European Union and Human Rights: Reducing Inequalities and Asymmetries in the Context of the Economic Crisis

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Abstract

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The criticism aimed at the European Union (EU) because of its preference for liberalism and the market economy (more accentuated in the era of globalisation and in the context of the current economic and financial crisis) has not, however, been an obstacle to this 'credo' (which has characterised the Union since its origins in the 1950s) being balanced by the recognition of some human rights associated with the principle of equality (as in the treaties establishing the European Communities of 1951 and 1957) and by the progressive development of social policy (above all since the Single European Act of 1986).

11.1. The Bases of European Union Law in the Field of Human Rights and Non-Discrimination

The criticism aimed at the European Union (EU) because of its preference for liberalism and the market economy (more accentuated in the era of globalisation and in the context of the current economic and financial crisis) has not, however, been an obstacle to this 'credo' (which has characterised the Union since its origins in the 1950s) being balanced by the recognition of some human rights associated with the principle of equality (as in the treaties establishing the European Communities of 1951 and 1957) and by the progressive development of social policy (above all since the Single European Act of 1986).

However, such recognition has been based on regulations with a very limited substantial profile in the EU and, from this perspective, since the original European Community treaties, human rights and egalitarian measures have focused particularly on non-discrimination for reason of nationality or sex. Along these lines, in terms of the principal reforms of the Union's 'Primary Law', the Maastricht Treaty of 1992

deepened the principle of non-discrimination for reason of nationality by consecrating a kind of 'mini-catalogue' of human rights connected to the new Union citizenship,[1] while the Treaty of Amsterdam of 1997 introduced a general clause of non-discrimination with new grounds (age, disability, sexual orientation) as well as the possibility of adopting positive measures in favour of women and other affirmative action policies.

Later on, the Nice Treaty of 2001 was not able to incorporate as a part of the primary Law the Charter of Fundamental Rights of the EU, which was only proclaimed in a solemn way, and with no legally binding character, in December 2000.

Then, after the failure of the 2004 Constitutional Treaty, the Lisbon Treaty of 2007 gave binding effect to the Charter of Fundamental Rights by the insertion of a phrase conferring on it the same legal value as the treaties [new Article 6(1) of the Treaty on European Union, TEU]. The EU Charter summarises the common values of the EU Member States and brings together in a single text the traditional civil and political rights as well as economic and social rights.

For the first time, a single document brings together all of the rights previously to be found in a variety of legislative instruments, such as national laws and constitutional traditions as well as international conventions from the Council of Europe, the United Nations and the International Labour Organisation. By making fundamental rights clearer and more visible, the Charter intends (according to its Preamble) to develop 'the indivisible, universal values of human dignity, freedom, equality and solidarity', alongside 'the principles of democracy and the rule of law', 'citizenship of the Union' and 'an area of freedom, security and justice'.
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The EU Charter theoretically enhances legal certainty as regards the protection of common values and fundamental rights, where in the past such protection was guaranteed only by the case law of the European Court of Justice (ECJ). Nonetheless, even if the ECJ made explicit reference to the Charter in its ruling of 27 June 2006 concerning the directive on family reunification (Case C-540/03) and, thus, even before becoming legally binding after the entry into force (1 December 2009) of the Lisbon Treaty, the truth is that the position of the Court of Justice in relation to several rights (especially social rights) is still 'restrictive'.[2] For this reason, a more expansive judicial activism may be traced in these and other fields in order to avoid inconsistencies within the EU Charter, and thus with democratic legitimacy (Gjortler 2017, p. 180).

Indeed, such a degree of activism on the part of the ECJ (and, more broadly, on the part of the other European institutions) appears to be necessary to combat the negative national strategies (Alter 2011, p. 63)[3] against this emblematic expression of the common values (articulated through initial confusing opt-out clauses from the EU Charter by Poland and the United Kingdom and then by the Czech Republic) and, even worse, against the whole European project (recently challenged by 'Brexit'[4]).

From this point of view, the following Sect. 11.2 tackles the difficult and asymmetric road towards the consolidation of a European consensus on values and fundamental rights. Then, Sect. 11.3 underlines the importance of such consensus by emphasising the necessary synergies between the EU and the Council of Europe, while Sect. 11.4 focuses on some challenges to be faced in the EU agenda. Finally, Sect. 11.5 highlights the necessity of making efforts to optimise common human rights standards in Europe.

