Articles

The Irish "Bail-Out" and Cuts to Social Protection Spending—the Case for a Right to a Subsistence Minimum in EU Law

By Roderic O'Gorman[*]

Abstract

As part of the 2010 EU/IMF economic adjustment program or "bail-out," the Irish Government was required to undertake billions of euros in cuts to social protection spending over a three-year period. These have been implemented in subsequent budgets, resulting in increased levels of poverty and social exclusion. In light of these impacts on social rights in Ireland and other Member States, this article argues that the outcome of such Union legislative measures should be subject to some degree of rights-based scrutiny. It examines how, in the Hartz IV *decision, the German Constitutional Court ruled that an attempt by the German Government to pass legislation that significantly cut a range of social welfare benefits breached the fundamental right to a subsistence minimum under the German Basic Law. Drawing inspiration from the approach of the German Constitutional Court, the article argues that the two elements of the German Basic Law which grounded that decision—the right to human dignity (Article 1(1)) and the social state principle (Article 20(1))—are both present within the Union Treaties as a result of changes occasioned by the Lisbon Treaty. The article advocates that the European Court of Justice should discover such a right within Union law and use it as a tool to analyze the impact of future cuts mandated by Union institutions on the economically disadvantaged.*

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A. Introduction

The scale of political, economic, and legal change occasioned by the economic crisis in the Eurozone is immense. The response of the European Union has, by necessity, been multifaceted and has included massive intervention in domestic economic affairs, sustained activity on the international bond market by the European Central Bank, and reliance on extra-Union law treaties as a means of extending economic governance. Such measures, previously unimaginable, have left commentators trying to both rationalize what has happened and propose new directions for the future development of Union law.[1] The desire to restore stability has been an ever-present objective in all actions taken by the EU in response to the crisis.[2] Measures implemented in furtherance of this goal have resulted in a significant shift in power from Member States to the Union institutions, particularly for those States within the Eurozone.

The Member States that have been forced to enter into economic adjustment programs, colloquially referred to as "bail-outs," have experienced an even greater, temporary loss of power over economic and social decisions. The conditions attached to these programs, negotiated by EU and IMF institutions, require a range of onerous domestic measures, including major retrenchment of social protection spending. The scale of cuts to social welfare programs in these countries is causing an undeniable deterioration in the standard of living of citizens and is a threat to basic social rights.

National governments within the affected Member States are bound by both the practical compulsion to implement these measures as a requirement of receiving the financial support they need to fund their exchequers and the legal obligation flowing from the doctrine of supremacy of Union law, as the measures are framed as legislative decisions of the Council of Ministers. The detailed nature of the programs outlined in these decisions cover not only the overall financial objectives to be achieved, but also the cuts that must be made under a range of specific headings.

Thus, the European Union is causing basic social protections to be undermined in a situation where the justification for this is not being tested against any fundamental rights standards. This article seeks to propose an admittedly theoretical response to this situation. Drawing from case law of the German Constitutional Court, it proposes that a right to a subsistence minimum could, and should, be discovered within EU law as a fundamental principle, and that such a right could be deployed as a tool to analyze the impact of future social protection cuts mandated by the Union on Member States.

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[1] *See* Caoimhin MacMaolain, *Ramifications of the EU/IMF Loan to Ireland for the Financial Services Sector and for Irish Law and Society*, 17 EUR. PUB. L. 387 (2011); Phoebus Athanassiou, *Of Past Measures and Future Plans for Europe's Exit from the Sovereign Debt Crisis: What is Legally Possible (and What is Not)*, 36 EUR. L. REV. 558, 564 (2011); Jean-Victor Louis, *The No-Bailout Clause and Rescue Packages*, 47 COMMON MKT. L. REV. 971 (2010); Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 EUR. L. J. 667 (2012).

[2] *See* Pringle v. Ireland, CJEU Case C-370/12 (Nov. 27, 2012), http://curia.europa.eu/.

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The article begins by examining as a case study those elements of the 2010 EU/IMF Economic Adjustment Program for Ireland related specifically to social protection payments. It demonstrates how the requirements of the program, contained in an implementing decision, have been subsequently undertaken by the Irish Government in three successive national budgets. It then explores the available statistical data regarding the impact of these changes on levels of poverty and social exclusion. Having examined the current Irish situation, the article then discusses efforts to undertake social spending retrenchment in Germany in the mid-2000s, and how the decision of the German Constitutional Court in *Hartz IV* struck down significant elements of these legislative changes. There will be a particular focus on how the combination of the right to human dignity and the principle of the social state, both contained in the German Basic Law, led the Court to determine that there was a fundamental right to a subsistence minimum within national constitutional law.

Inspired by the German approach, the article then examines EU law for evidence that these two values—human dignity and the social state principle—are present within the Union's legal system. It finds that, as a result of the changes wrought by the Lisbon Treaty, both values are explicitly protected by Union law. The paper concludes by demonstrating how such a right would be legitimate within the context of Union law. Further, it argues how, in light of the enhanced power that the Union institutions have gained through the economic adjustment programs, it is now necessary for the Court of Justice to discover this right in order to give some level of legal protection to the economically vulnerable.

B. EU/IMF Intervention in Ireland

Following over a decade of unprecedented economic growth, the Irish economy slid into recession in 2008, primarily as a result of the bursting of a property price bubble. The budgetary problems caused by falling tax revenues and increased claims for unemployment allowance were augmented by severe problems surrounding the capitalization of a number of the largest banks in the country. These concerns led to a Bank Guarantee being issued in September 2008, by which the State guaranteed all the liabilities of six banks and building societies.[3] While this initially calmed market fears about Ireland's economy, the fact that the liabilities of these institutions were more significant than the Government originally estimated, and these liabilities now rested on the State, meant that by autumn 2010, the interest rates being charged on Irish Government bonds had risen to an unsustainable level. After a period spent publically denying the existence of any plans for outside help, on 3 December 2010 the Irish Minister for Finance and Governor of the Central Bank wrote to the European Commission, the European Central Bank, and the

[3] Credit Institutions (Financial Support) Bill 2008 (Act No. 45/2008) (Ir.), *available at* http://www.oireachtas.ie/documents/bills28/bills/2008/4508/b4508d.pdf.

International Monetary Fund, seeking assistance.[4] In exchange for the necessary package of financial assistance, Ireland agreed to enter into a "Program" of economic adjustment, fiscal consolidation, and financial sector reform.

The European Union element of the financial assistance was given legal effect through an Implementing Decision of the Council.[5] This contained the financial support being offered by the EU to Ireland, as well as an outline of the conditions attached to this support. This conditionality was expanded upon in greater detail in the Memorandum of Understanding signed between the Irish Government and both the EU and IMF, which outlined the range of economic reforms that were to be made. Safeguarding the public finances was to be a crucial element of this. The structure of the Implementing Decision makes it clear that the first installment of financial aid would only be released following the entry into force of the Memorandum.[6] The payment of subsequent tranches was made conditional on positive quarterly analyses of success in meeting the targets set out.[7] The European Commission was given the lead role in overseeing the achievement of the program on behalf of the EU.[8] In setting out the Commission's role in implementing the program, Article 3(9) mandates it to periodically review its economic and social impact and recommend measures to inter alia minimize harmful social impacts, particularly for the most vulnerable members of Irish society. The Memorandum of Understanding similarly stated that "[p]rotecting the socially vulnerable at a time of difficult economic adjustment remains a central policy goal."[9]

I. Impact on Social Protection Expenditure

In view of the importance placed on regaining control over the public finances, the Implementing Directive required extensive fiscal adjustments, including a range of tax increases and spending cuts. Article 3 outlined broad measures that were to be achieved by Ireland across three budgetary periods, comprising of a €2.09 billion reduction in expenditure in 2011, a €2.10 billion reduction in 2012, and a €2 billion reduction in 2013.[10]

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[4] MacMaolain, *supra* note 1.

[5] *See* Council Implementing Decision 2011/77, On Granting Union Financial Assistance to Ireland, 2011 O.J. (L 30) 34 (EU) [hereinafter Financial Assistance to Ireland] (discussing a grant of Union financial assistance to Ireland as part of the wider legislation that had established the European Financial Stabilisation Mechanism, Council Regulation 407/2010, 2011 O.J. (L 118) 1 (EU)).

[6] Financial Assistance to Ireland, *supra* note 5, art. 1(2).

[7] *Id.* art. 1(4).

