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Mobilising Social Rights in EU Economic Governance:

A Pragmatic Challenge to Neoliberal Europe

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Abstract

A 'constitutional asymmetry' exists at the heart of contemporary EU socio-economic governance, privileging the economic at the expense of the social. Prevailing academic responses suggest, on the one hand, the need for radical constitutional reforms aimed at redressing this asymmetry and, on the other hand, piecemeal reforms reliant on current soft and non-binding modes of governance for the championing of social concerns. Offering a pragmatic middle way between these positions, we identify the potential *within* the extant constitutional settlement to pursue a rebalancing in favour of the social. In particular, we highlight the Commission's pre-existing legal and rhetorical commitment to social rights, arguing that it might draw on the standards established by the Council of Europe's European Committee of Social Rights (ECSR) and incorporate these into its economic governance mechanism, the European Semester. Such a step would usefully repoliticise socio-economic governance in the short-term and promote radical reform in the long term.

Key Words: *Eurozone crisis; economic governance; social Europe; social rights.*

Introduction

The current status quo is one that, according to many critics of supranational economic governance, privileges further integration at the expense of democratic and social politics at supranational and national levels. It can be understood in terms of the pursuit of what Gill refers to as a 'new constitutionalist' initiative on the part of élite 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 above claim that a neo-liberal '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) (Parker, 2008). 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', particularly of levels of national public debt. This was the prevailing diagnosis of those political forces that led the reform process: in particular, a group of structurally powerful 'creditor' member states led by Germany (Bulmer, 2014; Matthijs, 2016) and key European institutions such as European Central Bank (ECB) and European

Commission (Crespy and Menz, 2015) – collectively, the 'Brussels-Frankfurt consensus' (Jones, 2013).

Following from such a diagnosis, reforms to EU socio-economic governance introduced a range of new legal mechanisms and increased the executive powers of the EU (and especially the European Commission) to 'police the limits of the possible' in national economic policies. More concretely, this has meant the imposition of socially deleterious austerity policies, particularly in highly indebted member states with low rates of growth. Against this backdrop it has been suggested that we witness in the contemporary EU, variously an 'authoritarian' (Oberndorfer, 2015) or 'Hayekian' (Streeck, 2014) constitutionalism that undermines distinct varieties of welfare and capitalism and broadly accepted labour and social rights norms. In short, responses to the crisis have exacerbated a constitutional 'asymmetry' between the economic and the social in favour of the former (Scharpf, 2010). More generally, the conditions that have legitimised capitalism in the modern state, in particular the social and democratic contract between citizen and sovereign (Bellamy, 2012), have been undermined by neoliberal governance mechanisms.[ii]

The current threat to what remains of the so-called European social model and a European democratic 'input' legitimacy – in the form of parliamentary politics and inclusive governance – is stark from such a perspective. And there is scant evidence that the empowerment of executive actors to enforce austerity will produce the economic growth that might grant the EU 'output' legitimacy. Indeed, many heterodox and political economists convincingly argue that policies of austerity and 'internal devaluation' – primarily in the form of wage cutting – are self-defeating in terms of reviving the European economy (Stiglitz, 2014; Krugman, 2015, Blyth, 2015). Contrary

to the Frankfurt-Brussels consensus focused on public debt and administering austerity – often couched in terms of 'common sense' analogies with the household – these critics highlight that simultaneously implementing public-sector austerity across states that primarily trade with each other cannot work as an effective stimulus. Indeed, such an approach has rendered the social consequences of the crisis worse than they might have otherwise been.

