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The (Dim) Perspectives of the European Social Citizenship

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The (Dim) Perspectives of the European Social Citizenship

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Introduction

Social citizenship is an elusive concept[1] and not only because of its intrinsic ambivalence. Examined from the viewpoints of different disciplines, for instance, political theory or constitutional law, it acquires different contents. More importantly, it has very different meanings in European and American constitutionalism. Despite osmotic procedures between Western legal systems, which lead some authors to speak of a "European–Atlantic constitutional state"[2], a clear dividing line it is still discernible between the European and American legal cultures[3], which can be traced to the very different weight attached to the social element within them.

This article is about the state of social rights in the European Union, in comparison with their protection at national level. In order to substantiate this comparison, I am using, however, as a kind of "control group" the respective solutions of the American legal system, so as to show that (unexpectedly?) the existing situation in European Union is closer to the Anglo-American paradigm than to the continental one.

The first part of the paper aims to define the term of social citizenship as it is understood in European legal culture, in order to clarify the conceptual landscape and avoid the danger of parallel 'competing narratives'[4]. The second part examines the recent evolution of the case-law of the ECJ on social rights protection. Contrary to some authors who believe that there is a clear process of "socialization" of this jurisprudence[5], I think that the Court is still, essentially,

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[1] Cf. O' Leary, S. (1996). *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, The Hague: Kluwer, p. 3, Heater, D., (1991) ''Citizenship: A Remarkable Case of Sudden Interest'', 44 Parliamentary Affairs (1991) 140-156, p. 152.

[2] See, e.g., Fabrini, S., (2004) 'Transatlantic constitutionalism: Comparing the United States and the European Union', European Journal of Political Research 43 547, Giegerich, Th. (1997), 'Verfassungsgerichtliche Kontrolle der auswärtigen Gewalt im europäisch-atlantischen Verfassungsstaat: Vergleichende Bestandsaufnahme mit Ausblick auf die neuen Demokratien in Mittel- und Osteuropa' 57 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 405–564, cf. Rosenfeld M. (ed.) (1994), *Constitutionalism, Identity, Difference and Legitimacy*, Durham: Duke University Press, Stern, K. (1984) *Grundideen europäisch-amerikanischer Verfassungsstaatlichkeit* Berlin: Schriftenreihe der Juristischen Gesellschaft, Berlin, Heft 91.

3 I use the term legal culture broadly, in the sense that includes every aspect of institutional and legal set up, including the particular ethos of a polity. For the concept of the "common european legal culture" see Häberle, P. (1991), Gemeineuropäisches Verfassungsrecht, EuGRZ 261-274.

[4] Weiler, J.H.H., (1999) 'To be a European Citizen, Eros and Civilisation, in The Constitution Of Europe : "Do The New Clothes Have An Emperor?" And Other Essays On European Integration, 324-357, p. 333.

[5] Cf., among others, Prosser, T. (2005), "Competition Law and Public Services: From Single Market to Citizenship Rights?' European Public Law, Volume 11, (4) 543-563, Besson, S. Utzinger, A. (2007) 'Introduction: Future

following the same liberal approach which does not recognize but few, if any, fundamental social rights. In my opinion, the transition from a market to a social citizenship has not yet taken place at the European level. This disparity between the national and the EU concept of social citizenship could create serious problems of legitimacy in the future.

A- CLEARING THE SCENE: SOCIAL RIGHTS AND CITIZENSHIP IN EUROPE

A-1- A brief genealogy of social rights in Europe

The welfare state is the universal type of state of modern times, as all industrialized countries had to face similar social tasks related to the reproduction of a well educated working class, as "a problem of industry"[6]. This "problem" required to be taken into account in order to ensure optimal conditions of production and market functioning. However, the institutional patterns and the legal norms adopted by consequence are far from similar. Different historical trajectories have shaped two different "welfare polities" on the two sides of the Atlantic.

The roots of the divergence extend backwards beyond the industrial revolution, to the 18th century, and the intrinsic difference between the American and French Revolutions: the first aimed at political independence as an end in itself, whereas the second aimed primarily at a different social and legal order, and only when this proved unfeasible under the 'ancien régime' were the monarchy overthrown[7]. It is illustrative that, already in 1793, Robespierre had proposed to the Convention a Bill of Rights which recognized as legally enforceable the rights to work and to social assistance and which treated the right of property not as a natural or absolute right, but as one limited by the law and the needs of other people[8].

Challenges of European Citizenship—Facing a Wide-Open Pandora's Box', European Law Journal 13 (5), 573–590, Hatzopoulos, V. (2005), 'A (more) Social Europe: A political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon', Common Market Law Review 42 ; 1599–1635, Nazet-Allouche, D. (2006), 'La Cour de Justice des communautés européennes et les droits sociaux fondamentaux', in Gay, L. et al. Les droits sociaux fondamentaux, Paris: Bruylant: 215-232.

[6] Beveridge, W. (1909) *Unemployment: A problem of industry,* London: Longmans.

[7] See on that Grimm, D. (2005), 'The protective function of the state' in Nolte, G., (Ed) (2005) European and US constitutionalism, Cambridge, New York: Cambridge University Press, 137-155, p. 139.

[8] These articles had as follow: "Art. 9: The right of property cannot harm the security, the freedom, the existence or the property of other citizens. Art. 10. Every property that violates this principle is essentially illegal and immoral. Art. 11. The society is obliged to ensure the existence of all its members, either by giving work to

Still, it was the 19th century that shaped definitively the European legal concept of social rights, as a response to the great 'social question' of this century: how could the market and the representative, timocratic[9] system be made compatible with the extension of political and social rights, without a socialist revolution?[10] In Europe, two opposite historical currents, a revolutionary and a counterrevolutionary one, tried to give an answer to it.

(On the contrary, this question has not been posed in USA, at least not in the same terms. During all the 19th century the social tensions there had not acquired explosive character, as the vastness of the country's resources and its "new, open frontiers" provided land and opportunities in a scale unknown in the Old Continent[11]. In the words of Tocqueville[12]: *"Why is it that in America, the land par excellence of democracy, no one makes the outcry against property in general that often echoes through Europe? Is it need to explain? It is because there are no proletarians in America. Everyone, having some possession to defend, recognizes the right to property in principle*."[13])

The recognition of enforceable social rights was one of the main demands of the social revolution of 1848 in France, especially with regard to the rights to work and education. The apostrophe of the radical representative Armand Marrast in the post-revolutionary Assembly of 1848 is characteristic: *"The rights that you have declared till now are bourgeois rights. The right*

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them, or by providing to those who cannot work the means to survive. Art. 12. The assistance to the miserable is the debt of the rich toward the poor. The law will determine how this duty is going to be paid." Robespierre (1973), *Textes choisis* (1793), Paris: Editions Sociales, t. II, p. 138.

However, the Constitution of the Convention (24 June of 1793), despite adopting in its Declaration of Rights some of these propositions, especially in the articles 21 (right to work and to public assistance) and 22 (right to education), was merely referring to them as "a sacred debt of the society".

[9] In UK, the most democratically developed country of this century, only 1,8 percent of the population had electoral rights before the Reform Act of 1832 and just 2,7 percent after it. In 1867 and 1884 the respective figures have been 6,4 and 12,1 per cent Zakaria, F. (2003), *The future of freedom*, New York-London: Norton & Co, p. 80.

[10] See Preuss, U., *(*1986) 'The concept of rights in the Welfare State', in G. Teubner (Ed.), Dilemmas of law in the Welfare State, W. de Gruyter, Berlin, N. York, 151-172, p. 152.

[11] During the nineteenth century the US Governments passed a number of legislative acts (Homestead Act -1862-, Timber Culture Act -1873-, Dessert Land Act -1887-) in order to provide dozens of millions acres of public land to farmers and to settlers of the "new frontiers", creating, thus, millions of new property holders. It was only in 1890 the US Census Bureau has officially announced the end of the American frontier. See Rifkin, J. (2005), *The European Dream*, New York: J. p. Tarcher/Penguin, p. 151.

[12] Tocqueville, A. de (1988, trans. G. Lawrence), *Democracy in America*, New York: Harper, p. 238. Cf. F. D. Roosevelt who has said, quoting Jefferson, that America had no paupers, as "most of the labor class possessed property". F. D. Roosevelt, New conditions impose new requirements upon Government and those who conduct government, Campaign Address, 1932, in The Public Papers of Franklin Roosevelt (1938), San Francisco

[13] Naturally, even the American 19th century was not entirely idyllic and "pauper-free". This is shown by many dramatic incidents of class warfare, such as the violent strike against the Pennsylvania Railroad in 1877 or the industrial war at Andrew Carnegie's Homestead steel plant in 1890. See on that, among others, Beatty, J., (2007) *Age of Betrayal, The Triumph of Money in America, 1865-1900* , Harvard: A. Knopf.

to the work is the right of the workers"[14]. However, this current was defeated both politically and juridically. The final version of the related article 13 of the French Constitution of 1848 replaced the initially proclaimed right to work by the freedom to work. Although it guaranteed also free primary education and the right to social assistance (art. 8), the conservative majority had made clear that the related state obligation was not a legal, but a moral one.

Thiers, who was to quell two decades later the Commune of Paris (1871), summarized the final defeat of the quest for justiciability of social rights by these words: *"it is important that social obligations remain a moral virtue, that is, they must be voluntary and spontaneous (...). If, actually, a whole class instead of receiving could command, it would look like a beggar who prays with a gun in his hand*".[15]

The conservative countercurrent, archetypically represented by the Bismarckian paradigm, tried to solve the "social question" with the introduction of social insurance, in tandem with repressive measures, such as the laws against the trade unions (1854) and the socialist organizations (Sozialistengesetze, 1878-1890)[16]. This reformist alternative was ideologically reinforced by the "Christian Social teaching" of the Catholic Church (die Katholische Soziallehre) and its first important Encyclical on social rights, "De Rerum Novarum" of Pope Leon XIII (15/5/1891).

The introduction of social legislation of this kind did not signify, however, the constitutional recognition of social rights on equal footing with traditional rights[17]. Quite the opposite: social rights were established on the basis of socialization of risk, through the expansion of the insurance technique, and not as fundamental rights of the same nature as

[14] Speech of the 25/5/1848, quoted by Lavigne, P., (1946), *Le travail dans les constitutions françaises*, Paris, p. 199. Other radical representatives, as Lamartin, have explicitly differentiated the right to work from the public assistance and charity. The conservatives, on the other hand, with Thiers as eminent figure, have rejected the right as "an insane promise". Their basic argument was that the law must merely protect the individual, and all the other social activities should be left to the personal virtue unregulated by the state.

[15] Lavigne op.cit. , p. 262, Rapport de la commission sur la prévoyance et l´assistance publique, 1850.

[16] King William I, in his introductory speech of the new social legislation in Reichstag (Speech of the 17th November 1881), stressed that *"it is not a new, socialist element, but just the development of the modern State Idea (based on the Christian spirit) that the State, in addition to the defence and the protection of the vested rights, has also the obligation to contribute with positive actions to the welfare of all its subjects and especially the poor and the needy*" See Hentchel, V. (1983), *Geschichte der deutschen Sozialpolitik,* Frankfurt: Shurkamp, 333 ff.

[17] Donzelot, J., (1988) "The promotion of the social rights", Economy and Society 17, 403-404.

traditional liberties. The constitutionalization of the social obligations of the state was predominantly a 20th century phenomenon[18].

Still, the introduction of social rights, albeit incomplete and not yet constitutional, represented a breach in the liberal tradition. It is true that the insurance principle is not alien to the logic of the market, as it implies an exchange of equivalents, a quid pro quo (social contributions versus provisions). Still, the compulsory element of social insurance and the non-contributory character of social assistance schemes represented a radical break[19].

More generally, human rights in liberal thought are conceived as inherent to human nature and inalienable, possessed at birth, and not granted by either society or state. The role of the government was not to establish these rights, since they preceded it, but simply to respect them and guarantee their free exercise[20]. Social rights, as individual or collective claims towards the state, could never be conceived as prior to society, because their role was precisely to compensate societal risks and alleviate extreme inequalities produced by the functioning of the market.

Besides, the primacy of the right of property over the other two fundamental rights of liberalism (freedom and equality) prohibited the introduction of any kinds of claims that could limit its exercise. Hamilton's remark regarding American judges, that *"in the universe behind their hats liberty was the opportunity to acquire property",*[21] was valid universally for the most part of the nineteenth century, up to the point of recognition of social rights.

Instead of the watertight separation of the political and economic spheres of early liberalism, social rights introduced mechanisms of political intervention in the socio-economic process, as a corrective mechanism for the risks and failures that the "invisible hand" of the market could not prevent. In this way, they implied the re-politicization of the market, in the

[18] Sporadic references to social rights, primarily to the right to education, were included also in liberal Constitutions of the 19th Century, such as the Constitutions of Netherlands (1814), of Portugal (1838) and Denmark (1849).

[19] The difference between actuarial and non contributory schemes is well illustrated in the modern American conception of welfare: while the contributory programmes (based on contractual exchange) give to their beneficiaries a genuine right, the recipients of public assistance are believed to "get something for nothing". See Fraser N. Gordon, L. (1994) 'Civil Citizenship against social citizenship? On the Ideology of Contract-Versus-Charity'' in B. Von Steenbergen (ed.), The condition of citizenship, London, Sage Publications, 90-104, p. 91.

[20] See Binoche, B. (1989), 'Critiques des droits de l'homme' Paris: 1989, p. 4 ff.

[21] As quoted by. Reich, Ch.A. (1964), 'The new property', Yale L.J. 5, 733-778, p. 772

opposite direction of the French revolution of 1789, which separated the realms of state and economy[22].

Nonetheless, social rights are not "socialist rights"[23]. They simply provide the legal basis for a political intervention in the market, in order to alleviate major inequalities, without infringing the primacy of the latter[24]. They constitute an interface between the market, the state and the family, institutionalizing a kind of national solidarity that does not threat the market relationships[25]. Hence, they do not constitute a breach of the capitalist system, but rather a breach *within it*. They have created a different kind of market to the supposedly self-regulated liberal one[26], defined later by the conservative Ordoliberalists in Germany as the "social market economy".

In this model, the State, instead of regulating the market only on the basis of norms that derive from the private law of contract, property and tort[27], uses, in addition "political power to supersede, supplement or modify operations of the economic system in order to achieve results, which the economic system would not achieve on its own (…) guided by other values than those determined by open market forces"[28].

Hence, the basic function of social rights is "market correcting", reconciling social policy and market order [29]. In the words of Marshall, "social rights imply (…) the subordination of market to social justice, the replacement of the free bargain by the declaration of rights"[30]. This

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[22] See Habermas, J., (1985) 'Law as medium and law as institution', in G. Teubner (ed.), Dilemmas of law in the welfare state, Berlin: De Gruyter, 203-220, cf. Rokkan, S., (1974) 'Cities, States and Nations', in S. Rokkan, S. N. Eisentat (Eds Building States and Nations), Vol. 1: Models and Data Resources, London: Sage, pp. 73- 98.

[23] See Schmitt, C., (1970) Verfassungslehre[5], Berlin, p. 169, where he characterizes social rights as "essentially socialist rights".

[24] Cf., among others, Offe, C. (1984), *Contradictions of the Welfare Society*, London: Hutchinson, p. 61.

[25] See Merrien, F.-X. (2000), L'Etat-providence, Paris : Presses Universitaires de France, p. 5-6.

[26] Supposedly, because there was never such thing as a completely self-regulated market. Even proponents of the "spontaneous order of the market", like Hayek, are not against the regulation of the market according to criteria of economic efficiency, not social justice, such as the removal of discriminations/ Cf. Hayek, F.A, (1980) *Law, Legislation and Liberty: A new statement of the liberal principles of Justice and Political Economy*, London: Routledge, p. 141.

[27] Cf. Hayek, F.A, (1980) *Law, Legislation and Liberty: A new statement of the liberal principles of Justice and Political Economy*, London: Routledge, p. 141

[28] Marshall, T.H. (1975), *Social Policy*, London: Routledge, p. 15. Marshall was referring to the social policy in general, but his description defines very elusively also the basic functions of the social state principle.

[29] Cf. Deakin, S. and J. Browne (2003) in T. Hervey and J. Kenner, Economic and Social Rights under the EU Charter of Fundamental Rights-A legal perspective, Oxford-Portland Oregon: Hart Publishing, 27-43, p. 28.

[30] Marshall T.H., (1992) *Citizenship and Social class*, London: Pluto, (Reprint from his 1949 Cambridge Lectures) p. 40, cf. Deakin, S., (2006) 'Social Rights in a globalized economy', in Ph. Alston (Ed.) Labour Rights as Human Rights', Oxford: Oxford University Press, 25-60, p. 37.

'basic conflict between social rights and market value"[31], is solved in Europe in a different manner than in the liberal, Anglo-Saxon legal culture, where the central role of market ideology resulted in a different overall setting of the relationships between state power, the market and the citizen.

On the other hand, in the small Scandinavian nations, a relatively weak market and a tradition of state subsidy in the rural economy facilitated a broad alliance of farmers and workers, based on a consensus for an interventionist social policy of neo-corporatist type. Thus, "three worlds of Welfare capitalism", three models of welfare state formation, according to the widely accepted typology of G. Esping-Andersen[32], have emerged, clearly discernible not only at institutional but also at legal level:

- The Continental model, based on the insurance principle,
- The liberal, Anglo-Saxon model, its main feature being the universal but residual character of flat-rate benefits and means-tested public assistance.
- The Scandinavian or "social-democratic" model, characterized by the principles of universality and equality.

