European 'Social States' and the USA: An Ocean Apart?

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Constitutional protection of social rights – Differences between European and American legal cultures – National solidarity and market relationships – New Deal and the creation of the American Welfare State – Functions of the American State – The reflection of profound political, moral and societal choices – The concept of *Sozialstaat* – Positive obligations and negative freedoms – European Social Model – Social services and competition rules – The concept of solidarity and the deregulatory effect of EU law – EU citizenship – Locating of social rights in market integration

Introduction

The aim of this article is to compare macroscopically the constitutional orders of the continental European states and of the USA, from the viewpoint of the constitutional protection of social rights. The main argument of the paper is that the European 'social states' have a distinct constitutional ethos, which determines their entire legal culture,[1] including also the conceptualisation and the functions of the traditional rights and freedoms. Therefore, a clear dividing line is still discernible between the European and American legal cultures, despite important osmotic procedures between them, which lead some authors to speak of a 'European–Atlantic constitutional state'.[2] This is due to dissimilar historical trajectories (*see*

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[1] 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* P. Häberle (1991), 'Gemeineuropäisches Verfassungsrecht', *EuGRZ* (1991), p. 261-274.

[2] *See*, e.g., S. Fabrini, 'Transatlantic constitutionalism: comparing the United States and the European Union', 43 *European Journal of Political Research* (2004) p. 547; Th. Giegerich, '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* (1997), p. 405–564; cf. M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham, Duke University Press 1994).

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below) and the very different weight attached to the social element in the respective constitutional orders (*see* below). However, paradoxically, the legal order of the European Union seems closer to the American archetype than to the European average and that despite some timid steps of the European Court of Justice (ECJ) in the opposite direction (*see* below). This ideological and institutional mismatch between the European and the national polities could, potentially, undermine the project of European political integration.

The genealogy of social rights in Europe and the USA: two different historical trajectories

The welfare state is the universal type of state of modern times, as all industrialised countries have to face similar social tasks related to the production of a well educated working class, as 'a problem of industry'.[3] 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 as a consequence are far from similar. Different historical trajectories have shaped two different 'welfare polities' on the two sides of the Atlantic.

The 19th century and the 'social question'

The roots of the divergence extend backwards beyond the industrial revolution, to the 18th century, and the intrinsic difference between the American and French Revolutions: the first aimed at political independence as an end in itself, whereas the second aimed primarily at a different social and legal order, and only when this proved unfeasible under the 'ancien régime' was the monarchy overthrown.[4] It is illustrative that, already in 1793, Robespierre had proposed to the Convention a Bill of Rights which recognised as legally enforceable the rights to work and to social assistance and which treated the right of property not as a natural or absolute right, but as one limited by the law and the needs of other people.[5]

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

[4] *See* on that D. Grimm, 'The protective function of the state', in G. Nolte (ed.), *European and US constitutionalism* (Cambridge, New York, Cambridge University Press 2005) p. 137 at p. 139.

[5] These articles were as follows: 'Art. 9: The right of property cannot harm the security, the freedom, the existence or the property of other citizens. Art. 10. All property that violates this principle is essentially illegal and immoral. Art. 11. Society is obliged to ensure the existence of all its members, either by giving work to them, or by providing for those who cannot work the means to survive. Art. 12. Assistance to the wretched is the debt of the rich toward the poor. The law will determine how this duty is going to be paid.' Robespierre, *Textes choisis*, vol. II (Paris, Editions Sociales 1793), 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 Articles 21 (right to work and to public assistance) and 22 (right to education), was merely referring to them as 'a sacred debt of society'.

Still, it was the 19th century that shaped definitively the European legal concept of social rights, as a response to the great 'social question' of this century: how could the market and the representative, timocratic[6] system be made compatible with the extension of political and social rights, without a socialist revolution?[7] In Europe, two opposite historical currents, a revolutionary and a counter-revolutionary one, tried to give an answer to it.

On the contrary, this question has not been posed in the USA, at least not in the same terms. During all the 19th century the social tensions there had not acquired explosive character, as the vastness of the country's resources and its 'new, open frontiers' provided land and opportunities on a scale unknown in the Old Continent.[8] In the words of Tocqueville:[9] 'Why is it that in America, the land par excellence of democracy, no one makes the outcry against property in general that often echoes through Europe? Is it necessary to explain? It is because there are no proletarians in America. Everyone, having some possession to defend, recognizes the right to property in principle.'[10] Two other decisive factors have been the special political power of the great landowners in the West and South of the country[11] and the relative weakness of the working class organisations.[12]

[6] In the UK, the most democratically developed country of this century, only 1.8% of the population had electoral rights before the Reform Act of 1832 and just 2.7% after it. In 1867 and 1884 the respective figures have been 6.4 and 12.1%. F. Zakaria, *The future of freedom* (New York-London, Norton & Co 2003), p. 80.

[7] *See* U. Preuss, 'The concept of rights in the Welfare State', in G. Teubner (ed.), *Dilemmas of law in the Welfare State* (Berlin, New York, W. de Gruyter 1986) p. 151 at p. 152.

[8] During the 19th century, US Governments passed a number of legislative acts (Homestead Act -1862-, Timber Culture Act -1873-, Dessert Land Act -1887-) in order to provide dozens of millions acres of public land to farmers and to settlers of the 'new frontiers', creating, thus, millions of new property holders. It was only in 1890 that the US Census Bureau officially announced the end of the American frontier. *See* J. Rifkin, *The European Dream* (New York, J.P. Tarcher/Penguin 2005) p. 151.

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

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

[11] *See* Th. Skockpol, 'State formation and social policy in the United States', in Th. Skockpol, J. Campbell (eds.), *American Society and Politics* (New York, McGraw Hill 1995) p. 297 at p. 501.

[12] *See* I. Katznelson, 'Working class formation and the state', in P. Evans, D. Rueschemeyer, T. Skockpol (eds.), *Bringing the State back in* (Cambridge and New York, Cambridge University Press 1985) p. 257; M. Shefter, 'Trade Unions and political machines: The organization and disorganiza-

The appearance of an important working class in continental Europe had as a result the formulation of new claims toward the state. 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 work is the right of the workers'.[13] 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 (Article 8), the conservative majority had made clear that the related state obligation was not a legal, but a moral one.

Thiers, who two decades later was to quell the Commune of Paris (1871), summarised 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 preys with a gun in his hand.'[14]

The conservative countercurrent, archetypically represented by the Bismarckian paradigm, tried to solve the 'social question' with the introduction of social insurance, in tandem with repressive measures, such as the laws against the trade unions (1854, preceding Bismark's chancellorship) and the socialist organisations (*Sozialistengesetze*, 1878-1890).[15] This reformist alternative was ideologically reinforced by the 'Christian Social teaching' of the Catholic Church (*die Katholische Soziallehre*)

tion of the American working class in the late nineteenth century', in I. Katnelson and A. Zolberg (eds.), *Working class formation: Nineteenth Century Patterns in Europe and the United States* (Princeton, Princeton University Press 1986) p. 197.

