Articles

The ECHR, the EU and the Weakness of Social Rights Protection at the European Level

By Roderic O'Gorman[*]

A. Introduction

Ever since the conceptual division of rights into three separate categories; civil, political and social,[1] the legal status of social rights has been controversial.[2] This divergence in views is illustrated by the decision of the Council of Europe in 1950 to protect civil and political rights through a judicial format where adherence to the European Convention on Human Rights (ECHR) was ensured by the European Court of Human Rights, whereas social rights were addressed separately through the European Social Charter ("Social Charter"), with merely a reporting mechanism to the European Committee of Social Rights.

Section B illustrates how this Council of Europe decision has had repercussions for the protection of social rights within the European Union. Whereas the original Community Treaties made no provision for the protection of any human rights within their texts, this gap was addressed by the European Court of Justice (ECJ) through its jurisprudence protecting fundamental rights within the General Principles of Community law. While these general principles have been found to spring from common national constitutional traditions, international treaties and the European Convention on Human Rights; all of which have resulted in the protection of civil and political rights, other sources which could have formed the basis for protection of social rights have been largely neglected. This

[*] Lecturer in Law, Griffith College Dublin. Ph.D candidate, Trinity College Dublin. My thanks to the participants at the UCD PhD Workshop on Human Rights who made helpful comments on the first draft of this paper, in particular Dr. Oana Stefan. All errors and omissions are my own. Email: rodericogorman@gmail.com.

[1] Thomas Marshall, *Citizenship and Social Class*, *in* CITIZENSHIP AND SOCIAL CLASS 8 (Thomas Marshall & Tom Bottomore eds., 1992); Michael Lister, *Marshall-ing Social and Political Citizenship: Towards a Unified Conception of Citizenship*, GOVERNMENT AND OPPOSITION 471 (2005); Peter Dwyer, UNDERSTANDING SOCIAL CITIZENSHIP 4 (2004).

[2] Grainne De Burca, *The Future of Social Rights Protection in Europe*, *in* SOCIAL RIGHTS IN EUROPE 4 (Grainne De Burca & Bruno De Witte eds., 2005); Keith Ewing, *Social Rights and Constitutional Law*, PUBLIC LAW 104, 121 (1999); CECILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE (2004); Rodolfo Arango, *Basic Constitutional Rights, Social Justice and Democracy*, 16 RATIO JURIS 141 (2003); Gisella Gori, *Domestic Enforcement of the European Social Charter: The Way Forward*, *in* SOCIAL RIGHTS IN EUROPE 71 (Grainne De Burca & Bruno De Witte eds., 2005).

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neglect was confirmed by the text of the former Article 6 EU inserted at the Maastricht Treaty.

Section C uses decisions of the ECJ such as *Schmidberger*, *Viking* and *Laval* to demonstrate that while fundamental rights can sometimes be successfully invoked to limit the fundamental economic freedoms (free movement of goods, persons, capital and services/establishment) protected in the EU Treaties, the failure to protect social rights within either the Treaties or the case law means that these can never be used against the fundamental freedoms. The result is a significant imbalance in the protection of rights at Union level, particularly when the economic freedoms come into conflict with national services. Section D investigates the impact of the fundamental freedoms on two such areas which states traditionally view as falling with the social sphere: health and education.

Section E makes the argument that two significant alterations to the EU Treaties occasioned by the Lisbon Treaty opens the possibility of providing genuine social rights protection within Union law; the granting of legal effect to the Charter of Fundamental Rights and the addition of new social values to the Treaties. The paper concludes by arguing that these amendments potentially enhance the ability of Member States to protect social rights when these clash with the fundamental freedoms. Further, it is submitted that without making such changes, Union citizenship cannot be seen as a genuine form of citizenship.

The term 'social rights', as used in this paper entails individual or collective claims off the state.[3] These are supplied in the form of "public goods and services"[4] and ensure that citizens do not fall below a certain material standard of living.[5] Such rights may be guaranteed as individual social entitlements through legislation, or within national constitutions. Fabre identifies four key claims that require protection as social rights; that individuals should have rights to a minimum income, housing, health care and education.[6] Alongside these four headings, it has been suggested that certain guarantees surrounding employment must also be understood within the concept of social rights.[7] Union law now

[3] George Katrougalos, *European 'Social States' and the USA: An Ocean Apart?*, 4 EUROPEAN CONSTITUTIONAL LAW REVIEW 225, 230 (2008); Fiorella Dell'Olio, *Supranational undertakings and the determination of social rights*, 9 JOURNAL OF EUROPEAN PUBLIC POLICY 292, 304 (2002).

[4] Günter Frankenberg, *Why Care? The Trouble with Social Rights,* 17 CARDOZO LAW REVIEW 1365, 1365 (1995).

[5] EWING, *supra* note 2, at 105.

[6] FABRE, *supra* note 2, at 4. These four categories have been similarly identified by other authors as forming a core element of social rights, though not always framed in exactly the same manner. *See* Vassilis Hatzopoulos, *Current Problems of Social Europe*, EUROPEAN LEGAL STUDIES, 7 RESEARCH PAPERS IN LAW 2 (College of Europe, 2007); ARANGO, *supra* note 2, at 141; FRANKENBERG, *supra* note 4, at 1386; EWING, *supra* note 2, at 106. Ewing substitutes the heading "availability of a broad range of cultural, recreational and leisure facilities" for education.

[7] HATSOPOULOS, *supra* note 6, at 2.

contains extensive provisions surrounding the position of the worker in employment under Title X on Social Policy encompassing Articles 151 – 161 TFEU. Some of the articles included in this section pertain to the sub-category of rights described as 'labour rights.'[8] These would include rights such as the right to strike. Contrary to some authors, it is submitted here that the right to strike is not a social right but rather a civil right, though one that is often used in furtherance of social policy goals.[9] Therefore, the term 'labour right' cannot be synonymous with 'social right'. Title X does however include certain labor rights that are also social rights, such as the right to vocational training (Article 166 TFEU).

B. Social Rights and the General Principles of Community Law

Despite a complete absence of reference to fundamental rights in the Treaties before the TEU in 1992, vigorous judicial activism on the part of the ECJ since the late 1960s saw the creation of such a jurisprudence for the EU.[10] The ECJ was able to determine that "[r]espect for fundamental rights forms an integral part of the general principles of European Community law [...]."[11] While the ECJ never enunciated a clear distinction between its conceptual treatment of civil and political rights on one hand, and social rights on the other, the case law demonstrates that the ECJ of Justice has never seriously attempted to use the general principles of Community law as a source for the protection of social rights.[12]

Having proclaimed its own capacity to apply fundamental rights, the ECJ proceeded to identify a number of sources from which it could draw inspiration regarding those rights to be protected under Community law. These included international treaties that the Member States had signed or cooperated in the drafting of[13] and also national

[8] DE BURCA, *supra* note 2, at 4.

[9] Laurent Pech, *France: Rethinking 'Droits-Creances*, *in* SOCIO-ECONOMIC RIGHTS JURISPRUDENCE – EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW 264 (Malcolm Langford ed., 2009).

[10] *See* Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419; Case 11/70, Internationale Handelsgesellschaft, 1970 E.C.R. 1125; Case 4/73, Nold v. Commission, 1974 E.C.R. 491; Case 44/79, Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 3727.

[11] *See Internationale Handelsgesellschaft*, *supra* note 10, at para. 4.

[12] Bruno De Witte, *The Trajectory of Fundamental Social Rights in the European Union*, *in* SOCIAL RIGHTS IN EUROPE 155, 153 (Grainne De Burca & Bruno De Witte eds., 2005).

[13] *Nold, supra* note 10, at para. 13.

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constitutional traditions that were common across the Member States.[14] The ECHR was identified as a specific source of inspiration.[15]

The extent to which the ECHR could be used as a basis for identifying social rights protected in Community law was limited by the fact that other than the right to education, it primarily addresses civil and political rights. However, neither of the other two sources have been used by the ECJ to any significant extent. A significant number of Member States protect social rights within their constitutions.[16] Despite this, the ECJ has never attempted to use these as a basis for the discovery of common constitutional traditions related to social rights.

