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Eu Social Cit

European Social Citizenship

The State of European Social Rights and European Social Citizenship

Edited by

Maarten Keune

Flagship Report 1

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2. How to conceptualise EU social rights and EU social citizenship? A multi-level resource-based framework

Maurizio Ferrera, Francesco Corti and Maarten Keune

2.1 Introduction

Over the last few years, the European Commission has emphasized time and again that, in the face of global uncertainty, the European Union (EU) has to strengthen its social dimension and to foster convergence towards better working and living conditions for its citizens (European Commission, 2018). To achieve this aim, the EU wants to strengthen social citizenship by advancing social rights, implementing the principles in the European Pillar of Social Rights (EPSR) at both the European and national level (European Commission, 2017a; 2017b; 2017c). In order to identify the possible pathways from an analytical point of view - and thus assess the Commission's choices and efforts – a foundational question must be raised: what is the nature of EU social citizenship and the social rights associated with it?

Answering such question requires a 'dissection' of the constitutive elements of social rights and of the various levels (local, national and EU) at which they are provided. To this end, this chapter develops a resource-based and multi-level conception of social rights. The structure of the paper is as follows. Section 1 focuses on the increasingly multi-level character of social rights and social citizenship in the EU. It also proposes a distinction between what we call 'EU social rights', 'Europeanised social rights' and 'EU law observant social rights'. Section 2 develops the concept of social rights as a bundle of three types of individual power resources: normative, instrumental and enforcement power resources. Section 3 discusses each of these types of power resources in more detail. Section 4 combines the multi-level perspective with the resource-based perspective into the entitlement chain of social rights. Section 5 concludes.

2.2 Social citizenship in transition

Social citizenship is a key distinctive feature of European nation-states. It complements freedoms of individuals based on civil and political rights with a social sharing component, i.e. the entitlement to partake in the fruits of social cooperation. In the Polanyian tradition, social entitlements are both a result

and a multiplier of power resources. They were historically obtained through collective mobilization, in response to the Great Transformation and its extensive commodification of labour. Once obtained, social entitlements greatly improved the living conditions of workers and made them less dependent on their market positions and on the unbridled discretion of employers. According to the Marshallian tradition, social citizenship is inextricably linked to and embedded in the cultural, political and institutional framework of the nation state.

This is a historical reality, still largely in place today. In various direct and indirect ways, however, European integration has gradually modified the institutional articulation of social citizenship, reducing its exclusive connection with the nation state. A rich debate, with contrasting positions, has tried to establish the extent to which the EU has weakened or strengthened national welfare states and their evolution over time. However relevant and pertinent, here we will not address this debate. Our aim is to strengthen our analytical understanding of the new institutional articulation of social rights in the EU, including the role and competencies of multilevel institutional actors. The EU intervenes in the domain of social and employment policies by supporting and complementing the activity of member states with a variety of instruments. Among these are: charters and proclamations, directives and regulations, coordination and guidance through recommendations, communications, resolutions, opinions, open methods of coordination, the promotion of dialogue between management and labour and of collective agreements (which may become EU law through Council decisions) and - last but not least – financial support, in particular through the European Social Fund. Thanks to all such instruments, the EU has been able to put in place a significant social *acquis*.

From a Treaty perspective, social cohesion and social progress feature as prominent objectives of the EU. In the preamble to the Treaty on the European Union (TEU), explicit reference is made to the Turin European Social Charter (1961), the Community Charter of the Fundamental Social Rights of Workers (1989) and to the social rights defined in the EU Charter of Fundamental Rights (2000). In Article 3 of the TEU, the Union is conceptualised as a ‘social market economy’, aimed at full employment and social progress, committed to combatting social exclusion and discrimination and promoting social justice and protection. Article 9 in the Treaty on the Functioning of the European Union (TFEU) introduces a so-called social clause in EU policy-making. According to this, ‘in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’. Finally, title X (articles 151-161) TFEU defines the competences of the EU vis-à-vis Member States in the domain of social and employment policies. Notably, the EU shall support and complement Member States’ activities in the following areas: worker health and safety; working conditions; social security; protection of workers when their employment contract is terminated; information and consultation of workers; employment conditions for third-country nationals; re-integration of persons excluded from the labour-market; gender equality; combating social exclusion; and modernisation of social protection systems.

