Social Rights in the European Union: The Possible Added Value of a Binding Charter of Fundamental Rights

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1 What Are Social Rights?

The expression "social rights" cannot be fully understood without considering civil and political rights, which are all inherent to citizenship. In particular, as T.H. Marshall notes, "the civil element is composed of the rights necessary for individual freedom-liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude contracts, and the right to justice."[1] Political rights, instead, embody "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the member of such body."[2] Finally, social rights comprehend "the whole range, from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of civilized being according to the standards prevailing in the society."[3]

Hence, while civil and political rights can be defined and listed, social rights are difficult to identify, and the relative standard of protection varies over time. It follows from the above that social rights, which are intended to guarantee adequate conditions of life to citizens, do not operate on the basis of universally recognised minimum standards. Rather, they belong to an open catalogue, which constantly evolves according to the changes that occur within the society. On the one hand, this means that social rights are flexible and capable of responding to the needs of society, thus contributing to ensure a high standard of life to citizens. On the other hand, their vagueness and the consequent difficulty of translating objectives into binding norms conditions their justiciability and their effectiveness.

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[1] T. H. Marshall, *Citizenship and social class* (Pluto Press, 1992).
[2] Ibid., 8.
[3] Ibid.

G. Di Federico, *The EU Charter of Fundamental Rights*, Ius Gentium: Comparative Perspectives on Law and Justice 8, DOI 10.1007/978-94-007-0156-4_11,

During the nineteenth century, social rights were progressively recognized as such, thus contributing to the elimination of inequalities. In particular, this was possible by enabling individuals to claim for the respect of those rights by public authorities.[4] And yet, social rights are regarded as relative, without a universal character. Citizens are entitled to be protected by the State when, in a given situation, they are discriminated[5] and only inasmuch as social rights have been implemented through domestic legislation.[6]

Broadly speaking, social and economic rights, the so-called "second generation rights", are programmatic rather than directly enforceable and they are addressed to the community rather than to the individual.[7] On the contrary, civil and political rights, which are undoubtedly complementary to social rights, are often qualified as negative freedoms. Endowed with a constitutional status, they presuppose non-intervention by the State. Social rights specify a number of guarantees which characterize the modern welfare State, ranging from adequate income standards to education, from housing to health care, from collective bargaining to workplace safety. The legislator's intervention will determine the scope and the extent to which welfare services are to be granted to the Community, taking in due consideration the social and cultural traditions which characterize the national context.[8]

2 Social Rights in the Constitutions of the EU Member States

All EU Member States protect social rights at a statutory level by fixing labour conditions and regulating the social security system. Hence, the level of protection is far from uniform, as opposed to what happens in relation to civil and political rights, which enjoy a constitutional rank. In fact, social rights are not regarded as fundamental in all Member States and similar concepts are treated differently in the various legal systems. Moreover, even when social rights are recognised by the Constitution, they often amount to policy clauses. They are therefore relegated to the rank of

[4]See further L. Principato, 'I diritti sociali nel quadro dei diritti fondamentali', (2001) *Giustizia Costituzionale* 873, and P. Carretti, *I diritti fondamentali. Libertà e diritti sociali* (Giappichelli, 2005).

[5]See M.V. Ballestrero, 'Europa dei mercati e promozione dei diritti', (2007) 55 *WP CSDLE "Massimo D'Antona"* 2.

[6]See J. P. Costa, 'Vers une protection jurisdictionelle des droits économiques et sociaux en Europe?', in *Les droits de l'homme au seuil du troisième millénaire: Mélange en hommage à Pierre Lambert* (Bruylant, 2000).

[7]See G. S. Katrougalos, 'The implementation of social rights in Europe', (1996) 2 *Columbia Journal of European Law* 277.

[8]G. Majone, 'The EC between social policy and social regulation', (1993) 31 *Journal of Common Market Studies* 153 at 161.

general, public objectives, which leave the legislator free to determine their scope of application.[9]

A brief overview of the constitutional systems of the EU Member States allows us to classify the latter in three general categories, based on the rank assigned to social rights. Some countries, such as United Kingdom and Austria, do not include social rights in their Constitution: they prefer a market-oriented solution, leaving social regulation to statutory law. Southern States, like Italy, Greece, Spain and Portugal, instead, have opted for constitutional catalogues of social rights, albeit rarely provided with direct effect. In this regard, an exception can be traced in the Fundamental Law of the ex-Communist new Member States where, pursuant to the concept of "social market economy", social rights are considered to be rights of the individual.[10] Finally, a third group of Member States combines the two said approaches by differentiating among individual social rights, social objectives and social policy clauses.[11]

