

**THE ‘MANIFESTATION’ OF SOCIAL RIGHTS AND THE
MARGINALISATION OF THE EUROPEAN SOCIAL CHARTER
IN THE UNITED KINGDOM**

***LA MATERIALIZACIÓN DE LOS DERECHOS SOCIALES Y LA
MARGINALIZACIÓN DE LA CARTA SOCIAL EUROPEA EN EL
REINO UNIDO***

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ABSTRACT

This article is concerned with the United Kingdom and the Social Charter. It examines the ratification of the Charter, the acceptance of Charter provisions, and compliance with these latter obligations. The paper considers the role of the domestic courts as well as the European Court of Human Rights in the enforcement of Charter obligations, whether directly or indirectly. The implications of the post Brexit EU-UK Trade and Cooperation Agreement which imposes duties on both parties to comply with accepted Social Charter measures are also addressed. Following an account of the potential role for parliamentary scrutiny in monitoring compliance with the Charter, the paper concludes with a bleak assessment of low levels of compliance by successive British governments and ineffective methods of enforcement in domestic law.

KEYWORDS: Social Charter, United Kingdom, domestic enforcement, Human Rights Act 1998, European Court of Human Rights, Trade and Co-operation Agreement, Joint Committee on Human Rights.

RESUMEN

Este artículo se ocupa del Reino Unido y de la Carta Social Europea. Examina la ratificación de la Carta y el cumplimiento de las obligaciones derivadas de la misma. El artículo analiza el papel de los tribunales nacionales, así como del Tribunal Europeo de Derechos Humanos, en el cumplimiento, directo o indirecto, de las obligaciones de la Carta. También se abordan las implicaciones del Acuerdo de Comercio y Cooperación UE-Reino Unido tras el Brexit, que impone a ambas partes la obligación de cumplir con las medidas aceptadas de la Carta Social. Tras exponer el papel que puede desempeñar el control parlamentario en la supervisión del cumplimiento de la Carta, el presente trabajo concluye con una sombría valoración del escaso grado de cumplimiento por parte de los sucesivos gobiernos británicos así como de los métodos ineficaces de su aplicación en el ámbito nacional.

PALABRAS CLAVE: Carta Social Europea, Reino Unido, aplicación nacional, Ley de Derechos Humanos de 1998, Tribunal Europeo de Derechos Humanos, Acuerdo de Cooperación y Comercio, Comité Conjunto de Derechos Humanos

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I. Introduction

On 10 October 1961, the British Cabinet considered a memorandum prepared by the Foreign Secretary proposing that the United Kingdom Government should ratify the European Social Charter.¹ In his memorandum, the Foreign Secretary explained that ‘in order to ratify the Charter a member country must accept the declaration of aims in Part I and a minimum of ten of the nineteen Articles in Part II, of which at least five shall be drawn from a list of seven specified Articles’.² He then advised that the ‘United Kingdom has no difficulty in accepting the declaration of aims and on the basis of existing law and practice it can accept fourteen articles (and parts of some others), including six of the seven specified Articles’.³ Not only could the Charter thus be ratified by ‘a wide margin’, much of its content was ‘already recognised by the member countries of the Council of Europe’, its significance resting ‘largely in its becoming a manifestation of the social rights and standards common to Western Europe’.⁴ The proposal was adopted, as was the recommendation that the Charter ‘should be signed on behalf of the United Kingdom at a ceremony which had been arranged for 18th October [1961] and that it should be ratified in due course’.⁵ The United Kingdom ratified the Social Charter on 11 July 1962.

The commitment by a Conservative government to social rights is impressive, as is the confident belief that the Charter could be ratified apparently without the need to change domestic law, simply because domestic law generally met the Charter’s minimum standards. In the years since, however, the United Kingdom has slipped from being a Social Charter pioneer to being a Social Charter straggler, failing to ratify any subsequent substantive protocol, and signing but failing to ratify the Revised Social Charter of 1996. Despite the confidence of the government in 1961, as will be explained the United Kingdom has been found to comply with fewer than half of the Charter provisions which it has accepted, and there is no method in domestic law whereby the Social Charter can be enforced, or the jurisprudence of the European Committee of Social Rights implemented against the wishes of the government. In addressing the contemporary position of the Charter, it is proposed in the pages that follow to examine the levels of acceptance and compliance with Charter provisions; the difficulties of judicial engagement with the Social Charter whether directly in domestic law or indirectly through the European Court of Human Rights (ECtHR); as well as political and legal initiatives which provide new opportunities for better parliamentary scrutiny and judicial intervention to enhance Social Charter compliance.

¹ TNA, CAB 128/35, Cabinet Conclusions, 10 October 1961.

² TNA, CAB 129/107/156, The European Social Charter, Memorandum by the Secretary of State for Foreign Affairs, 7 October 1961.

³ Ibid.

⁴ Ibid.

⁵ Cabinet Conclusions, 10 October 1961, above.

II. Social Charter in the United Kingdom

The provisions of the Social Charter will be well known to readers of this journal. For many years, the United Kingdom had accepted 60 of the 72 provisions, but on 12 July 2021 the British government denounced Art 18(2), so that there are now 59 accepted provisions. It is easier to say what has not been accepted than what has been accepted. Thus, the provisions which have not been or are no longer accepted are as follows

- **Article 2(1)** (reasonable daily and weekly working hours);
- **Article 4(3)** (equal pay for work of equal value);
- **Article 7(1)** (minimum age of 15 for admission to employment, subject to exceptions);
- **Article 7(4)** (limitation on working hours of under 16s);
- **Article 7(7)** (minimum of three weeks paid holiday for employed persons under 18);
- **Article 7(8)** (under 18s not to be employed in night work, subject to exceptions);
- **Article 8(2)** (prohibition on dismissal during maternity leave);
- **Article 8(4)** (regulation of night work by women);
- **Article 12(2)** (social security levels to be compatible with ILO Convention 102);
- **Article 12(3)** (endeavour progressively to improve social security);
- **Article 12(4)** (equal treatment of foreign nationals in relation to social security benefits);
- **Article 18(2)** (abolition or reduction of chancery or other duties payable by foreign workers).

The reasons for some of these non acceptances were given by the Foreign Secretary in his Cabinet Memorandum of 7 October 1961. In the case of Article 2(1), it was explained somewhat cryptically that it could not be accepted because ‘it anticipates the course of collective bargaining which is traditionally a matter left to Employers and Workers in the United Kingdom’.⁶ It seems that the point here is that in the United Kingdom, working time was dealt with by agreement between the social partners, the outcomes of which could not be prejudged or guaranteed in the manner expressed in Article 2(1). But this seems a curious explanation. As the Foreign Secretary pointed out, the Social Charter, Article 33 permitted Article 2 to be implemented by collective agreements applicable to the ‘great majority’ of the workers concerned. And it is likely at the point of ratification (though not now) that the working time of the ‘great majority’ of British workers would have been covered by collective agreements. A more likely explanation for the non-acceptance of Article 2(1) is that the then Ministry of Labour did not agree with the principle which it contained. This is conjecture

⁶ ‘The European Social Charter, Memorandum by the Secretary of State for Foreign Affairs’, above.

strengthened by the Foreign Secretary's claim that Article 2 (2), (3) and (5) 'are acceptable to us under the terms of Article 33'.⁷

So far as Article 3(4) (equal pay for work of equal value) is concerned, this was a tricky issue for United Kingdom, which had been troubled during the preparations for ILO Convention 100 (Equal Remuneration Convention, 1950) on the same topic. Despite also being a principle set out in the ILO Constitution 1919, the British government gave only grudging support to ILO Convention 100, and would have preferred the matter to have been dealt with if at all by a Recommendation instead. Revisiting the issue some ten years later, the Foreign Secretary explained that the Social Charter, Article 3(4) could not be accepted

because there is no Equal Pay among the Government's own industrial employees or among the domestic grades of hospital staff in the National Health Service. Acceptance of this paragraph could be regarded as morally committing the Government to do something about unequal pay in those spheres at least.⁸

Much has happened since then and although the United Kingdom still struggles with equal pay, there is no reason for the continuing failure to accept the Social Charter, Article 4(3). ILO Convention 100 was eventually ratified by the United Kingdom in 1971, the year after the enactment of the Equal Pay Act 1970 requiring equal pay for equal work. As a result of the then Equal Pay Directive in 1975,⁹ British law has since 1983 recognised 'the right of men and women workers to equal pay for work of equal value',¹⁰ which is now also embraced by one of the five ILO fundamental principles.

