

REVIEW ARTICLE

The Way Forward for Social Europe: How Do We Get There from Here?

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Nicola Countouris and Mark Freedland (eds), **Resocialising Europe in a Time of Crisis**,

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INTRODUCTION

Labour law is where the market and the social meet. When both of these domains mapped on to the boundaries of the nation state, the traditional institutions of democratic politics – including trade unions – had the capacity to influence the balance between market forces and social concerns, in large part through labour law. However, within the European Union, the market and the social have become profoundly misaligned. Market integration has dismantled the national boundaries to facilitate factor (goods, capital, services, and labour) mobility, while competency over social policy in general, and labour law in particular, lies primarily, albeit not exclusively, with the Member States. The EU's institutional architecture and substantive competencies, when combined with the adoption of the Euro and the inclusion of Member States with wage costs and social entitlements that were not aligned with those of existing members, placed redistributive and protective national labour laws in jeopardy of negative harmonisation through downward competition. The 2008–9 financial crisis and consequent Euro and sovereign debt crises brought the threat to national labour laws home to roost. As part of the conditions for obtaining international loan agreements, the 'Troika' of creditors (the European Commission, European Central Bank, and International Monetary Fund) required affected EU Member States (Greece, Ireland, and Portugal) to reform their labour laws in order to reduce labour market rigidities and strong employment protection as part of the process of internal devaluation.¹

This constellation of political and economic events provoked Nicola Countouris and Mark Freedland, two labour law scholars based in the UK, to organise a two-day conference in London in May 2012 on *Resocialising Europe*

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1 S. Deakin and A. Koukiadaki, 'The sovereign debt crisis and the evolution of labour law in Europe' (175–176). Deakin and Koukiadaki note that at the time of writing their chapter, although Italy and Spain had not yet completed loan agreements, they were under significant pressure to introduce similar changes to their domestic labour markets.

and the Mutualisation of Risks to Workers to which they invited mostly labour lawyers, with a sprinkling of fellow travellers from geography, industrial relations and sociology, from across Europe to participate in a collective endeavour to envisage a new future for a truly social Europe. Identifying the contemporary conjuncture as one in which ‘the social profile of the EU has entered a deep period of crisis’, they characterised the status quo as involving ‘a process of de-mutualisation of work related risks [that] is seriously undermining the hard-fought and hard-earned social *acquis* that national social law, and Social Europe itself, once aspired to provide’.² In response, they advocated ‘a reversal of this trend in favour of a process of fair-mutualisation of these risks, so as to disperse them away from workers, and share them more equitably between employers, the state, but also consumers, and society at large’.³ This impressive collection of twenty-three essays, bookended by the editors’ context-setting introduction and manifesto-inflected conclusion, is the tangible result of the conference. Blending diagnosis and prescription, *Resocialising Europe: In a Time of Crisis* captures the deepening sense of foreboding that Social Europe will be little more than a faded dream unless immediate and direct steps are taken to counter the shift of risks on to working people. It also adds a glimmer of optimism, although it is of the Gramscian pessimism of the intellect kind, by identifying a variety of ways that Social Europe could be reinvigorated.

The collection begins with the editors setting the scene of the slow rise and subsequent threat to Social Europe, providing a unifying analytic framework for the essays and concluding with a helpful overview of the chapters. Countouris and Freedland identify the project of building a Social Europe with Jacques Delors’ presidency of the European Commission from 1985 to 1994. Quoting Delors’ aphorism ‘nobody falls in love with a single market’, they cast him as a neo-Polanyian who recognised the need to balance the deepening of the free market project, epitomised by the 1992 Maastricht Treaty, with greater European-level competencies over social policies. Exemplified by what they characterise as the ‘socially ambitious (but not legally binding)’ 1989 Community Charter of Social Rights of Workers, Countouris and Freedland claim that a series of important directives introduced as part of the Maastricht Treaty on a range of labour-related matters from maternity pay and parental leave to health and safety legislation, which included working-time limits, demonstrate that Social Europe was more than a slogan. The project achieved its pinnacle with the proclamation of the now binding Charter of Fundamental Rights of the EU in 2000. However, the pendulum described a very low arc before being drawn back by the much stronger gravitational pull of the free market. Countouris and Freedland explain that the tight macroeconomic and financial requirements attached to European Monetary Union combined with the general commitment to neo-liberal policies belied the commitment to Social Europe, and they claim that this can be seen most clearly in the Lisbon Agenda, which ‘was meant to

2 Conference announcement for Resocializing Europe and the Mutualization of Risks to Workers, 18–19 May 2012 at <http://www.ucl.ac.uk/european-institute/events/re-socialising> (last accessed 18 June 2014).

3 *ibid.*

transform labour market deregulation into more jobs which in turn would contribute to economic growth' (4). The series of economic crises that have wracked Europe since 2008 have given rise to a politics and economics of austerity, absolving politicians, at both the EU and national levels, of the need even to genuflect towards protecting, let alone to enhance, social rights.

