

The perspectives of the European Social Citizenship

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A- Clearing the scene: Social rights and citizenship in Europe

Social citizenship is an elusive concept¹ and not only because of its intrinsic ambivalence. Examined from the viewpoints 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, or more generally, Anglo-Saxon, legal cultures³, which can be traced to the very different weight attached to the social element within them. The first part of this paper aims to define the term 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.

A-1- A brief genealogy of social rights

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”⁵. 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” one 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

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¹ See 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 zu 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 Beveridge, W. (1909) *Unemployment: A problem of industry*, London: Longmans.

régime' were the monarchy overthrown⁶. 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 people⁷.

Still, it was the 19th century that shaped definitively the European legal concept of social rights. This was the outcome of two opposite historical currents, a revolutionary and a counterrevolutionary one, which tried to give an answer to the great 'social question' of this century: how could the market and the representative, timocratic system be made compatible with the extension of political and social rights, without a socialist revolution?⁸

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 to the work is the right of the workers*"⁹. 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*"¹⁰.

The 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

⁶ 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.

⁷ 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 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 (1793), *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".

⁸ 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.

⁹ 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.

¹⁰ Lavigne op.cit. 262, Rapport de la commission sur la prévoyance et l'assistance publique, 1850.

(Sozialistengesetze, 1878-1890)¹¹. 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 rights¹². 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 traditional liberties. The constitutionalization of the social obligations of the state was predominantly a 20th century phenomenon¹³.

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 break¹⁴.

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 protect them and guarantee their free exercise¹⁵. 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*”,¹⁶ 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

¹¹ King William I, in his introductory speech to 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.

¹² Donzelot, J., (1988) *The promotion of the social rights*, Economy and Society 17, 403-404.

¹³ 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).

¹⁴ 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 Steenberg (ed.), *The condition of citizenship*, London, Sage Publications, 90-104, p. 91.

¹⁵ See Binoche, B. (1989), ‘Critiques des droits de l’homme’ Paris: 1989, p. 4 ff.

¹⁶ As quoted by. Reich, Ch.A. (1964), ‘The new property’, Yale L.J. 5, 733-778, p. 772

market could not prevent. In this way, they implied the re-politicization of the market, in the opposite direction of the French revolution of 1789, which separated the realms of state and economy¹⁷.

Nonetheless, social rights are not “socialist rights”¹⁸. 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 latter¹⁹. 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 one²⁰, 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 tort²¹, 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”²².

Hence, the basic function of social rights is “market correcting”, reconciling social policy and market order²³. 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”²⁴. This ‘basic conflict between social rights and market value’²⁵, 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,

¹⁷ 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. Eisinger (Eds *Building States and Nations*), Vol. 1: Models and Data Resources, London: Sage, pp. 73- 98.

¹⁸ See Schmitt, C., (1970) *Verfassungslehre*⁵, Berlin, p. 169, where he characterizes social rights as “essentially socialist rights”.

¹⁹ Cf., among others, Offe, C. (1984), *Contradictions of the Welfare Society*, London: Hutchinson, p. 61.

²⁰ 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.

²¹ 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

²² 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.

²³ 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.

²⁴ 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.

²⁵ Marshall, op. cit. p. 42.

according to the widely accepted typology of G. Esping-Andersen²⁶, 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”²⁷.

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 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 Constitution 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 Labour 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)²⁸, 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

²⁶ Esping-Andersen, G., (1990) *The Three Worlds of Welfare Capitalism*, Cambridge: Polity Press, 30 ff, 46 ff.

²⁷ Flora, P., Heidenheimer, A., (1982) ‘The historical core and changing boundaries of the Welfare State’, in P. Flora and A. Heidenheimer (Eds) *The development of welfare state in Europe and America*, N. Brunswick: Transaction Books, 50-59.

²⁸ 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 economic order must conform to the principles of Justice and to the goal of ensuring a decent existence for everybody. It is within these confines that economic liberty is protected.” 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) *Verfassungslehre*, op. cit. (note 18) p. 169.

(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.

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 general principle of the Constitution, on par with the Rule of Law. The majority of the new democracies have incorporated a similar clause in their Constitutions²⁹, but 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 it³⁰. Illustrative of its general and expanding recognition is the fact that in Greece, the term was explicitly introduced by the constitutional revision of 2001³¹, 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 ones³². 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 spheres³³. In this sense, the USA or Australia are “welfare states” but not “social” ones, as social policy therein has no constitutional foundation.

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 Constitutions³⁴, or an analytical enumeration of social rights³⁵, or both³⁶. It is noteworthy that

²⁹ 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.

³⁰ See, e.g., for the Switzerland, Müller J.P., (1973) ‘Soziale Grundrechte in der Verfassung?’ *Schwizericher Juristenverein, Referate und Mitteilungen*, Heft 4, Basel, . 690, esp. p. 824. Also interesting is the case of Austria, where, although the Constitutional Court considers that the Constitution 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.

³¹ Art. 25 para. 1.

³² Sometimes the term “social welfare states” is used instead. See, for instance, Sajo, A., (2005) ‘Social Rights: A wide Agenda’ *European Constitutional Law Review* 1, 38-43.

³³ 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.

³⁴ 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.

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 state³⁷. 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 ones³⁸.

