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The EU Charter of Rights and Brexit Effect on the Implementation of Economic and Social Rights among EU Member States

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Abstract: This article examines the extent to which the inclusion of the European Union (EU) Charter of Rights and Fundamental Freedoms in the Treaty of Lisbon which gives legal force to socio-economic rights as well as civil and political rights, economic will succeed in helping EU member states meet international treaty obligations to implement socio-economic rights. Will the EU's renewed commitment to developing the social sphere, post-Brexit, be more successful and will British citizens lose out on socio-economic rights in the long term if the EU succeeds in creating a better social or public dimension? Member states of the EU that have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) have obligations to progressively realise economic, social and cultural (ESC) rights. Progress on this has been slow and potentially made more difficult by the economic direction adopted by the EU since the 1980s. Although the EU, from the beginning, saw itself as a "social market" it struggled to embed the "social" to the same extent that it embedded the "market". Critics argue that the economic policies of the EU and key judgements of the European Court of Justice (ECJ) successfully dis-embedded the market from its social context. Additionally, the regulatory regime of the EU developed in a direction that limited the capacity of nation states to ameliorate the consequences of market-led policies for the least advantaged. However, the Charter of Rights, which places socio-economic rights on an equal footing with civil and political rights, is a novel and bold initiative. It has stimulated debate on whether the Charter could rebalance the EU's economic agenda by paying attention to the social consequences of predominantly market-led policies. This paper examines the potential impact of the EU Charter, in the context of member states international human rights obligations, to create an environment where member states of the EU have fewer obstacles to the "progressive realization" of ESC rights.

Keywords: EU Charter of Rights and Fundamental Freedoms; Treaty of Lisbon; economic; social and cultural rights; international human rights



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1. Introduction

In 2009 the European Union (EU) incorporated the Charter of Rights and Fundamental Freedoms (Charter of Rights) into the Treaty of Lisbon, giving equal legal status to civil and political (CP) and economic and social rights.¹ This was a unique and bold initiative as no other regional treaty gives equal legal protection to both CP and socio-economic rights. This article addresses the potential long-term impact of this on the EU's ability to create a more enabling environment for EU member states to meet their international treaty commitments to realise socio-economic and cultural (ESC) rights.

The Treaty of Lisbon does not resolve the tensions inherent in the EU project such as the gulf between north and south or the political elite and EU citizens, however, the inclusion of the EU Charter signalled a reorientation of the EU towards the neglected

¹ (Charter of Fundamental Rights of the European Union 2012/C 326/02): Available online: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed on 10 October 2020).

social sphere of the EU.² The social or public dimension refers to the mutual responsibility members of a society assume for each other. This is expressed politically in determinations about how society is structured, and resources distributed—the welfare state is an example of this.³

By adopting policies that promoted the economic at the expense of the social, EU institutions strained the capacity of member states to develop the domestic social sphere. It is not clear how political engagement can be enhanced at the EU level to reverse this situation. de Witte points out that “[w]hile distributive justice remains the bread and butter of political conflict, the capacity of the political [at the EU level] to implement the answer to the social question has increasingly vanished.”⁴ The shrinking public or social sphere has become an urgent political issue since EU citizens have signaled their disaffection with the economic direction of travel of the EU—the most serious rejection of the EU occurring with Brexit.

The EU is made up of states that have responsibilities outside of and independent of the EU such as obligations arising out of multilateral international and regional human rights instruments.⁵ Universal rights, founded in human dignity, are enunciated in international treaties but individual legal entitlements are protected and guaranteed within the legal framework and jurisdictions of nation states. The EU is not a state, so is not directly responsible for the human rights of EU citizens—this responsibility rests with each member state. EU member states do not afford the same protection to all the categories of human rights. They mostly guarantee the core civil and political (CP) rights of their citizens, but ESC rights, involving states’ obligations to ensure adequate standards of living, work, health and education, if included in states’ constitutions, are usually in the form of directive principles. The distinction reflects the dichotomy that developed in international human rights law between CP and ESC rights exacerbated by cold war politics which cast the free world as champions of liberties and freedom and the Soviet Union as favouring equality and social rights.⁶ This distinction blurred after the fall of communism and it is now generally recognised that denial of ESC rights could give rise to “serious human rights violations.”⁷ So even though ESC rights are not implemented in the same way as CP rights, EU member states have treaty obligations to realise ESC rights.

The slow and uneven progress on the implementation of ESC rights among western states, including member states of the EU, has been blamed on the fact that western democracies undervalue ESC rights. This perception was challenged by Donnelly and Whelan who point out that post-WWII western states included “the universal provision of economic and social rights to all citizens as a matter of legal rights or political guarantee.”⁸ This article does not dispute the claim that the welfare state was a creation of the West. Instead, it argues that the public or social sphere is distinguishable from legally guaranteed ESC rights but crucial for the implementation of them.⁹ ESC rights are contestable in court through judicial review procedures and the state is held judicially accountable for its

² Anderson (2012) “After the Event.” *New Left Review*, 1 February.

³ (de Witte 2013) “EU Law, Politics, and the Social Question.” *German Law Journal* 14: 582. See also (Streck 2011) “The Crisis of Democratic Capitalism.” *New Left Review* 71: 1. “The structure of the post-war settlement between labour and capital was fundamentally the same across the otherwise widely different countries where democratic capitalism had come to be instituted. It included an expanding welfare state, the right of workers to free collective bargaining and a political guarantee of full employment, underwritten by governments making extensive use of the Keynesian economic toolkit.”

⁴ de Witte (n 3) p. 582.

⁵ See *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997). Available at http://www1.Umn.edu/humanrts/instreet/Maastrichtguidelines_.html (accessed 10 October 2020).

⁶ See Alston (1994) “Denial and Neglect” in R. Roach (Ed) *Human Rights: The New Consensus* (London: Regency Press 1994). For an in-depth discussion of the attitudes of the West to ESC rights, see (Kirkup and Evans 2009) “The Myth of Western Opposition to Economic, Social and Cultural Rights. A reply to Whelan and Donnelly.” *Human Rights Quarterly*, 31 (1) pp. 221–38.

⁷ (Ssesyonjo 2009), *Economic, Social and Cultural Rights in International Law* (Oxford: Hart Publishing 2009) p. 112.

⁸ (Whelan and Donnelly 2007) “The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight.” *Human Rights Quarterly*, vol. 29, 908–49, p. 94.

⁹ A Kirkup and T Evans (n 5). See also (Lang 2009) “The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly.” *Human Rights Quarterly* 31 1.006–1029, p. 1023.

failure to deliver on these rights. States would find it difficult to meet ESC benchmarks if they labour under or adopt policies that diminish the public dimension. The incorporation of legally enforceable social rights into the EU treaty could potentially help the EU sustain the public dimension, creating scope for EU member states to meet international ESC benchmarks.

This analysis focuses first on international and regional socio-economic obligations of EU member states and the significance of the inclusion of the Charter of Rights and Fundamental Freedoms in the Treaty of Lisbon; this is followed by an examination of the impact of EU economic policies on the social dimension of the EU; last, the spotlight falls on the impact of Brexit on the EU's determination to address the social dimension and the implications of this for ESC rights in EU member states (and the recently departed UK).

