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Public Services and Citizenship  
in European Law

Law, Public Services, and Citizenship.  
New Domains, New Regimes?

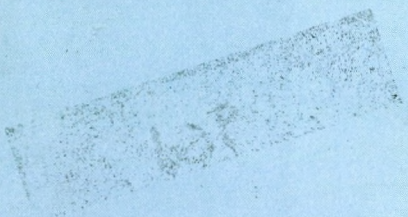
MARK FREEDLAND

Labour Law. A Bridge Between  
Public Services and Citizenship Rights

SILVANA SCIARRA

EUR No. 98/6

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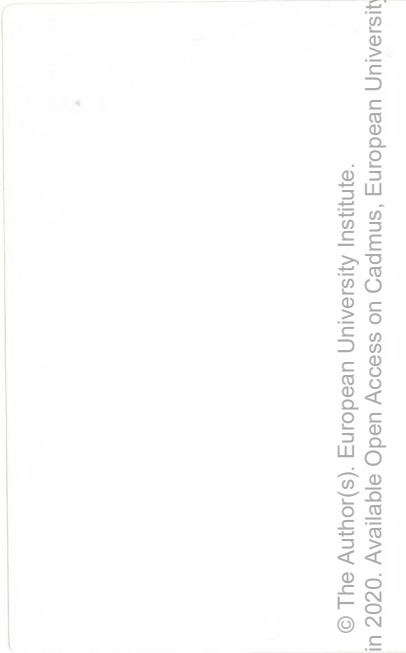


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The European Forum, set up in 1992 by the High Council, is a Centre for Advanced Studies at the European University Institute in Florence. Its aim is to bring together in a given academic year, high-level experts on a particular theme, giving prominence to international, comparative and interdisciplinary aspects of the subject. It furthers the co-ordination and comparison of research in seminars, round-tables and conferences attended by Forum members and invited experts, as well as professors and researchers of the Institute. Its research proceedings are published through articles in specialist journals, a thematic yearbook and EUI Working Papers.

This Working Paper has been written in the context of the 1995/6 European Forum programme on 'Citizenship', directed by Professors Klaus Eder, Massimo La Torre and Steven Lukes.



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

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## PREFACE

The following working paper is composed of two texts which are respectively the first and the last chapter of a book which is being published by Oxford University Press entitled 'Public services and citizenship in European law'. The authors are also the editors of the book and were in 1996 the organisers of a workshop, within the 1995-96 **Forum on 'Citizenship'**, directed by professors Steven Lukes, Klaus Eder and Massimo La Torre. They owe a tribute of gratitude to the **European Forum (Centre for Advanced Studies)**, under whose auspices the forum was held and which has provided support for the publication of the book. In particular this expression of gratitude goes to Professor Yves Mény, for the intellectual challenges offered during the workshop and to Kathinka España, for the highly professional co-ordination of the whole enterprise.

The workshop had as its ambitious goal the linking together of two points of view on public services. The result was to discover that public law and labour law perspectives both contribute to create an area of legal research with its own peculiarities and with interesting insights into policy-making at a European level. The book reflects this stimulating experience of a borderline reflection on issues of citizenship, trying to underline the role of consumers as holders of rights with respect to the provision of public services.

In offering these two chapters as working papers the authors wish to keep the discussion open within the European Forum and among researchers in the field, without losing close contact with the publication of which they form an integral part. This is the reason why internal references to other chapters of the book have not been altered, at the risk of appearing alien to the readers of these two contributions.





# Law, Public Services, and Citizenship - New Domains, New Regimes?

Mark FREEDLAND



## 1. The General Thesis - a Public Service Sector

In the academic year 1995-96, the European University Institute devoted its annual Forum to the subject of citizenship, the principal focus being on European Community citizenship; this created the opportunity to organize workshops on topics relevant to the subject of citizenship. It was decided to organize a workshop which had the purpose of exploring the idea of citizenship in relation to labour law, especially the labour law of public services. The notion that this was a useful and coherent subject for discussion was a matter far more of intuition than of evidence; and the group of people we invited to participate in this workshop was decidedly heterogeneous in terms of their interests and intellectual backgrounds.

Nevertheless, the symposium which resulted produced a powerful sense of excitement among the participants, and a stimulating sense of convergence upon an interesting theme from a variety of very different starting points. So much was this the case that it was decided to treat the papers which had been given as the basis for a symposium book. However, the gathering together of those papers, even with the addition of one or two more contributions, did not in itself resolve the question, what was the exact relationship between them, or, in other words, what was the thesis which would link them together, which they between them would sustain and elaborate. It has required a further period of reflection and discussion to establish that synthesis; the purpose of this Chapter is to indicate the results of those deliberations.

The central thesis may be boldly stated as follows.<sup>1</sup> We are witnessing, in the law and practice of European countries, quite a rapid evolution of a third sector which we might call the public-service sector, which we have to distinguish from, on the one hand, the state sector and, on the other hand, the wholly private sector. In this third sector, ideas about citizenship (both at State level and at European Community level) are particularly significant and influential, especially in the way that they inform the shape and application of

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<sup>1</sup> Since proposing this thesis, I have had the great benefit of reading Wade MacLauchlan's chapter on 'Public Service Law and the New Public Management' in the symposium edited by Michael Taggart. *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) (ch.6). His paper, by 'evok[ing] a discipline of public-service law en emergence' (ibid., 119) engages in a project which is similar to the one which I attempt in this chapter, with the difference, perhaps, that I am less inclined than he is to construct public-service law as a distinct discipline, in that I prefer to see the discourse about the law applicable to the public-service sector as remaining within the disciplines of public law and employment law (and, for that matter, competition law), albeit as the subject of distinct treatment within those disciplines. This is in no way to disparage his argument, which seems to me to have great force and usefulness.

public law and labour law. That is how we arrive at the title of this symposium. So the central and unifying argument of this work is that it is useful to envisage a distinct and distinctive body of law for public services, and to expound that body of law in a way which draws on notions of citizenship. But we should not be deceived by the high-sounding references to notions of public-service and of citizenship into thinking that this is a sector in which there is a particular consensus as to values and policies which should determine the shape of the legal regime. On the contrary, by identifying this third sector, we actually concentrate attention upon a set of conflicts and tensions which occur, certainly, in the other sectors, but which are experienced especially acutely in this sector. There is reason to think, and the papers in this symposium point towards the conclusion, that the existing discourse both of public law and of labour law needs to be re-aligned towards the problems of this rapidly growing third sector.

However, before those conclusions, so boldly stated, can be regarded as having been substantiated, quite a long intellectual journey has to be undertaken. This involves travelling through less than fully explored territory, in which the terrain is at times extremely difficult. In particular, it will be necessary to spend quite a lot of time in the field of public law before going into the field of labour law. In fact, the chapters fall into two groups, in a way which reflects this. There is a general group, which is mainly about public law (chapters 1-8); and there is a special group, part which is directly concerned with labour law (chapters 9-10). Between them, they construct and explore the idea of a third, public-service, sector both in relation to public law and, in relation to labour law.

## **1. The Growth of a Distinct Public-service Sector in the Political Economy**

The central thesis of this chapter is the assertion of the extreme transformative significance, in relation both to public law and to labour law, of the growth of a public-service sector as a third sector distinct both from the public and the private sectors. The purpose of this section is to define that development, and in particular to identify it as primarily an economic and political development, and only secondarily a development in legal doctrine and legal reasoning. We have to begin, therefore, by defining this phenomenon, which we allege to be not just authentic but also profoundly important, of the growth of a third, public-service, sector of the political economies of European countries.

For the purposes of our argument, then, we offer the following working definition of the third, public-service, sector. It is the sector of the economy in which services or activities, recognized as public in the sense that the State is



seen as ultimately responsible for the provision of them, are nevertheless not provided by the State itself but by institutions which are intermediate between the market and the State. These institutions are, on the one hand, too independent of the State to be regarded as part of the State, but are, on the other hand, too closely and distinctively associated with the goals, activities, and responsibilities of the State to be thought of as simply part of the private sector of the political economy.

We will, of course, have to justify and defend various aspects of this purportedly definitive assertion. Indeed, the first thing we have to do is show that this phenomenon exists outside our own imagination, our abstract mental constructions. It is important, for this purpose, to realize that the existence of this distinctive third intermediate sector is not asserted as a matter of existing political, economic, or legal theory. In fact, the point will be made that the assertion of the distinctness of the public-service sector cuts across and challenges much conventional legal analysis, which is of an essentially binary character, insisting on a straightforward dichotomy between the public and the private sectors, between the realms of public and of private law.

Perhaps the best way of arguing for the distinctive existence of our third, public-service, sector as a matter of practical reality is to point to the political dynamics which have so greatly increased its significance in recent years. We can confidently assert that there has been a great political fashion in the 1980s and 1990s for attempting to transfer to the private sector many of the service-providing functions which had been assumed by the State in most European countries. This push has varied in its intensity between those countries, but has produced a large measure of privatization of state enterprises, dissolution of state monopolies, and contracting-out by the State of many of its previous activities.

Note that we described these initiatives as *attempts* to transfer to the private sector rather than actual transfers to the private sector. This is the key to understanding why these initiatives in fact create or augment the intermediate third sector which we have postulated. That is to say, we suggest that these initiatives, these exercises in hollowing-out the State, often amount to an incomplete or partial transfer to the private sector, leaving the activity in question perched between the public and private sectors in a genuinely distinctive situation, which should be regarded as constituting a third sector. We now need to explain in what sense we assert that the transfer to the private sector is incomplete in the situations to which we refer.

The point is that in relation to many of these exercises in privatization (using that word in its broadest and loosest sense), we find that the State is left

not just with that ultimate regulatory responsibility which we might regard it as having for *all* activity occurring within its political economy, but with a higher level of responsibility which, although reduced from primary to secondary level, nevertheless still ascribes a partly public character to the activity in question. Is this, however, simply a re-statement in slightly different terms of our theoretical construction of a third sector, or can we demonstrate the existence of this kind of intermediate level of responsibility in practical terms?

We can do this most effectively by pointing to the many situations in which even the most extreme proponents of total privatization have had to accept that there are a number of services and utilities which governments cannot transfer completely to the private sector, however much they may wish to do so. They have at least to leave in place a special apparatus of regulation of the economic and social functioning of the activity concerned, as where they 'privatize' utilities such as the supply of water, gas, or electricity, or transport systems such as railways, or as where they contract out governmental services such as the prison service. Or they may have to content themselves with going no further than creating market analogues or 'internal markets' in the service or activity in question, as in health and education services in the United Kingdom, though in that case it may be highly debatable whether the activity has even been moved out of the pure public sector. So privatized but regulated public utilities and contracted-out custodial services probably provide the best and purest practical examples of transfer of activities to an intermediate public-service sector.

