

Social Rights in Times of Crisis

Bob Hepple*

Nicola CONTOURIS and Mark FREEDLAND (eds.), *Resocialising Europe in a Time of Crisis* (Cambridge, Cambridge University Press 2013) 525 p., ISBN 978-1-107-04174-5

Aoife NOLAN, Rory O'CONNELL and Colin HARVEY (eds.), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford, Hart Publishing 2013) 257 p., ISBN 978-1-84113-011-8

Economic and social rights are among the first casualties of economic crisis. This has been the case in those EU countries that have required bail-outs and financial assistance during the Eurozone and sovereign debt crises since 2007. As a condition of assistance the EU-ECB-IMF 'troika' have imposed conditions including privatisation, retrenchment of the welfare state, decentralisation of wage bargaining and the deregulation of employment rights.¹

These two collections of papers seek ways to rescue the European Social Model (ESM), including the rights and principles enshrined in the EU Charter of Fundamental Rights, from the crisis. Among the important questions they raise are: What is the scope and effect of economic and social rights? How can State Parties to the International Covenant on Economic Social and Cultural Rights fulfil their obligation to expend the 'maximum available resources' towards the 'progressive realisation' of economic and social rights in a time of crisis? How could participatory democracy and social dialogue be utilised? How could the European

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¹ See Klaus Armingeon and Lucio Boccardo, 'The Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation', 41 *Industrial LJ* (2012) p. 254; Aristeia Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Deregulation in Greece', *ibid.*, p. 276; Samuel Dahan, 'The EU/IMF Financial Stabilisation Process and Its Implications for Labour Law and Social Policy', *ibid.*, p. 305. See also Claire Kilpatrick and Bruno de Witte (eds.), 'Social Rights in Time of Crisis. The Role of Fundamental Rights' Challenges', *EUI Working Papers LAW* 2014/05 (2014), Department of Law, European University Institute and the articles (Achim Seifert (ed.)) on 'the European Financial Crisis and National Labor and Employment Law Reforms', 35 *Comparative Labor Law and Policy Journal* (2014) p. 295-478.

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social model be saved and developed, for example through the mainstreaming of human rights in budgetary and policy decisions? What is the role of constitutional principles and the judiciary in protecting economic and social rights? No less than thirty academic writers contribute to the Contouris and Freedland volume, and fifteen to that edited by Nolan, O'Connell and Harvey (hereafter referred to as Nolan). These authors are drawn mainly from the United Kingdom and Ireland, but also from some other EU countries.

Although both volumes are concerned with broadly the same issues, they approach them in different ways. The idea underlying the Contouris and Freedland collection is that of mutualisation and demutualisation of risks to workers, that is the shifting of risks and the bearing of costs of risks either away from individual workers so that the risks or risk-costs are borne by or shared with entities or a community (mutualisation) or back towards the individual worker (demutualisation). This is an idea that Contouris and Freedland first put forward in their work on *The Legal Construction of Work Relations*,² and it bears some resemblance to the much earlier analysis by J.J. Dupeyroux of the development of welfare systems in Europe.³ The starting point of the Nolan volume is narrower, namely the linkage between public finance, particularly budget decisions, and the realisation (or not) of economic and social rights. It would not be possible, in the scope of this review, to comment on each of the 23 contributions in Contouris and Freedland, and the 10 in Nolan. Instead, I propose to discuss only some of the general issues that emerge from the two volumes.

The first is the nature and effect of economic and social rights. What is the difference, if any, between what some constitutions call 'directive principles of social policy' and others call social 'rights'? In Dworkinian legal theory,⁴ 'principles' are political arguments to establish subjective (individual) rights, and can be a guide to particular rights. Rights are of various kinds – some 'background' indistinguishable from principles; some are abstract rhetorical statements (like a 'right' to work), some are concrete and specifically defined (like the right not to be unfairly dismissed by one's employer). It can be argued that rhetorical rights, like principles, are a 'noble lie',⁵ aspirations which cannot be fulfilled because until they are implemented there is no one with an obligation to deliver them. At best they create imperfect obligations.

This is an issue which finds its reflection in the distinction that the EU Charter of Fundamental Rights draws between 'rights' and 'principles'. Any analysis of the

² Oxford University Press 2011, p. 443-446.

³ J.J. Dupeyroux, *Évolution et tendances des systèmes sécurité sociale des Payes Membres des Communauté Européennes et de la Garde Bretagne* (Luxembourg, EEC 1966).

⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

⁵ Onora O'Neill, 'The Dark Side of Human Rights', 81 *International Affairs* (2005) p. 427.

role of fundamental rights must surely discuss this distinction. Unfortunately the essays in these books do not do so. There are interesting analyses of the compatibility of deregulatory measures with the individual Charter right not to be unfairly dismissed,⁶ but not of the ‘principles’ set out in other articles. The importance of the distinction is that Article 52(5) of the Charter says that ‘provisions of the Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of the Member States when they are implementing Union law, in the exercise of their respective powers’, but that ‘they shall be judicially cognisable only in the interpretation of such acts and in ruling on their legality’. The ‘principles’ do not give rise to direct claims for positive action by the Member States. This is consistent with the approach of the constitutional systems of several Member States to ‘principles’ especially in the field of social law. Explanations of the Charter give as examples of ‘principles’ Article 25 (‘rights’ of elderly), Article 26 (integration of persons with disabilities) and Article 37 (environmental protection). Confusingly, some provisions of the Charter contain elements of both ‘rights’ and ‘principles’, such as Articles 23 (principle of equality between men and women), 33 (family and professional life), and 34 (social security and social assistance).

In Case C-176/12 *Association de Médiation Sociale* (15 July 2013) Advocate-General Cruz Villalón gave his Opinion that Article 27 (workers’ right to information and consultation within the undertaking) is a ‘principle’, a matter on which the ECJ did not rule in its subsequent judgment in this case (15 January 2014). The first judgment of the Court in which it explicitly discussed Article 52(5) was in Case C-356/12 *Glatzel* (22 May 2014), ruling that Article 26 contains a ‘principle’ and not a right. However, this preliminary ruling still does not resolve the crucial issue whether Article 52(5) prevents judicial review when the EU or a member state fails or refuses to implement a ‘principle’ or simply means that judicial review on the basis of ‘principles’ will be less intense than that for ‘rights’ with judges limited to examining whether the margin of appreciation has been exceeded or there has been manifest error. This is an issue to which scholarly literature will have to turn in future.

A second issue is what are the alternatives open to state parties to the International Covenant on Economic Social and Cultural Rights when fulfilling their obligations to devote the ‘maximum available resources’ to the ‘progressive realisation’ of economic and social rights? This is a matter of political economy rather than law, but both volumes contain some illuminating reflections. Diane Elson, Radhika Balakrishnan and James Heinz⁷ show the different approaches of neo-

⁶ Catherine Barnard in Contouris and Freedland, chap. 12, and Manfred Weiss, *ibid.*, chap. 13.

⁷ Nolan, chap. 1.

classical and Keynesian/human development economists to crisis and argue that governments do have alternatives. For neo-liberals crisis entails shock-therapy and austerity – the poor have to accept that cuts in the welfare state and ‘flexibility’ in the labour market are necessary. For neo-Keynesians public expenditure can be used creatively both to foster growth and to maintain economic and social rights. Nolan⁸ extends the discussion of the linkage between international economic and social rights and public finance, criticising the failure of the UN Committee on Economic Social and Cultural Rights to engage fully with the concept of ‘retrogressive measures’ in a way that would allow arguments against specific budgetary measures as contravening States’ obligations under the Covenant. She also urges the Committee to examine the privatisation process where this undermines economic and social rights.

An essential key to providing ‘maximum available resources’ for economic and social rights is a system of progressive taxation. Rory O’Connell points out that Thomas Paine’s classic *Rights of Man*⁹ includes a significant section on what might be called human rights budget analysis.¹⁰ Still relevant articles of the French *Declaration of the Rights of Man and the Citizen* (1789) identified the principle of state action to protect fundamental rights including a general tax, which should be ‘equally distributed among all citizens, in proportion to their ability to pay,’ and also the need for participation and accountability.¹¹ In his contribution to the Nolan collection, Ignacio Saiz shows that progressive taxation can provide the resources necessary to generate the full range of human rights and to mitigate social inequality.¹² He argues convincingly that taxation must be brought under the lens of human rights scrutiny. Although the recent work of Thomas Piketty on *Capital in the Twenty-First Century* was published only after this contribution, Saiz’s conclusion corresponds to that of Piketty that the ‘ideal policy for avoiding an endless inegalitarian spiral and regaining control over the dynamics of accumulation would be a progressive global tax on capital’.¹³ In future, campaigners for economic and social rights will need to focus on tax law and policy and not only on the technical aspects of human rights.

⁸Nolan, chap. 2.

⁹(London, Penguin 1984, first published 1791). Paine set out statistical tables which showed how it would be possible to alleviate poverty by cutting expenditure on the military and civil service and a tax of up to 100% on inheritance of large estates, but property acquired by ‘honest industry’ would not be affected.

¹⁰Nolan, chap. 5, p. 122.

¹¹Arts. 13, 14, 15; see R. O’Connell in Nolan, p. 114.

¹²Nolan, chap. 4.

¹³Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge Mass, and London, Bellknapp Press of Harvard University 2014), p. 471.