2. EU Member States Commitment to ESC Rights and the EU Charter

Since the 1950s several member states of the EU have had obligations to implement both CP and ESC rights. After WWII, an intergovernmental organisation, the Council of Europe was established. The Council, dominated by a liberal-socialist coalition, attempted to guarantee both CP and ESC rights¹⁰ in the European Convention for the Protection of Fundamental Rights and Freedoms (ECHR)¹¹ and the European Social Charter 1960, revised in 1996.¹² The ECHR protects individual CP entitlements, implemented on a non-discrimination basis and adjudicated through the European Court of Human Rights (ECtHR). Most European countries included Convention rights into their domestic law. The UK achieved this with the Human Rights Act of 1998.¹³

Socio-economic rights were included in the European Social Charter. The Social Charter, supervised by the European Committee of Social Rights, generates obligations among European states including member states of the EU to implement socio-economic rights. However, there are fundamental differences between Convention and Social Charter rights and in the machinery for their implementation. The universal enjoyment of basic rights to food, water, health care, education, and labour rights inevitably involves a commitment to invest and redistribute resources to ensure their realisation.¹⁴ There is, therefore, a qualitative difference in the obligations imposed on state parties to implement socio-economic rights as compared to CP rights. The socio-economic rights in the European Social Charter are not legally enforceable.¹⁵

The separation of the CP rights from ESC rights was largely political as CP rights were considered essential for democracy while ESC rights were, according to the British representative to the Charter negotiations, "controversial and difficult to enforce."¹⁶ The protection of the rights of the Social Charter is also weaker in several respects when compared to Convention rights. The ECHR, unlike other Council Treaties whose implementation is overseen politically by a Committee of Ministers, is the "only Convention that judicially guarantees the effectiveness of the rights it protects."¹⁷ The rights of the European Social Charter are non-binding and cannot be adjudicated in court as individual entitlements. They require

¹⁰ (Weston et al. 1987) "Regional Human Rights Regimes: a Comparison and Appraisal." *Vanderbilt Journal of Transnational Law* Vol 20, No 4, p. 593.

¹¹ (Council of Europe 1950, [Council of Europe Convention for the Protection of Fundamental Rights and Freedoms 1950](http://conventions.coe.int/treaty/en/treaties/html/5.htm)), Europ. T.S. No. 5 (entered into force Sept 3, 1953). Available online: <http://conventions.coe.int/treaty/en/treaties/html/5.htm> (accessed on 10 October 2020).

¹² (Council of Europe 1961), Council of Europe, European Social Charter, Turin Oct.18, 1961, Europ. T.S. No 35 (entered into force, Feb.26.1965) and (Council of Europe 1996) Council of Europe, European Social Charter (revised), Strasbourg, 3 May 1996, in force 1 July 1999, <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> (accessed on 11 November 2020).

¹³ (Human Rights Act 1998). *UK Public General Act, 1998* available at <https://www.legislation.gov.uk/ukpga/1998/42/contents> (accessed on 21 March 2020).

¹⁴ Article 2(1) ([International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](https://www.unhcr.org/refugees/article/1967/11/1967-11-01-international-covenant-on-economic-social-and-cultural-rights-icscr) UN Doc. A/RES/2200 (1967)). (entered into force January 3, 1976) (accessed 2 April 2020).

¹⁵ The European Social Charter does not protect the same range of social rights included in the ICESCR. It is fairly restricted and appears to emphasise only those provisions of the ICESCR that states are required to implement immediately such as the right to work (art 1), just working conditions (arts 2,3,4), union rights (5 and 6), vocational training (arts 9 and 10), social security, medical and social welfare rights (arts 14,15,16). The Charter also protects mothers, the rights of migrant workers (art 19) and the right to education (Protocol 1 art 2) European Social Charter (n 12).

¹⁶ (Lang 2009) (n 9).

¹⁷ (Benoit-Rohmer and Klebes 2005), *Council of Europe Law: Towards a pan-European legal area* (Strasbourg: Council of Europe Publishing 2005) p. 103.

only a declaration on the part of state parties to pursue these aims “by all appropriate means.” This wording highlights the lower status of social and economic rights (compared to CP rights) which are protected and promoted “primarily through reportorial means.”¹⁸ The European Social Charter established a two-tier system for monitoring compliance. States submit biennial reports detailing their progress to a Committee of Social Rights made up of 13 independent experts. The Committee of Ministers then evaluates states’ progress to meet their treaty obligations and adopt conclusions and recommendations.¹⁹

The differential treatment of CP and ESC rights at the regional level was, according to some scholars, the reason for the development of two separate international Covenants protecting CP and ESC rights, respectively.²⁰ The International Covenant on Civil and Political Rights (ICCPR)²¹ also required that CP rights would be immediately implemented, however, implementation of ICESCR rights (except those designated for immediate implementation)²² are constrained by “the limits of available resources” and were to be “progressively implemented.”

By separating the legal regime of civil and political rights from socio-economic rights, where the former enjoys adjudicative protection while the latter political or reportorial obligations, it is contended that ESC rights were made less effective than they might otherwise have been.²³ Riedel et al. point out that without “a minimum existence protection standard,” the human rights picture is incomplete, and a crucial purpose of human rights will be missed, namely protection for the most needy, marginalised and disadvantaged.²⁴ This is why the Committee on Economic, Social and Cultural Rights (CESCR) accepts that for ESC rights to be justiciable the courts will have to become involved in adjudicating some level of resource allocation. At the Vienna World Conference on Human Rights in 1993, the Vienna Declaration and Plan of Action declared that human rights are “universal, interdependent and inter-related” and enjoined states not to differentiate between different types of rights but to place the same emphasis on all.²⁵

However, while all rights are regarded as equally important the problem of determining the “minimum existence protection standard” and the enforceability of this standard remains.

Legally it is difficult to create an enforceable entitlement in law to a positive ESC right. The minimum threshold a state must reach in the implementation of ESC rights has to be decided to determine a breach of the right. A popular argument against the justiciability of ESC rights is that distribution of resources and policy priorities properly belongs to the sphere of political contest where electorates have a role, through the franchise, in determining the social obligations and priorities of a government. ESC rights blur the distinction between the legitimate spheres of law and politics. Sensitivity to these issues meant that CP rights, in international and regional treaties and in national constitutions,

¹⁸ Weston et al. (n 10) p. 595.

¹⁹ (Brillat 2005), “The supervisory machinery of the ESC: recent developments and their impact,” in G. de Búrca and B. de Witte (eds.) *Social rights in Europe* (Oxford: Oxford University Press 2005). The European Committee of Social Rights is “supported by the Governmental Committee, a political body comprising representatives of states which have ratified the Charter, assisted by observers from workers’ and employers’ associations.” (Benoit-Rohmer and Klebes 2005), Council of Europe Law (2005) p. 103.

²⁰ Ibid.

²¹ Article 2 (International Covenant on Civil and Political Rights (ICCPR) UN Doc. A/6316 (1967)) (entered into force March 23, 1976) and ICESCR (n 13). (accessed 2 April 2020).

²² These include equal economic, social and cultural rights between men and women (art 3): fair wages, equal remuneration and good working conditions especially between men and women ((art 7(a) (1); rights to join trade unions and take strike action (art 8); protecting children from, economic and social exploitation (art 10(3)); compulsory education, especially for primary education (art.13 (2)(a)); guardian and parents freedom to make educational choices for children and even to establish educational institutions (art 13); and the freedoms associated with research and creativity (art 15 (3)). (Fact Sheet No. 16 (Rev.1) The Committee on the Economic, Social and Cultural Rights 1996). <https://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf> (accessed 10 April 2020).

