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The EU and the absence of fundamental rights in the Eurozone: a critical perspective

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Abstract

Despite the development of fundamental rights mechanisms in the EU, including the Charter of Fundamental Rights, the governance of the Eurozone has led to policies that have undermined basic social rights. The purpose of this article is to explain why it is that the EU has been able to act in this manner despite the assurances supposedly enshrined in its own rights guarantees. To do this, recent advancements in critical integration theory that posit European integration as the outcome of competing hegemonic projects are drawn upon. The construction of fundamental rights is conceptualised within the context of the institutional framework of the EU and the current dominant neoliberal project. It is argued that the process of construction of rights has led to a highly restrictive understanding of what the concept of fundamental rights entails in the EU. This has allowed EU institutions to rhetorically commit to rights while simultaneously acting to undermine rights in practice.

Introduction

The 2000s saw a seemingly unstoppable movement towards a more state-like European Union (EU). Not even the rejection of the Constitutional Treaty by popular referendums in France and the Netherlands in 2005 could derail this process, as the Treaty of Lisbon saw most of its provisions repackaged and implemented anyway, albeit after a short period of reflection. One of those provisions in the Treaty of Lisbon was a legally binding Charter of Fundamental Rights – a guarantee to the people of Europe that the institutions of EU would respect their basic rights. This charter of rights contains social rights side-by-side with traditional civil rights in a bid to take seriously the principle of indivisibility. Yet the Eurozone crisis that erupted soon after the Charter was granted legal value has seen a political response by the institutions of the EU that has undermined social rights. In the governance arrangement hastily constructed to manage the Eurozone there are no mechanisms to ensure that rights are taken into consideration. What has happened to the guarantees of the Charter of Fundamental Rights? How is it that the EU that had so recently granted

legal value to a Charter enshrining fundamental social rights is able to act in a manner that undermines those same rights?

To answer this question, the development of fundamental rights is analysed by drawing on recent advancements in critical perspectives on the EU (Bulmer and Joseph, 2015). This critical approach, highlighted in more detail below, draws attention to the fashion in which the institutional framework of the EU and presence of pre-existing dominant economic ideas have shaped the construction of fundamental rights. It is argued that the unique process of the construction of fundamental rights in the EU has led to a dominant understanding of rights as justiciable civil rights of equal value to key neoliberal economic principles and applicable only within the jurisdiction of the European Court of Justice (ECJ). Social rights are afforded a secondary and non-fundamental status. Crucially, this dominant understanding of rights differs in key areas from the image projected by the Charter of Fundamental Rights, wherein social rights are presented as full fundamental rights and rights are applicable to the institutions of the EU without any regard for constraints arising out of the jurisdiction of the Court of Justice. This dominant understanding of fundamental rights has restricted their potential application to the governance of the Eurozone, which has been strongly premised on key neoliberal principles, due to the relative absence of civil rights issues and exclusion of the Court of Justice.

This article proceeds in four parts. Part I sets out the theoretical perspective by building on recent critical integration theory and incorporating insights from historical institutionalism. This first part highlights the importance of engaging critically with the construction of key political concepts such as fundamental rights and the impact of the EU's institutional framework and dominant hegemonic projects on their formation. Part II outlines the governance of the Eurozone, focusing on the dominance of neoliberalism and noting the adverse impact on social rights at the national level. Part III analyses the historical construction of rights in the EU in order to determine how the concept of fundamental rights is understood in the EU. Part IV addresses why EU rights mechanisms have not been utilised in the governance of the Eurozone by linking in the historical construction of fundamental rights in the EU and the current dominance of neoliberalism.

Towards a critical perspective on the EU

The theoretical framework outlined here builds heavily on recent work by Simon Bulmer and Jonathan Joseph, who have sought to theorise integration from a more critical perspective by incorporating insights from critical realism and neo-Gramscian critical political economy. Bulmer and Joseph (2015) conceptualise EU integration as the outcome of competing projects that seek to achieve hegemony in the Gramscian sense. That is, projects backed by political actors that seek to secure power by embedding their own values and principles as the 'common sense' of politics (Bulmer and Joseph, 2015, 9-10; see also Cafruny and Ryner, 2007, 8-9; Burawoy, 2003, 214-217). European integration is the outcome of the competition between different hegemonic projects driven by actors predominately situated at the domestic level (Bulmer and Joseph, 2015, 15-19).

Whilst Bulmer and Joseph (2015, 16) identify four competing hegemonic projects – neoliberal, national-social, national-conservative, and pro-European social democratic – it is the neoliberal¹ project that has achieved dominance in the EU (on neoliberalism, see also Ryner, 2015; Bonefeld, 2012; Hay and Wincott, 2012; Drahokoupil, van Apeldoorn, and Horn, 2009). This neoliberal project is mainly backed by transnational financial capital and certain national governments, in particular in northern export-orientated states and led by Germany (Ryner, 2015; Hay and Wincott, 2012; van Apeldoorn, 2009). It seeks to expand market competition as the primary means to distribute resources and commit EU member states to restrictive public spending rules and macroeconomic restructuring favouring the flexibility of business whilst constraining the agency of labour (Bulmer and Joseph, 2015, 16; van Apeldoorn, 2009, 26-27). Examples of this neoliberal project can be seen in core aspects of the EU's economic constitution, in particular the dominance of the four fundamental freedoms of the single market and the strict budgetary rules and conception of macroeconomic competitiveness at the heart of EMU (Oberndorfer, 2015; Tuori and Tuori, 2014; Menendez, 2013; van Apeldoorn, 2009).²

Conceptualising integration as the outcome of competing hegemonic projects is a significant advancement on older integration theories in which questions regarding the nature of the EU were more confined to whether power lies with member states or supranational institutions. Critical integration theory puts the political nature of the EU at the heart of its analysis, linking the ontological question to the direction of policies and decision-making. However, Bulmer and Joseph (2015) offer only a limited account of the role of supranational institutional actors and the way in which the institutional framework of the EU influences further developments. This is understandable in the context of developing critical integration theory with a view to a broader analysis of EU integration, but does not offer an appropriate toolkit to examine specific developments within the EU that have been driven forward primarily by institutional actors and cannot be reduced to any one hegemonic project. To redress these shortcomings, historical institutionalist research must be looked to.

