

XI European Congress of Labour Law & Social Security, Dublin

States' Social Security & Support for the Wage-Work Bargain

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Abstract. *In this paper I consider European States' social security systems and 'Social Europe', focusing on support for the employment relationship and the wage-work bargain. After commenting on the effects of the post-2007 crisis and recession, consideration is given to core features of in-work support and distributive mechanisms, and the balance between employers' responsibilities for wages and other occupational elements of the wage-work bargain and support from the State. Whilst attention certainly needs to be given to repairing and improving Europe's systems and 'floor of social protection' – something which will require radical new approaches at EU and State levels to the way in-work support is funded and delivered - the welfare of workers and their families will also require key distributive mechanisms like collective bargaining and wages and conditions-setting to be strengthened. These will be essential 'next steps' in rebalancing the responsibilities of employers, individuals, and State schemes in a renewed, rights-based Social Europe.*

Introduction & Context

May I thank the organisers for an excellent Congress and programme and for my invitation to speak.

Most European countries operate social security and other schemes which either directly support the wage component of the work-work bargain through income transfers, subsidies, tax credits, or tax reliefs - or do so indirectly, typically by assisting the family, housing and household income, and reducing costs which would otherwise be borne out of the worker's wage income.

However, the perfect storm engulfing Europe since 2007 has hit many of those schemes hard.

The Crisis

Wage levels have fallen or stagnated (ILO, 2012/13, 2014; IDS, 2014). At the same time, cutbacks to social security programmes and the 'social wage' have affected overall welfare. This has been aggravated by weakened labour market mechanisms: collective bargaining, minimum wage regulation, and other redistributive mechanisms. While Eurofound research this year shows that collective bargaining remains a major determinant of wages, the system has undoubtedly been affected by the crisis. The net result is that in some sectors wages remain well below 2007/8 levels.

Wages and occupational benefits reductions have also been exacerbated by deregulatory trends and 'liberalising' labour market reforms imposed as conditions of sovereign debt relief – I have in mind, Spain, Portugal, Greece, Ireland and Cyprus in particular (Baylos & Trillo, 2013; Koukiadaki & Kretsos, 2012; Barnard, 2012).

In France, there is pressure to reform the perceived 'rigidities' of the labour market, while at the same time addressing perceived shortcomings in an 'improperly dimensioned' benefits system, seen as 'sometimes too generous, sometimes inadequate' (Pagnerre, 2014).

There are now some signs of a fragile recovery. Nevertheless, much of the continent struggles to deliver improvements in living and working conditions. This is evident from Eurofound's analysis in the *Living and Working in Europe Yearbook*, No. 5, July 2014.

In the face of changing work patterns, and the rise of unemployment, part-time and short-term work, coupled with 'self-employment', we are seeing significant changes to social security systems.

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Each country's approach varies, but systems like France's evolving *Revenu de Solidarite Active* (Vlandas, 2013; Denis & L'Horty, 2012); Austria's Bedarfsorientierte Mindestsicherung (Steiner and Wakolbinger, 2010); and the UK's Universal Credit (Puttick, 2012a; 2012b) offer interesting examples of how adaptations are in progress, and how these are meeting expectations that State schemes should facilitate entry to, and retention in flexible work transactions. This has been controversial at times – particularly when support is accompanied by coercion – but especially so when the unemployed and 'underemployed' are expected to enter low paid employment which may also be lacking the other attributes of Decent Work: besides a 'fair income', 'security', social protection for family and dependants, reasonable prospects of personal development and integration, and participation in decisions affecting their working life (ILO, 2008). The new generation of flexible working contracts, including a proliferation of unregulated, transactions like zero hours and on call contracts (often entailing misuse of 'self-employment' status) is also characterised by a transfer of costs and risks away from the employer and onto the community at large.

In general, whilst Europe's social protection schemes have helped many families keep the wolf from the door they have not always worked as well as they should during the crisis.

In this respect, some countries' systems seem to have coped much better than others, according to analyses by Verena Maria Mai. This is evident, she says, when examining the challenges that countries like Spain have had to face, which have certainly not been helped by austerity measures which have also been a factor in growing inequalities (Banyuls & Reccion, 2012).

In comparison to Spain's experience, countries like Sweden and Austria have been able to maintain high levels of social protection throughout much of the crisis. The need for a high level of investment was generally understood when the schemes were designed, and this meant less demands on public finances had to be made when the crisis started to bite (Mai, 2013: 36).

Such points take us to issues of funding.

Funding & 'Sustainability'

Needless to say, at a time when unemployment and underemployment has risen, the demands on State programmes have risen. So, too, has their cost. This begs the question whether current programmes, including those which are being funded from taxation - usually on a 'social solidarity' basis, rather than on more traditional 'insurance' principles - are sustainable?

Are new approaches needed, perhaps those placing greater emphasis on 'the philosophy of individual responsibility' or 'alternative mechanisms of social support'? These are among the interesting questions due to be posed at the Capetown World Congress next year in debates on 'Theme 3' (From Social Exclusion to Social Security). Speakers will include Professor Kamala Sankaran of the University of Delhi. The pre-Congress abstract observes that 'In the poorest countries...State revenue may be too limited to provide more than the most basic social security', and so the emphasis is on informal and alternative mechanisms of social support. It is asked: 'What is the scope for further development of such mechanisms'? It adds 'Could the lessons of these systems be relevant also for more developed countries where the "welfare state" *may have reached its limits*?

Participants will have their own thoughts on this.

I look forward to the debate, but at this stage, and admittedly hearing the rationale for such a position, I have to say I find it difficult to buy into the idea that European countries' 'Welfare States' have somehow 'reached the limits'.

