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978-1-107-04174-5 - Resocialising Europe in a Time of Crisis

Edited by Nicola Countouris and Mark Freedland

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Introduction

The myths and realities of ‘Social Europe’

NICOLA COUNTOURIS AND MARK FREEDLAND

In this introduction, we seek first to set the scene with some reflections about the history and current state of ‘Social Europe’; and second we suggest how the idea of ‘mutualisation and de-mutualisation of risks to workers’ provides a unifying theme around which we seek to organise the rich offering of chapters that have been contributed to this book.

It is common knowledge that when the European Economic Community (EEC) was set up in 1957, there was little or no ‘Social Europe’ to talk about. Sure enough, all of the six founding Member States had already some fairly sophisticated labour law and social security systems and took pride in their respective welfare state models. But that was pretty much the whole story as far as Social Europe was concerned. The Treaty of Rome itself was oblivious to either the need for, or the desirability of, any type of supranational social regulation and – with the exception of a timid ‘equal pay for equal work’ clause – it completely neglected to introduce any provision directing the EEC to the creation of a common social policy. The explanation for this important gap is in one sense obvious: the EEC was primarily about setting up a regional free market where all factors of production (including ‘labour’) could move unrestrained and achieve the optimal allocation that market forces were seen as guaranteeing. As noted in the ‘Spaak Report’ ‘the spontaneous tendency to harmonisation of social systems and of the level of wages . . . will be favoured by the progressive creation of a common market’.¹ The self-regulating myth of the marketplace was being resurrected at a pan-European level, after most nation states had decided to opt for a far more interventionist, at times overtly Keynesian, approach in their domestic economic affairs. As the opening provision of the Treaty of Rome asserted, (merely) by establishing a common market, the Community would ‘promote . . . a

1 Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, Brussels, 21 April 1956, p. 65.

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harmonious development . . . , a continuous and balanced expansion . . . , an accelerated raising of the standard of living’.

One of the many problems with the ‘invisible hand’, however, is that it is precisely . . . *invisible*. Just as with Plato’s mythical Ring of Gyges, one is left to speculate what it could do for justice and social progress if only it could be seen. But since it cannot be seen, when things do not quite go in the predicted direction of ‘spontaneous tendency to harmonisation’ and ‘accelerated raising of the standard of living’ etc., people unsurprisingly persuade themselves that market failures are failures of the market and a process of alienation and rejection of the market project itself begins. This is true now, in 2012 and it was probably much more vividly perceived in the ideologically divided Europe of the 1970s, following the first and second oil shocks and the beginning of that long period of economic and political stagnation that European historians sometimes refer to as ‘Eurosclerosis’.

The genius of Jacques Delors, the French Socialist politician who was Head of the European Commission between 1985 and 1994, was precisely to bring about a package for political and economic reform that would speak both to the minds of European political and economic elites and to the hearts of Europe’s citizens and its numerous and often fractious, labour movements. Europe was to become a sort of two-headed Janus, where the deepening of the European free market project (exemplified by Delors’ 1985 White Paper² and later on by the 1992 Maastricht Treaty itself) would be accompanied and compensated by the development and broadening of a European ‘social dimension’. The EEC, with the assistance and support of European business and the European trade union movement, was thus to develop a set of European social policies – mostly in the form of European directives providing for minimum standards in a number of areas of labour regulation – that would both contribute to introducing a level-playing field for companies to operate and compete freely and fairly and to enhancing Europe’s social progress credentials and legitimacy amongst European peoples. As put by Delors himself, ‘*nobody falls in love with a single market*’. Europe had to become more social and, just as importantly, had to be perceived to be becoming so.

Successive treaty reforms, introduced under the watchful eye of the Delors Commissions in 1986 and 1992, ensured that the European Community (EC) was at least equipped to talk the talk of ‘Social Europe’. While some important areas of social regulation (such as pay, industrial action