Title X TFEU, however, does not exhaust the legal basis for EU interventions in the domain of social and employment policies. For instance, the right to move and reside freely in the territory of the member states is underpinned by the principle of non-discrimination on the basis of nationality (TFEU, art. 18 and 48). Also, the coordination of social security systems, which has conferred a subjective right to all “persons resident in the territory of one of the Member States ...to be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State” (Regulation (EC) No 883/2004), is based on articles 48 and 352 TFEU. Another example is that apart from articles 151 and 153, also articles 91, 114, 115 and 352 TFEU provide a legal basis for EU intervention in health and safety at work. In addition, in the field of gender equality, the principle that men and women should receive equal pay for equal work has been enshrined in article 157 TFEU. However, also Article 19 TFEU enables legislation to combat all forms of discrimination, including discrimination based on sex. And more examples could be given of social rights outside title X TFEU.

EU interventions in the domain of social policy at large and social rights in particular must be clearly distinguished from each other. A social policy is a course of action aimed at achieving certain goals (mainly to do with risks and needs) through authoritative decisions (regulative, allocative) which may or may not include the creation of individual social rights. Allocating funds for disease prevention or for pharmaceutical research is a social policy which provides a collective good, but it does not create or strengthen social rights. On the other hand, a social policy program for promoting female employment may well, among other things, introduce – under the spur of the EU - a new social entitlement to cash benefits for mothers returning in the labour market.

In order to systematize the role played by the EU in the realm of social rights proper, it is useful to differentiate between three types of interventions, which have generated three “layers” of social rights. As shown by Table 2.1, there is first an EU layer of social rights, which result from EU hard law. Even if the transposition of EU directives allows for a degree of national differentiation, the EU *acquis* in this layer has now become part and parcel of the legal provisions which sustain citizens’ security vis-à-vis risks and needs. The second layer includes Europeanized social rights, shaped by the principles, common objectives and targets set by soft law. Soft law alone cannot create fully-fledged rights; but it can provide important components for their definition and assemblage. In most areas, national social rights have thus acquired a European dimension: they have been linked to the EU’s overall normative vision. The third layer of social rights is the strictly national type of rights. Yet, also on this front, the Union plays a certain role. Given the primacy of supranational law (primary and secondary, both monitored by the CJEU) any national social right (whether Dutch, or German or Italian) must be compatible with the EU legal order. In this third sense, it can be said that the EU has set a legal perimeter of validity that covers also the most “intimate” layer of nation-based social rights. Thus, even the basic national layer of social citizenship has become EU law observant: not only in respect of anti-discrimination and equal treatment, but also – to a large extent – in respect of competition law.

Table 2.1 The layers of social rights

EU LAYER	Regulations and directives: impose binding norms to the MS	E.g.: mobility rights; parental leave rights
EUROPEANISED LAYER	Soft law: inspires/guides/recommends MS action through national legislation	E.g.: right to sufficient resources or to active employment services
NATIONAL LAYER (EU LAW OBSERVANT)	MS norms, under the review of the CJEU	E.g.: national social insurance benefits can be managed by non-public bodies only if there is (i) compulsory participation; (ii) redistribution based on solidarity principle; and (iii) State supervision

Source: own elaboration

With respect to this point, there is an extensive literature highlighting the asymmetry between economic and social rights within the EU, whereby the former have been systematically prioritized over the latter (see for an overview see Barnard 2017). Similarly, after the Great Recession, national social legislation has been put more and more under scrutiny of European economic surveillance, with extensive changes required to individual employment rights, to wage and pension entitlements and to collective bargaining systems (see for an overview Kilpatrick and De Witte 2014).

