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The Secretary-General has received the contribution annexed hereto from Mr Danny Pieters, alternate member of the Convention.

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## **Towards a European concept of social federalism**

**Danny PIETERS\***

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## 1. The European Union and Social Security

### 1.1. Social Security

When dealing with the meaning of the regions of Europe for social security we have of course first to define what we understand by social security. However, we are aware of the fact that diversities between the member states of the European Union appear already in this conceptual stage<sup>1</sup> In the broadest sense the social provisions area includes benefits for families/children, care for families/children, study grants, parental leave, sickness benefits, invalidity benefits, benefits for the elderly, care for the elderly, benefits for survivors, unemployment benefits, employment promotion, health care, benefits for the handicapped, care for the handicapped, guaranteed minimum income, prevention of social risks, employment, safety and health at work, vocational education & training and the protection of employees. This definition is rather broad and therefore perhaps less suited for the present study. On the other hand a more narrow approach also exists, such as the one followed by VANSTEENKISTE in his study concerning Europe, federalism and social security<sup>2</sup>. VANSTEENKISTE refers to social security schemes which are classified as such by ILO-Convention 102 or by EC Regulation 1408/71 (i.e. schemes dealing with the following situations: medical care, sickness and maternity benefits, professional injuries and occupational diseases, invalidity benefits, old age benefits, survivors benefits, benefits in case of death, unemployment benefits and family allowances), plus social assistance benefits aimed at providing a general subsistence minimum.

In order to facilitate the discussion concerning the meaning of regions to social security, we would like to propose for the purposes of present exercise, an approach including in the broader 'social security' concept income replacement schemes, cost compensating schemes and social services. Income replacement schemes include benefits in case of old age, in case of survivorship, in case of temporary/short term work incapacity (sickness benefits), in case of permanent/long term work incapacity (invalidity benefits), in case of unemployment, in case of parental leave, in case of pregnancy/motherhood, in case of handicap, in case of study (student wage), and in case of a general lack of resources. Cost compensating schemes include benefits in case of familial or child charges (general), for day care costs (children), for study costs (study grants and alike), for health

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<sup>1</sup> See e.g. Berghman, J., Concepts in Social Protection: the lack of a common language, in: PIETERS, D. (ed.), Social Challenges of the EU and the Intergovernmental Conference, Helsinki, 1996, pp. 12-20.

<sup>2</sup> VANSTEENKISTE, S., Sociale Zekerheid, federalisme en de Europese Gemeenschap, Acco, Leuven/Amersfoort, 1995, 4-14.

care costs, for the integration of the handicapped, for integration into the labour market/employment promotion, and for prevention. Social services in the broad sense cover the provision of child care/day care for children, health care, care for the elderly, care for the long term ill and care for the handicapped.

## **1.2. The European Union and its regions**

We shall examine the relevance of the regions of Europe for social security. Hereby we understand by 'Europe' the European Union, be it that we shall also make a brief excursion to that one country of Europe with a long vested federal tradition, which does not belong to the EU, Switzerland.

It could of course have made sense also to include in our investigation larger federal entities like the United States of America, Canada, Australia or even Russia. This would however have exceeded the scope of the present intervention. Moreover it is interesting to see that the issue of federalism and social protection is politically and scientifically at the heart of today's debates in most of these larger entities. In Canada and Australia important research is being carried out on the subject and in Russia the relationship between the federation and the regions seems to be at the heart of the political debate, also in relation to social issues.

We have still to define what we shall understand by 'regions'. Here we would like to propose a very broad definition of region as any territorial subdivision of a state, with some form of self-government. As such the concept government includes federated states, regions, Belgian 'communities', Spanish 'autonomies, as well as districts and municipalities. This concept of region is in line with the understanding of region by the Committee of Regions. This Committee of Regions<sup>1</sup> is an advisory EU institution on the same footing as the Economic and Social Committee. The EU Treaty requires it to be consulted on matters relating to trans-European networks, public

