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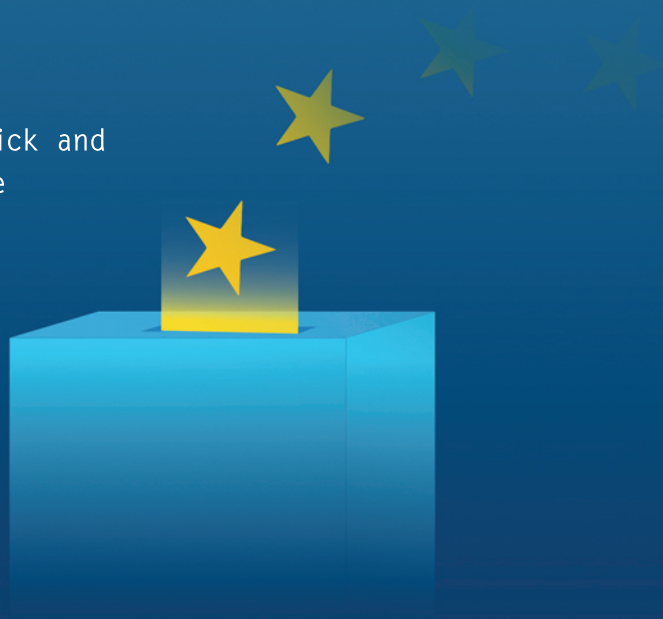
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A Tangible Humna Face for Social Europe

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Bruno De Witte



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European Parliament elections in May 2019 come at a critical time in the evolution of the EU as these will be the first elections after the expected departure of the UK (March 2019) and at a time when divergence on many issues characterises member state relations. Wider global developments weigh heavily on Europe with the return of hard geopolitics and efforts to undermine the global multilateral order. The European University Institute (EUI) wants to highlight the major issues that are at the heart of the political agenda at this juncture as a contribution to the debate. The papers are part of a wider programme on the elections including the development of a Voting Advice Application (VAA), euandi2019, and an online tool specifically tailored for mobile EU citizens voting either in their country of citizenship or residence, spaceu2019.

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Abstract

Our analysis first briefly outlines the growth of Social Europe, from its origins focused on what we call Social Europe for Workers to a much broader focus. It shows how increased attention to Social Europe in the Lisbon Treaty, including in the EU Charter of Fundamental Rights, was not matched by the EU's actions, which instead were characterized by a series of regressive moves across a range of EU institutions. It then considers the genesis, status and debate around the European Pillar of Social Rights, showing that it has been accompanied by renewed EU activity. At the same time, we suggest that the Pillar is insufficient to provide a tangible human face for Social Europe in the new context of migration and the legacies of the economic crisis. We argue that binding EU commitments to minimum pay and income and to addressing inequalities are now needed. We conclude by briefly surveying the options for developing Social Europe over the next five years: in the use of competences; in macro-economic governance; in EU spending; and going outside the Treaties to overcome blockages and limits.

Keywords

Social Europe; Lisbon Treaty; European Pillar of Social Rights; new binding EU floors for pay and income.

1. The growth of Social Europe and the failed promise of the Lisbon Treaty

In the twentieth century, the social component of the EU had a clear profile when contrasted with definitions of social policy at the national level. It focused mainly on improving and protecting the rights of workers, both in (i) the market integration project *per se*, by ensuring the free movement of workers (and their families) and job-seekers within the European Union, and in (ii) protecting the rights of all workers, including their health and safety, their working time and, centrally, the rights of women not to be discriminated against at work. A level of member state consensus (with just one outlier member state after 1979), empowered and adept supranational policy entrepreneurs in the European Commission and judicial dialogue via the preliminary reference procedure led to a worker-focused social *acquis*. We might call this *Social Europe for Workers*. This focus was an essential part of underpinning the legitimacy of the EU project at the time, giving it what Michael Shanks, Commission Director-General of Social Affairs in the 1970s, called a ‘human face.’

As the EU project became much more capacious after the Maastricht and Amsterdam Treaties, so too did the EU’s social component. First, Social Europe moved beyond work. It became focused on a much wider range of welfare and social issues than just workers and their families. Health, education, pensions, housing and social inclusion all became objects of EU policy activity. At the same time, much of the expanded EU activity was taking place outside the Social Policy Chapter of the Treaty. For instance, a significant new corpus of legislation on work and social entitlements came via EU migration and asylum law.