Three waves of social legislation have shaped the final form of these three models: The first (1870-1910) introduced accident and sickness insurance, the second (1900-1930) pension insurance and the final wave, several years after the World War II, unemployment insurance. This sequence is explained by the degree to which each of these legislative waves constituted a break with the dominant liberalism. Hence, accident insurance was easily associated with the traditional notion of liability for individual damages (especially as the worker could not claim compensation if his negligence could be proved). Insurance against non-occupational risks, like sickness, is more alien to the liberal tradition, but still maintains a clear demarcation between the market and welfare, since it is provided only to those who are not able to work for "objective" reasons. It is unemployment insurance that represented the greatest departure from the liberal tradition of aid exclusively to the "deserving poor" [33].

In all these cases the "liberal" welfare states lagged behind the two other two models, sometimes by more than two decades. Nevertheless, the fundamental difference between the two

[31] Marshall, op. cit. p. 42.
[32] Esping-Andersen, G., (1990) *The Three Worlds of Welfare Capitalism*, Cambridge: Polity Press, 30 ff, 46 ff..
[33] Flora, p. , Heidenheimer, A., (1982) 'The historical core and changing boundaries of the Wefare State', in p. Flora and A. Heidenheimer (Eds) The development of welfare state in Europe and America, N. Brunswick: Transaction Books, 50-59.

groups is not the rhythm or the pace of social legislation, but the complete lack in the liberal welfare state of constitutional protection of social rights and, more generally, of any kind of supra-legal positive obligations on public power.

A-2 Liberal Welfare States and "Social States"

In contrast with the liberal welfare model, the incorporation of social rights in the constitutions became widespread already during the aftermath of World War I. This was the outcome of a political compromise between liberal and social-democrat political forces (reflected also in the early legislative work of the International Labor Organization) in order to insulate western European societies from the influence of the October Revolution.

Even before the emblematic Constitution of the Weimar Republic (1919)[34], social rights were included in the Constitution of Finland (1919) and a number of other constitutions followed: Estonia (1920), Poland (1921), Italy (1927), Greece (1927), Portugal (1933), Spain (1931, 1938) and Ireland (1937). Although the social provisions of these constitutions were usually not enforceable in the courts, their enshrinement in the Constitution signified that social policy was no longer left to the discretion of the legislator. This fundamental constitutional decision to give to social provisions supra-legislative force was revised again in the aftermath of World War II, via a new compromise between social-democratic and Christian-democratic parties. (With the exception of Scandinavian countries, where the dominant social-democratic parties have shaped alone a more egalitarian and inclusive welfare model, based on social citizenship.)

In order to describe the new type of polity that emerged, German legal theory developed the concept of the "Social State" (*'Sozialstaat'*), enshrined in Art. 20 of the Fundamental Law. The term is now widely used throughout Europe, as a fundamental normative and organizational

[34] The Constitution of Weimar was the first European Constitution that contained an elaborate list of social rights (art. 151-165), including an absolutely unique, both then and now, provision (art. 162), that proclaimed as the duty of the State to act on the international level to secure a minimum of social rights to the workers of the world. The article 151 § 1 incorporated a Social State clause: "The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. It is within these confines that economic liberty is protected. Legal force is permissible to realize threatened rights or in the service of superseding demands of public welfare. Freedom of trade and industry will be realized according to a Reich law."However, the theory and the jurisprudence interpreted these provisions as mere policy directives, deprived of any legal validity, without the intervention of the legislator. See Schmitt, C., (1970) Verfassungslehre5, op. cit. (note 23) p. 169.

general principle of the Constitution, on par with the Rule of Law. Indicative of its continental acceptance is the fact that he majority of the new democracies of Central and Eastern Europe have incorporated a similar clause in their Constitutions[35]. It is, anyway, broadly accepted in European constitutional theory that the concept can be deduced from the overall corpus of constitutional legislation, even without explicit, solemn reference to it[36]. Illustrative of its general and expanding recognition is the fact that in Greece, the term was explicitly introduced by the constitutional revision of 2001[37], although both theory and jurisprudence considered it a valid fundamental principle before that.

Hence, the "Social State" can be used as terminus technicus, in order to differentiate European welfare states from Anglo-Saxon, liberal ones[38]. In this sense, the terms "Welfare State" and "Social State" are not interchangeable: The first one is descriptive and denotes the universal type of state which emerged in all developed countries in the 20th century, as a response to functional necessities of the modern capitalist economy. On the other hand, the "Social State" is a normative, prescriptive principle, which defines a specific polity, a sub-category of the welfare state in the former sense, where the State has the constitutional obligation to assume interventionist functions in the economic and social spheres[39]. In this sense, the USA or Australia are ΄΄welfare states΄΄ but not "social" ones, as social policy therein has no constitutional foundation. On the contrary, countries like India or South Africa, although lacking the basic infrastructure of a mature welfare state, they can be considered as "social" ones, due to

[35] See the Preamble of the Constitution of Bulgaria and Art. 1 para 1 of the Constitutions of Croatia and FYR of Macedonia, 2 of Slovenia, 6 para 1 of Russia.

[36] See, e.g., for the Switzerland, Müller J.P., (1973) 'Soziale Grundrechte in der Verfassung?' Schwizericher Juristenverein, Referate und Mitteilungen, Heft 4, Basel, p. 690 ff, esp. p. 824. Also interesting is the case of Austria, where, although the Constitutional Court considers that the Consitution is socially and economically "neutral" (VerfGH, e.g. Slg 475/1964, 5831/1968, 1966/1969), accepts, nevertheless, the constitutional obligation of the State to promote the substantial and economic equality (See Slg 5854/1968, 3160/1957. See for further discussion Wipfelder H.-J., (1986) 'Die verfassungsrechtliche Kodifizierung sozialer Grundrechte', ZRP 6, 139, p. 142, and the same, ZfS 1982.289.

[37] Art. 25 para. 1.

[38] Sometimes the term "social welfare states" is used instead. See, for instance, Sajo, A., (2005) 'Social Rights: A wide Agenta' European Constitutional Law Review 1, 38-43.

[39] On the varieties of American and European versions of economic constitution see also Heller, Th. (1996) 'Comments on the Economic Constitution of the European Community', in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 149-165, cf. Katrougalos, G., (1998) *Constitution, Law and Rights in the Welfare State... and beyond*, Athens: A. Sakkoulas, 56 ff.

their constitutional arrangements regarding the protection of social rights. This is true also for the majority of Latin American countries[40].

Nearly all countries in Europe –with most notable exception being the United Kingdom- are social states, either comprising an explicit "Social State" clause in their Constitutions[41], or an analytical enumeration of social rights[42], or both[43]. It is noteworthy that the explicit inclusion of social rights in the Constitution is not a prerequisite for a polity to be a Social State. The archetypical social states of Germany and Austria do not have such rights in their constitutional charters and the Nordic Constitutions –with the exception of Finland- contain only minimal provisions.

Moreover and more importantly, the Social State does not only entail the constitutional protection of social rights, but a whole series of new functions for public power that are specific to it and alien to the liberal state[44]. These may be summarized as follows:

a) The Sozialstaat functions as a fundamental interpretative meta-rule. In this sense, it constitutes both a means of consistent interpretation of other constitutional rules and of control of the generation of infra-constitutional ones[45].

b) It contributes to the formulation of an objective system of values, which constitutes a different constitutional 'ethos' to that of a liberal state. In this framework, 'legitimacy of state action comes from adherence to these values', and 'the justification that these values constitute are not a matter of pure political discourse: they provide a resource to restrict or contest the influence of 'market mechanism, in other words the dynamic of competition law, (…) offering

[40] Cf. Hendrix, S.E., (1995), 'Property Law Innovation in Latin America With Recommendations', 18 B.C. INT'L & COMP. L. REV. 1, 7-8.

[41] As in article 20 para 1 of the German Fundamental Law, art. 1 of the Constitution of France, art. 1 para 1 of the Constitution of Spain, art. 2 of the Constitution of Portugal.

[42] See, e.g., the Constitutions of Belgium (art. 23), Italy (art. 2-4, 31, 32, 35-38, 41, 45, 46), Luxembourg (11, 23, 94), Netherlands (19, 20, 22) Greece (21, 22), Spain (39-52, 129, 148, 149), Portugal (56, 59, 63-72, 108, 109, 167, 216).

[43] Cf. Katrougalos, G., (1996) "The implementation of social rights in Europe", The Columbia Journal of European Law, 278.

[44] All these functions are not necessarily associated only with the Social State principle, but they can derive from other constitutional foundations, such as the fundamental value of dignity, the principle of legitimate expectations (Vertrauenschutzprinzip, principe de confiance légitime),etc.

[45] Cf. Lyon-Caen, A. (2002) 'The legal efficacy and significance of fundamental social rights: lessons from the European experience', in B. Hepple (Ed.), Social and Labour Rights in a global context, Cambridge, Cambridge University Press, 182-192, p. 186, 187.

legal justification to circumscribe its limits.'[46] Hence, concepts such as the human dignity[47] or social justice[48], acquire not only a programmatic but a fully normative, binding content[49].

c) It ensures a "defensive" function, in the sense of guaranteeing a constitutional "floor" for social legislation, i.e. a minimum of protection that the legislator is not allowed to withdraw. This 'standstill' effect ("effet clicquet" in French theory and case law[50], Bestandsgarantie", "Bestandschutz" or "Ruckschrittsverbot" in Germany) is a minimal guarantee[51]. It does not prohibit all retrogressive legislation, but only measures that abrogate or essentially lessen statutory guarantees without replacing them with others of equivalent result[52]. Furthermore, the German jurisprudence derives from the Social State's clause (and from the fundamental principle of human dignity, in relation to the right of life, art. 2 I GG) a constitutional right to a minimum social subsistence (Existenzminimum[53]), although not to concrete social services or provisions. Thus, a minimum core or welfare protection is beyond the scope of the powers of both the legislature and the administration, not anymore "*something that might be changed or abolished whenever the administration changes its political hue" but a constitutive element of social citizenship*[54].

d) The social state offers constitutional justification for the limitation of economic freedom and the right to property, allowing state regulation of the economy both on the demand and the supply side. The right to property, especially, is functionally limited, in the general interest, and

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[46] Lyon-Caen, A. (2002) 'The legal efficacy and significance of fundamental social rights: lessons from the European experience', ibidem, p. 187

[47] See BVerfGE 1, 104.

[48] BVerfGE 5, 85, 22, 180, also 22, 204. Explicit references to the social justice contain many European Constitutions. See, e.g, art 3 of the Albanian Constitution, 43 para 2 of Ireland's, 106 para 4 of Portugal's.

[49] See, Bognetti, G., (2005), 'The concept of human dignity in European and US constitutionalism' in Nolte, G., (Ed) European and US constitutionalism, Cambridge, UK ; New York :Cambridge University Press, 85-107. For a more general discussion of the relationship between equality and human dignity see Dworkin, R. (2000), *Sovereign Virtue*, Cambridge: Harvard University Press .

[50] See Jorion, B., (1995)'Note', CC 94-359, AJDA 455, 461, Pisier, Ev., (1986) 'Service public et libertés publiques', in Pouvoirs no 36 1151.

[51] "Minimalgarantie", in the sense that the legislator is free to proceed to necessary adjustments, but he cannot, however, completely annihilate the pertinent protection. See BVerfGE 59 231, 84 133, Löbenstein, E., (1983) 'Soziale Grundrechte und die Frage ihrer Justiziabilität, in: FS Floretta, 1983, . 224-225, 209.

[52] The Constitutional Court of Hungary in its Decision 43/1995 (VI. 30.) AB, established that in case of legislative withdrawal of social rights, the extent of welfare benefits as a whole may not be reduced below a minimum level, according to Article 70E of the Constitution [ABH 1995, 192] and the principle of human dignity.

[53] BVerfGE 40, 121, (133). In the aforementioned decision 43/1995 (note 52), the Constitutional Court of Hungary also established as a general constitutional requirement that the right to social security entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity.

[54] Waldron, J. (1993), 'Social Citizenship and the defense of welfare provision', in Liberal Rights: Collected Papers 1981-1991, p. 271, 273.

the principle of equality is construed not only formally, but also substantively, in association with the concepts of solidarity and social justice[55]. What is more important, however, is that this implies a general re-conceptualization of all fundamental rights, not only social rights.

More specifically:

- Constitutional rights bind not only, vertically, public power, but also bind horizontally other individuals, especially in cases where the parties are not on a relatively equal footing, as, for instance, within the context of the employment contract. *–Drittwirkung-*[56].
- Fundamental rights do not produce effects only at individual level, but also form an objective system of values, having, thus, a "radiating effect", obliging all state authorities (legislative, executive and judiciary) to act in conformity with them in all spheres of public action[57]. Especially the '*social rights participate less in the organization of a hierarchy of norms than they contribute to the development of an axiological system whose function is to organize differing social representations and logics and integrate them around a common purpose*.'[58] Therefore, contrary to Anglo-Saxon public law, which is individualistic and procedural, the continental is substantive and based on this objective system of social collective values[59].
- The state assumes an obligation for positive measures for the protection of traditional, "negative" civil rights and liberties (Schutzpflicht)[60] and the creation of the material conditions necessary for their fulfillment (Teilhaberechte).
- In consequence of all the above, social states have not as their sole obligation to abstain from the violation of fundamental rights, (the traditional "negative" function), but are

[55] See BVerfGE 27 253, 41 126, also 33 303, 50, 57 (107), 44, 283 (90) etc. The French Conseil Constitutionnel (see 87-237 DC of 30/12/1987) also associates the principle of solidarity to equality (égalité devant les charges publiques).

[56] See Tushnet, M. (2003), 'The issue of state action/horizontal effect in comparative constitutionalism', 1, ICON, 79

[57] The seminal case is the Lüth judgment of the German Constitutional Court (BVerfGE 7, 198), Dorsen, N., Rosenfeld, M., Sajo, A., Baer, S. (2003), *Comparative Constitutionalism*, St. Paul: Thomson/West, p. 824 ff.

[58] Lyon-Caen, A. (2002) 'The legal efficacy and significance of fundamental social rights: lessons from the European experience', in B. Hepple (Ed.), Social and Labour Rights in a global context, Cambridge, Cambridge University Press, 182-192, p. 190.

[59] Cf. Harlow, C. (1998), 'Public Service, market ideology and Citizenship', in M. Freedland and S. Sciarra (eds) Public Services and Citizenship in European Law, Oxford: Clarendon Press, 49-56, p. 51.

[60] According to the German Constitutional Court, *"the State must establish rules in order to limit the danger of these civil rights being violated. Whether and to what extend such an obligation exists, depends on the kind of the possible danger, the kind of the protected interests and the existence of previous rules*" . BVerfGE 19, 89. See Grimm, D. (2005), 'The protective function of the state', op. cit., note 7, esp. 143 ff, D., Szczekala, B. (2002), Die sogennanten grundrechtlichen Schutzpflichten im deutschen und europäischen Recht, Berlin, Dunker and Humblot.

also subject to a compelling, positive obligation to protect against infringement by third parties and to fulfil, i.e. to take the appropriate measures to ensure the actual implementation of all rights[61].

Two final remarks: First, it should be clear that all the above do not presuppose the full justiciability of constitutional social rights, which is one of the most debatable issues in modern European constitutional theory and case law[62]. Whereas in some countries, such as Austria or Netherlands, their judicial protection vis-à-vis the legislator is negligible, in others the Constitutional Courts have been much more active. For instance, in Italy[63], the Constitutional Court recognizes as fully enforceable the constitutional rights to education[64], to family[65], to health[66] and social insurance[67]. In Portugal[68], the Constitutional Court has invalidated statutory legislation as contrary to the right to health[69] and to social insurance (pensions)[70]. This is also the case in Greece, in which the Supreme Administrative Court (Council of State –StE-) is very activist, having invalidated many times statutory legislation considered to lower the standards of constitutional protection, especially in the field of the protection of the environment,[71], but also in other fields of social protection, e.g. in the case of family allowances[72].

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[61] This tripartite typology of the state obligations has been fully endorsed in the General Comment No. 9 of the CCESCR, the supervising organ of the UN Covenant on Economic, Social and Cultural Rigths. The Domestic Application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 5, cf. also the General Comment No. 3 (1990), The Nature of States Parties' Obligations (Article 2 paragraph 1 of the Covenant), in: UN Doc. E/1991/23, Annex III. See Koch, I.E, (2005) 'Dichotomies, Trichotomies or Waves of Duties? HRLR 5, 81.

[62] See Iliopoulos-Stranga, J. (2000), 'Conclusions Comparatives', in J. Iliopoulos-Stranga, La protection des droits sociaux fondamentaux dans les Etats-Membres de l'Union Européenne, Brussels, Athens : Nomos Verlag, A. Sakkoulas, Bruylant, 793ff, Fabre, C. (2005) 'Social Rights in European Constitutions', in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, p. 22 ff

[63] See Vergottini de, G., (1991) 'La protection des droits sociaux en Italie', in F. Matscher (Ed.) Die Durchsetzung wirtschaflticher und sozialer Grundrechte, Engel Verlag 394, the same (2000), 'Italy', in J. Iliopoulos-Stranga, La protection des droits sociaux fondamentaux dans les Etats-Membres de l'Union Européenne, Brussels, Athens : Nomos Verlag , A. Sakkoulas, Bruylant, 559 ff..

[64] Cor. Cost. 27/1987

[65] Cor. Cost. 181/1976

[66] Cor. Cost. 88/1979, 184/1986, 479/1987, 992/1988, 455/90, 304/1994.

[67] Cor. Cost. 160/1974, 64/1975.

[68] Cardoso da Costa, J.M., (1990), 'La hiérarchie des normes constitutionnelles et sa fonction dans la protection des droits fondamentaux' Revue Universelle des droits de l'Homme, 269, Veira de Andrade, J.C., 'Portugal', in J. Iliopoulos-Stranga, La protection des droits sociaux fondamentaux dans les Etats-Membres de l'Union Européenne, Brussels, Athens : Nomos Verlag , A. Sakkoulas, Bruylant,. 667.