²³ Weston et al. (n 10) p. 596.

²⁴ (Reidel et al. 2014), *Economic, Social and Cultural Rights in International Law: Contemporary issues and Challenges*. (Oxford Scholarship Online: May 2014) p. 3.

²⁵ (UN General Assembly. Vienna Declaration and Programme of Action 1993), A/CONF.157/23, available at: <https://www.refworld.org/docid/3ae6b39ec.html> (accessed 22 February 2021) Also, (Indivisibility of Rights (Proclamation of Tehran) Final Act of the International Conference on Human Rights 1968), Tehran 22 April to 13 May UN Doc. A/CONF 32/41 at 3 (1968) (accessed 2 April 2020) See also Reidel et al. (n 23) p. 14.

produced immediate and binding obligations but ESC rights were deferred obligations contingent on state resources.

However, the Committee on Economic, Social and Cultural Rights (CESCR) published General Comment No. 3 to encourage states' to comply with their obligations under Article 2 (1) to "progressively realise" ESC rights and to set the criteria for the justiciability of ESC rights.²⁶ States are enjoined to use the "maximum available resources" to meet the "minimum core obligation" of rights to food, primary health care, basic shelter and education.²⁷ The comment stated that state parties should "take steps, individually and through international assistance and co-operation" to move as "expeditiously and effectively as possible towards that goal." These steps should be "deliberate, concrete and targeted" and involve adopting "all appropriate means including particularly the adoption of legislative measures."²⁸ The concept of the "minimum core" serves to ensure that a justiciable ESC right is created and that there is an effective legal remedy if it is breached.²⁹ CESCR General Comment No. 9 states that the remedy does not have to be judicial but could be administrative, social, financial, or educational.³⁰ The CESCR committee placed the responsibility on states to deliver on and remedy breaches of ESC rights "because the state has the appropriate power to do so."³¹ This implies that when the matter is adjudicated by the courts the state is held to account — as was demonstrated by the South African courts when that government was challenged on its lack of adequate housing provision.³²

The recognition of fundamental rights by EU institutions and treaties was an evolutionary process.³³ The original treaties of the European Economic Community (EEC) implicitly recognised rights as fundamental to its founding principles of freedom, democracy and rule of law but there was no specific mention of human rights.³⁴ There was no expectation that community law would be responsible for the protection of individual rights as these were covered by international and regional law and the constitutions of members states.³⁵ However, the clash of fundamental rights with EU law, as in the *Bosphorus* case, meant that the ECtHR and the European Court of Justice (ECJ) had overlapping jurisdictions when fundamental rights were involved.³⁶ What followed were several landmark cases where the ECJ recognised that fundamental rights are part of the general principles of the EU.³⁷

²⁶ CESCR General Comment No 3: The Nature of States Parties' Obligations (art.2, para.1, of the Covenant) Fifth Session (1990) Contained in document E/1991/23, para. 9. (accessed 10 April 2020)

²⁷ *Ibid.*, para. 10.

²⁸ *Ibid.*, para. 9.

²⁹ See (Young 2008) "The Minimum Core of Economic and Social Rights: A Concept in Search of Content." *Yale International Law Journal* 33, 113-175 for a critical examination the concept of minimum core. The 'minimum core' is difficult to define but this is the phrase used by the CESCR. The General Comment is aimed at ensuring the justiciability of ESC rights and Young explores how states' obligations for ESC rights could be made subject to measurable indicators.

³⁰ CESCR General Comment No 9: The Domestic Application of the Covenant, UN Doc. E/C./12/1998/24, 3 December 1998, para. 9.

³¹ (Ssesyonjo 2009) (n 7) p 49. (accessed 10 April 2020).

³² *Government of the Republic of South Africa & Ors v Grootboom & Ors* 2000 (11) BCLR 1169. (CC), See also (Mbazira 2007) "Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies" (core.ac.uk) (accessed 1 March 2021).

³³ The four main treaties that brought about the EU are: Treaty Establishing the European Economic Community (Treaty of Rome) 25 March 1957, 294 U.N.T.S. 17 (entered into force 1 January 1958); Single European Act, 28 February 1986, 25 I.L.M. 503 (entered into force 1 July 1987); (Treaty on European Union 2007) (Maastricht Treaty) 7 February 1992 31 I.L.M. 247 (entered into force 1 November 1993); Treaty of Amsterdam, 2 October 1997, 32 I.L.M. 56 (entered into force 1 May 1999).

³⁴ Art 6 (2) of The Treaty on The European Union signed in Rome on 4 November 1950.

³⁵ (Banaszak 2016), "Fundamental Freedoms and Rights in Contemporary Europe" in R, Arnold (ed) *Convergence of the Fundamental Rights Protection in Europe. Ius Gentium: Comparative Perspectives on Law and Justice* 52 (Netherlands: Springer 2016).

³⁶ C-84/95, *Bosphorus*, [1996] ECR I-3953. The "ECJ has always held that its application of the ECHR, as a general principle of law, offered the Member States enough security in ensuring the protection of ECHR rights. However, recent decisions of the ECtHR illustrate that this security might be questionable. Recent judgments, like *Bosphorus*, show that international obligations may collide and impose a serious dilemma on Member States." Katherine Kuhnert (Kuhnert 2006) "*Bosphorus* – double Standards in EU Human Rights Protection." *Utrecht Law Review* Vol 2 Issue 2. See also Tobias Lock (Lock 2010) "Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention of Human Rights." *Human Rights Law Review* 10:3, 529-545.

³⁷ Case 11/70, *International Handelsgesellschaft mbH v. Einfuhr* [1970] ECR 1125. Case 36/75. More recently Opinion 2/94 on Accession by the Community to the ECHR (1996) ECR-I-1759, para. 33. *Connolly v. Commission* [2001] ECR I-1611.

In *Nold*, the ECJ expressly stated that the ECHR and constitutional traditions of member states are the sources of fundamental rights of EU Law.³⁸

When the EU adopted The [Charter of Fundamental Rights of the European Union](#) (EU Charter) in December 2000, the organisation demonstrated its commitment to both ESC and CP rights.³⁹ The EU Charter “recognises and respects entitlements for social security benefits and services” and includes specific references to health care, housing education and welfare.⁴⁰ The EU Charter did not introduce any new rights but included those rights recognised by the Treaty of the European Union (TEU), the ECHR, the European Social Charter and the jurisprudence of the ECJ and the ECtHR.⁴¹

At the time of its adoption the EU Charter was not legally binding but an agreement between institutions.⁴² When the EU Charter was incorporated into the Treaty of Lisbon 10 years later, some of the rights were reformulated to better address contemporary problems. More importantly, the treaty changed the legal status of the EU Charter by making it an enforceable instrument.⁴³ This was a very significant development since the EU Charter is the first regional instrument to give socio-economic rights the same legal force as CP rights. The African Charter on Human and People’s Rights (Banjul Charter)⁴⁴ recognises ESC as well as CP rights allowing for judicial review on all these rights, but the Banjul Charter is not legally binding.⁴⁵ The regional Inter - American Convention of Human Rights (IACHR) recognises ESC rights but employs the same hortatory language as the ICESCR with respect to implementation.⁴⁶ ESC and CP rights are both included in the League of Arab States, Arab Charter on Human Rights which declares that human rights are “universal, indivisible, interdependent and interrelated” but the Arab Charter’s enforcement mechanisms are also weak.⁴⁷

The EU inclusion of socio-economic rights and CP rights in the same document and having the same legal status also goes beyond the protection of ESC rights in constitutions of EU member states.⁴⁸ This inevitably raises questions as to whether the EU Charter will help member states meet broader international and regional treaty commitments with respect to ESC rights. The answer to this depends on the impact of the EU Charter on EU institutions and policies and the role of the ECJ.