If Social Europe is to mean *anything* it can and must be able to maintain an effective residual, minimum floor of social protection – particularly for groups like the 'unorganised worker'.

Apart from providing a safety-net for Europe's most vulnerable, organised around core principles of solidarity – reinforced by a code of rights underpinned by measures like the Charter of Fundamental Rights of the European Union - social security performs an important empowerment role. This is readily apparent when considering schemes that assist groups like older returners to the labour market (some of whom are driven to make such a return by inadequate pension income). Schemes also help disabled and long-term incapacitated workers for whom full-time employment may otherwise be problematic; and assist parents returning from maternity and parental leave with support to enable them balance work and family responsibilities, and retain a foothold in the labour.

It is difficult to envisage a Social Europe that could give effect to integrative provisions of the Charter like art 23 (equality between women and men), art 25 (the rights of the elderly, including the right to 'lead a life of dignity and independence and to participate in social and cultural life', and art 26 (integration of persons with disabilities) - or the Solidarity provisions in Title IV - *without* adequately resourcing schemes of social security and social assistance.

I also take issue with those advocating yet more austerity - especially at a time when deflationary pressures dictate a need for greater investment in social programmes, not less!

Social security programmes are, of course, just part of a wider set of macroeconomic mechanisms and tools. They are not simply concerned with philanthropy. Nor are they *just* driven by T.H. Marshall-type social citizenship ideals (Marshall, 1950), or other 'citizenship' discourses. Income transfers from State social security, and other forms of assistance – whether reciprocated by the beneficiary or not - serve a range of important functions in the management of the modern economy, including the need to counter the effects of falls in 'real average wages'. By sustaining employment, including nascent new forms of self-employment, schemes like the UK's New Enterprise Allowance - a hybrid in-work benefit/small business subsidy. Such programmes may be controversial, but they undoubtedly play a part in sustaining consumption and aggregate demand.

This was well understood by the architects of the US recovery, including the representatives and senators in both houses of Congress who approved President Obama's 'stimulus package' of nearly \$800 billion in the American Recovery and Reinvestment Act of 2009.

Much of that assistance and 'spend' continues to be directed at social security recipients and beneficiaries of 'aid to low income workers' – primarily through a raft of new tax credits and expansion of child tax credits and the earned income tax credit, coupled with easements to the homebuyer credit.

Interestingly, at a time when Europe was going in exactly the *opposite* direction, and cutting back social welfare programmes, the US's Nobel prize-winning economist Paul Krugman was arguing for *more* public expenditure on such programmes. Furthermore, he argued that the 2009 package was 'too small' ('Too Little Stimulus in Stimulus Plan', Wharton School, University of Pennsylvania, Feb 19 2009). He pointed out that the crisis is essentially one of deflation (more precisely debt deflation), aggravated by the 'engines of growth going silent', including housing, exports, business investment, and consumer spending. A huge spending gap had been created.

With monetary policy a 'non-starter' that left nothing but 'government spending' to prime the pump, he said.

I was also very interested in the debates on Thursday 21st November 2013 in the Joint Committee on EU Affairs, Ireland's Houses of the Oireachtas, Dáil Éireann (House of Deputies) and Seanad Éireann (Senate) on the Social Dimension of Economic and Monetary Union, and concerns about the impact of austerity measures in the Irish Republic.

This included valuable points about the downsides of austerity, deflation, and the negative consequences of pursuing price stability and anti-inflation measures made by Dr Peter Rigney.

Among other things, he observed that

'The core of our problem is that we have an evolving Eurozone economy with a Central Bank observing the narrow mandate of price stability at a time when Europe's main challenge is deflation... Without easing up on the 2% inflation target, it is difficult to see how the European economy can be reflatd, and without reflation there are grim prospects for Europe's 25 million unemployed'.

Dr. Seán Healy, Social Justice Ireland, spoke in a similar vein. He noted how an austerity approach was being imposed on Ireland as part of changes which insisted that

'the cost of health care and pension systems should be reduced; that wage formation systems should be placed within a competitive framework with little respect for those on low incomes and the working poor; that social benefits systems create disincentives to labour market participation and so must be reduced, as if, in some way, reducing welfare rates creates jobs, which does not happen; and that labour costs must be reduced...We need macroeconomic stability and a just taxation system. We need social protection and the social infrastructure to be strengthened rather than weakened'.

There is much to agree with in these points and insights.

So what is to be done, particularly on funding and sustainability challenges?

Notwithstanding pronouncement at this year's EU leaders' summit in June that Europe's State welfare systems should continue to be the preserve of Member States, it is not difficult to see that at a strategic level EU-wide problems and challenges like the funding of social welfare programmes need EU-wide solutions. Innovative new approaches to funding Europe's social protection floor are among the priorities to be considered as part of the blue-print for a stronger Social Europe (ETUC, 2013; Picketty, 2014; Picketty, Rosanvallon, et al, 2014).

Europe's Well-Developed 'Floor of Social Protection': Bachelet Report/ILO

In the face of stark statistics that upwards of between a fifth and a quarter of EU citizens, including a sizeable and growing proportion of the *employed* population, are affected by low wages and are 'at risk of poverty' (Eurostat/EU-SILC; IFS, 2013), Europe's leaders need to come up with some effective responses.