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 legal justification to circumscribe its limits.’³⁹ Hence, concepts such as the human dignity⁴⁰ or social justice⁴¹, acquire not only a programmatic but a fully normative, binding content⁴².

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 law⁴³, Bestandsgarantie”, “Bestandschutz” or “Ruckschrittsverbot” in Germany) is a minimal guarantee⁴⁴. It does not prohibit all retrogressive legislation, but only measures that abrogate

³⁵ 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).

³⁶ Cf. Katrougalos, G., (1996) *The implementation of social rights in Europe*, The Columbia Journal of European Law, 278.

³⁷ 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 (Vertrauensschutzprinzip, principe de confiance légitime), etc.

³⁸ 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.

³⁹ Lyon-Caen, A. (2002) ‘The legal efficacy and significance of fundamental social rights: lessons from the European experience’, *ibidem*, p. 187

⁴⁰ See BVerfGE 1, 104.

⁴¹ 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.

⁴² See, Boggetti, 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 .

⁴³ See Jorion, B., (1995) ‘Note’, CC 94-359, AJDA 455, 461, Pisier, Ev., (1986) ‘Service public et libertés publiques’, in *Pouvoirs* no 36 1151.

⁴⁴ “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,

or essentially lessen statutory guarantees without replacing them with others of equivalent result⁴⁵. 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 (Existenzminimum⁴⁶), 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 citizenship⁴⁷.

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 the principle of equality is construed not only formally, but also substantively, in association with the concepts of solidarity and social justice⁴⁸. 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*-⁴⁹.
- Fundamental rights do not produce effects only at individual level, but also form an objective system of values thus having, thus, a "radiating effect", obliging all state authorities (legislative, executive and judiciary) to act in conformity with them in all spheres of public action⁵⁰. 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*

Löbenstein, E., (1983) 'Soziale Grundrechte und die Frage ihrer Justiziabilität, in: FS Floretta, 1983, . 224-225, 209.

⁴⁵ 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 to below a minimum level which may be required according to Article 70E of the Constitution.[ABH 1995, 192] and the principle of human dignity.

⁴⁶ BVerfGE 40, 121, (133). In the aforementioned decision 43/1995 (note 45), 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.

⁴⁷ Waldron, J. (1993), 'Social Citizenship and the defense of welfare provision', in *Liberal Rights: Collected Papers 1981-1991*, p. 271, 273.

⁴⁸ 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*).

⁴⁹ See Tushnet, M. (2003), 'The issue of state action/horizontal effect in comparative constitutionalism, 1, *ICON*, 79

⁵⁰ The seminal case is the Lütth 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.

a common purpose.⁵¹ 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 values⁵².

- The state assumes an obligation for positive measures for the protection of traditional, “negative” civil rights and liberties (Schutzpflicht)⁵³ 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 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 rights⁵⁴.

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 law⁵⁵. 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 Italy⁵⁶, the Constitutional Court recognizes as fully enforceable the constitutional rights to education⁵⁷, to family⁵⁸, to health⁵⁹ and social insurance⁶⁰. In Portugal⁶¹, the Constitutional Court has invalidated

⁵¹ 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.

⁵² 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.

⁵³ 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 extent 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 6, esp. 143 ff, D., Szczekala, B. (2002), *Die sogenannten grundrechtlichen Schutzpflichten im deutschen und europäischen Recht*, Berlin, Duncker and Humblot.

⁵⁴ 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 Rights. *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.

⁵⁵ 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

⁵⁶ See Vergottini de, G., (1991) ‘La protection des droits sociaux en Italie’, in F. Matscher (Ed.) *Die Durchsetzung wirtschaftlicher 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.

⁵⁷ Cor. Cost. 27/1987

⁵⁸ Cor. Cost. 181/1976

⁵⁹ Cor. Cost. 88/1979, 184/1986, 479/1987, 992/1988, 455/90, 304/1994.

⁶⁰ Cor. Cost. 160/1974, 64/1975.

statutory legislation as contrary to the right to health⁶² and to social insurance (pensions)⁶³. 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,⁶⁴ but also in other fields of social protection, e.g. in the case of family allowances⁶⁵.

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 state⁶⁶. Echoing the sociological work of Durkheim⁶⁷, 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*”)⁶⁸. Public service corresponds to rights and procedures and to positive obligations of the state⁶⁹.

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’ functions⁷⁰, in the sense that positive obligations derive also from “negative” freedoms, in order to achieve an effective and not just textual protection⁷¹, in cases related to the rights to

⁶¹ 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.

⁶² No 39/84.

⁶³ No 12/88, 43/88, 191/88.

⁶⁴ StE 10/88, 1876/80, 1096/84, 695/86, 1097-99/1987, 2783/1985, 930/1982, 1615/88, 2282/92, 3186/86.

⁶⁵ StE 2004/1998.

⁶⁶ Laufer, R. and Paradeise, C. (1980), *Le Prince Bureaucrate*, Paris: Flammarion, p. 131.

⁶⁷ And especially of his concept of ‘organic solidarity’. See Durkheim, E., *The division of labour in society* (1893), London: Macmillan 1984, 172 ff.

⁶⁸ 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.

⁶⁹ 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.

⁷⁰ Generally, the dominant contemporary position in International law and Labour Law is the indivisibility of rights and the recognition of enforceable fundamental social rights. Indivisibility 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.

