

THE EUROPEAN SOCIAL CHARTER AND THE UK: WHY IT MATTERS

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Abstract

The ESC is a Council of Europe treaty instrument which protects a range of fundamental social rights. The UK has ratified the ESC and is bound by its provisions, as are forty-three of the forty-seven member states of the Council of Europe. UK compliance with its obligations under the ESC are monitored by the European Committee on Social Rights (ECSR), the expert body established to assess whether state parties are complying with the requirements of the Charter. The ECSR has repeatedly found the UK not to be in conformity with the Social Charter, identifying substantial defects in how the fundamental social rights sets out in the Charter are implemented within national law and policy. The requirements of the ESC and the conclusions of the ECSR are often overlooked. This is part of a wider pattern whereby social rights are often marginalised within British ‘rights talk’. However, this paper argues that the Social Charter should feature much more prominently in legal and political debate in the UK, along with the UK’s poor record of compliance. Social rights are fundamental to a healthy democracy, and the European Social Charter is an invaluable instrument for assessing how the UK is giving effect to these rights.

Introduction

The ESC is a Council of Europe treaty instrument which sets out a range of binding legal obligations relating to the enjoyment of certain core social rights.¹ Adopted in 1961, the Social Charter is sometimes described as a ‘sister’ instrument to the European Convention on Human Rights (ECHR): just as the ECHR protects fundamental civil and political rights, the ESC was established to safeguard fundamental social rights such as the right to work, the right to organise and take part in collective action, the right to just conditions of work, and the right of families and vulnerable persons to enjoy social protection.²

The UK has ratified the ESC and is bound by its provisions, as are forty-three of the forty-seven member states of the Council of Europe – including all the EU states.³ UK compliance with its obligations under the ESC are monitored by the European Committee on Social Rights (ECSR), the expert body established to assess whether state parties are complying with the requirements of the Charter. The ECSR has repeatedly found the UK not to be in conformity with the Social Charter, identifying substantial defects in how the fundamental social rights sets out in the Charter are implemented within national law and policy. Its findings testify to serious failings in the UK’s record on social rights, which in some circumstances have persisted for decades.

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¹ For an excellent if by now outdated overview of the ESC, see D. Harris and J. D’Arcy, *The European Social Charter* (2nd edn, Transnational Publishers, 2001). See also the collected essays in O. De Schutter (ed.), *The European Social Charter: A Social Constitution for Europe* (Bruylant 2010).

² Its provisions were also intended to help create a common European ‘social space’, by protecting the rights of migrant workers who were nationals of one contracting state to engage in gainful occupation in the territory of other contracting states, and to enjoy associated rights such as the right to family reunification. See Arts 18 and 19 ESC.

³ The only Council of Europe states who have not ratified the ESC are Monaco, Liechtenstein, San Marino, and Switzerland.

However, the requirements of the ESC and the conclusions of the ECSR are often overlooked. The UK's repeated failure to adhere to its obligations under the Social Charter rarely feature in debate about the country's human rights record. This is part of a wider pattern whereby social rights are often marginalised within British 'rights talk'. This paper argues that the Social Charter should feature much more prominently in legal and political debate in the UK, along with the UK's poor record of compliance.

The Missing Social Dimension to UK 'Rights Talk'

In the UK, social rights have been detached from the human rights/civil liberties mainstream for decades.⁴ Their marginalisation takes effect in both law and politics: in both spheres, 'human rights' are usually understood as denoting civil and political entitlements and having little if anything to do with socio-economic concerns. Indeed, it is widely assumed that 'rights talk' is something best avoided in general when it comes to the regulation of socio-economic affairs. Furthermore, entrenched scepticism exists as to whether social rights have any tangible meaning or substantive content.⁵

The language of social rights thus has very little purchase in UK public life.⁶ Legal mechanisms for protecting rights - whether common law-based, or legislative instruments such as the Human Rights Act 1998 - are generally applied in a way that limits their capacity to protect individual access to social entitlements or collective rights to engage in industrial action. For example, it is common for the scope of legally enforceable rights to be reined in if they threaten to spill over into wider socio-economic terrain.⁷ Similarly, public authorities are generally granted very wide margins of discretion whenever courts are asked to review the impact of their decisions in this regard.⁸ It is also rare for social rights to feature in British political discourse: civil and political rights feature prominently in parliamentary scrutiny work, public debate and media commentary, while social rights are usually relegated to the margins of the discussion.⁹ Furthermore, international treaty instruments which are designed to promote respect for social rights, such as the ILO framework of norms or the International Covenant of Economic, Social and Cultural Rights (ICESCR), have little resonance in law or policy.

As a result, issues such as poverty, limited access to social security, restrictions on trade union activities, inadequate housing and so on are therefore rarely conceptualised as affecting fundamental rights. Instead, they are viewed as aspects of collective life which should be regulated by a predominantly utilitarian calculus, with particular emphasis being placed on considerations of economic efficiency as interpreted by the government of the day. Consequently, individuals and

⁴ K. Ewing, 'The Unbalanced Constitution', in T. Campbell, K. Ewing and A. Tomkins, *Sceptical Essays on Human Rights* (OUP, 2001), 103-118; C. O'Connell, 'Legal Accountability and Social Justice', in P. Leyland and N. Bamforth (eds.) *Accountability in Public Law* (Oxford: OUP, 2013), 389-409.

⁵ O'Connell, *ibid.*

⁶ This is in interesting contrast to the situation in many other European states: see C. O'Connell, 'The Present Limits and Future Potential of European Social Constitutionalism', in K. Young, *The Future of Economic and Social Rights* (CUP, 2018), forthcoming.

⁷ For a comprehensive analysis of the case-law, see E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart, Oxford, 2007).

⁸ See e.g. the judgments in *R v North West Lancashire Health Authority ex p A* [2000] 1 W.L.R. 977; *R (AC) v Berkshire West Primary Care Trust* [2011] EWCA Civ 247. Numerous other examples can be given, as set out in O'Connell, n 3 above, and Palmer, *ibid.*

⁹ The index to the excellent edited collection, M. Hunt, H. Hooper and P. Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), a book which is 499 pages long, does not contain a single reference to social rights, or to specific social rights treaty instruments.

groups claiming access to specific forms of social or employment protection, or asserting an entitlement to engage in collective action within the workplace, struggle to invoke the moral and legal force of 'rights talk' in support of their claims – which limits their ability to challenge policies and practices which are asserted to be 'efficient', 'economically rational' or otherwise justified by the prevailing economic utilitarianism of the day.

This sidelining of social rights thus weakens 'rights talk' in the UK. Certain important human interests – the ability to participate in civil life; freedom from abuses of the coercive power of the state; the enjoyment of personal autonomy within the sphere of private life – are currently protected by human rights law while also enjoying plenty of lip service in political rhetoric.¹⁰ But other important human interests – enjoying secured access to adequate shelter, health care and a means of subsistence; being able to withhold one's labour as part of collective industrial action; benefiting from decent levels of social and employment security – lack both legal protection and political acknowledgement.

