LAW, DIGNITY & SOCIO-ECONOMIC RIGHTS: THE CASE OF ASYLUM SEEKERS IN EUROPE

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Note: This is a draft paper based on research for my forthcoming monograph, The Socio-Economic Rights of Asylum Seekers in International & European Law (Abingdon: Routledge, 2015). As this paper is in draft, any comments are very welcome. A version of this paper was presented at the European Database of Asylum Law Conference (EDAL), Reflections on the Current Application of the EU Asylum Acquis, Friday 18th January 2014 & Saturday, 19th January 2014.
A. INTRODUCTION: LOCATING ‘ASYLUM’ IN EUROPEAN UNION LAW

This paper explores the interplay of dignity, law and rights as regards the socio-economic rights of asylum seekers. It does so by posing some questions as regards the extent to which this concept of ‘reception’ is preferable to the issue of socio-economic rights. This paper is not going to discuss the (rather depressing) situation in different EU member states; rather, this paper considers whether systems and processes of international and European human rights law offer heightened protection for the socio-economic rights of asylum seekers. Part B clarifies some of the terminology that is utilised in this paper, in particular as regards what I mean by the phrase ‘asylum seeker’ and why I utilise the language of ‘socio-economic rights’ in preference to ‘reception conditions’. Part C, the core of this paper, considers the extent to which the socio-economic rights of asylum seekers are protected at the supranational level under international and European law (both EU and Council of Europe). Part D reflects on the extent that asylum seekers truly enjoy equal protection of socio-economic rights vis-à-vis citizens or legal residents of a state.

Before going on to consider each of these issues in detail, some reflections on the European asylum acquis in general are necessary.

In 1992, at the start of the creation of the asylum acquis, Weiler stated that:

“[t]he treatment of aliens...has become a defining challenge to an important aspect of the moral identity of the emerging European polity and the process of European integration.”

Some ten years later in 2000, Colin Harvey felt that

1 For an non-exhaustive list of current concerns relating to (amongst other things) the socio-economic rights of asylum seekers in European Union (EU) member states, see: United Nations High Commission for Refugees, UNHCR Observations on the Current Situation of Asylum in Bulgaria (UNHCR, 3 January 2014); ECRE, Asylum Information Database: Country Report for Italy, (ECRE, May 2013), however the European Court of Human Rights has found that the transfer of asylum seekers to Italy, does not constitute inhuman and degrading treatment, see Application no. 27725/10, Mohammed Hussein et al. v the Netherlands and Italy, unreported judgment of the ECtHR, 03 April 2013. The treatment of asylum seekers in Greece is discussed below, but more generally see, Amnesty International, The End of the Road for Refugees, Asylum Seekers and Migrants (December 2012).


“The picture emerging from the EU is grim. The asylum seeker is routinely constructed as a threat to the area of freedom, security and justice.”

Minimum refugee and asylum standards emerged after externalisation of EU borders. Byrne suggests that a deliberate policy of minimised asylum protection and enhanced deflection of migratin groups is at the core of the CEAS process. EU asylum and protection law and policy, has largely mimicked the regression in procedural and social rights, which had occurred at member state level, including in the UK and Ireland. From the mid 1990s, reform of the asylum determination system at the national level and the European Union level was predicated on the need to tackle perceived abuse. A number of commonalities exist between the asylum laws in Ireland and the UK and the minimum common standards which exist at the EU level. The introduction or extension of carrier sanctions, the gradual limitation of procedural rights for those seeking asylum, the introduction of fast-track status determination for certain categories of asylum seeker, introduction of the safe third

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7 Some reference to Ireland and the UK in this regard, countries whose asylum systems I am most familiar with. With regard to Ireland, see, DJELR, Immigration and Residence in Ireland Outline Proposals for an Immigration and Residence Bill: A Discussion Document (Dublin: DJELR, April 2005) where it argued that there was a potential for abuse of state migration systems by asylum seeks (pp.113-114), people traffickers, terrorists and criminals (pp. 7-22), students (pp. 73-78), those seeking family reunification and persons entering marriages of convenience (pp. 78-87). In the UK, the Home Secretary has noted the use of the asylum system by ‘abusive claimants and racketeers’ which, he argues, has made it more difficult for ‘genuine applicants’ to gain refugee/humanitarian status (Home Office, Fairer, Faster, Firmer: A Modern Approach to Immigration and Asylum (July 1998), preface by Jack Straw M.P.). In Safe Borders, Safe Haven, the Home Office stated that the UK asylum system should be ‘fair, but robust’ (at p. 48).
9 Limitation of certain applicants to paper appeal only (Section 11A3 of the 1996 Act (as amended), UK) and restriction on right to take judicial review proceedings to short time frames (Section 13(3)(c) of the Immigration Appeals Act 2000). In addition, adverse inferences may be drawn to an applicant’s credibility inter alia where Ireland was not the first safe country reached by the applicant and/or where the asylee makes false representations in relation to the refugee claim (Section 11B of the 1996 Act (as amended)) Ireland).
country of origin concept,\textsuperscript{11} and the prohibition,\textsuperscript{12} or a heavily restricted\textsuperscript{13} right to work were gradually introduced (at different times) within Irish law, UK law and also EU law.\textsuperscript{14} This retrenchment of asylum protection at the national and supranational level preceded, and followed the introduction of restrictive reception conditions for those seeking asylum and other forms of protection. Many EU member states have engaged in similar debates on the need for the restriction on the numbers of asylum seekers.\textsuperscript{15}

Honig notes the increasing hysterical reaction of the citizenry in Western Europe to provision of socio-economic rights to aliens. She points out the contradiction that, at a time when (most) European welfare states contracted, foreigners were depicted as wanting to “...come ‘here’ to take ‘our’ welfare...”\textsuperscript{16} EU Member states have utilised the supranational structures of EU law to legitimate the creation of separate welfare rights for those seeking asylum. As will be highlighted below, attempts by the European Commission to lessen differentiation in the enjoyment of educational, social assistance and health care rights between citizens and asylum seekers ultimately failed.\textsuperscript{17} The formation of a European citizenship, the tentative but limited emergence of a pan-European welfare state, a declaration of respect for the human rights of all and the creation of a European common asylum system could have resulted in the stronger social rights protection for those seeking asylum. Member states sought to agree upon a directive which has as little impact as possible upon domestic legal norms relating to the reception of asylum seekers and those seeking protection.\textsuperscript{18} The 2003 Reception Directive did not lead to a lowering of reception conditions as had been predicted.\textsuperscript{19} Nevertheless, there remains a lack of recognition for the respect of fundamental human rights in relation to the socio-economic rights of asylum seekers.\textsuperscript{20} In 2003, the European Commission stated that the protection system was “in crisis” which posed “a real threat to the institution of


\textsuperscript{12} Section 9(4)(b) of the Refugee Act 1996 (Ireland).

\textsuperscript{13} Part 11B, Articles 360-361, Immigration Rules, which allows an asylum/protection seeker to seek permission from the UK Border Agency to enter employment if the initial asylum claim has not been decided upon within 12 months, and this delay was not due to the actions of the asylum or protection seeker. This is necessitated by Article 11(2) of the Reception Conditions Directive.

\textsuperscript{14} Reference is just made to the asylum directives as initially introduced, although all of these provisions are also reflected in the various Recast asylum directives.