We should be under no illusion that ameliorating economic stagnation and a worsening EU legitimacy crisis will be straightforward because a complex array of factors exogenous and endogenous to the EU/Eurozone context are driving this ongoing economic and institutional crisis (on the broader context, see, for instance, Gamble, 2014, Streeck, 2014, Rosamond, 2016 and on the EU/Eurozone context, see, for instance, Parker and Tsarouhas, 2017; Ryner and Cafruny, 2017; Matthijis and Blyth, 2015). However, such difficulties have not prevented attempts to envisage alternative European responses. Such responses have taken broadly two forms. On the one hand, radical reform proposals have championed moves towards either deeper integration or (at least partial) disintegration. Some have, for instance, promoted the uploading of a social democratic politics and (rebalanced) constitutional settlement to supranational level, which would include the (re)regulation of finance and the establishment of a so-called 'transfer union' approximating a social-democratic federal state (Habermas, 2001, 2013). Others have argued that the end of economic and monetary integration (the euro) and the restoration of national monetary autonomy at least needs to be contemplated. This would address the growing imbalances between surplus and deficit countries that the single currency has locked-in and provide greater space for a *national* social democratic politics (Streeck, 2014; Flassbeck and Lapavitsas, 2015). Both extremes would represent radical overhauls of the

prevailing constitutional settlement in the EU and in that sense both represent long-term visions. However, when we consider the reality of integration *and disintegration* blockages – in terms of a lack of both popular and governmental support for *both* such proposals – we would argue that neither will be realisable in the short to medium term in the absence of a significant further crisis (Genschel and Jachtenfuchs, 2013: 3-4).

On the other hand, a number of pragmatic proposals have suggested ways in which we might rebalance a neoliberal orientation with social concerns within the EU's current contemporary socio-economic governance structures. Often such pragmatic perspectives identify current practices of soft governance or policy co-ordination in social and employment policy and suggest that they might be made more robust via piecemeal reform (Zeitlin, 2010; Zeitlin and Vanhercke, 2014). While far more realisable than radical proposals, as discussed in what follows, we contend that many such proposals understate the ways in which conceptions of 'the social' have been rhetorically transformed – subsumed within a neoliberal agenda – in the contemporary EU and overstate what soft governance mechanisms might achieve in the broader context of a hardened neoliberal legal framework. In short, they fail to shift the aforementioned constitutional asymmetry in any meaningful way.

Reflecting on both sets of reform proposal we concur with Fritz Scharpf's insight that:

> [W]e… do not have normatively and pragmatically convincing ideas of what could and should be done if the window of political opportunity for a basic overhaul of the system should open … [P]olitically feasible policies appear to be ineffective and illegitimate,

> whereas radical policy changes seem to lack political feasibility. In other words, our conclusions seem to resemble the advice the tourist received when asking an Irish farmer for the way to Tipperary: "If I were you, I wouldn't start from here" (2014: 14-15).

Scharpf himself proposes a series of reforms designed to fill the gap that he identifies. Cutting through the detail of his proposals, these are geared towards a rebalancing of the constitutional asymmetry and an opening of more space for differentiated integration, whereby states can more easily opt-out of integration in certain areas. His suggestions are oriented towards enlarging 'the action spaces of national and European political processes' (Scharpf, 2014: 18); essentially, the repoliticisation of a depoliticised socio-economic governance that would permit a shift away from the failures of a neoliberal austerity highlighted above. We concur with the broad orientation of these and similar proposals. However, whether they really start 'from here' is debatable; indeed, with Scharpf, we believe that for such reforms to be realisable a rather large 'window of political opportunity' would need to open.

In this paper we present a proposal that is closer to the pragmatic and technocratic reforms highlighted above – a proposal that 'starts from here' and might be realisable in the context of a far narrower window of political opportunity – but at once has the potential to address the EU's constitutional bias. Notwithstanding the reality of such a bias, we believe that unfulfilled potential remains within the extant European constitutional settlement to quite radically challenge a neo-liberal reality. We concur with Dawson and de Witte who note that, "[l]aw 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 its socio-economic governance.

Traditionally, social rights have been realised in modern European nation-states through legislation enacted as part of the democratic process or via collective bargaining and these rights have thereafter been enshrined in international covenant, including in the European context: for instance, the Council of Europe's European Social Charter (ESC), 1965, and the EU's Charter of Fundamental Rights (EUCFR), 2009. Recognising that the hardened economic governance framework discussed above is in many respects at odds with commitments to social rights, contained, inter alia, in the EUCFR, we offer a potential way forward highlighting a new and novel role that social rights may play in guiding technocratic decision-making within this new governance framework. The current post-national monitoring of social rights already performed by the (Council of Europe) European Committee of Social Rights' (ECSR) monitoring of the ESC – and hitherto ignored by the EU – provides such guidance and should be integrated into the operating procedures of EU socio-economic governance.

