

Conceptual underpinnings of the EU's commitment to human rights

Lorena Sosa and Alexandra Timmer

A. Introduction

How human rights are envisioned have practical consequences. In the words of Beitz, 'to say that something is a human right is to say that social institutions that fail to protect the right are defective'.¹ That said, human rights are deeply contested and continuously in a process of revision and development. By proclaiming human rights as a core value of the European Union (EU or the Union), and by incorporating the concept in the Treaties, the EU has thus expressed its commitment to a complex and disputed idea. At a very abstract level there is consensus that human rights are the inalienable rights to which each person is entitled by being human. In other words, these rights are inherent in human beings (ie they do not have to be earned or granted); they are inalienable (ie they cannot be forfeited); and they are equally applicable to all. But beyond this abstract level, different interpretations exist.

This chapter focuses on EU conceptions of human rights. Concepts do not have clear boundaries, and they are dynamic in the sense that their meaning can change over time. Where different, possibly competing, interpretations exist of a concept, we speak of 'conceptions'.² The aim of this chapter is to elucidate the content of the EU's conceptions of human rights, and the major conceptual challenges the EU faces in developing human rights action. While most of this volume will focus on questions of operationalisation, the present chapter is more theoretical. In our opinion, however, questions of conceptualisation and operationalisation partially overlap; concepts are formed in practice and the practice is informed by underlying concepts. We take the view that human rights concepts are the result of social debate and social movements.³ We recognise, however, that not everyone, notably natural law and positive law scholars, would share this view.⁴

The chapter discusses both the EU's internal and external conception of human rights, and some of the tensions between them. The first tension appears in the terminology; the term 'fundamental rights' is commonly used to denote rights within the EU (eg the EU Charter of Fundamental Rights), while the term 'human rights' is used in external action (eg the EU Strategic Framework on Human Rights and Democracy). Legal literature is not clear

¹ Charles R Beitz, 'Human Rights and the Law of Peoples' in Deen K Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (CUP 2004) 210.

² See, eg, Elisabetta Lalumera, 'On the Explanatory Value of the Concept-Conception Distinction' (2014) 8(3) *Rivista Italiana di Filosofia del Linguaggio* 73.

³ Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philos & Public Aff* 315 (hereafter Sen, 'Elements of a Theory of Human Rights'); Charles R Beitz, *The Idea of Human Rights* (OUP 2009) (hereafter Beitz, *The Idea of Human Rights*).

⁴ Marie-Bénédicte Dembour, 'What are Human Rights? Four Schools of Thought' (2010) 32 *Hum Rights Q* 1.

on what explains this distinction, and many commentators use the terms interchangeably.⁵ EU scholars usually refer to 'fundamental rights'.

The sources used in our conceptual analysis are primarily legal; eg the EU Charter of Fundamental Rights (CFR or Charter), and key policy documents, such as the EU Strategic Framework on Human Rights and Democracy. Secondary sources include human rights literature and our own findings from previous research, which partly draw on interviews with officials of the EU and other organisations. The chapter is structured as follows: section B examines the conceptions of human rights within the EU. First, subsection B.1 describes the current state of affairs, both at the internal and the external level, and then subsection B.2 discusses some of the emerging challenges, such as the impact of the economic mission of the EU on conceptualisations of human rights (B.2.a), and the difficulties that arise when attempting to conceptualise contested notions such as substantial universality (B.2.b) or a universal and inclusive human rights legal subject (B.2.c). In section C we discuss opportunities to coin more inclusive and coherent conceptualisations. The chapter concludes with a few final observations (section D).

B. The EU's conceptions of human rights

1. State of affairs

a) Internal

The CFR is the most authoritative formulation of the EU's conceptualisation of human rights within the Union. In this section, we analyse the EU's conception of human rights as codified in the Charter, supplemented with analysis of key policy documents. Due to the constraints of this chapter, we focus on core elements of the EU's concept of human rights, namely human dignity, positive and negative obligations, equality, and indivisibility.

Human dignity is considered a founding value of the EU, as mentioned in Article 2 of the Treaty on European Union (TEU).⁶ The Charter presents human dignity as the cornerstone of all human rights, as well as a fundamental right in itself.⁷ Yet, despite the prominence of dignity in the legal architecture of the EU, its precise meaning is unclear and not elaborated to any great extent except in the Charter.⁸ Chapter I of the Charter is entitled 'Dignity' and includes a set of 'core prohibitions'.⁹ Article 1 states that: 'Human dignity is inviolable. It must be respected and protected.' The other provisions in this chapter are the right to life (Article 2), right to the integrity of the person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), and prohibition of slavery and forced labour (Article 5). Many academic commentators have questioned what is the added value of the notion of dignity, and to what extent it is legally enforceable.¹⁰ Dupré argues

⁵ See eg Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010) 112.

⁶ The Court of Justice already held that the right to human dignity is part of EU law, before the Charter or the TEU became legally binding. See Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECLI:EU:C:2001:523, para 70.

⁷ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

⁸ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing 2015) 3 (hereafter Dupré, *The Age of Dignity*).

⁹ *ibid.*, 77.

¹⁰ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655. In relation to EU Law, see eg Antonio-Carlos Pereira-Menaut and María-Carolina Pereira-Sáez, 'Human Dignity and European Constitutionalism: Flatus Vocis or Ratio Decidendi?' in Rainer Arnold (ed), *The Convergence of the Fundamental Rights Protection in Europe* (Springer 2016); Dupré, *The Age of Dignity* (n 8).

that the codification of dignity in the Charter has led the EU to embrace a fuller notion of humanity—moving beyond specific nationalities or citizenship, and confirming that human rights are for everyone.¹¹ She writes that through the notion of dignity, ‘the EU acknowledges and protects a comprehensive definition of human beings, moving beyond a purely economic logic, within which individuals can be reduced to their ability as economic agents, with the consequence that they become worthless when they cannot (or can no longer) actively participate in economic life.’¹² We will return to this question of who is the legal subject of EU human rights below (section B.2.c).

While the Charter’s chapter focusing on dignity comprises negative obligations, the following chapters include positive obligations for both the Member States and the EU institutions. Thus, to borrow a metaphor from the EU Fundamental Rights Agency (FRA), the EU’s conception of human rights acts both as sword and shield.¹³ Positive obligations are obligations that require active measures to ensure the protection and realisation of fundamental rights, unlike negative obligations, which require the state to refrain from interfering with rights. Traditionally, EU fundamental rights protection was conceived as a purely negative exercise: fundamental rights were a restriction on the EU’s ability to act.¹⁴ That traditional view is changing, and the Charter has played an important role in that process. An example of a Charter right that includes positive obligations is Article 26 which focuses on the right of persons with disabilities to integrate and participate in the community. Also, the Treaty on the Functioning of the European Union (TFEU) includes positive human rights obligations, such as the duty to mainstream gender in all the activities of the Union and to ‘promote equality between men and women’ (Article 8); the less strongly worded duty to ‘take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’ (Article 9); and finally, the duty to ‘combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’ (Article 10). Thus, at the conceptual level, human rights clearly entail both positive and negative obligations—which is also in line with international human rights law and the European Convention on Human Rights (ECHR). EU secondary law (including directives and regulations) has given concrete content and direction to the positive obligations mentioned in the Charter and the treaties.