[69] No 39/84.

[70] No 12/88, 43/88, 191/88.

[71] StE 10/88, 1876/80, 1096/84, 695/86, 1097-99/1987, 2783/1985, 930/1982, 1615/88, 2282/92, 3186/86.

[72] StE 2004/1998.

Second, it is true that most of this theorization originated in German constitutional theory. For instance, although the Constitution of 1958 defines France as a "social Republic", French legal theory has not used this term in the same way as German theory has construed the "Sozialstaat" principle. The dominant parallel concept on the other shore of Rhine has been public service, as expression and basic instrument of social solidarity. Through public service, the invisible hand of the market is replaced by the invisible hand of the state[73]. Echoing the sociological work of Durkheim[74], Duguit wrote *"if the state fails to ensure to anyone the satisfaction of their needs, so as everyone has, the necessary means of subsistence, it fails a compelling obligation" ("Il manque à un devoir stricte")*[75]. Public service corresponds to rights and procedures and to positive obligations of the state[76].

However, the case law of the European Court of Human Rights (ECtHR), without following always the same reasoning as the German Constitutional Court, has also elevated most of the aforementioned postulates to the rank of general principles of an emerging "European Common Law". More specifically, it has recognized the indivisibility of rights' functions[77], in the sense that positive obligations derive also from "negative" freedoms, in order to achieve an effective and not just textual protection[78], in cases related to the rights to life[79], to privacy[80], to education[81], to assembly[82] and child-rearing[83] or even for protecting aspects of social rights, as the

[73] Laufer, R. and Paradeise, C. (1980), *Le Prince Bureaucrate*, Paris: Flammarion, p. 131.

[74] And especially of his concept of 'organic solidarity'. See Durkheim, E., *The division of labour in society* (1893), London: Macmillan 1984, 172 ff.

[75] Duguit, L., (1901), *L'Etat, le droit objectif et la loi positive*, Paris: Albert Fontemoing 291, Spanou, K. (2005), The reality of rights, Athens: Savvalas, 123.

[76] Chevallier, J., *Le service public*, Paris: PUF, 2003, 17, Spanou, op.cit, p. 127, cf. Lyon-Caen, A. (2002) The legal efficacy and significance of fundamental social rights: lessons from the European experience, in B. Hepple (Ed.), Social and Labour Rights in a global context, Cambridge, Cambridge University Press, 182-192, p. 184.

[77] Generally, the dominant contemporary position in International law and Labour Law is the indivisibility of rights and the recognition of enforceable fundamental social rights Individisibility first recital in the Preamble of the Charter, reference to the two Social Charters Cf. Valtikos, N., (1998) 'International labour standards and human rights: Approaching the year 2000', 13 International Labour Review, 135.

[78] The seminal case is Airey (A 32; (1979), para. 24, 26), where the ECtHR affirmed that "the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective (...) Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature. The Court therefore considers (…) that there is no water-tight division separating that sphere from the field covered by the Convention". Cf. also the cases Artico of 13/5/1980, A.,37, Kamasinski of 19/12/1980, A 168.

[79] Yıldız v. Turkey (App. no. 74530/01), judgment of 18 June 2002.

[80] Sidabras and Dziautas v. Lithuania, App.Nos.55480/00 and 59330/00, Judgment of 27 July 2004, Rainys and Gasparavicius v. Lithuania, App.No.70665/01 and 74345/01, Judgment of 7 April 2005, cf. the cases X and Y v. The Netherlands A 91; (1985).

[81] Affaire linguistique Belge A 6 (1968).

rights to health[84], to housing[85] or to social security[86]. The ECtHR reaffirms also that States have the obligation actively to protect human rights and *"this obligation involves the adoption of measures designed to secure respect (of them) even in the sphere of the relations of individuals between themselves.*[87]"

It is also noteworthy that, despite the negative prognosis[88], the new republics of Central and Eastern Europe, supposedly "pro-American" and more 'free-marketeer', did not undermine the social dimension of this "European Common Law". It is true that, anticipating membership in the European Union, these countries have adapted a program of systematic privatization, deregulation and liberalization of their economies and labour markets[89]. Still, in their constitutions, they have adopted all included a list of social rights which reflect various degrees of social justice[90]. More detailed and analytical are the Constitutions of Estonia, Lithuania, Slovakia and Czech Republic[91], whereas the most minimalist is the Constitution of Slovenia. What is more important is also the fact that the Constitutional Courts have, generally, accepted the normative character of these constitutional provisions[92].

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[82] Plattform Ärzte für das Leben, A 139 (1988), recognizing that the state must take positive measures in order to ensure the free exercise of the right of demonstration.

[83] Z and others v. United Kingdom 34 Eur. H.R. Rep. 3 (2001), which contrasts sharply with the 1989 decision in DeShaney v. Winnebago County (489 US 189 (1989)) of the US Supreme Court which has reached the exact opposite judgment, considering that federal rights do not obligate the state to protect against private individuals.

[84] Guerra and Others v Italy 1998-I 210; (1998), Z and Others v UK 2001-V 1; (2002), E and Others v UK Judgment of 26 November 2002.

[85] Bilgin v Turkey (2003) 36, James and Others v UK A 98 (1986).

[86] Feldbrugge A 99 (1986); Deumeland A 120 (1986); Salesi v Italy A 257-E (1993); (Koua Poirrez v France Judgment of 30 September 2003, Application no. 40892/98.

[87] Judgment X and Y v. The Netherlands, A, 91; (1985), para. 24, cf. Clapham, A. (1993) "The "Drittwirkung" of the Convention" in Macdonald, R. St. J et al. eds., The European System for the Protection of Human Rights, Dordrecht: Martinus Nijhoff, 163-206.

[88] See, for instance, Vaughan-Whitehead, D.C. (2003) *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model*, Cheltenham : Edward Elgar.

[89] Schimmelfennig, F., (2001),"The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union," International Organization 55, No. 1, pp. 47-80, Lemke, Ch., (2001) 'Social Citizenship and Institution Building: EU-Enlargement and the Restructuring of Welfare States in East Central Europe', Center for European Studies Program for the Study of Germany and Europe Working Paper Series 01.2.

[90] The term appears as such in the Constitutions of Poland, Estonia, Slovenia and Hungary.

[91] See Jacquelot, F. (2006) 'Les droits sociaux fondamentaux dans les pays d'Europe centrale et orientale', in L. Gaz, E. Mayuer, D. Nazet-Allouche (Eds), Les droits sociaux fondamentaux, Entre droits nationaux et droit européen, Bruxelles : Bruylant, 149-165.

[92] According to the Constitutional Court of Poland (Decision K 21/95 of 25/2/1997), the constitutional provisions related to the social security should be interpreted under the light of the principle of social justice. The decision K1/88 of the Court on the indexation of pensions reflects the similar positions of the Hungarian Constitutional Court (see above, note 52). The decisions 42/2000 of the Hungarian Constitutional Court, 5/96 and 41/2000 of the Lithuanian and 2001-02-2001 of the Latvian ones reaffirm also the binding character of the related

A-3 Excursus: The weight of values, or why state functions are different in Europe and in America

As R. Aron has remarked, in Europe *"the concept of State and law is not anymore merely negative, but also positive, in the sense that the law is considered to be not only the juridical foundation but also the source of the material conditions for its fulfillment*[93]*.*" On the contrary, the functions of the liberal state are essentially negative. They consist to the removal of arbitrary legal impediments, not to the provision of positive means for the exercise of rights and liberties. In consequence, there is an eclipse of positive rights, even as guarantees of traditional liberties[94] and a complete vacuum of constitutional social rights[95]. For this reason, for many scholars the concept of the "State" itself in Europe is closer to the Anglo-American notion of the Welfare State or even of the "administrative state"[96]. There is not only "a European culture of social justice"[97], in the sense of a distinct ethos vis-à-vis the Anglo-Saxon legal systems, but essentially a different polity.

(It is interesting that this radically different understanding of the state's role, social justice and equality is not limited to "old Europe" but characterizes also the new republics of Central and Eastern Europe. Hence, in the last poll of Eurobarometer[98], a vast majority of citizens of

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constitutional provisions. See on them Jacquelot, F. (2006) 'Les droits sociaux fondamentaux dans les pays d'Europe centrale et orientale' ; ibidem, Sajo, A. (2006) 'Social Rights as middle-class entitlements in Hungary: The role of the Constitutional Court', in Gargarela et alii Courts and social transformation in New Democracies, Hampshire: Aldershot, 83-105, Osiatynsik, W. (1996), 'Social and economic rights in a new constitution for Poland' in A. Sajo (Ed.), Western rights? Post-communist applications, The Hague: Kluwer, 234, Garlicki, L. (1988), 'La jurisprudence du Tribunal Constitutionnel polonaise en 1988', AIJC, 507-520, p: 518.

[93] Aron, R., (1972) *Etudes Politiques*, Paris: Gallimard, p. 242.

[94] Cf.the cases Harris v. MacRae, 448 US 297 (1980), Deshaney v. Winnebago County Department of Social Services, 489 US 189 (1989).

[95] See, for instance, Bork, R. (1979), The impossibility of finding welfare rights in the Constitution, Washington University Law Quarterlym, p. 695, cf. Scoffoni, G., (2006) Observations comparatives sur la place des droits sociaux constitutionnels deans les systèmes de common law et de droit mixte in Gay, L. et al. Les droits sociaux fondamentaux, Paris: Bruylant,167-184.

[96] See, for instance, Casper, G. (1989) 'Changing Concepts of Constitutionalism', S Ct Rev 311,318-399, Glendon, M.A. (1992) 'Rights in the Twentieth Century Constitutions', U Chi L Rev 59, 519.

[97] Fabre, C. (2005) 'Social Rights in European Constitutions', in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, 15-28, p. 16.

[98] Poll carried out between 6 September and 10 October 2006, by TNS Opinion & Social, a consortium createdcbetween Taylor Nelson Sofres and EOS Gallup Europe, accessible at http://ec.europa.eu/public_opinion/archives/eb/eb66/.

these countries agree with the proposition that *"there is a need for more equality and social justice even if this means less freedom for the individual*"[99].)

This fundamental division of European, "social" and Anglo-American "liberal" states cannot be reduced only to the legal differences between the common law and continental legal traditions[100]. It reflects much more profound political, moral and societal choices[101]. This happens because one of the functions of Constitution is to ensure social integration, by presupposing and promising the common values that constitute the foundations of the political community[102]. This is a two-directional process, because the Constitution crystallizes already embedded social values, but on the other hand it contributes to their consolidation to an objective system, which can have normative repercussions. So, the normative and axiological elements are closely and mutually underpinned.

The recent empirical studies of Alberto Alesina reaffirm the deep clash of values between Europe and America[103] with regard to the redistributive functions of the state. In the former, in the words of Abba Sieyès, the citizens feel they have a right to demand from the state everything it can do for them[104]. In the latter, the belief that individual talent and effort determine income, that all have a right to enjoy the fruits of their effort, in tandem with the traditional mistrust towards the state, result to a much more individualistic, Lockean *Weltanschauung* and, especially, a fundamentally different conceptualization of equality. As Slaughter remarks, the American concept of equality tolerates a lot of inequality, as it focuses on starting points, not endpoints. The idea that everybody is created equal, but opportunity and individual effort can

[99] Sometimes more predominantly than the EU average, as for instance in Slovakia, where 66% of citizens agree with this proposion, as against 64% in the EU25.

[100] See Dyson, K. (1980), *The state tradition in Western Europe*, Oxford: Martin Robertson, cf. Kahn-Freund, O., (1978) 'Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation', in Mauro Cappelleti (ed), New Perspectives for a Common Law of Europe-, London: Sijmoff .

[101] Cf. Markezinis, B. (2001), 'Unity or Division: The search for similarities in contemporary European Law', Current Legal Problems, 51, 591-617, p. 612.

[102] Walker, N., (2006) 'European Constitutionalism in the State Constitutional Tradition'. Current Legal Problems, 57, 51-89, p. 63, Grimm, D. (2005) 'Integration by Constitution', ICON 3, 193–208, cf. Smend, R., (1956) "Integrationslehre", in Handwörterbuch der Sozialwissenschaften, 5, 299-310.

[103] Alesina, A., Angeletos, M., (2002) "Fairness and Redistribution: US versus Europe," Harvard Institute of Economic Research Working Papers 1983, Harvard - Institute of Economic Research

[104] "Il suffit de dire que les citoyens en commun ont droit à tout ce que l'Etat peut faire en leur faveur". Abba Sieyès, "Des droits de l'homme et du citoyen", lu les 20 et 21 juillet 1789 au comité de la Constitution, Hermann, 1939, p. 70.

make a difference is deeply embedded in the American dream[105]. That's why many poor people are for tax cuts for the wealthier, hoping that one day they will be rich, too[106].

It is true that the "general welfare constitution" introduced by F.D. Roosevelt in his 1934 address to Congress, announcing the formation of the Social Security Act of 1935, seemed to approach the American to the European understanding of rights. Under the New Deal conception, the social rights were "the modern substance" of the traditional liberties[107]. Even in 1944 FDR proclaimed "a second Bill of Rights" to an education, a job, adequate medical care, and "a decent home", "*under which a new basis of security and prosperity can be established for all —regardless of station or race or creed*[108]."

However, New Deal was just a parenthesis, which has not survived the racially motivated so-called "Southern Veto"[109]. This became clear after WW II, when the bulk of the welfare programs have been secluded to the war veterans[110]. Even the subsequent Kennedy's and Johnson's projects of "Great Society" and the "War on Poverty"[111] that have introduced the principal means-tested social assistance schemes (AFDS, Food Stamps, Medicaid), have not put into question the fundamentals of the American welfare state tradition: residuality of the social security and commitment to workfare ethics. These postulates are perpetuating the underlying

[105] Slaughter, A.M. (2007), *The idea that is America*, Cambridge, MA: Basic Books, p. 80, 105.

[106] According to the World Values Survey, 71 per cent of Americans versus 40 per cent of Europeans believe that the poor could become rich if they just tried hard enough. See Alesina, A., Angeletos, M., (2002) "Fairness and Redistribution: US versus Europe,", op. cit.

[107] See Forbath, W. (2001), 'Constitutional Welfare Rights: A history, critique and reconstruction", 69 Fordham L. Rev. 1821-1893, p. 1833, who, additionally remarks that *"This was a conceptual revolution. Even Holmes, in his dissenting opinion in Lokhner was agreeing with the majority that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laisser faire" (198 US 45 (1905) at 75)*.

[108] Speech of January 11, 1944, see Sunstein, C. (2004), The second Bill of Rights: FDR's unfinished revolution and why we need it more than ever, New York: Basic Books.

[109] Half of the Southerner Democratic Senators have voted against FDR welfare legislation. See Weiss, J. (1983) Farewell to the Party of Lincoln: Black Politics in the Age of FDR. Princeton: Princeton University Press.

[110] John Rankin of Mississippi, who introduced the "GI Bill" on behalf of the American Legion, was *one of the most openly bigoted racists and anti-Semites ever to serve in the House of Representatives*," according to the GI Bill's chief chronicler, Michael J. Bennett. See Bennett, M.J., (1997), *When Dreams Came True: The GI Bill and the Making of Modern America*, Brassey's, p. 111, Branch T., (2007) Justice for Warriors NY RoB LIV, 6, 2007, p. 40-48.

[111] See Pujoll C. (1986), *De la Nouvelle Frontière à la Grande Société, Une Etude de la lutte contre la pauvreté de J. F. Kennedy et L.B. Johnson*, Doctoral Thesis, Bordeaux: Un. Bordeaux 3.

division between the "deserving" and the "undeserving" recipients, who get "something for nothing"[112], without any reference to legally enforceable entitlements.

It seems that race played, also, a decisive role in the final formation of the American welfare state, as racial animosity makes redistribution to the poor, who are disproportionately black, unappealing to many white voters[113]. The Warren Court did not treat poverty as race[114] and even the NAACP lawyers had eliminated social rights from their litigation agenda, marginalizing thus any potential legal remedies against economic inequality[115]. It is true that the Supreme Court has expanded in the 1960's "due protection" of the 14th Amendment to welfare entitlement[116] and social security benefits[117]. Still, even these timid efforts to create some procedural guarantees have met a vehement reaction, which denounced the rejection by the Court "*of the social and political philosophies that motivated the Framers of the Constitution*" that contributed to "*the creation of social maladies that continue to plague the American polity*"[118].

A-4 The European concept of "Social Citizenship'

Most authors distinguish two elements comprising citizenship: a) rights deriving from 'community belonging' and b) collective identity stemming from participation in this community[119], usually the nation-state[120]. In this sense, citizenship, is a "right to have rights"

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[112] Cf. Fraser N., Gordon, L. (1994) 'Civil Citizenship against social citizenship? On the Ideology of Contract-Versus-Charity'' in B. Von Steenbergen (ed.), The condition of citizenship, London, Sage Publications, 90-104, p. 91

[113] Cf. Alesina, A., E. Glaeser, and B. Sacerdote (2001), "Why Doesn't the United States Have a European-style Welfare State?", ibidem, cf. Craig, G. (1998) 'Poverty, Race and Social Security', in J. Ditch (ed.) Poverty and Social Security. London: Routledge.

[114] See Fiss, O. (2006) Preface in Gargarela et alii Courts and social transformation in New Democracies, Hampshire: Aldershot, p. xiii.

[115] See Goluboff, R., (2007) *The Lost Promise of Civil Rights*, Harvard: Harvard University Press.

[116] Goldberg v. Kelly, 397 U.S. 254, 265 (1970).