[8] *Id.* at recital 8.

[9] IRELAND MEMORANDUM OF UNDERSTANDING ON SPECIFIC ECONOMIC POLICY CONDITIONALITY 9–10 (2010), http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf.

[10] Financial Assistance to Ireland, *supra* note 5, arts. 3(6), 3(7)(b), 3(8)(a).

These cuts were to be made across a range of headings, including social expenditure reductions.[11] Structural reforms were also required, such as measures to move people more swiftly from unemployment to work. The benefit system for the unemployed was to be reformed, which would guarantee active attempts to secure jobs combined with a "sanction mechanism [which would] be set to cause an effective loss of income without being excessively penal."[12] The Memorandum of Understanding contains a more specific figure of €750 million in savings resulting from overall reforms in the welfare system including reform of unemployment and social assistance benefits.[13]

The real-world impacts of these requirements were first seen in Ireland's 2011 Budget. With respect to welfare payments, working age payments were reduced by 4%.[14] This resulted in a decrease in €8 per week in jobseekers' allowance, one-parent family payments, disability allowance, and caregivers' allowance. Child benefit payments, a universal entitlement, were reduced by €10 per month per child, apart from the third child, in which case the reduction was €20 per month.[15]

The 2012 Budget saw a further €475 million cut directly from the social protection budget. This was achieved through a range of alterations to existing schemes, rather than direct percentage reductions. As such, the rate of child benefits was to be standardized for all children, rather than a higher rate for children after the second child. The period of time over which the State would pay a winter fuel allowance to pensioners was reduced by six weeks. Jobseekers' benefits were to be paid over a five-day, rather than a six-day, basis. Changes to the one-parent family payment were also made.[16]

The 2013 Budget, the last within the timeframe of the program, saw a further €10 reduction in the monthly child benefit payment. The duration of time in which individuals could claim the jobseeker's benefit was reduced by three months. Alterations were also made to the Household Benefits package, a range of subsidized utility services, such as

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[11] These cuts also included reductions in planned capital expenditure, a reduction in public service employment, changes to public service pensions, and cuts in other expenditure.

[12] Financial Assistance to Ireland, *supra* note 5, art. 3(7)(i).

[13] IRELAND MEMORANDUM OF UNDERSTANDING ON SPECIFIC ECONOMIC POLICY CONDITIONALITY 20 (2010), http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf.

[14] BRIAN LENIHAN, FINANCIAL STATEMENT OF THE MINISTER FOR FINANCE A.7 (2010) (Ir.), http://budget.gov.ie/budgets/2011/Documents/Budget%20Speech%20-%207%20December.pdf.

[15] *Id*. at A.9.

[16] Brendan Howlin, Minister for Pub. Expenditure and Reform, Address to Dáil Éireann on Expenditure Estimates 2012 9–11 (Dec. 5, 2011).

telephone, energy, and television licenses, which reduced the telephone and electricity allowances.[17]

The impact of the economic crisis in Ireland is now being reflected in statistical data. Figures for 2010 showed that 22.5% of Irish people suffered from material deprivation, an increase of over 5% from the previous year.[18] The figure for severe material deprivation in 2011 was 7.8%, more than a 2% increase on the previous year.[19] While the increase in this statistic and other measures of poverty are not solely attributable to cuts contained in the budgets, they do illustrate the extent to which people who depend on social transfers for all, or a substantial part, of their income are significantly at risk of poverty.[20] NGOs such as *Social Justice Ireland* have drawn particular attention to increasing levels of child poverty and the role that social welfare payments and child benefit have in reducing instances of poverty. Both of these supports have been consistently targeted for cuts across the three budgets.[21] One UN report noted that the measures being undertaken by the Government in pursuance of the economic adjustment are concerning from a human rights perspective.[22] In light of this evidence, it cannot be denied that the reductions in a range of social protection payments specifically mandated as part of the EU program are impacting, and will continue to impact, the most economically vulnerable in Ireland.[23]

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[17] *Id.* at 12.

[18] CENT. STATISTICS OFFICE, IR., SURVEY ON INCOME AND LIVING CONDITIONS (SILC) PRELIMINARY RESULTS 2010 (2011), http://www.cso.ie/en/media/csoie/releasespublications/documents/silc/2010/prelimsilc_2010.pdf.

[19] *Severely Materially Deprived People*, EUROSTAT (May 21, 2014), http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=t2020_53&tableSelection=2.

[20] *Id*. at tables 2, 3a, 4.

[21] Seán Healy, Sandra Mallon, Michelle Murphy & Brigid Reynolds, *Shaping Ireland's Future: Securing Economic Development, Social Equity and Sustainability*, SOC. JUST. IR. 57–58, 68–70 (2012).

[22] Human Rights Council, Rep. of the Indep. Expert on the Question of Human Rights and Extreme Poverty, 17th Sess., U.N. Doc. A/HRC/17/2, add. at 7 (May 24, 2012) (Magdalena Sepúlveda Carmona).

[23] *See* Eur. Anti-Poverty Network Ir., *Anti-Poverty Group Meets with Trioka to Highlight that the Government Needs to Make Choices Other Than Those Which are Leading to an Increase in Poverty*, EUR. ANTI-POVERTY NETWORK IR. (July 9, 2012), http://www.eapn.ie/eapn/anti-poverty-group-meets-with-trioka-to-highlight-that-the-government-needs-to-make-choices-other-than-those-which-are-leading-to-an-increase-in-poverty (noting comments made by members of the Network when they met with representatives of Troika to discuss the impact of cuts).

C. Subsistence Minimum in Germany: The *Hartz IV* Decision

I. Social Protection Retrenchment in Germany

While Germany has avoided the worst elements of the current economic crisis, it did face a period of economic turbulence in the mid-part of the last decade, which resulted in significant retrenchment of social spending, though on a far smaller scale than that currently being undertaken by Ireland and other EU States. One element of this was a major series of reforms that were made to the legislation concerning social welfare entitlements in Germany, entitled the *Fourth Act for Modern Services on the Labour Market*.[24] The most significant aspect of these changes was the combination of unemployment assistance and social assistance to form a uniform welfare system for employable persons. Alterations were also made to the existing provision that lump sum payments meet non-recurrent needs, and a formula was designed for calculating these non-recurrent needs, based on average patterns of consumption.[25] A number of challenges were mounted to the legislation through the domestic courts, arguing that the changes, which altered the method of assessment of a range of welfare benefits resulting in lesser payments, violated the German Basic Law. Three of these cases were heard by the German Constitutional Court in the *Hartz IV* decision. The key element of the Court's judgment was its determination that a number of the provisions of the law were incompatible with the fundamental right to a subsistence minimum. This right was found to spring from Article 1(1) on human dignity when considered in conjunction with Article 20(1), the principle of the social state.[26]

In explaining how it established the existence of the right to a subsistence minimum, the Court noted that the right emerged from the protection of human dignity in Article 1(1). The social welfare state principle in Article 20(1) mandated that the legislature ensure a subsistence minimum for all, which would be in line with human dignity. Significantly, the Court described how the subsistence minimum right, which originated from Article 1(1), also attained a status of "autonomous significance" with respect to the general guarantee in Article 1(1) once it was placed in conjunction with Article 20(1). This meant that, despite the absolute nature of the protection of human dignity in Article 1(1), the legislature possessed a margin of appreciation in determining the amount of the subsistence

[24] Johannes Rau et al., Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt [Fourth Act for Modern Services on the Labor Market], Dec. 24, 2003, BUNDESGESETZBLATT [BGBI – The Federal Law Gazette] 2954–55 (Ger.); *see also* Markus Sichert, *Constitutional Review of Social Law-Reform in Germany and Its Impact on Legislation*, 27 ZB. PRAV. FAK. SVEUČ. RIJ 725, 728 (2006) (discussing the legislation in greater detail).

[25] Johannes Rau et al., Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt [Fourth Act for Modern Services on the Labor Market], Dec. 24, 2003, BUNDESGESETZBLATT [BGBI – The Federal Law Gazette] paras. 51–53 (Ger.).

[26] *Id*. at para. 132.