The lack of an immutable bill of social rights is not necessarily detrimental to their protection as flexibility allows the legal order to adjust to the cultural, economic and social developments of the society.[12] In fact, regardless of the different approaches elaborated at a domestic level, it can be maintained that throughout the Member States minimum guarantees encompass "old age pensions, sickness and invalidity allowances, unemployment benefits, minimum subsistence benefits, educational grants, the provision of healthcare, and maternity and child-raising allowances".[13] In particular, it seems that in order to allow citizens to conduct a decent and dignified life, all constitutional systems envisage the right to economic resources necessary for subsistence, to be ensured through the arrangement of social aids schemes.[14]

Judicial review is often left to the national Constitutional Courts, pursuant to domestic legislation. The rules governing the scope of the relative judgment vary substantially throughout the Member States. Some countries

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[9]To be sure, references to "adequate standards of protection" are of little use without implementing provisions. See further A. Manessis, in J. Iliopoulos-Strangas(ed.), *La protection des droits sociaux fondamentaux dans les États membres de l'Union européenne: Étude de droit comparé* (Bruylant, 2000) 19.

[10]See C. Costello (ed.), *Fundamental social rights: Current European legal protection and the challenge of the UE Charter of Fundamental Rights* (Irish Centre for European Law, 2001).

[11]The welfare State clause of the German Basic Law offers a good example of this approach. See further C. Fabre, 'Social rights in European Constitutions', in G. De Búrca, B. De Witte, *Social rights in Europe* (Oxford University Press, 2005) 22.

[12]See C. Fabre, n. 11 above, at 15.

[13]See S. O' Leary, 'Solidarity and citizenship rights', in G. De Búrca (ed.), *EU Law and the Welfare State – In search of solidarity* (Hart Publishing, 2005) 39.

[14]The underlying rationale being that all individuals should be guaranteed a decent and dignified life. See G. S. Katrougalos, n. 7 above.

provide for an ex post control whilst others establish an ex ante judicial review mechanism, following the request of the legislator or, in some instances, as a result of popular referenda.[15]

Just as the criminal and fiscal domains, welfare is thus perceived as a national priority, a very expensive one actually, because of the investments it requires (in terms of premises, infrastructures, personnel, etc.). *A contrario*, it could be argued that the natural resistance of Member States to give up sovereignty in the field of social security can be traced to the will to preserve their own distinctive features. Certainly, despite the many differences which characterize the European legal landscape in this area, it can be nonetheless stated that EU Member States guarantee a rather high standard of living to their citizens.[16]

3 Social Rights in the EU Legal Order: Retrospective Analysis

If the protection of social rights is one of the distinctive functions of the State, it is quite natural that, pursuant to the founding treaties, the Community was devoid of any competence in this respect. Nevertheless, the "raising of the standard of living" and the "quality of life, and economic and social cohesion and solidarity among Member States" were listed amongst the goals to be pursued by the Community.[17]

As a consequence, Community legislation dealing with the rights of workers was mainly aimed at removing all obstacles to economic integration within the common market.[18] Initially, basic social rights were thus able to emerge through the case law of the Court of Justice (hereafter ECJ or EUCJ) ECJ on the provisions relating to the four fundamental freedoms, which had progressively been granted direct effect.[19]

Unfortunately history shows that contemporary States periodically face market failures which need to be confronted through public intervention[20].

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[15] See A. Eide, 'Future protection of economic and social rights in Europe', in A. Bloed, L. Leicht, M. Nowak, A. Rosas (eds), *Monitoring human rights in Europe: Comparing international procedures and mechanism* (Martinus Nijhoff, 1993) 187.

[16] See G. S. Katrougalos, n. 7 above.

[17] Art. 2 TEC.

[18] See T. Faist, 'Social citizenship in the European Union: Nested membership', (2001) 39 *Journal of Common Market Studies* 37, at 38 and M. Luciani, 'Diritti sociali e integrazione europea', (2000) 3 *Politica del Diritto* 367.

[19] See K. Lenaerts and P. Foubert, 'Social rights in the case-law of the European Court of Justice: The impact of the Charter of Fundamental rights of the European Union on standing case-law', (2001) 28 *Legal Issues of European Integration* 267.

[20] See M. E. Butt, 'Fundamental social rights in Europe', (2000) *Social Affairs Series*, SOCI 104-02/2000.

The first European document which expressly enumerates and protects social rights is the European Social Charter (hereinafter ESC) adopted by the Council of Europe in 1961, later revised in 1986. This document has the same status as the European Convention on Human Rights (hereinafter ECHR) and is complementary to it.[21] The ESC covers a number of fundamental social and economic rights such as housing, health, education, employment, legal and social protection, free movement of persons and non-discrimination, but, most importantly, establishes a supervisory mechanism guaranteeing their respect by the Contracting Parties. In this regard, the European Committee of Social Rights verifies whether the contracting Parties comply with the Charter.[22]

The monitoring procedure is based on national reports. States submit a yearly report indicating how they have implemented the Charter in law and in practice.[23] The Committee examines the reports and decides whether or not the national situation complies with the provisions of the Charter[24]. Should a breach of the Charter be found, and the position of the Social Committee disregarded by the addressee, the Committee of Ministers may issue a recommendation demanding that the violation be remedied through a modification of law and/or practice.[25]

Although the will to equate civil and political rights, enshrined in the ECHR, and economic and social ones, included in the ECS, seems to prevail, only the former covenant has been ratified. This appears to indicate that social rights are relegated to the periphery of the EU legal order. In addition, the ECS has a relatively ineffective system of control and the EU is not a member of the Council of Europe. However, it should not go unnoticed that the latter instrument significantly contributed to the elaboration of concepts later included in the Community Social Charter of 1989.