[13] Speech of the 25/5/1848, quoted by P. Lavigne, *Le travail dans les constitutions françaises* (Paris 1946), p. 199. Other radical representatives, as Lamartin, have explicitly differentiated the right to work from public assistance and charity. The conservatives, on the other hand, with Thiers as the pre-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 personal virtue unregulated by the state.

[14] P. Lavigne *supra* n. 13, p. 262, *Rapport de la commission sur la prévoyance et l'assistance publique* (Paris, 1850).

[15] King William I of Prussia, in a speech introducing of the new social legislation to the Reichstag (17 Nov. 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 defence and the protection of 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* V. Hentchel, *Geschichte der deutschen Sozialpolitik* (Frankfurt, Suhrkamp 1983) p. 333.

and its first important Encyclical on social rights, '*De Rerum Novarum*' of Pope Leo XIII (15 May 1891).

It is noteworthy that in Great Britain during this period the predominance of 'laissez-faire' individualistic values did not allow many alternatives to the failure of individual achievement other than charity and self-help.[16] It is true that a reform of the old Poor Laws, the so called 'Speenhamland system', had been introduced in 1795, in an effort to appease the social tension and the ideological spread of revolutionary ideas. This 'system' provided an allowance from the public treasury to all workers whose pay fell below the subsistence level, but already in the 1830's its failure was evident. The Poor Law Commissioners' Report of 1834 defined it as a 'universal system of pauperism' and 'bounty on indolence and vice'.[17] It is also true that the influence of the revolution of 1848 can be detected in the Medical Act of 1858;[18] and Disraeli had attacked the existing social legislation on the ground that it was relying on the 'moral error' that aid to the poor is more a charity than a right. Still, it was only after World War II and the universalistic reforms of Lord Beveridge, that the United Kingdom approached the European concept of the welfare state and the related rights.

The introduction of social legislation in continental Europe did not signify, however, constitutional recognition of social rights on equal footing with traditional rights.[19] Quite the opposite: social rights were established on the basis of socialisation of risk, through the expansion of the insurance technique, and not as fundamental rights of the same nature as traditional liberties. The constitutionalisation of the social obligations of the state is, predominantly, a 20th century phenomenon.[20]

Still, the introduction of social rights, albeit incomplete and not yet constitutional, represented a breach in the liberal tradition. It is true that the insurance principle is not alien to the logic of the market, as it implies an exchange of equivalents, a quid pro quo (social contributions versus provisions). Still, the compulsory element of social insurance and the non-contributory character of social assistance schemes represented a radical break.[21]

[16] *See* G. Rimlinger, *Welfare Policy and Industrialization in Europe and America* (New York, Wiley 1971) p. 62.

[17] *See* Ph. Deane, *The First Industrial Revolution* (Cambridge, Cambridge University Press 1965) p. 144.

[18] *See* D. Vagero, 'The evolution of Health Care Systems in England, France and Germany in the light of 1848 European Social Revolutions', *Acta Sociologica* (1983) p. 83

[19] J. Donzelot, 'The promotion of the social rights', 17 *Economy and Society* (1988) p. 403,404.

[20] 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 the Netherlands (1814), of Portugal (1838) and of Denmark (1849).

[21] 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 ex-

More generally, human rights in liberal thought are conceived as inherent in human nature and inalienable, possessed at birth, and not granted by either society or state. The role of the government was not to establish these rights, since they preceded it, but simply to respect them and guarantee their free exercise.[22] 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. It is characteristic that professional associations and social classes were equally suspect to the French revolutionaries of 1789 as a restoration of the feudal guilds and orders.[23] Therefore, one of the most notorious laws of the French Revolution, the *'loi le Chapellier'*[24] imposed a complete ban on *every* class based association.[25]

Besides, the primacy of the right of property over the other two fundamental rights of liberalism (freedom and equality) prohibited the introduction of any kind 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',[26] was valid universally for the greater part of the nineteenth century, up to the point of recognition of social rights. Instead of the watertight separation of the political and economic spheres of early liberalism, social rights introduced mechanisms of political intervention in the socio-economic process, as a corrective mechanism for the risks and failures that the 'invisible hand' of the market could not prevent. In this way, they implied the re-politicisation of the market, in the opposite direction from the French revolution of 1789, which separated the realms of state and economy.[27]

change) give to their beneficiaries a genuine right, the recipients of public assistance are believed to 'get something for nothing'. *See* N. Fraser and L. Gordon, 'Civil Citizenship against social citizenship? On the Ideology of Contract-Versus-Charity', in B. Von Steenbergen (ed.), *The condition of citizenship* (London, Sage Publications 1994) p. 90 at p. 91.

[22] *See* B. Binoche, *Critiques des droits de l'homme* (Paris, PUF 1989) p. 4 et seq.

[23] Cf. J.J. Rousseau (Contrat Social, vol. II, 3): 'If the people are informed adequately and the citizens have not any kind of mutual communication, from the great number of small differences results always the general will and this will shall always be good (…). Thus, it is important that there is any partial society within the State and every citizen is acting independently.'

[24] Loi Le Chapelier of the 14, 17/6/1791. Bailly, Mayor of Paris, was expressing the spirit of the law in a speech on the 29 of April 1791: 'We have just abolished the monopoly hold by the corporations of the past. Should we now authorize other coalitions that would establish another kind of monopoly?'

[25] Similar legislation (e.g., the British Combination Act of 1800, the Prussian law of 1854) was introduced in many countries during the following decades.

[26] As quoted by Ch. A. Reich, 'The new property', 5 *Yale Law Journal* (1964), p. 733 at p. 772.

[27] The essential difference between the feudal and the capitalist social relations lies in the fact that the constitution of civil society in the latter is not political, i.e., it is not based primarily on the use of political constraint. Human beings are conceived as individual bearers of rights, prior to any

Nonetheless, social rights are not 'socialist rights'.[28] They simply provide the legal basis for a political intervention in the economic sphere, in order to alleviate major inequalities, without infringing the primacy of the market.[29] They constitute an interface between the market, the state and the family, institutionalising a kind of national solidarity that does not threaten market relationships.[30] Hence, they do not constitute a breach of the capitalist system, but rather a breach *within it*. They have created a different kind of market to the supposedly self-regulated liberal one,[31] defined later by the conservative Ordoliberalists in Germany as the 'social market economy'.

