

Alessandra Facchi - Paola Parolari - Nicola Riva

# Values in the EU Charter of Fundamental Rights

A Legal-Philosophical Analysis  
with a Focus on Migrants' Rights

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**G. Giappichelli Editore**

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## Acronyms

CCFSRW	Community Charter of the Fundamental Social Rights of Workers
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
COE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
FRA	Fundamental Rights Agency (of the EU)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

## Forward

This work is intended to make public the main findings of the Report on the Normative Content, Genesis, Historical Background and Implementation of the EU Charter, elaborated within the research project NoVaMigra – Norms and Values in the European Migration and Refugee Crisis, funded by the European Union under the programme Horizon 2020 (Grant Agreement no. 770330).

The NoVaMigra project, coordinated by the University of Duisburg-Essen, involves universities and research centres based in eight European countries, and a university based in the United States. It aims at: a) providing a comprehensive understanding of the core European values/norms; b) explaining how these values/norms motivate and/or affect relevant political, administrative, and societal agents with regard to migration and the integration of migrants and refugees into European societies; c) studying whether, how, and why these values/norms have been changing as a consequence of the refugee crisis since 2015; and d) developing a rights-based democratic perspective for the EU and its Member States, which takes into account differences in European values/norms that became visible during the refugee crisis, but also reflects Europe's global responsibility. In pursuing these goals, the NoVaMigra project devotes particular attention to gender issues.

Within this research framework, this work provides a sketch of a legal-philosophical understanding of the nor-

mative content of the Charter of Fundamental Rights of the European Union. In particular, it reconstructs how «the indivisible, universal values of human dignity, freedom, equality and solidarity» – on which, according to the preamble of the Charter (par. 2), the «[European] Union is founded» – are conceived in the Charter itself. This task is mainly carried out through the analysis of the rights specifically associated with each of those values, respectively, in Titles 1-4. Nevertheless, punctual references are made also to some of the rights included in Titles V and VI, devoted, respectively, to citizens' rights and justice.

Given its specific contextualization within the NoVaMi-gra research framework, this work mainly focuses on those rights which are, or could be, particularly significant in relation to migrants, asylum seekers and refugees. Furthermore, special attention is devoted to women's rights and gender equality.

The analysis is primarily based on the provisions of the Charter, on the Explanations relating to the Charter of Fundamental Rights, and on the case law of the Court of Justice of the European Union and the European Court of Human Rights<sup>1</sup>. Nonetheless, EU secondary law and other international human rights instruments are also considered, when relevant.

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<sup>1</sup> Our main (although not exclusive) sources in the selection of the cited case law are the commentaries to the Charter edited by Peers *et al.* (2014) and Mastroianni *et al.* (2017), and the reports edited by the European Observer on fundamental rights respect of the Fondazione Basso (2015, 2016 and 2017).

As regards its conceptual framework, the analysis combines both a value(s)-based and a rights-based approach, as defined in the Conceptual Map elaborated in the very first phase of the NoVaMigra project<sup>2</sup>. In fact, as is typical of legal documents – and, in particular, of such legal documents as charters of rights and constitutions – the Charter uses normative concepts such as “values” and “rights” in ways that may appear, from a philosophical perspective, vague and ambiguous. It does not develop a coherent moral or political theory of how those normative concepts should be precisely understood and of how they relate to each other. In particular, while the Charter explicitly refers to values (par. 2-4 of the preamble<sup>3</sup>) and organizes fundamental rights according to their relations to them, it would be wrong to think that it definitely adopts a value(s)-based approach rather than a rights-based one. On the contrary, it leaves some space for both interpretations. Thus, for instance, it is possi-

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<sup>2</sup> The Conceptual Map, edited by Jos Philips and Marcus Düwell of the Utrecht University research unit, defines the basic normative concepts of “value”, “norm”, “right”, “duty” etc., and identifies two different approaches to understand the relations and tensions between them: a *value(s)-based* and a *rights-based* approach. According to the first one, value(s) provide(s) the basis for duties, norms and rights: one value or a set of values is identified as what should be promoted, pursued and/or realized, and the moral validity of norms, rights and duties depends on their contribution to the promotion, pursuit and/or realization of that value or set of values. In turn, according to the second approach, duties are defined as correlative to rights: valid norms are those that secure rights and the language of values can be reduced to the language of rights.

<sup>3</sup> See also articles 2 and 6 of the Treaty on the European Union.

ble both to consider freedom as a value that precedes and grounds specific freedoms (such as, for instance, freedom of religion, freedom of expression, freedom of association, and so forth) and to consider references to the value of freedom as simply a way of referring to the set of those fundamental rights.

Finally, it is worth specifying that, while this work adopts a predominantly philosophical-legal approach, it is aimed at a multidisciplinary audience. Accordingly, it avoids an excessively technical language and does not undertake an in-depth analysis of many philosophically and legally controversial questions, which, while certainly relevant, are also very specific and complex.

The work is structured as follows. The first introductory chapter briefly considers the genesis of the Charter and its main features, including its field of application and personal scope. The second chapter provides a short reconstruction of four traditions in the history of European thought – Christianity, Republicanism, Liberalism and Socialism – as those traditions which most contributed to the philosophical background of the values affirmed in the Charter. Chapters 3-6 analyse synthetically how dignity, freedoms, equality and solidarity are understood in the Charter and in the case law of the European courts. The concluding chapter summarises the main insights emerging from the analysis.

We want to thank Isabelle Aubert, Marcus Düwell, Volker Heins, and Jos Philips, as well as the monitors assisting in the project assessment, Ferdinando Sigona and Gezim Krasniqi, for their useful comments on the Report on the

Normative Content, Genesis, Historical Background and Implementation of the EU Charter. We also express gratitude to the coordinator of the NoVaMigra Project, Andreas Niederberger.

Alessandra Facchi, Paola Parolari, and Nicola Riva

Milan, 29<sup>th</sup> June 2019

*This work is the result of a joint effort of the authors to combine their specific competences into a unitary analysis. Nevertheless, the authorship of its different parts can be attributed as follows: Chapter 1 was authored by Paola Parolari; Chapter 2 was authored by Alessandra Facchi and Nicola Riva; Chapter 3-7 were co-authored.*



# 1. The EU Charter of Fundamental Rights. An Introduction

The unique supranational organization called “European Union” is the ongoing development of a process of regional integration which was originally conceived, in the aftermath of World War II, as a peace project based primarily on economic cooperation (Dinan 2019). For this reason, fundamental rights initially remained outside the scope of the European Communities. However, they became part of the process of European integration very soon. Indeed, since 1969<sup>1</sup>, the Court of Justice (now Court of Justice of the European Union, hereinafter CJEU) has affirmed several times that fundamental rights are part of the general principles of Community law (now EU law)<sup>2</sup>.

Subsequently, a political process began, which finally

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<sup>1</sup> CJEU, *Stauder v. Stadt Ulm*, 1969 (C-29/69). See also CJEU, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 (C-11/70).

<sup>2</sup> With effect from 1 December 2009, date of the entry into force of the Lisbon Treaty, the EU has acquired legal personality and has taken over the competences previously conferred on the European Community. Community law has therefore become the law of the Union. For simplicity, in this work we will always refer to EU law and use the acronym CJEU to indicate the Court of Justice of the European Union, irrespective of when an act was adopted or a judgement was pronounced (with the sole exception of literal citations). Indeed, although we are aware that this is not properly accurate, we think that using different denominations and acronyms may be even more confusing.

led to the adoption of the Charter of Fundamental Rights of the European Union (hereinafter Charter) in 2000. In particular, besides a number of non-binding declarations and resolutions adopted by the European institutions<sup>3</sup>, fundamental rights were mentioned in the preamble of The Single European Act (1986) and, then, reaffirmed «as general principles of Community law» in art. F of Treaty on the European Union (hereinafter TEU), signed in Maastricht in 1992.

In this context, the Charter represents a milestone in the process of progressive inclusion of the protection of fundamental rights within the political goals and the legal framework of the EU, since it substantially contributed to producing a qualitative change in the way the EU now describes itself: that is, as a “Europe of Rights”.

This introductory chapter will sketch the genesis of the Charter (par. 1.1) and its main features, including its field of application and personal scope (par. 1.2).

## 1.1. The genesis of the Charter

The preparatory works that led to the adoption of the Charter officially started in 1999 in Cologne, when the Eu-

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<sup>3</sup> Among the others: in 1977, the Parliament, the Commission and the Council adopted a Declaration on the importance of respecting fundamental rights; in 1984, the protection of fundamental rights was reaffirmed in art. 4 of the draft Treaty on the establishment of the European Union (“Spinelli draft”), which, however, was never signed; in 1989, the European Parliament adopted the Declaration on Fundamental Rights and Freedoms, which «can be considered as the first formal ancestor of the [Charter] and was prepared “to supplement the Maastricht Treaty”» (Dupré in Peers *et al.* 2014, 11).

ropean Council declared: «There appears to be a need, at the present stage of the Union's development, to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union's citizens»<sup>4</sup>. To this purpose, the European Council established that «a draft of such a Charter of Fundamental Rights of the European Union should be elaborated by a body composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments»<sup>5</sup>. This body – which called itself “Convention”, to underline the importance of the document it was called to elaborate – was led by a *Praesidium*, which coordinated its activities and which finally wrote the Explanations relating to the Charter of Fundamental Rights (hereinafter Explanations), providing official indication of how each article of the Charter has been conceived<sup>6</sup>.

The Charter was solemnly proclaimed during the Nice European Council, in December 2000. At the beginning, it was a non-binding document: it was soft law. Nonetheless, the conclusions of the Cologne European Council already prefigured the possibility to integrate it in the Treaties. In 2004, the project of a Treaty establishing a Constitution for Europe, which would have included the Charter as a very part of its text,

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<sup>4</sup> Annex IV of the Conclusions of the Presidency of the Cologne European Council 3-4 June 1999.

<sup>5</sup> *Ibidem*.

<sup>6</sup> The Explanations are very important for the interpretation of the Charter, insofar as both the preamble (par. 5) and art. 52,7 of the Charter itself state that it must be interpreted «with due regard» to the them.

failed. However, only three years later, with the Lisbon Treaty, the Charter finally became a primary source of EU law. Indeed, art. 6 of the consolidated version of the TEU currently in force states that «The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have *the same legal value as the Treaties*» (emphasis added).

The Charter was aimed at reaffirming a catalogue of fundamental rights that were considered to be already part of EU law. In this perspective, the preamble (par. 5) explicitly mentions the following reference sources: a) the constitutional traditions common to the Member States; b) the international obligations common to the Member States; c) the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR); d) the Social Charters adopted by the Union and by the Council of Europe (hereinafter COE): that is, respectively, the Community Charter of the Fundamental Social Rights of Workers (hereinafter CCFSRW) and the European Social Charter (hereinafter ESC); and e) the case-law of the CJEU and the European Court of Human Rights (hereinafter ECtHR).

In particular, the ECHR deserves special attention, since art. 52,3 of the Charter states: «In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention», although «This provision shall not prevent Union law providing more extensive protection». Furthermore, art. 6 TEU states a clear commitment of the EU to accede to the

ECHR, although such accession has not been realised yet<sup>7</sup>. Therefore, the ECHR and the case law of the ECtHR have a special role and weight in the interpretation of the Charter. Nonetheless, as the Explanations make clear, the Charter has been inspired also by other international legal sources, in addition to those explicitly mentioned in the preamble. Those sources will be recalled in chapters 3-6 below, where relevant.

Therefore, the Charter deeply values its roots in the past achievements in the field of fundamental rights. Nonetheless, it also looks closely at the present and thinks about the future: in fact, as the preamble says, «it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments» (par. 4), and the «enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations» (par. 6).

This stance is immediately evident, for instance, in the specific provisions on the right to the integrity of the person in the fields of medicine and biology (art. 3,2), the right to the protection of personal data (art. 8)<sup>8</sup>, the environmental

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<sup>7</sup> In this regard, it is worth noting that, in 2010, the European Council adopted a Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human rights and Fundamental Freedoms. However, the CJEU, required to evaluate the compatibility of the draft agreement with the TEU and the Treaty on the Functioning of the European Union (hereinafter TFEU), expressed a negative opinion. See CJEU, Opinion 2/13, 2014.

<sup>8</sup> In fact, this article stems from the need to protect individuals' privacy in the "digital era".

protection (art. 37), and the consumer protection (art. 38). In addition, the attention to how society has changed in the last decades is also reflected in the wording of some of the articles concerning classical rights, such as the right to marry and the right to found a family, recognized in art. 9. In fact, this provision is unprecedented in the way it avoids any reference to men and women, thus letting the way open to same-sex marriages, as far as States decide to allow them<sup>9</sup>; which is also coherent with the prohibition of discrimination based on sexual orientation as stated in art. 21 of the Charter.

## **1.2. The structure of the Charter, its field of application, and its personal scope**

The Charter is composed of six Titles, dedicated, respectively, to dignity, freedoms, equality, solidarity, citizens' rights, and justice, plus a final Title containing general provisions for the interpretation and application of the Charter. This unconventional structure can be related to the principle of the *indivisibility* and *interdependency* of fundamental rights. The centrality given to this principle – which was a leading one also in the Universal Declaration of Human Rights (hereinafter UDHR) and was strongly reaffirmed in the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights in Vienna,

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<sup>9</sup> On this point, see ECtHR, *Schalk and Kopf v. Austria*, 2010 (application no. 30141/04).

on 25 June 1993<sup>10</sup> – marks an important difference with, for instance, the COE system, where civil and political rights, on the one side, and social rights, on the other, go “at different speeds”. In that system, in particular, civil and political rights, stated in the ECHR, can count on stronger judicial guarantees as compared to social rights, stated in the ESC.

The field of application of the Charter is defined in art. 51,1, which states: «The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the *principle of subsidiarity* and to the Member States *only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof *in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties*» (emphases added). Furthermore, art. 51,2 confirms that «The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties».

The field of application of the Charter is therefore confined within the limits of the scope of EU law. However, the CJEU case law proves that the implications of the growing EU legislation directly or indirectly concerning matters of fundamental right protection may lead to affirm the fundamental rights jurisdiction of the EU beyond its *prima facie* limits. Therefore, the “spillover effects” of such

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<sup>10</sup> See, in particular, art. 5 of the Vienna Declaration, which states: «All human rights are universal, indivisible and interdependent and inter-related».

EU legislation must be taken carefully into account, as they may pose multiple challenges for the interaction between the European and domestic legal orders (Muir 2014). Furthermore, as regards the duties of the Member States established in art. 51,1, it is worth noting that the phrase “implementing Union law” has been interpreted by the CJEU in a broad sense, as substantially including every case in which States act in the scope of Union law (FRA 2018, 17-18, 38-39, 58-67)<sup>11</sup>, even if they are exercising their so called “retained powers”<sup>12</sup>.

As regards the personal scope of the Charter, it has been argued that the very decision of dedicating a specific Title – Title V – to (a limited number of) citizens’ rights indicates the will to stress the universality of all the other rights enshrined in the Charter, which are recognized to everyone (Paciotti 2010, 41). In this perspective, the preamble (par. 2) lists equality as one of the universal and indivisible values that found the EU, together with human dignity, freedom and solidarity. Here, the Charter seems to assume the idea of *basic or fundamental equality*, understood as a normative principle that prescribes to consider all persons as (morally and) legally equal, independently from their being “the same”, as a matter of fact, in any respect<sup>13</sup>.

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<sup>11</sup> Sometimes, the simple fact that the national rules gave effect to an EU obligation (even if they did not flow directly from EU law) has been enough to trigger EU fundamental rights protection. See, e.g., CJEU, *Åkerberg Fransson*, 2013 (C-617-10).

<sup>12</sup> On the «retained powers formula» in the case law of the CJEU, although not specifically in relation to the Charter, see Azoulai (2011).

