

EXCHANGE OF VIEWS ON THE DRAFT CONSTITUTION OF THE RUSSIAN FEDERATION (17 February 1993)

Economic and Social Rights

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I have been asked by the organizers of the exchange of views to comment on those aspects of the Constitution of the Russian Federation which concern economic and social rights.

This might appear somewhat surprising at first sight as the Belgian Constitution, unlike those of its neighbours, still only recognizes what are usually referred to as "traditional" rights, i.e., civil and political rights (or freedoms) and makes no provision for economic and social rights.

However, the economic, social and cultural development of our society has revealed the need to recognize the new constitutional rights of citizens which are as fundamental to the citizen as traditional rights and which enable him to lead, in particular, a life which is more in keeping with his dignity as a human being and to develop as a person and as a member of society.

This development which has already found legal expression at international level in the conclusion of several conventions such as the "International Covenant on Economic, Social and Cultural Rights" adopted by the United Nations on 16 December 1966 and at European level, by the "European Social Charter" of 18 October 1961 - both of which have been signed by Belgium - has been noted in successive revisions of the constitution, but to little or no effect.

The declaration of 17 October 1991 which explicitly provides for the possibility of adding an Article 24a on economic and social rights in Title II of the Constitution, has again placed this item on the agenda.

In the light of the large number of proposals currently before the Parliament, it appears that the intention is simply to establish the principle of these fundamental rights and to leave it to federal legislation or legislation by decree, as the case dictates, either to determine what rights the citizen can claim or, once these rights have been set out in the Constitution itself, to define concretely the nature of rights and the ways and means of effectively exercising them. Some take the view that allowing the ordinary rather than the constitutional legislator to define these rights would make possible a more flexible adaptation of these rights to the developments which are constantly taking place in our society.

At most, the Belgian Constitution will confirm the most important principles governing economic and social legislation. The gaps referred to in the Constitution clearly do not mean that these rights are not recognized in Belgium. In fact, the legislator had recognized and adopted most economic and social rights even before the proclamation of the revision of the Constitution, simply with a view to implementing the international conventions to which Belgium has acceded. Numerous regulations have been adopted and various state and semi-state bodies have been set up to implement these conventions. These rights are protected by the right of recourse to the civil courts, the Council of State, specific administrative Courts and Tribunals and the Cour d'Arbitrage.^[1]

The existence of these fundamental rights, in particular the right to economic freedom, to work and to social security does not depend on their being explicitly laid down in the Constitution. A country can have progressive and even advanced social legislation even though the principles in question are not set out in the Constitution.

As Professor MAST has pointed out, it is dangerous to put too much faith in the supreme authority of the text of the Constitution. We should never lose sight of the fact that freedom actually exercised is better than freedom which is merely proclaimed. It is one thing to recognize rights; it is another to respect them.

The general nature of fundamental economic and social rights

It must be noted at the outset that it is difficult in practice to define or delimit the content of economic and social rights.

Moreover, both legal authors and constitutional legislators have, as a general rule, confined themselves to enumerating these rights, often in an open ended fashion.

Some writers have tried to provide an fixed definition while others have stressed the progressive nature of these rights in an attempt to raise progressively the level of the benefits which they cover.

What is the basis of the distinction between traditional freedoms and economic and social rights?

Although at first sight it may seem easy to establish criteria for distinguishing between the two categories of rights, this is not the case in practice. For example, the right to free entrepreneurship and the right to private property can be regarded either as traditional freedoms or as basic economic rights.

Is this to be explained by the legal nature of these rights? Are economic and social rights really rights or simply statements of intention which lack any mandatory force?

The usual distinction between traditional freedoms (civil and political rights) and economic and social rights is, in principle, based on the role ascribed to the public authority in upholding these different categories of right.

Civil and political rights are essentially those rights which guarantee the freedom of the individual vis-a-vis the public authority. They may have a social and economic component (e.g., the freedom to engage in trade and industry). They require governments to refrain from adopting measures or taking action to restrict them. They do not endow the individual with the right to demand that the public authority grant certain advantages or provide certain services.

These freedoms are to some extent an "inalienable and sacred achievement". They are real subjective rights which are defined and guaranteed positively.

By recognizing traditional rights, the public authority recognizes that every citizen enjoys a certain number of freedoms with which the public authority has no right to interfere, save in exceptional and clearly defined circumstances.

On the other hand, economic and social rights are quite different. Because of the relative and circumstantial manner in which they develop, they enjoy a certain degree of mobility.