A final remark: the recognition of social rights is concomitant with the generalisation of civil and political rights to the whole of society. Before that, not only women as well as different ethnic or racial groups were excluded from basic civil or political rights,[32] but, in many respects, this was the case for the working class as a whole. This was not limited only to suffrage rights. The example of restrictions in France on the freedom of movement, one of the fundamental civil rights, is illustrative: by the law of the 7th Frimaire of the XII Year, an obligatory '*livret ouvrier*'[33] was established for all workers, to be repealed only by the law of 2 July 1890. This 'booklet' functioned as a domestic passport, forbidding any movement without the explicit permission of the employer, who held it permanently. It had to be presented to the mayor before any change of residence or employment,

of their socio-political relationships and independently of their place in the social hierarchy. The social division and hierarchy do not result from a politically imposed separation in classes but are, simply, the consequence of the impersonal and 'neutral' (hence, self-legitimating) laws of the market. Cf. J. Habermas, 'Law as medium and law as institution', in G. Teubner (ed.), *Dilemmas of law in the welfare state* (Berlin, De Gruyter 1985) p. 203; S. Rokkan, 'Cities, States and Nations', in S. Rokkan, S.N. Eisentat (eds.), *Building States and Nations*, Vol. 1: Models and Data Resources (London, Sage 1974) p. 73.

[28] *See* C. Schmitt, *Verfassungslehre* (Berlin 1970) p. 169, where he characterizes social rights as 'essentially socialist rights'.

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

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

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

[32] *See*, for instance, the Dred Scott Case of the American Supreme Court (*Scott* v. *Sandford*, 60 US (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.

[33] First established by the law of 22 Germinal of the year X, Art. 11, 12.

in order for its bearer to obtain a visa indicating his new destination. A worker leaving without it could never hope to find employment in the future.[34] Naturally, things were far worse for the freedoms of the recipients of social assistance: 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 always to wear a special uniform, like criminal convicts.[35]

This discrimination came to an end with the generalising of social rights, for a simple reason: the only reason the early liberal state did not extend political rights to the whole population was the fear that 'democracy might produce socialism'.[36] When, despite these fears, the Welfare State integrated the workers into 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 full expansion of rights.

The 20th century and the constitutionalisation of social rights

The incorporation of social rights in constitutions became widespread in Europe in the aftermath of World War I. This was mainly 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, founded in 1919), which aimed at the insulation of western European societies from the influence of the October Revolution. Even before the emblematic Constitution of the Weimar Republic (1919),[37] social rights were included in the Constitution of Fin-

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

[35] *See* A. de Swaan, *In care of the State* (Cambridge, Polity 1988) p. 191. Generally the workhouses for the poor were 'places of discipline and terror', J. Scott, *Poverty and Wealth, Citizenship, Deprivation and Privilege* (New York, Longman 1994) p. 8.

[36] G. Esping-Andersen, *The three worlds of Welfare Capitalism* (Cambridge, Polity Press 1991) p. 11.

[37] The Constitution of Weimar was the first European Constitution to contain an elaborate list of social rights (Art. 151-165), including an absolutely unique, both then and now, provision (Art. 162), that proclaimed it the duty of the State to act on the international level to secure a minimum of social rights to the workers of the world. Article 151 § 1 incorporated a 'Social State' clause: 'The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. It is within these confines that economic liberty is protected. Legal force is permissible to realize threatened rights or in the service of superseding demands of public welfare. Freedom of trade and industry will be realized according to a Reich law.' However, the theory and the case-law interpreted these provisions as mere policy directives, deprived of any legal validity, without the intervention of the legislator. *See* C. Schmitt, *supra* n. 28 at p. 169.

land (1919) and a number of other constitutions followed: Estonia (1920), Poland (1921), Italy (1927), Greece (1927), Portugal (1933), Spain (1931, 1938) and Ireland (1937).

Although the social provisions of these constitutions were usually not enforceable in the courts, their enshrinement in the constitution signified that social policy was no longer left to the discretion of the legislator. This fundamental constitutional decision to give to social provisions supra-legislative force was revised again in the aftermath of World War II, via a new compromise between social-democratic and Christian-democratic parties (with the exception of Scandinavian countries, where the dominant social-democratic parties alone have shaped a more egalitarian and inclusive welfare model, based on social citizenship).

This was not the case in the USA, where, besides the weight of history, the political balance of power and the institutional structure were also very different. Especially critical was the predominance of non-programmatic, patronage oriented political parties. It is interesting to note that on this side of the Atlantic, the emergence of the mass parties is concomitant with the transition to the welfare state and the related political and social struggle. In America, on the contrary, the generalisation of the suffrage right to the white male population already in the 1830's, has given a central institutional role to the existing political parties, of which the main battlefield was not social rights but the control of the staffing and functioning of public administration (the notorious 'spoils system'[38]). This kind of patronage-oriented politics facilitated the distribution of segmented legislative benefits[39] – for instance, pensions for the veterans of Civil War – but not the establishment of an all-encompassing welfare state or the recognition of general, legally binding social rights.

In consequence, early American social policy, besides some benefits for the Civil War veterans, included only basic education, conceived rather as a political right of democratic citizenship than a social one. At the beginning of the twentieth century, the ultra-liberal majority of the Supreme Court under Chief Justice W.H. Taft regarded any protective legislative measure for the workers as unconstitutional and contrary to the economic due process and the 'free contract'.[40] For this reason, the social legislation of the time protected *exclusively* the female popu-

[38] *See* L. Maisel and J. Cooper (eds.), *Political Parties: Development and Decay* (Beverly Hills, CA, Sage Publications 1978), especially the contribution of M. Shefter, 'Party, Bureaucracy and political change in the United States', p. 211; Th. Skockpol, *supra* n. 11 at p. 502.

[39] That is why some selective social laws, like the first Agricultural Adjustment Act have been criticised for promoting a style of 'Government through bribery'. *See* C. Reich, 'Individual Rights and Social Welfare, the emerging legal issues', 74 *Yale Law Journal* (1965) p. 1245, who quotes Willcox, 'Patterns of social legislation: reflections on the Welfare State', 6 *Journal of Public Law* (1957) p. 3 at p. 7.