\textsuperscript{17} See below, pp. 19-23.


asylum and more generally for Europe’s humanitarian tradition…”21 Despite this concern, regressive proposals for widespread reform of the 1951 Convention were rejected, and commitments to fully implementing the 1951 Convention and the ECHR were reiterated.22 Indeed, the finalisation of significant recast directives was a significant achievement over the last number of years.23

Focusing on the issue of socio-economic rights of asylum seekers, in the recent Recast Reception Directive (RRD),24 two recitals of note emerged that should cause us to reflect on the interaction and interplay between international and European systems of human rights protection and EU law.

Recital 9 of the RRD states:

“In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively.”

Recital 10 of the RRD states:

“With respect to the treatment of people falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.”

Throughout, the concept of human rights, along with the concept of dignity25 or dignified treatment,26 is referred to in the Directive. However, it must also be noted

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22 Ibid., pp. 19-22.


25 The concept of dignity is mentioned as regards detention of international protection applicants (see Recital (18) RRD), something which is beyond the scope of this paper and in Recital (35). In Recital (35), it is stated that the RRD seeks to respect the concept of human dignity in light of cited provisions of the Charter of Fundamental Rights of the European Union (EUCFR) [(2010) O.J. C. 83/389]; including: human dignity (art. 1); prohibition of torture, inhuman and degrading treatment (art. 4); right to liberty and security (art. 6); respect for family life (art. 7); right to asylum (art. 18); non-discrimination (art. 21); rights of the child (art. 24) and right to an effective remedy and fair trial (art. 47). There is no mention or reference to Chapter Four, Arts 27-38 EUCFR. The rights protected under this chapter of the EUCFR include *inter alia*, the right of workers to information and consultation from employers, right to collective action, fair and just working conditions, protection from exploitation, the Union
that at no stage is any reference made to the concept of ‘socio-economic rights’ for those seeking protection in Europe. Before going on to discuss this issue in detail, a brief discussion on asylum and the terminology of rights is necessary.

B. ASYLUM: THE TERMINOLOGY OF AND ACCESS TO ‘RIGHTS’

1. Asylum seekers
The practice of seeking surrogate state protection has been around for many centuries. A refugee is an individual who flees her country of nationality or country of former habitual residence due to a well founded fear of persecution for reasons of her race, religion, nationality, political opinion or membership of a social group. Traditionally, the term ‘asylum seeker’ described those who claimed protection for reasons outlined in the 1951 Refugee Convention, but whose claims for protection had not yet been decided by a country’s status determination bodies. In Europe, the term ‘asylum seeker’ should now be viewed as having a wider denotation, and includes those who seek other forms of protection from a state under European Union law (subsidiay protection: death penalty, freedom from torture, fleeing generalised violence due to personalised risk) and European Convention on

“recognises and respects the entitlement to social security and social assistance if needed, right to access health care and also to environmental and consumer protection.

26 See Recital (11) and Recital (25) where a ‘dignified standard of living’ is mentioned. The only appearance of this phrase in the core text of the RRD is in Article 20(5) RRD, where it is stated that decisions for withdrawal or reduction of material reception conditions, Member States ‘shall under all circumstances...ensure a dignified standard of living.”


Human Rights law (in particular restriction on removal from being tortured, but possibly to avoid a violation of private and family life). Additionally, there are arguments (not fully accepted) that individuals may be entitled to protection if their human rights (as protected under the various international human rights treaties) are being violated in a particularly deplorable manner. While the phrase ‘applicants for international protection’ has come to prominence in EU law over the last number of years, the phrase asylum seeker properly communicates the process of fleeing for protection, but awaiting determination of the protection application. Therefore, under international and European law, the concept of unsettled residency, of an individual whose legal rights and entitlements are in a sort of abeyance potentially exists.

2. Socio-Economic Rights & The Language of ‘Reception Conditions’

Socio-economic rights are those rights recognised under international law as forming part of the corpus of human rights. These include (but are not limited to) the following:

- The right to social security (art. 22 UDHR, art. 9 ICESCR),
- The right to work and to fair conditions of work (art. 23 UDHR, arts. 6 & 7 ICESCR), The right to rest and leisure (art. 24 UDHR),
- The right to an adequate standard of living, including food, water, clothing and shelter and medical care (art. 25 UDHR, arts. 11 & 12 ICESCR),
- The right to elementary education (art. 26 UDHR, art. 13 ICESCR),
- The family has a right to adequate social protection since it is the “natural and fundamental group unit of society” (art. 10 ICESCR).


These rights are also protected under various other thematic treaties on Race, Women, Children and Disability, as well as being protected (to a great degree) by the European Social Charter and under the European Charter of Fundamental Rights (EUCFR).
The controversy surrounding economic, social and cultural rights gives rise to a line of argument that these cannot be ‘rights’ properly so called. Eide makes short shrift of such an argument, noting the respectable level of signature and ratification of the ICESCR and the historical movement towards the recognition of a right to live free from poverty. Eide notes, socio-economic rights aid the poor, the oppressed, the disabled as well as non-nationals. Fundamental needs, he argues, “should be defined as entitlements” not subject to the whims of governmental change. Seeking to emphasise the indivisibility of rights, regardless of legal status, I use the phrase social and economic rights/socio-economic rights in preference to the phrase ‘reception conditions’. International human rights law sought to place the dignity of the human person as the ultimate purpose of law. Principles of equality and non-discrimination have been described as the linchpin of the international human rights regime wherein all persons are equal before the law, entitled to equal protection of the law and are entitled to benefit from the law without distinctions of any kind. The recognition of the “inherent dignity and of the equal and inalienable rights of all members of the human family” suggests that demarcations of international human rights norms between citizens and non-citizens does not bode well with an inclusive cosmopolitan system of international human rights law. However, as we examine below, this type of rights universality cannot be presupposed. International human rights law has yet to pierce the sovereign veil when it comes to the socio-economic rights of asylum seekers. The protection of the social and economic rights of asylum seekers in international human rights law lacks the clarity, coherence or adequate sanction that exists in many countries in Europe. The socio-economic rights of asylum seekers are particularly vulnerable. International human rights law, although having a cosmopolitan promise, has allowed for the emergence of differentiated welfare systems and differentiated conditions of social assistance entitlement permitting reception conditions that severely constrain the enjoyment of

33 Eide, A. et al. Economic, Social and Cultural Rights: A Textbook 2nd Edition (The Netherlands, Kluwer Law International, 2001) at p. 15 where Eide quotes President Roosevelt’s State of the Union address wherein he stated that individual freedom does not exist without economic security and independence. President Roosevelt continued noting, “[n]ecessitous men are not free men. People who are hungry and out of a job are the stuff of which dictators are made.” President Roosevelt in particular mentioned inter alia the right to work, the right to an adequate salary, the right to recreation, the right of every family to a decent home, the right for business to trade freely at home and abroad, the right to protection from infirmity, old age, unemployment and a right to education.

34 Eide, A. et al. Economic, Social and Cultural Rights: A Textbook 2nd Edition (The Netherlands, Kluwer Law International, 2001) at p. 6. Being self admittedly provocative, Eide asks the question as to what precisely was the permanent achievement of the international community in the prohibition of torture under international law, when international law did not provide for a person to be free from famine, hunger or preventable disease.