The latter, which is a community act, encompasses the fundamental social rights of workers and defines the general framework for the

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[21] S. Evju, 'The European social Charter', in R. Blanpain (ed.), *The Council of Europe and the social challenges of the XXI century* (Kluwer Law, 2001) 19.

[22] Its fifteen independent and impartial members are elected by the Committee of Ministers of the Council of Europe for a period of 6 years, renewable.

[23] The report will only concern the provisions which have been accepted by the submitting member State.

[24] The conclusions of the Committee are published every year and posted on the website of the Council of Europe (http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsIndex_en.asp)

[25] The Committee of Ministers' work is prepared by a Governmental Committee comprising representatives of the governments of the States Parties to the Charter, assisted by observers representing European employers' organisations and trade unions which, since 1995, have the possibility to lodge complaints of violations of the Charter to the European Committee of Social Rights See further J. F. Akandji-Kombé, 'L'application de la Charte sociale européenne: La mise en oeuvre de la procédure de réclamations collectives', (2000) *Droit social* 888.

development of European labour law. Many of the economic and social rights protected by the ECS received a first formal acknowledgment by the EC legal order through the Social Charter. Initially, it was intended to be part of the Single European Act, but remained a mere political declaration after the refusal of the United Kingdom to confer binding force upon it. This opposition also explains why the Social Charter foresees mere guidelines in the field of employment for the national and supranational legislators .

Although not formally binding, some authors consider this Charter an instrument of soft law, used by the Court of Justice as a catalogue of social rights, and by the European legislator during the nineties as an inspiration for some labour related directives.[26] The adoption of the Social Charter by eleven Member States favoured the debate on social rights at the Community level. In fact, during the drafting of the Maastricht Treaty, those eleven States reached an agreement with the United Kingdom on the Community social policy. Despite the lack of a formal competence in this field, the EC was entrusted with the task of defining minimum standards of protection, the application of which pertained to the Member States. For example, the Community had to guarantee minimum standards of remuneration, which were however concretely established by each Member State. Also, the right to strike and the freedom of association remained questions of national law and escaped the Community regulatory powers.

Even the Amsterdam Treaty disappointed those who expected a triumphal entry of social policy in the realm of Community competences. On the one hand, the Amsterdam Treaty made explicit reference to the Community Charter and to the ECS introducing guidelines for a social European policy through Art. 136 TEC. On the other hand, it did not create well defined rights, and in particular it failed to establish an effective system of protection. The right to equality between men and women constituted an exception being recognised by Art. 141 TEC, a provision which was soon declared of direct effect.[27]

One of the major achievements of the Amsterdam Treaty was the removal of the opt-out of the United Kingdom on social policy. Protocol no. 14 of the Maastricht Treaty was repealed and the content of the Agreement on social policy included in Arts. 136 to 145 of the revised EC Treaty. However, action taken at a supranational level was only intended to "complement and support" Member States policies in this area and the aforementioned provisions, with the notable exception of Art. 141 TEC, were devoid of direct effect.

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[26] See, for instance Directive 92/56/EEC on the approximation of the laws of the Member States relating to collective redundancies, [1992] OJ L 245/73; Directive 98/50/ECC on the approximation of the laws of the Member States relating to the safeguarding of employees'rights in the event of transfers or undertakings, businesses or part of undertakings or businesses, [1998] OJ L 201/88.

[27] Case 43/75 *Defrenne* [1996] ECR 455, para 42.

Although only a very small part of the EU budget was specifically devoted to the development of a social policy, many expenditures included therein were nonetheless able to indirectly affect the social policies of the Member States, namely those provided for within the Common Agricultural Policy, as well as Structural and Social funds. In addition, it should not be forgotten that a growing number of positive social obligations were being imposed on the Member States pursuant to the EC Treaty: an example of this is the improvement of labour conditions for mothers and the guarantee of a safe and healthy working environment.[28]

National welfare law and social policies were subject to the basic tenets of EU law, including those relating to fundamental freedoms, competition, state aids and, of course, those on equality between men and women in the workplace.[29] In the field of social welfare, the result of this symbiotic relationship between EU and national law is a contribution to the development of a multilevel system of social welfare. Welfare governance took place at two and perhaps more levels, depending on the protection-oriented remedies offered at the community level.