There is, however, some resistance to the adoption of positive measures. One clear example is the situation regarding the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation.¹⁵ Ten years after its submission, although adopted by the Commission, the proposed directive has not entered into force due to the inability to reach unanimous

¹¹ Dupré, *The Age of Dignity* (n 8) 78.

¹² Catherine Dupré, ‘Laws Born Out of Trauma: in Defence of the EU’s Conception of Human Rights’ (*LSE Blogs*, 19 May 2016) <<http://blogs.lse.ac.uk/brexit/2016/05/19/laws-borne-out-of-trauma-in-defence-of-the-eus-conception-of-human-rights>> accessed 10 September 2020.

¹³ European Union Agency for Fundamental Rights, *Fundamental Rights: Challenges and Achievements in 2013—Annual Report 2013* (FRA 2013) 12. (‘Fundamental rights should not be reduced to a function of imposing limits on legislation and public administration. Fundamental rights have a dual role: they do not act just as a shield; they are also an enabling “sword” that can point towards the design, adoption and implementation of certain initiatives.’)

¹⁴ See eg Malu Beijer, *The Limits of Fundamental Rights Protection By the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017) 5–8 (hereafter Beijer, *Positive Obligations*); Olivier De Schutter, *The New Architecture of Fundamental Rights Policy in the EU* (University of Louvain 2007) 8–10.

¹⁵ European Commission, ‘Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation’ COM/2008/0426 final.

approval by the Council. The proposed directive includes a provision on 'positive action', yet it also states that 'the Member States have different traditions and practices regarding positive action, and this article lets Member States provide for positive action but does not make this an obligation.'¹⁶

Nevertheless, the above-mentioned rights that entail positive obligations point to a related core element of the EU's conception of human rights: the notion of indivisibility. The preamble to the Charter mentions that the values of human dignity, freedom, equality, and solidarity are indivisible. Indivisibility is one of the basic principles of international human rights protection, globally recognised in the Vienna Declaration of 1993,¹⁷ with roots dating back to the Universal Declaration of Human Rights (UDHR).¹⁸ Indivisibility primarily denies there is any hierarchy between civil, political, economic, social, and cultural rights, and rejects there is any dichotomy between positive and negative rights. It also implies that full realisation of political and civil rights is needed for the enjoyment of economic, social, and cultural rights (ESCR), and vice versa. Nickel defines indivisibility as 'the idea that no human right can be fully realised without fully realising all other human rights.'¹⁹ One example is the right to join a trade union (Article 12 CFR), which is a civil and political right connected to the freedom of association, and that, for instance, subsequently contributes to the enjoyment of the social rights connected to employment (Articles 28, 30, 31, 32, 33).

The Charter's list of fundamental rights is broad, as such includes civil, political, economic, social, and cultural rights. After the first chapter on dignity, the Charter includes chapters on freedoms, equality, solidarity, citizen's rights, and justice. In this way the Charter eschews the familiar categorisation of civil and political rights on the one hand, and social economic and cultural rights on the other. The chapter entitled 'Solidarity', in particular, includes social rights, for example, related to working life (eg Article 31 on fair and just working conditions) and social rights of the population in general (eg Article 35 on health care).²⁰ However, social rights are also found in other chapters (eg Article 14, the right to education, in Chapter 2, 'Freedoms').

Despite the official adherence to indivisibility, however, the Charter undercuts this notion by introducing a distinction between rights and principles in Article 52. Unlike rights, the application of principles requires legislative acts. Thus, principles are not directly justiciable.²¹ This distinction has been termed the 'internal fault line within the text of the Charter'.²² The Charter contains this differentiation because of the Member States' diverging views on social rights. The United Kingdom, in particular, did not want to accept the

¹⁶ *ibid*, art 5.

¹⁷ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

¹⁸ Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2010) (hereafter Whelan, *Indivisible Human Rights*).

¹⁹ James W Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 *Hum Rights Q* 984.

²⁰ Niilo Jääskinen, 'Fundamental Social Rights in the Charter—Are They Rights? Are They Fundamental?' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (Hart 2014) 1707 (hereafter Jääskinen, 'Fundamental Social Rights').

²¹ Art 52(5) of the Charter explains the distinction between rights and principles as follows: 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the EU, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'

²² Bruno de Witte, 'The Trajectory of Fundamental Social Rights in the European Union' in Grainne de Burca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005) 160.

label ‘economic and social rights’, and preferred the word ‘principles’ instead.²³ However, the Charter provides little guidance as to which provisions can be considered rights and which provisions are considered principles.²⁴

The EU’s somewhat uneasy position on social rights is also reflected in its organisational structure. Whereas fundamental rights thematically form part of the Directorate-General (DG) Justice of the European Commission, social protection and social inclusion fall under DG Employment, Social Affairs and Inclusion. This is just one example that shows that while conceptually speaking the EU might adhere to the idea of indivisibility of civil and political rights with ESCR, in practice these two sets of rights are approached separately.

Cutting across these various areas of rights is the right to equality. The Charter includes both a formal and a substantive conception of equality.²⁵ The formal conception of equality is evident in such provisions as Article 20 (equality before the law) and Article 21 (prohibition of discrimination on certain enumerated grounds). More substantive conceptions appear, for instance, in the provision on gender equality (Article 23), which mandates positive action to achieve it, and in the provision on the rights of persons with disabilities (Article 26). In the sections below, we discuss some of the main challenges related to the right to equality.

b) External

Universality is the key concept in the EU’s external conceptualisation of human rights. Just as indivisibility, universality is one of the basic principles of international human rights protection. The Strategic Framework on Human Rights and Democracy, which is the main policy document setting out the EU’s vision for human rights abroad, puts much emphasis on universality.²⁶ However, universality is a complex concept with various dimensions. There are various ways in which human rights can be considered as universal. Firstly, universality means that all human beings possess human rights; what Donnelly calls ‘conceptual universality’.²⁷ Secondly, there are a list of core universal rights, which Donnelly calls ‘substantive universality’.²⁸ Thirdly, the notion of ‘international legal universality’ points out that nearly all countries in the world endorse the UDHR and the two International Human Rights Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights).²⁹ The EU Strategic Framework on Human Rights and Democracy refers to universality in all three ways: it refers to the universality of rights-holders, it suggests that there is a list of rights that is universally protected, and it calls on all States to implement the provisions of the UDHR and the two Covenants.³⁰

²³ Catherine Barnard, ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty—EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 275.

²⁴ eg Beijer, *Positive Obligations* (n 14) 132–35.

²⁵ On the differences between these concepts of equality, see eg Sandra Fredman, *Discrimination Law* (OUP 2011).

²⁶ Council of the European Union, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, Doc No 11855/12, 1 (hereafter EU Strategic Framework and Action Plan).

²⁷ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Hum Rights Q* 282–83 (hereafter Donnelly, ‘Relative Universality’).