37 Preamble title 1 of UDHR, ICCPR and ICESCR all begin with this same formulae of words to express the cosmopolitan nature of human rights. The ICCPR and ICESCR in their second preamble title also expressly recognise “these rights derive from the inherent dignity of the human person.” Therefore it appears that the rights within these Covenants’ are simply declaratory in nature and inhere within humans due to the fact of their very existence. However, it is their acceptance by States parties that result in legal obligations to ensure compliance with these Covenants.

socio-economic rights. It is to this issue, the applicability of supra-national human rights norms to those seeking asylum, which must be considered.

C. THE SOCIO-ECONOMIC RIGHTS OF ASYLUM SEEKERS & PLURALITY OF RIGHTS SYSTEMS

While human rights seek to protect the weak, marginalised and vulnerable,39 there is often a presupposition amongst human rights lawyers, academics and activists that asylum seekers automatically have the same socio-economic rights as citizens and others.40 To what extent therefore can the plurality of rights systems add to our understanding of the socio-economic rights of asylum seekers. When I mention a plurality of rights systems, I am focusing solely on the following:41 international human rights law; European Union human rights law; European Convention on Human Rights law and European Social Charter law. As is discussed below, the precise answer as regards the protection of the socio-economic rights for asylum seekers under each of these systems is not easily identifiable. This section will simply signpost some key (but not all) issues that arise within the plurality of legal systems impacted by the socio-economic rights of asylum seekers.

1. International Human Rights Law

The primary actors and the primary rights bearers and duty holders within the international system of law continues to be states. State parties to international human rights instruments expressly agree to protect the rights provided for in those treaties.42 However, the interpretation and application of human rights treaties treaty provisions can vary. The International Bill of Human Rights (which includes the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights)43 recognises the vast array of civil, political, socio-economic, and cultural rights that individuals possess. These rights inhere in all individuals “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”44 While political rights are expressly limited to citizens,45 socio-economic rights, including the right to social security, the right to work and to fair conditions of work, the right to an adequate standard of living, including food, water, clothing and shelter and medical

41 To this extent, it is fully recognised that other systems of rights protection exist, in particular national systems of rights protection with courts, administrative tribunals, ombudsman systems etc.
42 See generally, Article 18, Article 19 and Article 31(2) of the Vienna Convention on the Law of Treaties, U.N.T.S., Vol. 1155, 331; Article 27. The Vienna Convention of the Law of Treaties (VCLT) is seen as, in the main, being declaratory of existing customary international law. The ICJ sees such a statement as uncontroversial and has declared it customary in Territorial Dispute (Libya v Chad) (1994) ICJ Reports, para. 41 and Oil Platforms (Iran v United States) (1996) ICJ Reports, para. 23.
43 This refers to the UDHR, the ICCPR and ICESCR which are collectively known by this title.
44 Art. 2 UDHR, art. 2(1) ICCPR and art. 2(2) ICESCR.
45 Art. 21 UDHR, Art. 25 ICCPR.
care and the right to elementary education, inhere in “everyone”. While there is still controversy regarding the legal-judicial nature of socio-economic rights, the international system of rights protection proclaims the indivisibility of all rights. In the other main thematic human rights treaties on the Elimination of Racial Discrimination, Rights of Women, Children, Migrant Workers and those with Disabilities civil and political rights, along with economic, social and cultural rights were dealt with side by side.

Much of the normative content of international human rights law has been developed by the human rights treaty bodies, who are charged with assessing state compliance. However the precise legal effect of concluding observations, general comments and jurisprudence of these bodies remain sharply contested. Views range from acceptance of the judicial character of treaty bodies views and opinions, to observations of the treaty bodies as being highly persuasive or interpretative declarations, to outright rejection of treaty bodies’ findings having the character of rules of law. So how then has international human rights law dealt with socio-

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46 Arts. 23-27 UDHR and Arts. 7, 8, 9, 11, 12, 13 & 15 ICESCR. The exception which exists for developing countries restricting economic rights to citizens need not be discussed in the context of this paper.


economic rights claims from asylum seekers? The answer: in a confusing and incoherent manner.

The Committee on the Rights of the Child has seemingly rejected any attempt to differentiate between the socio-economic rights of children in asylum-like situations. Distinctions in treatment in the fields of health, social welfare and education, between citizen children and non-national children have been frowned upon. In relation to the right of a child to an adequate standard of living, the Committee has expressed concern where vulnerable children were living in situations where the household income remains significantly lower than the national mean. Asylum seeking children, be they in the care of their parents, or unaccompanied, should also have full access to a range of services and asylum seeking families should not be discriminated against in provision of basic welfare entitlements that could affect the children in that family. The Committee on Economic Social and Cultural Rights have stated that differences of treatment in the enjoyment of socio-economic rights may be justified where these differences are reasonable, objective and proportionate. It is not fully clear whether nationality or asylum status in an of itself would be reasonable, objective and proportionate means of restricting access to socio-economic rights. In the Committee’s General Comment on Social Security, it seems to be implicitly recognised that there can be differences in the enjoyment of social security between different groups within society. The Committee has stated that social security systems should not infringe on the right to an adequate standard of living for immigrants, including asylum seekers, and has raised concerns about the living conditions of asylum seekers in reception centres and their exposure to racial discrimination. The most recent examination of the UK’s record on the economic, social and cultural rights of asylum seekers and those seeking protection is examined in one paragraph. While the Committee “encourages” the UK to allow asylum seekers to access the labour market, there is an implicit acceptance that there can be differentiation in mode of delivery of social services for asylum seekers. While welcoming the introduction of additional voucher support to particularly

[1998] ECR I-621 at para. 46, the European Court of Justice said that the Human Rights Committee is not a judicial body and its findings have no force of law.

54 Concluding Observations, CRC, Ireland, UN Doc. CRC/C/IRL/CO/2 (September 2006), para. 56.
55 Ibid. para. 64. See also, Concluding Observations, CRC, United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (2008), paras 70-71.
56 Concluding Observations, CRC, United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/121 (2002) 23, para. 142(b); Concluding Observations, CRC, Canada, UN Doc. CRC/C/15/Add.215 (2003), para 47(e).
59 Ibid., see in particular, para. 9, para. 24, para. 37 and para. 64.
63 Concluding Observations, ICESCR, United Kingdom, UN Doc. E/C.12/GBR/CO/5 at para. 27 (2009).
vulnerable asylum-seekers, there was no discussion of the fact that asylum seekers socio-economic rights are markedly less than those of UK citizens and other legal residents. However, when discussing Australia’s report, the Committee expresses concern that asylum seekers and those seeking protection do not enjoy universal coverage for social security payments (including non-contributory payments). In 2011, commenting on Germany’s and the Russian Federation’s reports on socio-economic rights, the Committee expressed “deep concern” for the situation of those seeking asylum or protection and their lack of access to adequate healthcare and social security. The Committee stated that asylum seekers must enjoy “equal treatment in access to” the labour market, healthcare and non-contributory social security benefits. This confusion surrounding applicability of seemingly universal socio-economic rights for asylum seekers is mirrored by other UN human rights treaty bodies. The inability of human rights instruments to fully

64 Ibid. The Committee goes on to express concerns relating to “the low level of support and difficult access to health care for rejected asylum-seekers.” The social rights of rejected asylum seekers are outside the scope of this thesis.


