THE EU AND FUNDAMENTAL RIGHTS: The case of social rights

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2014/2015
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INTRODUCTION

The recognition of fundamental rights, and of social rights as well, at the European level and their incorporation inside the European Union (EU) legal system has not been an automatic process at the beginning of European integration. Conversely, it followed an evolutionary path which has unfolded over a long period of time and has required the intervention of a plurality of actors.

The aim of this paper is to give an overview of the historical development of the recognition of social rights in the European Union, and to offer a problematic analysis of this issue. Therefore, a first section will be dedicated to trying to define the concept of social rights and to raising the issue of the status of social rights inside the broader set of fundamental rights, in the conviction that this issue is likely to have a major impact on the effective and substantial recognition of those rights. Secondly, I will draw a trajectory of the evolution of the recognition and promotion of social rights in the European Community (EC), later become European Union, until the adoption of the EU Charter of Fundamental Rights (also known as Nice Charter) in order to highlight how their relationship with the other fundamental rights (i.e. civil and political) has been interpreted in the different phases. Finally, based on an analysis of the point of arrival of such trajectory (namely the text of the Nice Charter and the provisions of the Treaty of Lisbon related to the latter), I will try to answer the question whether this document has changed the status of social rights among the other fundamental rights and has thus overcome the classical dichotomy between civil/political rights and social rights.

The choice of focusing, among the fundamental rights, particularly on the recognition of social rights in the European Union is justified firstly by the fact that such rights play a major role among the fundamental values upon which European democratic societies are traditionally built. Secondly, and most importantly, we want to stress the even greater importance of the promotion of social rights in times of globalization on the one hand, and of economic crisis on the other hand. Indeed, whereas social rights have so far traditionally been recognised and enforced at the national level, the main actors in the market (the entity which is most likely to affect the protection of social rights) operate nowadays in a global and transnational context. Such context is likely to threat the protection of social rights as a result of the pressures to deregulation it triggers. Finally, social rights in Europe are nowadays under the threat of the economic crisis, as the realization of such rights requires substantial investments of resources by the States.
1. A PROBLEMATIZATION OF SOCIAL RIGHTS: SOCIAL RIGHTS AS “SUBORDINATE” RIGHTS?

The concept of “social rights” is one of the most controversial in the legal doctrine, as it primarily presents a major problem of definition. Such problem originates from two main sets of difficulties: one relating to the heterogeneity of social rights (due to the diversity of sources from which social rights are derived), and another linked with a traditional conception of social rights as “subordinate” rights and the subsequent debate over the classification itself of them as “actual” rights. Indeed, whereas it is relatively simple to trace a common definition of civil and political rights in modern liberal democracies, the definition of social rights is far more blurred. This should be intended both in a “geographic” dimension (i.e. their recognition varies much among the different countries, even among the Member States of the European Union) and in a “temporal” dimension (i.e. they belong to an open catalogue which is likely to change over time according to the evolution of society). As regards the heterogeneity among Member States in the recognition of social rights, it will suffice here to note that social rights are not even classified as “rights” by all Member States (e.g. the United Kingdom and Germany do not include social rights in their Constitution).1

As will be argued, such degree of uncertainty in the definition of social rights affects dramatically their effectiveness. However, for the purpose of this paper, we will consider as “social rights” those rights related to economic and social well-being, as listed in three main documents: the European Social Charter (1961, revised in 1996), the Community Charter of Fundamental Social Rights of Workers (1989), and the EU Charter of Fundamental Rights (2000).

Secondly, the historical tardive emergence of social rights (20th century) in comparison with that of civil and political rights and freedoms (18th century) has had a major impact on their recognition. Indeed, although the rhetoric of “indivisibility” of rights is used more and more frequently, the discourse on fundamental rights has so far been heavily affected by the traditional dichotomy (developed by T.H. Marshall in 1949)2 between “classic” civil and political rights on the one hand, and “second-generation” social and economic rights on the other. The main difference between the two is that, whereas civil and political rights impose on the State a duty of non-intervention, social and economic rights put in place an obligation of positive action.