In the case of the Social Charter, Article 12(2), this too is slightly baffling, given that it requires Contracting parties to 'maintain the social security system at a satisfactory level at least equal to that required for ratification' of ILO Convention 102 (Social Security (Minimum Standards) Convention, 1952), which the United Kingdom had ratified in 1954. It was explained by the Foreign Secretary, however, that 'the Minister of Pensions and National Insurance feels that, although we have ratified ILO Convention 102, it is not desirable that we should further tie ourselves to it through this Charter'.¹¹ In other words, 'we have no intention of being bound by it should circumstances so require'. No other explanation was provided. In the case of Article 12(3), this could not be accepted because it was 'regarded as embarrassing in that it

⁷ Ibid. But it makes no sense now, with (i) the decrease in the levels of collective bargaining coverage, and (ii) the implementation of the Working Time Directive in 1998, which means that for the best part of 25 years, the United Kingdom has accepted the principle of 'reasonable daily and weekly working hours', and the role of legislation in implementing the principle.

⁸ 'The European Social Charter, Memorandum by the Secretary of State for Foreign Affairs', above.

⁹ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. Now Equal Treatment Directive (Recast) (2006/54/EC), which came into force on 15 August 2008.

¹⁰ See now Equality Act 2010, s 65.

¹¹ 'The European Social Charter, Memorandum by the Secretary of State for Foreign Affairs', above.

might be quoted in support of claims for higher benefit rates or other improvements or against any proposals there might be in the future for some restriction in the scope of our social security provisions'. Article 4(3) was 'also not acceptable to the Minister of Pensions because it appears to create an obligation to make an agreement with any other country which ratifies the Charter'.¹² Acceptance of Social Charter, Article 12(2)-(4) now would require a major reset of British social security policy.¹³

III. Social Charter and the European Committee of Social Rights

Having ratified only the 1961 Charter, the next question relates to the level of compliance with the 60 (now 59) paragraphs accepted by the United Kingdom. The answer is to be found in part in the last four sets of Conclusions of the European Committee of Social Rights, which assessed the bulk of the United Kingdom's obligations under the Charter.¹⁴ The first set deals with the thematic group 'employment, training and equal opportunities', and covers

- **Article 1** (right to work);
- **Article 9** (right to vocational guidance);
- **Article 10** (right to vocational training);
- **Article 15** (right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement);
- **Article 18** (right to engage in a gainful occupation in the territory of other Contracting Parties);

The Conclusions relating to the United Kingdom in this group were said to cover **nine obligations**, with **two Conclusions of conformity** (Articles 1(1) and 15 (2)); **one Conclusion of non-conformity** (Article 18(2), which deals with charges payable to foreign workers and which has since been denounced by the United Kingdom); and

¹² Ibid.

¹³ The British 'policy of keeping the basic standard of living of those who are on benefits and not in work below the absolute poverty line' which 'results in using social security as a means of economic compulsion to labour' has been the subject of excoriating criticism by the ILO Committee of Experts: ILO Committee of Experts, Observation on the Social Security (Minimum Standards) Convention, 1952 (ILO Convention 102) (Adopted 1996, published 1997). Note that the failure to accept Article 12(2) has not helped the United Kingdom avoid equally stinging criticism from the European Committee of Social Rights. In the last cycle of supervision, the ECSR was highly critical of the United Kingdom's failure to comply with the Social Charter, Article 12(1) (general duty to establish or maintain a system of social security). In developing its criticisms, the Committee was influenced in part by ILO Convention 102 to which it referred, to guide its conclusions about conformity with Social Charter, Article 12(1), even though compliance with ILO Convention 102 is expressed as a requirement Social Charter, Article 12(2) only. See Council of Europe, European Committee of Social Rights, Conclusions XXI-2 (2017) (United Kingdom) (2018), pp 19-22.

¹⁴ It is to be noted that these four sets of Conclusions cross two different ECSR supervision cycles (the 20th and the 21st).

another six cases where the Committee was unable to reach a Conclusion without further information (Articles 1(2), 10 (1), 10(3), 10(4), 15(1) and 18(3)).¹⁵

The second of the most recent sets of Conclusions covers the thematic group ‘children, families and migrants’, and deals with the following:

- **Article 7** (right of children and young persons to protection);
- **Article 8** (right of employed women to protection);
- **Article 16** (right of the family to social, legal and economic protection);
- **Article 17** (right of mothers and children to social and economic protection);
- **Article 19** (the right of migrant workers and their families to protection and assistance).

The provisions in question covered **19 obligations**, with **seven Conclusions of conformity** (Articles 7(2), 7(6), 7(9), 19(1), 19(4), 19(5) and 19(7)); **six Conclusions of non-conformity** (Articles 7(3), 7(5), 7(10), 8(1), 17, and 19(6)); and six cases where additional information was required in order to reach a Conclusion (Articles 16, 19(2), 19(3), 19(8), (9) and (10)).¹⁶ So far as the issues of non conformity are concerned these were as follows:

- **Article 7(3)** (restrictions on employment by persons in full time education), breached on the ground that the daily and weekly duration of light work permitted to children who are still subject to compulsory education during school holidays is excessive;
- **Article 7(5)** (fair wage for young persons and apprentices), breached on the ground that the minimum wage of young workers is ‘not fair’;
- **Article 7(10)** (special protection from physical and moral hazards in or arising from employment for children and young persons), breached on the ground that child victims of prostitution may be criminalized;
- **Article 8(1)** (at least 12 weeks paid maternity leave), breached because the standard rate of statutory maternity pay is inadequate;
- **Article 17** (social protection for mothers and children), breached on several grounds relating to the age of criminal responsibility and the use of corporal punishment;
- **Article 19(6)** (family reunion for migrant workers), breached on several grounds including the denial of an independent right to remain for family members.

Turning to the third set of Conclusions in the thematic group ‘labour rights’, so far as the United Kingdom is concerned this covers

¹⁵ Council of Europe, European Committee of Social Rights, Conclusions XXII-1 (2020) (United Kingdom) (2021), p 3.

¹⁶ Council of Europe, European Committee of Social Rights, Conclusions XXI-4 (2019) (United Kingdom) (2020), p 2.

- **Article 2** (right to just conditions of work);
- **Article 4** (right to a fair remuneration);
- **Article 5** (right to organize);
- **Article 6** (right to bargain collectively).