4 The Open Method of Coordination

As previously seen, the allocation of competences between the EU and the Member States remained of central importance for the full recognition of social rights at the Union level. The European Council of March 2000 set up the so-called Lisbon strategy: a strategic plan aimed at turning the EU into "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion."[30]

The Lisbon strategy indicates two objectives: the improvement of European competitiveness and the development of the European social method through social cohesion. The implementation of those policies entails integration via coordination of the Member States' legal orders, the so called Open Method of Coordination (OMC). The OMC – which appears to be an alternative to the harmonization approach – is based on three elements: flexibility, the use of non regulatory instruments and the partial delegation of powers. It was used for the first time in the late 1990s as an

[28] See for example Joined Cases C-397 to 303/01 *Pfeiffer* [2004] ECR I-8835 and Case C-207/98 *Mahalburg* [2000] ECR I-549.

[29] See M. Dougan and E. Spaventa, 'Wish you weren't here: new models of social solidarity in the European Union', in M. Dougan and E. Spaventa (eds.), *Social welfare and EU law* (Hart Publishing, 2005).

[30] See Lisbon European Council, 23–24th March 2000, Presidency Conclusions, accessible at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm, para 5.

alternative to the community method to guarantee a minimum coordination of the Member States' policies in the field of employment. The so-called EES, the European Employment Strategy, was created in 1997 during the Luxembourg Council in order to properly address the problems concerning the different employment policies of the Member States and their compatibility with the single market. A dialogue between the Member States had to be ensured in order to develop a common approach in guaranteeing high employment standards within the European single market.

European Employment Guidelines are issued yearly and are to be taken into account by the Member States when developing and implementing national employment policies. The latter are also required to submit an annual report (NAP) illustrating what measures were adopted to implement the guidelines. The role of the Commission is to analyse the results of the annual reports in order to draft subsequent guidelines, so that the Council can make non-binding recommendations to Member States.[31]

The OMC provides a model of integration that does not entail a delegation of competences to the EU. The foreseen mechanisms of coordination are represented by administrative and political networking as well as sharing practices, knowledge and experience, assisted by the cooperation between the different social actors at the European level. Hence, the OMC leaves untouched the subsidiarity principle and does not involve any transferral of competence from the national to the supranational level.

The OMC also provides an adequate framework of mutual learning through the exchange of experiences and good practices and particularly by the involvement of all stakeholders, including social NGOs, in the process of preparing, implementing and evaluating action plans in the field of the fight against poverty and social exclusion. Moreover, the OMC favours exchanges and contacts between organizations at the European level and regional and local social actors.[32] In this respect it is a multilevel instrument of governance which creates a balance between the need to respect diversity among Member States and the coherence of EU action in the social field.

Concretely, the main procedures of this method are: common guidelines to be reflected in the national policy, combined with periodic monitoring, evaluation and peer reviews. These mechanisms are organized as mutual learning processes based on predetermined indicators and benchmarks as additional means of comparing best practices.[33] The OMC is therefore a

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[31] For a more detailed description of the OMC mechanism see S. Smisman, 'Reflexive law in support of directly deliberative polyarchy: Reflexive-deliberative polyarchy as normative frame of the OMC', in O. De Schutter and S. Deakin (eds.), *Social rights and market forces: Is the Open Method of Coordination of employment and social policies the future of social Europe?* (Bruylant, 2005).

[32] Such as employers, unions and NGOs.

[33] Ibid., para 37.

sort of soft law instrument first of all because it does not provide a coercive mechanism and secondly because the Court of Justice is not involved. The OMC is a flexible benchmark which refers to fundamental social rights as parameters used to improve social policies. The role for the open coordination method in the field of social protection and social cohesion has been strengthened in the last decades. By virtue of the positive results achieved through the EES, the use of the OMC was further extended to areas such as social inclusion and pensions.[34]

Although at present the real impact of the OMC on the EU legal order is hard to assess, the European actors seem to have recognized it as a viable way of achieving harmonization. Perhaps this is why the Lisbon Treaty (indirectly) refers to it in some provisions dedicated to social policy. Most notably, Art. 168 (2) TFEU expressly assigns to the EU the task of encouraging *cooperation between the Member States to improve the complementary of their health services in cross- border areas*, and imposes on the latter an obligation to *coordinate among themselves their policies and programmes* in this domain.