As a result, whereas civil and political rights have received broad recognition in liberal democracies, social and economic rights tend to be considered as more controversial and to have a subordinate status.\textsuperscript{3} This different evolution is clearly shown in the fact that the Council of Europe, in its willingness to recognise and enforce fundamental rights, has drafted two different treaties (the European Convention for the Protection of Human Rights of 1950 and the European Social Charter of 1961), operating through different procedures.

Following such dichotomy, civil and political rights tend to be regarded as proper fundamental rights (connoting inherent rights of the individual, and thus directly enforceable), whilst, with regard to social and economic rights, a debate has emerged over their status, and namely over their “justiciability”.\textsuperscript{4} Many authors have dealt with this issue. An important part of the doctrine points out that social rights do not constitute individual prerogatives but mere principles and programmatic objectives for legislation (therefore being transformed into actual “rights” only after legislative intervention) and are thus not likely to enjoy a direct legal enforcement.\textsuperscript{5} According to this view, it is the national legislator who has the duty to determine the scope and the extent to which those rights are to be made effective.\textsuperscript{6}

Moreover, social rights have been heavily criticised by the liberal doctrine, which regards them as operating in tension with the freedom of the market (insofar they entail an intervention of the State) and eventually likely to lead to the establishment of a totalitarian State.\textsuperscript{7}

In the context of the EU legal order, these problems must be added to the fact that European integration was initially conceived merely as a process of economic integration. For this reason, as will be discussed in the next section, the promotion of social rights at the beginning did not figure among the priorities of the European Community and for many years a European common idea of social rights could hardly be identified. Nevertheless, the evolution of the treaties has contributed to a gradual refocusing of the European Union on citizens and on the protection of fundamental rights, and to a progressive recognition of social rights.\textsuperscript{8} Despite these developments, it can be noted that the recognition of social rights in the European Union has followed a different path from that of other

\textsuperscript{3} J. Kenner, “Economic and social rights in the EU legal order: the mirage of indivisibility”, in T. Hervey, J. Kenner (eds.), op.cit., p. 2
\textsuperscript{4} The justiciability of a right is defined as its capability of being invoked in a court of law or applied by judges in Ivi, p. 3
\textsuperscript{7} J.-F. Akandji-Kombé, Droits économiques, sociaux et culturels”, in J. Andriantsimbazovina et al. (eds.), op.cit., p. 324
\textsuperscript{8} M. Benlolo-Carabot, “Les droits sociaux dans l’ordre juridique de l’Union Européenne”; in La revue des droits de l’homme, 1(2012), p. 84
fundamental rights. Some authors have thus stressed, in observing the conduct of the European Court of Justice (ECJ), that some reluctance can be observed in providing social rights with real effectiveness. This can be seen especially if looking at two dimensions: the rare references made to instruments such as the European Social Charter, and the fact that, while the ECJ has often referred to civil and political rights as general principles of European law, it never provided social rights with such status. As I will argue, the text of EU Charter of Fundamental Rights did not affect much this situation, and still today the legal status of social rights in the EU legal order remains ambiguous. In the next sections, I will draw a history of the recognition of social rights in the European Union through an analysis of the main instruments dealing with social rights at the European level, both inside the European Union and in the broader context of the Council of Europe.

2. THE RECOGNITION OF SOCIAL RIGHTS IN THE EU LEGAL ORDER: A HISTORICAL OVERVIEW

2.1 Outside the European Union: The Council of Europe and the European Social Charter

One of the first steps in shaping the definition of social rights at the European level did not take place in the EU framework but in the broader context of the Council of Europe.

The European Social Charter was signed in Turin in 1961 and was conceived by the Council of Europe as strictly linked, rather complementary, to the European Convention on the Protection of Human Rights (ECHR) guaranteeing civil and political fundamental rights. However, many authors point out that the former instrument was ultimately overshadowed by the Convention and thus largely ignored. In addition, the implementation of the rights listed in the Charter was based for a long time entirely on a mechanism of reports submitted by the signatory States to a Committee of independent experts, whereas the Convention was subject to a proper jurisdictional mechanism.

The Charter was complemented with some additional protocols aiming to extend the list of rights included (1988) and to render the mechanisms of implementations more effective by adding a

9 Ivi, p. 90
collective complaint procedure (1995). Finally, a process of relaunch of the Charter was initiated in the 1990s, following the end of the Cold War and the development of a social dimension of the European Union (embodied in the drafting of a Community Charter of the Fundamental Rights of Workers), and culminated in the proclamation of a Revised European Social Charter in 1996.