<sup>13</sup> For philosophical discussions of the idea of basic or fundamental

However, there are indications that the situation is actually more complex. First, the distinction between EU citizens and third-country nationals re-emerges in different parts of the Charter. For instance, art. 15 states that «Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation» (par. 1). However, only EU citizens are recognized «the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State» (par. 2), while third-country nationals are only entitled to working conditions *equivalent* (and not equal) to those of the EU citizens (and only if they are authorized to work in the territory of a Member State, par. 3). Furthermore, the «right to vote and to stand as a candidate at elections» – at both EU (art. 39) and municipal (art. 40) level – as well as the «freedom of movement and of residence» (art. 45) are placed in Title V on Citizens' Rights.

Secondly, even when the Charter does not connect rights to EU citizenship, it grants several of them in accordance with EU and/or Member States law, which actually distinguish different entitlements depending on the different status of individuals: for instance, refugees and beneficiaries of subsidiary protection<sup>14</sup>, beneficiaries of a residence permit

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equality see Williams (1962); Singer (1979, chap. 2); Veatch (1986, chap. 2-4); Waldron (2008) and Carter (2011). On the evaluative idea of “equality as sameness” see MacKinnon (1987) and Gianformaggio (2005).

<sup>14</sup> See the Directive 2011/95/EU (Qualification Directive). As regards the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, see par. 4.1 below, on the relation between this directive, the Charter, and the Geneva Convention on the Status of Refugees (1951).

for victims of human trafficking<sup>15</sup>, asylum seekers<sup>16</sup>, long-term residents<sup>17</sup>, beneficiaries of a family reunification permit<sup>18</sup>, migrants in an irregular situation and/or in a return procedure<sup>19</sup>, and so on<sup>20</sup>. In particular, while beneficiaries of international protection are granted many of the rights enshrined in the Charter (including freedom of movement and maintenance of family unity, as well as the access to employment, education, health care, social welfare, and accommodation)<sup>21</sup>, migrants (with the partial exception of long-term residents) generally enjoy less favourable conditions (see, in particular, chap. 6 below).

In this regard, it is meaningful that, while the Charter explicitly recognises the right to asylum (see par. 4.1 be-

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<sup>15</sup> See the Directive 2004/81/EC (Residence Permit for Victims of Anti-Trafficking Directive).

<sup>16</sup> See, in particular, the Directive 2013/33/EU (Reception Conditions Directive) and the Regulation (EU) no. 604/2013 (Dublin Regulation).

<sup>17</sup> See the Directive 2003/109/EC (Long-Term Residents Directive).

<sup>18</sup> See the Directive 2003/86/EC (Family Reunification Directive).

<sup>19</sup> See the Directive 2008/115/EC (Return Directive).

<sup>20</sup> Furthermore, the conditions reserved to third-country nationals may vary depending on the existing agreements between their country of origin and the EU.

<sup>21</sup> The Qualification Directive grants to the beneficiaries of international protection substantially the same rights recognized in the Geneva Convention on the Status of Refugees. Differently from that Convention, it does not explicitly mention freedom of religion, right to association and access to justice. Anyway, art. 20 of the Directive, which opens the chapter on the content of international protection, explicitly states that that chapter «shall be without prejudice to the rights laid down in the Geneva Convention».

low), it is silent on the issue of the right to migrate, and that the freedom of movement is recognized to third-country nationals, «in accordance with the Treaties», only if they are «legally resident in the territory of a Member State» (art. 45,2). Furthermore, although the impact on national sovereignty of the growing body of EU laws relating to asylum, borders and immigration (prominently those concerning the Schengen system and the Common European Asylum System – CEAS) has to be considered<sup>22</sup>, the decision as to whether, and under what conditions, a third-country national may be authorized to enter and stay in a Member State mainly depends on the legislation of that State.

The EU legal framework concerning migrants', asylum seekers' and refugees' rights is therefore very fragmented<sup>23</sup>.

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<sup>22</sup> For further information on the Schengen system and the CEAS, see FRA (2015).

<sup>23</sup> On the «fragmentation of citizenship within the European Union» see Benhabib (2004, chap. 4).

## 2. The Philosophical Background of the Charter

The Charter may be seen as the last step of the institutional development of the European system of fundamental rights. The very idea of fundamental rights as the best way to ensure and protect such values as dignity, freedoms, equality and solidarity was born and grew in the European culture, nourished by philosophical theories, social movements and legal documents (see Facchi 2013).

While the precise origin of the idea of subjective rights and its relation to the tradition of Natural Law are a matter of academic discussion (see Tuck 1979; Villey 1983; Tierney 1997), a clear statement of that idea can be found in the work of Vitoria (1539), who wrote of subjective rights as *dominii* (properties) of all human beings. Vitoria theorized the rights to life, freedom and properties, but also the *ius migrandi* and the *ius occupandi*, as rights of all human beings.

The idea of natural rights was then reformulated by Grotius (1625) and has a central role in Locke's (1689b) version of the social contract theory, which deeply influenced modern constitutionalism. According to Locke, already in the "state of nature", that is, before the establishment of a civil government, human beings have natural rights to life, liberty and property. With the social contract, the enforcement of natural rights, by preventing or punishing their violations, became the major task of a civil government. At the same time, respect for those rights represents a constraint to the exercise of political authority.

In the age of the Enlightenment, the idea of natural rights became, all over Europe and beyond, a basic element of a wide reform project for legal, political, cultural and economic orders (see Israel 2009). Theories of natural rights provided the ideological background for the Declarations of Rights, notably civil and political rights, stated by the American and French Revolutions. Those events represent a turning point in the history of rights, by translating them from abstract moral ideals and aspirations to basic legal principles, that would have been variously implemented in the legal orders of the national States during the XIX century.

The history of fundamental rights, in the XIX century and the early XX century, have been characterized by two different trends. On the one side, by an increasing scepticism about the idea of “natural” rights pre-existing the legal order: a scepticism inaugurated, from very different perspectives, by Burke, Bentham and Marx in their respective criticism of the French Declaration of the Rights of Man and Citizen (see Waldron 1987) and developed by legal positivists, from Jellinek (1892) to Kelsen (1934). On the other side, by the progressive extension of civil and political rights to all the citizens, conceived as equal members of the national community, and by the progressive expansion of the catalogue of citizens’ rights, with the inclusion of social rights, starting from the right to education and workers’ rights (see Marshall 1950). In Europe, a full set of social rights, including social security rights, was included for the first time alongside civil and political rights in a constitutional text in the Weimar Constitution of 1919.

After the catastrophe of World War II, the idea of human rights reappeared with a renewed force, both as the main in-

strument to impose constitutional and international limits to governments and determining their tasks and as a guiding principle for the reform of international relations. In particular, at the international level, the UDHR, adopted by the UN Assembly in 1948 (see Glendon 2001), is the main symbol of this “new era” of human rights: individuals, not only States, are recognized as subjects of international law and all the persons in the world become human rights holders. That idea found a first reaffirmation, in the European context, with the ECHR in 1950 (see Bates 2010).

Behind the institutional developments lays a rich history of ideas and political struggles: their heritage can be found in the provisions of the Charter. For the limited purposes of this paper we have focused on four traditions characterising the European values landscape: *Christianity* (par. 2.1), *Republicanism* (par. 2.2), *Liberalism* (par. 2.3), and *Socialism* (par. 2.4)<sup>1</sup>. These four traditions are not independent from each other. They often overlap, and it is not always easy to define their respective boundaries or to classify an author within one of them.

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<sup>1</sup> We decided to focus on these four traditions, because, in our opinion, they are those that mainly contributed to the history and culture of fundamental rights. While those traditions are central in the history of European political thought, that history cannot obviously be reduced to them. Furthermore, we couldn't account for all the controversies regarding the interpretation of those traditions and their relations. We inevitably had to simplify important debates in the history of ideas. For the same reason, we decided to consider in the section devoted to the liberal tradition a fundamental element of the European value landscape, that is secularism and the separation among religious and political spheres, even if we are aware that also the republican and in the socialist traditions contributed to its development.

## 2.1. Christianity

The contribution of Christianity to the contemporary idea of political and legal equality remains ambiguous. Christianity, with its idea of the derivation of all human beings from a single ancestor, has played a fundamental role in supporting the idea of the basic equality of all human beings (see Veatch 1986, chap. 2-3). That idea was not completely unknown to the pre-Christian Greek and Roman culture, and can be found for instance in the Stoic tradition (see Cicero 55-51 b.C.). Nevertheless, for the Stoics and for many early Christian thinkers as well (see Augustine 426), the moral equality of human beings was considered to be compatible with the existence of social hierarchies and inequalities of legal status. It is only with the contribution of early modern Christian authors in the Natural Law Tradition, such as Vitoria (1539), Grotius (1625) and, later on, Locke (1689b), that the idea of basic moral equality provides a foundation for the idea of legal equality and natural rights of all human beings.

On the one side, the contemporary idea of moral and legal equality of all human beings, that dates back to the Enlightenment, can be considered in part as the result of a process of secularization and radicalization of the natural law tradition that can be found in such authors as Vitoria, Grotius and Locke. On the other side, the modern idea of political and legal equality emerged from the crisis of the consensus on those doctrines, mainly Christian ones, that have provided for a long time a legitimation for rigid social hierarchies (see Filmer 1680) and in opposition to the Ecclesiastical institutions' efforts to confine the idea of equality to the moral

realm, to neutralize its potential for undermining the traditional social order.

Christianity contributed also to the history of the idea of human dignity, that is, of the special value of the human being (see Rosen 2012; Debes 2017). While what is the precise ground of human dignity is a matter of discussion among theologians and scholars, the Christian understanding of human dignity insists on the idea of respect of the human person and of its “nature” – including life and physical integrity – as an absolute limit to human action and stresses that such limit applies also to one’s disposal of herself/himself, thus creating possible conflicts with the value/principle of individual autonomy. This understanding of human dignity has provided a justification for the political and legal struggles against slavery and trade in human beings and still remains central, for instance, as a foundation for many Christian positions on bioethical questions (see President’s Council on Bioethics 2008).

## **2.2. Republicanism**

The Republican tradition goes back to Roman political and legal thought (e.g. Cicero 55-51 b.C.) and to the modern contribution of such authors as Machiavelli (1531), Locke (1689b), Montesquieu (1748) and Rousseau (1762) (see Pocock 1975; Skinner 1998). That tradition insists on the importance of the law, of institutional design, prominently concerning the relations between powers (separation of powers; checks and balances), and of political participation. All these aspects are necessary conditions to protect, or even

create, freedom in a Republic. According to this idea, freedom requires something more than non-interference: it requires non-domination by every power, public and private.

The idea of freedom, in this perspective, is rooted in the roman opposition between *liber* and *servus* and is the legacy of the Roman tradition of liberty (*libertas*) as a status, from which the idea of freedom as an individual and/or collective condition of non-domination develops. Unlike the tradition that conceives the law as a limit – maybe a necessary one – to individual freedom (a tradition that includes Hobbes 1651 and Bentham 1789), the republican tradition conceives freedom as something that can exist only under the rule of a general and abstract law, that protect individuals from arbitrary powers of any sort (see, for an actualization, Pettit 1997).

While some republican authors – most notably Rousseau – were supporters of radical democracy, not all republicans support properly democratic institutions and full political equality. Nonetheless, all of them stress the importance of some form of political participation and civic engagement, either as a form of human flourishing (as was typical of classical/humanist republicanism) or as a form of guarantee against the abuse of political authority (as was typical of Machiavellian republicanism).

### **2.3. Liberalism**

The contribution of Liberalism to modern constitutionalism and to the culture of fundamental rights can hardly be overestimated. It can be considered as the ideology of the

middle class, functional to the dismantling of the rigid social hierarchies typical of the *Ancient Regime*. Central to this tradition are two elements.

First and foremost, the insistence on the importance of protecting individual freedom – understood as something pre-existing to political institutions – from the abuses of political authority, but also from non-political authorities, like religious ones, and from the “tyranny of the majority” (see Tocqueville 1835-1840 and Mill 1859). This perspective is grounded in the theorization of natural rights to life, personal freedom and property as inviolable limits to political authority (see, once again, Locke 1689b, and Kant 1797) and to the idea that the protection of those rights requires special constitutional arrangements, imposing negative and positive duties constraining the exercise of political authority. More generally, the liberal insistence on the need to protect individual liberty is typically grounded in an understanding of the importance of personal autonomy and sovereignty (see Kant 1785 and Mill 1859) that provides the foundation for an understanding of human dignity alternative to the Christian one.

As a consequence, central to liberalism is the idea that the criminal law and the use of coercion to restrict individual liberty should be limited to the prevention of harm to others (an idea paradigmatically defended by Mill 1859, but already implicit in the utilitarian conception of punishment expressed by Bentham 1789 and Beccaria 1764)<sup>2</sup>.

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<sup>2</sup> See also art. 5 of the French *Declaration of the Rights of Men and Citizenship*: «The Law has the right to forbid only those actions that are injurious to society».

Strictly linked to the valorisation of individual liberty is also the contribution of liberalism to the development of the modern understanding of the proper relations between political and religious authorities.

All liberals advocated toleration, that is, the principle establishing that, even if the State supports a specific religion, religious liberty should be protected, including, in particular, the liberty to profess a religion different from the one supported by the State. This idea of toleration, initially limited to different religious views (see Locke 1689a), during the Enlightenment is expanded into liberty of conscience (Voltaire 1763), and toleration is progressively extended to non-religious views. This protection of the liberty of conscience, together with the protection of freedom of expression and association, favoured the development in Europe of a secular culture and, over time, a general secularization of European societies.

Beyond toleration, many liberals supported more radical principles, such as the principle of the separation of Church and State, that is between religious and political authorities, or even the principle that the State should remain neutral towards different religious perspectives: a neutrality that can be understood as requiring that the State abstain from supporting religion or as requiring that, if the State supports religion, it should support the different religions in an impartial way.

Besides individual freedom, a second element which is central to the liberal tradition is the critique of social privileges, especially of rigid social hierarchies based on birth and, thus, undeserved. That critique is based on the idea that social inequalities could be considered justified only when grounded on one's efforts and success in a fair social com-

petition. This led many authors within the liberal tradition to oppose legal barriers excluding certain groups of people from social competition to access to education, professions, jobs and other social positions (see Smith 1776), but also to stress the role of the State in promoting equality of opportunity, for instance as regards education and a fair distribution of wealth from one generation to the next (see Mill 1847). The struggles for the abolition of legal barriers excluding women and the vindications of equal rights for the two sexes (see Wollstonecraft 1792, Taylor 1851, and Mill 1869) characterised liberal feminism, the so-called “first wave” of feminism.

## **2.4. Socialism**

Last but not least, the Socialist and, more generally, social-reformist tradition that can be associated with the worker movement and trade-unionism contributed to shape the European system of values and fundamental rights. This tradition insists on economic equality, or at least reduced economic inequality, as a social and political goal, and on the material conditions of freedom, on the need to protect and empower, also politically, the social groups that are more vulnerable to exploitation and social exclusion.

Anticipated by some radical thinkers in the XVIII century (see the criticism of private property and inequality in Rousseau 1755), socialism emerged during the XIX century in an attempt to confront the social problems produced by the Industrial Revolution and to interpret and give voice to the needs of the working class. Within socialism, different

attitudes emerged toward the language of rights. Marx (1843), influenced by Hegel's (1820) criticism of abstract universalism and individualism, rejected that language, considering it to be compromised with liberal individualism and presupposing an atomistic and conflictual conception of society. Other currents of the Socialist movement were less sceptical about the possibility of expressing the needs of the working class through that language. Among them, there are those social reformers that Marx and Engels (1848) dismissingly called Utopian Socialists, such as Saint-Simon, Owen and Fourier; the French Solidarists led by Bourgeois (1896) (cf. Blais 2007); and the British radical social reformers from Mill (1847) to the Fabian Society.

Socialist ideas, some of them revolutionary, some other more reformist, informed the political agenda of the workers' movements, and their struggles for democratic inclusion, better working conditions and redistribution, which contributed to laying the foundations of mass democracy and of social reforms, such as the adoption of measures of work regulation and social insurance. Those reforms, like the Poor Laws in England and the reforms adopted in Germany under Bismarck, that provided the foundations for the welfare state, were initially aimed at containing social conflict. However, in the early XX century, they finally resulted in the idea of social rights being an integral part of the system of fundamental rights (Alber 1982; Ritter 1991).