This difference in treatment is difficult to justify. 'Social' interests are arguably as integral to human flourishing as 'civil and political' interests.¹¹ Furthermore, it is extremely difficult to draw clear-cut distinctions between the content of civil/political and social rights claims and their respective associated interests.¹² Individuals will only be able to participate as equal citizens in the shaping of their own society, and enjoy meaningful liberty in sense of being free from external domination, if both these sets of civil/political and social interests are respected: civil and political liberty means little by itself unless the material and associative conditions necessary to meaningfully enjoy such liberty are also secured, in a manner that respects the equal status of all subjects of the state.¹³ But the absence of a social rights dimension to UK 'right talk' leaves it functionally unable to protect this essential social dimension of citizenship: its legal and political vocabulary is insufficient to counter the corrosion of individual freedom that generated by socio-economic forms of exploitation and dominance.

These defects in UK rights discourse would not matter so much if the social dimension to equal citizenship was secured through other routes, not involving 'rights talk' – as was arguably done in the post-1945 period, via the development of the British welfare state and the accompanying growth of trade union power with its inherent redistributive impact. However the social safety-net provided by the welfare state has been substantially diluted over the last few decades, while union membership and consequently union power has gone into sharp decline. Social security provision has been cut back, state provision of key public goods such as housing and education has sharply

¹⁰ This cloak of protection even extends to include the right to property, which is secured directly through the provisions of Article 1 of the First Protocol of the ECHR and indirectly via an array of administrative law controls: see Ewing, n 3 above.

¹¹ J. Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1–30; A. Sen, *The Idea of Justice* (Harvard University Press, 2009) 379–86.

¹² C. O'Connell, 'The Constitutionalisation of Socio-economic Rights', in H. Alviar García, K. Klare and L. A. Williams (eds.) *Socio-economic Rights in Theory and Practice: Critical Inquiries* (Abingdon and New York: Routledge, 2014), 258–276.

¹³ As Keith Ewing has put it, 'social rights are not simply a consequence of democracy: they are its essential precondition': see K. Ewing, 'Judicial Review, Socio-Economic Rights and the Human Rights Act: Weak Courts, Strong Courts: Judicial Review and Social Welfare Rights in Comparative Constitutional Law' (2009) 7(1) *International Journal of Constitutional Law* 155–169, 168; see also J. King, *Judging Social Rights* (CUP, 2012) 17–57.

declined, and substantial restraints has been imposed on collective action within the employment sphere.¹⁴

Many of these welfare state/labour law 'reforms' have been justified on the neo-liberal basis that they supposedly enhance market freedoms and reduce individual dependence upon the state. However, they have also increased socio-economic vulnerability, subjected individuals to new forms of market-based discipline, and generated greater exposure to the risk of workplace exploitation. They have thus eroded individual autonomy in material and substantive ways, in contrast to the formal, highly abstracted Hayekian vision of liberty underpinning neo-liberalism. But the political appeal of neo-liberalism, coupled with appeals to economic efficiency, have outweighed the utilitarian concerns usually put forward to justify the maintenance of the British welfare state - and supporters of a more expansive concept of 'social citizenship' have not been able to appeal to social rights discourse to push back against these arguments.

Indeed, an interesting contrast exists between the growth in legal and political salience of civil/political rights over the last fifty years or so, and the contraction of protection for the interests associated with social rights during the same time period.¹⁵ The development of administrative law controls since the late 1960s, taken together with the enactment of legislation such as the Human Rights Act 1998 and the high-profile political activism of civil liberties groups such as Liberty, has opened up new opportunities for contesting state action which undermines respect for civil and political rights. However this enhanced protection for civil and political rights has not been translated over into the socio-economic sphere, generating a damaging imbalance as to the interests currently protected in Britain by rights discourse.¹⁶

Attempts to Plug the Social Rights Gap

The lack of this social dimension to British 'rights talk' is increasingly the subject of academic criticism.¹⁷ Furthermore, various civil society organisations have mobilised around this issue and tried to extend rights discourse into the social domain, as have 'official' human rights bodies such as the Equality and Human Rights Commission.¹⁸ Some of this push has been focused on trying to secure greater legal protection of social rights – either by the courts recognising that such rights should be treated as free-standing, enforceable legal entitlements, or else by adopting a wide interpretation of existing legal standards so as to confer more indirect protection on extend forms of

¹⁴ For a general overview, it is difficult to do better than S. Hall, 'The Neo-Liberal Revolution' 25(6) *Journal of Cultural Studies* 705-28.

¹⁵ See for a global perspective on this. S. Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018). This pattern of expansion and contradiction has not been a zero sum game, contrary to the views of some of the more excitable critics of human rights law. The expansion of 'rights talk' in relation to civil and political rights has at times operated so as to enhance social protection, in particular when it comes to the application of non-discrimination rights. But the imbalance persists, not least because civil and political rights protection is consistently read down so as not to extend too far into the terrain of socio-economic or labour rights: see K.D. Ewing and J. Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' [2016] 45(3) *ILJ* 391-422.

¹⁶ Ewing, 'The Unbalanced Constitution', n 3 above.

¹⁷ See e.g. Palmer, n 7 above; Ewing, ns 3 and 15 above, along with multiple other publications.

¹⁸ See e.g. the work of the social consortium Just Fair, outlined at www.just-fair.co.uk. See also the recent sustained work of the Equality and Human Rights Commission in this field, including the publication of its report, *Progress on Socio-economic Rights in Great Britain* (EHRC, 2018), and its highlighted of socio-economic rights in relation to the Grenfell Tower tragedy of June 2017.

civil and political rights protection.¹⁹ Attempts have also been made within the political domain to enhance the profile of international social rights standards within Parliament and the executive, and to encourage greater engagement with such rights in the policy-making process.²⁰

This campaigning work has had some impact. Various parliamentary committees have engaged with socio-economic issues through a social rights lens,²¹ certain court judgments have shown some degree of responsiveness to the social dimension of rights,²² and the concerns of UN special rapporteurs and other human rights bodies relating to poor access to housing, poverty levels and other aspects of socio-economic disadvantage surface periodically in the media.²³

However, entrenched scepticism about the status of social rights remains strong. Furthermore, the fuzzy nature of much social rights dialogue does not always help to challenge or dispel this scepticism. Social rights campaigners like to invoke the relevant UN standards, with their language of ‘minimum core’, ‘progressive realisation’ and ‘non-regression’. However, the content of these standards is often vague. Similarly, the findings of UN experts can also lack precise definition: ‘concern’ is often expressed about socio-economic developments, or certain specific aspects of UK law or policy, but this does not always translate into a detailed diagnosis of what exactly is wrong with the status quo and how it should be modified.²⁴ This vagueness can fuel the impression that social rights discourse does not add much to existing left/progressive political rhetoric about socio-economic issues – and therefore can be comfortably ignored. Furthermore, the lack of clear standards makes it more difficult to call public authorities to account for infringements of such rights, or to incite public debate about a particular set of socio-economic issues.