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<sup>1</sup> The Committee of the Regions consists of 24 members from each of the larger EC countries (France, Germany, Italy and the United Kingdom), 21 from Spain, 12 from each of the following countries, Austria, Belgium, Greece, the Netherlands, Portugal and Sweden, 9 from Denmark, as well as from Finland and Ireland, and 6 from Luxembourg. The term of office is of four years; the Committee meets in Brussels, at least five times per year. The Committee's work is based on a structure of eight standing Commissions and four Sub-Commissions: Regional Development, Economic Development, Local and Regional Finances (+ Sub-Commission: Local and regional finances), Spatial Planning (agriculture, hunting, fisheries, marine environment and upland areas) (+ Sub-Commission: Tourism, rural areas), Transport and Communications Networks (+ Sub-Commission: Telecommunications), Citizen's Europe, Research, Culture, Youth and Consumers (+ Sub-Commission: Youth and sports), Urban Policies, Land-use Planning/ Environment/ Energy, Education and Training, Economic and Social Cohesion/ Social Policy/ Public Health. The Committee has also established a Special Commission on Institutional Affairs, which is responsible for contributing to the debate on the reform of the EU institutions. The Bureau, elected for a two-year term, organises the work of the Committee of the Regions.

health, education, youth, culture and economic and social cohesion. But the Committee can also take the initiative and give its opinion on other policy matters that affect cities and regions.

### **1.3. The European Union and social security**

Before embarking upon an analysis of the meaning of the regions of Europe for social security, it may be useful to very briefly recall the meaning of the EU for social security today. The Treaties have not provided the EC with powers to develop its own social security system; in fact they have paid rather little attention to the social security phenomenon as such, as certainly in its earlier stages the EC was dealing with economic, not with social integration. The restricted possibility of the EU legislator to intervene in social security matters has mainly been used to implement a co-ordination of the national social security systems in favour of intra-community migrant workers (s. EEC Reg. 1408/71) and to impose the principle of equal treatment of men and women upon all social security systems within the EU. For the rest the EU legislator has been very reluctant to directly intervene in social security and has continued to recognise the member states sovereignty in social affairs. We should indeed not forget that the legislative competence of the European Community is based upon the powers expressly granted to it by the EC-Treaty. This principle of enumerated powers is expressly stated in the EC-Treaty since the coming into force of the Treaty on European Union. The Treaty on European Union also confirmed the so-called 'subsidiarity principle' stating: 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'. Much has already been said and written about the subsidiarity principle, so I shall not venture to synthesise all these opinions. What stands beyond any doubt though, is that, notwithstanding what has often been heard, the subsidiarity principle is not a competence distribution principle. It is to the contrary a principle that first applies when there is a concurrence of competencies of EU and the member states and it tells us how the European legislator should make use of its powers in such a case. However, the latter may be true from a legal point of view, but the subsidiarity principle has often been hailed in political discussions as the supreme principle of competence distribution between the EC and the member states. Interestingly enough, nowadays the principle is also increasingly invoked by regional authorities to justify their powers as opposed to the powers of the central (EU member) state. Even in the official Internet-presentation of

its institutions by the European Union we can read: “Created as a consultative body by the Treaty on European Union, the Committee (of Regions) has emerged as a strong guardian of the principle of subsidiarity since its first session in March 1994.

Subsidiarity is enshrined in the Treaty and means that decisions should be taken by those public authorities, which stand as close to the citizen as possible. It is a principle which resists unnecessarily remote, centralised decision taking. As regional presidents, mayors of cities or chairmen of city and county councils, the 222 members of the Committee are elected officials from the levels of government closest to the citizen.

This means that they have a very direct experience of how the Union's policies and legislation affect the everyday life of their citizens.”

Let us keep this in mind when sketching the picture of the social Europe to come, we shall not only have to discuss the right distribution of competencies and political responsibilities between the EU and its member states, but may also have to rethink the division of competencies inside the member states. If not legally speaking, at least in a political sense, we shall have to reflect about the integral federalist construction of the European Union. This seems quite self-evident to me, but may not be widely accepted. Less controversial are two other, but related conclusions.

First, it should be stressed that the confrontation between national competence and competence of the ever more integrated European Union, should not also mean that internally in the member states, the debate should be narrowed to the only choice between the state and the European Union. If until now, and with the exception of the Committee of Regions, the EU constitution has to a large extent ignored the regions, this provided some member states’ central authorities with arguments against their composing regions. However, in the traditional view, the recognition by the EU of a power to the member state level, doesn’t entail any information as to whether internally in that member state this power should be exercised by central or regional authorities.

