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Economic freedom and economic rights: Direction, significance and ideology

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Abstract

The discussion here takes stock of and analyses the way in which ideas of economic freedom and basic economic rights have evolved during the last half century to generate legal discourse and legal action, and with what effect, with particular reference to Europe as a site for such developments. It is necessary to probe the understanding and purpose of such 'rights talk' and also to set the discourse in relevant ideological contexts. For the purpose of this exercise, a broad distinction is drawn between two major categories of economic right. The first category may be broadly described as 'integration rights'—entrepreneurial in character, forward-looking and opportunistic in a historical context of supranational integration and trade liberalisation. The second category, in contrast, may be termed 'vulnerability rights'; these are more protective in character, and serve to enhance the opportunities of the economically disadvantaged, those sections of the population at risk of social exclusion and poverty. An assessment is made, on the one hand, of the achievement of the movement to exploit integration rights, and on the other hand, the prospect for the mobilisation and assertion of vulnerability rights in the wake of governmental policies of austerity.

1 | INTRODUCTION

The idea of economic freedom and associated rights, understood as basic or fundamental rights, is now an established feature of legal parlance and legal practice at a number of levels—international, supranational and national.[1] Yet while the rhetoric is strong, attempting to penetrate and understand the practice of declaring and asserting this area of entitlement remains in a number of respects a matter of uncertainty and obscurity. Unlike other categories of legal entitlement, especially that characterised as 'political', what has happened in relation to freedom and rights in the economic realm may appear more opaque, contingent and indecisive, provoking a certain degree of scepticism.[2] Whereas basic political freedom and rights comprise the domain par excellence of individual human assertion, the

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[1]Although, as a discrete category of human rights protection, the subject of economic rights has attracted relatively little academic commentary of the more general and textbook kind, so that it is not easy to say at this point, 'on which, see generally …'. But, for a more general account, see: Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart, 2003); Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012).

[2]See, for instance, the position adopted in the mid-twentieth-century discussion by Marshall, referring to the distinction in any Bill of Rights between civil and economic protections: 'One might well wish to include the former whilst excluding or reserving judgment on the latter. Nobody is very much an expert in elaborating and applying the economic rights of man—and judges less so than many.' Geoffrey Marshall, *Constitutional Theory* (Oxford University Press, 1971), at 134. And then, Daintith writing in 2004: 'I conclude that 'economic rights is a flawed concept, and that the express constitutional protection of such rights … adds little of value to the protection that derives from other constitutional and legal sources'. Terence Daintith, 'The Constitutional Protection of Economic Rights', (2004) 2 *International Journal of Constitutional Law*, 56, 57.

economic sphere of action may be less susceptible to a clear delineation of agency and interests: whose position and which interests deserve this preeminent level of legal protection? Historically, of course, economic activity—industry, trade, finance, purchase and consumption—has been a matter of significance, but talking about it as something special in legal and constitutional terms has occurred more recently. The elevation of marketplace action and economic strategy to the higher reaches of special legal entitlement has followed in the wake of an increasingly sophisticated and incursive politicisation, management and regulation of economic actors as a matter of overarching public interest and concern. So, in the more recent and contemporary world, it is the emergence of State and intergovernmental intervention and efforts of control, and the alternative political model of the free market, in an increasingly interdependent global community, which has triggered a new kind of legal discourse.[3] Prevailing ideas of political democracy also spawn a discourse of freedom and rights talk.

Viewed in this way, Europe and North America, historically at the forefront of large-scale industrialisation, global trading and economic development, have been the principal sites for launching the legal project of enhancing economic freedom and its translation into high level rights protection. There is some historical irony in the earlier favouring by more interventionist, dirigiste 'socialist' political regimes of 'second generation' economic and social rights,[4] since the more productive seedbed of economic freedom and entitlement has been the arena of capitalism and trade liberalisation. But this follows from a certain logic: if private economic activity is unrestrained and its reach becomes increasingly pervasive and incursive, the resultant complex mix and clash of interests demands some effort of management, regulation and control. To talk about this situation in terms of basic freedom and rights is but one route to the resolution of the resulting conflicts of interest. There are differing models, strategies and ways of conceptualising attempts to regulate and manage the marketplace, ranging, for instance, through regulatory supervision, compensation and criminalisation, as well as a constitutionally elevated scheme of rights protection. It is important to understand the choice on offer in that respect and how these approaches relate to each other.

Taking as its main focus the European legal site, this discussion probes the meaning and significance of recent and contemporary economic rights talk. How should we understand the content and purpose of presenting the legal control of the marketplace as a matter of 'economic freedom' and 'economic rights'? We should ponder the significance of this development, and its direction and achievement. There are important questions underlying this kind of investigation: more precisely, *whose* freedom and rights and *which* interests are the subject of special protection? An associated question concerns the possibility that the project of rights protection has been commandeered as an instrument of ideology—the disquiet expressed by some commentators[5] that the protection of economic rights in the Western legal arena has flourished as an instrument of free market ideology rather than as a means of addressing true economic vulnerability. For this purpose, some report on and analysis of such legal developments in the European context may help to illuminate the nature and consequences of such economic rights discourse.

2 | SOME REFLECTION ON 'FREEDOM' AND 'RIGHTS'

It is all too easy, in an age of established rights talk and significant and pervasive global economic activity, to assume that economic freedom is an expected, established and necessary state of play. After all, there has always been a measure of economic freedom for societies to survive and develop, even though in practice it has been distributed

[3]See, generally, Christopher Harding, Uta Kohl and Naomi Salmon, *Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors* (Ashgate, 2008).

[4]Socialist regimes tended to prioritise the protection of economic, social and cultural rights, or the 'second generation' rights, to use the term promoted by Karel Vasak. See Karel Vasak (ed.), *The International Dimensions of Human Rights* (Greenwood Press, UNESCO, 1982).