11.2. The Asymmetric Road Towards Consolidation of a European Consensus on Values and Fundamental Rights

As mentioned, the consolidation of both the specific EU Charter of Fundamental Rights and the whole European project currently established by the Lisbon Treaty have been threatened by some national strategies of exclusion. The initial rejection of the Lisbon Treaty in 2008 by the Irish electorate (a decision which was reversed in a second referendum on 2 October 2009 by essentially voting 'the same text') was the pretext for some governments to reopen negotiation in order to change the treaty. The clearest example is provided by the Presidency Conclusions of the European Council of 29–30 October 2009, which included the Annex I with *Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic* implying the amendment of Protocol N° 30 on the application of the Charter to Poland and to the United Kingdom. Similarly, it can be argued that the referendum on Brexit was conceived as a British 'card' that was part of a roadmap to push for a revision of current European treaties (Dauderstädt, M., et al. 2014).

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In real terms, the number and content of Protocols and Annexes to the Treaties are likewise the result of political wishes (Kölliker 2001).[5] The negotiations of the Lisbon Treaty led to the integration of the text with 37 Protocols and 65 Declarations. Even though some experts had tried to portray the Lisbon Treaty as a 'substantial rescue' of the 2004 'European Constitution' (Aldecoa Luzarraga and Guinea Llorente 2008; Ziller 2007a), the real picture shows that the name 'Reform Treaty' emerged during the conference held in Brussels on 23 July 2007, finally clarifying the abandonment of the constitutional terminology. In the same vein, the Brexit vote implies a clear challenge from a constitutional point of view at both the European and British levels, since it has an impact not only on the EU integration project itself, but also on the UK unity (Castellà Andreu 2016; Gilmore 2016).[6]

Actually, the political character of some Protocols is understandable when they deal with sovereign matters and their acceptance is submitted to the political will of national governments and parliaments. For example, Protocol N° 14 on the Euro Group, which lays down special provisions for enhanced dialogue between Member States whose currency is the euro, pending the euro becoming the currency of all Member States of the Union, affirms that the creation and regulation of the currency of a nation implies the exercise of sovereign power. For this reason, even if the 2004 Constitutional Treaty conceived the euro as a symbol of the EU, the dynamics of the 'Europe of different speeds' might justify the reluctance of some countries to attribute this sovereign power to the European monetary authorities (Verdun 2002).[7]

Nevertheless, the political imposition of other Protocols annexed to the Lisbon Treaty is unacceptable when this imposition invokes a presumed attack on national constitutional values supported by the verdict of the national supreme court or constitutional jurisdiction (Choudhry 2006).[8] For instance, in the case of the Czech Republic, even if its Constitutional Court ruled (Judgement of 3 November 2009) that the Lisbon Treaty as a whole was compatible with the Czech Constitution, the president of the Czech Republic Vaclav Klaus obliged all Member State governments to grant an apparent opt-out from the Charter of Fundamental Rights by means of a Protocol attached to the Presidency Conclusions of the European Council of 29–30 October 2009.[9]

In general terms, it must be said that the more one introduces Protocols and Declarations in order to facilitate political negotiations, the less one strengthens real application of the provision of the treaties. This is so because priority is given to exceptions in order to reach consensus. Simply stated, the legally binding clauses (Protocols) as well as the soft law clauses (Declarations) lessen the treaties' force. However, such exceptions are unacceptable when they attack the pillars of the European consensus on values and fundamental rights, especially the above-mentioned Protocol N° 30 on the application of the Charter of Fundamental Rights of the EU to Poland and to the United Kingdom (as well as, then, to the Czech Republic).

At most, this Protocol can be considered a political victory for these three Member States in terms of the imposition of such an arrangement as a part of the negotiations leading to the final acceptance of the Lisbon Treaty. Nonetheless, this Protocol produces a relative (and even null) legal effect (a more symbolic than real effect), insofar as it only clarifies the contents of the Charter and its relation with national legislation according to the terms established by the Charter itself. From a legal point of view, it must be argued that Protocol N° 30 is closer to a 'Declaration' than to an opt-out clause. Consequently, the null legal effect of Protocol N° 30 which could be considered useless (Ziller 2007b, p. 177) or ineffective (Fernández Tomás 2008, pp. 119–149) can be held on the basis of the following arguments (Jimena Quesada 2009):

- Firstly, considering Protocol N° 30 as an opt-out from the Charter could somehow be read as incompatible with the object and purpose of the Lisbon Treaty and correspondingly, it could be considered as equivalent to a reservation prohibited by the 1969 Vienna Convention on the Law of Treaties. A different interpretation would raise serious questions of credibility and legitimacy with regard to the EU's commitment to human rights as a goal of the European treaties (Brems 2009, p. 372).[10] Under these conditions, Art. 6 TEU and the Charter represent homogeneous clauses to be shared by all Member States,[11] without possible heterogeneous exceptions (Bellamy 2007, p. 50).