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minimum.[27] The Court also emphasized that the dignity right applied to each individual person.[28]

II. Defining the Subsistence Minimum

In defining the subsistence minimum, the Court limited it to "those means which are vital to maintain an existence that is in line with human dignity."[29] These means were initially defined in the context of an individual's physical existence, consisting of food, clothing, household goods, housing, heating, hygiene, and health. The Court went further, however, and also included those resources necessary to enable the maintenance of inter-human relationships and a minimal ability to take part in social, cultural, and political life.[30]

Having determined that the right was to be protected within a statutory claim, the Court held that whatever was enshrined in legislation must be sufficient to meet the total needs necessary for the existence of each rights holder.[31] However, while the Court found that the Article 1(1) claim had direct constitutional protection, neither that which the claim covered, nor how it was to be met, could be determined from the Constitution.[32] The prevailing view of what constituted a life with dignity would be set by the legislature, bearing in mind the existing circumstances. Article 20(1) would influence this, in that it required this view to be both current and realistic regarding what society viewed as a minimum.[33] Legislation passed by the Parliament that did not meet the constitutional requirements of the subsistence minimum would be unconstitutional to the extent that it failed to meet these standards.[34]

III. Reviewing the Assessment of the Subsistence Minimum Figure

In order to come up with a specific figure for the subsistence minimum, which would then be enshrined in legislation, the Parliament must devise a formula for measuring the

[27] *Id*. at para. 133.

[28] *Id*. at para. 134.

[29] *Id*. at para. 135.

[30] *Id*. at para. 135.

[31] *Id*. at para. 137.

[32] *Id*. at para. 138.

[33] *Id*.

[34] *Id*. at para. 137.

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amount of money necessary to support an individual's basic existence.[35] This formula must be open to review and alteration, in light of price or tax increases.[36] The Court was entitled to review the margin of discretion given to the legislature in arriving at the figure, in order to ensure that the amount was not "evidently insufficient."[37] While the Court could not insist on a specific figure, it could examine the way in which the figure was arrived at, to ensure the figure met the aim of the fundamental right. In so doing, it must be satisfied that "the assessment of the benefits [is] clearly justifiable on the basis of reliable figures and plausible methods of calculation."[38] The Court would then examine whether the calculation method used was fundamentally suited to an assessment of the subsistence minimum, whether the legislature completely and correctly determined the required facts, and, finally, whether the legislature remained within the bounds of what is justifiable in each step when calculating the amount.[39] To ensure this, the legislature must reveal the figures and methods used in reaching its conclusions.[40]

IV. The Decision in Context

Previous judgments of the German Constitutional Court had recognized the notion of a subsistence minimum, though not necessarily as a constitutional guarantee.[41] Bittner highlights the two innovative elements of the *Hartz IV* judgment. First, it enshrines the subsistence minimum as a fully-fledged constitutional right. Second, it establishes that this right must be met through legislative-based entitlement, rather than merely as a matter of fact.[42]

The decision itself represented a significant intrusion by the Court into the purview of the legislature, striking down legislation that represented a crucial element of the 2010 Agenda: Social and economic reforms implemented by the Schroeder Government. The

[35] *Id*. at para. 139.

[36] *Id*. at para. 140.

[37] *Id*. at para. 141.

[38] *Id*. at para. 142.

[39] *Id*. at para. 143.

[40] *Id*. at para. 144.

[41] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 220/51, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 97, 104 (Dec. 19, 1951); Claudia Bittner, *Casenote – Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Substence Minimum in the German Federal Constitutional Court's Judgment of 9 Februrary 2010*, 12 GERMAN L.J. 1941, 1942 (2011); Sichert, *supra* note 24, at 739–740.

[42] *See* Bittner, *supra* note 25, at 1943–44.

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Court emphasized the margin of appreciation left to the legislature and further noted that the right does not equate to the setting of a specific monetary figure. Nevertheless, the Court permitted itself the extensive ability to interfere with political decisions through its extensive scrutiny of the process used for calculating the subsistence minimum formula. The breadth of what is considered by the legislature when undertaking this calculation is increased by the Court's expansive view of the fields of activity that are essential for the maintenance of human dignity. While the inclusion of food, clothing, health, etc. is unsurprising, the broad category of maintaining inter-human relationships greatly extends the ambit of what must be given financial support.

D. Locating a Right to Subsistence Minimum Within EU Law

In *Hartz IV*, the German Constitutional Court relied on the conjunction of the social state principle and the protection of human dignity, both stated in the Basic Law, to ground a subsistence minimum which could be used to assess and strike down legislation which failed to comply with that principle. In order to sustain the argument that such a fundamental right exists within Union law, it must be determined whether the same two elements can be found within the Union treaties.

I. Human Dignity Within EU Law

1. Human Dignity as a General Principle of Union Law

Modern legal scholarship readily identifies the significant and growing importance that the concept of human dignity holds in relation to rights adjudication.[43] Nevertheless, at the inception of the then European Economic Community in the 1950s, there was no reference to human dignity in the Treaty Establishing the European Community. Neither was dignity mentioned in the later Treaty on European Union. As such, prior to the Lisbon Treaty, the only basis upon which to protect a right to human dignity within the EU was as a general principle of Union law, based on the well-recognized sources of common constitutional traditions and international human rights agreements Member States had jointly signed or cooperated in drafting, with special reference to the ECHR.[44]

[43] Chava Schwebel, *Welfare Rights in Canadian and German Constitutional Law*, 12 GERMAN L.J. 1901 (2011); Henk Botha, *Human Dignity in Comparative Perspective*, 20 STELLENBOSCH L. REV. 171 (2009); Jackie Jones, *"Common Constitutional Traditions": Can the Meaning of Human Dignity Under German Law Guide the European Court of Justice?*, PUBLIC LAW 167 (2004); David Feldman, *Human Dignity as a Legal Value: Part 1*, PUB. L. 682 (1999); David Feldman, *Human Dignity as a Legal Value: Part 2*, PUB. L. 61 (2000); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008).

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

As discussed previously in Section B, the concept of human dignity holds a place of great significance within the German constitutional order.[45] An examination of the constitutions of the other Member States shows dignity being referenced in the body or preamble of nineteen.[46] The specific term "human dignity" is used in twelve of these.[47] Here, the nature of the references vary from the wide-ranging guarantees across many fields in the Belgian Constitution, to more confined references in the context of specific areas, like preventing offences in the case of Greece, or outlawing torture in Latvia.[48] A slightly altered phrasing of personal or individual dignity is used in a further six.[49] Two Member States' constitutions, Italy and Portugal, contain the notion of "social dignity."[50] In certain contexts, such as Germany, the right of human dignity is elevated to the status of a "mother right," influencing the interpretation of other constitutional provisions.[51]

While dignity is a cornerstone of many of the major international human rights treaties, the term is not referenced within the European Convention on Human Rights, other than in the Preamble to Protocol 13 on the Abolition of the Death Penalty.[52] However, as Gearty

[45] It has been argued that the strong protection of human dignity within the German Basic Law is a reflection of that nation's political history and particularly a reaction to the Second World War. *See* Schwebel, *supra* note 43, at 1923; *see also* Botha, *supra* note 43, at 173.

[46] Six national constitutions contain no reference to the term dignity—Austria, Cyprus, Denmark, Luxembourg, Matla, and The Netherlands—while the United Kingdom does not possess a written constitution. Rao notes that while there is no reference to human dignity in the French Constitution of 1958, it has been found by the courts to gain protection through its reference in the Preamble to the 1946 Constitution. *See* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Case Law*, 14 COLUM. J. EUR. L. 201, 217 (2008).

[47] 2012 CONST. art. 23(1) (Belg).; Charter of Fundamental Rights and Freedoms, No. 2/1993, art. 10(1) (1993) [Constitution of the Czech Republic]; Constitution of the Republic of Estonia, § 10 (1992); Constitution of Finland, § 1(2) (1999); GRUNDGESETZ [GG] [Basic Law], May 23, 1949, BGBL. I art. 1(1) (Ger.); 1975 SYNTAGMA [SYN.] [CONSTITUTION] 7(2) (Greece); A MAGYAR KOZTARSASAG ALKOMANYA [CONSTITUTION OF THE REPUBLIC OF HUNGRY], art. 2; Constitution of the Republic of Latvia, art. 95 (1922); Constitution of the Republic of Lithuania, art. 21(2) (1992); Constitution of Romania, art. 1(3) (1991); Constitution of the Republic of Slovenia, art. 21(1).

[48] Catherine Dupre, *Unlocking Human Dignity: Towards a Theory for the 21st Century*, 2 EUR. HUM. RTS. L. REV. 190, at 203 (2009).