Bulmer and Joseph (2015) provide a limited account of institutions in their critical integration theory. They outline institutional structures as relatively enduring and as pre-existing the agents who act upon them. Institutions create a framework of enablement and constraint, whilst agents retain the ability to engage critically and, through this engagement, reproduce and transform institutional structures (Bulmer and Joseph, 2015, 6). Historical institutionalism provides a more in-depth account, emphasising that institutions are sets of formal rules and informal norms that influence

¹ It should be noted that some political economists describe the EU as being ordoliberal rather than neoliberal, often to emphasise the strength of German preferences and to differentiate the EU from a more Anglo-liberal style of neoliberalism (see Ryner, 2015; Bonefeld, 2012). Ordoliberalism is a type of neoliberalism and shares many key tenets and intellectual figureheads. Debates over the differences between these branches are important to political economy (see Cerny, 2016), but do not bear any significant consequences for the study of fundamental rights in this article. Scholars using both terms are drawn upon in this article.

² See Tuori and Tuori (2014) on recent developments in the EU's economic constitution, including the incorporation of a macro-economic constitution focused on financial stability on top of the original micro-economic constitution based on the freedoms of the single market and competition law.

(though do not determine) actors' identities, interests, and strategies, but are also the product of political outcomes driven by actors (Hay, 2008, 6; Thelen and Steinmo, 1992, 9-10). This includes both codified texts, e.g. the EU treaties, and working norms that have developed despite written rules, e.g. the norm of seeking consensus in the Council of the EU even when qualified majority voting rules are in place. The institutional framework of the EU also includes specific institutional actors (the European Commission, the European Parliament, and the Court of Justice) that are able to operate with partial autonomy from the national governments who created them, though their capability to do so varies depending on institutional role and social norms (Pierson, 1996, 132). Conceptualising institutions in this way provides key insights into institutional change in particular. Take, for example, the ECJ's role in reconceptualising the EU legal order by establishing the doctrines of direct effect, supremacy of EU law, implied powers, and fundamental rights in its case law in the 1960s (Weiler, 1991, 2413-2419). This process significantly transformed the EU, yet was pursued by only one institutional actor reinterpreting the treaties without any change to their actual text. One actor used its agency to change the broader structure of the EU – though, crucially, this was acceptable to the other actors involved.

One of the key aspects of the relatively enduring nature of institutional structures is path dependency (Hay, 2008, 9; Pierson, 1996). At the EU level, the high unanimity threshold necessary for positive integration has constituted a strong obstacle to political change (Pierson, 1996, 142-143; see also Scharpf, 2010; 1999). Instead, integration has often been pursued through law, with the European Court of Justice underpinning key developments. Yet the ECJ is itself constrained by its institutional role enshrined in the treaties and norms regarding how courts should operate that also results in path dependent outcomes (de Sousa, 2011, 165-166; Scharpf, 2010, 240). It is limited to interpreting what the treaties mean when prompted by a dispute that has been brought before it, must set out its reasoning based on legal norms, and should strive for consistency in the application of its case law (de Sousa, 2011, 166-167).

The resistance of institutional structures to change also raises the importance of the timing of events. For example, the decision by national governments to pursue European integration via economic means in the 1950s combined with the Court of Justice's constitutionalisation of EU law in the 1960s meant that an economic legal basis with prominent provisions on the freedoms of the internal market was established at the top of the European legal hierarchy, creating an economic constitution.³ The difficulty in achieving the necessary consensus among national governments to change the nature of the EU has hindered efforts to ensure a more balanced polity through, for example, social integration (Scharpf, 2010). The Court of Justice's later case law establishing the freedoms of the single market as 'fundamental' may have simply been based on the prominence of these provisions in the original Treaty of Rome, but has had the effect of contributing greatly

³ Due to the later development of EMU, some scholars have referred to the freedoms of the single market as a micro-economic constitution (Tuori, 2015, 125; Tuori and Tuori, 2014). For an in-depth theoretical account of constitutionalism in the EU, including the primacy of the economic constitution and its relationship to other aspects of the EU constitution, see Tuori (2015).

(whether intentional or not) to the neoliberal hegemonic project that is now dominant in the EU (Everson and Joerges, 2012, 651; Hay and Wincott, 2012, 136-142; Scharpf, 1999, 56-58).

Critical integration theory has important implications for the study of fundamental rights in the EU. Existing research has focused on how neoliberalism has become dominant in the EU (Ryner, 2015; Menendez, 2013; Bonefeld, 2012; Drahokoupil, van Apeldoorn, and Horn, 2009) and how fundamental rights have been developed as a secondary project aimed primarily at legitimising the new economic order (Smismans, 2010; Williams, 2004). In order to critically appraise the role of fundamental rights in the EU, it is necessary to identify those actors that have shaped the development of rights and situate their agency within the appropriate context of the institutional framework of the EU and their relationship to the dominant neoliberal hegemonic project. In particular, it is the relationship between the construction of rights and the neoliberal hegemonic project that is central to the role rights play in the EU today. Before that, however, it is necessary to engage in more detail with the neoliberal hegemonic project and how it has been manifested in the Eurozone.

The neoliberal hegemonic project in the Eurozone

To fully grasp the implications of the way in which fundamental rights have been constructed in the EU, consideration must first be given to the dominance of the neoliberal hegemonic project in the contemporary governance framework of the Eurozone. Approaching from the perspective of critical integration theory, this governance framework is the strongest example of the neoliberal hegemonic project. In recent years, the EU has embarked upon a process of constitutional mutation in which reforms to the Eurozone have greatly enhanced the ability of supranational EU actors to intrude on policy areas previously under national control (Tuori and Tuori, 2014). The result is the mainstreaming of neoliberal policies supported by a coercive Eurozone governance apparatus that has undermined fundamental rights. While space precludes a detailed account of the development of this new governance arrangement (see Joerges, 2014 and Tuori and Tuori, 2014 for such accounts), the main features of the governance of the Eurozone and its impact on fundamental rights are set out below by drawing on recent literature from critical political economy and EU governance studies.