As for the content of the Charter, this document draws a clear distinction between Part I, defined as a “declaration of aims which [the State parties] will pursue by all appropriate means”, and Part II, listing the provisions by which the parties are bound. The Charter enumerates a number of rights related to employment (part II, art. 1-6), health (part II, art. 11), social security (part II, art. 12), non-discrimination (part II, art. 15, 19, 20), housing (part II, art. 31), and so forth. The Charter operates through two main instruments. First of all, the State parties have to submit a yearly report on their implementation of the accepted provisions of the Charter to an independent body of experts, the European Committee of Social Rights. The Committee assesses whether national laws and practice have honoured the undertakings of the Charter and publishes its conclusions and recommendations. Secondly, the Charter has been provided in 1995 with a collective complaints mechanism, according to which some organisations (namely national and international non-governmental organizations and organisations of workers and employers) can address complaints to the European Committee of Social Rights based upon violations of the Charter by the State parties. The European Social Charter is characterized by what has been called an “à la carte” approach, which means that the State parties can select the provisions of the Charter by which they will be bound.

Despite the importance of this document, as far as its role in the recognition of social rights in the European Union is concerned, it can be noted that the European Social Charter has not been a primary source of reference for the development of a social dimension of the Community. In this respect, many authors have stressed the rare and selective references made to this document by the Treaties and the European Court of Justice. For these reasons, it has been noted that “the social dimension of the European Community has developed largely in parallel with the Council of Europe’s Social

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13 European Social Charter (revised) (1996), part III, article A
16 According to the Charter, “each of the Parties undertakes […] to consider itself bound by at least six of the following nine articles of Part II of this Charter: articles 1, 5, 6, 7, 12, 13, 16, 19, 20” and “by an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs”.
17 Among them: M. Benlolo-Carabot, op.cit., p. 90; O. De Schutter, (ed.) (2010), La Charte Sociale Européenne : une constitution sociale pour l’Europe, Bruylant, Bruxelles, p. 2
Charter, rather than building on it, notwithstanding the fact that this instrument represents the main normative source of social rights on the European continent”.

2.2 The EU level: a gradual recognition of social rights

When the European Economic Community was established in 1957 through the Treaty of Rome (TEC), there was no reference to any role of the Community in the promotion of human rights, and particularly social rights. Some vague references to a social dimension could be seen in the Preamble, stating that the parties are “resolved to ensure the economic and social progress of their countries” and affirm “as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples”

However, as some authors point out, such social objectives appear in the Treaty as subordinate to the establishment of the common market. The silence about the promotion of fundamental and social rights was mainly due to the purely economic perspective in which European integration was conceived for the first two decades. Indeed, the dominant view was that the productivity gains related to the establishment of the common market would automatically lead to a gradual improvement of social conditions in Europe: it is clearly stated in article 117 TEC that the common market “will favour the harmonisation of social systems”. In this perspective, it was deemed unnecessary to assign any task or competence to the European Community in the social domain. The only exception in the Treaty of Rome is represented by the principle of non-discrimination between men and women in the field of remuneration, contained in article 119.

This perspective changed during the 1970s as a result of three parallel processes. Firstly, the European Court of Justice began to derive the protection of fundamental rights from the Member States’

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19 Treaty establishing the European Economic Community (Treaty of Rome) (1957), Preamble
20 Ivi, Article 118
22 Treaty establishing the European Economic Community (Treaty of Rome) (1957), art. 117,
23 Ivi, art. 119
constitutional traditions and thus, through its judgements, to refer to fundamental rights as part of the “general principles” of Community law.\(^{25}\)

Secondly, at a more political level, the notion of a political and social integration of the European Community gradually emerged, especially after the Hague Summit in 1969 and the following Declaration on European Identity in 1973\(^{26}\). This tendency can be seen in the Joint Declaration on fundamental rights issued by the EC institutions in 1977,\(^{27}\) and in the proposal of the European Commission in 1979, which invited the Council to discuss the possibility of the European Community’s accession to the European Convention for the Protection of Human Rights, although at that time it was not followed by any initiative. Similarly, some proposals brought forward in the 1970-1980s, such as the Spinelli Project in 1984, advocated not only for the recognition of the ECHR and the European Social Charter, but also for the adoption by the EU of its own declaration of fundamental rights.\(^{28}\)