[49] Constitution of the Republic of Bulgaria, art. 4(2) (1991); IR. CONST., 1937, pmbl.; Constitution of the Republic of Poland, art. 30 (1997); Constitution of Slovakia, art. 12(1) (1992); C.E., B.O.E. § 10(1), Dec. 27, 1978 (Spain); REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.).

[50] Art. 3 Costituzione [Cost.] (It.); Constitution of the Portuguese Republic, art. 13(1) (2005).

[51] Dupre, *supra* note 48, at 202.

[52] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl. & arts. 1, 22, 23 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI), pmbl. & art. 10 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI), pmbl. & art. 13 (Dec. 16, 1966) (referencing dignity).

points out, "the notion that each person matters in view of his or her humanity is a core sentiment that lies behind and explains much of the language actually deployed in the Convention."[53] As such, human dignity has played a role in some significant decisions of the Court of Human Rights.

In *Cyprus v. Turkey*, the Greek Cypriot applicants living in the Turkish-controlled section of the island argued that they were subjected to a range of oppression which lessened their human dignity.[54] The Court determined that as the treatment amounted to a violation of the population's human dignity, a breach of Article 3 had occurred. The Court emphasized that discrimination based on race can amount to a particular attack on the notion of human dignity.[55]

In his partly dissenting judgment in the case, Judge Marcus-Helmons noted how changes in scientific progress could pose new threats to human dignity, particularly with respect to the right to life under Article 2. This theme resurfaced years later in the decision in *Pretty v. UK*.[56] The applicant, a terminally ill woman, argued that the refusal of the British authorities to guarantee that her husband would not be prosecuted if he assisted her in committing suicide breached a range of Convention articles. While rejecting the substantive argument, the Court adopted an approach similar to that in *Cyprus v. Turkey*, determining that humiliating or degrading treatment that reduced human dignity fell within the realm of Article 3.[57] Article 3 was also found to be applicable in the case of a man suffering from HIV who was being threatened with deportation back to St. Kitts from the United Kingdom.[58] The Court determined that in light of the advanced stage of his illness, removal would expose him to a real risk of dying in distressing circumstances, which would amount to inhuman treatment.[59] These cases demonstrate that while there is not a

[53] CONOR GEARTY, PRINCIPLES OF HUMAN RIGHTS ADJUDICATION 84 (2004); Ellie Palmer, *Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*, 2 ERASMUS L. REV. 397, 403 (2009) (describing human dignity as a core value of the Convention).

[54] Cyprus v. Turkey, ECHR App. No. 25781/94, 35 EUR. CT. H.R. 71 (2001).

[55] *Id*. at paras. 309, 306; *see also* Moldovan v. Romania (No. 2), ECHR App. Nos. 41138/98 & 64320/01, para. 113 (2005) (affirming the concept that racially based discrimination is a breach of human dignity falling within Article 3), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69670.

[56] Pretty v. United Kingdom, ECHR App. No. 2346/02, 35 EUR. CT. H.R. 1 (2002).

[57] *Id*. at para. 52.

[58] D v. United Kingdom, ECHR App. No. 30240/96, 24 EUR. CT. H.R. 423 (1997).

[59] *Id*. at para. 53. It should be noted that the Court did not use the term "human dignity" within its decision.

right to dignity per se within the Convention, the Court has clearly determined that "[t]he very essence of the Convention is respect for human dignity and human freedom."[60]

2. *Human Dignity Within the Case Law of the ECJ*

Due to the growing acceptance of human dignity as a fundamental rights concept, it is unsurprising to find cases before the Court of Justice seeking to protect this right under the general principles of Union Law, despite its absence from Union treaties.

In *Netherlands v. European Parliament and Council*, the Court examined a challenge to a biotechnology directive, which the Dutch Government argued breached a range of procedural and substantive legal points, including the fundamental right to human dignity.[61] While it rejected each of the grounds set forth, when discussing whether the directive impinged on human dignity, the Court declared, "It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed."[62]

Subsequently in *Omega*, a company challenged a German national rule which prohibited it from operating a "play at killing" game, where participants would use laser guns to shoot at targets attached to the jackets of other participants.[63] The company argued that the national provision violated its right to free movement of goods and freedom to provide services under Article 34 TFEU and Article 56 TFEU. The national court referred a question, asking if the purpose of the rule was to prevent a practice that offended a value enshrined in the German Basic Law—in this case, the right to human dignity as protected in Article 1(1)—and was the national rule therefore permitted under the Treaties.[64]

Initially the Court had to determine whether human dignity was protected within the general principles of Union law. If this were the case, then this right would be balanced against the fundamental freedoms in question. If human dignity was not protected in this respect, then the Member State would have to argue that protecting human dignity was a public policy justification for the restriction of the fundamental freedoms.[65]

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[60] Pretty v. UK, ECHR App. No. 2346/02, 35 EUR. CT. H.R. 1, para. 65 (2002).

[61] Netherlands v. Parliament, CJEU Case C-377/98, 2001 E.C.R. I-7079, para. 12.

[62] *Id*. at para. 70.

[63] Omega v. Bonn, CJEU Case C-36/02, 2004 E.C.R. I-9609.

[64] *Id*. at para. 17.

[65] *Id*. at paras. 16, 45.

The Court restated its existing case law about fundamental rights, which established their protection as part of the general principles of Union law from accepted sources.[66] The Court supported the view of AG Stix-Hackl that the Union unquestionably sought to protect human dignity as a general principle, stating that "the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right."[67] The Court went on to find that the protection of such fundamental rights could justify a restriction on one or more of the fundamental freedoms, and it was not necessary for all Member States to agree on the manner by which the fundamental right would be protected. As such, the German provision was upheld.

It is submitted by this author that the fact that the Court found it necessary to analyze whether the German measure was justified on the basis of public policy means that it was not sufficiently convinced about the existence of a fundamental right to human dignity protected within the general principles. This conclusion is supported by the Court's reference to the Advocate General's more detailed discussion on this particular point.

In her opinion, AG Stix-Hackl undertook a comprehensive analysis of dignity provisions. She particularly focused on whether Union Law protects a specific right to human dignity—similar to the German approach—or whether, more generally, protection of fundamental rights in sum protects human dignity.[68] She noted the lack of an express enumeration of human dignity within the ECHR but accepted that the concept forms the essence of the Court of Human Rights decisions.[69] While human dignity forms an element of many national constitutions, Germany is unusual, in that it protects human dignity as a separate fundamental right.[70] While it is not directly mentioned within the Treaties, the Advocate General noted the reference to human dignity in *Netherlands v. European Parliament and Council*.[71] Furthermore, the term is also protected within the Charter of Fundamental Rights.

[66] *Id*. at para. 33.

[67] *Id*. at para. 34.

[68] *Id*. at para. 81.

[69] *Id*. at para. 82.

[70] *Id.* at paras. 83–84.

[71] *Id.* at para. 89.

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In light of this analysis, the Advocate General determined that:

> Because of the inchoate nature of the concept of human dignity, however, it is almost impossible for the Court in this case—unlike in the *Schmidberger* judgment—immediately to equate the substance of the guarantee of human dignity under the German Basic Law with that of the guarantee of human dignity as recognised in Community law.[72]

It is argued by this author that this aspect of the decision is problematic, considering that in *Netherlands v. European Parliament and Council*, to which the Advocate General had just referred, the Court had explicitly endorsed the existence of the fundamental right of human dignity as a general principle.[73] Indeed, the manner in which the Advocate General approaches the issue is difficult to reconcile. She indicates that there are two possible applications of human dignity: One as a specific fundamental right, the other as a wider general principle of interpretation.[74] Further, she suggests that there is some confusion concerning whether the Court of Justice recognizes human dignity in the former sense of *Netherlands v. European Parliament and Council*, though she immediately goes on to accept that there is no real justification for this confusion within the text of the decision.[75] However, this alleged confusion forms the backdrop for the Advocate General's subsequent conclusions that dignity, as protected under Union law, is a "comparatively wide understanding" and has an "inchoate nature."[76] It is suggested here that the decision in *Netherlands v. European Parliament and Council* is a clear statement of the role of the Court in protecting human dignity as a fundamental right within the general principles of Union law, and that the Advocate General's analysis of the case in *Omega* only clouds the true situation.[77]

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[72] *Id.* at para. 92.