Another problem exists with the social rights advocacy work undertaken by many civil society organisations in the UK – namely its lack of engagement with labour issues, and with employment-related activism more generally. Labour rights are an integral part of the social rights spectrum, as recognised by the provisions of ICESCR and other instruments. However, civil society activism in this field rarely address issues of workplace exploitation and imbalances of power.²⁵ In turn, trade unions and other organisations focused on labour issues are happy to invoke ILO standards – the original set of social rights guarantees – but rarely invoke other social rights instruments. This tends to split social rights activism into ‘poverty’ and ‘employment’ camps. Some civil society groups may be a little reluctant to associate too closely with the trade unions, out of a fear that social rights campaigning will become excessively associated with the political left. In turn, the unions may be sceptical of apolitical rights activism. Either way, this divide hampers the development of a comprehensive approach to social rights, and helps to keep it marginalised within public debate more generally.

¹⁹ See e.g. the legal arguments made against the ‘bedroom tax’ in cases such as *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16.

²⁰ See e.g. the Just Fair event, ‘Bringing Economic and Social Rights Home’, hosted in Parliament on 8 February 2017, details available at www.just-fair.co.uk/past-events.

²¹ See e.g. Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, 6th Report of Session 2016-7; HCL paper 153; HC 443; 5 April 2017.

²² See e.g. *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

²³ *The Guardian*, ‘UK May have Breached Human Rights Over Grenfell Tower’, 9 March 2018, <https://www.theguardian.com/uk-news/2018/mar/09/grenfell-tower-uk-may-have-breached-human-rights-says-un>.

²⁴ C. O’Cinneide, ‘Austerity and the Faded Dream of a Social Europe’, in A. Nolan (ed.) *Economic and Social Rights after the Global Financial Crisis* (CUP, 2014), 169-201, 195.

²⁵ See the criticisms expressed by Keith Ewing about the failure of the ‘human rights bridge’ to engage with the right to strike: K. Ewing, ‘Yes, Striking is a Human Right’, *The Guardian*, 26 March 2010, <https://www.theguardian.com/commentisfree/libertycentral/2010/mar/26/ba-strike-human-rights>

The Potential Significance of the European Social Charter

Given all of this, the European Social Charter would appear to be an obvious jumping-off point for the development of a more substantive social rights dimension to UK rights discourse. The UK has been bound by this Council of Europe treaty instrument since 1962, when Britain was in the first wave of states to ratify the Charter.²⁶ More specifically, the UK is bound by the entirety of the ESC provisions relating to the right to work (Article 1), to enjoy safe and healthy working conditions (Article 3), to organise and engage in collective bargaining (Articles 5 and 6), to have access to vocational guidance and training (Articles 9–10), health care (Article 10), social and medical assistance (Article 13), to benefit from social welfare services (Article 14), for disabled persons to participate in employment and occupation (Article 15), to protection for families in need of social, economic and legal protection (Article 16) and mothers and children in a similar situation (Article 17), for nationals of a contracting state to be able to engage in a gainful occupation in the territory of other contracting parties (Article 18), and for migrant workers and their families to enjoy social protection (Article 19). The UK is also bound by key sub-paragraphs relating to the right to just conditions of work (Article 2), the right to fair remuneration (Article 5), the right of children to special protection in the employment context (Article 7), the right of women to the same (Article 8), and the right to social security (Article 12).²⁷ In other words, UK ratification of the ESC has committed it to respecting a comprehensive range of social rights.

Furthermore, UK ratification of the ESC opens its record of compliance with these social rights commitments up to formal scrutiny. The Charter establishes a monitoring system based on periodic submissions of national reports, which is similar to the monitoring systems used within the framework of the ILO, and under ICESCR and other UN human rights treaties. Under this monitoring system, the UK government submits an annual report to the ESC's expert supervisory body, the European Committee on Social Rights (ECSR),²⁸ on how it is giving effect to a specific sub-set of its obligations.²⁹ In turn, the ECSR reviews the report and issues its conclusions, identifying situations where the UK is or is not in conformity with the Charter's requirements as interpreted by the Committee. The ECSR's conclusions in respect of national reports are discussed by a Governmental Committee composed of officials from each of the contracting state and then referred to the Committee of Ministers, which can issue recommendations to states to take remedial action to bring

²⁶ When states ratify the ESC, they can elect to be bound by some of the rights obligations it contains, but not others: see U. Khaliq, 'The EU and the European Social Charter: Never the Twain Shall Meet?' (2014) 15 *CYELS* 169, 174. This *à la carte* ratification mechanism was intended to give some states some flexibility in determining what legal commitments they would be bound by under the Charter, in order to accommodate the diverse range of employment, social welfare and legal systems across Europe. However, this flexibility is not absolute. All states must agree to be bound by a minimum number of the substantive legal obligations set out in Part Two of the ESC, including at least two-thirds of what are defined to be the 'core' rights protected by the Charter such as the right to work, the right to collective bargaining, and the right to social security. When it first ratified the ESC in 1962, the UK actually agreed to be bound by more than the minimum number of Charter provisions that state parties are required to accept. It remains bound by these commitments, even if this first flush of enthusiasm for the Charter process is long gone.

²⁷ See in general, Council of Europe, *Acceptance of Provisions of the European Social Charter*, September 2017, available at <https://rm.coe.int/1680630742>.

²⁸ The membership of the ECSR (originally referred to as the 'Committee of Experts') are elected by the Committee of Ministers of the Council of Europe from a list of 'independent experts of the highest integrity and of recognised competence in international social questions': see 1961 Charter, Art 25.

²⁹ State reports are prepared by reference to a standard form which is approved and periodically revised by the Committee of Ministers of the Council of Europe: see www.coe.int/t/dghl/monitoring/socialcharter/ReportForms/FormIndex_en.asp

their national law and policy into conformity with the Charter.³⁰ In other words, the ECSR's legal conclusions are fed into an inter-state political process, the idea being that the contracting states should mutually police each other's compliance with Charter rights as interpreted by the ECSR.³¹

The UK's compliance with the extensive list of social rights protected under the Charter is thus subject to constant review. Furthermore, this review process has been in operation since the 1960s, meaning that an extended chronological record exists of how Britain has over time lived up to its commitments under the ESC.

So, at first glance, the ESC might seem to be the natural platform on which to base a campaign to mainstream social rights in the UK – in the same way that the ECHR has become the touchstone for much civil and political rights activism. Its significance is certainly highlighted in the work of leading social rights academics,³² and has also been acknowledged in publications such as the influential *Manifesto for Labour Law* produced by the Institute for Employment Rights in 2016.³³

Why the European Social Charter Often Lacks Impact

However, the ESC is often overlooked in the recent push to add a social dimension to UK rights discourse. Its provisions are rarely cited, either in court or in the course of political campaigning. Furthermore, even when negative conclusions of the ECSR relating to the UK – of which there are plenty – attract publicity, the UK government is usually able to shrug off negative criticism.

There are several reasons for the limited salience of the ESC within the British context. Some of those reasons relate to the ESC's profile as a pan-European human rights treaty instrument. Others relate specifically to British perceptions of the ESC, and the UK's record of engagement with its provisions. Taken together, they have obscured the importance of the Social Charter – and its potential contribution to giving real substance to UK 'rights talk'.

