

Having said that, it pays to note that in Europe at least, constitutional discourse and actual practices somewhat diverge. No welfare policy can hope exactly to implement the distinction between the deserving and undeserving poor in all the areas in which it applies. For we simply cannot gather enough information about individuals' precise circumstances, which include not merely their current situation, such as unemployment, and its direct causes, such as poor interpersonal skills, but also what in their education, background, etc., contributed to it. We cannot, in short, know precisely the extent to which someone is responsible for being poor. However, we can, up to a point, at least in some cases, know whether someone is responsible for requiring medical treatment: someone who can, but does not, get vaccinated against serious diseases; a driver who has a car accident while driving under the influence of alcohol or using the phone, and so on. If European practices were in line with the spirit of their constitutions, such individuals should not be given medical treatment for free. And yet, they are: notwithstanding their (at times) stern constitutional languages, European societies simply cannot accept the idea that someone who is responsible for his predicament, but does not have the wherewithal to pay for medical treatment, should be left to die. One cannot help thinking that this is as it should be—that in the area of social rights, one should not stick to the letter of the constitutional law, but rather to its spirit—that no



matter what they do, individuals are entitled to be treated in ways which are compatible with the idea of human dignity. More precisely, they are entitled to social rights to minimum income, education, housing, and health care.

### III. JUSTICIABILITY

I shall come back to human dignity in section 4. For now, I want to focus on the second feature of constitutional entrenchment, namely justiciability. For it is one thing for a constitution to say, for example, that all individuals have a right to a decent income; it is quite another to allow the courts to ensure that public authorities, most notably the legislative power, actually respect that right. The issue of justiciability raises three questions: (1) Are constitutional social rights within the remit of the courts?; (2) How can the courts intervene so as to protect those rights **(p.22)** from legislative and executive attempts to undermine them?; (3) How difficult is it for the legislative power to override courts' decisions?

Not all European constitutions allow the courts to adjudicate conflicts between public authorities and individuals regarding constitutional social rights. The Constitution of Denmark is entirely silent on the issue. Others, such as the Dutch Constitution, explicitly disallow judicial interference with legislative action; still others explicitly disallow judicial interference with social policy specifically. Thus, the Constitution of Ireland enshrines the right to free and adequate education for all children, but 'relegates' other social rights to a section called 'Directive Principles of Social Policy'—principles which, under Article 45, do not fall within the remit of the courts. Similarly, the Constitution of Malta, which as we saw does enshrine rights to education and to social assistance for the needy, explicitly rules out at Article 21 the possibility of allowing the courts to intervene in those areas. As to the Spanish Constitution, it allows for judicial review of constitutional rights by the Constitutional Court as well as lower courts, but only for breaches of the right to equal treatment before the law, civil and political rights, as well as the right to education (Articles 53, 161). Under Article 53(2), it does not allow for judicial review of other constitutional social provisions such as adequate social assistance and the rights to health protection and adequate housing.

However, the majority of countries provide for justiciability, although in one case, that of Romania, the legislative power can override courts' decisions without having to amend the constitution. In and of itself, this does not mean that individuals have extensive recourse, at the bar of the constitution, against their governments, indeed against their elected

representatives. For whilst some constitutions allow any court to make a judgment of unconstitutionality (such as Cyprus and Estonia), many others do not, and restrict this possibility to a Constitutional Court (for example Bulgaria, Belgium, and Greece). Some constitutions (such as the Estonian Constitution) allow individuals to petition the constitutional courts, whereas others only allow them to raise the question of the constitutionality of a law or decision in the course of any judicial proceedings (as is the case in Cyprus); still others, such as the French Constitution, simply rule out individual petition altogether. Finally, some countries allow not merely for judicial review, whereby the constitutionality of a law is assessed after the law is passed or upon a complaint from a party in judicial proceedings, but also for judicial preview, whereby the constitutionality of the law is assessed before the law is passed. Such is the case with Romania and Bulgaria. And whereas some constitutions explicitly rule out judicial preview (see Article 128 of the Slovakian Constitution as well as Articles 156 and 160 of the Slovenian Constitution), France, by contrast, is the only country which makes constitutional social rights justiciable *and* rules out judicial review: neither the Council, nor the Council of State, which is the highest court to adjudicate conflicts between the state and individuals residing in France, can invoke the constitution once a law is passed to annul the latter.

**(p.23)** What is the significance of all this? The easier a constitution makes it for an individual to petition a court on the grounds that his constitutional rights have been violated, the greater the strength of entrenchment. Judicial review is crucial in that respect, since it works on the assumption that a law may well appear to be congruent with the constitution as it is passed, but turn out not to be once it is applied to individual cases. This is not to say that judicial preview is unnecessary: one can imagine situations where a law clearly violates the constitution, or is phrased in such a way that it can obviously be applied in violation of it, in which case it is better to strike it down before it is promulgated—in other words, before it can do any damage. European constitutions which allow for one, and not for the other, of those modes of adjudication, fail to protect individuals' constitutional rights, and thereby their constitutional *social* rights, to the full extent of their power. Needless to say, those which rule out constitutional social rights from the remit of the courts fail on that count to an even greater degree.