The Bachelet Report in 2011 and linked ILO's recommendations (ILO, 2012) made valuable recommendations about the need for countries to develop and maintain a floor of social protection. Whilst much of the report was directed at countries where floors are still being developed, the report had some important things to say about countries with more 'developed' systems, including those in Europe. Among other things, as the report rightly observed, the effectiveness of a country's social protection floor will continue to link strongly to implementation of the Decent Work Agenda. To succeed in combating poverty, deprivation and inequality, programmes 'cannot operate in isolation'; and poverty reduction strategies must be accompanied by other measures, ie strengthening labour/social institutions and promoting pro-employment macroeconomic environments (Bachelet, p.xxiv)

It is certainly the case that in countries where more comprehensive systems already exist, the social floor serves to fill 'coverage gaps', enhance coherence among social policies, and improve coordination among institutions (Recommendations, p.91). In the European context this was evident even before 2007 when both productivity and wages falling in key sectors. However, by the time the report was published in 2011, many of the assumptions underlying the analysis were being overtaken by the crisis, and a deteriorating position.

As at 2014 most of the 'gaps' now look more like sizeable holes in the European floor.

The evidence speaks for itself. 25% of EU citizens are 'at risk of poverty'. That includes a sizeable and growing proportion of the employed workforce (Eurostat/EU-SILC; IFS, 2013).

In the UK, the reports of the Social Mobility and Child Poverty Commission in 2013 and this year have also highlighted this concern. Much of the fall-out, and ensuing debate, following publication of the reports has focused evidence of a rising tide of in-work poverty. This has raised big questions about policy-makers' assumptions that a job is necessarily the 'best route out of poverty', even when supplemented by tax credits and other forms of support. This has been a central tenet of UK welfare policy under New Labour in *New Ambitions for Our Country: A New Contract for Welfare* (DSS, 1998; Puttick, 1998), and continued by the Coalition government's blue-print for welfare reform, *21st Century Welfare* (DWP, 2010; Puttick, 2012a, 2012b).

Plainly, much needs to be done in response.

Repairs are needed to that part of the floor which depends on strengthened collective bargaining, ie the wages floor. Effective action is needed to ensure that coverage is maintained. Even in organisations not covered by such arrangements, dialogue between interest groups is vital.

As Eurofound research and corporate surveys in 2010 concluded, workplace social dialogue is an important contributing factor that will help to bring European companies out of the crisis.

Strengthened collective bargaining, besides offering a better chance of improving the basic wages and occupational benefits floor, will serve to reduce an increasing dependency on in-work support and State welfare 'nets' (ETUC, 2012a; 2013).

In the UK, our Institute of Employment Rights has produced a timely and well-received *Manifesto for Collective Bargaining*. This highlights the importance of strengthening this key element in the UK's 'floor' (IER, 2013). Among other things, the recommendations on measures to assist those not in areas covered by bargaining arrangements offer some important and viable solutions for the problem of workers in low pay sectors living on poverty wages while, at the same time, struggling to access State support.

A recent study provided in a TV documentary 'Supermarkets: The Real Price of Cheap Food': Winners and Losers in the Supermarket Supply Chain', August 2014 (UK Channel 4, 2014) identified some key issues. In particular, it highlighted the problems workers face when collective representation and bargaining coverage is weak, and there is minimal dialogue between the parties to the wage-work bargain (or the social partners at sectoral level).

The astonishing thing, even for the most dispassionate observers, is that this can be happening in a supply chain at the end of which are some of the most profitable corporations on the planet!

What is Needed?

Undoubtedly, stronger and better functioning labour market institutions: collective bargaining (coupled with effective dialogue), effective wages and conditions setting mechanisms where workers are beyond the reach of collective bargaining process, implementation of Decent Work 'standards', and better enforcement – all of these things, coupled with a pro-active, rights-based 'Social Europe' at EU level that is responsive to the needs of a changing labour market.

A re-balancing of employers' and State programmes' responsibilities is also essential – particularly in the face of evidence that regulatory mechanisms like national minimum wage setting is pitching the wages floor at a levels which are too low, and employers are being unnecessarily subsidised at the public's expense.

Before looking at that more closely, it's worth revisiting the way that labour market distributional systems operate, and how they inter-act with State provision in most European countries.

This is particularly important in order to appreciate how better, more functional wage-setting mechanisms can mean a reduced need for costly, publicly-financed State schemes.

Distributive Mechanisms & Interactions

Within the typologies of 'welfare' provided by leading lights like Gøsta Esping-Andersen, Christopher Pissarides (2014), and Nicholas Barr (2012) it can be seen that two key mechanisms operate at the interface of the 'private' employment transaction and State welfare support for that transaction, and the wage-work bargain at that transaction's heart.

First, income from wages and occupational benefits: the basic element in the 'floor'.

Second, State support, including in-work benefits, income transfers, wage subsidies, and assistance in the form of tax reliefs and reductions of the kind favoured by the USA.

As Barr explains, the income from wages is still the primary source of welfare for many, with State support in its various forms providing a further major source within the overall welfare 'mosaic'.

The Importance of Regulation. In this context it is not difficult to see the on-going importance of effectively regulating wages, hours, and the other core components of the wage-work bargain. Indeed this remains absolutely 'key' in the context of the crisis (ILO/Bonnet, Saget, 2012).

Whilst collective bargaining remains a major determinant of wages in Europe, legal interventions in the form of minimum wage-setting also play a key role – indeed they may be seen as 'a cornerstone of the European Social Model' (Eurofound, 2014).

Yet it is by no means clear that minimum wage-setting - whether at national or sectoral level – operates as efficiently as it should.

Regulating Wages & the WWB: Specific Issues & Limitations

Typically, as we see in the UK, the national minimum wage is set at a level which is too low. There are a lot of reasons for this, including the need to cater for sectors with widely differing conditions, including those which are particularly sensitive to changes, and where even the smallest increase can produce negative effects and problematic costs and on-costs.

Unfortunately, a consequence of this is that the NMW operates in other sectors at too low a level.