Despite this 'grim' account of the recent history, Countouris and Freedland are committed to a 'Promethean vision of Social Europe based on the meaningful protection of fundamental values such as dignity, freedom, equality, solidarity and social justice', which could be used to redirect European politics and economics (7). To this end they offer the idea of the mutualisation and demutualisation of risks to workers as a framework for thinking about how to resocialise Europe and as an organising theme for the essays they have collected. They introduced this idea of mutualisation and demutualisation in the conclusion of their book, *The Legal Construction of Personal Work Relations*,⁴ and use it here to describe '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 workers (demutualisation)' (7). They chart four (non-exhaustive) directions in which risks can be moved between individual workers and entities or communities: (i) vertically between individual workers and their employers (broadly understood); (ii) diagonally between individual workers and intermediary entities such as employment agencies and labour subcontractors; (iii) horizontally between individual workers and groups or collectivities of workers; and (iv) universally between individual workers and communities or localities such as municipalities, regions, nation-states or federation of states (8).⁵ They further suggest that labour law can be understood as a device that contributes to the movement of risks and risk-costs both away from and onto individual workers. However, they are careful to emphasise that this is only one of labour law's functions or regulatory aims, a point I will return to later when I discuss the significance of the fact that labour law's primary aim is no longer regarded as mediating industrial conflict given that trade unions and workers' collective action no longer pose a threat to economic and social stability in advanced economies like those in Europe and North America.

The chapters are grouped into three basically equal parts, the first dealing with Social Europe and the crisis of ideas and ideals, the second addressing precariousness and precarious work, and the third exploring the relationship between mutualisation and collective solidarity. Countouris and Freedland conclude their introduction with a succinct overview of each of the chapters. One of the strengths of the collection is that each of the chapters engages, either explicitly or implicitly, with this framework so that the book, unlike many collections emanating from conferences, is thematically unified at a deep level. Another

4 M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: OUP, 2011) 443–446.

5 Elsewhere I have argued that horizontal mutualisation also includes shifting risks and costs within the household, especially onto the unpaid work of women: J. Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' (2014) 22 *Feminist Legal Studies* 1.

strength is that the individual chapters are uniformly of a high quality, displaying a great deal of erudition as they grapple with aspects of the impact of the crisis on labour markets and labour law and the challenge of resocialising Europe.

Instead of providing a chapter-by-chapter review, I will identify and discuss what I regard as the collection's major contributions: the mutualisation and demutualisation framework and the diagnosis of the extent to which neo-liberalism and the crisis have undermined the redistributive capacity of labour law. I will then move to a slightly more critical register by identifying two themes – a preoccupation with the content of norms at the expense of considering the strategies to achieve them and a tendency to look to the past, instead of to the future, for inspiration – which, I argue, not only recur within this book but also inform much of contemporary labour law scholarship.

MUTUALISATION AND DEMUTUALISATION OF RISKS

One of the major benefits of the framework of mutualisation and demutualisation, or the various ways in which risks and their costs can be shifted either onto or away from workers, is that it can be used at a number of different levels to show how labour law in particular, or law more generally, is involved in shifting these burdens. Simon Deakin and Aristeia Koukiadaki use it to elucidate the link between the financial crisis and the current policies of labour market deregulation. In their empirically rich chapter, they discuss the growing body of evidence that points to the positive contribution of labour regulation to productivity and competitiveness of firms even during neo-liberalism's ascendancy (a finding also supported in Crouch's chapter). But they also note that since the early 1970s across developed countries there was a substantial fall in the share of national income devoted to wages as opposed to profits, especially in co-ordinated market systems, as well as increasing wage inequality (170). This fall in wage share and increase in wage inequality was accompanied by the largest drop, in proportional terms, in union density, despite the fact that labour law deregulation did not occur on a major scale in the large industrial economies in Western Europe and North America. Despite the relative stability in formal labour law, in many countries its effectiveness in practice was diminished by union decline. Thus, Deakin and Koukiadaki conclude 'labour law regulation survived the period of growing neo-liberal policy dominance within the EU, but in a form in which it was unable to fulfil its traditional goals of redistribution and in a context where its role in co-ordinating the employment contract was increasingly called into question by its reduced effectiveness in practice' (172). Moreover, they go on to identify the feedback loops between labour and financial markets to show how 'regulatory mismatches were transmitted from one market context to another, reinforcing and deepening the crisis' (173). Although the crisis was caused by deregulation and lax supervision in financial markets, household indebtedness compensated for increased wage inequality and the resulting asset price inflation contributed to the fragility of the financial system. Deakin and Koukiadaki provide a political economy account of the crisis that explains how at a macro level risks and costs were shifted from financial markets to labour markets through policies of 'internal devaluation', which entail

cuts to social benefits and services as well as reductions to minimum wages, extension to working time, increased fragmentation in collective bargaining, and changes to employment protection in order to encourage atypical work arrangements (175).