With its commitment to low inflation and restrictions on debt and deficit levels, EMU has been criticised from the outset as a neoliberal project of 'new constitutionalism' backed by transnational capital (van Apeldoorn, 2009; Gill, 1998). Yet while in the 2000s this account of EMU was critiqued for ignoring the softness of the actual enforcement mechanisms and domestic resistance to neoliberalism (Parker, 2008), reforms introduced since 2010 have sought to greatly enhance the capability of EU actors to impose neoliberal policies on Eurozone states (Ryner, 2015; Bonefeld, 2015; van Apeldoorn, 2014). According to Tuori and Tuori (2014), the response to the Eurozone crisis has seen a constitutional mutation that has refocused EMU towards financial stability and crisis management premised on strict conditionality, to the detriment to national sovereignty and the

European social model. The strength of EU-level enforcement mechanisms varies depending on the level of economic imbalances present in a Member State (de la Porte and Heins, 2015). Non-Eurozone states face only soft-law recommendations, while Eurozone states are subject to varying degrees of surveillance and Treaty-based 'recommendations' backed by sanctions for non-compliance, and in the worst cases of economic imbalances are subject to strict conditionality in order to receive financial assistance (de la Porte and Heins, 2015, 14). Even Eurozone states with high imbalances but have not formally requested financial assistance may face strict conditionality from the European Central Bank using access to its bond-purchasing schemes and the threat of formal bail-out proceedings to pressure states into compliance (Sacchi, 2015). These reforms have constructed a coercive framework designed to implement neoliberal reforms despite reluctance among Eurozone states, constituting a form of 'authoritarian constitutionalism' (Oberndorfer, 2015, 186).

Under the European Semester, first launched in 2011, all Member States are subject to a cycle of surveillance and policy recommendation overseen by the European Commission and the Council of the EU. The European Commission publishes an Annual Growth Survey of the EU economies and Country-specific Recommendations detailing policies for each Member State, which are backed by in-depth Country Reports analysing the socio-economic situation in each state. These documents are subject to debates and endorsement in the Council of the EU, though this process rarely leads to any policy changes.⁴ De la Porte and Heins (2015, 14) situate this ordinary European Semester process at the low to medium end of the spectrum of EU involvement in domestic policy. It is when Eurozone states experience an economic imbalance that intrusion by EU institutions is increased, a situation that has been rather common in the Eurozone. Through the reformed Excessive Deficit Procedure (EDP) and the new Macroeconomic Imbalance Procedure (MIP), a Eurozone state experiencing an excessive imbalance on a broad range of economic indicators⁵ can face large sanctions amounting to 0.1% or 0.2% of GDP if they fail to follow the recommendations stipulated by the Commission and the Council. A new voting procedure called 'reverse qualified majority voting' has been introduced that means a proposal by the Commission to enact a sanction is adopted unless blocked by a qualified majority of the Council within a set timeframe. Thus, the power of the Commission over the Eurozone governance has been enhanced considerably. This new process for enacting sanctions was deliberately designed to make it difficult for Eurozone states to form a blocking minority and to streamline the sanctioning procedure (European Commission, 2011).

Those Eurozone states that have experienced more significant fiscal imbalances and have been unable to borrow money from the financial markets have been subject to the most intrusive EU mechanisms. Constrained by a common EU currency and so unable to use domestic monetary policy to rebalance their economies, Eurozone states facing a sovereign debt crisis have required financial assistance packages, commonly known as bail-outs, from other Member States and the EU (Hall, 2012). Mechanisms to provide bail-out funds were hastily constructed between 2010 and 2012. In

⁴ Interview with official in DG Employment, 17th June 2015

⁵ Deficit and debt under the EDP or a indicators from current account balance to private indebtedness (and potentially expandable to other aspects of national economic performance, Scharpf, 2011, 32) under the MIP

2010, the European Financial Stabilisation Mechanism and the European Financial Stability Facility were created – the former as an ordinary EU instrument (Regulation (EU) 407/2010) and the latter as an intergovernmental agreement, necessary to overcome the budgetary restrictions of the EU. In 2012, the European Stability Mechanism was created by intergovernmental agreement to replace both of the earlier instruments, though it is set to be formally incorporated into EU law in the future. Despite the mix of formal EU law and intergovernmental agreement, these bail-out mechanisms all function in the same way. They are managed by a troika consisting of the International Monetary Fund, the European Commission, and the European Central Bank (ECB) and the release of funds is premised on the recipient state fulfilling a strict set of conditions set out in a memorandum of understanding. According to de la Porte and Heins (2015, 14), this involves ‘far-reaching structural reform with a high potential for undermining the existing institutional structure and for changing the fundamental principles of a policy area’.

What is notable about this governance arrangement is its reliance on executive actors: mainly the European Commission and the Council of the EU, but also the ECB at times (Oberndorfer, 2015). Within these institutions, it is mainly the economic and finance bodies (DG ECFIN and the ECOFIN council) in control. Furthermore, there are no fundamental rights mechanisms whatsoever to regulate or guide the actions of these economic and finance bodies. The mainstreaming activities of the European Commission, part of its strategy on the ‘effective implementation of the Charter’ (European Commission, 2010), are nowhere to be seen. There are no check lists, impact assessments, preparatory consultations, targeted recitals on rights, or explanatory memorandums on rights impact – all of the specific mechanisms the European Commission has established on rights are absent. The Annual Growth Surveys, Country-specific Recommendations, In-depth Reviews, and the other output documents that form the backbone of the operation of the EMU governance framework make almost no reference to any fundamental rights. Furthermore, the empowerment of executive actors in the governance of the Eurozone has also come at the expense of judicial oversight. The Court of Justice has so far declined jurisdiction when cases concerning bail-out conditionality have been raised, though scholars have been critical of this position and have suggested it may change (Kilpatrick, 2014; Barnard, 2013). As highlighted above, one of the bail-out mechanisms (the European Financial Stabilisation Mechanism) is under EU law, while the European Stability Mechanism is due to be formally incorporated into EU law at a later date. The European Semester and the EDP and MIP enforcement mechanisms are also established by EU law, though again the ECJ has so far not expanded its jurisdiction to cover this in its case law. As these governance arrangements emerged out of a soft-law process, the absence of the ECJ is understandable, but may no longer be sustainable as the enforcement mechanisms have hardened.