⁷¹ The seminal case is the 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

life⁷², to privacy⁷³, to education⁷⁴, to assembly⁷⁵ and child-rearing⁷⁶ or even for protecting aspects of social rights, as the rights to health⁷⁷, to housing⁷⁸ or to social security⁷⁹. 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.*”⁸⁰”

Therefore, 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*”⁸¹. For this reason many scholars believe that 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”⁸². There is not only “a European culture of social justice”⁸³, in the sense of a distinct ethos vis-à-vis the Anglo-Saxon legal systems, but essentially a different polity.

A-3 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 community⁸⁴, usually the nation-state⁸⁵. In this sense, citizenship, is a “right to have rights”

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.

⁷² Yildız v. Turkey (App. no. 74530/01), judgment of 18 June 2002.

⁷³ 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).

⁷⁴ Affaire linguistique Belge A 6 (1968).

⁷⁵ 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.

⁷⁶ 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.

⁷⁷ 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.

⁷⁸ Bilgin v Turkey (2003) 36, James and Others v UK A 98 (1986).

⁷⁹ 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.

⁸⁰ 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.

⁸¹ Aron, R., (1972) Etudes Politiques, Paris: Gallimard, p. 242.

⁸² 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.

⁸³ 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.

⁸⁴ 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

according to the definition attributed to H. Arendt⁸⁶ and simultaneously, in the words of Abba Sieyès ‘what makes men resemble each other and rally’ (“*Se rassembler et se ressembler*”) ⁸⁷. 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 citizenship⁸⁸. 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*’⁸⁹.

In this sense, citizenship consists of a triad of rights, often –but not accurately- said to belong to different generations: Civil rights to the eighteenth, political to the nineteenth and social to the twentieth. According to the classical theorisation of Marshall⁹⁰, these three types of rights emerged during the last three centuries, which correspond to three consecutive types of citizenship⁹¹.

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 Prussia⁹². Accordingly, the principal inconsistency of the above theorisation, is its disregard

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’.

⁸⁵ 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.

⁸⁶ 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.

⁸⁷ As cited by Rousseau, D. (2005) ‘Citizenship in Abeyance’, *European Constitutional Law Review*, I, 44-46, p. 46.

⁸⁸ 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.

⁸⁹ Preuss, U., et alii. *Traditions of Citizenship in the European Union*, *Citizenship Studies*, Vol. 7, No. 1, 2003, 1-12, p. 7.

⁹⁰ 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.

⁹¹ 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 trusts, 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 17, 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.

⁹² 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: Routledge, 133, p. 135. The European Community seems also to disrupt the Marshallian sequence, since it began with civil rights, has gone on to establish a minimum of social rights and is now promising to develop political rights. See Roche, M., *Rethinking Citizenship* (1992) Cambridge, Polity

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 rights⁹³, 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*”⁹⁴, 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 future⁹⁵. 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 convicts⁹⁶.

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 recognition of social rights. The only reason the liberal state did not extend political rights was the fear that ‘*democracy might produce socialism*’⁹⁷. 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*”.⁹⁸

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.

⁹³ 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.

⁹⁴ First established by the law of 22 germinal of the year X, art. 11, 12.

⁹⁵ 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 ‘*sedition opinions*’ Rivero, J., (2003) *Libertés publiques*, Paris: Thémis-PUF, p. 69 ff.

⁹⁶ See Swann, de, A., (1988) *In care of the State*, Cambridge: Polity, p. 191. Generally the workhouses for the poor were “*places of discipline and terror*” (Scott, J., (1994) *Poverty and Wealth, Citizenship, Deprivation and Privilege*, N. York: Longman, p. 8.

⁹⁷ Esping-Andersen, G., (1991), *The three worlds of Welfare Capitalism*, op. cit. p. 11.

⁹⁸ Marshall, T.H, *Citizenship and social class*, op. cit. p. 8.

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 and identity⁹⁹, 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 community¹⁰⁰.

Even for Marshall, citizenship was “*by definition national*”¹⁰¹. 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.’¹⁰² Therefore it is not unexpected that although states have lost their ‘internal sovereignty’¹⁰³, 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 provision¹⁰⁴. In this sense, welfare may be the ‘*last bastion of respectable nationalism*’¹⁰⁵. 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 social citizenship, associated with the specific role of social rights: the de-commodification of social services. Social citizenship confers a right to access to social goods independently of labour market participation and personal income¹⁰⁶. 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 de-commodification of the status of individuals vis-à-vis the market*”¹⁰⁷.

⁹⁹ See Ashford D.E. (1986), *The emergence of Welfare States*, Oxford: Basil Blackwell.

¹⁰⁰ 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

¹⁰¹ 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.

¹⁰² Dwyer, P. (2000), *Welfare Rights and responsibilities: Contesting Social Citizenship*, Bristol, Policy Press., p. 187.

¹⁰³ 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*, Philadelphia: Temple University Press.

¹⁰⁴ 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.

¹⁰⁵ Davies, G., (2006) ‘The Process and Side-Effects of Harmonisation of European Welfare States’, Jean Monnet Working Paper 02/06, p. 34,

¹⁰⁶ 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.

¹⁰⁷ 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.

In other words, social citizenship contrasts with the tendency of consumerism to commodity ever more facets of life into marketed products¹⁰⁸, leaving social services insulated from the market. 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’¹⁰⁹. On the contrary, in the 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”¹¹⁰. 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”¹¹¹.