Thirdly, concerning more specifically social rights, the economic crisis in the 1970’s unveiled the urge to provide the European Community with a social dimension. Therefore, during these years the European Community adopted a number of directives in the social field, mainly building on the provision contained in the Treaty of Rome, according to which the Council could take the appropriate measures “if action by the Community should prove necessary to attain […] one of the objectives of the Community and this Treaty has not provided the necessary powers”.\(^{29}\)

However, the turning point in the establishment of a social dimension of the EU is the signature of the Single European Act (SEA) in 1986. This treaty came just after the enlargement of the European Union to three new Member States (Greece, Portugal and Spain) which presented major differences in their economic and social standards compared to the “old” Member States. The fact that such differences were likely to trigger a problem of “social dumping” severely pushed the EC to act in order to foster the harmonisation of national legislations in the social field. Not only did a European

\(^{25}\) Because of the shortness of this paper, a detailed analysis of the ECJ judgments was not possible. However, some examples of the mentioned trend can be found in the following ECJ judgments: Stauder vs. Ulm-Sozialamt (26/69), Internationale Handelsgesellschaft vs. Einfuhr und Vorratsstelle für Getreide und Futtermittel (11/70), Nold vs. European Commission (4/73), Ruatti vs. Ministre de l’Intérieur (36/75), Johnston vs. Chief Constable of the Royal Ulster Constabulary (222/84), Klensch vs. Secrétaire d’état à l’agriculture et à la viticulture (201-202/85), ERT vs. DEP (260/89).

\(^{26}\) Declaration on European Identity (1973), Copenhagen, art. 1: “The Nine […] are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights”.

\(^{27}\) Joint Declaration of the European Parliament, the Council and the Commission (1977), art. 1: “The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

\(^{28}\) Draft Treaty Establishing the European Union (Spinelli Project) (1984), Art. 4.3

\(^{29}\) Treaty establishing the European Economic Community (Treaty of Rome) (1957), art. 235
Treaty refer for the first time to the European Social Charter\(^{30}\), but it also provided the European Community with a partial competence in the social field and added to the Treaty of Rome an entire chapter devoted to economic and social cohesion.\(^{31}\) Indeed, the Single European Act provided for the TEC to be supplemented by article 118a, which states that (1) “Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area […]” and that (2) the European Community “shall adopt, by means of directives, minimum requirements for gradual implementation”.\(^{32}\) Moreover, article 130a was integrated in the TEC affirming that “[…] the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion” and article 130b stressing the role of the Structural Funds in the achievement of these objectives.\(^{33}\)

Another major step in the recognition of social rights at the EU level is the adoption of a Community Charter of the Fundamental Rights of workers at the Strasbourg European Council of 8-9 December 1989. The decision to adopt a Community catalogue of social rights was mainly the result of an initiative of the European Commission aiming to face the lack of consensus among the Member States for an increase of the Community competence in the social field. However, the proposal put forward by the Commission for a social charter of citizens was heavily revised and led to the adoption of a charter which provided workers (instead of all citizens) with a catalogue of social rights.\(^{34}\)

The Charter lists a plurality of rights related to working conditions, such as for example the freedom to choose an occupation (art. 4), the right to a fair remuneration (art. 5), the right to social protection (art. 10), the right of association and collective bargaining (art. 11-12), the right to collective action (art. 13), the equal treatment of men and women (art. 17), and the right to health protection and safety at work (art. 19).\(^{35}\) As for the implementation of its provisions, the Charter states that:

“It is more particularly the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee the fundamental social rights in this Charter and to implement the social measures indispensable to the smooth operation of the internal market as part of a strategy of economic and social cohesion.”\(^{36}\)

