

## BOOK REVIEWS

ULRICH BECKER AND ANASTASIA POULOU (EDS),  
*EUROPEAN WELFARE STATE CONSTITUTIONS AFTER THE  
FINANCIAL CRISIS* (OXFORD UNIVERSITY PRESS 2020)

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### I. INTRODUCTION

In the wake of the financial and economic crisis of 2008, a distinct field of comparative constitutional law scholarship emerged to explore the interaction of the crisis with constitutions. Especially at the European level, the sovereign debt crisis gained much attention as a distinct lens for examining constitutional responses, reactions and transformations.<sup>1</sup> At the same time, social rights scholarship began to provide a detailed account of welfare state reforms in the context of austerity programmes and financial assistance conditionality and the significant impact of these reforms on the enjoyment and realisation of social rights.<sup>2</sup> Edited by Ulrich Becker and

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<sup>1</sup> See e.g. Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); Xenophon Contiades (ed), *Constitutions in The Global Financial Crisis: A Comparative Analysis* (Routledge 2016); Thomas Beukers, Bruno DeWitte and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017); Tom Ginsburg, Mark D Rosen and Georg Vanberg (eds), *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019).

<sup>2</sup> See e.g. Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 *International Journal of Constitutional Law* 660; David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 *International Journal of Constitutional Law* 710; Claire Kilpatrick and Bruno DeWitte, 'A

Anastasia Poulou, *European Welfare State Constitutions after the Financial Crisis* builds on these two streams of scholarship and combines the study of constitutions with that of welfare states in the context of the recent economic and sovereign debt crisis.<sup>3</sup> The editors have succeeded in producing a volume that benefits from a comparative approach and offers important insights, both as a whole and as individual contributions.

The book begins by introducing the topic and framing the volume – that is, drawing links between welfare states, constitutions and responses to the sovereign debt crisis (Chapter 1). It then proceeds with a discussion on the application of human rights obligations to European financial assistance mechanisms (Chapter 2). The following chapters consist of nine national case-studies (Chapter 3 to 11). In the final chapter, the book offers conclusions from a comparative angle, building on the individual contributions (Chapter 12). Deviating from the structure of the book, in this review I first reflect on the national case-studies (Section II). Then, I discuss the second chapter in a separate section (Section III). In the final section, I turn to the framing, method and conclusions (Section IV).

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Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone' (2014) 1 *European Journal of Social Law* 2; Claire Kilpatrick and Bruno DeWitte (eds), 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' (2014) EUI Department of Law Research Paper 2014/05 <<https://cadmus.eui.eu/handle/1814/31247>>; Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014); Margot E Salomon, 'Of Austerity, Human Rights and International Institutions: Of Austerity, Human Rights and International Institutions' (2015) 21 *European Law Journal* 521; Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2017).

<sup>3</sup> Ulrich Becker and Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2020).

## II. THE NATIONAL CASE-STUDIES

The book examines welfare state reforms and their impact on the constitutional protection of social rights in the nine European Union (EU) Member States that were 'most seriously affected by the demands for rapid fiscal consolidation and structural reforms'.<sup>4</sup> The structure follows the timeline of financial assistance provision to seven states, examining the country-specific cases in chronological order. Italy and Spain, which were not subject to explicit financial assistance conditionality in the field of social policy, follow. Italy adopted reforms with the aim of reducing public expenditure following pressure from the European Central Bank (ECB). Spain, which received financial assistance for bank recapitalisation, also introduced a range of reforms limiting social expenditure.

The nine case-studies include three different groups of Member States. The first group of case-studies consists of Hungary, Latvia and Romania, the three non-Eurozone Member States that received financial assistance from the EU, the International Monetary Fund (IMF) and the World Bank. On the Hungarian case, József Hajdú provides an account of welfare state and employment policy reforms and the treatment of social rights under the 2011 Fundamental Law.<sup>5</sup> Kristīne Dupate discusses in detail the constitutional review of austerity programmes by the Latvian Constitutional Court, arguing that, for the most part, austerity did not lead to permanent shifts or structural changes in the Latvian welfare state.<sup>6</sup> Last, in the Romanian case-study, Elena-Luminița Dima highlights the importance of the constitutional entrenchment of social rights for their adjudication in the context of the

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<sup>4</sup> Anastasia Poulou, 'Human Rights Obligations of European Financial Assistance Mechanisms' in Becker and Poulou (n 3) 24.

