

## THE EUROPEAN MODEL OF PROTECTION OF SOCIAL RIGHTS

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SUMARIO: I. *The european constitutional identity.* II. *Social citizenship in the European Union.* III. *The perspectives for the future.*

Nation states continue to bear the basic responsibilities for the provision of social services and the enjoyment of social rights. Actually, the process of the elaboration of the Welfare State has greatly contributed to the deepening of national bonds of solidarity within each nation's borders and the emergence of a new type of citizenship, including social rights a par with the traditional civil and political freedoms. However, nowadays the capacity of national governments to "lock in" and exert coercive rule on the activity of social actors (especially of the transnational corporations)<sup>1</sup> and the allocation of resources is severely limited by the ongoing processes of globalisation. Therefore, the role of international organisations and supra-national entities will continue to grow in the years to come.

The European Union (EU) experience in this field is especially important for two reasons: First of all because it represents a model of social and political integration much more advanced than any other similar endeavour (NAFTA, Mercosur, etcetera). Secondly, and more importantly, because the European model of social protection has unique institutional features, especially in contrast with the Anglo-Saxon rival model.

The European Communities has had from the beginning a "constitution", although an unfinished one.<sup>2</sup> The European Court of Justice (*from*

<sup>1</sup> *Cfr.* Muchlinski, P. T., "Human Rights and Multinationals: Is There a Problem?", *International Affairs*, vol. 77, n. I, 2001, p. 37.

<sup>2</sup> Snyder, F., "EMU Revisited: Are We Making a Constitution? What Constitution Are We Making?", in P. Craig et G. de Burca (dirs.), *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, pp. 417-473.

now on ECJ, or simply “the Court”) has many times declared that the Community has a constitutional legal order, although its fundamental provisions have been dispersed, till now, in 17 treaties. They, most certainly, had an “economic constitution”, in the sense of a system of fundamental legal rules of supralegislative force that regulate the economic process in relation with the limits of governance and define the legitimate national limitations to the functioning of the market.<sup>3</sup> According to the Court certain aspects of its economic Constitution could not be revised, even through an amendment of the treaties.

Writing in the nineties, two scholars attempted a prophesy regarding the future of the citizenship rights in the European Union:<sup>4</sup> According to them, for some time to come, whatever will occupy the place of the supranational European Polity, will likely resemble a pre-New Deal liberal state, with, in Marshall’s terms, a high level of civil rights, a low level of political rights, an even lower level of social rights and the almost complete absence of a European system of industrial citizenship.

This paper will try to speculate on these hypotheses, exclusively from the legal perspective. More specifically it will try to answer the following questions: Is there today a European Social Model (ESM), based on legally enforceable social rights? Which will be the role of the affirmation of such rights for its normative formulation?

<sup>3</sup> See, among others, Sauter, W., “The Economic Constitution of the European Union”, 4 *Columbia Journal of European Law*, 1998, pp. 27 ff; Jorges, Ch., “The Market Without the State? The «Economic Constitution» of the European Community and the Rebirth of Regulator Policies”, *European Integration online Papers* (EioP), vol. 1, no. 19, 1997; Mertens de Wilmars, “Réflexions sur l’ordre juridico-économique de la Communauté européenne”, in J. Dutheil de la Rochere and J. Vandamme, *Interventions publiques et droit communautaire*, Paris, Pedone, 1988, p. 1; P. Behrens, “Die Wirtschaftsverfassung der Europäischen Gemeinschaft”, in G. Braggermeier (Hrsg.), *Verfassungen für ein ziviles Europa*, Baden-Baden, Nomos, 1994, p. 7; Boscowits, K., *The European Judge and the Economic Constitution: the Contribution of ECJ to the Formulation of a Constitutional Economic Model of the European Community*, ToS, 2, 2001 (in Greek).

<sup>4</sup> Streeck, W. and Schmitte, P., “From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market”, *Politics and Society* 19, 1991/2, p. 512.

## I. THE EUROPEAN CONSTITUTIONAL IDENTITY

The answer to the first question is not easy. One could generally say that, although, at the European (EU) level, the European Social Model has not yet attained its normative formulation, it is, however, defined through three basic and universally accepted principles: *a)* the recognition of social justice as a policy target, *b)* the acceptance of the productive role of social policy and its contribution to economic efficiency, and *c)* the development of a high level bargaining between the social partners.