Proclaiming such rights means setting goals and laying down a programme for the public authority, requiring it to do or to give something or to intervene actively to ensure the effective exercise of the rights it recognizes. It also means recognizing that citizens have the right to demand the intervention of the public authority. It is for the public authority to create an environment in which everyone can make maximum use of his capacities, both individually and collectively, in order to develop his full potential as a person and as a member of society.

Economic and social rights are based on the recognition of the fact that legal equality is something purely formal and that it does not automatically lead to de facto equality (real equality).

This gives rise to the idea that the group or the collectivity has certain responsibilities vis-a-vis the individual and that it devolves not only on the public authority but also on the citizens themselves to work for the social and economic advancement of the society in which they live.

Although governments are required to take the initiative in providing appropriate legislative arrangements and regulations to implement these rights, they cannot do everything at once or for everyone at the same time. They have to make choices and establish priorities. In one sense, these rights are "promises made to the governed" and "directives for those who govern" on whom they are not in principle directly binding. They do not often have the force of a statutory obligation.

The content of these rights depends on the economic situation and on their level of development. The progressive implementation of these rights is determined by the resources available to the public authority.

They can only be guaranteed to the extent that the public authority takes adequate steps to implement them and to ensure that they are respected. It should, however, be noted that in this context the public authority has wide discretion to determine the measures to be taken on the basis of the needs and resources of the authority itself and of the individual.

The nature and content of each law and the way it is formulated play an important role in determining the binding force and more particularly, the direct effect of the law. Moreover, the intention of the legislators must also be taken into account.

These considerations enable a decision to be made whether the right should be established gradually through legislative action and executive measures or whether it is a provision which, by virtue of its content, can be directly binding on each and every individual.

Certain rights may also give rise to a rule governing the relations between citizens (e.g., fixing working conditions, the right to information and worker participation etc.).

Significance and consequences of recognizing social and economic rights in the Constitution.

The fact that economic and social rights will henceforth be enshrined in the Constitution and not simply in ordinary legislation, will mean that any violation of economic and social rights recognized in internal legislation will automatically involve an infringement of the Constitution. However, as we have already stressed, most of these rights are already recognized in national legislation as a result of international conventions which are binding on the State and which take precedence over national legislation.

Apart from this important consideration, altering the legal status of these economic and social rights would not appear to produce any major change.

The inclusion of these rights in the Constitution, particularly where they are formulated clearly and unconditionally, could give rise to specific obligations where the public authority is concerned. In this event, a private individual could, by virtue of the Constitution, directly call on the public authority to intervene. However, it is generally recognized that constitutions do not easily accommodate economic and social rights which they have considerable difficulty in formulating clearly.

As a general rule, the simple recognition of these rights in the Constitution does not of itself give rise to a subjective right to economic and social benefits. The legislator and the executive authorities have, in any event, to intervene to implement these rights. This is particularly true in the case of economic and social rights which give rise to benefits for the citizen (right to social security, right to work, right to housing etc.). It should, however, be borne in mind that there is often another side to the recognition of these rights which does not require the state to provide any positive benefits. For example, the right to work presupposes the freedom to work or not to work and to choose one's work.

The meaning and legal force of these constitutional provisions will, therefore, be largely determined by the courts. It is interesting to note here that the adoption of the special law of 6 January 1989 on the Cour d'Arbitrage makes available to the citizen a legal arsenal which enables him to insist that these basic rights are respected. The effect of this development has been to increase the legislator's responsibility in this area.

Economic and social freedoms and rights in the draft Constitution of the Russian Federation.

On the basis of these very brief comments on the situation in Belgium, we shall now examine the provisions of the draft Constitution of the Russian Federation concerning economic and social rights.

It should be stressed at the outset that the draft Constitution seems to be proclaiming - in greater or lesser detail depending on the freedoms and rights concerned - all the economic and social rights enshrined in most European constitutions.

On the basis of the English text I have been given, I have decided to deal systematically with the various freedoms and rights in such a way as to give the reader an overall picture of the different aspects of a particular freedom or right. The classification is explained in an appendix which also provides references to the articles in which the different provisions dealt are contained.

This method highlights the extent to which the part of the draft Constitution being considered here - and indeed the draft Constitution as a whole - tends to separate different aspects of one and the same freedom or right, sometimes without giving any reason for so doing. Why, for example, is a principle, the content of the principle, its guarantees and limitations and the respective duties of the public authority and the citizen set out in different places and under different provisions?