Turning from the level of the political economy to that of the firm, Wanjiru Njoya uses the risk-shifting frame to pry open the orthodox notion of the firm in which shareholders are regarded as the only stakeholders exposed to risk. She probes the idea of enterprise risk in legal and economic theories of the firm to argue that employees as well as shareholders bear the firm's residual risk, and that 'in reality risk is shifted to employees while profit remains vested in shareholders' (296). Since workers bear residual risk, they should have a 'voice', and Njoya explores the notion of interest representation in a nuanced discussion of the various ways in which workers' voice could be institutionalised within the firm.

A series of chapters, beginning with Sonia McKay's overview of the growth of precarious work in the EU, illustrate how well the ideas of vertical and diagonal shifting of risk from employers and intermediaries such as employment agencies to workers captures the limitations in traditional labour law approaches to the regulation of employment relationships. Starting from how the standard employment contract distributed risks between employers and employees, which she helpfully categorises along ten dimensions compiled in a table, McKay proceeds through a discussion of the wide-ranging literature defining precarious work, which she maps in terms of disciplinary perspectives. She returns to the ten dimensions of risk to contrast the distribution between workers and employers in a standard employment relationship and precarious work arrangements to show how in the latter risks have been shifted onto workers. This chapter is followed by Consuelo Chacartegui's analysis of how risks are shifted along a diagonal axis from employers through intermediaries such as temporary employment agencies onto workers. Using Spain as her example, she recounts the inadequacies of the 'equal treatment' approach embodied in the Temporary Agency Work Directive.⁶ As an alternative, she explores mechanisms of liability, such as joint and several liability, that can rejoin the responsibilities of the 'notional' employer (the agency) with the 'real' one (the client user) in ways that enable a temporary agency to access and benefit from labour standards. Anne Davies broadens the critique of EU's equal treatment approach beyond the Agency Work Directive to include the two other (no longer so accurately dubbed) 'atypical' work directives: the Part-Time Work and Fixed-Term Work Directives.⁷ She identifies three questionable assumptions underlying the Directives – that these forms of work (equally) benefit employees, that they serve as stepping stones to standard jobs, and that unequal treatment as compared with standard workers is the main problem faced by workers on such contracts (231). She proceeds to detail a series of reforms that do not rely on this set of assumptions. Moreover, Davies identifies a more profound set of problems: 'the focus on non-standard working assumes a division between nonstandard and standard working that may no longer reflect the reality of working lives' (246). Her hypothesis is that 'the

6 Directive 208/104/EC.

7 Directive 97/81/EC and Directive 99/70/EC.

problem of the transfer of risk from employers to the workforce is a pervasive one at all levels of the labour market' (247). Astrid Sanders' chapter on the impact of austerity on the meaning of 'flexicurity', a neologism that has dominated EU employment policy discourse since 2007, suggests that it is possible to detect within the EU documents 'a greater emphasis on what might be referred to as the "social" dimension of flexicurity' (331). But the key question remains: to what extent will most Member States seize the initiative to shift the risk of flexibility away from workers, especially in a context in which some Member States are being required to deregulate their labour markets, which shifts risks onto workers? Sanders' discussion of the UK indicates that some Member States are only concerned with increasing labour market flexibility and have little interest in providing security for workers.

Focusing on the mutualisation of pension risks, Kendra Strauss shows how three types of risks (financial and investment, adequacy and financial sustainability) have been shifted from employers and the state to workers in pension reform policies prevalent in the Anglo-American and developing work contexts (347). However, instead of suggesting ways to return to the standard pension contract, which she defines as mandatory membership in a defined benefit (final salary) pension scheme that provides a guaranteed pension and limited survivor's benefits (342), she suggests a more radical reform, one that would 'distribute risk more equitably between workers, employers, the state and society in part by recognising the indeterminacy and fluidity of these categorical assumptions' (349). Drawing upon the work of feminist labour law and political economy scholars, Strauss is concerned with the way that the standard pension contract is based upon a standard employment relationship that fails to accommodate the socially necessary, but largely unpaid, work of caring, especially for young children, overwhelmingly performed by women. She emphasises the extent to which the standard pension contract reinforces the distinction between those in paid employment and those doing such unpaid domestic and care work, as well as occupational hierarchies and labour market segmentation, 'by projecting income and status differentials that originate in the labour market into the sphere of non-work once employees retire, leaving it to tax and transfer programmes to redistribute (or fail to redistribute) resources among non-working populations' (347, footnote omitted). She concludes that the concept of a basic minimum income for all, what Countouris and Freeland call universal mutualisation and Strauss identifies as socialisation, is the fairest form of risk distribution for the future.