The existence of a European constitutional identity,<sup>5</sup> in this sense is undeniably true, especially by contrast to the American, or more generally, the Anglo-Saxon paradigm. Despite the osmotic procedures between the Western legal systems, it is still discernible a clear dividing line between the European and American (more generally Anglo-Saxon) legal tradition.<sup>6</sup> The basic discrepancies are related to the functions of the state, especially in its relationship with the civil society and the market: The main points of their divergence lay on the recognition of affirmative social rights and consequent obligations of the public power in the framework of the so-called European Social-State, as well as a more substantive conceptualization of equality”.<sup>7</sup>

In the Anglo-Saxon dominant legal ideology property rights are the model for all other rights, thereby translating all sorts of claims into property claims and conceptualizing them in conditions of exchange of equivalents.<sup>8</sup> This omnipotence of the market paradigm has forced even the defenders of the welfare state to elaborate a theory of welfare provision as a “new property”.<sup>9</sup> On the contrary, the European model is based to a wider

<sup>5</sup> See, among others, the classical remarks of Häberle, P., “Gemeineuropäisches Verfassungsrecht”, *EuGRZ*, 1991, 261; *cf.* Arnaud, A. J., *Pour une Pensée Juridique Européenne*, Paris, PUF, 1991.

<sup>6</sup> *Cfr.* Friedrich, C. J., *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 4th ed., 1968.

<sup>7</sup> For a review of this discussion see Katrougalos, G., *Constitution, Law and Rights in the Welfare State... and Beyond*, Athens, A. Sakkoulas, 1998, Chapter 1 of Second Part.

<sup>8</sup> See, for instance, N. Fraser and L. Gordon, “Civil Citizenship Against Social Citizenship? On the Ideology of Contract-versus-Charity”, in B. van Steenberghe (ed.), *The Condition of Citizenship*, London, Sage, 1994, pp. 90 ff.

<sup>9</sup> The “new property” theory of Ch. Reich (see below and note 11) had the advantage to offer procedural guarantees for the withdrawal of social benefits, using the due

range of supportive values. The most crucial of them—under the influence of neo-Kantian theorization—are epitomized to the triptych of freedom-property-human dignity.<sup>10</sup>

In consequence, contrary to the American one,<sup>11</sup> the European State has not as sole obligation to abstain from the violation of fundamental rights, but also a compelling, positive obligation to protect and to promote them. This assumption inevitably results to the undertaking of new, general obligations for the State.<sup>12</sup> Therefore, as R. Aron remarked, in Europe “the concept of State and law is not any more 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”.<sup>13</sup>

It has been often noted by many scholars that the concept of the “State” itself in Europe is closer to the Anglo-American notion of the Welfare

process clause. However, thus, as N. Fraser and L. Gordon remark (*op. cit.*, pp. 103 ff.): “Although they won the right to a hearing, they won no right to be lifted out of poverty”. For another critical approach of the “new property” approach see: E. Sparer, “The Right to Welfare”, in N. Dorsen (ed.), *The Rights of Americans, What they are, What they should be*, New York, Pantheon, 1970, and the self-critical account of Ch. Reich, “Beyond the New Property, an Ecological View of Due Process”, *Brooklyn Law Review* 56, 1990, 730.

<sup>10</sup> See Basta, L., “Constitutions and Peace within States: Minorities, Human Rights and Welfare State”, *General Report for the 4th World Congress of the International Association of Constitutional Law*, Tokyo, 1995, pp. 8 ff.; *cf.* Denninger, E., “Vielfalt, Sicherheit und Solidarität, Ein neues Paradigma für Verfassungsgebung und Menschenrechtsentwicklung”, in Denninger, E., *Menchenrechte und Grundgesetz*, Beltz, Athenäum, Weinheim, 1994, p. 13.