Existing legal scholarship on rights has provided a comprehensive account of the ways in which fundamental rights have been used before constitutional and international courts to resist neoliberal reforms *ex post* (see Kilpatrick and De Witte, 2014). Offering a different though complementary perspective, we highlight the potential for rights to act as an *ex ante* constitutional check within EU governance processes, considering the ways in which the Commission could and, indeed, should, engage with rights. The European Commission, as the key actor in contemporary socio-economic governance and a potentially powerful 'policy entrepreneur'

(Crespy and Menz, 2015) could and should abandon its orthodox endorsement of austerity and 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 structures through which EU and Eurozone governance currently takes place: namely, the European Semester.

The argument is built upon a careful analysis of EU primary documents relating to EU socio-economic governance, the application of fundamental rights in the EU and the case-law of the ECSR. Insights from several interviews with officials in the European Commission have also been incorporated where appropriate. In a first step, we describe how economic governance reforms have hardened neoliberalism in the EU in recent years, increasing discretionary powers for executive actors, particularly the European Commission, within a technocratic mode of governance: the so-called European Semester. Second, we argue that while the social dimension of the EU has been largely subsumed within a neoliberal agenda, the Commission could, and should, use its significant margin for discretion to take seriously its commitment to the social rights contained in the ECFR. In the third and final step, we describe the mechanisms via which such rights could be incorporated into the European Semester process and significance of ECSR expertise in this context. In conclusion we are clear on the limitations of our proposal, which will rely upon as well as reinforce broader shifts away from a neo-liberal governing rationality.

Crisis and EU socio-economic governance

The permanent structure of EU socio-economic governance is embodied in the European Semester, which is the primary focus of this paper.[iii] Introduced in 2011, the Semester refers to a rather complex (some would say convoluted) cyclical governance process characterised by regular annual reporting at supranational and national levels that is underpinned by a range of targets. It is concerned first (and foremost) with ensuring member state compliance with the fiscal targets enshrined in the revamped Stability and Growth Pact (SGP) (public deficits to be kept below 3 per cent and public debt below 60 per cent of GDP) and the 'fiscal compact' of the Treaty on Stability Coordination and Governance (TSCG) (structural deficit to be kept below 1 per cent GDP). Second, it is concerned with ensuring adherence to an array of targets measuring macroeconomic imbalances and economic competitiveness, including current account balance and unit labour costs, determined by the European Commission's Directorate-General for Economic and Finance Affairs (DG ECFIN) (see European Commission, 2012). Third and finally, it also includes oversight of ostensibly social priorities related to poverty reduction and employment contained in the EU's 'Europe 2020' strategy.

The European Commission is the main actor in the Semester process in terms of both policy recommendations and enforcement. It initiates the process with the publication of 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 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 by 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 aforementioned 'fiscal compact' (Articles 6-7 & 11, TSGC), are expected to discuss and negotiate all major policy reforms that may have implications for public debt with the Commission and Council.

When a Eurozone state is adjudged to have seriously breached the aforementioned fiscal or 'imbalance' measures, the Commission has two 'corrective' enforcement mechanisms at its disposal. These are, respectively, the Excessive Deficit Procedure (EDP) – substantially enhanced for Eurozone states with the 'Two-Pack' reform package in 2013 – and the Macroeconomic Imbalance Procedure (MIP) – introduced as part of the 'Six-Pack' reform package in 2011. Under these procedures, Eurozone states submit corrective plans to the Commission and receive guidance on reforms in the form of the CSRs and In-Depth Reviews. Any non-compliant Eurozone state that fails to address is breaching of fiscal rules (EDP) or 'excessive macroeconomic imbalances' (MIP) can be sanctioned. 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 moves by qualified majority in the Council ('reverse qualified majority voting'). The financial sanctions themselves are significant,

amounting to 0.2 per cent GDP under the EDP and 0.1 per cent of GDP under the MIP, as well as restrictions on access to EU structural funds.[iv]