Second, we have to establish that the EU subsidiarity principle in its broad, political meaning at least shows that there is no contradiction between the growing ‘Europeanisation’ and the trend to give more competencies to the regions. In other words it is false to pretend, as we often hear in the social security debates, that it would be absurd to allocate new powers to the regional authorities, at the very moment we are also discussing the transferral of competencies to the EU level. There is no contradiction between ‘Europeanisation’ and ‘regionalisation’; both may very well be the result of a reflection of an optimal division of tasks, responsibilities and competencies between the different layers of government ... the result of what we shall call later ‘social federalism in Europe’.

## 2. Federalism, regionalism and decentralisation

When discussing the meaning of the regions of Europe to social security, we explore an area, which gets close to that of European social federalism. We shall hear more about this later on. We may suffice here with clarifying some concepts, which will have to be used when dealing with the distribution of powers in the European Union and its member states. When talking about territorially layered division of competencies within one constitutional entity, we meet with concepts like unitary state, federalism, regionalism, decentralisation etc. A very voluminous literature exists in relation to the definition of these concepts. It cannot be our intention to reproduce this literature here, not even to summarise it. Therefore allow me to restrict myself to very short and indeed approximate definitions.

I shall consider a unitary state, to be a state in which no territorial components have been recognised or, when they exist, have not been granted any autonomous powers and do not participate as components in the policy making of the unitary state. The unitary state can be opposed to the federal state, i.e. the state in which the component parts are granted autonomous powers and these component parts participate as such in the policy making of the federation. Although we know that literature sometimes distinguishes the regionalised state from the federal state, we shall use both concepts as exchangeable. Decentralisation is used when component parts of a (in principle unitary) state are granted competencies by the state, which these components may exercise according to the instructions and under supervision of the state; if so desired, the state may take back the delegated competencies from the components. These definitions are not only rather approximate; they also fail to reflect the wide variety of federal, decentralised, etc. realities. Because one thing has to be stressed from the outset: the federal state, the decentralised state etc. do not exist; every state is in fact 'special'. This is true in general but also in relation with the competencies in the area of social security.

As to the object of competence, we can distinguish a functional and a material approach. In the functional approach we may distinguish the following *functions*:

- normative (or legislative or regulatory);
- executive (or administrative or managing);
- judiciary
- control and law enforcement
- financing, budgeting and subsidising

We have to observe that it is current also to work with what we could call ‘sub-functions’, especially as far as the normative function is concerned: we then distinguish e.g. the competence to lay down the basic or framework legislation, from the competence to legislate in general (non basic/within the established framework) or the competence to set absolute or relative minima or maxima as opposed to the competence to fix standards. It may sometimes also be useful to distinguish the *intensity* of the functional competence. Normally this intensity will be set at the deciding level, however the level may also be weaker and consist of being informed about, giving advice, giving binding advice etc. The competence to set up projects or pilots is a special one.

The material approach of the object of competence leads us to distinguish the following ways of establishing the *material object of competence*:

- through defining areas of life;
- by enumeration of branches of law;
- by relating to solving a certain problem or aiming at a certain goal;
- by defining a certain action (e.g. borrowing money)

We can also distinguish following *competence relations*:

- the exclusive competence: one level is competent, thus the other is not;
- integral concurring competence: one level is competent as long as the other level doesn’t take any initiative in the concerned matter; after that, the first level is not competent anymore;
- facultative concurring competence: one level is competent as long as the other level doesn’t take the initiative; after that, the first level is not competent anymore as far as the second has used its competence, but can further use its competence for all other matters in which the second level did not (yet) intervene or which are not contrary with what the second level decided;
- shared competence: all techniques, which imply the co-operation of both levels; without the consent of either one of the levels, no decision can be taken.

Perhaps we could also add here, the competence to co-ordinate, which can be given to the federal level (rather obvious), or left to the states (to agree between each other).

If I took a relatively long time to go into these definitions and various approaches, I did so mainly in order to stress that one should always keep in mind that there are various forms and contents of federalism, regionalism, decentralisation etc.



### 3. The relevance of the regions to social security throughout Europe

After having listened to the various contributions and on the basis of earlier research carried out on the subject, we adventure to identify some common features concerning the role of regions and local authorities in relation with social security. We could make, with all due reservations, the following general statements.

The *legislative* power recognised to the regions is mostly restricted by a centrally set framework, which has to be respected. This is e.g. typically so for general social assistance or health care coverage, be it that there are examples of full devolution to the regions also in these matters. Regional and local authorities are often also fully in charge of the social services and the health care institutions. The situation where the labour mediation is left to the region is not exceptional, whereas the unemployment benefits are mainly governed centrally.