The multi-level perspective just outlined calls for a new analytical framework suitable for capturing the relationships among the three layers and, more importantly, the possible synergies among them. In order to move in this direction, we draw on the Weberian conception of “rights” as sources of power (*Machtquellen*) (Weber, 1978). In the Weberian tradition, the focus is less on collective groups (as in Polanyi) or on the nation (as in Marshall) than on the empowerment of the individual as such, situated within a stable institutional order, whichever its socio-political origins and nature. In Weber’s perspective, rights confer to individuals the ability to obtain compliance from other individuals (horizontal power) and from public authorities (vertical power). Such ability is effective because (or to the extent that) right holders are provided with a bundle of distinctive power resources. In the Weberian conception, rights (and in particular social rights) coincide with this bundle, they are a set of individual power resources which enable citizens to claim something against someone (typically a public authority).

2.3 Social rights as bundles of power resources

We define a “social right” as a guaranteed subjective power to obtain a certain cash or in-kind benefit (table 2.2). Such power is in turn constituted by three distinct resources (normative, instrumental and enforcement), which enable the right holder to concretely assert his/her right (see section 3 for a more

detailed discussion). As mentioned above, the ‘something’ that can be claimed is the concrete content of a right: the output that is related to the right should match that content. The output is defined by legislation or collective agreement and then must be ‘constructed’ through an administrative and practical process which assembles various elements, especially budgetary funds, physical infrastructures and staff. One might say that these funds, infrastructures and staff are ‘output resources’ that allow the production of the right’s content. But these ‘resources’ are not the ‘power resources’ which we refer above. The difference between power resources and outputs is fundamental in our perspective. Without power resources, one cannot legitimately and validly claim and access outputs. This is what distinguishes a right-based from a market-based output provision (e.g. through private insurance).

Table 2.2. Social rights, individual power resources and outputs

SOCIAL RIGHTS	INDIVIDUAL POWER RESOURCES RELATED TO A SOCIAL RIGHT		
	NORMATIVE	INSTRUMENTAL	ENFORCEMENT
<i>Guaranteed subjective powers to obtain a certain benefit/service</i>	<ul style="list-style-type: none"> ➔ Provide justifications ➔ Specify the content (who, what, how) ➔ Guarantee compliance from others and establish obligations on public authorities to provide the benefit/services 	<ul style="list-style-type: none"> ➔ Secure access to the content/output ➔ Provide informal remedial channels for disputes ➔ Guarantee access 	<ul style="list-style-type: none"> ➔ Guarantee formal justiciability ➔ Guarantee adjudication
↓	MEANS/RESOURCES NEEDED TO TRANSFORM CONTENT INTO OUTPUT		
	FINANCIAL	PHYSICAL	ADMINISTRATIVE/ORGANIZATIONAL , ETC
<i>OUTPUTS</i> <i>Tangible goods assembled into benefits and services ready for delivery to individuals</i>	Fund allocations	Staff and infrastructures	Roles and offices, implementation and delivery rules, standard operating procedures etc.

Source: own elaboration

Before discussing in more detail each type of right-related individual power resources, we need to provide a second clarification about our use of this notion. Power resources play a key role in comparative welfare studies and especially in regime theory (Esping-Andersen, 1990; O’Connor and Olsen, 1998). Our

conception of individual power resources is closely related to regime theory and supplements it. The link becomes clear if we revisit the original micro-foundations of power resource theory (PRT).

In his pioneering article of 1974, Walter Korpi constructed his framework starting from the individual level: he argued that it is the perceived asymmetry in life chances that triggers a “deprivation-frustration-aggressiveness” mechanism in individuals (Korpi, 1974); shared experiences then push individuals to join together and mobilize to redress the asymmetry². In the early industrialization phase, the primary power resource of workers was collective mobilization, made possible by civil rights (freedom of association and demonstration). Mobilization typically started in the industrial relations arena, orchestrated by trade unions. With the formation of socialist parties and the extension of the suffrage (political citizenship), the struggle shifted to the arena of democratic politics. It was in this arena that workers were able to forge the necessary majorities to create the welfare state. The expansion of social policies and in particular the institutionalization of subjective social rights generated an entirely new set of resources, which promoted decommodification. The latter term has a double effect, substantive and relational. On the one hand, the outputs of social rights directly improved the living conditions of working people, redressing pre-existing asymmetries. On the other hand, by guaranteeing access to a number of “worldly goods” (e.g. unemployment benefits) independently from the tyranny of the market, decommodification increased workers’ relational power vis-a-vis employers.