This brings me to a third issue which is also a key to providing the ‘maximum available resources’ for economic and social rights: the role of participatory democracy and social dialogue. Piketty makes the point that progressive taxation ‘would expose tax to democratic scrutiny’.¹⁴ He sees this scrutiny as a ‘necessary condition for effective regulation of the banking system’. This argument can be developed: democratic scrutiny and social dialogue are necessary conditions for the maintenance and development of ESR. Paul O’Connell says that ‘the adoption of some form of participatory budgeting would be useful’ because it would ‘potentially enhance the chances of ensuring sustained, long-term governmental commitment to socio-economic rights, even in times of economic contraction’.¹⁵

Several contributions in both books show ways and means of improving participatory democracy. The most prominent of these is the public sector duty to advance equality in the United Kingdom. Sandra Fredman shows the transformative possibilities of this duty for human rights, but warns that the low level of the duty – simply to have ‘due regard’ to the need to advance equality – limits its effectiveness.¹⁶ If such a duty is to be developed throughout the EU it must be one that requires public bodies to take proportionate steps to eliminate discrimination and to advance equality. A fundamental problem here is whether arguments for economic and social rights can be reconciled with the predominant ideology of neo-liberal market fundamentalism. The so-called ‘business case’ for rights can easily be turned on its head, as it has been in the UK, by claiming that in times of crisis economic and social rights are ‘burdens on business’ and should be deregulated.¹⁷ Alain Supiot argues powerfully that the failure of Social Europe results from treating work simply as a variable subject to the needs of labour markets rather than as a condition for the existence of those markets.¹⁸ What is needed, he says, is a comprehensive view of work organisation, not compartmentalised between individual employment law, trade union law and the law of the enterprise but a broad concept of work in all its forms, with the human being at its core. Colin Crouch, too, takes a pessimistic view of the advance of neo-liberal marketisation, with the threatened eclipse of social citizenship.¹⁹

On the other hand Eoin Rooney and Colin Harvey²⁰ assert that even in a hostile economic environment, mainstreaming rights-based discourse into state practice can produce some change, but they recognise that ultimately this is de-

¹⁴ Ibid.

¹⁵ Nolan, p. 73.

¹⁶ Contouris and Freedland, chap. 7.

¹⁷ B. Hepple, ‘Back to the Future: Employment Law under the Coalition Government’, 42 *Industrial LJ* (2013) p. 203.

¹⁸ Contouris and Freedland, chap. 1.

¹⁹ Contouris and Freedland, chap. 2.

²⁰ Nolan, chap. 6.

pendent upon power relations. This is exemplified in the contributions by Silvana Sciarra on 'Resocialising Collective Deliberations'²¹ and Alan Bogg and Ruth Dukes on the European Social Dialogue.²² The balance of power in labour markets is decisively with employers. Trade unions are in decline, and collective national and global solidarity is increasingly difficult to sustain.

This leads to my final comment. Can the gap in enforcement of economic and social rights be provided by constitutional entrenchment and active intervention by the judiciary? Although courts in some of the debtor countries have accepted challenges to the implementation of troika-imposed reforms to labour law and social rights, their judgments are characterised by utilitarian considerations, weighing fundamental constitutional rights against business efficiency and economic considerations.²³ Courts tend to concentrate on procedural issues. This is due to several causes: the institutional incompetence of courts to determine the substance of indeterminate economic and social rights; the potential conflict of economic and social rights in a market economy with the protection of private property; and the perceived limits of law as an instrument of social change. Contouris and Freedland suggest that fundamental economic and social rights should not be subject to economic and technical considerations but should only be balanced against other rights of an equal status.²⁴ I am sceptical as to whether courts would ever be willing to go down that route apart from a few absolute rights such as those against torture and (subject to exceptions) forced labour and child labour.

It is likely to be more productive to rely on preventive measures, including human rights budget-proofing, and equality and human rights impact assessments (a detailed methodology is set out by James Harrison and Mary-Ann Harrison).²⁵ Moreover, economic and social rights can be used as a lever to compel state actors to engage in meaningful negotiations with disadvantaged groups to ensure the 'progressive realisation' of these rights.²⁶ The latter is not a topic pursued in these collections.

The bottom line is whether the European Social Model can be rescued. Contouris and Freedland set out ten principles towards this end.²⁷ These include unlocking the potential of the Charter of Fundamental Rights, integrating international and other sources, protecting employment stability, expanding the

²¹ Contouris and Freedland, chap. 20.

²² Contouris and Freedland, chap. 23.

²³ See Kilpatrick and De Witte, *supra* n. 1 for details in relation to Greece, Ireland, Italy, Portugal and Spain.

²⁴ Contouris and Freedland, p. 496.

²⁵ Nolan, chap. 10.

²⁶ See B. Hepple, 'Negotiating Social Change in the Shadow of the Law', 129 *South African LJ* (2012) p. 248 in the context of the case law on ESR in the South African Bill of Rights.

²⁷ P. 495-503.

scope of application of labour law beyond employment, promoting freedom of association, collective bargaining and workers' voice, achieving substantive equality, decent pensions and social security, and not treating migrant labour as a commodity. These, like the idea put forward by others of a new Social Compact²⁸ which would match the Fiscal Compact giving priority to fundamental rights over economic freedoms and rules of competition, may be unrealistic at the present time, when the future of the EU seems bleak and politicians lack the political will for reform. But they provide an important alternative agenda for those who seek a new Social Europe.



²⁸ See the discussion of this and other more modest proposals by Catherine Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future', *Current Legal Problems* (2014; forthcoming).