NEO-LIBERALISM, AUSTERITY AND LABOUR LAW

Another key contribution made by the collection as whole and several individual chapters is the diagnosis of the combined effect of market expansion, neo-liberalism and austerity policies on labour law and labour markets. Alain Supiot decries the mechanistic vision of work shared both by free marketers and the Leninist-influenced Left, and advocates instead a humanist approach to work that enables workers to express their talents. Rather than attacking its assumptions, Colin Crouch evaluates neo-liberalism's outcomes. He characterises the neo-

liberal thesis as the contention that ‘economic success depends upon a willingness of policy makers to expose labour to market forces’, which requires ‘dismantling industrial relations institutions such as collective bargaining and the role of trade unions’ (44). He tests this contention by subjecting it to empirical verification. If the neo-liberal thesis is correct, then the level of employment should be lower where there is less labour market regulation and greater income inequality. Looking at four measures of labour market regulation (employment protection laws, unemployment replacement pay, level of union membership and the level of collective bargaining coordination) as well as the degree of income inequality, Crouch finds that, with the exception of employment protection laws, the relationship between strong labour market regulation and income equality, on the one hand, and employment rates, on the other, is weak. Although he is careful not to draw causal directions between the relationships, he suggests that they ‘do cast serious doubts on the claims of neo-liberal orthodoxy that all forms of labour protection and welfare states have a negative effect on economic performance’ (56–57). Crouch concludes that neo-liberal policies are promoted precisely because they result in concentration of power and income.

While Deakin and Koukiadaki document the impact of the imposition of credit-led austerity policies on labour laws and labour market institutions in Greece, Portugal and Spain, the chapter by Lydia Hayes, Tonia Novitz and Petra Herzfeld Olsson looks at broader strategies of restricting access to collective bargaining and using migrant workers to undercut established rates of pay. In particular, they focus on how the Troika’s encouragement of Member States to replace co-ordinated collective bargaining at the national or sectoral level with much more fragmented systems that take place at the level of the enterprise or workplace combines with the practice of employers in one Member State posting workers to work in another Member State to lower wages and to deregulate the labour market. Here the controversial Posted Workers Directive, which sets the maximum terms and conditions a Member State can require an employer to adhere to with respect to workers posted in its territory, is crucial for it excludes collective agreements concluded at the enterprise or workplace level from the set of mandatory terms. Using the organisational theory concept of ‘institutional isomorphism’, they argue that there are a range of pressures, both coercive and mimetic, on Member States to converge towards reducing the degree of co-ordination in collective bargaining. They conclude that ‘neither the potential mimeticism nor the apparent coercion lent to these developments offer the legitimacy that the EU requires’, and they propose that, ‘as professionals, lawyers can play a crucial role in a resocialised Europe insofar as they prompt reference to international and European human rights law as a superior source of legitimacy in uncertain times’ (450).

NORMS AND VALUES/INSTITUTIONS AND POLITICAL ECONOMY

Not surprisingly, given that most of the contributors are lawyers, there is a great deal of attention paid to values in many of the chapters. Values are generally regarded as a source of legitimacy of which the Europe Union is sorely lacking, and Frank Hendrickx, for example, claims that a ‘value-oriented enterprise is

required' (64). A great deal of attention is paid to the normative repertoire and values embodied in international and European labour standards and rights instruments, such as International Labour Organization Conventions, the European Social Charter, the EU Charter of Fundamental Rights and the European Convention on Human Rights.⁸ Hendrickx argues that the way forward is to be found in a 'United States of Europe' unified by a 'proactive and promotional view of fundamental rights, centrally embedded in a constitutional approach' (80). Giuseppe Casale urges the cultivation of a more efficient and collaborative approach between International Labour Organization (ILO) standards and European labour law. Two chapters take the European Social Charter (ESC) as a source of values for a truly Social Europe. Monika Schlachter argues that, despite the 'obstacles to effectiveness built into the structure of the ESC itself, it can contribute to protecting social rights both by shaping public opinion and, through the idea of the 'indivisibility of human rights', influencing the interpretation of other, harder rights instruments (115). Claiming that 'the right to strike is a fundamental right and therefore ought to be included in the rights protected within the international sphere', Andrzej Marian Świątkowski provides a systematic analysis of the right to strike as protected by the ESC. The belief underlying these chapters seems to be that, if social rights are elevated to a fundamental constitutional level and given a hard edge, they will not only save workers from the worst deprivations of austerity policies but provide a secure basis for resocialising Europe.