Regime theory has developed several variants of what is essentially a “mobilization” model, centred on organised pressures from below and on collective actors/action (the upward process of Table 2.3). Such model was elaborated with reference to the formative phase of the welfare state, but it has been re-elaborated to account for subsequent developments as well, up to the present day. The theory’s micro-foundations, however, went somewhat lost in the process and PRT is today primarily considered and used as a macro (at most meso) theory. In its macro-formulation, PRT falls short of analysing in depth the mechanism that leads from the formal establishment of social rights through collective mobilization to the betterment of life chances and relational power of each worker (the downward process in Table 2.3), thanks to the individual power resources conferred to her by social rights. Institutionalized social rights (their content, their output) are a necessary but not sufficient condition for the enhancement of people’s life chance: what ultimately matters is the individual encounter with the outputs of rights. Regime theory leaves this last step under-explored.

² PRT’s original focus was on the class struggle between workers and employers. More recently it has however extended its focus on gender, racial and ethnic conflicts (O’Connor, 1996; Korpi, 2018).

Table 2.3 Power resource theory: an extension

<i>Level</i>	<i>Upward Process</i>	<i>Institutional framework</i>	<i>Downward process</i>
<i>Macro</i>	Mobilisation and “democratic struggle” → class	“Welfare state” (social policies and social entitlements) →	Laws aiming at improving living conditions + Collective empowerment ↓
<i>Meso</i>	↑ Organisation and collective voice	Parties and Party systems Interest intermediation and industrial relations Social administrations	Entitlement chain Production of outputs ↓
<i>Micro</i>	↑ Lack of “wordly goods”, chances and relational power	Individual citizenship Rights + informal networks	Individual fruition of “wordly goods” + relational power

Our resource-based conception of social rights fills this theoretical gap. As a matter of fact, it argues that in order to extract both material goods and generalized relational power from social rights, one has to unravel the latter’s inner nature as guaranteed powers and the process which leverages on such powers for obtaining “worldly goods”. Our breakdown of rights-as-powers into their three internal power resources (normative, instrumental and normative) does exactly that. We mentioned above that PRT starts from the existence of asymmetries in individual life chances, which can be redressed via collective power resources. Our conception contributes to this approach by bringing classical PRT full circle, by spelling out the further steps which, once the welfare state is in place, transform collective power resources into those individual power resources which guarantee the right-holder encounter with his/her due outputs, redressing at the micro-level the lack of goods, opportunities and autonomy from the market.

2.4 The resource tripod

Let us now illustrate the building blocks of our conception. In Table 2.2 above, we have distinguished between three types of individual power resources (the ‘resource tripod’): normative, instrumental and enforcement resources. The types form a sequence, which starts with moral principles and justifications.

At an abstract and general level, any “right” needs a constructed normative position, an imagined desirable state of affairs and a legitimate justification for claim making and claim-satisfaction. At this level, a “right” only exists in aspirational terms, as no counterpart is assigned the obligation to satisfy the claim. Normative positions are typically defined in intellectual/technical arenas, in connection with moral principles. Initially they take the form of mere declaratory statements, advancing an epistemic claim to political consideration. When officially formulated in an institutional text – typically resulting from some act of democratic deliberation which legitimizes it from the input side -, a declaratory principle becomes a “programmatic” right (sometimes also called “manifesto” right). At the individual level, such right does not provide immediately actionable public guarantees, but does provide important deontic resources, i.e. legitimate formalized justifications for demanding the transformation of the programmatic right into a fully-fledged legal right. At the institutional level, programmatic rights – such as those enshrined in national constitutions or European charters - establish a political obligation on the institutions to promote their application in accordance with their powers. In addition, programmatic rights create “negative guarantees” (Ferrajoli, 2004). At national level, for instance, no ordinary legislative act can derogate from constitutional rights. If this happens, a case can be brought before the Constitutional Court. Similarly, at the European level, the principles set not only in the Treaties but also in the Charters or other programmatic documents define the perimeters that the EU legislative initiatives cannot violate.