The Conclusions relating to the United Kingdom were said to cover **13 obligations**, with **three Conclusions of conformity** (Articles 2(3), 6(1) and 6(3)), and **10 Conclusion of non-conformity** (Articles 2(2)(4),(5), 4(1),(2),(4),(5), 5, 6(2)(4)).¹⁷ The cases of non-conformity were as follows:

- **Article 2(2)** (paid public holidays), breached on the ground that the right of all workers to public holidays with pay is not guaranteed;¹⁸
- **Article 2(4)** (elimination of risks in dangerous or unhealthy occupations), breached ‘on the ground that workers exposed to residual occupational health risks, despite the existing risk elimination policy, are not entitled to appropriate compensatory measures’;¹⁹
- **Article 2(5)** (weekly rest period), breached ‘on the ground that there are inadequate safeguards to prevent workers from working for more than twelve consecutive days without a rest period’.²⁰
- **Article 4(1)** (decent remuneration), breached on the ground that ‘the minimum wage does not ensure a decent standard of living’. Under the Charter, the rate should not be below 60% the national average wage.²¹
- **Article 4(2)** (overtime rates), breached on the ground that ‘workers have no adequate legal guarantees to ensure them increased remuneration for overtime’.²² The statutory minimum wage is based on a flat hourly rate and does not have overtime rates.
- **Article 4(4)** (notice of termination), breached on the ground that ‘notice periods are not reasonable for employees with less than three years of service’.²³
- **Article 4(5)** (deductions from wages), breached on the ground that ‘the absence of adequate limits on deductions from wages equivalent to the National Minimum Wage may result in depriving workers who are paid the lowest wage and their dependents of their means of subsistence’.²⁴
- **Article 5** (right to organize), breached on the ground that ‘legislation which

¹⁷ Council of Europe, European Committee of Social Rights, Conclusions XXI-3 (2018) (United Kingdom) (2019), p 3.

¹⁸ Ibid, p 4.

¹⁹ Ibid, p 6.

²⁰ Ibid, p 7.

²¹ Although there are data to suggest that this target has now been reached in the United Kingdom, it is not clear if this applies only to over 25 year olds, and whether a failure to reach this target in younger age groups would be a breach of article 4(1).

²² Council of Europe, European Committee of Social Rights, Conclusions XXI-3, above, p 9.

²³ Ibid, p 10.

²⁴ Ibid, p 11.

makes it unlawful for a trade union to indemnify an individual union member for a penalty imposed for an offence or contempt of court, and which severely restricts the grounds on which a trade union may lawfully discipline members, represent[s] an unjustified incursion into the autonomy of trade unions'.²⁵

- **Article 6(2)** (collective bargaining), breached on the ground that 'workers and trade unions do not have the right to bring legal proceedings in the event that employers offer financial incentives to induce workers to exclude themselves from collective bargaining'.²⁶ Only a worker who has been directly induced may bring a claim, a right denied to other workers affected as well as to the union itself.
- **Article 6(4)** (right to strike), breached on multiple grounds, undermining the scope for workers to defend their interests through lawful collective action, which is 'excessively circumscribed' as a result:
 - lawful collective action is limited to disputes between workers and their employer, thus preventing a union from taking action against a de facto employer if this was not the immediate employer;
 - the requirement 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 protection of workers against dismissal when taking industrial action is insufficient.²⁷

Finally, the fourth set of Conclusions in the thematic group 'health, social security and social protection' cover

- **Article 3** (right to safe and healthy working conditions);
- **Article 11** (right to protection of health);
- **Article 12** (right to social security);
- **Article 13** (right to social and medical assistance);
- **Article 14** (right to benefit from social welfare services).

The Conclusions relating to the United Kingdom were said to cover **13 obligations**, with **10 Conclusions of conformity** (Articles 3(2), 3(3), 11(1), 11(2), 11(3), 13(2), 13(3), 13(4), 14(1) and 14(2)), **two Conclusions of non-conformity** (Articles 3(1) and 12(1)); and another case where the Committee was unable to reach a conclusion without further information (Article 13(1)). In relation to Article 13(1), however, the Committee noted that 'the absence of the information requested amounts to a breach of the reporting obligation entered into by the United Kingdom under the Charter', and

²⁵ Ibid, p 12.

²⁶ Ibid, p 14.

²⁷ Ibid, pp 16-17.

requested ‘the authorities to remedy this situation by providing the information in the next report’.²⁸ The cases of non conformity were

- **Article 3(1)** (duty to issue health and safety regulations), breached because not all self-employed and domestic workers are covered by the occupational health and safety regulations;
- **Article 12(1)** (establish or maintain a system of social security), breached because the level benefits for sickness, unemployment and incapacity are inadequate.

The United Kingdom has thus been found to be in conformity with 22 out of 54 obligations examined, and in breach of 19 (in some cases for multiple reasons), with there being insufficient information to be able to reach a Conclusion in the other 13 cases.

IV. Social Charter and the Domestic Courts

A. Limited Legal Effects

Given the low levels of conformity, questions arise about the legal status of the Charter in domestic law. The difficulty here is that the United Kingdom is a dualist system which means that international treaties have no domestic legal effects until they are implemented by an Act of Parliament. The point is illustrated by *CIS/259/2008*, where a Turkish asylum seeker was granted temporary admission to the United Kingdom despite her application for political asylum having been refused. The asylum seeker’s claim for social security benefit was nevertheless rejected under the regulations then in force, but the decision was reversed by a social security tribunal on the ground that the denial of benefit was a breach of the European Convention on Social and Medical Assistance, as well as the Social Charter, Article 13(4). On an appeal by the government, the Social Security Commissioner reversed the appeal tribunal’s decision on the constitutionally uncontestable ground that

the tribunal overlooked the fact that the Convention and the Charter impose obligations on ratifying states but are not directly enforceable by citizens in the absence of any domestic legislation to that effect. Therefore, even if the United Kingdom is in breach of its obligations under those treaties, the tribunal was not entitled to ignore the unambiguous provisions of the 1987 Regulations.²⁹

²⁸ Council of Europe, European Committee of Social Rights, Conclusions XXI-2 (2017) (United Kingdom) (2018), p 3.

²⁹ [2008] UKSSCSC CIS_259_2008 (04 July 2008), para 4.

This does not mean, however, that international treaties will have no effects in domestic law, there being a number of steps between wholly ignoring a treaty on the one hand (which constitutional purity might require), and giving full effect to it on the other (which constitutional purity would oppose). Thus in *CIS/1773/2007*, the Social Security Commissioner repeated the conventional intermediate position that ‘domestic legislation will, where possible, be construed so as not to conflict with the United Kingdom's international obligations’. However, this applies only where ‘there is an ambiguity in the domestic legislation, while ‘the duty to construe legislation consistently with treaty obligations is weaker where the legislation was not enacted specifically to give effect to the treaty obligations in question’.³⁰ Moreover, in areas such as social security law where much of the law is contained in secondary legislation, the courts have no power to ‘compel a minister to enact regulations to give effect to a treaty’; it is also ‘not permissible to find subordinate legislation to be *ultra vires* on the ground that it is incompatible with the United Kingdom's international obligations’.³¹

Although treaties thus have an interpretive role, it is difficult to find cases where the Social Charter has had a decisive interpretative impact.³² The Charter is occasionally referred to, but rarely discussed, and never discussed in any detail. If that is true of the Charter, it is even more true of the ECSR’s Conclusions, extracts of which to my knowledge are to be found to have been discussed in only one case, without any positive effect.³³ The Social Charter is not alone in being treated in this way: the same is true of ILO Conventions, though these perhaps have earned more consideration by the courts, albeit with probably no greater impact than the Social Charter. Perhaps an exception in terms of the importance of the Social Charter is *RMT v Serco*,³⁴ which was concerned with the statutory procedural obligations trade union must comply with before they may take strike action. Until the *Serco* case, the courts had generally indulged employers by granting injunctions on the flimsiest claims that the union had failed to comply with the various statutory conditions.³⁵ In *Serco*, the Court of Appeal appeared to change its mind, now warning employers that the procedural obligations were to ensure trade unions had the support of their members before taking strike action, and were not designed to set legal ‘traps or hurdles’ in litigation.