[40] *See*, for instance, the notorious case *Lochner* v. *New York*, 198 US 45 (1905).

lation, as the Court assumed that the State had a legitimate interest in protecting the 'mothers of the race'.[41]

The Great Depression opened the way for the wide reform of the New Deal[42] and the creation of the American Welfare State, sometimes defined in the theory – pejoratively – as 'administrative state'.[43] The 'general welfare constitution' introduced by F.D. Roosevelt in his 1934 address to Congress, announcing the formation of the Social Security Act of 1935, seemed to approach the American to the European understanding of rights. Under the New Deal conception, the social rights were 'the modern substance' of the traditional liberties.[44] Even in 1944 FDR proclaimed 'a second Bill of Rights' to an education, a job, adequate medical care, and 'a decent home', 'under which a new basis of security and prosperity can be established for all – regardless of station or race or creed.'[45]

However, the New Deal was just a parenthesis, which has not survived the racially motivated so-called 'Southern Veto'.[46] This became clear after World War II, when the bulk of the welfare programs have been confined to the war veter-

[41] Therefore Skockpol (Th. Skockpol and G. Ritter 'Gender and the origins of modern social policies in Britain and the United States', 5 *Studies in American Political Development* (1991) p. 36 at p. 56-62; L. Gordon (ed.), *Women, the State and Welfare* (Wisconsin, University of Wisconsin 1991) considers the USA as a 'maternalistic welfare state', in opposition to the paternalistic one of Europe. However, other authors (cf. for instance, N. Fraser and L. Gordon, 'Civil Citizenship against social citizenship? On the ideology of contract-versus-charity', in B. van Steenbergen (ed.), *The Condition of Citizenship* (London, Sage 1994) p. 102) find there a dichotomy of the American social policy into two streams: one 'masculine' proffering aid to the 'deserving' poor, based on an almost contractual base, e.g., industrial accident insurance, and one 'feminine' and charity inspired, exemplified by the 'widows' pensions'.

[42] The change in the case-law is marked by the decision *U.S.* v. *Carolene Products*, 304 US 144 (1938). *See* D. Harris, 'The protection of economic and social rights in common law countries', in F. Matscher (ed.), *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte: eine rechtsvergleichende Bestandaufnahme* (Kehl am Rhein, Engel Verlag 1991) p. 203.

[43] *See*, for instance, G. Lawson, 'The rise and rise of the administrative state', 107 *Harvard Law Review* (1994) p. 1231, for whom 'The post New Deal administrative state is unconstitutional and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution'. Cf. R. Pound, 'The rise of the service state and its consequences', in S. Glück (ed.), *The Welfare State and the National Welfare* (Cambridge Mass., 1952).

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

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

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

ans,[47] exactly as had happened some decades earlier with the Civil War veterans. Even the subsequent Kennedy and Johnson projects of 'Great Society' and the 'War on Poverty'[48] did not put into question the fundamentals of the American welfare state tradition: the residuality of social security and a commitment to workfare ethics. These postulates perpetuate the underlying division which has its roots in the Poor Law's distinction between the 'deserving' and the 'undeserving' recipients, who get 'something for nothing',[49] without any reference to legally enforceable entitlements.

It seems that race played, also, a decisive role in the final formation of the American welfare state, as racial animosity makes redistribution to the poor, who are disproportionately black, unappealing to many white voters.[50] The Warren Court did not treat poverty as race[51] and even the NAACP lawyers had eliminated social rights from their litigation agenda, marginalising thus any potential legal remedies against economic inequality.[52] It is true that the Supreme Court has in the 1970's expanded 'due protection' of the 14th Amendment to welfare entitlement[53] and social security benefits.[54] Still, even these timid efforts to create some procedural guarantees have met a vehement reaction, which denounced the rejection by the Court 'of the social and political philosophies that motivated the Framers of the Constitution' that contributed to 'the creation of social maladies that continue to plague the American polity.'[55]

The remodelling of legal culture by the 'social state' principle

As we have seen in the first part, the 'basic conflict between social rights and market values',[56] is solved in Europe in a different manner from that in American

[47] John Rankin of Mississippi, who introduced the 'GI Bill' on behalf of the American Legion, was 'one of the most openly bigoted racists and anti-Semites ever to serve in the House of Representatives,' according to the GI Bill's chief chronicler, Michael J. Bennett. *See* M.J. Bennett, *When Dreams Came True: The GI Bill and the Making of Modern America* (Brassey's 1997), p. 111.

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

[49] Cf. N. Fraser and L. Gordon, *supra* n. 21 at p. 91.

[50] Cf. A. Alesina, E. Glaeser, and B. Sacerdote, 'Why Doesn't the United States Have a European-style Welfare State?', *Brookings Papers on Economic Activity* (2001) p. 203; cf. G. Craig, 'Poverty, Race and Social Security', in J. Ditch (ed.), *Poverty and Social Security* (London, Routledge 1998).

[51] *See* O. Fiss, 'Preface', in Gargarela et al., *Courts and social transformation in New Democracies* (Hampshire, Aldershot 2006) p. xiii.

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

[53] *Goldberg* v. *Kelly*, 397 US 254, 265 (1970).

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

[55] R.J. Pierce, 'The due process counterrevolution of the 1990's?', 96 *Columbia Law Review* (1996) p. 1973-2001.

[56] T.H. Marshall, *Social Policy* (London, Routledge 1975) p. 42.

legal culture. The constitutional recognition of social rights implied a change of the functions of the State: instead of regulating the market only on the basis of norms that derive from the private law of contract, property and tort,[57] the European state 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.'[58] This 'market-correcting' function[59] impregnates the legal culture, in the sense that, in the words of R. Aron, 'the concept of State and law is not any more merely negative, but also positive, so that the law is considered to be not only the juridical foundation but also the source of the material conditions for its fulfilment.'[60]

On the contrary, the functions of the American state have remained essentially negative. They consist of the removal of arbitrary legal impediments (e.g., the anti-trust legislation), not of the provision of positive means for the exercise of rights. In this type of polity not only are there no constitutional social rights,[61] but there can be no positive constitutional obligation of the state, not even as a guarantee of traditional liberties.[62] For this reason, for many scholars the concept of the 'State' itself in Europe is closer to the American notion of the Welfare State or even of the 'administrative state'.[63]

Therefore, the fundamental division of European 'social' and American 'liberal' states cannot be reduced only to the legal differences between the common law and continental legal traditions.[64] It reflects much more profound political,

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

[58] T.H. Marshall, *supra* n. 56 at p. 15. Marshall was referring to social policy in general, but his description defines very precisely also the basic functions of the social state principle.

[59] Cf. S. Deakin and J. Browne, 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 2003) p. 27 at p. 28.