To start with the more general reasons, it is clear that the Social Charter has an image problem. It tends to be overshadowed by its civil and political sibling treaty instrument within the Council of Europe system of rights protection, namely the ECHR. More widely, it is often obscured by the social provisions of EU law – and confused with the high-profile EU Charter of Fundamental Rights. In general, awareness of the Social Charter remains low, both among legal experts and the wider European population: they may have some awareness of its existence, but even social law or labour law specialists tend to have a vague grasp of its provisions and the functioning of its monitoring system.³⁴

³⁰ For a general overview of the ESC monitoring system, see R. Brillat, 'The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact', in G. De Búrca and B. De Witte (eds), *Social Rights in Europe* (OUP, 2005) 31.

³¹ The Committee's conclusions in respect of national reports constitute formal legal findings within the ESC process: no other body is authorised to provide any other legal interpretation of Charter rights. However, state parties are not under a formal legal obligation to give effect to decisions of the Committee, unlike the case with the European Court of Human Rights under Article 46 ECHR.

³² See e.g. Ewing, n 3 above.

³³ K. Ewing, J. Hendy and C. Jones, *A Manifesto for Labour Law: Towards a Comprehensive Revision of Workers' Rights*, (IER, 2016).

³⁴ The Secretariat that provides support to the ECSR within the Council of Europe is also seriously under-resourced: see the comments by the President of the ECSR, Giuseppe Palmisano, at an exchange of views with the Committee of Ministers of the Council on 21 March 2018, available at <https://rm.coe.int/palmisano-speech-exchange-views-cm-21-03-18-final-en/16807960fb>.

Furthermore, the impact of the ESC is mixed. State parties to the ESC are often slow to amend national law and policy in response to findings of non-conformity by the ECSR. Indeed, some states, including the UK, have (as discussed further below) for decades refused to bring aspects of their law into conformity with the ESC despite multiple non-conformity findings by the ECSR. The Committee of Ministers of the Council of Europe is supposed to monitor state compliance with the ESC, as it does for the ECHR and other Council of Europe human rights instruments. However, the Committee is often reluctant to single out individual non-conforming states for criticism - which means that states do not face the same political pressure to conform to the ESC as applies in respect of the ECHR.³⁵

This is not to say that the ESC lacks impact. In many European states, the text of the Charter and the ECSR's interpretation of its provisions are an important reference point in legal and political debates. In some countries, the ESC even forms part of national law and can be taken into account by courts and tribunals – while, in some other states, the ESC has not been incorporated into domestic law but nevertheless has moral and political weight, with national legislation periodically being adjusted to reflect the requirements of the Charter. However, its impact in certain states has been much more limited. Much depends on the extent to which social rights are taken seriously at the legal and political level within a given state, and also its degree of openness to the influence of supranational standards.³⁶

Given this, it should be no surprise that the ESC has exercised unusually little influence over the development of UK law, especially since the neo-liberal turn of the 1980s. The marginalisation of social rights within UK rights discourse helps to ensure that the ESC is rarely invoked in domestic law and policy debates, despite the UK's clear commitment to be bound by its provisions.³⁷ In addition, international human rights treaty commitments tend to have limited influence over the development of British law and policy (with the significant exception of the ECHR). The Social Charter is no exception: indeed, if anything, the marginal status of social rights has served to limit its influence in Britain even when compared to other unincorporated human rights treaty instruments such as the UN Convention on the Rights of the Child (CRC).

British Euroscepticism is also a factor here. The conjunction of the words 'European', 'social' and 'rights' as they relate to the ESC and the ECSR is guaranteed to trigger eurosceptic ire. Indeed, negative findings by the ECSR in respect of the UK have regularly been dismissed by politicians and media commentators as more 'Brussels interference'. Post-Brexit, this trend is likely to continue – with the added argument being made that the referendum vote to leave the EU should be interpreted as a rejection of all forms of pan-European standard-setting in the socio-economic context. This particular line of argument can be challenged on the basis that the ESC is not an EU instrument: as a Council of Europe member, the UK ratified the Social Charter even before it joined the EU and, unless it chooses to denounce its treaty obligations, it remains bound by its provisions along with Norway, Turkey and a range of other non-EU states. But this Eurosceptic line of attack remains politically potent, and the ESC's salience has clearly been affected in the UK by its perceived link to the EU.³⁸

³⁵ C O'Cinneide, 'Austerity and the Faded Dream of a "Social Europe"', n. 24 above, at 199-201.

³⁶ Ibid.

³⁷ Judy Fudge has argued that this reflects a wider trend involving labour rights instruments more generally: see J. Fudge, 'Constitutionalising Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 6891 *Current Legal Problems* 267–305.

³⁸ Indeed, this may be the primary explanation of the particular reluctance of many UK social rights activists to cite the ECSR's conclusions.

Taken together, the interplay of these different factors have ensured that successive UK governments have been able to disregard repeated ECSR findings of non-conformity without paying any particular legal or political cost. ECSR conclusions are also rarely cited in parliamentary or policy debates. In turn, this lack of salience undercuts the status of the ESC: a vicious cycle is established, whereby the ESC's lack of profile makes activists reluctant to cite it, which in turn helps contribute to its marginalisation in political, legal and policy-making circles.

Furthermore, successive UK governments have shown little enthusiasm for engaging with the requirements of the ESC, at least when it comes to doing anything that goes beyond a bare minimum of formal compliance with the ESC. The UK adheres faithfully to its reporting obligations under the ESC, unlike some other states, and participates on an equal footing with other state parties in the political aspect of the Charter's monitoring process. However, beyond that, UK governments tend to shrug off ECSR findings of non-conformity. They have also shown no interest in ratifying new treaty instruments designed to modernise and expand the scope of the rights protected by the ESC. These include the revised ESC of 1996, a new iteration of the Social Charter which updates and extends the rights protected by the Social Charter system.³⁹ While the clear majority of state parties to the ESC have ratified the revised ESC, the UK has clung to the original Charter of 1961 despite its occasionally outmoded language and narrow scope of application.⁴⁰

The UK has also shown no interest in ratifying the Collective Complaints Protocol to the ESC, which allows representative employee or employer associations and NGOs who enjoy consultative status with the Council of Europe to bring complaints alleging that a 'collective' situation of state non-conformity with ESC rights exists directly to the ECSR.⁴¹ This Protocol has been ratified by seventeen state parties, and the channel it has opened up for complaints to be referred directly to the ECSR has injected new vitality into the ESC mechanism of rights protection – not least because it has enabled the ECSR to develop a more developed social rights jurisprudence, built around a detailed assessment of concrete situations.⁴² However, the UK has remained aloof from this mechanism. This again limits the profile and potential impact of the ESC in the UK context, with Britain remaining cut off from arguably the most dynamic element of the Charter system.

Why the European Social Charter Should Matter

All of these factors explain why the ESC has enjoyed limited salience in Britain. But this does not mean that it has nothing to contribute to UK rights discourse. On the contrary, it has the potential to add much to the impoverished social dimension of existing rights talk, and thus to wider debates about human rights protection and the enjoyment of fundamental liberties in the UK.

To start with, it is worth emphasising the comprehensive nature of the rights protected by the ESC. Even allowing for the more restrictive scope of the original 1961 Charter as opposed to that of the revised Charter of 1996, the range of social rights recognised by the ESC is extensive - extending from the right to work (protected by Article 1 ESC) and the right to a fair remuneration (Article 4) to

³⁹ CETS n° 163, opened for signature in Strasbourg on 3 May 1996.