International treaty sources have fared little better. Admittedly in *Defrenne*, the provisions of the Social Charter were used to enshrine the prohibition of discrimination on the grounds of sex as one of the general principles.[17] Bearing in mind the argument that this right is actually classified as a civil rather than a social right, the decision would appear to be one of very few instances in which the ECJ used international treaties pertaining to social rights to justify its discovery of a general principle.[18] This reluctance to use international treaties is unusual, particularly in light of the existence of explicitly 'European' documents such as the Social Charter which enumerated extensive social rights and which almost all Member States helped author.[19] The Social Charter was of a similar status to the ECHR and had been specifically referenced in the Preamble to the Single European Act.[20] Similarly, the Community Charter of the Fundamental Social Rights of Workers (Community Charter) was a document exhibiting pan-Member State support, albeit originally excluding the UK.

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[14] *Hauer, supra* note 10, at para. 15.

[15] Rutili v. Minister for the Interior, 1219 1975 E.C.R. 1219, at para. 32.

[16] Cecile Fabre, *Social Rights in European Constitutions*, *in* SOCIAL RIGHTS IN EUROPE 15 (Grainne De Burca & Bruno De Witte eds., 2005). Fabre determined that of twenty-nine EU Member States or accession applicants, twenty-five of those States protect social rights within their constitutions to some degree.

[17] Defrene II, 1978 E.C.R. 1365 , at paras. 26-28.

[18] DE WITTE, *supra* note 12, at 153. The Social Charter was referred to in *Blaziot*, but this was in the context of it being used to assist with the interpretation of the term 'vocational' in what is now Article 167 TFEU. Blaziot v. Belgium, 1988 E.C.R. 379, at para. 17.

[19] Olivier de Schutter, *Anchoring the European Union to the European Social Charter: The Case for Accession*, *in* SOCIAL RIGHTS IN EUROPE 122 (Grainne De Burca & Bruno De Witte eds., 2005).

[20] Mark Gould, *The European Social Charter and Community Law – A Comment*, 14 EUROPEAN LAW REVIEW 223, 225-6 (1989).

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The ECJ's approach to international sources can be contrasted with the far more willing attitude exhibited by AG Tizzano in *BECTU*.[21] In assessing whether national conditions on paid annual leave were in compliance with the Working Time Directive, the Advocate General spoke of "fundamental social rights" in Union law and their sources.[22] In finding that annual paid leave was such a fundamental social right, the Advocate General cited the Universal Declaration of Human Rights and the UN Charter on Economic, Social and Cultural Rights.[23]

In contrast, the ECJ's judgment made one reference to the Community Charter, and this was merely to the extent of acknowledging that it was mentioned in the preamble to the Working Time Directive. The term 'fundamental social right' does not appear in the text of the decision. This complete failure by the ECJ to address the treatment of social rights by the Advocate General is an indication of its implicit rejection of social rights as comprising part of the general principles.

The second-class status of social rights was made explicit when fundamental rights finally obtained a reference within the Treaties. At Maastricht, the former Article 6(2) EU was added to the Treaties, indicating the EU respected fundamental rights as general principles. The ECHR and common constitutional traditions of the Member States are stated as being the source of these rights. However, the concept of using human rights documents that Member States had signed or cooperated in as potential sources of the general principles, as was decided in *Nold*, is expressly omitted.[24] This omission is notable in light of the explicit mention of the other two sources of general principles that emerged from the case law, national constitutional traditions and the ECHR.[25]

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[21] R. v. Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), 2011 E.C.R. I-4811.

[22] *Id*. at para. 22 of the opinion.

[23] *Id*. at para. 23 of the opinion. Significantly, AG Tizzano also located the right in both the Social Charter and the Community Charter, before copper-fastening its position as a fundamental social right by referring to the Charter of Fundamental Rights at paras. 23, 24 and 28 of the opinion. The Advocate General made further references to both the Social and Community Charters in paras. 26-27. *See* The Charter of Fundamental Rights of the European Union [hereinafter "the Charter], Dec. 18, 2000, 2000 O.J. (C364) 1.

[24] *Nold, supra* note 10.

[25] In Amsterdam, an overt mention of the term social rights was inserted in what is now Article 151 TFEU. While this article did cite a number of international treaties dealing with social rights which the Member States either signed or cooperated in, the significance of the provision was certainly questionable, containing as it did a mere exhortation to "implement measures" in the areas of improving living and working conditions, promoting employment, maintaining proper social protection and maintaining dialogue between management and workers. There was clearly a difference in the status of the norms contained within it, and those set out in the former Article 6 EU.

C. Balancing Fundamental Rights and Fundamental Freedoms

The previous section demonstrated how a fundamental rights jurisprudence was created by the ECJ, though it did not protect social rights. The evolution of the relationship between Union law and fundamental rights continues to this day, with recent cases dealing with situations where the protection of human rights has clashed with the enjoyment of the four fundamental freedoms protected under the Treaties.

I. Schmidberger *and* Omega*: Fundamental Rights trumping Fundamental Freedoms*

In *Schmidberger*, the ECJ had to adjudicate on a conflict between the desire of environmental demonstrators to exercise their rights of free speech and free association and the right of a transport company to engage in the free movement of goods.[26] The ECJ held that Austria had not breached Article 34 TFEU by giving permission for the demonstration, even though this had caused disruption to the applicants business by blocking a major transport route. In so deciding, it gave precedence to the rights of free expression and free assembly, both of which it noted were guaranteed in the ECHR and also in the Austrian Constitution, over the fundamental freedom in question. The ECJ declared:

> [...] since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.[27]

This is a significant statement by the ECJ regarding the hierarchy of rights within EU law. It makes it clear that the fundamental freedoms will not automatically trump human rights in situations where the two come into conflict. In reaching this position, the ECJ referenced the traditional line of case law which declared that the EU protected fundamental rights and drew inspiration for these from national constitutional traditions, international human rights treaties which the Member States has collaborated on or signed and in particular, the ECHR.[28] The ECJ noted that this line of case law had been confirmed by the Maastricht

[26] Schmidberger v. Austria, 2003 E.C.R. I-5659.

[27] *Id.* at para. 74.

[28] *Id.* at para. 71.

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Treaty, where the former Article 6(2) EU had been added to codify respect for fundamental rights within Union law. Having determined that the two rights at issue formed part of the general principles of Union law due to their enumeration in the ECHR, the ECJ then proceeded to undertake an extremely detailed proportionality analysis of how much the vindication of the fundamental rights in question wound impact upon the freedom to move goods.[29] The ECJ eventually found in favor of the rights of the protesters.[30] This was the first occasion where the ECJ allowed the invocation of the protection of fundamental rights as "an independent ground for justification" of the restriction on fundamental freedoms.[31]

A broadly similar outcome was reached in *Omega*.[32] There, the ECJ determined that a ban on a war game that simulated killing humans was not in breach of Article 56 TFEU (freedom to provide services) as it was a legitimate restriction in furtherance of the principle of respect for human dignity as protected under the German Constitution.[33] It was argued by the Advocate General and accepted by the ECJ, that ensuring respect for human dignity was a general principle of Community law. The ECJ determined that a Member State was entitled to invoke the need to protect human rights as outlined in its own constitution in order to broaden its margin of appreciation in the application of the public policy Treaty derogation.[34]

Both *Schmidberger* and *Omega* deal with conflicts between fundamental freedoms set out in the Treaty and civil rights explicitly protected by the ECHR and national constitutions. As a result, it is clearly possible to identify the rights in question in both these cases as falling within the general principles of Union law. However, in a subsequent set of cases where fundamental rights were in conflict with fundamental freedoms, the weakness in the pre-Lisbon approach of the ECJ to the protection of human rights becomes more apparent. The cases in question, *Viking* and *Laval*, demonstrate a clash between the freedom of companies to provide or establish services and the rights of unions to strike or engage in collective action. [35] Like in *Schmidberger* and *Omega*, the fundamental right in question

[29] *Id.* at para. 77.

[30] *Id.* at paras. 78 – 93.