[5]See, for instance, the overview and analysis presented by Andrew Willams, 'Human Rights in the EU', in Anthony Arnull and Damian Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), as discussed further below.

unevenly along a spectrum of opportunity. But a bland and broad assertion of opportunity in the economic sphere is meaningless without specifying some substance (freedom to do what?) and motivation (for what purpose?). That second question of purpose leads to a first main typology within the broad concept of economic freedom in the contemporary world, comprising (a) a free market and free trade, entrepreneurial interest and activity; (b) a 'welfare economics' approach, emphasising individual well-being as an outcome; and (c) freedom from 'want' or poverty, implying a minimum standard of living.[6] Each of these denotes a different emphasis and different content for such aspirational freedom, and certainly differing ideologies of political action, and differing interactions with other categories of freedom and right—for instance in terms of content, respectively a right to trade, a right to work, and a right to sustenance and food. In short, any reference to economic freedom must have some such contextual and ideological location to acquire any meaning.

In the context of the European Union, the mid-twentieth-century starting point in the form of the earlier European Communities was clearly entrepreneurial and market-based—the concept (both politically and economically inspired) of a common or single market, which was open and expansive, and drawing upon centuries of European and then global free trading. The idea of the open market was specified further in categories of free movement—of commodities, persons, businesses and capital, underpinned by a competitive freedom of opportunity. This was not to foreclose more social and welfare-oriented objectives, and indeed there would develop some 'spill-over' into welfare guarantees. But, as will be discussed further below, the latter, as EC/EU entitlements, were essentially at the service of the master concept of the Single Market, which in EC/EU ideology should prevail, even at some cost to countervailing welfare claims. Policies based on social welfare, environmental considerations or cultural preference, could at the most moderate, but certainly not defeat, the Single Market imperative of free movement.

The constitutional declaration of the Common and then Single Market in the founding Community Treaties, and the institutional and legal structure of the original Communities facilitated a rapid and significant development of rights based upon these broadly conceived freedoms. 'Rights' in this sense and context may be understood as specific legal assertions or claims exploiting and confirming the freedom of opportunity and action in particular situations and circumstances. Freedom of movement to carry out work, quickly spawned the right of a Member State national to move from one State to another to take up employment there—a classic EC economic right, and so on. Moreover, the field of economic action thus envisaged as a freedom, the imperative nature of its guarantee, and the institutional and legal structures laid down to ensure such freedom, quickly resulted in a justiciable and court-oriented process of assertion and enforcement of a range of rights in diverse market situations. What emerged then as the 'substantive' law of the European Community in the 1960s through to the 1980s was very much 'economic' law within the frame of the developing European Single Market,[7] largely a matter of elaborating and securing such free movement rights via an increasingly detailed and sophisticated case law of the European Court of Justice and Member State courts. By its nature this was a justiciable subject and judicial resolution and elaboration was a favoured route of policy and legal development. The outcome has been a large corpus of law, impressive in its depth and scale, and expressed very much as a confirmation of market rights.

These developments should also be viewed through a certain legal and cultural lens, which may be broadly understood as a distinctively European 'rights culture'. Put simply, by the second half of the twentieth century, there had evolved in Europe a robust political and legal tradition of ensuring and asserting recognised community and societal values through the enunciation and enforcement of specific rights within a framework of judicial review—and moreover, in a multi-level way, allowing this process to be carried out by the European Court of Human Rights,

[6]Represented respectively, for instance by (a) theories of economic liberalism; (b) theories of social market economy (such as German Ordoliberalism of the Freiburg School); (c) the third principle, freedom from want, as enunciated in classical form by F.D. Roosevelt in his 'Four Freedoms' speech (or State of the Union Address) in 1941. But these are broad categories and schools of thought.

[7]As can be seen from a snapshot view of the subject taken from the contents and coverage of textbooks at that time. See, e.g., D. Lasok and J.W. Bridge, *The Law of the Economy of the European Communities* (Butterworths, 1980), published as a companion volume to the pioneering textbook by those authors on the 'Law and Institutions' of the EC.

the European Court of Justice, the German Bundesverfassungsgericht, and many other courts. Claiming rights, and sometimes overriding fundamental rights, became the expected norm.[8]

One further point in considering this context of economic rights is to note what might be viewed as their *active* quality. The assertion of such EU-based rights is to take an initiative in a situation of opportunity, which is another way of expressing their entrepreneurial character. In that sense, historically the typical beneficiaries of EC and EU Single Market policies (and whether, for instance, they are in market terms suppliers or consumers) have been in a position to take an advantage and move forward. The essential economic context is positive, in the sense of greater opportunity and greater choice. In this way, it is interesting to reflect on some similarity with the kind of rights culture which has emerged in North America, and especially the United States. The European settlement of North America was informed very much by a sense of new opportunity and freedom, especially for individuals, and so also a later resistance to moves to restrict such individual freedom for the benefit of a wider or more general interest.[9] This 'active' aspect of some economic rights may be compared with a more *defensive* or protective nature of some other economic rights, arising from a situation of vulnerability rather than opportunity, such as the right to employment, to sustenance or to a minimum standard of living. This is an important categorisation, which will be revisited later in the discussion.

3 | SOME REFLECTIONS ON THE ECONOMIC DOMAIN

It should be stressed, then, that the driving force and spirit of this EU development was economic integration of a particular kind, embodied in a new kind of supranational organisation, and guided by a certain ideological spirit. In crude terms, there is a world view here in which the Single Market (or trade liberalisation) is king (and the same would of course be true of the wider global context of the WTO, in so far as the basic rights argument has arisen there).[10] Given what has been said above about the importance of the judicial medium in this process of rights development, it is important, then, to note a strong critical view of the approach and philosophy of the European Court of Justice, notable for its working out of a system of rights protection at the service of the Single Market ideal. This line of critique is concisely summarised by Andrew Williams as the tendency of the Court of Justice:

> *to see every case through the lens of this position, whereby the central objective was always closer integration* through *law … Therefore, in judgments that reportedly advanced human rights … the language of preserving the integrity of this philosophy (namely the coherence of the internal market as the focus of integration and thus law) lies at the root of decisions.*[11]

And then, referring more specifically to the Court's decision in *Omega v. Bonn* in 2004,[12] Andrews comments:

> *In essence, the referred question and the decision represents a reaffirmation of the EU's ranking of value, in that those seeking to protect a fundamental right have to convince the Court that the act restricting a commercial interest is both necessary and proportionate … The value of market freedom is the primary consideration,* subject to *but not unseated by a fundamental right.*[13]

[8]This is an interesting and important aspect of legal culture, which emphasises the perceived importance of 'having a day in court', the possibility of formal appeal and review procedures, and a belief in justiciability and judicial solutions, so translating interests and freedoms into rights.

