



The
University
Of
Sheffield.

SPERI Paper No. 26

The Unfulfilled Promise of Social Rights in Crisis EU.

Robbie Pye and Owen Parker

speri.

Sheffield Political Economy
Research Institute.

About the authors



Robbie Pye

Robbie is a Doctoral Researcher in the Department of Politics at the University of Sheffield.

Email: Robbie.pye@sheffield.ac.uk.
Phone: 0114 222 1697.



Owen Parker

Owen is Senior Lecturer in European Politics at the University of Sheffield.

Email: o.parker@sheffield.ac.uk.
Phone: 0114 222 21695

ISSN 2052-000X

Published in January 2016

Introduction

In an adaptation of Rodrik's (2011) famous 'trilemma' enunciated in his *Globalization Paradox*, Crum (2013) has argued that it is not possible to pursue a combination of autonomous nation-states, deep economic and monetary integration (EMU) and democratic politics in the context of the contemporary Eurozone/EU. According to the trilemma, it is possible to pursue two of these agendas but at the expense of the third. So, if democracy and national autonomy are prioritised, this is at the expense of EMU; if EMU and democracy (reinvented at the European level in this scenario) are prioritised, this is at the expense of national autonomy; and, if EMU and national autonomy are prioritised, this is at the expense of democracy.

The current status quo is one that, according to many critics of supranational economic governance, equates to the third of these scenarios. It privileges further integration at the expense of democratic politics (at supranational and national levels). While national autonomy is formally respected, this amounts to the autonomy of executive actors, rather than an inclusive or parliamentary – and so democratic – politics. This status quo has been understood in terms of the pursuit of what Gill refers to as a 'new constitutionalist' initiative on the part of elite actors:

[Such] initiatives are designed to lessen short-run political pressures on the formulation of economic policy by implicitly redefining the boundaries of the 'economic' and the 'political'. Such boundaries police the limits of the possible in the making of economic policy. Legal or administrative enforcement is required, of course, since the power of normalizing discourse or ideology is not enough to ensure compliance with the orthodoxy (Gill, 1998).

If Maastricht and the establishment of monetary union and its governance represented an important 'new constitutionalist initiative', then the early years of monetary union confirmed Gill's claim that a neoliberal 'normalizing discourse or ideology' would not be enough to ensure 'compliance with the orthodoxy' as evidenced, *inter alia*, in the persistent breaching of the Stability and Growth Pact (SGP). Indeed, for many of the élites pursuing this 'initiative' the key problem with the structures of economic governance – and a key factor in the spillover of the global financial crisis into a Eurozone crisis – was precisely the lack of effective 'legal or administrative enforcement'.

Such a claim has informed many recent reforms to economic governance, which have seen the introduction of a range of new legal mechanisms and increased the executive powers of the European Commission to 'police the limits of the possible' in national economic policies. Against this backdrop it has been suggested that we witness in the contemporary EU variously an 'authoritarian' (Oberndorfer, 2015) or 'Hayekian' (Streeck, 2014) constitutionalism. The threat to what remains of the European social model – in the shape of national social and welfare settlements – and a European democracy – parliamentary politics and inclusive governance – is stark from such a perspective. And there is little evidence that the empowerment of executive actors is likely to produce the economic growth that might grant it ('output') legitimacy. Indeed, many economists argue that policies of austerity and retrenchment are self-defeating in terms of reviving the European economy (Blanchard et al, 2015; De Grauwe, 2013). In short, the failures of monetary union have precipitated an existential crisis for the EU.

Accepting the thrust of such critiques, our starting point in this paper is that alternative ways out of Rodrik's trilemma are urgently needed to preserve democratic and social priorities in Europe and, perhaps, the European project itself. To this end, some have championed the uploading of a social democratic politics and constitutional settlement to supranational level (Habermas, 2001), while others have argued for the end of deep economic and monetary integration (EMU and the euro) and the restoration of a social democratic politics at national level (Streeck, 2014). Both extremes would represent radical overhauls of the prevailing constitutional settlement in the EU and in that sense both represent long-term visions. When we consider the reality of integration and disintegration blockages certainly neither will be realisable in the short to medium term in the absence of a significant further crisis (Genschler and Jachtenfuchs, 2013: 3-4).

A number of mid-range proposals, while not offering a definitive route out of the aforementioned trilemma, have suggested ways of reinvigorating some combination of a democratic politics (at supranational and national levels), particularly to safeguard social rights and standards. This is achieved via various attempts to re-balance neoliberal concerns with social concerns in the contemporary socio-economic governance structures. Often such pragmatic proposals look to prioritise and give greater weight to extant structures of soft governance or policy co-ordination in social and employment policy within the broader structures of current socio-economic governance (Zeitlin and Vanhercke, 2014). However, we would contend that such proposals often overstate what soft governance mechanisms could achieve in the broader context of a hardened neoliberal legal framework (Parker, 2010).

In short, resolutions to the EU's existential crisis come in the form of radical proposals that seem unrealisable any time soon and pragmatic proposals that fail to adequately address the structural asymmetries in the prevailing constitutional settlement. This paper attempts to offer a *via media* between these extremes. This is to offer a pragmatic mid-range proposal that is, we would claim, more effective in offsetting the aforementioned neoliberal direction of travel than other such proposals, while cognisant of the difficulties of radical constitutional change. Although we agree with the aforementioned critics that recent governance reforms have amounted to something like Gill's 'new constitutionalist initiative', we believe that the potential remains within the extant European constitutional settlement to challenge a neoliberal reality. We concur with Dawson and de Witte who note that 'law can be used – and has been used in the past in the integration process – precisely as a means of *politicising societal choices*' (Dawson and de Witte, 2013: 843; see also, Parker, 2008).