In so doing, however, they thereby accord greater importance to democratic decision-making than those constitutions which provide for judicial review, judicial preview, and individual petition. For the greater the strength of constitutional entrenchment, the more restricted the scope for legislative

and executive decision-making. Justiciability, or the lack of it, is crucial, then, in particular when constitutional social rights are concerned, in so far as it gives us an indication of a given country's understanding of the relative importance of social justice and democracy.

I am presupposing here that social rights matter in and of themselves, that they are not instrumental to democracy. This is a controversial view, particularly in academic circles, where it is widely held that one cannot be an effective citizen if one does not know where one's next meal is coming from. I have rebutted that argument at length elsewhere, and I shall not repeat myself here.<sup>6</sup> Suffice it to say that European constitutions do not ground social rights on the claim that they are part and parcel of political citizenship. In fact, some of them say very little on the fundamental values to which social rights give expression. But quite a few invoke the importance of two ideals, of human dignity and fundamental equality. To examining those two ideals, which in those constitutions at least are the explicit basis for constitutional social rights, I now turn.

#### IV. FUNDAMENTAL PRINCIPLES: DIGNITY AND EQUALITY

Some European constitutions (such as, for example, the Czech, Finnish, Italian, and Portuguese Constitutions) clearly state that human beings have dignity and should be treated as such; more specifically, that they should be treated as having *equal* moral worth. Unsurprisingly, those constitutions do not in any way **(p.24)** elucidate what they mean by 'human dignity' or 'equal moral worth'. But in so far as they avail themselves of a vocabulary to be found in the philosophical, religious, and political discourses which constitute the foundation of European public culture, one can easily and plausibly understand them to mean the following: human beings have a special moral status, in that they have attributes such as the capacity for moral and rational agency which no other being has. Moreover, they have that capacity to the same degree. Accordingly, in so far as they have equal moral worth, they should be treated with equal concern and respect.<sup>7</sup>

My aim in this section is first to explore the view I have just sketched out, and which for convenience's sake I shall dub the *principle of fundamental equality*, in relation to European constitutions' treatment of social rights. It is then to assess whether the principle can be proven.

Notice, first, that 'treating with concern' and 'treating with respect' are two different ways of treating someone, although the words 'concern' and 'respect' are often lumped together. To treat them with concern is to have

solicitous regard for their interests; it is to recognize that their interests are important in and of themselves, irrespective of whatever importance they might have to us; it is, accordingly, to refrain from harming those interests as well as to help promote them, on those very grounds. Thus, to treat someone with concern is to attach importance to their interest in continuing to live a minimally decent life, which in turn means not killing them *and* helping them to get the resources which they need in order to live such a life. Hence the attention paid, in most European constitutions, to such necessities as minimum income and housing.

By contrast, to treat someone with respect is to recognize that they are capable of acting rationally and morally so as to promote their interests. Thus, although I treat my cat with concern (I feed him not because it is in my interest that he remain alive, but because it is in *his* interest to do so, and because he depends on me), I do not respect him. I do not mean that I *dis*respect him: I mean that he is not the kind of creature which warrants respectful or, indeed, disrespectful, treatment. Some of the social rights enshrined in European constitutions are founded on the importance of respectful treatment. To insist that individuals should receive an adequate income, either from the state directly, or at work thanks to the protection afforded by minimum wage legislation<sup>8</sup> is not merely to have concern for them: it is to pay respect to them, by recognizing that they are able, through work, to raise the resources they need; and if not in work, that they need an all purpose resource such as money in order to further their own interests, even if they end up squandering such resources. European constitutions would have been far less respectful of the needy if they had provided, instead, for help in kind rather than in cash, by way of food and clothing vouchers.

**(p.25)** Although the principle of fundamental equality dictates that we treat one another with equal concern and respect, the two requirements may conflict with each other: I may be led, out of concern for someone, to act so as to promote his interests in what I think is the best way, thereby failing to recognize that he has a say over how his interests should be promoted, and thereby failing to show him respect. Conversely, I might, out of respect for him, decide not to take any step to help him promote his interests, thereby contributing to his downfall. European constitutions emphasize the importance of respecting, by contrast with showing concern for, individuals, in two ways. First, as we saw in Section II above, they guarantee material help to those who are not causally responsible for their predicament and not to those who are. In so doing, they imply that we should respect individuals

for their ability to take charge of their lives, the correlative of which is that those individuals are held morally responsible for their predicament. Secondly, unlike instruments such as the International Declaration of Human Rights, they do not characterize individual rights in general and social rights in particular as inalienable. If an individual decides *not* to avail herself of the material provision to which she has a constitutional right, then so be it: it is her choice, which has to be respected.

