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Edited by Aoife Nolan

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Introduction

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Economic and social rights are at a critical juncture. The burst of the US housing bubble and the subsequent financial and economic crises have impacted severely on human rights realisation globally.¹ This is particularly so with regard to economic and social rights (ESR),² the enjoyment of which has been grievously affected by the crises and the domestic and supranational responses thereto.

The financial and economic crises have created, and exacerbated, jobs, food and housing crises. According to the International Labour Organization, in the 51 countries for which data were available, at least 20 million jobs were lost between October 2008 and the end of the following year.³ Almost 43 million further workers were deemed to be at risk of exclusion from the labour market.⁴ While the global food prices crisis had

¹ This book does not seek to explain the origins and evolution of the crises in any detail but it is necessary to provide a short overview of the approach adopted to the crises herein. While definitions and perceived root causes of the financial and economic crises vary, this volume treats them as separate but strongly interrelated entities. The global financial crisis, the start of which was signalled by the American sub-prime mortgage collapse, effectively resulted from a combination of a failure of risk models to assess financial products underpinned by serious long-term shortcomings related to the financial system such as financialisation, inadequate regulation and mismanagement of intentionally abstruse institutions. The economic crisis, which goes beyond crises in relation to the financial system per se (albeit that the latter contributed to the former) has had a number of causes, including recessions caused by housing bubble collapses in the US, Ireland and Spain, recessions partially caused by retrenchment in banks leading to a cut in credit in the economy, as well as sovereign debt crises, some of which stemmed from States taking on banking losses in order to shore up their banks and/or socialise losses.

² The terms economic and social rights, socio-economic rights and social rights are used interchangeably by authors in this collection. The term 'human rights' is used to denote the full spectrum of human rights, including civil, political and cultural rights – not simply economic and social rights. In this introduction, the terminology used to describe rights reflects that employed by authors in their specific chapters.

³ International Labour Organization/International Institute for Labour Studies, *World of Work Report 2009: The Global Jobs Crisis and Beyond* (Geneva: International Institute for Labour Studies, 2009), p. vii.

⁴ *Ibid.*, p. 1.

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peaked by June 2008 its effects were still being felt when the financial system went into turmoil; an estimated 40 million people were pushed into hunger in 2008, bringing to 963 million the number of hungry people worldwide at the end of that year.⁵ As of June 2009 that number had risen to 1.02 billion.⁶ With regard to the right to adequate housing, there is mounting evidence of increases in homelessness and reduced access to housing finance.⁷

The financial and economic crises have had a devastating and disproportionate effect on already vulnerable groups, including women, children, people with disabilities, ethnic minorities and migrants.⁸ Emerging research demonstrates that the poorer, more powerless and less visible populations, those who already experienced lower levels of economic and social rights enjoyment than other social groups, have been hit especially hard by the job losses, poverty and economic and political upheaval that have followed the global financial collapse.⁹ While the financial crisis effectively originated in the US, and has had a direct effect on the economic stability and performance of that country (as well as a large number of European States), there is growing evidence of severe impact on developing countries too. With regard to the Millennium Development Goals, 2010 data suggested that in numerous countries the crises resulted in progress towards many of the Goals either stalling or going into reverse.¹⁰

⁵ Special Rapporteur on the Right to Food, 'The Right to Food and the Financial and Economic Crisis: Submission to the UN Conference on World Financial and Economic Crisis, UN General Assembly, 24–26 June 2009', www2.ohchr.org/english/issues/food/docs/NoteCrisisFinal26062009.pdf, last accessed 22 January 2014.

⁶ *Ibid.*

⁷ See, e.g., in the US context, National Coalition for the Homeless, the National Health Care for the Homeless Council, the National Alliance to End Homelessness, the National Association for the Education of Homeless Children and Youth, the National Law Center on Homelessness & Poverty, the National Low Income Housing Coalition and the National Policy and Advocacy Council on Homelessness, 'Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis' (2009), www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf, last accessed 22 January 2014; National Law Center on Homelessness and Poverty, 'Indicators of Increasing Homelessness Due to the Foreclosure and Economic Crises' (2010), www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf, last accessed 23 January 2014.