[31] Nicolett Hos, The Principle of Proportionality in the *Viking* and *Laval* Cases: An Appropriate Standard of Judicial Review, 6 EUI WORKING PAPERS (Law) 8 (2009).

[32] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn, 2004 E.C.R. I-9609.

[33] *Id.* at paras. 34-5.

[34] Hos, *supra* note 31, at 8.

[35] International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, 2007 E.C.R. I-0779; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, 2007 E.C.R. I-11767. For a discussion of these cases, see – inter alia - Norbert Reich, *Free Movement v. Social Rights in the European Union:*

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(the right to strike) is regarded as a civil right. Its treatment in these cases will be used to illustrate major potential pitfalls for the protection of social rights.

II. Viking & Laval: Illustrating the Lack of Treaty based protection of social rights

Viking concerned a dispute between a seaman's union and the Viking ferry company which was attempting to 'de-flag' from Finland and set up a 'flag of convenience' in Estonia where it could pay lower rates. The EU sent around a circular to unions in other Member States, asking them not to enter into negotiations with Viking. Viking went to the British courts seeking an injunction to have circular withdrawn for being in breach of its right to establish under Article 49 TFEU

Considering the question of whether the right to strike was a fundamental right, the ECJ referred to a range of international instruments that the Member States had signed or cooperated in where the right was recognized: the European Social Charter, Convention No 87 concerning Freedom of Association and Protection of the Right to Organize, adopted by the International Labour Organization and the Community Charter. The ECJ also made reference to the Charter of Fundamental Rights.[36]

In light of this, the ECJ determined that the right to strike and take collective action was a fundamental right protected under the general principles of Community law, but also that it was subject to restriction.[37] In reaching this conclusion, the ECJ specifically referred to the fact that the right of collective action under Article 28 of the Charter was protected according to Community law and national law and practices.[38] Read in the context of the paragraph, the ECJ suggests that Community law along with national laws and practices form the basis for possible restrictions.

The Laval and Viking Cases before the European Court of Justice, 9 GERMAN L. J. 125 (2008), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=892; Christian Joerges, Sozialstaatlichkeit *in Europe?*, *A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation*, 10 GERMAN L. J. 335-360 (2009), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1096; Uladzislau Belavusau, *The Case of Laval in the Context of the Post-Enlargement EC Law Development*, 9 GERMAN L. J. 2279-2308 (2008), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1069; Eric Engle, *A Viking We Will Go! Neo-Corporatism and Social Europe*, 11 GERMAN L. J. 633-652 (2010), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1263

[36] *Viking, supra* note 35, at para. 43. It is noteworthy to see ECHR using international treaties primarily related to social rights to base its decision that the right to strike was protected under Union law, but just as in *Defrenne*, the right in question is a civil right and not a social right.

[37] *Viking*, *supra* note 35, at para. 44.

[38] *Id.*

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In determining how this restriction could be assessed, the ECJ referred to its previous judgments in *Schmidberger* and *Omega*, stating that in those cases it had held:

> [...] the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements *relating to rights protected under the Treaty* and in accordance with the principle of proportionality [...][39] (emphasis added)

The emphasized phrase clearly refers to the fundamental freedoms. This outlines a two-step process, where the ECJ must first determine that a fundamental right falls within the Treaties, which then must be balanced against any impact on the fundamental freedoms, through the mechanism of proportionality. The initial hurdle of whether a right comes within the scope of the Treaties is not a significant problem for most civil and political rights such as freedom of assembly, free speech and human dignity, as these are explicitly protected under the ECHR or national constitutional traditions. As such, these values have a basis as recognized general principles of Union law and this allows them be balanced against the fundamental freedoms.

The difficulty for social rights is that they do not benefit from this same degree of protection as civil and political rights, under Union Law. It has already been demonstrated in Section B that social rights, either in the form of national constitutional traditions or those contained in international treaties which the Member States have signed up to, have never been recognized by the ECJ as forming part of the general principles of Union law. Nor were international treaties associated with the Member States, arguably the best potential source of social rights inspiration, given recognition by the former Article 6(2) EU as a source of the general principles.

So when the ECJ stated in *Schmidberger* that "[...] measures which are incompatible with observance of the human rights *thus recognized* are not acceptable in the Community", the highlighted words can only possibly refer to fundamental rights stemming from the recognized sources— the common constitutional traditions and the ECHR. This excludes the possibility of using other international treaties containing explicit recognition of social rights, which the Member States had been involved in drafting, as the sole basis for discovering social right within Community law.[40] *Viking* thus demonstrates that Community law lacked either an express enumeration of social rights within the Treaties themselves,

[39] *Viking*, *supra* note 35, at para. 46.

[40] *Schmidberger*, *supra* note 26, at 73.

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or a definitive article permitting the sourcing of general principles of Community law within documents in which social rights could be found.

The detrimental consequences of this are clearly demonstrated in the *Laval* judgment. The case centered on a dispute between a Latvian company, Laval, and Swedish trade unions. Laval was refusing to sign up to a collective agreement with the Swedish unions covering the pay and conditions that would apply to Latvian workers it was employing on sites in Sweden. The EUs organized strikes against all Laval's sites in Sweden.
In addressing the issue of the interaction between the right to strike and the right to provide services under Article 56 TFEU, the ECJ repeated much of what it said in *Viking* about the status of the right to strike being a fundamental right comprising part of the general principles of Community law, but also as one which was subject to restriction.[41] It reiterated some conclusions it had made in earlier cases; from *Schmidberger*, that a fundamental freedom could be restricted by reference to a fundamental right and thus the exercise of a fundamental right did not fall outside the scope of the Treaties, and from *Viking*, that the fundamental right "[...] must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality".[42]

It is submitted that what is most significant about the judgment was the way in which the ECJs undertook the second step of its analysis; assessing the proportionality of the impact of the EU's right to strike on the company's right to provide services. In outlining how it balanced the pair of conflicting rights, the ECJ stated:

> [i]t should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection.'
>
> Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their

[41] *Laval*, *supra* note 35, at para. 90 – 92.

[42] *Id*. at para. 94.

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> harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.[43]

In identifying which standards to use in its balancing process, the ECJ is clearly reaching for those values explicitly set out in the Treaty. While earlier in the case there were references to the Charter of Fundamental Rights, the Social Charter and ILO conventions, when it comes to the task of actually balancing the norms, these are not mentioned.[44] As in *Schmidberger*, *Omega* and *Viking*, the ECJ relies on values unequivocally contained in the Treaties or directly linked to the Treaties via the former Article 6(2) EU. As discussed above, both the approach of the ECJ and the lack of explicit enumeration within the text of the Treaties mean that such a link cannot be established in the context of social rights, leaving them inadequately protected.

D. Assessing the impact on the Member States

Having demonstrated the major weakness in the safeguarding of social rights values at constitutional level within the European Union, attention now turns to the consequences of this gap in protection, when social rights protected under national laws come into conflict with the fundamental freedoms. This will be examined in the context of the interaction between the freedom to provide and avail of services under Articles 56 and 57 TFEU and two distinct areas where states traditionally provide social rights: healthcare and education.

I. Healthcare

Issues related to the compatibility of national rules regarding the financing of healthcare with Union law have come before the ECJ of Justice with increasing regularity in the last fifteen years. The ECJ has taken an interventionist approach to this area through its application of the freedom to provide services.[45] This is significant due to the wide variation in the manner in which healthcare is paid for across the Member States, and also the large proportion of national expenditure that these costs constitute for each country.

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[43] *Id.* at paras. 104 – 105.

[44] *Id.* at para. 90.

[45] Hatzopoulos describes the case law as being a "spectacular development." *See* Hatsopoulos, *supra* note 6, at 12.

Four decisions covering similar factual situations are crucial in this area; *Kohll*, *Geraerts-Smits & Peerbooms*, *Muller-Faure* and *Watts*.[46] The applicants in each case travelled to another Member State to seek medical treatment there. None obtained the necessary prior authorization of their national health system or sickness insurance provider and were therefore refused when they subsequently sought reimbursement of the cost of the procedure. While the national rules did not prevent an insured person seeking a medical service from a provider in another Member State, they did make this more difficult. For the purposes of this paper, a pair of key themes across the four judgments are highlighted.