67 Ibid.

68 While the ICCPR does not explicitly protect social and economic rights. Article 26 ICCPR (equality before the law and equal protection of the law without discrimination) may have an impact on economic and social rights. In particular, Article 26 has been utilised by the Committee in finding that social security systems cannot discriminate, however, compare Communication No. 182/1984, Zwaan-de Vries v. The Netherlands, ICCPR, U.N. Doc. CCPR/C/OP/2 at 209 (1990) (9 April 1987) and Communication No. 196/1985, Gueye at. al v France, ICCPR, UN Doc. A/44/40 (3 Apr. 1989) with Communication No. 1160/2003, Godfried and Ingrid Pohl v Austria, ICCPR, UN Doc. CPR/C/81/D/1160/2003 (23 August 2004). The Human Rights Committee have stated that differences in treatment can be justified if reasonable and objective reasons underline the difference, see generally Communication No. 1615/2007, Zavrel v Czech Republic, ICCPR, UN Doc. CCPR/C/99/D/1615/2007 (14 September 2010), para. 9.2.; Communication No. 172/1984, Broeks v. The Netherlands, ICCPR, UN Doc. A/42/40 139 (9 April 1987) at para. 13. The Human Rights Committee have expressed concerns as regards the socio-economic rights of asylum seekers, in particular as regards how it impacts on asylum seekers enjoyment of civil and political rights: see, Concluding Observations, ICESCR, Switzerland, UN Doc. CCPR/C/CH/CO/3, para. 19 (3 November 2009). In the 2011 Concluding Observations for Slovenia, the Human Rights Committee stated: those “granted asylum and refugee status” should have equal access to employment, education, housing and health, see, Concluding Observations, ICCPR, Slovakia, UN Doc. CCPR/C/SVK/CO/3, para. 9 (20 April 2011). The recent decision in Communication No. 1799/2008, Georgopoulos et al. v Greece, ICCPR, UN Doc. CCPR/C/99/1799/2008 (14 September 2010) may also be of relevance to asylum seekers. This case dealt with violations of Roma civil, political, economic, social and cultural rights. Article 2(1) of CERD recognises that distinctions solely made on the grounds of citizenship do not contravene the general prohibition on racial discrimination as regards differential treatment for socio-economic rights. In General Recommendation No. 30, CERD, Discrimination against Non-Citizens UN Doc. CERD/C/64/Misc.11/rev.3 (February/March 2004), the Committee stated that Article 2(1) must not be construed as detracting from the rights or freedoms enunciated by the UDHR, ICCPR or ICESCR. The General Recommendation provides that four core socio-economic rights are deemed to inhere in all, and could not be construed as coming within the Article 1(2) distinction: the right to education, the right to adequate housing, the right to adequate conditions of employment and the right to access healthcare. However, see Communication No. 39/2006, CERD, D.F. v Australia, UN Doc. CERD/C/72/D/39/2006 (03 March 2008) and Communication No. 42/2008, CERD, D. R. v Australia, UN Doc. CERD/C/75/D/42/2008 (15 September 2009) where nationality/residence requirements for accessing social assistance systems was not found to constitute discrimination. Nevertheless in concluding observations on States parties reports, the Committee has expressed...
pierce the veil of State sovereignty within the field of socio-economic rights continues to have a profound effect for those seeking asylum.

2. Council of Europe Human Rights Law

Like international human rights law, the precise limits on the permitted differentiation between the rights of asylum and protection seekers has yet to be fully teased out by the European Court of Human Rights (ECtHR) or the European Committee on Social Rights (ECSR). Traditionally, the ECtHR has refused to interpret provisions of the European Convention on Human Rights as protecting socio-economic rights. In *Pancenko* ECHR stated categorically that:

> ‘concerns’ on discrete aspects of socio-economic for asylum seekers, but have not condemned differentiated social support mechanisms in place, see generally: Concluding Observations, CERD, United Kingdom of Great Britain and Northern Ireland, UN Doc. A/58/18 (2003) 88 where the Committee noted the establishment of NASS as being “an important step in providing support to eligible asylum seekers and ensuring they can access necessary services.” (para. 527), Concluding Observations, CERD, Japan, UN Doc. A/56/18 (2001) 34 at para. 177; Concluding Observations, CERD, Japan, UN Doc. CERD/C/JPN/CO/3-6 (2010) at para. 23. Concluding Observations, CERD, Australia, UN Doc. A/49/18 (1994) 78 at para. 546; Concluding Observations, CERD, Canada, UN Doc. CERD/C/CAN/CO/18 (2007) at para. 23; Concluding Observations, CERD, Ireland, UN Doc. CERD/C/IRL/CO/2 (14 April 2005), para. 13 and Concluding Observations, CERD, Ireland, UN Doc. CERD/C/IRL/CO/3-4 (4 April 2011), para. 20. In terms of *CEDAW*, like most other treaties, the literal wording of suggests that rights inhere in all women regardless of legal status, but the actual situation is more complex. The Committee has expressed the view on a number of occasions that asylum seekers are protected by the provisions of CEDAW and special measures may have to be taken to protect female asylum seekers and their rights under this Convention, see: Concluding Observations, CEDAW, Ireland, UN Doc. CEDAW/C/IRL/CO/4-5 (3 February 2006) at paras. 28-29, Concluding Observations, CEDAW, Denmark, UN Doc. CEDAW/C/DEN/CO/7 (7 August 2009), at para. 33. Concluding Observations, CEDAW, Spain, UN Doc. CEDAW/C/ESP/CO/7 (7 August 2009) at para. 22 and Concluding Observations, CEDAW, Australia, UN Doc. CEDAW/C/AUL/CO/5 (3 February 2006) at paras. 22-23. See also, UNHCR and CEDAW, Examining the particular relevance of the Convention on the Elimination of All Forms of Discrimination Against Women to the protection of women of concern to UNHCR, July 2009, available at [www.unhcr.org](http://www.unhcr.org) (last accessed, 15 January 2014). The Committee has only ever commented in the most limited way on socio-economic for those seeking asylum or other forms of protection. These comments have simply expressed concern about the adequacy of reception conditions for asylum seekers, without ever setting out what precisely is required by virtue of states obligations under CEDAW. This may suggest that socio-economic rights of those seeking asylum or protection can legitimately differ from the socio-economic rights of women citizens and legal residents, see: Concluding Observations, CEDAW, Liechtenstein, UN Doc. CEDAW/C/LIE/CO/4 (5 April 2011), at para. 40; Concluding Observations, CEDAW, Malta, UN Doc. CEDAW/C/MLT/CO/4 (9 November 2010) at paras. 38-39; Concluding Observations, CEDAW, Germany, UN Doc. CEDAW/C/DEU/CO/6 (12 February 2009) at para. 60.

For an expanded examination of some of the key socio-economic rights asylum cases before the European Court of Human Rights, see, Thornton, L. “Socio-Economic Rights as the Rule of Law before the European Court of Human Rights” in Egan, S., Thornton, L. & Walsh J. (eds), *The ECtHR and Ireland: 60 Years and Beyond* (Dublin: Bloomsbury, 2014 (forthcoming)). An earlier version of this piece is available here: [http://www.academia.edu/4392847/Seasca_Bliain_Faoi_Bhlath_60_Years_A-Growing_Socio-Economic_Rights_and_the_European_Convention_on_Human_Rights](http://www.academia.edu/4392847/Seasca_Bliain_Faoi_Bhlath_60_Years_A-Growing_Socio-Economic_Rights_and_the_European_Convention_on_Human_Rights) [last accessed 13 January 2014].  

