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Miguel Poiares Maduro
Nova University, Lisbon

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Europe's Social Self: "The Sickness Unto Death"

by Miguel Poiares Maduro, Nova University, Lisbon

maduro@fd.unl.pt

"The Sickness Unto Death" is the title of the famous book written by Søren Kierkegaard in the middle of the last century.¹ The sickness to which Kierkegaard refers is that of a human being who is unable to believe in his own destiny beyond physical death. A human being who, in his view, refuses to accept the meaning of his or her life. That meaning is, in Kierkegaard's writings, closely associated with the Christian faith but the metaphor of the sickness unto death can be used in a broader context. In this essay I use it in two ways: first, to highlight the fact that many of the European Union's current social policy problems stem from its own refusal to accept the conclusions which follow from its internally developed political identity; and second to stress that current social debates risk begging the question if they continue to ignore, and do not discuss, the question of Europe's social self and advance proposals that are instead based on quite different assumptions. The risk, as Kierkegaard would say, is that of constantly discussing the "rest" while losing oneself. This argument, applied in my own terms, goes so far as to say that this is a foundational moment for Europe, in which it can either "accept" its selfhood or deny it with a risk that a split may occur between its self (which guarantees social legitimacy) and its emerging political form.

It has often been argued that the impact of EU law on social policies has been a functional one with regard to economic integration and the general promotion of economic freedom and social de-regulation. At the same time, it is historically known that economic integration has, on other occasions, provided a rationale for the promotion of social rights in Europe in order to guarantee a level playing field and to avoid distortions of competition. Furthermore, European integration has also been conceived of as a safeguard of the welfare state. In the latter perspective, the European Union is the new forum in which social rights, no longer viable at the national level, are re-introduced. These different perspectives of Europe's social policy are also associated with a broader debate on the nature of European integration: some conceive of European integration exclusively as economic integration; others argue that economic integration needs to be complemented by some form of political integration which

must include a system of social entitlements. But this political integration can still be conceived of either as a functional necessity deriving from economic integration, or as arising from an independent political claim which stresses the need for solidarity in Europe.

This paper approaches the debates on the nature and position of social policy in the EU from a different perspective. It puts them in the context of a discussion on Europe's constitutional identity and its social self. In this way, the paper relates the current debates on the European Union's social policy to other recent or anticipated constitutional developments. The paper also identifies a series of dilemmas and problems in Europe's social policy the solution of which, it is argued, requires us to focus on the contested social identity of Europe. Are the different aspects of the social impact of European integration and the social policies of the Union based on some agreement regarding a core set of shared European social values? What rationale has commanded the different social developments involved in European integration? Does European integration need some criterion of distributive justice?

The main normative argument of this paper will be that it is no longer possible to evade the debate on Europe's social identity at the risk of putting at stake the overall integration project itself. *The Sickness Unto Death* to which this paper refers is Europe's refusal to face and discuss its integration identity in the social sphere. Kierkegaard identifies the crisis of one's search for one's identity in three types of despair: "being unconscious in despair of having a self (inauthentic despair), not wanting in despair to be oneself, and wanting in despair to be oneself."² I will argue below that Europe's dilemma in defining its social identity lies in the two forms of authentic despair highlighted by Kierkegaard.

In the first section of the paper I will concentrate on contrasting Europe's social self with Europe's social policy and the concept of European citizenship. Raising awareness of one's identity is the first step in making a true choice of one's self. This section will additionally review the emergence of a European social policy from the perspective of the debate between negative and positive integration. I will review the evolution of the different dilemmas at the core of this policy and highlight the current strains within the EU's traditional approach to social issues in light of the fact that European social policy has been developed in a functional relation to market integration. The second section will review the emergence of the concept of European citizenship in relation to social rights. It will highlight the under-developed nature of European social citizenship and the confused and ambiguous character of the current set of European social rights. Again, the underlying paradoxes and dilemmas will be related to other aspects of the political and constitutional development of the EU and I will argue that those paradoxes and dilemmas can only be properly addressed in the context of a debate on Europe's social self. The last section of the paper will relate the normative and political paradoxes of European social policy to the debate on Europe's constitutional model. It will be argued that present developments of the EU's constitutional model (to be reinforced in the planned

institutional reform) are producing a change in the dominant conceptions of the *demos* and *telos* of the European Union, and can only be fully legitimised if this is reflected in the degree of European solidarity and if the question of Europe's social self is finally addressed.

1. From Negative to Positive Integration: The Emergence of Europe's Social Policy

It has now become common to hear about Europe's social deficit. Either as result of legal constraints or the constraints of economic competition, European economic integration (in parallel with global economic integration) has generated pressures towards de-regulation and has challenged social standards and welfare. This has not been (totally) compensated for by social policies arising at the level of the European Union. It is easier to promote integration by reducing state legislation interfering with economic activities (negative integration) than by creating common standards and regulatory frameworks for economic agents (positive integration). The latter requires an agreement on social policies and rights normally expressed in the form of legislation, and is difficult to achieve in the EU context of different national interests and ideological standpoints.

The impact of Community law on national social rights, through negative market integration, has generally been seen as "negative" by social lawyers because it has restricted the capacity of States to enact social provisions. However, the opposite has normally occurred when Community law is addressed by social lawyers from the perspective of positive market integration in the form of social legislation enacted at the EU level.³ This is so, even though the competence of the EU on social issues has generally been limited and moves at a slow pace. Community law has been seen, mainly among labour lawyers, as a source for the defence and promotion of social policies against the predominantly deregulatory ideologies at the national level. The ideology of de-regulation is not uniform among the Member States and labour lawyers hope to mobilise the more "social" states to push, at the European level, for social rights and policies that they are not able to establish at the national level. At the same time, the arguments in favour of de-regulation often stress the need to be competitive in the European market, which requires states with more protective social rights to reduce their degree of protection. Thus, labour lawyers try to reinstall the primacy of social rights over the market through common regulations at the European level.

Nevertheless, the core of the European economic constitution lies in market integration. It was under the legitimacy granted by market integration and through the rules provided in the Treaties for its achievement that the Court has developed the notion of a European constitution.⁴ Although the original Treaty of Rome also contained social provisions (for example Articles 117 to 119 EEC), the core of market integration has been the free movement provisions promoting market access to the different national markets. However, the borderline between securing access to the market to further market integration and securing access to the market to

enhance economic freedom is thin and often non-existent. When reviewing national measures which have an effect on free movement, the Court of Justice is deciding both on the acceptable degree of restriction on trade and on the level of market regulation. The fundamental rights character granted to the free movement provisions and the widening of its scope of action in order to extend European supervision over national regulation and support the constitutionalisation of Community law has led to a spill-over of market integration rules into virtually all areas of national law. As a consequence, many national social rights and policies have been challenged under the free movement provisions. The extension of the scope of action of the free movement of goods and services has raised a challenge to almost any regulation of the market and has limited the social and economic policies of Member States. Several non-discriminatory national regulations protecting or promoting social rights have been challenged as giving rise to restrictions on free movement. This has been the case with legislation regarding the working hours of workers,⁵ the organisation of work and the monopoly of workers associations,⁶ public systems of labour procurement services⁷ or price regulations,⁸ all of which can be said to be related to social rights. In general, the application of some of the free movement rules has been seen as promoting deregulation and as preventing Member States from pursuing national social policies, even those which are non-protectionist. The same has occurred with the application of Community competition rules which has led to challenges to different national labour law provisions.⁹ In some cases, it has been common for social provisions to be challenged through a co-ordinated application of free movement and competition rules.