The one real note of caution about relying on such a values-based approach is contained in Catherine Barnard's sobering chapter, in which she considers whether the changes to dismissal laws in the UK and Portugal would withstand a legal challenge brought to the Court of Justice of the European Union (CJEU) that they violate the European Union's Charter of Fundamental Rights. After detailing the reasons given for changing the dismissal laws, the actual changes and their effects in the two countries, she painstakingly reviews the legal arguments that these changes violate the Charter. She concludes that there is little likelihood that the UK changes give rise to a challenge based on the Charter, whereas she argues that in Portugal there is some scope. She then tackles the thorny issue of how such a legal challenge could be brought given that the CJEU has gone out of its way to avoid the issue of horizontal direct effect of the rights provided in the Charter. Finally, she considers whether or not there is a principled basis for bringing a challenge to changes to dismissal laws 'at a time when youth unemployment is crippling high in a number of Member States' (274). She suggests that a procedural approach to the issue, one in which the Court would consider whether or not the state 'has engaged in appropriate discussions with interested parties [in particular the social partners] prior to deciding on the reforms necessary' is both principled and appropriate (275–276).

There are two problems with concentrating on values, especially as embodied in international and human rights instruments, as the way forward for resocialising Europe. There is a tendency to treat the rights contained in these

⁸ Along with the chapters by Hayes, Novitz and Herzfeld Olsson and Hendrickx, see also those by Casale, Schlachter and Świątkowski, and Countouris and Freedland's concluding chapter.

instruments as Platonic Forms, only the expert legal study of which can provide the rest of us, including politicians, with genuine knowledge. This approach ignores the extent to which the meaning of the values embodied in the international and European rights instruments is contested, contingent and provisional. Consider the recent controversy over the status of the right to strike at the ILO. In June 2012 the Employers' Group, one of the three constituents of the ILO (along with Member States and the Workers' Group), interrupted the usual proceedings of the annual International Labour Conference (the 'legislative' forum) to challenge the right to strike.⁹ Although this challenge was not unprecedented – Hovary recounts that since 1989 the Employers' Group has regularly voiced opposition to the right to strike – it was the most dramatic. The Employers Group claimed that the right to strike is not specifically protected in Convention 87 on Freedom of Association, and, further, that the ILO's Committee of Experts on the Application of Conventions and Recommendations, which interpreted freedom of association as including by necessary implication the right to strike, does not have the legal mandate to interpret conventions. Although Hovary remarks that 'the fact that a right's existence is contested does not make it any less of a right,'¹⁰ such a challenge may make constitutional courts that have turned to the ILO for a source of interpretive guidance when faced with giving meaning to labour rights less willing to do so in the future.

This controversy over values is also manifested in the decisions of constitutional courts. While many labour lawyers have been inspired by a series of decisions by the European Court of Human Rights interpreting the freedom of association provided in Article 11 of the European Convention of Human Rights in light of the interpretation provided by the ILO's supervisory bodies, which includes the right to strike,¹¹ it is now clear that the Court does not feel bound to adopt the same conclusions as these bodies. In *RMT v United Kingdom*¹² (8 April 2014), the European Court of Human Rights (ECtHR) held that the ban on secondary action in the United Kingdom was a justified interference with the right to freedom of association in Article 11 of the European Convention on Human Rights. The ECtHR referred to ILO Convention No 87, Article 6 of the European Social Charter and its earlier decision in *Demir* in order to reject the UK's argument that Article 11 did not apply at all to secondary action. It also rejected the UK government's argument that the on-going disagreement about the status of a right to strike in the ILO, when combined with the ILO Committee of Experts' acknowledgement that its opinions are not binding, should require the ECtHR to reconsider the Com-

9 C. Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42 *Industrial Law Journal* 338.

10 *ibid.*, 368.

11 *Demir and Baykara v Turkey* ECtHR 12 November 2008 (*Demir*); *Danilenkov v Russia* ECtHR 30 July 2009; *Enerji Yapi-Yol Sen v Turkey* ECtHR 21 April 2009; *Saim Özman v Turkey* ECtHR 12 September 2009; *Kaya and Seyhan v Turkey* ECtHR 15 September 2009, which are discussed in K. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

12 *Case of the National Union of Rail, Maritime and Transport Workers v The United Kingdom* ECtHR 8 April 2014, unreported.

mittee's 'role as a point of reference and guidance for the interpretation of certain provisions of the Convention'.¹³ But, despite these comments, the Court concluded that 'the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of much persuasive weight for determining whether the operation of a statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to national authorities under Article 11'.¹⁴ Emphasising that the margin of appreciation was wide in the context of industrial and economic policies of the state, the Court concluded that in the circumstances of the instant case the operation of the ban did not entail a disproportionate restriction on the applicant's right under Article 11.¹⁵ While it is possible to speculate that a number of factors account for the Court's change in how it treated the relevant *acquis* of the ILO and Social Charter, not least the UK government's threats to withdraw from the European Convention, this decision makes it clear that the values embodied in rights instruments are not self-evident and that their meaning changes.¹⁶

The second problem with a values-based approach to resocialising Europe is that it runs the risk of ignoring the instrumentalities needed to put values to work. In contrast to the attention given to values and norms throughout the collection, the question of the agents, institutions and processes by and through which the norms will be given practical, and not just symbolic, effect receives less scrutiny. This difference in focus tends to distinguish lawyers, on the one hand, from sociologists and political economists, on the other. Polanyi showed his hand as a political economist when in 1944 he wrote: 'No mere declaration of rights can suffice; institutions are required to make the rights effective.'¹⁷ The preponderance of the concern with values over that of the institutions needed to implement them is not confined to this collection but tends to be a feature of labour law scholarship more generally.