All this is not to say that it is only by means of partial privatization that activities become located in the intermediate public-service sector. There was a long period during which European countries were as much or more engaged in various forms of nationalization or partial socialization as they have recently been engaged in privatization; in many cases, the latter movement is largely a reversal of an earlier, in its time no less radical, movement in the opposite direction. And, although that kind of partial socialization seems to be out of fashion among the nation States of Europe, there are some stirrings in this direction at Community level, for instance in the form of recognition of 'services of general interest', with which we shall be extensively concerned in the present work. So transfer of an activity into the public-service sector can occur on more than one trajectory; it is not purely and necessarily the product of neo-liberal marketization of the political economy.

If, as we shall hope to argue, it is thus possible to construct a useful tripartite theoretical model from these practical realities, it is at the same time also important to acknowledge the limitations of that model. Above all, it is essential



to acknowledge that the intermediate public-service sector, which is of course the critical and novel feature of our model, is nevertheless not homogeneous in character. Indeed, that is evident from the variety of the arrangements to which we have referred. That is to say, the secondary responsibility of the State which is the distinguishing feature of this sector will be embodied in various different kinds of regulatory arrangements, such as the institution of a regulator, or on the other hand a process of enforcement of compliance with extra-commercial standards in contracts, or even the use of a 'golden share' in an otherwise purely commercial company.

Moreover, because these arrangements for implementing the secondary responsibility of the State vary considerably, the boundaries of this sector cannot be regarded as precise. It will often be a matter for difficult debate whether the particular set of arrangements places the activity fully in the public sector, where the responsibility of the State is primary, or fully in the private sector where the responsibility of the State is purely residual. However, these imprecisions are not so great as to discredit the whole model; the tri-partite scheme still improves on the precision of the bi-partite model, and does so without simply descending to compiling lists of species of flora and fauna in the garden of political economy. It does seem to be useful to think of a new *genus*, distinct from the accepted two. Perhaps we are now in a position to consider the implications of this analysis for legal doctrine and legal regulation in the fields of public law and labour law.

### 3. The Public Service Sector in Relation to Public Law

The recognition of a distinct public-service sector, between the public and the private sectors of the political economy, in which, as a defining and distinguishing feature, the responsibility for an activity or service is shared between the State (at a secondary level), and a separate service provider (at a primary level), permits some important analytical refinements to the way we think about the regulation of public-service provision as a matter of public law. We shall find that the insights which these analyses seem to provide also turn out to be helpful in relation to labour law; but the process of re-casting the legal analysis of public-service provision has to begin in relation to public law.

One good reason for beginning, in that sense, with public law is that the recent growth of the intermediate public-service sector, even if not recognized as such - or, perhaps, *because* not recognized as such - has produced a kind of crisis in legal analysis which has been far more obvious in relation to public law than it has been in relation to labour law - though we shall argue that the crisis, in reality, extends to labour law as well. This crisis, manifested in several of the papers in

this symposium, is produced by, indeed consists of, the enormous difficulty of sustaining and applying the accepted and traditional division between public law and private law in the current situation, in which, as we have argued, so much of the activity of the political economy now occurs in a zone which is truly intermediate between its public and private sectors.

The recognition of that zone as a distinct sector does not simply sidestep that problem; it actually addresses the problem, and helps to resolve the crisis associated with that problem, in two main ways. First, by breaking away from a monolithic statist analysis of public-service provision, it enables us to recognize two distinct though complementary roles, in our public law analysis, for, on the one hand, the public-service provider and, on the other hand, the State as the bearer of secondary responsibility in the public-service sector. Secondly, by identifying a conceptual state between the public and private sectors, it enables us to consider at a profound level the tangential relationship between public law and private law at a point where they intersect, and where their different approaches come into contestation with each other.

Each of those two themes or analyses will obviously require substantial elaboration. In the elaboration of these arguments, it will be suggested that ideas about citizenship play a crucial role. First, it will be argued that in this intermediate sector it is a distinctive feature that separate relationships exist between the State and the citizen on the one hand, and, on the other hand, between the citizen and the public-service provider. Those two relationships differ in character in a way which is concealed by a perspective in which a single simple relationship exists between the State and the citizen.

Secondly, and even more centrally to the project of this book, we shall seek to show that it is in the public-service sector that we find revealed most clearly a contestation between rival conceptions of citizenship. For, although there exist many versions and accounts of citizenship, they can usefully be grouped into two types which correspond respectively to the values and concerns of public law and of private law. We can think of these two types as constitutional citizenship on the one hand and market citizenship on the other hand. This proposition challenges a widespread assumption that the discourse about citizenship is one which takes place wholly or mainly in the public sphere, and which is therefore associated with public law *rather than* with private law. This ambiguity or equivocality of citizenship as between the public and the private spheres can be brought out into the open more effectively in a framework of analysis which asserts, precisely, the existence of an intermediate sector poised between the two domains.



We should first, then, revert to and expand upon the suggestion that our analysis in terms of a third distinct public-service sector is useful in exposing the separation of roles as between the State and the public-service provider, and the further suggestion that this can best be understood by reference to their distinct relationships with citizens. We shall suggest shortly why it is legitimate, and indeed helpful, to speak here in terms of *citizens*, rather than simply in terms of *individual persons*; for the moment, it is the relationships between the institutions on the one hand, that is the State and the public-service provider, and the citizen on the other hand with which we are concerned.

The crucial point about these relationships is that they are multiple ones, and that it is the separation between the State and the public-service provider which brings about that multiplicity, by contrast with the situation where the service in question is provided directly by the State itself. In the public-service sector, the citizen has relationships both with the public-service provider (as the bearer of the primary immediate responsibility for the service) and with the State (as the bearer of the secondary but still very significant responsibility in relation to the service concerned). The bilateral relationship between State and citizen in the purely public sector, and for that matter the bilateral relationship between the citizen and the private service provider in the purely private sector, are transformed into trilateral relationships between State, citizen, and public-service provider in the intermediate public-service sector.

It is very important to be able to recognize that this trilateral structure is, from the perspective of public law, really a reorganization of the direct relationship between the State and the citizen into a more complex form, a redistribution of the responsibility of the State so that it is located in two places instead of one. This recognition is important for public law because otherwise public law may easily lose the sharpness of its focus in the public-service sector. That is to say, in the public-service sector, the State on the one hand and the public-service provider on the other might each be able to escape its responsibility in public law by referring to the other as the proper bearer of that responsibility.

This risk, that the control exerted by public law might be mutually deflected and jointly or severally evaded by the State and the public-service provider, is greatly reduced by the analysis in terms of a public-service sector (especially when the analysis is conducted by reference to the idea of citizenship). That is because this analysis recognizes that the trilateral set of relationships, so far from being a marginal and unimportant deviation from a normal public-sector pattern, is on the contrary an entirely stereotypical feature of a different sectoral pattern, namely that of the public-service sector. It thus

becomes apparent that if public law is to maintain its vigour, indeed its very integrity, in this sector, it is necessary to make sure that each of the divided parts of public responsibility is maintained in a state where it can be effectively asserted by the citizen - in other words, that it is not possible, *vis-à-vis* the citizen, to 'play both ends off against the middle' in three-sided public-service situations.

This, however, by no means represents the full extent of the problems of applying or interpreting public law in the public-service sector. There is a further and more profound sense in which, if we argue for the distinctiveness of a third, intermediate, public-service sector, we have to accept that the application of public law to it becomes more deeply contestable and contested than if we were content merely to operate on the margins of the traditionally accepted territory of public law. That is to say, it comes into question whether and how far this whole zone is within the province of public law. In other words, has the enterprise of 'privatizing' the activity in question been successful to the point where it has been taken out of the territory of public law, even though described as part of a public-service sector? This is a problem which our second line of argument seeks to address; and, even more so than with the first line of argument, we shall find that reference to ideas of citizenship is helpful. This justifies a section of its own, to which we now turn.

#### **4. Rival Conceptions of Citizenship in Relation to the Public Service Sector**

We have argued earlier that the distinctive public-service sector is often enlarged, sometimes even created, by projects of 'privatization' in the broadest sense, whereby governments seek to limit, by deflecting towards public-service providers (who are not, or who can be represented as not being, part of the machinery of the State), their responsibility for activities which would otherwise be viewed as wholly or largely a matter of the public responsibility of the State. But it is of the essence of this intermediate sector that the State retains, whether as a matter of choice and design or despite the best endeavours of governments to the contrary, a secondary public responsibility, of a more than residual kind, for the activity in question. As a result, this third intermediate sector is one which is shared between, or contested as between, the frameworks of public and of private law. One important way in which this sharing or contestation takes place, or at least can be better understood, consists in an interplay between rival versions of citizenship, some of which fit into or form part of a public law framework, others of which promote or sustain a private law approach.



What, then, characterises these rival versions of citizenship? It might be thought that there was only one obvious basic version of the idea of citizenship, which we shall call constitutional citizenship. On this view, citizenship is the conception we have of full individual membership of the society, State, or community in question. In a democratic society, it implies a claim to participate in the processes of democracy; more generally, it implies a set of links between the State and the individual which it is the very business of public law to maintain in a meaningful and coherent condition.

A very significant component, possibly, it could be argued, the defining feature, of this conception, and certainly the dimension of it with which public law is centrally concerned, consists in the obligation which it imposes upon the institutions which have a relationship of a public character with the citizen to behave in a constitutional, principled, and non-arbitrary fashion *vis-à-vis* the citizen. Increasingly, we tend to think of this as an obligation to refrain from unjustifiably *discriminatory* behaviour towards the citizen, either generally, or particularly in respect of the citizen's membership of a sub-group of the community in question - such as a sub-group distinguished by race, ethnicity, religion, gender, family status, age, or disability.

It is that set of obligations which we tend to think of as creating the 'rights' which this conception of citizenship is seen as giving rise to. From this, as it were 'constitutional', perspective, those rights will tend to be seen as inalienable; and in so far as those rights admit of qualification by reference to the behaviour of the citizen, that will tend to be by reference to the willingness of the citizen to be law-abiding, or, in more exacting variants, by reference to the extent of the citizen's positive contribution to the social or political goals of the community ('active citizenship'). It will be reasonably clear how closely these ideas correspond to the broad notions and approaches of public law (allowing, of course, for the diversity of those approaches as between different European legal systems).

One might imagine that all the versions of citizenship which one would encounter in present-day European societies would conform to this conception; and perhaps we could say that this is in some basic sense the case. However, it is suggested that recent neo-liberal political fashions have tended to involve or evolve a different set of conceptions of citizenship, which we can think about as 'market citizenship' or 'consumer citizenship'. This rival set of conceptions is especially associated with the public-service sector; protagonists of neo-liberal policies of 'privatization' tend to see it as the very *raison d'être* of that sector, to the limited extent to which they are willing to admit of that sector

as distinct from the purely private sector. This obviously needs some more explanation.