The implications of the absence of fundamental rights mechanisms in the governance of the Eurozone become apparent when the actual policies being implemented are looked to. With EMU designed around the prioritisation of core neoliberal economic goals including low inflation and balanced budgets (or rather, anti-cyclical fiscal policy), domestic social policy has faced significant constraints. State spending on social security (e.g. pensions, healthcare, welfare) have been targeted for fiscal retrenchment as Eurozone states struggle to restrictive debt and deficit targets and labour

market regulation has been targeted for restructuring to reduce market intervention of employment protection and to suppress wages in order to make Eurozone states more competitive (Bonefeld, 2015; Wigger, 2015). There is already an emerging body of legal scholarship focusing on the incompatibility between EU policies in the Eurozone and fundamental rights mechanisms, including the European Social Charter, the ILO, and national constitutional arrangements (Yannakourou, 2014; Fischer-Lescano, 2014; Lo Faro, 2014; Psychogiopoulou, 2014; Nolan, 2014; Jimena-Quesada, 2014). The UN Commissioner on Human Rights (2013) and the Council of Europe Commissioner for Human Rights (2013) have published reports on the violation of fundamental rights in the response to the Eurozone crisis. There have been a number of legal challenges against Eurozone policies within states. In Greece, a number of policies adopted in compliance with its Memorandum of Understanding have been found to have violated fundamental social rights by the Council of State (the Greek supreme court), the International Labour Organisation Committee of Experts, and the European Committee of Social Rights (Yannakourou, 2014). In Portugal, the constitutional court has found several austerity measures adopted under its Memorandum of Understanding to have violated fundamental rights (de Brito, 2014). In Spain, specific policies including the decentralisation of collective bargaining and a special employment contract with very low severance pay, which were requested specifically by the ECB and through recommendations in the European Semester backed by its enforcement mechanisms,⁶ were found to have violated social rights by the European Committee of Social Rights (Rodriguez, 2014).

The current state of EMU represents a strongly entrenched neoliberal hegemonic project in the EU. The prioritisation of austerity and macroeconomic restructuring as a means to reshape the relationship between the state, the market, and society has been supported strongly by both transnational capital (van Apeldoorn, 2014) and Northern export-focused economies led by Germany (Ryner, 2015). As tensions within this neoliberal project have precipitated the current Eurozone crisis, its capacity to incorporate and neutralise rival projects has decreased and given way to coercive governance framework designed to impose policies regardless of domestic democratic will (Bonefeld, 2015; Menendez, 2013). Yet the current state of the governance of the Eurozone is not reducible to the will of transnational capital or the German government. The institutional dynamics of integration through law have privileged the neoliberal project at the expense of efforts to create a supranational social democracy or Keynesian-style economic policy (Joerges, 2014; Everson and Joerges, 2012). The technocratic regulatory style of the EU has proved to be compatible with neoliberal ideas about independent central banks and the management of monetary policy committed to low inflation.

Recognising that the current state of the Eurozone represents a dominant neoliberal project that has taken a turn towards more coercive practices raises the question of what has happened to the EU's fundamental rights guarantees. In 2009, just prior to the changes to the governance of the Eurozone highlighted above, the Treaty of Lisbon had entered into force and granted legal value to the Charter

⁶ It should be noted that Spain did receive a bail-out package in 2012, though its conditionality was focused on the banking sector. All of the labour and social policy recommendations for Spain came via the European Semester and from the ECB.

of Fundamental Rights. This Charter lists many fundamental social rights which have not only not been taken into account in the governance of the Eurozone, but actively undermined by the policies pursued. The Commission's strategy for implementing the Charter, which contains an array of rights-based governance mechanisms, is nowhere to be seen in this area of integration. While some left-wing movements within Eurozone states have sought to use constitutional and international fundamental rights mechanisms to challenge austerity and neoliberal restructuring within Member States (though these have tended to be fruitless, see Tuori, 2015, 256), such challenges are far rarer at the EU level where many of these policies originate from. To understand how it is that rights in the EU could be so neglected in the governance of the Eurozone, the concept of fundamental rights must be analysed in more detail from a critical perspective. Only by looking to how it is that fundamental rights are conceived of and understood in the EU can this cognitive dissonance between the rights guarantees supposedly enshrined in the EU and the actual practice of Eurozone governance be accounted for.

The construction of fundamental rights in the EU

The history of fundamental rights in Europe spans several centuries and the actual process of rights developments (whether in international treaties or incorporation into national constitutions) has varied to some extent, though rights have usually been established through political means that have ensured that they could be situated at the core of a given constitutional order. Every national European constitution contains provisions on fundamental rights, usually featured prominently in the opening sections. In the EU, the process of construction of rights has been different. Instead of developing in a political manner that could have allowed a more prominent position for fundamental rights in the EU treaties, rights were instead constructed in a judicial manner by the Court of Justice. This means that the role of fundamental rights in the EU has been shaped by the institutional position of the Court of Justice, affecting how rights interact with the hegemonic projects underpinning EU integration that have been driven forward in a more overt political manner. The judicial construction of rights by the Court of Justice is the primary focus of this section, but first the issues surrounding political developments must be addressed.

The difficulty facing political developments

The absence of a European *demos* and the general weakness of integrationist politics, in particular the difficulty in achieving the necessary consensus among national government for positive integration, has led to a tendency towards integration through law (Everson and Joerges, 2012, 645; Scharpf, 2010; Bellamy, 2006). Even attempts to have the EU accede to the ECHR, a move thought to be politically easier given that all EU Member States are signatories, have proven to be unattainable. Attempts in 1979 and 1990 failed to gain the support of national governments in the Council. The latest treaty amendment, the Treaty of Lisbon (2007), has taken further steps by formally committing the EU to accede to the ECHR, but as of 2017 progress has stalled. The Commission has also sought to support rights developments by linking them to the national-social and pro-European

social democratic hegemonic projects (on these projects, see Bulmer and Joseph, 2015, 16). Social rights in developments such as 1989 Community Charter of Fundamental Social Rights of Workers were justified on both the grounds of protecting national level social settlements and as a basis for further EU level social developments (Smismans, 2010, 52; Maduro, 2003, 285). Yet the resolute opposition of the UK prevented the 1989 Community Charter from amounting to anything more than a soft law declaration signed by the other 11 EU member states. Essentially, the structural dynamic of EU integration wherein positive integration requires a high level of consensus among national governments (Everson and Joerges, 2012; Scharpf, 2010) has prevented the political development of fundamental rights. The institutional framework of the EU privileges negative and Court-led integration, wherever possible.

Although it has fallen to the Court of Justice to develop the concept of fundamental rights, there has been one recent significant political development that has held the potential to enhance the role of rights in the EU. The Charter of Fundamental Rights, which was drafted in 2000 and entered into force in 2009. Yet for all the symbolism of the Charter, its purpose was primarily to endorse the protection of fundamental rights already afforded by the Court of Justice. Upon making the decision to draft the Charter, the European Council was clear on the context: '[the] obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice' (European Council, 1999, 43). The task at hand was therefore 'to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens' (European Council, 1999, 43). The Commission followed the lead of the European Council, describing the drafting of the Charter as a 'task of revelation rather than creation, of compilation rather than innovation' (European Commission, 2000, 2).