2 European Commission, Coupletting the Internal Market, COM (85) 310 final.

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and freedom of association) were left outside the Social Europe equation, there is no denying that, at times, the EU was quasi-unanimously credited for delivering more justice, fairness and equality to European citizens and that the broad political support it received had visible legitimising effects, best exemplified by the socially ambitious (but not legally binding) 1989 Community Charter of the Fundamental Social Rights of Workers.³ Social Europe was undoubtedly much more than a slogan and through the adoption of a series of important directives introduced as part of the Maastricht Treaty, the EU introduced a number of key safeguards and protections covering matters as important as maternity pay and parental leave, together with paid holiday and a raft of health and safety legislation applying, *inter alia*, to working time limits. There was indeed a time when Social Europe even appeared to be a possible bulwark against the worst negative effects of globalisation, setting up mechanisms such as the (arguably insufficiently endowed – compare its €500 million budget to the £850 billion⁴ spent by the UK alone to rescue its financial sector in 2009) European Globalisation Adjustment Fund.⁵ The formal proclamation of the, now binding, Charter of Fundamental Rights of the EU in 2000, with its Solidarity title introducing a qualified protection for a range of important socio-economic rights, can probably be seen as the heyday of the 'Social Europe' project.

Paradoxically the appeal of the 'Social Europe' promise has been such as to partly obfuscate the fact that during the 1990s and at the turn of the millennium the other, free-market, deregulatory and increasingly neo-liberal face was relentlessly gaining prominence and, in many ways, entrenching a number of political and institutional changes that were depriving European citizens and workers of the very same rights that the 'social face' of Europe was meant to deliver. In terms of classic and mythological metaphors, gone is *Janus Bifrons*, enter the 'Trojan Horse'. Talking critically about the European Monetary Union and the Euro and

3 On 9 December 1989, the Heads of State or Government of eleven of the then twelve Member States adopted the text of the Community Charter of the Fundamental Social Rights of Workers. The Community Charter was not signed by the UK until 1998.

4 National Audit Office, 'Maintaining Financial Stability across the United Kingdom's Banking System', available at www.nao.org.uk/report/maintaining-financial-stability-across-the-united-kingdom-banking-system/. See also A. Grice, '£850 bn: Official Cost of the Bank Bailout', *The Independent*, 4 December 2009.

5 Regulation (EC) No. 1927/2006 of the European Parliament and of the Council of 20 December 2006 and establishing the European Globalisation Adjustment Fund, OJ 2006 L 406/1.

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the tight macroeconomic and financial stability requirements attached to them since the Treaty of Maastricht, British historian Brian Blackburn perceptively noted that ‘at different times this [was] a programme that [had] been espoused by such varied sponsors as German Christian Democrats, German Social Democrats, German Greens, French Gaullists and Socialists, Italian former Communists and neo-conservatives, British New Labour and the Spanish Right. The project was flimsily disguised by attaching to it the phrase ‘social Europe’.⁶

In the same vein, the Lisbon Strategy should be seen as the other strong candidate for the Social Europe ‘Trojan Horse Prize’. Building on the earlier European Employment Strategy, it enticed European Member States into deregulating their labour laws and social security systems and introducing new forms of flexible labour contracts (see the very first 1998 Employment Guidelines) offering as a trade off the promise that by 2010 Europe was ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’.⁷ The Lisbon Agenda was meant to transform labour market deregulation into more jobs which in turn would contribute to furthering economic growth. Member States embraced this God-given gift and eagerly began a process of deregulation that, for once, even appeared to satisfy the insatiable OECD.⁸ But, by 2010, the now largely deregulated Europe was in the midst of its worst economic recession since 1929, recording falling GDPs and historically high levels of unemployment. Nobel Laureate Pissarides had, of course, already warned the EU that ‘job creation is not likely to be the main contributor to growth. The link runs the other way: more growth will bring job creation’, but it was all falling on deaf ears.⁹ In spite of its obvious failure, the Lisbon Strategy was revived in 2010 with the introduction of the essentially identical Europe 2020 Agenda.¹⁰ Lisbon is dead, long live Lisbon!

And this is arguably one of the main failures of the process of European integration and governance these days: its inability to listen and to learn, no doubt because national governments often prevent it from doing so (as

6 B. Blackburn, ‘Capital and Social Europe’ (2005) 34 *Next Left Review* 87.

7 Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000.

8 Which, however, was always keen to demand more, cf. OECD, *Employment Outlook 2004* (Paris: OECD, 2004), chapter 2.

9 C. A. Pissarides, ‘Lisbon Five Years Later: What Future for European Employment and Growth?’, 2006, p. 3, available at personal.lse.ac.uk/pissarid/papers/Pissarides%20Vienna%20Paper.pdf.