[117] Mathews v. Eldridge 424 US 319 (1976).

[118] Pierce, R.J.(1996) 'The due process counterrevolution of the 1990's?", 96 Colum. L Rev. 1973-2001.

[119] See on that Habermas , J., (1995) 'The European Nation State : Its Achievements and its limits. On the past and Future of Sovereignty and citizenship', PLS 2 9 1-10, p3 ff. : 'in the course of [the] spread of political participation, there emerged a new level of a legally mediated solidarity among citizens, while the state, by implementation of democratic procedures, at the same time tapped a new secular source for legitimation … citizenship gained the additional political and cultural meaning of an achieved belonging to a community of empowered citizens who actively contribute to its maintenance'.

[120] Lehning, P, (1997) 'European citizenship: A mirage?'' in p. Lehning, and A Weale, Citizenship, democracy and justice in the new Europe, London, New York: Routledge, 175-199.

according to the definition attributed to H. Arendt[121] and simultaneously, in the words of Abba Sieyès 'what makes men resemble each other and rally' (*"Se rassembler et se ressembler"*) [122]. As nationality continues to be the basic legal link, the necessary juridical condition for attribution of rights and obligations, nations which were born (or reborn) around the time of the French Revolution tend not to differentiate between the concepts of nationality and citizenship[123]. In the Greek language there is not even a different word for citizenship, dissociated from nationality. However, even if nationality is a *'starting point for citizenship (...) it is not citizenship itself." Citizenship is the status that encompasses the rights, duties, benefits and burdens that follow from a person's nationality*"[124].

In this sense, citizenship consists of a triad of rights, often –but not accurately- said to belong to different generations: Civil rights to the eighteen, political to the nineteenth and social to the twentieth. According to the classical theorisation of Marshall[125], these three types of rights emerged during the last three centuries, which correspond to three consecutive types of citizenship[126].

However, it seems that the process toward full citizenship has not been so linear. Not infrequently, the establishment of social rights preceded political ones, as was the case in

[121] Cf. Bellamy, R., (2001) 'Constitutive Citizenship versus Constitutional Rights: Republican reflections on the EU Charter and the Human Rights Act, in T. Campbell, K. Ewing and A. Tomkins (Eds.), Sceptical Essays on Human Rights, Oxford: OUP, 15-39 p. 15.

[122] As cited by Rousseau, D. (2005) 'Citizenship in Abeyance', European Constitutional Law Review, I, 44-46, p. 46.

[123] See Hammar, T., (1986) 'Citizenship of a Nation and of a state', 24 International Migration 735-748, Gardner, p. , (1990) "What Lawyers Mean by Citizenship", BIICL, London, at p. 4.

[124] Preuss, U., et allii. Traditions of Citizenship in the European Union, Citizenship Studies, Vol. 7, No. 1, 2003, 1-12, p. 7.

[125] Marshall, T. H., (1952) *Citizenship and social class*, Cambridge: Cambridge University Press, pp. 8 ff., the same, (1964), *Class, Citizenship and Social Development*, New York: Doubleday, pp. 79 ff.

[126] In a parallel theorisation, Habermas distinguishes four "thrusts" of legal foundation ("juridification") of citizenship: The first is related to the creation of the bourgeois despotic state, through the differentiation of the economy from the politics and the guarantee of individual freedom and property. The other three thrusts, on the contrary, have as common characteristic the re-constitutionalisation and de-differentiation of the political and economic spheres: The first of them established the principle of legality of the administration, while the second has imposed the generalisation of the political rights. While these two thrusts constitute the political system, the third attempts the re-constitution of the economic one, through the recognition of social rights. *Habermas J.*, (1981) *Theorie des kommunikativen Handels*, Frankfurt: Suhrkamp, p. 522, the same, (1985) 'Law as medium and law as institution', in Teubner (ed.) Dilemmas of Law in the Welfare State, op. cit., p. 203. Cf. the four steps of state formation of *S. Rokkan*, in Cities, States and Nations, op. cit., note 22, p. 73 ff., Rokkan, S. (1974), Dimensions of State Formation and Nation Building, in Ch. Tilly, The formation of National States in Western Europe, Princeton Un. Press, Princeton, 1974 ,pp. 562 ff.

Prussia[127]. Accordingly, the principal inconsistency of the above theorisation, is its disregard for the fact that the extension of the first category of rights (civil and political) did not address the whole society, at least up to the recognition of social rights and the final consolidation of the Welfare State. Before that, not only women as well as different ethnic or racial groups were excluded from basic civil or political rights[128], but in many respects, this was the case for the working class as a whole.

The example of restrictions in France of the freedom of movement, one of the fundamental civil rights, is illustrative: By the law of the 7th Frimaire of the XII Year, an internal passport for workers, the "*livret ouvrier"*[129]*,* was established, to be repealed only by the law of July 2, 1890. This booklet functioned as a domestic passport, forbidding any movement without the explicit permission of the employer, who held it permanently. This booklet had to be presented to the mayor before any change of residence or employment, in order for its bearer to obtain a visa indicating his new destination. A worker leaving without it could never hope to find employment in the future[130]. Naturally, things were far worse for the recipients of social assistance, especially in the liberal welfare model: for instance, under the Poor Laws, paupers had to return to their place of birth for relief, where they were separated from their family and obliged to wear always a special uniform, like criminal convicts[131].

So, the *full* expansion of civil and political rights does not in fact belong to a previous stage of the historical process, but is concomitant with the transition to the Welfare State and the

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[127] Leibfried, S., (1993), 'Towards a European Welfare State? On integrating poverty regimes into the European Community', in C. Jones (Ed), New Perspectives on the welfare state in Europa, London and N. York: Routledgee, 133, p. 135. The European Community seems also to disrupt the Marshallean sequence, since it began with civil rights, has gone on to establish a minimum of social rights and is now promising to develop political rightsSee Roche, M., Rethinking Citizenship (1992) Cambridge, Polity Press, p. 201, O' Leary, S. (1996) *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, The Hague: Kluwer, p. 14 ff.

[128] See, for instance, the Dred Scott Case of the American Supreme Court (Scott v. Sandford, 60 U.S. (19 How.) 393, 404–06, 417–18, 419–20 (1857)). In Chief Justice Taney's Opinion, United States citizenship was enjoyed exclusively by white persons born in the United States. The ''Negro,'' or ''African race,'' was ineligible to attain United States citizenship, either from a State or by virtue of birth in the United States, even as a free man descended from a Negro residing as a free man in one of the States at the date of ratification of the Constitution.

[129] First established by the law of 22 germinal of the year X, art. 11, 12.

[130] See Donjelot, J. (1988) 'The promotion of the social', Economy and Society 17, 395, p. 407 ff. G. Burdeau remarks that "its real utility was the police supervision of the working class. (...) The workers were assimilated to vagabonds". *G. Burdeau*, (1966) *Libertés publiques*, Paris, LGDJ p. 353. Rivero adds that the "livret" translated the distrust of the state towards the "vagrant poor" and more generally the working class, as suspect of 'seditious opinions' Rivero, J., (2003) *Libertés publiques*, Paris: Thémis–PUF, p. 69 ff.

[131] See Swann, de, A., (1988) *In care of the State*, Cambridge: Polity, p. 191. Generally the workhouses for the poors were "places of discipline and terror" (Scott, J., (1994) *Poverty and Wealth, Citizenship, Deprivation and Privilege*, N. York: ,Longman, p. 8.

recognition of social rights. The only reason the liberal state did not extend political rights was the fear that *'democracy might produce socialism'*[132]. When, despite these fears, the Welfare State integrated the workers to the new structures of power, by offering a reformist alternative to revolutionary socialist projects, the working class ceased to be a "classe dangereuse" and there was no further obstacle to the expansion of rights.

Therefore, the modern, final concept of citizenship embraces all aspects of social life: *"citizenship is a kind of basic human equality associated with the concept of full membership of a community (...) The whole range from the right to the modicum of economic welfare and security to the right to share the social heritage and to live the life of a civilised being according to the standards prevailing in the society (...) and the right to participate in the exercise of political power"*.[133]

In this framework, the relationship between social rights and citizenship has been a dialectic one. On the one hand, social citizenship triggered, through an evolutionary process, the development of modern states. The social dimension was pivotal in state formation[134] and identity[135], as a direct source of legitimacy. On the other hand, distributive justice has been legitimised on the basis of solidarity that comes from the membership of the political community[136].

Even for Marshall, citizenship was "*by definition national*"[137]. There is an interrelationship between solidarity and community, as 'the right of an individual to claim membership of a particular community is crucial if that individual is to gain access to a community's collective welfare arrangements.'[138] Therefore it is not unexpected that although

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[132] Esping-Andersen, G., (1991), The three worlds of Welfare Capitalism, op. cit. p. 11.

[133] Marshall, T.H, *Citizenship and social class*, op. cit. p. 8.

[134] Cf. Pierson, p. , (2001), "Investigating the Welfare State at Century's End", in: Pierson, Paul ed., The New Politics of the Welfare State, 1–14. 1, 5, who writes that welfare states are not merely "protective reactions" against the market but, instead, an integral part of modern capitalism.

[135] See Ashford D.E. (1986), *The emergence of Welfare States*, Oxford: Basil Blackwell.

[136] Cf. Walker, N., (2003) Postnational constitutionalism and the problem of translation, in J. H.H. Weiler, European Constitutionalism and the State, Cambridge: Cambridge University Press, 27-54, p. 47-48, O' Leary, S. (1996), *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, The Hague: Kluwer, p. 16 ff, Pierson, p. , (1992) 'Prospects for Social Europe' , 20 Politics and Society 333-365, p. 336

[137] Marshall T.H., (1965) *Class, Citizenship and Social Development*, N.York: Anchor Books, , p. 72, cf. Bendix, R., (1964) Nation Building and Citizenship, N. York J. Wiley.

[138] Dwyer, p. (2000), *Welfare Rights and responsibilities: Contesting Social Citizenship*, Bristol, Policy Press., p. 187.

states have lost their 'internal sovereignty'[139], as a result of lack of control over their national economy, following the processes of globalization and Europeanization, they retain their legitimacy as the primary focus of collective identity and welfare provision[140]. In this sense, welfare may be the *'last bastion of respectable nationalism'*[141]. However, the modern conception of social rights as universal ones, in association with the principle of human dignity can offer an alternative, more inclusive basis of citizenship.

All the above do not concern only the European, but all the welfare states. However, there is a basic distinctive element to European theorization of social rights as universal and integral to the status of citizenship. A social citizenship, based on universal and legally enforceable social rights, confers a right to access to social goods independently of labor market participation and personal income[142], so as "*[t]he provided service, not the purchased service, becomes the norm of social welfare*"[143]. In G. Esping-Andersen's words, *"the outstanding criterion of social rights must be the degree to which they permit people to make their living standards independent of pure market forces. (...) If social rights are (...) inviolable, and if they are granted on the basis of citizenship rather than performance, they will entail a decommodification of the status of individuals vis-à-vis the market*[144]."

This "de-commodification"[145] of social services insulates them from the market, in sharp contrast with the tendency of consumerism to commodify ever more facets of life into marketed products[146]. In this sense, '*the social rights of citizenship (...) hold the key to active participation in democratic processes and the capacity to contribute to civil society*'[147]. On the contrary, in the

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[139] They have become 'semi-sovereign states', according to the neologism coined by p. Katzenstein (Katzenstein, p. (1987), *Policy and Politics in West Germany: The growth of semisovereign state,* Philadelpiha: Temple University Press.

[140] Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 229-268, p. 232.

[141] Davies, G., (2006) 'The Process and Side-Effects of Harmonisation of European Welfar States', Jean Monnet Working Paper 02/06, p. 34,

[142] Plant, R., (1992) 'Citizenship, Rights and Welfare' in A. Coote (Ed.), The Welfare of Citizens: Developing new social rights, London: IPPR/Rivers Oram Press, 15-29, p. 16.

[143] See Marshall T.H., (1963), *Citizenship and Social Class*, op. cit., p. 67.

[144] Esping-Andersen G., *The three worlds of Welfare capitalism*, op. cit., p. 21, cf. Twine F., (1994) *Citizenship and social rights*, , London: Sage, p. 102 ff.

[145] The term has been coined by C. Offe. See Offe C. (1984) *Contradictions of the Welfare State,* London: Hutchinson.

[146] Baldock, J., (2003) 'On being a Welfare Consumer in a Consumer Society' Social Policy & Society 2:1, 65– 71, p. 65.

[147] Harris, N. (2000), 'The Welfare State, Social Security, and Social Citizenship Rights', in N. Harris, ed., Social Security Law in Context, 3–38. Oxford: Oxford University Press, p. 23–4

Anglo-Saxon liberal tradition property rights continue, essentially, to act as a model for all other rights, by translating all sorts of claims into property claims and conceptualizing them in conditions of exchange of equivalents. In this framework, social rights cannot be enjoyed as genuine rights. As "all extra-familial relationships had to be either contractual or charitable (...) the welfare recipients are getting something for nothing, (so) they are violating standards of equal exchange'[148]. The omnipotence of the market paradigm has led even the defenders of the welfare state to elaborate a theory of welfare provision as a "new property"[149].

B- SOCIAL CITIZENSHIP IN THE EUROPEAN UNION

It would be trite to reaffirm that European integration had from the beginning the character of an economic project[150]. Integration's social objectives have served merely as an auxiliary and European rights were tailored according to the functional requirements of the internal market[151]. Not surprisingly, the principle of "Social State" is not embodied in the Treaties, although the Treaty of Rome contained some social provisions, especially regarding the equality of treatment of men and women and the programmatic clause of Article 117, by which the Member States agreed to improve working conditions and living standards for workers, "*so as to make possible their harmonization while the improvement is being maintained*".[152] However, this goal was not to be achieved by interventionist redistributive measures, but

[148] Fraser N. Gordon, L. (1994) 'Civil Citizenship against social citizenship? On the Ideology of Contract-Versus-Charity'' in B. Von Steenbergen (ed.), The condition of citizenship, London, Sage Publications, 90-104p. 90 ff., especially p. 94, p. 98.

[149] Reich, Ch.A. (1964), 'The new property', Yale L.J. 5, 733-778. This theorization had the advantage to offer procedural guarantees for the withdrawal of social benefits, using the due process clause. However, as *N. Fraser* and *L. Gordon* remark (op. cit., p. 103 ff.): "(The poor) although they won the right to a hearing, they won no right to be lifted out of poverty".

[150] See, among others, Scharpf, F. (2002), 'The European Social Model' Journal of Common Market Studies, Vol. 40, pp. 645-670, 2002 Moravcsik, A. (1998) *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* Ithaca, NY: Cornell University Press).

[151] Cf. Everson, M. (1995) 'The legacy of the market citizen', in: J. Shaw and G. More (Eds), New Legal Dynamics of European Union Oxford: Oxford University Press, ibidem.

[152] The Court of Justice considers that such a provision "is essentially in the nature of a programme" although "an important aid, in particular for the interpretation of other provisions of the Treaty and of secondary legislation in the social field'. See Case 149/77 *Defrenne v. Sabena III* [1978] ECR. 1365, Case 170/84 *Bilka / Weber von Hartz* [1986], ECR 1607, Case 126/86 *Giménez Zaera v Instituto Nacional de la Seguridad Social and Tesorerva General de la Seguridad Social* [1987] ECR 3697.

spontaneously, by the formation of the common market, which would promote wealth and, consecutively, welfare.

In this framework, social policy has always been the "step-child" of the European integration[153], as its basic goal is to facilitate free movement, especially through the aggregation of eligibility and social security benefits for EU migrants and standardization of the interfaces between national systems[154]. This is why, contrary to its traditional function at the national level, European social policy is not of the "market breaking" but of the "market-making" variety.

Maduro has shown the clear relation between the process of constitutionalization of the Treaties and the rules of market integration[155]: The functional result of negative integration in the form of judicial review of divergent state regulations restricting trade was the emergence of a European economic constitution, with only two Grundnorms: free movement and competition rules[156].

Consequently, any national interference with market freedoms, even if it derives from constitutional provisions, reflecting "a deeply held national societal more or value"[157], or even if it concerns matters that do not fall directly within the scope of application of EC law, is contrary to European Law and prohibited, unless if it falls under its derogation clauses.

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[153] See Flora, p. , (1993)The national welfare states and the European Integration, *in:* L. MORENO (Ed.), *Social Exchange and Welfare Development*, Madrid: Consejo Superior de Investigaciones científicas, Instituto de Estudios Sociales Avanzados.

[154] Through Community Regulation 1408/71, which has recently been substantially reformed with the adoption of Regulation 883/2004. Cf. Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 229-268, p. 258, Mosley, H. (1990), "The Social Dimension of European Integration", International Labour Review, 129 (2): 147-64.

[155] Maduro, M.P., (1998), We The Court, *The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, pp. 61 ff., the same, (1999) 'We Still Have Not Found What We Have Been Looking For. The Balance Between Economic Freedom and Social Rights in the European Union', Faculdade de Direito da Universidade Nova de Lisboa Working Paper 4/99, accessible at www.fd.unl.pt/web/Anexos/Downloads/185.pdf, p. 6, cf. Davies, p. , (1995) 'Market Integration and Social Policy in the Court of Justice', 24 Industrial Law Journal 1995, 49, p. 51.

[156] On the concept of the European economic constitution see, among others, Sauter, W. (1998), 'The Economic Constitution of the European Union', 4 Columbia Journal of European Law 1998, p. 27 ff., Jorges,S., (1997), The market without the state? The "Economic Constitution" of the European Community and the rebirth of regulator policies, European Integration online Papers (EioP), v. 1, 19, Behrens, p. (1994), 'Die Wirtschaftsverfassung der Europäischen Gemeinschaft', in G. BRAGGERMEIER (Hrsg.), Verfassungen für ein ziviles Europa, Baden-Baden: Nomos, p. 7 ff, Boscowits K., (2001) The European Judge and the Economic Constitution: The Contribution of ECJ to the formulation of a constitutional economic model of the European Community, ToS, 2, (in Greek).