³⁰ [2008] UKSSCSC CIS_1773_2007 (23 June 2008), para 11.

³¹ Ibid, para 9.

³² As illustrated by *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763. For the avoidance of doubt, domestic legislation will not be read down to the Charter standard if the legislation is more favourable to the individual: *University College London v Brown* UKEAT/0084/19/VP (17 December 2020).

³³ *Metrobus v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173.

³⁴ [2011] EWCA Civ 226, [2011] ICR 848.

³⁵ See R Dukes, ‘The Right to Strike under UK Law: Not Much More than a Slogan? *Metrobus v Unite the Union* [2009] EWCA Civ 82’ (2010) 39 ILJ 32.

The significance of the Social Charter in *Serco* related to its role in changing the interpretative approach of the courts to trade union legislation generally. As was pointed out by the Court of Appeal, ‘the common law recognises no right to strike’,³⁶ the legality of which depends on a limited statutory immunity from common law liability. It is a condition of immunity that the union must comply with the notice and ballot obligations referred to above. The employer argued that these latter obligations must be interpreted strictly against the union in order to minimize the adverse the impact of the legislation on the employer’s common law rights. This argument was dismissed by the court:

if one starts from the premise that the legislation should be strictly construed against those seeking the benefit of the immunities, the effect is the same as it would be if there were a presumption that Parliament intends that the interests of the employers should hold sway unless the legislation clearly dictates otherwise. I do not think this is now a legitimate approach, if it ever was. In my judgment the legislation should simply be construed in the normal way, without presumptions one way or the other.³⁷

The Court of Appeal thus rejected the argument that because strike action was unlawful unless it enjoyed a limited immunity created by statute, the statutory immunity had to be construed narrowly against the union. This was an important step in the approach to trade union legislation, informed in part by the Social Charter. That said, the latter was not responsible on its own for this shift, reference being made by the court to ILO Conventions 98 and 151, as well as the ECHR where ‘the right to strike is conferred as an element of the right to freedom of association conferred by Article 11(1)’.³⁸

B. The Human Rights Act 1998

A new opportunity for use of the Social Charter arose as a result of the Human Rights Act 1998, which at the time of writing enables Convention rights to be enforced in the domestic courts.³⁹ Although the HRA does not apply to the Charter, the Charter nevertheless has been used by the Strasbourg Court to guide the interpretation of Convention rights.⁴⁰ So in order to understand the scope of Convention rights it may be necessary to engage with the Social Charter, as illustrated by *R (Teckle) v Home Secretary*.⁴¹ Here an asylum seeker, whose renewed asylum application was delayed for several years, was unable to work because of Home Office policy at the time

³⁶ Ibid, para 8.

³⁷ *RMT v Serco*, above, para 9. Compare *Metrobus v Unite the Union*, above.

³⁸ *RMT v Serco*, above, para 8. Although no authority was cited to support this proposition in relation to the ECHR, by 2011 there was an emerging body of case-law to this effect.

³⁹ Human Rights Act 1998, ss 2-6.

⁴⁰ As the domestic courts have frequently acknowledged: see for example *Metrobus v Unite the Union*, above, *Unison v Kelly* [2012] UKEAT 0188_11_2202, and *R (Boots Management Services Ltd) v CAC* [2014] EWHC 65 (Admin).

⁴¹ [2008] EWHC 3064 (Admin).

prohibiting people in such circumstances from taking up employment. Teckle challenged the policy on the ground that the denial of his right to work was a violation of the ECHR, Article 8, following the decision in *Sidabaras v Lithuania* where it had been held that

having regard in particular to the notions currently prevailing in democratic states the court considers that a far reaching ban on taking up private sector employment does effect 'private life'. It attaches particular weight in this respect to the text of Article 1(2) of the European Social Charter and the interpretation given by the European Committee of Social Rights and to the text adopted by the ILO it further reiterates that there is no water tight division separating the sphere of social and economic rights from the field covered by the convention.⁴²

The High Court in *Teckle* accepted that 'the ability to take employment is an aspect of private life'.⁴³ Indeed, 'the right to work generally is a human right set forth in the Universal Declaration of Human Rights 1948 and the European Social Charter', and 'as the European Court pointed out in *Sidabaras* the scope of the term private life set out in Article 8(1) should be developed taking into account these related requirements of international requirement or commitment'.⁴⁴ The judge (Blake J) continued:

In my judgment, the positive prohibition on being able to take employment, self employment or establishing a business, when placed alongside the inability to have recourse to cash benefits, restricts the claimants ability to form relations either in the work place and outside it. When such a requirement is imposed on someone who cannot be removed from the United Kingdom and it is maintained against someone who has been physically resident in the United Kingdom since the fresh claim was made 4 ½ years ago this restriction can thus be said to be an interference with right to respect for private life. As Lord Bingham himself had memorably said in *Huang v SSHD* [2007] UKHL 11 [2007] 2 AC 167 at [18] "human beings are social animals. They depend on others". The ability to develop social relations with others in the context of employment, as well as the ability to develop an ordinary life when one is in possession of the means of living to permit travel and other means of communication with other human beings is thus an aspect of private life.⁴⁵

⁴² [2015] ECHR 603.

⁴³ *Teckle*, above, para 35.

⁴⁴ *Ibid.*

⁴⁵ *Ibid*, para 36.

It was held that the Home Office policy was ‘unlawfully overbroad and unjustifiably detrimental to claimants who have had to wait as long as this claimant has [had to wait]’.⁴⁶

But although notable, *Teckle* is nevertheless unusual, the Social Charter cited from time to time in Convention rights litigation, but generally ignored by the courts. In *Wandsworth London Borough Council v Vining*,⁴⁷ Article 1(2) (duty ‘to protect effectively the right of the worker to earn his living in an occupation freely entered upon’) was cited by the applicant as part of an argument that the ECHR, Article 8 (right to respect for one’s home and private life) applied to dismissal from employment. The argument was based on the decision of the Strasbourg court in *Sidabras v Lithuania*, above, a case excluding people from employment. It was held by the ECtHR in *Sidabras* that the exclusion from employment of the applicants breached Article 8(1) having regard to the ESC, Article 1(2) and the interpretation of the Social Rights Committee, as well as the absence of a ‘watertight division separating the sphere of social and economic rights from the field covered by the Convention’.⁴⁸ However, the Court of Appeal in *Vining* dismissed the Article 8 claim on the ground that the issues raised did not fall within the ambit of ECHR, Article 8. It did so without referring to the Social Charter or other international treaties brought to its attention.⁴⁹

Not only is the role of the Charter in domestic law thus very limited, subject to the discussion below on the European Union (Future Relationship) Act 2020, any potential role for the Charter is likely to be diminished still further by two recent developments. The first is the recent powerful restatement of constitutional orthodoxy by the UK Supreme Court that because of the principle of parliamentary sovereignty, unincorporated treaties are not to be given legal effects in domestic law.⁵⁰ Although not directed at the Social Charter particularly, this will apply to the Social Charter as well as to other treaties. The other is the government’s announcement that the HRA is to be repealed and replaced by a British Bill of Rights.⁵¹ One possible effect of this initiative if successful will be to weaken the duty on the part of the British courts to

⁴⁶ Ibid, para 54. Further consideration of this issue was dominated by concerns about EU Law. See *R(ZO)(Somalia) v Home Secretary* [2010] UKSC 36, [2010] 1 WLR 1948.

⁴⁷ [2017] EWCA Civ 1092, [2018] ICR 499.

⁴⁸ *Sidabras v Lithuania*, above, para 47. However, the restraint was held to be justifiable under Article 8(2).