Cutting through these technicalities of the Semester process, we can say that, in accordance with Gill's abovementioned notion of a 'new constitutionalist' project, the current design 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 reinforced (Bauer and Becker, 2014: 219-223; Oberndorfer, 2015) and states have been obliged to implement reforms that embed neoliberal preferences in national legislation. Moreover, this 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 they have enacted legislation with a dubious basis in the extant 'European constitution' (the 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 and EDP. As Oberndorfer puts it, not mincing his words, 'the ordinary revision procedure [the EU's standard legislative 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 emerging 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, to pass judgement and impose

sanctions. The Commission has arguably been complicit in its own empowerment as executive actor in recent reforms to socio-economic governance (Crespy and Menz, 2015). Within the Commission power has shifted towards DG ECFIN (and some other economic DGs). 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 DG ECFIN and the Economic and Finance Council (Copeland and James, 2014; Oberndorfer, 2015). 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 lead to 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 either within the EU or at national level; the democratic and social deficits that have long plagued the EU (Bellamy, 2012) are compounded by governance mechanisms that directly undermine these sources of legitimacy.

That said, such de-politicisation unsurprisingly prompted at least some *re*-politicisation. This came from below in the form of public protest and dissent (Bailey et al., 2016) and in the form of clear rifts between member states and between the EU and other international organisations and sources of economic knowledge such as the International Monetary Fund (IMF). The Commission was not immune from this; in practice it did not strictly or consistently enforce its own rules, using its discretion to interpret data and define terms in ways that eased the pressure on, for instance, France, Italy and Spain (Mabbett and Schelkle 2014; Schmidt, 2016: 1044-5). Despite dissenting voices (Spiegel 2014), ultimately even a fiscally hawkish Germany acquiesced

to some extent in this greater flexibility. Moreover, under President Jean-Claude Juncker the Commission's rhetoric shifted: its reflection piece on 'The Future of Europe (at 27)' (Commission, 2017a) emphasised the importance of the 'social dimension' (Commission, 2017b) and it was concurrently working towards 'Establishing a European Pillar of Social Rights' (Commission, 2017c).[v] As discussed in the following section, such re-politicisation certainly had not marked a radical departure from a broader neoliberal agenda at the time of writing (mid-2017). However, this (political) flexibility within the Commission (Schmidt, 2016) does at least speak to the possibility of more substantive change.

The unfulfilled promise of social rights

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 and, with EMU, budgetary policies (Höpner and Schäfer, 2012; Scharpf, 2010; Streeck, 2014). To the extent that the EU has developed a discourse on the 'social', this has recast it 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 (Schellinger, 2015: 5). Post-crisis reforms of the sort described in the preceding section have, on the one hand, led to more significant indirect encroachment by the EU through the introduction of tougher macroeconomic rules (especially on public debt) and, on the other hand, led to an expansion of

the EU's ability to directly impose its particular vision of the 'social' in domestic reform processes.

It is against this backdrop that we ought to understand the incorporation of a number of ostensibly social policies into the Semester process outlined in the preceding section. Thus, while there has been an increase in social goals in country specific recommendations (CSRs), particularly since 2013 (Zeitlin and Vanhercke, 2014: 33-33) we should be circumspect about regarding this as the 'socialisation' of the semester (Clauwaert, 2016: 16). Indeed, it is important to consider both the content of those recommendations and the enforcement mechanisms that apply to them. On the one hand, where hard mechanisms are applied (for instance in line with the MIP), the content tends to align with the supply-side agenda described above. In particular, recommendations are geared towards greater labour market flexibility – focusing on, for instance, employment protection and collective bargaining frameworks – and substantive state spending – focusing on, for instance, pensions and healthcare (European Commission, 2013: 17-19; Pavolini et al, 2015: 65-68; Bekker, 2015: 12-13; Clauwaert, 2016: 12). According to one official in the more socially orientated DG Employment, every proposal they make in the European Semester must be conducive to macroeconomic competitiveness (interview, official in DG Employment, Brussels, 17th June 2015).