[9]As stated by Richard Hofstadter: 'From its colonial beginnings through most of the nineteenth century, ours was overwhelmingly a nation of farmers and small-town entrepreneurs—ambitious, mobile, optimistic, speculative, anti-authoritarian, egalitarian, and competitive.' Richard Hofstadter, 'What Happened to the Antitrust Movement ?', in E. Thomas Sullivan (ed.), *The Political Economy of the Sherman Act* (Oxford University Press, 1991), 20, at 26.

[10]See, generally, Harding et al., above, n. 3.

[11]Williams, above, n. 5, at 255.

[12]Case C-36/02, *Omega v. Bonn* (2004), ECLI:EU:C:2004:614.

[13]Williams, above, n. 5, at 255-6.

So, in this quite typical case involving the balancing of competing rights claims, both of which involved high order fundamental rights, the approach is to employ a burden of argument whereby the claimant against the Single Market integration right has to show convincing necessity and proportionality in order to defeat a presumption in favour of that integration right.

Such an analysis then raises the argument that the economic rights that serve Single Market integration derive their fundamental character, and indeed prevail, on account of their instrumental function. In that sense, these rights are fundamental within the confines of the Single Market ideology, rather than being inherently fundamental in a broader sense. Integration rights, as EU fundamental rights, serve the needs of *effet utile* in the same way as the doctrines of supremacy and direct effect, in that the beneficiaries of Single Market rules have been recruited as enforcement agents in relation to those rules, encouraged and empowered to assert their rights. Whether as traders or consumers, such parties have become both the beneficiaries and the agents of integration, and as such this may be put forward as a reading of the basic rights project in this context. In this way, it is also a kind of answer to the question—what is so crucial (and therefore fundamental in rights terms) about the opportunity to export certain products, or to have maximum choice in buying certain products, and for this interest to prevail over, for instance, a risk to environmental protection, or freedom of expression?

Moreover, to analyse the matter in terms of an imperative of economic integration, may also inform judgments and choices when necessary as between competing economic rights which both serve integration in this way. In economic terms a supplier and a consumer, although by definition in need of each other, may nonetheless stand in opposition. For instance, the supplier's freedom to determine price, conditions of supply, or level of profit may be countered by the consumer's demands in relation to choice, cost and standards of the commodity supplied. The resolution of these competing economic claims is the standard diet of competition regulation, but in the EU context will be carried out with reference to appropriate conditions of competition *for the effective functioning of the Single Market*. Thus the message to both the trader and the consumer is that it is not their position as one or the other in the chain of supply and demand which will be determinative, but rather an evaluation of their situation as actors within the Single Market. This frame for interpretation of the scope and content of such claims to basic legal protection can be traced of course to the Court of Justice's classic statement regarding the 'discovery' of inherent Community law protection of fundamental rights at the start of the 1970s: 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.'[14] Or, rather more fully and explicitly, as was made clear in the following explanation by the Court of Justice:

> *The fundamental rights* recognized by the Court *are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of these rights*, in particular in the context of a common organization of the market, provided that these restrictions in fact correspond to objectives of general interest pursued by the Community *and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights.*[15]

This has been taken forward into the language of the Charter of Fundamental Rights of the EU, for instance in Article 16 which refers to the 'freedom to conduct a business in accordance with Union law', or in Article 52 that 'limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union'. If sense is to be made of the fundamental nature of basic rights, this can be best done through an enquiry into the interest protected by such rights, and in a contemporary European context, fundamental trading and consumer rights may be best understood as serving an interest of market integration.

[14]Case 11/70, *Internationale Handelsgesellschaft v EVsT* (1970), ECLI:EU:C:1970:114, at 1134.

[15]Case 5/88, *Wauchauf* (1989) ECR 2639 (emphasis added).

4 | 'INTEGRATION RIGHTS': FUNDAMENTAL OR PART OF A 'BANAL EXERCISE'?

Viewing matters in this way may also help with the observation that many judicial statements and outcomes regarding economic rights in the EU context appear to have a small-scale technical character rather than that of grand constitutional argument. In many cases in which basic rights argumentation has been deployed, the factual background may strike many outside observers as very mundane and routine, so leading to an impression of a lot of noise about little things. The classic and ground-breaking *Internationale Handelsgesellschaft* litigation and rulings by the Court of Justice[16] and the Bundesverfassungsgericht[17] provides an example. The litigation and argument arose out of an administrative procedure relating to the issue of export licences in the cereal market and more specifically the forfeit of a deposit payment on account of failure to carry out an intended export. To claim that such an economic loss[18] was tantamount to violation of legally fundamental guarantees of economic freedom would strike many as a trivialisation of significant legal argument, yet the matter was considered seriously at the highest judicial level. Responding to that view, it can of course be said that the case itself was a convenient legal trigger for an episode of judicial politics and constitutional development, and also that this may be characteristic of the case law method (in the same way that a foundational statement of the English law of negligence in tort law arose from an incident involving a snail in a bottle of lemonade[19]). But whatever might be said about the strategies and tactics of legal development should not divert us from the factual banality behind such development, since that will also affect the outcome of the particular case and in that way also the process of legal development. So, in *International Handelsgesellschaft*, the predictable, almost inevitable, judicial conclusion was that, whatever basic economic freedom may be claimed, that freedom is *of course* not absolute and can *easily* be defeated by countervailing claims based on other interests (in that instance, a reasonable procedure of administrative efficiency for purposes of market regulation and the project of integration). Closer examination of the judicial language in that ruling demonstrates that the real issue is a matter of reasonable and necessary regulation, with particular reference to the established criteria of *force majeure*. Applying that latter concept, the Court of Justice stated:

> *Beyond such occurrences, for which they cannot be held responsible, importers and exporters are obliged to comply with the provisions of the agricultural regulations and may not substitute for them considerations based upon their own interests.*[20]

For, as explained in the detailed analysis carried out by AG Dutheillet de Lamothe regarding the purpose and advantages of the deposit payments, as a device within a system of export refunds ultimately aimed at providing a fair standard of living for European producers, the deposit system was 'both in its principle and detailed application necessary and even indispensable to the proper functioning of the common market in cereals.'[21] The deposit, and risk of its forfeiture, should then be seen as a 'sacrifice' which should be accepted by exporters 'to that end'. In other words, the loss of the deposit payment may be seen as a business risk which was reasonable within that greater scheme.[22]

[16]Case 11/70, above, n. 14.

[17]English language version published in (1974) 2 CMLR 540.

[18]The amount forfeited by the exporter in that case was DM17,000, equivalent then to about £3000.

[19]*Donoghue v Stevenson* (1932) AC 562 (House of Lords).

[20]Case 11/70, above, n. 14, at 1138.

[21]*Ibid*., at 1152. The forfeiture mechanism was seen to be the least onerous way of enabling the Commission to gain a 'view of the market' by predicting trade flows.

[22]Should business be risk-free? To assert an absolute right of disposition of property would appear to argue so! In which case there would be some force in Bentham's argument about 'nonsense on stilts' (Jeremy Bentham, *Anarchical Fallacies*, in vol. 2 of Bowring (ed.), *Works* (1843). See, also, Philip Schofield, Catherine Pease-Watkin and Cyprian Blamires (eds.), *Rights, Representation, and Reform—Nonsense upon Stilts and Other Writings on the French Revolution* (Clarendon Press, 2002)). Note as well the comment by J. D.B. Mitchell in correspondence, referring to this kind of EC litigation, in *The Times* newspaper in January 1975: 'It is well known that those who deal in margins sometimes get their fingers burnt, when too close to the margin. There is nothing odd about this.' (Mitchell was a professor at Edinburgh University and at the Europa Institute there.)

A similar reading may be made of so many of the cases which over the years have contributed to what on paper appears to be an impressive jurisprudence and judicial edifice of fundamental trading and consumer rights, whether the context be, for instance, regulation of the agricultural market or competition policy. So, to use a somewhat different example, in the *National Panasonic* case,[23] a bold claim was presented alleging violation of the right to privacy following an unannounced inspection as part of a competition investigation, and was accepted an arguable claim, but then easily and unsurprisingly resolved on the basis of a common sense conclusion that the whole system of investigation would be rendered ineffective without the use of such a power. True enough, in some of these cases a lot of money (or profit) may be at stake, but the legal argument tends to be everyday rather than monumental.

The characterisation of what has happened in this context should recall Martti Koskenniemi's argument that the main focus of human rights in Europe has become a

> *banal administrative recourse to rights language in order to buttress one's political priorities … the European Court's judicial everyday is the banal exercise of coping with conflicts of (most commonly economic) interests, and allocating scarce resources. The fact that those interests are dressed in rights language does not change this pattern, but is does obscure the political nature of the task.*[24]

The result, then, for Koskenniemi, is that if there is 'no single vision of the good life that rights would express, then everything hinges on the appreciation of the context, on the act of *ad hoc* balancing', using a 'technocratic language that leaves no room for the articulation or realization of conceptions of the good'.[25] Koskenniemi refers in a number of places to the 'banal' and 'mundane' character of this technocratic, *ad hoc* balancing exercise, which provides the substance of much of the jurisprudence of the European courts. That would not be to deny the elaborative achievement and theoretical contribution of a vast body of legal argument, rights talk and discourse. In the field of competition law alone, over the last 40 years the European courts have evolved a vast body of doctrine and practice establishing substantive and procedural rights for business actors and invigorated a debate regarding the provision for claimant status of corporate persons,[26] so extending notions of agency in this context. The question is how to read the significance of this kind of development as such. Sure enough, it has drawn a new map of corporate basic rights and provided a certain kind of voice to such actors—but with what consequences? Taking Koskenniemi's view, this may be an articulation of the banal, but the question then concerns the political and moral outcome of all of that as rights talk.

The answer depends on the disciplinary location of any task of assessment of such action as rights talk. This is also a matter of what Koskenniemi has described as 'field constitution', of the use of language to structure a normative field. Taking the jurisprudence of the European Court of Justice as an example, he argues that 'the Court has in a particularly striking way also reconstituted the field of economic activity in terms of human rights', [and then quoting the Court of Justice]:

> *it should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.*[27]

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[23]Case 136/79, *National Panasonic (UK) Limited v Commission of the European Communities*, ECLI:EU:C:1980:169.

[24]Martti Koskenniemi, 'The Effect of Rights on Political Culture', in Phlip Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999), 99, at 110.

[25]*Ibid*., at 99.

[26]For an overview and wider analysis, see Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Oxford University Press, 2nd edn, 2010), ch 7.

[27]Koskenniemi, above, n. 24, at 106. Case 240/63, *Procureur de la République v Association de défense des brûleurs d'huiles usagées*, ECLI:EU:C:1985:59, at 548.