<sup>11</sup> The American constitutional theory is very reluctant to recognize affirmative constitutional rights. The initial position of the jurisprudence regarded them not as subjective, enforceable rights but as largesse, “gratuities” of the state, a kind of public charity. See *Lynch v. United States*, 292 US 571, 577 (1934), compare *Thompson v. Gleason*, 317 F. 2d 901, 906 (1962), for further discussion *cf.* Reich, Ch., “The New Property”, *Yale Law Journal* 5, 1964, 733. Moreover, the affirmative action is not conceived as an obligation of the state in order to promote the substantial equality, but rather as a sui-generis collective compensation for the injustices of the past. Therefore, its foundation is not the recognition of a right, but the “victimization” of the recipients. *Cfr.* Steele, *The Content of our Character. A New Vision of Race in America*, New York, St. Martin Press, 1990; Rosanvallon, P., *La nouvelle question sociale*, Paris, Seuil, 1995, pp. 64 ff.

<sup>12</sup> *Cfr.* Katrougalos, G., *Constitution, Law and Rights in the Welfare State... and beyond*, *op. cit.*, pp. 171 ff.

<sup>13</sup> Aron, R., *Etudes politiques*, Paris, Calman Lévy, 1977, p. 242.

State or even of the “administrative state”.<sup>14</sup> In any case, all the countries in Western Europe (with the notable exception of the United Kingdom) are “Social States” in the sense that they endorse a fundamental constitutional principle, which imposes to the Polity constitutional obligations in the social and economic fields.<sup>15</sup>

(A necessary caveat: One should not use the terms “welfare state” and “social state” interchangeably. As already mentioned, the latter is a constitutional, normative concept, whereas the first is descriptive and organizational. In this sense, and despite important institutional variations, the welfare state is *the universal type of state* of modern times, as a response to a functional necessity of the capitalist type of organization. The Social State (Sozialstaat, Etat Social), on the contrary, is the constitutional form of organization of one type of welfare state, the one that implies a guiding role of the public power in economic and social matters and the establishment of social rights. In the countries where the legal system contains (explicitly, by a “Social State (Sozialstaat) clause or even implicitly, deduced by the whole system of constitutional protection) such principle, the latter fulfils mainly three functions:

a) It allows the state interventionism and dirigisme (and, more generally, any kind of affirmative action) in the economic domain. The regulation of the economy embraces both demand and supply side, from the wage levels and working conditions to the profits and investments

<sup>14</sup> See, for instance, Casper, G., “Changing Concepts of Constitutionalism”, *SCtRev*, 1989, p. 311, esp. pp. 318-339; Glendon, M. A., “Rights in the Twentieth Century Constitutions”, *U Chi L Rev* 59, 1992, p. 519.

<sup>15</sup> And that not only by adopting explicitly the principle in the form of a “Social State’s Clause”, but also, and more often, by incorporating a list of social rights to their Constitutions. It is broadly accepted in the European constitutional theory that structural principles like the “Rule of law” or the “Social State” can be deduced by the overall corpus of the constitutional legislation, even without an explicit, solemn reference to them. See, for instance for Greece Tsatsos, D., *Constitutional Law*, vol. A, Athens, Sakkoulas, 1994 (in Greek) for Switzerland, see Müller, J. P., *Soziale Grundrechte in der Verfassung? Schweizerischer Juristenverein, Referate und Mitteilungen*, Heft 4, Basel, 1973, p. 690, esp. p. 824. Noteworthy 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 (sec. Slg 5854/196S, 3160/1957). See for further discussion Wipfelder, H. J., *Die verfassungs- rechtliche Kodifizierung sozialer Grundrechte*, ZRP 6, 1986.139, p. 142, and the same, ZfS 1982.289.

b) It *obligates* the public power to interfere in the market function, in order to guarantee the exercise of basic social rights, to maintain social security and to equalize extreme social differences.

c) Finally, it forbids the dismantlement of the basic structures of the welfare state. Therefore, USA or Australia are “*welfare states*” but not “*social*” ones, as the social policy has no therein a constitutional foundation. Illustrative is the fact that in the earlier jurisprudence of the Supreme Court<sup>16</sup> what we call in Europe “social rights” were regarded as largesse or “gratuities”, in other words a kind of public charity. Moreover, in the rare cases, in which the US Supreme Court accepted the existence of positive obligations of the State, it was only for favoring directly the interests of employers and not of the workers. So, the Court interpreted that the due process clause, despite its negative formulation, imposed the *positive* obligation to protect the employers against the acts of private parties.