³⁸ Case 44/79 *Nold v commission*, 1974 E.C.R. 419. CP rights apart from health and education which is protected in a separate Protocol of the ECHR.

³⁹ The Charter of Fundamental Rights of the European Union, Dec 2000/C 364/01 https://www.europarl.europa.eu/charter/pdf/text_en.pdf. (accessed 10 October 2020).

⁴⁰ Section 34 of the ECHR deals with social security.

⁴¹ (Zetterquist 2011), “The Charter of Fundamental Rights and the European Res Publica” in Giacomo D (eds) *The EU Charter of Fundamental Rights. Ius Gentium: Comparative Perspectives on Law and Justice* 8. (Dordrecht: Springer 2011).

⁴² (Kenner 2003) Kenner, Jeff. 2003. Economic and social rights in the EU legal order: The mirage of indivisibility in economic and social rights in the EU legal order. In *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*. Edited by Tamara K. Hervey and Jean Kenner (Hervey and Kenner 2003). Oxford: Hart.

⁴³ (Treaty of Lisbon 2007), Conference of the Representatives of the Governments of the Member States, C16 14/07, Brussels, 3 December 2007. (accessed 10 May 2020).

⁴⁴ (African Charter on Human and People’s Rights 1981) African Charter on Human and People’s Rights. 1981. OAU Doc. CAB/LEG/67/3/Rev.5 (1981) (Entered Into Force October 21, 1986) The Banjul Charter. June 28 (accessed 1 March 2020).

⁴⁵ (A Guide to the African Charter of Human and People’s Rights 2006). AI Index: IOR 63/005/2006 www.amnesty.org. (accessed on 3 January 2020). See also (Yeshanew 2013), *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect* (Cambridge: Interscencia 2013).

⁴⁶ See Article 1. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (“Protocol of San Salvador”) OAS Treaty series No 69 (1988) <https://www.refworld.org/docid/3ae6b3b90.html> (accessed 13 April 2020). See also (Harris eds. 1988) *The Inter-American System of Human Rights* (Oxford: Clarendon Press 1988) and (IACHR *Access to Justice as a Guarantee of Economic, Social and Cultural Rights* 2007): A review of the Standards Adopted by the Inter-American System of Human Rights, Report No OEA/Ser.L/V/II.129, 7 September 2007, paras. 3 and 4. <https://www.refworld.org/docid/477e3d062.html> (accessed 2 April 2020).

⁴⁷ (League of Arab States 2004), Arab Charter on Human Rights, May 22, 2004 entered into force March 15, 2008 Introduction and Articles 34–39. <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035> (accessed 21 March 2020).

⁴⁸ Boguslaw Banaszak, observed that ESC rights (with the exception of property rights) do exist in individual constitutions to varying degrees, but no common patterns are observable (n 35).

3. The EU Social Dimension and ESC Rights

From the outset, the EU attempted to promote “economic and social cohesion” and to strengthen social solidarity in the community.⁴⁹ The founding idea of the EU was that member states should benefit from the solidarity resulting from membership in the EU. The editorial comment in the *European Constitutional Law Review* eloquently describes this solidarity as not mere interdependence or shared understanding but a solidarity that is “primitive and inarticulate” and a solidarity also cultivated and nurtured to produce greater social cohesion.⁵⁰

EU solidarity implies that social policy goals are an integral part of the EU’s vision. From the outset, the European economic model was regarded as a “social market economy” which should be distinguished from the American model as it differs from the latter in the attention that is paid to “social cohesion.”⁵¹ The EU successfully embedded “market solidarity” namely, the mutual rights and obligations that stem from the EU single market,⁵² and its social agenda included improved working conditions, pensions, gender equality, free movement and social security deriving from employment. The labour market and other work-related issues are emphasised.⁵³

The EU addressed its social agenda through various social action programmes. The first, in 1974, pre-dating the Maastricht Treaty that established the EU, aimed through legalisation and funding, to achieve full and better employment, improvement to living and working conditions and “increased involvement of the social partners in the economic and social decisions of the European Community.”⁵⁴ To some extent this successfully promoted a few of the core minimum ESC rights that the CESC identified as immediately enforceable—equality between men and women in respect of work opportunities and working conditions including health and safety. Subsequent initiatives, such as the “Community Charter of Basic Social Rights for Workers” which was appended to the Maastricht Treaty as a “Protocol on Social Policy”, together with a related Social Action Programme (1989),⁵⁵ and the setting up of the Structural Funds,⁵⁶ attempted to develop greater social cohesion across the EU. This initiative was unsuccessful mainly because of a lack of consensus among all EU countries (the UK declined to sign the Charter); the Charter’s non-binding character, and the seemingly exclusive focus on workers’ rights. Crucially, the single biggest problem with the Social Charter related to the relationship between a standardizing Community Charter and the heterogeneous employment and labour laws among the nation states of the Community.⁵⁷ Teague and Grahl, in their review of the development of the Social Charter, questioned whether “an essentially federal arrangement as a social constitution could be adopted by the Community, a pre-federal body, without it causing disruption and disorder.”⁵⁸

This problem was to dog further efforts by the EU to achieve social cohesion. EU leaders were committed to the vision of the EU becoming by 2010 “the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the envi-

⁴⁹ (Sykes 2005) “Crisis? What Crisis? EU Enlargement and the Political Economy of European Union Social Policy.” *Social Policy and Society* 4:207-215 p. 207.

⁵⁰ (Eijsbouts and Nederlof 2011) *European Constitutional Law Review* Vol 7: 169–72.

⁵¹ Ibid. See also, (Plomein 2018), “EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights.” *Social Policy and Society*, 17:2, 281-296, 282 and 283.

⁵² Gareth Dale and Nadine El-Enanny, (2013) “The Limits of Social Europe: EU Law and the Ordoliberal Agenda.” *German Law Journal (Special Issue Regeneration Europe)* 14:5, p. 614.

⁵³ Article 3 of the Treaty of the European Union (TEU) describes the EU economy as entailing ‘full employment and social progress and a high level of protection’ (2007).

⁵⁴ (Daly 2007) “Whither EU Social Policy? An account and Assessment of Development in the Lisbon Social Inclusion Process.” *Jnl Soc.Pol.*37:1 1-19. p. 3.

⁵⁵ Ibid.

⁵⁶ (Sykes 2005) (n 49) p. 209.

⁵⁷ (Teague and Grahl 1991) “The European Community Social Charter and Labour Market Regulation.” *Jnl Publ. Pol.*, 11: 2, 207-232, p. 212.