⁴⁹ Although the applicants succeeded on the alternative ground that the statutory exclusion of the employees in question from the redundancy consultation obligation violated ECHR, Article 11 (freedom of association), this was a conclusion reached without reference to the Social Charter. See also *Taylor Ryan’s Application for Judicial Review* [2020] NIQB 78 (Social Charter relied on unsuccessfully in another ECHR, Article 8 case, this time in relation to social security).

⁵⁰ *R (SC, CB) v Secretary of State for Work and Pensions* [2021] UKSC 26. It is ‘a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom’ (para 77).

⁵¹ Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, 2021.

have regard to the jurisprudence of the ECtHR,⁵² and with it any indirect influence of human rights treaties such as the Social Charter in the British courts. But there are no proposals yet for the United Kingdom to denounce the European Convention on Human Rights, though that is a possibility that cannot be discounted in the future. As a result, it will still be possible in the meantime for applications to be made to Strasbourg from the United Kingdom, in the event of the domestic courts failing to give full effect to Convention rights.

V. Social Charter and the European Convention on Human Rights

A. Interpretation of the ECHR

In view of the foregoing, the greatest impact of the Social Charter in the United Kingdom is probably through its role in the interpretation of the ECHR by the ECtHR, beginning with the landmark *Wilson and Palmer v United Kingdom*.⁵³ The latter is an important decision in which the ECtHR held that the British government had a duty under the ECHR, Article 11 (freedom of association) to ensure that workers (i) are not penalized by their employer for using the services of a trade union, and (ii) are protected from employers making financial inducements designed to encourage them to relinquish trade union rights. These practices were lawful in the United Kingdom at the time,⁵⁴ and in holding that they violated ECHR, Article 11, the ECtHR noted that the latter aspect of domestic law had been ‘the subject of criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association’.⁵⁵ The Court concluded that ‘by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention’.⁵⁶

Also notable is *ASLEF v United Kingdom*,⁵⁷ in which applicant expelled from the trade union an individual because the individual in question was a member of a far-right political party. This was done in accordance with union policy that membership of the political party in question was incompatible with membership of the union, and that the individual in question was likely to bring the union into disrepute by virtue of his association with the far-right. The expelled individual succeeded in legal proceedings against the union for breach of the Trade Union and Labour Relations (Consolidation) Act 1992, s 174, which prohibited a trade union from expelling anyone from membership because of his or her membership of a political party. In

⁵² Human Rights Act 1998, s 2.

⁵³ [2002] ECHR 552.

⁵⁴ *Associated Newspapers Ltd v Wilson* [1995] 2 AC 454.

⁵⁵ *Wilson and Palmer v United Kingdom*, above, para 48.

⁵⁶ *Ibid.*

⁵⁷ [2007] ECHR 184.

upholding the union's claim that its Convention rights had been violated as a result, the ECtHR referred to the Social Charter, Article 5, as well as the Conclusions of the Social Rights Committee to support the view that by virtue of ECHR, Article 11 'unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union', and that there is 'no right to join the union of one's choice irrespective of the rules of the union'.⁵⁸

It would be difficult to say that the ECtHR's decisions in either *Wilson and Palmer* or *ASLEF* respectively were based on the Social Charter and the jurisprudence of the Social Rights Committee alone. But in the *ASLEF* case in particular, the jurisprudence helped greatly, the Court citing the XVIth Conclusions where it was said that

Section 174 of the 1992 Act limits the grounds on which a person may be refused admission to or expelled from a trade union to such an extent as to constitute an excessive restriction on the rights of a trade union to determine its conditions for membership and goes beyond what is required to secure the individual right to join a trade union....The Committee concludes that, in light of the provisions of the Trade Union and Labour Relations (Consolidation Act) 1992 referred to above (sections 15, 65, 174 and 226A) the situation in the United Kingdom is not in conformity with Article 5 of the Charter.⁵⁹

In both *Wilson and Palmer* and *ASLEF*, the ECtHR's decision led to domestic legislation to change the law in line with the Court's requirements, and in this way it can fairly be claimed that the interaction of the Strasbourg court with the Social Charter led to a breach of the latter being addressed.⁶⁰ As the Social Rights Committee subsequently pointed out, however, the amending legislation to deal with the *Wilson and Palmer* decision did not and still does not fully comply with the requirements of the Social Charter, Article 6(2).⁶¹ On the other hand, the Committee rejected claims by British trade unions that the legislation implementing the *ASLEF* decision also fell short of Social Charter obligations.⁶²

The role of the Social Charter in the interpretation of the ECHR appeared to be strengthened thereafter, following the decision in *Demir and Baycara v Turkey*.⁶³ In what is a seminal decision of great importance, the Grand Chamber emphasized in para 85 of its judgment that 'in defining the meaning of terms and notions in the text of the Convention', the Court '*can and must take into account* elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common

⁵⁸ Ibid, para 39.

⁵⁹ Ibid, referring to this passage as set out in para 23 of the Court's judgment.

⁶⁰ See *Unison v Kelly* [2012] UKEAT 0188_11_2202.

⁶¹ Council of Europe, European Committee of Social Rights, Conclusions XXI-3 (2018) (United Kingdom) (2019), p 14.

⁶² Ibid, p 12, referring to earlier Conclusions.

⁶³ [2008] ECHR 1345.

values'. One such instrument is of course the European Social Charter, and for present purposes Articles 5 (right to organise) and 6 (right to bargain collectively). Both provisions were referred to in *Demir and Baycara*, together with a wide range of other material to help the Court reach its remarkable conclusion that ECHR, Article 11 is to be read to include the right to bargain collectively.⁶⁴ Paradoxically, however, *Wilson and Palmer*, and *ASLEF* respectively nevertheless represent the high water mark of positive Social Charter engagement by the ECtHR in British applications, the Court tending in more recent Article 11 cases from the United Kingdom to keep the Charter at arm's length.

B. Declining Role of the Charter

It is often overlooked that the Grand Chamber in *Demir and Baycara* was not unequivocal about the role of international treaties. The far reaching first sentence of para 85 is followed by a second in which the Court says in more guarded terms that 'The consensus emerging from specialised international instruments and from the practice of Contracting States *may* constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases'. The implications of the second sentence of are to be seen first in *RMT v United Kingdom*,⁶⁵ in which a railway workers' union claimed that British statutory restrictions on the right to strike violated the ECHR, Article 11. One of the restrictions related to the duty of the union to notify the employer of its intention to conduct a strike vote.⁶⁶ The complaint was held to be inadmissible,⁶⁷ despite ECSR Conclusions XIX-3 where it was said that

The Committee considered in its previous conclusions ... that the requirement 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 (even the simplified requirements introduced by the Employment Relations Act (ERA 2004). As there have been no changes to the situation, the Committee reiterates its finding that the situation is not in conformity with Article 6(4) of the Charter in this respect.⁶⁸

A second complaint by RMT in the same case relating to the statutory prohibition on the right of trade unions to organize any form of secondary or solidarity action was at least held to be admissible. Here again the attention of the Court was drawn to the ECSR's Conclusions XIX-3 where it was said that

⁶⁴ Ibid, paras 45, 49, 103 and 149 on the Social Charter. It was all the more remarkable for the fact that Turkey had not accepted the relevant provisions of the Charter.

⁶⁵ [2014] ECHR 366, (2015) 60 EHRR 10.

⁶⁶ The union had been restrained by an injunction from taking strike action for failing to comply with statutory formalities: *EDF Energy Powerlink Ltd v RMT* [2009] EWHC 2852 (QB).