The drafting of the Charter did create some opportunity for actors to attempt to enhance the protection of rights, particularly in the area of social rights. For all the European Council and Commission were focused on further codifying the Court of Justice's case law, they did recognise a need to address the issue of social rights that had hitherto been largely neglected by the Court. The European Parliament, backed by the inclusion of national parliamentarians in the drafting convention, was strongly supportive of the inclusion of stronger provisions on social rights. Social rights were eventually included in the Charter of Fundamental Rights despite strong opposition from the UK, but on the basis that the Charter was not legally binding (Bercusson, 2005, 171). When it was decided to grant the Charter legal value (originally by incorporating it into the Constitutional Treaty, later by annexing it to the Treaty of Lisbon with reference to its legal value in the text of the treaty) a new provision was introduced outlining a distinction between judicially enforceable rights and programmatic rights to be implemented via legislation or collective agreement. Though the Charter does not specify which rights fall into which category, this provision is widely considered to be aimed at social rights in order to undermine their justiciability and afford them a lesser value (Bercusson, 2005, 172-173). The guidance issued by the Commission on mainstreaming fundamental rights in policies (part of its strategy to implement the Charter) has little to say as to how those rights that are programmatic principles should be implemented (European Commission, 2011). When asked about guidance on fundamental rights mechanisms, officials in the Commission emphasised that it is the

case law of the Court of Justice that is looked to when mainstreaming rights.⁷ It is not clear how programmatic social rights can be mainstreamed as there are few examples in the case law. Instead, it is more ‘hard-core’ rights rather than social and economic rights that the Commission is concerned with when it comes to mainstreaming.⁸

Recognising the barriers that have faced the development of fundamental rights via positive integration and the importance of the ECJ’s case law for informing the recent Charter of Fundamental Rights, attention must be turned to how rights are understood by the Court.

The judicial construction of rights

Recalling the critical integration theoretical perspective outlined above, it is necessary to consider how the ECJ is situated within the institutional framework of the EU and how this affects its relationship to other dominant sets of ideas. The ECJ sits at the top of the legal hierarchy, essentially as a kind of constitutional court of Europe. Yet the ECJ is institutionally constrained to address only EU law, though this is a body of law that it has historically interpreted very broadly on the basis of the reach of the four economic freedoms underpinning the single market (de Sousa, 2011). As a court, the ECJ must also conform to the norms of behaviour widely expected of a judicial body in Europe (de Sousa, 2011, 164-166). For example, its decision-making is restricted to adjudicating on cases brought before it, it must demonstrate legal reasoning, it is restricted to interpreting existing law, and is reluctant to engage in questions of distribution that are felt to be political rather than legal. These norms can be bent to some extent, as the introduction of fundamental rights to the EU legal order as outlined below is widely regarded to have gone beyond interpreting existing law and into the realm of creating new law. Due to the barriers facing political integration, as highlighted above, the history of the EU has seen a fairly active role for the ECJ in pushing the boundaries of integration and has given rise to the term ‘integration through law’, though this activity tends to be premised on reinterpreting and expanding existing treaty law, usually the four fundamental freedoms of the single market. This deference to existing treaty law also shapes the ECJ’s relationship to dominant hegemonic projects in the EU, though it should be emphasised that the Court’s own elevation of the four freedoms of the single market to ‘fundamental’ status has, perhaps unintentionally, contributed greatly to the dominance of the neoliberal project (Menendez, 2013, 479-481; Höpner and Schäfer, 2010, 17; Scharpf, 1999, 56-57).

While the history of the ECJ’s engagement with fundamental rights is well known, this case law must be considered in light of the critical integration theoretical framework highlighted above to fully understand how it has shaped rights in contemporary EU activities. The silence of the original treaties on the issue of rights and the reluctance of the German Federal Constitutional Court to be

⁷ Interview with official in European Commission DG Justice, 2nd July 2015; Interview with official in European Commission DG Justice, 11th July 2015

⁸ Interview with official in European Commission DG Justice, 2nd July 2015

bound by a supranational European law without rights guarantees equivalent to the German constitution necessitated action. Despite refusing to engage with the issue of rights in a number of cases in the 1960s, in the case of *Stauder* in 1969 the ECJ decided that rights are, in fact, enshrined in the general principles of Community law and protected by the Court. Some reference was made to treaty provisions on non-discrimination (including between the producers and consumers of agricultural products) to justify this sudden inclusion of the concept of fundamental rights, but for the most part it appeared these rights had their basis in 'unwritten Community law derived from the general principles of law in force in Member States'.⁹ Additional cases in the first half of the 1970s further specified sources of this unwritten Community law: constitutional traditions common to Member States¹⁰ and international treaties to which Member States are signatories.¹¹ The European Convention on Human Rights (ECHR) is widely regarded as the paramount international treaty in this regard and has enjoyed a privileged position in the case law of the ECJ, though other treaties, including the European Social Charter, have been referred to on occasion (de Witte, 2005, 154).

The original introduction of fundamental rights to the EU legal order demonstrates the judicial nature of their construction from the outset. Rights were not in any of the original treaties, evident from the way in which the ECJ had to rely on very specific non-discrimination clauses to attempt to make some link, yet had to be introduced lest the legitimacy of EU law be challenged by national constitutional courts. Because of this absence of written law, the ECJ had to act simultaneously in an innovative fashion and remain within the confines of its role as a court. The result was the introduction of the concept of 'unwritten Community law', allowing the Court to tread a fine line between unilaterally creating new law and legitimately drawing on sources of rights common in Europe, namely national constitutions and international treaties. The ECJ was even cautious when specifying international treaties, waiting until all Member States had ratified the ECHR (France was the last to do so in 1974) before specifying it as a source of rights in 1975 (Rack and Lausegger, 1999, 805). The unwritten nature of fundamental rights standards stands in contrast to the written, and rather prominent, nature of the economic freedoms that underpin European integration. Rights were also introduced as a negative concept, as restrictions on what the EU can do. While this notion of rights sits comfortably with the protection of civil rights, the positive action required to fulfil many social rights is absent from the ECJ's case law. While these aspects of the EU concept of fundamental rights are understandable in the context of the institutional role of the ECJ, they do also set the scene for two further developments that have had clear impact on the role of rights today: the relationship between rights and economic principles underpinning integration; and the scope of application of rights.