⁵⁸ Ibid.

ronment.”⁵⁹ To achieve this they adopted the Lisbon Strategy, which introduced a means for member states to arrive at a “convergence” of common social goals and to generate a “Europeanisation of problems” in the context of common global objectives.⁶⁰ The Open Method of Coordination (OMC) (already in use in EU employment policy and economic policy) was designed to arrive at an EU wide understanding of social cohesion and to better implement key ideas across nation states by performance managing non-binding common objectives.⁶¹ Unfortunately, this initiative also failed in achieving any EU wide shared understanding of social cohesion. The Kok review of the Lisbon Strategy concluded that the failure resulted from a lack of political commitment.⁶² There was “neither Europeanisation nor a (re)nationalisation of social exclusion as a policy problem/approach.”⁶³ Following the Kok report the Lisbon Strategy was re-adjusted with an even greater focus on “growth and employment” and the aim of achieving “social inclusion” through building an “inclusive labour market.”⁶⁴

European efforts to embed social goals into its economic vision did not give rise to a “European welfare state” resembling national welfare states with social entitlements and provisions organised at the EU level.⁶⁵ This is unsurprising given that the original Lisbon Strategy attempted to do two things: to “overcome the differences in growth and productivity between the EU and its leading global competitors at the time, the USA and Japan”⁶⁶ and to harmonise and improve divergent labour arrangements among sovereign EU member states. Daly points out that the EU tendency is to “force social policy through the needle’s eye of economic progress.”⁶⁷ According to Daly, social policies, as envisioned by the treaties of the EU, aimed at harmonising employment and living standards among EU member states to facilitate the common market. EU social policy is market-making, not market-correcting.⁶⁸ The former aims to remove barriers to the integration of the labour market and improve its efficiency while the latter uses redistribution mechanisms to correct for undesirable market outcomes that exacerbate inequalities.⁶⁹

Social cohesion has been difficult to achieve since the 1980s with the Community’s move to create a Single Market and the beginnings of globalisation.⁷⁰ The European business community and the UK successfully negotiated a Single Market restricted only to trade in goods and services leaving employment regulation in the hands of member states. The Single European Act “qualified majority” Council voting system excluded qualified voting (unanimity required) on all employment issues except health and safety.⁷¹ The result was that the Single European Act led to the rapid development of the Single Market at the expense of the social dimension.

⁵⁹ (Facing the Challenge 2004). The Lisbon Strategy for Growth and Employment. Report from the High-Level Group chaired by Wim Kok (2004) http://Europa.eu.int/comm/lisbon_strategy/index_en.html (accessed 23 June 2020).

⁶⁰ Mary Daly (n 54) p. 8.

⁶¹ Ibid. Also See (Bernard 2003), “A ‘New Governance’ Approach to Economic Social and Cultural Rights” in T A Hervey and J Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford, Hart 2003) p. 250 ff for a discussion of the OMC.

⁶² Wim Kok (n 59) p. 7.

⁶³ Mary Daly (n 54) p. 12.

⁶⁴ Wim Kok (n 59) p. 7.

⁶⁵ Leibfried (2000), “National Welfare states, European Integration and globalisation: a perspective for the next century.” *Social Policy and Administration*, 34,1, March, 44–63 p. 45.

⁶⁶ (The Lisbon Strategy 2010). An Analysis and evaluation of the methods used, and results achieved. Final Report 2010 <http://www.europarl.europa.eu/activities/committees/studies.do?language=EX> (accessed 13 June 2020).

⁶⁷ Mary Daly (n 51) p. 12.

⁶⁸ (Daly 2018) Analytical framework of Wolfgang Streeck summarised by M Daly, *The Implications of the Departure of the UK for EU Social Policy* (CUP 2018) p 108. See details of the failure of the social project after Maastricht, (Streeck 1994) “European Social Policy after Maastricht: The ‘Social Dialogue’ and Subsidiarity.” *Economic and Industrial Democracy* Vol 15, 151–77.

⁶⁹ M Daly, Ibid.

⁷⁰ The Single European Act or 1986 created the European Single Market.

⁷¹ (Dowling 1996) “From the Social Carter to the Social Action Program 1995-1997: European Union Employment Law Comes Alive.” *Cornell International Law Journal*, Vol 29 Issue 1, p 41.

Globalisation, which also accelerated in the 1980s, describes the influence of financial markets on national policies and the privatisation of state functions.⁷² Globalisation separates the global marketplace from the politics of nation states where the contest about the allocation of resources happens. De Witte rightly describes capital as a “fugitive power” that eludes the administrative and legal reach of nation states.⁷³ The EU represents a regional version of this. The Treaty of the European Union (TEU) 1992 created a new and unique entity—a largely legally integrated EU.⁷⁴ Economic supranational law subordinated the laws of the nation state to the laws of the Single Market thus diminishing the social and public sphere at the EU and the member state level. Subject to the EU regulatory framework, member states partially ceded sovereignty and autonomy to develop and implement policies that fulfil the social demands of their citizens.⁷⁵ The common market, trade and economics upon which the close co-operation of the EU is based were bound to conflict with social policies that are confined to the contested political sphere within member states.⁷⁶ The EU regulatory state is independent of and insulated from social and democratic forces—it is “depoliticised.”⁷⁷

The commitment to the four freedoms—the free circulation of goods, services, capital and labour at the expense of social rights chipped away at the social welfare arrangements that member states of the EU had developed in the post-war period, diluting their commitment to implementing ESC rights.⁷⁸ In the Millennium Declaration, the CESCR raised concerns about the impact of globalisation on ESC rights.⁷⁹ The people who lose out are the most disadvantaged. Indeed, EU fiscal reforms focusing on “balanced budgets, limited deficits and limited macro-economic imbalances,”⁸⁰ means that if there are conflicts over social issues, the system is protected from it. Dale and El-Enanny wryly comment that EU social justice is a “valuable principle so long as it does not conflict with the higher principle of free market competition.”⁸¹ It was unavoidable that the European citizenry would become increasingly conscious of the political and social deficit of the EU and its negative impact. Analysis of the Brexit result and the rise of populism in Europe point to widespread disaffection with the effects of globalisation and policies of the EU.⁸²

The inclusion of the EU Charter in the Lisbon Treaty followed by the establishment of the European Fundamental Rights Agency⁸³ encouraged the view that the development and implementation of legally enforceable social rights will redress the imbalance created by the prioritisation of the economic over the political. The ECJ had successfully used fundamental rights to limit the application of the fundamental freedoms of the EU Treaties. Social rights now enjoy the same legal status as fundamental rights but the role the ECJ plays and could play within the EU regulatory system to consolidate the “community *aquis*” is the subject of much debate and little agreement among scholars.

⁷² Manisulu Ssenyonjo (n 7) p. 19.

⁷³ Floris De Witte (n 3) p. 589.

⁷⁴ (TEU C 191 1992) (Maastricht Treaty) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11992M%2FTXT> (accessed on 13 June 2020).

⁷⁵ S Liebfried (n 65) p. 45.

⁷⁶ See for example, (Schmidt and Thatcher 2013) *Theorising ideational continuity: the resilience of neo-liberal ideas in Europe's Political Economy*. (Cambridge University Press: 2014) and (Schmidt and Thatcher 2014) “Why are neoliberal ideas so resilient in Europe's political economy?” *Critical Policy Studies* Vol 8, 2014. (Briebricher and Vogelmann 2017) *German Ordoliberalism and Contemporary Neoliberalism*. (Ranham: Rowman and Littlefield 2017).

⁷⁷ (Chalmers 2012) “The European Redistributive State and a European Law of Struggle.” 18 *Eur.L.J.* 667, 693.