State support (income transfers, etc) is therefore often being provided at levels which are higher than it needs to be. This also generates on-costs for other parts of States' welfare programmes. We see this in the UK, for example, with the operation of schemes like Housing Benefit. If wages do not keep pace with rises in living costs, including rising rents, workers who are unable to meet costs like rents and travel-to-work costs have to increasingly look to, and depend on, schemes like Housing Benefit and Local Housing Allowance (Kelly, 2013). As a result, workers are more likely to leave the labour market and look to more costly out-of-work benefits, or continue in employment - but joining the growing army of 'working poor'.

This begs the question whether there may be better mechanisms, particularly for the 'unorganised worker' – for example by reinstating sectoral wage-setting mechanisms like the UK's wages council and wages board system (a system that involves a periodic, legally regulated union/employer negotiation, followed by legislative orders giving effect to the collective bargain: the terms and conditions of the bargain are then incorporated into workers' individual contracts).

Recent attempts by the UK's Coalition government to get rid of the final vestiges of that system, as part of its deregulation programme, have not been entirely successful.

Having abolished the last remaining 'board' in England – the Agricultural Wages Board – the other three countries in the union, Scotland, Northern Ireland, and Wales refused to go along with this. They opted to retain the system.

The UKSC to the Rescue! Retention was helped by a decision of our Supreme Court this year which construed devolution legislation in a way that decisively favoured the government of Wales measures to reconstruct the AWB system, replacing it with its own new board (Agricultural Sector Bill, UKSC, 2014). The outcome implicitly recognised Wales' concerns that deregulation of agricultural wages would quickly lead to wages falls, produce negative impacts on the rural economy, and add costs to the welfare system and local welfare services.

Interestingly, the Coalition government's own impact assessment confirmed that deregulation would result in wages falls and other negative outcomes (DEFRA, 2012).

Apart from both sides of the Welsh agricultural sector – employers and labour unions - wishing to maintain a mechanism that has served it well in terms of producing sustainable agreements on wages and conditions, the 'public interest' has also, arguably, been well served. In particular, the result means the containment of costs in the form of social security programmes like in-work tax credits and housing costs support (Housing Benefit and Local Housing Allowance).

Scotland, too, has opted to maintain the AWB system for similar reasons, despite the concerns of Scottish employers. Understandably, Scottish farmers and food producers look across the border to Northern England where competitors have already benefited from wages and conditions deregulation, and they see themselves at risk of being priced out of the market by English competitors benefiting from deregulation and lower labour costs. Whilst welcoming the most recent sectoral agreement, negotiated with Unite the Union, this is what the employers had to say:

'NFU Scotland believes the proposed increases in agricultural wages announced by the Scottish Agricultural Wages Board are proportionate and reflect the hugely challenging year faced by the sector...As part of the wage discussions, we again voiced our concern that those parts of our industry that are reliant on seasonal workers could face serious competition issues for staff in the years ahead once the Agricultural Wages Board in England and Wales is disbanded. For our soft fruit and vegetable growers, having a statutory requirement to pay higher wages while growers South of the border need only pay the national minimum will put our farms at a competitive disadvantage.'

I know that Ireland recently opted for retention of the Joint Industrial Committee system, albeit in modified form, and has legislated for this in the Industrial Relations (Amendment) Act 2012 (Kerr, 2013) - notwithstanding challenges to the system in the courts (John Grace, 2011; McGowan & Others, 2013) and on-going opposition from employers' organisations (Doherty, 2013).

It is certainly the case that our Trades Union Congress in the UK has started to see the attractions of a restoration of the wages council system, albeit with improvements to avoid the mistakes of the past (TUC 2013).

Of particular interest, for present purposes, will be the way that a nascent JIC system interacts with Ireland's State welfare schemes.

Why are Regulated 'Floors' Needed? Will Germany follow the UK's Experience..?

Despite their contribution to social protection, it is certainly the case that national minimum wage (NMW) type systems have a propensity to become a 'ceiling' rather than a 'floor'.

Research by the UK's Resolution Foundation suggests this. It has also indicated that the NMW has started to take on all the appearances of becoming a 'going rate' rather than what it was intended to be - a *minimum* national rate (Resolution Foundation 2013a; 2013b).

The NMW in the UK has also increasingly depends on sizeable supplementary support from the State in order to function as a welfare mechanism. This has, in effect, created a 'two-tier' labour market (Bain, 2013), with Tier 2 making up of an increasingly large portion of the work force.

I have been following the minimum wage design process in Germany with great interest, and I wonder whether, in time, Germany could go the same way as the UK – or whether new design features will be built in to the scheme to avoid such problems?

Why does Germany need a national minimum wage? As I understand, but I am happy to be corrected, the scale of low pay in Germany is big – indeed bigger than it has ever been in recent times: up from 15% in 1990s to 22%+ (Steen, 2013). Whilst the new scheme is set to give a sizeable ‘pay rise’ to an estimated 17% of Germany’s low-paid workers (Meyer, 2014), there will continue to be some complex wage/social security inter-actions, coupled with compliance and enforcement problems in some sectors and fragmented parts of the labour market.

We will see, but I suspect that whatever the design, new ‘dependencies’ will emerge at the interface of Germany’s in-work welfare schemes and the occupational wage.

From the UK experience, it’s clear that minimum wage schemes, even when supplemented by costly State income transfers, tax reliefs, etc, are *no* guarantee against in-work poverty (Social Mobility & Child Poverty Commission, 2013).

With these points in mind, let’s look more closely at the State’s input.

State Support & Schemes of Social Solidarity: The Social Wage/WWB

This has been described variously as the ‘social wage’, schemes of social solidarity, the welfare addition to the wage-work bargain, or more accurately the wage-work-welfare bargain.