Regional and local schemes are in principle *administered* by the regional or local authorities; but these authorities rarely get recognised autonomous or decentralised competence to administer schemes, which are governed by central legislation. Here again the examples of social assistance and health care are typical. It goes without saying that such power to administer also implies a (be it restricted) normative competence.

Even when legislative and executive powers in relation with social security benefits are to be situated at the central level, very often the central authorities will run the schemes through regional and local *branches* of the central authority; it is rather exceptional that a social security scheme is run entirely from one central point, although this occasionally appears. In some countries the ‘one stop administration’ of all social security schemes at a local level, belongs to the essence of the social protection system.

As far as *financing* is concerned, we have to conclude that it is not self evident that the authorities who legislate or administer in a certain matter, also bear themselves the financial burden of the schemes; although this correspondence should in our opinion in principle prevail in order to avoid situations ‘where one cooks with the money of the other’. Cases where there is a discrepancy between who legislates in a matters and who pays for the related benefits, mostly pursue the ambition to establish more solidarity (in such a case the central authority pays although it does not run a scheme) or to create incentives for the one who administer a central scheme at a local or

regional level, not to pay out benefits to persons not really entitled (in such a case the regional or local authority pays the cost of the centrally established scheme). What is rather popular is e.g. co-payment of the expenses of social assistance between the central and regional/local level. Also in the health care and social services sector this phenomenon is not uncommon.

When considering the various *benefit schemes* and the importance of the regions and local authorities for these, we could also put forward, with all due caution, certain common trends. The impact of the local authorities is certainly most noticeable in relation to social assistance, and within assistance in relation to the non-recurrent social assistance interventions. The role of the regions and local authorities is further also important as far as the social services, especially in the field of labour mediation and health care are concerned. Probably the local and regional authorities have the least impact upon the income replacement social insurance schemes.

Concluding, couldn't we state that it is to be considered to belong to the essence of social security in Europe, that regional and local authorities are in one way or another also 'involved' in social security. Certainly it can be said that in most federations in the world, the federal authority plays a major role in the shaping of social security legislation, but the composing entities are not completely left out. This comparison with major federal entities might become rather important to the pre-federal European Union ... what then could make the national member-states and the regions again allies!

#### **4. The Convention for the future of Europe: social security and the regions**

It is not our intention to describe here in general the meaning of the on going Convention for the future of Europe, I have the honour to be an alternate member of. Nor shall I share in general with you the visions expressed in it on the role of the regions in tomorrow's European Union, nor these on the social security dimension of the European Union. As interesting as all these topics may be, they would exceed the topic of today's speech. I would rather focus on some aspects of the Convention's activities which may be directly relevant to our topic, which in itself has not really been discussed as such until now.

In the first place, I would like to refer to my own investigation in relation with the desired division of competencies in social security matters between Member States and European Union.

As a substitute member of this Convention and a member of National Parliament I sent all my colleagues of the national Parliaments as well as the members of European Parliament a questionnaire in order to obtain their vision on the future of the social security aspects of the

European Union. We indeed need to find out what it is exactly that we want before we can start to inquire into the legal means we have at our disposal to achieve our goals.

Of the approximately 8000 questionnaires that were sent out, always in the mother tongue of the recipient, only some hundred thirty were returned to us. That is certainly a low percentage. Yet, we find we can still draw a number of conclusions from these answers.

Of course, the answers do not determine our stance where the questions of the questionnaire are concerned. A study of the answers received can however be used to find out which proposals will have the highest chance of success and which ones would probably be rejected by a large majority of the European peoples and their representatives.

The questionnaire consisted of one complex and one simple question.

The first question inquired into who should be responsible for a number of aspects of social security: the member states and/or the European Union? If the European Union had a role to play, we also asked for the way in which this responsibility ought to be implemented, while suggesting a large number of ways of intervention:

- a) Formulating general principles/setting a general framework
- b) Formulating fundamental social rights
- c) Formulating minimum standards
- d) Formulating bench marks/points of reference
- e) Creating financial incentives
- f) Setting standard terminology
- g) Setting common goals for the member states
- h) Granting the European Union full and exclusive authority for this matter
- I) Granting the European Union full and competing authority in addition to the full and secondary authority of the member states
- j) Granting the European Union the authority, subject to the primary authority of the member states
- k) The European Union joins existing international bodies for these matters.