1. National Autonomy and the Effect of Article 168(7) TFEU

In each of the cases, the ECJ began by emphasizing the autonomy that the Member States enjoyed, but swiftly qualified this by stating that they must still comply with Union law.[47] In *Kohll*, the ECJ restated the position from *Sodemare* and other cases that Community law does not detract from the powers of the Member States to organize their own social security systems,[48] but it also noted that the fact that certain services are of a special nature does not remove them from the application of the Treaty provisions, specifically Articles 56 and 57 TFEU.[49] Significantly, in *Muller-Faure*, the ECJ went further and stated that the achievement of the fundamental freedoms would result in the need for some adjustments to national social welfare systems, though this would not undermine sovereign powers in the field.[50]

Despite the existence of Article 168(7) TFEU on Union action in the field of public health, this provision was only considered in the *Watts* case.[51] The national Court asked whether

[46] Kohll v. Union des Caisses de Maladie, 1998 E.C.R. I-1937; Geraets-Smits & Peerboms, 2001 E.C.R I-5473; V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, 2003 E.C.R. I-4509; Watts v. Bedford Primary Care Trust, 2006 E.C.R. I-4325.

[47] *See Kohll*, *supra* note 46, at para. 17; *Geraerts-Smits*, *supra* note 46, at paras.53-4; *Muller-Faure*, *supra* note 46, at paras. 39, 100; *Watts*, *supra* note 46, at para. 92. Note Davies' states that "[it] is suggested that the capacity to believe that these statements are compatible serves as a test of true faith," Gareth Davies, *Welfare as a Service*, 29 LEGAL ISSUES OF ECONOMIC INTEGRATION 27, 28 (2002).

[48] *Kohll*, *supra* note 46, at para. 17.

[49] *Kohll*, *supra* note 46, at paras. 20-21.

[50] *See Muller-Faure*, *supra* note 39, at paras. 101-2; *see also Watts*, *supra* note 46, at para. 121.

[51] "Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood." The second sentence was newly added during the Lisbon Treaty process.

Article 56 TFEU in conjunction with Regulation 1408/71 meant that there was an obligation on a Member State to fund hospital treatment in other Member States regardless of budgetary constraints and if so, whether this complied with Article 168(7) TFEU.[52] The ECJ noted that under Article 168(7) TFEU, Union action in the field of public health must fully respect the responsibilities of the Member States in the organization and delivery of health care, but also repeated its jurisprudence that Treaty obligations such as 56 TFEU may require Member States to make adjustments to their national social security systems, though this would not undermine state sovereignty.[53] It is submitted that this exchange shows that the introduction of Article 168(7) into the analysis made no real difference to the ECJ's approach. This raises questions about the function of the article and whether the ECJ was giving its provisions adequate weight, particularly as one would expect it to be interpreted as a clear indication of the limits of EU competence in this area.

2. Acceptable Limitations on the Freedom to Provide Services

In each of the judgments, the ECJ listed justifications that it would accept for limitations on the freedom to provide services. These included situations where the financial solvency of the healthcare system was under threat.[54] This applied despite the fact that it is settled case law of the ECJ that purely economic concerns could not justify a barrier to the fundamental freedom to provide services.[55] In relation to the assessment of the potential impact for the national system, the ECJ noted in *Muller-Faure* that:

> [i]t is self-evident that assuming the cost of one isolated case of treatment, carried out in a Member State other than that in which a particular person is insured with a sickness fund, can never make any significant impact on the financing of the social security system. Thus an overall approach must necessarily be adopted in relation to the consequences of freedom to provide health-related services.[56]

[52] *Watts*, *supra* note 46, at para. 144.

[53] *Watts*, *supra* note 46, at paras. 146-7.

[54] *Kohll*, supra note 46, at paras. 41-2; *Geraerts-Smits*, *supra* note 46, at para. 72*; Muller-Faure*, *supra* note 46, at para. 73*; Watts*, *supra* note 46, at para. 103.

[55] *Muller-Faure*, *supra* note 46, at para. 72. Nic Shuibhne illustrates the point regarding the problematic nature of using economic justifications for derogating from the fundamental freedoms in Niamh Nic Shuibhne, *Derogating from the Free Movement of Persons: When can EU Citizens be Deported?*, 8 CAMBRIDGE YEAR BOOK OF EUROPEAN LEGAL STUDIES 187, 210 (2006).

[56] *Muller-Faure*, *supra* note 46, at para. 74.

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In light of this stance, it is legitimate to ask whether there ever will be circumstances in which this ground can practically be invoked. The cases coming before the ECJ usually concern individuals who are in the position to claim the benefit of the EU right. While a 'floodgates' argument is a blunt instrument, if each individual claimant is safe in the knowledge that their singular bill will not be found to be the tipping point that threatens the financing of the health care system, it would appear to undermine this as a potential basis for limiting free movement of services.[57]

A further potential justification for restricting the freedom to provide services was determined to be requirements surrounding the provision of an appropriate health system.[58] However, having given this apparent degree of flexibility to the Member States, the ECJ proceeded throughout the cases to draw together a series of rules designed to strengthen the position of the individual patient *vis-a-vis* the Member State. The ECJ conceded that in order to allow for the proper planning of a hospital system, a prior authorization scheme for persons seeking to travel to another Member State for medical treatment was of itself compatible with Article 56 TFEU.[59] However, the ECJ also placed emphasis on the need for the conditions for prior authorization to be as clear as possible and also made it a requirement that a refusal of prior authorization must be reviewable by a quasi-judicial body.[60]

It is in the ECJ's approach to waiting lists that its willingness to directly interfere with the operation of the Member State's health systems is most clearly illustrated. Through compelling Member States to pay for nationals who obtained healthcare in another Member State, the ECJ was undermining the waiting list system operated by the national health authorities. As persons lower down on the list now had the opportunity to get treatment earlier in another Member State, and still have it paid for by that health authority, this enabled them to by-pass persons higher up on the national list.

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[57] This criticism of the ECJ's approach to the solvency of national healthcare systems has not been restricted to its approach to the scale of individual financial claims. Concerns have also been raised about other financial assertions the ECJ has made. For example, it has been suggested that distinctions made in both *Watts* and *Muller-Faure* that allowing patients go to another Member State to receive non-hospital medical treatment would not cause financial risk, while allowing them travel for hospital based medical treatment would, were not based on any substantive economic analysis. The ECJ appears comfortable making wide generalizations, which may result in major expenses being incurred by the Member States. *See* Gareth Davies, *The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare*, *in* PROMOTING SOLIDARITY IN THE EUROPEAN UNION 117 (Malcolm Ross & Yuri Borgmann-Prebil eds., 2010).

[58] *Kohll*, *supra* note 46, at paras. 50-2; *Geraerts-Smits*, *supra* note 46, at paras. 73-4*; Muller-Faure*, *supra* note 46, at para. 67*; Watts*, *supra* note 46, at para. 104-105.

[59] *Geraerts-Smits*, *supra* note 46, at paras. 76-81*; Watts*, *supra* note 46, at paras. 107-113.

[60] *Geraerts-Smits*, *supra* note 46, at para. 90*; Muller-Faure*, *supra* note 46, at para. 85; *Watts*, *supra* note 46, at para. 116.