²⁸ *ibid.*

²⁹ *ibid.*, 288–89.

³⁰ EU Strategic Framework and Action Plan (n 26) 1–2 (‘The EU reaffirms its commitment to the promotion and protection of all human rights, whether civil and political, or economic, social and cultural. The EU calls on all States to implement the provisions of the Universal Declaration of Human Rights and to ratify and implement the key international human rights treaties, including core labour rights conventions, as well as regional human rights instruments. The EU will speak out against any attempt to undermine respect for universality of human rights.’).

The language of universality, however, seems to have lost some of its pre-eminence in EU external action. Whereas the 2012 Action Plan on Human Rights and Democracy included a prominent chapter on 'promoting the universality of human rights', the term 'universality' was almost completely dropped from the 2015–2019 Action Plan (apart from the preamble). Instead, this document shifted the focus towards 'Boosting the Ownership of Local Actors'.³¹ This is in recognition of the fact that while human rights are considered as universal in conception, they are local in implementation.

2. Challenges

In this section we discuss challenges to EU human rights. There are different types of challenges to human rights, some being incidental or connected to specific circumstances and thus related to implementation. In this section, however, we highlight challenges that are conceptual in nature and derive from the very essence of human rights (evolving ethical and legal claims, which are the product of social debate and social movements) and the inherent structure of the EU. As such, these challenges are persistent and need to be assessed and addressed in a constant and sustained manner, yet mindful of the time and context of their particular manifestations.

a) **The impact of the EU's economic mission on its conceptualisation of human rights**
At the very heart of the EU and the EU's role as human rights actor lies a tension. This results from the fact that the EU is bound to protect human rights while ensuring the four economic freedoms of the internal market (free movement of goods, persons, services, and capital). The tension between different aspects of the EU's mission is a complex issue, which has many different ramifications.³² On the legal level, the Court of Justice of the European Union (CJEU) has been asked to rule on the relationship between fundamental rights and market freedoms.³³ For example, it has been confronted with the question whether the free movement of goods could be restricted in order to protect fundamental rights.³⁴ According

³¹ Council of the European Union, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015–2019' (*Foreign Affairs Council* 2015) actions 1–10 <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015-2019_en.pdf> accessed 10 September 2020.

³² Armin Von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 CML Rev 1307.

³³ Case C-36/02 *Omega Spielhallen—und Automatenaufstellungs-GmbH/Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECLI:EU:C:2004:614; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECLI:EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECLI:EU:C:2007:809. These cases have generated a lot of scholarly debate. See eg ACL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 ILJ 126; Andreas Bücken and Wiebke Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms After Viking, Laval and Ruffert* (Nomos 2011); Nik J de Boer, 'Justice, Market Freedom and Fundamental Rights: Just How Fundamental are the EU Treaty Freedoms? A Normative Enquiry based on the Political Theory of John Rawls into whether there should be a Hierarchy between Fundamental Rights and the Treaty Freedoms' <<https://web.archive.org/web/20180329055758/https://renforce.rebo.uu.nl/wp-content/uploads/2013/12/de-Boer-Treaty-Freedoms-and-Fundamental-Rights-working-paper-Nik-de-Boer1.pdf>> accessed 10 September 2020; Sybe A de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 Utrecht L Rev 169 (hereafter de Vries, 'Balancing Fundamental Rights with Economic Freedoms').

³⁴ eg Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECLI:EU:C:2003:333.

to the CJEU there is no hierarchy between fundamental rights and the four freedoms. This position has both supporters and detractors.³⁵

Our concern here, however, is on the conceptual level. What is the impact of the EU's economic mission on the way it conceptualises human rights? The EU's economic objectives have shaped its conception of human rights from the very beginning. At its foundation, the European integration project was premised on the idea that Member States have a strong national social welfare system and that the common market would not require harmonisation of labour standards (the idea of 'embedded liberalism').³⁶ Economic integration, it was thought, would result in an 'upwards convergence' in living standards.³⁷ Thus, the social policy dimension of the European Community was initially very narrow.³⁸ The same applies to human rights—as is well known, at its foundation, the European community left human rights largely to the Council of Europe's ECHR.³⁹ From these earliest inceptions the EU has come a long way, and both its social policy and its commitment to human rights have become much broader and institutionally embedded in the Union. Yet the EU's economic mission continues to shape its human rights agenda, both on the level of operationalisation—for example, when it comes to human rights conditionality in trade agreements⁴⁰—and on the level of conceptualisation.

Liberalism permeates the EU's conceptions of human rights. This is evident in relation to social and economic rights, as has already emerged in the discussion above. Scholars have identified many frictions between the protection and promotion of social and labour rights and the traditional understanding of EU internal market law.⁴¹ Here, questions of conceptualisation partially overlap with issues of EU competence. Fredman argues that 'as traditional social rights are concerned, the coverage at EU level remains haphazard and incomplete.'⁴² For example, while the Charter includes a provision on the right to strike (Article 28 of the Charter), Article 153(5) TFEU stipulates that the EU does not have legislative competence in this field. Strong regulation, on the other hand, does exist in the field of gender equality and non-discrimination in the sphere of employment.⁴³ Yet efforts to enact non-discrimination legislation outside the sphere of employment,⁴⁴ such as education and health care, are

³⁵ A supporter is, for example, de Vries 'Balancing Fundamental Rights with Economic Freedoms' (n 33). Detractors are, for example, Dagmar Schiek and Liz Oliver, *EU Social and Labour Rights and EU Internal Market Law* (study for European Parliament 2015) <[www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOI_STU\(2015\)563457_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOI_STU(2015)563457_EN.pdf)> accessed 10 September 2020 (hereafter Schiek and Oliver, *EU Social and Labour Rights and EU Internal Market Law*).

³⁶ Diamond Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 ELJ 303 (hereafter Ashiagbor, 'Unravelling the Embedded Liberal Bargain').

³⁷ Art 117 Treaty of Rome. For discussion see eg Frank Vandenbroucke, 'The Idea of a European Social Union: A Normative Introduction' in Frank Vandenbroucke, Catharine Barnard, and Geert De Baere (eds), *A European Social Union after the Crisis* (CUP 2017) 22.

³⁸ Ashiagbor, 'Unravelling the Embedded Liberal Bargain' (n 36) 307–08.

³⁹ Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 AJIL 649.

⁴⁰ Nicolas Hachez and Axel Marx, ch 16, in this volume.

⁴¹ eg Schiek and Oliver, 'EU Social and Labour Rights and EU Internal Market Law' (n 35) 11; Miguel Poiares Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in Philip Alston, Mara R Bustelo, and James Heenan (eds), *The EU and Human Rights* (OUP 1999); Ashiagbor, 'Unravelling the Embedded Liberal Bargain' (n 36); Sandra Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space' (2006) 12 ELJ 41 (hereafter Fredman, 'Fundamental Rights in the EU Social Space').

⁴² Fredman, 'Fundamental Rights in the EU Social Space' (n 41) 43.