The expanded explanation runs as follows. A simplistic view of neo-liberal projects of 'privatization' would assess their feasibility, or success if attempted, in terms of their ability to accomplish the complete transfer of a given activity from the public to the private sector. Governments engaged in such projects, however, have on the whole needed to arrive at a less simplistic view, if only because the scope for absolute privatization in that simple sense turns out to be rather limited. That is mainly because such governments perceive, or at least are driven by trial and error to accept, that their electorates will expect and exact of them that they continue to accept a secondary responsibility in relation to most of the services or activities which they seek to privatize. This amounts to a political demand that the service or activity remains to some extent within the domain of public law, and within the framework of constitutional citizenship.

The sophisticated neo-liberal response to this problem or demand is a highly interesting one (and incidentally one which is inherent in much of the school of thought of 'law and economics'). It consists of re-conceptualizing the citizen as primarily an economic rather than a social or political actor, in other words of promoting a notion of market citizenship rather than of constitutional citizenship, thus drawing on and developing a different philosophical tradition. On this view, the individual person is accounted a full member of the community, is identified as a citizen more by reference to that person's role in its economy than by reference to his or her role in its political society.

It is quite striking to what an extent the governments which have espoused this approach have experienced and responded to incentives to identify and interpret the citizen, not just as a market citizen, but more particularly as a consumer citizen. That is to say, the citizen is especially valued as the maker of choices about consumption of goods and services by which alone the market economy can be disciplined into the condition of 'efficiency' which is necessary to its prosperity in an internationally competitive environment. Emphasis is placed on the role of the citizen as the discriminating purchaser of goods and services, as the maker and enforcer of economically sound and rational consumer contracts.

Note how well this approach equips governments engaged in neo-liberal projects of privatization to respond to the difficulties of absolute privatization. Instead of simply denying the responsibility of the State for the activity in question, they can transform it into a responsibility for creating and maintaining consumer choice, and for policing the quality of service afforded to the consumer, in relation to the activity in question. Instead of formally severing



the link between the citizen and the State in relation to a given service generally regarded as a public-service, governments can maintain that they have actually reaffirmed those links in a different form. Moreover, they can and do assert the superiority of that form, by contrasting it to the monopolistic form of service provision in the purely public sector.

This, then, is the sort of approach to citizenship which jockeys for position with the constitutional approach to citizenship; and the public-service sector is precisely the arena in which that contest occurs - we might almost say that it is the arena which is created by that contest. It will be apparent that the rights and claims attributed to market citizens, being especially contractual rights and claims associated with contracts, are of the kind which private law, rather than public law, recognizes and protects. Again we find that there is a major challenge for public law; it has to redefine itself in relation to the distinctive public-service sector if it is to resist a highly sophisticated project of transferring that sector largely into the domain of private law. However, rather than pursuing further that set of issues about the role of public law, our present purpose is to use this discussion to tease out the parallel, and no less weighty, implications for the development of labour law in relation to the public-service sector. But before doing so, we need to sketch in one more piece of the relevant background, this consisting of the identification of a public-service sector in the context of the European Union.

## **5. The Public Service Sector in the Law and Policy of the European Union**

In this section, it will be argued that it is helpful, for purpose of acquiring a general understanding of the issues of labour law, public services, and citizenship, to consider the evolution towards the recognition of a distinct public-service sector in the law and policy of the European Union. This argument will be developed in three stages. At the first of those stages, the reasons for this emergent recognition will be identified. At the second stage, the fact of this occurrence - limited enough, but nevertheless clearly discernible - will be described, while at the third and final stage we shall canvass the consequences of this phenomenon and begin to consider its implications for labour law.

If, then, we first consider the reasons why there might be expected to be an impetus towards recognizing a public-service sector in the law and policy of the EU, we find, I suggest, that there are two sets or kinds of reasons for such a development. One set of reasons is directly comparable to and parallel with the rationale for recognition of a public-service sector within each Member State. In relation to that set of reasons, the EU is in the situation of being a macrocosm of its Member States. However, it will also be argued that the EU has another and

further set of reasons for recognizing a public-service sector which is peculiar to its situation as a community of States. In relation to that set of reasons, the EU is pursuing concerns which are distinct from those of its Member States, even, it might be said, in competition with those of the Members States. The two sets of reasons will be explained in turn.

The first set of reasons for the tentative emergence of a distinct public-service sector in the law and policy of the EU, which replicates the situation within Member States, has to do with changes in the patterns and structures of economic and social organization and activity. Essentially, the regulatory structures of at first the EEC and then the EC were predicated upon a certain set of assumptions about the division of economic and social activities into the public and private sectors of the economies of the Member States. This is not to say that the allocation of economic and social activities between those sectors was entirely uniform as between the Member States. Nor is it to say that the extent and kind of regulatory differentiation between the two sectors was the same as between the Member States. But for about the first twenty-five years of the existence of the Community, there was enough convergence of patterns as between the Member States to make it coherent and sustainable to construct Community regulation and policy around a binary system, recognizing a mixed-economy paradigm in which most Member States had placed a wide range of public services and public utilities squarely within their state or public sectors. There was a certain amount of argument about what counted as an emanation of the State, but the logic seemed broadly sustainable.

From the early 1980s, however, this picture began to change, and the division of the economy into sectors started to need to be re-conceptualized. There were two main movements at work. One was the movement towards privatization and liberalization of enterprises and activities hitherto conducted within the public sector or dominated by the public sector. This produced (in varying degrees as between Member States) a momentum from the public sector towards the private sector. There was, however, a countervailing movement towards a recognition and vindication of the public interest, often expressed as the interests of consumers or of citizens, in various kinds of public interest regulation of these privatized or liberalized activities. This resulted in a reverse momentum back towards the public sector. These two pressures upon the boundary between the public and the private sectors caused the boundary in effect to disintegrate, to the point where it became necessary, or at least important, to conceive of a third, intermediate, public-service sector in which the kind and degree of regulation could be different from those applying to the fully public sector on the one hand and the fully private sector on the other. This was a



rationale for recognition of a public-service sector both at Member State and at Community level.

There was also, as we have said, a further set of reasons for such an evolution at Community level, which was distinctive to the EU in the sense that it did not have an obvious parallel at Member State level. In fact, this set of reasons derives precisely from the (changing) nature of the relationship between the Community and its Member States. In the law and policy of the EU, the binary division of the economy, and of the society, of Europe into a public and a private sector is even more complicated and mutating than it is within the Member States, not only because the Community has to reconcile different approaches to that division as between Member States, but also because the Community as an entity, or as a set of institutions, has a complex relationship with its Member States. That complex relationship alters the way that the division is made between the public and the private sectors or spheres, so much so as to create a special impetus towards the recognition of a third, intermediate, public-service sector at Community level. This thesis obviously requires expansion in greater detail.

The complexity of the relationship between the institutions of the Community on the one hand and the Member States on the other, when it comes to making the division between the public and private sectors at Community level, consists in the particular way in which the mission of the Community was formulated. That is to say, the Community was formally dedicated to, indeed constructed around, the notion of the free and competitive market; the conceptual pillars upon which it was rested were explicitly identified in those terms. The public sector of this liberal European economy and society was that of the Member States; the Community was concerned, in theory at least, not with creating a supra-national public sector, but, on the contrary, with putting in place an integrated European private sector characterized by free and undistorted competition. There was, of course, a considerable measure of artificiality and not a little irony in this formulation, as the normative or regulatory structures, and the institutional and bureaucratic apparatus to support them, grew ever more elaborate in ostensible pursuit of the free and single market; but there was at the same time an apparently coherent rationale for a Community which defined its private sector in expansive and inclusive terms, and its public sector in narrow and constrained terms (for example by subjecting public authority contracting or procurement to requirements of compulsory competitive tendering).

From the mid-1980s onwards, the tensions which had always been present within and around this mode of Community self-definition were heightened. On the one hand, as we have said, the stereotype of social welfarist Member States started to disintegrate, and there was an evolution towards neo-liberalism at

national level. This threatened to create private sectors of de-regulated trade competition which would be more fiercely neo-liberal than was readily compatible with the Community model. On the other hand, for the Community itself, the nearing of its goal of realizing the Single Market accentuated its own need for further and other bases of self-legitimation than that of free trade alone. For both those reasons, it was important for the institutions of the Community to acquire an enhanced capacity for public interest regulation of the provision of services to the Community public or citizenry.

The acquisition of this new or enhanced capacity would inevitably, however, run up against the sensibilities of various Member States, concerned sometimes with maintaining the integrity of their sovereign national public sectors, sometimes with protecting their liberalized private sectors from the encroachment of Community normativity. The path between these sets of constraints has, of course, been a narrow one; but it has afforded enough space for a limited evolution of a Community concern with what is, in reality, an intermediate public-service sector identified under the title of Services of General Interest.

It is only very recently that there has been the political will in the Community institutions to begin to concretize these policies and treat them as the basis for legislative measures. It was early in 1996, during the process of preparation for the Intergovernmental Conference leading to the 1997 Amsterdam Treaty, that the Commission began to stake out the territory of Services of General Interest as one of the main areas in which the new political expansionism of the Community would be manifested. Thus the Commission makes the following pronouncement in February of 1996:

'Europe is built on a set of values shared by all its societies and combines the characteristics of democracy - human rights and institutions based on the rule of law - with those of an open economy underpinned by market forces, internal solidarity and cohesion. *These values include access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment*' (emphasis added).<sup>2</sup>

It was that strand in the thinking of the Commission about the then forthcoming Intergovernmental Conference which was fashioned into their Communication of September 1996 on *Services of General Interest in Europe*.<sup>3</sup> This Communication is in effect the White Paper or definitive policy document for the

<sup>2</sup> *Reinforcing Political Union and Preparing for Enlargement - Commission Opinion for the Intergovernmental Conference*, COM (96) 90 final, 28 Feb. 1996.

<sup>3</sup> COM (96) 443 final of 11 Sept. 1996.



development of a Community public-service sector, or services of general interest sector; as such, the details of its formulation deserve some attention. It proceeds in three stages: the first is that of purposive analysis of the *status quo*; the second is that of identifying aims for future development; the third is that of recommending legislation. Each stage will be considered in turn.

In this Communication, the Commission is extremely cautious in its legislative proposals, so that its purposive evaluation of the present position, with its identification of future objectives, is probably the most significant part of the policy document. The purpose and effect of the descriptive analysis are to indicate that the Community, both as a group of nation-States and through its central institutions, is already engaged in recognizing and conducting a general interest services sector in which, it is asserted, the Member States and the central institutions of the Community share a responsibility for vindicating the public interest and the set of values associated with that interest.<sup>4</sup>

The Communication pursues an interesting and important argument as to the way in which the general interest services sector is to be identified or defined. It is a two-part argument, the first part of which is general, and the second part of which is specific to certain sectors of the European economy. In the general part of the argument, it is asserted that this general interest services sector is and should be identified by reference to a European consensus as to the need for a certain set of services to be provided as essentially public services. It explicitly rejects a contrary approach, which would confine the general interest service sector to the services provided by institutions which are in their nature public or state authorities or enterprises. So the general interest services sector, as envisaged by the Commission in this Communication, is functionally defined and extends into the provision of public services by private sector enterprises.<sup>5</sup>

Those who formulated this Communication seem to have been aware that an attempt to identify a European general interest sector solely by reference to

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<sup>4</sup> That set of values is specified thus:

*'The roles assigned to general interest services and the special rights which may ensue reflect considerations inherent in the concept of serving the public, such as ensuring that needs are met, protecting the environment, economic and social cohesion, land-use planning and promotion of consumer interests'* (COM (96) 443, para.7).