⁸ M. Sepúlveda, 'Report of the Independent Expert on the Question of Human Rights and Extreme Poverty on the Human Rights Based Approach to Recovery from the Global Economic and Financial Crises, with a Focus on 'Those Living in Poverty' (17 March 2011) UN Doc. A/HRC/17/34, para. 23.

⁹ See, e.g., R. Heltberg, N. Hossain and A. Reya (eds.), *Living through Crises: How the Food, Fuel, and Financial Shocks Affect the Poor* (Washington, DC: World Bank, 2012).

¹⁰ *Global Monitoring Report 2010: The MDGs after the Crisis* (Washington, DC: World Bank, 2010), pp. 6–7.

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The damage done to ESR realisation is not only attributable to specific crises-related outcomes such as turmoil on markets and labour opportunities but also results from a ‘creeping’ of austerity measures and excessive economic contraction in terms of public expenditure beyond those countries/economies (e.g. the US, Spain, Greece, Ireland, Portugal and Italy) that have dominated the financial headlines since 2008.¹¹ While most governments affected by the crisis introduced fiscal stimulus programmes (fiscal expansion) and ramped up public spending in 2008–9, by 2010, premature expenditure contraction – in the form of ‘austerity’ measures – became widespread, and this public expenditure consolidation is now expected to intensify at least into 2016.¹² And, far from being exclusively a Eurozone or North American issue, fiscal contraction has been most severe in the developing world.¹³

Together with growing awareness on the part of human rights scholars and advocates of the role that non-rights-centric neoliberal, supranational and domestic economic policies and structures have played in causing (or at least not preventing) the crises,¹⁴ there is mounting concern about the implications of the national and supranational responses just described for the human rights enjoyment of the most vulnerable in

¹¹ See, e.g., I. Ortiz, J. Chai and M. Cummins, *Austerity Measures Threaten Children and Poor Households: Recent Evidence in Public Expenditures from 128 Developing Countries* (New York: UNICEF, 2011). This study found that 70 developing countries (or 55 per cent of the study sample) reduced total expenditures by nearly 3 per cent of gross domestic product (GDP), on average, during 2010, and 91 developing countries (or more than 70 per cent of the sample) were expected to reduce annual expenditures in 2012. Moreover, comparing the 2010–12 and 2005–7 periods suggested that nearly one-quarter of developing countries appeared to be undergoing excessive contraction, defined as cutting expenditures below pre-crisis levels in terms of GDP. The study also highlights that the scope of austerity measures under consideration in developing countries seems to have widened considerably since 2010.

¹² See I. Ortiz and M. Cummins, ‘Age of Austerity; A Review of Public Expenditures and Adjustment Measures in 181 Countries’ (Initiative for Policy Dialogue and the South Centre Working Paper, May 2013), i.

¹³ *Ibid.*

¹⁴ Neoliberalism is a contested term that has been accorded multiple definitions. However, frequently identified elements of neoliberalism as an economic theory include an emphasis on deregulation, economic liberalisation and market reforms. These will be understood as constituting fundamental elements of neoliberalism for the purposes of this chapter. For considerations of the history and evolution of neoliberalism as a political and economic movement and a philosophy, see D. Stedman Jones, *Masters of the Universe: Hayek, Friedman and the Birth of Neoliberal Politics* (Princeton University Press, 2012) and P. Mirowski & D. Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press, 2009).