⁴³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

⁴⁴ European Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426 final.

blocked by the Council, as discussed above. So even in the area of gender equality and non-discrimination, where EU law is well developed, the EU's conception of the rights at stake remains largely limited to the economic sphere.

Whether the economic crisis has changed the premise of European integration in any fundamental way is questionable.⁴⁵ The crisis has certainly shaken faith in the idea that membership to the Union would increase the standard of living. However, the response of the Troika (consisting of the European Commission, the European Central Bank, and the International Monetary Fund) was to impose austerity on the countries which were most affected (Greece, Ireland, Portugal, Spain, and Cyprus). These countries were forced to slash social benefits. The Troika's reforms have been widely criticised for their ultra-liberal outlook on market integration, at the expense of social policy.⁴⁶ The European Pillar of Social Rights,⁴⁷ first announced by the European Commission in 2016, was meant to off-set some of these problems. It restates the EU's social rights in twenty principles and rights. It mostly repeats the pre-existing EU social acquis which was partly described above.⁴⁸ The Pillar has put social justice more visibly on the EU agenda, but it is arguably more an exercise in window dressing than a comprehensive view on social rights. The biggest drawback of the Pillar, however, is not so much on the conceptual level as on the level of implementation: it contains few concrete measures by which it can deliver on its vision. Deakin formulated it succinctly: 'the Pillar does not suggest appropriate means for achieving its supposed ends.'⁴⁹

b) Challenges regarding substantive universality

As mentioned above, substantive universality suggests that the list of rights people enjoy is supposed to be a universal one. This aspect of universality has been much critiqued ever since the UDHR was proclaimed.⁵⁰ In particular, there is a longstanding debate about the tension between human rights universalism on the one hand and the recognition of cultural and social diversity on the other.⁵¹ Critical human rights scholars and non-Western voices have castigated human rights as a Western invention, synonymous with Western liberalism, which the West uses to further its own interests under the flag of universalism.⁵² Interviews made it clear that officials from the Commission and the European External Action Service (EEAS) are keenly aware of this critique. Indeed, the EU Special Representative for Human Rights, Stavros Lambrinidis, has called this one of the most important challenges confronting the EU. He warns against 'dangerous attacks on Human Rights universality in the

⁴⁵ eg Frank Vandenbroucke, Catharine Barnard, and Geert De Baere (eds), *A European Social Union after the Crisis* (CUP 2017) (hereafter Vandenbroucke, Barnard, and De Baere, *A European Social Union*).

⁴⁶ eg Simon Deakin, 'What Follows Austerity? From Social Pillar to New Deal' in Vandenbroucke, Barnard, and De Baere, *A European Social Union* (n 45) (hereafter Deakin, 'What Follows Austerity?'); Costas Douzinas, *Philosophy and Resistance in the Crisis: Greece and the Future of Europe* (Polity 2013).

⁴⁷ Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights, C(2017) 2600 final.

⁴⁸ Leyre Maiso Fontecha, 'The European Pillar of Social Rights' (2017) ERA Forum 149.

⁴⁹ Deakin, 'What Follows Austerity' (n 46) 208.

⁵⁰ eg Executive Board American Anthropological Association, 'Statement on Human Rights' (1947) 49 *Amer Anthropol* 539.

⁵¹ eg Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001) (hereafter Brems, *Human Rights*); András Sajó (ed), *Human Rights with Modesty. The Problem of Universalism* (Martinus Nijhoff 2004); Donnelly, 'Relative Universality' (n 27).

⁵² See eg Costas Douzinas, *The End of Human Rights* (Hart 2000); Ratna Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28 *Syd LR* 665 (hereafter Kapur, 'Human Rights in the 21st Century'); Makau Mutua, 'The Ideology of Human Rights' (1996) 36 *Va J Intl L* 589; and Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 *Harv Intl LJ* 201.

name of cultural relativism' and emphasises that 'human rights are the universal language of the powerless against the cultural relativism of the powerful'.⁵³

The critique of universalism first emerges in practice. It is when human rights policies need to be implemented in practice that the ideal of universality is confronted with the local reality. This holds true for EU internal as well as external action. Internally, the dilemma is how to uphold EU human rights norms—such as freedom of speech and gender equality—while at the same time respecting the identity of Member States (as is demanded in Article 4(2) TEU), when Member States have democratically elected governments that question these norms. An aspect of this dilemma is that, when national identity is defined around ethnic or cultural markers, it excludes groups within the State that do not possess these markers, such as minorities, from the protection of human rights and from democratic participation.⁵⁴ They become, thus, 'the others'.⁵⁵ A prime example now is Poland.⁵⁶

Externally, dilemmas arise in relation to the recognition of the equal rights of the Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) community⁵⁷ or historically relegated groups, such as the Dalit in India.⁵⁸ Yet such resistance to the formal recognition of LGBTI or minority rights confronts the EU with its own inconsistencies in the advancement of substantial universality, in relation to the very same sets of rights it promotes abroad. One example of the practical challenges to substantial universality within the EU is the long resistance of different Member States to the Proposal for a Council Directive on equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation that we mentioned above. The periodic reports of the FRA on the vulnerable position of the Roma community and other minorities in Europe, are also painful reminders of these contradictions.⁵⁹

Tension between universalism and diversity is definitely a conceptual question. In previous research, we compared the EU's conceptions of human rights, democracy, and rule

⁵³ 'Human Rights is the Universal Language of the Powerless—EU Special Rep. for Human Rights Lambrinidis' (*World Youth Alliance Blog*, 16 October 2014) <www.wya.net/op-ed/human-rights-is-the-universal-language-of-the-powerless-eu-special-rep-for-human-rights-lambrinidis/> accessed 10 September 2020.

⁵⁴ The disadvantaged position of racial and ethnic minorities has been largely examined in academia and regularly addressed in Europe by the European Union Agency For Fundamental Rights; see eg the results of the Second European Union Minorities and Discrimination Survey, available at <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf> accessed 10 September 2020. For feminist critiques arguing the exclusion of women within minorities, see eg Rebecca Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994); Karen Knop (ed), *Gender and Human Rights* (OUP 2004); Dianne Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and Its Others* (CUP 2006) (hereafter Otto, 'Lost in Translation').

⁵⁵ Kapur, 'Human Rights in the 21st Century' (n 52) 675.

⁵⁶ On this issue, it is interesting to follow the work of the Standing Group on Identity of the European Consortium of Political Research. Regarding the reconstruction of Polish national identity, see Marzena Kisielowska-Lipman, 'Poland's Eastern Borderlands: Political Transition and the Ethnic Question'; and Luiza Bialasiewicz, 'Upper Silesia: Rebirth of a Regional Identity in Poland' in Judy Batt and Katarzyna Wolczuk (eds), *Region, State and Identity in Central and Eastern Europe* (Routledge 2013); Magdalena Kania-Lundholm and Simon Lindgren, 'Beyond The Nation-State Polish National Identity and Cultural Intimacy Online' (2015) 19(3) *National Identities* 293–309.