[157] Weiler, J.H.H. (1999), Fundamental Rights and Fundamental Boundaries, in Weiler, J.H.H. (ed.), The Constitution of Europe, Cambridge: Cambridge University Press, Chapter 3, p. 121.

Moreover, as is well known, the ECJ, based on international law sources as inspirational guidelines and the "constitutional traditions common to Member States"[158] has recognized many fundamental rights as general principles of European law and among them the protection of the rights to property and economic freedom. However, the language of rights has been used selectively. Although the Court has sporadically referred to general sources of social rights protection such as the European and Community Social Charters[159], it is very reluctant to recognize any social rights as general principles[160], much less as fundamental rights[161].

The social rights, although enshrined, one way or another, in the majority of the national Constitutions, have never been considered by the Court as part of the common constitutional tradition of Member States. (It is true that the Britannic delegate at the European Convention of the Constitutional Treaty has argued that the social rights do not exist in English law, at least not with the same meaning than in continental law[162]. However, the fact that such rights and an entire Chapter IV on Solidarity have been included in the Charter of Fundamental Rights of the EU is an irrefutable proof that there is, after all, a European common denominator regarding them). This reluctance of the Court to recognize social rights at European level is probably explained, as De Búrca remarks, by the "fear of giving strong legal recognition and priority to particular social values in the face of competing economic interests[163]." Evidently, social citizenship's rights make the market less free[164].

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[158] See, for example, Case 4/73, *Nold*, [1974] ECR 491 and Case 44/79, *Hauer*, [1979] ECR 3727.

[159] The first references by the ECJ to the European Social Charter were in the Case 149/77 *Defrenne III* [1978] ECR 1365 and in Case 24/86, *Vincent Blaizot and others against the City of Liege* [1988], ECR 379, cf. also Case C-246/96 *Magorrian and Cunningham v. Eastern Health and Social Service Board and the Department of Health and Social Services* [1997] ECR I-7153, Case C-191/94 *AGF Belgium* [1996] ECR I-1859.

[160] See infra, para B-4. Cf. Witte de, B., (2005)'The trajectory of fundamental social rights in the European Union' in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, 153-168 Witte de, B., 'The trajectory of fundamental social rights in the European Union' in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, 153-168, Ponthoreau, M.-C. (2003), 'Le principe de l'indivisibilité des droits: l'apport de la Charte des droits fondamentaux', Revue Française de Droit Administratif, p. 931. The initial proposal of the Commission was also referring to rights of citizens.

[161] With most notable exception the gender equality, which is, however, in the European tradition regarded primarily as a civil right.

[162] See Braibant, G. (2001), *La Charte des droits fondamentaux de l'Union européenne*, Paris: Seuil, p. 40, cf. Molinier, J. (dir.) (2005), *Les principes fondateurs de l'Union européenne*, Paris : PUF, p. 271-272.

[163] De Búrca, G., (2005) 'Introduction', in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, 1-14, p. 14, cf. Sciarra, S. (1996) 'Building on European Social Values: an analysis of the multiple sources of European social law', in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 1175-206.

[164] Streeck W. (1995), 'From market making to state building? Reflections on the political economy of European social policy' in S. Leibfried and p. Pierson (Eds) European Social Policy: Between fragmentation and integration, Washington: The Brookings Institution, 389-431, p. 413Lehning, P, (1997) 'European citizenship:

This economic constitution, developed as a function of economic efficiency and with basic aim of protecting market freedom from public power[165], is clearly in conflict with the essence of the Social State principle. Of course, economic freedom, efficiency and even competition and consumer choice are also part of the national constitutions of social states, but in harmonized co-existence with opposing general principles, such as human dignity, social justice, substantive equality and solidarity. These latter are absent or, at least underdeveloped in the European law[166].

As EU welfare law remains in "embryonic state"[167], the repercussions of this clash of values are mostly felt domestically[168]. (European social policy is developing simultaneously at two levels, but predominantly at national and only residually at a supranational one.) According to the Court, 'Community law does not detract from the powers of the Member States to organize their social security systems'[169], but only insofar as they conform to it. Hence, the negative integration of the common market had immediate de-regulatory consequences on national social rights[170], especially where protective national social regulation was above the European average.

It is true that the gradual 'demise of the European nation-state's Keynesian capacity'[171] is a very complex process, triggered by the general trends of globalization. Still, it is certain that European law has played also an important role therein. On the one hand, many national social

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A mirage?'' in p. Lehning, and A Weale, Citizenship, democracy and justice in the new Europe, London, New York: Routledge, 175-199, p. 180.

[165] Maduro, M.P. (1999), 'We Still Have Not Found What We Have Been Looking For. The Balance Between Economic Freedom and Social Rights in the European Union', op. cit., note 155, p. 1.

[166] Cf. Fitzpatrick, B. (2000) 'Converse pyramids and the EU social Constitution', in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 304-324, who describes how the respective underpinning values are reversed in the economic and social constitutions of the member states and the Union.

[167] O' Leary, S., (2005) 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union', in G. De Búrca, EU Law and the Welfare, In Search of Solidarity, Oxford: Oxford University Press, 40-88, p. 54

[168] Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 229-268, p. 230.

[169] Case 238/82 *Duphar v Netherlands* [1984] ECR 523 para 16, Cases C-159 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, para 6, Case C-158/96 *Kohl v. Union des Caisses de Maladie* [1998] ECR I-1931, para 17, see Hervey, T. (2000) 'Social Solidarity: A buttress against internal market law?' in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 31-47, p. 33 ff.

[170] In areas so diverse as the working hours of workers (see Case 145/88, *Torfaen Borough Council*, [1989] ECR 3851, or prices regulations (Case 65/75, *Tasca,* [1976] ECR 291; Case 13/77, *ATAB,* [1977] ECR 2115. See Maduro, M.P., (1999) 'We Still Have Not Found What We Have Been Looking For. The Balance Between Economic Freedom and Social Rights in the European Union', op. cit., note 155.

[171] Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 229-268, p. 262.

rights or arrangements have been challenged under the freedom of movement or competition rules[172]. On the other, even when it was not normatively imposed on member states to change their social legislation, the imperatives of the stability pact and the general political orientation of the Community have, de facto, subjected their policies to a more or less neo-liberal reasoning leading to reduction of public social expenditure[173].

This ideological and institutional mismatch between the European and the national polities could, potentially, undermine the project of deepening of political integration. Several attempts have been made to introduce a "social dimension" into the Community, more recently the Treaty of Amsterdam, which added a new, fourth recital to the Preamble of the EC Treaty that confirms the attachment of member sates to fundamental social rights, as defined in the European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers. Article 117 (now 136) of the Treaty has also been reformulated accordingly. Most of these changes have been more rhetorical than substantive[174].

However, the case law of the ECJ has given to the social dimension potential hope for a second, normative life[175]. In this line, the concepts of solidarity and the Services of General Economic Interest have been applied in order to justify exceptions from the rules of competition *(below, B-1, B-2)* and the use of European Citizenship in cases of free movement has resulted in a wider recognition of social rights to moving persons *(B-3)*. However, this case law has not changed the dominant, economic-driven dynamic of European Law[176]. Still, there are few

[172] Maduro, M.P. (2003), 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union', in T. Hervey and J. Kenner, Economic and Social Rights under the EU Charter of Fundamental Rights- A legal perspective, Oxford-Portland Oregon: Hart Publishing, 269-298, p. 286.

[173] See, among others, Panic, M. (2005) 'The Euro and the Welfare State' in E. Spaventa, M. Dougan, Social Welfare and EU Law, Oxford and Portland: Hart Publishing, 25-44, p. 161 ff.

[174] Cf. Shaw, J., (1994) 'Twin-Track Social Europe –The inside track' in O' Keefe and Twomey (Eds) Legal Issues of the Maastricht Treaty, 295-311, p. 298: "Since the Paris Summit in 1972, the Member States have been concerned to promote a public rhetoric in which social affairs are accorded equal status with 'pure' economic integration. The rhetoric (…) indicates that it is 'neo-liberal business as usual', with these provisions (of the TEU) apeing those which have long stood largely unheeded in the Treaty of Rome".

[175] Cf. Maduro, M.P. (2003) ''The double constitutional life of the Charter of Fundamental Rights of the European Union', ibidem.

[176] As Allot remarks, *'when democracy-capitalism was adopted as the basis of 'European Integration', it was obvious that the process would take on an inexorable life of its own, a self-determining becoming. Opposition to any particular development in that progress could be characterized as illogical and incoherent, a denial of the true nature of the whole enterprise. It was (and is) difficult to judge the development of the system other than in terms of the inherent logic of the system'*. Allot, Ph. (2003) 'Europe and the dream of reason', in J. H.H. Weiler, European Constitutionalism and the State, Cambridge: Cambridge University Press, 202-225, p. 212.

exceptions where the predominance of the social element over the economic one has been recognized *(B-4)*, which give some hope for the emergence of a European social citizenship.

B-1 The exception of "Solidarity": A "buttress against internal market law"[177]?

The primary vector of European integration is the elimination of barriers to free movement and distortions of competition[178]. Any restriction on cross-border free movement or any measure which prevents, restricts, or distorts competition, as such is *prima facie* prohibited. Still, rules which hinder free movement may be justifiable, if they are applied in non-discriminatory manner, are justified by imperative requirements of general interest and respect the proportionality principle[179]. Similarly, exemptions or derogations from the competition rules can be justified, e.g, under the Art. 86 par. 2.

Hence, it could be argued that derogation should exist from the application of the Treaty rules in relation to the social security systems of member-states either on a maximalist assumption that the core welfare activities per se form part of the essential functions of the State[180] or, at minimum, because of their non-economic, social character. (In USA, even purely economic sectors can be excluded from the ambit of competition rules for reasons of public policy. For instance, there are important exemptions from the federal anti-trust law with regard to agriculture[181].)

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[177] Hervey, T. (2000) 'Social Solidarity: A buttress against internal market law?' in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 31-47.

[178] The two definitions apply, respectively to state and private parties, but are otherwise essentially equivalent. See Case 56 and 58/64 *Consten v Grundig* [1966] ECR 299; Case 56/65 *Société Technique Minière* [1966] ECR 235, cf. Davies, G., (2006) The Process and Side-Effects of Harmonisation of European Welfar States, Jean Monnet Working Paper 02/06, p. 23.

[179] See Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, paragraph 32). See, for example, Case C-55/94, *Gebhard*, (1995) ECR I-4165, para 37.

[180] After all, social services are providing a public good, as the protection of environment recognized as a non-economic activity in Case C-343/95, *Diego Cali & Figli v Servizi Ecologici Porto di Genova ApA* [1997] ECR I-1547, para 22, cf. AG Opinion para 29, 43 ff. At the eve of the adoption of the Community Social Charter, the Economic and Social Committee has proposed the issuance of a framework directive, which would guarantee the basic social rights, as established in the ILO Conventions and the European Social Charter, "immune to competitive pressures". See Doc CES 1069/87, 19 November 1987, para 1.6, cf Kenner, J. (2003), 'Economic and Social Rights in the EU legal order: The mirage of individisibility' in T. Hervey and J. Kenner, Economic and Social Rights under the EU Charter of Fundamental Rights-A legal perspective, Oxford-Portland Oregon: Hart Publishing, 1-25.

[181] Capper-Volstead Act, 7 USC §§ 521-522, Fisheries Cooperative Marketing Acts, 15 USC §§ 521-522, see on that , Holmes, J. (2004) 'Fixing the limits of EC Competition Law: State action and the accomodation of the Public Services', Current Legal Problems 57, 149-174, p. 152.

Indeed, the presence of economic, market oriented activity is a prerequisite for the application both of competition rules to an "undertaking" (as defined in Art. 85 and 86, now 81 and 82) and for the freedom of movement of a "service" (in the sense of Art. 59-60 of the Treaty –now 49-50-). The member states have tried to hang on to this argument, at two levels: first for insulating the internal functioning of welfare institutions and, second, for treating their own nationals more favorably in the area of social services (*see below B-3*).

The first strategy initially enjoyed limited success; although the Court made clear very early on that the social security sector does not constitute 'an island beyond the reach of Community law'[182]. In *Humbel* and in *Gravier* it was accepted that public education services provided free by the state and financed through taxation do not constitute services within the meaning of Art. 59 of the Treaty (now art. 50)[183]. Equally, in *Poucet and Pistre* the ECJ recognized that 'organizations involved in the management of the public social security system, fulfill an exclusively social function (… which) 'is based on the principle of national solidarity and is entirely non profit-making', (…while, also) 'the benefits paid are statutory benefits bearing no relation to the amount of the contributions'. Accordingly, that activity is not an economic activity and, therefore, the organizations to which it is entrusted are not undertakings'[184].

However, in the 1990's the ECJ has narrowed its array of limiting principles of competition rules, in favour of one much more pro-market interpretation. A subsequent jurisprudence has rejected the idea that non-profit, non-competitive public services which serve social goals are exempted from the internal market rules merely because of their objectives[185]. So, in *FFSA*[186] a pension fund, created by the state to provide supplementary retirement to a group of lower income, was considered to be an "undertaking" despite the fact that it was not

[182] See AG Tesauro's Opinion in Case C-120/95 *Decker* [1998] ECR I-1831 and Case C-158/96 *Kohll* [1998] ECR I-1931, para. 17.

[183] Case 236/86 *Belgian State v. Humbel* [1988] ECR 5365, Case 293/83 *Gravier v City of Liege* [1985] ECR 593. Both cases are relative to the national education system.

[184] Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, para 8, 16, 18-19. Cf. Case C-115/97 *Brentjens* [1999] ECR I-6025; C-219/97 *Drijvende Bokken* [1999] ECR I-6021;

[185] Case C-41/1990 *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-1979, para 21, Case C-67/96 *Albany* [1999] ECR I-5751, para 74, 83.

[186] Case C-244/94 *FFSA* [1995] ECR I-4013. According to A. Lyon-Caen (Lyon-Caen, A., (1996) Fundamental Social Rights as benchmarks in the construction of Europe, (1996) in L. Betten, D. Mac Devitt, The Protection of fundamental social rights in the European Union, The Hague, London, Boston: Kluwer Law International., 43-46, p. 45), this is case offers *"an example that the Judges of the European Court of Justice are as naïve as other lawyers about the ascendancy of the market"*.

profit-making, and its contributions were defined by the law and not linked to the risks incurred, as in the private insurance scheme[187]. The facts that membership in this fund was based on voluntary participation, contributions were paid, and benefits were directly related to contributions (capitalization system) made its activity, according to the Court, competitive with private life insurance companies.

In the same line of cases, in *Albany*[188] and in *Pavlov and others*[189], the pursuit of a social objective, by a non-profit-making fund, operating under statutory restrictions, was insufficient to 'deprive' the activity carried on of its economic nature. According to the Court, the solidarity established by these funds was limited, because it extended only to their members. On the contrary, in *AOK-Bundesverband and Others*[190] the absence of market conditions of competition prompted the Court to concede that organizations entrusted with the management of statutory health insurance and old-age insurance schemes are not undertakings. Similarly, in *Cisal*[191], a case related to a national insurance scheme against accidents at work and occupational diseases, solidarity was evidenced by its compulsory affiliation and the fact that contributions were not systematically proportionate to the risk insured against, nor were the benefits paid strictly proportionate to the insured person's earnings.

The basic criterion of this jurisprudence seems to be, in the words of then AG Jacobs, '*whether the entity in question is engaged in an activity which consists in offering goods or services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits*'[192]. If there is even potential to make profit from the activity, it is an economic one[193]. In other words, only if the activity is incompatible even with the theoretical possibility of a private undertaking carrying it on, it can escape the internal market rules[194].

In this line, the crucial test is whether the redistributive element is so determinative as to preclude any kind of profit expectation. Redistribution must not only be the purpose, but also the

[187] However, in Poucet (ibidem, para 18) the Court has attached importance both to the funds' pursuit of a social objective and their non-profit-making character.
[188] Case C-67/96 *Albany* [1999] ECR I-5751, cf.
[189] Joined cases C-180/98 to C-184/98, *Pavlov and others,* [2000] ECR I-6451.
[190] Joined Cases C-264/01, C-306/01, C-354/01, C-355/01 *AOK-Bundesverband and Others* [2004] ECR I-2493
[191] Case C-218/00 *Cisal* [2002] ECR I-691, paras 38-40.
[192] Opinion of AG Jacobs in Case C-218/00 *Cisal di Battistello Venanzio* [2002] ECR I-691, para 38.
[193] See Case C-41/1990 *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-1979.
[194] Opinion of AG Jacobs in *AOK-Bundesverband and Others* [2004] ECR I-2493, para 34

effect[195]. According to Advocate General Fennely, 'social solidarity envisages the inherently uncommercial act of involuntary subsidization of one social group to another'[196]. However, the existence of an element of solidarity is not enough. Solidarity must "predominate"[197]. Therefore, the State is free to withdraw certain activities from the market only on the condition that it replaces the market, implying redistribution fully in the interests of social solidarity[198].

On the contrary, after the recent wave of free movement cases, an entire sector of welfare, the provision of health care is now almost entirely considered to consist of economic activity[199]. In *Geraets-Smits* and *Peerbooms*[200] the Court, diverging from the opinion of its Advocate General[201], who insisted on the precedent of national solidarity as in Poucet and Pistre jurisprudence, considered that Dutch compulsory sickness schemes, although lacking the element of remuneration, were services within the meaning of Article 50 of the Treaty[202].

