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Resocialising Europe in a Time of Crisis, edited by Nicola Countouris and Mark Freedland, Cambridge, Cambridge University Press, 2013, 525 p. ISBN: 978-1-107-04174-5

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L'on a également évoqué dans cette troisième partie le cas de certaines entreprises, à l'effet d'illustrer par des exemples de terrain la situation de ces dernières à l'égard de la responsabilité de l'entreprise. L'on rapporte ainsi le cas d'une entreprise minière colombienne d'exploration de nickel et de production de ferronickel, la CERROMATOSO SA (CMSA), propriété dès 2008 de la compagnie australienne BHP, et ses relations face à ses parties prenantes. L'accent est surtout mis sur l'instauration d'un dialogue avec les employés, la prise en compte de la santé et sécurité au travail, de l'environnement, l'appui de fondations dont l'une sur l'éducation (offrir une éducation primaire et secondaire bilingue de haut niveau aux enfants des travailleurs de même qu'à certains membres de la communauté), et l'autre sur la santé par l'entremise de la construction d'une unité hospitalière (deux cliniques modernes) afin d'offrir aux travailleurs et à leurs familles des services de santé de qualité… et enfin, le fait de considérer le syndicat comme une partie prenante et un allié de l'entreprise.

L'on souligne enfin que l'expérience canadienne est peu visible dans la littérature, hormis la diffusion internationale de pratiques *made in Canada* telles que la norme d'exploitation des forêts *(Forest Stewardship Council-FSC)*, le programme *Responsible Care* de l'industrie chimique.

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Resocialising Europe in a Time of Crisis

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ISBN: 978-1-107-04174-5.

The European Union is a tantalizing locus for commentary on the employment issues emerging from the economic crisis (and resulting austerity measures) of the early 21st century. The remarkable strains placed on finances have produced a number of opinions on how to recalibrate expenditure. Muted by these discussions, the social policy example that is the European Union has been put aside. If actions speak louder than words, social Europe has been ranked behind economic interests in importance. Here is where legal scholars Nicola Countouris and Mark Freedland have situated this collection arising from a conference on this very topic. This is a packed edition with twenty-three contributions divided into three sections, not including the editors' introduction and epilogue. For the most part, contributors to *Resocialising Europe* are law academics, but their remarks extend beyond the law. As the collection's title suggests, the theme is how the law has been used towards social policy goals and the challenge economic crisis poses to that end.

To frame what follows, consider a portion of the context in which contributors were asked to situate their remarks: "We define the status quo as one in which a process of demutualisation of work-related risks is seriously undermining the hard-fought and hard-earned social *acquis* that national social law and Social Europe itself, once aspired to provide." Each part of the collection is discussed individually below followed by a brief commentary.

Part I

In the first section of the text, the editors confront a key issue for the European Union, "Social Europe and the crisis of idea(l)s." In this opening part, the editors have placed a number of different contributions which speak to the marginalization of the notion of a 'Social Europe.' One of the pre-eminent voices in the European Union labour law provides the initial entry. With "Towards a European policy on work," Alain Supiot criticizes the current preoccupation with wealth in banks and chastises Member States for failing to devote greater attention instead to the work capacities of its citizenry "as our starting point and stop

treating work as an exploitable resource or as human capital, but instead as an essential area for self-realisation." Among others, one remark encapsulates Supiot's stark criticism: "Labour is not an adjustment variable subject to the needs of the markets, but a condition for their existence."

Following on from Supiot's critique of neoliberalism, Colin Crouch continues the dissection with "Entrenching neo-liberalism: the current agenda of European social policy." He argues that the marketization agenda (in some areas this may be called financialization) has precipitated an increase in inequality of incomes and power in the workplace. Crouch itemizes the consequences of the economic crisis in those Member States which made news for long periods, such as Greece. The dismantling of labour protections and regulation was a "return to the simple-minded neoliberalism of the 1990s." Here the social becomes apparent, but more in opposition to the loss of national autonomy these state bailouts created by returning to the notion of competitiveness being primarily about reduction of labour costs.

Next, Frank Hendrickx' "Completing economic and social integration: towards a labour law for the United States of Europe" contains the argument that a value-oriented enterprise is needed to resocialize Europe. This would entail a "constitutional embedding of EU labour law as well as a promotional and proactive view of fundamental EU social rights." It is interesting to note that Hendrickx' comments about the only way forward being a political Europe echoes other prominent academic commentators (see, for example, David Kennedy, "Law and the Political Economy of the World" in G. de Burca, C. Kilpatrick and J. Scott (eds) *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek* (Oxford: Hart, 2014), 66-102).

Guiseppe Casale, Director of the Labour Administration Programme at the International Labour Office, brings the international together with the EU in "International labour standards and EU labour law." He advocates for an International Labour Code. An interesting comment in this piece is Casale's description of the EU as a "kind of 'policy incubator' for the ILO, serving to test ideas at the regional level for potential export to the global level." He points to the Maritime Labour Convention 2006 as an example of co-operation between the two.