## **2.5. Final remarks**

While some of the four traditions that have been briefly

considered in the previous paragraphs are older, in the last two centuries they have developed alongside each other, often entering into conflict but also exercising reciprocal influence. Each of them has evolved in the attempt to respond to the challenges of the others and by including some of their elements. This has resulted in a hybridization of the different traditions, which has facilitated their convergence. Thus, for instance, the process of democratization, with the progressive recognition of political rights to a larger number of people, can hardly be considered the contribution of just one of those traditions. Documents such as constitutional texts and charters of fundamental rights can be considered the result of their fruitful convergence. Nevertheless, the complex set of ideas behind those documents, and the tensions between them, often re-emerges in the process of interpreting, applying and implementing their normative content.

As this brief overview of the philosophical background of the Charter shows the values of human dignity, freedom, equality and solidarity express highly polysemic and “philosophically thick” concepts, which are open to several possible interpretations. The following chapters will try to bring out the meaning(s) attributed to these concepts in the Charter and in the case law of the CJEU and the ECtHR, keeping in mind the main philosophical issues related to each of them.

### 3. Dignity

The concept of dignity is among the more controversial ones in the philosophical debate (see Kateb 2011; Rosen 2012; Waldron 2012; McCrudden 2013; Düwell *et al.* 2015; Debes 2017). In the Charter, dignity seems to refer to the value of the person as a human being, and, insofar as it is common to every and each human being as such, it constitutes the basis of the moral and legal equality of all persons – of their equal moral and legal status – and of their equality in fundamental rights. However, like the other charters and declarations of rights which refer to dignity, including the UDHR, the Charter does not provide an explicit definition of this concept, nor identifies what/which feature(s) confer(s) the person her/his dignity.

The first Title of the Charter articulates human dignity at two different levels. Besides a specific set of more directly dignity-related rights (par. 3.2), it also assumes a more abstract and far-reaching understanding of human dignity, establishing it both as a fundamental right itself – a right with a very special status among fundamental rights – and as «part of the substance» of all the other rights laid down in the Charter (par. 3.1).

#### 3.1. Dignity as «part of the substance» of all fundamental rights

The more abstract and far-reaching understanding of

dignity rests on art. 1, which states: «Human dignity is inviolable. It must be respected and protected». Human dignity is therefore the very first right enshrined in the Charter.

Constructing dignity as an autonomous right is something new in the landscape of international human rights law, where dignity is usually considered not as a right but, rather, as the basis of human rights (see, for instance, the preamble of the UDHR). The same holds true for the philosophical debate, where dignity, understood as the special status of human beings or as the value that grounds that special status, is not considered as a right in itself but rather as what provides a foundation for “human rights” (see, e.g., Griffin 2008).

Nonetheless, the drafting strategy adopted by the Convention seems to be just a different way to reaffirm the special importance assigned to dignity in the light of the *indivisible* character of all fundamental rights enshrined in the Charter. Indeed, the Explanations on art. 1 clearly state that «The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. [...] It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted».

These statements can be understood as meaning that all the rights included in the Charter – with no distinction between civil, political, and social rights – have, at their core, a “dignity component”, and that, therefore, their implementation and enforcement are needed, among other things, in order to respect and protect human dignity. This does not mean that the function of all the fundamental rights stated in

the Charter may be entirely reduced to securing human dignity: indeed, the Charter is pluralistic, since the rights it enshrines are aimed at protecting a set of values (namely: dignity, freedoms, equality, solidarity, citizenship, and justice). Nor the fact that every right has a “dignity component” implies that the restriction of each of them will always – inevitably and automatically – result in a violation of human dignity. However, the balancing between fundamental rights – or between fundamental rights and other relevant public interests – can never go so far as to undermine human dignity, and, more in general, human dignity may certainly function as a limit to the possibility to restrict other rights beyond the threshold which delimits their core “dignity component”.

In this regard, for instance, the CJEU has recently clarified that, while a certain degree of interference with the right to private and family life of asylum seekers may be necessary in order to ascertain whether they risk to be persecuted for their sexual orientation in their country of origin, they cannot be required to describe their sexual practices or to provide audio-visual documentation of such practices, since this would violate not only their privacy but also their human dignity<sup>1</sup>. Moreover, human dignity may also be affected by certain violations of the principle of equality in several fields, such as, for instance, racial discrimination stemming from immigration laws<sup>2</sup>, discrimination against transsexual people in the workplace<sup>3</sup>, and discrimination

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<sup>1</sup> CJEU, *A*, 2014 (C-148/13).

<sup>2</sup> ECR, *East African Asians v. UK*, 1973 (applications nos. 4403/70 *et al.*).

<sup>3</sup> CJEU, *P v. S and Cornwall County Councils*, 1996 (C-13/94), which is, by the way, the first use of dignity by the CJEU.

between men and women<sup>4</sup>. Finally, the CJEU has clarified that respect for human dignity must prevail also on the fundamental freedoms enshrined in the European Treaties, such as, for instance, the freedom to provide services and the free movement of goods<sup>5</sup>.

As it comes to the specific provision of art. 1, human dignity is first of all defined as *inviolable*. This means that the duty to respect human dignity does not admit derogation. Furthermore, art. 1 states that human dignity should be both respected and protected. In particular, the *duty to respect* is especially connected with the negative obligation of non-interference. Therefore, EU institutions and Member States have to avoid any act which may breach the human dignity of an individual<sup>6</sup>. As regards the *duty to protect*, there is agreement on the fact that it implies positive obligations, understood as duties to take active steps to ensure that dignity is not breached by other individuals, collective subjects, or public authorities (even of other States). This includes the duty to protect individuals not only from actual breaches but also from potential ones.

In this perspective, the protection of human dignity implies, for instance, that a State cannot send back migrants or

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<sup>4</sup> CJEU, *K.B.*, 2004 (C-117/01).

<sup>5</sup> CJEU, *Omega*, 2004 (C-36/02). In this case, the CJEU ruled that «Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity».

<sup>6</sup> See, once again, CJEU, *A*, 2014 (C-148/13).

asylum seekers to their country of origin if that country is not a safe one and, therefore, they are likely to suffer inhuman or degrading treatments or the violation of their right to life<sup>7</sup>; nor it can deny subsidiary protection to a third-country national who suffers of a severe illness if he/she could not receive the appropriate health care assistance in his/her country of origin<sup>8</sup>.

Furthermore, a State may be held responsible for not providing the necessary protection to victims of domestic and sexual violence<sup>9</sup>. In this regard, it is worth noting that,

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<sup>7</sup> See, e.g., ECtHR, *L.M. and Others v. Russia*, 2015 (applications nos. 40081/14 *et al.*). This is clearly stated in art. 19 of the Charter (see par. 4.1 below), but it is worth noting the important role that human dignity plays in interpreting that article. See also CJEU, *N. S. and Others*, 2011 (C-411/10), where the Court ruled that a Member State may not even transfer an asylum seeker to the Member State responsible to examine her/his asylum application within the meaning of the Dublin Regulation (establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national), when it cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. Such ruling is explicitly based, among other things, on the need to respect human dignity as enshrined in art. 1 of the Charter (see par. 15 and 123,3 of the judgement).

<sup>8</sup> See, in particular, CJEU, *Abdida*, 2014 (C-562/13). Dignity (as recalled in the preamble of Directive 2008/115/EC) is explicitly mentioned also in this judgement (par. 11 and 42), although the decision is primarily based on articles 19,2 and 47 of the Charter. In the same line, see also, e.g., CJEU, *M'Bodj*, 2014 (C-542/13); ECtHR, *D v. UK*, 1997 (application no. 30240/96); ECtHR, *Paposhvili v. Belgium*, 2016 (application no. 41738/10).

<sup>9</sup> See, e.g., ECtHR, *Halime Kiliç v. Turkey*, 2016 (application no.

in the case of migrant women, the COE's Istanbul Convention (articles 59-61) directly connects domestic and gender-based violence to the right of the victims to obtain subsidiary international protection (see Parolari 2014). More in general, the Resolution no. 1478/2006 on Integration of Immigrant Women in Europe, adopted by the COE Parliamentary Assembly, affirms that «It is the responsibility of the member states of the Council of Europe to protect women against violations of their rights, promote and implement full gender equality and accept no cultural or religious relativism in the field of women's fundamental rights» (par. 5). This goal must be pursued by the States through the wide set of measures listed in par. 7 of the Resolution, which includes several positive obligations.

It is controversial whether positive obligations include also the duty to deliver special services, such as, for instance, granting minimum subsistence means (Olivetti in Bifulco *et al.* 2001). However, the case law shows that dig-

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63034/11), and ECtHR, *M.G. v. Turkey*, 2016 (application no. 646/10) on domestic violence, where the court ruled that the failure of the State to protect the victim amounted, respectively, to a violation of the right to life and of the prohibition of inhuman or degrading treatment. See also ECtHR, *S.W. v. UK*, 1995 (application no. 20166/92), where the ECtHR ruled that the conviction of man for raping his wife does not constitute a violation of his right to private and family life, and explicitly stated that «the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom» (par. 44). The duty to protect the victim extends to the criminal proceedings against her aggressor: see, e.g., ECtHR, *Y v. Slovenia*, 2015 (application no. 41107/10).

nity may play a role also in this sense. For instance, the CJUE has established that «the general scheme and purpose of Directive 2003/9/EC<sup>10</sup> and the observance of fundamental rights, in particular the requirements of art. 1 of the Charter [...], preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive». Accordingly, a «Member State must ensure that the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs»<sup>11</sup>.

Furthermore, the CJEU had already affirmed in the past

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<sup>10</sup> Directive 2003/9/EC, laying down standards for the reception of applicants for international protection, has been repealed by Directive 2013/33/EU, which still refers to dignity in its “Whereas” no. 35: «This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly».

<sup>11</sup> CJEU, *Saciri and Others*, 2014 (C-79/13), par. 35 and par. 52. And the same goes, on the basis of Directive 2011/95/EU, for refugees who have been revoked their residence permit as long as they are in the territory of the State. See CJEU, *T*, 2015 (C-373/13) and, more recently, CJEU, *M (Révocation du statut de réfugié)*, 2019 (joined cases C-391/16 *et al.*).

that the right to free movement of «Community workers» cannot be exercised with dignity if the best possible conditions for the integration of the worker's family in the society of the hosting State are not granted. These conditions include, *inter alia*, equal treatment in relation to the access of the worker's family to housing services<sup>12</sup>, and the access of the worker's children to education services<sup>13</sup>.

### 3.2. Specific dignity-related rights

Title I of the Charter identifies also a specific set of rights, thus suggesting that they have a special link with human dignity. These rights are: the right to life (art. 2), which includes the prohibition of the death penalty<sup>14</sup>; the

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<sup>12</sup> CJEU, *Focheri v. Belgian State*, 1983 (C-152/82).

<sup>13</sup> CJEU, *Di Leo v. Land Berlin*, 1990 (C-308/89).

<sup>14</sup> This seems worth noting, since the prohibition of death penalty represents a distinctive feature of the European system of fundamental rights, as compared, for instance, to the US system. According to the Explanations, the scope of art. 2 is the same of Protocol no. 6 to the ECHR (adopted in 1983), which states the prohibition of the death penalty during peacetime. However, Protocol no. 13 to ECHR (adopted in 2002) now prohibits death penalty in every circumstance. It seems therefore unlikely that the reference to Protocol no. 6 may ever lead to consider death penalty as admissible, given that, according to art. 53 of the Charter, «Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions».

right to the physical and mental integrity of the person (art. 3), which includes the prohibition of eugenic practices and of the reproductive cloning of human beings; the right not to be tortured or subjected to inhuman or degrading treatment or punishment (art. 4)<sup>15</sup>; and the right not to be reduced into slavery or forced to work (art. 5)<sup>16</sup>, including the prohibition of human trafficking. Taken together, these rights could be considered as the core content of the right to human dignity, that is, as those rights the violation of which can be recognised, by itself, as a violation of human dignity, irrespective of what specific account of this concept is adopted.

The rights that the Charter considers specifically dignity-related are traditionally classified as civil rights and considered to be basic freedoms<sup>17</sup>. Sometimes they are qualified as *negative* freedoms, that is, freedoms *not to be* harmed (or freedoms from harm), and distinguished from the *positive* freedoms *to do* something (see Ferrajoli 2007, chap. 15). It is significant that the drafters of the Charter decided to divide basic freedoms into two sets and to classify some of them under Dignity, thus conferring them a special value in the system of fundamental rights.

The unifying feature of the rights enshrined in articles 2-5 could be found in the fact that they express the Kantian idea that human beings should always be considered as

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<sup>15</sup> The scope and the meaning of this right is the same of art. 3 ECHR.

<sup>16</sup> The scope and the meaning of paragraphs 1 and 2 of this article is the same of art. 4 ECHR.

<sup>17</sup> It is worth noting, for instance, that the integrity of the person is protected by the ECtHR as an aspect of the right to private life enshrined in art. 8 ECHR.

“ends in themselves”, that is, as beings capable of choosing their own ends and pursuing them (two capabilities that should be preserved in any circumstance)<sup>18</sup>. As a consequence, no human being can ever be treated only as a mean for the satisfaction of someone else’s ends (either individual or collective) and/or reduced to a “thing” that can be used as an instrument, or even commercialized. In this perspective, articles 3,2<sup>19</sup> and 5,3<sup>20</sup> – which contain two of the most innovative provisions of the Charter, as compared to previous human rights instruments of general scope – deserve particular attention.

In particular, resting on the principles laid down in the COE’s Convention on Human Rights and Biomedicine (Oviedo Convention)<sup>21</sup>, which establishes a strong relation between dignity and the integrity of the person, art. 3,2 draws attention to the issue of self-determination and its limits<sup>22</sup>. Indeed, on the one side, art. 3,2 (a) states that no person can be subjected to a medical treatment or experiment without her/his informed consent. On the other side, as

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<sup>18</sup> On the Kantian idea of dignity see Hill (1992).

<sup>19</sup> «In the fields of medicine and biology, the following must be respected in particular: (a) the free and informed consent of the person concerned, according to the procedures laid down by law, (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons, (c) the prohibition on making the human body and its parts as such a source of financial gain, (d) the prohibition of the reproductive cloning of human beings».

<sup>20</sup> «Trafficking in human beings is prohibited».

<sup>21</sup> See the Explanations.

<sup>22</sup> On the concept of dignity in bioethics and biolaw see Beylveland and Brownsword (2001); President’s Council of Bioethics (2008).

far as the most problematic bioethical issues are concerned, art. 3,2 (b) (c) and (d) set limits to what people can consent to, establishing that (selective) eugenics practices, commercialization of the human body and its parts<sup>23</sup>, and reproductive cloning of human beings are in any case inadmissible.

Finally, as regards the issue of reducing human beings to a “thing” that can be used as an instrument, or even commercialized, the explicit prohibition of human trafficking established in art. 5,3 is particularly remarkable. According to the Explanations, this provision «stems directly from human dignity and takes account of recent developments in organised crime, such as the organisation of lucrative illegal immigration or sexual exploitation networks»<sup>24</sup>. As the ECtHR has pointed out, States have a duty to take active steps to repress such criminal activities, clarifying that this includes, for instance, the duty to take seriously individual criminal complaints of being victim of human trafficking

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<sup>23</sup> In this regard, it is worth noting that the ECtHR has ruled that also the *donation*, for scientific research, of embryos stemming from in vitro fertilization can be legitimately prohibited (ECtHR, *Parrillo v. Italy*, 2015, application no. 46470/11). However, in the case of organisms which are not capable of developing into a human being (e.g., un-fertilized human eggs), and which cannot therefore be considered human embryos, commercialization has been held to be admissible: see CJEU, *International Stem Cell*, 2014 (C-364/13). More in general, on the relation between biomedical inventions and human dignity see, in particular, CJEU, *Netherlands v. Parliament and Council*, 2001 (C-377/98).