It is true that even if social services are found to fall within the ambit of the Treaty, they may be still exempted by the application of competition rules. This happened in *Albany, Brentjens* and *Drijvende*[203], where the Court held that "agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) (now 81(1) of the Treaty"[204].

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[195] Odudu, O. (2006), *The Boundaries of EC Competition Law,* Oxford: Oxford University Press, p. 38, cf. Case C-415/93 *Bosman* [1995], ECR I-4921, AG Opinion para 147, 218 ff.

[196] Case C-70/95 *Sodemare v. Regione Lombardia* [1997] ECR I-3395.

[197] Cf. the Opinion of GA Poiares Maduro in Case C-205/03 *FENIN* [2006] ECR I-6295, para. 16.

[198] Cf. the Case C-70/95 *Sodemare* [1997] ECR I-3395, where a non-profit requirement by the Italian legislation for every entity providing residential care was considered justified.

[199] Actually, health services are deemed to fall within the ambit of the economic fundamental freedoms of the EC already since the Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para. 16. cf. Hervey,T. K, and McHale, J. Eds (2004), *Health Law and the European Union*, Cambridge: Cambridge University Press, Nihoul, p. and Simon, A-C. (2005), *L'Europe et les soins de santé: Marché intérieur, sécurité sociale, concurrence*. Paris: L.D.G.J. and Editions Larcier, Hatzopoulos, V., (2000) 'Recent Developments of the Case Law of the ECJ in the Field of Services", in CMLR 37, 43-82.

[200] Case C-157/99 *Geraets Smits and Peerbooms* [2001] ECR I-5473.

[201] Case C-157/99 *Geraets Smits and Peerbooms*, ibidem, AG' s Opinion, para 54.

[202] Ibidem, para 58. Cf. Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-385/99 *Müller-Fauré* [2003] ECR I-4509; Case C-372/04 *Watts* [2006] I-4325, C-56/01, *Partricia Inizan v. Caisse primaire d'assurance maladie* [2003] ECR I-12403

[203] Case C-67/96 *Albany* [1999] ECR I-5751, Case C-155-157/97 *Brentjens* [1999] ECR I-6025 and C-219/97 *Drijvende* [1999] ECR I-6121.

[204] *Albany* , op. cit., para. 60.

Therefore, it is not clear if solidarity is a test for whether there is an application of Community Law or merely justification for an exception[205]. Moreover, the Court has failed to provide a clear test of "predominance of solidarity", having developed, instead, a range of indicators applied on a case by case basis (social aim of the activity, compulsory participation, statutory control over contributions and services, absence of link between cost and price), and with respect to which is not clear if they are cumulative or alternative[206].

Moreover, the growing privatization of social services, encouraged by EU policies, blurs the frontiers between social and economic elements, exposing "payments where previously there was funding'[207]. Even traditional public funds try to adopt self-sustaining alternatives which bring them, in the light of this jurisprudence, closer to being undertakings. This could have as a result that public institutions until now "immune", such as the compulsory social security funds, fall within the ambit of Treaty rules: member states may be free to organize their social security systems, but only to the extent these do not involve private agents. Otherwise the competition rules apply[208].

In general, this concept of solidarity is, clearly, inadequate for limiting the deregulatory effect of EU law. The mere possibility of a virtual market does not offer a sufficient de-commodification test. In the words of GA Poiares Maduro, "*almost all activities are capable of being carried on by private operators. Thus, there is nothing in theory to prevent the defense of a State being contracted out, and there have been examples of this in the past.* [209]" Actually, any social security system can be refashioned into a market based one[210].

[205] Cf. Hervey, T. (2000) 'Social Solidarity: A buttress against internal market law?' op. cit. (note 177) p. 46. On the distinction among scope (which activities fall within the ambit of competition law), substance (which activities are subject to these rules) and justification of the exceptions to competition see also Holmes, J. (2004) 'Fixing the limits of EC Competition Law: State action and the accomodation of the Public Services', Current Legal Problems 57, 149-174.

[206] Odudu, O. (2006), *The Boundaries of EC Competition Law,* Oxford: Oxford University Press, p. 39 ff.

[207] Davies, G., (2006) The Process and Side-Effects of Harmonisation of European Welfar States, Jean Monnet Working Paper 02/06, p. 20.

[208] Hervey, T. (2000) 'Social Solidarity: A buttress against internal market law?' in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 31-47, p. 36.

[209] Opinion of GA Poiares Maduro in Case C-205/03 *FENIN* [2006] ECR I-6295, para 12.

[210] See Bernard, N. (2005) 'Between a Rock and a Soft Place: Internal Market versus Open Co-ordination in EU Social Welfare Law', in E. Spaventa, M. Dougan, Social Welfare and EU Law, Oxford and Portland: Hart Publishing, 261-286, p. 269.

B-2 The Services of General Economic Interest

The interpretation that public services per se are not undertakings, as they carry primarily social and non-economic activities, has been excluded from the beginning[211]. However, the early case-law applied a relatively limited judicial control to abusive state interventions in the market by public enterprises[212]. Later on, however, the Court was led gradually to a radical inversion of this initial immunity, and since the 1980s the application of Community rules of competition has been fully extended to the economic activity of public enterprises and their market and regulatory policies, the general principle now being the equal treatment of public and private enterprises. This approach has been criticised, by no other than the former Competition Commissioner, as *'a liberalisation machine, ultra-liberal and dogmatic'*[213].

Another major issue related to welfare services is whether the financial support given by states in order to fulfill their public service obligation constitutes a prohibited State Aid[214]. Financial assistance that merely compensates for public services obligations does not qualify as state aid under Article 87(1) EC, because it does not confer any advantage because it is, in fact, 'consideration for the services performed'[215], which does not alter the conditions of competition. On the contrary, there is overcompensation when, inter alia, the aid surpasses the cost of providing the service of general economic interest[216].

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[211] See Szyszczak, E. (2001), 'Public Service Provision in Competitive Markets' 20 Yearbook of European Law 35-77. According to the 2003 Commission Green Paper, 'any activity consisting in offering goods and services on a given market is an economic activity. (…) Thus, economic and non economic services can co-exist within the same sector and sometimes even be provided by the same organization' (Commission of the European Communities, Green Paper on Services of General Interest, COM (2003) 270 final, para 44.)

[212] See, for instance, Case 59/75 *Manghera and others* [1976] ECR 91, Case 94/74, *IGAV v ENCC* [1975] ECR 699.

[213] Quoted by Prosser, T. (2005), Competition Law and Public Services: From Single Market to Citizenship Rights? European Public Law, Volume 11, 4 543-563, available at: http://europa.eu.int/comm/competition/speeches/text/sp1996_053_fr.html (consulted 1 March 2005).

[214] For an overview see Quigley, C., Collins, A.M. (2003) EC State Aid Law and Policy, Oxford: Hart Publishing.

[215] See Case 240/83 *ADBHU* [1985] ECR 531, para 18, Case C-53/00 *Ferring* [2001] ECR I-9067 and, especially, C-280/00 *Altmark Trnas GmbH* [2003] ECR I-7747, which has elaborated the final judicial test that ECJ implement.According to the case-law of the Court of First Instance (Cases T-106/95 *FFSa and others v. Commission* [1997] ECR II-229, Case T-46/97 *SIC v. Commission* [2000] ECR II-2125, para 84), this kind of economic support may be still state aid, but eventually justified, under art. 86 para 2 EC. The ECJ in the light of this approach and the Opinions of General Advocates has fine-tuned its previous jurisprudence, by constructing a four-tier juridical test in the Case C-2800/00 *Altmark Trans* [2003] ECR I-7747. Cf. Biondi, A., Rubini, L. (2005), 'Aims, effect and justifications: EC State Aid Law and its impact on national social policies', in E. Spaventa, M. Dougan, Social Welfare and EU Law, Oxford and Portland: Hart Publishing, 79-105, p. 91 ff.

[216] In the wording of "*Altmark*" (C-280/00 *Altmark Trnas GmbH* [2003] ECR I-7747, para 87), 'where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order do discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favorable competitive position than the

Art. 86(2) EC, however, provides a general exception from the rules of competition for public undertakings entrusted with the operation of services of general economic interest. The latter are subject to the rules of the Treaty, "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". This limitation is subject to proportionality control, which examines whether the same goals might be achieved with other means, less restrictive of competition[217].

The term "services of general economic interest" is itself unfortunate because 'economic' is clearly intended to refer to the service rather than the interest[218]. Initially the article was aimed to cover only services which contributed immediately to the general economic infrastructure, but it has been used repeatedly in a legitimizing way, to introduce to the European legal order a concept that corresponds roughly to the national 'public service'[219]. The Treaty of Amsterdam added a new art. 16 to the EC Treaty, recognizing that these services belong to the shared values of the Union, and that the Community and the Member States, "shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions".

Some authors claim that this clause could provide a new balancing of market and non-market objectives by imposing a positive duty on Member States to ensure the European concept of general interest public service, as part of a 'minimum overlapping Union consensus' of citizenship"[220]. However, unless – which is improbable – there is a U-turn in the ECJ's jurisprudence, this provision does not add either a new normative rule, or a new legal judicial test, as it is clear that the public services are not beyond competition[221]. Member States are

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undertakings competing with them, such a measure is not caught by Art. 87 (1) of the Treaty'. Cf. also Case C-53/00 *Ferring v. ACOSS* [2001] ECR I-9067

[217] Cases C-18/88 *RTT* [1991] ECR I-5941, Case C-320/91 *Procureur de Roi v. Paul Corbeau* [1993] ECR I-2533, C-393/92 *Almelo* [1994] ECR I-1477, C-157-94 *Commission v. Netherlands* [1997] ECR I-5699.'

[218] Jones, A. and Sufrin, B., (2004) *EC Competition Law* (2nd Edn), Oxford: OUP, p. 537, Buendia Sierra (1999) Exclusive Rights and State Monopolies under EC Law, Oxford, OUP, p. 273, At the same tone Davies speaks of 'linguistic violence', as 'legal scholarship and official documents refer to two kinds of service; 'services of general interest', which are understood to be those of social importance, but provided in a non-economic way, and 'services of general economic interest' which are those of social importance, provided in an economic way'. Davies, G., (2006) The Process and Side-Effects of Harmonisation of European Welfar States, Jean Monnet Working Paper 02/06, p. 37.

[219] Prosser, T. (2005), *The limits of competition law*, Oxford: Oxford University Press, p. 133, Buendia Sierra (1999) Exclusive Rights and State Monopolies under EC Law, op. cit., p. 279.

[220] Posser, T., (2005), *The limits of competition law*, op. cit., p. vii, 139, Ross, M. (2000), 'Article 16 EC and Services of General Interest: From Derogation to Obligation? 25 European Law Review 22-38, p. 34-38, Napolitano, G., (2005) Towards a European Legal Order for Services of General Economic Interest European Public Law, Vol. 11, 4, 565-582, p. 566.

[221] Jones and Sufrin, (2004) *EC Competition Law,* op. cit., p. 590, See Szyszczak, E. (2001), 'Public Service Provision in Competitive Markets', op. cit., p. 63.

always free to define what they regard as services in this sense. Thus, the dominant opinion in the UK is that 'it is impossible to argue for a public service unless market failure can be shown'[222]. On the contrary, the essence of public service is, according to the French Conseil d'Etat, the consolidation of social solidarity, through various types of redistribution[223]. So, it is considered to be an element of the social contract, associated with social citizenship[224] and national self-identity[225]. The majority of European legal cultures are much closer to the French than to the British concept.

Clearly, the emerging "universal service" concept of European Law is not identical with the continental principles of equality and continuity of public service, as it concerns only the provision of a minimal and residual service, aiming just to cover the market failure of a competitive regime[226]. In the best case scenario, it will imply the application of a 'public interest' test, which would allow some space within competition law for social values, as exceptional islands.

The assumption underlying both art. 86 and 16 EC (as well as the related articles 36 of the Charter of Fundamental Rights and the art. III-122 of the Constitutional Treaty) is that social aims can be adequately addressed via the market[227], as an appropriate means of delivering public services[228]. The Court has made clear that Article 86(2) "*being a provision permitting derogation from the Treaty rules, must be interpreted strictly*"[229]. As this basic question has been answered in the opposite way than in the national social states, the only thing remaining is to delimit the exceptions of the rules of competition related to their activity and to define principles of good governance for their delivery.

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[222] Posser, T. (2005), *The limits of competition law,* op.cit. p. 209.
[223] Conceil d'Etat (1995), *Etudes et Documents no 46, Rapport Public 1994*, Paris : La Documentation Française.
[224] Cohen, E., Henry Cl.(1997), *Service Public, Secteur Public*, Paris: La Documentation Francaise, p. 17.
[225] Prosser, T. (2005), *The limits of competition law*, op. cit., p. 97.
[226] Prosser, T. (2005), ibidem, p. 108, 122 ff.
[227] The 1996 Communication of the Commission on Services of General Interest (COM (96) 443 of 9 September 1996) after referring to "solidarity and equal treatment within an open and dynamic market economy' (para 1) then notes that 'market forces produce a better allocation of resources and greater effectiveness in the supply of services" (paras 6 ff).
[228] Cf. Prosser, T. (2005), *The limits of competition law*, op. cit, 17 ff. Buendía Sierra, J.L. (1999) 'Article 86: Exclusive Rights and Other Anti-Competitive State Measures', in J. Faull and A. Nikpay (eds.), The EC Law of Competition (1999) 273, p. 319.
[229] Case C-157/94, *Commission v Netherlands* [1997] ECR I-5699, para. 37.

B-3Free movement, European Citizenship and the 'de-territorialization of welfare"[230]

The free movement of persons was considered as an incipient form of an emerging European citizenship already in the 1960s[231]. However, as it has been developed more as a function of economic efficiency for the optimal allocation of labor in the internal market[232] than as an individual human right, it has contributed to the emergence of a kind of "market citizenship"[233], dissimilar to the national concept of social citizenship. Hence, until the adoption of the three Residence Directives in 1990, economically inactive nationals had no right to free movement and residence[234]. And, although the ECJ has gradually extended the rights associated to free movement to workers' family members[235] and other non-active categories[236], the rationale of protection has not essentially changed.

According to the Court, *"the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State"*[237]. In this framework, it has repeatedly repelled the argument

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[230] Sindbjerg Martinsen, D., 'Social Security Regulation in the EU: The De-Territorialization of Welfare? , in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, 89-110.

[231] O'Leary has shown that already in 1961 the Commission regarded free movement as "le premier aspect d'une citoyenneté européenne" (Debs. EP. no. 48, 135, 22 November 1961). The same right was described as a "fundamental right of workers and their families" in the preamble of Regulation 1612/68, OJ 1968 L257/2. See O' Leary, S. (1996) The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship, The Hague: Kluwer, p. 17 ff, cf. Plender, R., (1976) "'An Incipient Form of European Citizenship'", in Jacobs, F.G. (ed.), European Law and the Individual North Holland, 39-53.

[232] Ball, C. 'The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order', 37 Harvard International Law Journal 2, 1996, 307, p. 314.

[233] Everson, M., (1995) 'The Legacy of the Market Citizen', in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* 73–90, cf. Magnette, p. , (1999) *Citoyenneté européenne: droits, politiques, institutions,* Brussels: Editions de l'Université de Bruselles, p. 34.

[234] Directives 90/364, OJ 1990 L 180/26; 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ 1990 L 180/28; and 90/366 on the right of residence of students, OJ 1990 L 180/30, annulled and readopted as Directive 93/96, OJ 1993 L 317/54.

[235] Case 7/75, *Mr. and Mrs. Fracas v. Belgian State*, [1975], ECR 1975, p. 679, Case C-308/93, *Bestuur van de Sociale Verzekeringsbank v. J. M. Cabanis-Issarte,* [1996], ECR I-2097.

[236] See, e.g., Case C-357/98, *Raulin* [1992] ECR I-1027 on the right of residence of students.

[237] See, for example, Case 143/87 *Stanton v. INASTI* [1988] ECR 3877, para 13and Case C- 168/91 *Konstantinidis v. Stadt Altensteig-Standesamt* [1993] CMLR 401, where the decision of the German authorities to change the plaintiff's name only violated Community law if and to the extent that it injured his professional activities. See O' Leary, S. (1996). *The Evolving Concept of Community Citizenship, ibidem, p.* 67, cf. also Meehan, E., (1991) "European Citizenship and Social Policies", in Vogel, U. and Moran, M. (eds.), The Frontiers of Citizenship Macmillan, 125-154, p. 128.

made by governments that the bonds of national solidarity justified exceptions from the principle of non-discrimination in the allocation of social benefits[238].

Nevertheless, two recent waves of jurisprudence seem to create a qualitatively different European dimension of "de-territorialized welfare". The first wave concerns the direct application of the rights conferred by the status of EU citizenship (Art. 17-18), the second the interpretation of cross-border health services, in a sense allowing an almost unlimited mobility of patients, even without the prior authorization of their national health systems.

EU citizenship has been used by the Court as a central concept, *'destined to be the fundamental status of nationals of the Member States'*[239], in order to expand, within the whole material scope of EC law, its earlier jurisprudence that banned any direct or indirect discrimination on grounds of nationality against lawfully resident EU migrants, with regard to any substantive social benefits, including some social assistance allowances[240].

In *Martinez Sala* [241] it recognized the right to a familial benefit of an unemployed Spanish national, on the basis that the benefit in question lay ratione materiae in the field of application of the Treaty and Regulations 1612/68 and 1408/71. Consequently, since the recipient resided legally in Germany, she was protected from discriminatory behaviour, according to art. 12 of the Treaty, just by virtue of her capacity of European citizen. Later decisions such as *Baumbast*[242], *Collins*[243] and *Grzelczyk*[244], confirmed this case law, founding a directly effective right to residence under Art. 18 of the Treaty[245] and a subsequent right of non nondiscrimination in all

[238] See especially Case 186/87 *Cowan,* [1989] ECR. 195, based on Article 6 EC.