Concretely, we point to the EU and European Commission's constitutional commitment to fundamental rights and, in particular, social rights, as a possible basis for fruitful reform to (socio-)economic governance. While the status quo has eroded such rights in a number of national contexts, we argue that this reality is at odds with the commitments of the EU to protect such rights, which is contained in the Charter of Fundamental Rights. We highlight that the post-national monitoring of social rights, while largely ignored in the EU, does exist in the broader European context, particularly in the institution of the Council of Europe's European Committee of Social Rights (ECSR). The European Commission, as the key actor in contemporary socio-economic governance, could build on pre-existing links with the Council of

Europe in order to learn important lessons from this committee. In particular, an assessment of the implications of economic policy for social rights should, according to the Commission's own commitments, be inserted into the structure through which EU and Eurozone governance currently takes place: namely, the European Semester.

This paper is premised on a careful analysis of EU primary documents relating to the European Semester, the application of fundamental rights in the EU and the conclusions of the ECSR. Insights from select interviews with officials in the European Commission have also been incorporated, where appropriate. The paper proceeds in three steps. First, we describe how economic governance reforms have amounted to a 'new constitutionalist initiative' in recent years, becoming more disciplinary since the onset of the Eurozone crisis. This has been achieved via a combination of hardened legal rules and increased discretionary powers of executive actors, particularly the European Commission, to implement those rules. Second, we argue that, while the social dimension of the EU has been largely subsumed by a neoliberal agenda in new economic governance frameworks, the Commission could – and *should* – use its significant margin for discretion to take seriously its commitment to a social dimension. In particular, it could, without legal change, invoke its commitment to social rights, which is manifest in its undertaking to fully implement the EU Charter of Fundamental Rights. In the third and final step, we set out how rights could be incorporated into the European Semester and what this would mean for the types of policies currently being adopted. To do this, we suggest that the Commission might draw on the work of the ECSR, which operates under the auspices of the Council of Europe. In conclusion we are clear on the limitations of our proposal, but suggest that, if implemented, it could mark an important first step towards a more social and democratic constitutional settlement for the EU.

Crisis EU: The Fulfillment of a Neoliberal New Constitution?

Following the start of the crisis a set of governance structures has emerged based on a mix of new and pre-existing legal structures and mechanisms. Indeed, economic governance in the EU today is based on a 'hybrid' (Armstrong, 2013) combination of EU and extra-EU law (intergovernmental treaty or agreement), which encompass hard and soft legal mechanisms. Different combinations of these mechanisms apply to different categories of member state, rendering governance in this area highly complex. In terms of extra-EU law, memoranda of understanding (MoUs) are agreements pertaining to states in receipt of so-called 'bailout' packages (a combination of intra-EU and extra-EU financial support mechanisms) with the Commission, European Central Bank and International Monetary Fund collectively acting as enforcers and compliance monitors. These have offered a highly disciplinary and highly discretionary method for enforcing neoliberal domestic reform. As states exit financial programmes MoUs will become defunct, although for some states this may certainly be a difficult task in the context of existing agreements.

The permanent structure of economic governance is embodied in the European Semester, which is the primary focus of this paper. This structure applies to all states that have not signed a MoU. Introduced in 2011, it is underpinned by a range of targets and strategies enshrined in various legal agreements, which apply differentially to different categories of member state, as described below. It is pri-

marily concerned with ensuring compliance with the fiscal sustainability targets enshrined in the revamped Stability and Growth Pact (SGP) and the extra-EU 'fiscal pact' of the Treaty on Stability Coordination and Governance (TSCG) and new targets on macroeconomic balance and economic competitiveness. However, it also includes oversight of ostensibly social priorities related to poverty reduction and employment contained in the Europe 2020 strategy.

The European Commission is the main actor in the Semester in terms of both policy recommendations and enforcement. It publishes an Annual Growth Survey (AGS) on the whole of the EU economy along with recommendations on general policy direction and later issues Country-Specific Recommendations (CSRs) containing specific policy direction to each individual member state. Both the AGS and CSRs are backed by detailed thematic Country Reports drawn up by the Commission, which account for the socio-economic situation in each member state and the implementation of reforms from previous cycles of the European Semester. National governments discuss and endorse the AGS and CSRs in the Council, but rarely change any policy recommendations. Member states submit national reform programmes (NRPs) detailing how they will meet the macroeconomic and growth objectives set out in the AGS, which are taken into account in the CSRs, and a series of bilateral meetings between the Commission and member states are held. Governments of the Eurozone states have to go even further and submit their annual budgets for approval from the Commission, before they are even debated in their respective national parliaments (Articles 3-7, Council Regulation (EU) 473/2013) and, under the rules of the Fiscal Compact, are expected to discuss and negotiate all major policy reforms with implications for public debt with the Commission and Council (de la Porte and Heins, 2015: 18).

When a Eurozone state is adjudged to be experiencing economic 'imbalance' – something that has been rather common in the history of the Eurozone – two enforcement mechanisms spring into action. These are the Excessive Deficit Procedure (EDP) and the Macroeconomic Imbalance Procedure (MIP), which have been enhanced considerably by successive legal reform packages (the so-called Six-Pack in 2011 and Two-Pack in 2013). These are the only direct enforcement mechanisms in the European Semester and are both premised on economic indicators. The EDP is based on measures of deficit (3% GDP) and debt (60% GDP). The MIP utilises a broader and non-exhaustive array of indicators on macroeconomic competitiveness determined by the Directorate-General for Economic and Finance Affairs (DG ECFIN) in the Commission (de la Porte and Heins, 2015: 16; Scharpf, 2011: 32).