“The Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living.”

While the case of *M.S.S. v Greece and Belgium* is significant, it is also a carefully crafted and limited decision, only made possible due to Greece’s failure to comply with legal obligations under EU law. M.S.S was an Afghan asylum seeker. The applicant first entered Greece, where he was detained for a number of days. He was then ordered to leave the state and made his way to Belgium. The applicant had not applied for asylum in Greece at this stage. Upon arriving in Belgium, M.S.S made an application for asylum. Implementing the Dublin Regulation, Belgium returned the applicant to Greece and received assurances that the applicant would be allowed to enter the Greek asylum process. The applicant was detained for a further seven days when he re-entered Greece, and eventually his asylum claim was processed and he was released with an entitlement to work and medical care. The ECtHR noted that Greece had transposed the EU Reception Conditions Directive (RCD), after the Court of Justice of the European Union (CJEU) had ruled that it had not transposed the RCD within the prescribed transposition period. M.S.S lived in extreme poverty while awaiting the outcome of his asylum claim, which had been lodged in June 2009 and still had not been decided upon on the date of the ECtHR judgment. No information on accommodation or subsistence was provided to M.S.S. The applicant was living in a park with other Afghan asylum seekers, did not have any sanitation or opportunities to maintain his appearance or hygiene, and relied on churches and other individuals and organisations for food. Greece argued that the applicant had a ‘pink card’ which enabled him to work and also to obtain medical assistance free of charge. Greece stated that had the applicant remained in the country, rather than going to Belgium (from which he was later returned), he would have had ample resources to rent accommodation and cater for his needs. Greece further argued that to find that the applicant’s Article 3 rights were violated by

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71 Application no. 30696/09, *M.S.S v Belgium and Greece*, Unreported judgement of the ECtHR, 21 January 2011. See also, some of the the Greek detention decisions relating to asylum seekers: Application no. 70427/11, *Horshill v Greece*, Unreported judgment of the ECtHR (01 August 2013); Application No. 8256/07, *Tabesh v Greece*, Unreported judgment of the ECtHR (26 November 2009); Application No. 12186/08, A.A. *v Greece*, Unreported judgment of the ECtHR (22 July 2010); Application No. 2237/08, *R.U. v Greece*, Unreported judgment of the ECtHR (07 June 2011). The decision of the Court of Justice of the European Union (CJEU)

72 Previously, the Court of Justice of the European Union had held that Greece failed to properly transpose the Reception Conditions Directive, see Case C-72/06, *Commission v Greece*, Unreported judgment of the European Court of Justice (19 April 2007).

73 Ibid., para. 205.

74 Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national [2003] O.J. L.222/3. Regulation 343/2003 is also known as *Dublin II*.


76 Case C-72/06, *Commission v Greece*, Unreported judgment of the European Court of Justice (19 April 2007).

77 Supra. fn. 71 at para. 235.

78 Ibid., para. 236.

79 Ibid., para. 238.

80 Ibid., paras. 240-243.
a failure to provide for material reception conditions, would place an undue burden on the state in the midst of its worst ever financial crisis.\(^{81}\)

The ECtHR began by emphasising that Article 3 does not provide the right to a home\(^{82}\) or the right to a certain standard of living.\(^{83}\) The ECtHR stated that the obligation to provide accommodation and decent material conditions to impoverished asylum seekers is due to “positive law”, namely the RCD.\(^{84}\) The ECtHR also noted their decision in *Budina v Russia*,\(^{85}\) where it was stated that in a situation of severe deprivation, a contracting state may have obligations under Article 3 ECHR. The ECtHR emphasised that asylum seekers were a particularly vulnerable group\(^{86}\) and while the ‘pink card’ gave the applicant the opportunity to work, this was not realisable due to his poor command of Greek, the administrative hurdles in being registered as an employee, and the general unfavourable economic climate in Greece.\(^{87}\)

It is important to note that the ECtHR only found such a violation due to Greece’s legal obligations under the RCD. Judge Roazakis, in a concurring opinion, stated that the RCD ‘weighed heavily’ on the court.\(^{88}\) The distinctions made between asylum seekers and other persons, who may not have a legislative right to accommodation or means of subsistence, was crucial. The ECtHR held that the Greek authorities did not have due regard to the vulnerability of the applicant who has spent several months sleeping in a park with no regular or guaranteed access to food. This was degrading treatment, which violated Article 3 ECHR.\(^{89}\) Belgium was also found liable for the living conditions of M.S.S in Greece. The ECtHR stated that the expulsion of an asylum seeker by a contracting state can result in a violation of Article 3, even if the state is operating under the Dublin Regulation.\(^{90}\) Since Belgium should have been aware of the general living conditions that M.S.S would be living under, Belgium had knowingly transferred to Greece, exposing him to living conditions that amounted to degrading treatment.\(^{91}\) Judge Roazakis emphasised that not everybody can claim the right to a minimum level of subsistence under the ECHR, as the RCD provided an “advanced level of protection” to asylum seekers.\(^{92}\)

In a partly dissenting opinion, Judge Sajó was of the view that neither Greece nor Belgium had any obligation as regards the living conditions of M.S.S under the ECHR. Rejecting the finding that asylum seekers were a vulnerable group *per se*, Judge Sajó argued that the majority within the Grand Chamber were constitutionalising welfare rights, something that could only be done by state legislators or constitutional courts of the contracting states to the ECHR. Judge Sajó also stated that the obligations of EU member states under the RCD are

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\(^{81}\) Ibid., para. 243.

\(^{82}\) Repeating the sentiments expressed in *Chapman v UK* (2001) 33 EHRR 399 at para. 99.


\(^{84}\) Supra fn. 71 at para. 250.

\(^{85}\) Application No. 45603/05, *Budina v Russia*, Unreported judgment of the ECtHR, 18 June 2009.

\(^{86}\) *Supra*. fn. 71 at para. 251, see also Application No. 15766/03, *Orsú v Croatia*, Unreported judgement of the ECtHR, 16 March 2010 at para. 147.

\(^{87}\) Ibid., para. 261.

\(^{88}\) Individual concurring opinion of Judge Roazakis, *supra*. fn. 71. There are no paragraph numbers to which direct reference can be made.

\(^{89}\) *Supra*. fn. 71 at para. 263.

\(^{90}\) Ibid., para. 365.

\(^{91}\) Ibid., para. 367.

\(^{92}\) *Supra*. fn. 88.