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society.¹⁵ Notably, ‘austerity’-focused national and supranational policies have generally operated to exacerbate and entrench pre-existing disadvantage. As Saiz noted in 2009, ‘despite the obvious human rights dimensions of the crisis, human rights have barely figured in the diagnoses or prescriptions proposed by the international community’.¹⁶ Far from putting an end to the dominance of anti-statist unregulated free market liberalism that predated and contributed to the crises,¹⁷ it is strongly arguable that by rescuing the financial markets (through taxpayer money), mainstream neoliberalism has actually contrived an opportunity to *intensify* the dominance of individualistic, anti-statist unregulated free market liberalism, and that this has been at the expense of other, more potentially ‘human rights-friendly’ models. That is not to suggest that international human rights law, including ESR, requires States to adopt a specific economic model – indeed, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has emphasised that it does not.¹⁸ However, international human rights law has a crucial role to play as an analytical framework for evaluating (and, if necessary, critiquing) and recalibrating the processes, inputs, outputs and outcomes of the models that have been chosen, albeit that there is very limited evidence that States are prepared to employ it in such a way.¹⁹

¹⁵ See, e.g., ESCR-Net, AWID, Center for Economic and Social Rights, Center for Women’s Global Leadership and Center for Concern, ‘Bringing Human Rights to Bear in Times of Crisis: A Human Rights Analysis of Government Responses to the Economic Crisis’ (March 2010), 1–3, www.escr-net.org/usr_doc/HRResponsestoEconCrisis_Final.pdf, last accessed 22 January 2014.

¹⁶ I. Saiz, ‘Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis’, *Journal of Human Rights Practice*, 1 (2009), 277–93, 280.

¹⁷ See, e.g., Grant and Wilson who note the ongoing dominance of what they term ‘neoliberal Washington consensus policies’ following the global financial crisis, and contrast this with earlier financial crises which resulted in major shifts in policy paradigms. (W. Grant and G. Wilson, ‘Introduction’ in W. Grant and G. Wilson (eds.), *The Consequences of the Global Financial Crisis: The Rhetoric of Reform and Regulation* (Oxford University Press, 2012), pp. 1–14, p. 6). See also D. Persendorfer, ‘Good-Bye Neoliberalism? Contested Policy Responses to Uncertain Consequences of the 2007–2009 Financial Crisis’ in K. Alexander and R. Dhumale (eds.), *Research Handbook on International Financial Regulation* (Cheltenham: Edward Elgar, 2012), pp. 414–434; John Quiggin, *Zombie Economics: How Dead Ideas Still Walk among Us* (Princeton University Press, 2010).

¹⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 3’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (27 May 2008) UN Doc. HRI/GEN/1/Rev.9 (Vol. I), para. 8.

¹⁹ An ongoing critique of State responses to the crisis has been the widespread failure on the part of many States to carrying out human rights impact assessment and equality impact

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In sum, while the financial and economic crises have heightened awareness of ESR as an advocacy tool at the domestic and international levels, responses to them have largely served to shore up existing power distributions and inequalities, to the detriment of ESR.²⁰ In short: ESR were largely ignored by economic policymakers prior to the financial meltdown and resultant economic turmoil,²¹ have been seriously affected by both, and appear largely to be being ignored in past and current state responses to such.

I. Painting the big (global) picture: the crises and economic and social rights protection internationally

This collection is motivated by two key questions: what have the crises meant in terms of ESR enjoyment? What is the alternative(s)? With other than a few notable exceptions,²² the crises and their interrelationship with and impact upon ESR have not yet been subjected to adequate academic, policymaker or activist attention or analysis. Even the Committee on Economic, Social and Cultural Rights – the body with pre-eminent

assessments that would evaluate the potential and actual ESR impact of State responses to the crises. This has been highlighted by the CESCR in its review of a number of States who have enacted post-crisis austerity measures. See, e.g., CESCR, ‘Concluding Observations on Spain’ (6 June 2012) UN Doc. E/C.12/ESP/CO/5, para. 23.