[73] Netherlands v. Parliament, CJEU Case C-377/98, 2001 E.C.R. I-7079, para. 70.
[74] Omega v. Bonn, CJEU Case C-36/02, 2004 E.C.R. I-9609, para. 90.

[75] *Id*.

[76] *Id.* at paras. 91, 92.

[77] *See* P v. S & Cornwall Cnty. Council, CJEU Case C-13/94, 1996 E.C.R. I-2143, para. 22 (determining that the decision to dismiss an employee on the account of undergoing a gender reassignment operation was discrimination and there would be a failure to respect the individuals dignity if this was not addressed, while not making a direct reference to a "right of human dignity").

3. Human Dignity Post-Lisbon: The Charter of Fundamental Rights

Bearing in mind the uncertainty outlined above, the ratification of the Lisbon Treaty has transformed the position of human dignity within Union Law. The requirement in Article 6(2) of the TEU that the Union must accede to the ECHR means that the Court of Human Rights jurisprudence already discussed will have an influence on decisions of the Court of Justice. Of even greater significance is the granting of legal effect to the Charter of Fundamental Rights through Article 6(1) of the TEU. The Charter introduces for the first time an explicit reference to human dignity within Union law. Its preamble states that the EU is founded on "the indivisible, universal values of human dignity, freedom, equality and solidarity."[78] This strong proclamation of the position of human dignity is repeated in Article 1 of the Charter, which states, "Human dignity is inviolable. It must be respected and protected."[79]

The similarity of this wording to Article 1 of the German Basic Law is striking. Whereas the reference to human dignity within the Preamble to the Charter may be explained as a more nebulous description of the term, perhaps in keeping with the looser approach to human dignity reflected within the jurisprudence of the Court of Human Rights, it is very difficult to see how Article 1 of the Charter can be explained in any way other than a clear protection of a right to human dignity. Jones emphasizes the fact that the terms "respect" and "protect" in Article 1 of the Charter, which mirror identical language in Article 1 of the Basic Law, are not generally used in other constitutional references to dignity.[80] She suggests that this means the German text is a good source from which to draw guidance in interpreting Article 1 of the Charter.[81]

The document prepared by the Praesidium of the convention which drafted the Charter casts some doubt on this point. Although it first acknowledges that human dignity is a fundamental right in itself and also forms the basis of other fundamental rights, it states that the result is that:

> [N]one of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It

[78] Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2.

[79] *Id.*

[80] Jackie, *supra* note 43, at 181.

[81] *Id*. at 182.

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> must therefore be respected, even where a right is restricted.[82]

It could be argued that this sentence, taken on its own, confines the right to dignity to function first as an element of each Charter right, and second as a control over the exercise of each of those Charter rights, but without the right having an independent basis on its own. Yet this would directly contradict the earlier statement that the right is fundamental in itself. Furthermore, the text of Article 1 does not limit the application of the right in any way, whereas many of the other rights are subject to limitation.[83] The uncertainty about the actual scope of the right to dignity is also noted by the EU Network of Independent Experts on Fundamental Rights, who urge caution in its application.[84] However, they also stress that the fact that Article 1 states that human dignity "must be respected" indicates that there is a substantive individual right.[85]

II. The "Social State Principle" and EU Law

1. The Social State Principle and Member State Constitutions

Katrougalos suggests that most European countries, excluding the United Kingdom, contain a social state principle enshrined at the constitutional level.[86] This has been described as "a normative, prescriptive principle, which defines a specific polity, where the State has the constitutional obligation to assume interventionist functions in the economic and social spheres."[87] The social state principle should be seen as separate from the constitutional entrenchment of social rights. These are supplied in the form of "public goods and services" and ensure that citizens do not fall below a certain material standard

[82] *See* Draft Charter of Fundamental Rights of the European Union Nos. 4473/00, 4487/00 of 11 Oct. 2000 (C 50, 49) 3 (including the text of the explanations relating the complete text of the Charter).

[83] For example, the right of workers to engage in collective action and collective bargaining in Article 28 is said to be subject to both Union law and national law and practices.

[84] EU NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, COMMENTARY ON THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION 29 (2006), http://cridho.uclouvain.be/documents/Download.Rep/ NetworkCommentaryFinal.pdf.

[85] *Id.* at 25.

[86] George S. Katrougalos, *European "Social States" and the USA: An Ocean Apart?*, 4 EUR. CONST. L. REV. 225, 238 (2008).

[87] *Id.* at 238. The term "social state" has been described elsewhere as having "institutionalised individual social rights as universal rights." Brian Bercusson et al., *A Manifesto for Social Europe*, 3 EUR. L.J. 189, 189 (2007).

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of living.[88] Such rights are protected by state institutions such as the education system and by social services.[89]

A state may protect individual social rights in its constitution without having a social state clause, or *vice versa*. Germany maintains the social state principle through Article 20(1), yet does not enshrine many individual social rights within the Basic Law. A review of the constitutions of the other Member States illustrates a significant occurrence of the social state principle, but also a wide divergence in how it is structured.[90] The Polish and Slovak constitutions use the term "social market economy."[91] Six Member States describe themselves as social or socialist states.[92] Two more southern European states—Italy and Malta—characterize themselves as being founded on work or labor.[93] Only seven of the Member States make no explicit reference to a social state principle within their constitutional system.[94]

The Constitutions of Italy and Portugal directly link the concepts of dignity with a social element through use of the term "social dignity."[95] While both countries would fall within the broad "southern European" categorization, it is significant that the Constitution of Italy was devised straight after the Second World War, while that of Portugal is more modern, dating from 1976. It is submitted that this is important as unlike Portugal (and Spain), the constitution writing process in Italy could not have been influenced by the "social state"

[88] Gunter Frankenberg, *Why Care? The Trouble with Social Rights*, 17 CARDOZO L. REV. 1365, 1365 (1995); Keith D. Ewing, *Social Rights and Constitutional Law*, PUB. L. 104, 105 (1999).

[89] T.H. Marshall, *Citizenship and Social Class*, *in* CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS (T.H. Marshall ed., 1950). Marshall was the person to first categorize social rights when he defined them as ranging from "the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society." *Id.* at 11.

[90] As the United Kingdom does not have a written constitution, it cannot be assessed on this point. For more on the "social state" principle in Germany, see Christian Bommarius, *Germany's Sozialstaat Principle and the Founding Period*, 12 GERMAN L.J. 1879 (2001).

[91] Konstytucja Rzeczypospolitej Polskiej 17 Oct. 1997, art. 20 (Pol.); Ústava Slovenskej republiky 1 Oct. 1992, art. 55(1) (Slovk.). Preamble to the Hungarian Constitution also contained a reference to "social market economy," but this was removed when that country's constitution was rewritten in 2010.

[92] Konstitutsiya na Republika Balgariya [Constitution] 12 July 1991, pmbl. (Bulg.); Constitution du 4 octobre 1958 4 Oct. 1958, art. 1(1) (Fr.); Constituição da República Portuguesa 25 Apr. 1976, pmbl. (Port.); Constitutia Romaniei 8 Dec. 1991, art. 1(3) (Rom.); Ustava Republike Slovenije [Constitution] 23 Dec. 1991, art. 2 (Slovn.); Constitución Española 6 Dec. 1978, art. 1(1) (Spain).

[93] Costituzione della Repubblica Italiana 1 Jan. 1948, art. 1(1) (It.); Constitution of Malta 21 Sept. 1964, art. 1(1).

[94] Austria, Belgium, Czech Republic, Denmark, Ireland, Luxembourg, and the Netherlands.

[95] Costituzione della Repubblica Italiana 1 Jan. 1948, art. 3(1) (It.); Constituição da República Portuguesa 25 Apr. 1976, art. 13(1) (Port.).

approach present in the German Basic Law as this document was drafted after the Italian Constitution. The approach used in Italy "endorses a concept of freedom and personal dignity aimed at creating the Italian citizen as a truly 'social person.' "[96] Boni argues that the use of the term "equal social dignity" is a particularly novel approach, because it combines the traditional liberal notion of equality with the more communitarian notion of social dignity.[97]

Rao argues that throughout European constitutions, the conception of human dignity has been linked to the commitment to the social welfare state, and that constitutional courts have allowed their interpretation of it to be influenced by "European" values of socialism and communitarianism.[98] It is submitted that his position is correct, with the linkage having been made explicit in the articles of the Italian and Portuguese constitutions, whereas in states like Germany, it has been developed by the courts.