In *Watts*, the ECJ determined that refusal to grant authorization to travel for treatment on the basis of the existence of a waiting list could only occur if the patient had undergone a objective medical assessment of her medical condition, examining the history and course of her illness, the degree of pain being suffered and the nature of the disability at the time when the request was made.[61] If the delay for the patient resulting from the waiting list was found to exceed an acceptable period, having regard to the objective medical, the health authority could not refuse the authorization on the grounds of the existence of those waiting lists. Nor could any possible distortion of the normal order of priorities linked to the relative urgency of the cases to be treated justify a refusal of the authorization sought.[62]

Addressing the issue of the legitimacy of individual delays caused by the existence of waiting lists versus the right of health authorities to run their own system in *Muller-Faure*, the ECJ declared that waiting times which were too long or abnormal would be likely to restrict access to balanced, high-quality care.[63] While it may be enjoyable for the ECJ of Justice to feel that it is defending individual patients against the tyranny of hospital bureaucracy, the simplicity of the reasoning again demonstrated by the ECJ shows a stark lack of understanding about the huge financial, logistical and priority-setting pressures that national health systems operate under.[64]

3. A Threat to the Social Right to Healthcare

The principle concern about the cases discussed above is not the substantive outcomes, but rather with the overall approach of the ECJ. For the individual patients concerned, these decisions are positive in that they were able to obtain reimbursement for the treatments they had received. However, the judgments have wider implications concerning the organization of national social security.[65] What is most significant is that while health care is discussed as a service and as an economic issue, there is virtually no consideration of it as a "social right."

Member States have to manage entire healthcare systems and make choices about which group of patients or which illnesses are to be prioritized. It has already been pointed out

[61] *Watts*, *supra* note 46, at para. 119.

[62] *Watts*, *supra* note 46, at para. 120.

[63] *Muller-Faure*, *supra* note 46, at para. 92.

[64] *See* Antje Du Bois-Pedain, *Seeking Healthcare Elsewhere*, 66 CAMBRIDGE LAW JOURNAL 46-7 (2007).

[65] *See* Vassilis Hatzopoulos, *Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in Vanbraekel and Peerbooms*, 39 COMMON MARKET LAW REVIEW 683 (2002).

how the ECJ's approach to healthcare may allow individuals skip those higher on national waiting lists and obtain treatment, even when it has been determined that there are persons more in need of the particular care. It has been suggested that the ability to access health care which has been created is actually a right to choose between alternative health services.[66] The approach of the ECJ consistently benefits a certain type of patient; those who are have enhanced mobility as a result of greater wealth. These benefit from the individualist approach of the ECJ, to the detriment of poorer patients who could never afford to go abroad for treatments in the first place and who are therefore wholly dependent on the national systems, which in turn must now subsidize the treatment wealthier individuals received outside the state.[67]

Hypothetically, in the event of a policy decision to make major investment in vaccinating against a certain type of cancer, at the expense of screening for the same disease, it is possible that individuals could use these precedents to obtain the screening in another Member State, but nevertheless have it paid for by the national system. This could start happening on a large scale, considering the ECJ has not been prepared to look at the financial impact of individual cases, and could eventually completely undermine the policy decision taken by the national government. In light of the degree to which the ECJ was prepared to scrutinize the workings of the health care system in these cases, its claim that Union law continues to respect the sovereignty of the Member States and allows them full control over their own social services, is not reassuring. It is also clear that the economic assertions the ECJ applies are not particularly robust. As such, major decisions relating to healthcare are being made on grounds based solely on the requirements of the fundamental freedoms and without any recognition of healthcare as a social and therefore fundamental right. This approach gives grounds for genuine fear from those concerned with the vindication of social rights.

II. Education

1. Education Is Not a Service

The fundamental freedom to provide and receive services has also interacted with the provision of education in the Member States, but with different consequences to those in

[66] George Katrougalos, *The (Dim) Perspectives of the European Social Citizenship*, 5 JEAN MONNET WORKING PAPER 45 (2007).

[67] This point is originally made by Barnard in relation to education but is equally applicable to healthcare. *See* Catherine Barnard, *EU Citizenship and the principle of solidarity*, *in* SOCIAL WELFARE AND EU LAW 178 (Eleanor Spaventa & Michael Dougan eds., 2005). For a contrary view, welcoming these decisions as a means of democratizing the provision of healthcare for patients, *see* Mark Flear, *"Together for Health"? How EU Governance of Health Undermines Active Biological Citizenship*, 26 WISCONSIN INTERNATIONAL LAW JOURNAL 868 (2009).

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healthcare. In *Humbel*, the applicants were seeking repayment of the cost of their son's education fees for a year. A question arose as to whether, in attending the course provided in a national secondary education institute, he was receiving a service within the meaning of Article 56 TFEU.[68]

The ECJ stated that the existence of remuneration was key, defining it as consideration for the service in question, and normally being agreed upon between the provider and recipient of the service. This was not the case here as firstly, the State was not seeking to engage in gainful activity, but rather was fulfilling its duties towards its own population and secondly, the system was funded by the public purse and not by pupil fees.[69] As such, courses taught in a technical institute which form part of the secondary education provided under the national education system could not be regarded as services for the purposes of Article 56 TFEU.[70]

The *Humbel* ruling was important as it protected public education, an area that would be considered to fall within the concept of the social state, from the application of the fundamental freedoms. A narrow exception was made in *Wirth* where the ECJ did determine that educational institutions which were privately run and profit making through student fees, could constitute providers of services under Article 56 TFEU if they were "essentially" funded from such private sources.[71] It is interesting to note that in AG Colomer's opinion in *Geraets-Smits*, he referenced both *Humbel* and *Wirth* in defending his position, contrary to the one eventually arrived at by the ECJ, that the Dutch benefit-in-kind health insurance system in question was not a service in return for remuneration, and as such did not fall within Article 56 TFEU.[72]

One similarity with the healthcare decisions was the lack of any reference to a right to education in the course of the ECJ's judgments. While the provision of education was considered a "duty'" of the Member State in *Humbel*, the approach taken clearly puts it in the context of an economic service.[73]

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[68] Belgian State v René Humbel and Marie-Thérèse Edel, 1988 E.C.R. 5365.

[69] *Id.* at paras. 17-18.

[70] *Id.* at paras. 20.

[71] Stephan Max Wirth v Landeshauptstadt Hannover, 1993 E.C.R. I-6447, at para. 17. This distinction was repeated subsequently by the ECtHR in Case C-218/05, Commission v. Germany, 2007 E.C.R. I-6957, at paras. 71-72.

[72] Geraerts-Smits, *supra* note 46, at para. 30 of the opinion. It is difficult to divine the reason for the ECJ's very different approaches to education and healthcare. Davies highlights the inconsistency in holding in *Humbol* that the Government was fulfilling its duty to the population by supplying education, while making no such similar statements in the healthcare cases, when the provision of public health is as significant a role for a government as the provision of education. *See* Davies, *supra* note 47, at 32.

[73] *Humbel*, *supra* note 68, at paras. 17-18.

2. A Potential New Approach to Education

Significantly, in the more recent case of *Rhiannon Morgan*, AG Colomer suggested a radically different approach to the treatment of education services.[74] The applicants were German nationals challenging a decision of national authorities to refuse them study grants to pursue university courses in other Member States. The Advocate General stated he was applying a similar approach to education as had been applied to cases concerning healthcare.[75] His concern was that the national rules were limiting the freedom to provide services by lessoning the attractiveness of foreign providers of education to German students. By focusing on the existence of remuneration in exchange for education services, and the presence of consideration in the form of fees paid, he suggests that the provision of university education at the very least falls under Article 56 TFEU. However, he also wrote of the article applying to "schools" within the opinion, which would suggest his interpretation could have a broader application than merely third level.[76]

In its decision, the ECJ did not address the issue of education as a service. However, it is submitted that from the point of view of the protection of social rights, the opinion is deeply concerning. The healthcare cases illustrate the extent to which the ECJ's determination that healthcare is a service has allowed it involve itself in decisions taken by national healthcare providers. While undoubtedly there are occasions when the ECJ is justified in intervening in national education systems,[77] nevertheless the Advocate General's categorization of education represents a radical reversal of the position stemming from *Humbel*. This is particularly so as AG Colomer had previously used the education cases as part of his argument, rejected by the ECJ, that the health insurance system in *Geraets-Smits* was not a service. The Advocate General thus reversed his more restrictive position on what constitutions remuneration in light of the ECJ's healthcare decisions, and then went further in the opposite direction. Should the ECJ follow the Advocate General on this trajectory, it will mean an erosion of Member State competence in another aspect of social service provision, without a counterbalancing Union recognition of education as a social right.

[74] Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren, 2007 E.C.R. I-9161.