Our second question concerned the way in which European policy-making processes should be organised for social security matters. Which role should the different European institutions play? Should the Commission, the Council of Ministers, the European Parliament and the social partners be more or less involved than they are today? Should the regions or the national parliaments play a more important role in the creation of a European social security area?

The questionnaire was anonymous, yet we asked the respondents to give some more information about their country of origin, the assembly and the political family they belong to.

In view of the relatively limited number of answers, we must be very careful with figures; still we have noticed a number of quite interesting trends which we would like to discuss below.

A first and very noticeable trend is that the members of the European Parliament – and more so than their national colleagues - clearly want the affirmation of the exclusive authority of the member states for social security. The Members of Parliament of the candidate member states are most in favour of a shared responsibility. When asked about the level on which social security financing is set, nearly all EP respondents replied that it should be exclusively the member state whereas still a third of the members of national parliaments of member states and of candidate member states are in favour of a shared way of financing. More than half of the EP members finds that the safeguarding of legal social security rights should be guaranteed exclusively on a national level whereas that point of view is less apparent among the members of national parliaments of the member states (less than half of them) and of the candidate member states (less than a third).

A clear majority of all groups of respondents considers the co-ordination of the social security systems as an exclusive matter for the EC and not only for the benefit of migrating employees but also in favour of all people who legally move through the European Union. Surprisingly though, a clear majority of all national members of parliaments of member states and candidate member states are in favour of the creation by the European Union of a specific social security system for persons working throughout the European Union.

Approximately two thirds of the European and National members of Parliament find that the decisions public/private mix relating to protection against social risks is the responsibility of each member state.

When asked for the level on which social protection should be organised for the different social risks, a large majority is in favour of the national level; often the EP members are more in favour thereof than the members of the national parliaments. This trend is seen for all risks, except for the access to and the availability of health care: nearly half of the members of the national parliaments of the member states are in favour of a non-exclusive national competence. The members of other parliaments follow the described pattern they also show for the other social risks.

Concerning the promotion of employment opportunities (including professional training etc.) more than half of EP members as well as of the members of national parliaments see a role for the Union (exclusively or together with the Member States).

Where the protection of the income of employees in case of insolvency of their employers is at stake - for which the Community has already issued a directive - only the members of the national parliament of the member states show a slight majority to make this matter not an exclusive competence for the member states.

Two thirds of the EP members put the competence for the prevention of social risks exclusively with the member states; nearly half of the members of national parliaments would also be in favour of a concurrent or exclusive competence of the EU where prevention is concerned. The members of national parliaments adopt a similar attitude concerning the competence for safety and health at work, surprisingly enough a majority of the EP members would favour shared competence and a

quarter is in favour of exclusive community competence!

When we look at the political families of the respondents, we find that usually social-democratic members of the national parliaments of the member states situate the competencies for social policy more at the level of the EU or conceive them as a shared competence. Their EPP colleagues are more in favour of an exclusive authority of the member states.

Respondents from candidate member states follow the trends of their party colleagues in the member states, but they show a little more sympathy for EU competence or shared competence than their colleagues from the member states.

Striking is that the social democratic respondents in the European Parliament are less prepared than their colleagues in the national parliaments to take social policy away from the exclusive competence of the member states. Members of national parliaments seem to be more pro-European than their EP colleagues. That leads us to the following paradox: usually, members of national parliaments fear the limitation of their competence by the EU yet they are the most willing to give exclusive or shared competence to the EU. The EP members of corresponding political groups systematically prefer making certain social policy aspects an exclusive responsibility of the member states.

It would be dangerous to immediately try and find a reason for this paradox. Still, we will attempt to give a possible explanation. As a consequence of the economic integration and the influence thereof on traditional social policy aspects, the members of national parliaments increasingly sense their powerlessness in social matters. It is their experience that when social security remains a national matter and economics a European one, a conflict between 'social' and 'economic' will immediately create a conflict between 'national' and 'European'. The European, hence the economic aspect, usually takes precedence. The members of national parliaments realise that this vicious circle can only be broken by making Europe show its colours also in social policy. On the other hand, the members of the European Parliament feel powerless as well where social matters are concerned. They fear it will be very difficult to obtain in Europe a wide consensus regarding social policy matters. Their experience with colleagues from different member states shows them that the divides concerning social policy collide far more often with national boundaries than with European political families. The conclusion we could come to, should this analysis prove to be correct, is that we must at least transcend this general powerlessness on a social level. The real opposition will not be Europe or the member states, but the European Union should have more competence to allow the member states to implement their competence in a more efficient way.

