

ISLSSL XI European Congress of Labour Law & Social Security, Dublin

Theme III Session

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Introduction

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

In this paper I consider European States' social security systems and Social Europe, with a focus on support for the employment relationship and the wage-work bargain. After commenting on the effects of the post-2007 crisis and recession I consider core features of in-work support, distributive mechanisms, and the balance between employers' responsibilities for wages and occupational benefits deriving from the wage-work bargain and support from the State.

Whilst attention certainly needs to be given to repairing and improving Europe's social security and systems and the 'floor of social protection' – something requiring 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 also requires distributive mechanisms like collective bargaining and regulated wage-setting to function effectively. Such labour market institutions must be viewed as part of the overall 'floor'.

Strengthening these institutions, as well as repairing the other elements in the floor, will be essential next steps in rebalancing the responsibilities of employers, individuals, and State schemes and as part of a renewed, rights-based Social Europe.

Context

Reliable and up-to-date information about European States' social security systems is provided by MISSOC, the EU Commission Mutual Information System on Social Protection (MISSOC, 2014). This also provides Comparative Tables on Social Protection. Together with other EU and national sources it is possible to get a reliable picture of the state of Europe's systems.

European countries continue to be responsible for their systems. The systems are diverse, sometimes with distinctive features. However, most States support workers on low wages, and they do this in one of two ways, or both. Namely *direct support*: income transfers, wage supplements or subsidies, tax credits, and tax reliefs being common ways of providing support. More commonly, it is provided *indirectly* – for example through help with the family's household income, housing, and other costs. The latter approach assists in meeting living costs, and reduces the costs which would otherwise have to be met from wages.

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ISLSSL Congress Programme: <http://www.dublinlabourlaw2014.com/congress-programme/>

The Crisis

Needless to say, both forms of State support have been busy since 2007 and the onset of the crisis.

Wages have fallen or stagnated. In consequence, the demands on social security schemes, and especially in-work support, have intensified.

The main requirement for the kinds of social security and assistance programmes we are talking about is that they should be responsive to changing wages and income needs. As wages, occupational benefits, and overall household income go *down*, the State's input generally needs to go *up*, and vice versa. Ideally, it should provide income maintenance that straddles periods when wages are paid and not being paid – a kind of portable income bridge. In differing degrees, many of Europe's schemes try to do this, but with mixed success. This is particularly evident with means-tested forms of State support helping those on low wages, or on part-time and agency work where earnings fluctuate and may be insufficient to meet claimants' requirements. Besides unemployment, the phenomenon of *underemployment* has been stalking Europe since before 2007 when productivity began to fall. By this time, the State's 'wage' had already started to take on new functions, particularly in low pay sectors.

If wages *are* sufficient to meet workers' and their dependants' needs, and keep pace with rises in living costs, then the State's role - whether as regulator of the wage-work bargain (through mechanisms like minimum wage fixing or maximum hours setting) or as purveyor of social goods – becomes unnecessary or *less* necessary. The community and public finances benefit as a result.

However, in the absence of voluntary redistributive mechanisms like collective bargaining, or other redistributive mechanisms that work efficiently, the State has long retained the ability to intervene to regulate private transactions like the wage-work bargain. It has done this, most notably, through mechanisms like a national minimum wage. Schemes of social solidarity built on collective insurance have operated since time immemorial, with reciprocated and unreciprocated assistance being a feature of everyday life, even before the advent of the modern State (Sahlins, 2003).

In the modern era, *both* approaches generally operate in tandem. The State (*qua regulator*) makes corrective justice interventions in the wage component of the wage-work bargain in individuals' and the community's interest. Typically it may then complement this (*qua purveyor*) to add the social wage to the contractual wage, making use of collective insurance schemes, or the divisible assets of the State, generally funded from taxation, or loans repaid by the community. Such support has been rooted in the European tradition since at least Aristotle's *Nichomachean Ethics* and notions of distributive justice and solidarity began (Aristotle, 337 BC: Book V).

Indeed, it is still the distributive justice model, albeit with some updating to meet today's needs and systems, which provides the foundations for Social Europe. Let's look at this more closely.

Post-2007 Crisis and Impacts

Since the crisis started the wages part of the 'floor' has been hit *very* hard. Indeed, according to the International Labour Organisation (ILO) wages in many sectors are still well below 2007 levels (ILO, 2012/13 and 2014; IFS, 2013; IDS, 2014).

States' Social Security & Support for the Wage-Work Bargain Reconstructing Europe's Floor of Social Protection

In the face of worsening trading and operating conditions during the crisis, and as an alternative to making workers redundant, many employers opted to cut pay or impose 'freezes' in pay rises. In the UK this was the response of 42% of organisations surveyed in the UK government's most recent Workplace Employment Relations Study (WERS, 2013).

Otherwise, a common response has been to simply modify the way work is organised (24% of organisations surveyed) - often with implications for remuneration, work time, and other conditions.

The up-to-date position is variable, but downward pressures on wages continue. Annual wage growth between 2014 and 2017 is expected to be below pre-2008 levels for most low to middle income earners (Ernst & Young, 2014). At the same time, living costs rise. Pay increases have been limited, although purchasing power in some countries rose as a result of lower inflation (Aumayr-Pintar/Eurofound, 2014).

In many sectors, the European floor continues to be affected by weakened labour market institutions: collective bargaining, minimum wage regulation, and other redistributive mechanisms.

One of my discussants, Christian Welz of the EU's Eurofound Foundation, will say more about this and current European trends, but I will just make this comment. While Eurofound research this year has shown that collective bargaining remains a major determinant of wages in most European countries, some of the changes we are seeing, for example decentralisation of bargaining arrangements, clearly have the propensity to impact negatively on wages and conditions levels. For example, we have been hearing reports today about the changes to collective bargaining systems in Romania, and likely impacts. Weakened distributive mechanisms have, of course, been accompanied by austerity measures and cutbacks to States' ability to maintain in-work and other social security programmes. Indeed, the perceived need to downsize social welfare programmes, even when this weakens the social wage of employed citizens, seems to be a continuing policy driver in much of Europe - notwithstanding the beginnings of a recovery. We are seeing this in France where there is pressure to reform the perceived 'rigidities' of the labour market. At the same time the French government has also been addressing what some commentators have seen as an 'improperly dimensioned' social security system, 'sometimes too generous, sometimes inadequate' (Pagnerre, 2014).