To the outsider, the order followed in drafting the text is not always clear, at least in the case of Articles 13 and 73 of the draft.

The topics dealt with in Sections 2 and 3 are so intertwined that one cannot easily and quickly grasp the nature of a particular freedom or right.

Although it is clear that Section 1 (Articles 1 to 12) simply sets out the basic principles of the constitutional system and refers to other sections for further details, nonetheless there seems to be a lack of coherence in the way Sections 2 and 3 are drafted. The same problem is sometimes dealt with in two, three or even more different chapters or sections.

On the basis of the text provided, an effort has been made to synthesize in the appendix, the different aspects of economic and social rights in line with the title of Section 2, Chapter IV "Fundamental Rights, Freedoms and Duties of Man and Citizen".

We shall therefore distinguish between economic rights and freedoms, social rights and cultural rights and freedoms.

I. Beginning with an analysis of economic rights and freedoms, we have examined the principles and foundations of these rights.

These are contained in provisions which have been included in two different sections:

- First, in Article 9 (Section 1: Basic Principles of the Constitutional System) which deals with the different forms of economic activity. It states that the social market economy constitutes the basis of the economy of the Russian Federation. This involves freedom of economic activity, entrepreneurship and labour, diversity and equality of forms of property, their legal protection, fair competition and public benefit;
- secondly, in Article 34 (Section 2, Chapter IV) which states that in the Russian Federation, the economic liberty of every person shall be realized in the right of property, the right of free entrepreneurship and the right to free labour.

One might legitimately expect that, having laid down the basic principles, the Constitution would immediately go on to define the content of these principles.

This is however not the case.

A variety of provisions have to be consulted in order to define the different aspects of the right of property :

- on the basis of the principles laid down in Article 34, Article 35 does indeed recognize that every person has the right to own property and to inherit; but it goes no further.
- Articles 57 and 58 (Section 3, Chapter VII, Civil Society) recognize property in all its forms (see also Article 9.1) - private, State and other - by defining the content, guaranteeing legal protection and setting limits.
- Article 38 (Section 2, Chapter IV, Economic, Social and Cultural Rights and Freedoms) and Article 43.3 (Section 2, Chapter V, Guarantees of Rights and Freedoms) has to be consulted to discover that the right of redress for any harm done to property is affirmed.
- Article 42 states that intellectual property is protected by law.

This is not a very logical way of organizing these concepts.

2. The right to free entrepreneurship which is one of the basic principles of the constitutional system (Articles 9.1 and 34) is similarly dealt with in Section 2, Chapter IV which is nonetheless entitled "Economic, Social and Cultural Rights and Freedoms".

- By virtue of Article 61 (Section 2, Chapter VII, Civil Society, Property, Labour, Entrepreneurship), the duty of protecting free entrepreneurship and competition (see also Article 9.1) which is its corollary, devolves on the State. Unfair competition is prohibited. Under the same article, federal law establishes the limits and types of State monopoly and enacts other measures for the regulation of competition. The State also intervenes in economic life in the interest of man and society (Article 9.2).
- Economic relations must also be built on cooperation between man and the State, the worker and the employer and between the producer and consumer (Article 9.3).

It should be noted that the location of Article 60 is open to question as it deals with rights of consumers and their protection.

3. The third of the three parts deals with the right to free labour and its protection (Article 34; see also Articles 8.2 and 9.1).

The wording of the Article explicitly affirms the principle referred to above and therefore seems to be much more appropriate.

This provision summarizes clearly the different aspects of this right. It refers in particular to the right to work, the right to free choice of work, the right to safe and hygienic working conditions, the right to remuneration for work without any discrimination and not below the minimum amount fixed by federal law, the right to protection against unwarranted dismissal as well as to assistance in case of unemployment, the right to rest and leisure and the principle of fixing by law the duration of working time.

Why deal with the same topic again in Chapter VII (Section 3, Civil Society, Property, Labour, Entrepreneurship) simply to restate (Article 59.1) that labour is free and shall be encouraged by the State and society and that the State shall facilitate the creation of the conditions for full employment?

Where the worker's right to material benefits is concerned, why dissociate, on the one hand, the right to social protection and to a guaranteed minimum income in the event of the loss of the capacity for work or temporary handicap (Article 59.4) and on the other, protection against unemployment (Article 36.2) with the corresponding responsibility on the part of the State to guarantee the payment of unemployment benefits (Article 59.4) as these are in fact two aspects of the same topic.