- Secondly, the acceptance of an opt-out from the Charter cannot be conceived as a mere opposition to the substance of the major achievement represented by Part II of the 2004 treaty establishing a Constitution for Europe (Bonnemaison 2008, p. 173). It would represent an attack on a classic aim of community treaties: to guarantee protection of fundamental rights as part of the general legal principles of the European construction by drawing inspiration from the shared constitutional traditions of the Member States and from the European Convention on Human Rights (Goldston 2009, p. 603; Tapper 2009, p. 81),[12] according to settled case law of the Court of Justice.[13]
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- Thirdly, if the Charter of Fundamental Rights 'reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights' (Preamble) and, in parallel, Poland, the United Kingdom and the Czech Republic take part in all these common traditions and international instruments, such a presumed opt-out Protocol shows a lack of consistency from these countries (Palombella 2009).

- Fourthly, if the Charter of Fundamental Rights has been used as a source of inspiration by national and European jurisdictions since it was solemnly proclaimed in December 2000 and, consequently, before its entry into force on 1 December 2009, such a presumed opt-out Protocol, likewise, has no sense in practical legal terms (Díez-Picazo 2001, p. 26).[14]

- Finally, if the EU must consistently legislate with the Charter (and, in practice, the European institutions have been adopting regulations and directives in which the Charter is mentioned as a source of inspiration), it would appear very strange not to accept the primary EU law (the Charter) and, by contrast, to admit secondary EU law (regulations and directives).[15] Furthermore, it must be noted that the stated aim of the Lisbon Treaty was 'to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action'.

11.3. The Necessary Synergies Between the EU and the Council of Europe

First of all, it is worth mentioning that the TEU (according to the Lisbon Treaty) recalls in its Preamble the 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal *values* of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'. As far as the EU's *objectives* are concerned, this Preamble recalls likewise 'the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe'. This Preamble also refers to the *fundamental principles* of the EU: 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.[16]

From this last point of view, it must be reminded that the three pillars of the Council of Europe are also democracy, human rights and the rule of law. Such convergence was already explicitly articulated in the Treaty of Rome of 1957.[17] Then, the Single European Act mentioned (in its Preamble) for the first time in 'Primary Law' the two basic instruments of the Council of Europe: the 1950 European Convention on Human Rights and the 1961 European Social Charter. Subsequently, the 1992 Maastricht Treaty only included in its text a reference to the 1950 European Convention, while the 1997 Amsterdam Treaty introduced a reference to the 1961 Charter in its legally binding content (now Article 151 TFEU).

Later on, the Charter of Fundamental Rights referred to the 1961 Social Charter only in its Preamble, while the 1950 European Convention is also mentioned in Articles 52(3) and 53 of the EU Charter. In this respect, even if the EU Charter does not establish the right to appeal (a kind of 'amparo' appeal) before the Court of Justice, the Court of Luxembourg has to deal with many issues in which fundamental rights are involved. And this may provoke conflicts of European jurisdictions, in particular between the Court of Justice of Luxemburg and the European Court of Human Rights in Strasbourg. Similarly, there can be divergences between the Court of Justice and the European Committee of Social Rights (the monitoring body of the European Social Charter).

One solution to avoid these conflicts is EU accession to the European Convention on Human Rights, as foreseen and imposed by the Lisbon Treaty (but the modalities of this accession have yet to be concluded). Unfortunately, in its Opinion 2/13, of 18 December 2014, the ECJ (Full Court) raised new obstacles to this accession by concluding that 'the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No. 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms'.

Finally, regarding the establishment of coherent and harmonious relationships between the two normative systems (EU and Council of Europe) in favour of the harmonization of human rights standards and to avoid controversies, it appears essential not to forget EU accession to the European Social Charter as a further step to complete the parallel accession to the European Convention on Human Rights.[18]

11.4. Challenges to Reduce Inequalities and Asymmetries at EU Level

11.4.1. Strengthening Social Rights

At the origin of European construction, the 1957 TEEC contained few provisions on social policy and social rights, which were conceived in close relation to two important goals: free competition and worker mobility. In this regards, it has been noted that economic integration was the primary objective of the EEC and its predecessor, the
European Coal and Steel Community (ECSC)
European Coal and Steel Community (ECSC), and the founding treaties reflected this (Anderson 2015, pp. 52–54). In this sense, even the treaties establishing the ECSC in 1952 and the European Atomic Energy Community (EAEC) in 1957 emphasised social policy more than the Treaty of Rome did. The reason of this: because they referred to specific industries (coal, steel, nuclear energy), the ECSC and EAEC had fairly strong social policy mandates in order to deal with the employment and health effects of these rapidly changing industries. The ECSC had funds to deal with redundant workers, and the EAEC was empowered to set health and safety standards (Anderson 2015).