⁵⁷ Katharina Häusler and others, 'Human Rights, Democracy and Rule of Law: Different Organisations, Different Conceptions?' (2016) FRAME Report 3.4, 45–50, and 94–97 <www.fp7-frame.eu/wp-content/uploads/2016/11/Deliverable-3.4.pdf> accessed 10 September 2020.

⁵⁸ Balázs Majtényi, Lorena Sosa, and Alexandra Timmer, 'Human Rights Concepts in EU Human Rights Dialogues' (2016) FRAME Report 3.5, 20–21 <www.fp7-frame.eu/wp-content/uploads/2016/11/Deliverable-3.5.pdf> accessed 10 September 2020 (hereafter Majtényi, Sosa, and Timmer, 'Human Rights Concepts in EU Human Rights Dialogues').

⁵⁹ For an overview of such reports, see the FRA website <<https://fra.europa.eu/en>> accessed 10 September 2020.

of law, with those conceptions in China, India, Peru, and South Africa.⁶⁰ We found there are significant differences in human rights conceptualisations, especially between the EU and China. What animates such differences are the diverging views on social justice and the role of the state in achieving that. These diverging views on what constitutes justice have deep historical roots. In the four countries we reviewed, experiences of poverty, inequality, and struggles for independence have helped shape and drive the domestic conceptions of human rights.⁶¹ For instance, Xu points out that, considering China's large population and the imbalanced stages of development in its different regions, the country must put economic and social rights first. Therefore, China has to ensure the people's right to subsistence and the right to development for the purpose of social interest and social security.⁶² The right to subsistence is, thus, the primary and basic element of human rights in China, the scope of which challenges the traditional divide between civil and political rights on one hand, and economic, social, and cultural rights on the other. It covers the right to life, fundamental freedoms, and the respect for human dignity, while at the same time it guarantees basic living standards.⁶³ Similarly, the Indian Supreme Court has held that: 'In any organized society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter.'⁶⁴

This is closely related to another aspect of substantial universality (and the critiques), namely the indivisibility of rights, discussed above. Indivisibility is often formally endorsed, while in practice different sets of rights received diverse levels of attention, and above all, commitment. This is no surprise, since debates over the indivisibility of human rights are inherently ideological and date back to the Cold War period.⁶⁵ Although historically discussions represented an East/West confrontation, in recent decades the debate has taken a North/South dimension. For instance, developing countries have united since the 1970s in the struggle for the recognition and promotion of the right to development, deeply connected to economic, social, and cultural rights,⁶⁶ while Europeans emphasised the pre-eminence of civil and political rights.⁶⁷

The different standing of various human rights is clearly perceived in the external dimension of EU's human rights policies, particularly when the agendas of Human Rights Dialogues with third countries and international organisations are set.⁶⁸ In such cases, the

⁶⁰ Lorena Sosa and others, 'Conceptions of Human Rights, Democracy and the Rule of Law in Selected Third Countries' (2015) FRAME Report 3.3 <www.fp7-frame.eu/wp-content/uploads/2017/03/Deliverable-3.3.pdf> accessed 10 September 2020 (hereafter Sosa and others, 'Conceptions of Human Rights').

⁶¹ *ibid.*, 86.

⁶² Xianming Xu, *The Study of Human Rights*, vol 2 (Shangdong People's Press 2012) 4.

⁶³ Xi Jieren, *The Encyclopedia Dictionary of the Scientific Development* (Shanghai Lexicographical Publishing House 2007) 667.

⁶⁴ *Chameli Singh and Others v State of Uttar Pradesh and Another* 1996 (2) 549 SCC para 8.

⁶⁵ Whelan, *Indivisible Human Rights* (n 18); Asbjørn Eide, 'Interdependence and Indivisibility of Human Rights' in Yvonne Donders and Vladimir Volodin (eds), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (UNESCO Publishing 2007).

⁶⁶ Arjun Sengupta, 'Right to Development as a Human Right' (2001) 36 *Econ Polit Wkly* 2527.

⁶⁷ Richard Balme, 'The European Union, China and Human Rights' in Zaki Laidi (ed), *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences* (Routledge 2008) 152; Elena Jurado, 'Assigning Duties in the Global System of Human Rights: The Role of the European Union' in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave Macmillan 2006) 128.

⁶⁸ Majtényi, Sosa, and Timmer, 'Human Rights Concepts in EU Human Rights Dialogues' (n 58), particularly in relation to India and China.

agendas of the Human Rights Dialogues only list human rights with a relatively strong level of protection within the EU. Issues such as social rights, the rights of migrants and asylum seekers, and the rights of national and ethnic minorities, although intensely debated issues within the EU, are missing from the priorities' list.

c) Conceptualising a universal and inclusive legal subject of EU human rights

In principle, the EU adheres to the idea that all human beings possess human rights. Yet, is this so in practice? How is the legal subject of EU law imagined? Jääskinen summarises the classical EU legal subject as 'an economically active adult exercising free movement and non-discrimination rights and seeking judicial protection thereof'.⁶⁹ Several authors, particularly feminist ones, have explained how being 'economically active' relates to particular ideas of the body, promoting an ideal—a norm—and leading to the exclusion, and even disciplining, of bodies which deviate from that norm because of their sex, their physical characteristics, or their age, being either too young or too old.⁷⁰ In response to the biased depiction of the 'normal' subject of human rights, there have been several efforts aimed at finding the conditions and conceptualisations capable of producing 'inclusive universality'.⁷¹ Two of these are particularly useful for our analysis of conceptualisations of the EU legal subject, namely, vulnerability and intersectionality.

i) *Vulnerability and intersectionality*

Vulnerability theory offers a more inclusive conceptualisation of the legal subject, shedding light on the universality and indivisibility of human rights.⁷² It describes the human condition and the situation in which certain individuals find themselves, and suggests the proper response to this condition. As Martha Fineman, one of the foremost vulnerability theorists, emphasises: vulnerability is universal and unavoidable.⁷³ People are vulnerable because they have bodies (in other words, they are embodied) and because they are social beings embedded in relationships.⁷⁴ The notion of 'embedded vulnerability' highlights the importance of institutions in providing resources to face and overcome the difficulties related to 'embodied vulnerability'.

Yet, institutions can also create vulnerability by setting up and sustaining unequal systems of power.⁷⁵ Vice versa, they can contribute to human resilience by challenging social inequality and adopting empowering measures. The interconnection of systems of oppression operating through multiple categories of distinction and the complexity of inequality is

⁶⁹ Jääskinen, 'Fundamental Social Rights' (n 20) 1709.

⁷⁰ eg Otto, 'Lost in Translation' (n 54).

⁷¹ Brems, *Human Rights* (n 51).

⁷² Joana Abrisketa and others, 'Human Rights Priorities in the European Union's External and Internal Policies: An Assessment of Consistency with a Special Focus on Vulnerable Groups' (2015) FRAME Report 12.2 <www.fp7-frame.eu/frame-reps-12-2/> accessed 10 September 2020; Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan 2010); Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the Case Law of the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 147.

⁷³ Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory L J* 251 (hereafter Fineman, 'The Vulnerable Subject and the Responsive State').