⁶⁷ *RMT v United Kingdom*, above, para 45

⁶⁸ Ibid, para 35, where this passage is quoted verbatim. See now Council of Europe, European Committee of Social Rights, Conclusions XXI-3 (2018) (United Kingdom) (2019), pp 16-17.

In its previous conclusions ... the Committee found that lawful collective action was limited to disputes between workers and their employer, thus preventing a union from taking action against the *de facto* employer if this was not the immediate employer. It furthermore noted that British courts excluded collective action concerning a future employer and future terms and conditions of employment in the context of a transfer of part of a business (*University College London NHS Trust v. UNISON*). The Committee therefore considered that the scope for workers to defend their interests through lawful collective action was excessively circumscribed in the United Kingdom. Given that there have been no changes to the situation, the Committee reiterates its finding that the situation is not in conformity with Article 6(4) of the Charter in this respect.⁶⁹

Nevertheless, the Court held that although a breach of ECHR, Article 11(1), the restriction on secondary action fell within the margin of appreciation for the purposes of Article 11(2) and therefore did not breach the Convention. Particularly significant for present purposes is the Court's engagement with the ECSR jurisprudence. The British government had notably attempted to diminish the authority of the Committee on the ground that 'the ECSR did not possess judicial or quasi-judicial status', 'despite the independence and expertise of its members'.⁷⁰ According to the Court in reply, however, 'the interpretative value of the ECSR appears to be generally accepted by States and by the Committee of Ministers', adding that 'it is certainly accepted by the Court, which has repeatedly had regard to the ECSR's interpretation of the Charter and its assessment of State compliance with its various provisions'.⁷¹ But while not doubting the authority of the Committee, the Court nevertheless proceeded to diminish the relevance of its work, holding that

the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight for determining whether the operation of the statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to the national authorities under Article 11 of the Convention.⁷²

Further evidence that the link between the Convention and the Charter is being weakened is to be seen more recently in *Unite the Union v United Kingdom*.⁷³ Here

⁶⁹ Ibid, para 35, where this passage is quoted verbatim. See now Council of Europe, European Committee of Social Rights, Conclusions XXI-3 (2018) (United Kingdom) (2019), p 16.

⁷⁰ *RMT v United Kingdom*, above, para 94. This coincided with a parallel British-led attack on the authority of the ILO Committee of Experts. See C La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42 ILJ 338.

⁷¹ Ibid.

⁷² Ibid, para 98.

⁷³ [2016] ECHR 1150, [2017] IRLR 438.

the union complained that the abolition of the Agricultural Wages Board (a tripartite statutory procedure for the setting the wages and other terms and conditions of employment for agricultural workers) also violated ECHR, Article 11. Although the matter had not been considered by the ECSR, the ECtHR appeared to accept that such arrangements were covered by the Social Charter, Article 6(2), and concluded that the statutory procedures fell within the definition of collective bargaining for the purposes of the ECHR, Article 11. The union's application was nevertheless found to be inadmissible as manifestly ill-founded,⁷⁴ for what is thought by one commentator in a powerful criticism to be unconvincing reasons.⁷⁵ Of significance for present purposes, is the following passage from the decision of the Court, appearing to make clear that the distance between the Convention and the Charter is growing:

while the European Social Charter may provide some guidance for how the trade-union rights inherent in Article 11 of the Convention are to be interpreted, and in particular how terms used in the area of social rights are to be understood, States' obligations under Article 6 of the European Social Charter cannot be considered synonymous with the positive obligations which arise under the Convention. As its preamble illustrates, the Charter was adopted as a counterpart to the Convention and was intended to guarantee social and economic rights which had been largely omitted from the scope of the Convention and its First Protocol (see paragraph 32 above). Further, the Charter itself does not contain any provisions stipulating that States must put in place mandatory collective bargaining bodies. It imposes an obligation on States to "promote" machinery for "voluntary negotiations" between employers and workers.⁷⁶

VI. Social Charter and the EU-UK Trade and Cooperation Agreement

For various reasons, the Social Charter thus has a very limited direct or indirect on British law. There is, however, a potential for that to change significantly, ironically as a result of Brexit. Before Brexit, the Social Charter had an indirect impact and possible indirect legal effect on the United Kingdom as a result of EU law. The TFEU, Title X (Social Policy), Article 151. expressly acknowledges the inspiration of the Social Charter, and British social law has been much influenced by Directives made under the treaty as a result. That said, the inspiration of the Social Charter thereafter appears otherwise to be limited, with little attention being paid to it by the

⁷⁴ Ibid, para 66.

⁷⁵ K Arabadjieva, 'Another Disappointment in Strasbourg: *Unite the Union v United Kingdom*' (2017) 46 ILJ 289.

⁷⁶ *Unite the Union v United Kingdom*, above, para 61.

CJEU.⁷⁷ One case where it was referred to, however, is the *Viking* case, which was a reference to the CJEU from a British court.⁷⁸ But although it is true that the Social Charter was referred to in *Viking* by the Luxembourg court in the development of the general principles of EU law, it was a reference that was to prove ineffectual against the over-riding demands of the EU's fundamental freedoms, which were accorded priority.

Nevertheless, Brexit has provided a potential new role for the Social Charter in both British and EU law respectively. The new relationship between the EU and the UK is set out in the Trade and Cooperation Agreement, which deals with a wide range of matters including labour and social standards. Two articles are particularly relevant. The first is Article 387(2) which provides that

A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards.

The term 'labour and social levels of protection' is defined by Article 387(1) to include fundamental rights at work, occupational health and safety standards, and fair working conditions and employment standards. The scope and content of these terms are not defined, though they will undoubtedly include many provisions contained in the Social Charter, Article 387(1) referring to 'each Party's international commitments'.

More importantly, however, a second article makes separate provision for social rights under the Agreement, with Article 399 dealing with multilateral labour standards and agreements, committing the parties to comply with certain ILO declarations and principles, as is now standard practice in free trade agreements. **For the first time ever in a free trade agreement, however, Article 399(5) commits the United Kingdom and the Member States to implement those provisions of the Social Charter that they have accepted.** Article 399(5) also commits the United Kingdom and the Member States to implement all the ILO Conventions they have ratified. This obligation is clarified by a footnote which states that

Footnote 63 Each Party maintains its right to determine its priorities, policies and the allocation of resources in the effective implementation of the ILO Conventions and the relevant provisions of the European Social Charter in a manner consistent with its international commitments, including those under this Title. The Council of Europe, established in 1949,

⁷⁷ U Khaliq, 'The EU and the European Social Charter: Never the Twain Shall Meet?' 2013 15 CYELS 169. Examples referred to by Khaliq include Case C-271/08 *Commission v Germany* [2010] ECR I-709; and Case C-268/06 *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-2483.

⁷⁸ Case C-438/05, *International Transport Workers v Viking Line ABP* [2007] ECR I-10779.

adopted the European Social Charter in 1961, which was revised in 1996. All Member States have ratified the European Social Charter in its original or revised version. For the United Kingdom, the reference to the European Social Charter in paragraph 5 refers to the original 1961 version.⁷⁹

These are commitments which raise interesting questions for EU lawyers so far as they relate to binding obligations on Member States by means of a free trade agreement. But they also raise questions about the overlap with Article 387 which covers much the same territory.