Such de-regulatory consequences *at the national level* are not, however, a product of a neo-liberal vision of the economic constitution by the Court, but are instead the functional result of the need to promote integration – requiring negative integration in the form of judicial review of divergent state regulations restricting trade – coupled with the absence of a distributive justice criterion which could guide the Court in authorising some of those restrictions on the basis of socio-economic grounds. Market integration generates competition between the national economic and legal systems subject to the goal of efficiency. This is a process which is reinforced if such market integration is achieved mainly through negative integration (accepting products complying with different social and labour standards) and not through positive integration (introducing common social standards). The consequences of this process are deregulation at the national level and a reduction in the political control over the economic sphere.

The arguments in favour of a European social policy attempt to reintroduce such political control over the economic sphere at the EU level and, in such an instance, the EU would become the relevant level for the establishment and protection of social policies. Negative integration should be followed by positive integration. On the other hand, those

arguing against the development of a European social policy and European social rights prefer to subject those policies and rights to market competition itself.

Much of the current status of social values in the European Union is a consequence of the balance between negative and positive integration. There is nothing new about this debate. When the EC Treaty was drafted there were two divergent opinions on whether the prior harmonisation of social policy was necessary. One side (coinciding with the French who had the most protective social legislation) argued in favour of European legislative harmonisation of social policies. The other side (Germany) opposed such harmonisation, preferring to “rely on normal competitive forces to achieve it in the long run”.¹⁰ What became Article 119 EEC, requiring equal pay for men and women (now Article 141 EC), was a result of the compromise reached in the Treaty.

In reality, both systems of managing economic and regulatory competition in integrated markets generate harmonisation of social rights and policies. The difference lies in the institutional framework through which such harmonisation arises and its impact on the final outcome of harmonisation. As stated by Trubek:

“Once economic interdependence reaches a certain point, and borders no longer serve as major barriers to economic movement, there is a pressure towards uniformity in economic policies. These pressures may come about to ensure fair competition and the smooth functioning of economic enterprises that span national borders (‘level playing field’), or they may be the result of ‘regulatory competition’ among sovereignties in a unified space”.¹¹

One of the questions to be addressed in the context of the European Union is whether we should accept competition among the different states even with respect to social rights and policies or whether should we establish common rights and policies to which such competition should conform. For a long time, this balance between positive and negative integration and its impact on social policies has been decided on the basis of the institutional problems linked to positive integration coupled with a vision of negative integration as the only available alternative to integrate the market. However, this state of the affairs has slowly changed and today there are enhanced legislative competences for the Union to intervene in the social sphere.¹² At the same time, incentives have been created for social partners to shift their social dialogue into the European arena.¹³ These developments have, however, remained prisoners of the logic of market integration whereby they secure equal conditions of competition while imposing common social standards which are to be secured and guaranteed by the different Member States. This emerging social policy is not one in which the Union takes into hand the job of guaranteeing a minimum safety net and social protection for all European citizens. Instead, it is a social policy in which the European Union requires its Member States to comply with certain social standards in order to fully benefit from their membership of the internal

market. This is why Europe's social policy is built upon the joint-efforts of two different forces: European States which have an interest in promoting higher social standards to secure their competitive position; and national social actors who use European social policy as an alternative political process to promote national social rights. But the alliance between these two forces is only possible with regard to social rights which can be constructed as preventing unfair competition in the internal market. Rights which could promote redistribution in European terms and would require a commitment of the Union to distributive justice are excluded from European social policy. Moreover, even the social rights which are enacted as part of that social policy are, as a consequence of the limits under which such social policy is conceived, understood so as to restrict their potential for redistribution within the Union. Moebius and Szyszczak have recently reviewed the notion of worker in Community legislation and the rights it affords to European citizens.¹⁴ In their article they argue against the limited interpretation of the concept of work which is usually assumed to underpin Community rights and policies. They favour a concept of work and worker to include people undertaking unpaid care work. The difference between the traditional concept of Community worker and that proposed by Moebius and Szyszczak lies in the different identities of European social policy which those concepts reflect. The policy developments proposed by Moebius and Szyszczak require a European social policy which pursues independent political goals of the Union and which the Union is ready to assume, if necessary by "paying the bill" and setting up a criterion of distributive justice to allocate it. Instead, the continuing dominating paradigm of European social policy is not based upon a criterion of European distributive justice but only upon assuring the incorporation of some common social standards at the national level to the extent that they do not imply an additional burden for the Union and may help to secure a "level playing field" within the Union. According to this paradigm, the costs of social policies are distributed by the market and supported by the different States independently of their welfare position. A different paradigm, such as that underlying the proposal of Moebius and Szyszczak, would require the Union to assume independent social goals and figure out a method of distributive justice to allocate its costs.

The debate between negative and positive integration and its effect on social policy has usually underscored the consequences of the definition of distributive justice in Europe. Independently of the preferred method of integration chosen, it is obvious that the dominant political arena for the determination of social values shifts to the European level. The notion that negative integration will protect the various states' political autonomy (by recognising their different rules) is artificial since the balance between efficiency-enhancing and re-distributive policies is no longer a choice dependent on those policies but a functional result of the degree of negative market integration and its system of competition among rules. Negative integration already implies a shift in the relevant political arena of social policies. It therefore becomes

crucial to discuss what legitimises that political arena and the social values to be taken into account therein. But positive integration also requires more than the setting of common social standards to be secured by the different Member States. Once European economic integration develops its own social policies and erodes the capacity of nation States for redistribution, the relevant question becomes, what should guide the framing of those policies, and how should mechanisms of redistribution at the European level be re-introduced? Those who focus on the EU exclusively as an area of free trade and a common market envision the Union as an instrument of efficiency and wealth maximisation. But can and should the EU only be about increasing societal net gain through market integration without concerns about how such wealth is distributed within the Union? And, if, as it will be shown, European rights and policies have re-distributive consequences, should these not be based on a European criterion of distributive justice instead of being decided by the market and the power of the different states?

2. From Free Movement to Social Rights: The Different Faces of European Citizenship

The foundations for the construction of the European citizen and the status of citizenship are to be found in the free movement rules. This provides the best starting point for an enquiry into the social identity of Europe and the ranking and character of social rights in its legal order. A comparative analysis of the treatment given to the different free movement rules and its re-distributional impact already highlights the subsidiary and under-developed nature of Europe's social citizenship when compared with its original market citizenship¹⁵ and the emerging political citizenship. The Court has referred to the free movement provisions as "fundamental freedoms"¹⁶ granting them a status similar to that of fundamental rights in national constitutions. This conception of the free movement provisions as fundamental rights has played a key role both as an instrument of market integration (in co-operation with individual litigants and national courts) and, at the same time, as a form of legitimation of Community law and market integration. However, the character of such fundamental freedoms has, to a certain extent, remained indistinct and the Court has for some while favoured the promotion of the free movement of goods and, to a lesser extent, the free movement of services over the free movement of persons.