The latter descriptor reflects the reality that for many workers there are now *two* elements in the transaction:

- Wages from the bilateral contract of employment
- Income and other support from a secondary source, the State

Schemes’ ‘Facilitating’ Role

As I indicated earlier, at the inter-face of employment law and social security law State support schemes play a number of key roles, not least:

- Supporting newer forms of work, and patterns, and underemployment, flexible working, etc)
- Facilitating entry to the labour market for key groups who would otherwise be *marginalised* and excluded from the mainstream.

In these respects I am very much in accord with earlier discourses of commentators like Hugo Sinzheimer (Sinzheimer, 1924; 1949) who saw the important inter-actions between social security law, and rights which complement employment law and ‘protection’. As has been said more recently, the two systems operate as two sides of the same coin (Weiss, 2013).

Key Groups: Solidarity/Citizenship

As I suggested in earlier comments, social security schemes, and schemes of social solidarity in general, play an important labour market facilitating role.

It is not one which I think the EU and most European States will be prepared to forego lightly, even in the face of funding challenges or concerns about ‘sustainability’.

The subject is a big one, but the point is illustrated by the way schemes facilitate welfare-to-work and work retention in circumstances in which the worker may otherwise be forced to leave the labour market: this can be seen in relation to groups like single parents with childcare needs; younger workers needing training and support; older ‘returners’; and those with disabilities and special needs (all being groups who are assisted by a mix of anti-discrimination, equalities measures, and State support, and who in some circumstances have rights underpinned by the ECHR and Convention rights).

In general, schemes provide invaluable support on the basis of solidarity and 'citizenship': a key function of 'Social Europe'.

However, is there now a newer discourse? Support for employers in order to promote a newer agenda - the 'flexible' market...?

Support for Non-Union, Low-Paid Workers: the 'Unorganised Worker'

The context in the UK and EU has to take into account the reality that significant numbers of workers are no longer in unions.

Nor are they covered by collective bargaining - at least to the same extent as they were in the past. Indeed, if anything the position continues to show declining coverage in the UK (WERS, 2013) and, more widely, in other parts of the continent (Eurofound, 2014).

With this in mind, it's clear that a key function of social security - one that is growing in importance - is to address that 'exclusion' by support in a variety of forms:

Direct support: example, besides the UK's Universal Credit system, and France's RSA (Bourgeois & Tavan, 2009; Vlandas, 2013)

Indirect support: there are plenty of examples, including Ireland's Family Income Supplement (FIS), which operates in conjunction with other schemes, albeit with limitations for some groups such as non-'employees' and those in short-term jobs (under 3 months).

Finally, I did not want to finish this presentation without referring to standards and rights.

Standards and 'Rights'

An important dimension to social protection is the need for a rights-based Social Europe.

Similar considerations apply to 'standards'. It is vital to start making a reality of ILO and other international standards (Korda, 2013), as well as the distinctly European jurisprudence embodied in the ECHR, and EU Charter of Rights. Adherence to key measures at EU Law level such as the 'equal treatment' provisions in measures like Dir 2004/38 (free movement) is also essential.

Does Europe do enough to actually protect core rights, including 'economic' rights of the kind Sunstein referred to in *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* including 'the right to a remunerative job...to earn enough' (Sunstein, 2006).

What role do rights play?

Among other 'functions', they certainly provide a counter to unfettered, sometimes irrational, administrative discretion in social security adjudication.

Similarly, they can also pre-empt, and counter unwelcome judicial interventions.

In the Scottish context recent cases like *Docherty & Jones*, 2013 illustrated the problem of the courts failing to protect employees at the height of the crisis, when permitting massive in-roads to basic labour rights. Judicial activism is important in social rights (Whyte, 2002) – but this can cut *two* ways...

With social welfare schemes we have started to see the transition from what Charles Reich described in the 1960s as the theory that welfare is a 'gratuity furnished by the State', and thus subject to whatever conditions the State sees fit to impose' and 'the poor are all too easily regulated...' (Reich, 1964; 1965).

But there's still a long way to go.

The EU and Social Europe

Whether at EU or national level, the types of intervention and support I have been describing require a robust, rights-focused Social Europe – not least at a time when atypical forms of employment are becoming increasingly ‘typical’, and when groups like EU migrant workers increasingly need the protection of domestic courts and CJEU/ECtHR in the face of tendencies threatening the cohesion of free movement.

The *St Prix* case (*St Prix*, 2014) offers a valuable example of this, and of the role of ‘rights’ as a means of reinforcing requirements of equal treatment.

The case also highlighted the complex issues around judicial lacuna-filling, especially in the growth area of EU *citizenship* as a basis for developing rights.

St Prix, Equal Treatment & Worker Status

At a basic level *St Prix* was about retention of ‘worker’ status as a means of accessing replacement income from the State during pregnancy, and when this was not accessible from the employer.

At another level it was about *much* more than that.

In particular, making a reality of equal treatment and expectations of dignity in the way our systems of social protection should operate, and if Social Europe is to work effectively in the key area of migrant workers’ rights, and free movement.

The CJEU and UKSC’s actions have, I believe, struck an important blow against current anti-welfare, and anti-immigration and free movement trends, including those coming from the Right of the political spectrum. They have also, regrettably, been informing elements of the neo-liberal agenda. I have in mind the tendency to view migrant workers as some kind of Team B to which normal expectations of equal treatment, and Decent Work, do not always extend. The issue was an important one in 2004 when Sweden was one of three countries (the others being Ireland and the UK) which resolved when opening up their labour market to new A8 workers *not* to permit the development of ‘two teams’; (Puttick, 2004). Cases like *St Prix* serve to maintain that position, and core equal treatment principles. They also indirectly serve to reinforce rights and standards in measures like the UN Migrants’ Rights Convention (1990) – a wider ranging measure directed at ensuring that basic rights at work should also extend to migrant workers who form an increasingly large portion of Europe’s labour markets.