⁷⁴ Martha Albertson Fineman, 'Equality and Difference—The Restrained State' (2015) *Emory University School of Law Research Paper* 15, 348, 209 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591689##> accessed 10 September 2020.

⁷⁵ Veronica Beechey, 'On Patriarchy' (1979) 3 *Fem Rev* 66; Bonnie Thornton Dill, 'Race, Class and Gender' (1983) 9 *Fem St* 131; Patricia Hill Collins, 'It's All in the Family: Intersections of Gender, Race, and Nation' (1998) 3 *Hypatia* 62; Joan Acker, 'Inequality Regimes: Gender, Class, and Race in Organizations' (2006) 20 *Gender Soc* 441.

effectively captured by intersectionality. This notion challenges traditional legal approaches to discrimination and inequality—which hinge on a closed list of prohibited grounds of discrimination that can only be invoked one at a time—and introduces a structural analysis of inequality, moving from a formal ‘equal treatment’ approach towards a substantial view of inequality.⁷⁶ It encourages an examination of human rights violations in light of the interconnections between gender, race, class, and other social categories of distinction.⁷⁷ The intersectional perspective, thus, calls ‘ideal’ depictions of the legal subject into question, challenging human rights responses.⁷⁸

ii) Internal and external dimension

There are no explicit references in EU law that clearly outline the legal subject of human rights. Instead, we can get a glimpse of the holder of human rights by looking at the type of rights that are recognised, in relation to whom, and the role of States and EU institutions in their fulfilment. The Charter provides several implicit elements that help delineate the legal subject of human rights.

The notion of human dignity provides us with some hints. Several dimensions of the European conceptualisation of ‘dignity’ implicitly relate to the ‘body’ as susceptible to physical pain, such as the prohibition of torture, of slavery, or even the right to life. In addition, Article 3, on the right to (physical and mental) integrity of the person, explicitly links dignity with the body by prohibiting ‘making the human body and its parts as such a source of financial gain’. The body is thus implicitly recognised as capable of posing some strain or limitations in its capacity to ‘enjoy’ human dignity. This notion is reinforced in Chapter III on ‘Equality’ of the Charter, which enumerates women, children, the elderly, and people with disabilities, those whose bodies or physical capacity deviates from the norm due to their sex, age, maturity, or abilities, as in need of extra attention in order to enjoy their rights.

The disadvantaged positioning of those deviating from the imagined legal subject of human rights and the need for ‘additional’ entitlements is more easily recognised when it is body-related. In relation to old age and disabilities, the State needs to ensure individuals’ ‘independence and participation’, and extra protection in the case of children. This approach, which is found in the Charter, and particularly the way it has been translated into policies, has given rise to some criticism. On the one hand, it has been argued that it can be disempowering and stigmatising, offering a protectionist rather than an empowering solution.⁷⁹ On the other hand, it seems to ignore the intersectionality of the human condition,

⁷⁶ Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies’ (1989) *The University of Chicago Legal Forum* 139; Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30 *Signs: Journal of Women in Culture and Society*; Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (CUP 2017) (hereafter Sosa, *Intersectionality in the Human Rights Framework*).

⁷⁷ Ange-Marie Hancock, ‘When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm’ (2007) 5 *Perspectives on Politics*, 63–79, 64; and Margaret Satterthwaite, ‘Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers’ (2005) 8 *Yale Hum Rights Develop L J* 71.

⁷⁸ Discussing the potential of intersectionality in law: M Angeles Barrerre Unzueta and Dolores Morondo Taramundi, ‘Introducing Intersectionality into Antidiscrimination Law and Equality Policies in Spain’ (2016) 43 *Sociologia del Diritto* 169; Susan Burri and Dagmar Schiek, ‘Multiple Discrimination in EU Law. Opportunities for Legal Responses to Intersectional Gender Discrimination’, European Commission Directorate-General for Employment Social Affairs and Equal Opportunities (2009); Lorena Sosa, ‘Inter-American Case Law on Femicide’ (2017) 35 *NQHR* 85.

⁷⁹ Christina Churruca Muguruza and others, ‘Mapping Legal and Policy Instruments of the EU for Human Rights and Democracy Support’ (2014) *FRAME Report 12.1*, 131 <www.fp7-frame.eu/wp-content/uploads/2017/03/Deliverable-12.1.pdf> accessed 10 September 2020.

for example, one can be an ‘elderly person with disabilities’. Actually, the references to ‘groups’ (the elderly, children, people with disabilities) upholds the ideal of a liberal subject of rights, untouched by old age or ailments, rather than presenting these as facets of the human condition.

That said, much in line with the notion of embedded vulnerability, the Charter adopts the notion of ‘solidarity’ with those who deviate from the ‘economically active adult’. This clearly shows in ‘the recognition and respect of social security benefits’ in cases of ‘maternity, illness, industrial accidents, dependency or old age’ (Article 34). Yet, it is unclear whether it is the State, the Union, or the rest of society that is expected to show solidarity in such cases. That said, although the ‘loss of employment’ is clearly a factor leading to ‘vulnerability’, and one that lately appears to affect large groups of people, at least temporarily, it appears to be seen as an exception rather than a feature of the economic model of the EU.

Furthermore, although the inclusion of social and equality rights in the Charter evokes a more inclusive legal subject and attempts to respond to the reality of many people in Europe, the incorporation of the right to education and the right to ‘freely choose’ a profession and ‘engage’ in work in the chapter on ‘Freedoms’ endorses a market-regulated order. The right to education carries the liberal imprint that education, training, and capacity-building will ‘empower’ any individual and turn him/her into the ideally ‘economically active’ adult.⁸⁰ Education will place everybody on an equal footing.

EU policy, however, attempts to mitigate the contrasting scene described above. Internally, the Stockholm Programme⁸¹ seemed to delineate a more inclusive legal subject. For instance, it mentioned that ‘vulnerable people’ (children, women, victims of crimes, and the Roma) have ‘special needs’ to fully enjoy their citizenship and fundamental rights.⁸² The response to those special needs varies according to group. In relation to children, the EU seems to focus particularly on those in an extremely vulnerable situation, calling mostly for protection, rather than adopting a truly empowering approach.⁸³ A more (liberal) emancipatory approach is perceived in relation to the Roma, calling for the prohibition of discrimination in relation to education and employment.⁸⁴ That said, McGarry argues that Roma policies tend to ‘segregate economic and cultural injustices and ignores the fact that most Roma are exploited in and excluded from the labour market because of racial discrimination.’⁸⁵

The EU Strategic Framework on Human Rights and Democracy and the Action Plan for 2012 and for 2015–2019 help us delineate the legal subject of human rights in relation to the external dimension of the EU. The Framework outlined the central tenets of EU external human rights policy, while the 2012 Action Plan indicates the concrete measures to be taken. It expressed the need to ‘promote’ ESCR, particularly the access to services of ‘vulnerable

⁸⁰ On this, see eg the role of education in relation to racist disadvantage discussed by David Theo Goldberg, ‘Racial Europeanization’ (2006) 29 *Ethn & Racial Studs* 331; Amartya Sen, *Development as Freedom* (OUP 1999) (hereafter Sen, *Development as Freedom*).