To Monika Schlachter ("The European Social Charter: could it contribute to a more social Europe?," the European Social Charter of 1961 can be an effective tool in resocializing Europe. She views an opening in the way that the European Social Charter (ESC) is used as a model (for example, by the European Court of Human Rights) and this approach "has at least the potential of strengthening the concept of 'indivisibility of human rights'" thereby making it more than a rhetorical instrument.

Anti-discrimination and equality law are discussed by Colm O'Cinneide and Sandra Fredman respectively. In "Anti-Discrimination Law and 'Social Europe'," the former contributor identifies this discipline as one of the "few areas in which the EU can credibly claim to be giving effect to a positive social rights agenda." Still, O'Cinneide cautions about the "onward trajectory" as he identifies three "sins" (attributed to the "Leftist critique") of the system which may undercut the EU's claim: "underachievement" (the struggle to deliver on the promise to provide social justice); "judicialisation" (the need for judicial pronouncement to give effect to anti-discrimination norms); finally, "the manner in which it can legitimate existing market-orientated law and policy." Echoing the positive potential noted by O'Cinneide, Fredman views proactive equality duties as a means of breaking the mould of following a market imperative. In "Equality as a Proactive Duty," equal-

ity duties are a means of "remutualis[ing] Europe through building on and strengthening the understanding of how change within organisations can be triggered by the appropriate mix of incentives and punitive measures."

To warn against being carried away with optimism by the two preceding chapters, the editors have placed frequent co-authors Simon Deakin and Aristea Koukiadaki's "The sovereign debt crisis and the evolution of labour law in Europe" at the conclusion of the first section. These contributors write of an alternative, "solidaristic integration"; that is EU integration on the basis of innovations in solidarity such as moving towards harmonization of Member States' social and fiscal laws. In so doing they usefully situate European austerity: "Austerity policy simply takes to a further stage the logic of neoliberalism, which requires flexibility in labour markets to compensate for rigidities elsewhere, including, in this case, the effects of a strict monetary policy."

Part II

The second part of the book offers considerations of precariousness at work which speaks to (de)mutualization. Sonia McKay's criticism of the much-used term "precarious" in "Disturbing equilibrium and transferring risk: confronting precarious work" reveals how expansive the word has become. The introductory observation that insecurity in employment has grown is reinforced throughout the piece. This insecurity, McKay contends, stems from the shift of risk from the employer to the worker. A re-balancing is imperative, she continues, and it must shift more of that risk back to corporations because they are better situated to absorb them.

In "Resocialising temporary agency work through a theory of 'reinforced' employers' liability," Consuelo Chacartegui, using Spain as an example, considers the controversial temporary agency worker grouping. She contends that complexities therein are "seriously undermining the protective purpose of labour law."

In "Job security: a challenge for EU social policy," Manfred Weiss recalls the commercial and social positives in job security. He contends: "Removing the fear of losing one's job in an unfair or arbitrary way … increases the employees' motivation and, thereby readiness to invest and reinvest in their qualification, a necessary precondition for their company's long-term success." In fact, there is no evidence, he points out, to suggest that deregulation of employment protections has influenced unemployment in a positive way. He relies on Article 30 of the Charter of Fundamental Rights of the EU establishing protection for workers against unjustified dismissal as a means of avoiding the arbitrariness often associated with unjust dismissal.

Corporate and labour interests have long been contrasted and Wanjiru Njoya's "Flexibility and enterprise risk: employees as stakeholders in corporate governance" contributes further considerations. She imagines stakeholder-oriented corporate governance as a means of effecting employment protection. In particular, she notes that risk allocation may be dealt with by self-regulation, but that does not mean that self-regulation is an end in itself. Instead it is to enhance the capabilities of workers (a point which has been investigated for some time since S. Deakin and F. Wilkinson, *The Law of Labour Market* (Oxford: OUP, 2005)). To this end, Njoya concludes: "Risk-bearing leaves employees exposed to the vagaries of the market, but at the same time offers a powerful normative foundation for claiming voice rights in the firm that will accord workers a sense of agency and autonomy in their working lives."

From flexibility in Njoya's chapter, the text moves to Astrid Sanders' study of flexicurity; that all-purpose term devised by the European Commission which is supposed to speak to achieving two goals. In "The

changing face of 'flexicurity' in times of austerity?," Sanders identifies differing conceptions of this term amongst Member States. Notably, she identifies the UK as adhering to flexicurity as flexibility; a movement which the editors describe as demutualisation.

Part II concludes with Kendra Strauss' important addition, "Equality, fair-mutualisation and the socialisation of risk and reward in European pensions." Strauss strikes out upon an area which, to this reviewer at least, is undervalued in austerity discussions: "to consider what a fair mutualisation of risks, one that shares them more equitably between all members of society, might look like."