Until the case of *Keck and Mithouard*,¹⁷ the Court of Justice adopted an interpretation of the rule of the free movement of goods that subjected almost any national regulation to a test of proportionality similar to cost/benefit analysis.¹⁸ This brought virtually any public regulation of the market under close scrutiny and promoted de-regulation of the market *at the national level*. As we have seen in the previous section, the expansion of free movement rules has had an impact on other areas of the law related to social concerns and not just trade protectionism and the promotion of economic freedom.¹⁹

Market integration can also be used to promote the development of European social rights although the functional use of market integration rules to further social rights has been limited. The Court has mainly required the abolition of discrimination based on nationality among workers in one Member State, albeit expanding the prohibition of discrimination beyond the issues mentioned in Article 39 EC: “employment, remuneration, and other conditions of work and employment”. For some time the Court has been giving a more restrictive interpretation of the rules regarding the free movement of persons than its interpretation of the free movement of goods and the freedom to provide services. As we have seen, in the field of the free movement of goods (and to a more limited extent, services), the Court has considered as restrictions to trade national regulations that do not discriminate against imports but may, nevertheless, affect trade by affecting market access in general. In this way, many national regulations limiting economic freedom (including regulations protecting social rights) have been challenged under Community rules since the limits to economic freedom are also conceived of as limits to free trade and market access. The same broad scope has not been given to the free movement of workers which could be used to challenge national regulations restricting certain social rights. In fact, in the same way that it is possible to argue that regulation of the market creates barriers to trade, it would be possible to argue that workers will need a minimum degree of protection to effectively exercise free movement. For example, the argument could be made that a prohibition, in a Member State, to strike or to become a union member could deter workers from other Member States, where those rights existed, from moving to that Member State.²⁰ This argument may seem remote from the original wording and intent of the Treaty rules on the free movement of workers but it is in no way different from the arguments, in favour of deregulation, which have been accepted in the context of the free movement of goods.²¹

The broader scope granted to the free movement of goods and services in comparison to the free movement of workers has however had re-distributional effects; the wealth generated by economic integration has mainly gone to those who benefit from the free movement of goods and services. The more restricted development of the free movement of workers when compared to other free movement rules has, in fact, reinforced the exclusionary character of the free movement rules with regard to some categories of people, such as the unemployed who were not included in the original free movement provisions. The more cautious interpretation of the Court of Justice in the area of the free movement of persons may have simply reflected the political sensibility of some States with regard to this issue; this can be seen in parts of the Treaty such as the unanimity requirement for the adoption of Community legislation in this area.²² This attitude on the part of some Member States departs from their concern about the re-distributional effects which a general principle of the free movement of persons could have within the Union but, at the same time, it appears to *ignore* the re-distributional effects which

the current *status quo* promotes and which tends to create a category of European people excluded from the full benefits of European Union. The extent to which this state of the affairs can be maintained is dubious in view of the political growth of the European Union and the current dilemmas facing both its political and judicial processes.

The recent case-law of the Court signals a shift in its judicial activism towards favouring a limitation of the scope of the application of the free movement of goods and a broader application of the free movement of persons. The limits set in *Keck* to challenges, under Article 28 EC (ex Article 30), to national rules the effect of which is to limit the commercial freedom of traders,²³ will reduce the impact of the free movement of goods on national legislation protecting social rights. Instead, a broader use of the free movement of workers is now available to promote social rights in the European common market. The *Bosman* decision is a good example, supporting a right to work and the freedom of workers to choose their work and employment.²⁴ This decision prohibited rules that, albeit not discriminating against workers of other Member States, reduced their free movement by imposing limits on their freedom to leave their employer and to choose among different employment contracts. The consequence of the recent expansion of the free movement of persons provisions beyond the simple prohibition of discrimination on the basis of nationality may be the recognition of a set of European social rights required for an effective protection of the free movement of persons. Developments in this sense will depend largely on the sophistication and capacity of social actors to raise litigation combining Community law arguments with fundamental social rights.²⁵ But they will also depend on the notion of the underlying European political community which the Court and the political process will construct to support and mould the rights of market integration.

What is clear is that the most important developments in the area of social rights have also come from the core of market integration. It is the relationship established between free movement of persons and the principle of non-discrimination on the basis of nationality that has mainly been the driving force behind some of the most important developments on the protection of social rights in the European Union and the construction of a European citizenship. The prohibition of discrimination on the basis of nationality (Article 12 EC) has been used by the Court to extend the protection conferred by social rights in a given Member State to nationals of any Member State in that State.²⁶ This has been furthered by the direct effect granted to the principle of non-discrimination on the basis of nationality established in Article 12 EC. Such a principle is only effective within the scope of the application of the Treaty but, once a certain social right can be conceived, for example, as being instrumental to the protection of the free movement of an individual included in one of the categories of persons covered by the Treaty, such a right must be applied in a non-discriminatory manner. This process culminated in the *Martínez Sala* decision where the Court appeared to confer almost absolute protection against discrimination by a Member State to a national of another Member State

lawfully resident in that State. So long as that is the case, a national of any Member State in another Member State is granted the same social rights and protection accorded by that State to its own nationals. Discussing what are now Articles 17(2) and 12 EC, the Court stated:

“Article 8(2) of the Treaty attaches to the status of citizen of the Union rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.

It follows that a citizen of the European Union (...) lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.

Since the unequal treatment in question thus comes within the scope of application of the Treaty, it cannot be considered to be justified: it is discrimination directly based on the appellant’s nationality and, in any event, nothing to justify such unequal treatment has been put before the Court.”²⁷

The limit posed by the condition that the “unequal treatment in question comes within the scope of application of the Treaty”²⁸ is much less significant than one could initially think, as the case in question confirms. In fact, it is difficult to conceive of any area which is still *ratione materiae* outside the scope of Community law,²⁹ much less when any unequal treatment among nationals of different Member States in a Member State can be said to restrict the free movement of persons. In this area, the scope of application *ratione materiae* of Community law will basically depend on its scope of application *ratione personae*. In other words, it will depend on the extent to which all European citizens are given a general right of free movement. If they are granted a general right of free movement, the logical consequence will be that they should not be discriminated against independently of the State in which they choose to live.

However, even this basic right to free movement for European citizens (the right to freely take up residence where he or she wishes) is doubtful. Although the Treaty of Maastricht proclaimed the general principle of the free movement of persons, it is not clear whether this principle has direct effect and the conditions upon which its exercise are made dependent are equally uncertain.³⁰ This uncertainty comes directly from the ambiguous nature of Europe’s social identity and the incapacity to face the questions immediately raised by general principles such as the free movement of persons: Can Europe citizens choose whatever national model of social protection they prefer? Would some type of harmonisation of national social policies be

required? And will that not require, in turn, an exercise at the European level of a re-distributive function to be supported by some European criterion of distributive justice? My argument, to be developed below, is that it is no longer possible for the European Union to avoid these questions and the definition of its social self.

At the moment, the traditional “unbearable” status quo still dominates; although the Court has extended the protection granted by Community law to students or job-searchers, there is no general right of free movement of persons granted with direct effect even, arguably, after the *Martínez Sala* decision in which the Court did not consider it necessary to clarify the status of what was then Article 8a EC (now Article 18 EC).³¹ So long as the free movement of persons continues to be developed as a function of market integration and economic efficiency, the intention is an optimal allocation of labour under the mechanisms generated by market integration. There is no free movement of persons conceived of as a right to choose among different models of life and regulatory regimes (including social protection). Neither is such a principle accepted to entail a form of redistribution by allowing people to optimally locate themselves in view not only of labour demand but also of social protection. At the same time, however, it is becoming more and more difficult to explain the “status of apartheid” of the free movement of persons in the context of a Union with growing spheres of competence and an increasingly majoritarian institutional framework (which however still does not apply to free movement of persons). The answers to these questions require us to face different re-distributional consequences and to discuss the nature of the European social contract, something which the Union continues to avoid.