10 See R. Hyman, ‘Trade Unions, Lisbon and Europe 2020: from Dream to Nightmare’ (2011) LEQS Paper No. 45/2011.

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famously put by Joseph Weiler, 'the States, like the Olympian Gods, would forever remain ultimate Masters of their creation'¹¹). The French and Dutch 'No' votes to the 'European Constitution' in 2004 partly reflected a profound dissatisfaction of the progressive electorate with the stagnation of 'Social Europe'. But nobody listened and Europeans had to settle for an equally socially uninspiring 'Lisbon Treaty'. The uncompromising opposition of the European trade union movement to *Viking* and *Laval*,¹² two deeply anti-union judgments produced by the European Court of Justice in 2007, which according to Mr Mario Monti himself 'exposed the fault lines that run between the single market and the social dimension at national level',¹³ resulted in a, now repealed, Draft Regulation which academic commentators exposed as a codification and entrenchment of those judgments.¹⁴ Even the occasional calls for more social rights¹⁵ are met with lacklustre responses such as the recently presented 'Employment Package'.¹⁶ The following comment by Commissioner Reding is quite telling of the changed attitude of some European institutions in respect of the fate of 'Social Europe': 'Jacques Delors once said that nobody falls in love with a single market. I believe it is high time to change this. Because our single market is the best asset that Europe has, in particular in these times of economic downturn'.¹⁷

We have now moved beyond the 'Trojan Horse' analogy. Neo-liberalism and free-market dogmas appear to have lost any compunction and no longer feel the need to disguise their deregulatory intentions with social fig-leaves so as to successfully penetrate and demolish the last few citadels of social progress. The current 'Greek tragedy' is perhaps the best example of this more recent trend, whereby Social Europe has once again worn its invisible cloak and the neo-monetarist 'medieval medicine' prescribed by the EC/ECB/IMF, with the explicit or tacit support of a number

11 J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), p. 292.

12 Respectively Case C-438/05, [2007] ECR I-10779 and Case C-341/05 [2007] ECR I-11767.

13 M. Monti, 'A New Strategy for the Single Market', 9 May 2010, p. 68.

14 See COM (2012) 130 final. See also comments by K. Ewing, 'The Draft Monti II Regulation: An Inadequate Response to Viking and Laval', Institute of Employment Rights, 2012; N. Bruwn and A. Bucker, 'Critical Assessment of the Proposed Monti II Regulation – More Courage and Strength Needed to Remedy the Social Imbalances', ETUI Policy Brief 4/2012.

15 European Commission, 'Communication from the Commission – Towards a Single Market Act – For a Highly Competitive Social Market Economy – 50 Proposals for Improving our Work, Business and Exchanges with One Another', COM (2010) 608 final 12.

16 European Commission, 'Towards a Job-rich Recovery' COM (2012) 173 final.

17 V. Reding, 'Opening Remarks at the European Parliament Hearing in the Legal Affairs Committee (JURI)', Brussels, 1 January 2010, p. 4.

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of key European Member States, is administered in massive doses to struggling Member States on the verge of sovereign defaults. Stiglitz recently said that ‘A principled Europe would not leave Greece to bleed’.¹⁸ But Greece is bleeding and so are a growing number of European citizens whose working conditions, employment prospects and living standards are deteriorating on a daily basis. One could not blame the Greeks (or the Irish, the Portuguese, the Cypriots or the Spaniards for that matter) for seeing Europe as merely ferrying them into uncharted territories of despair and pain, while the monetarist dogma of fiscal austerity is being institutionalised and entrenched in the European constitutional framework with provisions such as the ‘Euro Plus Pact’¹⁹ and the new ‘Treaty on Stability, Coordination and Governance in the EMU’.²⁰ Obviously, as noted by Krugman,²¹ not only are these policies choking growth and economic recovery but they also become the backdrop to justify further deregulatory rounds of what is left of the European social model, which is now perceived as the only flexible and soft ‘variable’ in an EU where all the other macroeconomic variables are placed into the neo-monetarist straitjacket of fiscal austerity ‘targets’ – a perverse catch-22 challenging the fundamentals of Social Europe and of European social and political cohesion at large.

So is there a future for Social Europe and indeed for European integration as such?

In spite of this rather grim account of its recent history, we like to think that there is indeed a future as long as Europeans are willing to rediscover ‘Social Europe’ as Europe’s modern-day Prometheus. But to do so, it is first important to debunk two negative myths about modern-day Europe. The first one is that Europe is short of credible alternative ideas. That is simply not true. They exist and they are at everybody’s fingertips – just use your preferred search engine in your favourite internet browser and you will find a wealth of alternative visions of European politics and economic affairs meticulously illustrated by Nobel prizes, illustrious

18 J. Stiglitz, ‘A Principled Europe would not leave Greece to Bleed’ *The Guardian*, 25 January 2010, also available at www.guardian.co.uk/commentisfree/2010/jan/25/principled-europe-not-let-greece-bleed.