The fact that concern and respect denote different dispositions towards others does bear on the requirement that we treat them with *equal* concern and respect. For it may be that, in some cases, the interests of some individuals outweigh those of other individuals. For example, although we ought to show concern for individuals by helping them get the material resources they need, we ought not to bring about full equality of resources through extensive distributive policies. For if we were to do so, we would jeopardize the interests of those in a position to help, by asking them to give far more of their own resources than is reasonable to expect. There is, in other words, a limit to our obligation to help others. European constitutions are, by and large, sensitive to this, since they understand social rights as ensuring that individuals have enough resources to meet their needs, not that everyone has as much as others. I say 'by and large', for the Italian and the Portuguese Constitutions (Articles 3 and 9 respectively) provide for more extensive, more egalitarian measures.

So far, so good. But to elucidate the relationship between having equal moral worth and being under a duty to treat one another with equal concern and respect, and in turn to define with greater precision than is (perhaps) usually done what those terms mean, does in no way show *why* we should, indeed, believe that human beings have equal moral worth, and why we should treat them accordingly. Unsurprisingly, European constitutions do not do this: for that is not their role. However, it pays to assess whether it is possible to show the truth of that belief. For if it turns out that the principle of fundamental equality is not justifiable, then we may well have cause to worry that the European constitutional culture of justice rests on shaky foundations.

Remember the basis upon which the principle of fundamental equality is asserted. Human beings, it is said, have a special moral status, in that they have (p.26) attributes such as the capacity for moral and rational agency which no other being has. This in turn suggests that they should be treated with concern and respect. Moreover, they have that capacity to the same

degree. Accordingly, in so far as they have equal moral worth, they should be treated with equal concern and respect.

There are various familiar problems with that argument. First, human beings who share that capacity, actual or potential, do not have it to the same degree. Egalitarians readily acknowledge that people are better able than others at furthering their own interests and at understanding what is morally right and wrong. Yet, they claim that, notwithstanding those variations, human beings must be treated with *equal* concern and respect. However, if it is true that the capacity for moral and rational agency is what warrants treating one another with concern and respect, why not say that we should treat one another with concern and respect to the degree to which we have that capacity?

Some philosophers, many of them Kantians, and certainly Kant himself, have argued that the capacity for agency is independent of the mental and psychological capacities we are empirically found to have, and is therefore not vulnerable to the challenge posited at the end of the last paragraph. But their response to that challenge is clearly false. For it makes sense to state that human beings have, and trees lack, the capacity for agency, only in virtue of the fact that human beings have capacities that trees do not. In order to distinguish between human beings and trees in respect of their moral status, one cannot but appeal to that fact. The problem, of course, is that this argument for the principle of equal concern and respect under study rests on a naturalistic fallacy. It seeks to derive a moral requirement from a set of facts, whereas no such derivation is possible: to acknowledge that human beings are capable of acting rationally and morally does not in any way commit us to agreeing that we should treat them with equal concern and respect.

Now, there are other justifications for the principle of fundamental equality than the one mentioned so far, most notably the Golden Rule. On that view, if, as a human being, you wish to be treated with concern and respect by others, you should treat them in exactly the same way. However, I do not believe that the Golden Rule is in the spirit of most European constitutions. For those constitutions deem that human beings are inherently worthwhile, and equally so, and it is *that* which grounds our obligations to others, rather than our (legitimate) desire to be so treated by them. In any event, even if the Golden Rule is a tenet of European constitutional orders, it does not provide a more successful defence of fundamental equality than the aforementioned alternative. For it will not work against someone who does



not already believe in fundamental equality. Imagine a white supremacist, who systematically discriminates against, or abuses, members of other races. Were you to point out to him that he should treat them with the same degree of concern and respect he demands of them, he could, in reply to your criticism, point out that the reason why he asks them to show to him concern and respect is precisely because he belongs to the superior race. The Golden Rule, he (p.27) could go on to say, only dictates that he show to fellow white supremacists the kind of concern and respect he demands of them; it does not dictate that he so behave towards other races.

However repugnant the supremacist's reasoning may sound, I do not think it can be countered in a non-question-begging way. To counterclaim to him, for example, that he should not believe in the superiority of the white race in the first instance, begs the question, since this is precisely what is at issue. The Golden Rule, then, is powerless to defend fundamental equality, when fundamental equality applies to all human beings who share moral and rational agency, irrespective of race, gender, sexual orientation, etc.