As things stand, and to use the raw Marxist language of Gustav Peebles, “people primarily gain rights within the European Union by demonstrating that they embody exchange value and are therefore personified commodities; people are not accorded rights merely for being human”.³² The extension of rights performed by the European Court of Justice has gone hand in hand with an extension of the economic and market rationale into other areas of human interaction.³³ It was the latter that made the former possible, but it also made the European constitution and its “citizens” prisoners of the functional logic of the Treaties. Therefore, the development of social rights in the EU does not come about as a consequence of a political conception of the social and economic protection deserved by any European citizen. An overview of the status and position of classical social rights in the EU confirms this.

The classic example of a social right enshrined in the Treaty is Article 141 EC which establishes “the principle that men and women should receive equal pay for equal work”. However it is well known that the origin of this norm is to be found in the aim of protecting equal conditions of competition. Even if the Court’s case-law and Community legislation have, in effect, partly raised it into the status of a true fundamental social right, this principle has always appeared a “lone ranger” in the otherwise empty and foggy landscape of European social

rights. Moreover, its unique status and the absence of an underlying rational and coherent construction of the legitimacy of Europe's social rights has limited the development of this principle of equal treatment between men and women with regard to work into a prohibition of other forms of work discrimination, such as discrimination on the basis of sexual orientation.³⁴ Only a perception of strong limits on the legitimacy of European social rights may justify the reluctance of the Court to extend the prohibition of discrimination into other categories of people. A broader understanding of the legitimacy of social Europe would have allowed the Court to fill in the gaps in the protection afforded by current European legislation to cases of work discrimination on the basis of the general principles of the European legal order.

The picture is even more complex and confused if we look at the broader status and catalogue of European social rights. It is well known that the Court of Justice has developed a catalogue of fundamental rights as legal principles of the Community legal order with which Community acts, and, in some cases, national acts have to conform with. This judicially constructed protection of fundamental rights has been transplanted into the Treaties. However, social rights have always appeared to assume a secondary position in the context of that catalogue. It has even been argued that the Court's jurisprudence has generated some confusion between its fundamental human rights doctrine and its fundamental economic rights doctrine and, in effect, has made the former dependent on the economic objectives of the Union.³⁵ There is, however, a core of social rights which have been tentatively developed by the Court in different circumstances and under different doctrines. We have already highlighted the right not to be discriminated against on the basis of nationality, equality between men and women, free movement of persons (with some limits to be clarified),³⁶ the right to work and the right to freely choose a job and employment. Other rights (such as those regarding workers' participation) have been affirmed by the Court but only following Community legislation and without the recognition of a constitutional and fundamental rights status. Both the Court of Justice and the Court of First Instance have also referred to general sources of social rights protection such as the European and Community Social Charters.³⁷ Such references have, however, been limited and rarely has the Court of Justice affirmed, as general principles of Community law, fundamental social rights. This contrasts sharply with its approach to property rights or to economic activity which have been frequently applied in the review of Community acts and legislation.

It is this uncertainty regarding the status and catalogue of fundamental social rights in the EU legal order that has led to calls for the introduction of a list of fundamental social rights in the Treaties.³⁸ This is reflected in the proposals of the *Comité des Sages* responsible for the report on a Europe of Civic and Social Rights prepared before the Amsterdam IGC. The Committee argued that it was necessary to provide the Court with a stronger legal basis in the Treaties empowering it to review Community legislation (and national legislation within the

scope of Community law)³⁹ under the criteria of fundamental social rights. The Treaty of Amsterdam did not however include a list of social rights and fewer steps were taken than the Committee had proposed. Nevertheless a relevant novelty was the insertion into the EC Treaty of a general principle prohibiting discrimination on the basis of sex, race, ethnic origin, religion, beliefs, disabilities, age or sexual orientation.⁴⁰ But such a principle does not appear to have direct effect and is more a clause of empowerment for future EC action in this area. The Social Chapter was also inserted into the Treaties and Article 136 (in the Title on social policy) now includes a reference to “fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers”. Contrary to the proposals of the Committee, no catalogue of fundamental social rights was inserted, nor were they given the same status as other fundamental rights whose respect by the Union is imposed in Article 6 TEU. Moreover, the reference in Article 136 must be read in light of the fact that the Court of Justice has considered that such a provision “is essentially in the nature of a programme”.⁴¹ As to rights which could promote a European function of distributive justice, the Treaty is completely silent. The idea of a European safety net is far from even being considered a topic of debate and redistribution is still to be constructed in cross-national terms and is limited to regional and cohesion funds.

The overall picture remains ambiguous and confused. The status of Europe’s social rights and its relation with other fundamental rights is still unclear. The legitimacy constraints which limit the potential of Europe’s social policy will continue to restrain the development of Europe’s social rights and will provide misguided results between the ambitions of the independent goals commanding some of those social rights and the limits on their interpretation and application derived from the ambiguous and limited nature of the legitimacy underlying such rights at a European level. At the same time, the growth of the number of such rights without an appropriate framework of legitimacy identifying their status and overall placing in the European political project will raise potential conflicts of rights without appropriate criteria to regulate them. The new Charter of Fundamental Rights may bring some certainty and coherence into this confused panorama with the introduction of a catalogue of fundamental rights but it will not solve any of the underlying dilemmas if it does not use the opportunity to start a deliberative moment in which the legitimacy of social Europe is discussed, including the lack of a criterion of distributive justice. This is also required to complete the construction of European citizenship and the social legitimacy of its supportive demos.

Citizenship is normally defined in reference to a certain demos and developed in a political and social status derived from the social contract of that political community. But one of the originalities of European integration was an evolving notion of citizenship referring not to a demos but, to use the expression of Peebles, to a “community of economic circulation”.⁴² This corresponds to what Everson has termed as the “market citizen”. This is a citizenship whose

status corresponds to the set of rights granted to individuals as participants and beneficiaries of the process of economic integration. The political spill-over of European integration has stressed the inadequacy of this limited version of citizenship and reinforced the claims for political and social rights in the European Union. The “Maastricht citizen” was an attempt to answer those claims by formally establishing a European citizenship and a limited status of political rights which can be related to other institutional changes (such as the reinforcement of the European Parliament’s powers). But it is still unclear to which dominant demos these political rights relate.⁴³ Furthermore, apart from the still contested and ambiguous principle of the free movement of persons there is no real social content given to European citizenship. Again, the reason probably lies in the difficulty of elaborating a principle of distributive justice within the emerging European political community. The crucial question becomes whether there can be a European citizenship deprived of a social content. This is not to say that there are no European social rights. In fact, as we have seen, there are several of such rights. The problem is that they arise and are defined not in reference to independent political goals associated to a social status attributed to any European citizen *vis á vis* the emerging European political community, but in reference to *ad hoc* political bargains that are aimed at binding the States but not the Union and which are legitimised via market integration. As a consequence, their redistributive effects are not really thought out in accordance with a criterion of distributive justice for the Union.

3. Demos, Telos and Europe’s Social Self

If one looks at Marshall’s well known description of the three waves of fundamental rights associated with citizenship one is bound to notice that, whilst political rights are emerging in the European Union, social rights continue to be the main gap in the process of constructing European citizenship.⁴⁴ Even the arguments in favour of European social rights refer mainly to the need to create a set of rights in relation to which the European Union can ensure *States’* compliance. The idea of European social rights as European social entitlements arising from a criterion of distributive justice agreed among all citizens of the Europe Union is rarely, if ever, discussed.