The relationship between fundamental rights and the economic principles underpinning European integration has been a significant feature of the ECJ's case law. As highlighted above, one of the key aspects of the dominance of the neoliberal hegemonic project in the EU is the fundamental value attributed to the four freedoms of the single market (Bulmer and Joseph, 2015; Menendez, 2013).

⁹ *Stauder v City of Ulm*. [1969]. ECJ, Case C-29/69,

¹⁰ *Internationale Handelsgesellschaft* [1970]. ECJ, Case 11/70.

¹¹ *Nold, K. v European Commission* [1974]. ECJ, Case 4-73,

According to Tuori (2015, 26), the economic constitution of the EU has been afforded a 'functional primacy' in relation to other dimensions of the EU constitution. As Scharpf (1999, 57) notes, the constitutional-like protection of economic freedoms by attributing them a fundamental status and strong judicial oversight is unique to the EU and is not found in any domestic state order. Yet, as Bulmer and Joseph (2015) set out, there are other competing projects that seek to establish other principles at the core of European integration. Here, the relationship between fundamental rights and fundamental economic freedoms is of key importance.

The ECJ has handled the relationship between rights and economic principles through its proportionality test. With regards to fundamental rights, this proportionality test was articulated in the case of *Hauer* in 1979. In *Hauer*, on the issue of the fundamental right in question, the Court stated that 'far from constituting an unfettered prerogative, must be viewed in the light of the social function of the activities protected' and that it 'is necessary that those restrictions in fact correspond to objectives of general interest pursued by the Community and that, with regard to the aim pursued, they should not constitute a disproportionate and intolerable interference'.¹² This approach of permitting interference that is not intolerable or disproportionate and in pursuit of an objective of general interest has been applied to both fundamental rights and fundamental economic freedoms. Yet when these two principles come into conflict with one another, it tends to be the economic freedom that is taken as the core principles to which interference on the basis of protecting a right must be justified. According to Augenstein (2013, 1935), this is a reversal of the 'rule/exception logic' through which rights issues are addressed in national constitutional orders or at the European Court of Human Rights (see also Tuori, 2015, 28). For the most part, despite this logic reversal, civil rights tend to be adequately protected and often justify restrictions on the fundamental economic freedoms. For example, in the case of *Schmidberger* the Court permitted the Austrian authorities to interrupt the fundamental freedom of movement of goods by closing a highway to allow the right to public protest to be exercised.¹³ Given the ease at which civil rights can be protected judicially, as negative rights that constitute restrictions on certain actions, it is of little surprise that these rights tend to be balanced adequately when they come into conflict with economic freedoms. However, the same cannot be said about social rights.

Social rights have historically posed more difficulties when it comes to judicial enforcement. They do not enjoy a consensus on the precise role of courts regarding their enforcement in Europe (Fabre, 2005) and the ECJ has tended to shy away from applying them in its case law (de Witte, 2005, 154). Until relatively recently the ECJ had not directly addressed the issue of fundamental social rights, though in a number of cases domestic welfare arrangements have been exempt from internal market rules by applying a concept of national solidarity and access to national welfare services has been opened up to some extent based on free movement of people (Tuori, 2015, 237-248; Bernard, 2003, 249-252). However, this case law has generally not been considered an adequate replacement for the legitimacy afforded by national welfare states (Bellamy, 2012; 2006). As highlighted throughout this article, the protection of domestic welfare arrangements is now directly undermined

¹² *Hauer v Land Rhineland-Pfz.* [1979]. ECJ. Case C-44/79.

¹³ *Schmidberger v Austria.* [2003] ECJ, Case C-112/00.

by the EU's economic constitution. The development of social rights as attributes of free movement has raised concerns about their potential to undermine the national solidarity that underpins social settlements (Tuori, 2015, 242-243; Bellamy, 2012, 164). Further, instead of being applicable to all, in practice it is a narrower band of mobile EU worker citizens and their families who have benefited from ECJ's construction of social rights as access to welfare services (Everson, 1995; see also Tuori, 2015, 243-251).

In 2007 the balance between the EU fundamental freedoms of the single market and national social settlements was disrupted. In the case of *Viking Line* the ECJ recognised for the first time that the right to collective bargaining is a fundamental right, but declared that collective action interfering with the fundamental freedoms of the single market must be justified and proportionate.¹⁴ In doing so, the ECJ imposed obligations on trade unions to ensure their actions do not infringe on single market rules. Given the centrality of collective bargaining to fair pay and employment protection in Europe, a key aspect of many national social settlements suddenly became encompassed under single market freedoms (Christodoulidis, 2013; Höpner and Schäfer, 2010). The implications of this new approach became clear in a second case in 2007. In the case of *Laval*, a Swedish trade union had taken collective action against a Latvian construction firm for posting working to Sweden at lower wages and conditions than the sectoral collective agreement in place.¹⁵ This issue is also covered by the Posted Workers Directive, which provides for minimum employment standards to be applied to posted workers and contains a provision allowing more favourable terms to be applied to workers. The ECJ decided that interference with the fundamental freedoms of the single market by the Swedish trade union was excessive and therefore in contradiction of EU law (see Davies, 2008 for details of the *Viking* and *Laval* cases).

The *Viking Line* and *Laval* cases, along with subsequent cases following the same logic, have been heavily criticised by legal scholars and trade unions for prioritising EU fundamental economic freedoms and undermining national social settlements (Christodoulidis, 2013; Barnard 2013; Everson and Joerges, 2012; Höpner and Schäfer, 2010; ETUC, 2008). The European Committee of Social Rights (ECSR), the body tasked with monitoring and enforcing the European Social Charter, has also passed judgement on the outcome of the *Laval* case through its collective complaints mechanism (see Brillat, 2005 for more information on this mechanism). Although the ECSR has stated that it could not comment directly on the case law of the ECJ (as the former is based under the Council of Europe and the latter under the EU), it did rule that the domestic legislation passed by Sweden to ensure conformity with EU law is not in conformity with the right to take collective action and has been particularly critical of the prioritisation of economic freedoms over labour rights (ECSR, 2014, 48-49). What this means is that unlike civil rights, social rights have not been adequately protected by the application of the ECJ's proportionality test when they come into conflict with fundamental economic freedoms. The absence of a clear judicial consensus on social rights in Europe in contrast to the prominence of the fundamental economic freedoms in the treaties and the clear

¹⁴ *Finnish Seaman's Union v Viking Line*. [2007] ECJ, Case C-438/05.