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 project¹¹². Integration’s social objectives have served merely as an auxiliary and European rights were tailored according to the functional requirements of the internal market¹¹³. 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 harmonisation while the improvement is being maintained*”¹¹⁴. However, this goal was not to be achieved by interventionist redistributive measures, but spontaneously, by the formation of the common market, which would promote wealth and, consecutively, welfare.

¹⁰⁸ Baldock, J., (2003) ‘On being a Welfare Consumer in a Consumer Society’ *Social Policy & Society* 2:1, 65– 71, p. 65.

¹⁰⁹ 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

¹¹⁰ Fraser N. Gordon, L. (1994) ‘Civil Citizenship against social citizenship? On the Ideology of Contract-Versus-Charity’ in B. Von Steenberg (ed.), *The condition of citizenship*, London, Sage Publications, 90-104p. 90 ff., especially p. 94, p. 98.

¹¹¹ Reich, Ch.A. (1964), ‘The new property’, *Yale L.J.* 5, 733-778. This theorisation 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”.

¹¹² 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).

¹¹³ 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*.

¹¹⁴ 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 Tesorería General de la Seguridad Social* [1987] ECR 3697.

In this framework, social policy has always been the “step-child” of the European integration¹¹⁵, 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 systems¹¹⁶. 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 constitutionalisation of the Treaties and the rules of market integration¹¹⁷: 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.

Consequently, any national interference with market freedoms, if it derives from constitutional provisions, reflecting “a deeply held national societal more or value”¹¹⁸, 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.

Moreover, as is well known, the ECJ, based on international law sources as inspirational guidelines and the “constitutional traditions common to Member States”¹¹⁹ 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 Charters¹²⁰, it is very reluctant to recognize any social rights as general principles¹²¹, much less as

¹¹⁵ 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.

¹¹⁶ 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.

¹¹⁷ 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.

¹¹⁸ 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.

¹¹⁹ See, for example, Case 4/73, *Nold*, [1974] ECR 491 and Case 44/79, *Hauer*, [1979] ECR 3727.

¹²⁰ 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.

¹²¹ 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.

fundamental rights¹²². Evidently, social citizenship's rights make the market less free¹²³. This probably explains, in De Búrca words, the "fear of giving strong legal recognition and priority to particular social values in the face of competing economic interests¹²⁴."

This economic constitution, developed as a function of economic efficiency and with basic aim of protecting market freedom from public power¹²⁵, 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 law¹²⁶.

As EU welfare law remains in "embryonic state"¹²⁷, the repercussions of this clash of values are mostly felt domestically¹²⁸. (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'¹²⁹, but only insofar as they conform to it. Hence, the negative integration of the common market had immediate de-regulatory consequences on national social rights¹³⁰, especially where protective national social regulation was above the European average.

¹²² With most notable exception the gender equality, which is, however, primarily a civil right.

¹²³ 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. 413. 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, p. 180.

¹²⁴ 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.

¹²⁵ 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 117, p. 1.

¹²⁶ 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.

¹²⁷ 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

¹²⁸ 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.

¹²⁹ 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.

¹³⁰ 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 117.

It is true that the gradual ‘demise of the European nation-state’s Keynesian capacity’¹³¹ 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 rights or arrangements have been challenged under the freedom of movement or competition rules¹³². 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 expenditure¹³³.

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 states 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 substantive¹³⁴.

However, the case law of the ECJ has given to the social dimension potential for a second, normative life¹³⁵. 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 Law¹³⁶. Still, there are few 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.

¹³¹ 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.

¹³² 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.

¹³³ 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.

¹³⁴ 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”.

¹³⁵ Cf. 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

¹³⁶ 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.

B-1 The exception of “Solidarity”: A “buttress against internal market law”¹³⁷?

The primary vector of European integration is the elimination of barriers to free movement and distortions of competition¹³⁸. 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 principle¹³⁹. 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 State¹⁴⁰ or, at minimum, because of their non-economic, social character. 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’¹⁴¹. 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 (art. 50 now)¹⁴². 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

¹³⁷ 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.

¹³⁸ 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 Welfare States*, Jean Monnet Working Paper 02/06, p.23.

¹³⁹ 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.

¹⁴⁰ 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 indivisibility’ 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.

¹⁴¹ See AG Tesaro’s Opinion in Case C-120/95 *Decker* [1998] ECR I-1831 and Case C-158/96 *Kohll* [1998] ECR I-1931, para. 17.

¹⁴² 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.

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 undertakings¹⁴³.

However, 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 objectives¹⁴⁴. So, in *FFSA*¹⁴⁵ 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 profit-making, and its contributions were defined by the law and not linked to the risks incurred, as in the private insurance scheme¹⁴⁶. 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*¹⁴⁷ and in *Pavlov and others*¹⁴⁸, 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*¹⁴⁹ the absence of market conditions of competition prompted the Court conceded that organizations entrusted with the management of statutory health insurance and old-age insurance schemes are not undertakings. Similarly, in *Cisal*¹⁵⁰, a case related to a national insurance scheme against accidents at work and occupational diseases, solidarity was evidenced by 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 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*’¹⁵¹. If there is even potential to make profit from the activity, it is an economic one¹⁵². In other words, only if the activity is incompatible even with the

¹⁴³ 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;

¹⁴⁴ 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.