<sup>5</sup> József Hajdú, 'The Transition from Welfare to Workfare in Times of Crisis: A Double-based Reform of the Hungarian Welfare State' in Becker and Poulou (eds) (n 3).

<sup>6</sup> Kristīne Dupate, 'The Latvian Response to Its First Economic Crisis under a Free Market Economy' in Becker and Poulou (eds) (n 3).

crisis.<sup>7</sup> She sustains, however, that in Romania restrictions to benefits that did not stem from constitutionally protected rights were temporary.<sup>8</sup>

The second group of countries includes Greece, Ireland, Portugal and Cyprus, Eurozone Member States that were subjected to explicit social policy conditionality in the form of Memoranda of Understanding (MoUs). In the Greek chapter, Maria Bakavou identifies trends in constitutional adjudication of austerity measures by the Greek supreme courts.<sup>9</sup> She observes, for instance, a tendency to conflate the public interest with the state's fiscal interest.<sup>10</sup> Focusing primarily on social security and healthcare, she connects the imminence of state default with the intensity of Supreme Administrative Court scrutiny on measures that restricted welfare benefits.<sup>11</sup> At the same time, her case-study reports that Supreme Administrative Court judges also placed limits on restrictions to fundamental rights, both substantive and procedural, especially in cases concerning reforms in the social security system. The substantive limit refers to the decent standard of living.<sup>12</sup> The procedural limit refers to state authorities' obligation to justify social security reforms with 'recent actuarial reports and studies of the possible outcomes'.<sup>13</sup> Absent from the Greek case-study is a discussion on post-crisis constitutional amendment projects involving social rights. A 2019 constitutional amendment constitutionalised the state's obligation to ensure decent living conditions to its citizens through a minimum guaranteed

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<sup>7</sup> Elena-Luminița Dima, 'Upholding the Welfare State During the Financial Crisis: The Pivotal Role of the Constitutional Court of Romania' in Becker and Poulou (eds) (n 3).

<sup>8</sup> Ibid.

<sup>9</sup> Maria Bakavou, 'Salus Rei Publicae Suprema Lex Esto? Welfare State Reforms Before the Greek Courts' in Becker and Poulou (eds) (n 3).

<sup>10</sup> Ibid 176.

<sup>11</sup> Ibid 180.

<sup>12</sup> Ibid 172, 176.

<sup>13</sup> Ibid 176.

income policy.<sup>14</sup> More attention could have been paid to this development. The chapter would have benefited from an investigation into potential links between this constitutional amendment, on the one hand, and the crisis-related legislation and case-law, on the other.

The contributions proceed with the Irish case-study, in which Elaine Dewhurst reviews the Irish austerity measures and discusses the obstacles to challenging their constitutionality through litigation.<sup>15</sup> One central concern is the lack of explicit social rights protection in the Irish Constitution.<sup>16</sup> Contrary to the Greek chapter, which lacks any discussion on formal constitutional change, the Irish chapter reflects on this matter. It discusses the Constitutional Convention's 2014 recommendation to constitutionalise economic, social and cultural rights and subsequent attempts in the same direction.<sup>17</sup> The author hypothesises on the potential contribution of such reform in the protection of social rights and concludes that, even though any such change would not have changed the course of developments during the crisis, it would still be valuable in the advancement of socio-economic rights protection.<sup>18</sup>

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<sup>14</sup> Vasileios G Tzemos, Eleni Palioura and Konstantinos Margaritis, 'Greece' in Luís Roberto Barroso and Richard Albert (eds), *The 2020 International Review of Constitutional Reform* (Program on Constitutional Studies at the University of Texas at Austin and the International Forum on the Future of Constitutionalism 2021).

<sup>15</sup> Elaine Dewhurst, 'The Financial Crisis as a Turning Point for Constitutional Rights Jurisprudence: An Assessment of the Absence of Social Rights Protection in the Irish Constitution' in Becker and Poulou (eds) (n 3).

<sup>16</sup> Ibid 199.