The second question concerned the importance of the different institutions in the decision-making process for future social security policies. More specifically, we asked which bodies should have more and which ones should have less power when deciding about social policy compared to their current contribution. Especially the respondents from the European Parliament would like to increase the role of the Commission, the Members of Parliament from candidate member states are satisfied with the current importance of the European Union whereas members of national parliaments would prefer to reduce the significance of the Commission. Remarkably though, members of the national parliaments of the member states want to limit the role of the Council of

Ministers in the future whereas other groups of respondents are quite satisfied with the current role of the Council in the social decision-making process. All respondents would like to increase the role of the European Parliament. The members of the European Parliament as well as members of the parliaments of the member states prefer a status quo where the role of the social partners is concerned; most in favour of a larger responsibility of the social partners are the respondents from the candidate member states. We see an analogue pattern for the role of the regions in decision-making processes. Surprisingly, especially the members of European Parliament and to a lesser extent (yet still more than half of them) the respondents from the candidate member states would like to see the role of the national parliaments in European social decision-making increased. A slight majority of the respondents from the national parliaments of the member states are in favour of a status quo instead of giving them more competence.

When we look at the political orientation of the respondents the answers given to the second question, we can only find one main divergence, i.e. for the role of the social partners. Whereas social democrats and members of the European People's Party want a more important role for the social partners, the liberals largely prefer a status quo or a reduction of importance of the social partners. That result is probably less surprising.

The main conclusion for the answers to the second question seems to be that there is wide support for a larger role of the European Parliament in social matters than it has today.

## **5. Towards a European concept of social federalism**

Can we integrate the findings of the comparative studies on the role of regions within member states and the results of the European reflections on a distribution of powers relating to social security between member states and the Union, into one comprehensive theory of what could be called 'social federalism' in Europe?

There is already a well established, mainly economic, theory of 'fiscal federalism', but 'social federalism' seems a quite new concept and approach. The idea that it would be possible to develop a theory on the optimal level of decision and policy making relating to social security within a coherent theory of division of powers within a federal or pre-federal entity has certainly not got wide acceptance. Moreover, the results of our study on the role of regions with regard to social security and those of the opinions expressed in the context of the Convention with regard of the division of powers seem at first glance contradictory:

- Europe takes a particular interest in the fight against social exclusion, whereas social assistance is by excellence an area in which regions may take the lead;
- Opinions expressed in our enquiry with national and European parliament members point at health

care and also the promotion of employment as areas in which the EU should be granted more powers, but these are exactly domains in which regions today have sometimes important competencies;

- The principle of subsidiarity –mainly in its political meaning- is very much stressed by the Convention and put forward as a key to a new division of powers between Member States and the European Union, which in legal terms it certainly is not. The same, political, principle of subsidiarity, pointing at the lowest level as the best level of action unless..., is however often forgotten about in a national context;
- When within a federal state social security competencies are being recognised to the constitutional components of that state, the federal level (if not the constitution itself) will set a binding federal frame within which the autonomous legislative powers of the federated regional and local authorities can be developed. Within the European Union one seems until now very reluctant to even consider such legally binding framework and one rather looks into the direction of all kinds of non binding recommendations and benchmarks, the key-word being today very often ‘open method of co-ordination’.

We strongly hold the belief that the above mentioned apparent contradictions between the relation Member-state vs Union on the one hand and the relation Federal state vs constituent regional and local components can be overcome, and that it is indeed possible to develop a theory of ‘social federalism’ which could be valid both in a EU and in a national context. It will of course not be possible to develop such a comprehensive theory on ‘social federalism’ within the limits of this contribution. But we hope to set some landmarks, on the basis of which, others and ourselves will be able in the nearby future to develop such a theory.

Let me start with the last apparent contradiction, which opposed a European favour for an ‘open method of co-ordination’ to the hard law approach within federal states. This contradiction can be lifted by unmasking the ‘open method of co-ordination’ and showing that what is needed on a European level are also binding norms.