On the other hand, where soft mechanisms apply to recommendations – in accordance with, for instance, the Europe 2020 programme – they have included at least some that are not clearly linked to a broader competitiveness or economic agenda (de la Porte and Heins, 2015). However, to the limited extent that recommendations support them, it is doubtful that

substantive social standards – for instance, on pension provision and healthcare – can easily be maintained while the more robustly enforced SGP targets (on debt and deficit reduction) are also met. Indeed, many scholars have highlighted the negative impact of fiscal targets on social spending (Hyman, 2015: 98; Pavolini et al. 2015; Grahl, 2015). A recent attempt by the Commission to integrate social standards into the European Semester through a 'social scoreboard' was met with a similar critique 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; Commission, 2017d). Indeed, when we consider socio-economic governance as a whole it is difficult to avoid the conclusion that, rhetoric notwithstanding, a 'constitutional asymmetry' (Scharpf, 2010) between enforceable economic and unenforceable substantive social policies has become starker in the recent crisis context (Hyman, 2015: 98; de la Porte and Heins, 2015).

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). As Vandenbrouke and Vanhercke (2014: 90, emphasis added) 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"'. Indeed, social partners have suggested that without such mainstreaming the Commission's (2017c) 'European pillar of social rights' will do little to challenge the constitutional asymmetry (Lörcher and Schömann, 2016). The weakness of

the social pillar is reflected in the limited weight given to the social *acquis*. For instance, writing for the European Trade Union Institute (ETUI), Lörcher and Schömann note that, '[r]eferences to the common values and principles shared at the EU, national and international levels are presented as sources of inspiration, whereas they should be the *foundations* on which the Pillar rests' (2016: 7, emphasis in original).

We concur with both the importance of mainstreaming social concerns and the importance of treating legal commitments in the social domain as *foundations* in an attempt to offset the EU's constitutional asymmetry. 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* the political activities of the Commission: in other words, to ensure that they were 'mainstreamed' (see also, Maduro, 2003: 285). It commits the EU to being 'exemplary' in the field of rights and outlines a range of governance mechanisms geared towards this end, including: rights 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 governance mechanisms are designed to ensure that fundamental rights are given due regard and that any interference with rights is legitimate and justified both *ex ante* and *post hoc*.

These rights mechanisms have, to date, not been deployed to any great extent, including in the context of the Semester (see Pye, 2017). At a technical level, there are two main reasons for this. First, the Commission's strategy on the Charter is primarily based around the traditional Community method[vi] of policy-making, whereas, as noted, economic governance deploys a complex hybrid of co-ordination mechanisms and legal rules (Armstrong, 2013). 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. Even in recent case-law, social rights remain poorly developed, particularly when faced with the economic freedoms that have underpinned European integration in the single market (see Pye, 2017; Höpner and Schäfer 2012; De Vries, 2013).

The Commission has expressed a wish to address these shortcomings on social rights. In its aforementioned communication on the 'social pillar' it, inter alia, focuses on 'the enforcement of the rich acquis already existing' (2017c: 7). Given its margin for discretionary action in the context of the Semester, the Commission could certainly use the ECFR to develop a more appropriate set of standards on social rights in the context of its socio-economic governance.

And it could do so 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 (European Commission, 2010: 3) 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, as we have emphasised, 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. However, in the absence of either deepening political union or the disintegration of EMU, the type of technocratic intervention offered by social rights holds the potential to address the immediate shortcomings of socio-economic governance, namely, as highlighted in the previous section, the re-orientation of certain social and labour policies towards economic objectives and the 'soft' basis of more genuinely social recommendations. While technocratic in nature, such an intervention would also

force a confrontation with and bring much needed publicity to the human consequences of crisis responses.

While relatively limited in the EU/ECJ, more robust social rights standards have evolved in the Council of Europe, notably in the context of the 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. The ECSR has also been active in the context of the Eurozone crisis, finding some government reforms in the context of the crisis to have breached a number of rights (Kilpatrick and De Witte, 2014; Jimena Quesada, 2014; see also below). Yet operating outside of the framework of the EU, the ECSR is currently restricted to a *post hoc* examination of national policies and so is unable to directly influence the formation of policy recommendations within the socio-economic governance structures of the EU. 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.[vii] 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.