<sup>24</sup> The Explanations refer to the Annex to the Europol Convention for the definition of trafficking for the purpose of sexual exploitation, and to Chapter IV of the Convention implementing the Schengen Agreement on the issue of illegal immigration networks.

and/or of being forced to prostitution<sup>25</sup>. In this perspective, the Directive 2011/36/EU (replacing the Council Framework Decision 2002/629/JHA) provides binding legislation: it takes a victim-centred approach to cover actions in different areas such as prevention activities, criminal law provisions, prosecution of offenders, victims' support, and victims' rights in criminal proceedings. The particular attention to children and to the gender perspective gives additional value to this directive.

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<sup>25</sup> ECtHR, *L.E. v. Greece*, 2016 (application no. 71545/12). In this case, the applicant was a Nigerian woman who complained that the person who helped her to arrive in Greece (in return for a debt pledge of EUR 40,000) confiscated her passport and forced her to work as a prostitute.

## 4. Freedoms

The preamble of the Charter states that the EU «places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice» (par. 2). Therefore, differently from dignity (which is considered inherent to human beings, and thus representing a pre-existing limit to the exercise of power by public authorities and private subjects), freedom is understood as something which needs to, and must, be created. As pointed out in par. 2.2 above, this conception is distinctive of the republican tradition of freedom and is paradigmatically expressed by the idea that «the end of law is not to abolish or restrain, but to preserve and enlarge freedom» (Locke 1689b, VI, 57; cf. Pettit 1997).

The preamble also affirms that «To this end, it is necessary to strengthen the protection of fundamental rights» (par. 4). It results that, according to the Charter, freedom, as a value, is a political goal, to be reached through the guarantee of fundamental rights. In this perspective, freedom is not considered antithetical to security – as it is often depicted at present times – but, rather, complementary to it: there is no freedom without the security of individual rights. Not by chance, the complementarity between freedom and security is reaffirmed in the first article of Title II, which states the right to liberty *and* security (art. 6), where liberty refers to *habeas corpus* and the other guarantees protecting

individuals from the arbitrary curtailing of their rights<sup>1</sup>.

As widely recognized, the fundamental right to freedom needs to be specified in order to be implemented, since the protection of one person's freedom to do something necessarily implies the restriction of the freedom of others to interfere (see Dworkin 1977, chap. 12). Therefore, a legal system cannot avoid selecting a set of freedoms as basic or fundamental (as compared to others which does not deserve that status; see Rawls 1993, chap. 8), on the basis of an appreciation of their respective value. In this perspective, the Charter articulates its particular understanding of the value of *freedom* through a catalogue of *freedoms*<sup>2</sup>.

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<sup>1</sup> The Explanations clarifies that art. 6 of the Charter has the same meaning and scope of art. 5 ECHR, that lists the traditional *habeas corpus* rights. These rights became relevant for the EU activities after that, with the Amsterdam, Nice, and Lisbon Treaties, immigration, asylum and aspects of criminal justice have come to fall within EU competences. Indeed, «With the increasing integration of these functions provided for by the creation of the Area of Freedom, Security and Justice, there are now significant fields where the scope of Union law extends to matters that potentially engage Article 6» (Wilsher in Peers *et al.* 2014, 122).

<sup>2</sup> These freedoms are: the already mentioned «right to liberty and security» (art. 6), the right to «respect for private and family life» (art. 7), the right to «protection of personal data» (art. 8), the «right to marry and the right found a family» (art. 9), the «freedom of thought, conscience and religion» (art. 10), the «freedom of expression and information» (art. 11), the «freedom of assembly and association» (art. 12), the «freedom of arts and sciences» (art. 13), the «right to education» (art. 14), the «freedom to choose an occupation and the right to engage in a work» (art. 15), the «freedom to conduct a business» (art. 16), the «right to property» (art. 17), the «right to asylum» (art. 18), and the right to «protection in the event of removal, expulsion or extradition» (art. 19).

All the freedoms stated in Title II may be reconducted to the idea of freedom *to* do (or not do) something, as distinct from the idea of freedom *from* those violations of fundamental rights which impinge directly on human dignity (see par. 3.2 above). Nonetheless, as well as the rights enshrined in Title I on Dignity, also freedoms contained in Title II entail not only a duty of non-interference, but also a positive obligation of the State to adopt all the necessary measures to grant the conditions for their effective enjoyment, including the protection against possible violations committed by private (individual or collective) subjects.

A comprehensive overview of all the articles contained in Title II would exceed the scope and aims of this work. In the following paragraphs, we will consider the general conception of freedom – a substantive one – that emerges from the Charter (par. 4.1) and then focus on the rights to private and family life and marriage (par. 4.2) and on the right to freedom of religion (par. 4.3), that seem to be particularly relevant for our analysis, as far as refugees, asylum seekers, and migrants in general are concerned<sup>3</sup>. The case law of the ECtHR and the CJEU on these rights provides further examples of how the protection of fundamental freedoms can imply positive obligations for the States, thus supporting the idea that the Charter adopts a substantive idea of freedom.

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<sup>3</sup> Not by chance, the principle of unity of the family and the freedom of refugees to practice their religion in the host country are given special weight also in the Geneva Convention on the Status of Refugees.

## 4.1. A substantive idea of freedom

The Charter opens to a substantive idea of freedom, understood as an effective possibility to exercise one's freedom, which may require the positive intervention of public authorities. This may recall Amartya Sen's idea of a «capability approach» to freedom (Sen 1999, 2009; cf. Nussbaum 2011)<sup>4</sup>. A meaningful indication of that is the fact that Title II includes rights which are not freedoms in a strict sense, but that may be conceived as necessary conditions for the effective enjoyment of such freedoms. This is the case, in particular, of the right to education (art. 14), the right to asylum (art. 18) and the right to protection in case of removal, expulsion or extradition (art. 19).

First of all, the placement of the right to education in Title II on Freedoms is particularly meaningful<sup>5</sup>. Indeed, the right to education is traditionally considered a social right that entails positive obligations for the State, understood in

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<sup>4</sup> On the different concepts and conceptions of freedom see Carter, Kramer and Steiner (2007); Schmitz and Pavel (2018). Classical references in the debate on the concepts of freedom are Berlin (1958); Oppenheim (1961); and MacCallum (1967).

<sup>5</sup> The same cannot be said with regard to art. 15 on the right to engage in a work. Indeed, this right is conceived as a freedom in a strict sense, and not as a right to actually have a job, which would imply an obligation for the States to maintain a high and stable level of employment (see also par. 6.1 below). On this, see e.g. Ashiagbor in Peers *et al.* (2014, 430-431), who also underlines that «the right to work as contained in Article 15 [of the Charter] has a relatively narrow theoretical basis, when compared with the way in which the right to work is recognized in ILO, Council of Europe or UN instruments». In the same sense, see Nogler in Peers *et al.* (2014, 286).

the strong sense of a duty to provide a service. In this regard, it is particularly worth noting that art. 14,2 expressly states that the right to education includes «the possibility to receive *free* compulsory education» (emphasis added)<sup>6</sup>. Like in the case of dignity, this not only confirms that the Charter adopts an unprecedented articulation of the catalogue of fundamental rights, but also reaffirms the indivisibility and complementarity of those rights (Salazar in Mastroianni *et al.* 2017, 270). Indeed, due to its empowering potential, the right to education may be understood as an essential condition of the full enjoyment of any other right (as already recognized by Condorcet 1791).

Secondly, the inclusion of articles 18 and 19 in the Title on Freedoms deserves attention. In particular, the right to asylum (art. 18) is a necessary precondition of the opportunity to enjoy those fundamental freedoms which could be denied under oppressive regimes. As regards the scope of art. 18, the Charter recognizes the right to asylum in accordance with what is established by the Geneva Convention on the Status of Refugees (1951), meaning that it only applies to persons who are, or risk to be, persecuted for their race, religion, nationality, political opinions, or belonging to a particular social group<sup>7</sup>. Therefore, the so called “human-

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<sup>6</sup> This provision, which rests on international human rights instruments such as the UDHR (art. 26), the ESC (art. 17), and the International Covenant on Economic, Social and Cultural Rights (art. 13), marks a significant difference from art. 2 of Protocol no. 1 to the ECHR, despite the fact that, according to the Explanations, the latter represents the basis of art. 14 of the Charter.

<sup>7</sup> These are also the grounds that art. 10 of the Directive 2011/95/EU

tarian refugees”, who escape not from personal persecution but from a general lack of protection of their rights, fall outside the scope of art. 18. This limitation has severe consequences, in particular, for people escaping from territories of war, but it may also affect other situations. For instance, some NGOs submitted observations to the Convention which was drafting the Charter calling attention to the relevance of practices such as female genital mutilation or other forms of gender-based violence, but the intention to establish only a minimum standard of protection did prevail (see Brunelli in Bifulco *et al.* 2001)<sup>8</sup>.

However, at least a partial compensation of such a restrictive approach may be found in art. 19 on the protection in the event of removal, expulsion or extradition. In fact, it applies not only to refugees in the strict sense (meaning, those persons who have been legally recognized as such), but rather to foreigners in general. Furthermore, art. 19 not only reproduces the principle of *non-refoulement* as affirmed in art. 33 of the Geneva Convention and in art. 4 of Protocol no. 4 to ECHR<sup>9</sup>. Rather, it also transposes the relevant ECtHR case law on the right to life and the prohibition of torture and inhuman and degrading treatment and

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(Qualification Directive) considers to be relevant for the assessment of whether asylum should actually be granted.

<sup>8</sup> In this regard, see also the COE Resolution no. 1478/2006 on Integration of Immigrant Women in Europe, which calls on the States to «take fully into account gender specific forms of persecution when examining women’s claims for asylum» (par. 7.2).

<sup>9</sup> See also art. 21 of the Directive 2011/95/EU (Qualification Directive).

punishments, which goes beyond the concept of persecution, strictly understood.

Therefore, a State may be held responsible for the expulsion or extradition of a person who risks to be subjected to death penalty<sup>10</sup>, or to suffer inhuman or degrading treatment or punishment<sup>11</sup>. Responsibility under art. 19 may arise also when threats does not come from the authorities of another State but from individuals or private groups within it, if that State is not able to provide the necessary protection<sup>12</sup>. Moreover, when an individual is a member of a group which is subject to systematic ill-treatment, it may not be necessary to give evidence of personal risk factors<sup>13</sup>.

In this perspective, art. 15 of the Directive 2011/95/EU (Qualification Directive) imposes the duty to concede *subsidiary protection* to those persons who do not qualify as refugees but who, if returned to their country of origin, would face a real risk of suffering serious harm – defined, once again, as death penalty or execution, torture or inhuman or degrading treatment or punishment – or serious threats to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict<sup>14</sup>. Pre-

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<sup>10</sup> Art. 19,2 of the Charter. In this regard, see, e.g. ECtHR, *Ocalan v. Turkey*, 2005 (application no. 46221/99) and ECtHR, *Bader and Kanbor v. Sweden*, 2005 (application no. 13284/04).

<sup>11</sup> See, among many others, ECtHR, *Ahmed v. Austria*, 1996 (application no. 25964/94); ECtHR, *Chahal v. UK*, 1996 (application no. 22414/93).

<sup>12</sup> See, e.g., ECtHR, *H.L.R. v. France*, 1997 (application no. 24573/94).

<sup>13</sup> See, e.g., ECtHR, *Salah Sheekh v. the Netherlands* (application no. 1948/04).

<sup>14</sup> See, e.g., CJEU, *Elgafaji*, 2009 (C-465/07).

cisely on the basis of this directive, in conjunction with articles 4 and 19 of the Charter, the CJEU has recently established that even a third-country national who has been denied or revoked the refugee status after being convicted of an offense cannot be deprived of subsidiary protection when the conditions for its granting are met<sup>15</sup>.

Articles 18 and 19 must also be read in conjunction with art. 6 on the right to liberty and security, and art. 47 on the right to an effective remedy.

In particular, in the field of migration and asylum there are many measures impinging on personal liberty as stated in art. 6. In particular, under EU law deprivation of liberty is regulated by the Directive 2013/33/EU (Reception Conditions Directive, art. 8) and the Regulation (EU) no 604/2013 (Dublin Regulation, art. 28) for asylum seekers, and by Directive 2008/115/EC (Return Directive, art. 15) for person in return procedures<sup>16</sup>.

Although art. 5,1(f) ECHR includes in its exhaustive list of grounds for detention the need to prevent unauthorized entry or to facilitate the removal of a person from the country, the ECtHR has fixed strict conditions for lawful arrests or detentions. In particular, detention should be necessary, proportionate and not arbitrary, and any other effective measure (including less intrusive forms of restriction on the freedom of movement) should be unavailable<sup>17</sup>. Also, a rea-

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<sup>15</sup> See CJEU, *M (Révocation du statut de réfugié)*, 2019 (joined cases C-391/16 *et al.*).

<sup>16</sup> For more details, see FRA (2015).

<sup>17</sup> See, e.g., ECtHR, *Mikolenko v. Estonia*, 2009 (application no. 10664/05) and ECtHR, *Rusu v. Austria*, 2008 (application no. 34082/02).

sonable limit for its duration must be established by the law and respected by public authorities<sup>18</sup>. Furthermore, the ECtHR has condemned several times the detention of irregular migrants without a statutory basis and without an adequate motivation<sup>19</sup>. In this perspective, the CJUE has stated that the «Directive 2008/115 must be interpreted as precluding legislation of a Member State which permits a third country national in respect of whom the return procedure established by that directive has not yet been completed to be imprisoned merely on account of illegal entry across an internal border, resulting in an illegal stay»<sup>20</sup>.

Finally, in order to protect the rights enshrined in articles 18 and 19, an effective remedy against their violations must be provided (art. 47). The right to an effective remedy may be held to be violated, for instance, if no suspensive effect is foreseen for the case of appeal against a decision of removal, when returning the person to her/his country of origin may have potentially irreversible effects<sup>21</sup>; if there is no procedure through which a detainee may ask for a judicial

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<sup>18</sup> See, e.g., ECtHR, *Azimov v. Russia*, 2013 (application no. 67474/11); ECtHR, *Mathloom v. Greece*, 2012 (application no. 48883/07); ECtHR, *Auad v. Bulgaria*, 2011 (application no. 46390/10). See also CJEU, *Kadzoev*, 2009 (C-357/09).

<sup>19</sup> See, e.g., ECtHR, *Khlaifia et al. c. Italia*, 2016 (application no. 16483/12); ECtHR, *Buzadji c. The Republic of Moldova*, 2016 (application no. 23755/07); ECtHR, *Mergen and Others v. Turkey*, 2016 (applications nos. 44062/09 et al.).

<sup>20</sup> CJEU, *Affum*, 2016 (C-47/15), par. 93.

<sup>21</sup> See, e.g., ECtHR, *Gebremedhin v. France*, 2007 (application no. 25389/05).

re-examination of the lawfulness of her/his detention<sup>22</sup>; if administrative and practical barriers hinder the ability of the applicants to pursue their asylum claims<sup>23</sup>; if legal assistance is not practically available to the applicant<sup>24</sup>; or if a State does not conduct a rigorous scrutiny of the asylum application<sup>25</sup>. In this perspective, the ECtHR has found, for instance, that pushing back migrants and asylum seekers at sea violates, among other things, their right to an effective remedy<sup>26</sup>.

Many of these judicial achievements concerning detention and remedies are now explicitly stated, with regard to asylum seekers, also in the Regulation (EU) no. 604/2013 (Dublin Regulation).

## 4.2. Private and family life and marriage

Art. 7 concerns the respect for *private* and *family* life. The relation between these two dimensions is complex and sometimes ambivalent. On the one side, there are cases in which private life has been kept distinct from family life

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<sup>22</sup> See, e.g., ECtHR, *Abdolkhani and Karimnia v. Turkey*, 2009 (application no. 30471/08).

<sup>23</sup> See, e.g., ECtHR, *Conka v. Belgium*, 2002 (application no. 51564/99).

<sup>24</sup> See, e.g., ECtHR, *M.S.S. v. Belgium and Greece*, 2011 (application no. 30696/09).

<sup>25</sup> See, e.g., ECtHR, *Singh and Others v. Belgium*, 2012 (application no. 33210/11).

<sup>26</sup> See, e.g., ECtHR, *Hirsi Jamaa and Others v. Italy*, 2012 (application no. 27765/09).