\(^{30}\) Single European Act (1986), Luxembourg, Preamble
\(^{31}\) Ivi, art. 23
\(^{32}\) Ivi, art. 21
\(^{33}\) Ivi, art. 23
\(^{34}\) J. Kenner, “Economic and social rights in the EU legal order: the mirage of indivisibility”, in T. Hervey, J. Kenner (eds.), op.cit., p. 7-9
\(^{35}\) Community Charter of the Fundamental Social Rights of Workers (1989)
\(^{36}\) Ivi, art.27
Despite its symbolic importance, the force of the Charter is strongly limited by its nature of mere political declaration (that is, having no legally binding value) and by the fact that it does not provide the Community with any additional competence in the social field. In addition, despite its non-binding nature, the United Kingdom decided to opt-out from the Charter. Nevertheless, the ultimate importance of the Community Charter lies in the fact that it was meant to act as a source of inspiration for future initiatives and legislation in the social field, thus as a soft instrument for the promotion of social rights.

As the completion of the internal market did in the 1980s, the establishment of the Economic and Monetary Union in the 1990s brought the urge of a social dimension of the Union back on top of the EU agenda. Therefore, the Maastricht Treaty of 1992 was supplemented with an additional Protocol and Agreement on Social Policy, whose main idea was to “continue along the path laid down in the 1989 Social Charter”. To this end, the Agreement on Social Policy states that, in the will to achieve the objectives of the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion, “the Community and the Member States shall implement measures which take account of the diverse forms of national practices”. However, once again the United Kingdom and Northern Ireland expressed the will to opt-out from these provisions.

The Protocol on Social Policy was finally integrated into the Treaty of Amsterdam in 1997, thus removing the British opt-out. Moreover, the introduction of a non-discrimination clause operated by the Treaty allowed the Community to achieve a competence in the fight against any discrimination (based on sex, race, ethnic origins, religion, handicap, etc.) However, even though those Treaties marked important steps in the establishment of a European social policy, they added little in terms of recognition of proper “social rights”. This issue was to be coped with in the subsequent years with the drafting of a EU catalogue of fundamental rights.

38 Treaty on European Union, (1992), Maastricht, Protocol n°14 on Social Policy, Preamble
39 Treaty on European Union, (1992), Maastricht, Protocol n°14 on Social Policy, Agreement on Social Policy, art. 1
40 M. Benlolo-Carabot, op.cit., p. 93
2.3. A EU catalogue of fundamental rights: the Nice Charter

The decision to draft a EU Charter of Fundamental Rights was the result of a number of factors. First of all, the aim was to strengthen the legitimacy and the visibility of the EU among its citizens.\(^{41}\) Secondly, it was even more important to stress the attachment of the EU to fundamental rights at a time when the EU was about to enlarge to new countries from Central-Eastern Europe.\(^{42}\) Finally, the adoption of a catalogue of fundamental rights was seen as a means to compensate for the growing “communitarisation” of the Justice and Home Affairs sector.\(^{43}\)

The EU Charter of Fundamental Rights, also known as Nice Charter, was proclaimed at the 2000 European Council in Nice, after being drafted by a Convention composed by representatives from Member States, the European institutions and the national Parliaments. The Charter does not add new rights to those already part of the *aquis communautaire*. Nonetheless, it has the aim to gather in a single document all the rights resulting from different sources: the constitutional traditions of the Member States, the existing EU primary law, the ECHR, the European Social Charter, the Community Charter of the Fundamental Social Rights of Workers, as well as the case-law of the ECJ and of the European Court of Human Rights.\(^{44}\)

The main innovation of the Charter is in its structure, as the Nice Charter does not reproduce the classical distinction (and hierarchy) between civil/political rights and social/economic rights. Conversely, it proclaims the indivisibility of rights\(^{45}\) by structuring the catalogue around six main chapters: Dignity (I), Freedom (II), Equality (III), Solidarity (IV), Citizens’ rights (V), and Justice (VI). In each title, a mixture of civil, political, social and economic rights can be found. Moreover, in expressing the principle of rights deriving from the citizenship of the Union, the Nice Charter also marks an important step in the process of untying the enjoyment of fundamental rights from the economic purposes of the common market.

Most of the social rights proclaimed in the Charter, such as the right to collective bargaining and action (art. 29), to fair and just working conditions (art. 31), the prohibition of child labour (art. 32), the right to social security (art. 34) and health care (art. 35), can be found in the Solidarity Chapter.\(^{46}\) However, other Chapters contain important social rights such as the principle of non-discrimination.