The foundation of the European Social Model to the law contrasts also sharply to other antagonist welfare models, as for instance, the Asian or Confucian one, which is based in the famous “Asian values”, which stress the Confucian tradition of order, work discipline, ethic, responsibility

## II. SOCIAL CITIZENSHIP IN THE EUROPEAN UNION

However, what has been already said is true only at the level of the separate State-Members (except the UK), not at the level of the EU. The principle of “social state” is not embodied at the Treaties, although the Treaty of Rome contained some social provisions. The social policy itself had never been the most salient aspect of the European Union. It has been characterized, not quite unjustifiably, as the “step child” of European Integration.<sup>17</sup>

The social objectives have always served as an auxiliary to the economic integration, conceived principally as a way of correcting distortions to the operation of the common market. That’s why, contrary to its traditional function at the national level, the European social policy is not of the

<sup>16</sup> See the case *Lynch v. United States*, 292 US 571, 577 (1934), compare the case *Thompson v. Gleason*, 317 F. 2d 90L 906 (1962). See for a further discussion Ch. Reich, “The New Property”, *cit.*, p. 733.

<sup>17</sup> See Flora, P., “The National Welfare States and the European Integration”, in Moreno, L. (ed.), *Social Exchange and Welfare Development*, Madrid, Consejo Superior de Investigaciones Científicas, Instituto de Estudios Sociales Avanzados, 1993, p. 11.

“market breaking” but of the “market-making” variety. The concept of a “social dimension” or “social space” of Europe,<sup>18</sup> in the sense of an inclusive European social policy, distinctive from the sum of the separated national social policies, was practically absent from the high level political agenda at least till the middle of the eighties, after the Venturini Report. It is noteworthy that even in nowadays the social of social policy set by the Council in Lisbon are oriented towards the promotion of economic competitiveness and growth.

Still, one can see a clear evolutionary process, over three periods of European social policy: One from the Treaty of Rome to the Single European Act (1957-1987), a second from the Single European Act till the Treaty of Amsterdam (1987-1997) and a third one from the Treaty of Amsterdam till today.

In the first period the bulk of initiatives was related to the completion of the single market, by ensuring the equality of treatment of the immigrant workers through the national social security systems, in order to remove the obstacles for the free movement of labor (negative integration).<sup>19</sup>

In the second period the basic concern was, on the one hand to prevent the institutional delay in the development of social policy from obstructing the economic integration, through the setting of “minimal models” and “standards” against the social dumping”. On the other hand it was imperative to legitimize this process, by constructing also a social “face” the Union. Following these considerations, the Social Charter has been adopted in 1989. The Charter, despite being a non legally binding declaration, it represented a considerable ideological step in presenting a new, social face of the European Institutions. However, it is the Treaty on European Union (TEU) and especially its Protocol and the Agreement on Social Policy which are the basic landmarks of this period. The White Book of the Commission (1994)<sup>20</sup> has for the first time officially defined the “European Social Model” as a combination of economic performance and social solidarity, based on the social consensus and the tripartite negotiations.<sup>21</sup>

<sup>18</sup> Teague, P., *The European Community: the Social Dimension*, London, Kogan Page, 1989.

<sup>19</sup> See, for instance, the case of the ECJ *Biaison v. Caisse Regionale d'Assurances Maladie de Paris*, 24/1974.

<sup>20</sup> COM 94, 333 final, 1994.

<sup>21</sup> *Ibidem*, pp. 2 and 3. J. Delors, (Defending the European Model of Society, in Commission of the European Communities, DG V, Combating Social Exclusion, Fos-



Finally, in the third period, we have some timid trends towards the constitutionalisation of the social policy. The Treaty of Amsterdam, by reformulating the article 117 of the Treaty, has set as objectives of the Union the promotion of employment, the improvement of living and working conditions, proper social protection, dialogue between management and labor, sustainable development and the combating of exclusion. The reference to the European Social Charter, absent in the Maastricht Treaty, has reappeared in the Treaty of Amsterdam.