The overlap between Articles 387 and 399 can be explained on the ground that Article 387 is designed to prevent a regression of standards by either side in order to secure some trade advantage, with breach of this obligation attracting the possibility of trade sanctions. Article 399 in contrast contains free standing obligations unrelated to trade and investment with which both sides are expected to comply, subject to supervision under procedures prescribed by the agreement. Where these conciliation and mediation procedures are invoked, the Parties must ‘take into account available information from the ILO or relevant bodies’,⁸⁰ and ‘where relevant, the Parties shall jointly seek advice from such organisations or their bodies, or any other expert or body they deem appropriate’.⁸¹ These ‘bodies’ would surely include the Council of Europe and perhaps also the ECSR. Where it is necessary to refer the dispute to a panel of experts, the latter ‘should seek information from the ILO or relevant bodies established under those agreements, including any pertinent available interpretative guidance, findings or decisions adopted by the ILO and those bodies’.⁸² Again, these bodies would surely include the Council of Europe and also the ECSR.

Compliance with the Social Charter is thus made an obligation under the TCA, in addition to any existing obligations already arising under international law to comply with the commitments made.⁸³ That apart, implementation of the agreement also has implications for the role of the Social Charter in domestic law in the United Kingdom, by virtue of the European Union (Future Relationship) Act 2020, which by s 29(1) provides that

Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement ... so far as the agreement concerned is not otherwise so implemented and so far as such implementation is

⁷⁹ The interesting effect of Footnote 63 is that the Social Charter thus imposes an asymmetrical obligation, with those countries which have ratified more treaties and accepted more obligations subject to higher demands than those countries which have done less.

⁸⁰ EU-UK TCA, Art 408(3).

⁸¹ Ibid.

⁸² Ibid, Art 409(6).

⁸³ It also brings additional forms of supervision.

necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.

The term ‘modify’ or ‘modification’ is defined for these purposes to include a power to ‘amend, repeal or revoke’,⁸⁴ which is a remarkable power to give to the courts in the British system,⁸⁵ particularly in the context of Brexit. But what it means is that where there are provisions of the Social Charter (or other applicable international treaties) which have not been implemented, then the courts will be required to modify existing law to give effect to the Charter.

The EU(FR)A 2020 is complex, and as might be expected the power of the courts to modify legislation to give effect to the TCA is limited. As explained elsewhere, any legislation passed after the TCA has been implemented will have to be given effect if inconsistent with the TCA, regardless of the nature and extent of the inconsistency.⁸⁶ That is the inevitable consequence of an arrangement driven politically by a strong rhetorical commitment to parliamentary sovereignty. Moreover, the scope to ‘modify’ is also limited by EU(FR)A 2020, s 29(2), which provides rather opaquely that s 29(1) is subject to any equivalent or other provision:

(i) which (whether before, on or after the relevant day) is made by or under this Act or any other enactment or otherwise forms part of domestic law, and

(ii) which is for the purposes of (or has the effect of) implementing to any extent the Trade and Cooperation Agreement or any other future relationship agreement.

It is possible nevertheless that the EU(FR)A 2020, s 29 would empower the courts to modify legislation passed before the 2020 Act came into force, if for example the legislation in question introduced specific restrictions either in the knowledge that the measures in question breached ILO Conventions and/or the Social Charter, or were indifferent to that possibility.⁸⁷ There is a significant body of legislation to which this would apply.

⁸⁴ EU(FR)A 2020, s 37(1).

⁸⁵ the duty in the European Communities Act 1972, s 2 and the Human Rights Act 1998, s 3.

⁸⁶ Bradley, Ewing and Knight, *Constitutional and Administrative Law* (18th ed, Pearson, Harlow, 2022), pp 164-5.

⁸⁷ An example is the Trade Union and Labour Relations (Consolidation) Act 1992, s 224 which prohibits ‘secondary’ action by trade unions. Possibly, even though in this case the restriction (first introduced in 1990) has been held by the European Court of Human Rights not to breach Article 11: *RMT v United Kingdom*, above. The issue here would then be whether the power to ‘modify’ would require the courts substantially to qualify the restriction so that rather than being a total prohibition of secondary action, it now operated only to the extent of its compatibility with international legal standards. The Foreign Secretary’s Memorandum of 7 October 1961 (‘The European Social Charter, Memorandum by the Secretary of State for Foreign Affairs’, above) will be very useful in helping to determine what legislation passed post-ratification was made for the purposes of or has the effect of giving effect to Charter obligations. It is tempting to think that there has not been very much, given that

VII. Social Charter in Parliament

An assessment of the role of the Social Charter in British law would be incomplete without consideration of the extent to which it is used by parliamentarians in the enactment of legislation or in the scrutiny of government. Shortly before the enactment of the HRA, a joint committee of both Houses of Parliament was established to examine ‘matters relating to human rights in the United Kingdom’,⁸⁸ a role reinforced by the Human Rights Act 1998, s 19.⁸⁹ The committee in question is the Joint Committee on Human Rights (JCHR), and in performing its general duties, it examines government (and other) Bills to determine their compatibility with human rights obligations. Although it is true that the work of the Committee is dominated by the ECHR, parliamentary scrutiny of this kind does nevertheless permit an opportunity for scrutiny of Bills to ensure compatibility with the Social Charter, as well as other international human rights treaties. This is a role reinforced by the relevance (albeit it seems a declining relevance) of the Social Charter in the development of Convention jurisprudence. But it will be no surprise to the reader that in relation to the Social Charter, the JCHR has been no more effective than the courts.

In its scrutiny of legislation, in 2005, for example, the Committee examined the Health Bill which imposed a partial ban on smoking in workplaces. In considering whether the proposed legislation was sufficient to meet the government’s human rights obligations to non-smokers, the Committee referred to the Social Charter as well as the ICESCR in its assessment, noting that the Charter ‘provides that ‘all workers have the right to safe and healthy working conditions’ and ‘everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable’’.⁹⁰ Having referred to the Social Charter, however, the JCHR appeared to forget about it, concluding that the ‘main human rights issues’ raised by the Bill were ‘whether the positive obligation on the State to take measures to protect the lives and health of non-smokers under Articles 2 and 8 ECHR, or under Article 8 of the WHO Framework Convention, requires the State to legislate to prohibit smoking’. The Committee concluded with a finding that ‘the Strasbourg case-law does not require the UK to introduce a total prohibition on smoking’,⁹¹ without expressing any conclusion in relation to the Social Charter.

Engagement of this kind is both tokenistic and inadequate, but is perhaps symptomatic of the approach generally to the Social Charter in the United Kingdom. We find the

the government seemed intent on accepting only those parts of the Charter for which no fresh legislation would be required.

⁸⁸ House of Commons, Standing Order 152B.

⁸⁹ In the case of government bills, HRA, s 19 requires the minister responsible for the Bill to make a statement in writing that the Bill is compatible with Convention rights. If unusually the minister is unable to make such a statement he or she must declare that although unable to make a declaration of compatibility, the minister nevertheless wishes the Bill in question to proceed.

⁹⁰ HC 787 (2005–6), para 1.16.

⁹¹ Ibid, paras 1.23, 1.28.

same approach in the general scrutiny work of the JCHR. Apart from its work in scrutinising bills, the Committee also engages in wide-ranging inquiries, including recently the human rights implications of the government's response to Covid-19.⁹² The Committee has twice examined the relationship between business and human rights,⁹³ and on both occasions has received evidence of extensive non-compliance with the Social Charter as well as other international instruments.⁹⁴ On the first of these occasions the JCHR (i) reminded the government that in 2004 ministers had informed the Committee of their intention to ratify the Revised Social Charter,⁹⁵ critically important not only for expanding the scope of Charter rights, but also for providing access to the Collective Complaints procedure. The JCHR also (ii) recommended that ministers should now explain why they had failed to do, repeating the recommendation of its predecessor Committee in 2005: 'the UK should ratify the Revised Social Charter'.⁹⁶

The matter was not revisited when the JCHR re-examined the question of business and human rights in 2011, and it is unlikely that the Revised Social Charter will be ratified any time soon. The government's disregard of the recommendations of the JCHR perhaps points to the Committee's ineffectiveness, and perhaps also its powerlessness as well as even its irrelevance, harsh though such a judgment will sound to the Committee's few admirers. This is not to deny the potentially important role of a specialist parliamentary committee, adequately resourced, with suitable expertise, and sufficient powers. But there is a sense that social rights (and the Social Charter) are treated very much as an afterthought, the Committee failing to respond appropriately to Charter points.⁹⁷ There is also a sense of a lack of confidence in engaging with the ECSR jurisprudence which is infrequently if ever cited, and that social rights are too politically divisive and difficult for a bi-partisan Committee of parliamentarians to deal with. Perhaps as a result, JCHR inquiries on Brexit and Covid-19 have managed

⁹² See HC 265/HL Paper 125 (2020-21) (The Government's Response to Covid-19: The Human Rights Implications).