As previously stated, the effectiveness of this method in coordinating the different national legal systems remains uncertain, but can still offer a viable alternative approach to the problem, favouring the creation of new employment and a new social policy without generating further bureaucratic burdens.[35]

The OMC is based on recommendations and opinions which are not directly challengeable under Art. 263 TFEU. The role of social rights can nevertheless be appreciated taking into consideration that Member States are allowed to invoke fundamental rights in order to depart from EU law.[36] A clear example of this is offered by the recent *Viking* and *Laval* cases, where the ECJ recognized that important labour rights, such as the right of collective bargaining and the right to collective action, amounted to legitimate interests which, in principle, can justify a restriction of one of the fundamental freedoms guaranteed by the Treaty.[37] A logical consequence of this is that the results of the OMC could amount to derogations, in the sense

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[34] See D. M. Trubek and L. G. Trubek, 'Hard and soft law in the construction of Social Europe: The role of the Open Method of Coordination', (2005) 3 *European Law Journal* 343.

[35] See D. Ashiagbor, 'EMU and the shift in the European labor law agenda: From Social Policy to Employment Policy', (2001) 7 *European Law Journal* 311.

[36] Although the Court has recognized fundamental social rights as part of the general principles of Community law, they have rarely found their way into the case law, and there is no case in which the Court has required the Member States or the EU to take positive action in order to respect an 'unwritten' fundamental social right. See Section 11.6 .

[37] Case C-438/05 *Viking* [2007] ECR I-10779 and Case C-341/05 *Laval* [2007] ECR I-11767. On the relation between fundamental rights and fundamental freedoms see further in this volume S. Curzon, Chapter 8.

that they "promote the application of the rights and principles enshrined in the Charter."[38]

The OMC does not operate in a legal vacuum. It is based on the coordination of the different national systems by defining minimum requirements and the EES demonstrates that this may happen in practice. The marginal role recognized to the workers' and employers' associations, and the absence of participation of NGOs are mainly responsible for the scarce success obtained by the Social European Charter and by the system that this Charter has created. On the contrary, the potential of the OMC mechanism lies in the possibility to determine "a high level of political participation",[39] through the involvement of the civil society. In this respect the OMC could be an important instrument to plan, define and direct the European social policy.

5 Social Rights and the EU Charter of Fundamental Rights

In 1999 the Cologne Council agreed to elaborate a catalogue of rights recognized within the EU legal order. Comprising civil, political and social rights, the aim of such a document was to codify principles expressed in the existing case law on the matter and to provide the latter with more visibility. As to social rights it was decided to take into account those protected by the ECHR, the ECS and the International Labour Organisation (ILO) conventions.

The task was assigned to a special body, the Convention, that drafted the Charter as if it were to have a binding character. This is apparent in the language used in the text, which is often similar to that of the American Declaration of Independence, the UN Declaration of Human Rights, the ECS and the Community Charter of Social Rights. On the other hand, some of the Member States, in particular the United Kingdom, were worried about the possibility that such a change in the legal status of the Charter could cause a significant increase of EU competences, in particular in the field of social policy. This is one of the reasons why Art. 51 CFR explicitly clarifies that the provisions contained in the Charter do not extend the field of application of Union law.

The circumstance that, on the one side, social legislation has a major impact on the life of citizens and that, on the other, the level of protection varies considerably from one State to another (partially) explains why some governments are worried about losing competences in the field of social rights to the advantage of EC/EU legislation and creative case law by

[38] Art. 51 CFR.

[39] See S. Borrás and K. Jacobsson, 'The Open Method of Coordination and new governance patterns in the EU', (2004) 11 *Journal of European public policy* 185.

the ECJ. According to Antonio Vitorino, social rights such as the right to education (Art. 14 CFR), the right to social security and social assistance (Art. 34 CFR) and the right of collective bargaining and action (Art. 28 CFR) could enlarge the tasks of the Community, violating the principle of conferral of powers enshrined in Art. 5 (1) TEC.[40]

Thus, it should not come as a surprise that the "horizontal provisions" of the Charter, such as Arts. 51, 52, 53 and 54 divided Member States between those hoping for a more extensive control by the EUCJ over fundamental rights protection and those fearing that such a control may have widened the Community competences in this sensitive area. As expected, the final text is a compromise: Arts. 51 and 52 CFR state that EU tasks and powers are not extended or modified, and that the Charter can be invoked to review European acts and national legislation, but only when implementing EU law.

Notwithstanding the fact that during the 2000 European Council in Nice the Charter was solemnly proclaimed by the European Parliament, the Council and the Commission, it remained a non-binding political declaration. The EU institutions committed themselves to respect the Charter when proposing or adopting legislation, but the Charter's legal status was postponed and left to the general debate on the future of the European Union.[41]

During the preparatory works of the newly created Convention for the elaboration of a Treaty establishing a Constitution for Europe, it was decided to give the Charter binding force by integrating it in Part II of that text. To limit the expansion of the EU fields of intervention via the promotion/protection of social rights, during the negotiations which led to the signature of the Constitutional Treaty some Member States pressed for an amendment of the Charter obtaining a clear distinction between rights and principles.[42] The United Kingdom in particular conditioned its acceptance of the latter to the explicit indication of such a distinction. The reason for this is quite simple: principles are not justiciable, or at least not in the same way as rights can be. In fact principles come into play only in the interpretation of EU primary and secondary law, or of domestic legislation (and practice) when implementing the former. Only the social rights of the individual are 'fully reviewable'. The Chapter on Solidarity covers individual rights, guiding principles and objectives.[43] According to this distinction Art. 34 CFR (Social security and social assistance) is considered as a mere

[40] See Document 03, 5-VII-2002 accessible at www.european-convention.eu.int

[41] See in particular Laeken European Council, 14–15th December 2001, Presidency Conclusions, accessible at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/68827.pdf

[42] See Art. 52 CFR.