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\(^{42}\) *Ibidem*

\(^{43}\) *Ibidem*

\(^{44}\) Charter of Fundamental Rights of the European Union (2000, as amended in 2007), Preamble

\(^{45}\) *Ibidem*

\(^{46}\) Charter of Fundamental Rights of the European Union (2000, as amended in 2007)
(art. 21), of equality between men and women (art. 23) and of the integration of persons with disabilities (art. 26), all of which can be found in the Equality chapter.\textsuperscript{47} Despite the solemnity of its proclamation, the Nice Charter remained for some years a non-binding declaration. A first attempt to modify its status was done in the process of drafting a Constitution for the European Union. Indeed, the text of the Charter was integrated in Part II of the Constitutional Treaty. After the failure of the Constitutional Treaty and the so-called “period of reflection”, it was decided in the Treaty of Lisbon to provide the Charter with “the same legal value of the Treaties”\textsuperscript{48}, thus positioning the Charter among the sources of EU primary law and providing it with legally binding force.

The Treaty of Lisbon reiterated the commitment of the EU to the promotion of social objectives through its policies by stating that “in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.”\textsuperscript{49} Finally, the Treaty of Lisbon also marked an important step in affirming the attachment of the EU to fundamental rights by envisaging the accession of the EU to the European Convention for the Protection of Human Rights.\textsuperscript{50}

3. THE IMPACT OF THE EU CHARTER OF FUNDAMENTAL RIGHTS ON THE STATUS OF SOCIAL RIGHTS

Many authors have pointed out that the drafting of a EU catalogue of fundamental rights which includes social rights can be regarded as a potential turning point in the conception of social rights and of its relationship with the other fundamental rights. For some, providing social rights with an equal legal status to those of civil and political rights entails providing social rights with direct justiciability: in this view, the Nice Charter is seen as likely to play the role of a “Trojan horse” in the extension of EU competences.\textsuperscript{51} Others stress the fact that proclaiming the indivisibility of rights means overcoming the dichotomy between political and civil rights.\textsuperscript{52} This view seems to be

\textsuperscript{47} Ibidem
\textsuperscript{48} Consolidated version of the Treaty on European Union (2009), art. 6.1
\textsuperscript{49} Consolidated version of the Treaty on the Functioning of the European Union (2009), art. 9
\textsuperscript{50} Consolidated version of the Treaty on European Union (2009), art. 6.2
\textsuperscript{51} O. De Schutter, “La garantie des droits et principes sociaux dans la Charte des Droits Fondamentaux de l’Union Européenne”, in Carlier, Jean-Yves, De Schutter, Olivier (eds.), \textit{op.cit.}, p. 120
\textsuperscript{52} M. Benlolo-Carabot, \textit{op.cit.}, p. 95; B. De Witte, “The trajectory of fundamental social rights in the European Union, in G. De Burca, B. De Witte, (eds.), \textit{op.cit.}, p. 158; J. Kenner, “Economic and social rights in the EU legal order, the mirage of indivisibility”, in T.K. Hervey, J. Kenner (eds.), \textit{op.cit.}, p.5; S. Deakin, J. Browne, “Social rights and market order: adapting the capability approach”, \textit{ivi}, p. 27
supported by the fact that fundamental rights are listed in a single document instead of the plurality of instruments devised in the past (e.g. ECHR vs. European Social Charter). These potential consequences of the insertion of social rights into the EU Charter were clear during the negotiations in the Convention: this is testified by the fear, expressed by some Member States, that the EU would be assigned with new competences in the social field in order to ensure the protection of the rights listed in the Charter. \(^{53}\) However, scholars agree that the eventual realization of this potential lies largely in the future activity and case-law of the European Court of Justice. \(^{54}\)

Nevertheless, the analysis of the text of the Charter as amended in 2007 reveals that its real impact on the status of social rights among the fundamental rights was ambiguous and quite limited. Three main arguments support this view.