<sup>17</sup> Dewhurst (n 15) 205. The Constitutional Convention, established in 2012, was a body of 100 members, consisting in its majority of randomly selected citizens (66 members), together with elected legislators (33 members) and a chairperson, with the mandate to debate and propose amendments to the Irish Constitution. For more information see 'Convention on the Constitution' (Citizens Information, 12 November 2021) <[https://www.citizensinformation.ie/en/government\\_in\\_ireland/irish\\_constitution\\_1/constitutional\\_convention.html](https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitutional_convention.html)>.

<sup>18</sup> Dewhurst (n 15) 205.

The book then moves on to the cases of Portugal and Cyprus. Written by José Carlos Vieira de Andrade, João Carlos Loureiro and Suzana Tavares da Silva, the Portuguese chapter pays a lot of attention to the constitutional review of austerity measures by the Portuguese Constitutional Court.<sup>19</sup> It analyses the novel ways of assessing the compliance of legislative measures with the Constitution that emerged through the crisis case-law, especially the concept of 'equal proportionality'.<sup>20</sup> In the Cypriot chapter, Constantinos Kombos and Athena Herodotou review welfare state reforms introduced during the crisis and the relevant administrative case-law. They argue that 'the assessment of the legality of the social protection cuts and reforms adopted as austerity measures in Cyprus is rather limited, one-dimensional, unclear and disappointing'.<sup>21</sup>

Both the Italian and Spanish chapters are not limited to reviewing welfare state reforms and constitutional case-law. They also provide an analysis about the constitutional amendments in both countries that constitutionalised balanced budget rules. Matteo De Nes and Andrea Pin, in their fascinating contribution, explore the treatment of the new constitutional 'golden rule' in the Italian Constitutional Court's social rights case-law.<sup>22</sup> Maldonado Molina and Romero Coronado show the 'constitutional imbalance' between the economic and the social constitution induced by the amendment of the Spanish Constitution.<sup>23</sup>

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<sup>19</sup> José Carlos Vieira de Andrade, João Carlos Loureiro and Suzana Tavares da Silva, 'Legal Changes and Constitutional Adjudication in Portuguese Social Law in Consequence of the European Financial Crisis' in Becker and Poulou (eds) (n 3).

<sup>20</sup> Ibid 233.

<sup>21</sup> Constantinos Kombos and Athena Herodotou, 'A "Bail-In" of Social Rights? The Cypriot Experience of the Financial Crisis' in Becker and Poulou (eds) (n 3).

<sup>22</sup> Matteo De Nes and Andrea Pin, 'The Outcome of the Financial Crisis in Italy: A Sea Change for the Doctrine of Social Rights' in Becker and Poulou (eds) (n 3).

<sup>23</sup> Juan Antonio Maldonado Molina and Juan Romero Coronado, 'The Predominance of a "Strong" Economy over a "Weak" Social Constitution: The Legacy of the Financial Crisis in Spain' in Becker and Poulou (eds) (n 3).

### III. EUROPEAN FINANCIAL ASSISTANCE MECHANISMS

However important the national constitutional context may be, any discussion about the economic crisis of 2008 and the sovereign debt crisis in Europe would be incomplete without an examination of the involvement of EU institutions. Forged to a great extent by the IMF and EU institutions, legal and social policy responses to the crisis have a strong transnational element. This issue is explored in the remarkable contribution by Poulou, which forms the second chapter of the book.<sup>24</sup> There, she provides a nuanced account of the institutional arrangements and the different mechanisms (European Financial Stability Facility, European Financial Stabilisation Mechanism, European Stability Mechanism (ESM)) – each with its own distinct characteristics – that were set up to provide financial assistance. The author advocates a tailored approach to applying the EU Charter of Fundamental Rights to each EU institution (European Commission, ECB, European Council) and to holding them accountable to human rights norms more generally.<sup>25</sup> Lastly, the chapter explores three possible avenues for binding ESM under international human rights law: self-regulation via internal guidelines, similar to the practice of IMF and the World Bank; customary international law, including core socio-economic rights; and the human rights obligations of individual ESM Member States, which bind their representatives in their participation in the ESM decision-making.