19 C. Barnard, ‘The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective’ (2012) *Industrial Law Journal* 98.

20 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012.

21 P. Krugman, ‘Europe’s Economic Suicide’, *The New York Times – The Opinion Paper*, 15 April 2012, available at www.nytimes.com/2012/04/16/opinion/krugman-europes-economic-suicide.html?_r=0.

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academics, respectable think-tanks, workers organisations and (even!) political parties. Paraphrasing Gramsci, we are convinced that it is now essential 'to dissipate the dark cloudbanks of heavy pessimism . . . which represent a great danger . . . because of the political passivity, the intellectual torpor and the scepticism towards the future which they produce'.²² The second myth is that the EU is a non-democratic organisation, constitutionally incapable of responding to the changing demands of the European people. False. Sure enough the EU's system of governance is far from being perfect and undoubtedly – as noted above – the last twenty years of European integration have seen several attempts on the part of (note, democratically elected representatives of) EU Member States to rig the rules of the game and constitutionalise a neo-liberal vision of Europe where 'there is no such thing as society'. But none of those changes are irreversible, as long as the European people decide that the time has come for their governments and Europe to change direction.

In fact a Promethean vision of Social Europe based on the meaningful protection of fundamental values such as dignity, freedom, equality, solidarity and social justice could, in our view, go a long way towards redirecting European politics and economics and the process of European integration, towards a brighter future. Animated by this view, we set out to organise a colloquium and the present collection of chapters, on the subject of 'resocialising Europe'. We put forward one particular idea, that of the mutualisation and demutualisation of risks to workers, as a way of shaping the thinking which would take place about 'resocialising Europe'. We proceed to outline our notion of the mutualisation and demutualisation of risks to workers and then suggest how it might be regarded as a unifying thread which draws together the ensuing chapters of this book.

The idea of mutualisation and demutualisation of risks to workers²³ could be defined in various ways; our chosen definition is that it consists of 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, an entity or set of entities or a community (mutualisation) or back towards the individual worker (demutualisation). We may elaborate that definition by charting the following paths of movement of risks and risk-costs towards and away from individual workers; risks and risk-costs

²² *L'Ordine Nuovo*, 15 March 1924.

²³ We put this idea forward in the conclusion to our work on *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011), pp. 443–6.

may be moved between individual workers and entities or communities either

- (i) vertically between individual workers and their employers in the sense of the persons or entities using their services, or
- (ii) diagonally between individual workers and entities which are intermediary between them and their employers, such as employment agencies or labour sub-contractors, or
- (iii) horizontally between individual workers and groups or collectivities of workers, or
- (iv) universally between individual workers and the communities or localities such as municipalities, regions, nation-states or federations of states.

This might not constitute an absolutely complete map of the paths of movement of risk and risk-costs to and from individual workers, but it does provide a working guide to them.

We suggest that the utility of this depiction of mutualisation and demutualisation of risks to workers consists in the fact that labour law itself can, to a significant extent, be understood in the same terms, that is to say, much of the regulation of employment relations and labour markets in which labour law engages consists of, or contributes to, movement of risks and risk-costs from and to individual workers; and we think that it is often illuminating to analyse labour law's measures or interventions in those terms. The emphasis in that statement is on the word 'often', because we are far from sure that it makes sense or is useful to try to explain all of labour law's regulation in that way. We have to be equally careful to resist a temptation to adopt the idea of 'mutualisation' as an easy way of re-stating the dominant objective or mission of worker-protective labour law.

Nevertheless, having entered those caveats we feel that the the ideas of mutualisation and demutualisation of risks to workers have sufficient force and power as analytical tools to justify deploying them in expounding the notion of 'resocialising Europe'. This was our experience at the colloquium which we held on that topic. It will be evident that the contributors of the ensuing chapters have, admittedly in varying degrees, found these ideas of the mutualisation and demutualisation of risks to workers a useful touchstone when developing the papers which they presented at the colloquium. And, although we hope not in any way to have coerced the contributors into that frame of reference, we do think that it is appropriate now to suggest how their chapters can be viewed through that lens. This, however, cannot and should not be achieved by a crude

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identification of the points at which the contributors have or could have used the language of mutualisation and demutualisation. The contributors have themselves drawn upon that vocabulary where and to the extent that they have found it useful to do so and it is not for us to manipulate their work any further into that particular discourse. Instead, we think it more useful now to show how we have tried to present these rich reflections on 'Social Europe' in an order and within a structure which might display their bearing upon the ideas of mutualisation and demutualisation in a larger and looser sense. To that end, the book is presented in three parts, which we now enumerate with the briefest of indications as to their relevance to the mutualisation/demutualisation theme.