(although respect for the former «must also comprise, to a certain degree, the right to establish and develop relationships with other human beings»<sup>27</sup>). For instance, the right to private life is the main reference in relation to the issue of the treatment of personal data, which are also protected in art. 8. Furthermore, reproductive and sexual life are often dealt with in the light of private life. For instance, the ECtHR has found a violation of private life in making gender reassignment surgery conditional on the proof that the person concerned is no longer able to procreate<sup>28</sup>, whereas it has affirmed that the right to private life could not be interpreted as conferring a right to abortion<sup>29</sup>. On its side, the CJEU has stated that requiring asylum seekers on the ground of sexual orientation to go into details about their sexual life constitutes a violation not only of their dignity (see par. 3.1 above) but also of their right to private life<sup>30</sup>.

By contrast, in many other cases, private and family life are treated as strictly interconnected and can hardly be distinguished. In this respect, art. 7 may partially overlap with the right to marry and the right to found a family affirmed in art. 9. About this, it must be underlined that neither the Char-

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<sup>27</sup> ECtHR, *Niemietz v. Germany*, 1992 (application no. 13710/88), par. 29. See also ECtHR, *Omojudi v. UK*, 2009 (application no. 1820/08).

<sup>28</sup> ECtHR, *Y.Y. c. Turkey*, 2015 (application no. 1820/08).

<sup>29</sup> ECtHR, *A, B and C v. Ireland*, 2010 (application no. 25579/05). Affirming that the right to private life does not imply a right to abortion, the ECtHR came to an opposite conclusion from that of the US Supreme Court in the landmark case *Roe v. Wade*, 1973, which affirmed the right of women to choose an abortion, grounding it precisely on the right to privacy.

<sup>30</sup> CJEU, *A*, 2014 (C-148/13).

ter and the ECHR, nor the case law of the CJEU and ECtHR, contain a definition of family, while an empirical approach is usually adopted in order to evaluate whether a concrete situation may fall into that notion<sup>31</sup>. However, not every claimed expression of family life is protected, even when it is allegedly based on marriage.

In this regard, restrictions on the rights enshrined in articles 7 and 9 may interact with the issue of respect for the cultural traditions of migrants, asylum seekers, and refugees. For instance, the ECtHR has established that the removal of an Afghan man under the Dublin Regulation following the refusal to recognise his marriage to his 14-year-old bride did not constitute a violation of his right to family life, thus indicating that child-marriages are not protected<sup>32</sup>. Analogously, forced marriages (of both children and adults) are expressly prohibited by the Istanbul Convention (art. 37). That is not surprising, since it is undisputed that the right to marry includes the right to choose one's own spouse and, also, the negative right not to marry. Furthermore, there is no obligation for the States to recognise religious-only marriages<sup>33</sup>, while it is held to be legitimate the refusal to recognise the effects of a polygamous marriage<sup>34</sup>, or to grant a residence permit to a polygamous spouse<sup>35</sup>. It must also be remembered that respect for family life does not

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<sup>31</sup> See, e.g., ECtHR, *X,Y and Z v. UK*, 1997 (application no. 21830/93).

<sup>32</sup> ECtHR, *Z.H. and R.H. v. Switzerland*, 2015 (application no. 60119/12).

<sup>33</sup> ECtHR, *Şerife Yiğit v. Turkey*, 2010 (application no. 3976/05).

<sup>34</sup> *Ibidem*.

<sup>35</sup> ECR, *E.A and A.A. v. the Netherlands*, 1992 (application no. 14501/89).

prevent State interference when the rights of a member of the family are violated, as for the case of domestic and gender-based violence. On the contrary, in these cases the State has a positive duty to protect the victims (see par. 3.1 above).

In the CJEU case law, family life issues are often dealt with in connection with the right to freedom of movement and, in particular, with the concession (or denial) of residence permits. In this perspective, the unity of the family and the consideration of the best interest of the child have been given particular importance in some cases. For instance, on the one side, the CJEU has stated that «the removal of a person from the country where close members of his family are living may amount to an infringement of the right to respect for family life»<sup>36</sup>, and that the family reunion should be permitted even if a third-country national entered the territory of the State irregularly and married her/his EU spouse during the period of irregular permanence<sup>37</sup>. On the other side, the CJEU has affirmed that a third-country national whose dependent minor children are EU citizens has to be granted a residence and work permit, in order to live with and support them<sup>38</sup>.

More in general, the right of the children not to be separated from their parents is held in great consideration also by the ECtHR, both for granting children the admission to

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<sup>36</sup> CJEU, *Orfanopoulos and Oliveri*, 2004 (joined cases C-482/01 and C-493/01), par. 98. See also CJEU, *Carpenter*, 2002 (C-60/00).

<sup>37</sup> CJEU, *Metock and Others*, 2008 (C-127/08).

<sup>38</sup> CJEU, *Ruiz Zambrano*, 2011 (C-34/09), which, however, refers to art. 20 TFEU rather than to art. 7 of the Charter.

enter in a European country for family reunification<sup>39</sup> and for preventing the expulsion of one of the parents following a relationship breakdown<sup>40</sup>. In this perspective, it must also be stressed that art. 24,3 of the Charter states that «Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests». This does not mean that articles 7 and 24 of the Charter deprive States of their discretionary power in the examination of applications for family reunification<sup>41</sup>; however, it does mean that States have a duty to examine such applications in the light of those articles<sup>42</sup>.

### 4.3. Freedom of religion

While art. 10 does not cover only freedom of religion, but also freedom of thought and conscience (including, for

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<sup>39</sup> ECtHR, *Sen v. the Netherlands*, 2001 (application no. 31465/96); ECtHR, *Osman v. Denmark*, 2011 (application no. 38058/09).

<sup>40</sup> ECtHR, *Berrehab v. the Netherlands*, 1988 (application no. 10730/84).

<sup>41</sup> Meaningfully, in cases similar to *Ruiz Zambrano* (see footnote no. 38 above), the CJEU denied the existence of a right to be granted a residence permit, on the basis that children were not dependent on the applicant. See, e.g., CJEU, *Dereci and Others*, 2011 (C-256/11).

<sup>42</sup> CJEU, *Rahman and Others*, 2012 (C-83/11). See also CJEU, *Rendón Marín*, 2016 (C-165/14), which explicitly relies on art. 7 of the Charter, read in conjunction with the obligation to take into consideration the child's best interests, recognised in art. 24,3.

instance, pacifism<sup>43</sup>, veganism<sup>44</sup>, and opposition to abortion<sup>45</sup>), issues concerning religion are prevalent in the case law. In particular, the CJEU has recognised that «Freedom of religion is one of the foundations of a democratic society and is a basic human right»<sup>46</sup>. Accordingly, EU law prohibits any discrimination based on this ground (not only in art. 21 of the Charter but also in the secondary law such as, in particular, the Directive 78/2000/CE establishing a general framework for equal treatment in employment and occupation).

The CJEU has recognised that the freedom to manifest one's own beliefs is no less important than the freedom to hold such beliefs. This means, for instance, that the risk of being persecuted for manifesting religion beliefs may represent the basis for the concession of asylum<sup>47</sup>. However, while, in the *forum internum*, freedom of religion (including the right to change one's religion and the right not to adhere to any religion) is held to be almost absolute, by contrast, in the *forum externum*, freedom to manifest one's religion or belief may be restricted by the law for the sake of public safety, public order, health and moral, and the protection of the rights and freedoms of others<sup>48</sup>.

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<sup>43</sup> ECR, *Arrowsmith v. UK*, 1977 (application no. 7050/75).

<sup>44</sup> ECR, *H v. United Kingdom*, 1985 (application no. 11559/85).

<sup>45</sup> ECR, *Knudsen v. Norway*, 1985 (application no. 11045/84).

<sup>46</sup> CJEU, *Y and Z*, 2012 (joined cases C-71/11 and C-99/11), par. 57.

<sup>47</sup> CJEU, *Y and Z*, 2012 (joined cases C-71/11 and C-99/11).

<sup>48</sup> See art. 9.2 ECHR, recalled in the Explanations on art. 10 of the Charter. According to this provision, it has been ruled, for instance, that a pharmacist is not allowed to refuse to supply contraceptive on religious grounds (ECtHR, *Pichon and Sajous v. France*, 2001, application no.

In this regard, it may be worth recalling that the CJEU has recognized to Member States also the faculty to make citizenship or residence conditional on migrants satisfying integration tests<sup>49</sup>: indeed, someone has read such a decision as possibly legitimating States to refuse citizenship or residence permits if the religious beliefs of the applicant were to be considered inconsistent with such values as, for instance, gender equality<sup>50</sup>. Furthermore, although a certain degree of active facilitation of religious choices is required in the area of employment<sup>51</sup>, this has to be balanced with other relevant interests and must not imply an intolerable burden for the employer<sup>52</sup>.

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49853/99), and that a registrar is not allowed to refuse to carry out same-sex marriages (ECtHR, *Eweida and Others v. UK*, 2013, applications nos. 48420/10 *et al.*).

<sup>49</sup> CJEU, *Parliament v. Council*, 2006 (C-540/03).

<sup>50</sup> See, e.g., McCrea in Peers *et al.* (2014, 302), who recalls, as an example, the Decision 286798/2008 of the French Conseil d'Etat (2008), which rejected the claim of a woman who had been denied French nationality «Considérant qu'il ressort des pièces du dossier que, si Mme A possède une bonne maîtrise de la langue française, elle a cependant adopté une pratique radicale de sa religion, incompatible avec les valeurs essentielles de la communauté française, et notamment avec le principe d'égalité des sexes; qu'ainsi, elle ne remplit pas la condition d'assimilation posée par l'article 21-4 précité du code civil; que, par conséquent, le gouvernement a pu légalement fonder sur ce motif une opposition à l'acquisition par mariage de la nationalité française de Mme A». It must be noted, however, that this decision does not make reference to the case *Parliament v. Council* mentioned above (footnote no. 49).

<sup>51</sup> ECtHR, *Eweida and Others v. UK*, 2013 (applications nos. 48420/10 *et al.*); CJUE *Prais v. Council*, 1976 (C-130/75).

<sup>52</sup> CJUE, *Cadman*, 2006 (C-17/05); CJEU, *Kiiski*, 2007 (C-116/06).

Restrictions on manifestation of religion play a central role also with specific reference to religious symbols. In this field, the case law of the ECtHR shows a significant deference to the margin of appreciation of the States. For instance, while in *Lautsi v. Italy* the court ruled in favour of the Italian law prescribing the exposition of the crucifix in the schools, in several cases it justified restrictions on wearing an Islamic headscarf (*hijab*)<sup>53</sup>. Such restrictions were held to be legitimate, for instance, during security controls<sup>54</sup>, in schools (in the name of secularism)<sup>55</sup>, and in the workplace (in the name of the right to conduct a business)<sup>56</sup>. Furthermore, the prohibition of wearing a full veil (*niqab* or *burqa*) in the public space has been declared legitimate by ECtHR for the sake of the preservation of the conditions of “living together”<sup>57</sup>. However, the possibility to restrict freedom of religion is not unlimited: for instance, it

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<sup>53</sup> For a reconstruction of different approaches to religion in the jurisprudence of the ECtHR see Bhuta (2014).

<sup>54</sup> ECtHR, *El Morsi v. France*, 2008 (application no. 15585/06).

<sup>55</sup> This is so for both teachers (ECtHR, *Dahlab v. Switzerland*, 2001, application no. 42393/98; ECtHR, *Kurtulmuş v. Turkey*, 2006, application no. 65500/01) and students (ECtHR, *Leyla Şahin v. Turkey*, 2005, application no. 44774/98; ECtHR, *Köse and Others v. Turkey*, 2018, application no. 15014/11; ECtHR, *Dogru v. France*, 2008, application no. 27058/05; ECtHR, *Aktas v. France*, 2003, application no. 24351/94).

<sup>56</sup> ECtHR, *Ebrahimian v. France*, 2015 (application no. 64846/11). See also, in the same line, CJEU, *G4S Secure Solutions*, 2017 (C-157/15).

<sup>57</sup> ECtHR, *SAS v. France*, 2014 (application no. 43835/11), see the comment of Parolari (2015); ECtHR, *Dakir v. Belgium*, 2017 (application no. 4619/12); ECtHR, *Belcacemi and Oussar v. Belgium*, 2017 (application no. 37798/13).

may not go so far as to justify the exclusion of a Muslim woman from the courtroom for wearing a *hijab*<sup>58</sup>.

Finally, it must be underlined that freedom of religion may interact with other rights enshrined in the Charter, such as, in particular, freedom of expression (art. 11), freedom of assembly and association (art. 12), and the right to education (art. 14). In some respects, all of these rights may be seen as functional to a full enjoyment of the freedom of religion. Firstly, as regards freedom of expression, it has been clarified that freedom of religion includes the right to proselytising<sup>59</sup>. Secondly, as regards the right to education, art. 14,3 of the Charter states «The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions». Thirdly, as regards freedoms of assembly and association, States have a positive obligation to grant to religious communities the possibility to operate without external interference<sup>60</sup>. This implies, for instance, that a State may be held responsible, on the one side, for failing to take adequate steps to prevent or investigate disruption of collective ceremonies or prayers by offensive and violent demonstrators<sup>61</sup>, as well as for planning restrictions making it impossible for small religious

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<sup>58</sup> ECtHR, *Lachiri v. Belgium*, 2018 (application no. 3413/09).

<sup>59</sup> ECtHR, *Kokkinakis v. Grecia*, 1993 (application no. 14307/88); ECtHR, *Buscarini and Others v. San Marino*, 1999 (application no. 24645/94).

<sup>60</sup> ECtHR, *Hasan and Chaush v. Bulgaria*, 2000 (application no. 30985/96).

<sup>61</sup> ECtHR, *Karaahmed v. Bulgaria*, 2015 (application no. 30587/13).

community to have a place of worship<sup>62</sup>. On the other side, a State may be held responsible for refusing to register a religious association for the lack of precise description of its beliefs and rites in its statute<sup>63</sup>.

In particular, respect for the autonomy of religious organizations is taken in great consideration. In this perspective, art. 17,1 TFEU significantly states that «The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States». This may also imply, within certain limits, the possibility for religious organisations to treat people differently in the name of religious freedom<sup>64</sup>, not only with regard to religious offices (e.g. all-male nature of priesthood in the Roman Catholic Church) but also in the field of significant secular functions, such as schools and hospitals (McCrea in Peers *et al.* 2014, 296)<sup>65</sup>.

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<sup>62</sup> ECtHR, *Association for Solidarity with Jehovah's Witnesses and Others v. Turkey*, 2016 (joined applications nos. 36915/10 and 8606/13).

<sup>63</sup> ECtHR, *Metodiev and Others v. Bulgaria*, 2017 (application no. 58088/08).

<sup>64</sup> See art. 4,2 of Directive 78/2000/CE establishing a general framework for equal treatment in employment and occupation.

<sup>65</sup> For instance, with regard to the dismissal of church employees for adultery, the ECtHR has established that it may or may not violate the right to private and family life, depending on the post the employee was appointed to. In particular, in the case of a director for Europe of the public relations within the Mormon Church, the ECtHR ruled that his dismissal had amounted to a necessary measure aimed at preserving the Church's credibility (ECtHR, *Obst v. Germany*, 2010, application no. 425/03). On the contrary, in the case of an organist and choirmaster in a Catholic parish, it found that the dismissal was illegitimate (ECtHR, *Schuth v. Germany*,

However, the rights enshrined in articles 11, 12 and 14,3 are not absolute, neither *per se* nor in conjunction with art. 10. Therefore, for instance, the dissolution, by the Constitutional Court, of a political party that had expressed the intention of introducing a theocracy based on Islamic law (*sharia*) may be considered compatible with the aim of preserving a democratic society<sup>66</sup>. Moreover, freedom of expression may sometimes be in conflict with (rather than functional to) freedom of religion, as religious satire and hate speech cases demonstrates. In particular, freedom of religion has sometimes been used as a justification for restricting the freedom of expression<sup>67</sup>.