Despite promising signs of a fragile recovery, much of the continent struggles to deliver meaningful 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. The impact of such trends on workers' and household incomes has affected spending power in a lot of European countries, impacting on aggregate demand and consumer spending (and contributing to the downward spiral). However, it has hit countries like Spain and Greece particularly hard as a result of the Troika's work and debt relief arrangements (Banyuls & Reccio, 2012; Baylos and Trillo, 2013; Koukiadaki and Kretsos, 2012). The financial crisis has undoubtedly been a catalyst for significant changes in Europe's labour law regimes, especially in those countries most affected by debt restructuring (Barnard, 2012).

System Changes

As a result of changing work patterns, and the rise of unemployment, part-time and short-term work, coupled with 'self-employment', it will be clear to the Congress that we have been seeing some significant changes and adaptations to Europe's social security systems, and the roles European schemes play in supporting the labour market.

National Variations

Each country's approach varies, but systems like France's evolving *Revenu de Solidarite Active* (RSA) (Vlandas, 2013; Denis and L'Horty, 2012), and earlier schemes like the Prime pour l'Emploi (Beland and Hansen, 2000; Mikol et al, 2008); Austria's Bedarforientierte Mindestsicherung (Steiner and Wakolbinger, 2010); and the UK's Universal Credit (Puttick, 2102a; 2012b) offer interesting examples of how adaptations have been made. These have generally been aimed at facilitating entry to, and retention in, newer forms of employment, including short-term and often more flexible kinds of work transaction.

France's RSA, or earned income supplement, was introduced twenty years after the start of the Revenu Minimum d'Insertion (minimum integration income) and within two years of the onset of the crisis. It was introduced to 'combat poverty among people in work'. As Clément Bourgeois and Chloé Tavan have explained, it plays a twofold role. First, ensuring a minimum income for people out of work (the 'base' RSA) and, second, providing an income supplement for low-paid members of households in work (the 'cap' RSA). As income rises, benefit declines (Bourgeois & Tavan, 2009). The RSA's focus on means rather than employment status has been another feature. In practice, this can be helpful for workers on the periphery of the labour market who move in and out of short-term work, but who depend on continuing State support.

The change process, as it has been affecting Europe's schemes, has been controversial at times – particularly if support is accompanied by coercive measures, usually in the name of 'promoting active inclusion' – but especially so when the unemployed and 'underemployed' are expected to enter low paid employment that lacks the other attributes of Decent Work: a 'fair income', 'security', social protection for family and dependants, reasonable prospects of personal development and integration, participation in decisions affecting their working life, and so forth (ILO, 2008).

A 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 evident - often 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 analysis 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 and Reccion, 2012).

In comparison to Spain's experience, countries like Sweden and Austria appear to have been able to maintain higher levels of social protection throughout much of the crisis. The need for a high level of investment, and continued investment that is responsive to changes in demand, were generally understood as requirements when the schemes were designed; and this, in turn, meant less demand on public finances being made when the crisis started to bite (Mai, 2013: 36).

Are Schemes of Social Solidarity Sustainable?

State support is not cheap. This is especially so in times of scarcity when the demands on the State's support intensify. For that reason, if no other, it becomes doubly important that redistributive mechanisms and labour market institutions should operate fairly and efficiently. In this context 'fairly' begs the question whether the interests of the hard-pressed taxpayers paying for schemes out of taxation, and the repayment of borrowing when schemes are funded in *that* way, are being sufficiently taken into account. They are, of course, major investors and stakeholders.

As we heard from Ireland's Labour Minister, Mr Bruton, at the Congress yesterday, funding from taxation and borrowing has been extremely difficult to sustain since 2007.

This is particularly the case in periods when revenue from taxes is falling, and the costs of borrowing to fund the State's activities, including social programmes, have gone up exponentially.

Participants at this Congress from the States may want to comment on this - but looking across the Atlantic to what has been happening in the USA, the US labour market since 2009 has been *massively* supported by a raft of in-work tax credits, child tax credits, and other forms of support since 2009. The first tranche of support came when Congress approved President Obama's 'stimulus package' of nearly \$800 billion in the American Recovery and Reinvestment Act of 2009. The 2009 Act and subsequent measures have been aimed at boosting spending and countering on-going deflationary trends - much of it directed as the Act says as 'aid for low income workers'.

However, as a form of social protection, such stimuli and subsidies – because that's what I am sure they are – are not particularly efficient in helping either side of the bargain. In the longer term, wage subsidies tend to create new dependencies, with low-paying employers becoming among the biggest stakeholders alongside the workers they assist. As long ago as 1848 political economists like J.S. Mill warned about the potentially 'pauperising' effects of transferring the burden, or part of the burden, of wages away from employers and on to the community (Mill, 1848: Book II, Distribution, Ch XII 'Of Popular Remedies for Low Wages'; and Puttick, 2012b: 236).

Besides the scope for fraud that exists with most systems that depend on means-testing, governments and the community at large cannot be sure that employers are paying wages at a level they can afford. If employers are in effect receiving an unnecessary State subsidy, it will be difficult to justify this to hard-pressed taxpayers. Furthermore, there is likely to be a long-term political cost to pay as we have seen in recent anti-welfare sentiments in recent European elections.

In contrast to the USA, most European States have either had to cut back such support, or have *chosen* to cut it back. Arguably an unwise approach in the face of what is a deflationary crisis, and when State there is a case for maintaining spending.

Ireland, for example, was not only forced to modify regulatory wage interventions - notably by cutting its minimum wage (albeit as a temporary measure) - it has also had to cut back on support programmes. On a more positive note, I note from the Irish newspapers this week that recent agreement with other EU finance ministers on refinancing of loans has meant Ireland paying less interest on its debts. This, in turn, we're told, may ease the pressure on social programmes like Ireland's family benefits and in-work schemes like Family Income Supplement – an important source of supplementary in-work support for low paid workers. That's fine, and positive news ahead of Ireland's forthcoming Budget - but I think it is pretty evident that such schemes remain highly vulnerable - financially and politically.

Funding Social Security: Are New Approaches Needed?

Are new approaches needed? It has been suggested, for example, that a radical overhaul is needed, with a more centrally funded and 'managed' Europe-wide scheme (Piketty, Rosanvallon, et al (2014). At other end of the spectrum of opinion on funding it has been suggested that we may have started to reach the *limits* on what State support is affordable, and there is possibly a need for much less State involvement, and a return to an emphasis on 'the philosophy of individual responsibility', and certainly 'alternative mechanisms of social support'. These are among the interesting points due to be debated at the Capetown World Congress next year as part of 'Theme 3' (From Social Exclusion to Social Security). Speakers will include Professor Kamala Sankaran of the University of Delhi. Interestingly, 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 continues: '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 contributing to the debates in Capetown. However, at this stage, and admittedly before hearing all the arguments, 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 then it can, and *must*, be able to maintain an effective residual, minimum floor of social protection – particularly for groups like the 'unorganised worker' and other groups outside the scope and reach of collective bargaining.