The recognition of a set of social rights accorded to all European citizens both with regard to the different national demos’ and the emerging European demos must follow from a notion of citizenship that is not simply inclusive of those wealthy enough to enjoy the elitist free movement and (currently) limited citizenship provisions. If citizenship *is* narrowly inclusive, many Europeans will feel estranged from European citizenship⁴⁵ and it will be a hotly debated issue: Debates on efficiency *versus* distributive justice never have been peaceful and are not likely to be in the context of a “contested” European political community whose degree of cohesion and solidarity can only be said to be weak. The main problem is that decisions on

these issues are *already* being taken at the European level. In the absence of an agreed European social contract those decisions simply flow from the functional ideology of market integration. Moreover, European integration has reached a point where its emerging European *demos* and its re-distributive and majoritarian elements can no longer be socially accepted and legitimised without an underlying social contract and a criterion of distributive justice.

The rhetoric of the Treaties has seen a progressive reinforcement of the social goals of European integration included in the preambles and initial articles. This social rhetoric goes beyond the simple safeguard of social values in light of the regulatory challenges brought by economic integration. The current rhetoric is even partially linked with a notion of European solidarity whereby the goal of economic and social cohesion is entrusted to the Union.

Article 2 of the EC Treaty states that the Community shall “promote throughout the Community a harmonious, balanced, and sustainable development of economic activities, a high level of employment and of social protection (...) and economic and social cohesion and solidarity among Member States”. This provision is reflected in Title XVII but also in the conception of the Community’s social policy as aiming at “the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to a lasting employment and the combating of exclusion” (Article 136(1)). A goal which the Member States recognise will not only ensue from the functioning of the common market but will require direct Community action (Article 136(3)).

However, this rhetoric has much of the symbolic about it, lacking any real correspondence with the other provisions of the Treaties or the policies of the Union,⁴⁶ and it is clear that Jacques Delors’ goal of a European social area has not moved much beyond words. Still, one must not ignore the powerful consequences which may be derived from this rhetoric as a legitimating factor for the European Union. In combination with human rights and citizenship, the reinforcement of the goal of economic and social cohesion is one of the key instruments written in at the Maastricht and Amsterdam IGCs to promote the social legitimacy of the integration process in light of its economic and institutional developments. Maastricht saw the reinforcement of the structural funds and an increased stress on the social and economic cohesion of the Union as a necessary complement to Economic and Monetary Union, vital to safeguard its feasibility and social acceptance.⁴⁷ But the re-distributive function of the Union (although not its re-distributive effects) is still fundamentally restricted to the structural funds which form the basis of a policy of economic and social cohesion much more modest than the name leads us to assume.⁴⁸ In fact, the re-distributive function performed by the structural funds appears as part of package-deals agreed in the context of broader reforms within the Union and to guarantee support for other substantive and institutional developments. In spite of the rhetoric

of social and economic cohesion included in Articles 2, 3, and 158 *et seq* EC, that goal is not reflected in the different policies of the Union and its pursuit appears to be committed only to the structural funds. In this way, that re-distributive policy is not part of a criterion of distributive justice which could co-ordinate all the policies of the EC and EU but is, instead, a compensation which is given to some States which could lose more or gain less from other specific policies or institutional choices of the EC and EU. Redistribution in the EU occurs as a result of *ad hoc* inter-governmental bargaining and not as a constitutive element of an emerging polity founded upon a social contract which includes a criterion of distributive justice. This form of re-distributive policies could fit well with the original foundations of the European Communities, but it is doubtful whether it is adequate for the political form and re-distributive effects of the contemporary European integration project.

If it is usual to see critiques of the current status quo refer to a European social deficit, the same is true that few of those critiques address the question of distributive justice at a European level. Bob Hepple, for example, argues that “until such time as European social policy is explicitly based on general principles which reflect common social values, there will be no rational basis for Community legislation and judicial interpretation in the social field”.⁴⁹ However even Hepple appears to concentrate on the protection of a common set of social values (which he derives from the different Member States) from the intrusion of market integration and efficiency enhancing policies and not on the establishment of European policies which would promote a European dimension of that common set of social values.⁵⁰ The social constitution of Europe to which this author refers will serve as a yardstick for the protection of social rights at the national level and Community norms but would not, itself, promote forms of redistribution and social allocation at the European level. It would therefore preserve the idea of Europe’s social policy as establishing a common set of social values to be achieved and safeguarded by the different Member States, and not as promoting a European ideal of distributive justice expressed in independent political and social goals. In other words, that social constitution of Europe will guarantee a level playing field within Europe and impose on all States a core set of social values to be respected by all but would not entrust to the Union a function of redistribution to be achieved in accordance with a European criterion of distributive justice. The social perspective underlying this limited conception of Europe’s social self is that which merges the interests of those who want to guarantee a level playing field in the internal market with regard to social standards, with the interests of those who want to use Europe to promote more social rights at the national level. This limited version of the European social self does not really recognise Europe’s right and legitimacy to establish and exercise an independent re-distributive function.

The reality, however, is that European policies already have broad re-distributive effects and what appears to be lacking is an overall criterion of distributive justice to assess and co-

ordinate those re-distributive effects. Is the lack of a real agreement on a criterion of distributive justice for Europe acceptable in light of the political and economic developments of the European Union? Is the current and expected future model of the European Union compatible with the lack of identification of its social self expressed in a criterion of distributive justice? Or will that social self come about as a creation of the functional method without a true European social contract? Does European despair (following Kierkegaard) come from not wanting to be itself as it has now become or does European despair come from wanting to be itself? The latter, as Kierkegaard noted, entails a higher level of consciousness of the self. In our case, it departs from recognising the political form that Europe has already attained and the re-distributive impact it has in the different States and among European citizens. But can this political form continue to emerge and have re-distributive effects without a form of social legitimation? To use the words of Kierkegaard, this despair arises in the context of “severing the self from any relation to the power which has established it, or severing itself from the conception that there is such a power”. How, therefore, can this relation be established and Europe become itself? The answer given by Kierkegaard, in relation to human beings, is faith. This is what, in his view, allow us to leave despair and relates us to the power that created us, thus gaining perfect conscience and acceptance of our self. This is not an easy concept to transfer into a political project. Here, the power lies in the people (the *demos*) and, at least in my view, the relation between the *demos* and the polity must be rational. The form of the polity must come about through a form of deliberation among the members of the *demos*. But the individual reasons for giving our allegiance to that polity and acceptance of being part of that *demos* may vary. What are the conditions for European citizens to have “faith” in the current European Union? To answer this we must ask both what the European self already is (to improve consciousness of that self) and what it needs to find out about itself if it wants to secure the relation with the power that created it (the European *demos*, however it may be understood).⁵¹ This raises several broad and difficult questions which there is not space to address here; I instead wish simply to raise awareness of the European social self and to highlight its relation with other political and constitutional developments of the Union in a way that may contribute to re-shaping the current constitutional debates of the Union and the understanding and role of social policies. The focus is on assuming that distributive justice has to become part of the European social self.