But that is field constitution as a legal field, it is rights talk as legal discourse, aimed first and consumed first by lawyers and courts. It is to assert, for instance, that trading freedom comprises important rights to be taken seriously, and that these rights can be asserted by corporate, non-human actors, and that has certainly transformed discourse and understandings in the legal domain. In that way, it has generated legal action, time and energy in professional legal practice, litigation and judicial considerations, and legal scholarship. That in itself is an important reality, in the form of a burgeoning legal industry which as such is worth a great deal of money and generates economic activity in its own right (think of the emergence of public regulatory bodies as monitors and arbiters of these arguments,[28] of specialist lawyers engaging in a new field of lucrative legal practice,[29] and investment in research into what is happening—witness the writing of this paper). As a matter of legal scholarship, one reactive outcome has been an agonising about corporate roles and specifically the question of corporate entitlement to basic human rights protection and how corporate persons fit into that whole scheme of elevated legal protection.[30] And that in itself is a worthwhile and progressive field of intellectual and philosophical enquiry—how do we understand and compare human individual and non-human corporate entities in a world in which the two have an important and inescapable co-existence?[31] In that way, the rights talk has stimulated a valuable reflection and self-assessment of the nature of contemporary society.

But that kind of probing and wider and deeper analysis also indicates the hazard of restricting the frame of discussion to one disciplinary domain. If an assessment is attempted of the outcome of rights talk in relation to economic interest and activity in a European context, the answer may well be, broadly speaking, 'a lot of noise but not much change' (that is, the significance has been rhetorical). As Koskenniemi, again, expressed the matter:

> *I do not hold the Benthamite view that that rights talk is 'nonsense upon stilts'. I do not think that rights have absolutely no value or that they encapsulate a bourgeois ideology in contrast to some deeper truth.*[32]

But he does argue that the central focus of human rights in Europe today is a banal administrative recourse to rights language.[33] Similarly, the conclusion of another study of 'human rights in the marketplace' was that much of the activity involving an assertion of economic rights

> *operates rather like admission to a vestibule. For instance, as under the European system, corporate actors are admitted into the house of basic rights protection: the door is opened with an apparent act of welcome. But frequently they proceed no further than the entrance hall, before being politely refused further entry. They have come into the domain of derogation and, after all, their basic right is qualified—it turns out that they did not hold a trump card. In a sense, this is something of a tease, combining a politic open-handedness with a hard-nosed decision making, a willingness to hear the case coupled with a resolve to grant sparingly. Such an approach gratifies an expansive concept of basic rights protection, but privately admits the danger of devaluing the currency of that system of protection. Under such a model the trump card would seem to be the public interest derogation.*[34]

On the basis of this analysis, the important site for the resolution of economic rights argument is the derogation zone, where matters are guided very much by an application of proportionality and necessity, and this would

[28]See, for instance, Christopher Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation', in Caron Beaton-Wells and Ariel Ezrachi (eds.), *Criminalising Cartels* (Hart, 2011).

[29]*Ibid*.

[30]See, in particular, Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press, 2006); Anna Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights', (2007) 7 *Human Rights Review*, 511.

[31]See, generally, Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan Publishing, 2007).

[32]Koskenniemi, above, n. 24, at 99.

[33]*Ibid*., at 100.

[34]Harding et al., above, n. 3, at 243.

correspond with Koskenniemi's depiction of a rather technocratic process. And given the typical subject-matter of many of these claims, should much else be expected as a matter of judicial resolution?

But does this imply that a playing of the fundamental economic rights trump card is something of a legal trick, or a sham? Such a question should return the discussion to some consideration of the role of rights talk in this context. One way to read the EU situation—which now comprises a large body of litigation and case law in relation to market regulation and trading activity—is that the rights talk has stimulated this kind of legal process, and enabled the consideration of these questions at a senior judicial level. Whatever the outcomes of these cases, they are fully considered and authoritative and over time contribute to a considerable corpus of law. That view would also include a certain historical reading of European judicial politics: that the Court of Justice cast the subject as a matter of fundamental rights discussion as a way of drawing it into its own jurisdiction and opportunity for judicial resolution and development of law. In that way, the fundamental rights talk is a means to steer the development of policy and law towards judicial consideration, and by courts of a certain kind and at a certain level. To take the one example of the legal entitlement and standing of corporate actors, referred to above—in Europe that legal position of the corporate person has been established quite easily, without too much argument, largely on account of the willingness of the European Court of Human Rights and the Court of Justice to adopt that inclusive approach .[35] That may also serve as an example of what is also referred to above as a notable European 'rights culture', and an important aspect of the latter is of course the prominent role of courts in determining particular issues. Put very bluntly, this may be seen as a matter of courts ensuring that they have control, or at least some control, even if that means that much of the time courts must grapple with 'banal' issues.

Moreover, even if a survey of case law may suggest that certain economic actors (such as large corporations as traders) have their day in court but do not always win that day,[36] the day in court does provide a platform for argument and debate regarding their interests, and this informed and legally expert debate may have a longer term impact on policy and practice. As Harding et al. argue:

> *in the context of EC competition regulation, companies subject to investigation rarely demonstrate in court serious violations of their rights of defence. But the fact that such rights may be invoked in the first place may well have ensured that regulators aim at a higher standard in the conduct of investigations, so as to avoid formal determinations of rights infringement. Thus, at the meta-level, a 'chill factor' may operate, deterring potential violations and inculcating a different general culture and standard of behaviour.*[37]

There is another potential value in fundamental rights talk as a broad legal strategy, which applies both in the context of integration rights and more widely regarding economic rights (as will be discussed further below). Discussion within legal scholarship should take care not to become embedded in the idea that law is not worthwhile or effective if it cannot be easily translated into successful courtroom argument, and rights based argument may be especially prone to such an outlook.[38] Legal discourse (and its underlying moral and political argument) may have an impact in a number of ways and in a number of locations, not only in a courtroom but also in the 'legal hinterland' of pre-legislative debate, negotiated action, comitology and administrative practice. This may result in 'some change in the normative landscape which is more concretely evident in shifts in attitude and culture'[39]—for instance, the *de facto* alteration of position and modification of policy, or reallocation of resources, or change in administrative practice.

[35]See, for instance, Emberland and Grear, above, n. 30. Both stress the way in which the ECHR system and the EU project of fundamental rights protection are informed by the core values of the capitalist system and the liberal State, in which the company as a protagonist of private enterprise has a natural place.

[36]See, generally, Harding et al., above, n. 3.

[37]*Ibid*., at 99.