Subsequently, the adoption of the Single European Act in 1986 gave a new impetus to several areas of social policy, especially in the working environment (as regards the health and safety of workers) and in the social dialogue. The Single Act also introduced in its preamble, as mentioned above, the first reference to the 1961 European Social Charter in the founding treaties.

Coming to the present situation, a first approach to 'social policy' in the Lisbon Treaty shows that the provision serving as a basis or introduction to Title X ('Social Policy') of the Treaty on the Functioning of the European Union (Art. 151 TFEU) introduces an apparent prevalence of commercial objectives over the Union's social objectives.

From this perspective, while in the economic sphere advances in the EU have been occurring evenly, social progress has been introduced 'asymmetrically' (according to the dynamic of the 'Europe of different speeds'). In truth, the adjective 'social' as an element associated with the 'market economy' is merely incidental. Ultimately, the idea of a 'European social and economic constitution' does not project a balance between the social and the economic, but rather an imbalance clearly in favour of economic issues rather than social concerns. Furthermore, the entry into force of the Lisbon Treaty took place in the context of the economic crisis, which has even weakened social policy instruments, since the development of such policy has not been consolidated in accordance with 'the procedures provided for in the Treaties', but following new controversial procedures under the dynamics of the Troika.

Similarly, the EU Charter of Fundamental Rights has approached social rights in a weaker manner, since it refers in its Preamble to the recognition of 'the rights, freedoms and principles set out hereafter', the latter (principles) being associated with social rights in spite of the principle of indivisibility. Nonetheless, the European Social Charter of the Council of Europe, which reflects to a large extent a kind of European social consensus, has been ratified by all Member States of the EU (in most cases even before EU membership). For this reason, it is incomprehensible that some EU Member States did not at first accept a non-binding instrument such as the Community Charter of the Fundamental Social Rights of Workers of 1989 (which does not compete with the 1961 Social Charter, but is rather based on it), or that they have also articulated the above-mentioned confusing opt-out clause from the Charter of Fundamental Rights (whose catalogue of social rights—especially those under the heading 'Solidarity'— was based precisely on the Revised Social Charter of the Council of Europe).[19]

A convergent dynamic has recently been promoted by the Council of Europe in the framework of the so-called new 'Turin process for the European Social Charter', which was launched by the secretary general of the Council of Europe at the high-level conference on the European Social Charter organised in Turin on 17–18 October 2014. This process aims at reinforcing the normative system of the Social Charter

within the Council of Europe and in its relationship with the law of the EU. Its key objective is to improve the implementation of social and economic rights at the continental level, in parallel to the civil and political rights guaranteed by the European Convention on Human Rights.[20] Regrettably, Brexit is generating further asymmetries and damaging the European social model through lack of solidarity and internal cohesion.[21]

11.4.2. Facing Anti-Crisis and Austerity Measures

The Court of Justice has not only appeared 'timid' when protecting the social rights recognised by the EU Charter of Fundamental Rights,[22] but has also exercised clear 'self-restraint' when tackling austerity measures. From this perspective, the Court of Luxembourg has conferred important weight to national parameters (or, more exactly, to state margin of discretion) when dealing with anti-crisis legislation incorporating austerity measures deriving from the operations of the troika.

A recent illustration of this approach is offered by Case C-117/14 (*Nisttahuz Poclava*, Judgement of 5 February 2015), concerning the employment contract of indefinite duration to support entrepreneurs introduced by Law 3/2012 of 6 July 2012 on urgent measures for labour market reform, which amended employment legislation because of the economic crisis that Spain was undergoing. According to the referring court, this new employment contract (entailing a one-year probationary period during which the employer might freely terminate the contract without notice or compensation) infringed Article 30 of the Charter of Fundamental Rights, Directive 1999/70, Articles 2 (2)*b* and 4 of 1982 ILO Convention No 158 concerning the Termination of Employment at the Initiative of the Employer and the 1961 European Social Charter 1961 (in relation to a decision of the European Committee of Social Rights of 23 May 2012 on a similar Greek contract).

Nevertheless, on the one hand, the Court of Justice validates this 'diverse national solution' by holding, 'as regards Article 151 TFEU, which sets out the objectives of the EU and Member States in the field of social policy, that provision does not impose any specific obligation with respect to probationary periods in employment contracts. The same is true for the guidelines and recommendations in the field of employment policy adopted by the Council under Article 148 TFEU' (paragraph 40). On the other hand, for the Court of Justice, the external international sources which are invoked by the referring court (including those explicitly mentioned in Article 151 TFEU, such as the European Social Charter) would not have any impact, due to the fact that 'the Court has no jurisdiction under Article 267 TFEU to rule on the interpretation of provisions of international law which bind Member States outside the framework of EU law' (paragraph 43).