⁸¹ European Council, ‘The Stockholm Programme—An Open and Secure Europe serving and Protecting Citizens’ [2010] OJ C115/1.

⁸² See *ibid.* sections 1.1., 2.3.3., 2.3.4, 5.1, and 6.1.7.

⁸³ See Helen Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart 2012) 224. A broader vision, addressing all children and promoting a ‘rights approach’, is found in EU external policy: Directorate-General for International Cooperation and Development (European Commission), ‘The New European Consensus On Development “Our World, Our Dignity, Our Future”’ (Publications of the European Union, 18 November 2018) <<https://op.europa.eu/en/publication-detail/-/publication/5a95e892-ec76-11e8-b690-01aa75ed71a1>> accessed 10 September 2020; Council of the European Union, ‘Revision of the EU Guidelines for the Promotion and Protection of the Rights of the Child (2017) Leave No Child Behind’, Doc No 6846/17.

⁸⁴ See Eva Sobotka and Peter Vermeersch, ‘Governing Human Rights and Roma Inclusion: Can the EU Be a Catalyst for Local Social Change?’ (2012) 34 *Hum Rights Q* 800.

⁸⁵ Aidan McGarry, ‘The Dilemma of the European Union’s Roma Policy’ (2012) 32 *Critic Social Pol* 126, 129–30.

groups, yet it failed to give a conceptualisation of these groups. It also set a number of priorities that aimed at protecting diversity and eliminating discrimination based on race, ethnicity, age, gender, and sexual orientation. Vulnerability language, however, was almost completely eliminated from the 2015–2019 Action Plan, using it only in the context of migration, trafficking and asylum. Nevertheless, the 2015–2019 Action Plan continues to pay attention to the rights of children, women and girls, minorities, LGBTI people, indigenous peoples, and persons with disabilities.⁸⁶ It also introduces age as a ground for discrimination and, most interestingly, the language of multiple discrimination.⁸⁷

In sum, the EU triggers a response to the ‘special needs’ of some individuals by making reference to their ‘vulnerability’, yet in spite of this, the legal subject in EU law reappears as a self-standing subject, whose recognition of embodied and embedded vulnerability is very limited. The problem is that the adoption of a ‘vulnerable group’ approach obscures the relevance of the social and institutional positioning of individuals and increases the risk of stigmatising and disempowering such groups.⁸⁸ The potential of a vulnerability approach for conceptualising an inclusive legal subject of human rights can be strengthened by highlighting the factors that render a person vulnerable, instead of focusing on groups alone, since references to ‘vulnerable groups’ do not always suggest that such vulnerability is the result of structural (social or institutional) arrangements, and may in fact be interpreted in essentialising ways.⁸⁹

La Barbera argues that the adoption of some recent documents suggests a shift towards an intersectionality perspective.⁹⁰ This is particularly apparent in the field of gender equality,⁹¹ with special attention paid to Romani women. It is also found in relation to disability, in which case the Commission points out ‘the cumulative impact of discrimination that people with disabilities may experience on other grounds, such as nationality, age, race or ethnicity, sex, religion or belief, or sexual orientation’,⁹² women with disabilities deserve specific attention.⁹³ In time, the adoption of an intersectional view may lead to the depiction of a more inclusive legal subject in EU law.

C. Opportunities and recommendations for further conceptualisation

Looking forward, we believe that opportunities for further meaningful EU conceptualisation of human rights require addressing the political dimensions of human rights.⁹⁴ Human rights should not be reduced to a merely positivist perspective. If the political nature of these

⁸⁶ Council of the European Union, ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015–2019’, Doc No 10897/15, objectives 14, 15, and 16.

⁸⁷ *ibid.*, objective 16.

⁸⁸ *eg* Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 73); Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law’ [2013] *ICON* 1056.

⁸⁹ Sosa, *Intersectionality in the Human Rights Framework* (n 76) 118.

⁹⁰ María Caterina La Barbera, ‘Interseccionalidad, un “Concepto Viajero”’: Orígenes, Desarrollo e Implementación en la Unión Europea’ (2016) 4(8) *Interdisciplina* 113–14.

⁹¹ European Parliament resolution of 8 March 2011 on equality between women and men in the European Union—2010 (2010/2138(INI)).

⁹² European Commission, ‘European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe’ COM (2010) 636 final 6.

⁹³ European Parliament resolution of 11 December 2013 on women with disabilities (2013/2065(INI)).

⁹⁴ Sen, ‘Elements of a Theory of Human Rights’ (n 3); Beitz, *The Idea of Human Rights* (n 3).

rights is made invisible, in other words, if the contestations surrounding human rights are denied, the EU will fail in its mission—both internal and external.

1. Incorporating multiple voices

The ‘failure’ to adopt definitive theoretical conceptualisations of human rights at an early stage may in practice be less problematic than it appears at first sight. In fact, it brings the opportunity to coin conceptualisations that resonate with the many voices that can be found within the Union, and those outside. Such an inclusive approach has many advantages, one of which relates to the potential to represent different concerns and realities, adding legitimacy to the resulting policies.

In doing so, it is necessary to recall that human rights entail not only a legally binding force, but they also hold considerable political force, turning them into the preferred tool of many social movements, particularly those defending minorities’ rights, for expressing their claims. The ability of human rights to raise awareness on specific issues is inherently connected to the possibility to hold extended and public debates. Sen argues that debates on human rights are a part of the praxis and theory of human rights.⁹⁵ Such debates can enhance the cogency and legitimacy of human rights claims if they are open to everybody, with unrestricted access to information⁹⁶ and subject to cross-border scrutiny. Furthermore, inclusive debates will help counter existing challenges to the universality of human rights by incorporating the views of minorities, often excluded from mainstream discourses.⁹⁷ Finally, incorporating multiple voices also contributes to the transparency of the EU.

There are some measures suggesting that the EU attributes great importance to participation and dialogue. For instance, the Charter calls for the promotion of the participation of the elderly and persons with disabilities in society, and the integration of vulnerable sectors of the population (Articles 23–26). In the external dimension, the EU also adopts a welcoming stance toward dialogue. The EU stated in its 2012 Strategic Framework and Action Plan that the Union ‘will always seek constructive engagement with third countries; in this light, the EU will continue to deepen its Human Rights Dialogues and consultations with partner countries and will aim to ensure that these dialogues lead to results’.⁹⁸

Moreover, the EU appears to be aware that on certain sensitive topics, multiple and sometimes opposing positions exist within countries. In this regard, civil society’s take on the issues is key to avoid essentialising views and believing that the government’s voice represents the interests of the whole population within the State, particularly when such interests are controversial. For instance, the 2015–2019 Action Plan regards dialogue with civil society as an essential element in the promotion of LGBTI and indigenous peoples’ interests, a measure in line with our previous research findings.⁹⁹ In this sense, the 2015–2019 Action Plan confirms that ‘the EU places great value on its regular dialogue with civil society both inside and outside the EU’.

⁹⁵ Sen, ‘Elements of a Theory of Human Rights’ (n 3).