\(^{93}\) Partly concurring and partly dissenting opinion of Judge Sajó, *supra*. fn. 71. There are no paragraph numbers to which direct reference can be made.
‘fundamentally different’ to the positive obligations upon contracting parties under Article 3 ECHR. In Judge Bratza’s partly dissenting opinion, he stated that Belgium should not be held liable under Article 3 ECHR for returning M.S.S to Greece. In December 2008, the ECtHR had ruled in *K.R.S. v United Kingdom* that returning an asylum seeker to Greece under the Dublin II Regulation would not violate Article 3. K.R.S was challenging his return to Greece claiming that the asylum determination process and reception conditions in Greece violated Article 3. In dismissing this claim, the fourth chamber of the ECtHR stated that Greece had an adequate refugee status determination system and the EU “… asylum regime so created protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance.” Judge Bratza noted that the deficiencies in the Greek asylum and reception system were known to the court in *K.R.S.* The Grand Chamber was relying on many of the reports from international organisations and non-governmental organisations that the fourth chamber in *K.R.S* had already rejected. The Belgian authorities had specifically referenced the *K.R.S.* judgment when they decided to transfer M.S.S back to Greece. Given the close proximity in time between the *K.R.S* decision and the application of M.S.S to the ECtHR for immediate Rule 39 measures (which were not granted), Belgium was simply implementing known ECHR law in relation to the transfer of M.S.S to Greece. Therefore, Belgium should not have, in Judge Bratza’s opinion, been found liable for the degrading treatment suffered by M.S.S in Greece.

This judgment raises some interesting questions on how the ECtHR reached its decision that both Belgium and Greece violation Article 3 due to the reception conditions for those seeking asylum in Greece. Prior case law set a very high threshold before a lack of basic state social supports would engage Article 3 ECHR. The decision in *M.S.S* goes some way to dealing with the question of when state inaction in the field of socio-economic rights protection, can lead to a violation of Article 3 ECHR. However, this decision also raises important questions regarding the extent to which Article 3 ECHR can prevent destitution for all persons in a state. The decision in *M.S.S* relied heavily on Greece’s membership of the EU and the obligations upon it due to the requirements of the RCD. The RCD only applies to those who seek asylum and not other forms of complementary protection. While in Ireland and the UK, most who seek asylum or protection are provided with reception conditions that safeguard against destitution, it is unclear whether contracting states, which do not provide any form of reception for those seeking complementary forms of protection, will be found to have violated Article 3 ECHR. This raises a more fundamental issue on the ‘absolute’ nature of Article 3 in relation to socio-economic rights protections.

Given that a slim majority of contracting states to the ECHR are not members of the EU (Ireland and Denmark are not bound by the Reception Conditions Directive (2003) and these states along with the UK are not bound by the Recast Reception Directive), to what extent can asylum seekers in these states rely on Article 3

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99 *Supra*. fn. 94 at para. 3.
100 *Ibid*.
ECHR? It is likely, that if asylum seekers and those who claim subsidiary forms of protection can rely on Article 3, then the most that this would ensure would be a very basic level of socio-economic protection, extending no more than to the provision of shelter, food and other basic means of subsistence. There is no suggestion within M.S.S that there is a requirement to provide a right to shelter, food, subsistence and social assistance payments at a level enjoyed by nationals or legal residents within a contracting state. The decision in M.S.S leaves a lot of questions unanswered in relation to the level of support that must be maintained. However, given previous decisions in Pancenko, Larioshina\textsuperscript{103} and Budina v Russia,\textsuperscript{104} it is unlikely that the ECtHR would delve into the modalities of reception or question the level of monetary payment received by an individual claiming asylum or subsidiary protection. In Limbuela,\textsuperscript{105} the House of Lords in the United Kingdom found that the withdrawal of all form of social supports for an asylum seeker, coupled with the denial of the right to be self-sufficient would give rise to a violation of Article 3 where

“it appears on a fair and objective assessment of all relevant facts … that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life…”\textsuperscript{106}

Without substantively discussing Limbuela, both courts relied on concepts of positive law,\textsuperscript{107} however the tenor of Limbuela seems to suggest that providing reception conditions for those seeking asylum (or subsidiary protection) was inherent within Article 3 ECHR to ensure that an individual did not suffer inhuman or degrading treatment due to a states actions or inactions. Nevertheless, the limited remit of these judgments must be emphasised in that both permit significant differences in protecting the socio-economic rights of asylum seekers (and potentially those seeking other forms of protection) in comparison with citizens or legal residents of a state. In any case, once material conditions for subsistence protect against destitution, it is likely that the ECtHR would not entertain a challenge arguing that reception conditions were inadequate for Article 3 ECHR purposes. When discussing positive obligations, the ECtHR, while wary of interfering with how a government allocates resources,\textsuperscript{108} nevertheless has proved willing to intervene where prison conditions were wholly inadequate. This would have a knock on effect on other government priorities. However, the Court does not appear to have an appetite to set down precise degrees of protection for socio-economic rights. In general, the ECtHR has adopted a cautious approach when assessing the degree to which Article 3 ECHR can be seen as providing individuals with a certain minimum standard of living as evidenced in M.S.S where the ECtHR noted that the only reason the applicant was protected was due to Greece violating EU law. Nevertheless, it needs to be emphasised that states obligations under Article 3 ECHR would not extend to

\textsuperscript{103} Larioshina v Russia Application no. 56679/00 (23 April 2002),
\textsuperscript{104} Application No. 45603/05, Budina v Russia, Unreported judgment of the ECtHR, 18 June 2009.
\textsuperscript{105} R (Limbuela, Tesema & Adam) v Secretary of State for the Home Department [2006] QB 1440.
\textsuperscript{106} [2006] QB 1440 at p. 1441, per Lord Bingham.
\textsuperscript{107} In the case of Limbuela, section 95 of the Immigration and Asylum Act 1999.
\textsuperscript{108} See generally, Ilascu et. al. v Moldova and Russia (2004) 40 EHRR 1030, where the ECtHR stated that in pronouncing upon the extent of positive obligations a fair interest has to be struck between an individuals Convention rights, the general community interest and the choices which elected governments must make in terms of priorities and resources.
ensuring equality in the provision of welfare rights to asylum seekers or those seeking protection.\textsuperscript{109}

The European Social Charter (ESC) 1961\textsuperscript{110} and the European Social Charter (Revised) 1996\textsuperscript{111} provide for protection of \textit{inter alia} the right to social security and social assistance, the right to work, the right to health care, the right to housing and the right to education for children. Both the 1961 Charter and the Revised Charter expressly state that the socio-economic rights recognised only extend to those who are lawfully present in a contracting state and who are nationals of states parties to the Charters.\textsuperscript{112} The ECSR recognises that states may legitimately restrict social rights on the basis of nationality/legal status within a state. While there is a general reluctance by the ECtHR to declare certain socio-economic rights as being inherent within the ECHR, the ECtHR has recognised certain positive obligations upon states to protect socio-economic rights in limited and prescribed circumstances. Nevertheless, the European Committee of Social Rights (ECSR) has found, notwithstanding the declaration in the Annex, that certain rights under the 1961 and 1996 Charters’ do apply to those whose presence in the state is not lawful. In recent reports to the ECSR for Ireland, the UK and The Netherlands, while the socio-economic rights of those seeking asylum were outlined, the ESCR did not comment upon the differentiated provision of social support as compared to citizens or other legal residents.\textsuperscript{113} The ECSR has invoked the concept of human dignity to insist that all persons in a state, regardless of legal status, may have certain rights under the Charter. Nevertheless, the precise impact on reception conditions for those seeking asylum and/or subsidiary protection would be minimal, and would be unlikely to go beyond the parameters set down by the ECtHR in \textit{M.S.S}.\textsuperscript{114}


\textsuperscript{110} Council of Europe, European Social Charter (ESC), 18 October 1963, E.T.S 35.