The assumption of economic integration was, as stated before, increased growth without interference in the distributional function. But a viable and sustainable integration is only workable if the effects of economic growth are fairly distributed. The issue of redistribution is therefore present from the outset of any project of economic integration. It is well known in economic theory that, although all may gain from economic integration and trade liberalisation, it is to be expected that richer and more competitive countries may gain more than less developed countries.⁵² Still, as I have mentioned before, the focus of the project of European

economic integration has been on efficiency enhancing and wealth maximisation. The economic growth to be expected from market integration was to be beneficiary to all, albeit not in equal terms. Moreover, the degree of economic and social cohesion of the starting members of the project would create reassurance that the re-distributive effects would not impose an undue burden on any of the members. In most economic integration agreements, States make their cost/benefit analyses at the time of signing and, if necessary, obtain specific compensations for agreeing to certain areas of economic integration. The fact that re-distributive effects have taken place as a consequence of developments in other policies of the Union could also be legitimised in light of the adoption of unanimous voting procedures for decision-making in the European Union. In this case, States could either prevent policies which could have adverse re-distributive effects on their own welfare or could subject their agreement to the receipt of some form of compensation in other areas of European policies (something referred to as issue linkage).⁵³ It is this that has determined the pattern of both goal determination and the institutional development of the European Communities. Taking as our basis the traditional standards of efficiency, we can make reference to Pareto superiority, Pareto optimality, Kaldor-Hicks efficiency and Pigou optimality in determining the different goals and decision-making procedures which can be adopted in the project of European integration. They can be seen as rules orientating decision-making procedures or decision-making outcomes.⁵⁴ In the latter, Pareto superiority is assured if no one is worst off and at least one person is better off. Pareto optimality exists once there is no conceivable state (n) in which anyone will be worst off. A decision is Kaldor-Hicks efficient if those that are better off win sufficiently to compensate the losers so that they are not worst off. Finally there is a Pigou optimal as long as there is a net benefit, that is those better off win more than those worst off lose. The original model of European integration and its patterns of decision-making emphasised a kind of Pareto or Kaldor-Hicks efficiency. In the absence of a common belief in some kind of European ideal or political concept of European integration, integration could only proceed if it pragmatically satisfied as many people or groups as possible.⁵⁵ This could be achieved either by guaranteeing that all would have to agree to a specific decision (an institutional rule promoting Pareto efficiency) or by agreeing on mechanisms of compensation to those who would be worst off by virtue of a certain decision (subordinating institutional and substantive developments to a form of Kaldor-Hicks efficiency). The leading idea justifying free trade is a kind of Pareto or Kaldor-Hicks efficiency. Free trade and economic integration will maximise total net benefits but not necessarily in an even way. With the development of European economic integration and its institutional and political spillovers, re-distributive concerns arose and the solution was the introduction of re-distributive policies which have been developed as compensating some States and which still correspond to an overall Kaldor-Hicks form of efficiency.

However, the development of European integration has strained this form of relation between the model and degree of integration and its ideals. The degree of integration, the expansion of the scope of action of the European Union and its institutional changes are producing re-distributive effects which are no longer predictable as part of *ad hoc* political bargaining that may then be legitimised through appropriate forms of compensation. Instead, the degree of majoritarian decision-making and the scope of European policies require an overall criterion of distributive justice which may legitimise those different policies and their re-distributive effects. The institutional shift to majoritarian decision-making (both through the extension of majority voting and parliamentary intervention) and the growth of Community competences tend to subordinate the EU to a societal goal such as Pigou optimality and to have a re-distributive impact larger than that which could be functionally legitimised.

In this respect, by increasing majoritarian decision-making and parliamentary intervention, the Treaty of Amsterdam may have a constitutional importance well beyond that which is usually attributed to it.⁵⁶ Renaud Dehousse has identified two models in the European institutional architecture: the parliamentary system and the regulatory structure. As this author remarks, “the regulatory approach is primarily a functional one: the European Union should concentrate on activities in which it can hope to achieve greater efficiency than can the Member States”.⁵⁷ The Parliamentary system entails a move towards forms of traditional democratic legitimacy such as those involving majoritarian decision-making and direct representation. According to Dehousse once more, the Treaty of Amsterdam has, in many ways, confirmed and reinforced the role of the Parliamentary system which was already indicated at Maastricht.⁵⁸ The current 2000 IGC’s focus on institutional issues appears destined to further that parliamentary and majoritarian model. But, in my view, the change towards a parliamentary and majoritarian system cannot be separated from a debate on the *telos* of the Union and its social self. Those institutional changes also involve a move towards Pigou-optimal decisions which tend to have stronger re-distributive effects since they do not require the agreement of all parties involved. However, these re-distributive effects will not be guided by a criterion of distributive justice. In the absence of this, the re-distributive effects of the majoritarian system will simply favour the interests of the majority without taking into account the intensity to which different interests are affected by the decisions of the majority or the departing status quo of those called to participate in the decisions. In this way, a majoritarian system needs an underlying social contract based on a criterion of distributive justice to guarantee the social legitimacy of the majority decisions. Such a social contract guarantees the allegiance of all to the polity by stipulating forms of long term compensation and by protecting the interests of those minorities which may at times be unduly burdened by the re-distributive effects of the majoritarian decisions. One of the key elements of such a social contract is the setting up of overall mechanisms and criteria of distributive justice.

Up to now it has been possible for European integration to comply with the requirements of both formal and social legitimacy through its recourse to the regulatory model, functional legitimacy and national input. The re-distributive impact of European policies was legitimised both by recourse to functional goals and national direct or indirect agreement. Issue linkage provided the relation between the two: the unintended re-distributive effects of some European policies were compensated for with other policies and, in this way, such re-distributive impact could, one way or the other, be reached to an agreement of the States. In this way, functional legitimacy both limited the re-distributive impact of European integration and subjected it to trade-offs and agreements between the States. The increased majoritarian and parliamentary character of the European Union make this traditional form of legitimacy more difficult. At the same time, the extension of the scope of Community competences and its growing role as a new political arena mean that it will be increasingly used by different political and social groups to promote independent political goals, and not only those which are functionally attached to the construction of a common market. This emerging political and majoritarian character of the European Union can only be fully legitimised if it is based on a social contract. As Hirschman would put it: less voice would either lead to exit or be replaced by loyalty.⁵⁹ And loyalty can only come to the European Union through the means of a social contract. In my view the institutional and social challenges currently faced by the Union require it to also address its underlying *telos* and social identity. This constitutive moment of the Union arises out of the exhaustion of the functional model and its incapacity to legitimise the current institutional and political developments of the Union.

The result of this constitutive moment is unclear, but what must be included is a debate on the social identity of Europe and its reflection on a criterion of distributive justice.⁶⁰ Without such debate there can be no true social contract capable of legitimising the emerging European polity⁶¹ and the consequences would be either a return to a less advanced form of integration (including a reduction of majoritarian decision-making and stricter limits on European competences) or, if the current model continues to be stretched, a crisis of social legitimacy which may manifest itself in increased national challenges to European policies (whose re-distributive effects are not understood and accepted).

There are, however, good reasons to suppose that it will be possible to develop such a social contract (which does not necessarily require a constitutional project or referendum) and to agree on a criterion of distributive justice for the Union. Recent work by Habermas has developed this argument, departing from the current global challenges to the national welfare state. According to Habermas,⁶² it will not continue to be possible for the nation state to guarantee the mechanisms and instruments of social solidarity on which the welfare state has been founded. But this affects the legitimacy of the nation state which requires social justice to secure its own survival. The alternative, for Habermas, lies in the project of European

integration, but for this the reinforcement of its capacity for political action must go hand in hand with the development of a form of civil solidarity among European citizens which will secure and express itself in different re-distributive policies.