⁹⁶ For an interesting account on the relationship between media and law as a potential field of international law, see Daniel Joyce ‘Human Rights and the Mediatization of International Law’ (2010) 23 LJIL 507.

⁹⁷ Sen, ‘Elements of a Theory of Human Rights’ (n 3) 327; and Amartya Sen, ‘Human Rights and the Limits of the Law’ (2006) *Cardozo L Rev* 2925.

⁹⁸ EU Strategic Framework and Action Plan (n 26) section ‘Working with Bilateral Partners’ 3.

⁹⁹ Our previous research found that claims about indigenous peoples’ right to land in Peru, which were challenged by some sectors of society calling for more development projects, were addressed in the dialogues between Peru and the EU; see Sosa and others, ‘Conceptions of Human Rights’ (n 60).

The concept of ‘political intersectionality’ is a useful notion in relation to promoting civil society participation by fostering coalition making.¹⁰⁰ Coalitions, unlike identity groups, are born out of necessity rather than the desire for recognition, belonging, solidarity, or inclusion.¹⁰¹ Promoting an intersectional approach in the dialogues with civil society organisations offers the potential to organise across differences and identity categories. By doing so, more inclusive conceptions can be adopted. Since intersectionality is not a foreign concept to the EU—on the contrary, it appears to be supported in some of the EU policies discussed above—we can also envision its emergence in relation to policies concerning the Union’s engagement with civil society. This view is certainly reinforced by calls for solidarity found in the Charter, EU human rights policies, and the political arena.

Unfortunately, there are also difficulties in holding inclusive and open dialogues with civil society, particularly in relation to external policy. Secrecy remains a significant element of diplomacy today, used in European foreign policy and presented as necessary in certain cases. This is clearly perceived in relation to Human Rights Dialogues as a diplomatic tool,¹⁰² in which ‘a degree of genuine transparency vis-à-vis civil society’ will be given only ‘as far as possible’.¹⁰³ Combined with secrecy, the principle of non-interference in the internal affairs of another State, which determines the legality of the Union’s foreign policy tools, prevents the Union not only from addressing specific issues, but also from interacting with organisations that are not recognised by the governments. Such exclusion can have devastating effects, since civil society is not only necessary for raising awareness about the situation of human rights, but its participation is indispensable in any debate about the meaning and scope of human rights.¹⁰⁴ Human Rights Dialogues have, for these reasons, proved very opaque.¹⁰⁵ That said, EU support of human rights defenders, even if merely formal, confirms the Union’s commitment towards civil society regardless of States’ positions.¹⁰⁶

2. Critically assessing the politics of conceptual difference

In times of political turmoil, in which calls for nationalism commonly emerge, history shows that closing ranks by identifying who ‘we’ are and emphasising ‘our’ own values is customary. Culturally relative discourses flourish, both internally and externally. Suddenly, concepts that were previously supported and upheld are now seen as foreign, belonging to ‘the others’.

Exclusionary discourses challenge what Donnelly terms ‘ontological universality’; the idea that human rights have a single trans-historical foundation.¹⁰⁷ Such disbelief in a common foundation of human rights leads some to consider and label human rights and democratic

¹⁰⁰ Jessica Ringrose, ‘Troubling Agency and “Choice”: A Psychosocial Analysis of Students’ Negotiations of Black Feminist “Intersectionality” Discourses in Women’s Studies’ (2007) 30 *Women’s Studies International Forum*, 264–78, 267.

¹⁰¹ Mari J Matsuda, ‘Besides my Sister, Facing the Enemy: Legal Theory out of Coalition’ (1991) 43 *Stan L Rev* 1183, 1190.

¹⁰² For a detailed discussion on Human Rights Dialogue, see Majtényi, Sosa, and Timmer, *Human Rights Concepts in EU Human Rights Dialogues* (n 58).

¹⁰³ EEAS, ‘EU Guidelines on Human Rights Dialogues with Third Countries—Update’ (2009) <http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf> accessed 10 September 2020, 11.

¹⁰⁴ Sen, ‘Elements of a Theory of Human Rights’ (n 3).

¹⁰⁵ Katrin Kinzelbach, *The EU’s Human Rights Dialogue with China: Quiet Diplomacy and Its Limits* (Routledge 2014).

¹⁰⁶ European Council, ‘Ensuring Protection—European Union Guidelines on Human Rights Defenders’ (2016) <https://eeas.europa.eu/sites/eeas/files/eu_guidelines_hrd_en.pdf> accessed 10 September 2020. The EU has endorsed human rights defenders publicly and established a fund for emergency support via the EIDHR.

¹⁰⁷ Donnelly, ‘Relative Universality’ (n 27).

values as inherently alien, a ‘Western’ or ‘European’ construction.¹⁰⁸ Yet, as commented above, a large part of the clashes between European perspectives of human rights and third countries’ or international organisations’ positions derives from the stance toward the indivisibility of human rights. The clash between relative and universalist views should raise suspicion if these are conceptualised as a reduced cultural critique of ‘Western values’, rather than highlighting the importance of the long-standing economic, social, and historical contexts in which the discontent with strictly European readings of human rights emerge.

In addition to encouraging open debates in relation to human rights, as suggested in the section above, formal and practical promotion of the indivisibility of human rights can also strengthen the universality of human rights. In this sense, Sen sustains that the conceptualisation of economic claims will only arise on such debates and discussions, which in turn calls for the protection of political rights and democracy.¹⁰⁹ Promoting the universality and indivisibility of human rights and democratic values becomes, thus, paramount, in order to counteract clashes, divisions, and even violence.

D. Conclusion

Over the years, the EU’s conception of human rights has become broader and more holistic, and it is nowadays conceptually underpinned by the notion of human dignity. Yet this chapter showed that the EU faces complex challenges when trying to coin universal and inclusive conceptions of human rights. Scholars¹¹⁰ and key EU officials¹¹¹ perceive the EU to be in a struggle between opposing ideologies; this is sometimes characterised as a struggle between social democracy—based on the rule of law and human rights—and neo-liberalism, and at other times characterised as a struggle between social democracy and populism. These tensions among competing political and economic visions have practical as well as conceptual consequences. They show through the type of claims that are recognised as human rights, the preference for civil and political or social and economic rights, and the type of responses expected from States and organisations, including the EU, to include persons who do not ‘match’ the liberal view of the universal subject. Thus, the conceptual underpinnings of the EU’s commitment to human rights are in a constant process of re-elaboration, providing the EU with an opportunity to respond to social changes.

¹⁰⁸ See eg Brems, *Human Rights* (n 51); Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013); András Sajó (ed), *Human Rights with Modesty. The Problem of Universalism* (Martinus Nijhoff 2004).

¹⁰⁹ Sen, *Development as Freedom* (n 80).

¹¹⁰ Fredman, ‘Fundamental Rights in the EU Social Space’ (n 41) 43.

¹¹¹ Frans Timmermans, ‘Women’s Rights in Turbulent Times’ Annual Colloquium on Fundamental Rights, Brussels, November 2017.