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2010, application no. 1620/03). Furthermore, the ECtHR has established that the refusal to appoint a teaching post in a denominational university because of alleged heterodox views of the applicant amount to a violation of her/his freedom of expression (ECtHR, *Lombardi Vallauri v. Italy*, 2009, application no. 39128/05).

<sup>66</sup> ECtHR, *Refah Partisi and Others v. Turkey*, 2003 (applications nos. 41340/98 *et al.*).

<sup>67</sup> See, e.g. ECtHR, *Otto-Preminger-Institute v. Austria*, 1994 (application no. 13470/87); ECtHR, *Wingrave v. UK*, 2005 (application no. 40029/02); ECtHR, *IA v. Turkey*, 2005 (application no. 42571/98); ECtHR, *E.S. v. Austria*, 2018 (application no. 38450/12). On this issue, see also COE Venice Commission (2010).

## 5. Equality

The definition of equality as a normative principle – as distinguished from a descriptive concept of equality – has always been philosophically, politically, and legally troubling. It may be understood, for instance, as: basic or fundamental equality entitling every person to equal consideration; equality of status, rights and duties; equality of treatment (in adjudication and/or in legislation); equality of opportunities; or equality of achievements<sup>1</sup>. The Charter avoids to define equality, while different concepts of it are endorsed in different parts of the document.

As already noticed (par. 1.2 above), in the preamble the Charter seems to refer to the idea of basic or fundamental equality. In turn, Title III articulates the value of equality at three levels. Firstly, art. 20 expresses a very general (and indeterminate) principle of equality before the law. Secondly, articles 21 and 22 provide a specification of such principle in two respects. In particular, art. 21 lists the main grounds on which people must not be discriminated against. Art. 22 establishes an explicit link between the principle of

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<sup>1</sup> Although we are aware that the opposition between formal and substantive equality is very common (if not even dominant) in the philosophical and legal literature, we prefer not to use it, since it has several ambiguities which could not be properly discussed here. On different concepts and conceptions of equality see Pojman and Westmoreland (1997). For a classical analysis of the different meanings of equality in moral and legal discourses see Westen (1990).

equality and the commitment of the EU to respect for cultural, religious and linguistic diversity. It must be noted, however, that opinions diverge about the scope of art. 22. In particular, it is controversial whether it has to be understood as only prescribing a duty of the Union to respect differences *between* Member States, or as extending also to the protection of (persons belonging to) ethnic and cultural minorities *within* them<sup>2</sup>. Thirdly, the principle of equality is specifically reaffirmed as equality between women and men (art. 23)<sup>3</sup> and with regard to children (art. 24), older persons (art. 25), and persons with disabilities (art. 26). It is worth noting that, despite the neutral formulation of art. 23, it is more likely that the principle of gender equality is applied to protect women, since, as a matter of fact, they are the most affected by gender-based discrimination. Articles 23-26 may therefore be seen as aimed at stressing the principle of equality in relation to specific categories of subjects that, for different reasons, may be considered particularly vulnerable.

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<sup>2</sup> For instance, Ali in Mastroianni *et al.* (2017, 438-442) has a propensity for the first interpretation, and suggests that the protection of ethnic and cultural minorities may be seen as relying mainly on articles 20 and 21 of the Charter. By contrast, the latter view is defended by Craufurd Smith in Peers *et al.* (2014). In this regard, it is worth noting that the protection of ethnic and cultural minorities is explicitly recognized as a duty of the States by the ECtHR, *Chapman v. UK*, 2001 (application no. 27238/95), par. 93.

<sup>3</sup> The principle of equal treatment between women and men has a longstanding history within EU law. Indeed, it was already stated in the first founding treaty, signed in Rome in 1957, and sex was the sole protected ground before the Amsterdam Treaty (see Kilpatrick in Peers *et al.* 2014, 583).

In this regard, the Charter is perfectly in line with the process of specification of the fundamental rights holders (Bobbio 1992) that has characterised also international human rights law in the last decades<sup>4</sup>.

As regards the concepts of equality assumed in Title III, articles 20 and 21 refer mainly to the idea of *equal treatment* (par. 5.1), while articles 23-26 open to the idea of *equality of opportunities* (par. 5.2). These two concepts of equality are not necessarily in conflict with each other. On the contrary, it may be argued that there is a strong link between them, insofar as treating all persons “as equals”, rather than “equally” (see Dworkin 1977, chap. 12, for this distinction<sup>5</sup>), may be understood as requiring to grant them

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<sup>4</sup>In particular, discrimination against women has been object of several international declarations and conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Art. 24 is inspired by the UN Convention on the Rights of the Child (CRC). Art. 25 finds an antecedent in the UN Principles for Older Persons (while a UN convention is still missing in this field). Finally, art. 26 anticipates the UN Convention on the Rights of Persons with Disabilities (CRPD), which dates 2006. About this, it is worth noting that the CRPD has been approved by the Council Decision 2010/48/EC and, therefore, it is now an integral part of EU law (see CJEU, *HK Denmark*, 2013, joined cases C-335/11 and C-337/11).

<sup>5</sup>The matter of what “treating people as equals” requires has been widely discussed by philosophers. For instance, according to Jeremy Bentham (1789) and the Utilitarians it means weighting equally the welfare of every person (which requires taking into account differences in their utility functions). By contrast, according to Ronald Dworkin (1977, chap. 12) it means treating people with equal concern and respect, that is, giving the same importance to the life of different persons, and respecting their autonomy.

equal opportunities, which could legitimate differential treatment when inequalities in the conditions of persons are such that it is not possible to equalize their opportunities by treating them in the same way.

## 5.1. Equal treatment and non-discrimination

Art. 20 states: «Everyone is equal before the law». The Explanations only say that equality «corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of the Community»<sup>6</sup>. However, it is undisputed that, in the EU Treaties<sup>7</sup> and secondary law<sup>8</sup>, equality is mainly understood as a principle of equal treatment and non-discrimination. In particular, as the CJEU has clearly stated, «The principle of equality and non-discrimi-

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<sup>6</sup>The Explanations also refer to the following judgements: CJEU, *Racke v Hauptzollamt Mainz*, 1984 (C-283/83); CJEU, *EARL de Kerlast v Unicopa and Coopérative du Trieux*, 1997 (C-15/95), and CJEU, *Karlsson and Others*, 2000, (C-292/97).

<sup>7</sup>For a detailed account of the articles of the Treaties on which each of the articles of this Title of the Charter is based, see the Explanations.

<sup>8</sup>In particular, several directives are devoted to this issue, such as, in particular: the Directive 2000/43/EC against discrimination on grounds of race and ethnic origin; the Directive 2000/78/EC against discrimination at work on grounds of religion or belief, disability, age or sexual orientation; the Directive 2004/113/EC on equal treatment for men and women in the access to and supply of goods and services; and the Directive 2006/54/EC on equal treatment for men and women in matters of employment and occupation.

nation requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified»<sup>9</sup>. The scope and the field of application of art. 20 is very wide. Indeed, as reflected in the case law of the CJEU, it applies to everyone<sup>10</sup> and in relation to whatever issue falling within the scope of EU law, even though the categories concerned may be «transient in nature with no wider social meaning» (Bell in Peers *et al.* 2014, 565)<sup>11</sup>.

In this perspective, the principle of non-discrimination stated in art. 21 is a specification of the general principle of equal treatment, since it details the main grounds on which people must not be discriminated against. Accordingly, the CJEU has clarified that also the non-discrimination provisions contained in EU directives are «simply a specific expression of [...] the general principle of equality»<sup>12</sup>. The relevance of explicitly mentioning the grounds of discrimination listed in art. 21 consists in making any categorisation based on them automatically “suspect”. Indeed, such grounds

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<sup>9</sup> CJEU, *Advocaten voor de Wereld*, 2007 (Case C-303/05), par. 56.

<sup>10</sup> However, on the limits of the personal scope of the Charter (which suggest a careful reconsideration of the meaning of “everyone” in art. 20), see par. 1.2 above. See also the observations on art. 21,2 below.

<sup>11</sup> For instance, art. 20 played a role in cases that range from differences in the treatment of parents of twin children as compared to the treatment of parents of two children born in different times (CJEU, *Chatzi*, 2010, C-149/10), to differences in the procedures applicable to different types of farmers with regard to awarding public funding (CJEU, *Nagy*, 2011, C-21/10).

<sup>12</sup> CJEU, *Lotti and Matteucci*, 2010 (joined cases C-395/08, C-396/08), par. 58.

coincide with those personal characteristics that, more often than others, give rise to discrimination. However, this list is open and non-exhaustive, as clearly indicates the phrase “such as”, which introduces it. Moreover, it must be stressed that this is currently the widest list among all the non-discrimination provisions contained in other international instruments, since it includes, together with more traditional grounds of discrimination – such as sex, race, colour, language, religion, political opinion, national minorities, property – also genetic features, disability, age, and sexual orientation.

The CJEU has established that art. 21 has direct horizontal effects. This means that it may be relied upon by individuals in disputes between them, and that national judges have the duty to set aside any provision of national legislation contrary to the general principle of non-discrimination as provided for in art. 21<sup>13</sup>. Also, it is worth noting that the principle of non-discrimination in EU law explicitly includes a prohibition of indirect discrimination. Therefore, the principle of equal treatment not only prohibits to treat a person less favourably than another in a comparable situation, but also prevents the adoption of any apparently neutral provision, criterion or practice that would have as a consequence to put persons belonging to a specific protected group at a particular disadvantage as compared with other persons (unless that provision, criterion or practice is objectively justified by a legitimate aim,

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<sup>13</sup> See, in particular, CJEU, *Egenberger*, 2018 (C-414/16). On the developments of the CJEU attitude towards the issue of the possible horizontal direct effects of the Charter, see Rossi (2019).

and the means of achieving that aim are appropriate and necessary) <sup>14</sup>.

It must be noted that art. 21,2 confers a special position to nationality, as a ground of discrimination. This reflects the fact that equal treatment between nationals of different Member States has been recognised a founding importance since the very beginning of the process of European integration. While this provision is silent on the specific issue of third-country nationals, a restrictive interpretation has prevailed in the CJEU case law, according to which they fall outside its scope <sup>15</sup>. In this perspective, although the court has ruled that a national provision discriminating against EU citizens and third-country nationals in the availability of housing benefits is incompatible with EU law, it meaning-

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<sup>14</sup> See, for instance, art. 2 of the Directive 78/2000/CE and the analogous articles contained in the other directives mentioned above (footnote no. 8).

<sup>15</sup> See CJEU, *Vatsouras and Koupatantze*, 2009 (joined cases C-22/08 and C-23/08). This case was actually about the interpretation of art 18 TFEU. However, as the Explanations clarify, «Paragraph 2 [of art. 21 of the Charter] corresponds to the first paragraph of art. 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that article». Such a restrictive interpretation of art. 21,2 has been challenged, arguing that the ECtHR case law considers different treatments based exclusively on nationality as incompatible with the ECHR (see ECtHR, *Gaygusuz v. Austria*, 1996, application no. 17371/90; *Luczak v. Poland*, 2007, application no. 77782/01, and ECtHR, *Ponomaryovi v. Bulgaria*, 2011, application no. 5335/05). However, also the ECtHR seems to accept different treatment between EU citizens and third-country nationals in areas falling outside EU law (see ECtHR, *Moustaquim v. Belgium*, 1991, application no. 12313/86), and ECtHR, *Ponomaryovi v. Bulgaria*, 2011, application no. 5335/05).

fully based its decision on the Directive 2003/109/EC on Long-Term Residents, and not on art. 21,2 of the Charter<sup>16</sup>.

The leanings to exclude the applicability of art. 21,2 to third-country nationals is in line with the absence, in Title III, of any specific provision on migrants and refugees, despite the fact that, like the other categories considered in articles 23-26, they could be regarded as vulnerable subjects in many respects<sup>17</sup>. This might actually be seen as one of the most significant indications of the actual limits of the personal scope of the Charter. However, it is worth stressing that, since art. 21,2 does not textually limit itself to EU citizens, it remains open to different interpretations (see Kilpatrick in Peers *et al.* 2014, 582, 588-590).

From a different perspective, the account of equal treatment endorsed in articles 20 and 21 has been criticized for the way in which it can be used to legitimate social and legal practices that reproduce disadvantage (Bell in Peers *et al.* 2014, 571). Indeed, since articles 20 and 21 do not – and reasonably could not – provide any universal and objective yardstick to establish “what is comparable”, the outcome of a judgement finally depends on the relevant criteria that the court discretionarily selects, on a case by case basis. And, indeed, the CJEU actually seems to adopt wavering approaches to the principle of equal treatment: it alternates a «light touch judicial scrutiny», which, far from being demanding, simply requires an “objective” reason for different treatment

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<sup>16</sup> CJEU, *Kamberaj*, 2012, (C-571/10).

<sup>17</sup> Asylum seekers are considered a vulnerable group, for instance, in the case law of the ECtHR. See Peroni and Timmer (2013).

(equality as rationality), with a more rigorous and penetrating approach which requires more than «a simple assessment of whether the distinction [on which a differential treatment is based] conforms to a basic sense of rationality» (Bell in Peers *et al.* 2014, 571-575).

Furthermore, the wider is the margin of appreciation in establishing what is comparable, the wider is the risk that the prohibition of indirect discrimination may be frustrated by an insensitive and unthoughtful construction of the criteria of comparison, as well as by the inability to detect intersectional discriminations<sup>18</sup>.

For instance, as regards criteria of comparison in relation to equality between men and women, the Court has affirmed that parental leave is not comparable to military service when calculating length of service with regard to payment on the termination of employment, since the former is voluntary, while the latter is mandatory<sup>19</sup>. Similarly, the CJEU has ruled that EU law does not preclude national legislation that states criteria for the calculation of a contributory invalidity pension which disadvantage part-time workers, despite the fact that the group of part-time workers is, for the great majority, made up of female workers<sup>20</sup>. However, these judgements miss the point that while women are more likely

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<sup>18</sup> The idea of a «discriminatory combination of several factors» may be found in the opinion of Advocate General Kokott in the CJEU case *Parris*, 2016 (C-443/15). On the concept of intersectional discrimination see Crenshaw (1989). On the twofold dimension of discrimination on migrant's woman see also Facchi (1998).

<sup>19</sup> CJEU, *Österreichischer Gewerkschaftsbund*, 2004 (C-220/02).

<sup>20</sup> CJEU, *Cachaldora Fernández*, 2015 (C-527/13).

than men to apply for parental leave and part-time jobs, in many cases this is very far from being a voluntary choice.

Finally, a recent example of unrecognized intersectional discrimination may be found, for instance, in the case *G4S Secure Solutions*, 2017 (C-157/15), where the CJEU has failed to catch that those employees who are both women and Muslim may be disproportionately affected by a formally neutral provision prohibiting «the visible wearing of any political, philosophical or religious sign» in the workplace<sup>21</sup>. In this regard, it is also worth recalling the COE Resolution no. 1478/2006 on Integration of Immigrant Women in Europe (par. 1), which «denounces the two-fold discrimination to which [immigrant women] are subjected on the grounds of their gender and their origin and deplores the fact that this discrimination operates both in the host society and within immigrant communities themselves».

## 5.2. Equality of opportunities

These possible shortcomings in applying the principle of equal treatment might and should be partly compensated and corrected by the principle of equality of opportunities, which, as anticipated above, is also endorsed in the Charter (and in the EU anti-discrimination law and policies in general; see Kilpatrick in Peers *et al.* 2014, 592). This principle may be understood as requiring that every person is granted a set of opportunities that are instrumental to other opportu-

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<sup>21</sup> On the restrictions on the right to wear religious symbols see par. 4.3 above.

nities, as well as the necessary conditions for a minimally decent life (see Riva 2011 and 2015).

In particular, the idea of “instrumental opportunities” includes the possibility to compete, in a fair competition, for the access to different social positions, which implies not only that those positions are formally open, but also: a) that all the structural, cultural and social obstacles that impose unfair burdens to some competitors are actively removed; and b) that competitors can have access to those goods which are necessary for gaining an effective chance to win the competition (cf. Rawls 1971; Dworkin 2000; Mason 2006). Equality in the conditions for a minimally decent life requires, instead, the possibility to access to those means that are necessary to fulfil one’s basic needs.