[75] *Id.* at para. 100.

[76] *Id.* at para. 102.

[77] Particularly when these were being operated in a clearly discriminatory manner. *See* Case C-147/03, Commission v. Austria, 2005 E.C.R. I-5969; Case 293/85, Commission v. Belgium, 1985 E.C.R. 3521.

E. Impact of Lisbon Treaty

Section C showed how the EU has failed to protect social rights at a constitutional level. This absence or 'invisibility' is significant, as it means that the ethos underpinning the EU was primarily an economic one based on market integration.[78] The consequence was illustrated in Section D in that social rights maintained in national legislation or constitutions continue to be at risk when they come into conflict with the fundamental freedoms. The successful completion of the European economic constitution had fundamentally affected the room for maneuver of Member States in the social field, without compensating for the undermining of national social rights by creating similar trans-European values.[79]

This section will show how the passing of the Lisbon Treaty; specifically the giving of legal effect to the Charter of Fundamental Rights though Article 6(1) TEU and the addition of new objectives to Article 3(3) TEU, creates the potential for resolving this issue and creating a legal system that has strong social rights values at its core. Such changes offer Member States a potential line of defense against the market orientated policies of the Treaties if these interfere with national values that are mirrored by those protected in the Charter.

I. Article 3 TEU

1. New Social Objectives

The initial articles of both the former EU and EC Treaties set out the objectives,[80] tasks[81] or activities[82] of the two documents. These articles are understood as laying down "an objective system of values" through which the rest of the Treaties were understood.[83] The Lisbon Treaty brings about a range of changes and innovations to these provisions, in particular the new Article 3 TEU, which amalgamates aspects of the former Article 2 EU and Article 2 EC.

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[78] *See* Hos, *supra* note 31, at 3.

[79] Christian Joerges, *Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts*, 25 EUI Working Papers (Law) 4 (2007).

[80] Article 2 EU Treaty.

[81] Article 2 EC Treaty.

[82] Article 3 EC Treaty.

[83] *See* Hos, *supra* note 31, at 12; *See* Siofra O'Leary, *The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law*, 32 COMMON MARKET LAW REVIEW 519, 533 (1995).

Article 3(3) TEU speaks of aiming for full employment, rather than the previous reference to a high level of employment. It states that Europe is based on a "social market economy"; the first time this description is applied within the Treaties. It goes on to state that the EU shall "combat social exclusion and discrimination" and "promote social justice and protection". Again, this is the first occasion where the term social justice has been included in the Treaties. While social exclusion had been mentioned in the pre-Lisbon Article 137(j) EC as an area where the EU would support and complement Member State activity, the insertion of both terms at the very start of the TEU indicates a raising of their importance in the hierarchy of the EU's values. It is argued that these new provisions form legitimate grounds for any change in approach by the ECJ to giving stronger consideration to social rights values and being more forceful in balancing these against the fundamental freedoms.[84]

2. Social Market Economy

Considerable debate has been generated by the introduction of the objective that the EU will work for 'a highly competitive social market economy'. While the term is generally understood as coming from German constitutional law,[85] views diverge as to whether it will improve social rights protection. Sajo, argued that the term was hugely important as the similar "[...] reference to the social welfare state combined with dignity resulted in a high level of constitutional social rights protection in Germany."[86] While recognizing that there was a difference between a social welfare state and a social-market based economy, he argues that the latter would support social welfare considerations in the operation and regulation of the market, particularly in light of existing Court of Justice decisions where it held economic goals were secondary to social goals that express fundamental human rights.[87]

Joerges and Rödl are considerably less positive about the addition of the phrase. While accepting that its inclusion in the EU Treaty could provide a "constitutional principle" which would guide the overall application of the Treaties, they are nevertheless unhappy that this was the term chosen.[88] The concern is that it actually represents the

[84] *See* Katrougalos, *supra* note 3, at 250.

[85] Andras Sajo, *Social Rights: A Wide Agenda*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 38, 39 (2005); Christian Joerges & Florian Rödl, *"Social Market Economy" as Europe's Social Model*, 8 EUI Working Paper (Law) 3 (2004).

[86] *See* Sajo, *supra* note 85, at 39. The author was speaking in the context of the same phrase in the Constitutional Treaty.

[87] On this point, Sajo references Deutsche Telekom v. Schroder, 2000 ECR I-743.

[88] *See* Joerges & Rödl, *supra* note 85, at 9-10.

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accommodation reached in the German legal order between the need to be a social state and the economic freedoms that were enshrined in the Germany Constitution.[89] Within such a system, "[...] all social state policies were subordinated to the functionality of market mechanisms. Social policies which threaten to distort market competition and its core, the price mechanism, are excluded from the socio-political agenda".[90] As such, they argue that working towards a social market economy could actually act as a restriction on social objectives.[91]

If substantiated, these concerns would undermine the argument articulated in this paper that the changes made to the Treaties at Lisbon bring the EU closer to the social state model. However, it is submitted that these fears are misplaced or at worst overstated. Irrespective of the origin of the term "social market economy," the ECJ is under no obligation to interpret it exactly as it may have been by the German Constitutional Court. Nor indeed, is it likely to. The ECJ has always emphasized the importance of giving a Union interpretation to the meaning of terms in the Treaties, particularly when there are alternative national meanings for the same phrases.[92]

The ECJ is particularly unlikely to mechanically apply the term in the same way as the German courts as its addition to the Treaties comes at the same time as the new references to social justice and social exclusion. This, combined with the giving of legal effect to the Charter of Fundamental Rights, is indicative of a wider change in direction of the EU's relationship with social rights. It is submitted that the ECJ would be wrong not to interpret the new objective within this wider context.[93]

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[89] *Id.* at 11.

[90] *Id.* at 16.

[91] *Id.* at 20. Joerges & Rödl also argue that the very term "social market system" is unsuited to being described as an "objective' as it is under Article 3 TFEU. They describe it at best as a model or strategy. *See* Joerges & Rödl, *supra* note 85, at 12, 19-20. They propose two alternatives to the "social market economy" option adopted at Lisbon. First, they suggest that it would have been better to use phrases such as "social European legal order" or "social Union." Second, suggest that reliance could have been placed on the term solidarity in Article 2 TFEU.

[92] Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, 1982 E.C.R. 3415, at para. 19.

[93] Indeed, Joerges & Rödl do subsequently continence such an approach, asking "Why not trust that this Court will now be able to establish a "social Europe," to shape a "European social citizenship" and thereby give new meaning to the notion of a "social market economy;" *see* Joerges & Rödl, *supra* note 85, at 22. It is submitted that even if the authors are correct in asserting their concern about the new provision, the model emerging from the German approach could not be any less conscious of social rights than was the existing situation in Union law prior to Lisbon

3. Legal status for the Charter of Fundamental Rights and the ECHR

The most significant change occasioned by the Lisbon Treaty regarding fundamental rights is the new Article 6 TEU. This recognizes the Charter and states that the rights, freedoms and principles contained within it would have "the same legal values as the Treaties".

Article 6(2) TEU states that the EU "shall" accede to the ECHR.[94] Official negotiations began in mid-2010 regarding the modalities for the EU's accession to the ECHR. While this development is of huge importance, particularly in light of the previous rejection of attempts to accede, it admittedly will have little relevance to the protection of social rights at Union level bearing in mind the points made above about its focus on civil and political rights. No suggestion is made regarding the EU acceding to the ECHR's 'sister' treaty, the Social Charter. As such, civil and political rights will now be subject to a dual protection regime under the Charter and the ECHR, while social rights are solely addressed under the Charter.

Finally, Article 6(3) TEU states that the fundamental rights contained in the ECHR, along with those which result from the common constitutional traditions of the Member States, form the general principles of Union law. It is significant to note the repeat of the failure to include reference to the *Nold* category of international treaties that the Member States had cooperated in drafting.[95]

II. Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union is a codification of the range of rights that the European Union seeks to protect.[96] In undertaking a review of its potential impact on the protection of social rights, it is relevant to note that the document departs from the traditional movement based rationale for protection, which was the norm for

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[94] Official negotiations between the EU and the Council of Europe began on 7 July 2010. *See* Press Release, Council of Europe, European Commission and Council of Europe kick off joint talks on EU's accession to the Convention on Human Rights (Jul. 7, 2010), available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/906&format=HTML&aged=1&language=EN&guiLanguage=en (last accessed: 27 September 2011).