<sup>5</sup> The point is put thus:

*'It is all too easy to treat public sector and public-service as synonymous and fail to distinguish the legal status of a service provider from the nature of the service being provided... European policy is concerned with general interest, with what services are provided and on what terms, not with the status of the body providing them'* (COM (96) 443, para.11).

this rather abstract mode of functional definition would have lacked any sharpness of focus or sense of concrete reality. So they go on to argue that we can also identify this European general interest services sector by pointing to those specific areas of economic activity in which the Community has in some sense or other recognized and asserted an important public interest concern. The sectors which are so identified in the Communication are those of telecommunications, postal services, transport, electricity, and broadcasting.<sup>6</sup> It is very important to observe exactly how that selection is reasoned in the Communication.

The significance of this sector-specific approach in the Communication is very great, because it enables the Communication to identify a multiplicity of models for the services which it can claim to treat as general interest services. The models vary both in the way that the general or public interest is defined in relation to them, and in the intensity with which that general or public interest is pursued. It would be fair to say that the central or most influential model is derived from the areas of telecommunications and postal services. That is because there is a long and important history of imposing so-called universal service obligations on providers of telephone and postal services. That means to say that European States and societies have recognized at least some degree of need to impose on providers of those services a set of obligations to offer their services to all those wishing to have access to them on an affordable basis.

As the Communication argues, the Community has been able to assert a capacity to pursue universal service obligations on a cross-border basis between the Member States in relation to postal services and, especially, in relation to telecommunications services; and it has been able to do that irrespective of whether the service providers are within the public sectors or the private sectors of the Member States, or are on the move between the two sectors.<sup>7</sup> The

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<sup>6</sup> 'The principles and approach outlined above [i.e. the functional definition of general interest services] combine the dynamism of opening up markets with general interest requirements at European and national levels. The Commission has already taken steps in this directions in several areas, such as telecommunications, postal services, transport and energy.' 'In most Member States, television and radio have a general interest dimension, despite the structural and technological changes affecting those markets' (COM (96) 443, paras. 33, 52).

<sup>7</sup> 'The opening up of markets and infrastructures [for telecommunications] goes hand in hand with the definition of universal service obligations, which the Community has asked Member States to impose on operators to ensure the provision of a wide range of basis services.' 'The basis of the proposal [made by the Commission in July 1995 for common rules for the postal sector] is to safeguard the postal service as a universal service in the long term. Universal postal service means providing a high-quality service country-wide with regular guaranteed deliveries at prices everyone can afford. . . . It . . . would apply to both domestic and cross-border deliveries' (COM (96) 443, paras.35, 38).



Communication goes on to argue that the Community has shown a concern to secure analogous obligations upon the providers of electricity,<sup>8</sup> and of transport services, whether air, maritime, or inland, in relation to which the Commission has canvassed the creation of a 'Citizen's Network' at Community level.<sup>9</sup> Finally, in its enumeration of sectoral models, the Communication identifies a parallel Community set of general interests in broadcasting, the general interests being defined in this context by reference more to social than to economic considerations.<sup>10</sup>

In the analysis of general interest services which is offered in this Communication, the Commission is at pains to stress one particular theme, both at the general level and at the sector-specific level of its description. That is to say, it is recognized and asserted that there is a potential tension, and often various sorts of actual tension, between market forces and general interest considerations.<sup>11</sup> Moreover, it is seen as self-evidently part of the function of public authorities in general to concern themselves with the resolution of such tensions.<sup>12</sup> Indeed, the Community is depicted as recognizing the freedom of Member States to do that; it is said that the Community's approach to general interest services is underpinned by two basic principles, one of which is neutrality as regards the public or private status of companies and their employees, and the other of which is:

'Member States' freedom to define what are general interest services, to grant the special or exclusive rights that are necessary to the companies responsible for providing them, regulate their management and, where appropriate fund them, in accordance with Article 90 of the Treaty'.<sup>13</sup>

The establishing of this description of a general interest services sector within the Community provided a strong theoretical base upon which the Commission could build a set of objectives for the role of the Community institutions in relation to

<sup>8</sup> See COM (96) 443, paras. 47-50.

<sup>9</sup> COM (96) 443, paras. 41-6, referring to the Green Paper, *The Citizens' Network*, COM (95) 601 final of 1995.

<sup>10</sup> The general interest considerations [relating to broadcasting] basically concern the content of broadcasts, being linked to moral and democratic values, such as pluralism, information ethics and protection of the individual' (COM (96) 443, para. 51).

<sup>11</sup> 'Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer, who gets better quality at a lower price. However, these mechanisms sometimes have their limits; as a result the potential benefits might not extend to the entire population and the objective of promoting social and territorial cohesion may not be attained' (COM (96) 443, para.15).

<sup>12</sup> 'The public authority must then ensure that the general interest is taken into account' (*ibid.*).

<sup>13</sup> COM (96) 443, para.16.



that sector. The description conveys the messages, first, that the Commission believes that a general interest services sector exists and should be recognized as existing within the Community; secondly, that the central institutions of the Community have a legitimate and important existing function in relation to that sector of balancing general or public interest goals against the goals of free market competition; but, thirdly, that the central Community institutions have hitherto been confined to recognizing that general or public interest in the rather passive form of condoning Member State activities which would conflict with the Community requirements of free competition if they were not recognized as coming within the exception afforded by Article 90 of the EC Treaty.

In the Communication, the Commission goes on from those starting points to declare its objectives. The aims are to acquire what is, in effect, a more positive capacity to identify its own, supra-national, general interest services sector,<sup>14</sup> to apply to that sector its own concept of universal service or other public-service obligations,<sup>15</sup> and to be ultimately responsible for striking the balance between those public-service obligations and the demands of free competition in the internal market.<sup>16</sup> There are those who are apt to see in all this nothing more than an aim to protect the vested interests of public-sector undertakings in Member States in the face of increasingly harsh and direct intra-European and extra-European competition, but the foregoing analysis of this Communication suggests that it reveals aims which are at once more ambitious and less concessionary than a simple rearguard state public-sector protectionism would be.

All this said, the Commission was, as we indicated earlier, very cautious as to the nature of the legal measures which it recommended in pursuit of these objectives. In the Communication, it did recommend going beyond the option of simply leaving Article 90 in place as it stood, relying on it as a sufficient basis for the development of a Community general interest services sector. But the

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<sup>14</sup> 'The opening up of markets on a sector-by-sector basis for economic services and, in particular, networked services, and the introduction of universal service obligations should be continued . . . 'There are several sectors that have a cross-border dimension . . . which means that the general interest role is not necessarily best fulfilled at national level' (COM (96) 443, paras. 60, 63).

<sup>15</sup> '[The criteria of universal service] are not always all met at national level, but where they have been introduced using the concept of European universal service, there have been positive effects for the development of general interest services' (COM (96) 443, para.28).

<sup>16</sup> 'The Community's aim is to support the competitiveness of the European economy in an increasingly competitive world and to give consumers more choice, better quality and lower prices, at the same time as helping, through its policies, to strengthen economic and social cohesion between the Members States and reduce inequalities. . . . General interest services have a key role to play here' (COM (96) 443, para. 57).

Commission was not prepared to recommend the actual creation of a new legal base, preferring instead to suggest an addition to Article 3 of the Treaty, that is to say a new paragraph which would have added to the list of the tasks of the institutions of the community that of making 'a contribution to the promotion of services of general interest'.<sup>17</sup>

The framers of the Treaty of Amsterdam preferred to proceed in a slightly different way; it is hard to be sure whether they achieved less or more than the Commission had recommended. They enacted an additional Treaty Article, to be added to the Article 7 group which between them specify what is meant by the completion of the Community's internal market. The new Article 7d provides that:

'Without prejudice to Articles 77, 90 and 92 and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.'

This is accompanied by a Declaration to the Final Act which will, if and when made, provide that:

'The provisions of Article 7d on public services shall be implemented with full respect for the jurisprudence of the Court of Justice, *inter alia* as regards the principles of equality of treatment, quality and continuity of such services.'

It will be interesting and crucially important to see how much significance these provisions will have in the event. They may provide a vehicle by which the Commission can move the ideas set out in its Communication into its body of law and policy. The possibility that this will turn out to be the case has real implications for the subject which is being discussed in the present symposium, and we should turn to the task of teasing out what those implications might be.

I advance the bold suggestion that we may be witnessing the evolution of a general-interest sector or public-service sector at Community level, which is characterized by a recognition, on the part of the institutions of the Community, that it is necessarily and fundamentally a contested zone as between the economic objective of market efficiency and the social objectives of cohesion and inclusion, and that it is part of the task of the Community institutions to find the right way to reconcile those objectives. We could say, and we hope that it will emerge in the course of this book, that this is the way in which discussion of the law and policy

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<sup>17</sup> COM (96) 443, paras. 70-4.



relating to public services becomes linked with the discussion of labour law. That is because this dilemma between economic objectives and social objectives is one which permeates labour law as we currently understand it, and which has to be resolved partly by reference to labour law. We pursue this theme in the next section of this Chapter.

## **6. Labour Law in Relation to the Public Service Sector**

In this section it will be argued that the evolution and enlargement of the public-service sector is if anything an even more significant development in relation to labour law than in relation to public law. The transfer of services or activities from the purely public sector into the public-service sector has effects upon labour law which are parallel with its effects upon public law, but which may be even stronger and more decisive. In order to develop this argument, it will be necessary to show how labour law contains its own public law as well as private law sectors and how the balance between those sectors is altered by the growth of the public-service sector.

If we say that labour law contains its own public law as well as private law sectors we are in fact advancing a complex proposition which it is useful to disentangle into various aspects. Systems of labour law generally identify two broad types of employment regime, which we can think of as those of public and private employment. Under the private law regime, employment is conceived of as a market transaction, basically governed by the private law of the contract of employment. Under the public law regime, the employment relationship is differently conceived of, so that it exists between public institutions and public functionaries, and is basically governed by the principles of public law.

The matter becomes very complex, however, when we consider whether we can therefore say that there is a public sector of labour law in which the public law regime obtains, and a private sector in which the private law regime prevails. It is in fact difficult to enforce such a distinction too strongly, because systems of labour law vary considerably in the rigidity with which they separate the two regimes, and the ways in which they allocate employment relationships as between the two regimes. Nor can we resolve that problem simply by asking which employees are 'employees of the State', because different systems approach that question in ways which vary greatly.