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

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

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

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

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

moral and societal choices,[65] regarding the redistributive functions of the state[66] and its intrusive role in the market. In Europe, in the words of Abbé Sieyès, the citizens feel they have a right to demand from the state everything it can do for them.[67] Subsequently, in the words of Duguit, 'if the state fails to ensure to anyone (…) the necessary means of subsistence, it fails a compelling obligation' ('Il manque à un devoir stricte').[68]

In USA, the traditional mistrust towards the state resulted in a much more individualistic, Lockean *Weltanschauung* and, especially, a fundamentally different conceptualisation of equality. As Slaughter remarks, the American concept of equality tolerates a lot of inequality, as it focuses on starting points, not endpoints. The idea that everybody is created equal, but opportunity and individual effort can make a difference is deeply embedded in the American dream.[69] That is the reason that many poor people politically support tax cuts for the wealthier, hoping that one day they will be rich, too.[70]

The constitutions in the two sides of the Atlantic crystallise these already embedded social values. Normative and axiological elements are closely and mutually underpinned and, for this reason, there is not only 'a European culture of social justice',[71] in the sense of a distinct ethos *vis-à-vis* the American legal system, but essentially a different polity. In order to define this new type of polity, German legal theory has developed the concept of the 'Social State' ('*Sozialstaat*'), enshrined in Article 20 of the Fundamental Law. The term is now widely used throughout Europe, as a fundamental normative and organisational general principle of the Constitution, on a par with the Rule of Law. Indicative of its continental acceptance[72] is the fact that the majority

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

[66] Many empirical studies reaffirm this deep clash of values between Europe and America. See, for instance, A. Alesina, M. Angeletos, 'Fairness and Redistribution: US versus Europe', *Harvard Institute of Economic Research Working Papers* (Harvard – Institute of Economic Research 2002) p. 1983.

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

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

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

[70] According to the World Values Survey, 71% of Americans versus 40% of Europeans believe that the poor could become rich if they just tried hard enough. *See* A. Alesina, M. Angeletos, *supra* n. 66.

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

[72] This radically different understanding of the state's role is dominant in the public opinion both in 'old' and 'new' Europe. Hence, in the last poll of Eurobarometer, a vast majority of citizens

of the new democracies of Central and Eastern Europe have incorporated a similar clause in their Constitutions.[73]

Hence, the 'Social State' can be used as a distinct *terminus technicus*,[74] not interchangeable with the term 'Welfare State'. The latter is a descriptive concept, which 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, where the State has the constitutional obligation to assume interventionist functions in the economic and social spheres.[75] In this sense, the USA or Australia are 'welfare states' but not 'social' ones, as social policy therein has no constitutional foundation. On the contrary, countries like India or South Africa, although lacking the basic infrastructure of a mature welfare state, they can be considered as 'social' ones, due to their constitutional arrangements regarding the protection of social rights.

Nearly all countries in Europe – with the most notable exception being the United Kingdom – are social states, either comprising an explicit 'Social State' clause in their Constitutions,[76] or an analytical enumeration of social rights,[77] or both.[78] It is noteworthy that the explicit inclusion of social rights in the constitution is not a prerequisite for a polity to be a Social State.[79] The archetypical social

of the new Democracies of Central and Eastern Europe agree with the proposition that 'there is a need for more equality and social justice even if this means less freedom for the individual'. Poll carried out between 6 Sept. and 10 Oct. 2006, by TNS Opinion & Social, a consortium createdcbetween Taylor Nelson Sofres and EOS Gallup Europe, accessible at <http://ec.europa.eu/public_opinion/archives/eb/eb66/> visited 6/3/2007.

[73] *See*, e.g., 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.

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

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

[76] As in Art. 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.

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

[78] Cf. G. Katrougalos, 'The implementation of social rights in Europe', *The Columbia Journal of European Law* (1996) p. 278.

[79] It is broadly accepted that the concept can be deduced from the overall corpus of constitutional legislation, even without explicit, solemn reference to it. See, e.g., for Switzerland, J.P. Müller, *Soziale Grundrechte in der Verfassung?* (Basel, Schweizericher Juristenverein, Referate und Mitteilungen, Heft 4 1973) p. 690 at p. 824. Also interesting is the case of Austria, where, although the Constitu-

states of Germany and Austria do not have such rights[80] 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 entail only the constitutional protection of social rights, but a whole series of new functions for public power that are specific to it and alien to the liberal state.[81] These may be summarised as follows:

a) The Sozialstaat functions as a fundamental interpretative 'meta-rule'. In this sense, it constitutes both a means of consistent interpretation of other constitutional rules and of control of the generation of infra-constitutional ones.[82]
b) It contributes to the formulation of an objective system of values, which constitutes a different constitutional 'ethos' from that of a liberal state.[83] Hence, concepts such as human dignity,[84] social justice[85] or substantive equality,[86] acquire not only a programmatic but a fully normative, binding content.[87]
c) It ensures a 'defensive' function, in the sense of guaranteeing a constitutional 'floor', a 'standstill' effect for social legislation, i.e., a minimum of pro-

tional Court considers that the Consitution is socially and economically 'neutral' (VerfGH, e.g., Slg 475/1964, 5831/1968, 1966/1969), it 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., 'Die verfassungsrechtliche Kodifizierung sozialer Grundrechte', 6 *ZRP* (1986) p. 139 at p. 142, and the same, *ZfS* (1982) p. 289.

[80] With some marginal exceptions, as, for instance, the protection of family and marriage by the Art. 6 of the German GG.

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

[82] Cf. A. Lyon-Caen, '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 2002) p. 182 at p. 186, 187.

[83] A. Lyon-Caen, *supra* n. 82 at p. 187.

[84] *See* BVerfGE 1, 104.

[85] BVerfGE 5, 85; 22, 180, also 22, 204. Many European constitutions contain explicit references to the social justice. *See*, e.g, Art. 3 of the Albanian Constitution, 43 para. 2 of Ireland's, 106 para. 4 of Portugal's.

[86] *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*).

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

tection that the legislator is not allowed to withdraw ('effet clicquet' in French theory and case-law,[88] 'Bestandsgarantie', 'Bestandschutz' or 'Rückschrittsverbot' in Germany).[89] Thus, a minimum core of welfare protection is beyond the scope of the powers of both the legislature and the administration, no longer 'something that might be changed or abolished whenever the administration changes its political hue' but a constitutive element of social citizenship.[90]

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.

What is more important, however, is that the Social State implies a general reconceptualisation 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*).[91]
– The state assumes an obligation for positive measures for the protection of traditional, 'negative' civil rights and liberties (*Schutzpflicht*)[92] and the creation of the material conditions necessary for their fulfilment (*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 of rights), but are also subject to a compelling, positive obligation to protect against infringement by third parties and to fulfil, i.e.,

[88] *See* B. Jorion, 'Note', CC 94-359, *AJDA* (1995) p. 455 at p. 461; Ev. Pisier, 'Service public et libertés publiques', in *Pouvoirs* No. 36 (1986) p. 1151.

[89] It is, however, a 'Minimalgarantie', in the sense that the legislator is free to proceed to necessary adjustments, but he cannot, completely annihilate the pertinent protection. *See* BVerfGE 59, 231; 84, 133; E. Löbenstein, 'Soziale Grundrechte und die Frage ihrer Justiziabilität', in *FS Floretta* (1983) p. 209.