As I argue later in this paper, this will mean strengthening labour market institutions, especially collective bargaining. In sectors where this is difficult or impossible, it may mean resurrecting new forms of regulated bargaining and forums for dialogue on pay and conditions. Perhaps the UK's wages council system, or its close cousin Ireland's Joint Industrial Committee (JIC) scheme, can offer a model for regulated sectoral negotiation in order to help construct and maintain an acceptable wages and conditions floor. This is likely to be necessary for groups which find it difficult to organise collectively – for example because of the small scale of the enterprises involved, and the small number of workers in those enterprises. Given that such regulated sectoral bargaining is likely to lack the characteristics of mainstream collective bargaining, in particular a discernible, organised constituency of workers who can be consulted on proposed changes, this is very much 'second best' (at least until the conditions needed for mainstream bargaining can be met).

Without the maintenance of effective, well-funded social security and assistance programmes, coupled with regulatory interventions and new approaches to sectoral wages and conditions setting, it is difficult to see how a new, stronger floor of protection could function. This may also put some of Social Europe's core aims and values, and 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', art 26 (integration of persons with disabilities); or the Solidarity provisions in Title IV (Charter, 2010).

In the bigger picture, social security programmes are, of course, part of a wider set of macroeconomic management mechanisms and tools. They are not primarily concerned with philanthropy, the promotion of T.H. Marshall-type social citizenship ideals (Marshall, 1950), or, indeed, other 'citizenship' discourses. Income transfers from State social security, tax reliefs, 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.

By sustaining spending power, whether as supplementary or replacement income, or helping to promote employment, including nascent new forms of self-employment schemes like the UK's New Enterprise Allowance - a hybrid in-work benefit/small business subsidy – many of today's social security and social assistance schemes play a key role in sustaining consumption and aggregate demand.

This approach to maintaining the labour market has been well understood by the architects of the US recovery since the start of the crisis.

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

Europe's Well-Developed 'Floor of Social Protection'

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 'at risk of poverty and social exclusion' (Eurostat/EU Survey on Income and Living Conditions (SILC); IFS, 2013), Europe's leaders need to come up with some effective responses.

Let's look more closely behind the figures.

The EU's definition of poverty and social exclusion relies on a combination of three 'indicators' – the at-risk-of-poverty rate, severe material deprivation rate, and the proportion of people living in very low work intensity households. This approach extends the customary concept of relative income poverty to include non-monetary dimensions such as labour market exclusion, per se, and this needs to be taken into account. Nevertheless, the net result is that on the Eurostat figures, by 2011 an estimated 119.5 million people living in the EU (24.1 % of the EU population) were at risk of poverty or social exclusion in 2011.

There is a significant time lag, before figures become available. So we will have to see whether, and to what extent, the position has been improving more recently – but the scale of the challenge at the height of the crisis was pretty obvious, particularly in respect of households with members in low-paid employment.

The Bachelet Report/ILO 2011

Michelle Bachelet's Report for the ILO in 2011 (Bachelet, 2011), and linked ILO's recommendations (ILO, 2012), have made valuable recommendations about the need for countries to develop and maintain a floor of social protection in the face of such trends. Whilst much of the report was directed at countries where social security and assistance schemes are new, or where such floors are still being developed, I believe the report had (and still has) some important things to say about countries with more 'developed' systems, including those in Europe. Among other things, the effectiveness of a country's social protection floor will continue to link strongly to implementation of the Decent Work Agenda.

Furthermore, 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). Those who were present at the XX World Congress in Santiago, Chile in 2012 will recall how we debated long and hard about the importance of Decent Work standards and ILO guidance (ILO, 2008) in shaping a base-line for work environments, welfare-at-work, and as a necessary pre-condition for effective programmes.

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 were falling in key sectors. However, by the time the report was published in 2011, many of the assumptions underlying the analysis were starting to be overtaken by the crisis, and a deteriorating position.

Undoubtedly what in 2011 merely looked like *gaps* are now in 2014 starting to look more like sizeable *holes*. In the UK, for example, the reports of the Social Mobility and Child Poverty Commission in 2013 and 2014 have highlighted this concern. They have also shown how much of the rise in relative poverty has been affecting households with at least one adult in paid employment (Social Mobility & Child Poverty Commission, 2013)

Is a Job Still a 'Route out of Poverty'?

Post-2007 rises in in-work poverty, and increasing dependence by workers and employers on State support, raises big question marks around policy-makers' assumptions that a job is necessarily the 'best route out of poverty', even when supplemented by tax credits and other forms of State support. This was a long-term, central tenet of UK welfare policy under New Labour in *New Ambitions for Our Country: A New Contract for Welfare* (DSS, 1998; Puttick, 1998). It continued to be so in the Coalition government's blue-print for welfare reform, *21st Century Welfare* (DWP, 2010; Puttick, 2012a, 2012b), and since then.

Plainly, much needs to be done to make a reality of this - not just in the UK but in other European countries which are committed to the targets set by EU leaders in the Europe 2020 pact (COM(2010)758 Final). What does this mean, in specific terms - particularly at the labour market/social security inter-face? It dictates a need for some re-thinking, as well as repairs to that part of the floor which depends on mainstream labour market institutions functioning efficiently.

In particular, as the recovery accelerates, the focus should be on strengthening collective bargaining, and improving other distributive and regulatory mechanisms - nationally, sectorally, and at the enterprise levels. This is essential if we are to see the wages floor raised. Effective action, including legal interventions, will also be needed to ensure that coverage is maintained.

As Eurofound research and corporate surveys in 2010 concluded, workplace social dialogue will continue to be an important contributing factor helping 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, collectivism and the idea of 'joint regulation' continues to decline, despite continuity in the public sector and in some sections of the private sector (Beszter, Ackers, Hislop, 2014). Our Institute of Employment Rights produced a timely, well-received *Manifesto for Collective Bargaining* putting forward a ten point plan for addressing this (IER, 2013).

Among other things, it argues there should be incentives for employers to engage in collective bargaining, including a bar on companies' access to public sector contracts if they refuse to negotiate with their employees; support for sectoral bargaining; and changes to union recognition law to ensure workers have representation at work from their union, and providing for recognition if ten per cent workers are members.

The Food Sector: A Case Study in Failure?

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! We see workers in the supply chain being paid wages close to, and at some points along the chain *below* the national minimum wage.

Too often, they may also be working conditions that fly in the face of Decent Work standards.

Even at the retail end of that production cycle – the supermarkets – workers' wages are hardly over-generous, despite in many cases affiliation to strong unions like the UK's Union of Shop Distributive and Allied Workers (USDAW).

