

EDITORIAL

Editorial

Since 2008, the European Continent has been consumed by a series of overlapping and expanding crises. It has seen a shock in the financial markets evolve to a sovereign debt crisis in the European periphery and to a recessionary environment in central states. These are crises that have come to define Europe in political, economic and crucially legal terms. It is especially the latter that is in need of discussion as often policy responses have seen law subsumed within the priorities of economic stabilisation. This volume offers an exploration of the role of law in the context of European Crises. Such crises are defined in economic and financial terms, with an emphasis on their social impacts. The volume brings together six contributions that will offer the reader clarity in a number of important areas and also provide an opportunity for reflection. The crisis areas discussed are that of sovereign debt, regulatory policy, corporate governance and pensions. Each paper examines an instance of crisis from a different perspective, but with a common aim – to illuminate the role of law in a contemporary context. The writing of the volume was dominated by a sense of urgency and need. The urgency was born out of the dire situation that a good proportion of European citizens are living under, which cannot continue unabated for much longer. The need was caused by frustration at the perceived inability of policymakers to use the law as a tool to battle the crisis and reach a social, political and economic compromise that once again sets Europe on the path to prosperity.

My own contribution to this volume (Glinavos) is a theoretical one, attempting to locate the place of law in debates on the economic crisis. I argue that the crisis should be seen as the consequence of the dis-embedding of the political from the economic. The aim of the paper is to re-establish our view of law as the conduit of the popular will through political decision making onto economic systems and processes. This is done by examining the European debt crisis in general and the plight of Greece in particular in order to show why plasticity in policy-making is necessary. The paper, after conducting an investigation of exit points from the Eurozone, condemns the current institutional framework of the EU, and especially the EMU as inflexible and inadequate to deal with the stress being placed on Europe by the crisis. Plasticity and policy discretion, it is argued, is a necessary element of a healthy democracy and a necessary feature of a legal system that aims to support market mechanisms. In a peculiar paradox, the orthodoxy of austerity (as the paragon of financialised capitalism) and the economic determinism of institutional structures within the European Union does more damage to the European project than any potential reframing towards the promotion of social-democratic objectives.

A critique of financialisation and what it means for law is pursued directly in this volume by Pesendorfer, who takes on the structure of finance markets them-

selves, presenting ideas about deleveraging and downsizing finance as a response to the crisis. Pesendorfer takes issue with current regulatory reforms of finance and highlights the necessity of, and scope for, more radical, transformative strategies. The paper argues that changes in financial regulation adopted in the aftermath of the financial meltdown have not been radical enough to transform the overall system of finance-driven capitalism towards a more sustainable system with a more embedded finance. The paper uses the concept of financialisation as a tool in understanding the development of trends in finance over the past decades and the evolution of various theories used to describe the typical trends and patterns in financial regulation. Pesendorfer traces the regulatory space for transformative strategies and for taming finance in times of crisis and austerity, analysing the potential of increased public protest in shifting the policy discourse towards the fulfilment of social needs.

Following on from the theoretical critique of the European responses to the debt crisis (Glinavos) and the deconstruction of financialisation as a constraint on policy discretion and law reform (Pesendorfer), Bianco offers a critique of one of the proposed solutions to the European debt crisis – the use of contractual mechanisms in bond contracts, such as Collective Action Clauses. Bianco explains how the European Union opted for Collective Action Clauses as a solution to the problem of unsustainable sovereign debt in the European periphery, attempting to ‘bail-in’ the private sector and thereby easing the burden on sovereigns attempting fiscal consolidation. The paper does not repeat an often analysed critique of austerity and retrenchment (albeit one aided by private sector involvement in debt reductions) but attacks directly the mechanism itself, challenging its potential to deliver the promised engagement with private investors. The paper examines the capacity of contractual clauses to facilitate renegotiations of sovereign bonds between creditors and the sovereign debtor. The paper concludes that it is likely that practical results from the use of Collective Action Clauses will be significantly below political leaders’ expectations, raising the prospect of prolonging the debt crisis and pushing the burden of dealing with unsustainable debt further in the area of fiscal retrenchment.