²⁰ Paul O’Connell has argued that the undermining of ESR protection and enjoyment associated with the contemporary age of austerity is not an anomaly, but rather the necessary fate of ESR in the current social and economic order; the recent push for austerity is motivated not by objective, economic necessity but is driven by an ideological and political project to further entrench neoliberal capitalism. See P. O’Connell, ‘Let Them Eat Cake: Socio-Economic Rights in a Time of Austerity’ in A. Nolan, R. O’Connell and C. Harvey (eds.), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart Publishing, 2013), pp. 59–76.

²¹ See, e.g., S. Way and S. Stanton, *Human Rights and the Global Economic Crisis: Consequences, Causes and Responses* (New York: Center for Economic and Social Rights, 2009); S. Way, N. Lusiani and I. Saiz, ‘Economic and Social Rights in the “Great Recession”: Towards a Human Rights-Centered Economic Policy in Times of Crisis’ in E. Riedel, G. Giacca and C. Golay (eds.), *Economic, Social and Cultural Rights: Contemporary Issues and Challenges* (Oxford University Press, 2014), pp. 86–110, p. 86.

²² See, e.g., Sepúlveda, ‘Report on the Human Rights Based Approach to Recovery’; R. Rolnik, ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context on the Financial Crisis and Its Causes’ (4 February 2009) UN Doc. A/HRC/10/7; Office of the Council of Europe Commissioner for Human Rights, ‘Safeguarding Human Rights in Times of Economic Crisis’ (Council of Europe Commissioner for Human Rights Issue Paper, November 2013), www.enetenglish.gr/resources/article-files/prems162913_gbr_1700_safeguardinghumanrights_web.pdf, last accessed 10 December 2013.

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responsibility for interpreting international ESR standards – has been slow to engage in a consistent, coherent way from an ESR perspective with the events leading up to, and the responses that have followed, the 2008 collapse.²³

This collection of essays seeks to fill the gap, identifying not only the various impacts of the crises on economic and social rights but also how rights standards can be used to frame a different set of responses to the situation in which rights-flouting neoliberalism has left the world.

Challenging this ‘radio silence’ on the rights impact of the Great Recession, Magdalena Sepúlveda opens this volume by providing a clear-eyed overview of the impact of the post-2007 turmoil and austerity policies on ESR. In exploring the concept of a human rights-based approach to dealing with the crises, Sepúlveda argues that by designing and implementing recovery policies taking into account human rights obligations, States can prevent a steep rise in poverty levels, and ensure that the most disadvantaged groups in society are not disproportionately impacted by the crises. While the chapter provides a key evidence base in terms of the potential of regional and national responses to the economic collapse, including austerity policies, to threaten the enjoyment of economic, social and cultural rights of the poorest sectors of society, Sepúlveda also makes a set of important, pragmatic recommendations with regard to how States can facilitate a human rights-based recovery from the crises.

In their contributions, Raquel Rolnik and Lidia Rabinovich and Olivier De Schutter further develop the theme of the need for a human rights-centric response to the economic crisis. So far as the first of these chapters is concerned, Rolnik and Rabinovich highlight the key elements of the neoliberal approach to housing, demonstrating the way in which the commodification of housing, as well as the increased use of housing as an investment asset integrated in a globalised financial market, have resulted in public policies that have abandoned the conceptual meaning of housing as a social good. They argue that this approach has deeply impacted upon the enjoyment of the right to adequate housing. In doing so, Rolnik and Rabinovich discuss the relationship between this non-rights-centric approach to housing and

²³ The Committee has appeared reluctant to address issues arising in relation to the economic crisis, failing, for instance, to produce a General Comment that could serve as guidance to States and advocates with regard to economic and social rights protection in a time of financial and economic crisis. Indeed, the Committee has limited itself to a May 2012 open letter to States Parties, in which it sought to clarify a set of criteria by which to judge the lawfulness of austerity measures. It has subsequently applied this letter in its review of state reports. For more on this point, see Nolan *et al.*'s contribution to this volume.