¹⁴⁵ 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*”.

¹⁴⁶ However, in *Poucet* (para 18) the Court has attached importance both to the funds' pursuit of a social objective and their non-profit-making character.

¹⁴⁷ Case C-67/96 *Albany* [1999] ECR I-5751, cf.

¹⁴⁸ Joined cases C-180/98 to C-184/98, *Pavlov and others*, [2000] ECR I-6451.

¹⁴⁹ Joined Cases C-264/01, C-306/01, C-354/01, C-355/01 *AOK-Bundesverband and Others* [2004] ECR I-2493

¹⁵⁰ Case C-218/00 *Cisal* [2002] ECR I-691, paras 38-40.

¹⁵¹ Opinion of AG Jacobs in Case C-218/00 *Cisal di Battistello Venanzio* [2002] ECR I-691, para 38.

¹⁵² See Case C-41/1990 *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-1979.

theoretical possibility of a private undertaking carrying it on, it can escape the internal market rules¹⁵³.

The crucial test seems to be 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 effect¹⁵⁴. According to Advocate General Fennely, ‘social solidarity envisages the inherently uncommercial act of involuntary subsidization of one social group to another’¹⁵⁵. However, the existence of an element of solidarity is not enough. Solidarity must “predominate”¹⁵⁶. 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 solidarity¹⁵⁷.

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 activity¹⁵⁸. In *Geraets-Smits and Peerbooms*¹⁵⁹ the Court, diverging from the opinion of its Advocate General¹⁶⁰, 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 Treaty¹⁶¹.

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*¹⁶², 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”¹⁶³.

Therefore, it is not clear if solidarity is a test for whether there is an application of Community Law or merely justification for an exception¹⁶⁴. 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

¹⁵³ Opinion of AG Jacobs in *AOK-Bundesverband and Others* [2004] ECR I-2493, para 34

¹⁵⁴ 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.

¹⁵⁵ Case C-70/95 *Sodemare v. Regione Lombardia* [1997] ECR I-3395.

¹⁵⁶ Cf. the Opinion of GA Poirares Maduro in Case C-205/03 *FENIN* [2006] ECR I-6295, para. 16.

¹⁵⁷ 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.

¹⁵⁸ 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. Hatzopoulos, V., (2000) *Recent Developments of the Case Law of the ECJ in the Field of Services*, in CMLR 37, 43-82.

¹⁵⁹ Case C-157/99 *Geraets Smits and Peerbooms* [2001] ECR I-5473.

¹⁶⁰ Case C-157/99 *Geraets Smits and Peerbooms*, ibidem, AG’s Opinion, para 54.

¹⁶¹ 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, *Patricia Inizan v. Caisse primaire d’assurance maladie* [2003] ECR I-12403

¹⁶² 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.

¹⁶³ *Albany*, op. cit., para. 60.

¹⁶⁴ Hervey, T. (2000) ‘Social Solidarity: A buttress against internal market law?’ op. cit. (note 137) p. 46.

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 alternative¹⁶⁵.

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”¹⁶⁶. 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 apply¹⁶⁷.

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.*”¹⁶⁸ Actually, any social security system can be refashioned into a market based one¹⁶⁹.

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 beginning¹⁷⁰. However, the early case-law applied a relatively limited judicial control to abusive state interventions in the market by public enterprises¹⁷¹. 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.

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

¹⁶⁵ Odudu, O. (2006), *The Boundaries of EC Competition Law*, Oxford: Oxford University Press, p. 39 ff.

¹⁶⁶ Davies, G., (2006) *The Process and Side-Effects of Harmonisation of European Welfare States*, Jean Monnet Working Paper 02/06, p. 20.

¹⁶⁷ 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.

¹⁶⁸ Opinion of GA Poiares Maduro in Case C-205/03 FENIN [2006] ECR I-6295, para 12.

¹⁶⁹ 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.

¹⁷⁰ 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.)

¹⁷¹ See, for instance, Case 59/75 *Manghera and others* [1976] ECR 91, Case 94/74, *IGAV v ENCC* [1975] ECR 699.

Aid¹⁷². 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’¹⁷³, 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 interest¹⁷⁴.

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 competition¹⁷⁵.

The term “services of general economic interest” is itself unfortunate because ‘economic’ is clearly intended to refer to the service rather than the interest¹⁷⁶. 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’¹⁷⁷. 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.

¹⁷² For an overview see Quigley, C., Collins, A.M. (2003) *EC State Aid Law and Policy*, Oxford: Hart Publishing.

¹⁷³ 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-280/00 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.

¹⁷⁴ 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 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

¹⁷⁵ 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.’

¹⁷⁶ Jones, A. and Sufirin, 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.

¹⁷⁷ 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.

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 citizenship¹⁷⁸. 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 competition¹⁷⁹. Member States are 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’¹⁸⁰. 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 redistribution¹⁸¹. So, it is considered to be an element of the social contract, associated with social citizenship¹⁸² and national self-identity¹⁸³. 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 French 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 regime¹⁸⁴. 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 market¹⁸⁵, as an appropriate means of delivering public services¹⁸⁶. The Court has made clear that Article 86(2) “*being a provision permitting derogation from the Treaty rules, must be interpreted strictly*”¹⁸⁷. 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.