St Prix: Trainee Teacher/Assistant & French Welfare Claimant in the UK

So what was the case about? Jessy St Prix was a French national residing in the UK, and working until she was pregnant...

Whilst she was on the pay-roll, she had no difficulty in demonstrating that she was a worker, thereby demonstrating ‘qualified person’ status for the purpose of UK legislation that implements Directive 2003/38 (the UK’s EEA (Immigration) Regulations 2006). The need for ‘worker’ status also met expectations of reciprocity and ‘contribution’ to the UK economy on which entitlement to in-work support (tax credits, Housing Benefit, and so forth) now depends. The need to show ‘economic integration’ in the labour market in this way is something which workers from other parts of the EU are now generally expected to show as a result of leading UK cases like *Patmalniece* (*Patmalniece*, 2011). These have been emphasising the need for residents from other parts of the EU, who want to access social assistance benefits, demonstrating economic and social ‘integration’.

As a worker on the payroll the need for such support would have been obviated (or at least reduced).

She would also have been entitled to a range of maternity-related and other occupational benefits, and support from schemes like Working Tax Credit.

However, having left her job, migration and status issues made her position much more problematic, and she found it difficult to get lighter, less demanding work. As she was unable to earn wages, and with only 11 weeks to go before her expected week of confinement, she had to seek help from the UK social security system.

As a person who had left work, the question was whether she retained 'worker' status, and therefore a 'right to reside' for the purpose of accessing such assistance?

The decision-makers administering Income Support, a means-tested, social assistance benefit, immediately said 'no'.

Happily the CJEU has given a good, well reasoned answer, to why that response should have been 'yes'.

As importantly, it did this for the right *reasons*.

In particular, it noted that whilst art 7(3) of the Directive did not expressly enable 'worker' status to be retained because of the physical constraints of late pregnancy, and in the aftermath of childbirth, and pregnancy was not a form of 'illness' (which would enable temporary retention on the basis of incapacity), that did not mean EU citizens could be 'systematically deprived' of worker status. Above all, it made it clear that 'classification as a worker under Art 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (citing *Lair*, 39/86, EU: C:1988: 322, paras 31, 36).

On that basis, the Directive did not list 'exhaustively' all the circumstances in which a migrant worker who was no longer in an employment relationship could continue to benefit from that status.

The Need to be Working or 'Available for Work'. The fact that Ms St Prix was not actually 'available' for employment market in the host Member State's labour market did not mean that she had ceased to belong to that market. This was, however, subject to the proviso that she returned to work or found another job 'within a reasonable period after confinement' (the court cited, by analogy, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU: C: 2004: 262, para 50).

To determine what could be regarded as 'reasonable', Member States' courts need to take account of all the specific circumstances of the case, and the applicable national rules on the duration of maternity leave (in accordance with Art 8 of Directive 92/85/EEC of 19 October 1992 on measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding).

Such lacuna-filling, and judicial legislation is not ideal.

Furthermore, there are still some residual concerns in the aftermath of the CJEU judgment – not least on the wider question of why the UK, like other EU States, is still able to 'systematically deprive' EU workers in a range of other contexts – for example in the case of older, retired workers residing in other EU countries than their own, who may well have spent a large proportion of their life in employment in their country of origin, or other countries of the EU - but who are still being barred out of non-contributory retirement benefits?

This was the position of former workers like Galina Patmalniece. Having been treated as economically inactive, and therefore not 'economically integrated' in the host community, she was unable to show she had a 'right to reside'. She could therefore be treated as outside the scope of social protection (Patmalniece, 2011).

Conclusions

Clearly Europe is still in recovery mode. The crisis is by no means over.

Much repair work is needed, and changes to improve our 'floor of social protection' are overdue. Among other things, funding of State schemes is still a key issue.

Ideally, at the heart of the renewal process there will be measures to strengthen distributive mechanisms (collective bargaining regulatory systems, etc) on which to build other schemes of support, including assistance from State schemes.

This will be essential if the floor is to be secure, and if we are to see a renewed, strong, and rights-based Social Europe.

Thank you for your kind attention!

References

Aumayr-Pintar, C et al/Eurofound (2014) *Pay in Europe in the 21st Century*, Luxembourg: Publications Office of the European Union

Bachelet Report (2011) *Social Protection Floor for a Fair and Inclusive Globalisation: Report of the Advisory Group Chaired by Michelle Bachelet*, International Labour Organisation (ILO) and the WHO, Geneva: ILO, 2011

Bain, G (2013) 'Minimum wage risks becoming going rate for millions, low pay pioneer warns', *The Guardian* 5 July 2013

Banyuls, J and Reccio, A (2012) 'Spain: The Nightmare of Neoliberalism' in Lehndorff, S (ed) *A Triumph of Failed Ideas: European Models of Capitalism in the Crisis*, Brussels, ETUI

Barnard, C (2012) 'The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective' *Industrial Law Journal* 41(1), 98-114

Barr, N (2012) *The Economics of the Welfare State*, Oxford: Oxford University Press, 5th ed

Baylos, A & Trillo, F (2013) 'Social Dimensions of the EU and the Situation of Labour Law in the Member States: An Evaluation of the Spanish Experience', Medel Seminar Paper, Düsseldorf, 25th and 26th January 2013: *Revista de Evaluacion de Programas y Politicas Públicas (Journal of Public Programmes and Policy Evaluation)*, Num.1 (2013) 54-71