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the financial and economic crises, including the degree to which the former constituted both a cause and a response to the latter. In considering the effect of that approach on the enjoyment of the right to housing of the poorest and most disadvantaged in different contexts and across time, they analyse the three main housing finance policies directed at low income households (mortgage finance, demand side subsidies and housing micro-finance) from a human rights perspective. Ultimately, Rolnik and Rabinovich call for a paradigm shift from prevalent housing policies that focus on the financialisation of housing over to a rights-based approach to housing policies.

De Schutter also addresses the notion of ESR relating to, or constituting, social or public goods. He argues that the global food price crisis of 2008, and the financial and economic crises which followed, have led to a reassessment of the complementarity between actions to be undertaken at the domestic level to protect and fulfil the right to food, as well as of the measures that need to be adopted at the supranational level to create an international environment 'enabling' such efforts. In his view, given the growing interdependency between States, and because national efforts are doomed to fail unless supported by measures at the international level. ESR, including the right to adequate food, have become global public goods. As such, the delivery of food security requires new forms of collaboration and cooperation between States, rather than the 'beggar thy neighbour' policies that have tended to be a feature of domestic governmental policy in times of crisis. Highlighting the problem of what he terms 'the fragmentation of global governance', De Schutter argues that the reform of the global governance of food security following the global food crisis – instituted in order to ensure that sectoral policies in the areas of trade, investment and food aid converge towards the realisation of the right to food – should serve as a source of inspiration for the global governance reforms that, in De Schutter's view, are essential if ESR are to be realised at the domestic level as we move forward.

Both contributions emphasise both the critical impact of the crises on ESR enjoyment and the need for the reformulation of policy approaches at the local, national and supranational level. Taking up the second key question addressed in this book, the authors identify ways in which an ESR-oriented approach can provide an effective pathway through the current financial and economic turmoil – one that, in contrast to the current predominant model, aims to minimise damage to, indeed prioritise, the poor and the socially excluded and marginalised.

II. Teasing out obligations in a time of crisis

It is clear that a number of key challenges arise in relation to using ESR to guide post-crisis recovery approaches and global governance reforms. Probably the most fundamental of these is the fact that the substantive content of ESR duties (such as ‘maximum available resources’ and ‘minimum core obligation’) is itself complex and subject to contestation. Arguably the most pressing example of this is Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁴ the foundational obligation-related provision in terms both of that instrument and ESR law more generally.²⁵ The supposed difficulties with the obligations imposed by this provision, as well as the other duties set out in ICESCR or identified by the CESCR, have been much discussed.²⁶ There are undoubtedly definite advantages to having ESR and the obligations that they impose phrased or conceptualised sufficiently broadly to ensure that they are capable of general application to a variety of individual circumstances and different contexts over time.²⁷ However, it is obvious that where the scope of obligations is uncertain, this will have implications for the use of ESR as a framework for evaluating state action (or inaction). Fundamentally, how can one evaluate state responses in terms of compliance with ESR

²⁴ International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (ICESCR). Article 2(1) provides that: ‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

²⁵ This is evidenced, for instance, by the way in which the Committee on the Rights of the Child has shaped its interpretation of Article 4 and the obligations imposed by the substantive economic and social rights provisions under the Convention on the Rights of the Child in light of the Committee on Economic, Social and Cultural Rights’ construal of Article 2(1). See, e.g., Committee on the Right of the Child, ‘General Comment No. 5’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (27 May 2008) UN Doc. HRI/GEN/1/Rev.9 (Vol. II), para. 6.

²⁶ There is a wealth of literature on this point. For two key discussions of the obligations imposed by Article 2(1), see M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003); R. O’Connell, A. Nolan, C. Harvey, E. Rooney and M. Deutschke, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (London: Routledge, 2014).

²⁷ A. Nolan, M. Langford and B. Porter, ‘The Justiciability of Social and Economic Rights: An Updated Appraisal’ (NYU Centre for Human Rights and Global Justice Working Paper Series No.15, 2007), 14.