\textsuperscript{111} Council of Europe, European Social Charter (Revised), 03 May 1996, E.T.S 163. The two treaties co-exist with each other as a number of states, including the UK, have signed but not ratified the Revised European Social Charter. See generally, Harris D., \textit{The European Social Charter} (New York: Transnational Publishers Inc., 2001).


The cases and decisions referred to above, highlight the ongoing tensions between states, who seek to limit access to social benefits for those remaining in the state for the duration of an asylum/protection claim. It can also be inferred from the jurisprudence of both the ECtHR and ECSR that once some form of support is provided, which meets the basic needs of those claiming asylum and/or protection, these internationalised bodies will be weary of interfering with a state decision on the level of social benefit provided. Therefore, neither the ECHR nor the ESC provide an effective bulwark against regressive reception regimes that stop short of destitution.

While the ECtHR base this on ‘positive law’, which is applicable to a bare majority of states within the Council of Europe who have overlapping membership of the EU, the ECSR has relied (at least in the case of health and shelter of migrant children) on the concept of human dignity. While traditionally it had been assumed, and argued, that socio-economic rights should not be protected by the ECHR, it appears that this is no longer the case, in particular when dealing with particularly vulnerable individuals. The ECtHR has, however, succeeded in avoiding the elucidation of standards which may hint at the right to a certain minimum and basic standard of living. In M.S.S this was done through reference to the EU’s RCD.

3. European Union Human Rights Law

The Lisbon Treaty has seen more expressive commitment to human rights within the functioning of the EU. Many of the express commitments to human rights had developed over time, starting with the Maastricht Treaty. Article 2 TEU states that the EU is founded upon the principles of liberty, democracy, respect for human rights and the rule of law. The EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (EUCFR) and provides the legal base for EU accession to the ECHR. The EUCFR is split into seven sections, the main sections which contain the rights provisions are entitled, ‘Dignity’, ‘Freedom’, ‘Equality’, ‘Solidarity’, ‘Citizens Rights’ and ‘Justice’. According to the preamble of the Charter, the EU is based on the

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117 It should also be noted that since the 1970s, the Court of Justice of the European Union stated that the protection of fundamental rights formed an integral part of EU law. see: Case C-11/70, Internationale Handelsgesellschaft v Einfur und Vorratstelle fur Getreide und Futtermittel [1970] ECR 1125 at para. 4; Case C-4/73, Nold v Commission [1974] ECR 491, para. 13. More recently, and in the immigration sphere, see: Case C-200/02, Chen & Ors. v Secretary of State for the Home Department [2004] ECR I-9925 and Case C-34/09, Zambrano v Office national de l'emploi (ONEm) [2011] ECR I-1177.
118 Article 6 TEU.
119 Chapter One, Articles 1-5EUCFR.
120 Chapter Two, Articles 6-19EUCFR.
121 Chapter Three, Articles 20-26EUCFR.
122 Chapter Four, Articles 27-38EUCFR.
123 Chapter Five, Articles 39-46EUCFR.
124 Chapter Six, Articles 47-50EUCFR.
‘universal values’ of human dignity, freedom, equality and solidarity.\textsuperscript{125} The individual provisions of the Charter are divided into three categories, rights, freedoms and principles.\textsuperscript{126} The Commission has taken the view that the rights within the Charter are, in general, conferred on all persons, thereby reflecting a “…positive attitude to equal treatment of citizens of the Union and third country nationals.”\textsuperscript{127} EU policies on minimum reception conditions for asylum seekers emerged in the formative years of human rights discourses that have culminated with the adoption of the EUCFR. Despite recognition of solidarity rights under the EUCFR, the EU is not a traditional actor in the model of welfare provision. The EU does not have the legal competency to collect tax from Union citizens. It is not an agent of redistribution and does not have a transnational system for the distribution of social goods between European citizens across the 27 member states. In this respect the EU cannot be considered a ‘welfare state’ \textit{per se}. Issues of social inclusion and anti-poverty strategies, along with the promotion of non-discrimination and influence over the welfare policies of member states are all core areas of EU social policy.\textsuperscript{128} However, in the field of social welfare, member states remain largely in control. Only where the welfare state can be used as a bulwark against the fundamental aims of the EU does EU law interfere with national wealth transfers. Some suggest that principles of non-discrimination within the ‘European Social Model’ may lead to an over-burdening of individual welfare states.\textsuperscript{129} This argument is also adopted by Hervey, who states that notions of directly effective EU law in relation to the internal market and competition law can be an ‘inhospitable environment’ for national welfare state regimes.\textsuperscript{130}

The Reception Conditions Directive (RCD)\textsuperscript{131} and the successor Recast Reception Directive (RRD)\textsuperscript{132} are unique, in that a very basic standard of living has been set down from those considered outside the European polity. It has been estimated that the total cost across 25 member states (excluding Ireland and Denmark) for providing reception conditions to asylum seekers (and in some cases those seeking

\begin{itemize}
\item \textsuperscript{125} Preambular paragraph 2.
\item \textsuperscript{126} Preambular paragraph 7.
\item \textsuperscript{129} Shaw, J. (ed) \textit{Social Law and Policy in an Evolving European Union} (Oxford: Hart, 2000) at p. 12. At p. 13, Shaw states that the security of the welfare state can no longer be taken for granted since notions of State responsibility for individual citizens are rejected as being financially unrealistic and psychologically ineffective.
\item \textsuperscript{130} Hervey, T. “Social Solidarity: A Buttress against Internal Market Law” in Shaw J. (ed) \textit{ibid}. fn. 129, p. 33.
\end{itemize}
subsidiary protection as well as third country non asylum applicants) is €1.5 billion. Some of the obligations under the Reception Directives include:

- Recognition of a dignified standard of living;
- Highly circumscribed freedom of movement rights;
- The right to be provided with some form of shelter;
- Material reception conditions;
- A circumscribed right to education for children under 18;
- Protection of particularly vulnerable asylum seekers;
- A limited right to work.

The socio-economic rights highlighted above, should not be seen as a wholly rights based approach towards the socio-economic rights of asylum seekers or without practical problems of implementation. In the drafting of the Recast Reception Directive (as with the Reception Conditions Directive (2003) previously), there was institutional push back to adopting a more rights orientated system of reception for asylum seekers. As is evidenced from the progression of the proposals from 2008

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134 Preamble recital 7 RCD and Preamble recital 9 and 10 RRD.
135 Article 7 RCD/Article 7 RRD.
136 Article 14 RCD/Article 18 RRD.
137 Article 13 RCD/Article 17 & 18 RRD.
138 Article 10 RCD/Article 14 RRD. In relation to the possibility of separate education for children of asylees (or possibly asylum seekers themselves), Chalmers comments that educational provision “is only on terms of 1950s Mississippi”, Chalmers, D. (editorial) “Constitutional treaties and human dignity” (2003) 28(2) European Law Review 147.
139 See Article 16-19 RCD and Article 21-25 RRD.
140 Under the RCD, a right to work was granted (Article 11(2) RCD) if an asylum applicant’s first instance decision was not rendered within one year. This is to be reduced to 9 months under Article 15 RRD. Priority can still be given to EU citizens, EEA nationals and ‘legally resident’ third country nationals.