⁷⁸ (Cayla 2019) “The Rise of Populist Movements in Europe: A Response to European Ordoliberalism.” *Journal of Economic Issues, Newfound Press*. 53 (2), pp. 355–362, 2. See also (Vaughan-Whitehead 2013), *EU enlargement versus Social Europe? The uncertain Future of the European Social Model*, (Cheltenham: Edward Elgar 2013).

⁷⁹ (UN General Assembly 2000) UN Millennium Declaration GA Resolution 55/2 <http://undocs.org/A/RES/55/2>, <https://www.unescap.org/resources/ga-resolution-552-united-nations-millennium-declaration> (accessed 13 June 2020).

⁸⁰ (Dale and El-Enanny 2013) (n 52) p. 641.

⁸¹ *Ibid.*

⁸² See David Cayla (n 78).

⁸³ (Multi-Annual Framework for the European Union Agency for Fundamental Rights for 2007–2012, OJ 2008 No. L63/14. Regulation 168/2007/EC) (accessed 3 April 2020).

4. The Role of the Courts—The ECJ and the Regulatory System of the EU

The inclusion of the Charter of Rights in the Treaty of Lisbon seems to have signaled a change in the “self-understanding” of the EU. The original treaties that set up the European institutions and governed relations among member states were part of international law. The Charter changed the status of the Treaty of Lisbon from public international law to constitutional law.⁸⁴ According to Bazzocchi, this opens the door for the Charter to become an instrument that not only clarifies fundamental rights within the EU but also “constitutional traditions common to member states.”⁸⁵

Prior to the adoption of the Lisbon Treaty, the ECJ played a crucial role in the creation of the EU regulatory regime by prioritising EU law above the law of nation states. It is seen as an activist court in its efforts to promote economic integration.⁸⁶ The ECJ gave effect to EU economic policies that ensured that member states acted as a “market facilitating authority in the interests of capital.” While member states had the autonomy to determine their own particular economic arrangements, under the impact of the Single Market rules adjudicated by the ECJ, they increasingly lost control of aspects of the economy such as employment and industrial relations.⁸⁷

De Witte offers a positive analysis of the role the ECJ can play. The ECJ has the potential to shift the social question “from the national political arena to the transnational judiciary.”⁸⁸ Since it is not possible to re-appropriate the social question within the realms of politics, might it be possible to re-enfranchise the citizen at the transnational level through an activist ECJ armed with social rights?⁸⁹ Roderic O’Gorman also points out that since the 1960s vigorous activism on the part of the ECJ produced a jurisprudence on fundamental rights, despite the absence of rights in the treaties before the TEU in 1992.⁹⁰ De Witte also points out that the ECJ applying “EU law in general and EU Free movement law in particular has long been the lever that lifted the social question outside the scope of political contestation at the national level.”⁹¹ The ECJ did confirm in the *Akerberg Fransson* ruling that it will take into account the EU Charter whenever EU law is applied.⁹² The *Acciardi* case,⁹³ which involved the transferability of social entitlements of workers who move to other EU countries, is usually held up as an example of the ECJ taking into account the context of family and society in addition to the economic context. It is difficult to determine from this example if the effect of the ECJ ruling is market-making or market-correcting with some scholars arguing that the ruling did not reverse the notion of workers as a commodity. What the ECJ ruling enabled is easier movement of labour between EU countries thereby serving the single market more effectively. ECJ rulings have generally implemented the four freedoms of the EU in the interests of fundamental market freedoms with the result that health rights, labour rights and even the capacity of nation states to redistribute wealth were diluted.⁹⁴

Despite the obvious market facilitating impact of these rulings, the case law does reveal the power of the ECJ to alter the relationship between EU law and member states. The ECJ has to consider the four freedoms of the EU together with the legally enforceable

⁸⁴ Olga Zetterquist (n 41).

⁸⁵ (Bazzocchi 2011), “The European Charter of Fundamental Rights and the Courts” in G.Di Federico, (ed) *The EU Charter of Fundamental Rights. Ius Gentium: Comparative Perspectives on Law and Justice* (Dortrecht: Springer 2011) p. 60.

⁸⁶ Gareth Dale and Nadine El-Enanny, (n 52) p. 614. See *Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963).

⁸⁷ *Ibid* p. 621.

⁸⁸ Floris De Witte (n 3) p. 590.

⁸⁹ *Ibid* p. 610.

⁹⁰ Gorman (2011) “The ECHR, the EU and the Weakness of Social Rights Protection at the European Level.” *German Law Journal*, Vol 12, No.10 pp. 1834–61, p. 1835.

⁹¹ *Ibid* p. 605.

⁹² ECJ ruling in *Case C-617/10 Aklagaren v Hans Akerberg Fransson* EU:C:2014:126 at 21. See also (Menelaos 2018), *Brexit and the EU Charter of Fundamental Rights* papers.ssrn.com <http://ssrn.com/abstract=3280234> accessed 10 April 2020.

⁹³ *Case C-66/92, Acciardi v Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland*, 1993 E.C.R. 1-4567.

⁹⁴ In the key cases of *Viking* and *Laval* the ECJ ruled against labour in favour of the market. *Case C-438/05, Int'l Transp. Workers' Fed' v. Viking Line ABP*, 2007 E.C.R. I-10779; *Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. 1-11767 *Case-C343/06*.

Charter of Rights whenever EU law is engaged. This raises two questions: has the EU Charter made the ECJ another forum for rights adjudication for EU member states? and does the Charter give member states more scope to strike the balance between EU economic policies and commitment to ESC rights?

The EU Charter is limited in its application because the EU does not have the power, through its institutions, to enact human rights rules nor to create binding human rights treaties.⁹⁵ Art 51(1) of the Charter requires EU institutions to have regard for the rights of the Charter when creating legislation so EU Charter rights apply only within the competency of EU institutions. In addition, the text of the Charter makes clear that the new rights included do not confer new competencies on the EU.⁹⁶ It is unlikely that the ECJ will uphold individual entitlements against member states.⁹⁷ Rights, whether CP or socio-economic are weak at the EU level since they aid in the interpretation of EU and national legislation if EU and national law are discovered to be incompatible with EU Charter rights. Charter rights cannot be used to disapply the legislation of member states. The significance of the EU Charter is that it will have a constraining effect on EU institutions to the extent that legislation emanating from the EU cannot conflict with the rights protected in the EU Charter and member states are bound by EU Charter rights when acting within the scope of EU law.⁹⁸

However, even this modest impact of Charter rights on the operation of EU law created concern among a few member states that the new legal status of the EU Charter could mean that individuals in the EU, with locus standi, could use the Charter to expand the scope of rights. Indeed, it still remains unclear whether the rights in the EU Charter could become grounds for judicial review of laws and decisions of EU institutions.⁹⁹ The UK (and Poland) negotiated a protocol (No 30) to limit the jurisdiction of the ECJ rulings in situations where UK and Polish law are inconsistent with Charter rights except those rights already recognised in UK and Polish national law.¹⁰⁰

What was the reason behind the UK “reservation” or Protocol 30? Was the UK afraid that the Charter was in danger of expanding rights such as workers’ rights or labour rights at the domestic level? In the explanatory note accompanying the European Union Withdrawal Treaty (EUWA) the UK is emphatic that UK citizens will suffer no detriment when the EU Charter no longer applies in the UK.¹⁰¹ A 2017 UK Government Report claims that the rights of the EU Charter are superfluous since these rights are covered by domestic law, international human rights law and EU law that remains part of UK domestic law.¹⁰² If this is the case then there was little need for the reservation. A more accurate reading of the reservation is the concern created about the potential implications of a Charter of Rights that includes a raft of social rights with the same legal status as CP rights. As a member of the EU, the UK would have had to accept the constraining effect of the Charter on UK law-making powers so the UK rejected the jurisdiction of the ECJ in this regard. This hints at the role the ECJ could play in implementing the EU Charter. Significantly, the

⁹⁵ Accession of the European Commission to the European Convention for the Protection of Fundamental Freedoms. Opinion 2/94, above n.59, paras. 27 and 34.