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standards if those standards are themselves not clear? Always a difficulty, this becomes especially problematic during a time of economic tumult of the sort that the world has been witnessing since 2008.

ESR frameworks are certainly not without tools to resist the rights-related damage of the kind that has arisen following the crises. Possibly the most important obligation in terms of constraining – or critically evaluating – governmental action that might impact negatively on ESR achievement is the prohibition on ‘deliberate’ retrogressive measures in terms of ESR other than in very limited circumstances.²⁸ Such a measure can be defined as a backward step in the level of ESR enjoyment as a consequence of an intentional decision(s) by the State.²⁹ However, as Aoife Nolan, Nicholas Lusiani and Christian Courtis highlight in their contribution, the scope of this obligation remains nebulous, a fact that has made ESR advocacy and litigation in a time of financial and economic crisis more difficult than would otherwise have been the case. These authors seek to explain the CESCR’s reticent approach towards non-retrogression and the main conceptual issues posted by such. Having provided conceptual clarification of the obligation, they outline the ‘state of play’ with regard to the specification of operative legal standards capable of assessing state compliance with the general prohibition of retrogression.

Another important issue arising in relation to ESR obligations in a time of financial and economic turmoil is the scope and enforceability of extraterritorial obligations, which have an ever greater role to play in a globalised economy.³⁰ This is particularly so with regard to monetary policy formulation and financial regulation, which are the central foci of Radhika Balakrishnan and James Heintz’s chapter. These authors argue that the global economic crisis has demonstrated that the operation of financial markets and the management of the global macroeconomy have direct implications for human rights across national borders. In considering the largely ignored issue of the scope of extraterritorial obligations with regard to economic policy, Balakrishnan and Heintz document the nature of economic interdependence in terms of financial markets,

²⁸ See Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3’ in ‘Compilation of General Comments’, para. 9.

²⁹ Sepúlveda, *The Nature of the Obligations*, p. 323.

³⁰ For more on extraterritorial obligations and economic and social rights more generally, see M. Gibney and S. Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010), chs. 5–9; M. Langford, W. Vandenhoe, M. Scheinin and W. van Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013).

financial regulation and monetary policy, and draw out the implications of such for the realisation of human rights. They assert that an effective response requires international economic policy coordination across countries, and they consider the implications of this for global institutions such as the International Monetary Fund and the World Bank.

In addressing significant obligation-related gaps that go to the very heart of developing a clear, convincing ESR framework in the context of financial and economic crisis, these chapters identify and scrutinise a wide range of actions and actors that have played a central role in causing and ameliorating (or not) the financial and economic turmoil. Furthermore, they outline the implications that ESR obligations – properly conceptualised – can and should have for the development of responses to the recent crises and the avoidance of future ones.

III. Exploring responses to financial and economic crises

The third part of the collection focusses on regional and national experiences in relation to current and past financial and economic crises. Colm O'Cinneide opens this section with a consideration of Europe, a region in which ESR remain better protected in practice than almost anywhere else. Having reviewed the national and supranational legal and policy dimensions of the European social model, O'Cinneide argues that the formal embrace of the idea of 'social Europe' is not necessarily reflected in law and policy; the 2008 economic crisis and the intensification of austerity measures across much of the continent have demonstrated that the European commitment to social rights is essentially rhetorical in nature, and, what he terms, their 'partial constitutionalisation' remains an incomplete project. While O'Cinneide criticises the limits of European social rights law, he also identifies elements of European law and political practice that point the way towards how the concept of a social Europe could be given new vitality. These include the fact that the welfare state remains alive and well in parts of Europe, the existence of the constitutional principle of the *Sozialstaat* which gives legal expression to the concept of 'social citizenship' that originally underpinned the historical development of the European social model, and the possibility that international human rights law may yet influence the development of European Union (EU) law in the social field, and by extension national law and policy.

Moving from the broad European regional context to a specific European jurisdiction that has been hit particularly hard by the crises, Lusiani's chapter addresses the effect of government austerity policies that