⁴⁰ State parties who have ratified the revised ESC of 1996 – who constitute the bulk of the Council of Europe's membership, making up thirty-three of the – are subject to a wider range of obligations than states like the UK which stick to the original Charter of 1961.

⁴¹ CETS n° 158, opened for signature in Strasbourg on 9 November 1995. See R. Churchill and U. Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 *European Journal of International Law* 417-456.

⁴² See H. Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee on Social Rights' (2009) 9 *HRLR* 61.

the right to organise (Article 5), the right of access to health care (Article 11), the right to social assistance (protected by Article 13), the right of persons with disabilities to social inclusion (Article 15) and the right of migrant workers and their families to protection and assistance (Article 19). This list of rights was derived from various ILO conventions and recommendations, which had emerged by the late 1950s from the latter body's tripartite decision-making process. As such, the ESC codifies decades-old established international social and labour standards within a single human rights instrument - which by itself should make it a significant point of reference in debates about rights and liberties in the UK.

Furthermore, the standards set out in the ESC are relatively detailed and specific – at least when compared to the highly abstract nature of other social rights guarantees. For example, Article 7 ICESCR guarantees a general right to the 'enjoyment of just and favorable conditions of work', which is stated to involve in particular (i) fair and equal remuneration that guarantees a 'decent living' for workers and their families; (ii) 'safe and healthy working conditions', (iii) 'equal opportunity' in employment, and (iv) reasonable working times and holiday entitlement. In contrast, Articles 2-4 of the ESC cover the same ground but contain much more specific provisions – including for example a guaranteed minimum amount of paid holiday time (Article 2§3 ESC), a requirement to consult with employer and workers' organisations on safety and health measures (Article 3§3 ESC), and a requirement that wage deductions be regulated by law (Article 4§5 ESC).⁴³ Similarly, the ECSR's findings as to whether state parties are complying with their obligations under the ESC tend to be framed in more precise terms than the findings of equivalent UN bodies, especially when it comes to identifying the level of minimum wages or social security support that should be available to all workers in a particular country.⁴⁴ This greater level of detail is important: it means that ESC standards have the potential to provide civil society organisations, trade unions, legislators and others with concrete and specific reference points when it comes to challenging existing law and policy. Vagueness is a significant defect in most social rights discourse, but less of a problem when it comes to the ESC than for other frameworks.

Furthermore, the provisions of the ESC are framed by reference to the shared social values of all European states, as well as the socio-economic conditions that specifically affect their societies. It was possible for the drafters of the ESC to define the rights it protected in more precise terms than was done under ICESCR, because by 1960 there was a general European social model in place: the drafters were able to draw on established practice in most Western European states to fix a minimum level of behavior which all state parties were expected to adhere to, as reflected in for example the specific provisions set out in Article 2§3, 3§3 and 4§5 ESC as cited above.⁴⁵

Similarly, the ECSR in interpreting Charter rights takes particular account of (i) the need to ensure that Charter rights are effectively enjoyed within the specific socio-economic circumstances in play in the state in question, and (ii) the pan-European social values that animate the provisions of the Charter.⁴⁶ As such, the Committee made extensive use of the concept of a 'European consensus' as a

⁴³ For example, contrast the general provisions of Article 7 ICESCR relating to the right to just and favourable conditions of work with the much more specific provisions of Articles 2-4 of the ESC, which cover the same ground.

⁴⁴ This is partially the result of the Committee's established practice of finding states to be either in conformity or not in conformity with the ESC obligations, which over time generates a clear set of baseline requirements which states are expected to respect: in contrast, the UN bodies often just highlight areas of concern, leaving it uncertain as to when exactly a state has crossed the line into non-compliance territory.

⁴⁵ See Harris and D'Arcy, n 1 above.

⁴⁶ The Committee deploys the same interpretative techniques as are used by the European Court of Human Rights and equivalent expert bodies within the UN, Council of Europe and ILO systems to interpret other

way of delineating the scope and substance of the rights protected by the Charter, particularly when it comes to defining the minimum levels of social protection required by the Charter in areas such as the scope of social security coverage, access to health care, minimum wages, health and safety requirements, and protection against employment discrimination. In so doing, the Committee refers to ECHR and EU standards in developing its case-law, although the Committee emphasises that it adopts its own independent interpretation of the Charter.⁴⁷ The Committee also cross-refers to ICESCR and in particular ILO standards, reflecting the latter's influence on the formation of the text of the Charter: as such, its approach is not insularly European, but rather takes account of international social rights standards and in particular ILO norms in framing its specific account of the 'European consensus' applying in this regard.

The Social Charter thus embodies a distinctly European concept of social rights and gives it authoritative expression – as recognised, for example, by how its provisions have been carried over and used as the textual basis for the social principles set out in the EU Charter of Fundamental Rights.⁴⁸ Given this, it makes sense for the ESC to be invoked in British debates about rights, liberties and socio-economic development, despite Brexit. As the Prime Minister, Theresa May MP likes to put it, 'the UK is leaving the EU, not Europe'.⁴⁹ the ESC as interpreted by the ECSR provides a legal framework through which the UK's protection of social rights can be compared and contrasted with evolving European standards in this field, and there is no reason why Brexit reduces its value in this regard.

In general, the ESC framework of standards as interpreted and applied by the ECSR, has the potential to give much greater definition to social rights discourse in the UK – not least because of how it establishes a legal mechanism for comparing the UK's track record in protecting such rights to the wider European consensus in this regard. Furthermore, the UK as one of the original state parties to the ESC has had its record of respect for Charter rights subject to repeated review by the ECSR over the last fifty years, meaning that a clear track record exists as to the extent to which the UK has adhered to, or deviated from, established European standards of social rights protection. This again gives the ESC framework unique analytical teeth: the ECSR's assessment of the UK's social rights record provides an authoritative picture of how the UK has engaged with social rights over several decades, and the extent to which its protection of such rights has converged or deviated from accepted pan-European norms in this regard.

human rights treaties. See Cullen, n. 42 above; also J.-F. Akandij-Kombé, 'The Material Impact of the Jurisprudence of the European Committee of Social Rights', in G. De Búrca and B. de Witte, *Social Rights in Europe* (Oxford University Press, Oxford, 2005), 89-108

⁴⁷ EU standards may deviate from those established under the Charter: for example, the ECSR concluded in Collective Complaint No. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Decision on the merits of 3 July 2013, that the Swedish implementing legislation designed to give effect to the highly controversial CJEU judgments in Case C-438/05, *International Transport Workers Federation, Finnish Seaman's Union v Viking Line*, [2007] ECR I-10779 and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, [2007] ECR I-11767 did not conform with the requirements of Art. 6§4 ESC. Space prevents further discussion of this issue, which may be in any case of limited relevance for the UK post-Brexit: for more on the ESC/EU relationship, see C. O'Cinneide, 'The European Social Charter and EU law', in A. Bogg, C. Costello and A.C.L. Davies, *Research Handbook on EU Labour Law* (Elgar, 2016), 191-213; U. Khaliq, 'The EU and the European Social Charter: Never the Twain Shall Meet?' (2014) 15 *Cambridge Yearbook of European Legal Studies* 169-196.