In the first part of this book, the focus is upon a general crisis of ideals in the development of European labour law, which is particularly expressed or typified by the decline or marginalisation of the idea of 'Social Europe' as a guiding notion for the construction of EU law in the sphere of employment and personal work relations. **Alain Supiot** contributes a chapter which very powerfully locates that crisis in a failure, on the part of those who seek to maintain such an ideal, sufficiently to concentrate on the content and meaning of work itself, thus allowing neo-liberal actors to engage in a re-commodification of work or labour. He generously acknowledges that the idea of demutualisation provides a useful analytical tool for understanding this kind of re-commodification, but rightly asserts that this is only a step on the way to the kind of 'European Policy on Work' which he thinks is needed as a practical ideology with which to tackle that crisis. **Colin Crouch's** chapter depicts the twilight or gathering darkness of European social citizenship even more starkly, observing how the EU's marketisation agenda has acquired its own dynamic and calculus in which the increase of inequality both of incomes and of power in the workplace figure as positive gains.

The succeeding chapters in Part I of the book all endorse this sense of 'Social Europe' as a marginalised ideal, while in different ways canvassing various alternative reconstructive ideas or ideals. **Frank Hendrckx's** remedial ideal is that of gradual but steady advance towards a 'United States of Europe', that is to say a polity which is politically, as well as economically, integrated around a 'proactive and promotional view of fundamental rights' at the centre of a constitutional approach to European Union; for him, this but this alone could offer the prospect of securing the social dimension of the EU. For **Giuseppe Casale**, there would be an external source for the remedial ideal which would be needed to nurture the social aspect of EU law in general and EU labour law in particular, namely the

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idea of an International Labour Code based upon the standard-setting and more general regulatory activities or formulations of the ILO. In a somewhat parallel set of arguments, **Monika Schlachter** identifies the normative output of the Council of Europe and in particular the *acquis* which derives from the original European Social Charter of 1961, as having an important potential role in a process of ‘resocialising Europe’ by means of the vindication of social rights.

For the authors of the next two chapters, it is equality or anti-discrimination law which provides the key ideal which might unlock the door to ‘resocialising Europe’. **Colm O’Cinneide**, while clearly espousing that approach, is nevertheless at pains to depict the relationship between anti-discrimination law and the wider goals of ‘Social Europe’ as not being an unproblematic one and concludes that equality law is ‘likely to play only a supplemental role in correcting for the distortions of the market economy’. **Sandra Fredman**, while by no means unaware of the challenges facing the development of equality law in times of austerity, nevertheless stresses the positive potential of proactive equality duties to ‘break the mould’ in which the EU commitment to a social dimension is contained within a market imperative, taking certain proactive models of equality duties in UK law as her illustrative case. However, if those papers induce even a mild sense of optimism about the scope for ‘resocialisation’ or ‘remutualisation’ of employment relations around a renewed ideal of equality or non-discrimination, a sense of the exigency of the present reality is imposed by the chapter of **Simon Deakin** and **Aristea Koukiadaki** which we have placed at the conclusion of Part I of this book, which emphasises the negative impact of simply sticking with policies of enforced austerity on commitments to ‘Social Europe’ and of creating scenarios of ‘regulated austerity’ or ‘two-speed Europe’. They suggest an alternative route or ideal of ‘solidaristic integration’, which we think has some connections with the idea of remutualisation, as we hope that Parts II and III of the book will in certain ways demonstrate.

In Part II, into which we have grouped the chapters which concern precariousness or precarious work, the connection to the theme of mutualisation and demutualisation is even more evident than in Part I. That point is very powerfully made in **Sonia McKay**’s chapter, so much so that it seemed an apt one with which to begin Part II. She is particularly concerned with what we have styled as vertical demutualisation, whereby employing enterprises use the precarisation of work as a way of transferring to their workers risks which they themselves previously carried; she argues that there is an urgent need to re-balance those risks,