If a Eurozone state breaches these economic indicators, it is compelled to enact reforms to remedy the situation. Eurozone states submit corrective plans to the Commission and receive guidance on reforms to implement. This takes place through a process of 'implicit conditionality': 'conditionality based on an implicit understanding of the stakes and sanctions involved, underlain by some measure of power asymmetry' (de la Porte and Heins, 2015; Sacchi, 2015: 78). The EDP, which used to focus on more immediate budgetary policies to ensure fiscal sustainability, has been expanded to incorporate long-term fiscal sustainability through the introduction of economic partnership programmes in 2013. The EDP and MIP are backed by financial sanctions. Unlike traditional EU policy, which relies on judicial enforcement by the ECJ, these mechanisms are enforced by the Commission, with member states only able to block these by qualified majority in the Council ('re-

verse qualified majority voting'). The financial sanctions themselves are significant, amounting to 0.2% GDP under the EDP and 0.1% of GDP under the MIP, as well as restrictions on access to EU structural funds.

In accordance with Gill's 'new constitutionalism', the current design of the Semester reflects a hardening of the legal and administrative capacity of actors to enforce neoliberal preferences in the EU and the Eurozone in particular. Monitoring and sanctioning mechanisms have been hardened (Bauer and Becker, 2014: 219-223; Oberndorfer, 2015) and states have been obliged to implement reforms that embed ordo- or neoliberal preferences in national legislation. Moreover, this direction of travel has both relied upon and permitted a significant expansion of executive discretionary power. We have witnessed a proclivity on the part of executive actors in the Council to usurp the role of the Commission in initiating legislation. At times these actors have resorted to extra-EU methods (bailout mechanisms, MoUs, the TSCG) and at other times they have enacted legislation with a dubious basis in the extant 'European constitution' (treaty base). This latter approach was adopted for the tranche of legislation that was pushed through to establish the more long-term policing mechanisms such as the MIP, EDP and (in these contexts) reverse qualified majority voting. As Oberndorfer puts it, not mincing his words, 'the ordinary revision procedure is being circumvented and/or the appropriate instruments are being pressed into the "European Constitution" illegally' (2015: 189). This has led him to characterise the status quo not as 'new' but 'authoritarian' constitutionalism.

If the Council has established the legal framework underpinning this new governance approach, then it is, as noted, the Commission that is, in the context of the Semester, granted executive power and significant discretion to interpret laws and data, pass judgement and impose sanctions (with the aforementioned reverse QMV enhancing its authority in this respect). Within the Commission power has shifted towards DG ECFIN. A greater array of social and labour policy areas have been subsumed within macroeconomic coordination (as discussed further in the following section), wherein they are decided by economic and finance actors in DG ECFIN and the Economic and Finance Council (Copeland and James, 2014; Oberndorfer, 2015; Schellinger, 2015: 6). DG ECFIN has, moreover, repeatedly proposed increasing its own powers of oversight of member state 'competitiveness' (EPSC, 2015) – conceived problematically in terms of 'structural reform' and labour market flexibility – in ways that critics have rightly asserted would amount to the Europeanisation of the MoU approach and the significant further erosion of social rights (Oberndorfer, 2015: 199).

Certainly, such executive power is problematic in terms of its little regard for a separation of competences or institutional balance in the EU. It is not surprising then that inherently depoliticising 'new constitutionalist' initiatives have prompted important acts of re-politicisation from below in the European polity that those élites have struggled to ignore. Rifts have in fact already become apparent between member states and between the EU and other international organisations and sources of economic knowledge such as the International Monetary Fund. France as a long-time reluctant rule follower in the context of both the single market and monetary union (Parker, 2008) has shown signs that it might lead the challenge to a prevailing fiscal orthodoxy. The Commission itself is not immune from these broader political trends. It is notable in this respect that 'fiscal hawks' Germany and Finland have been critical of the Commission for being *too lenient* in some as-

assessments made to date (Spiegel, 2014). Such cracks in the unity of these neoliberal executive actors could grow larger. In the next sections we focus in particular on how a re-politicising rift might be developed within the particular institutional context of the Commission itself.

The Unfulfilled Promise of Social Rights

For some the social dimension was to remain the preserve of national politics, while for others it was to follow economic integration at supranational level (Delors, 1997). It has become increasingly clear over time that neither of these outcomes has been achieved. Economic integration has, since at least the 1980s, indirectly eroded social settlements and rights at the domestic level through its encroachment on domestic economic policy making autonomy (Höpner and Schäfer, 2012; Scharpf, 2010). In the recent context, described in the previous section, the stricter budgetary rules have further delimited the scope for national labour market and social policy, while for some categories of member state – particularly those in receipt of financial support with MoUs – formal member-state responsibility for such policy has in many instances been *directly* and explicitly undermined (Grahl, 2015: 171). And to the extent that the EU has become relevant in these areas it is via ‘soft’ informal policy co-ordination among member states (via various ‘open methods of co-ordination’). This shift in the mode of governance has been accompanied by a significant recasting of ‘the social’ in a manner that is compatible with the contemporary competitiveness agenda, established in the context of the 2000 Lisbon Strategy. This amounts to a supply side orientation, which promotes various kinds of investment in ‘human capital’ and rejects statutory labour market regulation as an impediment to efficiency, instead championing flexible labour markets (Schelling, 2015: 5).