Several chapters do indeed consider the role of the institutions needed to achieve a Social Europe. Julia López López focuses on the role of the European Trade Union Congress, examining a range of strategies, involving hard and soft law as well as strikes and demonstrations that it has employed to protect and

13 *ibid* at [97].

14 *ibid* at [98]. See the discussion of the ILO Committee of Experts' critical observations on the restrictions on secondary action, *ibid* at [30]-[33] and similar observations by the European Committee on Social Rights, *ibid* at [36]-[37].

15 The ECtHR stated that 'the ban on secondary action has remained intact for over twenty years, notwithstanding two changes of government during that time. This denotes a democratic consensus in support of it, and an acceptance of the reasons for it, which span a broad spectrum of political opinion in the United Kingdom. These considerations lead the Court to conclude that in their assessment of how the broader public interest is best served in their country in the often charged political, social and economic context of industrial relations, the domestic legislative authorities relied on reasons that were both relevant and sufficient for the purposes of Article 11', *ibid* at [99].

16 J. Hendy and M. Ford, 'RMT v United Kingdom: Sympathy Strikes and the European Court of Human Rights' *Oxford Human Rights Hub* 10 April 2014 at <http://ohrh.law.ox.ac.uk/rmt-v-united-kingdom-sympathy-strikes-and-the-european-court-of-human-rights/> (last accessed 30 April 2014).

17 K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1944) 276.

enhance social rights. Silvana Sciarra explores the capacity of European social dialogue – a core component of Social Europe – to build a new consensus based on a commitment to social rights, and considers both sectoral social dialogue and trans-European collective bargaining. In a similar vein, Alan Bogg and Ruth Dukes question whether the concept of autonomy, which has a long and distinguished history in national law systems, can provide a basis for reforming social dialogue at the European level. They conclude that it is necessary to reinvigorate social dialogue by countenancing ‘a more active role for the political institutions of the Union’ (467). Significantly, of the four chapters that explicitly consider the question of which institutions and agents can breathe life into social rights and thereby resocialise Europe, only one, that by Chris F. Wright and William Brown, looks beyond the traditional institutions and mechanisms of labour law – trade unions and various forms of social dialogue – to consider other means for improving labour conditions. They examine a range of different models of socially sustainable sourcing to see if these mechanisms offer any guidance on how to prevent lead firms in supply chains from shifting risks down to more vulnerable actors, such as workers, who are located at the opposite end of the chain.

PROTECTION OR EMANCIPATION

A tinge of nostalgia for the golden days of Social Europe colours the collection, as it does much of contemporary labour law scholarship. A quotation from Olaf Palme about the meaning of democracy, human dignity and social rights is the book’s epigram, and Jacques Delors is its heroic figure. The cover has a reproduction of George Seurat’s 1884 painting *Bathers at Asnières*, which depicts in lovely, mostly pastel tones a group of young workmen taking their leisure by the Seine in an industrial suburb west of Paris. While it is important not to gainsay the achievements of social democracy, not only is this a past to which it is impossible to return, but even during the golden years of the Keynesian-welfare states and Fordist entente there were important exclusions from social rights and limitations to the scope of social and industrial citizenship.

Several of the chapters evince a faith in the rejuvenating capacity of the key institutions and manifestations of social democracy – trade unions, collective bargaining, social dialogue, the International Labour Organization, the right to strike and job security.¹⁸ However, collective bargaining coverage is shrinking and collective action in the form of strikes in the advanced economies, unlike China for example, is increasingly rare.¹⁹ The industrial relations specialists

18 See the chapters by Lopez, Sciarra, Casale, Bogg and Dukes, Świątkowski, and Weiss.

19 See E. Tucker, ‘Can Worker Voice Strike Back? Law and the Decline and the Uncertain Future of Strikes’ in A. Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014) 455; S. Scheuer, ‘A Novel Calculus? Institutional Change, Globalization and Industrial Conflict in Europe’ (2006) 12 *European Journal of Industrial Relations* 143; K. Vandaele, ‘Sustaining or abandoning “social peace”?’ Working Paper 2011.05 (Brussels: European Trade Union Institute, 2011). By contrast, since 2010 China has been experiencing a strike wave of which the recent (April 2014) strike in the massive shoe manufacturer in Dungguan is only an extreme example. See ‘Labour Unrest: Danger Zone’ *The Economist* 25 April 2014; A.

included in the collection paint a dire picture of the capacity of trade unions in contemporary Europe. Wright and Brown's chapter begins with the bold assertion: 'the economic foundation upon which collective bargaining was built has been crumbling' (427).²⁰ Colin Crouch states 'trade union membership is collapsing in all industrial countries, within Europe and beyond, for which we have records' (60). Labour law's vitality both as a discipline and a regulatory instrument is inextricably tied to the political and economic strength of trade unions in the private sector, institutions that are in decline in most advanced economies. It is important to remember that one of labour law's core aims was to mediate industrial conflict – not only to protect workers or transfer risks – because trade unions in Europe used to exercise a great deal of economic and political power.