Unfortunately this says much about the difficulties such unions currently face - even when assisted through the medium of collective bargaining. Within the retail sector, as in others, there are employers trying to maintain reasonable wages and conditions. The problem seems to be that retail sector as a whole seems to be in the grip of cut-throat competition in order to offer cheap food.

That may be attractive for consumers, but it comes at quite a price for workers at earlier stages in the production cycle.

Caught between Two Hard Places: Low(er) Wages, and Less State Support

Regrettably, the story does not stop there. Low-paid workers in the sector are increasingly caught between *two* hard places, namely low(er) wages, while at the same time receiving reduced State Support from in-work Social Security schemes as a result of cutbacks to budgets.

Governments have also not been averse to simply moving the goal-posts, typically by introducing tougher eligibility criteria before workers can qualify for State support.

It may come as a surprise that workers employed by some of world's most successful and profitable corporations should have to depend on such State in-work benefits, tax credits, and support with housing costs. But that is increasingly the case. Specifically, in 2012 the UK government raised the minimum weekly hours required before claimants could qualify for Working Tax Credit – the UK's most important in-work cash transfer. Coupled with the impact of freezes on yearly increases in the value of support, this had an immediate impact on 212,000 working households, including those of many of the lowest paid workers in the retail sector (some of them earning barely 10% above national minimum wage). In particular, many claimants who were part of a couple were suddenly expected to meet a new minimum weekly working hours threshold before they could continue to get WTC support after April 2012, thereby in many cases losing upwards of £3870 a year according to the report 'Local Figures for Children and Families Losing Working Tax Credit in April', Child Poverty Action Group (CPAG), 16 February 2012. A credible and authoritative source based, in part, on House of Commons research data. Many of those workers were in USDAW, a union which negotiates wages and conditions for a large proportion of the sector.

The problem is, as in so many low paying sectors, employers clearly organised pay rates on the assumption that such State support will continue.

Like the workers and unions, they were as surprised to be told that such support was no longer 'sustainable'. So, the problem has become one for employers as much as workers – particularly in sectors that rely on part-time and casual workers who tend to be on the margins of mainstream employment conditions, and who tend to be more reliant on the State for income and support.

What is needed?

Undoubtedly, it makes sense to look to the labour market for solutions in the *first* instance, and only after that to social protection systems as a secondary, residual welfare safety-net. A pro-active, rights-based Social Europe clearly needs functioning and effective redistributive mechanisms rather than just an expanded, increasingly expensive social welfare system.

In some countries it is evident that such an expanding role for in-work programmes is becoming the norm – indeed it is an increasingly integral part of many of Europe's workers' wage/social wage.

The EU has at different times signaled the need to 'improve the quality of fiscal consolidation' and the 'resilience of social protection systems' across the EU. Interestingly, it has also observed that 'the emphasis needs to shift from short-term measures to structural reforms', for example by a range of measures to 'improve the social situation'. However, their entreaties are generally focused on approaches aimed at supporting enterprise, and making social protection work – eg through promoting active inclusion, improving competition and job creation, and removing 'fiscal pressures on enterprise' (Social Europe, 2013: 8-11).

Not much has been said at EU level about the way that redistributive mechanisms are working, or are being supported.

This is, I believe, rather surprising – especially as EU surveys have consistently pointed out that the ‘working poor’ make up a sizeable proportion of those identified as ‘at risk of poverty’ on Eurostat statistics. As has been rightly noted, ‘Having a job is not always a guarantee against the risk of poverty as the working poor represent one third of working age adults at-risk-of-poverty.

In 2011, 8.9% of the people in employment were living under the poverty threshold in the EU and the situation worsened in the period 2010-2011 in 12 Member States. In-work poverty is linked to three broad factors: the individual’s employment characteristics (low pay, lack of skills, temporary jobs, precarious employment, few working hours); household characteristics (size and composition of the household); and work intensity (defined as the ratio of the sum of all months worked by adults aged 18-59 in the past year to the total number of months that could have been worked)...’ (Social Europe, 2013: 48). This is my take, and I do not necessarily expect everyone at this Congress necessarily to share it – but it seems to me that the EU is strong on analysis, much of it helpful. However, in terms of responses, and actions, the position is far less clear or coherent. In a number of sectors - I do not confine my remarks to the food sector – the analysis dictates a more holistic approach is needed to combating low pay, poor working conditions, including consideration of the effectiveness of labour market institutions, and their operation, and a re-balancing of employers’ as well as States’ responsibilities in this key area of social protection.

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 adding another source within the overall ‘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 ‘key’ in the context of the crisis (ILO/Bonnet, Saget, 2012), and in the operation of labour markets. 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, in countries like the USA (Kronman, 1980) as well as Europe – indeed they may be seen as a ‘cornerstone’ of the European Social Model. Reference may also be made to the important role of regulation in reports such as Bonnet, Saget, Weber (2012) *Social Protection and Minimum Wages Responses to the 2008 Financial and Economic Crisis: Findings from the ILO/World Bank Inventory*, Geneva: ILO, 2012. Yet it is by no means clear that minimum wage-setting systems - whether at national or sectoral level – operate as efficiently as they should. This is particularly evident at the wage/social security interface.

Regulating Wages & the WWB: Specific Issues & Limitations

Minimum wage-setting schemes have weaknesses. These not only undermine the effectiveness of the schemes themselves, but also the effectiveness of social security and assistance programmes, as redistributive tools.

Typically, minimum wage floors have tended to be over-cautious and set minimum wage rates at too low a level - largely in the face of concerns about the potential negative impact on labour costs, new job creation, impact on differentials in pay structures, and so forth. As a result, the cost to the community of State support (income transfers, etc) may be much higher than it needs to be.

Furthermore, as we have been seeing in Europe, other 'welfare' costs, such as State support for low-paid workers' rent, rise. This is certainly evident in the UK. Since the onset of the crisis, and in the absence of effective regulation of the private market in rented accommodation increasingly large numbers of low-paid workers have had to look to the State and schemes in the UK like Housing Benefit for help with their rent. Rather than trying to address the problem at source, governmental responses have focused on limiting what claimants can expect to get. As reported by commentators like Liam Kelly in 'UK Housing Benefit Bill will Soar to £25bn by 2017' this is readily apparent from measures like the introduction of benefits 'caps', a 'bedroom tax' limiting claimants to the number of rooms for which they can claim support, and 'discretionary payment' schemes (Kelly, 2013).

Doubts about the effectiveness of current national minimum wage arrangements have prompted leading research organisations like the Resolution Foundation to look at other, better solutions. At the same time, groups like the UK's Trade Union Congress have started to put forward calls for the resurrection of sector-based bodies, including statutorily-regulated systems like the wages councils (in the UK) and Joint Industrial Committees (JICs) in Ireland. Basically, these are bodies operating at industry level, with representation by both social partners (employers and unions), which provide a forum for negotiation of claims from the union side, and which then have legal power to set minimum wages and conditions for that particular sector.