2. Social State Principles Within the EU Prior to Lisbon

Before the Lisbon Treaty, it would have been difficult to substantiate any argument that Union law exhibited a "social state principle." Indeed, the original EEC Treaty exhibited few references to social rights or principles, primarily due to the recommendations of the Ohlin Report, compiled by an International Labour Organization Group of Experts tasked with reporting on the social aspects of European economic co-operation.[99] The tone of the Ohlin Report was skeptical about the benefits of widespread integration of social.[100] The report therefore affected the initial stages of European integration by ensuring the prioritization of economic freedoms over social rights.[101]

Despite this, some social values were present within the original Treaties, and their status has been progressively enhanced through the various amendment processes. The Preamble to the original EEC Treaty included references to economic and social

[96] Guido Boni, *Social Rights in Italy*, *in* EUI WORKING PAPERS LAW 2010/07: DIVERSITY OF SOCIAL RIGHTS IN EUROPE(S): RIGHTS OF THE POOR, POOR RIGHTS 31, 31 (2010).

[97] *Id.* at 33.

[98] Rao, *supra* note 46, at 218. Rao does not make any reference to the influence of Catholic social teaching on the presence of social values within European constitutions. Such teachings certainly had some influence in countries like Ireland and Poland. *See* D. Keogh, *The Irish Constitutional Revolution: An Analysis of the Making of the Constitution*, 35 ADMIN. 4 (1987); Anna M. Jaroń, *Social Rights in Poland*, *in* EUI WORKING PAPERS LAW 2010/07, DIVERSITY OF SOCIAL RIGHTS IN EUROPE(S): RIGHTS OF THE POOR, POOR RIGHTS 55, 56 (2010).

[99] International Labour Office, *Social Aspects of European Economic Co-operation*, 74 INT'L LAB. REV. 99 (1956).

[100] *Id.* at 109. *See* Olivier De Schutter, *Anchoring the European Union to the European Social Charter: The Case for Accession*, *in* SOCIAL RIGHTS IN EUROPE 111, 112 (Gráinne de Búrca & Bruno de Witte eds., 2005).

[101] *See* De Schutter, *supra* note 100, at 112.

progress,[102] the improvement of the living and working conditions of the peoples of the Member States,[103] and harmonious development between economically successful regions and those less so.[104] The tasks of the Community include promoting "a harmonious development of economic activities [and] an accelerated raising of the standard of living . . . ."[105]

The Maastricht Treaty amended the Community tasks including the addition of the phrase "a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."[106] Achieving a high level of health protection and contributing to education and training were added as new activities of the Community.[107] At Amsterdam, amendments to the Preamble to the EC Treaty resulted in a reference to promoting the development of the highest possible level of knowledge through a wide access to education, while the coordination of employment policies between the Member States was added as a new activity of the Community.[108]

These references to social aims and objectives at the start of the EC Treaty were not without legal significance. In *Albany*, the Court invoked the aims of creating a policy in the social sphere, promoting harmonious and balanced development, and achieving a high level of employment and social protection, to rule that collective agreements between employers and unions fell outside of the remit of Union competition law.[109] Nevertheless the limitations of these provisions were demonstrated in *Zaera*.[110] Here the Court determined that the aim of the Treaty to promote an accelerated raising of the standard of

[102] Treaty Establishing the European Economic Community recital 2, 25 March 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty].

[103] *Id.* at recital 3.

[104] *Id.* at recital 5.

[105] *Id.* art. 2. The article has been altered in subsequent Treaty amendments to include a wider range of social tasks.

[106] Article 2 EC. While for the most part this looked like an enhancement of the previous provision, the stipulation for an "accelerated" raising of the standard of living was dropped.

[107] Maastricht Treaty Provisions Amending the Treaty Establishing the European Economic Community with a View to Establishing the European Community art. 3(o)–(p), Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter EC Treaty].

[108] Treaty of Amsterdam Amending the Treaty of European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 2(1)–(2), Oct. 2, 1997, 1997 O.J. (C 340) [hereinafter TEU].

[109] Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, CJEU Case C-67/96, 1999 E.C.R. I-5751, para. 54.

[110] *See* Zaera v. Institut Nacional de la Seguridad Social, CJEU Case C-126/86, 1987 E.C.R. 3697.

living was dependent on the establishment of the common market and the progressive approximation of economic policies. As such, it could not confer direct legal rights on individuals or legal obligations on Member States.[111]

3. Social Market Economy

The Lisbon Treaty resulted in the addition of the term "highly competitive social market economy" to Article 3(3) TEU.[112] Some argue the phrase flows from the similar, though not identical, reference to the "social federal state" in Article 20(1) of the German Basic Law.[113] Opinion diverges as to whether the addition of this phrase will enhance or lessen the protection of social rights within the Union, particularly in light of its alleged German ancestry. Semmelmann regards it as a "cosmetic and rhetorical step" and notes the lack of implementing measures.[114] Joerges and Rodl are concerned that the similarities to the German provision will mean that the phrase will be burdened by similar ideological disputes to those that surround Article 20(1) of the Basic Law.[115] However, Sajo notes the positive outcomes in Germany for social rights protection stemming from linking the social market economy principle to the notion of human dignity.[116]

It has already been noted that there are references to the precise term "social market economy" in two Member State constitutions—Poland and Slovakia—and to the wider conception of a social state in a further six. The Final Report of the Convention Working Group on Social Europe did not make any specific reference to Germany in its discussion of the provision.[117] As such, it is suggested that it is difficult to maintain that the text of Article 3(3) TEU can only be understood in the context of German constitutional law. At the same time, the German *Hartz IV* decision, which was delivered subsequent to the concerns articulated above by Joerges and Rodl, provides an interpretative approach that would sustain the argument being put forward in this paper.

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[111] *Id.* at paras. 10–11.

[112] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

[113] Christian Joerges & Florian Rödl, *"Social Market Economy" as Europe's Social Model?*, *in* EUI Working Paper LAW 2004/8 1, 10–11; Constanze Semmelmann, *The European Union's Economic Constitution Under the Lisbon Treaty: Soul-Searching Among Lawyers Shifts the Focus to Procedure*, 35 EUR. L. REV. 516, 521–2 (2010).

[114] Semmelmann, *supra* note 113, at 522.

[115] Joerges & Rödl, *supra* note 113, at 9–12.

[116] András Sajó, *Social Rights: A Wide Agenda*, 1 EUR. CONST. L. REV. 38, 39 (2005).

[117] Working Grp. XI on Social Eur., Final Report, CONV 516/1/03 (Feb. 4, 2003).

It is likely that the term "social market economy" will be considered in conjunction with the new "horizontal clause" of Article 9 TFEU, outlining the Union's obligations to consider high levels of employment, adequate social protection, fighting social exclusion, high levels of education and training, and the protection of human health in defining and implementing its policies.[118] Dawson and De Witte go as far as to argue that it "affirms that social objectives are equivalent to economic objectives within EU primary law."[119]

It is clear from the preparatory document for the European Constitutional Treaty, the precursor to the Lisbon Treaty, that the aim of inserting the social market economy provision was to maintain the existing system of protection associated with the European social model throughout Member States.[120] As such, it is suggested that the Court of Justice should continue in its tradition of giving a broad, Union based interpretation of Treaty provisions.[121] Such an approach would be consistent with the constitutional heritage of most of the Member States, as illustrated in the discussion of the social state principle. It would also be consistent with the aim of promoting social justice, which as a result of the Lisbon Treaty has now been added as a task of the Union under Article 2(3) TEU.[122]

E. The Case for an EU Right to a Subsistence Minimum

Having identified the right of human dignity and the concept of the social state as principles within Union law, it is necessary to demonstrate that the recognition of a right to a subsistence minimum would not offend existing limitations on the identification of new rights. Furthermore, the normative justification for such a right and the circumstances in which it could be beneficially invoked must be considered.

[118] Della Ferri & Mel Marquis, *Inroads to Social Inclusion in Europe's Social Market Economy: The Case of State Aid Supporting Employment of Workers with Disabilities*, 4 EUR. J. OF LEGAL STUD. 44, 55 (2011).

[119] Mark Dawson & Bruno de Witte, *The EU Legal Framework of Social Inclusion and Social Protection: Between Liston Strategy and the Lisbon Treaty*, *in* SOCIAL INCLUSION AND SOCIAL PROTECTION: INTERACTIONS BETWEEN LAW AND POLICY 54 (Bea Cantillion, Herwig Verschueren & Paula Ploscar eds., 2012).