However, the recognition of social enforceable rights at the level of the Union is still a half institutionalized promise. As already mentioned, the basic goal of the European Social Policy was to facilitate the European integration, by ensuring the free movement of workers, especially through the aggregation of eligibility and social security's benefits for the EU migrants.<sup>22</sup> In order to achieve this goal, and especially to ensure payments of benefits from country to country,<sup>23</sup> the European Court of Justice has interpreted largely the related Regulations and imposed the principle of non-discrimination in all aspects of Social Security, although not in the domain of public assistance.<sup>24</sup>

Hence, there is not a right to social assistance or a right to minimum income as an enforceable right for a EU migrant to a state that guarantees these rights for its citizens. For instance, the ECJ considered in conformity to the European Law the decision of FRG to expel foreign workers who were not eligible for the unemployment benefit and have applied for public assistance (Sozialhilfe).

tering Integration, Brussels, 1992, p. 49) defines this model as "a mixed economy, with participation of all citizens, that combines the market with the state steering and the social dialogue". For a further discussion see also M. Aubry, *Pour une Europe sociale*, Rapport au ministre des Affaires Sociales et de l'emploi, Paris, 1988; OI. Dutheil de Lamothe, "Du Traité de Rome au Traité de Maastricht: La longue marche de l'Europe sociale", *Dr. Soc.* 1993.194, 196; Ch. Charpy, "L'Europe sociale, une priorité pour la France", *Dr. Soc.* 1988. 413; J. van Langendock, "The Role of Social Security Systems in the Completion of the European Market", *Acta Hospitalia*, no. 1/1991, pp. 35-57.

<sup>22</sup> See principally the Regulations 1612/1968 and 1408/1971. *Cfr.* the directives 75/129 of 17/2/1975, 77/187 of 14/2/1977 and 80/987 of 20/10/1980.

<sup>23</sup> *Cfr.* Mosley, H., "The Social Dimension of European Integration", *International Labour Review* 129, 1990 147, pp. 150 ff.

<sup>24</sup> See Mosley, *op. cit.*, p. 150.



The freedom of movement<sup>25</sup> implies the rights to residence and to employment. However, it is not an absolute right. It can be limited on grounds of public security or public health.<sup>26</sup> Initially it covered only the working<sup>27</sup> persons and even today, despite its material expansion, it concerns only those who have the means for their subsistence. As it is rather the labor as a commodity<sup>28</sup> that is protected than the workers themselves, the liberty of the movement is not destined to cover individuals that don't have a steady income or a job in the country they want to move to.<sup>29</sup> Hence, there *is* a right to free movement for economic purposes, but there is no right to move to look for better social assistance, although EU citizens can move in search of work and have a right to assistance for an initial period.<sup>30</sup>

### III. THE PERSPECTIVES FOR THE FUTURE

The absence of rights of social citizenship at the level of the European Union poses serious problems not only to the consolidation of the ESM but also to the deepening of the political integration of the EU, as the elements of political social and economics integration are closely interwoven.

<sup>25</sup> See Burrows, F., *Free Movement in European Community Law*, Oxford, Oxford University Press, 1987.

<sup>26</sup> Article 48, sec. 3 of the Treaty of Rome. The article 8 A of the Treaty of European Union (TEU) recognizes also the right to move and reside freely, but "subject to limitations and conditions laid down in this Treaty and by the measures adopted to give it effect".

<sup>27</sup> The ECJ, however, considered that who is "working" is a question to be answered by the European law and not by the national standards. See the cases Levin and Kempf (European Court Reports 1986, 1749 ff), and for a further discussion S. Leibfried, "Towards a European Welfare State? On integrating poverty into the European Community", in Jones, C. (ed.), *New Perspectives on the Welfare State in Europe*, London-New York, Routledge, 1993.133, p. 147.

<sup>28</sup> *Cfr.* the intervention of Advocate General Trabuchhi, quoted by Arnul and E. Meehan, *Citizenship and the European Community*, London, Sage, 1993, p. 132: "The migrant worker is not... a mere source of labour... but a human being". The fact that it was necessary to reaffirm the human quality of workers is illustrative of the legal mentality during the first stages of implementation of the European Law...

<sup>29</sup> See the directives 90/364-366. *Cfr.* E. Lundberg, "The Protection of Social Rights", in Drzewicki, K. *et al.* (eds.), *Social Rights as Human Rights*, Institute for Human Rights, Åbo, Åbo Academi University, 1994, p. 169.