⁹³ HL Paper 5-I, HC 64-I (2009-10) (Any of our Business? Human Rights and the Private Sector); HL Paper 153/HC 443 (2016-17) (Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability).

⁹⁴ See HL Paper 5-I, HC 64-I (2009-10), above, pp 122-3 for a list of published written evidence. The Social Charter is discussed extensively in the submission by the Institute of Employment Rights, of which I was an author. See also HL Paper 153/HC 443 (2016-17), above, p 80 for a list of published written evidence. The Social Charter is discussed in the Submission by the International Centre for Trade Union Rights and myself.

⁹⁵ HL Paper 5-I, HC 64-I (2009-10), above, para 31.

⁹⁶ Ibid, para 1.61.

⁹⁷ A good example relates to the controversial Trade Union Bill in 2015, which raised questions about compliance both with ILO Conventions and the Social Charter. Although Social Charter was raised in evidence to the Committee, there was no response to these concerns in the Committee's report, though it did address ILO concerns, albeit ineffectively. On the latter, the Committee concluded lamentably as follows: 'We note the detailed analysis provided by both the Government and the TUC on the United Kingdom's obligations under the ILO Conventions, and the fact that the TUC has made a submission to the ILO Committee of Experts to the effect that the Government's proposals would violate ILO Conventions 87, 98 and 151. We draw this information to the attention of both Houses' (HL Paper 92/HC 630 (2015-16), para 50). This was reportage not scrutiny.

to avoid any discussion of the Social Charter, suggesting perhaps that neither Brexit nor Covid-19 had any implications for the Social Charter; or vice versa.⁹⁸

VIII. Conclusion

In evidence to the JCHR in relation to the Trade Union Bill 2015, John Hendy QC and I drew attention to the Social Charter and wrote that the ‘United Kingdom’s historic record of non-compliance with this instrument (ratified by a Conservative government in 1962) is shocking, and the continuing indifference to the legal obligations it contains is alarming’.⁹⁹ These words still ring true today:

- The United Kingdom has failed to ratify any substantive protocol since 1962, and now accepts only 59 of the Charter’s 72 paragraphs;
- The British government has been found to be in conformity with less than a half of the Social Charter’s paragraphs which it has accepted;
- The British government has failed to honour a commitment to Parliament made in 2004 that it will ratify the Revised Social Charter;
- The British government does not permit Collective Complaints to the European Committee of Social Rights;
- The British courts have marginalized the Social Charter, and the ECtHR appears now to be doing the same in British cases;
- The British government has sought actively to undermine the authority of the European Committee of Social Rights;
- The British Parliament’s human rights committee (JCHR) does not take the Social Charter seriously and rarely refers to it; and
- The United Kingdom has recently given notice of its intention no longer to be bound by a previously accepted paragraph, undoubtedly a regressive step.

These are problems that pre-date Brexit, though Brexit is unlikely to help. It is true that EU-UK TCA provides an opportunity for more active judicial and parliamentary engagement with the Social Charter. But it is also true that the implementing

⁹⁸ It is unclear what will happen to the Committee once the HRA is repealed, though continuing but more effective human rights scrutiny by Parliament will be necessary. The JCHR does not address its future role in its report examining the government’s proposals to repeal and replace the Human Rights Act 1998: HC 1033 / HL 191 (2021-22).

⁹⁹ HL Paper 92/HC 630 (2015-16), p 18 for a link to the evidence. See also K D Ewing and J Hendy QC, ‘The Eclipse of the *Rule of Law*: Trade Union Rights and the EU’ (2015) 4 *Revista Derecho Social y Empresa* 80.

legislation (EU(FR)A 2020 swims against the tide of judicial hostility and is unlikely to have much effect.¹⁰⁰

Before concluding, it ought to be said that the political and legal failings addressed above stand in sharp contrast to the active engagement of British-based or one time British-based scholars who have approached the Social Charter from multiple dimensions. One group has come to the Social Charter from what might be described as a human rights perspective (Churchill and Khaliq, Cullen, Harris, Nolan and O’Cinneide);¹⁰¹ a second has approached it from what might be described as a labour law perspective (Kahn-Freund, Novitz, and O’Higgins);¹⁰² while more recently a third dimension has been opened up, with the examination of the Social Charter from an EU Law perspective (Khaliq).¹⁰³ These and other scholars have produced a rich blend of published work which has done much to ensure that the Social Charter is a living instrument reflecting timeless values, and not simply a ‘manifestation’ of or a monument to Keynesian economics and Cold War politics.¹⁰⁴ It is a matter of great regret that the inspiring example of this scholarship has not been matched by the commitment of decision-makers,¹⁰⁵ particularly at a time when – primarily because of the consequences of economic liberalism – the need for the Foreign Secretary’s ‘manifestation’ to be realized in practice has never been more acute.

¹⁰⁰ *R (SC, CB) v Secretary of State for Work and Pensions*, above, is a particularly important (and devastating) decision.

¹⁰¹ R 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*, p. 417; H Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights’ (2009) 9 *Human Rights Law Review* 61; D J Harris and J Darcy, *The European Social Charter* (2nd ed, Transnational Publishers, Ardsley, NY, 2001); A Nolan, *Protecting the Child from Poverty: The Role of Rights in the Council of Europe* (Council of Europe, Strasbourg, 2019); C O’Cinneide, ‘The European Social Charter and the UK: Why It Matters’ (2018) 29 *King’s Law Journal* 275.

¹⁰² O Kahn Freund, ‘European Social Charter’, in F G Jacobs (ed), *European Law and the Individual* (North Holland Publishing, Amsterdam), ch 10; T Novitz, ‘Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter’ [2002] 7 EHRLR 50; P O’Higgins, ‘International Standards and British Labour Law’, in R Lewis (ed), *Labour Law* (Basil Blackwell, Oxford, 1986), ch 20. Also important more recently is *Andrew Moretta, Benchmarking Workplace Rights* (PhD thesis, University of Liverpool, 2019). Kahn-Freund, above, refers to the Social Charter as in part a ‘Worker’s Charter’ (p 186).

¹⁰³ Khaliq, ‘The EU and the European Social Charter’, above. For an earlier examination from the perspective of European law, see Kahn Freund, above.

¹⁰⁴ The Social Charter as a ‘manifestation’ is how it was referred to by the Foreign Secretary to the Cabinet in 1961: ‘The European Social Charter, Memorandum by the Secretary of State for Foreign Affairs’, above. Note that Foreign Secretary revealed in his Memorandum that the Contracting Parties had included an express reference to the right to strike in Article 6(4) ‘after a strong plea from the Workers that there should be an explicit reference to this right in a Charter meant for the free countries of Europe’.

¹⁰⁵ Note also that several of these scholars (Harris, Kahn Freund, Nolan, and O’Cinneide) served or currently serve on the Committee of Independent Experts/European Committee of Social Rights.

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