The Lisbon Treaty gave a more prominent place to the social dimension of the integration process. Article 3 TEU, which lists the overall objectives of the EU, commits the EU to work for “a highly competitive social market economy, aiming for full employment and social progress” and a mainstreaming social clause was written in Article 9 TFEU, according to which “In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.” Perhaps the most significant change came with the introduction of a written, and binding, Charter of Fundamental Rights into primary EU law. The Solidarity Chapter of the EU Charter of Fundamental Rights (Articles 27-33) mainly covers labour rights and some welfare rights (social security and assistance, healthcare, education and housing); discrimination and gender equality are in a separate Equality Chapter. The Charter of Fundamental Rights has its own mainstreaming clause in Article 51(1), which states that the Union’s institutions, and the member states when implementing Union law, shall “promote the application” of Charter rights “in accordance with their respective powers.” As the Charter itself does not create new competences for the Union, this means that in the exercise of the *other* competences of the Union the EU institutions must promote the application of the fundamental rights of the Charter. In other words, fundamental rights must be integrated in all domains of EU law.

In the years after the entry into force of the Lisbon Treaty, a contrast emerged between what the Treaties and the Charter seemed to promise and the concrete policies of the EU in the social field. Not much happened after 2009. In 2013, the Commission launched its Social Investment Package, and there was a brief spell of law-making in 2014 (at the end of the previous Commission and EP’s term) with the adoption of four social policy directives: directive 2014/67 on the enforcement of the posted workers directive, directive 2014/54 on facilitating the exercise of the right of free movement of workers, directive 2014/50 on the portability of supplementary pension rights and the seasonal workers directive, 2014/36. The latter gave seasonal workers equal treatment with host state workers for a series of labour and social security rights including working conditions and industrial action, but their admittance to the labour market of the host country was made subject to having a work contract, guarantees of sickness insurance, adequate accommodation and exclusion of recourse to the host-state social assistance system.

Whilst not many new policy initiatives were taken in the post-Lisbon years, there was even evidence of social regression in the context of the EU's macro-economic governance because of the way this governance developed during the financial crisis years. The social and employment Open Methods of Coordination lost their autonomy and became incorporated in a macroeconomic European Semester with strong fiscal consolidation and deregulatory messages, which was seen as threatening the integrity of national social protection. Moreover, the specific social and labour requirements imposed on the 'programme countries' as part of loan conditions or of ECB bond purchase programmes were causing a dismantling of national labour and social protections in these countries.

During those same years, the Court of Justice gave some judgments that moved away from the progressive and protective approach which had marked its earlier jurisprudence towards a protection-limiting interpretation of EU social rights and guarantees. These consisted in: limiting the rights of posted workers and of collective action to protect workers' rights in cross-border situations; limiting its earlier jurisprudence on the social rights accorded to mobile EU citizens; and providing new non-progressive readings of some elements of the legislative labour *acquis* through a range of interpretative devices, including extensive application of the fundamental freedoms and invocation of the freedom to conduct a business as a fundamental right protected by the EU Charter of Rights counteracting – and prevailing over – the social rights contained in the Charter.

All these varied EU developments, coming from a wide range of EU actors, were seen as leading to a regression of the Social Europe idea, and as a failure to live up to the promise of social progress contained in the Lisbon Treaty reform. Just as importantly, they demonstrate that a return to the *status quo ante*, whereby the EU asserts it has a limited role to play in national social policy, is difficult to sustain politically.

2. The potential role of the Pillar of Social Rights in advancing a European social policy agenda

More recently, Social Europe is again becoming a prominent part of the effort to provide a 'human face' for the EU. The European Pillar of Social Rights, an initiative of the Juncker Commission, can be seen as a response to the weakening of social rights required by EU institutions during the sovereign debt crisis, and also as part of a response to broader populist challenges to the EU project. In his State of the Union address to the European Parliament on 9 September 2015, Commission president Juncker proposed the establishment of what he was then the first person to call a 'European Pillar of Social Rights.'

This project emerged from the context of Economic and Monetary Union. It was meant to create a 'fairer' EMU, in reaction to the social justice deficit in EMU convergence and conditionality policies. During the broad consultation process that took place in 2016, it became clear that there was no convincing reason to tie the Pillar to the EMU and to the eurozone, and by the time the Pillar was 'proclaimed' by the EU institutions at the Gothenburg summit in November 2017 it had a broader scope, and it aimed at the broader objective of re-launching the social dimension of the European Union. It was addressed to all EU member states and not just the eurozone states.