Interestingly, there have been on-going concerns about the way the Irish JICs operate – not just from employers' organisations, but also from the courts in high-profile cases like *John Grace* in 2011, and *McGowan* in 2013 (Grace, 2011; McGowan, 2013).

Despite these setbacks, the system appears set to continue, albeit with limitations and restrictions (Kerr, 2013; Doherty, 2013).

Unusually, the courts in the UK have gone the other way in giving a new lease of life to regulated sectoral bargaining, and wages and conditions setting.

However, in 2014 the UK's Supreme Court this gave its blessing to Wales' constitutional ability to do this, and to establish its own agricultural wages board, mirroring many of the features of the previous board which it will replace, and the earlier wages council system (Agricultural Sector Bill, UKSC 2014).

This development came after attempts by the London government to extend the abolition of sectoral wages and conditions setting in England (as part of deregulation measures in Part 5 of the Enterprise and Regulatory Reform Act 2013 ('Reduction of Legislative Burdens') to Wales - over the heads of unions, employers, and the Welsh government. This failed as a result of the Supreme Court's intervention in the case, stopping the abolition of the board to Wales, and enabling Wales to set up its own scheme (Agricultural Sector Bill, UKSC, 2014).

So, despite the Coalition government's attempts to bring to an end this particular model for regulated sectoral bargaining and statutory wages and conditions setting, we now have three of the four countries of the UK, and our neighbour Ireland, opting to maintain the system.

In the aftermath of the Supreme Court's judgment, the Welsh government and Welsh Assembly, supported by both sides of the sector – employers and workers – has been constructing its own version of the Board – a process driven, primarily, by concerns that abolition of the system would inevitably be followed by falls in agricultural wages and consequential impacts on the Welsh rural economy. Even the government's original assessment suggested this was likely (DEFRA, 2012). In particular, it would take much-needed spending power out of it, and increase this in turn would increase demands on social security systems.

Northern Ireland and Scotland both cited similar reasons for retaining their systems. However, influential employer lobbies, including National Farmers Union Scotland, have had on-going concerns. NFU Scotland has cited the way English competitors over the border benefit from lower operating costs as wages fall following the abolition of the Agricultural wages Board for England and Wales. After the last settlement in 2013, when the Scottish board fixed new wages and conditions for another year, NFU Scotland welcomed the settlement. However, it added that in 'those parts of our industry that are reliant on seasonal workers could face serious competition issues for staff in the years ahead...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 wage will put our farms at a competitive disadvantage' (NFU Scotland 'Agricultural Wage Proposals Reflect Difficult Year', 23 May 2013).

Despite the isolation of England and the Coalition government on this issue, there are influential voices calling for a reversal of current deregulation policies. No doubt influenced by the stance of the devolved governments in Wales, Scotland, and Northern Ireland, and having a good understanding of the limitations of NMW systems (as a former member of the UK's Low Pay Commission, the leader of the UK's Trade Union Congress, Frances O'Grady, has called on the Labour Party and a future Labour government after the General Election in May 2015 to restore wages councils as part of a wider strategy for tackling low pay, and to 'boost wages for low to medium earners' (TUC, 2013a). She said at the conference *Strong Unions: Turning the Tide* in March 2013 that there should be new policies to reduce growing wage inequalities, including 'a return to wages councils that could set legally enforced minimum wages in different sectors, not just the agricultural sector'. They would 'involve union, employer and expert members, and could go significantly higher than the national minimum wage in particular sectors'.

This was repeated on 23rd August 2013 when she said that 'If we are to build a strong and sustainable recovery which benefits all working people, our vision must reach far beyond the minimum wage, which after all is just a floor on pay. Ministers should encourage all employers who can afford to pay a living wage to do so, and consider the introduction of new wages councils to press for decent pay rates across the economy.' (TUC, 2013b)

Clearly, it is not enough for developed economies like the UK's and Ireland's to rely solely on national minimum wage-setting as protection against low pay. There is an obvious need to maintain and, indeed, expand the coverage of sectoral wages and conditions setting systems like the AWB and Ireland's JICs. After all, who understands the needs of businesses and workers, and payability issues, better than the social partners in those sectors?

Why are Better Regulated Floors Needed? Will Germany follow the UK..?

In the face of weakened collective bargaining across the continent of Europe, falling union membership, deregulatory agendas, regulation in the form of sectoral and national minimum wage-setting may, in time, become the last tool in the modern State's tool-box for regulating wages and conditions.

Many of us with interests in this area of Labour Law have been observing with great interest Germany's plans for a minimum wage, including the likely benefits it will bring many in Germany's workforce. However, let's also consider some specific characteristics and longer-term prospects before looking at developments in Germany.

When the Floor becomes the Ceiling...

National minimum wage floors undoubtedly have a propensity to become a 'ceiling' (Resolution Foundation 2013a; 2013b). In effect, employers in sectors with a ready labour supply, untroubled by the need to compete for labour by offering higher wages, tend to treat NMW systems as the 'going rate' rather than as the minimum rate. Making this point, one of the architects of the UK's national minimum wage scheme, and a former Chair of the Low Pay Commission, Sir George Bain observed that this section of the labour market was liable to become divided between a 'lower' or 'second' tier, with the second tier being substantially more at risk of low pay and poor conditions (Bain, 2013). This is borne out by the Resolution Foundation's Report *Fifteen Years Later*, reporting on progress and trends since the scheme's introduction. It found that one in ten jobs (2.4 million) now paid within 50 pence of the minimum wage (£6.19 an hour at the full adult rate). That 10% figure rose to 12% among women, 22% among part-time workers, 18% in the retail sector, and 42% in hospitality (and this excluded any unofficial underpayment, which remains a problem in a system that is not well policed). It was also noted that in the early days of the minimum wage it was anticipated it would raise pay across the low-wage economy.

However, in practice the NMW has mostly helped those at the very bottom. In some sectors, employers take on millions of very low paid workers with little chance of progression. On this, Bain commented 'We created the minimum wage to stop extreme exploitation, yet some employers now see it as the going rate for entry-level staff'. 'That's not what it was supposed to do', he said. 'With a single rate, it will always be hard to raise the rate because you're worried about employment in vulnerable areas. But minimum wages are ill-fitting garments, pinching hard in some places and leaving room in others. We need to ask whether there's more we could do to push up pay in sectors that could afford it.'