Legislative provisions or collectively bargained agreements at the EU level generate what we call normative legal resources. Legislative (or collectively bargained) acts must be adopted by governments (or the EU) and provide a detailed and operational definition about who holds the (social) entitlement - the right-holder -, the content of the (social) entitlement, and the institutional counterpart which has the duty to provide the content of the entitlement (the responsible provider). In other words, an entitlement confers guaranteed powers to claim and receive certain benefits and at the same time a legal obligation for a given administration to produce and deliver those benefits. Legislative provisions may be accompanied by various legal complements, i.e. implementing acts (creating the operative conditions for making use of an entitlement) or delegated acts (for supplementing or refining of the basic legislative act). Also soft law plays a role, by providing guidelines and non-binding acts which go beyond ‘justification’; they can provide detailed guidance for policymakers and they can also be intended to guide the interpretation of legal resources.

Normative resources per se are not sufficient to guarantee a direct encounter between the holder of an entitlement and the providing administration. Through this encounter, right holders obtain their dues – a cash or in-kind benefit, what we called the “what” of social rights, i.e. the material output. As shown in the literature on take-up, many obstacles can prevent a right-holder from accessing rights (for a more detailed discussion see the chapter by Bruno and Kuijpers). In a report on “Access to Social Rights in Europe” (2002), Mary Daly identified some of these obstacles, such as lack of precision in the specification of the right or entitlement, complexity of the application procedures, insufficient stock and flow of high-quality information or an inappropriate form and nature of information, fragmentation between levels of administration and among services, etc. For example, for a number of reasons, people may not be aware

of the “whats” they can claim and even when there is knowledge about rights in general, obtaining their envisaged outputs (benefits and services) generally requires an explicit action of claim making. Such action implies an investment of time and energy in the application process.

This brings us to a second set of resources which are required for the full actualization of a right: instrumental resources, i.e. resources which facilitate individual access to benefits. Such resources are meant precisely to enable right-holders to overcome such obstacles/costs. Quality information and awareness raising, user-friendly application procedures, practical help in filling out forms and engaging in direct contacts with pertinent administrations, guidance, counselling, mentoring: these are some of the commonest and more effective instrumental resources facilitating access to social rights. Instrumental resources, however, are not limited to supporting individuals in their access to social rights. They also guarantee support to rights-holder in access to justice in case of non-compliance or violation of a certain right from a third party. Indeed, if it is true that the legal right and legal remedy are correlative, very often individuals who are entitled to a certain right, might encounter difficulties in access to justice. In this respect, we identify a second group of instrumental resources, which include also the set of non-traditionally juridical procedures that facilitate the access to court in case of non-compliance such as legal aid, public defenders or epistolary jurisdiction. Such resources are particularly important to guarantee that the most vulnerable groups have equal access to justice and thus fully benefit of their entitlements. Recent legal literature has therefore increasingly focused on the importance of mechanisms to facilitate citizens’ access to justice. For example, legal aids are mechanisms to help the most disadvantaged individuals to afford the high costs associated with legal proceedings, such as court and lawyers’ fees, which may deter individuals from pursuing remedies through the courts.

How are instrumental resources produced and distributed? In part, instrumental resources are defined by the law itself and made concretely available during the last stages of the overall process of output production. In other words, they are endogenously produced. In part, however, instrumental resources result from external initiatives, for example by trade unions, consumer associations, NGOs. In this case, they are derived exogenously through interventions by collective actors. We know little about collective mobilization at the meso-level in support of claim making, the delivery of benefits and services, “political” interactions between claimants and providers, conflict resolution dynamics and so on. There is scattered evidence that in various member states (from Scandinavia to Italy) unions play a key role not only in the adoption of collectively bargained social rights, but also in supporting access to outputs by means of dedicated counselling and help desks, monitoring and complaint structures and so on. Often, non-judicial remedial channels exist at the meso-level for settling disputes with social administrators: users are typically represented here by collective actors. The analysis of instrumental power resources at the meso level would be a particularly interesting topic for a conversation between the classical PRT tradition and our own conception.