The final solution reached in Luxembourg is perhaps not so deceiving if we take into account the fact that, this way, a potential contradiction between the ECJ and the previous decision adopted on 23 May 2012 by the European Committee of Social Rights,[23] has been avoided. In particular, in its decision, the Committee of Strasbourg declared that the 2010 Greek legislation (imposed by the Troika) allowing dismissal without notice or compensation of employees in an open-ended contract during an initial period of 12 months is incompatible with Article 4§4 of the 1961 Charter, as it excessively destabilises the situation of those enjoying the rights enshrined in the Charter.

Among others, in its legal reasoning, the Committee did not accept the observation made by the government to the effect that the rights safeguarded under the European Social Charter had been restricted pursuant to the government's other international obligations, namely those it had under the loan arrangement with the EU institutions (European Commission and European Central Bank) and the International Monetary Fund within the 'Troika'; in other words, these obligations did not absolve the government from their obligations under the Social Charter.[24]

11.4.3. Combating the Gender Pay Gap

The current EU has, from its origins,[25] put the emphasis on protection against non-discrimination on grounds of sex in the field of wages. In particular, Article 157 TFEU states that 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied' (paragraph 1), and that 'with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers' (paragraph 4).

The evolved gender perspective was a novelty introduced by the 1997 Amsterdam Treaty to provide a specific legal basis in the European treaties in this field, which also aimed at overcoming the restrictive approach established by the Court of Justice in the *Kalanke case*,[26] which started to be reviewed in the *Marschall case* concerning a provision similar to that in *Kalanke* but containing a 'saving clause'.[27]

Before the *Kalanke case*, the case law of the Court of Justice was basically grounded in two important legal acts adopted on the basis of Article 119 of the Treaty establishing the EEC: *Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women* as well and *Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*. Both directives[28] were then repealed by Directive 2006/54/EC.

Finally, that new approach introduced by the 1997 Amsterdam Treaty has been maintained in Article 23 of the Charter of Fundamental Rights: 'Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'.

With these parameters, alongside the major substantial challenge (which is not a new one, that is to say, the 'traditional' existence of gender wage gap), it is necessary to confront it with other two important procedural challenges (in conjunction): first, the role of social partners and relevant organisations of civil society in salary negotiations, and, secondly, the extension of the scope of the valid comparator beyond the same undertaking to facilitate the protective role of national judges. In both aspects, the synergies between the EU and the Council of Europe in a broader social Europe are essential.

Concerning the first aspect, it implies greater involvement of social partners, since several studies have revealed the persistent disadvantage that women have at the bargaining table. From this perspective, it has been criticised in doctrine that the European regulatory landscape has changed to one relying heavily on soft law approaches and with more limited ambitions in the field of gender equality than at the creation of the European Employment Strategy in 1997 (Deakin, S., et al. 2015).

With regard to the second aspect, the European Committee of Social Rights recently developed (in December 2012)[29] new case law in this field in the framework of the reporting system which affects the 43 state parties to the European Social Charter. In particular, it adopted a new interpretation under Article 20 of the 1996 Revised Social Charter (equivalent to Art. 1 of the 1988 Additional Protocol), which enables national courts to make comparisons outside the same undertaking.[30]

Of course, it would also be desirable that the Court of Justice of Luxembourg assumes these more

favourable standards deriving from the European Social Charter, consistent with the explicit reference to this emblematic social rights treaty of the Council of Europe, in Article 151 TFEU as well as in the Preamble and Explanations to the Charter of Fundamental Rights of the EU. In this spirit, it is worth recalling that the Court of Justice held a vanguard position in this field (since the famous case *Defrenne I*, Judgement of 25 May 1971), while the European Court of Human Rights proceeded with a 'belated recognition' of gender equality issues (Carmona Cuenca 2015).

11.4.4. Protecting Vulnerable Groups

Since its origins, the EU's negotiations and strategies have been focusing on the combat against distortion of competition and against social dumping associated with worker mobility. More recently, other types of migration within the common territory, including the current crisis of refugees in Europe, are dealt with through the *Asylum, Migration and Integration Fund* (AMIF)
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,[31] which also supports the *European Migration Network*, the *Union Resettlement Programme* and the transfer of beneficiaries of international protection from an EU state with high migratory pressure to another.

In this context, in spite of the lack of political will from some EU Member States to also fulfil European and international legal commitments in this field, in May 2015 the Commission presented its *European Agenda on Migration* setting out a comprehensive approach for improving the management of migration in all its aspects, as well as a first package of implementing measures, including relocation and resettlement proposals, and an EU action plan against migrant smugglers.