[95] This has been lamented by some commentators concerned that as the ECHR dates from the early 1950s, and the rights contained in national constitutions are usually deeply entrenched and inflexible, new international treaties offer the best source of updated views on existing rights, or indeed new rights which were not contemplated before. While this issue has less significance now due to the fact that social rights are contained within the Charter itself, nevertheless it is disappointing that the ECJ does not have as wide a range as possible of sources to canvass from. *See* Damian Chalmers *et. al.*, EUROPEAN UNION LAW: TEXT AND MATERIALS 236 (Second Edition, 2010.

[96] *See* the Charter, *supra* note 23.

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Union law. As such, the rights contained within it are not contingent on the exercise of one of the fundamental freedoms. This suggests a new rights-based approach to the guarantees that it contains.[97]

1. Preamble

When compared to the Treaties, the treatment of the four freedoms in the Preamble to the Charter demonstrates this change in emphasis. Recital 2 of the Preamble describes the EU as being "founded on the values of human dignity, freedom, equality and solidarity". The individual is placed at the heart of the EUs activities, "by establishing the citizenship of the EU and by creating an area of freedom, security and justice." It is only in the next paragraph that the Preamble notes that the EU "ensures free movement of persons, goods, services and capital, and the freedom of establishment."

Significantly, the ideal of solidarity is given a more prominent place in this introduction than the four freedoms. Indeed, the EU is described as being 'founded' on *inter alia*, solidarity, while it merely 'ensures' the four economic freedoms. Admittedly, the EU is also 'founded' on freedom, but it is argued that freedom understood in this sense is something much broader the economic freedom meant by the four freedoms. This point is reinforced through the use of the term 'Freedom' as the heading for Title III, which covers diverse issues such as freedom of thought, conscience and religion and freedom of speech. While the same point could be raised regarding the reference to solidarity within the Preamble – does it represent a wider meaning of solidarity than just social solidarity – it is submitted that this is not the case as in the body of the Charter, the title with the heading 'Solidarity' refers primarily to aspects of social rights.

2. Key Provisions Related to Social Rights

The prime aspect of the Charter relating to the protection of social rights is the aforementioned Title IV on Solidarity. It contains a range of provisions, many of which are addressed solely at the rights of workers.[98] This focus on employment related issues in a solidarity chapter has been the subject of some criticism, though some such as the right to

[97] Louise Ackers & Helen Stalford, A COMMUNITY FOR CHILDREN? CHILDREN, CITIZENSHIP AND INTERNAL MIGRATION IN THE EU 8 (2004).

[98] Article 27 of the Charter guarantees workers information and consultation within their undertaking, Article 28 protects the right of employees and workers to conclude collective agreements and enter into collective action including strikes, Article 30 protects a workers right to protection against unjust dismissal, Article 31 covers the right to fair and just working conditions, including pay, health and safety, work hours and annual leave. *See* the Charter, *supra* note 23, arts. 27, 28, 30.

access a placement service under Article 29 is said to vest in "everyone" rather than just in work

The Charter also addresses issues which relate to significant social spending within the Member States. Article 34 contains a number of provisions dealing with social security and social assistance.[99] Of particular note is the guarantee in 34(2) that everyone living and moving legally within the EU is entitled to social security benefits and social advantages in accordance with Union law and national law and practices. Article 35 deals with access to preventative health care and securing a high level of human health protection in the definition and implementation of all Union politics and activities. It states that everyone has the right to access preventative health care and medical treatment, under national conditions and practices. Article 36 recognizes and respects access to services of general economic interest provided for under national law, "in accordance with the Treaties."[100]

Social rights are not solely addressed within the Solidarity title. Most notably, education is dealt with in the title on Freedoms, where Article 14 guarantees the right to education and access to vocational and continuing training, including the possibility to receive free compulsory education. Here the right to education sits alongside a range of primarily civil rights.

It is noteworthy that the manner in which social rights are enumerated in the Charter differs from the manner in which they are protected in either the Council of Europe system or the International Covenant on Economic Social and Cultural Rights (ICESCR), in that they are listed amongst civil and political rights, not in a separate document. This is important as unlike the Social Charter and the ICESCR, the Charter does not create a separate and weaker stream for the protection of these rights through reporting and review mechanism. The social rights protected within it will be equally justiciable as the civil and political rights, bearing in mind those qualifications or limitations to the Charter discussed below. The fact that the final draft of the Charter reflects this unity of rights is important as during

[99] Article 34 (1) of the Charter. The EU recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices. *See* the Charter, *supra* note 23.

(2) Everyone residing and moving legally within the EU is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

(3) In order to combat social exclusion and poverty, the EU recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

[100] It should be noted that in both Article 35 and 36, the limitation phrases used are slightly different to those elsewhere in the Treaties. *See* the Charter, *supra* note 23, arts. 35, 36.

the drafting process, there was pressure to exclude social rights completely from the documents scope, or downgrade them to the status of programmatic rights.[101]

3. Limitations on the Charter

The Charter has been the subject of extensive commentary as to whether it will make a tangible difference to human rights protection.[102] A vital element which will impact on its potential effectiveness will be the interpretation that the ECJ places on its final provisions. These are set out in Title VII; 'General Provisions Governing the Interpretation and Application of the Charter'. Article 51 deals with the field of application of the Charter. Article 51(1) states that the Charter is addressed to the institutions, bodies, offices and agencies of the EU and also to the Member States when they are implementing Union law. Article 51(2) is explicit in confirming that the Charter neither extends the field of application of Union law nor grants it any new or modifies any existing power. The first of these provisions has been criticized on the basis that it ensures that the Charter cannot apply to the myriad of situations of interaction between citizens and their national government, in situations outside the scope of EU law.[103] This has particular relevance to the area of social rights, whereas has been demonstrated, the EU's competence is highly limited. This leads on to a criticism of the second provision; if the Charter neither creates new powers nor modifies existing ones, does its introduction bring about any real change.

The interpretation of the rights is addressed in detail in Article 52. This deals with limitations on the rights and the applicability of the principle of proportionality.[104] It also covers the relationship between Charter rights and similar rights protected in the ECHR,[105] common constitutional traditions[106] and national laws and practices.[107] The explanatory

[101] *See* Brian Bercusson, *Social and Labour Rights under the EU Constitution*, *in* SOCIAL RIGHTS IN EUROPE 170 (Grainne De Burca & Bruno De Witte eds., 2005).

[102] Diamond Ashiagbor, *Economic and Social Rights in the European Charter of Fundamental Rights*, EUROPEAN HUMAN RIGHTS LAW REVIEW 63 (2004); Alison Young, *The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by Community Law?* 11 EUROPEAN PUBLIC LAW 219 (2005); Christoph Engle, *The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and its Normative Consequences*, 7 EUROPEAN LAW JOURNAL 151 (2001); Koen Lenaerts & Petra Foubert, *Social Rights in the European Court of Justice: The Impact of the Charter of Fundamental Rights of the European Union on Standing*, 28 LEGAL ISSUES OF ECONOMIC INTEGRATION 267 (2001); Joerges & Rödl, *supra* note 85, at 9.

[103] *See* Ashiagbor, *supra* note 102, at 70.

[104] *See* the Charter, *supra* note 23, art. 52(1).

[105] *See* the Charter, *supra* note 23, art. 52(3).

[106] *See* the Charter, *supra* note 23, art. 52(4).