[38]This was for some time a tendency in relation to international law—if there is not a readily enforceable claim by 'normal' court process, or a court of compulsory jurisdiction, could it be taken seriously as 'real' law? See, e.g., H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1962), ch 10.

[39]Harding et al., *Human Rights in the Market Place*, above, n. 3, at 234.

All of the above suggests, then, the need for a more careful reading of the role and consequences of the strategy of formulating interests and claims in the vocabulary of fundamental rights. The discourse of economic freedom and basic economic rights has been significant in the EU context, (a) as discourse, (b) in support of the project of economic integration, and (c) in some transformation of the normative landscape (e.g., in enabling a greater legal voice for corporate actors, or in relation to standards of administrative practice and regulatory action). And it is important to appreciate how such developments regarding economic rights may differ in their form, impression and impact in comparison with other categories of right, especially those described as political.

5 | 'VULNERABILITY RIGHTS'

So much for economic rights in the context of market integration; but what, then, of economic rights as a matter of welfare economics or freedom from want or poverty, what may be broadly categorised as 'vulnerability' rights? It is important to appreciate that there is a world of difference in the respective position and needs of, on the one hand, transnational corporate actors or highly qualified professional individuals, and on the other hand individuals who are unemployed or deeply indebted and indigent and for whom the EU freedoms and opportunities are simply an irrelevance,[40] in that whatever may be said in theory about their entitlement as EU citizens, in practical terms they cannot clamber onto the platform for claiming that entitlement.[41] How can the economic rights discourse be utilised by this latter category (which in quantitative terms comprises millions of people[42])?

This category of economic rights features less obviously in EU instruments and case law, but is embodied in other relevant and applicable instruments and sources, notably the European Social Charter (revised, 1996) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997). The Social Charter contains detailed provisions on the right to work and access to social welfare, but also a more general right to protection against poverty and social exclusion in Article 30. The latter requires the State parties to promote and review the effective access of persons who live or risk living in a situation of social exclusion or poverty' to a clutch of supportive provisions (employment, housing, training, education, culture and social and medical assistance). Social exclusion is now a well-established concept and policy tool, subject to frequent measurement and review at both national and EU levels, often employing the AROPE definition and assessment agreed by the European Council in 2010 as part of its Europe 2020 Strategy for growth, and measured by three indicators: at-risk-of-poverty; severe material deprivation; and living in households with very low work intensity.[43] The Europe 2020 Strategy has set the target of 'lifting at least 20 million people out of the risk of policy and social exclusion by 2020 compared to 2008.[44] Moreover, the European Parliament adopted a resolution in January 2017,[45] followed by a European Commission proposal in April 2017,[46] to establish a

[40]More colloquially, those on 'Dead End Street': 'No chance to emigrate, I'm deep in debt and now it's much too late. We both want to work so hard, we can't get the chance' (Ray Davies, *Dead End Street*, 1966).

[41]In political terms, although perhaps controversially, this distinction may be linked to the dynamic of the 2016 UK referendum on EU membership. There is a perception that the leave vote was fuelled by a significant disaffection, arising from a sense (whether right or wrong) that EU benefits and opportunities were the preserve of a 'cosmopolitan elite' and did not extend to more deprived sections of society.

[42]For instance, according to a 2009 calculation, some 113 million people in the EU were at risk of social exclusion (see Orsolaya Lelkes and Katrin Gasior, 'Income Poverty and Social Exclusion in the EU: Situation in 2008 and Trends', European Centre for Social Policy and Research, Vienna, Policy Brief, 2012). 2008 data for the EU-27 is used as the baseline for monitoring progress towards the poverty target of the Europe 2020 Strategy.

[43]For an earlier history and background, see Rob Atkinson and Simin da Voudi, 'The Concept of Social Exclusion in the European Union: Context, Development and Possibilities', (2000) 38 *Journal of Common Market Studies*, 427. See also Lelkes and Gasior, above, n. 42.

[44]See Eurostat, 'Europe 2020 Indicators—Poverty and Social Exclusion', data from March 2017. The main findings from the March 2017 report may be referred to as a detailed source of information regarding the present position across the EU.

[45]European Parliament Resolution on the European Pillar of Social Rights, 19 January 2017 (2016/2095/INI).

[46]Commission Recommendation on the European Pillar of Social Rights, 26 April 2017, C (2017) 2600 final.

'European Pillar of Social Rights', to be based on a joint proclamation of the Council, Commission and Parliament, and structured around three categories of principles and rights: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. What may here be altogether conceptualised as a general 'freedom from social exclusion and poverty' may in more specific terms be linked to a range of legal guarantees regarding work, housing, social welfare, equality and non-discrimination in a number of instruments, both outwith (e.g. ILO Conventions, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the revised European Social Charter) and also to some extent within the EU (e.g. the Charter of Fundamental Rights). Especially taking into account linkage with the non-discrimination principle and particular guarantees relating to issues of age, gender and disability, there is clearly a well-established corpus of basic economic rights which may be drawn upon in the European context to challenge and respond to vulnerability in terms of social exclusion and risk of poverty.

There is, then, some real potential to shift the focus and invest in the deployment and development of the basic economic rights argument in this context, drawing theoretically on the second of Rawls' basic principles of social justice, that social and economic inequalities should be arranged so as to be of the greatest benefit to the least advantaged.[47] Such a project may not in the shorter term be so much a matter for the Court of Justice and other courts,[48] but rather something for the policy-making and legislative institutions within the EU to take on board with some determination and energy. As just noted above, there is certainly an awareness and a rhetoric on the part of the Council, Parliament and Commission, evident in the Europe 2020 Strategy and idea of a Pillar of Social Rights. But what are the prospects for conversion of rhetoric into effective action, even in the context of the Commission being now regarded as energised in a rights-enhancement role in recent years? Some commentators remain pessimistic. Williams, for example, in addressing the Commission's resolve to act as a promoter of this kind of economic right, suggests that

> *Perhaps the best place to examine this is not at the margins of procedure, but at the heart of crisis. Economic downturn and the re-emergence of austerity as a seemingly unassailable (albeit perhaps temporary) condition has placed something of a spotlight on the underlying position of the Commission vis-à-vis human rights.*[49]

But then:

> *Unfortunately, the economic crisis of the last few years has seen a relative* inability *on the part of the Commission to see matters of justice in rights terms. The survival of the Union, and particularly the Eurozone, has taken precedence.*[50]

Williams' assessment is that, despite its rhetoric, the Commission has proven to be complicit in providing support for admittedly rights-threatening[51] austerity policies, with consequences which are adverse in respect of social and economic justice and inter-generational equity, and also for the healthy functioning of the democratic process.