Beland, D and Hansen, R (2000) 'Reforming the French Welfare State: Solidarity, Social Exclusion and the Three Crises of Citizenship', *West European Politics*, Vol 23 (1) pp.47-64 <http://www.danielbeland.org/pubs/WEPBelandHansen2000.pdf>

Bonnet, F, Saget, C, Weber, A (2012) *Social Protection and Minimum Wages Responses to the 2008 Financial and Economic Crisis: Findings from the ILO/World Bank Inventory*, Geneva: ILO, 2012

Bourgeois, C & Tavan, C (2009) *The Revenu de Solidarite Active or Earned Income Supplement: Its Design and Expected Outcomes*, Paris: Trésor-Economics No. 61, July 2009: Treasury and Economic Policy Directorate, République Française

W. Brown, 'The Future of Collectivism in the Regulation of Industrial Relations' (2004) 2 *Human Resources and Employment Review* 4

Channel 4 Dispatches (2014) 'Supermarkets: The Real Price of Cheap Food: Winners and Losers in the Supermarket Supply Chain', UK's Channel 4 TV, 4 Aug 2014:

<http://www.channel4.com/programmes/dispatches/videos/all/supermarkets-the-real-price-of-cheap-food> (accessed 13 Aug 2014)

Doherty, M (2013) 'When You Ain't Got Nothin' You Got Nothin' to Lose.... Union Recognition Laws, Voluntarism and the Anglo Model', *Industrial Law Journal* 42 (4): 369-397

DEFRA (2012) *Abolition of the Agricultural Wages Board*, Impact Assessment (IA): London: Department for Food, Agriculture, and Rural Affairs, Defra1462 (Final), 19 December 2012

DSS (1998) *New Ambitions for Our Country: A New Contract for Welfare*, London: Department of Social Security, Cm 3908

DWP (2010) *21st Century Welfare*, London: Department of Work and Pensions, Cm 7913

Eurofound (2014), *Pay in Europe in the 21st Century*, Luxembourg: Publications Office of the European Union

Eurostat/EU-SILC *The European Union Statistics on Income and Living Conditions (EU-SILC)*: http://epp.eurostat.ec.europa.eu/portal/page/portal/microdata/eu_silc (accessed 13 Aug 2014)

Esping-Andersen, G (1990) *The Three Worlds of Welfare Capitalism*, Cambridge: Polity

Esping-Andersen, G, Hemerijck, A, Myles, J (2003) *Why We Need a New Welfare State*, Oxford: Oxford University Press

Esping-Andersen, G and Regini, M (2007) *Why Deregulate Labour Markets?* Oxford: Oxford University Press

ETUC (2012) 'Le Cri d'Alarme des Syndicats Européens sur La Crise Economique', 16 June 2012

ETUC (2013) 'ETUC Position on the Social Dimension of the European Union Brussels': European Trade Union Confederation, 23rd April 2013

IDS (2014) 'Average Earnings Figures Show Anaemic Growth', Income Data Services, July 2014

IER (2013) *Reconstruction after the Crisis: A Manifesto for Collective Bargaining* (Hendy, J and Ewing, K), Liverpool: Institute of Employment Rights

IFS (2013) 'Workers Kept their Jobs but One Third Faced Nominal Wage Freezes or Cuts', London: Institute of Fiscal Studies

ILO (2012/13) *Global Wage Report 2012-13 Wages & Equitable Growth*, Geneva: Dec 2012

ILO (2014) *World Social Protection Report 2014-15*, Geneva: International Labour Organisation

Islam, F (2013) 'Wonga: big profits as well as high interest rates: Exploiting the low-paid, financially vulnerable? A buffer for cash-short young, low-paid workers..?' Channel 4, 3 September 2013

Kelly, L (2014) 'UK Housing Benefit Bill will Soar to £25bn by 2017', *The Guardian*, 24 April 2014

Kerr, A (2013) *The Trade Union and Industrial Relations Acts (Ireland)*, Dublin: Thomson Round Hall, 4th Ed

Kerr, A & Whyte, G (2003) *Trade Union Law in Ireland*, London & Dublin: Butterworths

Korda, M (2013) *The Role of International Social Security Standards: An In-Depth Study through the Case of Greece* (Vol 32, Social Europe Series), Cambridge: Intersentia

Koukiadi, A and Kretsos, L (2012) 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece', *Industrial Law Journal*, 41(3): 276-304

Krugman, P (2009): 'Too Little Stimulus in Stimulus Plan', Speech at the University of Pennsylvania, 19 February 2009

Mai, Verena Maria (2013) *The Capacity of Welfare Regimes to Absorb Macro-economic Shocks: National Differences in the Development of Unemployment, Poverty and the Distribution of Income in the Aftermath of the Financial Crisis 2008* (Sweden, Austria, Spain), Hamburg: Anchor Academic Publishing

Marshall, T. H (1949) *Citizenship and Social Class & Other Essays*, Cambridge: Cambridge University Press

Meyer, H (2014) 'How the German Minimum Wage and Investment Could Help the Eurozone', *Social Europe Journal*, 30 January 2014

Mikol, Vicard, Bonnefoy, Mirouse (2008), *La Prime pour l'Emploi, Un Dispositif Bien Connu dans Son Principe, Peu dans ses Modalités* (The Working Tax Credit: A Mechanism that is Well Known in Principle, but not in Practice), Paris: Dossier Solidarité Santé, No. 5, 2008

Panyerre, Y (2014) 'Social Reforms to Cope with the Financial Crisis in France', Vol 35-3 *Comparative Labor Law and Policy Journal* 299-310

Piketty, T (2014) *Capital in the Twenty-First Century* Harvard University Press, 2014

Piketty, T, Rosanvallon, P, et al (2014) 'Our Manifesto for Europe: European Union Institutions No Longer Work. A Radical Financial and Democratic Settlement is Needed', *The Guardian* 2nd May 2014