I argue that the project foreseen by Habermas is not only a possible answer to the global challenges faced by the nation State but a choice which the Member States can no longer ignore in view of their own construction of the European Union. Once a certain degree of economic and political integration is achieved, the competition among states generated by that economic integration and the re-distributive effects of the policies of the new political entity, will make it difficult for the different Member States to carry on with successful independent re-distributive policies.⁶³ It is this that explains the fears of some who foresee the likelihood of a general principle of free movement of persons hinted at in the *Martínez Sala* decision of the Court of Justice.⁶⁴ But this is so only if we refuse to accept that the Union entails in itself a degree of solidarity between its citizens that must, at least, extend to full European citizenship for all, if necessary, by imposing a re-distributive burden that is to be legitimised by a criterion of distributive justice among all European citizens. The masters of the Union (citizens and Member States) may deny that such civil solidarity is possible within the Union but they may not evade the question any longer. Whatever the perspective adopted, it is now clear that we must link European social expectations to principles of social justice⁶⁵ and that this requires a debate on Europe's social contract.

The promotion of economic integration through free trade is understood to increase efficiency and wealth maximisation. However, many fear that such gains may occur at the cost of weaker social groups and may not be fairly distributed among all the members of society. At the same time, the institutional developments of the Union have promoted forms of decision-making with re-distributive effects. Without an agreement on a criterion of distributive justice, these decisions will be seen as a simple reflection of the balance of power in the Union and as lacking general social legitimacy. This is not to say that the EU needs some kind of supportive communitarian ideal or cultural or historical identity. The European demos and its social contract may result from the free allegiance of all European citizens with regard to a set of political and social values. But whatever the structure of the European demos it needs an underpinning social contract which, in its turn, must entail some criterion of distributive justice. In my view, this requires the replacement of the current redistribution policies based on trade-offs and issue linkages for redistribution policies which are no longer conceived of as State to State but as citizen to citizen and are embodied by a criterion of distributive justice which can be used in creating, interpreting and applying all European policies. In this sense, such a social contract does not necessarily require, for example, an immediate system of taxation and social security. It requires above all, a reconstruction of all current policies (directly re-distributive or not) in light of that overall criterion of distributive justice among European citizens and not

States. Only this transformation will give the Union the legitimacy basis for the political powers which it is currently acquiring.

Simply stated, Europe must, as Kierkegaard would say, discuss its identity. It can no longer remain with the intellect of a child and the body of an adult. As it now stands, and in Kierkegaard's terms, it faces despair: the despair of wanting to be oneself and the despair of not wanting to be oneself. I do not know the resolution but I believe that future developments of the Union depend on a discussion of this identity or, perhaps better, on a discussion of its underlying social contract. The content of that social contract will both define and be defined by the model and ideal of European integration adopted and, in general, our preferences with regard to efficiency and distributive justice. There are two basic dilemmas that intersect each other in this issue: the first concerns the choice between wealth maximisation and distributive justice; the second is to do with whether we favour a model of economic integration or a model of political integration for Europe. What is clear is that the present status quo is no longer viable as it no longer fits with the impact of European integration. The erosion of national powers and Europe's impact on the exercise of national redistribution policies will bring increased pressures in favour of the assumption of a re-distributive function at the European level. This claim will be reinforced by the need to complement the wealth maximisation brought about by economic integration with some form of distributive fairness. Furthermore, the coming institutional developments of the Union are bound to reinforce its majoritarian and supra-national characteristics, thereby increasing the re-distributive impact of European policies. This institutional development can only be fully legitimised and accepted if its re-distributive effects are guided by a socially agreed criterion of distributive justice.

To ignore this "social identity question" in the forthcoming constitutional debates of the European Union may well correspond to the dangerous path of which Kierkegaard warned: "The biggest danger, that of losing oneself, can pass off in the world as quietly as if it were nothing; every other loss, an arm, a leg, five dollars, a wife, etc., is bound to be noticed."

¹ S. Kierkegaard, *The sickness unto death: a Christian psychological exposition for edification and awakening/ by Anti-Climacus* (ed. S. Kierkegaard; trans. A. Hannay) (Harmondsworth, Penguin Books, 1989).

² Kierkegaard, above n.1 at 43.

³ See P. Davies, "Market Integration and Social Policy in the Court of Justice" (1995) 24 *Industrial Law Journal*, 49 at 49.

⁴ See M.P. Maduro, *We The Court, The European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998).

⁵ See the Sunday Trading cases, notably, Case C-145/88 *Torfaen Borough Council v. B&Q plc.* [1989] ECR 3851.

⁶ Case C-179/90 *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA* [1991] ECR I-5889.

⁷ Case C-41/90 *Höfner & Elser v. Macroton GmbH* [1991] ECR I-197 and Case C-134/95 *USSL v. INAIL* [1997] ECR I-195.

⁸ See, for example, Case 65/75 *Tasca (Ricardo)* [1976] ECR 291; Cases 88-90/75 *Sadam*, [1976] ECR 323; Case 13/77 *GB-INNO-BM v. ATAB* [1977] ECR 2115; Case 82/77 *Openbaar Ministerie v. Van Tiggele* [1978] ECR 25.

⁹ See the various examples given by Davies, above n.3, mainly at 58 ff.

¹⁰ E.B. Haas, *The Uniting of Europe*, (Stanford, Stanford University Press, 1968) (first published 1958), at 516.

¹¹ D. Trubeck, *Social Justice “After” Globalization - The Case of Social Europe* (mimeo, November 1996), at 5.

¹² See, notably, Article 137 EC.

¹³ See Articles 138 and 139 EC.

¹⁴ I. Moebius and E. Szyszczak, “Of Raising Pigs and Children” (1998) *YEL* 125.

¹⁵ The expression belongs to M. Everson, “The Legacy of the Market Citizen” in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* (Oxford, Oxford University Press, 1995) at 73.

¹⁶ See, for example, Case C-55/94 *Gebhard* [1995] ECR I-4165, at para. 34.

¹⁷ Joined Cases C-267 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

¹⁸ See Maduro, above n.4, at 61-68.

¹⁹ See Davies, above n.3.

²⁰ Note that the two examples of social rights given do not require any type of legislative action (as normally happens with social rights of a programmatic character) and could be established simply by judicial recognition.

²¹ It is sufficient to think of the arguments, regarding Article 28 (ex Article 30), used to challenge national regulations which prohibited shops from opening on Sundays, prevented certain marketing and advertising methods. or imposed the use of recyclable bottles.

²² See Article 95.

²³ *Keck and Mithouard* above n.17. In this decision, the Court restricted the scope of application of what was then Article 30 with regard to national measures regulating “selling arrangements” and which do not discriminate against imports (no longer considered as capable of restricting trade in the context of the free movement of goods). The traditional interpretation of Article 30 is, however, maintained with regard to national measures on product characteristics. On *Keck* see: S. Weatherill, “After *Keck*: Some Thoughts on How to Clarify the Clarification” (1996) 33 *CMLRev.*, 885; Gormley, “Two Years After *Keck*” (1996) 19 *Fordham International Law Journal*; M. Mattera, “De l’arrêt “Dassonville” à l’arrêt *Keck*: l’obscurité d’une jurisprudence riche en principes novateurs et en contradictions” (1994) *Revue du Marché Unique Européen*; D. Chalmers, “Repackaging the Internal Market – The Ramifications of the *Keck* Judgment” (1994) 19 *ELRev.* 385; M. Lopez Escudero, “La jurisprudencia *Keck* y *Mithouard*: Una Revision del Concepto de Medida de Efecto Equivalente” (1994) *Revista de Instituciones Europeas*, 379;

N. Bernard, “Discrimination and Free Movement in EC Law” (1996) 45 *International and Comparative Quarterly*, 82; Higgins, “The Free Movement of Goods Since *Keck*” (1997) 6 *IJEL*; and M.P. Maduro, “*Keck*: The End? The Beginning of the End? Or Just the End of the Beginning?” (1994) 1 *IJEL*, 30.