[120] Working Grp. XI on Social Eur., Summary of the Meeting on 11 December 2002, 4, CONV 472/02 (Dec. 21, 2002).

[121] Roderic O'Gorman, *The ECHR, the EU and the Weakness of Social Rights Protection at the European Level*, 12 GERMAN L.J. 1833, 1853 (2011).

[122] Treaty of Lisbon, 2007 O.J. (C 306) 11.

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I. Article 51(2) and the Scope of Union Law

Fundamental Rights as identified within the general principles of Union law apply to the actions of the EU institutions themselves.[123] They also apply to the actions of the Member States when they are acting as agents of the Union,[124] derogating from Union law,[125] or when they are implementing Union legislation which itself is based on human rights protection.[126] Giving legal effect to the Charter of Fundamental Rights at the Lisbon Treaty means that this is now also a source of rights protection within the confines of Article 51(2), which makes clear that the Charter neither extends existing powers or task of the Union, nor creates new powers or tasks.[127] It only applies to the Member States "when they are implementing Union law" or, according to the *Explanations Relating to the Charter of Fundamental Rights*, "when they act in the scope of Union law."[128]

The interpretation of Article 51 and the interaction of the Charter provisions with existing fundamental rights as already recognized by the Court of Justice has been the subject of extensive commentary.[129] In its recent decision in *Akerberg Fransson*, the Court declared that it does not make a distinction as to the scope of fundamental rights protection under the Charter as opposed to under the earlier case law regarding fundamental rights within the general principles.[130] The decision strengthens the argument made in this article because it means that the right of human dignity, which is contained in the Charter of Fundamental Rights and therefore bound by Article 51(2), will not be interpreted in a way that reduces its earlier treatment by the Court in pre-Charter case law. While some debate remains regarding the horizontal applicability of the Charter norms *vis-a-vis* the General Principles, this is not relevant to the argument stated here because the State undertakes

[123] *See* Kadi v. Council and Comm'n, CJEU Cases C-402/0-5 P & C-415/0-5 P, 2008 E.C.R. I-6351.

[124] Wachauf v. Ger., CJEU Case C-5/88, 1989 E.C.R. 2609.

[125] Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis, CJEU Case C-260/89, 1991 E.C.R. I-2925.

[126] Rutili v. Minister for the Interior, CJEU Case C-36/75, 1975 E.C.R. 1219. This third ground more recently been described as applying to Member State measures that implement Union law (beyond solely human rights), including directives which only lay down minimum harmonization or grant a margin of discretion. Armin von Bogdandy et al., *Reverse Solange—Protecting the Essence of Fundamental Rights Against the EU Member States*, 49 COMMON MKT. L. REV. 489, 498 (2012).

[127] Charter of Fundamental Rights of the European Union art. 51(2), 2012 O.J. (C 326/02) 406.

[128] *Id.* art. 51(1).

[129] *See* von Bogdandy, *supra* note 126; Laurent Pech, *Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in* Römer *and* Dominguez, 49 COMMON MKT. L. REV. 1841 (2012); Dorota Leczykiesicz, *Horizontal Application of the Charter of Fundamental Rights*, 38 EUR. L. REV. 479 (2013).

[130] Åklagaren v. Fransson, CJEU Case C-617/10, paras. 18–21.

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the disputed cuts to social protection expenditures, thus making the situation a vertical one.[131]

II. How to Litigate a Right to a Subsistence Minimum

Even if the Court of Justice were to recognize a right to a subsistence minimum, it is accepted that there would be difficulties in harnessing its protection to counter measures such as those outlined in the Irish bailout situation. There would be issues identifying a plaintiff who would be in a position to successfully take an action on the basis that the right to a subsistence minimum had been breached.[132] An action for annulment under Article 263 TFEU taken by an individual alleging that the Implementing Decision had resulted in their social welfare allowance being reduced in breach of the right to a subsistence minimum would face all of the difficulties of having to prove both direct and individual concern.

While the *Kadi* decision illustrated that the Court of Justice is prepared to strike down Union legislation on the basis that it breaches fundamental rights, the applicants in that case were specifically mentioned in the regulation being challenged.[133] It is unlikely that the changes wrought to Article 263(4) TFEU at Lisbon will improve the legal situation of an applicant in circumstances outlined above, as she would just be one of many affected by the impugned measure. Such an applicant would probably be best advised to challenge the Member States implementation of the Implementing Decision in the national courts, and hope that a reference to the Court of Justice will be made under Article 267 TFEU. This would see the applicant claim that the indiscriminate manner in which the requirements of the Implementing Decision were applied by the Government breached the right through the *Wachauf* "Member State as agent of the Union" case law.[134]

III. The Economic Crisis and the Expansion of Union Power

The legal argument in relation to the possibility of creating a right to a subsistence minimum leads to the wider question of the appropriateness of such a right. Under what basis should the Court of Justice recognize a principle which would increase its adjudicative oversight over the social spending policies of the Member States?

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[131] *See* Pech, *supra* note 129, at 1862; Leczykiesicz, *supra* note 129, at 494.

[132] My thanks to participants in the Integration or Disintegration conference in the Institute of European Law, University of Birmingham, for raising this point with me.

[133] *Kadi*, CJEU Cases C-402/0-5 P & C-415/0-5 P at I-6351.

[134] *Wachauf*, CJEU Case 5/88 at 2609.

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It is submitted in reply by this author that the Union's response to the economic crisis itself has already resulted in an unprecedented involvement with redistributive policies on the national level. The totality of the measures taken represents both a radical extension of the legal and *de facto* power of the European Union as well as a lurch away from the Social Europe model. These new powers exist within the economic adjustment programs which contain levels of conditionality far more intrusive into basic elements of national fiscal sovereignty than previously provided by Union law. While the level of compulsion may be disputed by the Commission, Armstrong notes:

> [T]he European Commission . . . suggest[ed] that the adjustment programs are not imposed by the EU but are adopted by the Member States themselves with the role of national parliaments in such processes defined by the national constitutional order. Yet in the context of a system where receipt of financial support is conditional on agreeing and implementing significant, and often painful, domestic reforms, and where national and indeed European parliaments are simply "informed" of measures, that statement may ring rather hollow.[135]

This increase in the Union's influence on domestic policy as a result of the crisis has been widely commented upon.[136] It is not solely apparent in the context of the economic adjustment programs, but also regarding other measures adopted at Union level, such as the fiscal and macroeconomic surveillance created by the "Six Pack."[137] The economic semester system created by the Two Pack provides for permanent EU involvement in the

[135] KENNETH ARMSTRONG, TOWARDS A "GENUINE" ECONOMIC AND MONETARY UNION: THE NEW GOVERNANCE OF FISCAL DISCIPLINE 35–36 (paper presented at *The Constitutionalization of European Budgetary Constraints*, Tilburg Law School, May 30–31, 2013).

[136] *See* Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 EUR. L.J. 667, 668 (2012); Diamond Ashiagbor, *Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration*, 19 EUR. L.J. 303 (2013). Somma discusses the wider impact that responding to debt crises generally has on human rights. Alessandro Somma, *Biopolitics of Transnational Private Law – Sovereign Debt Crises, Market Order and Human Rights*, 13 GERMAN L.J. 1571 (2012).

[137] Parliament & Council Regulation 1175/2011, Amending Regulation (EC) No 1466/97 on the Strengthening of Budgetary Surveillance and Coordination of Economic Policies, 2011 O.J. (L 306) 12; Council Regulation 1177/2011, Amending Regulation (EC) No 1467/97 Regarding Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 2011 O.J. (L 306) 33; Regulation (EU) of the European Parliament and Council on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L 306) 1; Parliament & Council Regulation 1176/2011, On the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25; Parliament & Council Regulation 1174/2011, On Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. (L 306) 8; Council Directive 2011/85, On the Requirements for the Fiscal Framework of the Member States, 2011 O.J. (L 306) 41.

budgetary processes of Eurozone members.[138] The consequences of this enhanced Union influence have been criticized, with Kilpatrick arguing that as a result, the EU has become a negative force within social policy in the Member States.[139]

A common thread across the economic adjustment programs for Ireland and Portugal is not just the binding requirement to address deficits through a range of measures, but also the high level of specificity regarding what was required to do this. Extra taxation measures, governmental reforms, and spending reductions are all set out in great detail in the Implementing Decision and Memorandum, allowing the Member State virtually no discretion.[140] Deviation from such measures threatens the grant of the financial assistance.[141]

In Ireland's case, it undoubtedly could be argued that the unsustainability of the public finances meant that social welfare cuts would have to be implemented irrespective of entering into the program. It should be noted that until the 2011 budget, however, the then-Government had made it a point of principle not to cut welfare rates.[142] This degree of compulsion means that Member States are required to reduce spending in the area of social protection without any assessment of what the effect of specific reductions would be in individual circumstances. Note that in *Hartz IV*, the German Constitutional Court stated:

> To make it possible to examine whether the valuations and decisions taken by the legislature correspond to the constitutional guarantee of a subsistence minimum that is in line with human dignity, the legislature handing down the provision is subject to the obligation to reason them in a comprehensible manner . . . .[143]

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[138] Francesco Costamangna, *Strengthened Economic Policy Coordination and the European Economic Constitution: A Withering Social Dimension*, *in* CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS (Maurice Adams, Federico Fabbrini & Pierre Larouche eds.) (forthcoming 2014).