Thus, neither of the justifications for fundamental equality which I have examined works. It could be, of course, that some other justification could work. Somehow, though, I doubt it. For it is unclear to me that any such justification can avoid the charge of question-beggingness, or avoid relying on the naturalistic fallacy. If so, what then? As I pointed out in Section I, if one cannot prove the truth of the principle of fundamental equality, European constitutions rest on extremely shaky philosophical foundations. For, to the extent that the principle of fundamental equality dictates that we respect others, it thereby requires that we be able to give those who disagree with us reasons for subjecting them to the power of the law. Of relevance here, it requires that we be able to give them a reason as to why they ought to contribute part of their income to help the needy. If we cannot give them such a reason—if we cannot justify subjecting them to taxation by appealing to equality—then are we not, in fact, violating the very principle which we aim to respect?

I submit that we are not guilty of such violation. For the main reason why we may think that we have cause to worry, if the principle cannot be proved, is that opponents of the principle may use its improbability as evidence that the principle of fundamental inequality is true. However, the fact that the principle cannot be proved need not worry us too much, because its opponents are vulnerable to some of the objections which they deploy against it. For consider: some of them might indeed adduce the claim that,

as egalitarians themselves must acknowledge, human beings are not equal in strength, intelligence, capacity for rational thoughts, and that they should therefore be treated with concern and respect to the degree to which they possess those qualities. Others might adduce the claim that only members of a particular race or gender should be so treated. In the field of social rights, then, they might claim that only White children should get the benefit of state education as Black children are by nature not as intelligent, that only men should enjoy full protection in the workplace since women's place is, by nature, at home, that the mentally and physically disabled should not get health care treatment since they are a drain on the nations resources, and so on. However, in so arguing, anti-egalitarians *themselves* are guilty of the naturalistic fallacy, since they assume that the possession, or lack thereof, of certain features by some human beings justifies unequal treatment. But that *does* amount to deriving values from facts.

**(p.28)** If I am correct, the fight between egalitarians and anti-egalitarians is a fight between people who can never hope to convince one another of the truth of the fundamental principles on which their theories respectively rest. All egalitarians can hope to do, *vis-à-vis* anti-egalitarians, is to show them that the facts which they use to justify their policies are false, and that some of the policies they advocate cannot be justified by the principle of fundamental *inequality*. For example, they can point out that women have skills and talents above and beyond the care and nurturing of children, and that men are capable of being good carers; that many Blacks are intelligent whilst many White children lag behind at schools, and that such differences as exist between minorities with respect to educational achievement can be traced not to natural differences, but to social and economic conditions. And so on.

Egalitarians, then, are not powerless when faced by anti-egalitarians. And even if they were, that still would not mean that they should give up on constructing normative arguments which appeal to the principle of fundamental equality; more concretely, it does not mean that they should tear apart those constitutions which rest on it. True, the principle has not been proven yet; and true, one may never be able to prove it. In so far as most people hold it to be true, and in so far as most philosophical and political fights occur between them, the whole enterprise of working out the implications of fundamental equality (Should we help those in need by way of coercive taxation? How much if at all should we distribute?) remains worthwhile. So does the business of forcing transient democratic majorities,

by way of constitutional entrenchment, to respect the norms of fundamental equality.

## V. CONCLUSION

In conclusion, we have seen that although European constitutions differ on the kinds of social provision they protect, as well as on the level of such provision they guarantee and the ways in which they do so, they (with the exception of the Austrian, British, and German Constitutions) converge to enough of a degree that it is appropriate to speak of a European constitutional order with respect to social justice. And although the ideal which underpins such order, fundamental equality, is philosophically shaky in the face of inegalitarian challenges, it is not so shaky as to warrant abandonment.

### Notes:

(1) For a classical exposition of the history of rights, see Marshall, 'Citizenship and Social Class', in T. H. Marshall, *Sociology at the Crossroads* (1963).

(2) Sources for constitutional texts: [http://www.ecln.net/elements/euro\\_constitutions.html](http://www.ecln.net/elements/euro_constitutions.html), and <http://www.oefre.unibe.ch/law/icl/index.html>. I do not restrict my account to the constitutions of the Member States; I also consider Bulgaria, Croatia, Romania, and Turkey, all four of which are candidates for accession.

(3) For an extended argument to that effect, see C. Fabre, *Social Rights under the Constitution: Government and the Decent Life* (2000), Ch 1.

(4) *Ibid.*, at 154ff.

(5) The best defence of an unconditional basic income is P. Van Parijs' brilliant book *Real Freedom for All: What, if Anything, Can Justify Capitalism?* (1995).

(6) See Fabre, *supra* n. 3, Ch 4.

(7) The best contemporary philosophical accounts of the view sketched here are J. Rawls, *A Theory of Justice* (1999, 2nd edn.); R. Dworkin, *Sovereign Virtue* (2000).

(8) As stipulated by, e.g., Article 59 of the Portuguese Constitution and, in France, Article 28 of the Preamble of Constitution of the Fourth Republic—which is part of the current Constitution.