To begin with, the Charter draws a distinction between “rights” and “principles”. Although the difference between the two is believed by the doctrine not to be very clear \(^{55}\) (according to article 51.1, rights must be “respected” while principles must be “observed”), \(^{56}\) stating such a distinction seems to reproduce the dichotomy between civil/political rights and social rights or however to create a new hierarchy of rights. Moreover, during the process which led to the recognition of the legally binding value of the Nice Charter, this document was amended in 2007. This amendment resulted in the insertion in the Charter of some paragraphs in article 52, namely paragraphs 4, 5, 6, and 7. According to the new version of the article:

“The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”. \(^{57}\)

Secondly, the indivisibility of rights proclaimed in the Nice Charter seems undermined by the Protocol n. 30 of the Treaty of Lisbon. This Protocol states that “the Charter does not extend the ability of the Court of Justice of the European Union […] to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the provisions of the Charter”. \(^{58}\)


\(^{54}\) O. De Schutter, “La garantie des droits et principes sociaux dans la Charte des Droits Fondamentaux de l’Union Européenne”, in Carlier, Jean-Yves, De Schutter, Olivier (eds.), \textit{op.cit.}, p. 146 ; M. Benlolo-Carabot, \textit{op.cit.}, p. 96 ; S. Coppola, \textit{op.cit.}, p. 215

\(^{55}\) J. Kenner, “Economic and social rights in the EU legal order, the mirage of indivisibility”, in T.K. Hervey, J. Kenner (eds.), \textit{op.cit.}, p. 18

\(^{56}\) Charter of Fundamental Rights of the European Union (2000, as amended in 2007), art. 51.1

\(^{57}\) \textit{Ivi}, art. 52.5
with the fundamental rights, freedoms and principles that it reaffirms” and specifies that this provisions applies particularly to the rights listed in the Solidarity chapter (“[…] nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom”). The partial opt-out of Poland and the United Kingdom thus seems to show that the concept of the indivisibility of rights is not shared by all Member States.

Finally, looking at the broader picture, namely at the Treaty of Lisbon, the endurance of a different status of fundamental rights can be found in the different treatment accorded to the two main European catalogues of fundamental rights, namely the European Convention for the Protection of Human Rights and the European Social Charter. Indeed, whereas the commitment of the EU to the promotion of human rights is strengthened by the EU accession to the ECHR, no parallel accession to the European Social Charter is envisaged.

58 Consolidated version of the Treaty on European Union (2009), Protocol n. 30, art. 1
CONCLUSIONS

The aim of this paper was to analyse the place of social rights in the EU legal system and to question whether the proclamation of the Nice Charter in 2000 and 2007 and the enhancement of its legal status by the Treaty of Lisbon in 2009 have changed the relationship between social rights and the other fundamental rights, namely the more “classic” civil and political rights. This has been done through a historical reconstruction of the main steps of the recognition of social rights in the European legal order and by an analysis of the main documents dealing with social rights in Europe: the European Social Charter of 1961 and its revised version of 1996, the EU Charter of the Fundamental Rights of Workers of 1989, the EU Charter of Fundamental Rights of 2000 (as amended in 2007), as well as the main European Treaties dealing somehow with the social dimension of the EU.59

As we have seen, the issue of a different status for social rights among the broader set of fundamental rights arises from the peculiar historical emergence of those rights and by the different definitions given to them by the European States, which have fostered the emergence of a “dichotomy” between civil/political rights and social rights that has so far proven to be difficult to overcome.

This difficulty was worsened by the relatively late emergence of the issue of fundamental rights in the EU legal order. However, as a result of a number of factors (among which the case-law of the ECJ played a prominent role), the EU has been focusing increasingly on citizens and on the notion of fundamental rights. Such process has culminated in the adoption by the EU of its own catalogue of fundamental rights and of its elevation to the same rank as the Treaties.

To sum up, the contribution of the EU Charter of Fundamental Rights in the recognition and the strengthening of social rights in the European Union cannot be denied, as it contributed partially to shaping a conception of rights which are no longer subordinate to the realization of the common market. Moreover, its reference to the indivisibility of rights shows the will to overcome the classical dichotomy between different kinds of fundamental rights. However, an analysis of the text of the Nice Charter reveals that this potential is not fully realized, as shown by the distinction that is made between rights and principles, the apparent opt-out of Poland and the United Kingdom as far as social rights are concerned, and by the lack of EU accession to the European Social Charter.

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