The Foundation has in its reports noted how other countries have seen the problems with national wage-setting, and have therefore focused more on sectoral arrangements, and on the prevailing conditions and 'payability' sector-by-sector. In the UK variations in the rate relate just to age; and the rate is set annually by reference to what it is judged the labour market as a *whole* can afford.

For more vulnerable groups, such as newly arrived migrant workers, particularly when they are working in segmented labour markets and sectors, there is also a risk of becoming a kind of *generally* disadvantaged 'second team players' as the Swedish government described this group when deciding on specific measures to protect workers (and the labour market itself) when workers and jobseekers from the newer East European States and other A10 States were being admitted in 2004.

Measures set out in the Holmberg-Karlsson Communication to Sweden's Riksdag included, among other things, anti-discrimination guarantees, checks on tax and social security contributions, and ratification of ILO Convention 94 to prevent 'social dumping'.

The aim was to avoid the development of a kind of 'guest worker' system, as well to protect existing workers from 'displacement' – ie replacement of workers on higher wages and better conditions by workers from the A10 countries prepared to accept lower wages and worse conditions.

A further concern was that such a 'second team' could increasingly become a burden on Sweden's welfare system.

The low pay, and less favourable conditions of the second team, would inevitably result in a transfer of costs to the state welfare system as the wage floor was lowered. It was noted, for example, that Swedish state benefits for the family would, in themselves, exceed a normal wage income in most of the new Member States. 'A family with two children that has a third child while the father is working in Sweden may receive social benefits far in excess of the income they could earn in their country of origin.' Not all the proposals were adopted. Nevertheless, as I observed in my commentary in *Welcoming the New Arrivals?* Sweden's measures compared favourably with those of UK and Ireland 'particularly in seeking to ensure that entry-level employment would be in line with prevailing labour market conditions' (Puttick, 2006: 245-250).

An interesting feature of Sweden's approach in 2004 to regulating the wages and conditions floor was that it looked to both social partners – unions and employers - to help with the task of *maintaining* labour market conditions. In the post-crisis period, and as (we hope) the recovery gains pace, that task is likely to be much harder - particularly if collective bargaining, and the union representation that underpins it, is weakening. In sectors where collective bargaining and union representation does not exist, or is weak, the risk is that in time workers and employers will increasingly become dependent on State support.

This propensity for State support to become an integral part of the 'wage', with a number of consequences – some of them unwelcome - is worth considering a little further.

The Fiscal Cost of Low Pay

As the Resolution Foundation report *Fifteen Years Later* (referred to earlier) has said 'In common with other advanced economies, the UK has introduced a large and permanent system of in-work cash transfers, largely in the form of Tax Credits, to top up the unsustainably low wages of low income working households'. The effect of this has been to raise the *fiscal* cost of low pay.

This is another way of saying the community is subsidising low-paying employers, and probably doing so unnecessarily in many instances.

The most effective counter to this, and the rising cost of in-work welfare, is, of course, to either ensure that collective bargaining systems operate (where the conditions support this), or that alternative voluntary or regulated arrangements operate. Whatever approach is taken, it is essential that sustainable wage-setting operates effectively in order to set and maintain a secure wage floor which then limits the necessity for State support.

As *Fifteen Years Later* goes on to note (at p.9), 'More generally, in-work welfare has made the NMW an integral part of the social security system because it *limits the extent to which employers can use Tax Credits as a wage subsidy that allows them to pay even less.*' [emphasis added]

Turning to the German experience, and what that may tell us. There is certainly a low pay problem in Germany, as there is in the UK. Indeed, the scale of low pay is *big*: up from 15% in 1990s to over 22% (Steen, 2013). According to some commentators the NMW, when it comes, will give a sizeable 'pay rise' to an estimated 17% of Germany's low-paid (Meyer, 2014).

That may be so. Furthermore, in the short-term, as in the UK after 1999, the immediate problem of extreme low pay will have been addressed – particularly for those sections of the labour market beyond the reach of collective bargaining.

The danger, however, is that in time in Germany (as with the UK experience) the system could atrophy, bringing with it complex labour/social security inter-actions, and new 'dependencies'. Above all, as we have seen in the UK, a NMW floor of regulated income, even when supplemented by in-work benefits, is *no* guarantee against in-work poverty. This has been made clear by several reports of our Social Mobility and Child Poverty Commission in 2013 which indicated a steady growth in the scale of in-work poverty in the UK - despite the existence of a NMW system and income transfers through the Working Tax Credit system.

Nationalism in the UK

Interestingly, in-work poverty has been an important issue in the lead-up to today's Scottish independence referendum, especially among disillusioned workers. Some of them seem to be deserting Labour in large numbers in areas like Glasgow, and voting 'Yes' to independence. Household poverty in parts of Scotland, including areas where traditional socialist heartlands like Glasgow have been losing ground to the SNP, is rife, as successive reports have been showing.

At different times in the independence campaign leading up to today's referendum vote the Scottish National Party has promised better regulation, a better minimum wage, and better trade union organisation and representation rights. Encouraged by the popularity they have enjoyed by measures like the retention of the Scottish Agricultural Wages Board system (despite fierce opposition by the employers, NFU Scotland) they have also opposed Coalition policies that have been hitting low paid workers hard, including cuts to tax credits and social security, and measures like the UK's bedroom tax which have been impacting on low income households. Very attractive promises, despite being short on specifics - but will they deliver if they win today? Let's see!!

English nationalism has been following a similar trajectory. Ahead of the UK's General Election in 2015, England's biggest nationalist party, the UK Independence Party, buoyed up by the SNP's successes, has said it will actively 'target the blue-collar vote'. Besides the usual rhetoric around curbing immigration and withdrawing from the EU, the promise is to take the low-paid out of taxation and cut the taxes of those on higher rates of tax 'dramatically' (UKIP, 2014). Evidence that the main parties have been losing ground on issues like these should serve as a warning to the political class in London.

These may also, no doubt, have some resonance in the rest of Europe.

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

Variously described as the 'social wage', schemes of social solidarity, the welfare addition to the wage-work bargain, or more accurately the wage-work-welfare bargain (WWB), there are generally *two* key transactions at work in relation to the wage-work bargain.

First, there is the bilateral contract of employment, under which a contractual wage is paid. Second, there is further transaction between the worker and the State operates, with a supplementary or secondary payment being made. In some European countries support may not be delivered *directly* in this way. Nevertheless, where schemes operate to support the worker and her/his family indirectly, in it may still be appropriate to characterise the State's support as in the nature of a secondary 'social wage'. Besides delivering a secondary, supplemental 'wage', and replacing income when wages are not in payment or reduce, what other functions has this area of the social security system been performing?