⁴⁸ See O'Cinneide, *ibid*, 204-205, referencing in particular Articles 15, 20, 25-35 of the EU Charter.

⁴⁹ T.May, 'We have voted to leave the EU, but not Europe', speech delivered 17 February 2017, <https://www.gov.uk/government/speeches/we-have-voted-to-leave-the-eu-but-not-europe-article-by-theresa-may>.

The ESC framework thus deserves to feature more prominently in UK 'rights talk': it has the potential to lend much-needed depth and precision to the stunted social dimension of British rights discourse, with its 'Europeanness' being arguably a source of strength in this regard than the negative it is often assumed to be. It should also be borne in mind that the UK has voluntarily ratified the Social Charter, and remains bound by its commitments in this regard: as such, the provisions of the ESC as interpreted by the ECSR should be significant points of reference when it comes to debating socio-economic issues in the UK, on account of their status as authoritative international law norms. In general, the Social Charter should be much more integral to debates about the UK's track record in respect of social rights and social citizenship more generally: its marginalisation is unjustified.

In making this case for much greater attention to be paid to the ESC framework, it perhaps needs to be emphasised that this does not entail treating the ESC as being on all fours as the ECHR – in the sense of being regarded as generating binding legal norms, which should be directly enforceable by UK courts within a HRA-style framework. There is a strong case to be made for social rights in general and the ESC rights in particular to be taken into account in UK public law adjudication – as advocated by Keith Ewing, for example, as a counter-balance to their role in protecting civil and political rights, and as a way of ensuring that the importance of such rights is adequately recognized within the UK's legal order.⁵⁰ However, the argument being made here is that the ESC framework should be taken seriously by all participants in UK 'rights talk' – who include civil society organisations, semi-state bodies, trade unions, academics, legislators, parliamentary committees and a host of other actors. The courts must inevitably be part of that discussion, as Ewing correctly argues. But engagement with the ESC also has the potential to add a more substantive dimension to how other actors engage with questions of social rights – in particular political actors, such as advocacy groups, the unions, and legislators in both Westminster and the devolved assemblies.

In general, the ESC framework constitutes what Richard Bellamy has characterized as a 'contestatory channel' within the structures of the Council of Europe, whereby the impact of UK law and policy on the enjoyment of social rights is reviewed by an expert body in the form of the ECSR and thereby opened up to a form of external assessment structured around a serious commitment to the comprehensive set of social rights set out in the text of the ESC. As Bellamy has argued, such a process allows 'lessons to be learned from other [European] democracies and certain unfounded parochial biases and prejudices to be challenged'.⁵¹ It also can highlight the marginalisation of particular groups within the functioning of the UK's socio-economic order, call certain received political, economic and legal truths into question, and bring an authoritative analysis to bear on the issue of how and whether the UK is living up to its commitments to respect the fundamental rights set out in the ESC.

As such, the ESC system of social rights protection has something substantive to add to the human rights debate in the UK – and, by extension, to democratic debate within the country more generally. Consequently, it deserves to be better known. But so too should the UK's record of compliance with its requirements, which should form part of any serious critical analysis of how rights and liberties are and have been protected in the UK over the last few decades.

The UK's Record of Conformity with its Obligations under the European Social Charter

⁵⁰ See Ewing, n 3 and n 13 above.

⁵¹ R. Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25(4) *European Journal of International Law* 1019-1042, 1033.

Surveying the Committee's conclusions in respect of the UK over the decades, a common pattern is detectable: while the UK's overall record of compliance with these social rights obligations is relatively sound when viewed as a whole, there are certain very significant areas where it has repeatedly been found to be in non-conformity – and, in these areas, it is badly out of step with the law, policy and practice of many other European states.

This point can be illustrated by reference to the Committee's most recent sets of conclusions relating to the UK, covering the four-year reporting cycle of 2013-7.⁵² (States currently report on a specific sub-set of obligations every year, with every ESC right covered across a four-year cycle.) Many of the conclusions of non-conformity relating to the UK during this cycle involve situations of 'manifest non-conformity', where the ECSR considers that a state is clearly and exceptionally in breach of its obligations. Furthermore, many of these conclusions are repeat findings – which demonstrates how the UK has tended to disregard ECSR findings, and to neglect its Charter obligations in general.

Social Security

For example, when it comes to the right to social security protected by Article 12§1, the ECSR has repeatedly concluded that the level of UK social security benefits is clearly inadequate. In 2013, the Committee made a finding of non-conformity on the basis that the minimum levels of key income replacement benefits - namely short-term and long-term incapacity benefits, of state pension and job seeker's allowance - were manifestly inadequate.⁵³ It based this finding on its long-established case-law position that such benefits should be fixed so as to 'stand in reasonable proportion to previous income' and not to 'fall below the poverty threshold defined as 50% of median equivalised income as calculated on the basis of the Eurostat at-risk-of-poverty threshold value'. In other words, the Committee took account of the authoritative Eurostat at-risk-of-poverty threshold in interpreting the requirements of Article 12§1 as they relate to the sufficiency of social security benefits – and concluded that the levels of such benefits were falling well short of this minimum threshold.

In a subsequent national report, the UK government contested this conclusion, arguing that the Committee had failed to take into account the existence of other supplementary benefits such as Housing Benefit and Disability Living Allowance in assessing the adequacy of the core income supplement benefits under review. However, the Committee in its recent 2017 Conclusions noted that the report itself acknowledged that the payment of such supplementary benefits was not always sufficient to take individuals and families over the risk-of-poverty threshold – and consequently that the minimum level of specific benefits remained clearly insufficient, namely Statutory Sick Pay (SSP), Employment Support Allowance (ESA), long-term incapacity benefits and unemployment benefits.⁵⁴

In other words, the Committee repeated a long-standing finding to the effect that UK social security benefits fall well short of the aim of Article 12§1, namely to secure the right of individuals and families to a guaranteed level of social security benefit that adequately secures their freedom from poverty. Significantly, the Committee bolstered its conclusions by noting that the levels of UK social security benefits had also been found to be too low to comply with the requirements of both the ILO Convention No. 102 and the European Code of Social Security – thereby reinforcing its conclusion

⁵² All of the ECSR's conclusions, along with the Committee's decisions in collective complaints, can be found by accessing the HUDOC database at <http://hudoc.esc.coe.int/>.

⁵³ Conclusions XX-2 (2013), *United Kingdom*, Article 12§1.