¹⁷⁸ 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.

¹⁷⁹ 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.

¹⁸⁰ Posser, T. (2005), *The limits of competition law*, op.cit. p. 209.

¹⁸¹ Conseil d’Etat (1995), *Etudes et Documents no 46, Rapport Public 1994*, Paris : La Documentation Française.

¹⁸² Cohen, E., Henry Cl.(1997), *Service Public, Secteur Public*, Paris: La Documentation Française, p. 17.

¹⁸³ Prosser, T. (2005), *The limits of competition law*, op. cit., p. 97.

¹⁸⁴ Prosser, T. (2005), *The limits of competition law*, ibidem, p. 108, 122 ff.

¹⁸⁵ 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).

¹⁸⁶ 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.

¹⁸⁷ Case C-157/94, *Commission v Netherlands* [1997] ECR I-5699, para. 37.

*B-3Free movement, European Citizenship and the ‘de-territorialization of welfare’*¹⁸⁸

The free movement of persons was considered as an incipient form of an emerging European citizenship already in the 1960s¹⁸⁹. However, as it has been developed more as a function of economic efficiency for the optimal allocation of labour in the internal market¹⁹⁰ than as an individual human right, it has contributed to the emergence of a kind of “market citizenship”¹⁹¹, 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 residence¹⁹². And, although the ECJ has gradually extended the rights associated to free movement to workers’ family members¹⁹³ and other non-active categories¹⁹⁴, 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”*¹⁹⁵. In this framework, it has repeatedly repelled the argument made by governments that the bonds of national solidarity justified exceptions from the principle of non-discrimination in the allocation of social benefits¹⁹⁶.

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), the second

¹⁸⁸ 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.

¹⁸⁹ 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.

¹⁹⁰ 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.

¹⁹¹ Everson, M., (1995) ‘The Legacy of the Market Citizen’, in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* 73–90.

¹⁹² 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.

¹⁹³ 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.

¹⁹⁴ See, e.g., Case C-357/98, *Raulin* [1992] ECR I-1027 on the right of residence of students.

¹⁹⁵ See, for example, Case 143/87 *Stanton v. INASTI* [1988] ECR 3877, para 13: and Case C-168/91 *Konstantinidis v. Stadt Altensteig-Standesamt* [1993] CMLR 401, where the decision of the German authorities to change the plaintiffs name only violated Community law if and to the extent that it injures his professional activities. See O’ Leary, S. (1996). *The Evolving Concept of Community Citizenship*, *ibidem*, p. 67, cf. also Meehan, E., “European Citizenship and Social Policies”, in Vogel, U. and Moran, M. (eds.), *The Frontiers of Citizenship* (1991) Macmillan, 125-154, p. 128

¹⁹⁶ See especially Case 186/87 *Cowan*, [1989] ECR. 195, based on Article 6 EC.

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*’¹⁹⁷, 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 allowances¹⁹⁸.

In *Martinez Sala*¹⁹⁹ 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. Subsequent decisions such as *Baumbast*²⁰⁰, *Collins*²⁰¹ and *Grzelczyk*²⁰², confirmed this case law and founded a directly effective right to residence under Art. 18 of the Treaty²⁰³.

However, this right is not unlimited. The Court has accepted that the requirement of all Residence Directives that public finances should not be unreasonably burdened by a inactive EU migrant without sufficient means of subsistence, may be regarded as a tolerated limitation of the right to equal treatment in the field of social benefits. Recourse to the social assistance system can in this case constitute a ground for terminating the right of residence²⁰⁴. Further restrictions may still be imposed, in order to determine if there is ‘a significant connection’²⁰⁵ between the applicant for the allowance and the country or reception and more specifically its market.

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 time²⁰⁶. In *Grzelczyk*, it asserted that a student who supported himself for three years but then applied for a social assistance scheme and was

¹⁹⁷ 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.

¹⁹⁸ 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.

¹⁹⁹ Cases C-85/96 *Martinez Sala* ECR I-2691.

²⁰⁰ Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7091.

²⁰¹ Case C-138/02, *Collins* [2004] ECR I-2703.

²⁰² Case 184/99 *Crzelczyk* [2001] ECR I-6193.

²⁰³ Cf Case C -456/02 *Trojani* [2004] related to the direct application of article 18 of the Treaty.

²⁰⁴ Opinion of Advocate General Alber in Case 184/99 *Crzelczyk* [2001] ECR I-6193, para 122, reflected in para 44 of the Judgment.

²⁰⁵ 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.

²⁰⁶ Case C-138/02, *Collins*, [2004] ECR I-2703, paras. 68–70.

denied, suffered direct discrimination contrary to Art. 12²⁰⁷. 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.

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 job-seeker²⁰⁸, although always under an assessment of proportionality. This has been reconfirmed in *Collins*²⁰⁹, 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 treatment²¹⁰ 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 provisions²¹¹.

Newer judgments have reconfirmed this case law²¹² and its postulates 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, it also requires nationals who move to another Member State to have sufficient resources so as not to be "an unreasonable burden on the public finances of the host Member State"²¹³. Social assistance benefits are not, generally, granted prior to acquisition of permanent residence.