Despite these difficulties, we could still, let us say twenty years ago, have asserted that the labour law systems of European countries generally contained a public sector of which the core consisted of employees of the State, and which



was at least to some extent governed by public law. That public sector was, to that extent, in a contrasting situation to a private sector governed by private law, pivoting upon the private law contract of employment. Very broadly speaking, the public-sector employment law regimes were characterized by the fact that they imposed greater obligations of loyalty upon employees, but conferred a greater degree of integration and security upon them, than the corresponding private sector employment law regimes.

More recently, however - and this is the key point in the present argument - the evolution and growth in importance of the intermediate public-service sector has fundamentally impinged upon, we might say has de-stabilized, that sort of dual-sector, dual-regime structure of labour law systems to the point where that kind of bi-polar analysis has become extremely difficult to sustain. For not only have we seen the evolution of what is, in effect, a third typology of labour law which is poised between the public law and private law regimes, but we can also observe that this typology is becoming so important and influential as to influence and encroach upon what happens in the original two sectors.

In order to understand why that is the case, we have to reconsider in the context of labour law the two features of the public-service sector which were seen to be so significant in the public law context, that is to say, first, the interposition of the public-service provider between the State and those who would otherwise have a direct relationship with the State, and, secondly, the augmenting of the role of the market citizen. We proceed, as previously in relation to public law, to elaborate on both those features, but especially the second one because of our special preoccupation with issues about citizenship - which do turn out to be particularly relevant to this discussion.

It has been argued earlier that when governments engaged on neo-liberal projects of privatization transfer activities from the purely public sector into the public-service sector, there nevertheless remains in place a significant secondary relationship between the citizen and the State in relation to that activity. In the context of labour law, however, we find that such transfers result in a much more complete severance of relationships between the employee and the State. In particular, the interposition of the public-service provider between the employee and the State operates to exclude the perception that the employee is a functionary of the State with a resulting special set of expectations about security of employment and the protection of a high standard of terms and conditions of employment. That is one of the main reasons why transfers of activities from the pure public sector to the public-service sector are often so controversial, especially in labour law systems where the public-sector regime is very distinct, and very strongly ring-fenced from the private sector.

In fact we can say that, for this set of reasons, transfers of activities into the public-service sector tend to be seen, both by their protagonists and their opponents, as paradigms for the achievement of gains in 'efficiency' because of the opportunities they provide for the introduction and development of more flexible employment regimes than are legally or practically available in the purely public sector. Given the extent of economic incentives currently operating upon governments of European countries to engage in this kind of flexibilization of employment in the provision of services for which they are politically responsible, it is not surprising that we find the public-service sector not only generally gaining in size and importance, but also becoming a model for the development of the other sectors of the labour market and the labour law system, especially of course the purely public sector.

There are important structural reasons why the public-service sector should be such an important location for the development of flexibility of employment, and by identifying these reasons we can understand better the meaning and implications of flexibilization for labour law as a whole, especially for the labour law of the public sector, and for the labour law of the individual employment relationship more generally. These structural reasons can best be understood by considering the nature of the public-service provider as an employer, and by contrasting that with the very different nature of the State as an employer.

This contrast originates in the general contrast which exists between the institutions of executive government on the one hand, and on the other hand the institutions which are public-service providers in the public-service sector. At least as a broad generalization, we can say that, both in principle and practice, the goals, objectives, or tasks of executive government and its institutions tend to be more diverse and diffuse, a more complex bundle of political, social, and economic factors than the corresponding goals, objectives, or tasks of public-service providers.

That is not to say that the goals, objectives, or tasks of public-service providers are in themselves simple or uni-directional ones. They are normally not simple, if only because we may regard it as one of the features which distinguish the public-service sector from the private sector that in the public-service sector, governments will have acquired or retained the power to some degree to shape and determine those goals, objectives, or tasks. Nevertheless, it is normally the case that the very rationale for the transfer of an activity from the purely public sector into the public-service sector is to ensure that there will be a unit of delivery of the service in question whose goals, tasks, and objectives will be more



clearly and tightly defined than would be the case if that activity were being conducted directly by one of the institutions of executive government.

Much of the discourse of new public management turns on precisely this contrast; the essence of new public management is to bring about the formation of specific units of management or of delivery of services, with precisely defined goals and objectives by reference to which efficiency can be measured, and gains in efficiency can be sought. This, moreover, links up very closely with the flexibilization of employment, which consists (in all but its crudest forms, at least), not simply of making the legal and contractual norms of employment looser and more malleable, but, particularly, of making them more responsive to the specific (and changing) goals, objectives, and tasks of the employing institution.

The public-service provider constitutes, and is created or chosen because it constitutes, the best vehicle for this kind of new public management and this kind of flexibilization of employment. That is to say, it can be endowed with tightly defined (yet controllable) goals, objectives, and task definitions; and the legal and contractual norms of employment within that institution can be made flexible by reference to those controllable goals, objectives, and task definitions, as regards both tenure of employment (especially by means of fixed-term contracts of employment or contracts of employment the duration of which is task-defined) and terms and conditions of employment (especially by means of performance-related remuneration, where the criteria of assessment can be tied to the immediate objectives of the public-service provider).

We can argue about whether this represents the triumph of managerialism over professionalism in the public-service sector, and whether, if so, that is a good or a bad thing. Without resolving those questions, we can accept that it is unsurprising, given the current interest in this kind of development both in employment practice and in labour law, that the public-service sector becomes a central arena for the contest between 'traditional' and 'flexible' labour law. We also find that the public-service sector acquires this paradigmatic or flagship status in terms of the role which ideas about citizenship play within it, and it is worth devoting a separate section to exploring the sense in which that occurs.

## **7. Labour Law, the Public-service Sector, and Citizenship**

We saw in an earlier section that one of the most significant attributes of the intermediate public-service sector was the way in which it provided fertile ground for the establishment and growth of a market or consumerist conception of



citizenship. The importance of that in relation to public law was, we saw, considerable; in relation to labour law, especially that of the traditional public sector, it is positively transformative. We shall seek to show that this is true in more than one dimension of labour law.

One such dimension is that of the flexibilization of employment in the public-service sector, as described in the previous section. In relation to the public-service sector, it proves to be especially attractive, and perhaps effective, for governments, when demanding and requiring efficiency, and in particular flexibility of employment in pursuit of efficiency, to do so in the name of the market citizen or the consumer citizen. One could almost say that they sometimes create the consumer citizen precisely in order to perform this task, to fulfil this disciplinary role.

This is more than mere rhetoric; it amounts to the promotion of a consumerist conception of citizenship as a major force, the focus of a major set of interests, in the formulation of the labour law of the public-service sector. Thus far, we have conducted that argument in terms mainly of the flexibilization of individual employment relationships, though no doubt with implicit reference to collective labour law. It will be useful to develop this analysis further in terms directly of collective labour law, in which dimension also the role and conception of citizenship turn out to be extremely and increasingly important.

The importance of the role and conception of citizenship to the collective labour law of the public-service sector comes about in the following way. The growth of the public-service sector in general effects a degree of re-alignment of the law and practice of collective bargaining and industrial disputes, especially as compared with the traditional public sector. Quite a lot of this is to the advantage of the State or government. For example, by transferring activities from the public sector into the public-service sector, governments can hope to fragment the previous patterns of collective bargaining and industrial action; and the public-service provider may be relatively free of the expectations placed upon the State itself to behave as a good or 'model' employer.

However, governments or public-sector employers may, upon transfer of an activity to the public-service sector, lose the benefit of specific legal restrictions upon industrial action applying to public-sector employees, either generally or in particular occupations. More generally, they may lose the benefit of a more general set of expectations, textured in a diffuse sense into the labour law system, that public-sector employees will feel and display greater loyalty and commitment to their duties of service provision than their private sector counterparts. Furthermore, they may, by transferring an activity into the public-

service sector, have abandoned a state monopoly and so no longer be able to threaten the workforce with the loss of that monopoly as a sanction against major industrial action in the relevant occupation or activity.

One quite significant pattern of response on the part of governments to the loss of those positions of strength in labour law or public-sector employment practice is to introduce the consumer citizen as a countervailing actor. This, in effect, counter-poses the claims of the consumer citizen to continuity of provision of goods and especially services against the heightened claims of public-service sector employees (compared with their public-sector predecessors) to freedom to take industrial action and deploy their industrial power to full effect.

All this tends towards a recognition of the rights of consumer-citizens as rights of the private law type, but brought within the framework of labour law. And it is in the intermediate public-service sector that this effect occurs most strongly, because it is there that the citizenship claims coming from a public law tradition converge with the consumerist or contractualist claims coming from a private law tradition. Governments in effect invite and encourage the consumer-citizen to regard most or all of the services provided by the public-service sector as essential services, and present themselves as maintaining or pursuing the claims, thus conferred upon the market citizen, to limit or prohibit industrial action in those, to that extent 'essential', services. It is to be noted that the designation of services as 'services of general interest' is especially conducive to that analysis.

We thus see, from what has been discussed both in this section and the previous one, that there is quite a significant tendency for a new kind of labour law to evolve in and from the public-service sector. This new kind of labour law is characterized by a new conception of the balancing of interests. Historically labour law has primarily been seen as a balancing of the interests of employers and employees, with the State figuring in the role of employer in the public-sector. There has of course been a consideration of the public interest or the interest of the community; but this has on the whole played a secondary role. In this new kind of labour law, that third set of interests, newly conceptualized as the interests of the market or consumer citizen, become part of the central balancing process, sometimes even coming into a direct theoretical and practical opposition to the interests of the workforce, especially in the arena of the public-service sector.

This section concludes by pointing to some concerns about and problems relating to this new kind of labour law which seems to be developing particularly



in the public-service sector. It is suggested that, in the balancing of competing interests in relation to the labour market generally and the public-service sector in particular, the analysis in terms of an antithesis between the interests of the citizen and those of the employee is far from being inevitable and may well indeed be suspect. It is an idea of antithesis which is generated or encouraged from within the perspective of the market or consumer citizen. The notion of antithesis is weakened or may even be dispelled if one examines the issues from a perspective of constitutional citizenship. Those arguments are very briefly enlarged upon in the ensuing paragraphs.

It follows from arguments which have been advanced in earlier sections that the notions of the public-service sector and of market citizenship go closely together and are in a sense mutually supportive. That is to say, the provision of public services by intermediate providers takes place in what is consciously designed as a market context or a market-like context. That market context is in effect created by the organizing of service provision either on a competitive basis, or on a basis where the pressures and incentives of competition are sought to be introduced by other means. In that kind of structure, the competition is identified as consumer demand, and it is the citizen-consumer who is regarded as making the demands, and the choices associated with the demand. This is regarded as a virtuous role for the citizen because of the importance of a keenly discriminating demand in ensuring rigorous competition.