⁹⁶ (Zetterquist 2011) (n 41).

⁹⁷ (De Schutter 2007) “Fundamental Rights and the Transformation of Governance in the European Union”. Cambridge Yearbook of European Legal Studies, Vol. 9.

⁹⁸ Menelaos Markakis (n 92).

⁹⁹ (Hervey 2005), ‘We don’t see a connection’: The ‘Right to Health in the EU Charter and European Social Charter’ in *Social Rights in Europe* (Eds) Gráinne de Búrca, Bruno de Witte, and Larissa Ogertschnig (Oxford University Press: 2005).

¹⁰⁰ (Consolidated version of the Treaty on the Functioning of the European Union 2016)—PROTOCOLS—Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. Doc 120086/PRO/30. Available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F30> (accessed on 13 June 2020).

Article 1(2) of the Protocol No 7 Treaty of Lisbon provides that: ‘nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the UK except in so far that Poland or the United Kingdom has provided for such rights in its national law.’ See also (Menelaos 2018) (n 87).

¹⁰¹ EUWA s 5 (5); Explanatory Notes, paras. 61, 106–7.

¹⁰² (Charter of Fundamental Rights of the EU: Right by Right Analysis 2017) (5 December 2017), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf (accessed 13 October 2020), para. 5–6.

scope of the Protocol did not allow the UK (or Poland) the freedom to implement laws or administrative regulations inconsistent with the provisions of the Charter.¹⁰³

The Treaty limits the ECJ to applying the fundamental rights of the Charter only in the context of EU law. This hardly amounts to a radical move to impose equitable social rights across EU member states. Besides, rights protecting instruments have never been enough to achieve the legal enforcement of rights without being accompanied by vigorous social action. The history of civil and political rights is a history of collective action by excluded groups to expand the application of rights. Sex and race equality before the law, for example, required the mobilisation of local and international movements to bring about legislative change in domestic jurisdictions. Significantly, the Committees serving the ICCPR and ICESCR take into account the views of NGOs in their assessment of country reports on the progress made in implementing rights. The EU and the ECJ are immune from the sorts of political pressures and mobilisation for rights that nation states face. This highlights the social and democratic deficits of the EU which results from “the absence of . . . a constituent power—some sort of sovereign people.”¹⁰⁴

If the EU Treaties have assumed “a regulatory form of authority” more akin to a constitution including employment and industrial relations regime,¹⁰⁵ then it is unlike a traditional constitution that regulates political governance and political opposition.¹⁰⁶ The ECJ cannot develop social policy through its rulings except in a limited, piecemeal way. Moreover, the court’s intervention is not the same as democratic representation as judicial legislation is “immunised [at the EU level] against political objections.”¹⁰⁷ The impact of ECJ rulings is more likely to act as a constraining force if EU institutions and nation states attempt to disregard the social consequences of EU law and policy.

5. Brexit and the Charter “Effect”

If Brexit, a political and constitutional event, is also seen as a social movement against the international and regional effects of globalisation, it may explain the post-Brexit moves by the EU to address the social question more directly. Ironically, if the Brexit effect results in pressure on the EU and ECJ to create an environment that is more conducive to the fulfilment of ESC rights in member states then UK citizens will not have a share in this.

Since the Brexit vote in 2016, the EU made two separate declarations to confirm Europe’s commitment to the social question and social rights. In the Rome Declaration of 2017, the EU included social rights in its statement on the future of Europe.¹⁰⁸ Twenty-seven EU member states (now excluding Britain) committed themselves to four key aims “a safe and secure Europe; a prosperous and sustainable Europe; a social Europe and a stronger Europe.”¹⁰⁹ The Declaration promised that the EU would become a union “which acts against unemployment, discrimination, poverty and social exclusion.”¹¹⁰ In November of the same year, the European Parliament, the Council and the Commission proclaimed the European Pillar of Social Rights which is the first set of social rights proclaimed by the EU institutions since The Charter of Fundamental Rights in 2000.¹¹¹ The Pillar of social rights “is about delivering new and more effective rights for citizens” and aims to achieve

¹⁰³ Case C-206/13 *Cruciano Siragusa v Regione Sicilia*.

¹⁰⁴ *Ibid.*

¹⁰⁵ Stephen Gill (1998) “European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe”, 3 *New Pol.Econ.*, 5-26 quoted in Gareth Dale and Nadine El-Enanny (n 52) p. 648.

¹⁰⁶ *Ibid* p. 624.

¹⁰⁷ (Scharpf 2010) “The Asymmetry of European Integration, or Why the EU cannot be a Social Market Economy.” *Socio-Economic Review* 8: 211–250.

¹⁰⁸ This was on the occasion of the celebration of the 60th anniversary of the Treaty of Rome.

¹⁰⁹ Europeanmovement.ie.

¹¹⁰ *Ibid.*

¹¹¹ News. The European Pillar of Social Rights has been jointly signed by the European Parliament, the Council and the Commission on 17 November 2017 at the Social Summit for Fair Jobs and Growth in Gothenburg, Sweden. The European Pillar of Social Rights in 20 Principles. ac.europa.eu. See also Barnard (2014) “EU employment law and the European social model: the past, the present and the future,” *Current Legal Problems* 67, 1, 199–237.

a practical social agenda through legislative and policy initiatives.¹¹² There are 20 key principles organised in three categories, namely, equal opportunities and access to the labour market, fair working conditions and social protection and inclusion.

A year after its declaration the European Commission took concrete steps to put the 20 rights and principles into practice claiming that “[t]he European Semester is now more social than ever, with the Pillar firmly integrated into the process to monitor social progress.”¹¹³ The statement included better EU support for fair and well-functioning labour markets and welfare systems now and in the future.¹¹⁴ The statement, timed for the May 2019 European elections, also announced €100 billion over the period of 2021–2027 for the European Social Fund. Jean Claude Juncker, emphasising the social dimension in the future of the European Union proclaimed that “[O]ur union has always been a social project at heart. It is more than just a single market, more than the euro. It is about our values and the way we want to live.”¹¹⁵ The Commission’s proposals on the European Social Fund Plus (ESF plus) and the future globalisation Adjustment Fund linked to the Pillar included a process whereby the Commission would monitor progress by member states on the basis of social indicators.