[43] It should not go unnoticed that other social rights, such as non discrimination and equality between men and women, are included in other parts of the Charter. See Art. 20

objective; Art. 28 CFR (collective bargaining) is a guiding principle[44] since its practical specification is left to national legislation while provisions such as Art. 29 CFR (right to access to placement services) and Art. 31 (2) CFR (maximum working hours), are considered justiciable.

With the failure of the Constitutional Treaty, the issue of the legal nature of the Charter remained unsettled and continued to represent one of the central issues to be discussed during the 2007 IGC, after the so-called period of reflection. In the meantime the opposition to its binding force became more evident, so that in the end it was decided not to incorporate it in the Lisbon Treaty. However, pursuant to the new formulation of Art. 6 TEU, the Charter has the same legal value as the Treaties. As a consequence, it becomes a (formal) parameter of legality of EU acts.

It is well known that one of the most distinctive features of the Charter is that it postulates the indivisibility of fundamental rights. Civil, political and social rights are in fact regarded as equivalent (i.e. not hierarchically organized), and inherent to all human beings. Another characteristic is that, with the notable exception of those specifically directed at EU citizens, rights are generally referred to all persons present on the EU territory, regardless of their nationality. This undoubtedly strengthens the idea that fundamental rights are perceived as universal.

Furthermore, the provisions of the CFR dealing with social rights must be read jointly with those included in Title X of the TFEU, devoted to social policy, and in particular with Art. 151 TFEU. The latter provides that, when implementing its policies and actions, the Union must take into account the promotion of employment as well as the need to guarantee an adequate social protection, to fight social exclusion and to increase the standard of education, training and human health. In addition, Art. 168 TFEU acknowledges the role of social parties by increasing the debate on employment.[45] This is particularly important considering that although social rights are not self-executing and need to be implemented through positive domestic measures,[46] they may play an important role in other domains of EU competence.

Those who oppose the Charter's legal enforceability claim that this would allow the EUCJ to "have substantial new power to review and change

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CFR (Equality), Art. 21 CFR (Non discrimination), Art. 23 (Equality between women and men).

[44]In this respect is should also be noted that Art. 137 (2) TEC expressly excluded collective bargaining and action from EU legislative competences.

[45]Gil y Gil J.L., 'Los derechos sociales en la Carta de los derechos fundamentales de la Union Europea', (2003) 8 *Relaciones laborales: Revista Critica de Teoria y Pratica* 93.

[46]An example of this particular role of social rights can appreciated in the Directive 96/71/EC on the protection of posted workers, [1997] OJ L 18/1, which is formally based on Art. 57 (2) EC Treaty (now 64 (2) TFEU), but nonetheless affects the social rights of employees.

national laws."[47] Of course this is an extreme view, but on the other hand it cannot be ruled out that the Court, through its case law, could extend the effective protection of fundamental rights. Under the former treaties, the ECJ viewed the Charter as a codification of those social rights which were already part of the EU legal order[48] and used it as a source and inspiration for the interpretation of social policy measures taken by EU institutions when acting under Art. 137 TEC.[49] Against this background it is well known that the United Kingdom, Poland and the Czech Republic have negotiated what appears to be an opt-out from the Charter, expressed in Protocol No. 30 of the Lisbon Treaty.

6 Social Rights vs. Economic Freedoms: The Balancing of Interests in the Case-Law of the European Court of Justice

In order to better understand the hostility of some countries towards the adoption of a binding Charter, it appears useful to analyze the attitude of the Court of Justice regarding social rights. With the entry into force of the Lisbon Treaty social rights assume a new role in the *aquis* due to their equation with the economic and civil rights. This means that also social rights shall be balanced with the economic freedoms when they enter in conflict with them.

To date social rights have generally been regarded as 'secondary rights' and the four economic freedoms have tended to prevail over social rights. In performing this balancing of interests the Court uses the proportionality test and accepts limitations to the former only when: (a) mandatory requirements are at stake (e.g. protection of workers); (b) the restriction is effectively capable of protecting the (legitimate) objective pursued and (c) the restriction is strictly necessary in order to attain that objective.