<sup>30</sup> See, among others, Guild, E., "The Legal Framework of Citizenship of the European Union", in Cesarani and Fulbrook (eds.), *Citizenship, Nationality and Migration in Europe*, London, Routledge, 1996.

Therefore, the so-called “democratic deficit” forms a vicious circle with the “social” one. On the one hand, it is not possible for the EU authorities and especially for the most active of them, the Commission, to override the reluctance of the State-Members to transfer social competencies to the Union, to the extent they lack immediate democratic legitimacy.<sup>31</sup> On the other hand it is not possible to foster support to a European Super-State which would not promote the fundamental in all member states rights.

This remark has far reaching consequences: It is true that is not possible to attain the goal of a ESM through the old harmonization concept, as a highly centralized European supranational welfare state is not likely to emerge. The proposition of for a de-centralized ESM, reflecting the diversity and the national peculiarities of the member states is much more plausible. In this sense, the ESM will be a mix of national and European policies, and there will continue to be a range of European social models at the level of the national members states.

However, this “soft” approach, based on the Open Coordination Methods should be accompanied by the consolidation, at the level of the EU, of the basic fundamental social rights. This is necessary because the OCM are primarily addressed to the Member-States and they do not affect immediately the institutional geometry of the EU. In the absence of a clear constitutional foundation in the treaties, the perpetuation of the present lack of social citizenship could jeopardize the process of unification itself and facilitate a downwards process of the social protection even at the level of member-states.

The incorporation in the new Constitution of the European Union<sup>32</sup> of the Charter of the Fundamental Rights, which includes all fundamental social

<sup>31</sup> *Cfr.* Flora, P., “The National Welfare States and the European Integration”, *cit.*, pp. 17 and 18: “any attempt to develop a stronger European Welfare State would lead to enormous conflicts at the European level and would create a democratic deficit, given the limited democratization of the European Community”.

<sup>32</sup> Its official title is “Draft Treaty Establishing a Constitution for Europe”. Of course, the term “Constitution” is not entirely accurate. First of all, because, although drafted by a consultative Convention of representatives of Governments, European and national Parliaments, it is actually a Intergovernmental Treaty. Moreover, one should have in mind that the concepts of state and constitution are indissociably interconnected. The EU is not a state and never will be one, so it cannot have a “traditional” Constitution (see on that, for instance, Mancini, G., “Europe: the Case for Statehood”, *European Law Journal*, 1998, 4/1, pp. 29-42). Its sui generis character is analysed in various theorisations, which stress its hybrid character, as union of states and peoples. The source of EU legitimacy lies si-

rights recognized in common by the Member-States, is a very positive step towards this direction, provided, of course, that the Constitution would be adopted. By this way the Charter, which is today a political non-binding declaration with some legal effects, especially at the level of interpretation, will take a legally binding character.

It is true that the Charter does not establish any new social competence for the Community or the Union. Moreover, according to articles 50-51, its provisions are addressed primarily to the institutions of the Union and secondary to the Member States, only when they are implementing Union law. However, its incorporation in the Constitution, besides its legitimization effects, would have an important constitutional significance, as it will mark the acceptance by European Union of the social state principle.

The Constitution, if and when ratified, will unify all the seventeen existing Treaties to a single Charter with supralegislative force. It merges the three initial Communities (EC, ECSC, Euratom), and the EU, to one legal order with legal personality, abolishing the “three pillar structure” established by Maastricht Treaty.<sup>33</sup> Its social provisions are more advanced, at least at the rhetorical level, than all the previous Community treaties. Its article 3 embraces among the Union’s objectives the “social market econ-