Pissarides, P (2014) *Social Europe in a Climate of Austerity*, Eurofound Conference, Athens 23rd June 2014, *Social Europe Journal* (June 2014)

Puttick, K (1998) 'Welfare as Wages: Benefits, Low Pay and the Flexible Labour Market', *Industrial Law Journal* 27(2), 162-168

Puttick, K (2004) 'Welcoming the New Arrivals? The Reception, Integration and Employment of A8, Bulgarian, Romanian Migrants', *Journal of Immigration Asylum & Nationality* (2006) Vol. 20, No. 4 238-254

Puttick, K (2011) 'Paying their Way? Contesting 'Residence', Self-sufficiency and Economic Inactivity Barriers to EEA Nationals' Benefits: Proportionality and Discrimination', *Journal of Immigration, Asylum & Nationality Law* 25(3), 280–292

Puttick, K (2012a), '21st Century Welfare and the Wage-Work-Welfare Bargain', *Industrial Law Journal*, 41 (1) 122-131

Puttick, K (2012b), '21st Century Welfare and Universal Credit: Reconstructing the Wage-Work-Welfare Bargain', *Industrial Law Journal*, 41 (2) 236-249

Resolution Foundation (2013a) *Low Pay Britain*, London: Resolution Foundation/Whittaker & M & Hurrell, A

Resolution Foundation (2013b) *Fifteen Years Later: A Discussion Paper on the Future of the UK National Minimum Wage and Low Pay Commission*, London: Resolution Foundation

National Minimum Wage and Low Pay Commission Sinzheimer, H (1927) 'Das Wesen des Arbeitsrechts' in H. Sinzheimer (ed) *Arbeitsrecht und Rechtssoziologie*, Vol 1 (Bund Verlag, 1976; and Frankfurt aM: Europäische Verlagsanstalt, 1976)

Social Mobility & Child Poverty Commission (2013) *State of the Nation 2013: Social Mobility and Child Poverty in Great Britain*, London: SM & CPC, 2013

Steiner, S and Wakolbinger, F (2010), 'Wage Subsidies, Work Incentives and the Reform of the Austrian Welfare System', Free University of Berlin, School of Business & Economics, Discussion Paper (2010/19)

Sunstein, C (2006) *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever*, New York: Basic Books/Perseus

TUC, 2013 'Bring Back Wages Councils to Tackle Living Standards Crisis' (General Secretary, Frances O'Grady at the TUC conference *Strong Unions: Turning the Tide*: TUC Press Release 8th March 2013)

Vlandas, T (2013) 'The Politics of In-Work Benefits: The Case of the 'Active Income of Solidarity' in France', *French Politics* 11, 117–142

Welz, C (2008) *The European Social Dialogue Under Articles 138 and 139 of the EC Treaty: Actors, Processes, Outcomes*, Alphen: Kluwer Law International

Whyte, G (2002) *Social Inclusion and the Legal System: Public Interest Law in Ireland* Dublin, Institute of Public Administration

Weiss, M (2013) 'Reinventing Labour Law?' in Davidov, G & Langille, B *The Idea of Labour Law*, Oxford: Oxford University Press, 2013

WERS (2013) Wanrooy, van, B et al *The Workplace Employment Relations Study: First Findings*, London: Department for Business, Innovation and Skills, May 2013; and the follow-up study *Workplaces in the Shadow of Recession: Findings from the 2011 Workplace Employment Relations Study* (Dec 2013)

Legislation, Conventions, etc

Charter of Fundamental Rights of the European Union 30.3.2010, OJ EU, C83/389
http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (accessed 13 Aug 2014)
 What is the EU Doing to Implement the Charter? http://ec.europa.eu/justice/fundamental-rights/charter/implementation/index_en.htm (accessed 13 Aug 2014)

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
<http://conventions.coe.int/treaty/en/treaties/html/005.htm> (accessed 13 Aug 2014)

Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights Adopted on 6 February 2013 (Margin of Appreciation, Subsidiarity, etc)

Directive 2004/38 (on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States), OJ L158 77, 30.4.2004

ILO (1952) Social Security (Minimum Standards) Convention, 1952 (No. 102), Geneva: International Labour Organisation, 10 June 2008

ILO (2008) Declaration on Social Justice for a Fair Globalization (including Institutionalization of 'Decent Work'), Geneva: International Labour Organisation, 10 June 2008

ILO (2012) Recommendation concerning National Floors of Social Protection 2012 (No. 202), Geneva: International Labour Organisation, 10 June 2008

UN Migrants' Rights Convention (1990) UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: Adopted by General Assembly Resolution 45/158, 18 December 1990

Cases

Agricultural Sector Bill, UKSC (2014) *Agricultural Sector (Wales) Bill: Reference by the Attorney General for England and Wales* [2014] UKSC 43 (UK Supreme Court)

Docherty & Jones (2013) *Docherty and Jones v SW Global Resourcing Ltd* [2013] CSIH 72:
<http://www.bailii.org/scot/cases/ScotCS/2013/2013CSIH72.html> (accessed 13 Aug 2014)

John Grace (2011) *John Grace Fried Chicken v The Labour Court* [2011] 3 IR 211

McGowan & Others (2013) *McGowan & Others v Labour Court Ireland & Others* [2013] IESC 21 (Supreme Court, Ireland)

Patmalniece (2011) *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621 (Court of Appeal; [2011] UKSC 11 (Supreme Court))

St Prix (2014) *Jessy St Prix v Secretary of State for Work and Pensions*, Case C-507/12, 19th June 2014, Court of Justice of the European Union (on referral from the UK Supreme Court [2013] 1 All ER 752)