Indeed the Court has recognised the right to paid vacation, the right of dignity, the right of freedom of thought and the right of meeting,[50] thereby showing a preference for individual social rights. By contrast, collective rights, and in particular the right to strike, were addressed for the first time

[47] See 'Guide to the Constitutional Treaty', accessible at www.open-europe.org.uk

[48] See Case C-173/99 *BECTU* [2001] ECR I-4881, AG Tizzano. See further in this volume V. Bazzocchi Chapter 10.

[49] See Case C-84/94 *UK v Council* [1996] ECR I- 5755 para 15.

[50] See Case C-36/02 *Omega* [2004] ECR I-9609; Case C-112/00 *Schmidberger* [2003] ECR I-5659, Case C-71/02 *Karner* [2004] ECR I-3025; Case C-210/03 *Swedish Match* [2004] ECR I-11893.

in *Viking*[51] case. In this case, as in *Laval*[52] and *Rüffert*,[53] the Court was called to balance the protection of workers' rights and working conditions together with the safeguard of fundamental freedoms as they are established by primary and secondary EU law. Here it was a matter of determining whether it was legitimate for an international trade union to use a collective action to force a ferry company to abandon its plans to re-flag a ship from Finland to Estonia. Viking argued, inter alia, that the threat of a collective action by the Finnish Union, and the coordination activities within the relevant association of trade unions (ITF), were incompatible with its right of establishment as guaranteed by Art. 43 TEC. The Laval case, instead, concerned the possibility for a Swedish Trade Union to use a collective action in order to force a Latvian company to enter into a collective agreement fixing work and pay conditions which went beyond the core mandatory rules established in the Posting of Workers Directive. Finally, Rüffert was about the scope of public procurement rules in a German Land Law and more precisely whether they could impose on a Polish undertaking wages higher than those set by the universally applicable federal collective agreement.

These cases focus on the conflict between the freedom of establishment (Art. 43 TEC, now 49 TFEU) and the freedom to provide services (Art. 49 TEC, now 56 TFEU), and collective actions taken by Trade Unions in order to pressure undertakings and avoid social dumping.[54] According to the Court the need to balance these potentially conflicting rights rests on the following considerations: (a) collective social rights, included in the Charter, fall within the constitutional heritage of the Member States and are thus principles of EU law[55] and (b) it is necessary to combine political and economic integration, the four freedoms representing a 'constitutional limitation' to social rights.

Hence, the right to strike appears to amount to a mandatory requirement capable of justifying a derogation to economic freedoms. On the other hand, the fact that their regulation falls within the competence of the Member States does not entail that the latter are free to limit the freedom to provide services and the freedom of establishment. To use the words of the Court:

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[51]Case C-438/05 *Viking*, n. 37 above. See also Case C-265/95 *Commission v France* [1997] ECR I-6959.

[52]Case C-341/05 *Laval*, n. 37 above.

[53]Case C-346/06 *Rüffert* [2008] ECR I-1989.

[54]One of the main problems here is represented by the fact that according to the constitutional traditions of the Member States, Trade Union agreements are autonomous in nature and amount to a constitutional prerogative, but are formally not attributable to the State. On the other hand, it should be noted that social dumping is not regulated in EU secondary legislation.

[55]Case C-438/05 *Viking*, n. 37 above, para 44 states that: "The right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of a general principles of Community law the observance of which the Court ensured [...]"

> even if, in the areas which fall outsides the scope of the Community's competences, the Member states are still free, in principle to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising those competences, the Member States must nevertheless comply with Community law.[56]

All conflict between economic freedoms and social rights must respect the principle of proportionality, an assessment which is normally left to the national judge. However, in all the above mentioned cases, the ECJ considered that the actions taken by the trade unions went beyond what was necessary to protect the workers involved. More notably, before applying a strict proportionality test, the Court 'wisely' conditioned the lawfulness of the collective action to the circumstance that "the job or conditions of employment at issue are in fact jeopardised or under serious threat."[57]

In conclusion, what emerges from these cases is that: (a) the right to strike and collective actions were granted the status of fundamental rights even before the Charter acquired full legal force; (b) by reason of the extensive reading of Art. 137 (5) TEC, now 151 (5) TFEU, the lack of legislative competences in the field of social rights does not relieve the Member States from the duty to ensure their respect; (c) as all mandatory requirements, social rights may justify a restriction to economic freedoms only insofar as their exercise complies with the principle of proportionality.

Now that the Charter has entered into force, it is suggested social rights will no longer be viewed as mandatory requirements, but – at least inasmuch as they are (directly) enforceable – as fundamental rights having the same status of Arts. 49 and 56 TFEU.