Both of these understandings of the equality of opportunity are present in the Charter.

On the one side, the idea of “instrumental opportunities” seems to be the rationale of articles 23 and 26, which explicitly endorse the idea of “positive discrimination”. In particular, art. 23,2 states that «the principle of equality shall not prevent the maintenance or adoption of *measures providing for specific advantages* in favour of the under-represented sex»<sup>22</sup> (emphasis added). Similarly, art. 26 establishes that «the Union recognises and respects the right of persons with disabilities to benefit from *measures designed to ensure*

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<sup>22</sup> Among the main decisions in which, before the Charter, the CJUE admitted – and fixed some limits to – the legitimacy of positive actions in the context of gender equality, see, e.g., CJEU, *Kalanke v. Freie Hansestadt Bremen*, 1995 (C-450/93); CJEU, *Marschall v. Land Nordrhein-Westfalen*, 1997 (C-409/95); CJEU, *Badeck and Others*, 2000 (C-158/97).

their independence, social and occupational integration and participation in the life of the community» (emphasis added); measures such as, for instance, “reasonable accommodations” in the workplace as foreseen in art. 5 of Directive 2000/78/EC<sup>23</sup>.

On the other side, equality of opportunity for a minimally decent life seems to inform articles 24 and 25 (as well as part of Title IV on Solidarity, see par. 6.2 below). Indeed, art. 24 states that «the children shall have the right to such *protection and care* as necessary for their well-being» (emphasis added), thus imposing, among other things, a positive obligation to provide services, which is a typical feature of social rights. In turn, art. 25 gives specific relevance to «the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life». In this respect, the principle of equality may be seen as a bridge between civil and social rights, as the placement of the Title on Equality – exactly in the middle between the Title on Freedoms and the Title on Solidarity – significantly symbolises.

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<sup>23</sup> See also CJEU, *Coleman*, 2008 (C-303/06), and CJEU, *HK Denmark*, 2013 (joined cases C-335/11 and C-337/11).

## 6. Solidarity

The history of the idea of solidarity as a major political value goes back at least to the idea of *fraternité*, that, together with those of *liberté* and *égalité*, constitutes one of the basic principles of the French Revolution. Either understood in opposition to liberal individualism or, quite often, as complementary to it (as a sort of counterbalance to redress its potentially atomizing and disaggregating tendency), this idea has been developed during the XIX century, along different lines, within different political traditions and social movements (see par. 2.4 above). The conjunction of those traditions and movements inspired the social reforms that resulted, in the aftermath of World War II, both in the distinctive European social model of Welfare State (see Alber 1982; Ferrera 1993; Ritter 1999) and in the idea of social rights as an essential component of the system of fundamental rights.

Following Marshall (1950), social rights are usually distinguished from civil and political rights. However, the very notion of social rights is somehow controversial (see Pino 2017, chap. 6). For instance, someone identifies their core characteristic in the connection with the fact of belonging to a specific social group (e.g., paradigmatically, workers) or social entity (e.g., the family). Here, the space for solidarity might be identified in the fact of sharing common interests and goals, the achievement of which requires a certain degree of cooperation. By contrast, others look more at the content of social rights, and understand them as “entitlements to bene-

fits”, in connection with the idea of equality in the conditions for a minimally decent life (see Fabre 2000 and par. 5.2 above). In this case, what defines the space for social solidarity is the idea that granting a minimally decent life requires at least the opportunity to access to those means which are necessary to fulfil basic needs, thus defining a minimal threshold of protection against bad luck (cf. Dworkin 2000).

While both of these understandings may provide a rationale for some of the rights included in Title IV of the Charter, none of them, if taken alone, is capable to embrace the whole set of those heterogeneous rights, which range from worker’s rights to environment protection, from family to health care, and from the right to social security and social assistance to costumer protection. Indeed, different (clusters of) rights seem to have different rationales.

Defining how the value of solidarity is understood in the Charter is, therefore, quite challenging. Nonetheless, it seems undeniable that there is a connection between some of the rights included in Title IV and the idea of Welfare State, as it is confirmed by the European social *acquis* on which they rest, including the ESC and the CCFSRW<sup>1</sup>. Moreover, while a study commissioned by the European Parliament in 2016 denounced that the ESC has been largely ignored by the recent developments concerning the protection of fundamental rights in the EU legal order (De Schutter 2016), in 2017 the EU institutions adopted a joint (although not legally binding) declaration on the creation of a European Pillar of Social Rights, which not only re-

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<sup>1</sup> See the Explanations.

calls the Charter but also widens the catalogue of rights enshrined in Title IV.

The following paragraphs will focus on two main groups of rights: the cluster of worker's rights, including art. 33 on work-life balance (par. 6.1), and the entitlements to benefits stated in articles 34 and 35 (par. 6.2).

Nonetheless, among the other rights enshrined in Title IV, also the following ones deserve at least to be mentioned: art. 36 on the access to services of general economic interest (including, for instance, telecommunications, postal services and transport, but also electricity, gas and water supply), and art. 37 on environmental protection. Indeed, although they do not grant entitlements to benefits in a strict sense, these articles seem to share a particular attention to the issue of those *fundamental goods* which are necessary for a decent and healthy life. Therefore, these goods not only must be made available to everyone, but also have to be protected for the wellbeing of all.

Art. 37, in particular, is highly interesting, as it seems to foster another idea of solidarity, distinguished from those embedded in the other articles of Title IV: that is, the idea of solidarity between generations.

## 6.1. Workers' rights

Title IV opens with a set of worker's rights. There is a wide *acquis* in this field, because EU law have been dealing with these rights since the very beginning (although mainly in the perspective of the freedom of movement and the constitution of a common European market). Among the arti-

cles on workers' rights, some – such as art. 27 on the right to information and consultation within the undertaking, and art. 28 on the right of collective bargaining and action – have a prevalent “procedural” nature. Others – such as art. 30 on the protection in the event of unjustified dismissal, and art. 31 on fair and just working conditions – have a more substantive dimension. However, all of them seem to share the traditional goal of re-equilibrating power imbalances between employers and workers. In this perspective, it is worth noting that the Charter does not recognise the right to actually *have* a job: indeed, art. 15 – which, significantly, is not included in Title IV, but rather in Title II – only states the right to engage in a *freely chosen* work.

According to some commentators, art. 31 is «the most fundamental of the labour rights set out in the EU Charter» (Bogg in Peers *et al.* 2014, 845), since it establishes an explicit connection between working conditions, on the one side, and dignity and integrity of the person (as affirmed, respectively, in articles 1 and 3 of the Charter), on the other. Indeed, it states that «every worker has the right to working conditions which respect his or her health, safety and dignity» (par. 1), including a limitation of maximum working hours, daily and weekly rest periods, and an annual period of paid leave (par. 2). The importance of this article is also reinforced by the fact that the provision contained in its par. 2 has been recognized by the CJEU as producing horizontal direct effects<sup>2</sup>.

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<sup>2</sup> See CJEU, *Bauer*, 2018 (joined cases C-569/16 e C-570/16); CJEU, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, 2018 (C-684/16). According to the CJEU, there are only two other articles in the

It is undisputed that the personal scope of art. 31 extends to every worker, independently of the type of her/his contract of employment, although it is worth remembering that art. 15,3 recognises to third-country nationals only the right to working conditions *equivalent*, and not equal, to those of EU citizen workers (see par. 1.2 above). However, art. 31 is quite vague in several other respects, since its meaning depends on the definition of the concepts of “dignity” at work, “health and safety”, and “working conditions”.

Some indications may be found in the ESC and in the case law of the CJEU<sup>3</sup>. For instance, the Explanations refer to art. 26 ESC on «the right to dignity at work», which establishes the duty of the State «to promote awareness, information and prevention of sexual harassment» and of any other «recurrent reprehensible or distinctly negative and offensive actions directed against individual workers». Any form of disrespect of the worker’s personhood must therefore be regarded as a violation of her/his dignity. Further-

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Charter which have horizontal direct effects: art. 21 (see par. 5.1 above) and art. 47 on the right to an effective remedy and to a fair trial. See Rossi (2019).

<sup>3</sup> Furthermore, other relevant sources for the interpretation of art. 31 are the framework Directive 89/391/EEC on the safety and health of workers at work, and the Directive 93/104/EC on working time. However, the latter Directive is subject to significant limitations and derogations which could weaken the provision of the Charter. It has therefore been asked (Bogg in Peers *et al.* 2014, 863) whether the Charter may be, instead, an instrument for challenging such limitations and derogations, as it has already happened, for instance, in the field of equal treatment between men and women (see CJEU, *Association Belge des Consommateurs Test-Achats ASBL and Others*, 2011, C-236/09).

more, as regards health and safety, the CJEU has been determinant in defining the general principle that health has to be understood «as a state of complete physical, mental and social well-being», in accordance with the definition of this concept provided by the World Health Organization<sup>4</sup>.

As regards working conditions, the CJEU has embraced a broad interpretative approach, establishing that this notion extends beyond the conditions set out in the contract of employment<sup>5</sup>, and may also cover conditions governing dismissal<sup>6</sup> (see below). The issue of fair working conditions has been raised also, for instance, with regard to the duty of the employers to provide reasonable accommodations for persons with disabilities<sup>7</sup>, and in relation to the practice of indefinitely renewing fixed-term contracts instead of granting a permanent employment contract<sup>8</sup>. Since there is no mention of the right to a fair remuneration in art. 31, it is doubtful whether it has to be considered as included in the notion of fair and just working conditions<sup>9</sup>. However, there

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<sup>4</sup> CJEU, *UK v. Council*, 1996 (C-84/94), par. 15.

<sup>5</sup> CJEU, *Meyers v. Adjudication Officer*, 1995 (C-116/94).

<sup>6</sup> CJEU, *Burton v. British Railways Board*, 1982 (C-19/81).

<sup>7</sup> CJEU, *HK Denmark*, 2013, joined cases C-335/11 and C-337/11).

<sup>8</sup> The CJEU has ruled that such practice may be illegitimate in *Mascolo and Others*, 2014 (joined cases C-22/13 et al.); *Pérez López*, 2016 (C-16/15); and *Martínez Andrés*, 2016 (joined cases C-184/15 and C-197/15).

<sup>9</sup> In the case *Sindicato Nacional dos Profissionais de Seguros e Afins*, 2014 (C-264/12), the national judge asked, among other things: «Must the right to working conditions that respect dignity, laid down in Article 31(1) of the [Charter], be interpreted as meaning that employees have the right to fair remuneration which ensures that they and their families can enjoy a satisfactory standard of living?». However, the CJEU declined to hear and

are strong arguments in favour of the positive answer: indeed, several international instruments and national constitutions state that a fair remuneration is a necessary condition for granting a decent standard of living for workers and their families. In this perspective, it is worth noting that art. 6 of the document on the European Pillar of Social Rights clearly states that «workers have the right to fair wages that provide for a decent standard of living» and that «adequate minimum wages shall be ensured».

Art. 31 is also strictly connected with art. 30 on the protection in the event of unjustified dismissal. Indeed, this provision may be understood as protecting workers' job security as another necessary precondition of their dignity and autonomy. Unjustified dismissal may be defined as dismissal without a valid reason<sup>10</sup>. EU law identifies some cases of automatically unjustified dismissal<sup>11</sup>: for instance, while

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determine the request for a preliminary ruling due to lack of jurisdiction, because there was no «specific evidence to support the view that [the national legislation under scrutiny] was intended to implement EU law».

<sup>10</sup> Many cases concerning dismissal arose before the CJEU in connection with transfer of undertakings, insolvency, collective redundancy, discrimination, and reconciliation between family and professional life (all issues explicitly regulated by secondary EU law).

<sup>11</sup> See also the Appendix to European Social Charter (Revised), which states that «For the purpose of [art. 24 ESC] the following, in particular, shall not constitute valid reasons for termination of employment: a) trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours; b) seeking office as, acting or having acted in the capacity of a workers' representative; c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; d) race, colour, sex, mar-

art. 33,2 reinforces the protection of parenthood rights in this field (see below), art. 10 of the Directive 92/85/EEC qualifies as automatically unjust the dismissal of pregnant workers and workers who have recently given birth or who are breastfeeding<sup>12</sup>. However, what constitutes a valid reason for dismissal is generally established on a case by case basis. In this regard, it must be underlined that workers' rights may conflict, and need to be balanced, with the right to conduct a business as stated in art. 16 of the Charter. The latter, of course, is not unlimited<sup>13</sup>, but it is not unlikely to prevail either<sup>14</sup>. In any case, protection against unjustified dismissal implies the availability of effective remedies (art.

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ital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; e) maternity or parental leave; f) temporary absence from work due to illness or injury».

<sup>12</sup>This was first established by the CJEU, two years before the Directive, in the leading case *Dekker*, 1990 (C-177/88). More recently, the CJEU has also clarified that the prohibition of dismissal of a pregnant woman includes preparatory activities, such as looking for a substitute (CJEU, *Paquay*, 2007, C-460/06), and that the failure to renew a fixed-term contract of employment due to the fact that the worker is pregnant constitutes a direct gender-based discrimination (CJEU, *Jiménez Melgar* 2001, C-438/99).

<sup>13</sup>See, e.g., the already mentioned CJEU, *HK Denmark*, 2013, joined cases C-335/11 and C-337/11). Furthermore, on the issue of discriminatory dismissal on religious ground see, for instance, CJEU, *Bougnaoui and ADDH*, 2017 (C-188/15) and ECtHR, *Ivanova v. Bulgaria*, 2007 (application no. 52435/99).

<sup>14</sup>See, e.g., CJEU, *Alemo-Herron and Others*, 2013 (C-426/11) on transfers of undertakings, CJEU, *AGET Iraklis*, 2016 (C-201/15) on collective redundancies, and CJEU, *G4S Secure Solutions*, 2017 (C-157/15) on religious neutrality in business policies.

47 of the Charter) to challenge the employer's decision and the existence of a valid reason<sup>15</sup>.

In the cluster of workers' rights, it is also worth mentioning art. 32, which prohibits child labour and prescribes a special protection of young people at work, including protection against economic exploitation. This implies that young workers must be granted not only working conditions appropriate to their age (and which do not interfere with their education), but also equal payment as compared to adult workers. The rationale of this article seems to be the aim of providing a special protection, in the labour area, to particularly vulnerable subjects.

Finally, art. 33 on family and professional life deserves particular attention. This provision may be seen as a bridge between the group of labour rights and those rights which are shaped as entitlements to benefits (see par. 6.2 below)<sup>16</sup>. Indeed, on the one side, par. 1 prescribes that family is granted (not only legal but also) economic and social protection. According to art. 16 ESC, on which this provision rests<sup>17</sup>, this protection includes «such means as social and family bene-

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<sup>15</sup> This also means that the employer has a duty to communicate to the worker the reason of her/his dismissal. See ECtHR, *KMC v. Hungary*, 2012 (application no. 19554/11).

<sup>16</sup> As regards entitlements to benefits within the cluster of workers' rights, it may be worth mentioning also art. 29 of the Charter, on the right of access to a free placement service. Indeed, granting a free placement service implies a duty of the State to supply such service, irrespective of whether it does it directly, through a public service, or indirectly, by granting that this service is supplied by private subjects (See Lotito in Bifulco *et al.* 2001, 219; Ashiagbor in Peers *et al.* 2014, 800-801).

<sup>17</sup> See the Explanations.

fits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means». On the other side, par. 2 is specifically devoted to reconciliation between family and professional life, and states that «everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child».

Apparently, art. 33,2 considers only children as care recipients, ignoring other dependent family members. Furthermore, focusing on protection against dismissal for maternity and parental leave, it does not refer to other substantive forms of support. However, the legal sources on which art. 33,2 is based may widen its scope and meaning<sup>18</sup>. In particular, one of these sources is art. 27 ESC on the right of workers with family responsibilities to equal opportunities and equal treatment. This article establishes, among other things, that States have a duty to take appropriate measures «to develop or promote services, public or private, in particular child day-care services and other childcare arrangements». In addition, the notion of «family responsibilities» adopted in this provision may be wider than parenthood responsibility.