Then, in June 2015, the European Council agreed to move forward on the proposals made by the European Commission in the European Agenda on Migration, focusing on relocation and resettlement, returns and co-operation with countries of origin and transit. Later on, in July 2015, the Justice and Homme Affairs Council agreed to implement the measures as proposed in the European Agenda on Migration, notably to relocate people in clear need of international protection from Italy and Greece over the next two years. In September 2015, the Commission proposed a new set of measures, including an emergency relocation mechanism for 120,000 refugees, as well as concrete tools to assist Member States in processing applications, returning economic migrants and tackling the root causes of the refugee crisis.

Unfortunately, the EU-Turkey Statement on 18 March 2016, apparently dedicated to deepening relations between both parties as well as addressing the migration and refugee crisis has actually put the European project at risk from a double perspective: from a procedural point of view, a mere declaration without binding force has been negotiated instead of adopting an international agreement in accordance with the rules of the TFEU. On the other hand, the European values themselves, which as universal ones are to be promoted by the EU in the rest of the world,[32] have also been substantially unknown.

Ultimately, this statement 'confirms the worrying trend that intergovernmental decision-making is taking over in the Union, and that national interests increasingly often prevail over the common values of the Union. This is bad for European democracy'.[33] Under these conditions, 'the absence of strong democratic leadership has been a problem, especially in relation to the refugee crisis. In a leadership vacuum, attitudes have become more radical (as also evidenced in the United Kingdom with the example of Brexit)' (Veebel 2016, p. 55).

Certainly, these political and legal actions must be improved by giving impetus to the Common European Asylum System (García Mahamut 2016)[34] and supported by the case law of the Court of Justice. A good illustration of this is provided by the Judgement of 18 December 2014, *Abdida*, C-562/13, concerning

minimum standards for determining who qualifies for refugee status or subsidiary protection status in terms of more favourable standards.[35] At the same time, the Court of Justice must also be 'sensitive' to the favourable standards deriving from the Council of Europe, in particular from the case law of both the European Court of Human Rights [36] and the European Committee of Social Rights (Jimena Quesada 2015).

11.5. Conclusion: Towards the Optimisation of Common Human Rights Standards in Europe

The optimisation of common human rights standards in Europe implies the establishment of coherent and harmonious relationships between the two normative systems (EU and Council of Europe) in order to avoid controversies resulting in a lack of credibility of the European system as a whole for the protection of human rights.

From this perspective, it appears essential not to forget the EU accession to the European Social Charter as a further step to complete the parallel accession to the European Convention on Human Rights. In other words, the more 'popular' accession of the EU to the European Convention on Human Rights should be accompanied by the parallel accession of the Union to the Council of Europe's Social Charter, so that political and social democracy go hand in hand, and for the sake of coherence with the principle of indivisibility of human rights.

Indeed, besides the theoretical argument, the importance of the Union's accession to the European Social Charter is particularly rooted in a pragmatic issue: avoiding divergences or contradictions between the Union's Court of Justice and the European Committee of Social Rights.[37] In other words, the need to exploit those synergies (at an interpretative level until the moment of the EU's actual accession to the Social Charter) is not merely theoretical, since the parallel solutions have already emerged in several occasions.

In case of different solutions, all these human rights treaties contain specific *favor libertatis* clauses, such as Articles 52(3) and 53 of the Charter of Fundamental Rights, Article 32 of the European Social Charter (Article H of the Revised Charter) and Article 53 of the European Convention of Human Rights (Jimena Quesada 2012).

In conclusion, strengthening such synergies is the best way to optimise our common human rights standards in Europe by reducing inequalities and asymmetries in a context of an economic crisis which must not lead to a crisis of values. In doing so, the considerable weight of Euroscepticism and Europhobia which has been recently experienced in some EU Member States in the name of their fierce defence of national sovereignty (Brexit and other potential 'Brexiters') will never prevail over European construction.

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[1] Among others, right to vote and to be elected in local and European elections, complaints before the European Ombudsman, petitions before the European Parliament, or diplomatic and consular protection. Concerning the case law of the Court of Justice, see, for example, the famous *Bosman* case (Judgment of 15 December 1995, case C-415/93): the Court declared that there could not be discrimination because of nationality between sportspeople who were nationals of EU Member States.

[2] As illustrated by its Judgement of 15 January 2014, Case C-176/12, *Association de médiation sociale*, where the ECJ concluded: 'Article 27 of the Charter of Fundamental Rights of the European Union, (…) *cannot be invoked in a dispute between individuals in order to disapply that national provision*'. In the same restrictive direction (concerning Article 20 of the EU Charter), ECJ, Case C-198/13, *Julián Hernández*, Judgment of 10 July 2014.

[3] Alter, K. J. (2011, p. 63): 'While the ECJ can be less concerned about the responses by national governments than many other international courts, it also has a larger and more diverse constituency to please. National court restraints are multiplied many times because each country has its own constitution and its own domestic political concerns'.