7 The UK and Polish Protocol on the Charter: A Real Opt-Out?

There has been particular concern in Britain that some of the rights and principles in the Charter could allow the EUCJ's case law to impinge on British law, especially in the field of employment law. This was considered to be particularly true for Art. 28 CFR on the right of workers to be consulted by their employers, the right of collective bargaining and the right to strike. However, these preoccupations are believed to be ill-founded since the Charter applies to EU institutions and to Member States, not only when they implement EU law. As the EU has no competence to pass legislation on the right to strike, the Charter cannot be used as a picklock for widening the scope of such a right.[58]

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[56] Ibid.

[57] Case C-438/05 *Viking*, n. 37 above, para 81.

[58] *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference 2003*, CM 5934, September 2003, para. 102.

Many authors claim that, in spite of the wording of Arts. 51 and 52, the Charter is capable of modifying national legislations in the sense of establishing a single standard of European protection, under the supervision of the Court of Justice.[59] The debate on the Charter at the time of the first draft of the Constitutional Treaty showed that those 'safeguards' were not sufficient to allow the British government and other countries to accept the Charter as legally binding. For this reason the United Kingdom asked for and obtained a specific Protocol on the Charter, annexed to the Lisbon Treaty.[60] The ultimate purpose of the latter is to avoid any possible interference by the EU on labour and entrepreneurial rights recognized under British national law.[61] Poland adhered to this Protocol given the entrenched notion of 'family' under domestic law. With respect to social rights, instead, the government feared a decrease in the level of protection of workers with respect to the guarantees they receive pursuant to national legislation as a consequence of the activism of Solidarnosc.[62] Lastly, in 2009, upon ratification, also the Czech Republic obtained the possibility to be included in the Protocol concomitantly to the next accession Treaty.[63]

However, it appears that the Protocol leaves the situation (and the competences of the EUCJ) substantially unaffected since, on the one side, the British and Polish courts are in any case obliged to respect the primacy of EU law[64] and, on the other, it merely reasserts what is already clear from Arts. 51 and 52 CFR. In addition, it is commonly accepted that the Court of Justice could continue to elaborate on social rights as general principles of EU law, a category which survives the Lisbon Treaty. Indeed, it is too early to assess the real impact of the Protocol, but the possibility for the EU law to interfere with the social model of its Member States cannot be excluded a priori. The refusal to concede an important portion of their sovereignty currently impedes any attempt to harmonize the legislation in this area. As a consequence, a different approach to the problem founded on the co-operation between the Member States could be a viable solution.

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[59] See 'The EU Charter of Fundamental Rights: Why a fudge won't work', accessible at www.openeurope.ork.uk

[60] See Protocol No 7 annexed to the Lisbon Treaty.

[61] On the scope of Protocol No 30, see further in this volume G. Di Federico, Chapter 2.

[62] Solidarnosc is a particular trade-union characterized by a major Catholic component. It was born during the 1980s and during the 1990s it became the antagonist of the Communist party, and led the movement for the liberal-democratic development in that country.

[63] The enlargement to Croatia and Iceland will most probably take place in 2012.

[64] See *Garland v British Rail Engineering Ldt* [1983] 2 AC 751, *Pickston v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering* [1990] 1 AC 58.

8 Final Remarks

In conclusion it can be said that social rights involve and are involved in many aspects of the EU legal order. While Member States recognize social rights to various extents, the EU has limited competences in this field. On the other hand, the ECJ actively contributed to their promotion, affirmation and development, thereby raising concerns as to the possible widening of supranational competences through judicial activism.

Given the opposition by many Member States to give up sovereignty on social matters, an alternative to the traditional community method was elaborated; a compromise aimed at guaranteeing the (most effective) protection of social rights. The OMC promotes a common understanding of the problems posed by the social rights dimension and stresses the need for common employment standards within the EU through a method of mutual accord. Although devoid of an effective mechanism of control, this alternative method has proven to be effective in addressing a variety of issues, ranging from the ESS macro-economic policy to employment policy and from social inclusion to enterprise policy. In this sense it has been suggested that in the absence of binding social norms at the EU level, the OMC could influence national social policies and promote a more uniform approach, thus reducing the risk of a *race to the bottom* effect due to regulatory competition.[65]

With the entry into force of the Lisbon Treaty, social rights are equated to civil and political rights as the newly binding Charter postulates the indivisibility of fundamental rights. However, social rights are not necessarily (directly) enforceable; nor, a fortiori, will their violation entail sanctions. What is clear is that they have entered the judicial arena and that in the future the EUCJ will face an ever increasing number of cases presupposing a balancing of economic freedoms and social rights. For the moment one can only hope in the emergence of a new "heroic jurisprudence".[66]

[65] See S. Smismans, 'The Open Method of Coordination and fundamental social rights, in G. De Búrca and B. De Witte, n. 11 above, at 237.

[66] See R. Bifulco, M. Cartabia, A. Celotto, 'Introduzione', in R. Bifulco, M. Cartabia, A. Celotto (eds.), *L'Europa dei diritti* (Il Mulino, 2001) 12.