[239] Case C-184/99, *Grzelczyk v Centre public d'Aide Sociale d'Ottingies-Louvain-la Neuve* [2001] ECR I-6193, para 31, cf. Case C-224/98, *D'Hoop* [2002] E.C.R. I-6191, para 28; Case C-224/02, *Pusa* [2004] E.C.R. I-5763, para 16. On the concept of European Citizenship see, Magnette, p. , (1999) *Citoyenneté européenne: droits, politiques, institutions,* Brussels: Editions de l'Université de Bruselles, O' Leary, S. (1996). *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, The Hague: Kluwer, Meehan, E., (1993) *Citizenship and the European Community*, London: Thousand Oaks, Sage, Marias, E., (1994) *European Citizenship*, Maastricht: European Institute of public administration, La Torre, M. (1998), *European Citizenship: an institutional challenge*. The Hague: Kluwer Law.

[240] See Case 39/86, *Lair* [1988] ECR 3161, Case 207/78, *Even* [1979] ECR 2019, Case 261/83, *Castelli* [1984] ECR 3199, (Case 94/84, *Deak* [1985] ECR 1873), Case 249/83, *Hoeckx* [1985] ECR 973, Case 39/86, *Lair* [1988] ECR 3161). The rationale of the Court was to facilitate free movement, by ensuring that moving nationals were not dissuaded from exercising their free movement by the fear of being excluded from welfare provisions and, furthermore to encourage their inclusion into the host Member State See O' Leary, S. (2005) 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' 39-88, p. 62 ff.

[241] Cases C-85/96 *Martinez Sala* ECR I-2691.

[242] Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7091.

[243] Case C-138/02, *Collins* [2004] ECR I-2703.

[244] Case 184/99 *Crzelczyk* [2001] ECR 1-6193.

[245] Cf Case C -456/02 *Trojani* [2004] ECR I-7573, related to the direct application of article 18 of the Treaty.

situations which fall within the scope ratione materiae of Community law, social allowances included, provided that there is 'a significant connection'[246] between the applicant for the allowance and the country or reception (more specifically, its market).

However, this right is not unlimited. The Court could not thoroughly depart from the requirement of all Residence Directives that public finances should not be unreasonably burdened by an inactive EU migrant without sufficient means of subsistence[247]. This is considered to be a legitimate limitation of the right to equal treatment in the field of social benefits, subject, however, to a proportionality control. Hence, in some cases, but not automatically, the inability of self-sustainability and the recourse to the social assistance system can constitute a ground for terminating the right of residence[248], especially if the link to the national host market is weakly established.

Accordingly, in *Collins* the Court considered that a job-seeker is not entitled to an allowance if he has not established a genuine link both with the Member State in question and its employment market, and can show a reasonable period of lawful residence and that he has genuinely sought work for some time[249]. In *Grzelczyk*, it asserted that a student who supported himself for three years but then applied for a social assistance scheme and was denied, suffered direct discrimination contrary to Art. 12[250]. However, the limitation of Directive 93/96 which required sufficient resources for migrant students was justifying the exclusion from Minimex after a period of time. It is, therefore, legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State[251].

In *D'Hoop* the Court recognized that, in the absence of a 'real link' between the claimant and the national market, it was legitimate to exclude from a unemployment benefit a first time

[246] Case C-257/00, *Nani Givane* [2003] ECR I-345, para. 46, cf Case C-224/98, *D'Hoop* [2002] ECR I-6191, paras. 38-39.
[247] See, for instance, *Trojani,* op. cit. at para 30, *Grzelczyk*, op. cit., at para 44, Case C-209/03 *Bidar* [2005] ECR I-2119 at para 56.
[248] Opinion of Advocate General Alber in Case 184/99 *Crzelczyk* [2001] ECR 1-6193, para 122, reflected in para 44 of the Judgment.
[249] Case C-138/02, *Collins,* [2004] ECR I-2703, paras. 68–70.
[250] Case C-184/99, *Grzelczyk* [2001] ECR I-6193
[251] Regarding student allowances, the existence of a certain degree of integration may be regarded as established just by a residence of a certain length of time. See Case C-209/03 *Bidar* [2005] ECR I-2119. For the unemployed see Case C413/01 *Ninni Orasche* [2003] ECR I-13187.

job-seeker[252], although always under an assessment of proportionality. This has been reconfirmed in *Collins*[253], where an Irish citizen sought employment in the UK, where he worked 17 years earlier. The reasoning of the Court is based on the assumption that, in the absence of a sufficiently close link with the employment market in the host Member State, the principle of equal treatment applies only as regards access to employment, and not to social benefits. The right to equal treatment[254] does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement is proportionate to the legitimate aim of the national provisions[255].

Newer judgments have reconfirmed this case law[256]. Accordingly, the actual preconditions for equal treatment in relation to social benefits of financial character are a) legal residence and (b) integration ("real link") into the market and the society of the host state, provided that (c) these benefits affect the rights of their potential holder to free movement and residence and (d) their recipient is not "an unreasonable burden" to the national social protection system [257].

The postulates of this jurisprudence are reflected in Directive 2004/38 on the right of citizens and their family members to move and reside freely within the territory of the Member States, which repeals and replaces the previous three Residency Directives. The Directive provides for a general right of residence for up to three months, a permanent right of residence after five years of continuous residence, and it extends the right to coordinated social security even to non-active nationals. However, the basic distinction between economically and non-economically active citizens has not been given up, as it also requires nationals who move to another Member State to have sufficient resources so as not to be "an unreasonable burden on the

[252] Case C-224/98 *MN D'Hoop v. Office national d'Emploi* [2002] ECR I-5899, para 36, cf. Case C-33/99 *Fahmi* [2001] ECR I-2415.

[253] Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703, para 66. See Golynker, O. (2005), 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity', European Law Review, 111-122, Muir, E. (2004) Statut et droits du demandeur d'emploi-travailleur-citoyen: confusion ou rationalisation?, Revue du droit de l'Union européenne nº 2, 249-274.

[254] Laid down in Article 48(2) of the Treaty (now 39(2) EC), read in conjunction with Articles 6 and 8 of the Treaty (now 12 EC and 17 EC).

[255] Case C-138/02 , *Collins*, [2004] ECR I-2703, para. 73, operative part 3.

[256] Cf., for instance, Case C-406/04, *De Cuyper* [2006] ECR I-6947.

[257] Cf. Besson, S., Utzinger, A. (2007), 'Introduction: Future Challenges of European Citizenship—Facing a Wide-Open Pandora's Box' European Law Journal 13 (5), 573–590.

public finances of the host Member State"[258]. Social assistance benefits are not granted, generally, prior to acquisition of permanent residence.

According to some commentators, ECJ has gone too far by this jurisprudence, contradicting concrete "limitations and conditions" laid down in secondary Community law and *"substituting its own view of the future development of citizenship and responsibility of the Member State for the welfare of its citizens over the view of the Member States and the European Parliament"*[259]. Nevertheless, essentially the Court has used citizenship in order to broaden the scope of the non-discrimination principle, without moving away from logic of market citizenship. As former AG Jacobs remarks, article 17 EC itself or even article 18 EC do not go much further than the previous law, as Articles 12 EC and the EC Treaty as a whole already offered everything that the recent case-law has achieved[260]. Although the differences between economically active and inactive Union citizens are bridged by the superceding link of Union citizenship, the umbilical cord with the market is far from being broken, and it still represents the ultimate criterion for recognition of social rights.

Still, the Court has never accepted the proposal advanced in some Advocates-Generals' opinions that "the principle of a minimum degree of financial solidarity", announced in *Grzelczyk*[261] could create, by itself, a right to entitlement in situations not connected with the fundamental economic freedoms[262]. Therefore, this principle does not establish a redistributive mechanism of solidarity linking directly citizens of different Member States, but a much narrower concept obliging the States to share the economic burden of some unexpected consequences of the internal market. This is the traditional theorization of European solidarity, which has as core recipient territories and not citizens[263].

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[258]Cf. Grzelczyk, op. cit., para 44, Case C-413/99 *Baumbast and R. v. Secretary of the State for the Home Department* [2002] ECR I-7091, para 93.

[259] Hailbronner, K., (2005) Union Citizenship and access to social benefits, Common Market Law Review 42: 1245–1267, p. 1264, the same, (2004) "Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?", NJW, 2189, cf. Niemann, I. (2004), "Von der Unionsbürgerschaft zur Sozialunion?", EuR, Heft 6, 946-953.

[260] Jacobs, F. G. (2007), 'Citizenship of the European Union—A Legal Analysis' European Law Journal 13 (5), 591–610.

[261] Case C-184/99, *Grzelczyk v Centre public d'Aide Sociale d'Ottingies-Louvain-la Neuve* [2001] ECR I-6193, para 44.

[262] See the Opinion of AG Geelhoed in Case C413/01 *Ninni Orasche* [2003] ECR I-13187, para. 90-91.

[263] Devertzis, V., (2005), "Solidarity inside the EU: European solidarity, without European Welfare State|, paper for the ESPAnet Conference 2005 22-24 September 2005 − University of Fribourg.

The other wave of case law, relating to patient mobility, may have created a 'Europe of Patients'[264], but it has not changed dramatically the situation with regard to European social citizenship. In *Decker* and *Kohll*[265] the Court established that the rules on free movement of goods and services, respectively, apply fully to public health systems (despite the lack of the element of remuneration) and, consequently, medical expenses incurred in another Member State cannot be conditional upon prior authorization. Only overriding reasons of general interest, such as financial balance, the cohesion of the social security scheme and the sound planning of national healthcare facilities may justify restrictions and then only with regard to hospital services[266]. In *Müller-Fauré*[267] the ECJ asserted that National Health Systems (NHS) are obliged to authorize treatment in another EU country, whenever their own system cannot offer such treatment without undue delay.

The extension of freedom of movement to health services signifies, rather, recognition of consumer choice than a social right, as patients' rights are protected on the premise of prevalence of economic over social considerations[268]. There is absolutely no reference to a right to health in this jurisprudence, either by the Court or in the Advocates-Generals' Opinions. It is true that Union competences are not important in this field, but such a right could be easily recognized as a part of the common constitutional traditions of Member States or, at minimum by a reference to the European Social Charter or even at art. 35 of the EU Charter of Fundamental Rights. The absence of a rights language here shows also, in the words of Barnard, an 'absence of awareness of solidarity'[269].

The Court has tried to create a new sense of transnational solidarity using the article 18 of the Treaty, instead of relying to the existing national substratum of social rights and the common European legal tradition of social state. This is not only happened on the expense of national

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[264] European Commission (1999), Free Movement and Social Security: Citizens' Rights when Moving within the EU, Bulletin No. 2, Brussels: Directorate General V – Employment and Social Affairs: p. 1.

[265] C-120/95, *Decker*, [1998] ECR I-1831; C-158/96, *Kohll,* [1998] ECR I-1931;

[266] Case C-157/99, *Smits and Peerbooms,* [2001] ECR I-5473 and Case C-368/98, *Vanbraekel*, [2001] ECR I-5363.

[267] Case C-385/99, *Müller-Fauré,* [2003] ECR I-4509. Cf. Case C-326/00, *IKA v. Ioannidis,* [2003] ECR I-1703, regarding pensioners' prior authorization.

[268] Gijzen, M. (2001) 'The Charter: A milestone for social protection in Europe' 8 MJ 1, 33-48, p. 43, Michalowski, S. (2004), 'Health Care Law' in S. Peers and A. Ward, The European Union Charter of Fundamental Rights, Oxford and Portland Oregon: Hart Publishing, 287-308, p. 290.

[269] Barnrard, C., (2005) 'EU Citizenship and the principle of solidarity' in E. Spaventa, M. Dougan, Social Welfare and EU Law, Oxford and Portland: Hart Publishing, 157-180, p. 161 ff., cf. Hervey, T. (2005) 'We don't see a connection: 'The right to health' in the EU Charter and European Social Charter' in G. De Búrca and B. de Witte, Social Rights in Europe, Oxford: Oxford University Press, 305-321, p. 315.

welfare systems and against the secondary Community legislation, but as it is based on a concept of consumer rights instead of a genuine social citizenship it can easily benefit social tourism[270]

The options for health care of wealthier citizens[271], who move often from country to country, will certainly be enhanced[272]. In this way, instead of an increasing equality between citizens[273], a kind of reverse distribution is taking place: poor (and hence non-mobile) taxpayers are funding the mobility of wealthier traveling consumers[274]. This evolution, and the lack of a rights-language approach, runs counter to the principle of de-commodification[275], instead underpinning national health systems with the "marketization" of health services. Moreover, as individual member-state control over NHS services is slipping away, there is evidence that this evolution could heal individual patients but "kill the National Health and Insurance Systems" overall[276].

This jurisprudence shows clearly the limits of any effort to build a concept of social citizenship without using any elements of social rights.

B-4 Social Rights exceptions

As we have seen, in the Community legal order social rights have been developed reflectively, as a collateral function of market integration and not as social entitlements that EU citizens can claim with regard to the European polity[277]. Consequently, in most cases they are

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[270] See Hailbronner, K., (2005) Union Citizenship and access to social benefits, Common Market Law Review 42: 1245–1267, p. 1258, for a more general discussion see Handler, J.F., (2003) Social citizenship and workfare in the US and Europe: from status to contract Journal of European Social Policy Vol 13 (3): 229–243; p. 241

[271] The Opinion of AG Colomer in Case C-157/99 *Geraets-Smits and Peerbooms associates the "practice of clinico-social tourism" with patients of "sound financial means".*

[272] Because of linguistic and cultural barriers, an extended 'social tourism' or 'regime shopping' is not probable. According to some estimates, approximately 2 per cent of the insured population opted for cross-border care till 2000. See Aziz, M., (2004) *The impact of European Rights on national legal cultures*, Oxford: Hurt Publishing, p. 119), cf Majone, G, (1993) 'The European Community between Social Policy and Social Regulation', Journal of Common Market Studies 31, 153-170.

[273] See the Opinion of Advocate General La Pergola in Joined Cases C-4 and 5/95 *Stoeber and Perreira* [1997] ECR I-511, para 50.

[274] Cf. Barnard, C., (2005) 'EU Citizenship and the principle of solidarity' in E. Spaventa, M. Dougan, Social Welfare and EU Law, Oxford and Portland: Hart Publishing, 157-180, p. 178.

[275] Cf. Holden C. (2003) 'Decommodification and the Workfare State', Political Studies Review, Vol. 1, No X, pp. 303–316

[276] Hatzopoulos, V., (2002) 'Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in Vanbraekel and Peerbooms', 39 CML Rev., 83–729, cf. Fuchs M., Free Movement of Services and Social Security – Quo Vadis?, European Law Journal, Vol. 8, n. 4, 2002.536.

[277] Maduro, M.P. (2003) ''The double constitutional life of the Charter of Fundamental Rights of the European Union' in T. Hervey and J. Kenner, Economic and Social Rights under the EU Charter of Fundamental Rights- A legal perspective, Oxford-Portland Oregon: Hart Publishing, 269-298, p. 285, cf. Szyszczak. E. (1995)

granted as means and not ends in themselves, which makes them "second class fundamental rights"[278]. Thus, the right to work in the EU is conceived principally as a freedom to undertake economic activity, whereas in national constitutions and the ESC it is correlative to a state duty to promote full employment[279]. Likewise, the right to health is conceived rather as a freedom to choose between alternative health services[280], etc.

There are, however, a few exceptions, which, like a *"'lone ranger' in the empty and foggy landscape of European social rights*"[281], represent a departure, although not a spectacular one, from the traditional predominance of the economic element over the social one. Two categories are of greatest importance: gender equality/equity rights and health and safety rights, involving harmonization of national laws.

Equal Treatment and affirmative action

Initially, even rules like equal treatment between men and women were dependent on the economic objectives of market integration, having as their rationale not so much to guarantee a right, but rather to avoid a distortion of competition[282]. Despite that, EU legislation on equal treatment has significantly improved the situation of women with regard to access to employment, equality of pay and protection of pregnancy. Of the ten directives passed under the Social Action Programme, three were related to equal opportunity for women and had considerable impact at national level[283].

The first interpretation by the Court of the related Art. 119 EC (now 141), was that it pursues a twofold purpose, both economic and social, the former being to avoid a situation in which undertakings established in States which have actually implemented the principle of equal

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'Social rights as general principles of Community Law' in N. Neuwahl and A. Rosas (Eds), The Hague, Boston, London: Martinus Nijzhoff Publishers, 207-220, p. 208.

[278] Hunt, J., (2003) 'Fair and just working conditions', in T. Hervey and J. Kenner, Economic and Social Rights under the EU Charter of Fundamental Rights-A legal perspective, Oxford-Portland Oregon: Hart Publishing, 45-65, p. 46, p. 56.

[279] Ashiagbor, D. (2005) 'The right to work' in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, 241-259, p. 244.

[280] See art. 35 of the European Charter of Fundamental Rights (EUCFR) art. 35 EUCFR right to health care) cf. Hervey, T. (2005) 'We don't see a connection: 'The right to health' in the EU Charter and European Social Charter' ibidem.

[281] Maduro, M.P., (2000) 'Europe's Social Self: "The sickness unto death"' in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 325-349, p. 337.

[282] See also Deakin S., (1996) 'Labour law as market regulation' in p. Davies et al. (eds.) European Community Labour Law: Principles and Perspectives, Liber Amicorum Lord Weddeburn, Oxford: Oxford University Press.