Schemes of Social Solidarity: The 'Facilitating' Role

Much may be said about this, but it is clear that some of the newer systems being developed in Europe have been helpful to some groups - what I would call the facilitating role. At the inter-face of employment law and social security law State support plays key roles including support for newer forms of work, in response to newer work patterns, and also facilitating entry to the labour market for key groups who would otherwise be *marginalised* and excluded from the mainstream.

While I have some concerns about *process*, and the way changes have been happening – particularly given some of the more coercive aspects of schemes like the UK's new Universal Credit - I like the ideas behind schemes like France's RSA. Rooted in notions of social solidarity, and recognising the reality that the groups being assisted represent sizeable sections of society who would otherwise be excluded from mainstream paid employment, they have a prominent place in the rich tapestry of European social security.

The underlying sentiment is clear enough. It is saying to some of the sizeable and growing groups of *les exclus* 'we, the community, support you' ... we want to give you opportunities for employment, progress, and improvement – opportunities you would not otherwise have if you were to be left to the mercies of the market. This perception of an 'active' role for social security schemes accords with the ideas of early commentators like the German labour law academic and commentator, Hugo Sinzheimer (Sinzheimer, 1924; 1949). Sinzheimer himself provided valuable insights into the interactions between social security and labour rights, and the role that systems can play in making a reality of anti-discrimination and other basic rights.

Key Groups: Solidarity/Citizenship

There are a number of key groups for whom measures like the UK's Working Tax Credit (and new Universal Credit), and France's RSA, are particularly important as they promote welfare-to-work, retention, and a much better 'wage' and level of household income than would otherwise be the case.

Groups include: single parents with care of children; younger workers needing assistance to enter the labour market, and older 'returners'; those with disabilities and special needs, helped by a mix of anti-discrimination, equalities measures, and State support (welfare-to-work transitions and retention); and those looking for flexible working – eg when balancing family and work, and facilitating flexible work, maternity/paternity through State replacement income.

Let's look at each these groups more closely, and what schemes have been providing – recognising that without such active support for welfare-to-work transitions, and in-work support to deal with retention issues (the so-called revolving door by which scheme beneficiaries enter work but then quickly return to 'welfare').

Clearly Social Security schemes have a valuable 'empowering' role for these sizeable (and growing) groups.

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

The context in the UK and EU is that a significant number of workers are not in unions, and are not covered by collective bargaining.

Indeed, research results in the most recent Workplace Employee Relations Study (WERS, 2013) have shown a continuing decline in union density and membership. Inevitably, this has implications in the longer term for the effectiveness of redistribution, equalities, and social security systems.

One of the various missions of social security and assistance programmes, particularly since the onset of the crisis, is to fill the gaps being left in occupational benefits and provision as a consequence of 'exclusion', and to provide support – a development illustrated in the case of France RSA (Bourgeois and Tavan, 2009; Vlandas, 2013), but also in Ireland, the Family Income Supplement (FIS/ENDA, 2014), in conjunction with other schemes - albeit with limitations for some groups: non-'employees' and short-term jobs (under 3 months).

Standards, Rights & the Wage-Work Bargain

Before concluding I wanted to say something about standards and 'rights' - particularly in the context of work-related social security, and the important role they can play in the way State schemes operate when they provide replacement income when normal wages cease or are in suspense.

An important element in any discussion of the operation of the wage-work bargain, and State support for it, is the role of standards and rights. Plainly, these were introduced for good reasons - so adherence to them is an important part of the European project and Social Europe.

In terms of standards, I believe it is vital to start making a reality of ILO and other international standards (Korda, 2013), as well as the distinct European jurisprudence that is in the ECHR, and EU Charter of Rights. This includes the specific measures aimed at assisting groups that would otherwise be vulnerable, or treated less favourably than other groups in the labour market - particularly if we are to have a level playing field across the continent. I have in mind key measures introduced at EU Law level, but which depend on implementation at State level. 'Equal treatment' provisions in measures like Dir 2004/38 (free movement) illustrate the point, and I will come back to it.

We should also be concerned about new developments that can impact negatively on process in the determination of rights and entitlements relating to the wage-work bargain, whether these are concerned with decisions between the parties, or by State agencies – for example in the determination of social rights and entitlements.

In this regard I would like to add my support to some of the concerns expressed yesterday at the start of this Congress by Carol Fawsitt, the Chair of the Irish Employment Lawyers Group (ELAI).

She emphasised the need for reform legislation, including the new Bill coming before the Irish Dail, to maintain basic rights to fair resolution of disputes, coupled with effective appeal and revision/review opportunities.

I agree whole-heartedly with this, and share the concerns of employment lawyers and advisers about changes that impact on parties' abilities to access justice and benefit from due process as a Labour Law and Social Security Law norm.

This is surely embedded in key measures like ECHR article 6, and the right to a fair trial. What is the point of regulation at the EU Law and Convention levels of Europe if, at the Member State level, such essentials are removed without any comeback?

In both the Employment and social security spheres we face some major challenges in this regard. In the UK, for example, as part of a creeping programme of labour market deregulation this has come in the form of charging fees for the right of employees and former employees to go to an employment tribunal. This has been a hugely controversial measure, which has succeeded in wiping out an estimated 70-80 of claims in the UK's Employment Tribunal system since it was introduced last year.

Again, what's the point of having employment rights, for example the right to contest withholding of wages, or non-payment of an occupational benefit, if employees are going to be dissuaded from asserting their rights in an independent judicial forum by such measures?

Similar considerations apply to social security adjudication, review, and appeal.

Protecting Rights

Does Europe protect core 'economic' rights sufficiently?

For present purposes, an 'economic' right encompasses matters like remuneration and occupational benefits paid under the employment contract. Traditionally, the law does not intervene in private bargains like the employment contract other than to enforce the terms of the bargain after it has been agreed, and to otherwise ensure the parties to the transaction carry out their obligations. It does little more.

However, as we have been seeing in the crisis years, the State's role in providing support for employment, including in-work benefits and other support for workers and families, has increased significantly. With this, the need for effective and timely adjudication, appeals, and review processes has grown as that 'dependency' has increased (Puttick, 2013). In the European context, the calls by Carl Sunstein, the American philosopher, to introduce a raft of essentially economic rights (including the 'right to a remunerative job...to earn enough') (Sunstein, 2006) have been responded to by the *State* rather than at the private law level, and through the private employer. Ie the *State supplementing* the product of the private bargain with social benefits: the 'social wage'.