Not only is there a mismatch between the normative prescription and the institutions available to implement them, some of the prescriptions for resocialising Europe seem to be either backward looking or entirely context dependent. With the prevalence of fixed-term and temporary employment and of zero-hour contracts, often mediated through employment agencies as described in McKay's chapter, advocating strengthening job security through robust unjust dismissal laws seems to ignore the huge problem of unemployed youth, a point Barnard makes.²¹ It also ignores the argument, repeated by Crouch in his chapter, that 'approaches to labour security that depend upon strong employment protection laws rather than on unemployment pay are typical of countries with a high level of class inequality' (47). According to Crouch, inequality is highest in countries with delayed industrial development, typically in Southern Europe. Here elites bought social peace from the small industrial working class and public sectors through job security, which did not pertain to the majority of the population, who worked in traditional agriculture and services outside of formal employment contracts. Nor does it assist the legions of workers in those countries who are self-employed or in informal or temporary jobs. Thus, while Weiss is correct that job security in the form of restrictions on dismissal may work in Germany, where unions have a long history of helping firms to adapt to competition, it is hard to see the lesson that job security coupled with internal flexibility provides for countries that lack either this tradition or Germany's industrial might.²² Internal flexibility, whereby firms do not shed workers to respond to market disruptions but instead adjust working-time arrangements, for example, is only an option for labour markets that have not already been externalised through various forms of outsourcing and labour contracting. Here it is important to be attentive to what Crouch characterises as the choice confronting working people 'between defending certain past social policy achievements that have ceased to have future utility and giving these up in exchange for nothing other than full exposure to the insecurity of

Chan, 'Strikes in China's Export Industries in Comparative Perspective' (2011) 65 *The China Journal* 27.

²⁰ Crouch, a sociologist, could also be described as a specialist in industrial relations.

²¹ See too Weiss's chapter.

²² Weiss is careful to stress that 'the reference to the German experience is not meant to recommend the German pattern for Europe. It is discussed more as an illustration of the tremendous possibilities inherent in the concept of internal flexibility' (289).

market forces' (43–44). The problem is that the unpleasantness of the latter does not contribute to the viability of the former.

It is possible to lament the current rapacious expansion of the market without being wistful for the past. Nancy Fraser's recuperation of Polanyi's 'double movement' is an antidote to nostalgia. She explains that, in *The Great Transformation*, Polanyi 'distinguished two different relations in which markets can stand to society.'²³ They can either be embedded in society, enmeshed in non-economic institutions and subject to non-economic norms, such as the case of a truly Social Europe, or they can be dis-embedded from extra-economic regulation and subject only to the forces of supply and demand, such as directed by neo-liberal policy prescriptions. Polanyi argued that the attempt to dis-embed the market tore the social fabric, generating a social crisis, which provoked a counter-movement in pursuit of social protection. *The Great Transformation* details an example of this double movement, which began in the 1830s and 1840s when the British government dismantled the system of outdoor relief and tariffs and subsidies on corn, leading to widespread immiseration of the working population. In response, a broad coalition of forces, including rural landowners, cooperative movements, trade unionists and religious activists, mobilised to implement various kinds of social protection, ranging from laws limiting the length of the working day, poor relief to tariffs on foodstuffs. Written in the immediate aftermath of World War II, Fraser characterises *The Great Transformation* as constituting 'a brief for a new democratic regulatory regime that would defang markets, removing their sting without suppressing them altogether'.²⁴ Yet, while Fraser acknowledges the important contributions that Polanyi makes with his distinction between dis-embedded and embedded markets and the idea of the counter movement, she is critical of his 'too rosy' account of social protection. She claims that historically 'the meanings and norms that have served to embed markets have often been hierarchical and exclusionary'.²⁵ By focusing exclusively on the harms that result from the unleashing of market forces from social institutions, Fraser argues that we ignore at our peril non-market-based forms of injustice often embedded in forms of social protection 'that are at the same time vehicles of domination'.²⁶ Thus, she maintains the need to conceptualise a third movement to add to those of market expansion and social protection, namely social emancipation. Two examples of emancipatory social movements she considers are feminism and anti-imperialism. She describes this third movement as subjecting both market exchange and non-market norms to critical scrutiny since it is opposed to domination. This task, in turn, requires her to rethink what is meant by society, and to this end she introduces the public sphere of civil society. Hence, adding the third movement 'transforms the triad of society, economy, state into a quartet, which includes the public sphere of civil society'.²⁷

23 N. Fraser, 'Marketization, Social Protection, Emancipation: Toward a Neo-Polanyian Conception of Capitalist Crisis' in C. Calhoun and G. Derlugian (eds), *Business as Usual: The Roots of the Global Financial Meltdown* (New York: New York University Press, 2011) 137.