While it has been possible for member states to resist to some degree this orientation to a competitiveness-friendly social policy due to its reliance on an unenforceable ‘soft’ policy co-ordination (Parker, 2008), this has arguably changed in the context of the Semester. As Bekker’s (2015: 12) careful analysis of the 2013 European Semester reveals, ‘half of the CSRs representing the social dimension ... are attached to at least one economic coordination mechanism; mechanisms that may result eventually in a sanction for Eurozone members’. In particular, the MIP has provided the pretext for expanding the discretion of economic policy makers to make recommendations beyond those domains that fall clearly within EU competences, including in areas such as wages policy (Bekker, 2015: 15). Moreover, in accordance with the aforementioned direction of travel, key elements of labour market regulation such as employment protection legislation and robust collective bargaining structures have been reconceptualised by such actors as barriers to competitiveness and targeted for reform (Hyman, 2015). An official in the more socially orientated DG Employment, Social Affairs and Inclusion reported that, when they feed in to this process, they are asked to ensure that every proposal is of relevance to macroeconomic balance (interview, official in DG Employment, Brussels, 17th June 2015). In short, we have seen a hardening of the governance mechanisms attached to an already established competitiveness-friendly supranational social policy.

For some this would represent an overly pessimistic assessment. It has been argued, for instance, that social goals and the role of social actors have gradually increased since the launch of the Semester in 2011, as reflected in a shift in CSRs to reflect such concerns (Zeitlin and Vanhercke, 2014). Moreover, recommendations that emphasise social concerns that do not have a clear economic or budgetary rationale – including, for instance, on the inadequacy of social assistance and unemployment benefits – have appeared in recent years, as alternative voices in the Commission have been included in the formulation of CSRs (Zeitlin and Vanhercke, 2014: 32-33). However, these remain attached to the ‘soft’ co-ordination mechanisms enunciated above (particularly the Europe 2020 programme), which is a clear signal of their subordinate status vis-à-vis the aforementioned competitiveness-friendly social priorities tied to the enforceable MIP or SGP. A recent attempt by the Commission to integrate social standards into the European Semester through a ‘social scoreboard’ was criticised on similar grounds by trade unions: in short, the standards lacked the ‘teeth’ to challenge the direction of travel in macroeconomic policy (ETUC, 2014; Zeitlin and Vanhercke, 2014: 53). Indeed, when we consider socio-economic governance as a whole it is difficult to avoid the conclusion that a ‘constitutional asymmetry’ (Scharpf, 2010) between the economic and social has grown in the recent context.

That said, the ‘European constitution’ or *acquis* is far from unambiguously neo-liberal. The so-called ‘horizontal social clause’ introduced into the Lisbon Treaty offers an example of this: it requires all EU actions to take into account ‘the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’ (Article 9 TFEU). It might therefore offer the basis for a ‘social mainstreaming’. As Vandenbrouke and Vanhercke (2014) have noted, ‘this [situation] requires the social dimension to be mainstreamed into all EU policies, notably into macroeconomic and budgetary surveillance, rather than being developed as a separate “social pillar”.’ Such mainstreaming would, as discussed, need to amount to more than a concern with social policy by economic policy makers intent on hollowing-out such policies as a means to fiscal consolidation. An effective social mainstreaming would, we would argue, require explicit reference by the Commission to an alternative constitutional foundation – one that might offset the hardened new economic governance mechanisms (Parker, 2010).

One such foundation exists in the form of the EU’s Charter of Fundamental Rights (EUCFR), which was granted legal value in 2009 with the Lisbon Treaty and refers to a range of social and economic rights. The Commission could – we would argue, *should* – actively monitor these rights in the context of the European Semester. Indeed, the Commission’s Strategy on the Charter (2010) outlines various mechanisms that were intended to ensure that rights were given due regard in *all* political activities of the Commission. Maduro (2003: 285) argues that one of the motivations behind introducing social rights to the EU legal order was as a guarantee that economic imperatives would not lower domestic social standards (in the manner that they are currently doing).

The EUCFR contains multiple social rights, including, but not limited to, the freedom to choose an occupation and right to engage in work (Article 15), right to collective bargaining and action (Article 28), protection in the event of unfair dismissal (Article 30), fair and just working conditions (Article 31), protection of young peo-

ple at work (Article 32), and social security and social assistance (Article 34). To give practical meaning to these rights, the Commission published a strategy on the implementation of the Charter in 2010. The strategy commits the EU to being 'exemplary' in the field of rights and outlines a range of governance reforms to this end, including mainstreaming rights in impact assessments, preparatory consultations with relevant stakeholders, processes for inter-institutional dialogue, and explanatory memorandums to detail how rights issues are affected (European Commission, 2010: 4-8). In short, these are governance mechanisms that are designed to ensure that fundamental rights are given due regard and that any interference with rights is legitimate and justified both *pre-emptively* and *post hoc*.

These rights mechanisms have, to date, not been deployed to any great extent. Of particular note for present purposes, the aforementioned socio-economic governance structure has not included any consideration of fundamental rights, including social rights. At a technical level, there are two primary reasons for this. First, the Commission's strategy on the Charter is primarily based around the traditional Community method of policy-making, whereas, as noted, economic governance deploys a complex hybrid of co-ordination mechanisms and legal rules (Armstrong, 2013). The aforementioned tools incorporated in the Commission's Charter strategy were already deployed in the traditional Community method, but not systematically in the context of other modes of governance, meaning that it is technically not fit for deployment in the area of economic governance (or so it could be argued). However, this does not justify the exclusion of the Charter and its rights from the European Semester. The Charter itself is addressed to 'the institutions and bodies of the Union with due respect for the principle of subsidiarity and to the Member States only when they are implementing EU law' (Article 51, Charter of Fundamental Rights) and there is no provision exempting the institutions and bodies of the EU when operating under the European Semester. From a legal perspective, the situation is trickier when it comes to member states and an assessment of whether they are implementing EU law. As highlighted above, the process of the European Semester relies on executive decision making and financial sanction-based enforcement, but it could be argued that this is underpinned by EU legislation. At the very least, the spirit of the Charter should apply to member states when acting under the direction of the EU.