How susceptible to 'protection' are such benefits, and what does Social Europe say on the matter? The answer to that can be seen in some of the very positive ways in which Free Movement – arguably a cornerstone of the European project – has been accompanied by protective measures. In the UK, for example, it has been gratifying in cases like *MR v HM Revenue and Customs* (2011) to see Polish workers working in the UK being able to assert the right to in-work support from systems like the Working Tax Credit '50 Plus' element, aimed at helping older workers. This was assisted by provisions on anti-discriminations on the grounds of nationality in Articles 18 and 45 of the Treaty on the Functioning of the European Union, and 'differential treatment' in Regulation 1612/68 (EEC) Article 7, requiring EU workers to enjoy the same 'social and tax advantages as national workers'. The ruling that such treatment was discriminatory, and could not readily be 'justified', was assisted by important ECJ cases like *De Cuyper* (Case C0406/04; [2006] ECR I-6947).

Besides classic economic/social rights, and the kinds of newer rights to which I have alluded, should they not extend to those kinds of rights on which effective collective bargaining *depends*? I have in mind the right to take industrial action in support of pay and other claims – an essential factor in protecting unions' and their members' rights to bargain effectively. As one participant expressed this in earlier debates on labour rights, Europe's failure to give full effect to such a core labour right has consequences in terms of the efficacy and efficiency of collective bargaining as a redistributive mechanism – it also reduces collective bargaining to a form of 'collective begging'.

The Function of Rights

Among other 'functions', rights are important in this area of Labour and Social Security Law because they provide a counter to unfettered, sometimes irrational, administrative discretion. Judicial activism is important in social rights – a theme on which the Chair of this session, Prof Gerry Whyte of Trinity College Dublin, has written extensively (Whyte, 2002). Unfortunately, though, 'rights' in the hands of the judiciary sometimes have an alarming habit of cutting *two* ways, and in ways that are not always predictable – we saw this with Irish interventions in the JIC cases recently, and in the RMT case alluded to by an earlier speaker today, Prof Keith Ewing of KCL and the Institute of Employment Rights.

There is also the kind of judicial *in*activism which actually ends up stifling the operation of rights, and thwarting the attainment of the legislator's clear policy objectives. I have in mind the historic, almost classical resistance of courts to expecting governmental bodies to deploy social welfare resources in particular ways – even when this accords with the legislator's intent. This is sometimes seen as undesirable, especially if it can be characterised as somehow crossing the line between the judicial and executive roles (and undermining the executive's ability to deploy public resources without unseemly intervention).

Measures like the 'equal treatment' provisions in Directive 2004/38 on free movement are good examples of where such law is both appropriate and necessary, with related rights in sources like the ECHR and EU Charter strengthening the substantive provisions concerned, as we have seen in social rights cases before the CJEU this year. The expectation in the free movement scheme is that host States should accord EU workers the same rights accorded to the host State's nationals. That includes support in the form of schemes designed to replace wages with State income (the 'income replacement' function) – an essential aspect of the workings of free movement, particularly in a context where visiting workers' employment may be short-term, and periods of inactivity and non-payment of contractual wages necessitate a degree of State support.

The area of *retention* of workers' residence rights, and therefore access to such support, has proved to be particularly difficult in practice - notwithstanding clear guidance from the EU Commission to host States on the need to act carefully and fairly before withholding assistance. In 2008 an EU Commission report described the transposition of Directive 2004/38 as 'disappointing' (EU Commission, 2008) As a result, guidance on the implementation of this key part of the scheme followed in 2009 (EU Commission, 2009); and this included points about the way restrictions on access to social assistance should operate, including proportionality requirements (Puttick, 2011).

The EU and a Rejuvenated 'Social Europe'

Whether at EU or national level, the kind of support I have been describing requires a robust, rights-focused Social Europe to reinforce it – not least at a time 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' in reinforcing expectations of equal treatment. It also highlighted, I believe, the complex issues around judicial lacuna-filling, especially in the growth area of EU *citizenship* as a basis for developing rights. Before considering the case itself, let's look at why Social Europe, and key rights like 'equal treatment', as they are underpinned by wider-ranging principles, matter so much.

EU workers exercising free movement rights make a big contribution in the EU labour market. Quite rightly they have 'equal treatment' rights, and that includes social rights.

Care workers, health workers, and But how well protected are such rights in practice? We are getting a mixed picture, with some decidedly positive results in recent test cases.

Teachers/Teaching Assistants

Jessy St Prix was a French national residing in the UK, and worked until she was pregnant.

Whilst she was on the pay-roll, there was no problem. It was generally easy to demonstrate 'qualified person' status under Dir 2003/38 and the UK's EEA (Immigration) Regulations 2006 as a 'worker'

Later her situation became *very* much more problematic. Six months into her pregnancy she could not get lighter, less demanding work. Unable to earn wages, and 11 weeks before her expected week of confinement, she sought assistance from the UK social security system.

Here was the key question for the court. Did she retain a right of residence (RtR) and therefore a right to support? This depended on whether she could retain 'worker' status.

Happily the CJEU gave us a very welcome answer ('yes').

To make reality of free movement rights, and linked equal treatment rights/obligations, it was implicit in the scheme (despite no express reference to the position of pregnant workers) that they should be treated as within this key area of social protection.

As importantly, the CJEU based its decision on 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's list of groups able to retain worker status was not definitive; and it did not set out '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 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, albeit with 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*, Cases C-482/01 and C-493/01, para 50).

To determine what could be regarded as 'reasonable' required some judicial elaboration, and the court was evidently content to look to Member States' courts, and national practice, to take account of the specific circumstances of particular cases, and the applicable national rules on the duration of maternity leave (primarily 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 innovation, is obviously a feature of the EU system, with considerable scope given to the CJEU to act as a kind of default legislator when major schemes like free movement threaten to unravel. This not well regarded in UK courts and lawyers, and Common Law tradition where we prefer to see certainty, and not rely on judicial rule-making and lacuna-filling.

Nevertheless, in this important area of the operation of wages, the social wage, and social rights more broadly, the court certainly came through with a strong and unambiguous judgment.

A Postscript to St Prix ...

As a postscript to this important case, I would only add this comment.

Despite a very positive result, there are some residual concerns in the aftermath of the CJEU judgment – not least on the wider question of why the UK and other EU States still seems able to systematically deprive EU workers of equal treatment to its own nationals, and in a range of contexts – for example in the case of older, retired workers residing in other EU countries than their own.

Such workers may well have spent a large proportion of their life in employment in their country of origin, or other countries of the EU. Nevertheless, they can find themselves barred out of schemes of assistance and non-contributory retirement benefits.

This was the position, for example, 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' – the gateway to a range of important social rights. She could therefore be treated as outside the scope of social protection (Patmalniece, 2011).

Conclusions

Clearly Europe is still in recovery mode, and 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 remains a difficult and contentious issue.

Ideally, at the heart of the renewal process will be measures to strengthen distributive mechanisms (collective bargaining regulatory systems, etc) 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!

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