⁵⁴ Conclusions XXI-2 (2017), *United Kingdom*, Article 12§1.

that the UK has been clearly out of step with international standards when it comes to the adequacy of benefits.⁵⁵

Minimum Wage

The ECSR had made similarly strong findings of non-conformity in relation to the UK in respect of the right of workers to a level of remuneration that will give them and their families a decent standard of living protected by Article 4§1 ESC. In interpreting this provision of the Charter, the Committee has again taken account of established European practice and the inherent normative content of the notion of a 'decent standard of living' in determining that minimum wage levels must be set at 50% of the net average wage. Applying this test to the UK situation, the ECSR noted that the report and supplemental Eurostat data established that 'after deductions due to social security contributions and income tax, the [UK's] National Minimum Wage (NMW) is below the minimum level set at 50% of the net average wage'. It therefore concluded that, notwithstanding recent increases in the level of the NMW, 'remuneration is still manifestly unfair within the meaning of Article 4§1 of the 1961 Charter'. This finding of 'manifest' unfairness is unusual: it reflects the fact that UK NMW levels are out of synch with the commitment to secure a 'decent standard of living'.⁵⁶ Similarly, the Committee considers by analogous logic that the situation is not in conformity with Article 7§5 of the 1961 Charter (the right of young workers to a fair wage) on the ground that the minimum wage of young workers is not fair.⁵⁷

The Rights to Organise and Engage in Collective Bargaining

The ECSR has again arrived at repeated findings of non-conformity in relation to the Article 5 ESC right to organise and some of the restrictions imposed by UK law on the autonomy of trade unions. S. 15 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) severely restrict the grounds on which a trade union may lawfully discipline members, while Section 65 makes it unlawful for trade unions to indemnify an individual union member for a penalty imposed for an offence or contempt of court. In the Committee's view, these constitute disproportionate restrictions on the capacity of unions to govern themselves, a principle which it considers to be an inherent element of the wider right to organise.⁵⁸

However, it is perhaps in relation to the Article 6 right to collective bargaining that the Committee's repeated findings of non-conformity are most striking. The Committee's conclusions call into question some of the key elements of UK collective labour law as it has been reshaped since the early 1980s. They also serve as a clear indicator of the extent to which UK regulation of collective action is out of step with the standards applied across much of the rest of Europe.

In relation to the obligation imposed on state parties by Article 6§2 ESC to promote voluntary collective bargaining, the Committee has repeatedly concluded that UK law does not contain sufficient guarantees to secure the free and voluntary character of collective bargaining process. In particular, it has concluded that the legislative reforms introduced via section 145A TULRCA after the

⁵⁵ See the Observations of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), adopted 2016, published 106th ILC session (2017) concerning Social Security (Minimum Standards) Convention 1952, No. 102; also the Council of Europe Committee of Ministers' Resolution CM/ResCSS (2016) 21 on the application of the European Code of Social Security by the United Kingdom, period from 1 July 2014 to 30 June 2015.

⁵⁶ Conclusions XX-3 (2014), *United Kingdom*, Article 4§1.

⁵⁷ Conclusions XX-4 (2015), *United Kingdom*, Article 7§5.

⁵⁸ Conclusions XVI-1 (2002), XVII-1 (2004), XVIII-1 (2006), XIX-3 (2010) and most recently Conclusions XX-3 (2014), *UK*, Article 5.

judgment of the European Court of Human Rights in *Wilson and Palmer v UK*,⁵⁹ which made it unlawful for employers to offer financial incentives to induce workers to exclude themselves from the scope of collective bargaining, were insufficient – on the basis that co-workers and trade unions were not also given a free-standing right to challenge inducements made to other workers.⁶⁰

Turning to the core of Article 6 – namely the Article 6§4 ESC right to engage in collective action – the Committee has for multiple reporting cycles concluded that the ability of workers to defend their interests through lawful collective action was excessively circumscribed in the UK.⁶¹ In particular, the Committee has taken the view that the situation in the United Kingdom is not in conformity with Article 6§4 on the grounds that:

- the possibilities for workers to defend their interests through lawful collective action are excessively limited;
- the requirement to give notice to an employer of a ballot on industrial action is excessive;
- the protection of workers against dismissal when taking industrial action is insufficient.

On the first point, the Committee has focused for multiple reporting cycles on how UK law prohibits secondary picketing by limiting lawful collective action to disputes between workers and their direct employer in line with the definition of a ‘trade dispute’ set out in s. 244 TULCRA. As the Committee notes, such restrictions impose substantial restrictions on the bargaining power of workers, especially when the reality of the contemporary labour market is taken into account:

[E]mployees nowadays often do not work solely for and under the direction of a single clearly defined employer...The result is a far more diverse and complex matrix of contractual relationships with workers who used to share the same employer being split amongst different employers...As a consequence, trade unions increasingly find themselves representing a workforce whose terms and conditions are to a large extent not determined by their direct employer.⁶²

Therefore the Committee has repeatedly concluded that the prohibition on secondary action set out in S. 244 TULRCA is disproportionate, on the basis that it imposes excessive constraints on the effective enjoyment of the Article 6§4 right to engage in collective action.

A similar logic lies behind the Committee’s reiterated conclusion that the requirement currently set out in s. 226A TULRCA to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive. The ECSR noted the strictness of UK law governing balloting for strike action, and concluded that this particular requirement imposed an additional and unnecessary burden on unions and their members attempting to engage in industrial activity. Similarly, it has repeatedly concluded that the limited duration of the protected period of twelve weeks after which workers engaged in collective action lose their employment protection set out in s. 238A TULRCA is arbitrary, and again imposes a disproportionate constraint upon the freedom of workers to avail of their Article 6§4 right to engage in collective action.

⁵⁹ (2002) 35 EHRR 20.

⁶⁰ Conclusions XIX-3 (2010); Conclusions XX-3 (2014), *United Kingdom*, Article 6§2.

⁶¹ See e.g. Conclusions XVII-1 (2004), XVIII-1 (2006), XIX-3 (2010), Conclusions XX-3 (2014), *United Kingdom*, Article 6§4.

⁶² The ECSR has also noted that these statutory restrictions prevent collective action concerning a future employer and future terms and conditions of employment in the context of a transfer of part of a business, citing *University College London NHS Trust v. UNISON* [1999] IRLR 31 CA.

The UK government has challenged the Committee's conclusions on these points, arguing that it has adopted an unduly wide interpretation of Article 6 and that British laws regulating collective action were justified by the particular history of UK industrial relations. In response, the Committee has emphasised that the Charter obliges state parties to ensure the effective enjoyment of the right to strike and that its review of Charter compliance had to take account of the *de facto* impact of such restrictions as they played out against the particular framework of UK law in this regard. In other words, the ECSR chose not to treat the UK with its particular history of industrial relations as a special case, but instead applied its standard interpretative approach to Article 6 – which is based upon the Charter's strong textual endorsement of the right of collective bargaining, and reflects the existence of a broad European consensus as to the importance of not imposing excessive constraints on the freedom of workers and their representative trade unions to engage in strike action.

The Committee's conclusions in respect of the UK and Article 6 therefore once again demonstrate the extent to which important aspects of UK law and policy are substantially out of step with standards elsewhere across Europe: indeed, the UK stands out amongst ESC state parties for its poor record of conformity with Article 6. Furthermore, the Committee was able to bolster its conclusions under Article 6 by cross-referring to similar findings in relation to the UK by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) – which shows the UK is also out of step with wider international standards more generally in this regard.