Second, it is notable that social rights are poorly developed in the case-law of the ECJ. This is relevant because, although the rights mechanisms highlighted above are not judicial, it is primarily the jurisprudence of the ECJ that shapes how the Commission engages with rights (interview, official in DG Justice, 2nd July 2015). The reason for this lies in the origins of rights in the EU. Prior to the drafting of the Charter in 2000, rights were introduced into the EU legal order on a case-by-case basis by the ECJ. As courts have generally been wary of adjudicating on social rights, preferring instead to leave such questions to elected bodies, the ECJ has, until very recently, shied away from introducing social rights into the EU's legal order.

Furthermore, the ECJ has engaged with rights by developing a 'proportionality principle', which is now also enshrined in the Charter. Interference with rights is only permissible in pursuit of a legitimate aim provided it is proportionate to what is necessary to achieve that aim and respects the essence of the right. However, tensions arise when it comes to balancing market concerns (treaty 'freedoms') with rights concerns (fundamental rights) (De Vries, 2013). It has been argued that it is

market concerns that have been prioritised to the detriment of social and labour rights, which are primarily protected at the national level (Höpner and Schäfer, 2012; Scharpf, 2010). The key recent cases at the ECJ that have concerned social rights, the *Viking* and *Laval* cases, ultimately restricted social rights (the right to collective action) in favour of protecting treaty-based market freedoms (the freedom to provide services). While there are some indications that the ECJ may now be moving towards stronger protection of social rights since the changes introduced by the Lisbon Treaty, including the Charter gaining legal value (De Cecco, 2013: 22-27), in general high standards for social rights have not been established by the Court. Thus, while the Court has referred to the importance of rights, including social rights – and, indeed, jurisdictional orders upholding these at the national and European levels – such references themselves should not lead to the conclusion that the Court is an even-handed adjudicator between economic and social values.

The main point for current purposes is that fundamental rights mechanisms within the EU were developed with reference to Union case-law that has not established high standards on social and labour rights, despite the inclusion of such rights in the Charter. Such rights have tended to be subordinated in practice to economic priorities, in accordance with the broader aforementioned constitutional asymmetries. Given its margin for discretionary action in the context of the Semester, the Commission could develop a more appropriate set of standards on social rights in the context of its socio-economic governance by turning to another source of standards on these rights: a source that has been increasingly critical of the post-crisis erosion of such rights in Europe.

Social Rights in the European Semester

The Commission's desire to be 'exemplary' on rights consists, as noted above, in giving weight to rights throughout its governance processes. Member states are required to do the same in the context of implementing EU law. The Commission has, we have noted, been far from exemplary in this respect in the context of its recent socio-economic governance and member states have failed to sufficiently draw attention to rights issues arising from Commission recommendations. Injecting a concern with social rights into all steps in the European Semester process would offer a means of partially redressing the constitutional asymmetry between economic and social issues that has widened in the crisis context. Given its preeminent role in this process, it is particularly important that the Commission addresses its shortcomings in this area and takes these rights seriously. To think that social issues could immediately be prioritised is, of course, unrealistic, as it would necessarily mean a blanket prohibition on a range of current (economic) policies. But an obligatory consideration of social rights would bring much needed publicity to instances where rights are threatened, while empowering actors within and beyond the Commission with an interest in promoting such rights.

As noted above, measures that seek to restrict rights in the EU have generally been addressed by the application of a proportionality test, whereby rights may be restricted only in pursuit of a legitimate interest provided that restriction respects the essence of the right and is not disproportionate (Peers and Prechal, 2014). For the ECJ this has often meant considering the proportionality of infringements of *economic* freedoms by, inter alia, those invoking social or collective rights. The chal-

lenge – at least in the context of prevailing economic governance mechanisms – is to push for a reversal of this logic: in other words, publically consider the proportionality of infringements of social rights by economic priorities and, to that end, establish a more substantive and rigorous set of social rights standards, against which a test of the proportionality of any infringement could be conducted.

While relatively limited in the EU/ECJ, more robust standards have evolved in Europe, notably in the context of the Council of Europe's European Committee of Social Rights (ECSR) monitoring of the European Social Charter (ESC). This body – made up of independent and impartial experts on social rights – has, in the context of its country reporting and collective complaints mechanism, established a considerable body of case-law on how to interpret and implement social rights in Europe. Working with the ECSR, the Commission could establish a set of standards for guiding a commitment to the protection of social rights. Links between the EU and the rights instruments of the Council of Europe have been productively developed in the past, notably in the context of developing the content of the Copenhagen political criteria in Enlargement policy.¹ Moreover, the ESC itself is already linked to the EU in numerous ways: all EU member states are signatories to it; it is cited in the preamble to the Treaty on the European Union and in Article 151 of the Treaty on the Functioning of the European Union; it is listed as a source for several of the rights contained in the EU's Charter of Fundamental Rights; and it has even been drawn upon on several occasions by the ECJ. Furthermore, it is arguably necessary for legal conformity in Europe for the standards of the ESC to be incorporated into the European Semester. European states are members of both regimes; they have an obligation to ensure the standards of the ESC are met and to implement recommendations under the European Semester.

What, in concrete terms, might constitute ECSR standards? It is beyond the scope of this paper to provide an exhaustive account of the ECSR's case-law (for a digest of this case-law, see ECSR, 2008; for specific case-law on crisis measures see Jimena Quesada, 2014), but considering just two rights – both of which have, according to the ECSR, been violated by member states in the crisis context – offers an idea of how ECSR standards could come into play in practice for the Commission. These are the right to collective bargaining (Article 6 ESC) and the right to reasonable notice of termination of employment (Article 4(4) ESC). With respect to these rights, the ECSR has highlighted ideal standards that states should be working towards, including the principle of non-retrogression,² and minimum standards that cannot be justifiably breached (Jimena Quesada, 2014: 4-5).