Part III

The final section investigates mutualization as compared to the "old-established … notion of collective solidarity." This final part is aimed at acting upon a belief in the "supreme importance of collective solidarity" in resocializing efforts. These contributions will not be all explored here for the simple purpose of encouraging readers to obtain their own copy. To whet readers' interest, two contributions are discussed. In "Migrant workers and collective bargaining: institutional isomorphism and legitimacy in a resocialised Europe," Lydia Hayes, Tonia Novitz and Petra Herzfeld Olsson catalogue two strategies which have "coalesced in a decsocialised Europe." "[O]ne strategy is to promote national legal reform to restrict workers' access to collective bargaining which might otherwise challenge wage reduction. Another is to develop legal instruments which facilitate the admission of migrant workers to EU labour markets under terms which undercut established rates of pay in a service or industry." Where the former is demutualization, the latter is the dissolution of collective solidarity. These contributors conclude that a more "competitive, individual and fractured" system of workplace bargaining has been adopted. Again, readers are confronted with an argument in favour of collective efforts and the questioning of individualistic attempts. This is not new. And yet, this collection (and this chapter) is precisely the kind of engagement needed to evidence the often rhetorical point. The authors use the example of the notoriously vulnerable migrant workers: "those who are most exposed to exploitation [and who] are subject to the replication of provisions designed to block off access to collective agreements." Ending the third part, Alan Bogg and Ruth Dukes' fascinating chapter, "The European social dialogue: from autonomy to here," dissects autonomy in European social dialogue as a model for national and pan-European labour law systems. The authors end their contribution with a "short manifesto in defense of 'resocialisation and re-mutualisation through democratisation'." They note that social dialogue depends upon a "renewed political will" to develop this area. This commitment requires expansion of forms of democratic debate. A European social dialogue will fail without strong collective bargaining and trade unions.

An Epilogue brings the collection to a close where the editors put forward ten principles "in the belief that their implementation can contribute to the goal of 'resocialising Europe' and saving the process of European integration from the precipice it is perilously nearing." Generally familiar to those fluent in the area, these principles are certainly precatory and are worth recounting for the purposes of encouraging wider engagement by readers: "Recasting the relationship between fundamental social rights and economic integration"; "Unlocking the potential for the Charter of Fundamental Rights of the EU"; "Integrating EU and other international sources for the protection of social and labour

rights"; "Protecting employment stability and de-casualising precarious work: labour is not a commodity"; "Expanding the scope of application of labour law beyond employment"; "Decent wages and working conditions for all European workers"; Promoting freedom of association, collective bargaining and workers' voice"; "Achieving substantive equality"; "Decent pensions and social security provisions"; "Migrant labour is not a commodity." An underlying theme here is the *quid pro quo* that is familiar to North American labour scholars in the form of the *Wagner Act*. With this text on the EU, the on-going challenge of balancing social and economic interests finds another jurisdiction. Among other points, what can be intriguing is the assessment of these ten principles. It would be facile to discount them: barriers to the free market ethos and therefore the economic potential of the EU. And yet, the circumstances precipitating crisis and responses to it (the impetus for the present collection) compel reconsideration of uncritical adoption. It is here that this text offers promise as a guide to such re-evaluation.

Commentary

Resocialising Europe itemizes the tensions of the early part of 21st century "Social Europe." Efforts to increase commerce have challenged notions of social protections which Continental Europe had developed over time. The United Kingdom was aloof in this latter aspect. And yet, reading through European Court of Human Rights decisions also tells a story of the socializing effects of European Union law on British law. Concurrently, it seems, Continental Europe has also moved closer to the commercial orientation often associated with the UK. Many printers have run dry across disciplines as a result of the decisions of the Court of Justice of the European Union in Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* [2007] ECR I-11767, Case C-438/05 *International Transport Workers Federation v Viking Line ABP* [2008] IRLR 143 and Case C-346/06 *Ruffert v Land Niedersachsen* [2008] ECR I-1989 (cases particularly noted in the chapter by Hayes, Novitz and Herzfeld Olsson). These aspects are all caught in this text. Still, the underlying message of the collection is that the present is a time of decision-making. We may take one example, Manfred Weiss' offering. Weiss outlines the denigration job security has suffered in a relatively short period of time; a belittling he contends is misplaced. This change is one which points to a paradigm shift: the transferring of (as much as possible) risk from the enterprise to the labour force. Job security has been conceived of as an impediment to economic growth.

Pension entitlement is one topic requiring further exploration. This is a nuanced area to explore because there are a number of considerations therein. For example, pensions have been viewed for some time in a negative light: drains on companies' and governments' financial resources. And yet, in the context of the wage-work bargain, pensions had been negotiated as part of the remuneration package. The public sector best illustrates the scenario. Workers there accepted lower salaries in exchange for, among other items, better benefits. It was a recruitment and retention strategy. With the economic crisis, public sector pensions have been vilified where random denigrations such as 'gold-plated' have been bandied about in order to foster more widespread negative sentiment against them. At present, it is the task of history to remind us that working in the public sector was once an esteemed position.

This collection prompts a simple question: when endeavouring to balance the economic and social, can there ever be a fair mutualization of risks? It would seem that the project which is the European Union has yet to realize that lofty ambition.

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