In consequence, and 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 rights²¹⁴. So far the Court has not accepted the proposal advanced in some Advocates-Generals' opinions that "the principle of a minimum degree of

²⁰⁷ Case C-184/99, *Grzelczyk v Centre public d'Aide Sociale d'Ottignies-Louvain-la Neuve* [2001] ECR I-6193

²⁰⁸ 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.

²⁰⁹ Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703, para 66. See Golyner, 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* n° 2, 249-274.

²¹⁰ 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).

²¹¹ Case C-138/02, *Collins*, [2004] ECR I-2703, para. 73, operative part 3.

²¹² Cf., for instance, Case C-406/04, *De Cuyper* [2006] ECR I-6947.

²¹³ 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.

²¹⁴ 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, *The Queen (on the application of Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills*, [2005] ECR I-2119. For the unemployed see Case C413/01 *Ninni Orasche* [2003] ECR I-13187.

financial solidarity”, announced in *Grzelczyk*²¹⁵ could create, by itself, a right to entitlement in situations not connected with the fundamental economic freedoms²¹⁶. Therefore, this principle does not establish, therefore, 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 market²¹⁷.

The other recent wave of case law, relating to patient mobility, may have created a ‘Europe of Patients’²¹⁸, but it has not changed dramatically the situation with regard to European social citizenship. In *Decker and Kohll*²¹⁹ 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 services²²⁰. In *Müller-Fauré*²²¹ 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 considerations²²². 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 art. 35 of EUCFR. The absence of a rights language here shows also, in the words of Barnard, an ‘absence of awareness of solidarity’²²³.

²¹⁵ Case C-184/99, *Grzelczyk v Centre public d’Aide Sociale d’Ottingies-Louvain-la Neuve* [2001] ECR I-6193, para 44.

²¹⁶ See the Opinion of AG Geelhoed in Case C413/01 *Ninni Orasche* [2003] ECR I-13187, para. 90-91.

²¹⁷ For a different opinion, see 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.

²¹⁸ 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.

²¹⁹ C-120/95, *Decker*, [1998] ECR I-1831; C-158/96, *Kohll*, [1998] ECR I-1931;

²²⁰ Case C-157/99, *Smits and Peerbooms*, [2001] ECR I-5473 and Case C-368/98, *Vanbraekel*, [2001] ECR I-5363.

²²¹ 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.

²²² 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.

²²³ 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. 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.

The options for health care of wealthier citizens²²⁴, who move often from country to country, are certainly enhanced²²⁵. In this way, instead of an increasing equality between citizens²²⁶, a kind of reverse distribution is taking place: poor (and hence non-mobile) taxpayers are funding the mobility of wealthier traveling consumers²²⁷. This evolution, and the lack of a rights-language approach, runs counter to the principle of de-commodification, 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” overall²²⁸.

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 polity²²⁹. Consequently, in most cases they are granted as means and not ends in themselves, which makes them “second class fundamental rights”²³⁰. 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 employment²³¹. Likewise, the right to health is conceived rather as a freedom to choose between alternative health services²³², etc.

²²⁴ 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”.

²²⁵ 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.

²²⁶ 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.

²²⁷ 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.

²²⁸ 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.

²²⁹ 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) ‘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.

²³⁰ 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.

²³¹ 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.

²³² 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*.

There are, however, a few exceptions, which, like a “‘lone ranger’ in the empty and foggy landscape of European social rights”²³³, 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 competition²³⁴. 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 level²³⁵.

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 pay suffer a competitive disadvantage in intra-Community competition²³⁶. However, in view of later decisions²³⁷, such as *Schröder* and *Sievers*²³⁸, 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 household²³⁹. Moreover, equal treatment, although now a generally accepted fundamental right in EU law is still marked by its origin as ‘market unifier’²⁴⁰. It is, therefore, generally understood as

²³³ 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.

²³⁴ 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.

²³⁵ 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.

²³⁶ Case 43-75 *Defrenne II* [1976] ECR 455, paras 8-10..

²³⁷ 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).

²³⁸ 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 Telekom 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, 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. 161 ff.

²³⁹ 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.

²⁴⁰ More, G. (1999), *ibidem*.

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*²⁴¹ the Court, adopting an individualistic and procedural ‘equal opportunities’ stance²⁴², has considered discriminatory and contrary to European law any “automatic” preference of women based on gender policies²⁴³. In later cases, as *Marshall*²⁴⁴ and *Badeck*²⁴⁵, a similar measure was upheld, as “discriminatory in appearance (but...) in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life”²⁴⁶, 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 discrimination²⁴⁷. 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 past²⁴⁸, or in light of a compelling state interest in racial diversity²⁴⁹. On the contrary, in the social states, there is a constitutional obligation for promotion of substantive and not only formal equality.

Health, safety and working conditions rights

The rights in this category are conceptually diffuse and not organized around a coherent central concept²⁵⁰. 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 movement²⁵¹. 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

²⁴¹ Case C-450/93 *Kalanke v. Bremen* [1995] ECR I-3051. See, esp. para 7 of Opinion of AG Tesouro.

²⁴² 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.

²⁴³ Equally, in *Abrahamson* (Case C-407/98 *Abrahamson and Anderson v. Fogelqvist* [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.

²⁴⁴ Case C-400/95 *Marshall v. Land Nordrhein-Westfalen* [1997] ECR I-6363,

²⁴⁵ Case C-158/97 *Badeck v. Hessischer Ministerpraesident* [2000] ECR I-1875.