¹⁵ *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECJ, Case C-341/05.

development of these economic freedoms by the ECJ has left social rights underdeveloped in the case-law of the Court.

The scope of application of fundamental rights has also been determined by the ECJ. The early cases involving fundamental rights were all in the context of decisions taken by the EU institutions themselves, which is perhaps the least controversial application of rights by the ECJ. When it comes to Member States, however, there has to be some connection to EU law. There are two broad instances in which this may happen (Groussot, Pech, and Petursson, 2013). First, in what is known as the *Wachauf* line of cases, Member States must ensure fundamental rights are protected when implementing EU law, such as directives or regulations (Groussot, Pech, and Petursson, 2013, 113). This essentially involves instances wherein the EU legislation is considered to adequately protect rights but the implementation actions by Member States have fallen short of rights standards. Second, in the *ERT* line of cases, Member States must protect fundamental rights when derogating from EU law, often the fundamental freedoms of the single market (Groussot, Pech, and Petursson, 2013, 113). This includes both justifying a derogation from EU law (as the *Schmidberger*, *Viking Line*, and *Laval* cases, mentioned above, involved) and to ensure the legality of the derogation itself. The case of *ERT* is an example of the latter, in which Greek authorities interfered with the freedom of movement of goods to grant a television broadcast monopoly on the basis of public interest and had to also prove that it did not undermine freedom of expression.¹⁶ Essentially, the Court has approached the application of fundamental rights in a manner more restrictive than the fundamental economic freedoms, which, in contrast, have been used to expand the reach of EU law (Weatherill, 2013; de Sousa, 2011). Furthermore, the scope of application of rights has relied almost entirely on the ECJ acting in areas where it already has jurisdiction, as either defined by the Treaties or through the Court's expansive interpretation of fundamental economic freedoms.

As demonstrated above, key aspects of fundamental rights have been defined by the Court and subject to constraints arising out of this process. While the fundamental freedoms of the single market were constructed politically and enshrined prominently in the treaties, fundamental rights development instead as a contender project to secure the legitimacy of this new supranational legal order. The judicial nature of the construction of rights in the EU has constrained the application of fundamental rights in key aspects, neutralising any potential challenges rights could bring against the neoliberal project that currently dominates the EU. Two key elements of the EU understanding of fundamental rights are of vital importance to understanding the absence of rights in the governance of the Eurozone: their restricted scope of application and the subordination of social rights to economic principles. For both of these elements, the prominence of fundamental economic freedoms in the Treaties in contrast to the unwritten nature of fundamental rights has played a key role. The fundamental economic freedoms have been used to expand the reach of EU law, while fundamental rights have been restricted to select instances where oversight by the ECJ has been established through links to other written EU law. The fundamental economic freedoms have become established as core constitutional provisions of the EU, to which other principles that may cause interference must be justified. Such justification may be determined by the ECJ relatively

¹⁶ *ERT v DEP* [1991] ECJ, Case C-260/89.

smoothly for civil rights, but has not been addressed adequately in the rarer occasions that social rights have been adjudicated on.

The specific conception of fundamental rights in the EU that has been constructed by the Court has exerted a path dependency effect on later developments. The high unanimity threshold required for the political development of rights meant that when the political will to create an EU Charter of Fundamental Rights finally emerged in the late 1990s, it was on the basis of endorsing the pre-existing ECJ approach to rights – as the European Council made clear when it took the decision to have the Charter drafted (European Council, 1999, 43). The familiarity with the ECJ's approach to rights was enough to overcome the unanimity threshold that had blocked previous attempts, but at the expense of endorsing an understanding of rights incorporating limitations associated with their judicial construction. The two key shortcomings of this construction – the balance between social rights and economic freedoms and the jurisdictional scope of rights – had some prospect of being redressed when the Charter was drafted, but were largely left unaffected. Social rights were introduced to the Charter on the basis that they would not be judiciable and so would hold a lesser legal value than the fundamental economic freedoms. The jurisdictional reach of fundamental rights remained restricted by the failure to incorporate the Charter into the actual text of the treaties as a basis for EU action, as the decision was taken to instead annex the Charter to the Treaty of Lisbon. The limited legitimising potential of integration through law as constructed by the ECJ (Everson and Joerges, 2012, 645) has spilled over into politics.

The non-application of fundamental rights in the Eurozone

The two preceding sections have set out the governance of the Eurozone, including its absence of rights mechanisms, and the historical development of rights in the EU, touching upon why it is that the EU is able to act in such a manner that disregards fundamental rights. The purpose of this final section is to link together what has been said above in order to fully address the barriers facing fundamental rights in the EU that have restricted their application to policy. To do this, the justifications given by the Commission for the absence of rights mechanisms are looked to and connect back to the construction of rights in the EU, using the critical integration perspective highlighted in part one to elucidate this link. When asked about the absence of fundamental rights mechanisms in interviews with the author,¹⁷ officials have sought to justify this in three ways.

First, the restricted scope of traditional EU law is contrasted to the new governance style of the Eurozone.¹⁸ The Commission has held that the bail-out mechanisms exist completely outside of EU law and that the European Semester, along with its enforcement mechanisms, is soft-law. As

¹⁷ These interviews were conducted as part of a larger project. Individual participants were selected by identifying the relevant units within the Commission responsible for social policy in the European Semester and fundamental rights.