The same comment applies to the provisions on the freedom and the right to form trade unions and those on social relations within the undertaking. This topic is dealt with in three different chapters: Chapter III (Section 2, Civil and Political Rights and Freedoms) and Chapter VIII (Non-Governmental Associations), on the right of association and the right to trade union activity (see Articles 32.1, 62.1 and 64). Section 3, Chapter VII also deals with the right to trade union activity (Article 59.3).

Here again the drafting seems unfortunate and not very logical.

II. With regard to social rights, we shall distinguish between the right to health, the right to social security, the right to housing and the right to a sound environment.

1. The right to health and to health protection.

This is a basic principle (Article 2) which the State is required to protect (Article 8.2) by guaranteeing free medical care (Article 37.1), by developing a federal health protection programme (Article 37.2) and by recognizing the right to compensation for damage unjustly caused to health (Articles 38 and

43.3).

There is no special comment to be made, except to repeat that the texts relating to the right to health and health protection are too widely scattered throughout the draft.

2. The right to social security.

This principle is set out in Articles 2.2 and 39.1 of the Constitution together with the corresponding duty of the State to develop a system of social protection (Article 39.3).

The effect of this principle, which is based on solidarity, is the establishment of a series of rights for the citizen: the right to family allowances (Articles 8.2, 71.1 and 72.2), the right to allowances in the case of incapacity for work or loss of employment (Article 39.1 and 2), the right to health insurance (Article 37.1), the right to a pension or survivor's pension (Articles 8.2 and 39.1), the right to assistance, particularly a subsistence minimum (Articles 8.2 36.2 and 39.3) and the right to legal aid (Article 44).

Again, why not group them closer together to make the texts clearer?

3. The right to adequate housing.

The right to housing which is recognized by Article 40.1 imposes on the State and local authorities the duty to encourage housing construction, to create the conditions for the implementation of the right to housing and to provide financial aid or free housing.

In this instance, the different parts of this right are brought together in the same provision.

4. The right to a sound environment.

This principle is set out in Article 38. Other provisions, moreover, impose on the State (Article 8.3) and on each individual (Articles 51 and 52) the duty of protecting the environment and making rational use of nature (see also Article 58).

The excessive fragmentation of the provisions on this topic should again be noted.

III. The final topic dealt with in Section 2, Chapter IV is the rights and freedoms relating to education, culture and leisure.

- Education

Education is both a right (Article 41) and an obligation (Article 50). The Constitution imposes various obligations on the State (Article 41.2 - education should be free and universally accessible). Parents are obliged to provide education (Article 50).

- Culture

Article 42.2 lays down the right to culture (to take part in cultural life) and to use national and local cultural institutions.

The State is therefore obliged to establish the necessary conditions for the cultural development of man and society (Article 8.3), to preserve and develop national culture (Article 70) and to protect cultural heritage (Article 52).

Under Article 67.1, culture is free and supported by the State.

- Rest and leisure (Article 36.3).

This is a universal constitutional right which finds expression in the right to fix by law the length of working time and in the right to annual holidays and days off.

The comments made in this analysis of the provisions of the draft Constitution of the Russian Federation on economic and social rights primarily concern the formal presentation of these rights and freedoms.

Where more substantial issues are concerned, the reader is referred to the comments on page 2 of this note. By way of illustration, the text of two proposals for the insertion of economic and social rights in the Belgian Constitution have been appended. One proposal merely establishes the principle and leaves the provisions for the actual exercise of these rights to legislation, decree and government order. The second proposal which is more explicit, is closer to the draft Constitution of the Russian Federation, although it does not the various economic and social rights are summarized in a single article. It lays down the content of the rights and establishes the duties which devolve on the public authority, leaving it to the legislator in the wide sense to determine the details of the exercise of these rights.

We feel that, on this point, the draft Constitution of the Russian Federation is much too long. It goes into too much detail and although the different aspects of these rights are sometimes scattered widely throughout the text, they are, for the most part, not dealt with in greater detail.

The choice of this method is open to question.

We feel that the European Social Charter, signed in Turin on 18 October 1961 could serve as a model. After laying down in the first part the goals to be achieved, the second part of the Charter sets out, right by right, the obligations which devolve on the contracting States and to which they consider themselves bound. This would be better way of structuring the text.

These are some comments which we feel obliged to make on the draft Constitution which we have been asked to study.

[Note Num].[1] *The Belgian Constitutional Court.*