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[47]John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

[48]To what extent are such rights easily justiciable? There is some ongoing debate on this question. As Andrew Clapham has noted: 'A main concern is that economic and social policy is best determined by policy makers who are democratically accountable, and not by unelected judges with no specialized knowledge of how to prioritize the distribution of limited resources … The result is that, in those instances when courts have adjudicated economic, social and cultural rights, judges have been careful not to impinge overly on the roles of the legislature and the executive.' Andrew Clapham, *Human Rights: A very Short Introduction* (Oxford University Press, 2007), at 121. Some research has contested the difficulties of justiciability in this context—see, e.g., Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experience of Justiciability* (International Commission of Jurists, 2008).

[49]Williams, above, n. 5, at 264.

[50]*Ibid*., at 266.

[51]See the reports by the European Union Agency for Fundamental Rights, 'Protecting Fundamental Rights during the Economic Crisis', Working Paper, December 2010; Council of Europe Commissioner for Human Rights, 'Safeguarding Human Rights in Times of Economic Crisis', Issue Paper, November 2013.

Realistically, this is a project with tough prospects, and some main strategic lines may be suggested and urged to take matters forward in the near future: first, a determination to address the large-scale problem of exclusion and poverty through basic rights argument which relies politically on a concern about massive discriminations; secondly, at the State and governmental level, to establish a shared moral responsibility to adjust and re-balance in the wake of gains and losses, in the form of what the German political sociologist Claus Offe has termed 'remedial responsibility'; and thirdly, to draw upon the role of reporting and monitoring organisations and feed into civil society debates and activity.

5.1 | Basic rights argument as anti-discrimination policy

Admittedly, asserting and framing an argument based on an *individual's* right to work or to a minimum standard of living, in both conceptual and in practical and strategic terms, may be challenging, if only as a matter of demonstrating a sufficient link between policy and a personal impact. However, there is plentiful evidence of social exclusion and economic deprivation on a large scale, and also of its variable and discriminatory distribution. This is manifest in the annual Eurostat data and analyses. In this way, a larger-scale collective discriminatory impact may be more convincingly presented as a serious violation of basic rights. This is so across both space and time. There is a degree of social exclusion, poverty and unemployment in all Member States of the EU, but clearly the scale of these phenomena differs significantly in geographical terms, and especially as between the south-east and the north-west of the continent.[52] There is also a disturbing inter-generational inequality emerging now, which has been exacerbated by funding crises of recent years—for instance, in the way in which younger generations within British society now face a blighted economic future of loan debt and investment freeze as a result of higher education funding and fee-paying policies.[53] In this kind of context the most effective strategy to exploit the moral and political capital of rights violation argument may be to channel this argument through the conceptual frame of serious and large-scale discrimination. The socially and economically indigent may be more effectively served by class action, as in the case of other disadvantaged categories, such as those affected by gender, race, disability and age discrimination. Again, as Williams has argued: 'the Commission's understanding of the "fundamental rights context" demonstrates a willingness to see human rights issues as societal and not purely individual concerns.'[54]

5.2 | Solidarity and remedial responsibility

In a number of recent writings,[55] Claus Offe has advocated an exit route from the Eurozone crisis 'trap', which draws upon an argument that the financial crisis and the Eurozone difficulties comprise a mess which we all brought upon ourselves collectively but which has had massively uneven impacts (e.g., Germany compared to Greece). Collectively brought about, it should then in normative terms be collectively resolved as a matter of solidarity. The gist of Offe's argument is as follows:

> *What would help, in my view, is not to allocate* blame *retrospectively but what I would call forward-looking* remedial responsibility. *The moral principle underlying this move is simple. It postulates that the* less *an agent (member state and its economy) has suffered as a consequence of the mistakes collectively made or the* more *it even has benefitted from them having been made (through interest rates which are lower than they otherwise would be, and external exchange rates of the Euro more favourable), the* greater *the*

[52]Eurostat, above, n. 44.

[53]The present system of university study fees in the UK has recently been referred to the Competition and Markets Authority in the light of its alleged anti-competitive and unfair character, leaving aside its acknowledged detrimental long-term economic impact for the students concerned.

[54]Williams, above, n. 5, at 265–266.

[55]Claus Offe, 'Europe Entrapped: Does the EU have the Political Capacity to Overcome its Current Crisis?' (2013) 19 *European Law Journal*, 595; *Europe Entrapped* (Polity Press, 2014).

> *share of the burdens the agent must shoulder in compensating others for adverse consequences resulting from the original mistake.*[56]

The application of this principle would mean, for instance, the reading of a measure such as debt mutualisation as a matter of beneficial solidarity rather than altruistic donation. What Offe urges as a moral principle and as sensible longer term political economy may also be energised by normative argument along the line of basic rights. In short, it is possible to embrace a vocabulary of 'solidarity rights'. In fact, this has been done, and is being done in other contexts—for instance, in relation to the earlier process of decolonisation, or now in the cause of protection of the global environment, and sustainable development.