Continuing with the theme of the involvement of the private sector in aspects of the crisis, Sergakis offers a reflection on one of the key components of the financial crisis: corporate mismanagement and excessive risk taking. While problematic attitudes to risk were focused on finance companies, a wider problem in corporate governance culture has led to a lively debate as to how to effect lasting change. Sergakis identifies institutional investor activism as the ultimate means for steady improvement in corporate governance standards and uses this hypothesis to test the current EU regulatory approach. The emphasis on shareholders is one favoured by the British government, but it is also a controversial one. For instance, Ha-Joon Chang in his 2011 book,¹ lambasts the orthodoxy of separation of ownership from control and argues that free floating shareholders in public listed companies are the last people that should be entrusted with disciplining corporate boards. Sergakis’ paper acknowledges criticism but convincingly

1 H.J. Chang, *23 Things They Don't Tell You about Capitalism*, London, Penguin 2011.

argues that the trend for much more active participation in companies' lives has started to make its presence more strongly. The paper cautions, however, that there may be a long period of time before it becomes unanimously accepted as one of the top priorities for EU policymakers.

The financial crisis and its European expressions in the South have manifested, amongst other things, in a collapse of social provision now and in the future. The debilitating deficits of pension funds (mainly state-supported in the European South) suggest a looming catastrophe for the lives of an increasingly aged population. Kalogeropoulou highlights how the effects of the crisis further impact on the capacity of pension schemes, both state provided and privately managed, to deliver pension promises. Her paper explains the challenges that pension provisions pose for Member States of the EU and focuses on a particular issue around occupational pension provision: the cross-border portability of supplementary pension rights. Portability of pension entitlements, one needs to note, is important for an additional reason – combatting unemployment. In an environment of low growth and high unemployment, any institutional deficiency that prevents workers from seeking work where it can be found can further aggravate an increasingly unmanageable social situation in the European periphery. The paper examines EU responses to this challenge and concludes by arguing that the renewed focus on pensions, in the context of the current economic climate and the need to enhance workers' mobility and to provide adequate social protection, paves the way towards the adoption of new measures in this area.

Building on the theme of the social impacts of the European crisis, Voiculescu offers a contribution reflecting on the link between economic policymaking and the protection of human rights. This is a theme that brings together elements of both corporate behaviour, via Corporate Social Responsibility strategies, and European institutional deficiencies, such as those touched on by the other contributors to this volume. Voiculescu's paper assesses the European Union's continuing strategy, in the context of the economic crisis, of addressing the human rights deficit of the current economic model by promoting a multifarious normative linkage between the economic, market-driven sphere and the human rights-anchored social sphere. The paper argues that the EU's position as a global role model in linking the free market normative discourse on the one hand with non-commercial social expectations on the other, depends on its contribution to the resolution of a series of conceptual tensions around contractual freedoms and discourses on rights. In a way, therefore, a critique of such a linkage agenda is also a critique of the role of law in contemporary capitalism as the guarantor of legal fundamentals to market activity. Voiculescu is optimistic that a dynamic linkage between the economic development model and the social model (coupling this with a conceptual rethinking) may just increase the chances of matching the, so far rhetorical, persuasiveness of the linkage discourse with conceptual coherence and policy consistency.

It is hoped that this journey through the sclerotic nature of Europe's economic institutions (Glinavos); the shackles financialisation places on regulatory responses (Pesendorfer); the weaknesses in relying yet again on market mechanisms in spreading the costs of dealing with the problem of sovereign debt

(Bianco); the avenues explored in dealing with corporate mismanagement and its social consequences (Sergakis); the dangers of Europe's embattled pension funds and the opportunities of free movement (Kalogeropoulou); and finally the promise of linking social, economic and human rights objectives in a coherent legal framework (Voiculescu), will offer the reader a new perspective on the European crisis and the role of law within it.

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Guest Editor

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