The Brexit event seemed to have forced a commitment by the EU to pay attention to the social sphere. This does not mean that the efforts made are enough to address or resolve the contradictions inherent in EU policies. The enhancing of the social will not bring about a redistribution of wealth or protecting people from the more egregious effects of the market. It appears to imply, instead, adjustment to the market “by way of increasing employability through the acquisition of skills. The expectation is that the labour force has to retrain and adapt to an increasingly competitive, globalised work economy.”¹¹⁶ These initiatives are consistent with the Social Charter which has long been criticised for protecting workers’ rights and rights that favour “participation, adjustment and development” with respect to the economy, but fall short of adequately catering to “life circumstances” of dependence that might need or require support and care.¹¹⁷

The EU Charter, limited as it is, will cease to apply in the UK after 31 December 2020. The European Union Withdrawal Act (EUWA) 2018 both repealed the European Communities Act 1972 and preserved much of the pre-Brexit legal status quo—for now. A raft of laws that implement the shared obligations of member states of the EU will remain as a consequence of the EUWA. This has created an anomaly in UK domestic law since the EU Charter applies when EU law is implemented but the EU Charter ceases to apply in the UK after Brexit even though a substantial corpus of EU law has been retained in UK domestic law.¹¹⁸ The confusion is made greater by s. 5 (2) of the EUWA which states that the supremacy of EU law applies to all EU provisions made before exit day.

UK citizens are facing several potential threats to the effectiveness of international treaties to protect their rights. The UK is officially no longer party to the EU Charter of Fundamental Rights. Brexit has also limited the continued application of the ECHR in UK domestic law even though this is a separate, regional human rights treaty protecting CP rights. The ECHR is entrenched in EU law and it is feared that the UK’s disengagement

¹¹² Statement by the President of the EU Commission, Vice President for the Euro and Social dialogue and Commissioner for Employment, Social Affairs, Skills and Labour Mobility. The European Pillar of Social Rights in 20 Principles. ac.europa.eu. (accessed 10 August 2020).

¹¹³ ac.europa.eu. (accessed 10 August 2020).

¹¹⁴ (European Pillar of Social Rights: Statement by President Juncker 2018), Vice-President Dombrovskis and Commissioner Thyssen one year following its proclamation. News. 13/11/2018. ac.europa.eu. (accessed 10 August 2020).

¹¹⁵ European Commission President Jean-Claude Juncker (2017), Statement following the proclamation of the European Pillar of Social Rights, Tripartite Social Summit, 17 November 2017. European Commission, ac.europa.eu. The president made reference to the Future of Europe Summit in 9 May 2018 in Sibiu, Romania (accessed 10 August 2020).

¹¹⁶ (van Apeldoorn 2009), “The Contradictions of “Embedded Neoliberalism” and Europe’s Multi-level Legitimacy Crisis: The European Projects and its Limits,” in Van Apeldoorn, B, Drahokoupil, J & Horn, L (Eds) *Contradiction and Limits of Neoliberal European Governance: From Lisbon to Lisbon* (Palgrave: 2009) pp. 21,31 See also (Hervey and McHale 2005) Law, Health and the European Union, *Legal Studies* 25 (2) 228–259.

¹¹⁷ (Barak-Erez and Gross 2007), Exploring Social Rights Between Theory and Practice. 2007. Available online: https://www.worldcat.org/title/exploring-social-rights-between-theory-and-practice/oclc/8164172932&referer=brief_results (accessed on 13 October 2020), p. 371.

¹¹⁸ ECJ ruling in Case C-617/10 *Aklagaren v Hans Akerberg Fransson* EU:C:2014:126.

from the EU “will remove any constraints to withdrawal from the ECHR resulting from EU law”.¹¹⁹ The ECHR is currently under independent review.¹²⁰ The chair of the independent review insists that the UK will remain a signatory to the Convention but that one of the key points of review is the relationship between the UK courts and the ECtHR, especially the requirement that UK judges “take into account” the jurisprudence of the ECtHR.¹²¹ The government seems determined to restrict the application of ECtHR jurisprudence in UK law and has mooted a British Bill of Rights. The UK government dismisses the idea that UK citizens or EU citizens residing in the UK suffer any loss of legal protection when the EU Charter ceases to apply. However, if the ECHR is also restricted, there will be little or no regional, European-wide rights protection for UK citizens.

6. Conclusions

Post-Brexit, it would appear that the UK may be on a different path to the EU if three factors are taken into account: efforts by EU institutions to take concrete steps to address through law and funding, social issues such as social welfare; the disapplication of the EU Charter in the UK; the independent review of the scope of the application of the ECHR in UK law. For decades EU policies diluted sovereignty without creating a meaningful democracy at the EU level and pursued ambitious economic policies that diminished the scope for either institutional or member state settlement of social issues. This approach risked “political rupture” with member states of the EU, as with Brexit, and undermined the legitimacy of national governments by eroding their ability to deliver equitable social welfare policies through political means.¹²² Fundamental rights, besides being the basis of individual entitlements also serve to constrain the power of the state. As mentioned previously, the EU is not a state, but its institutions, laws and policies dominate member states. Securing fundamental socio-economic rights against EU “institutions, bodies, offices and agencies” may create more scope for member states to take political responsibility for social arrangements. A more enabling environment for the development of equitable social policies is vital for the protection of ESC rights as the latter’s implementation depends more on states’ capacity to deliver on their treaty commitments than attempts to secure justiciability for ESC entitlements on the same basis as CP rights.

The role of the ECJ in promoting legal protection of ESC rights depends on the determination of EU institutions to rebalance the economic direction of travel by paying attention to the neglected social sphere. ECJ rulings have implemented the rules of free competition in the EU and the four freedoms. If the ECJ were activist in prioritising the economic over the social a change may come with the shift in emphasis of the Lisbon Treaty and stated EU policy? It could be argued that the ECJ gave effect to the EU’s economic ambitions which had the possibly unanticipated, and certainly undesirable, outcome of eviscerating the social sphere and diluting the political power of member states to legislatively correct for the damaging effects of the market. Just as the ECJ had given effect to the EU’s market-orientated ambitions the same court could potentially give effect to the EU Charter in constraining the overweening power of the institutions of the EU supra-state.

The human rights approach to the social sphere highlights the obligations on states. The EU ought to find, in its structural arrangements and organization, a way to prevent the diminution of other important shared values, besides material benefits, that recognises that life includes needs and dependence (temporary and permanent) which are part of human existence.¹²³ The EU Charter, for all its limitations, stands out as one of the few multilateral instruments enforcing both CP and ESC rights. It could act as a bulwark

¹¹⁹ (Lock 2017) *Human Rights in the UK After Brexit*, *Public Law*, Nov Supplement (Brexit Extra Issue) 117–134.

¹²⁰ On 7 December 2020 the UK government launched an independent review of the ECHR. Ministry of Justice Press Release www.gov.uk (accessed on 13 October 2020).

¹²¹ (Cross 2021), ECHR departure is not on agenda, say rights review chair. *Law Society Gazette* 13 January 2021.

¹²² Floris de Witte (n 3) p. 585. See also, (Anderson 2021), (21 January 2021). “The Breakaway” *London Review of Books*, Vol. 43 No. 2.

¹²³ D Barak-Erez and Aeyal Gross (n 113). See also Boguslaw Banaszak (n 33).

against EU policies that create a hostile environment for the implementation of ESC rights in member states. If the Charter becomes an instrument of pressure, as other human rights instruments successfully became, at the very least on the ECJ, it is likely that EU member states would find less obstruction from the EU to fulfil ICESCR treaty obligations. Whether this will translate into EU citizens enjoying greater ESC rights will be more dependent on policy choices made by member states than on the EU.

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