The third and final type of individual power resources has to do with enforcement. Legal obligations do not always mean de facto compliance on the side of public authorities. The involved institution may resist

action, fail to deliver outputs (benefits or services) or deliver outputs which do not match the legal content of rights. For this reason, it is important that legal rights are accompanied by a set of additional guarantees, typically consisting in judicial procedures and channels for dispute settlements and the application of rules (courts, inspectorates, arbitration bodies). Such guarantees provide enforcement resources, and may be specified or implicit in the legal act establishing the right, or may be the object of separate acts.

As mentioned above, in the Marshallian perspective, the possibility to access enforcement resources is considered a key and decisive element. Reliability and predictability are key because they stabilize social cooperation and decrease the likelihood of divisive conflicts. This is an important point, not only conceptually, but also practically (Börner, 2020). As mentioned, in social policy a crucial role is played by the implementing organizations, which bear specific obligations. Legal certainty and suability (i.e. legal and enforcement resources) provide right holders with direct guarantees, but they also induce compliance through the mechanism of anticipated reactions. The awareness of possible sanctions spurs providers into carrying out their legal duties.

Yet, what we propose here is that all three types of individual power resources should be in place for a social right to effectively materialize. Decomposing social rights into three types of power resources allows us to evaluate if this is indeed the case. It also helps to identify inequalities in social citizenship, which can arise from differential distributions of power resources: not only legal regulations, but also direct or indirect obstacles in accessing benefits or judicial remedies. For example, complicated procedures and delays in delivery may affect citizens with lower education more than those with higher education, or high costs related to enforcement resources may weigh more on low income groups than on high income groups. By observing each of the three dimensions we can moreover conceptualize social rights as potentially multilevel constructs, as will be discussed in the next section.

2.5 The entitlement chain

Since the EU has come to play a role in the sphere of social rights, according to our conception it also provides power resources. Thus within the EU's multi-level governance structure, rights themselves can today have multiple institutional anchors, with some resources developed at the EU level and others at the national or local levels (Bauböck, 2014). The social partners and other intermediary associations have also become important in the provision of some individual power resources. To illustrate the mix of institutional actors and levels in the construction and implementation of a social right, we introduce the notion of the "entitlement chain" (table 2.4). This unpacks the concept of entitlement into its constitutive components, highlighting the different but complementary roles played by the various institutional actors and levels. The upper rows show the components of rights and the corresponding tripod: normative (deontic and legal), instrumental and enforcement resources. The lower rows exemplify the type of acts or measures that can be taken by the EU, the member states, and the social partners respectively.

The EU plays a clear role in the provision of normative resources. The EU provides deontic resources via the Treaties, inter-institutional proclamations, charters, declarations, soft law recommendations and communications, etc. Such resources can be used by the CJEU as a reference point. An example are the rights enshrined in the European Charter of Fundamental Rights. Formally, the Charter does not introduce any binding obligation to Member States. However, it defines the perimeter of action of the EU institutions, which shall respect the rights, observe the principles and promote the application thereof in accordance with their powers (see Lock, 2019; Frantziou, 2019). The EU also provides legal resources by means of directives and regulations and as other sections of this paper illustrate, today the social acquis is far from negligible. EU regulations are directly applicable, while directives typically require transposition into national legislation. National institutions are of course the main providers of legal resources, while collective agreements often have or acquire the status of laws, at both the EU and the national level.

Table 2.4. The entitlement chain

Level	THE TRIPOD OF POWER RESOURCES						
	Normative				Instrumental		Enforcement
	<i>Deontic</i>	<i>Legal</i>	<i>Legal complements</i>	<i>Soft law</i>	<i>Procedures</i>		<i>Judicial</i>
EU	Treaties Charters Declarations etc	Directives regulations	Delegated and implementing acts Funding allocations	Recommendations, Communications, opinions, resolutions	Programs and initiatives	Extra-judicial remedies	CJEU
MS	Constitutions Charters etc.	Laws regulations	Delegated and implementing acts Funding allocations	Guidelines and plans	organizational designs, operating procedures, routines and practices facilitating access	Inspective authorities Arbitration Informal complaints and appeals channels ombudsman	Courts of justice
Social Partners		Collective agreements transposed into laws			Dedicated structures and services providing information and assistance in claim making	Assistance and representatio n of claimants	Counsel and representatio n of litigants
	1	2	3	4	5	6	7