In this context, the sense of opposition between the interests of the citizen and those of the public-service worker tends to be maximized. Whereas in the provision of goods, the workers who manufacture the goods are generally anonymous, so that there is little or no sense of presence between them and the consumers of the goods, the reverse is the case for public-service sector workers, who are typically the very embodiment and presence of the institutions by which services are provided to the public. Shortcomings in the quality or completeness of service provision present themselves as public-service sector workers acting directly to the detriment of citizens, especially when those shortcomings are the result of concerted industrial action.

This can all too readily come to appear as such a compelling account of the relationship between citizens and public-service sector workers as to appear totally inevitable and irrefutable. If, however, the citizen is regarded not so much as a consumer or market citizen but rather as a constitutional citizen, a rather wider set of possibilities opens up. The constitutional citizen is conceived of as having a wider role or set of roles, as having a more complex participation in the working of the democratic process. In this conception, it is more manifest that citizens include workers, that workers are also citizens, and that the two sets of

interests cannot be satisfactorily separated from each other. In the remaining part of this paper, we shall be concerned to show how the particular contributions to this symposium relate to those central themes.

## **8. Public Services, the State, and Citizenship: Welfare State, Post-welfare State, or European Social State?**

In the earlier sections of this paper, it has been argued that it is legitimate and useful to identify a distinct public-service sector, located between the public and the private sectors, for the purpose of improving our analysis and understanding of the current development of public law and policy, labor law and policy, and of the interaction between them. It has also been argued that this analysis, and this identification of a distinct public service sector, has to take place both at the level of the Member States and at the level of the European Community. At the former level, it is a matter of comparing and contrasting the development of different legal and political traditions and configurations. At the latter level, it is a matter of considering also the nature and extent of development of the European Union as a community, or as a federal State or meta-State. In this concluding section, I shall seek to show how this analysis involves a number of different but interlocking discussions or debates, which can be identified by reference to groups of chapters in this book, and to which those chapters make contributions which I regard as highly significant.

The succeeding chapters, and these groups of chapters, interrelate in the following way. The public-service sector, as identified earlier in the present Chapter, is the forum for and the focus of a set of changes in the nature of the modern European State, its public law, and its labour law. This is true both in the sense that the public-service sector is the central arena for these changes, and in the sense that the emergence of an analytically distinct public-service sector is itself a product and an index of those changes. The ensuing chapters show how this is a change occurring both at State level and at Community level and by way of interaction between those two levels. They also show how these changes are taking place both in public law and policy and in labour law and policy, and by way of interaction between those legal topics or disciplines.

There is an underlying reason for the complexity of these inter-actions. It is that we are seeing in the public-service sector, and indeed in the very fact of the evolution of a distinct public-service sector, an evolution, not just in the public law and policy and in the labour law and policy of the European nation-State, but in the very nature of the European nation-State itself. The point about this evolution is that it is occurring not just at nation-State level but also at Community or meta-State level and by way of reaction between those levels. We



can understand this by invoking the idea of an evolution away from the welfare-state model of the European nation-State. That evolution seems to involve movement both towards various kinds of post-welfare model for the nation-State, and also towards a certain kind of meta-state model at Community level. Much of that movement takes place in and around the public-service sector; that is the sense in which and the reason why that sector, and its distinct analytical existence, are of such transformative significance.

The above argument clearly needs further explanation. Let me begin by explaining what I mean by the evolution from the welfare State to the post-welfare State. Within the framework of Western Europe in the decades after 1945, we can say that the welfare State, which became a dominant model, was characterized by its relatively strong interventionism in guaranteeing high levels of social protection to its citizens. This was typically achieved by the direct assumption, by the State, of a high level of responsibility for the provision of services affecting the quality of life for citizens in the community, for sustaining guarantees of social security, and for underpinning minimum labour standards both of a substantive and of a procedural kind. Starting in the later 1970s, and gathering momentum in the 1980s and 1990s, was an evolution towards the post-welfare State, characterized by a scepticism as to whether those goals could effectively be pursued by means of public activity or close public regulation, and a systemic preference for seeking to achieve those goals by relying on free enterprise and the operation of the product market (to some extent in goods, but more particularly in services) and of the flexible labour market to do so as efficiently as was possible. Whether as part of this transformation or as a result of it, there emerges a public-service sector, now distinct from the public sector in a way that it previously was not, which is a zone of contestation between the values and approaches of the welfare State on the one hand, and of the neo-liberal State on the other. It is here, and in this, that the rather fragile self-definition of the post-welfare State is to be found.

This kind of transition from welfare State to post-welfare State also had a very important set of implications for the development of the European Community and of its role *vis-à-vis* its Member States. As the Member States began to move, in different ways and at different speeds, from being welfare States to being post-welfare States, it was probably predictable, and certainly became evident in the event, that the policy-makers who wished to retain, at least as ideals, the social goals of the welfare State would look to the Community itself as the residual guardian of those welfarist ideals, in however diluted a practical form. To this extent, there was an impetus towards an ironical reversal of the original role of the Community as the guardian of liberal free trade against

national protectionism, often of a statist or welfarist kind, practised by the Member States.

There are particular reasons why this should result in the evolution of a Community public-service sector, and a Community concern with that sector, such as we have identified earlier in this paper. The move from the welfare State to the post-welfare State involves, as we have seen, the retreat of the State from the role of primary provider of many services or primary undertaker of many service activities. In the post-welfare State, there is a corresponding expansion of the State or public role of regulating in the public interest the provision of public services which is increasingly being entrusted to private or semi-private undertakings. That regulatory role is identified in various different ways, but is generally envisaged as one of vindicating various kinds of public social and economic rights. There tends to be, as we have observed, a contest as to what kind of social and economic claims are being vindicated, indeed a contest as to whether it is social rights or economic arguments which are primarily at stake.

As the contest thus develops, in various ways, as to the sorts of policies which are to shape and inform the regulation of the emerging public-service sector, so the European Community becomes necessarily implicated in that contest. That is because it becomes apparent to all concerned that the Community has a very important actual role, and a still more important potential role, as a regulator of that sector. So the various policy makers and interest groups whose activities bear upon the central institutions of the Community become more and more strongly motivated to develop that Community role on their own terms. In varying degrees, they encourage the central Community to identify a public-service sector and a role in the regulation of that sector, in order to maximize the chances that this regulation will be according to their own conceptions of social and economic rights and claims. This is one of the ways, indeed one of the most important ways, in which the Community becomes implicated in the transition from the welfare State to the post-welfare State.

Hence it becomes apparent why this symposium, by focusing itself upon the public-service sector, takes place within an area of not yet fully articulated debates about the nature of the post-welfare State, and about the respective roles in relation to the post-welfare State of European nation-States and the European Community itself. It is extremely interesting and informative to try to locate the different contributions to this symposium within that arena. Although the contributors can all, I suggest, be regarded as having moderate centrist positions within this area of discussion, although moreover a high level of consensus pervaded our exchanges at our workshop, nevertheless highly revealing divergences of position about the public-service sector, labour law and citizenship



started to emerge during those exchanges, and can be observed even more clearly in the written contributions. It would be a crude over-simplification to portray the chapters as a series of antitheses between opposite positions. Nevertheless, by grouping the chapters together, we can identify a series of debates, or sub-themes, within our general discussion; and we can see how the participants take up positions which reflect the set of interests, indeed the intellectual and experiential base, on which each person is constructing his or her contribution.

The first group of chapters which can usefully be considered as relating closely to each other is made up of this Chapter, that of David Faulkner, and that of Carol Harlow. Our contributions are derived from the British experience of a relatively rapid and far-reaching move from the welfare State to a prominent, perhaps even the dominant, model of the post-welfare State in which the quest for economic efficiency by means of transfer of public-service activity away from the State has been pursued with particular ferocity. In that British context, the challenge has been more to the political system and ideology than to the legal system and ideology. In my Chapter, writing from the point of intersection between public law and labour law, I have sought to show how this challenge has resulted in the need to recognize a new analytical paradigm, both for the political system and for the legal system, which recognizes that the post-welfare State is typified by a third intermediate public-service sector in which the regulatory system is in various ways distinct from that of either the public (state) sector or the wholly private sector. I have been more concerned to develop this analytical framework than to discuss how far I welcome or how far I deplore the set of changes which are the subject of that analysis.

This is not to suggest that the other two chapters in this group are in any way less analytical or more judgmental than my own. Nevertheless, one can discern some degree of interesting divergence between them in the evaluations which they imply. David Faulkner writes from a base of public administration, from a deep experience of the working of British government over the last forty years, and from a strong personal commitment to the values which the British Civil Service brought to bear upon the British welfare State. He might be said to be specially concerned to point up the risks and dangers of too headlong a rush from the welfare State to the particularly commercially oriented version of the post-welfare State which was promoted in Britain during and after the 'Thatcher years'. At all events, he proposes a course of public discussion designed to ensure that concerns about community and about citizenship are not downgraded, or reduced to the level of lip-service, in current social, political, and ideological development.

Carol Harlow writes from a somewhat different perspective, and to interestingly different effect. Her perspective is from the standpoint of public law, rather than from the standpoint of public administration. She is anxious to remind us that the ways in which legal systems bear upon public services are multifarious and complex, so that we should not assume that they express a single ideal of public-service which is an obviously superior basis for the regulation of public services than other ideals emerging from other dimensions of legal systems. Thus, she points, in effect, to divergent traditions within public law - in particular, a French tradition which focuses upon the State itself is contrasted with an Anglo-Saxon tradition which focuses upon the individual or private citizen and his or her process rights against public authorities. Although in her view these and other relevant traditions are on the whole fairly convergent, she is nevertheless conscious of spaces between and around them, within which she thinks that the values and concerns of 'new public management' may have an important and legitimate place - at least to the extent that they should not be regarded as inherently and necessarily repugnant or threatening to the ideals of public-service in public law. That is to say, the criticisms one may have of 'new public management' ideology may also be in some measure applicable to older ideologies of public-service - there is as yet no clearly identifiable moral high ground in this debate.

For writers such as David Faulkner and Carol Harlow, reflecting British experience, the concerns are more with the ideology of public-service and public law than with the delineation of the proper sphere of public-service and public law. The experience to which they are relating is one in which the public sphere and public law are not set strongly and clearly apart from the private sphere and private law. The theoretical construction of a third intermediate public-service sector, for which I have argued, would, I imagine, raise questions for them as to the administrative and legal ideology which ought to apply within it, but would not, I suspect, be specially controversial as a classificatory or taxonomical proposition. It is quite otherwise, I think, for the writers of the following two chapters, Elisenda Malaret and Etienne Picard, for whom the relevant administrative and legal traditions make a much sharper division between the public and the private sphere, and correspondingly between public and private law. So, for them, the set of issues about the ideology of public-service and public law is crucially linked with very important questions about the proper *boundaries* of public-service and public law.