²⁴⁶ *Marshall*, op. cit. para. 26

²⁴⁷ 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.

²⁴⁸ See *Regents v. Bakke*, 438 U.S. 265 (1978), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁴⁹ 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.

²⁵⁰ Szyzszak, 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.

²⁵¹ 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

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 regulation²⁵². The second wave aimed to give a 'social dimension' to the internal market programme in late 1980s, addressing essentially similar issues²⁵³.

Although some authors consider that the promotion of such rights is actually "thoroughly defeated" in the EU²⁵⁴ and others claims that ILO standards laid down in the conventions address wider areas and set higher standards than the comparable EU legislation²⁵⁵, the impact of this secondary legislation was important, especially in the countries of the European South.

Moreover, the affirmation by the ECJ of some of these rights as general principles of Community law may have long term implications for their protection. In fact, the Court in *BECTU*²⁵⁶ confirmed paid annual leave as an principle of Community social law 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 reference²⁵⁷. However, it fell short of accepting the AG's opinion that it represented also a "fundamental social right"²⁵⁸, 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 legislation²⁵⁹, the recognition of its 'fundamental' character 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*²⁶⁰ 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*²⁶¹ it also avoided taking a stance based on the fundamental social rights rationale and directed the national court to proceed to a proportionality

²⁵² 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.

²⁵³ 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.

²⁵⁴ Streeck, W., (1996) 'Neo-Voluntarism: A new European Social Regime?' op. cit., (note 252) p. 245.

²⁵⁵ 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.

²⁵⁶ 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.

²⁵⁷ 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.

²⁵⁸ See paras 22, 25, 28, 29, 36 of AG's Opinion.

²⁵⁹ The directive 93/104 on Working Time, cf. Betten, L. (2001), 'The EU Charter on Fundamental Rights: A Trojan Horse or a Mouse?' 17 *IJCLLR* 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

²⁶⁰ Case C-133/00 *Bowden and others v. Tuffnells Parcels Express LTD* [2001] ECR I-7031, cf. Kenner, op.cit. p. 22.

²⁶¹ Joined Cases C-49, 50, 52-54, 68-71/98, *Finalarte* [2001] ECR I-7831.

balancing of the social protection offered by the right to annual leave and its economic implications.

Conclusions

The initial «constitutional asymmetry" of economic and social elements in the basic structure of the Community Treaties is yet to be overcome²⁶². EU citizenship is still defined not by a link to a demos but to a market²⁶³. It did not signify a shift in ethic, as the core set of shared European social values has not fully assumed the status of independent goals in the European polity²⁶⁴. 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 jurisprudence did not allow any space for a market restricting jurisprudence²⁶⁵. Regarding social rights, the ECJ has not proven to be the “least dangerous branch”²⁶⁶. In its ‘integrationist agenda’²⁶⁷ it has interpreted the general interest of the Community always 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 Acts, the former was rarely the winner²⁶⁸.

Although the liberalism of the Court is not the of the Chicago School’s model of ‘perfect competition’ but rather an attenuated form of ‘workable competition’²⁶⁹ it is, still, a non-social state theorization. It failed to introduce a new scale of values into Community law, as its ‘market mentality’²⁷⁰ confined its jurisprudence to an extension of limited civil and political rights on an equal treatment basis, without contributing to the

²⁶² 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.

²⁶³ 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.

²⁶⁴ 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.

²⁶⁵ 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 Witte, *Social Rights in Europe*, Oxford: Oxford University Press, 199-215, p. 203.

²⁶⁶ 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

²⁶⁷ 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..

²⁶⁸ 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,

²⁶⁹ 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.

²⁷⁰ Aziz, M., (2004) *The impact of European Rights on national legal cultures*, Oxford: Hart Publishing, p. 29 ff.

formation of some sort of identity based on rights as ends in themselves and not means to the market integration.

A new balancing in the judicial “construction” of the European Economic Constitution is necessary. 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”²⁷¹. The crucial issue is how to locate social rights within the logic of market integration²⁷², so as “transnational governance would not encroach of fundamental social values (...) which go to the very self understanding” of the European citizen”²⁷³.

This does not require an expansion of EU competencies in the welfare sphere, which is an improbable scenario in political terms. It entails merely ‘a common project, involving moral and cultural foundations’²⁷⁴, at different levels of social protection, transnational, national and subnational, eventually interactive or even competitive²⁷⁵, but not antithetic or self-contradicting. 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 integration²⁷⁶. A nested²⁷⁷ or multiple²⁷⁸ citizenship, as a mixture of rights guaranteed by regional, national and European institutions²⁷⁹ seems the only viable option for the European polity.

²⁷¹ Weiler, J. H.H., ‘To be a European Citizen, Eros and Civilisation’, 324 *The constitution of Europe*, -357, p. 334, 335

²⁷² Deakin and Browne, *op. cit.* p. 39.

²⁷³ 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 Nijhoff Publishers*, 51-76, p. 53, 54.

²⁷⁴ Faist, *op. cit.*, p. 50.

²⁷⁵ 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,

²⁷⁶ 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.

²⁷⁷ See Faist, T., (2001) ‘Social Citizenship in the European Union: Nested Membership’ 39 *JCMS*, 37-58, Golyner, 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.

²⁷⁸ 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.

²⁷⁹ 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.