multaneously with the Member States and their citizens, as its legislative competence is based upon the powers expressly granted to it by them see, for instance, D. Curtin, “Betwixt and Between: Democracy and Transparency in the Governance of the European Union”, in Winter, J. A. *et al.* (eds.), *Reforming the Treaty on European Union. The Legal Debate*, The Hague-Boston-London, Kluwer Law International, 1996, pp. 95-121; Caporaso, J., “The European Union and Forms of State: Westphalia, regulatory or post-modern”, *Journal of Common Market Studies*, 1996, 34: 29-52; Shaw, J., “The paradox of the «European Polity»”, in Green Cowles, Maria and Smith, Mike (eds.), *State of the European Union 5: Risks, Reform, Resistance, and Revival*, Oxford University Press, 2000; Tsatsos, D., “Die europäische Uniongrundordnung, Grundsatzfragen und fünf Anregungen zum Umdenken anlässlich der Regierungskonferenz 1996”, *EuGRZ* 1995.287; O. Dörr, “Zur Rechtsnatur der Europäischen Union”, *Europarecht* 1995, 30/4, 334-348; I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, *Common Market Law Review* 1999, 36, pp. 703-750; Curtin, D. and Dekker, I., “The EU as a ‘Layered’ International Organization: Institutional Unity in Disguise”, in Craig, P. and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, pp. 83-136; B. de Witte, “The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral”, in T. Heukels *et al.* (eds.), *The European Union after Amsterdam. A Legal Analysis*, The Hague, Kluwer Law International, 1998.

<sup>33</sup> Till now, the three Communities had international legal personality but not the European Union itself.

omy”, although not explicitly the “Social State” principle. It endorses, also, the promotion of social justice and protection, the equality between women and men, the solidarity between generations and the protection of children’s rights. It stresses that the EU shall promote economic, social and territorial cohesion, and solidarity among Member States.

Still, there are not new competencies for the EU deriving from this article (or any of the other social provisions of the Constitution), as it is clearly defined in its paragraph 5 that its objectives shall be pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union in the Constitution. According to article 7 paragraph 3, the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States (*hence, also the social rights*), constitute general principles of the Union’s law. Article 11 paragraph 3 stipulates that the Union has competence to promote and coordinate the economic and employment policies of the Member States and article 13 defines, more precisely, that shared competence (between the EU and the Member States) applies in the areas of social policy and economic, social and territorial cohesion.

The adoption of the Constitution would very possible contribute to the activism of the European Court of Justice (ECJ) in the domain of social protection. In a series of cases the Court has derived binding obligations from provisions generally” regarded to be of programmatic nature. Concerning the social policy, the first leading case to this direction was the *Defrenne v. Sabena* no 2,<sup>34</sup> in which the Court tried to dissociate the economic from the social policy and to assert the legal validity of the social provisions of the Treaties. It ruled that “the fact that the objectives of social policy laid down in article 117 of the Treaty of Rome are in the nature of a program, does not mean that they are deprived of legal effect. They constitute an important aid, in particular for the interpretations of other provisions of the Treaty and the social legislation”.<sup>35</sup>

However, some scholars observe that the Court is not consistent in the protection of social rights, as it is most likely to favor the interests of Euro-

<sup>34</sup> ECJ 43/75 Judgment of 08/04/1976, *Defrenne/Sabena*, Rec. 1976, p. 455.

<sup>35</sup> *Cfr.* also ECJ *Zaera v. Instituto Nacional de la Seguridad Social*, Case 126/86, ECR 3697.

pean Integration over anything else.<sup>36</sup> For instance, it has —already in 1967—<sup>37</sup> practically abandoned the goal of harmonization of national social policies, stipulating that the aim of the Treaty of Rome is not the equalization of the social security provisions around Europe. Therefore, the inclusion of a “clause of Social State” in the treaty would facilitate its activism, as, in this case, the protection of social rights and the deepening of the European integration would be two complementary and mutually enforceable goals.

As “Comité des sages” (a consultative committee set up by the Commission in order to examine what might become of the Community Charter of Social Rights in connection with the review of the European Union Treaties) stated, “Europe cannot be built on a shortfall in citizenship. Europe will be a Europe for everyone, for all its citizens, or it will be nothing. It will not tackle the challenges now facing it, does not strengthen its social dimension and demonstrate its ability to ensure that fundamental social rights are respected and applied”.<sup>38</sup>

<sup>36</sup> *Cfr.* A. O’Neil, “The European Court of Justice. Taking rights seriously?”, *Common Market Law Review* 29, 1992.

<sup>37</sup> See ECJ 2/67, Judgment of 05/07/1967, *De Moor/Caisse de pension des employés privés*, Rec. 1967, p. 255.

<sup>38</sup> European Commission, *For a Europe of Civil and Social Rights*, Report by the Committee des Sages, Office for Official Publications of the European Communities, Luxembourg, 1996.