144 See, European Parliament legislative resolution of 07 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), [2010] O.J. C-212E/348 (05 August 2010); European Economic and Social
to 2011, concerns about abuse of the asylum and protection system led to significant downgrading of core elements of socio-economic rights protection within the RRCD. In this regard, the European Parliament and Council of the European Union, 145 were central in arguing for a less rights orientated and more punitive approach to material reception conditions for asylum seekers. The European Parliament, as co-legislator along with the Council of the European Union, adopted a legislative resolution under the first reading of the co-decision procedure in May 2009. 146 (The ‘co-decision’ procedure is now known as the ‘ordinary legislative procedure’). 147 The Parliament modified the Commission’s proposal in a number of respects, including inter alia some attempt to strengthen guarantees for detained asylum seekers while permitting states to detain those claiming asylum and/or protection for reasons of public policy, 148 insisting that legal assistance be granted to those seeking asylum or protection free of charge, regardless of whether costs can be covered from their own resources, 149 and for the schooling of minors to take place once the application for international protection had been made. 150 Parliament considered that removing draft Article 13(5) RRD, which stated that material reception conditions in kind, through financial allowances or vouchers, would be a “significant pull factor, which would be likely to cause additional illegal immigration”. 151 Members of the European Parliament (MEPs) also deleted the method proposed by the Commission, which sought to calculate the level of material reception conditions with reference to social assistance available to nationals of the host state. 152 The Commission accepted many of the amendments proposed by Parliament. The UNHCR and the European Council on Refugees and Exiles (ECRE) welcomed the lessening of discretion and the linking of reception conditions with social benefits of nationals within member states. 153 However, the Commission, aware that Parliamentary approval will be needed to adopt the RRCD, removed this provision.

However, as has been documented by human rights organisations, and as seen in a number of cases coming before European courts, the minimum requirements as regards the Reception Conditions Directive are not being upheld in a number of EU member states. 154 The approach of the Court of Justice of the European Union (CJEU) towards substantive socio-economic rights of asylum seekers, shows the

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145 See above.
147 Article 294, Treaty on the Functioning of the European Union (TFEU) [2008] O.J. C115/77
152 Ibid. Amendment 1, Recital 11; Amendment 23 and Amendment 24 [2010] O.J. C-212E/348 (05 August 2010).
154 See above, fn. 1.
court willing to conform its findings and jurisprudence to that of the European Court of Human Rights i.e. willing to prevent removal to another EU member state who will not meet the minimum standards as set down in the RCD.\textsuperscript{155} The recent request for a preliminary ruling from a Belgian court,\textsuperscript{156} as regards the level of financial allowances for asylum seekers, may permit the CJEU to delve into the precise level of socio-economic rights protection that exists for asylum seekers under EU law. This decision is waited with some interest.

4. So what of the socio-economic rights of asylum seekers?

The language of human rights is universal in orientation. The promise of international human rights should not be confined by the migrant status of an an individual, but rooted in human personhood. The grand pronouncements in UN human rights treaties declaring that the rights protected inhere in ‘all’, ‘everybody’ and ‘everyone’ mask the reality that states may legitimately differentiate in the protection of rights between citizens and residents on the one hand and asylum and protection seekers on the other. An individual’s citizenship, and legal and settled residence status in a state, continues to have a profound effect on the enjoyment of socio-economic rights. The limitation on the protection of socio-economic rights for asylum and protection seekers in Council of Europe human rights law and European Union human rights law is also clear. European human rights law has played an important role in (almost) establishing a legal prohibition on the absolute destitution of asylum seekers. The ECHR and CJEU have both recognised that once a ‘positive law’ in a contracting state protects reception conditions, failures of the state to abide by this ‘positive law’, where asylum seekers are rendered absolutely destitute, can violate both EU law and the ECHR. However, limitations on freedom of movement, the right to work, the ability to suspend entitlement to material reception conditions and the denial of education to children all offend against a more cosmopolitan understanding of core human rights norms for asylum seekers in Europe. These rights limitations mimicked state responses to the distancing of asylum and protection seekers from general social assistance measures for citizens.

\textbf{D. The Socio-Economic Rights of Asylum Seekers: From Legal Plurality to Clarity to Dignity?}

International and European human rights law have attempted (albeit, in my view unsuccessfully) to protect the socio-economic rights of asylum seekers in Europe. The key method and efforts for seeking protection of the dignity, inherent worth and socio-economic rights for asylum seekers should be focused on domestic rights regime, with international rights mechanisms supplementing socio-economic rights protection for asylum seekers. However, this also carries risks. Bigo argues that the

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{155} See in particular, Joined cases C-411/10 and C-493/10, \textit{N.S. v Secretary of State for the Home Department, M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform} [2012] 2 Common Market Law Reports 9.
    \item \textsuperscript{156} Case C-79/13, \textit{Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others} [2013] O.J. C.114/26.
\end{itemize}
\end{footnotesize}
pan-European approach to asylum and protection reinforces the view of immigration as a threat, and those the perception of those who seeking asylum or protection as being fraudulent. The effect of differentiating between the needs of asylum seekers and of European citizens creates an overarching EU discourse of fear and mistrust of those outside the European polity. This feeds into national concerns on asylum and legitimises the controlling nature of reception conditions within individual member states. The large degree of discretion that exists in relation to the socio-economic rights of asylum seekers suggests human rights law and standards of dignity and respect for the individual, which the Union seeks to embrace, is lacking when one speaks of the rights of the outsider. The punitive elements of the CEAS are further compounded with the placement of issues of asylum alongside other actual threats to the EU such as terrorism, drug trafficking, people trafficking and international criminal enterprise. In relation to asylum matters, Harvey surmises the position currently taken by EU Member States wherein the:

“...humanitarian institution of asylum is now discussed as a threat and/or a security problem.”

Along with this, Hepple argues that the

“...rhetoric of ‘Fortress Europe’...undermines the civil and social rights which belong to all human beings.”

The desire to strictly control who enters Europe has led to the securitization of the issue of asylum. Tsoukala has opined that the problematisation of immigration is fermented by arguments arising from socio-economic degradation of the host society due to immigration, the need for extra security due to ‘problem’ communities and these two factors threatening a constructed and imagined ‘European’ identity. Within EU law, the language of ‘reception’ of asylum seekers masks the reality of asylum seeker exclusion from human rights protections. The limitations on freedom of movement, right to work, the ability to suspend entitlement to material reception conditions and the denial of education to children on par with nationals trump the ideals of tolerance, equality, non-discrimination and dignity, which the EU supposedly holds as core values. While the ECHR and international human rights law offer some protection against absolute destitution, the limits of human rights law and norms continue to have a profound effect on the socio-economic rights of those seeking asylum and/or subsidiary protection.

The EU legitimisation of controlling strategies towards those seeking asylum reflects policies already in place at the member state level prior to the adoption of the RCD. The end result, in spite of the plurality of legal regimes that protect, to some extent the socio-economic rights of asylum seekers, has been to deny asylum seekers

158 Ibid., p. 37.
access to mainstream social supports that are considered fundamental to ensuring all those within a state can enjoy a minimum, if basic, standard of living. In essence, international and European human rights law and norms have failed to act as an effective bulwark against the differentiation and lowering of the socio-economic rights of asylum seekers.