For the right to collective bargaining, the ECSR states that, according to the ideal standard, consultation must take place at several levels, which it identifies as the national and regional/sectoral levels (ECSR, 2014a: 24). However, the minimum ECSR standard is that bargaining frameworks should be entered into voluntarily by social partners and developed spontaneously. Voluntary agreements to decentralise bargaining structures have been found permissible, but decentralisation forced by the state without adequate consultation is considered a rights violation (ECSR, 2014b: 24-26; see also Lorcher, 2014). In addition to this, measures that undermine the utility of collective agreements, such as allowing employers to derogate from collectively agreed working conditions, have also been found to violate the right to collective bargaining (ECSR, 2014b: 24-26).

With regards to the right to reasonable notice of termination in employment, the ECSR has stated that national law should seek to dissuade employers from engaging in unfair practices, provide adequate protection against retaliatory dismissal, and be broad enough to ensure comprehensive coverage of workers. More specifically, the ECSR has established as a minimum standard a threshold of 26 weeks as the maximum time for probationary periods and has set out a framework for determining notice periods in ordinary contracts based on length of service (ECSR, 2008: 47, 152). In specific cases, employment contracts with excessive probationary periods without protection against dismissal and inadequate notice periods post-probationary period have been found to violate the right to reasonable notice of termination (ECSR, 2014b: 19).

In terms of the aforementioned proportionality test, then, policies that risk breaching minimum standards established by the ECSR should be prohibited, whereas those that are contrary to the ideal standards would require explicit justification. To offer a concrete example, the ECSR found in relation to Spain that collective bargaining reform imposed without consultation and use of excessive probationary periods in employment contracts had breached minimum standards (ECSR, 2014b). Both reforms were introduced in the context of the European Semester.³ In light of our proposal, the Commission would not permit such policies. Recommendations that depart from the ideal standards that states should be working towards or that regress on standards already achieved would have to be explicitly justified as proportionate, as respecting the essence of the right and in pursuit of a legitimate aim. Justification of rights interference would then have to accompany any CSR or recommendation under the enforcement procedures (EDP and MIP) that seek to interfere with or lower the standards of social rights, in a fashion similar to the explanatory memorandums the Commission utilises alongside traditional legislative proposals. Recommendations by the Commission to decentralise collective bargaining structures or to reform employment protection, which have been issued to a number of member states (European Commission, 2013: 16), would have to be justified in this way. These policies are generally justified in terms of the importance of flexible labour markets, which, it is argued, improve macroeconomic competitiveness and increase employment levels. The ultimate aims may be legitimate in this case, but it would be a matter for debate as to whether they justify the level of interference they have caused with social rights, particularly given the general failure to date of the means to successfully achieve these ends.

Mechanisms for the inclusion of and meaningful consultation with social partners at national and European levels would follow from ECSR standards in this area. Whilst the Commission has already proposed that consultations with European level social partners take place prior to the AGS (European Commission, 2014), we propose that national social partners could also be incorporated into the series of bilateral meetings held between the Commission and national governments throughout the European Semester. As highlighted above, one of the key minimum standards for the right to collective bargaining is the voluntary nature of bargaining structures. If decisions to decentralise collective bargaining are taken at the European level without the involvement or consent of trade union representatives, then this standard will not be met and the right will be violated. Furthermore, the active involvement of social partners would help to bolster the attention given to rights assessments, particularly given the rights-based strategies utilised by trade

unions across the EU in opposition to austerity (Kilpatrick and De Witte, 2014). Giving greater priority to social rights would contribute to overcoming a perennial problem with Commission initiatives to include social partners and other groups sympathetic to social rights: namely, that a hard neoliberal economic constitution effectively diminishes their influence (Parker, 2010). As with the above critique of soft modes of policy co-ordination, the issue has not been a lack of activity or inclusion at EU level with respect to issues of social concern, but the undermining of such activity and inclusion in the context of a broader constitutional (and political) asymmetry. Social rights standards adopted with reference to the ECSR might begin to offset such an asymmetry.

The key components of the Semester – outlined above in section 1 – where assessments of this sort could be conducted include the AGS and the providing of specific policy directions in the CSRs and as part of the enforcement mechanisms (the EDP and MIP). This work is already underpinned by a significant amount of socio-economic analysis conducted by the Commission (Country Reports and additional In-Depth Reviews for those member states under MIP). As these analyses already involve a close examination of the conditions in each country and the expected impact of reforms, the incorporation of rights assessments with reference to the standards of the ECSR would not involve significant changes to the European Semester itself.

The implications of incorporating fundamental rights protections into the European Semester go far beyond collective bargaining and employment protection. Reports published by the Council of Europe Commissioner for Human Rights (2013) and the president of the ECSR (Jimena Quesada, 2015) demonstrate a whole host of rights issues have been put at stake in the pursuit of austerity and highlight where the case law of the ECSR, along with other international rights bodies, can be used to guide policies towards protecting social standards. In the context of the Eurozone crisis, social rights ranging from healthcare to social security to fair wages have been undermined in the pursuit of fiscal and other macroeconomic targets without adequate attention on their human and social impact. By incorporating rights mechanisms into the European Semester, the impact of macroeconomic policies on social standards could no longer be addressed as only an afterthought.

Conclusion

This paper has outlined a strategy for countering a neoliberal bias in the contemporary economic governance of the EU, particularly in the context of the European Semester. It is a strategy that takes seriously the difficulties of radical constitutional change that many critics of the anti-social and anti-democratic characteristics of the prevailing economic governance have proposed. At the same time, it seeks to offer a strategy that is based on more than a 'soft' legal basis – the open method of co-ordination that has prevailed in EU employment and social policy-making – or straightforward proposals for greater inclusivity in the governance process.