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

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

[92] According to the German Constitutional Court, 'the State must establish rules in order to limit the danger of these civil rights being violated. Whether and to what extend such an obligation exists, depends on the kind of the possible danger, the kind of the protected interests and the existence of previous rules', BVerfGE 19, 89. *See* D. Grimm, *supra* n. 4 at p. 143 et seq.; B. Szczekala, *Die sogennanten grundrechtlichen Schutzpflichten im deutschen und europäischen Recht* (Berlin, Dunker and Humblot 2002).

to take the appropriate measures to ensure, the actual implementation of all rights.[93]

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 recognised the indivisibility of rights' functions,[94] in the sense that positive obligations derive also from 'negative' freedoms, in order to achieve an effective and not just textual protection,[95] in cases related to the rights to life,[96] to privacy,[97] to education,[98] to assembly[99] and child-rearing.[100] These positive obligations derived from 'negative' freedoms even protect aspects of social rights, such as the rights to health,[101] to housing[102] or to social security.[103] The ECtHR reaffirms also that States have the obligation actively to protect human rights and 'this obligation involves the

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

[94] Generally, the dominant contemporary position in international law and labour law is the indivisibility of rights and the recognition of enforceable fundamental social rights. Cf. N. Valtikos, 'International labour standards and human rights: Approaching the year 2000', 13 *International Labour Review* (1998) p. 135.

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

[96] *Yıldız* v. *Turkey* (Appl. No. 74530/01), judgment of 18 June 2002.

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

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

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

[100] *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 exactly the opposite judgment, considering that federal rights do not oblige the state to protect against private individuals.

[101] *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 Nov. 2002.

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

[103] *Feldbrugge* A 99 (1986); *Deumeland* A 120 (1986); *Salesi* v. *Italy* A 257-E (1993); *Koua Poirrez* v. *France*, Judgment of 30 Sept. 2003, Appl. No. 40892/98.

adoption of measures designed to secure respect (of them) even in the sphere of the relations of individuals between themselves.'[104]

It is also noteworthy that, despite the negative prognosis,[105] the new republics of Central and Eastern Europe, supposedly 'pro-American' and more 'free-marketeer', did not undermine the social dimension of this 'European Common Law'. It is true that, anticipating membership in the European Union, these countries have adapted a programme of systematic privatisation, deregulation and liberalisation of their economies and labour markets.[106] Still, in their constitutions, they have all included a list of social rights which reflect various degrees of social justice.[107] More detailed and analytical are the Constitutions of Estonia, Lithuania, Slovakia and the Czech Republic,[108] whereas the most minimalist is the Constitution of Slovenia. What is more important is also the fact that the constitutional courts have, generally, accepted the normative character of these constitutional provisions.[109]

The lack of the 'social state' principle in the EU's Economic Constitution

Although the national social protection systems in Europe belong to various institutional models, there is, still, a distinctive 'European signature' in all of

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

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

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

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

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

[109] According to the Constitutional Court of Poland (Decision K 21/95 of 25/2/1997), the constitutional provisions related to social security should be interpreted in the light of the principle of social justice. The decision K 1/88 of the Court on the indexation of pensions reflects the similar positions of the Hungarian Constitutional Court in its judgment 43/1995 (VI. 30.) AB. The decisions 42/2000 of the Hungarian Constitutional Court, 5/96 and 41/2000 of the Lithuanian and 2001-02-2001 of the Latvian ones reaffirm also the binding character of the related constitutional provisions. *See* on them F. Jacquelot, *supra* n. 108; A. Sajo, 'Social Rights as middle-class entitlements in Hungary: The role of the Constitutional Court', in Gargarela et al., *Courts and social transformation in New Democracies* (Hampshire, Aldershot 2006) p. 83-105, W. Osiatynsik, 'Social and economic rights in a new constitution for Poland', in A. Sajo (ed.), *Western rights? Post-communist applications* (The Hague, Kluwer 1996) p. 234; L. Garlicki, 'La jurisprudence du Tribunal Constitutionnel polonaise en 1988', *AIJC* (1988) p. 507 at p. 518.

them.[110] In this sense, there is a 'European social model', which is defined by the Commission of European Communities as a combination of economic performance and social solidarity, based on the social consensus and the tripartite negotiations.[111] However, the principle of 'social state' is not embodied in the Treaties, although the Treaty of Rome contained some social provisions. This is not a paradox. European integration had from the beginning the character of an economic project. Integration's social objectives have served merely as auxiliary aims and the few European social rights were tailored according to the functional requirements of the internal market.[112]

In this framework, social policy has always been the 'stepchild' of economic integration,[113] as its basic goal is to facilitate free movement, especially through the aggregation of eligibility and social security benefits for EU migrants and standardisation of the interfaces between national systems. 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.

However, the basic contradiction between the 'social state' members and the EU has not been the lack of social competences of the latter. 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, shaped by the European Court of Justice, with two 'Grundnorms': free movement and competition rules.[114] These 'Grundnorms' have been used to strike down member state laws which impede them: any national interference with market freedoms, even if it derives from constitutional provisions, is prohibited as contrary to European Law, unless if it falls under its derogation clauses. Conse-

[110] Cf. F.G. Castles, 'The European Social Policy Model: Progress since the Early 1980s', Vol. 3/4 *European Journal of Social Security* (2002) p. 299-313.

[111] CEC (1994) European Social Policy, COM(94) final, Brussels 7.7.94.

[112] F. Scharpf 'The European Social Model: Coping with the Challenges of Diversity', Vol. 40, No. 4, *Journal of Common Market Studies* (2002) p. 645; A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht Ithaca* (New York, Cornell University Press 1998); M. Everson, 'The Legacy of the Market Citizen', in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* (Oxford, Oxford University Press 1995) pp. 73-90; cf. P. Magnette, *Citoyenneté européenne: droits, politiques, institutions* (Brussels, Editions de l'Université de Bruxelles 1999) p. 34.

[113] P. Flora, '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 1993)

[114] W. Sauter, 'The Economic Constitution of the European Union', 4 *Columbia Journal of European Law* (1998); S. Jorges, 'The market without the state?' The 'Economic Constitution' of the European Community and the rebirth of regulator policies, *European Integration online Papers (EioP)*, v. 1, (1997) p. 19; K. Boscowits 'The European Judge and the Economic Constitution: The Contribution of ECJ to the formulation of a constitutional economic model of the European Community', 2 *To Syntagma* (2001) (in Greek).

quently, the negative integration of the common market had immediate de-regulatory consequences on national social rights,[115] especially where protective national social regulation was above the European average. The reason is simple: social citizenship's rights make the market less free.[116]

Hence, the Court has shaped an economic constitution with the basic aim of protecting market freedom from public power.[117] This 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, but in harmonised 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 European law.[118]

However, the recent case-law of the European Court of Justice has given to the social dimension potential hope for a 'second normative life'.[119] In this line, the concept of solidarity has been applied in order to justify exceptions from the rules of competition and the use of European citizenship in cases of free movement has resulted in a wider recognition of social rights to moving persons. Nonetheless, this case-law has not changed the dominant, economic-driven dynamic of European Law. Contrary to the opinion that there is a clear process of 'socialisation' of the case-law of the ECJ,[120] the Court is still, essentially, following the same

[115] 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).