Poulou's proposals on binding the ESM under human rights law – an undoubtedly interesting discussion grounded on detailed arguments – provokes further questions that deserved more attention. First, has self-regulation through internal guidelines in the cases mentioned, the World Bank and the IMF, actually succeeded in changing the attitude of these organizations towards social rights? The involvement of these organizations in the austerity programmes discussed in the book's case-studies suggests not. Second, is being bound only by *core* socio-economic rights obligations,

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<sup>24</sup> Poulou (n 4).

<sup>25</sup> Ibid.

a solution to which the author points, enough to respond to the whole range of fundamental social rights challenges that might emerge from financial assistance conditionality? The social policy conditionality that accompanied financial assistance during the crisis not only had a devastating effect for those at the lowest levels of income distribution, but also targeted pensioners, civil servants, workers. As Kilpatrick has pointed out, those with some resources, yet limited, form a 'central group at issue in euro-crisis constitutional challenges'.<sup>26</sup> Beyond social expenditure and wage levels, conditionality also targeted labour rights, the budgeting and institutions of welfare states and, in some cases, the public character of services.

#### IV. REFLECTIONS ON THE METHOD, FRAMING AND CONCLUSIONS OF THE VOLUME

The volume benefits from a detailed description of all nine country studies and provides an insightful account of how these different and diverse constitutional orders and welfare states experienced the economic and sovereign debt crises. The consistency in descriptions across the contributions allows readers to draw comparisons with ease. One of the virtues of the book is the methodological choice of compiling country-specific chapters on all EU Member States that, in one way or another, were involved in explicit or implicit social policy conditionality.<sup>27</sup> This approach confirms that the economic crisis as a distinct lens of inquiry opened new possibilities for the combined study of constitutional orders and welfare states that are otherwise diverse. That is not to say that it is the first scholarly work that provides a comparative perspective on the matter of the economic

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<sup>26</sup> Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in Beukers, de Witte and Kilpatrick (eds) (n 1) 301.

<sup>27</sup> On implicit conditionality, see Stefano Sacchi, 'Conditionality by Other Means: European Union Involvement in Italy's Structural Reforms in the Sovereign Debt Crisis' in Caroline De La Porte and Elke Heins (eds), *The Sovereign Debt Crisis, the EU and Welfare State Reform* (Palgrave Macmillan 2016).

and financial crisis and constitutional change. *Constitutions in Times of Financial Crisis* is one example.<sup>28</sup> The edited volumes *Constitutional Change through Euro-crisis Law* and *Constitutions in the Global Financial Crisis: A Comparative Analysis* also offer rich insights in the European context.<sup>29</sup> Becker and Poulou's book builds on this scholarship and goes a step further. First, because it compiles *all* of the EU Member States – Eurozone and non-Eurozone – that were most heavily impacted by the crisis, it brings into light the relatively less explored cases of non-Eurozone Member States in Eastern Europe. Second, because it focuses on one aspect of the constitution, its *social strand*, it enriches our understanding of fundamental social rights mobilization, evolution and change in a post-crisis context.

Beyond its methodological contribution, the conceptualization and framing of the book is of distinct interest. The combined study of constitutions, welfare states and social rights presumes, as Becker suggests in the introduction to the volume, that welfare states interact with their constitutional underpinnings.<sup>30</sup> He argues that two manifestations of this interaction can be observed in the context of the sovereign debt crisis in Europe. The first is where social policy reforms produce such significant changes to the welfare state that amount to informal constitutional change. The second is where constitutionalism controls and corrects the erosion of the welfare state caused by austerity, especially through constitutional review. This dual understanding of the relationship between the constitution and the welfare state during the crisis frames the whole volume and the individual contributions.

The common threads that come to the fore in the case-studies are tested against this conceptualization. However, the individual contributions suggest that there are more potential interactions between the welfare states

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<sup>28</sup> Ginsburg, Rosen and Vanberg (eds) (n 1).

<sup>29</sup> Contiades (ed), *Constitutions in The Global Financial Crisis* (n 1); Beukers, DeWitte and Kilpatrick (eds) (n 1).