It argues that a constitutional foundation for a more social settlement is needed and in fact already exists in the prevailing constitutional settlement. In particular, it highlights and recalls the relevance of the social rights contained in the legally binding EUCFR. It suggests that, given the Commission's increasing discretionary power in the context of the European Semester and its prior commitment to be an

‘exemplary’ actor with respect to the Charter, it could – and *should* – mainstream a consideration of social rights in to the EU’s (socio)-economic governance. In ascertaining which standards to adopt in this area it could, we argue, usefully draw upon the case-law and insights of the ECSR, which operates under the auspices of the Council of Europe.

While we believe the paper offers a realisable proposal that takes seriously the constraints of the current status quo, the difficulties and limitations of this proposal ought not to be understated. In terms of implementation difficulties, it would be naïve and contrary to the pragmatic spirit of this paper to think that the Commission will easily change its current approach and privilege social rights. That said, the Commission has shown a gradual softening of its position since the Semester began in 2011 and it is far from a unitary actor or an unambiguously neoliberal one. Moreover, it has, in its proposed mechanisms for engaging with fundamental rights, demonstrated a commitment in principle to be transparent in highlighting rights issues *even where its policies may infringe upon rights*. This amounts to a commitment to justify why in a particular instance it was necessary to infringe upon a particular set of rights and that should include social rights. Such publicity would certainly serve, at the very least, to re-politicise discussions within the Commission and empower actors beyond the Commission to make the case for social rights in the face of what is often presented as a ‘common sense’ logic of austerity. At the very least, the Commission could and should, in the short term, be held to its commitment to offer such transparency on rights issues in the context of socio-economic governance.

In terms of its limitations, even a full implementation of our proposal would not alone offer a resolution of Rodrik’s dilemma in favour of democratic priorities. For one thing, the proposal does not *directly* address the executive power of the Commission – and the associated deficit of democracy at national and supranational levels – but seeks initially to work within this context. This is not, it should be emphasised, to endorse the extent of its executive power. Indeed, the very shift that we propose would constitute an important instance of the repoliticisation of socio-economic governance that would both facilitate and require the inclusion of more plural voices at national and supranational levels in the short term. In the long term, prioritising the social may also entail a reconsideration of a status quo of austerity and permanently low taxation that, as many economists have noted (Blanchard et al. 2015; De Grauwe, 2013), has been self-defeating in terms of the promotion of economic growth and prosperity and corrosive of social rights. In that sense such repoliticisation might lead to a more fundamental re-thinking of the structures of economic and monetary union in ways that would either lead to its demise – and the return of democratic autonomy to the national level – or to the construction of a democratic political union alongside monetary union. In either scenario, the executive power of the Commission would necessarily be diminished, as representative democracy would be reinvigorated at national or supranational level. These, in essence, amount to the more radical social democratic proposals for resolving Rodrik’s trilemma, enunciated in the introduction.

From this broader perspective, the re-politicisation of the Commission’s socio-economic governance via the invocation its own commitment to social rights is best regarded as a small but important first step in plotting our way from where we are to a more radical social-democratic constitutional settlement for the EU.

Notes

1. One of the authors of this paper was involved in developing such links when working for DG Enlargement 2003-2006.
2. The principle limits regressive steps on standards achieved that are above minimum standards, unless they can be justified as necessary in a democratic society and proportionate.
3. These reforms were requested in Spain's CSRs and, in more precise detail, in a confidential letter from the ECB, which was later leaked to the media.

Acknowledgements

The authors would like to thank participants at the Euromemo group event at the University of Roskilde (24-25th September 2015), particularly John Grahl, as well as Simon Bulmer, Tony Payne and Colin Hay for useful comments on the paper. The authors are grateful for the financial support of the Leverhulme Trust and the ESRC that supported this work. The usual disclaimer applies.

References

- Armstrong, K. (2013) 'The New Governance of EU Fiscal Discipline', *European Law Review*. 38(5): 601-617
- Bauer, M. and Becker, S. (2014) 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance', *Journal of European Integration*. 36(3): 213-229
- Bekker, S. (2015) 'European socioeconomic governance in action: coordinating social policies in the third European Semester', *European Social Observatory Research Paper No. 19*, Brussels: European Social Observatory
- Blanchard, O. Romer, D. Spence, M. and Stiglitz, J. (2012) *In the Wake of the Crisis*. Massachusetts: MIT Press
- Commissioner for Human Rights (2013) 'Safeguarding human rights in times of economic crisis', *Issue Paper, Council of Europe*, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2664103&SecMode=1&DocId=2215366&Usage=2>
- Copeland, P. and James, S. (2014) 'Policy Windows, Ambiguity and Commission Entrepreneurship: Explaining the Relaunch of the European Union's Economic Reform Agenda', *Journal of European Public Policy*. 21(1): 1-19
- Crum, B. (2013) 'Saving the Euro at the Cost of Democracy?', *Journal of Common Market Studies*, 51(4): 614-630

Dawson, M. and De Witte, B. (2013) 'Constitutional Balance in the EU after the Euro-Crisis', *The Modern Law Review*. 76(5): 817-844

De Cecco, F. (2013) *State Aid and the European Economic Constitution*. Oxford: Hart Publishing

De Grauwe, P. (2013) 'Design Failures in the Eurozone: Can they be fixed?' LEQS *Discussion Paper*. 57/2013. London: LSE

De la Porte, C. and Heins, E. (2015) 'A New Era of European Integration? Governance of Labour Markets and Social Policy since Sovereign Debt Crisis', *Comparative European Politics*. 13(1): 8-28

De Vries, S. (2013) 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', *Utrecht Law Review*. 9(1): 169-192