The direction of Elisenda Malaret's chapter is towards a loosening of the boundaries of public law. She wants to challenge the idea that public law is constructed solely upon the State and public authorities. She wishes the idea of public-service, or of service to the public, to operate not solely as an obligation



upon the State and bodies designated as public authorities, but rather as a way of both identifying and regulating a set of functions which may be carried out by private actors as well as by the State or other public authorities. This approach is seen as according a fluid boundary to the scope of public law. This is combined with a multi-tiered structure as to the kind of regulation which public law represents. That is to say, there is a top tier in which public law addresses the State as a primary and exclusive or monopolistic executant of a public function, and lower tiers in which public law addresses a wider range of executants of public-service functions, who may be operating in a market or market-like situation. So, in the terms of my argument, she wishes public law to be understood as extending beyond the traditional public sector into the intermediate public-service sector.

Etienne Picard, though speaking from within the same legal tradition as Elisenda Malaret and sharing with her a set of concerns for the fundamental and human rights of citizens, nevertheless takes a somewhat different position with regard to the extension of public law into the realm where public services are provided by private actors. His concern is that if public law, and indeed the public realm itself, are viewed in too open-ended a way, we may risk overwhelming and subsuming the values of the private realm of society, and the liberal rights enshrined in private law. Perhaps we could say that his stance in relation to the intermediate public-service sector is analogous, albeit taken up in a rather different idiom, to that of Carol Harlow. They share a view that we should not take our enthusiasm for the public-service values of public law to the lengths of embracing public law, especially in its more statist versions, as the dominant or exclusive discourse for the public-service sector. So real debates begin to emerge within an area of apparent consensus between generally like-minded jurists.

The succeeding three chapters, those of Alessandro Petretto, Wolf Sauter, and Giuliano Amato, indicate that there is in a sense a parallel set of debates among those working in the field of law and economics, whether as economists such as Petretto, or as lawyers specially interested in the regulation of competition, such as Sauter or Amato. If we can regard these three chapters as a group, we find that they converge, even more obviously than the previous two groups, upon the notion that there is an intermediate public-service sector to which a special set of regulatory considerations applies (as compared with the fully public sector on the one hand, and with the purely private sector on the other hand). They diverge, however, in their conceptions of what those regulatory considerations are, and of how those considerations are most effectively taken into account.

In the first of these three chapters, that of Alessandro Petretto, a considerable measure of confidence is displayed in the capacity of the European nation-State to invent and implement new patterns of effective regulation in the public-service sector, and in particular in relation to public utilities in a liberalized regime. He attaches great importance to the flexibility and adaptability of the forms of governance which become available once the State has defined its role in relation to public utilities in terms of regulation rather than of primary service provision. In particular, he sees great potential for various ways of separating regulatory responsibilities from planning responsibilities on the one hand and from control responsibilities on the other, with the regulatory responsibilities being entrusted to distinct regulatory authorities. Such hierarchies, moreover, can also be made more responsive, it is argued, by decentralizing them to sub-national levels. He reviews in this light some Italian and some British institutional examples of actually or potentially positive development.

In the second of this group of chapters, that of Wolf Sauter, the focus is on the central institutions of the European Community, rather than upon the Member States, as the location of development of new and promising approaches to the regulation of the intermediate public service sector. Taking as his case in point the telecommunications sector, he shows how the EC Commission has started to transform and build upon the idea of the universal service obligation, traditionally often a rather general rationale for the intransigent defence of public monopolies, so that a more refined notion of universal or general service obligation becomes a basis for public interest regulation and sustains moves towards liberalization. This is an example of the way in which, it has been argued earlier in the present Chapter, there is the emergence of a public-service sector at Community level as well as at nation-State level.

Of the three chapters in this group, it is the third, that of Giuliano Amato, which offers the most general overview of the developments which are occurring in this field, so much so that this chapter almost constitutes a kind of synthesis of the previous ones. He argues that, both at Community and at Member-State level, if I understand it correctly, we are witnessing in the third, intermediate, public-service sector a convergence of two legal or regulatory traditions. The one is a continental civilian legal tradition in which the identification of a public interest in a type of service resulted in its generally being subjected to an essentially statist regime of public law. The other is an Anglo-Saxon common law tradition in which the identification of a public interest in a type of service might but did not necessarily result in its being placed within a statutory regime, but in any case could leave that service basically in the realm of private law but subject to special public interest liabilities or requirements, of which the paradigm examples are those of the common carrier or common innkeeper.



For Giuliano Amato, the systemic outcome of this convergence is best understood in terms of competition law. What starts to emerge is not so much a new type of competition law, to be contrasted with a more traditional type, but rather a combination of parallel types of competition law - the one primarily concerned with the creation and maintenance of free competition and a free market, the other more concerned with the regulation of that competition in the public interest. I would add that it is perhaps in EC law that we can most clearly see those two interwoven strands of competition law, though we might argue that this tension between the two types is also inherent in Member-State legal systems of market regulation, and that it is also an identifying feature of the third, intermediate, public-service sector. We could also say that this is or can become a tension between Member-State legal systems on the one hand, and the Community legal system on the other. There is, moreover, a similar set of tensions within labour law in relation to the public-service sector, and it is with the consideration of that tension that the final group of chapters in this book, those of Alain Supiot and Silvana Sciarra, is concerned.

It will become apparent to the readers of this book how fully and effectively those two chapters succeed in transposing the themes of the earlier chapters into the discourse of labour law; I shall not, at this stage, attempt to summarize their arguments, beyond what is necessary to draw attention to certain nuances as between their respective approaches to the topic, nuances which are quite fine ones but which express the potential, and in a real sense the need, for serious debate among labour lawyers about the role of their discipline in the public-service sector. Alain Supiot writes from a position of concern about the way in which the legal regime for public employment in Member States of the Community such as France may have become too rigid to serve the needs of the public-service sector. He welcomes the chance to recognize a new European conception of services of general interest, which will form an important element in a developing idea of European social citizenship. Like Etienne Picard, he emphasizes the complexity of the relationship between such a conception of social citizenship on the one hand and, on the other hand, the set of fundamental individual human rights which he conceives it to be the task of a legal system to vindicate; but, at the same time, he sees a real opportunity to integrate the needs and legitimate expectations of the public-service workforce into that concept of social citizenship.

In the final, and summatory chapter of the book, Silvana Sciarra completes the accomplishment of the task of linking the earlier discussions of issues of public law and administration, and of economic and competition law, into the particular discussion of labour law; she can justly indicate, as she does in its title,

that the chapter has a bridge-building function. In her analysis of the issues for and from labour law, she is as willing as Alain Supiot to be enthusiastic about the possibilities for, as she puts it, constructing a new paradigm for the public-service sector and adopting it as a frame of reference for new citizenship rights. At the same time, she is much concerned with the need to secure, in the new situation and through those new conceptions of citizenship, the collective and representative protections which the public-service workforce enjoyed under the welfare-State paradigm, and she wishes to alert us to the risks that the rights and claims of consumer citizens may encroach upon the rights to collective bargaining and the freedom to take industrial action which are accorded to public-service workers, also to be regarded as citizens in that capacity. She reviews some extremely interesting legislative developments in Italian labour and public law from that perspective. However, to engage in further description and analysis of the chapters which follow would be improperly to pre-empt the role of the readers and reviewers. Enough has been said to suggest the way in which this symposium is meant to have structure and coherence. It is for others to judge whether that has in fact been achieved.





# **Labour Law - a Bridge between Public Services and Citizenship Rights**

Silvana SCIARRA





## 1. A New Centrality for Labour Law

One of the aims of these two papers is to construct a new paradigm and adopt it as a frame of reference for the formulation of new citizenship rights. The novelty of such rights consists in the fact that they are dependent on the contract of employment, thus coinciding with a traditional, albeit not exhaustive, definition of social rights; they should also be seen as a precondition for the granting of public service status, which has been widely analysed earlier in the book, especially in those chapters employing the language and methodology of public law. This paradigm is at the moment mainly a descriptive one, although the ambition is that it might acquire a normative relevance and influence policy-making, both at a national and a supranational level.

Labour law adds interesting insights to this methodological challenge. In most European countries this discipline has offered a very rich background to the debate on legal pluralism, not only because of the recurring co-existence of different sources in the regulation of contracts of employment, but also because of the creative role played by employers' and employees' associations in the definition of such rules.<sup>18</sup>

Furthermore, as a result of flexible and often original approaches adopted by legislators, combined with the innovations brought about by collective bargaining, labour law has always represented an ideal ground for both theory and practice of legal comparison and still contributes immensely to the circulation of new legal approaches and methodologies. For the same reasons, this discipline has been at the intersection of the private and public spheres of legal regulation, because of its historical ambition to cover mandatory issues on the one hand and to nurture freedom of contract on the other. This divide did not necessarily follow the contraposition state *v.* private employment; it rather indicated an inborn ability of this relatively modern legal discipline to seek the protection of individual and collective rights of the employee through legislation of public relevance, while at the same time fully respecting the somewhat limited - and yet recognized - autonomy of the two parties entering a contract of employment.

The tendency discernible nowadays in most legal systems to demolish all divides, and to attach no relevance to the public or private nature of the employer is taken into account in the discourse that links together different contributions in

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<sup>18</sup> K.W. Wedderburn, R. Lewis, J. Clark, *Labour Law and Industrial Relations: Building on Kahn-Freund*, (Clarendon, Oxford, 1983); G. Balandi and S. Sciarra (eds.), *Il pluralismo e il diritto del lavoro* (Ed. Lavoro, Rome, 1982); P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Clarendon, Oxford, 1993).



this book. Privatization of the employer may mean, as has been exemplified in some of the papers, that a public service will be provided by a private entity; this will in most cases affect the nature of the employment contract and have indirect consequences for those to whom the service is addressed. Privatization may also - as in a recent Italian legislative reform<sup>19</sup> - be extended to the contract of employment itself, thus abolishing almost all distinctions between public and private employees and equalizing all legal treatments.<sup>20</sup>

The latter choice may be inspired either by the desire to eliminate old privileges associated with public contracts of employment or by the intention to inject fresh air into the apparatus of public administration, introducing new elements of competitiveness and efficiency. In both cases labour law is used as a modernizing tool, as a channel for innovation which, especially in times of economic constraint, must be able to satisfy the needs of the administration and yet continue to guarantee rights for employees.

In this very general perspective, one of the aims of this book is to link labour law with those sections of the formerly public - sometimes still public sectors of the economy in which services of public relevance are being provided, regardless of the private or public nature of the employer. The definition of a third sector, suggested in Chapter 1, is extremely useful for an understanding of the very specific connotations which may be attributed to contracts of employment, and in particular to the employer and the employee considered individually as holders of rights and obligations.