Furthermore, art. 33,2 must be read also in accordance with the fact that EU law and policies are increasingly up-

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<sup>18</sup> According to the Explanations, art. 33,2 rests not only on the already mentioned Directive 92/85/EEC on pregnant workers and on art. 8 ESC on the protection of maternity, but also in on art. 27 ESC on the right of workers with family responsibilities to equal opportunities and equal treatment.

holding – besides the more traditional aims of protecting maternity and granting equal treatment of women at work – the additional goals of freeing them up to take paid work and promoting a more equal allocation of care burdens between women and man. In this perspective, it is worth noting that the European Parliament and the Council have recently adopted Directive 2019/1158/EU on work-life balance for parents and carers, which repeals the previous Directive 2010/18/EU on parental leave and sets a number of new or higher minimum standards not only for parental leave, but also – and notably – for *paternity* and *carers’* leave, as a key deliverable of the European Pillar of Social Rights<sup>19</sup>.

Such a new focus on paternity and care responsibility in general (not limited to parenthood) could expressly fill the denounced gaps in art. 33,2 of the Charter, thus providing the basis for further measures to combat those stereotyped gender roles that prevent women from achieving an effective equality of opportunities, not only in the field of employment, but in the whole spectrum of social life.

## 6.2. Entitlements to benefits

The most typical entitlements to benefits can be found in art. 34 on social security and social assistance, and in art. 35 on health care. These rights extend beyond workers’ rights only. However, their real scope is disputed.

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<sup>19</sup> This new directive was defined «a key deliverable of the European Pillar of Social Rights» by the Commission, in a press release, on January 2019.

Art. 34 includes, on the one side, the right to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and loss of employment (par. 1-2)<sup>20</sup>, and, on the other side, the right to social and housing assistance «so as to ensure a *decent* existence for all those who lack sufficient resources» (par. 3, emphasis added). However, the distinction between social security and social assistance is somehow blurred and disputed in concrete terms, and, in the case law of the CJEU, there seems to be a tendency to consider as social security also benefits that are claimed to be social assistance<sup>21</sup>. Moreover, it has been argued that art. 34,1 does not pose any obligation to establish social services where none currently exist (White in Peers *et al.* 2014, 938). This would be suggested both by the fact that it simply «recognises and respects the entitlement to social security and social assistance benefits and social services», and by the lack, in the Explanations, of any reference to art. 14 ESC on the right to benefit from social welfare services.

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<sup>20</sup> It is worth noting that EU legislation on social security mainly concerns the coordination (and not the harmonization) of national legislations, in order to grant the effectiveness of free movement of workers. See, in particular, the Regulation (EC) No 883/2004 on the coordination of social security systems and the Regulation (EU) No 492/2011 on freedom of movement for workers within the EU.

<sup>21</sup> See, e.g., CJEU, *Vatsouras and Koupatantze*, 2009 (joined cases C-22/08 and C-23/08). Indeed, the CJEU has made clear that the classification of a benefit under coordination rules rests entirely on the factors relating to each benefit, irrespective of national legislations. See CJEU, *Gillard*, 1978 (C-9/78).

Art. 35 includes the right to access to preventive health care and the right to benefit from medical treatment. It is remarkable that a real right to health is missing in this article, although it states that «a high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities»<sup>22</sup>. This is especially relevant if considered in connection with art. 37 on environment protection. Until now, however, only three CJEU's substantive judgements have taken art. 35 into consideration, while the only EU regulation which explicitly mentions it is the Regulation (EC) No 1905/2006 on development cooperation. In this context, the Fundamental Right Agency of the European Union (FRA) is devoting particular attention to the implementation of the right to health, especially with regard to the most vulnerable persons, and has repeatedly called for revision of both EU and national legislation<sup>23</sup>.

Social security, social assistance, and health care are the rights which more directly recall the idea of equal opportunities for a minimally decent life. Not by chance, art. 34,3 explicitly connects the right to social and housing assistance to the goal of combating social exclusion and poverty. However, even these rights are not granted to everyone unconditionally, but, rather, in accordance with national laws and practices, as well as with EU law when relevant. In this perspective, the CJEU has acknowledged that, even in the case of benefits which flows from EU citizenship (articles 18-25 TFEU and Directive 2004/38/EC), Member States

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<sup>22</sup> See also CJEU, *Deutsches Weintor*, 2012 (C-544/10).

<sup>23</sup> For specific references to the relevant FRA's documents, see Hervey and McHale in Peers *et al.* (2014).

may use a residence test in determining access to social security and social assistance, provided that the residence requirement is proportionate and objectively justified<sup>24</sup>. Moreover, as regards third-country nationals, even the ECtHR has found admissible to make an entrance permit conditional upon having no recourse to public funds<sup>25</sup>.

Solidarity, if conceived as a universal value to be applied among the community of human beings, should not be limited to EU citizens. In the public debate solidarity is frequently invoked to ground legal and political European policies toward migrants and refugees. Nevertheless, EU and the Member States retain a very wide margin of appreciation in defining who is entitled to what benefit. In particular, while some of the “core benefits” covered by the right to social security, social assistance, and health care have been recognised, for instance, to refugees and beneficiaries of subsidiary protection<sup>26</sup>, victims of human trafficking<sup>27</sup>, asylum seekers<sup>28</sup>, and long-term residents<sup>29</sup>, they are not available to every migrant as such.

Indeed, as pointed out by FRA (2015, 181), not only «an acknowledged right to enter or remain [in an EU country] is

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<sup>24</sup> CJEU, *Collins*, 2004 (C-138/02); CJEU, *De Cuyper*, 2006 (C-406/04).

<sup>25</sup> ECtHR, *Bah v. UK*, 2011 (application no. 56328/07).

<sup>26</sup> Directive 2011/95/EU (Qualification Directive).

<sup>27</sup> Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

<sup>28</sup> Directive 2013/33/EU (Reception Conditions Directive).

<sup>29</sup> Directive 2003/109/EU (Long-Term Residents Directive). See also CJEU, *Kamberaj*, 2012, (C-571/10).

normally necessary for accessing the full range of social rights», but also, «for most migrants, being permitted to enter or to remain in a State is only the first step in establishing full residence rights», while «accessing employment, education, housing, health care, social security, social assistance and other social benefits can be a challenging exercise». In particular, migrants who are in an irregular situation are especially vulnerable to exclusion from these entitlements<sup>30</sup>.

Nonetheless, at least minimum standards must be granted to everyone, under any circumstances. For instance, the ECtHR has stated that State's responsibility for the violation of the prohibition of inhuman and degrading treatment may arise, for instance, if it supplies a wholly inadequate amount of financial support<sup>31</sup>, if it fails to provide shelter in extreme situations<sup>32</sup>, or if it puts an individual's life at risk through acts or omissions that deny the individual health care that has otherwise been made available to the general population<sup>33</sup>.

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<sup>30</sup> The implementation of social rights taking into account the cultural and religious belonging of the migrants and their descendants is an aspect that cannot be treated here, see Facchi (2006).

<sup>31</sup> See, e.g., ECtHR, *Larioshina v. Russia*, 2002 (application no. 56869/00) on the amount of old-age pension and social benefits allegedly insufficient to maintain an adequate standard of living.

<sup>32</sup> See, e.g., ECtHR, *M.S.S. v. Belgium and Greece*, 2011 (application no. 30696/09).

<sup>33</sup> See ECtHR, *Powell and Rayner v. UK*, 1990 (application no. 9310/81).

## 7. Towards a More Inclusive Europe? Final Remarks

The debate on European values and their relation to fundamental rights is becoming more and more central in the European public space. The recent Proposal for a Regulation of the European Parliament and of the Council establishing a Rights and Values Programme (2018) is aimed, among other things, at reaffirming «The Union’s vocation to be a community based on shared values and rights, a shared historical and cultural heritage and people’s involvement» in the face of «emerging movements which challenge the idea of open, inclusive, cohesive and democratic societies where civic participation and the enjoyment of rights make it possible to build a tolerant way of living together».

In this work we have carried out an initial analysis of the values of dignity, freedom, equality, and solidarity – that is, of the values on which, according to the preamble of the EU Charter of Fundamental Rights, the EU is founded. The analysis has been framed in a short account of the philosophical debates on those values and is based on the provisions of the Charter itself, as well as on the case law of the CJEU and the ECtHR.

The Charter has its roots in the very idea of fundamental rights as the best way to secure and realize such values as dignity, freedom, equality and solidarity; an idea that was born and grew in the European culture, nourished by philosophical theories, social movements and legal documents. In particular, we have identified, in the landscape of values

emerging from the Charter, the inheritance of four traditions in the history of ideas: Christianity, Republicanism, Liberalism, and Socialism.

Like the other legal documents on fundamental rights, the Charter does not provide an explicit definition of the basic values it is aimed to promote, which actually correspond to very polysemic and philosophically thick concepts. Nonetheless, the rights enshrined in it and the (sometimes unconventional) way in which they are distributed in its different Titles offer meaningful indications about the way in which it shapes those values. Furthermore, the case law of the European courts provides further clues as to how they are concretely understood.

While inspired by a number of international legal declarations and conventions on fundamental rights, as well as by the constitutional traditions of the EU Member States, the Charter has also elements of significant originality.

Title I articulates the value of human dignity at two different levels. On the one side, it establishes human dignity both as a fundamental right itself and as «part of the substance» of all the other rights laid down in the Charter. We have suggested that this should be understood as meaning that all the rights included in the Charter – with no distinction between civil, political, and social rights – have, at their core, a “dignity-component”, which must be secured even when those rights are restricted. Such dignity-component must be protected from violations that could occur in the territory of Member States. It also entails the duty of those States not to send back third-country nationals to their countries of origin if such countries are not safe ones and are not able to protect individuals from violations of their rights,

even if committed by private subjects. At the same time, Title I states a specific set of especially dignity-related rights<sup>1</sup>, thus conferring them a special value and place in the system of fundamental rights. We identified the unifying feature of such especially dignity-related rights in the fact that they express the Kantian idea that no human being can ever be treated only as a means for the satisfaction of someone else's ends, or reduced to a "thing".

In Title II, the Charter shapes freedom as a political goal, which has to be reached through the guarantee of fundamental rights, and which is complementary (rather than antithetical) to security. Such a relation between freedom and security is affirmed since the preamble of the Charter (par. 2), where the EU is presented as aiming at «creating an area of freedom, security and justice». There are relevant indications that have led us to conclude that the Charter embraces a substantive idea of freedom (understood as an effective possibility to exercise one's freedom), which may require the positive intervention of public authorities. Indeed, Title II includes rights that are not freedoms in a strict sense, but that may be conceived as necessary conditions for the effective enjoyment of those freedoms. This is the case, in particular, of the right to education (art. 14), the right to asylum (art. 18), and the right to protection in case of removal, expulsion or extradition (art. 19).

As regards equality, the Charter endorses different con-

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<sup>1</sup> Those rights include: the right to life; the right to the physical and mental integrity of the person; the right not to be tortured or subjected to inhuman or degrading treatment or punishment; and the right not to be reduced into slavery or forced to work.

cepts of it. While in the preamble it seems to assume the idea of basic or fundamental equality as a normative principle entitling every person to equal consideration, Title III significantly institutes a complementary relation between the principles of equal treatment and non-discrimination, on the one side, and the principle of equal opportunities, on the other. In particular, the Charter recognises the legitimacy and importance of differential treatment (and even of positive actions) when inequalities in the conditions of persons are such that it is not possible to equalize their opportunities by treating them in the same way. It is also significant that the Title on Equality includes a norm prescribing respect for cultural, religious and linguistic diversity (art. 22).

Finally, Title VI includes a set of heterogeneous rights, the different rationale of which corresponds, in our reading, to different understandings of the value of solidarity. In particular, while the cluster of workers' rights seems to share the traditional goal of re-equilibrating power imbalances within the labour market, other rights (prominently, the right to social security and social assistance, and the right to health care) are shaped as entitlements to benefits. These latter rights rest on the idea of equal opportunities for a minimally decent life as requiring at least the possibility of accessing those means that are necessary to fulfil basic needs. Therefore, there seems to be an undeniable connection between some of the rights included in Title IV on solidarity and the idea of a European model of Welfare State (as confirmed by the recently adopted declaration on the creation of a European Pillar of Social Rights). However, the Charter opens at least to another idea of solidarity, that is, solidarity

between generations, as art. 37 on the protection of environment demonstrates.

As it has been shown, all the four Titles can, and should, be interpreted adopting a gender perspective, considering how the single provision can differently affect women and men and valorising a conception of gender equality that is not limited to the principle of non-discrimination. As a matter of fact, women's rights and gender equality have received specific attention by the European institutions, an attention which has affected also EU legislation and policies concerning migrants and refugees.

Since its adoption (and even before its entry into force<sup>2</sup>), the Charter has been attracting increasing judicial attention, substantially influencing national judges and, to a certain extent, also the ECtHR<sup>3</sup>. Since the Charter became a binding instrument, in 2009, the number of cases in which its provisions were cited or argued before the CJEU have been increasing significantly (De Búrca 2013). However, its potential role in promoting an increased protection of fundamental rights is continuously in struggle with the limits of its field of application and personal scope.

Despite the “spillover effects” of the EU legislation on matters of fundamental rights, the principle of subsidiarity and the limited nature of the competences of the EU are clearly reaffirmed in art. 51 of the Charter, as well as in its

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<sup>2</sup> See CJEU, *Parliament v. Council*, 2006 (C-540/03) and CJEU, *Per-gan Hilfsstoffe für industrielle Prozesse v. Commission*, 2007 (T-474/04).

<sup>3</sup> The most remarkable example of such influence may probably be found in ECtHR, *Schalk and Kopf v. Austria*, 2010 (application no. 30141/04).

several provisions which state that the rights enshrined in them are recognized in accordance with the national laws on the subject and/or with EU law, when relevant. There is therefore a great concern to prevent EU law undue interference with the sovereignty of Member States, which may weaken the Charter's potential.

Even more relevant are the limits of the personal scope of the Charter, that is, the fact that it is still grounded, in many respects, on the ambivalent function of citizenship as a both inclusive and exclusionary political and legal institution. Therefore, the Charter actually reproduces the mechanism of overlapping "circles" of equals in status, rights and duties, thus creating, at the same time, relations of equality and inequality. And, as emerges in the case law mentioned throughout the present work, this especially impinges on the migrants' access to some of the rights enshrined in the Charter. Under this respect, the Charter is more similar to national constitutions, which include both human rights and citizen's rights, than to international human rights instruments. That is no surprise, insofar as the Charter refers to a specific, even if supranational, political community.

In the public debate, references to European values are sometimes used to support restrictive migration and refugee policies aimed at protecting European cultural traditions. However, according to our reconstruction, some elements in the Charter seem to point in a different direction. Indeed, despite the limits of the field of application and personal scope of the Charter, the values and the corresponding rights it expresses – with their critical tension – still can represent a starting point to imagine a more inclusive Europe, capable of meeting its cosmopolitan responsibility. Should this re-

sponsibility be taken seriously, Europe could then become a place in the world where respect for individual rights of everyone can secure a social space for peacefully cohabitation of differences.

In particular, some of the principles emerged from our analysis, that have been affirmed in the Charter and in the case law of the European courts, appear particularly significant not only for EU citizens but also for migrants and refugees: the dignity-component of every right, which sets a limit to every form of oppression of each human being, irrespective of her/his national origins; the link that the Charter institutes between liberty and security, which contrasts the current rhetorical idea that national security can be attained only by restricting some of the fundamental freedoms of non-citizens (and, sometimes, of citizens too); the substantive conception of freedom as something that cannot be secured only by abstaining from interfering with individual conduct and by imposing restrictions on such interference, but that also requires a commitment of institutions to promote the conditions for its effective exercise; an idea of equality that conceives it not only as non-discrimination and equality of opportunities, but explicitly includes respect for differences; a rich conception of solidarity that insists on workers' rights but, at the same time, prospects a European welfare system able to secure for everyone (citizens and non-citizens) at least the possibility to access to those means which are necessary to fulfil basic human needs of women and men.

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