[4] Paragraph 2 of the judgement handed down on 24 January 2017 by the Supreme Court of the United Kingdom summarises the domestic procedure leading to the Brexit result and the complex procedure of withdrawal under Article 50 TFEU: 'In December 2015, the UK Parliament passed the EU Referendum Act, and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the EU. UK government ministers (whom we will call "ministers" or "the UK government") thereafter announced that they would bring UK membership of the EU to an end. The question before this Court concerns the steps which are required as a matter of UK domestic law before the process of leaving the EU can be initiated. The particular issue is whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen'. The conclusion by the Supreme Court is that such Act of Parliament is necessary (see https://www.supremecourt.uk/news/article-50-brexit-appeal.html, visited on ~~7 February~~5 October 2017).

[5] The author reflects on a theory of differentiation by linking it with public good theory and intends to explain the effects of differentiation on the EU, its policies and members, as well as on individual policy areas.

[6] Concerning Ireland, see Gilmore, A. (2016): "The UK's referendum was the first significant disintegrative act in the EU's history and will have particularly profound implications in Ireland. As mentioned, the country's economic and political dependencies on the UK meant that its accession to the EU was entirely dependent on its neighbour's. Even today, Ireland remains the most deeply integrated country with the UK in terms of trade, language, culture, and politics. In both political and economic terms, Brexit will constitute an asymmetric shock for Ireland."

[7] See also ECJ, Judgement of 16 June 2015, Case C-62/14, *Peter Gauweiler and Others*, on the Decisions of the Governing Council of the European Central Bank (ECB) on a number of technical features regarding the Eurosystem's outright monetary transactions in secondary sovereign bond markets.

[8] See Choudhry, S. (2006), in particular cf. the chapter by M. Moran ('Inimical to Constitutional Values: Complex Migrations of Constitutional Rights'), who analyses the nature of legal authority as set against the cross-jurisdictional construction of constitutional values, along with its domestic impact at both vertical and horizontal levels.

[9] Despite the judgement adopted by the Czech Constitutional Court, the fact is that President Klaus revealed that the Charter would jeopardise the so-called 'Beneš decrees', and in particular the decree that allowed confiscation, without compensation, of the properties of Germans and Hungarians during World War II. This was one more cynical political pretext for exclusion from the Charter, insofar as these decrees are still part of the domestic law of both the Czech Republic and Slovakia (the latter not having requested any exemption from the charter).

[10] BREMS, E.: 'Human Rights: Minimum and Maximum Perspectives', *Human Rights Law Journal*, No. 9(3), 2009, p. 372: 'if it can be grounded in a shared commitment, maximisation of human rights through the improvement of monitoring techniques is both thinkable and feasible'.

[11] For a systematic analysis of homogeneous provisions, see MANGIAMELI, S.: 'La cláusula de homogeneidad en el Tratado de la Unión Europea y en la Constitución europea', *Revista de Derecho Político*, No. 67, 2006, pp. 409–452.

[12] With such a spirit, Goldston, J.A. (2009). Cf. a nuanced view in Tapper (2009, p. 81).

[13] Similarly, it has been noted that by means of two important judgements of the ECJ (*Schmidberger* and *Omega*), the path towards an impact beyond the EU constitutional order in the field of fundamental rights was open (Cartabia 2009, p. 544).

[14] The author has noted that it will be difficult, even in cases not dealing with EU law, for national judges not to follow the Charter when it offers a more generous level of protection.

[15] From this perspective, it has been argued that Protocol N° 30 creates a situation of legal uncertainty (De Schutter 2008, p. 127).

[16] See also Article 2 TEU ('The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the

rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail') and Article 3.1 TEU ('The Union's aim is to promote peace, its values and the well-being of its peoples').

[17] See Article 230 of the EEC Treaty: 'The Community shall establish all suitable co-operation with the Council of Europe'.

[18] As stated in the *European Parliament Resolution of 19 May 2010 on the institutional aspects of the accession of the EU to the European Convention on Human Rights* [Document of the European Parliament 2009/2241(INI)], paragraph 30. On this point, see GRAGL, P.: 'A giant leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights', *Common Market Law Review*, No. 51, 2014, p. 58.

[19] See in particular the explanations (established by the Praesidium of the Convention which drafted the EU Charter) of the following provisions of the EU Charter which mention the provisions of the European Social Charter as a source of law: Articles 14, 15, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.