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. Instead, excerpts of that case law are presented in table one, below. It is important to note that these rights are addressed in two ways: as minimum standards and according to the principle of progressive realisation. Minimum standards constitute a baseline; if a state falls below minimum standards then the right is violated regardless of any justification. For some rights the minimum standard is straightforward: minimum wage and minimum welfare income have numerical standards of 50 per cent and 40 per cent of national median income. For other rights the minimum standards are not so clear-cut and instead rely more on a case-by-case interpretation by the ECSR. Nonetheless, guidance as to what these standards are is still provided and outlined below. The principle of progressive realisation has allowed higher standards to be established towards which states should be working whilst still taking into account mitigating circumstances, including the Eurozone crisis (see ECSR, 2014b), that allow proportionate and justified restrictions on rights. Furthermore, progressive realisation includes non-retrogression, which means that any regression on standards already achieved must be proportionate and justified. The minimum standards and standards relating to progressive realisation for selected rights are outlined in table one.

[Table 1 to be inserted here]

How might these standards influence socio-economic governance? As highlighted in the previous section, several social and labour policy areas have been re-orientated towards

economic objectives. These standards can be used to draw these policies back towards their social purpose by embedding clear rights-based standards. For example, the decentralisation of collective bargaining and liberalisation of labour markets have been used as a (in our view misguided) means to achieve macroeconomic competitiveness. This has run counter to the standards established by the ECSR. In more extreme cases, such as in Spain, the pursuit of these objectives has actually breached the minimum standards. This has been the case for the forced decentralisation of collective bargaining, allowing unilateral employer derogation from collective agreements, inadequate notice periods for employment protection, lengthy probationary periods, and a low minimum wage (ECSR, 2014b). These reforms to collective bargaining and labour market regulations were requested through Country Specific Recommendations (CSRs) (Council of the EU, 2011) and (as noted above) directly by the ECB. More generally, as the policy direction at the EU level has pursued flexibility in labour markets and reduced spending in social security, there is a real risk that minimum standards will be breached. To prevent this from happening, adequate checks on the policy recommendations, particularly those linked to enforcement mechanisms, could be incorporated into the European Semester and the socially destructive impact of these policies could be identified at the European level and prevented.

Whilst the minimum standards outlined above would help to mitigate the more excessive policies being utilised in the Eurozone, the principle of progressive realisation has the potential to develop a stronger social dimension. It is clear that the drive towards flexible labour markets, decentralised collective bargaining, and austerity have interfered with numerous social rights, including many of those highlighted in table one. For example, decentralising collective bargaining is not compatible with ensuring consultation at the 'regional/sectoral' level; increasing

flexibility in labour markets often undermines efforts to protect workers against unfair dismissal and ensure reasonable notice periods; and retrenchment in social security runs counter to the commitment to progressively raise the system of social security to a higher level and may even threaten the existence of a functioning social security system (see table one, above). Indeed, several studies by human rights actors have highlighted interferences with social rights in the responses to the Eurozone crisis (Commissioner for Human Rights, 2013; Jimena Quesada, 2014).

As noted above, under the principle of progressive realisation such interference would require justification with respect to its proportionality and legitimacy. In the context of the Semester, justification of rights interference would 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 aforementioned explanatory memorandums the Commission utilises alongside traditional legislative proposals. Here much would depend on the economic ideology adopted. From the neoliberal status quo position enunciated above – and supported by the institutions – the defence of rights infringements would likely rest on the argument that 'internal devaluation' and consolidation promotes macroeconomic competitiveness, fiscal sustainability and therefore growth. However, such ideas are certainly contestable, if not disproven (among many others, Krugman, 2015; Stiglitz, 2014; Ryner and Cafruny, 2017; Wigger, 2015). A deliberative engagement with social rights would, of course, not in itself lead to the dominance of less neoliberal (for instance, neo-Keynesian) alternatives, but it would at least stimulate much needed debate within institutions that have long treated consolidation as 'common sense'.