Source: Own elaboration

The third column of the table includes two other sets of ancillary legal measures: both can be adopted by the EU and national authorities. Implementing and delegating acts have a legal nature, but they are adopted only for the specific purpose of operationalizing the primary prescriptions of a legal right. A key element which is typically defined by legal complements is the allocation of financial resources. This is normally done by legislative provisions (such as the annual budget law) and it is in this sense that funding belongs to legal resources. This holds also for the allocation of European funds. An example in case is the so-called Common Provision Regulation that sets out common provisions for seven shared management funds, included the European Social Fund and the European Regional Development Fund and contains the provisions needed to cater for the particularities of individual funds, in order to take into account their different rationales, target groups and implementation methods.

The last set of normative resources includes soft law (the fourth column): recommendations, communications, opinions, resolutions. Since the early 2000s, the EU has been making an increasing use of such type of instruments, launching a series of dedicated OMC processes, resting on common principles and shared objectives which can be considered as deontic resources. The practical effectiveness of such instruments is debated. Some authors argue however that soft law has indeed played a role in terms of policy adaptations and change at the national level, in line with the goals recommended by the OMCs and country-specific recommendations (Zeitlin et al., 2005; Zeitlin and Vanhercke, 2018).

The fifth column of Table 2.4 includes the instrumental resources. Under the general label of procedures, we include all endogenously produced organizational practices explicitly meant to facilitate access to rights. The latter can be provided by social administrations themselves and/or by the social partners and other intermediary associations. The EU has become increasingly active on this front, placing emphasis on the key role played by individualized forms of awareness raising and practical enablement, specifically addressed to vulnerable and excluded individuals (e.g. those not in employment, education or training, the NEETs). Through the recent introduction of the European Labour Authority, the EU now provides instrumental resources trying to ensure that EU rules on labour mobility and social security coordination are enforced in a fair, simple and effective way. Another example of instrumental resources is the support provided by the Commission to individuals to lodge complaints against a Member State. Based on such a complaint, the Commission can start an infringement procedure which may lead to a case before the CJEU.

Finally, the sixth column focuses on those guarantees that can be activated in case of noncompliance on the side of mandated providers and/or disputes about the process and contents of delivery. The column includes only fully fledged judicial guarantees, which make a subjective right actionable and the social administrations suable. Judicial remedies are provided by courts of law, usually in the exercise of civil law jurisdiction, and enforce rights by imposing sanctions. Often litigants are counselled and represented by the social partners. At the European level, the European Court of Justice can directly provide citizens with enforcement resources. On the one hand, the CJEU can intervene in and deliver judgments on cases between an individual and their national authorities, by allowing the former to hold their national authorities as imputable of noncompliance (Martinsen, 2015). On the other hand, the CJEU can intervene

in/on cases between private partners, such as between an employer and an employee (more specifically in dealing with preliminary questions from national courts).³

By unbundling the notion of social right into its internal components, i.e. the three sets of individual power resources that rights confer to citizens, our conception allows to move beyond the view according to which the litmus test for the existence of a right is its justiciability. We clearly and explicitly recognize that justiciability is indeed key in the overall entitlement chain, for both its direct and indirect implications. And we acknowledge, with Marshall, that in a historical perspective the establishment of legal certainty and suability represented a watershed between a “pre” of local discretion, unsteady forms of mutualism or voluntary insurance, to a “post” of standardized legal entitlements backed by coercive resources of the state. It took a while for public administrations and employers to discharge their new duties (e.g. due process in the delivery of benefits for the former and paying social security contributions for the latter) and the tangible and visible use of coercive law enforcement was the fundamental wedge for institutionalizing the new legal schemes of protection. Individuals have also the possibility to lodge complaints against a Member State with the European Commission, which can, on the basis of this complaint, start an infringement procedure which may lead to a case submitted to the CJEU. No guarantees, no rights.