ETUC (2014) 'ETUC Key Messages for the European Council', *ETUC Resolution on the European Semester 2014*. Brussels: ETUC, available at: <https://www.etuc.org/documents/etuc-resolution-european-semester-2014-etuc-key-messages-european-council#.Vkh4cqM3gul>

European Commission (2010) 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', *COM(2010) 573 Final*, 19 October, Brussels: Commission of the European Communities, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:dh0004> (accessed November 2015)

European Commission (2013) 'Annual Growth Survey 2014' *COM(2013) 800 Final*, 13 November, available at: ec.europa.eu/europe2020/pdf/2014/ags2014_en.pdf

European Commission (2014) 'Annual Growth Survey 2015' *COM(2014) 902 Final*, 28 November, available at: http://ec.europa.eu/europe2020/pdf/2015/ags2015_en.pdf

European Committee of Social Rights (2008) 'Digest of the Case Law of the European Committee of Social Rights', 1 September, *Council of Europe*, available at: https://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf

European Committee of Social Rights (2014a) 'Conclusions 2014 (Italy)' January, *Council of Europe*, available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Prep/Italy2014_en.pdf

European Committee of Social Rights (2014b) 'Conclusions XX-3 (Spain)' January, *Council of Europe*, available at: https://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXX3_en.pdf

European Political Strategy Centre (2015) 'The Euro Plus Pact', *EPSC Strategic Notes 3/2015*. Brussels: EPSC

Genschel, P. and Jachtenfuchs, M. (2013) 'Vision vs Process. An institutionalist account of the Euro-crisis'. Paper presented at Conference of European Union Studies Association. EUSC, Baltimore, 9-11 May

Gill, S. (1998) 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe', *New Political Economy*. 3(1): 5-26

Grahl, J. (2015) 'Social Europe and the Crisis of the European Union'. In J. Jager and E. Springler (eds) *Asymmetric Crisis in Europe and Possible Futures*. London: Routledge, pp. 168-185

Habermas, J. (2001) *The Postnational Constellation*. London: Polity.

Höpner, M. and Schäfer, A. (2012) 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting', *International Organization*. 66(3): 429-455

Hyman, R. (2015) 'Austeritarianism in Europe: What Options for Resistance?'. In D. Natali and B. Vanhercke (eds) *Social Policy in the European Union: State of Play 2015*. Brussels: ETUI, pp. 97-126

Jimena Quesada, L. (2014) 'The European Social Charter: the Committee and the protection of social rights in times of economic crisis'. Report presented at Conference on Protecting Economic and Social Rights in Times of Economic Crisis: What Role for the Judges?. Venice Commission & Supreme court of Brazil, Ouro Preto, 5-6 May

Kilpatrick, C. and De Witte, B. (2015) 'A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone', *European Journal of Social Law*. 1: 2-11

Lorcher, K. (2014) 'Legal and Judicial International Avenues: The (Revised) European Social Charter'. In N. Bruun, K. Lorcher, and I. Schömann (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. US: Hart Publishing, pp. 265-294

Maduro, M. (2003) 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union'. In T. Hervey and J. Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*. Oxford: Hart Publishing, pp. 269-299

Oberndorfer, L. (2015) 'From New Constitutionalism to Authoritarian Constitutionalism: New Economic Governance and the State of European Democracy'. In J. Jager and E. Springler (eds) *Asymmetric Crisis in Europe and Possible Futures*. London: Routledge, pp. 186-207

Parker, O. (2008) 'Challenging New Constitutionalism in the EU: French Resistance, 'Social Europe' and 'New Governance'', *New Political Economy*. 13(4): 397-417.

Parker, O. (2010) 'The Limits of a Deliberative Cosmopolitanism: The Case of 'New Governance' in the EU'. *CSGR Working Paper 270/10*. Warwick: Centre for Study of Globalisation and Regionalisation.

Peers, S. and Prechal, S. (2014) 'Article 52 - Scope and Interpretation of Rights and Principles'. In S. Peers, T. Hervey, J. Kenner, and A. Ward (eds) *The EU Charter of Fundamental Rights: A Commentary*. US: Hart Publishing, pp. 1455-1522

Rodrik, D. (2011) *The Globalization Paradox: Democracy and the Future of the World Economy*. New York and London: W. W. Norton and Company.

Sacchi, S. (2015) 'Conditionality by Other Means: EU involvement in Italy's Structural Reforms in the Sovereign Debt Crisis', *Comparative European Politics*, 13(1): 77-92

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

Scharpf, F. (2011) 'Monetary Union, Fiscal Crisis, and the Preemption of Democracy', *MPIfG Discussion Paper 11/11*, Cologne: Max Planck Institute for the Study of Societies

Schellinger, A. (2015) 'Giving Teeth to the EU's Social Dimension: Dismal Failure and Promising Potential', *Friedrich-Ebert-Stiftung Research Paper*, Berlin: Friedrich-Ebert-Stiftung

Spiegel, P. (2014) 'Berlin attacks EU's easing of austerity demands'. *Financial Times*. 28 February

Streeck, W. (2014) *Buying Time: The Delayed Crisis of Democratic Capitalism*. London: Verso.

Vandenbroucke, F. and Vanhercke, B. (2014) 'A European Social Union: 10 Tough Nuts to Crack', Friends of Europe Background Report. Brussels: Friends of Europe

Zeitlin, J. and Vanhercke, B. (2014) 'Socialising the European Semester? Economic Governance and Social Policy Coordination in Europe 2020', *Sieps Report No. 7*. Stockholm: Swedish Institute for European Policy Studies



The
University
Of
Sheffield.

Sheffield Political Economy Research Institute
Interdisciplinary Centre of the Social Sciences
219 Portobello
Sheffield S1 4DP

T: +44 (0)114 222 8346
E: speri@sheffield.ac.uk