<sup>30</sup> Ulrich Becker, 'Introduction' in Becker and Poulou (eds) (n 3).

and constitutions during and after the crisis. The Italian and Spanish chapters, for instance, illustrate that two rather rigid constitutions were amended to accommodate fiscal discipline in the wake of the crisis.<sup>31</sup> These amendments changed the social fabric of the respective constitutions. Another example is the case of Ireland, where the commentator discusses the increased demand for constitutional amendment to accommodate better protection of social rights as justiciable fundamental rights.<sup>32</sup> Two additional modes of interaction thus emerge that could have been part of the analysis. One is formal constitutional change, demonstrated in the cases of Italy and Spain, as well as in the case of Ireland as unsuccessful reform projects. A second is the limited interaction that exists when constitutional design places limits on challenging social rights retrenchment. Ireland serves as an example in this case. The conceptualisation of the interplay between welfare states and constitutions perhaps could have been broadened to consider and discuss the possibility of these forms of interaction.

One of the common themes that emerges from the individual case-studies and is captured in the conclusions is a shift in the welfare states towards the development of universal social assistance systems. Greece, Portugal, Italy and Cyprus all witnessed the adoption of minimum income schemes (or restructuring of such schemes where they existed).<sup>33</sup> On this point, Becker argues that

it is not by chance that in the aftermath of the financial crisis universal social assistance systems were set up in those countries that did not have such systems effectively in place at the beginning of this century. That does not mean the birth of new 'minimum welfare' states: a universal guarantee of subsistence is a necessary foundation for all developed welfare states.<sup>34</sup>

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<sup>31</sup> De Nes and Pin (n 22), Maldonado Molina and Romero Coronado (n 23).

<sup>32</sup> Dewhurst (n 15).

<sup>33</sup> Bakavou (n 9) 160; Vieira de Andrade, Loureiro and Tavares da Silva (n 19) 217; Kombos and Herodotou (n 21) 254; De Nes and Pin (n 22) 296.

<sup>34</sup> Ulrich Becker, 'Conclusions from a Comparative Perspective' in Becker and Poulou (eds) (n 3) 354.

Becker is swift in dismissing any objection to his conviction that such developments do not imply a move towards minimal welfare states. This is true especially considering that the focus of states' efforts on minimum income schemes is perceived as a shift, rather than a mere addition to the pre-crisis social security and social assistance techniques. In fact, concerns about this shift still emerge from the individual contributions.<sup>35</sup> Why, for instance, were these minimum income policies advanced instead of more generous welfare state techniques? Does the amount of such benefits respond and mitigate the pauperisation brought about by austerity? Did the adoption of such schemes lead to the expansion of welfare states or did it lead to reductions in welfare state expenditure and the scope of beneficiaries?<sup>36</sup> How should we think of such changes paired with the emergence of the concept of a decent standard of living in the constitutional review in some states?<sup>37</sup> The book does not engage with these questions, nor does it enter into the debate on the social minimum.<sup>38</sup> It thus leaves room for further inquiry into the constitutional significance of this observed turn in welfare states and compels us to ask: how does this shift change the constitutional protection of social rights? Does it limit the normative content and ambition of social rights constitutionalism?

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<sup>35</sup> n 33.

<sup>36</sup> See, for instance, Stefanos Papanastasiou and Christos Papatheodorou, "'Liberalising' Social Protection amid Austerity in Greece' in Sonja Blum, Johanna Kuhlmann and Klaus Schubert (eds), *Routledge Handbook of European Welfare Systems* (2nd edn, Routledge 2019) 232, arguing that the development of a minimum income policy in Greece was accompanied by cutbacks in other social provisions and by a decrease in social expenditure.

<sup>37</sup> Becker (n 34) 348.

<sup>38</sup> For relevant discussions, see e.g. Fernando Atria, 'Social Rights, Social Contract, Socialism' (2015) 24 *Social & Legal Studies* 598; Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Hart 2019); Fernando Atria and Costanza Salgado, 'Social Rights' in Emiliios Christodoulidis, Ruth Dukes and Marco Goldoni, *Research Handbook on Critical Legal Theory* (Edward Elgar 2019).

Even without addressing in detail the issues of constitutional amendment and the social minimum, the book still contributes substantially to the knowledge of 'what happened' in post-crisis welfare states and social rights constitutionalism. It brings out trends and shifts in a clear and concise manner. While the COVID-19 crisis is still unfolding, with a profound impact on social rights, it is important and timely to reflect on how crises and responses thereto have the potential to re-shape the social fabric of constitutions. *European Welfare State Constitutions after the Financial Crisis* succeeds in provoking such reflection.