¹⁸ Interview with official in European Commission DG Justice, 2nd July 2015; Interview with Official in DG Justice, 11th July 2015

highlighted above, these justifications are open to question. One of the bail-out mechanisms, the European Financial Stability Mechanism, was created by EU law and has been used to provide bail-out funds. The other mechanisms, the European Financial Stability Facility and the European Stability Mechanism, have been formed by intergovernmental agreement, but both contain clear roles for two EU institutions, the European Commission and European Central Bank, thereby raising questions about whether these institutions can act outside of EU law (Kilpatrick, 2014). The degree to which the European Semester is soft-law has also been brought into question by the recent reforms enhancing the EDP and MIP as credible enforcement mechanisms. It should be noted that one official in the European Commission did emphasise that even soft-law recommendations should respect fundamental rights anyway. Nonetheless, the idea that the governance mechanisms of the Eurozone fall outside of EU law has been used to justify the absence of fundamental rights mechanisms. This should come as little surprise. As highlighted in the previous section, the historical construction of rights in the case-law of the ECJ has been dogged by questions of their scope of application. Absent a clear legal basis in the treaties for the majority of their development, rights have been developed judicially in a manner that has restricted their application to areas where jurisdiction is pre-existing – in contrast to the fundamental economic freedoms, which feature prominently in the Treaties and have been used by the ECJ to expand its reach, the institutional constraints of this judicial development are clear. Crucially, this means rights are broadly understood in the EU as only applicable to areas where the ECJ can currently act, which excludes the governance of the Eurozone. The ECJ may be capable of changing this understanding by expanding the application of fundamental rights (and its own jurisdiction) to the governance of the Eurozone, as some scholars have suggested may happen (see Barnard, 2013), but it remains constrained by institutional limitations on its role and the clear preference of the stronger Member States to pursue a neoliberal project hostile to fundamental rights. As it stands, the European Commission sees no reason to apply its own rights mechanisms to the governance of the Eurozone as it views this as an area where rights do not apply.

Second, the lack of awareness on how to implement social rights in practice and little guidance on this issue from the case-law of the ECJ have hindered the application of rights to the Eurozone.¹⁹ The absence of any significant experience with social rights in the EU has essentially allowed them to be ignored. This is also an issue that is compounded by the restrictive scope of fundamental rights, resulting in a conundrum. As most contemporary issues concerning social rights are addressed under the governance of the Eurozone where the ECJ has no clear pre-established jurisdiction, there has been little scope to develop jurisprudence on social rights. As there is little pre-existing jurisprudence on social rights, there is less pressure on the ECJ to establish its jurisdiction to become involved with the governance of the Eurozone, despite other international bodies findings violations of social rights. The unique historical development of fundamental rights in the EU has left social rights underdeveloped, particularly in contrast to economic principles. Left to the ECJ to develop, the general reluctance of courts in Europe to engage with issues involving high levels of redistribution of wealth by the state and the limited competence of the EU on social issues have constrained the degree to which social rights could be developed in case-law. The recent engagement by the ECJ with social rights in the cases of *Laval* and *Viking Line* has only served to explicitly recognised one

¹⁹ Interview with official in European Commission DG Justice, 2nd July 2015

fundamental social right, the right to collective bargaining, and has acted in practice to subordinate it to the economic principles underpinning European integration. The inclusion of social rights as programmatic, non-directly justiciable principles in the Charter of Fundamental Rights has done little to redress this shortcoming.

Third, the governance of the Eurozone is based on a cycle of macroeconomic indicators for which social rights are viewed as an appropriate approach.²⁰ This is largely due to the fairly unique governance arrangement that has emerged for the Eurozone: a reluctance to delegate powers to the EU in the more traditional sense led to policies being addressed via soft-law coordination that was later augmented by executive-based enforcement mechanisms – what Armstrong (2013) has described as a hybrid governance architecture that sits between rules-based and coordination-based styles. As fundamental rights have been developed judicially in the EU within the traditional community method, this new Eurozone governance architecture presents an alien environment. Despite the move towards new governance rights-based mechanisms in the European Commission, the deference to the ECJ as the source of expertise on fundamental rights has continued to hinder the application of rights to new forms of governance.

The development of the governance architecture for the Eurozone without any regard for fundamental rights has been able to take place because of the unique development of rights in the EU as a secondary objective in the shadow of economic integration. As rights in the EU have developed by the ECJ, shaped by both the judicial nature of this institution and its role within the broader institutional framework of the EU, they have come to be understood in a fashion that has subordinated them to the neoliberal hegemonic project that has become increasingly dominant since the 1980s. The restrictive scope of the application, the absence of case-law on social rights, and the judicial nature of rights have allowed EU actors to ignore the EU's own supposed rights guarantees on fundamental rights when acting within the remit of the governance of the Eurozone. By contrast, the strong political support for neoliberal economic principles has seen a range of policies pursued without any consideration for their impact on rights.

Conclusion

The question that this article has set out to address is why is it that the governance of the Eurozone permits EU actors to undermine fundamental rights despite all the rights-based developments that have supposedly enshrined rights at the heart of the EU. Why it is that despite the Charter of Fundamental Rights being afforded legal value by the Treaty of Lisbon, not to mention all the references to the European Social Charter and the host of governance tools designed to mainstream rights, the governance of the Eurozone is devoid of any mechanisms to provide oversight on social rights. In the most basic terms, the answer to this shortcoming is that fundamental rights have been constructed in the EU in a specific fashion that poses no threat to the prevailing economic approach

²⁰ Interview with official in European Commission DG Employment, 17th June 2015

to integration. This process of construction that has so severely limited the utility of fundamental rights as core constitutional principles may not have been deliberate, though nor can it be described as fully unintentional. To understand this shortcoming of contemporary European integration, it has been argued above that it is necessary to address the dominance of the neoliberal hegemonic project in contemporary European integration and the how the institutional framework of the EU as affected the development of rights.

By approaching the study of fundamental rights from the perspective of critical integration theory, it is possible to analyse how rights have been constructed in light of the institutional constraints on the key actors involved (namely the ECJ) and the presence of a dominant neoliberal hegemonic project. Yet throughout their development, rights have not necessary been intentionally or deliberately subordinated to neoliberal ideas about the role of the state. The barriers facing positive integration that have pushed fundamental rights to be primarily developed judicially have meant that it is the ECJ's role within the institutional framework of the EU that has shaped the role that rights play today. The institutional framework of the EU includes the dominance of neoliberal ideas, visible in the fundamental status afforded to the freedoms of the single market and the prominence of values such as balanced budgets and low inflation in the Eurozone, but also includes ideas about the nature of different institutions within the EU, such as the ECJ. It is the interplay of these aspects of the EU that has affected the role of rights. As highlighted above, it is three aspects of fundamental rights associated with their unique construction in the EU -- the restrictive scope of application of rights, the under development of social rights, and the perception of rights as predominately judicial principles – that have combined to prevent rights mechanisms from being applied to the governance of the Eurozone. Each of these constraints on rights has been shaped by their relationship to the dominance of the neoliberal project and the institutional framework of the EU.

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