[20] See all the relevant documents in: *http://www.coe.int/en/web/turin-process*

[21] According to the British Government's official 'Brexit White Paper' (under the title *The United Kingdom's exit from and new partnership with the European Union*, presented to Parliament by Prime Minister Theresa May, February 2017), it is stated that 'in the last decade or so, we have seen record levels of long term net migration in the UK, and that sheer volume has given rise to public concern about pressure on public services, like schools and our infrastructure, especially housing, as well as placing downward pressure on wages for people on the lowest incomes. The public must have confidence in our ability to control immigration. It is simply not possible to control immigration overall when there is unlimited free movement of people to the UK from the EU' (p. 25); in addition, 'UK employment law already goes further than many of the standards set out in EU legislation and this Government will protect and enhance the rights people have at work' (p. 31).

[22] See, for example, the Order of 17 July 2015, *Sanchez Morcillo*, Case C-539/14, paragraph 39, in relation to the right to housing under Article 34 of the EU Charter.

[23] Complaint No. 65/2011, *General federation of employees of the national electric power corporation and Confederation of Greek Civil Servants' Trade Unions v. Greece*.

[24] See a critical approach in Jimena Quesada (2016), in particular chapter 9 ("Recent Controversies on Austerity Measures and Social Standards"), pp. 127–143. See also, more extensively, Alfonso Mellado, C., et al. (2014).

[25] Article 157 TFEU as its genesis in Article 119 of the Treaty establishing the EEC, which already stated that 'each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers'.

[26] ECJ, Judgment of 17 October 1995, Case C-450/93, *Kalanke*.

[27] ECJ, Judgment of 11 November 1997, Case C-409/95, *Marschall*.

[28] A connecting legal act is Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. In this respect, see ECJ, Judgement of 19 October 1995, Case C-137/94, *Richardson*.

[29] Statement of interpretation on Article 20 of the 1996 Revised Social Charter/Article 1 of the 1988 Additional Protocol: equal pay comparisons, Conclusions 2012 (published in January 2013).

[30] According to this interpretation: '*equal treatment between women and men includes the issue of equal pay for work of equal value. Usually, pay comparisons are made between persons within the same undertaking/company. However, there may be situations where, in order to be meaningful this comparison can only be made across companies/undertakings. Therefore, the Committee requires that it be possible to make pay comparisons across companies. It notes that at the very least, legislation should require pay comparisons across companies in one or more of the following situations:*

- *cases in which statutory rules apply to the working and pay conditions in more than one company;*
- *cases in which several companies are covered by a collective works agreement or regulations governing the terms and conditions of employment;*
- *cases in which the terms and conditions of employment are laid down centrally for more than one company within a holding [company] or conglomerate*'.

[31] The AMIF was set up for the period 2014–20, with a total of €3.137 billion for the seven years. It will promote the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration.

[32] See Article 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles

of the United Nations Charter.'

[33] Den Heijer and Spijkerboer (2016): 'Is the EU-Turkey refugee and migration deal a treaty?', http://eulawanalysis.blogspot.com.es/2016/04/is-eu-turkey-refugee-and-migration-deal.html (visited on ~~2 July 2016~~5 October 2017): both authors criticised the fact that after the conclusion of this statement, 'it is no longer possible to obtain an opinion of the ECJ "as to whether an agreement envisaged is compatible with the Treaties"' (Art. 218(11) TFEU). It is still possible for one of the EU institutions or a Member State to bring an action for annulment of the act of the European Council to conclude the agreement with Turkey. It is however possible for individuals (such as those being returned from Greece to Turkey) to challenge the implementation of the EU-Turkey agreement before national courts, arguing that it conflicts with fundamental rights. This in turn, may lead to a referral to the ECJ or a complaint before the ECtHR. Is the agreement in violation of human rights? As has been argued by UNHCR and many others, the agreement may well raise issues under (at least) the prohibition of refoulement (is Turkey safe and is there a risk of expulsion from Turkey?), the right to liberty (is systematic detention in Greece allowed?) and the prohibition of collective expulsion (are the returnees able to challenge their return on individual basis, including before a court?)'.

[34] According to this author, the unsustainable pressure concerning the national asylum systems, especially in Greece and Italy, generated by the severe humanitarian crisis and the tragedy undergone by hundreds of thousands of persons, many of them in clear need for international protection, has not managed to be mitigated throughout the emergency mechanisms taken to address them by the EU.

[35] By contrast, see the more controversial judgement delivered by the ECJ on 17 March 2016, case C-695/15 PPU, Mirza, on the extend of the examination of an application for international protection in connection with the rights of EU Member States to send an applicant to a safe third country and the obligations of the Member State responsible for examining the application in the event that the applicant is taken back.

[36] It must be noted that Turkish reception facilities are inadequate and the minimum procedural guarantees insufficient under the case law of the ECtHR (among others, Judgement of 15 December 2015, case of *S.A. v. Turkey*).

[37] The aim is to allow the 'cross-fertilisation of the two systems' (Clapham 1992, p. 197).