[139] Claire Kilpatrick, Professor of Int'l and Labour and Soc. Law, European Univ. Inst., Can Fundamental Rights Resocialize Europe, Address at University College London International Conference: Resocializing Europe and the Mutualization of Risks to Workers (May 18–19, 2012).

[140] Financial Assistance to Ireland, *supra* note 5; Council Implementing Decision 2011/344, On Granting Union Financial Assistance to Portugal, 2011 O.J. (L 159) 88 [hereinafter Financial Assistance to Portugal].

[141] Financial Assistance to Ireland, *supra* note 5, art. 1(4); Financial Assistance to Portugal, *supra* note 140, art. 1(4).

[142] "Things we'd be most concerned about would be maintaining social welfare rates and education expenditure. Also on the capital side our priority would be infrastructure relating to public transport and water services." Senator Dan Boyle, IRISH TIMES, July 10, 2010.

[143] *Id.* at para. 171.

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In the case of Ireland, the quarterly papers published by the European Commission on completion of each of its review missions and the subsequent implementing decisions all make reference to protecting the vulnerable and measuring the social impacts of the Programme. However, it is submitted by this author that there is little in these documents and legal instruments that indicate substantial consideration being given to the impact of the mandated cuts to social protection spending. Only in the second to last review does the Commission undertake a statistical analysis of the impact of the adjustment measures on the vulnerable, and this itself is primarily descriptive.[144] The three national budgets in which the Irish Government implemented the measures required under the Programme demonstrate a similar lack of analysis, something that itself was remarked upon in one of the Commission review mission reports.[145]

As the Irish Constitution does not itself contain a right to a subsistence minimum, if the reductions in social protection expenditures were solely the result of national measures, there would be no similar recourse to rights based protection. However, in a circumstance where a Member State government seeks to implement purely national measures that threaten social rights, there would be at the very least a level of political and media contestation of the law. This was completely lacking in the context of the economic adjustment programs, with the European Parliament excluded from any significant legislative or scrutiny role. A similar concern will apply to financial assistance packages undertaken in the future through the European Stability Mechanism.[146]

As such, it is submitted that the creation of a right to a subsistence minimum adjudicated by the Court of Justice is a necessary reaction to the Union's own increase in power over national budgetary choices following the economic crisis. The right would act in a defensive way, binding the EU institutions and the Member States in their implementation

[144] EUR. COMM'N, ECONOMIC ADJUSTMENT PROGRAMME FOR IRELAND SUMMER 2013 REVIEW 19–20 (2013), http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp162_en.pdf. The effect of the adjustments on income inequality was discussed in the Winter 2012 Review, where comments from charitable organizations such as the St. Vincent de Paul were noted regarding the need to examine access to frontline public services rather than just focusing on income trends in assessing the impact on the most vulnerable. EUR. COMM'N, ECONOMIC ADJUSTMENT PROGRAMME FOR IRELAND WINTER 2012 REVIEW 22 (2013), http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp131_en.pdf.

[145] EUR. COMM'N, ECONOMIC ADJUSTMENT PROGRAMME FOR IRELAND SUMMER 2013 REVIEW 19 (2013), http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp162_en.pdf

[146] While the Court of Justice determined that the Charter did not apply to the establishment of the ESM in its decision in Pringle, the case did not consider whether the Charter applies to its operation. Pringle v. Ireland, CJEU Case C-370/12 paras. 178–80 (Nov. 27, 2012), http://curia.europa.eu/. For a discussion of the application of fundamental rights to the operation of the ESM, see Roderic O'Gorman, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, 50 IRISH JURIST 221 (2013).

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of Union legislation. In the future, where Union legislation compels national governments to limit their spending and this directly affects the standard of living of indigent Union citizens, the right to a subsistence minimum would have to be taken into account in assessing the individualized impact of such reductions. Such a basic level of scrutiny of the consequences of actions taken at Union level would offer a degree of protection to those persons, often excluded from the political system, who would be most affected by these actions.

F. Conclusion: Protecting the Economically Weak Within the Evolved EU Political Process

Across Europe, measures required by the EU, both as conditions of its financial intervention in national economies and in order to avoid such intervention, are visibly impacting the standards of living of Union citizens.[147] In the process of applying this increased power, it is argued here that primacy has been given to the goal of cutting budget deficits irrespective of the consequences. In light of this transfer of powers to the non-elected institutions of the Union, there is a strong legal and political justification that economically weak groups within the European Union should be able to avail themselves of constitutionally mandated minimum standards, which would grant them greater protection within the decision making process. Such a right would not impose a positive obligation for the payment of a subsistence minimum on either the Member State or the Union itself. Indeed, it is the very feature of EU fundamental rights that they apply in only limited circumstances related to the application of Union law that would preclude such a positive obligation.

The Court of Justice will soon consider issues surrounding the impact of Union-mandated cuts on standards of living. In the *Fidelidade Mundial* case, a reference from the *Tribunal do Trabalho do Porto*, a Portuguese trade union is challenging aspects of a national law allowing for the non-payment of a range of Christmas and holiday allowances to public sector workers.[148] The legislation was enacted as part of Portugal's obligations under the economic adjustment program.[149] Among a number of questions put to the Court of Justice, the Tribunal asked whether such cuts would breach the right to working conditions that respect dignity as protected by Article 31(1) of the Charter by denying workers a fair remuneration that allows them and their families to enjoy a satisfactory standard of

[147] Mélina Antuofermo & Emilio Di Meglio, *Population and Social Conditions*, EUROSTAT: STATISTICS IN FOCUS (2012), http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-009/EN/KS-SF-12-009-EN.PDF; A. LEAHY ET AL., THE IMPACT OF THE EUROPEAN CRISIS: A STUDY OF THE IMPACT OF THE CRISIS AND AUSTERITY ON PEOPLE, WITH A SPECIAL FOCUS ON GREECE, IRELAND, ITALY, PORTUGAL AND SPAIN (2013).

[148] Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial—Companhia de Seguros, S.A., CJEU Case C-264/12 (July 14, 2012), http://curia.europa.eu/.

[149] Financial Assistance to Portugal, *supra* note 140.

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living.[150] The Tribunal also asked whether the potential for more cuts as a result of financial consolidation measures and the uncertainty created by this also breached Article 31(1).[151]

While this case concerns reductions of salaries, as opposed to the cuts in social welfare payments at issue in both *Hartz IV* and the Irish examples examined in Section B, it nevertheless will require the Court of Justice to examine the consequences of national measures mandated by EU/IMF programs. The Court will have the opportunity to determine whether the consequences of these programs for Union citizens are so great that their implementation requires some level of proportionality analysis.

Undoubtedly, it would be a radical step for the Court of Justice to declare that the actions of the Union institutions or Member States in implementing economic adjustment programs had to be constrained by principles such as a fundamental right to a subsistence minimum. However, the Court has historically shown itself willing to intervene in situations where the lack of EU protection for fundamental rights has threatened the wider legitimacy of the European integration project.[152] Surely, considering the statistically demonstrated threat to the basic social safety net of the Member States and the new emphasis given to social values within the EU post-Lisbon, now is the time for the Court of Justice to act?

[150] 2012 O.J. (C 209/09) 6.

[151] *Id.*

[152] *See supra* note 44; Schmidberger v. Austria, CJEU Case C-112/00, 2003 E.C.R I-5659.

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