After the Commission stopped discussing possible ways of harmonisation and left the concept of “convergence” alone, they started some years ago to suggest “open co-ordination” as the manner par excellence to deal with tensions between the diversity of the social protection systems on the one hand and the continuous economic, monetary and political integration on the other hand. At least the Commission managed in this way to keep the debate on social security alive on a European level. Confronted with a lack of unanimity on social policy issues and with a lack of a solid legal basis to

intervene on a European level, it was felt necessary to switch to a 'softer', lighter version of member state collaboration. They exchange information, assess each other's plans and experiences and sometimes they issue recommendations. Now, many in the Convention advocate incorporating this open co-ordination method into the Treaty. I tend to somehow find that useless because that method was nothing but an Ersatz solution *faute de mieux*. If it makes any sense to transform the current extra-treaty practice of the open co-ordination method into a recognised instrument of the treaty, then it would be to clearly define this method of open co-ordination and to provide the necessary guarantees of transparency and participation.

We should however have the ambition to ask the true questions and to provide means in the Treaty to find answers for them:

- Which minimum of social protection do we want to guarantee for all citizens of the European Union?
- Which principles do we want to implement in all member states in social affairs? In other words, what is the content of the often mentioned, but seldom defined 'European social model'?
- What do we do when a member state wants to live up to its social obligations but claims to be unable to do so? Should we implement a special mechanism of solidarity?
- What do we do when a member state does not comply with one of the established social principles (minimum rights and content of the 'European Social Model') because that member state supports a different policy?

The Convention probably should not intend to provide answers to all these questions but should create channels through which answers can be found. I do not believe that the open co-ordination method can be seen as a serious approach of real-life problems. Should the open co-ordination method, which is very fashionable nowadays, be incorporated into the treaty, that could hinder a more solid approach. It could also increase the tension between the publicly proclaimed higher visions of a 'European social model' and what people see in their daily lives. An enlargement of the discrepancy between theory and practice, European discourse and national reality, politics and citizens will probably be the result thereof. We prefer a clear, not a soft law approach to the division of competencies between member states and European Union; in such a clear division, full competence of the constituent elements can be guaranteed, as learns us the experience of the federal states having recognised legislative and other powers e.g. in areas of health care or social assistance to the regions or local authorities, within a pre-established federal framework. It is exactly such a binding framework we have also to reflect upon in the context of the European Union.

That one has progressed most within the European Union in sketching such framework or at least



setting the first, cautious steps into that direction, exactly in areas like employment or social exclusion, which are the areas where regions and local authorities within some member states have been recognised constitutional powers, should then be seen not as a contradiction, but rather as a confirmation of the emergence of a comprehensive social federalism theory. Indeed, for member states used to work with standard setting in these areas, as far as their constituent parts are concerned, it was more easy to accept and think the setting of such framework norms at a European level. In other areas, where no layered responsibilities viz. competencies exist within a national context, it seems more difficult to conceive them on a supra-national, European level.

The political subsidiarity principle, which in substance expresses a favour for the lowest democratic responsible entity, unless for reasons of scale or effects the higher level is to be preferred, will guide us in designing the division of powers within a federal state as within the European Union. This may mean that more competencies can be transferred at a national level in direction of the regions or local authorities, without conflicting with the attribution of new competencies in the same area to the European Union to set framework-standards. The crucial question remaining: if regional or local competencies are being recognised, who should set the framework if such framework is needed? The federal, national level or the European level or both or none? There is no uniform answer to this question, but the motivation to accept standard setting at a higher level will be similar: reasons of scale or effects. Just as it is undebated that the European Union should retain exclusive powers to regulate social security in favour of persons moving within the European Union (EC co-ordination law), it will be possible for member states to uphold the federal principles and competence areas against erosion by the confederated entities with competence in the social security area. How far the standard setting within a federal state will go, will thus depend upon which federal principles and competencies are to be maintained. Similarly within the European Union, the Union level will have to be equipped with the necessary standard and framework setting competencies to make that the principles and competencies of the Union should not be eroded by national social security measures. But both on a national and on a European level ‘social federalism’ will not only mean the higher level may restrict the competencies of the lower level, it will also mean the higher (federal or Union) level will exercise its own powers in such a way not only to respect the competencies of its constituent parts, but also to strengthen these constituent parts to be able to effectively exercise their powers. Because at the end of the day, federalism is nothing else as joining forces at all levels to achieve by a good division of work, an optimal result for society, for the citizens. In that sense federalism cannot but find in the social area, a privileged domain of action. In that sense I am convinced the European reflection on ‘social federalism’ has a great future.