[283] Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 229-268, p. 246.

pay suffer a competitive disadvantage in intra-Community competition[284]. However, in view of later decisions[285], such as *Schröder* and *Sievers*[286], the Court has reversed the importance of the economic and social elements, stating that "it must be concluded that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right."

However, equality has been limited to the participation of women in the employment market and has not expanded into other social areas, for instance, the household and the domestic sphere[287]. Moreover, equal treatment, although now a generally accepted fundamental right in EU law is still marked by its origin as 'market unifier'[288]. It is, therefore, generally understood as identical to non-discrimination and not, as in the social states, implying also the obligation to promote substantive equality. This is clear in most of the affirmative case judgments.

In *Kalanke*[289] the Court, adopting an individualistic and procedural 'equal opportunities' stance[290], has considered discriminatory and contrary to European law any "automatic" preference of women based on gender policies[291]. In later cases, as *Marshall*[292] and *Badeck*[293], a similar measure was upheld, as "discriminatory in appearance (but…) in fact intended to

[284] Case 43-75 *Defrenne II* [1976] ECR 455, paras 8-10.
[285] Case 149/77 *Defrenne III* [1978] ECR 1365, paras 26 and 27, Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, paragraph 16, and Case C-13/94 p. *v S. and Cornwall County Council* [1996] ECR I-2143, paragraph 19).
[286] Case C- 50/96 *Deutsche Telekom AG v Lilli Schröder* [2000] ECR I-743 para 57. Cf. also the related cases C-50/96 *Deutsche Telecom AG v. Vick and Gonze* [2000] ECR I-743, p. 799, and Cases 270-271 *Deutsche Post AG v. Sievers and Schrage* [2000] ECR I-929, Kenner, op. cit., p. 11, Barnrard, C., (2005) 'EU Citizenship and the principle of solidarity' in E. Spaventa, M. Dougan, Social Welfare and EU Law, Oxford and Portland: Hart Publishing, 157-180, p. 161 ff.
[287] See on that More, G., (1996) 'Equality of treatment in European Community Law: The limits of market equality', in A. Bottomley (Ed.), Feminist perspectives on the foundational subjects of law, London: Cavendish, Shaw, op. cit. p. 301. For a more general discussion on gender and citizenship see Meehan, E., (1993) *Citizenship and the European Community*, London: Thousand Oaks, Sage, chapter 6, "Sex and Citizenship".
[288] More, G. (1999), ibidem.
[289] Case C-450/93 *Kalanke v. Bremen* [1995] ECR I-3051. See, esp. para 7 of Opinion of AG Tesauro.
[290] Fredman, S. (2000) 'Affirmative action and the European Court of Justice: A critical analysis', in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 171-195, p. 177 ff.
[291] Equally, in *Abrahamson* (Case C-407/98 *Abrahamson and Anderson v. Fogelgvist* [2000] ECR I-5539) the Court has found discriminatory a Swedish scheme which gave preference to a woman candidate even if she was less qualified than a man candidate, unless the difference of qualification was very important.
[292] Case C-400/95 *Marshall v. Land Nordrhein-Westfallen* [1997] ECR I-6363,
[293] Case C-158/97 *Badeck v. Hessischer Ministerpraesident* [2000] ECR I-1875.

eliminate or reduce actual instances of inequality which may exist in the reality of social life"[294], only because the priority could be overridden by objectively assessed criteria

This jurisprudence, having as its basic concepts the primacy of the individual, the neutrality of the state and the understanding of equality mainly as equality of opportunity, is closer to the American interpretation of affirmative action or reverse discrimination[295]. On the other side of the Atlantic, affirmative measures are not conceived as a positive obligation of the state but are rather tolerated as a *sui generis* collective compensation for injustices of the past[296], or in light of a compelling state interest in racial diversity[297]. On the contrary, in the social states, there is a constitutional obligation for promotion of substantive and not only formal equality.

[294] Marshall, op. cit. para. 26

[295] See Rosenfeld, M. (1991) *Affirmative Action and Justice: A Philosophical Inquiry*, New Haven, Connecticut: Yale University Press, Jacobs, L.A. (2004) *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (Cambridge: Cambridge University Press.

[296] See Regents v. Bakke, 438 U.S. 265 (1978), City of Richmond v. J.A. Croson Co.,488 U.S. 469 (1989).

[297] See Stroud, S. (1999) "The Aim of Affirmative Action," Social Theory and Practice, 25, 399, Sander, R. (2004) 'A Systemic Analysis of Affirmative Action in American Law Schools', Stanford Law Review, 57, 439- 478.

Health, safety and working conditions rights

The rights in this category are conceptually diffuse and not organized around a coherent central concept[298]. The setting of transnational labour standards of health and safety is the basic example of "positive harmonization" in the social field, contrasting with negative harmonization measures aimed to remove the barriers that breach the principle of free movement[299]. The bulk of concrete and justiciable EU social rights in these domains dates from the time when harmonization was the leading regulatory technique, as the initial outcome of the so-called structural directives of 1970's Social Action Programme. This first wave, responding to the social unrest of post-1968 Europe, introduced harmonized labour standards at the highest level over health and safety regulation[300]. The second wave aimed to give a 'social dimension' to the internal market programme in late 1980s, addressing essentially similar issues[301].

Although some authors consider that the promotion of such rights is actually "thoroughly defeated" in the EU[302] and others claim that ILO standards laid down in the conventions address wider areas and set higher standards than the comparable EU legislation[303], the impact of this secondary legislation was important, especially in the countries of the European South. In consequence, the affirmation by the ECJ of these norms as genuine rights and not only as general principles of Community law could have long term implications for their protection.

. The Court in *BECTU*[304] confirmed paid annual leave as a principle of Community social law of particular importance, from which there can be no derogation, with direct reference to the Community Charter of Fundamental Rights of Workers of 1989 as a substantive point of reference[305]. However, it fell short of accepting the AG's opinion that it represented also a

[298] Szyszczak. E. (1995) 'Social rights as general principles of Community Law' in N. Neuwahl and A. Rosas (Eds), The Hague, Boston, London: Martinus Nijzhoff Publishers, 207-220, p. 208.

[299] Deakin, S. (2006) 'Social Rights in a globalized economy', in Ph. Alston (Ed.) Labour Rights as Human Rights', Oxford: Oxford University Press, 25-60, p. 42, 47

[300] Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 229-268, p. 244.

[301] Sciarra S. (2005), 'Fundamental Labour Rights after the Lisbon Agenda' in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, 199-215, p. 203.

[302] Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' op. cit., (note 300) p. 245.

[303] Pennings, F., Schulte B., (2006) International security standards: An overview, in F. Pennings (Ed.) Between Soft and Hard Law, The impact of International Social Security Standards on National Security Law, The Hague: Kluwer Law, p. 26.

[304] Case C-173/99, *R. v. Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I-4811.

[305] Bercusson, E. (2005), 'Social and Labour Rights under the EU Constitution' in G. De Búrca and B. De Witte, Social Rights in Europe, Oxford: Oxford University Press, 169-197.

"fundamental social right"[306], recognized in Article 31(2) of the Charter of Fundamental Rights. Although both these references are only indirectly probative, as paid annual leave is founded in EC secondary legislation[307], the recognition of a similar 'fundamental' right could lead to a new reading of other social rights as being on equal footing with the other 'fundamental' freedoms of Community law.

Unfortunately, this did not happen in subsequent jurisprudence. In *Bowden*[308] the Court accepted the conformity with European law of a provision depriving of the same right a group of 'non-mobile' workers in the transport sector, excluded from the scope of the Directive 93/104 EC. In *Finalarte*[309] it also avoided taking a stance based on the fundamental social rights rationale and directed the national court to proceed to a proportionality balancing of the social protection offered by the right to annual leave and its economic implications. Finally, in *Pfeiffer* [310] it reconfirmed that the 48-hour upper limit on weekly working time constitutes *"a rule of Community social law of particular importance"*, as well a minimum requirement necessary to ensure protection of his safety and health, but not a fundamental right.

Conclusions

The initial «constitutional asymmetry"[311] of economic and social elements in the basic structure of the Community Treaties is yet to be overcome[312]. Not only there is not a process towards a European welfare policy based on the social state principle, but, after Lisbon, the trend is towards the integration of economic policy, labor market policy and social policy in the logic

[306] See paras 22, 25, 28, 29, 36 of AG' Opinion.
[307] The directive 93/104 on Working Time, cf. Betten, L. (2001), 'The EU Charter on Fundamental Rights: A Trojan Horse or a Mouse?' 17 IJCLLIR 151-164, p. 158, O' Leary, S., (2005) 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union', in G. De Búrca, EU Law and the Welfare, In Search of Solidarity, Oxford: Oxford University Press, 40-88, p. 80 ff
[308] Case C-133/00 *Bowden and others v. Tuffnells Parcels Express* LTD [2001] ECR I-7031, cf. Kenner, op.cit. p. 22.
[309] Joined Cases C-49, 50, 52-54, 68-71/98, *Finalarte* [2001] ECR I-7831.
[310] Joined cases C-397/01 to C-403/01, *Pfeiffer* (C-397/01), *Roith* (C-398/01), *t Süß* (C-399/01), *Winter* (C-400/01), *Nestvogel* (C-401/01), *Zeller* (C-402/01) and *Döbele* (C-403/01) [2004] ECRI-8835.
[311] Expression of Scharpf, F. (2002) "The European Social Model : Coping with the Challenges of Diversity", Journal of Common Market Studies, vol.40, n°4 : 645-669, p. 646.
[312] Cf. Wendler F. (2004) The paradoxical effects of institutional change for the legitimacy of European governance: the case of EU Social Policy, European Integration on line Papers (EIoP), vol. 8, 7, Scharpf, F. (2002) The European Social Model : Coping with the Challenges of Diversity, in : Journal of Common Market Studies, 40, 645-70.

of economic growth[313]. EU citizenship, still defined not by a link to a demos but to a market[314], did not entail a shift in political ethic, as the core set of shared European social values has not fully assumed the status of independent goals in the European polity[315].

This situation reflects the general shift of economic policies in Europe, as a result of globalization's pressures, but, institutionally speaking, it has been shaped by the jurisprudence of the ECJ and its elaboration of the EU economic constitution. As Maduro points out, even if the deregulatory consequences of EU policy are not a direct product of neo-liberal vision of the Court, it is clear that the absence of a minimum platform of social rights and values in its theorization did not allow any space for a market restricting jurisprudence[316].

Regarding social rights, the ECJ has not proven to be the "least dangerous branch"[317]. It has always interpreted the general interest of the Community as a synonym for unequivocal support for the formation of the common market, so that economic integration has almost always taken priority over social objectives. When social rights were measured against Community interest, thus narrowly perceived, the former was rarely the winner[318]. Not only that: As it is cogently remarked, in order to promote its '*integrationist agenda*'[319] the Court often *"has little scruple in attributing to Community law quite a different meaning from what would follow from an unbiased interpretation on the basis of the objective wording of the provision, its systematic context and its purpose"*[320].

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[313] Dani M., (2005) Economic Constitutionalism(s) in a Time of Uneasiness – Comparative Study on the Economic Constitutional Identities of Italy, the WTO and the EU, ISSN 1087-2221, Jean Monnet Working Paper 08/05.

[314] Maduro, M.P., 'Europe's Social Self: "The sickness unto death"' in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 325-349, p. 340.

[315] Hunt J.(2003) 'Fair and just working conditions', op. cit., p. 45. Maduro, M.P. (2003) The Double Constitutional Life of the Charter of Fundamental Rights of the European Union, op. cit. p. 286.

[316] Maduro, M.P., (2000) 'Europe's Social Self: "The sickness unto death"' in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 325-349, p. 328-329, Sciarra S. (2005), 'Fundamental Labour Rights after the Lisbon Agenda' in G. De Búrca and B. De Bitte, Social Rights in Europe, Oxford: Oxford University Press, 199-215, p. 203.

[317] Weiler, J.H.H. (1999), 'The least dangerous branch: A retrospective and prospective of the European Court of Justice in the Arena of political integration', in The Constitution of Europe, Cambridge: Cambridge University Press, 188-228, p. 110

[318] Lorber, p. (2004), 'Labour Law' in S. Peers and A. Ward, The European Union Charter of Fundamental Rights, Oxford and Portland Oregon: Hart Publishing, 210F-230, p. 225, Gijzen, M. (2001) 'The Charter: A milestone for social protection in Europe' 8 MJ 1, 33-48, p. 45,

[319] Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 229-268, p. 240.

[320] Hailbronner, K., (2005) Union Citizenship and access to social benefits, Common Market Law Review 42: 1245–1267, p. 1251.

This is not a judicial competence but a legislative one, which should be democratically legitimized. It is clear that, at least initially, the governments of the member states were more than satisfied that neo-liberal decisions that could imply important political cost if taken at national level could be attributed to Luxembourg. However, this tacit attribution to the Court of the "pouvoir constituant" to determine, almost alone, the fundamentals of the European economic constitution and its implications to social rights does not only lack political legitimacy, but it is also in contradiction with the common legal traditions of the majority of European countries, which embrace the "social state" principle.

Although the liberalism of the Court is not of the Chicago School's model of 'perfect competition' but rather an attenuated form of 'workable competition'[321] it is, still, a non-social state theorization. It failed to introduce a new scale of values into Community law, as its 'market mentality'[322] confined its jurisprudence to an extension of limited civil and political rights on an equal treatment basis, without contributing to the formation of some sort of identity based on rights as ends in themselves and not means to the market integration. In other words, it has reproduced the initial archetype of EU "mercantile citizenship"[323].

A new balancing in the judicial "construction" of the European Economic Constitution is necessary. Obviously, the democratic way to do that would be by a revision of the Treaty. Till then, and taking into account the difficulties of projects of this magnitude, shown by the failure of the Constitutional Treaty, it is to the Court to rebalance its jurisprudence. This does not necessarily mean recognition of new social rights. As Weiler has shown, re-conceptualizing European citizenship around needs and rights risks being "an end-of-the millennium version of bread and circus politics"[324]. The crucial issue is how to locate social rights within the logic of market integration[325], so as *"transnational governance would not encroach of fundamental social values (...) which go to the very self understanding" of the European citizen*"[326].

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[321] Fleischer, H. (1995), Gezielte Kampfpreisunterbietung im. Recht der. Vereinigten Staaten – Der Supreme. Court zwischen Chicago School und Post-Chicago Economics WuW 45 (10) 796-805.

[322] Aziz, M., (2004) *The impact of European Rights on national legal cultures*, Oxford: Hurt Publishing, p. 29 ff.

[323] Cf. M. p. Vink, (2003) *Limits of European Citizenship*, PhDthesis University of. Leiden, Veenendaal: Universal Press.

[324] Weiler, J. H.H., 'To be a European Citizen, Eros and Civilisation', 324 The constitution of Europe, -357, p. 334, 335

[325] Deakin and Browne, op. cit. p. 39.

[326] Weiler, J. H.H., (1995), 'Fundamental rights and fundamental boundaries: On standards and values in the protection of human rights', in N. Neuwahl and A. Rosas (Eds), The Hague, Boston, London: Martinus Nijzhoff Publishers, 51-76, p. 53, 54.

This does not require, either, an expansion of EU competencies or positive harmonization in the welfare sphere, which is an improbable scenario in present political terms. It entails a new, harmonizing jurisprudential synthesis of the market principles of European Law with the social elements of the national Constitutional law in 'a common project, involving moral and cultural foundations'[327]. Basically, distributive justice would remain a national issue, but the Member States will be able to carry on their social functions without deregulatory constraints imposed by the process of European integration[328]. Different levels of social protection, transnational, national and subnational, would coexist, eventually interactive or even competitive[329], but never antithetic or self-contradicting. A nested[330] or multiple[331] citizenship of this kind, as a mixture of rights guaranteed by regional, national and European institutions[332] seems the only viable option for the European polity.

[327] Faist, T., (2001) 'Social Citizenship in the European Union: Nested Membership' 39 JCMS, 37-58, p. 50. Cf. Advocate General Jacobs in Case C-168/91, Konstantinidis v Stadt Altensteig Standesamt [1993] ECR I-1191: *'In my opinion, a Community national who goes to another Member State (...) is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that (...)he will be treated in accordance with a common code of fundamental values (...). In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights'*.

[328] Cf. Sciarra, S. (1996), 'How Global is Labour Law? The Perspective of Social Rights in the European Union', EUI Working Paper, Law No. 96/6, p. 32.

[329] See Barnard, Ch. (2000), 'Regulative Competitive Federalism in the European Union? The case of EU Social Policy' in J. Shaw (Ed.), Social Law and Policy in an Evolving European Union, Oxford, Portland: Hart Publishing, 31-47,

[330] See Faist, T., (2001) 'Social Citizenship in the European Union: Nested Membership' 39 JCMS, 37-58, Golynker, O., (2005) 'Jobseekers rights in the European Union: Challenges of changing the paradigm of social solidarity', E.L. Rev. 30(1), 111-122, Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' in F. Snyder (Ed.) Constitutional Dimensions of European Economic Integration, London: Kluwer Law International, 229-268, p. 232.

[331] Marks, G. (1997), "A Third Lens: Comparing European Integration and State Building", in Klausen, J. and Tilly, L.A. (Eds) European Integration in Social and Historical Perspective: 1850 to the Present, Lanham, MA & Oxford: Rowman & Littlefield, 23-43, p. 35.

[332] Cf. Weiss, M., (1996) 'Cumulative objectives of fundamental rights' protection in the European Union', in L. Betten, D. Mac Devitt, The Protection of fundamental social rights in the European Union, The Hague, London, Boston: Kluwer Law International 33-37, Kolb, A.K. (1999) 'European Social Rights Towards National Welfare States. Additional, Substitute, Illusory?' In J. Bussemaker (ed.), Citizenship and Welfare State Reform in Europe, London ; New York : Routledge, p. 171.