Respect for social rights would also require and facilitate changes to the structures of governance. Two changes in particular would be required. First, a means to determine the impact of proposed policies on rights standards. As mentioned above, the rights standards in table one are only a representation of select rights. The full case-law of the ECSR is significantly larger. For these standards to be properly integrated into the Semester, it would need to be underpinned by some degree of background analysis of the potential impact of proposed policies that incorporate the standards established by the ECSR. Currently, the Commission, in conjunction with member states, engages in a significant amount of detailed socio-economic analyses of the situation in each member state. This is found in the Country Report that accompanies every member state's CSR and the In-Depth Reviews that are conducted for those member states experiencing severe imbalances. It should also be noted that the Commission already has ample experience conducting impact assessments on various issues, now including fundamental rights (see European Commission, 2010), within the ordinary legislative procedure. The incorporation of rights assessments with reference to the standards of the ECSR would not involve significant changes to the European Semester itself.

The second change to the governance structures would be to incorporate a greater role for social partners. As highlighted above, one of the key minimum standards for the right to collective bargaining is the voluntary nature of bargaining structures. Decisions to decentralise collective bargaining taken at the European level without the involvement or consent of trade union representatives do not meet the standards established by the ECSR. The Commission has already proposed that consultations with European level social partners take place prior to the AGS

(Commission, 2014), though we suggest that national social partners should also be incorporated into the series of bilateral meetings held between the Commission and national governments throughout the European Semester. 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).

Conclusion

The argument put forth in this paper is motivated by Fritz Scharpf's (2014: 22) assertion that, 'it may be worth our time to shift some attention from the study of what is going wrong… to controlled speculation about what might be put right if the window of political feasibility should ever open.' As noted in introduction, a rather large 'window of political opportunity' will be required to enable any radical divergence from the current trajectory given blockages to further integration and disintegration. The proposal we offer in this paper, however, would require a much narrower opening: it might be implemented without legal change, 'by stealth' (Schmidt, 2016); it is pragmatic, but (unlike similarly pragmatic interventions) not reliant on 'soft-law' or too deferential to the (neoliberal) status quo; it is purposefully built upon immanent but largely untapped EU constitutional realities (particularly the Charter); and its implementation would draw upon pre-existing expertise (in the ECSR). Moreover, it is realisable within current EU socio-economic governance arrangements and could be implemented by an actor – the Commission – that has been empowered as potential 'policy entrepreneur' (Crespy and Menz, 2015) and has expressed a rhetorical commitment to a social Europe (Commission, 2016, 2017c).

We are not naïve, however, about the implementation difficulties of our proposal, which would rely on shifts in the thinking of key (dominant economic) actors in the Commission. Moreover, although its strength lies in the fact that it might be enacted without member state convergence, in practice it may well require at least the tacit support of a coalition of key member-states for a more pro-social agenda. At the time of writing (mid 2017), the imminent withdrawal of social Europe's most important and longstanding adversary – namely, the United Kingdom – offered some hope for that agenda (Lindstrom, 2017). However, the position of the new French President, Emmanuel Macron, remained largely unknown, as was the outcome of the 2017 German federal elections. Whatever that outcome, Germany's strict adherence to a neoliberal (or ordoliberal) orthodoxy – underpinned by a desire to maintain its current account surpluses and competitive advantage (Ryner and Cafruny, 2017: 222-7) – was likely to remain a crucial sticking point.

Furthermore, even if implemented our proposal would constitute but a first step in addressing the EU's constitutional asymmetry. Indeed, to focus on the Commission as the central executive actor in socio-economic governance (as we have done in this paper for pragmatic purposes) is not to endorse or seek to constitute this reality. Our proposal would lead not only to more social 'outputs', but also pluralise decision-making within socio-economic governance beyond the Commission – particularly through the aforementioned processes of public justification linked to 'progressive realisation' – increasing both its deliberative or 'throughput' (Schmidt, 2010) and 'input' legitimacy. In the short term, taking social rights seriously would permit an opening of the Semester process to the Council of Europe and its substantive standards on social rights.

However, in the longer term such modest reform would, we would hope, lead to a more radical repoliticisation; paraphrasing Scharpf (2014: 18), an enlargement of the space of national and European politics. In short, the rebalancing or re-politicisation of the Commission's socio-economic governance might be regarded as a small but potentially important first step in plotting our way from where we are to a more radical social-democratic constitutional settlement for the EU.