The term pillar reminds one of the second and third pillars created by the Maastricht Treaty, which were separate institutional 'worlds' with their own forms of decision-making, policy instruments and accountability. This is clearly not the case here. The Pillar does not create new institutions or decision-making rules for the social field. The French term for 'pillar' is '*socle*,' i.e. pediment, which is a more appropriate one as it harks back to the old idea of a Europe-wide floor of rights, which is in fact what the Pillar seeks to establish.

The Pillar comprises a list of twenty items arranged in three thematic Chapters: equal opportunities and access to the labour market; fair working conditions; and social protection and inclusion. Each item has a title referring to a particular subject (such as wages, work-life balance, minimum income, long-

term care, etc.). The word ‘right’ is not used in these titles but appears in the formulation of almost all the items. For example, item 12 entitled ‘Social protection’ is formulated as follows: “Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the *right* to adequate social protection.” And item 18, entitled ‘Long-term care’ goes as follows: “Everyone has the *right* to affordable long-term care services of good quality, in particular home-care and community-based services.”

However, none of these rights are directly enforceable before a court. Recital 14 of the Pillar’s preamble states “for them to be legally enforceable, the principles and rights require dedicated measures or legislation to be adopted at the appropriate level.” This is perhaps self-evident, given that the Pillar is a soft law document, but it would have been better to include this sentence in the main text of the Pillar so as to dispel the impression that it is a true legally binding human rights instrument. The use of rights language not being matched with the enforceability that normally comes with such language has led commentators to wonder whether the Pillar offers any added value compared to the EU’s Charter of Rights. As we already have a set of fundamental social rights in the Charter, why did we need another proclamation if it has no concrete legal consequences? Worse still, isn’t there a danger of eroding the value of the Charter by replacing a set of binding rights that are part of primary EU law with a set of vague programmatic commitments?

The answer to this objection could be that, since the policy-activating potential of the Charter has remained unused so far, the Pillar could actually help with the “duty to promote” the rights in the Charter because they are spelt out in somewhat greater detail in the Pillar, and it also adds some further rights and principles that are not in the Charter. The Commission’s hope, expressed in recital 12 of the Pillar’s preamble, is that it will “serve as a guide towards efficient employment and social outcomes ... and towards ensuring better enactment and implementation of social rights.” In some documents, it also refers to the Pillar “as a compass for a renewed process of convergence.” For Marianne Thyssen, the current commissioner for social affairs, the Pillar is now the background to all the Commission’s initiatives on employment and social affairs, and it sets out a new social agenda for the Union as a kind of late response to the promise contained in the Lisbon Treaty.

However, this compass is not only meant to guide the Union’s policy but also that of its member states. The crucial passage in this respect is again to be found in the preamble rather than in the main text of the Pillar. According to recital 17, this is “a shared political commitment and responsibility” that “should be implemented at both Union level and member state level within their respective competences” and to hammer in this point the next recital states that the Pillar “does not entail an extension of the Union’s powers and tasks as conferred by the Treaties. It should be implemented within the limits of those powers.”

The Commission has made legislative and non-legislative proposals that are explicitly presented as “implementing” the pillar. Its proposal for a work-life balance directive (extending parental and caretaking leave) can be seen as a direct implementation of item 9 (although the reality is that this item was prominently displayed in the Pillar because the Commission had already prepared a draft directive on the subject). The Commission also made a proposal for a Council recommendation on access to social protection for workers on atypical contracts and for the self-employed, and it proposed the creation of a European Labour Authority (a new EU agency) charged with facilitating and monitoring labour mobility between EU countries.

It seems that the Pillar, and its proclamation by the three institutions, has given new impetus and political energy. In June 2018, agreement was reached in the Council on three legislative files: revision of the coordination of social security systems, the draft directive on work-life balance, and the draft directive on transparent and predictable working conditions. In addition, the new posted workers directive 2018/957 was adopted, although it is not formally part of the Pillar programme. In its 2019 work programme the Commission is considering whether to propose a move from unanimity to qualified majority voting in three areas of social policy: dismissal protection, collective defence of workers and

employers, and social security and protection for workers. It remains to be seen whether this new political energy will last beyond the coming European election and the appointment of a new Commission.

3. Beyond the Pillar: A Tangible Human Face for Social Europe

Nonetheless, the Pillar process to date shows that the initiatives the EU most needs today to visibly address the concerns of those living and working within it are ones it currently fails to supply. It is unlikely that the Pillar will provide a sense to EU voters, rather than to Brussels insiders, that the EU is acting to underpin social rights in a Union struggling to cope with the stresses resulting from increased migration, mobility and economic crisis.