This kind of argument could also be set in the wider context of general equitable principles of international law, as a platform for promoting such solidarity rights. There may be some analogy, for instance, with the doctrine of 'odious debt' in international law, although that envisages a process of debt repudiation or renegotiation arising from an 'odious' political regime which had incurred an international debt contrary to the wishes or interests of a population and used for illegitimate purposes.[57] But there is some underlying common moral and political ground in this kind of discourse. An instructive recent analogy is an argument of co-responsibility in relation to the Norwegian ship export debt.[58] This involved a decision by the Norwegian Government in 2006 to cancel debt amounting to US$80 million arising from lending to developing countries as part of a ship export campaign in 1976–80 and guaranteed through the Norwegian Institute for Export Credits. The decision was based on an assessment that Norway should share responsibility with the debtor countries for the failure of the programme as a development policy, on account of inadequate needs analyses and risk assessment. In effect, this was a finding of irresponsible or bad lending, motivated by domestic concerns. This example is some way removed from the taint of odious or illegitimate activity, but the idea of co-responsibility did draw upon a broader argument of equity in the relationship between debtor and creditor.

5.3 | Reporting and monitoring: discourse as action

Awareness, information and discussion are important starting points for purposes of basic rights argument, and calls for formal legal process and compulsory jurisdiction should not be allowed to obscure the fact that talk in itself may have consequences. As writers such as Andrew Clapham and Michael Ignatieff have argued, the value of rights talk is to provide a convincing legal vocabulary—in Clapham's words, 'playing the "human rights card" can be persuasive, sometimes even conclusive',[59] and as Ignatieff has argued:

> *rights are not the universal credo of a global society, nor a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, and the bare human minimum from which different areas of flourishing can take root.*[60]

Indeed, there is a huge body of basic rights talk in the contemporary world; the important task and goal (which may be formally based on States' obligations under Article 30 of the revised European Social Charter) is to disseminate that discourse for purposes of policy formation, legislation and public and civil society debate,

[56]Offe, 'Europe Entrapped', above, n. 55, at 605. But as Offe quickly concedes: 'Yet, German political elites and publics are far from *appreciating* this answer as compelling and from acting accordingly—quite the cinerary and certainly not at a time when incumbent parties and governments are facing national elections' (*ibid*.).

[57]For a useful overview of the doctrine and its application under international law, see Robert Howse, 'The Concept of Odious Debt in Public International law', UNCTAD Discussion Paper No. 185, July 2007, UNCTAD/OSG/DP/2007/4.

[58]See Kjetil G. Abildsnes, 'Why Norway Took Creditor Responsibility—The Case of the Ship Export Campaign', Norwegian Debt Campaign and Norwegian Forum for Environment and Development, March 2007.

[59]Clapham, above, n. 48, at 1.

[60]Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001), at 95.

and not just for purposes of formal *ex post facto* remedial action. This is particularly true in the context of economic and social rights, where harms are widely dispersed and the capacity for individual initiative and legal action thereby limited. Realisation of economic rights and economic justice requires effective political and legal action, and that in turn depends on empowerment through information, informed analysis and strategic argument.

Take just one example of how this process should be followed through. In 2013 the Council of Europe Commissioner for Human Rights published an issue paper, *Safeguarding human rights in times of economic crisis*.[61] This paper supplied an informed analysis of the impact of governmental austerity measures and the economic crisis of the first decade of the millennium on the enjoyment of human rights. The data and analysis was accompanied by a list of recommended strategies, including for instance: the implementation of transparency, participation and public accountability throughout the economic and social policy cycle; the carrying out of systematic human rights and equality impact assessments; regulation of the financial sector in the interests of human rights protection; engagement with and support of an active civil society; integration of a human rights approach in the regular work of public administration; and the empowerment of national agencies such as ombudsmen, rights commissions and equality bodies.[62] The value of this kind of reporting process is that it identifies the rights at risk but uses rights talk to address that risk.

6 | BASIC ECONOMIC RIGHTS: THE RECORD SO FAR

What does the record reveal? Certainly, there has been a large amount of rights talk in the domain of economic action and opportunity and that itself is something of significance. But measuring outcomes and any impact on policy and governance of the market is open to argument and discussion, not least because this will inevitably be carried out through some ideological lens. Using the above categorisation of integration rights and vulnerability rights draws us towards some contrary conclusions. In the context of the European Single Market, dominated by a clearly conceived and enunciated underlying policy, and in a legal environment which is highly justiciable, there has indeed been much action and a large body of detailed law as a result. Yet all of this is subject to a critical evaluation: that there has been much noise and chatter, but in the final analysis this has been a technocratic regulation of the everyday and the banal, playing around with ideas of what is proportional and necessary in the zone of derogation, rather than high-minded constitutional theory. On the other hand, addressing the economic disadvantage of millions of citizens in the era of austerity through the language, rhetoric and argument of basic entitlements would appear to be a more challenging exercise, although something very worthwhile as a matter of social and economic governance. Certainly, we ought not to be too easily persuaded by the glib assertion by *The Economist* in 2001 that 'the moral imperative to stop poverty or disease is … not as convincing as the moral imperative to stop torture'.[63] Rather, it should be a matter of responding to the call by Janet Dine, writing in 2005 before the global financial crisis and austerity:

> *We have an international trading and financial system which creates destitution and injustice … it needs experts of considerable sophistication to try and unpick the injustice. Most of all it needs the compassion and goodwill of people of the wealthy world to demand the reconstruction of the trading system and the companies operating within it, which provide so much of that wealth.*[64]

[61]CE Commissioner for Human Rights, above, n. 51.

[62]*Ibid*., at 9–12.

[63]*The Economist*, 18 August 2001, 'Righting Wrongs', as cited by Clapham in *Human Rights*, above, n. 48, at 120.

[64]Janet Dine, *Companies, International Trade and Human Rights* (Cambridge University Press, 2005, 2010), preface, at x. See also Thomas W. Pogge, *World Poverty and Human Rights* (Polity Press, 2008), for similar argument.

In the twenty-first century, basic rights argument has a strong political as well as legal value and so there is a rich potential for this kind of legal argument, in particular for it to be used as a strategy towards redistributive justice. It is important, therefore, to understand how that potential may be exploited, and for what purposes, bearing in mind the truism that any choice of strategy will be ultimately guided by political preference.

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