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Table one: minimum standards and progressive realisation of selected social rights

Issue	Minimum Standard	Progressive Realisation
Fair remuneration during termination of employment (Article 4-4 ESC)	• Application to all categories of employee, including probationary periods • Termination notice periods based on length of service (or equivalent pay): over 1 week for under 6 months' work, over 2 weeks more than 6 months, over 1 month for 1 year, etc.	• Reasonable notice periods to ensure fair remuneration for termination of employment for all employees
Protection against dismissal (Article 24 ESC)	• Legal framework setting out valid reasons for dismissal & adequate compensation. • Specific protection regarding discrimination, Trade Union activity, maternity, family responsibility, worker representation, & retaliatory dismissal • Probationary periods no longer than 6 months or 26 weeks and regulated by law	• Protection of all workers against termination without valid reason • Compensation high enough to dissuade employer from termination without valid reason
Collective bargaining (Article 6 ESC)	• Level of bargaining determined voluntarily by social partners covering all matters of mutual interest • Protection against arbitrary dismissal for TU activity	• Consultation at national and regional/sectoral level. • State to ensure joint consultation with equal say to employers and workers spanning array of issues
Fair wages (Article 4-1 ESC)	• No lower than 50% national median wage. Wages lower than 60% median wage permissible with demonstration they provide for adequate living standards	• To make continuous effort for sufficient for decent standard of living including both material (e.g. food and housing) and social needs (e.g. education, social, and cultural)
Employment (Article 1 ESC)	• Requirement of concerted employment policy • Unemployment (particularly youth and long-term) kept below extremely high levels • Prohibition of excessive conditionality (i.e. disqualification from welfare payments) in access to social security	• Pursue policy of full employment through economic policy conductive to full employment and measures to assist unemployed to find work
Social security (Article 12)	• Cover significant percentage of population for traditional risks • Payments no lower than 50% of national median wage. Payments between 40% and 50% permissible if combined with other social assistance to reach 50% national median wage. • Welfare payments for reasonable durations • Reasonable period allowing for recipients to refuse employment without losing benefits • Restrictions to social security system allowed to	• Ensure existence of functioning social security system established by law and funded collectively • Commitment to progressively raise system of social security to higher level

	extent that effective protection for all members of society retained and does not reduce system to one of minimum assistance	

Source: own elaboration based on case-law digest and specific county conclusions of the ECSR (ECSR, 2008; ECSR, 2014a; ECSR, 2014b)

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[ii] The term neoliberal is used throughout this paper, though some would be inclined to describe the EU's economic governance as 'ordo'-liberal (following the German 'Freiburg school'). The similarities, differences and overlaps have prompted debate in recent political economy literature on the EU. Suffice to say here that ordoliberalism can be understood as a particular kind of neoliberalism with an emphasis on the need for rules to govern markets.

[iii] This structure applies to all states that are not being governed through so-called Memoranda of Understanding (MoUs). MoUs apply to states in receipt of financial support. The 'troika' of EU, International Monetary Fund and European Central Bank oversee relations with MoU states. Such governance is stricter and (even) more intrusive than within the semester. It has been compared, for instance, with the implementation of IMF Structural Adjustment Programmes in the developing world.

iv In addition to these formal surveillance and enforcement procedures, additional pressure can be placed on Eurozone states through mechanisms such as the ECB's bond purchasing programme. This was initially done in clandestine fashion and only came to light when two letters sent by the ECB to the governments of Spain and Italy calling for specific policy reforms were leaked to the media (Sacchi, 2015).

[v] The communication on the pillar of social rights was published following a consultation throughout the second half of 2016 (Commission, 2017c: 4). The pillar – a largely aspirational agenda – is conceived primarily for the Eurozone though other countries are invited to participate in its development.

[vi] With the Lisbon treaty, formally renamed as the 'Union method'.

[vii] One of the authors of this paper was involved in developing such links when working for DG Enlargement 2003-2006. Such links were geared towards establishing more detailed criteria that would offer greater substance and detail to the broader Copenhagen political criteria, particularly pertaining to human rights and minority rights. Similar use could be made of the expertise in the Council of Europe to develop more substantive understandings of social rights.