To visibly and clearly address problems of economic insecurity for individuals and families across the enlarged EU, some of which arise from sovereign debt crisis management, and which feed wider social and political unrest, the EU should act to guarantee a minimum income and minimum pay. Building on this floor, it should act with the Member States to address widening inequalities. Such a floor and commitment to address inequalities would make EU demands to respect budgetary limits, as recently seen in Italy, both more legitimate and effective.

One problem facing EU-level action is that its current legal competences in the social field are limited and fragmented. Even in the core legal basis for EU action, Article 153 TFEU, there is a disjunction between areas in which the EU can adopt measures of minimum harmonisation of national law (namely, in large parts of labour law) and areas in which it can only take a coordinating and funding role (namely regarding some aspects of social protection and inclusion). Article 153 also excludes some core areas of labour law, namely pay, the right to association and the right to strike.

The EU competence limit can be illustrated by the question of minimum income. In 2012 the European Commission refused to register a Citizen's Initiative called *Unconditional Basic Income* on the ground that the EU lacked the competence to enact a right to a minimum income. Combating social exclusion may well be an EU objective, but EU law-making on that subject is not allowed by Art 153 TFEU, so the Commission argued. A similar initiative (*Vite l'Europe sociale!*) was rejected on the same grounds in 2014. However, in January 2017 at the High-Level meeting concluding the consultations on the Pillar, Juncker committed to an EU guarantee of both minimum pay and income. One of the most resonant proposals to come out of the consultation process of 2016 was that of the Social Policy Platform (a grouping of 30 social NGOs) advocating an EU framework minimum income directive. It was argued that the Treaties do contain a sufficient legal basis for such a directive, namely in Article 153(1)(h), which allows for binding legal measures for the integration of persons excluded from the labour market. The text of the Pillar includes both a minimum wage (item 6b: "Adequate minimum wages shall be ensured...") and a minimum income (item 14), but the Commission does not seem convinced that the EU can take legal action. At any rate, it has not so far promised to take any concrete action on these subjects. It seems that this is entrusted entirely to Member State action. Thus, some of the 'star' principles of the Pillar, the ones that Juncker had highlighted in his interventions, cannot, apparently, be realized by the EU.

4. The future of social policy beyond the 2019 election

A number of questions arise for the future of social policy beyond May 2019. At the same time, some desirable directions are apparent. The biggest risk we foresee is that of doing too little.

Will the Union make more active use of the limited law-making competences that the Treaties gave it so as to effectively implement a number of the items in the Pillar? In this context, can the Commission limit itself to proposing non-binding recommendations to the Member States (as it recently did for access to social protection) or should it be more ambitious and propose a true minimum harmonisation? Our

suggestion is that where limits on social competences, including the exclusion of legislating on pay, strikes and freedom of association in Article 153(5) TFEU, block action vital to underpinning Social Europe in a new context, they should be revisited or worked around.

Turning to macro-economic governance, how can the EU ensure it will no longer undermine national welfare regimes and national systems of labour relations, but on the contrary underpin them while respecting ‘national social spaces’ (as Ferrera puts it)? Support in EU law and policies, including the European Semester, for union membership and activities within inclusive collective bargaining structures is a central means of underpinning democracy and credibly addressing income inequality and insecurity at work and has a clear Treaty basis in Article 156 TFEU. The widening and striking regional income inequalities within states from the 1980s onwards could also usefully become a more sustained focus of analysis and EU policy activity. Could future reforms of EMU lead to the creation of a European unemployment insurance system which could simultaneously strengthen the economic stability of the eurozone and enact a limited form of social solidarity among the euro countries?

According to the Commission, the European Social Fund+ for the new multiannual budget period 2021-2027 will “support the delivery” of the Pillar and will be “geared towards making the principles of the [Pillar] a reality on the ground.” It remains to be seen whether this ambition will survive the budget negotiations and how it will be operationalized, maybe by earmarking parts of the Fund for concrete national and local projects implementing Pillar rights.

Finally, one should consider the resources offered by enhanced cooperation to overcome the resistance of some member states. In addition, when there are doubts about the legal permissibility of EU action it would be possible to put in place new forms of social protection by means of international agreements between all, or a group of, member states. The possibility of concluding a separate agreement between a group of ‘willing and able’ states has been experimented in the past in the area of free movement (Schengen) and financial stability (European Stability Mechanism, Fiscal Compact). Could such an approach also be used to implement the Pillar by means of the adoption of a ‘Social Compact’?

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