Additional Conclusions of Non-conformity

Other examples exist of significant non-conformity findings against the UK, which again often tend to have a repetitive character. Many of these findings relate to the labour law field. Thus, the Committee has repeatedly concluded since 1979 that the UK was not in conformity with the requirements of Article 4§4 (the right of all workers to a reasonable notice period), on the basis that notice periods for workers who have accumulated less than three years of service were too short.⁶³ In the ECSR's 2017 conclusions in respect of the UK's compliance with its obligations under the right to safe and healthy working conditions (Art 3), the Committee determined that the UK's failure to include certain categories of self-employed workers and domestic workers employed in private households within the scope of national health and safety law was not in conformity with the Charter.⁶⁴ The Committee also concluded in another repeat finding that the situation in United Kingdom is not in conformity with Article 2§4 of the 1961 Charter, on the ground that workers exposed to residual occupational health risks are not entitled to appropriate compensatory measures.⁶⁵ Similarly, the UK has been found to be in non-conformity with Article 2§5 (the right to a weekly rest period), on the ground that there are inadequate safeguards to prevent that workers may work for more than twelve consecutive days without a rest period;⁶⁶ with Article 4§2 (the right to increased remuneration for overtime work) on the ground that workers do have no adequate legal guarantees to ensure them increased remuneration for overtime;⁶⁷ and with 4§5 (the right to limits on wage deductions), on the ground that existing regulations governing when employers can make deductions to wages are inadequate.⁶⁸

Like its above-mentioned conclusions in relation to Article 12 and the level of social security benefits, some of the ECSR's findings also go beyond the labour law field. Thus, for example, the Committee

⁶³ Conclusions XX-3 (2014), United Kingdom, Article 4§4

⁶⁴ Conclusions XXI-2 (2017), United Kingdom, Article 3§1.

⁶⁵ Conclusions XX-3 (2014), United Kingdom, Article 2§4.

⁶⁶ Conclusions XX-3 (2014), United Kingdom, Article 2§5.

⁶⁷ Conclusions XX-3 (2014), United Kingdom, Article 4§5.

⁶⁸ Conclusions XXI-1 (2016), United Kingdom, Article 4§5.

has concluded that the UK is not in conformity with Article 7§10 (the right of children and younger persons to special protection against ‘physical or moral dangers’), on the ground that British law permits treating children involved in prostitution as offenders.⁶⁹ The Committee has also concluded that the UK is not in conformity with Article 16 (the right to family protection) on the grounds that *inter alia* the right of Roma/Traveller families to housing is not effectively guaranteed.⁷⁰ The Committee has also concludes that the situation in UK is not in conformity with Article 17 (the right of children to social protection) on the grounds that not all forms of corporal punishment are prohibited in the home and the age of criminal responsibility is manifestly too low.⁷¹

Overview

Not every aspect of the UK’s record is negative. For example, the ECSR has concluded that the UK is in compliance with the requirements of Article 13 (the right to social assistance), even if the Committee is looking for more detail in the next national report on the application of the welfare sanction regime and the functioning of the Habitual Residence Test used to determine whether individuals have a sufficient link with the UK to be entitled to welfare support.⁷² In other areas, such as access to vocational education, gender equality and non-discrimination more generally, the UK’s record is relatively decent.

Having said that, the UK’s record under the ESC monitoring process does stand out for (i) the number of repeated findings of non-conformity handed down by the ECSR and (ii) the extent to which the UK is not complying with key ESC obligations, such as the Article 4§1 right to fair remuneration and the Article 6 right to collective bargaining. In formal terms, it is not the worst offender: there are other states who accumulate more findings of non-conformity, often due to a failure to discharge their reporting obligations under the Charter. However, this track record suggests that the UK is substantially out of sync with the values embedded within the provisions of the ESC – which reflect not alone a shared European commitment to a substantive vision of social rights, but also the values of the ILO framework of norms from which it derived its origin.⁷³

Conclusion

ECSR findings often have limited impact, due (as discussed above) to the low profile of the ESC and the lack of political pressure on state parties to conform to its requirements. The repeated failure of successive UK governments to take steps to respond to ECSR conclusions of non-conformity has attracted little in the way of sustained criticism, either within the Council of Europe or at national level.⁷⁴ Indeed, UK politicians and UK newspapers often react with dismissive fury to negative findings by the ECSR, insofar as they make the news at all.⁷⁵

⁶⁹ Conclusions XX-4 (2015), *United Kingdom*, Article 7§10

⁷⁰ Conclusions XX-4 (2015), *United Kingdom*, Article 16.

⁷¹ Conclusions XX-4 (2015), *United Kingdom*, Article 17.

⁷² Conclusions XXI-2 (2017), *United Kingdom*, Article 13§1. For convincing criticism of the Committee’s conclusions in this regard on the basis that they are too positive towards the UK, see the excellent analysis set out in M. Simpson, ‘Assessing the Compliance of the UK’s Social Security System with the State’s Obligations under the European Social Charter’ (2018) 18 *Human Rights Law Review*, forthcoming.

⁷³ For a forceable statement of this point, see K. Ewing and S. Weir, ‘The European Social Charter Turns 50 Today, But Britain Doesn’t Belong at the Party’ *Open Democracy*, 18 October 2011, <https://www.opendemocracy.net/ourkingdom/stuart-weir-keith-ewing/european-social-charter-turns-50-today-but-britain-doesnt-belong->

⁷⁴ The Committee of Ministers of the Council of Europe, in reviewing ECSR conclusions, has issued periodic recommendations to the UK indicating that it should ‘take account, in an appropriate manner, of the conclusion of the European Committee of Social Rights and requests that it provide information in its next

However, the ECSR's conclusions still retain great value as a marker of the UK's commitment to social rights – and the story they tell is far from positive. The Committee's repeated conclusions of non-conformity in relation to the UK's record of respect for core social rights such as the right to strike, the right to a fair remuneration and the right to social security are telling. They demonstrate how out of line the UK is with established social rights standards across Europe - and has been for a sustained period of time.

More generally, it is time for the ESC to feature much more prominently in British 'rights talk', both within its legal and its political dimension. It can add depth, precision and context to its under-developed social rights dimension and thus help to rebalance rights protection in the UK, even in the post-Brexit era.

report on the measures it has taken to bring the situation into conformity with the Charter': see e.g. Recommendation no. R ChS (2005) 1 on the application of the European Social Charter by the United Kingdom during the year 2001-2002 (17th supervision cycle, part I), 04/05/2005. In more recent years, such country specific recommendations have not been forthcoming, replaced instead by more general resolutions addressed to the ESC state parties as a whole: see e.g. Resolution CM/ResChS (2012) 1 on the implementation of the European Social Charter (Conclusions XIX-3 (2010), provisions related to 'Labour rights'), 15/02/2012. This may reflect a *realpolitik* acknowledgement that the UK, along with other regular 'defaulters', is unwilling to bring its national law and policy into conformity with its obligations under the ESC.

⁷⁵ See e.g. *Daily Express*, 'Fury as Eurocrats Slam Britain's Migrant Rights', 28 January 2016: '[a] group of unelected European legal academics yesterday tried to slap down the UK over its treatment immigrant mothers and children, as well as Travellers...' etc. However, note the very positive response to the CESR's most recent set of conclusions in January 2018 by the Corbyn-lead Labour Party: <https://labour.org.uk/press/debbie-abrahams-comment-european-committee-social-rights-report-uk-governments-obligations-meet-european-social-charter/>.