[116] W. Streeck, '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 1995) p. 389; P. Lehning, 'European citizenship: A mirage?', in P. Lehning and A. Weale, *Citizenship, democracy and justice in the new Europe* (London, New York, Routledge 1997) p. 175.

[117] M.P. Maduro, 'We Still Have Not Found What We Have Been Looking For. The Balance Between Economic Freedom and Social Rights in the European Union', (1999) Faculdade de Direito da Universidade Nova de Lisboa Working Paper 4/99, accessible at <www.fd.unl.pt/web/Anexos/Downloads/185.pdf> visited 2/1/2001.

[118] B. Fitzpatrick, 'Converse pyramids and the EU social Constitution', in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford-Portland, Hart Publishing 2000) p. 304-324.

[119] Cf. M.P. Maduro, '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 2003) p. 269 at p. 285; cf. E. Szyszczak, 'Social rights as general principles of Community Law', in N. Neuwahl and A. Rosas (eds.), *The European Union and Human Rights* (The Hague-Boston-London, Martinus Nijhoff Publishers 1995) p. 207-220.

[120] S. Besson and A. Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-open Pandora's Box', 13 (5) *European Law Journal* (2007) p. 573; V. Hatzopoulos, 'A (more) Social Europe: a political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon', 42 *Common Market Law Review* (2005), p. 1599 ; D. Nazet-Allouche, 'La Cour de Justice des communautés européennes et les droits sociaux fondamentaux', in L. Gay et al., *Les droits sociaux fondamentaux* (Paris, Bruylant 2006) p. 215.

neo-liberal approach, which recognises but few, if any, fundamental social rights.

At both levels (solidarity and citizenship), the evolution of the case-law is almost parallel. Initially, in *Poucet and Pistre* the ECJ recognised that 'organizations involved in the management of the public social security system, fulfil an exclusively social function (… which) "is based on the principle of national solidarity and is entirely non-profit-making". Accordingly, that activity is not an economic activity and, therefore, the organizations to which it is entrusted are not undertakings.'[121]

Nevertheless, later on the Court has narrowed its array of limiting principles of competition rules, in favour of one much more pro-market interpretation. The new case-law has rejected the idea that non-profit, non-competitive public services which serve social goals are exempted from the internal market rules merely because of their objectives.[122] In the same line of cases, in *Albany*[123] and in *Pavlov and others,*[124] 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.[125]

The basic criterion of this case-law seems to be, in the words of the Advocate-General 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.'[126] If there

[121] 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-6121.

[122] So, in *FFSA* (Case C-244/94 *FFSA* [1995] *ECR* I-4013) a pension fund, created by the state to provide supplementary retirement to a group of lower income workers, 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 scheme. According to A. Lyon-Caen (A. Lyon-Caen, 'Fundamental Social Rights as benchmarks in the construction of Europe', in L. Betten, D. Mac Devitt (eds.), *The Protection of fundamental social rights in the European Union* (The Hague-London-Boston, Kluwer Law International 1996), p. 43-46, p. 45) this 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'. Cf. 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.

[123] Case C-67/96 *Albany* [1999] *ECR* I-5751.

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

[125] On the contrary, in *AOK-Bundesverband (*Joined Cases C-264/01, C-306/01, C-354/01, C-355/01 *AOK-Bundesverband and Others* [2004] *ECR* I-2493) a statutory health insurance scheme and in *Gisal* (Case C-218/00 *Cisal* [2002] *ECR* I-691, paras. 38-40) a national insurance scheme against accidents at work have not been considered to be 'undertakings'. Solidarity was evidenced in these cases by its compulsory affiliation and the fact that contributions were not systematically proportionate.

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

is even potential to make profit from the activity, it is an economic one.[127] In other words, only if the activity is incompatible even with the theoretical possibility of a private undertaking carrying it on, can it escape the internal market rules.[128]

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 Bokken,*[129] 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).'[130]

All the same, the Court has failed to provide a clear test of 'predominance of solidarity', having developed, instead, a range of indicators applied on a case-by-case basis (social aim of the activity, compulsory participation, statutory control over contributions and services, absence of link between cost and price), and with respect to which it is not clear if they are cumulative or alternative.[131] Therefore, 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 decommodification test. In the words of Advocate-General Poiares Maduro, 'almost all activities are capable of being carried on by private operators. Thus, there is nothing in theory to prevent the defence of a State being contracted out, and there have been examples of this in the past.'[132] Actually, any social security system can be refashioned into a market-based one.[133]

Moreover, 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 free economic activity.[134] In *Geraets-Smits* and *Peerbooms*[135] the Court, diverging from the opinion of its Advocate-General,[136] who insisted on the precedent of

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

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

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

[130] *Albany*, *supra*, para. 60.

[131] O. Odudu, *The Boundaries of EC Competition Law* (Oxford, Oxford University Press 2006) p. 38.

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

[133] N. Bernard, '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-Portland, Hart Publishing 2005) p. 261 at p. 269.

[134] 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.

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

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

national solidarity as in *Poucet and Pistre* case-law, considered that Dutch compulsory sickness schemes, although lacking the element of remuneration, were services within the meaning of Article 50 of the Treaty.[137]

There are two related waves of case-law, which seem to create a qualitatively different European dimension of 'de-territorialized welfare'.[138] The first wave concerns the direct application of the rights conferred by the status of EU citizenship (Article 17-18), the second the interpretation of cross-border health services, in a sense allowing an almost unlimited mobility of patients, even without the prior authorization of their national health systems.

EU citizenship has been used by the Court as a central concept, 'destined to be the fundamental status of nationals of the Member States'[139] in order to expand, within the whole material scope of EC law, its earlier case-law banning any direct or indirect discrimination on grounds of nationality against lawfully resident EU migrants, with regard to any substantive social benefits, including some social assistance allowances.[140]

In *Martinez Sala*[141] and subsequent judgments[142] the ECJ recognised social rights of non-active EU migrants, on the basis of non-discrimination in all situations which fall *ratione materiae* within the scope of Community law, social allowances included, provided that there is 'a significant connection'[143] between the applicant for the allowance and the country or reception (more specifically, its market). However, this right is not unlimited. The Court could not thoroughly depart from the requirement of all Residence Directives that public finances should not be

[137] 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] *ECR* I-4325; Case C-56/01, *Patricia Inizan* v. *Caisse primaire d'assurance maladie* [2003] *ECR* I-12403.

[138] Expression of D. Sindbjerg Martinsen, '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 2005) p. 89.

[139] 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] *ECR* I-6191, para. 28; Case C-224/02, *Pusa* [2004] *ECR* I-5763, para. 16.