[107] *See* the Charter, *supra* note 23, art. 52(5).

document setting out a more detailed understanding of the rights is to be given due regard by the ECJ.[108]

While Article 52(3) grants a special position to the ECHR within the Charter, the same treatment is not accorded to the Social Charter.[109] Nor are all the rights set out in the Social Charter replicated in the Charter of Fundamental Rights. It is possible that this leaves the ECJ and the EU institutions with more discretion in its interpretation of these rights. This could result in these rights being applied in manner more protective of market policies than might have been the approach of the bodies charged with interpreting the Social Charter. Both the Social Charter and the Community Charter are referenced in the Preamble to the Charter. The two documents also are referred to as the basis of or having been drawn upon in creating a significant number of the articles in the Charter.[110]

Article 53 states that the Charter cannot be understood to restrict or adversely affect human rights and fundamental freedoms recognized elsewhere in Union law, international law, international agreements to which the EU or all the Member States have signed up, or Member State constitutions. It is interesting to observe the recurrence of the reference to international agreements which the Member States signed up to, in light of that fact that it was already noted in Section B above that this source was excluded from the Treaties proper.

a) Rights versus Principles Distinction

One source of controversy regarding the degree of protection afforded by the Charter centers around the distinction between rights and principles that exists within the document.[111] In the Preamble, three categories of content are listed; rights, freedoms and principles.[112] Certain articles clearly set out which of these three categories they can be classified under: Article 2(1) deals with the "right to life", Article 14(3) outlines the "freedom to found educational establishments" and Article 49 addresses the "Principles of legality and proportionality of criminal offences and penalties".

[108] *See* the Charter, *supra* note 23, art. 52(6).

[109] *See* De Schutter, *supra* note 19, at 120.

[110] *Explanations Relating to the Charter of Fundamental Rights* 2007 O.J. (C303) 17. The relevant articles are arts. 12(2), 14(1), 15, 23, 25 and 26 – 35.

[111] De Witte, *supra* note 2, at 160.

[112] *See* the Charter, *supra* note 23, at Recital 7.

Article 52(5) describes the practical implications of the distinction between rights and principles:

> 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.

Undoubtedly, this limits the applicability of those provisions which are understood as principles. It would appear that they can only be used in circumstances where legislative or executive acts based on these articles are being undertaken. As such, Charter provisions that are understood as principles cannot form the basis for a positive claim.[113] They merely serve as a shield against actions of the institutions or the Member States when implementing Union law. Their application is seen to be reserved to the purview of the ECJ. While this is confirmed by the explanatory document to the Charter[114] both it and the Charter itself fail to give a clear explanation on how to differentiate the two categories.[115]

It is submitted that from the point of view of protecting social rights, this distinction outlined by Article 52(5) is not of major significance. Many of the provisions listed earlier in this section as relevant to social values are actually described as rights rather than as principles. This means that any limitation to the effectiveness of 'principles' that is caused by Article 52(5) would not affect these. According to the Explanation, of those articles that deal with social rights in the Solidarity Title, only Article 33 on Family and Professional Life and Article 34 on Social Security and Social Assistance fall within the category of 'principles'.[116] The majority of Charter provisions that promote social values are unencumbered by any restrictive effect that may derive from Article 52(5).

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[113] *See* Bercusson, *supra* note 101, at 173.

[114] *See Explanations Relating to the Charter of Fundamental Rights*, supra note 110, at 35.

[115] Michael Dougan, *The Constitutional Dimension to the Caselaw on Union Citizenship*, 31 EUROPEAN LAW REVIEW 613, 665 (2006). Dougan also suggests that the ECJ may eventually allocate Charter articles between the categories of "rights" and "principles" on a case-by-case basis.

[116] *See Explanations Relating to the Charter of Fundamental Rights*, *supra* note 110, at 35. The document states that even both of these provisions contain some elements of rights.

F. Conclusion

Historically, social rights have held inferior status in most national legal systems. Does this provide a justification for the failure of the ECJ to Justice to give them adequate recognition within EU law? The nature of fundamental rights protection in Europe during the 1950s and 1960s, where the ECHR was the preeminent document, allowed the ECJ prioritize the protection of civil and political rights as it developed its rights jurisprudence. This divergent approach continued to the present day. While the opinion of AG Tizzano in *BECTU* above demonstrates a different approach, ambivalence towards social rights is the most consistent theme, as can be seen in the opinion of AG Jacobs in *Albany*, where in relation to the European Social Charter he stated:

> […] the mere fact that a right is included in the Charter does not mean that it is generally recognized as a fundamental right. The structure of the Charter is such that the rights set out represent policy goals rather than enforceable rights [...][117]

A similar attitude is seen from AG Lenz in *Bergemann* where he suggests that the ratification of the European Social Charter merely expressed "[…] common political will and entailed the recognition of common values […]" amongst the States who had signed it.[118] The preponderance of such philosophical beliefs may explain why in the cases on education mentioned above, the ECJ never felt the need to make reference to the rights surrounding education, which were protected under the First Protocol of the ECHR. Here was a situation where one of the sources of general principles explicitly acknowledged in both case law and in the former Article 6 EU protected a social right, yet it did not feature in either *Humbel* or *Wirth*.[119]

Furthermore, the ECJ did have alternative sources other than the ECHR from which it could have drawn social rights influences, but chose not to do so. This approach was given

[117] Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5751, at para. 146 of the opinion. While this would seem to suggest that the Advocate General believed that some rights in the Social Charter could obtain the status of fundamental rights, he was talking in the context of the right to join a trade union and the right to strike. It has already been argued that both of these are in the nature of civil rights, rather than social rights.

[118] Anna Bergemann v Bundesanstalt für Arbeit, 1988 E.C.R. 5125 at para. 28.

[119] It could be argued that this is a result of the very weak protection provided for education in Article 2 of the First Protocol which merely says no one will be denied the right to education. This is in contrast to the somewhat more robust text of Article 14 of the Charter of Fundamental Rights, which addresses both the right to education and vocational training, but also protects possibility of receiving free compulsory education. The latter point would obviously have some relevance to the fee paying situation in *Humbel*, though of course that decision predates the Charter.

vindication and confirmation by the Member States when they excluded international treaties as a source of general principles of Community law in the context of the former Article 6 EU.

It has been argued here that the changes resulting from the Lisbon Treaty offer the opportunity to create a new sense of constitutional parity between social rights and the rights of economic freedom.[120] By granting legal effect to the social rights values in the Charter and through the addition of new objectives via Article 3 TEU, Union law has taken an essential step in the development of true social rights protection. This will be of significant benefit to Member States as it will allow them articulate new arguments when actions they have taken in the area of social rights are challenged by the EU on the grounds of clashing with the fundamental freedoms. The necessity for this change has been demonstrated in light of the insufficient protection of social values in Union law prior to the Lisbon Treaty.

In light of this failure of the ECJ to engage with social rights in the past, can it be assured that it will start to do so now? Undoubtedly, it could take a narrow approach to its interpretation of the social rights values. Even as a result of the Lisbon changes, social rights still are in a weaker position, illustrated by the treatment of the Social Charter in contrast to the ECHR in both Article 52(3) of the Charter and Article 6(3) TEU. The concern is that the ECJ may use this differential approach to justify its continuation with the weak treatment of social rights.

However, it is submitted that Ashiagbor is correct in stating that the addition of the new and varied social rights values to Union law will require openness on the part of the ECJ to changing its understanding of what these rights require in practice.[121] It is argued here that if the ECJ is serious about creating a genuine form of Union citizenship that corresponds with the traditional model of citizenship, it has no choice but to protect social rights as an integral element of it. Today, practically all commentators recognize citizenship as requiring the protection of the three rights elements: political, civil and social.[122] The paucity of social rights protection illustrated in Sections C and D demonstrate why it is so important that the ECJ uses the alterations to the Treaties to change the dynamic of its approach to rights interpretation. Bearing in mind the impending fusion of the EU and Council of Europe's legal systems, such a shift in the legal reasoning of the ECJ would not only have consequences for the protection of social rights within the EU, but could potentially influence a rethink by the Council of Europe regarding its own weak approach to social rights.

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[120] Fritz Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 JOURNAL OF COMMON MARKET STUDIES 645, 665-6 (2002).

[121] *See* Ashiagbor, *supra* note 102, at 64.

[122] *See* Marshall, *supra* note 1, at 8; Lister, *supra* note 1, at 471; Dwyer, *supra* note 1, at 4.