24 *ibid.*, 139.

25 *ibid.*, 147.

26 *ibid.*

27 *ibid.*, 148.

It is important to keep an eye on social emancipation when thinking about how to resocialise Europe. When reflecting upon Seurat's depiction of the men at their leisure on the banks of the Seine we might consider why there are no women in the picture. A combination of restrictive social norms and sexual division of labour kept women, to a great extent, out of the market and firmly rooted, and simultaneously subordinated, in the social realm of the family, which was governed at that time by patriarchal norms. Several of the contributions in the collection make a similar point and caution against viewing Social Europe's past through rose-coloured glasses. In his chapter, Colm O'Conneide reminds us that 'the European Welfare states that were established after 1945 were the product of predominantly monocultural societies whose economies faced little global competition and were able to provide full employment for a largely adult male workforce. Many women and children did not participate in the labour market' (132). Thus he claims that Social Europe must 'involve more than just the redistribution of resources; it must also engage with the non-discrimination principle and find ways of incorporating historically and currently marginalised social groups into the mainstream of European society' (132). He sees anti-discrimination as playing a modest, but important role, in resocialising Europe. While it 'does not challenge the underlying logic of the market or attack the social structures that determine how jobs are allocated and "merit" is defined' (133), it can be used to chisel away at the 'neglect, indifference and outright hostility that often blocks off access by many disadvantaged groups to key social goods, including access to the employment market' (131). O'Conneide's conclusions about the importance of and limitations to equality law are reinforced by Sandra Fredman's examination of how the courts have treated the duty imposed in the UK's Equality Act 2010 on public bodies to have 'due regard' to the 'need to advance equality of opportunity, eliminate unlawful discrimination and promote good relations' (139). Although the 'due regard' duty has fallen short of instantiating a comprehensive deliberative approach to equality in policy formulation and implementation, it has, according to Fredman, provided an important resource around which civil society groups have mobilised in order to hold public bodies to account for developing policies that do not impose undue costs on marginalised groups.

Catherine Jacqueson's chapter also draws our attention to the emancipatory promise of the provision of free movement rights to Union citizens. She characterises this movement as a form of transnational solidarity, which has the potential to challenge a parochialism based exclusively on national identity. Jacqueson notes that work is not the only solidarity trigger and that lawful residence is sometimes sufficient. She also recognises not only that minimum residency requirements exclude the most needy, but that Member States from the wealthier north are trying to limit the influx of students to their territory because of the burden posed on their finances and that this limitation might spill over to workers. Jacqueson is clear that, 'as transnational social solidarity extends beyond a State's own nationals and transgresses its territorial frontiers, it has of course led to criticisms of illegitimate intrusion in welfare policies and fears of financial collapse' (387). However, she is also convinced that the response to this asymmetry in the European governance architecture is not for Member States to

fortify national borders against the Union citizen, but for the EU to modify its governance structure in order to adopt a more social EU budget and establish more comprehensive redistributive mechanisms.

The contributors to this collection are united in their commitment to a European project that better incorporates social values in order both to legitimise and to humanise the European enterprise of market integration. Many advocate a deeper political union²⁸ and the path of ‘solidaristic integration’, which Deakin and Koukiadaki describe as ‘involving an expansion of the European budget to deliver fiscal transfers from core to periphery and replacement of the model of competition among national legal systems by the harmonisation of the Member States’ social and fiscal law’ (187). In the conclusion, Countouris and Freedland offer ten principles, ranging from recasting the relationship between fundamental social rights and economic integration to the recognition that migrant labour is not a commodity (495–502), that could (and should) inspire a resocialised Europe. In the last paragraph of the book, they note that the realisation of some of their principles would require ‘a prior revision of the Treaties’ (503). However, the achievement of this political project requires us to move from the realm of ideas and ideals, where lawyers prefer to reside, to the messy business of interests, agents, institutions and coalitions, which is a terrain much more familiar to industrial relations, political science and sociology. The dream of a resocialised Europe is an important counter to nationalistic forms of parochialism and nativism that are too often the response of politicians and populations to the devastation accompanying market expansion. The pressing task now is to find ways to make these ideals real, and here lawyers need the assistance of scholars from other disciplines.²⁹

28 See in particular the chapter by Hendrickx, in which he advocates a ‘United States of Europe’.

29 Hendrickx makes this point (80).