²⁴ Case C-415/93 *Bosman* [1995] ECR I-4921.

²⁵ That has not been the case up to now. In this sense, see E. Szyszczak, “Future Directions in European Union Social Policy Law” (1995) 19 *ILJ*, at 31.

²⁶ In the words of Carlos Ball, “The Court of Justice has interpreted Community Law provisions that provide individuals with justiciable economic rights in a way that prohibits Member States from treating their own citizens better than the citizens from other Member States working within their borders. This has contributed significantly to the formation of a European social citizenship”, in “The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community’s Legal Order” (1996) 37 *Harvard International Law Journal*, 307 at 314.

²⁷ Case C-85/96 *Martínez Sala* [1998] ECR I-2708, paras. 62-64.

²⁸ The Court established two conditions: that the facts of the case must fall within the scope *ratione materiae* and *ratione personae* of the Treaty. The latter is linked to the interpretation to be given by the Court to the general right of free movement of persons established in Article 8a EC (now Article 18) which the Court considered unnecessary to consider in this case (see below).

²⁹ It is not required for specific Community rules to address an issue for it to come under its scope of application. Otherwise, the Court would not need to independently apply Article 6.

³⁰ See J. Shaw and S. Fries, “Citizenship of the Union: First Steps in the European Court of Justice” (1994) 4 *European Public Law* 533

³¹ See paras. 58-59.

³² G. Peebles, “A Very Eden of Innate Rights of Man? A Marxist Look at the European Union Treaties and Case Law” (1997) 22 *Law & Soc. Inquiry* 581.

³³ *Ibid.* at 586-587.

³⁴ See Case C-249/96 *Grant v. South West Trains* [1998] ECR I-62. The Court has however accepted a partial extension of the prohibition to discriminate on the basis of sex to cover transsexuals in Case P. complete citation.

³⁵ See Ball, above, n.26, at 315.

³⁶ See the discussion below.

³⁷ See, for example, Case C-246/96 *Magorrian and Cunningham v. Eastern Health and Social Service Board and the Department of Health and Social Services* [1997] ECR I-7153; Case C-191/94 *AGF Belgium* [1996] ECR I-1859; Case T-135/96 *UEAPME* [1998] ECR II-2335. See also Szyszczak, above, n.25, at 31 and references therein.

³⁸ See B. Hepple, “Social Values and European Law” (1995) 39 *Current Legal Problems*; R. Blanpain, B. Hepple, S. Sciarra and M. Weiss, *Fundamental Social Rights: Proposals for the European Union*, (Leuven, Walter Lëen Fonds, 1996). See also the *Molitor Group Report*, Section on labour law, Proposal 1, (Agence Europe/Documents, N° 1947, 4 August 1993).

³⁹ Thus, the degree of incorporation of EU fundamental rights in national legal orders would not be changed.

⁴⁰ Article 13 EC as introduced by the Treaty of Amsterdam.

⁴¹ See Case 149/77 *Defrenne v. Sabena* [1978] ECR 1365; Case 170/84 *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR I-1607; Case 126/86 *Gimenez Zaera v. INSS* [1986] ECR I-2261, para. 13.

⁴² The expression is drawn from Peebles, above n.32.

⁴³ Everson, above n.15 at 76, talks about a conceptual obscurity which raises two contrasting possibilities: “First, Union citizenship may relate to a common but limited European society, which does not supersede but exists alongside its national counterparts. Secondly, Union citizenship may yet be associated with national societies.”

⁴⁴ An application of Marshall’s theory to the European Union has recently been attempted by Duarte Bué Alves.

⁴⁵ *Ibid.*

⁴⁶ In this sense, see J. Shaw, “Twin-track Social Europe - the Inside Track” in D. O’Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (London, Chancery, 1994) at 295.

⁴⁷ See C. Mestre and Y. Petit, “La cohésion économique et sociale après le Traité sur l’Union européenne” (1995) 31 *RTD eur.* 207.

⁴⁸ See Shaw above n.46 at 305.

⁴⁹ Hepple, above n.38 at 40.

⁵⁰ *Ibid.*, mainly at 40-44, 52 ff. and 60.

⁵¹ As the sum of national demos, the constituency of European citizens is a community identified by history or other factors.

⁵² See Mestre and Petit, above n.47 at 241.

⁵³ According to S. Weber and H. Wiesmeth, “an international regime (...) provides a political environment that naturally promotes issue linkage: by affecting ‘transaction costs’, the costs associated with acts of non-co-operative behaviour, it makes it easier to link particular issues and to negotiate side-payments that allow some actors to extract positive gains on one issue in return for the favours expected on another”, in “Issue Linkage in the European Community” (1991) 25 *JCMS* 258.

⁵⁴ Coleman, speaks of the distinction between teleological (or consequentialist) modes of justification and consensual modes of justification. See: J.L. Coleman, “The Foundations of Constitutional Economics” in R.B. Mckenzie (ed.), *Constitutional Economics - Containing the Economic Powers of Government*, (Lexington, Mass., Toronto, Lexington Books) at 141 ff.. See also the description of Pareto superiority, Pareto optimality and Kaldor-Hicks efficiency at 143-144.

⁵⁵ See Haas, above n.10, at xxiv.

⁵⁶ In this sense, Jean-Claude Piris, “ Does the Europe Union have a Constitution? Does it need one?” (1999) 24 *ELRev.*, 557 at 564.

⁵⁷ R. Dehousse, “European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?” (1998) 35 *CMLRev.*, 595 at 599.

⁵⁸ *Ibid.* at 624.

⁵⁹ A. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations and States*, (Cambridge, MA, Harvard University Press, 1970).

⁶⁰ In a different sense from that argued here but also claiming that “the Union’s social policy now stands at a crossroads (and) requires courageous decisions” at the risk of creating “a policy vacuum and leading to the disenchantment among those very citizens who have had their expectations awakened”, see C. Barnard, “EC ‘Social’ Policy”, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, OUP, 1999), 47, at 511.

⁶¹ For Habermas, “the only kind of democratic process that will count as legitimate, and that will be able to provide its citizens will solidarity, will be one that succeeds in an appropriate allocation and a fair distribution of rights”, in *The Postnational Constellation*, (Polity Press, 2000, forthcoming).

⁶² See above n.61.

⁶³ On the problems and virtues of competition among states and competition among rules see Maduro, above n.4 at 126 ff.

⁶⁴ See Shaw and Fries, above n.30 at 533.

⁶⁵ See S. Sciarra, “European Social Policy and Labour Law – Challenges and Perspectives”, *Collected Courses of the Academy of European Law*, Volume IV Book 1, Academy of European Law (The Hague, Kluwer Law International, 1996) 301 at 310.