[140] *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. 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 (Cf. O'Leary, 2005, p. 62 et seq.).

[141] Cases C-85/96 *Martinez Sala* [1998] *ECR* I-2691.

[142] Case C-413/99 *Baumbast and R* v. *Secretary of State for the Home Department* [2002] *ECR* I-7091; Case C-138/02, *Collins* [2004] *ECR* I-2703; Case 184/99, *Grzelczyk* [2001] *ECR* 1-6193.

[143] 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.

unreasonably burdened by an inactive EU migrant without sufficient means of subsistence.[144] Hence, the inability to sustain oneself and have recourse to the social assistance system can constitute, but not automatically, a ground for terminating the right of residence,[145] especially if the link to the national host market is weakly established.[146]

Despite the innovative elements of this case-law, the Court has used citizenship in order to broaden the scope of the non-discrimination principle, without moving essentially away from the logic of market citizenship. As Advocate-General Jacobs remarks, Article 17 EC itself, or even Article 18 EC, does not go much further than the previous law, as Articles 12 EC and the EC Treaty as a whole already offered everything that the recent case-law has achieved.[147] Hence, although the differences between economically active and inactive Union citizens are somehow bridged by the superseding link of Union citizenship, the umbilical cord with the market is far from being severed, and it still represents the ultimate criterion for recognition of social rights.

The other wave of case-law, relating to patient mobility has not dramatically changed this situation. In *Decker* and *Kohll,*[148] the Court established that the rules on free movement of goods and services, respectively, apply fully to public health systems and, consequently, medical expenses incurred in another member state cannot be conditional upon prior authorisation. Only overriding reasons of general interest, such as financial balance, the cohesion of the social security scheme and the sound planning of national healthcare facilities may justify restrictions and then only with regard to hospital services.[149] In *Müller-Fauré,*[150] the Court 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 pro-

[144] *See*, for instance, Case C-456/02, *Trojani* [2004] *ECR* I-7573 at para. 30; Case 184/99, *Grzelczyk* [2001] *ECR* I-6193 at para. 44; Case C-209/03 *Bidar* [2005] *ECR* I-2119 at para. 56.

[145] Opinion of Advocate-General Alber in Case 184/99, *Grzelczyk* [2001] *ECR* 1-6193, para. 122, reflected in para. 44 of the Judgment.

[146] 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; Case 184/99 *Grzelczyk* [2001] *ECR* I-6193.

[147] F.G. Jacobs, 'Citizenship of the European Union-A Legal Analysis', 13 (5) *European Law Journal* (2007) p. 591.

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

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

[150] 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 authorisation.

tected on the premise of prevalence of economic over social considerations.[151] There is absolutely no reference to a right to health in this case-law, either by the Court or in the Advocates-Generals' Opinions. The absence of a 'rights' language here shows also, in the words of Barnard, an 'absence of awareness of solidarity'.[152]

The Court has tried to create a new sense of transnational solidarity using Article 18 of the Treaty, instead of relying on the existing national substratum of social rights and the common European legal tradition of 'social state' principle. This is not only happening at the expense of national welfare systems and against secondary Community legislation, but, as it is based on a concept of consumer rights instead of a genuine social citizenship, it can easily benefit social tourism.[153]

Conclusions

The dividing line between the European and American legal cultures persists. The majority of the European countries are 'social states' and this entails a thoroughly different structure of state institutions and of conceptualisation of all fundamental rights. This historical divergence is a resilient element, which corresponds to fundamentally dissimilar structural relations between the state and the market.

However, the social state principle, which is enshrined in the majority of the European states, contrasts sharply with the dominant-in-the-EU 'mercantile citizenship': the initial 'constitutional asymmetry'[154] of economic and social elements in the basic structure of the Community Treaties is yet to be overcome. Not only there is not a process towards a European welfare policy based on the social state principle, but EU citizenship is still defined not by a link to a *demos* but to a market.[155] The ECJ failed to introduce a new scale of values into Community law, as

[151] M. Gijzen, 'The Charter: A milestone for social protection in Europe', 8 *Maastricht Journal of European Comparative Law* (2001) p. 33 at p. 43, S. Michalowski, 'Health Care Law', in S. Peers and A. Ward, *The European Union Charter of Fundamental Rights* (Oxford-Portland Oregon, Hart Publishing (2004) p. 287.

[152] N. Bernard, *supra* n. 133; T. Hervey, '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 (eds.), *Social Rights in Europe* (Oxford, Oxford University Press 2005) p. 305 at p. 315.

[153] K. Hailbronner, 'Union Citizenship and access to social benefits', 42 *Common Market Law Review* (2005) p. 1245, J.F. Handler, 'Social citizenship and workfare in the US and Europe: from status to contract', Vol. 13 (3) *Journal of European Social Policy* (2003) p. 229.

[154] F. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', Vol. 40, No. 4 *Journal of Common Market Studies* (2002) p. 645.

[155] M.P. Maduro, '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 2000) p. 325.

its 'market mentality'[156] confined its case-law to an extension of limited civil and political rights on an equal treatment basis, without contributing to the formation of some sort of identity based on rights as ends in themselves and not means to the market integration.

This ideological and institutional mismatch between the European and the national polities could, potentially, undermine the project of 'deepening' European political integration.[157] Therefore, a new balancing in the judicial construction of the European economic 'constitution' is necessary. The crucial issue is how to locate social rights within the logic of market integration so that 'transnational governance would not encroach on fundamental social values (…) which go to the very self-understanding' of the European citizen'.[158]

Towards this direction the Court could use the new provisions of the Reform Treaty, which replace Article 2 of the Treaty on the European Union, providing that 'the Union shall work for the sustainable development of Europe based on' (*inter alia*) 'a highly competitive *social market* economy'. This new provision, together with the social rights included in the Charter of Fundamental Rights, which shall have the same legal value as the Treaties (according to the reformed Article 6 of the TEU) could be the basis for the recognition of the 'Social State' principle at the EU level.

[156] M. Aziz, *The impact of European Rights on national legal cultures* (Oxford, Hart Publishing 2004).

[157] For the eventual clash between the ECJ case-law and deeply held aspects of national legal or cultural identity *see* Ch. Hilson, 'The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National and European Identity', Vol. 14 No. 2 *European Law Journal* (2008), p. 186 and R. Craufurd Smith 'Community Intervention in the Cultural Field: Continuity or Change?', in R. Craufurd Smith (ed.), *Culture and European Union Law* (Oxford, Oxford University Press 2004).

[158] J.H.H. Weiler, 'Fundamental rights and fundamental boundaries: on standards and values in the protection of human rights', in N. Neuwahl and A. Rosas (eds.), *The European Union and Human Rights, supra* n. 119 at p. 51-76.