Today however coercion has receded in the background of administrative law enforcement, which tends to privilege other types of measures, such as orders subject to penalty or the imposition of fines. Full democratization, more transparency and accountability in policy-making and implementation as well as the expansion of the public sphere have in their turn increased the salience and effectiveness of justificatory standards and normative evaluations of outputs and access. It must also be taken into account that Courts (and in particular the CJEU) have become much more active in recent times, occasionally appealing to what we called programmatic rights (e.g. the Charter on Fundamental Rights) in their doctrines and rulings (Martinsen, 2015). Marshall insisted that in order to be secured, social citizenship was to be fully embedded in the national institutional structure, including its sanctioning apparatus. This certainly held for the immediate post-war period, when the disruption of the social and institutional fabric caused by the war needed to be mended and national solidarity be entirely reconstructed. In the new, increasingly “postcoercive” institutional context of contemporary European democracies, we can perhaps be more open and trustful towards a multi-level reconfiguration of the bundle of resources underpinning legal rights. In particular, we should be more proactive in taking advantage of the opportunities offered by the EU and creatively mobilizing supranational resources in order to complement and strengthen the tripod and the entitlement chain and thus augment social protection and the life chances of all citizens.

³ Individuals have also the possibility to lodge complaints against a Member State with the European Commission, which can, on the basis of this complaint, start an infringement procedure which may lead to a case submitted to the CJEU.

The advantage of a multilevel resources approach to social rights, however, is not limited to the possibility to better grasp the opportunities offered by the interaction of multiple levels of institutional actors. It is also useful to understand the possible negative externalities of the European processes on national social rights. For instance, after the Great Recession, via the European Semester ‘soft’ country specific recommendations, in a number of countries extensive changes were required to individual employment rights, wage and pension entitlements and cuts were imposed on public sector employment and the provision of social services, with the aim to stabilize public finances and boost economic recovery and growth (Kilpatrick and De Witte 2014). Similarly, member states in financial difficulties were demanded to reform their labour law, reducing rights related to collective bargaining, pay and other terms and conditions of employment (Achtsioglou and Doherty 2013).

2.6 Conclusion

Traditionally, the development of social rights and social citizenship has been intimately embedded within the process of state- and nation-building. However, and in spite of the predominantly economic character of EU integration, the gradual expansion of the EU’s social acquis has slowly but clearly started to disconnect social rights from their exclusive national foundations. Also, the renewed commitment to a strong social Europe formulated in the European Pillar of Social Rights and the subsequent innovations and advancements in EU social policy indicate a readiness to strengthen EU social citizenship (Corti 2022).

Although the political and institutional space for full-blown EU social rights remains limited, the EU is not without options for proceeding on this path. To shed light on such options, this chapter has departed from the traditional approach and its emphasis on justiciability and has outlined a novel conception of social rights as bundles of power resources, which enable individuals to claim and actually receive material benefits in order to cope with a codified array of risks and needs. We have distinguished between three sets of resources: normative, instrumental and enforcement resources. Normative and enforcement power resources are the ones conventionally considered in formal conceptions of social rights and are of obvious importance. However, as indicated by often substantial levels of non-take-up, instrumental power resources are equally important to overcome various impediments (e.g. information costs and administrative obstacles) and hence to guarantee citizens actual access to their rights.

By shifting the attention from the formal dimension to its concrete practice, our conception connects the concept of social citizenship more directly to what ultimately matters for life chances (individualised material benefits) as well as for the social and political bonds of a community (the right-based claim and experience of social protection). Moreover, and departing from the Marshallian nation-based approach, our conception extends the range of institutional actors and levels which can be involved in the production of the power resources that make up social rights, interacting with each other in various flexible ways. Under this light, the margins of action and influence of the EU become wider. It is

commonly assumed that the Union limits itself to guaranteeing transnational social rights by prohibiting non-discrimination in case of cross-border movements (Bruzelius et al. 2017; Börner 2020) – a guarantee which only affects citizens who are not transnationally active. In our perspective, the role played by the EU is already much more significant today and can be greatly enhanced in the future.

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