In using this terminology we are aware of the fact that the same terminology has also been adopted in different contexts. One is the ever-growing area of the economy occupied by non-profit organizations, interesting in comparative terms as a symptom of the differentiated and increasing demands of citizens which States are not fully capable of satisfying.<sup>21</sup> Even those not-for-profit or voluntary organizations operating at an intermediate level between citizens and States are, in a broad sense, service providers, and as such not far removed from the perspective adopted in this book. Nevertheless, the emphasis we put on labour law as a channel for the interpretation of new citizenship rights makes our perception of the third sector rather different and shows that the same expression may be adopted in different disciplinary

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<sup>19</sup> See further section below.

<sup>20</sup> A comparative perspective on this point is in Y. Moreau, *Entreprises de service public européennes et relations sociales. L'acteur oublié* (ASPE Europe, Paris, 1996), 167ff.

<sup>21</sup> To quote only significant examples in a very extensive bibliography, see H.K. Anheier and W. Seibel (eds.), *The Third Sector: Comparative Studies of Nonprofit Organizations* (Berlin-New York, 1990); P. Donati, *La cittadinanza societaria* (Laterza, Roma-Bari, 1993).

approaches. A few preliminary points will be indicated in the attempt to build a bridge between labour law and new citizenship rights.

## 2. Rights to be Exercised within the Enterprise

One of the tasks historically assigned to labour law has been to favour the consolidation of citizenship rights within the enterprise,<sup>22</sup> ranging from the right to vote and to be represented to the right to free expression, freedom of speech, and so on. Trade union rights have a tradition of their own, although it can be said that they become stronger and more significant in an environment of workplace democracy. With regard to these rights, labour law may appear as a self-determined field, with its own rules and its own legitimation, an island of industrial citizenship within a wider context of political citizenship. Indeed, an analogy is often drawn between political rights and union rights, with special emphasis on the similarities which can be found or constructed in the system of representation.<sup>23</sup> Such an exercise may imply a misconception of collective interests supported by both management and labour as interests of very general application, whereas the tendency seems to be that they often constitute fragmented sections of the labour market and continue to ignore those who have never had access to it.

Whatever perspective one might have chosen - totally internal to labour law or projected towards a broader political context - the enterprise level was considered a crucial one for the exercise of constitutional rights and for the shaping of legislation in a mature phase of labour law developments.<sup>24</sup> Even under the pressure of redistributive measures, which might have led to the redefinition - sometimes the diminution - of individual and collective rights, the enterprise remains the place in which constitutional principles are presented as the outcome of labour law developments. Such a strong contribution from a very specific disciplinary approach may or may not rest on the foundations of strong

<sup>22</sup> A. Supiot, 'Citoyenneté et entreprise' in G. Koubi (ed.), *De la citoyenneté* (Litec, Paris, 1995); G. Lyon-Caen, *Les libertés publiques et l'emploi*, Rapport au ministre du travail, de l'emploi et de la formation professionnelle (La documentation Française, Paris, 1992). Of particular interest in this report is the proposal, de lege ferenda in the French system, to introduce an elected employee representative (délégué élu aux libertés individuelles) with the particular function - of a purely symbolic value - of protecting individual freedoms at the place of work (see 167-8).

<sup>23</sup> The French debate on union 'representativeness' held a few years ago still represents an example of strong ideological confrontation. See in particular J.M. Verdier, 'Sur la relation entre représentation et représentativité syndicales' [1991] *DS* 5ff. and G. Borenfreund, 'La représentation des salariés et l'idée de représentation' [1991] *DS* 685 ff.

<sup>24</sup> P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (Stevens, London, 1983).



constitutional traditions and, more specifically, constitutional rights. We shall see that this difference has certain implications in comparative terms, as well as in policy orientations, especially when we come to discuss the weakness of constitutional social rights at Community level.

The constitutional foundation of rights becomes even more significant if we remember that the centrality of the enterprise is not all that obvious, whenever radical changes in production cause the decline of organizational hierarchies and favour the spread of networks. Organizational changes of this kind, strategically oriented towards wider and dynamic markets, bring with them more flexible rules at the place of work and the need to adapt to different and continually changing market demands. Citizenship rights at the enterprise level are constantly challenged. This explains the importance of constructing them as a patrimony of the individual employee, entitled to carry them with him through the various phases of his working life and following, when necessary, organizational changes occurring within the enterprise.

Citizenship rights at the enterprise level are not taken into direct account in the present analysis, although they must be accorded an indirect relevance. Rules of democracy at the place of work are included in the definition of constitutional citizenship which was offered in Chapter 1; in the third sector, when the provision of public services is at stake, constitutional rights stemming from an employment relationship and rooted in the enterprise constitute a strong guarantee for the fair definition of other rules, to which the provision of the service concerned is related or on which it depends. They must, therefore, be considered a preliminary and indispensable step towards the consolidation of other citizenship rights.

The third sector is not meant to be a land of deregulation, nor a battlefield on which old constitutional traditions will be put to flight. It must be maintained that a meaningful commitment on the part of both national legislatures and European Community institutions is necessary in order to strengthen the links of the third sector with labour law and to encourage the definition of constitutional citizenship, while enhancing the rules of economic profitability and managerial efficiency. The declining centrality of the enterprise in other sectors of the economy makes all efforts and experiments in the third sector particularly germane. A new dimension of labour law is that of being able to cross the boundaries of the enterprise and confront constitutional citizenship outside it, while being aware of the constraints imposed by market citizenship. It must be stressed that such a dimension requires an active role on the part of employers' and employees' organizations, asked to perform their traditional function, while becoming aware of the unique characteristics of the third sector.

### 3. Collective Rights and Citizenship Rights

The quasi-public role acquired in most European countries by employers' and employees' organizations often leads to the conclusion in public opinion that they can be defenders of general and public interests on the economic and political scene, while continuing to be key actors in the definition and guarantee of sectoral interests. This point is relevant for the arguments developed in this book: no mechanical substitution of the political actors is envisaged, even when labour law, in various fields, refers to collective bargaining or to other functions traditionally performed by management and labour. Consequently, the general interest is not synonymous with the collective interest, if by the latter we mean - as in labour law jargon - the interest advanced by collective organizations respectively representing management and labour. This must be understood despite the fact that employees simultaneously enjoy the status of consumers and of citizens.

It is indeed crucial for the definition of the third sector to draw a line between citizens as employees and citizens as consumers. The latter may be granted special rights of access to public services and may demand that the quality and continuity of such services reach certain standards, as well as expect that all public services are kept under close scrutiny and tariffs are controlled. External evaluators or specialized agencies - both private and public bodies acting as market authorities - are increasingly often brought into the picture, in order to establish and enforce fair rules for the provision of the service concerned. Whether as administrative agencies or as independent bodies, they bring about a system of legal guarantees for citizens/consumers which is generically different from the past; better protection is achieved in the market than in a system of 'vote maximizers', indifferent as such to the goals of efficiency and productivity.<sup>25</sup>

All this has to do with the position of consumers in a regulated market; prior to this, the decision to give substance to consumers' rights in constitutional rights - such as the right to education and the right to health - is traditionally left to national legislatures. Even in the absence of a constitution, legislators may decide that consumers are entitled to rights as citizens of the country concerned. The extension of citizenship rights of this kind to non-nationals rests in the hands

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<sup>25</sup> See Amato, chap. 8 of this volume.



of state authorities, with the possible exception of rights linked to the free movement of persons (and of workers) within the European Union.<sup>26</sup>

The novelty to be shown in legal analysis is that, because of the very special role played by labour law, consumers acquire a new status: their needs with regard to public services may not be disregarded even when labour law issues are at stake. Labour disputes cannot conflict with the provision of services; obligations under the contract of employment - the required proper performance of work and observance of working hours and disciplinary codes, to name but a few examples - must coincide with the welfare of consumers, that is to say with their rights as progressively defined in the process (which varies according to legal traditions in different countries) of enlarging citizenship rights.

Furthermore, through contracts of employment two separate and yet coinciding goals can be achieved: in granting rights to the employee - ranging from the protection of dignity at work to stability in employment and seniority rights - the quality of the public service is to be expected as an outcome of contractual obligations. Public interest becomes synonymous for fair implementation of employment contracts, regardless of the private or public nature of the employer. While leaving to the State the definition of general interests, employment contracts become a means to an end: they establish rules of mutual interest between the parties and yet they contribute to the strengthening of constitutional citizenship.<sup>27</sup> Especially when it comes to the furthering of European integration, management and labour are more than aware of the constraints imposed by market citizenship. As bearers of consensus and promoters of so-called social pacts, they are key actors in the definition of voluntary, non-binding guidelines, which then become stringent, and essential to the implementation of national and supranational economic policies.<sup>28</sup>

This is not irrelevant for the legal discourse to be developed in the third sector. Consumers and citizens demand the expansion of public services, thus favouring the expansion of state functions different from those traditionally

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<sup>26</sup> See Supiot, chap. 9 of this volume and H. Verschuere, 'Libre circulation des personnes et protection sociale minimale' [1996] *R du MUE* 83ff.

<sup>27</sup> Y. Moreau, 'Transformation de la relation de travail dans les entreprises de service public', in *Le travail en perspectives* (coll. Droit et Société, LGDS), 427ff.

<sup>28</sup> 'Social pacts. Alliance for employment. Discussion and working papers of ETUI, 96.01.1', S. Sciarra, 'Collective Agreements in the Hierarchy of European Community Sources', in P. Davies, A. Lyon-Caen, S. Sciarra, and S. Simitis (eds.), *European Community Labour Law: Principles and Perspectives* (Clarendon, Oxford, 1996), 208 ff.

exercised as a sign of authority and sovereignty.<sup>29</sup> In the attempt to respond to the requests coming from very diffuse groups, state powers have become increasingly dispersed and public services increasingly disseminated and often decentralized. The 'osmotic' State, as opposed to one capable of monopolizing all rules and expressing very generalized values, operates in order to introduce efficiency at all levels of its apparatus; it co-ordinates the various levels of intervention, favouring competition or privatization and regulating public services wherever there is a lack of control over tariffs or the quality of the services themselves.<sup>30</sup>

The peculiarities of the third sector could, in perspective, influence the overall exercise of collective rights and introduce a new dimension in labour law. Collective bargaining, the uttermost expression of voluntarism and private governance when dealing with services of general interest, may include matters of public relevance within its scope, going beyond the private associations that are parties to the agreements, and orienting itself towards consumers as an undefined - and yet visible - class of citizens.<sup>31</sup> This is, among other reasons, a consequence of the dissemination of public services at a decentralized level and of the fact that their delivery is partially dependent on labour rules agreed collectively.<sup>32</sup>

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<sup>29</sup> M.S. Giannini, *Il pubblico potere* (Il Mulino, Bologna, 1986); S. Cassese, 'Le trasformazioni dell'organizzazione amministrativa' [1985] *Riv. Trim. Dir. Pub.* 374ff.; G. Amato, 'Autorità semi-indipendenti ed autorità di garanzia' [1997] *Riv. Trim. Dir. Pub.* 645ss.

<sup>30</sup> This scenario is described by A. Predieri, *L'emergere delle autorità amministrative indipendenti* (Passigli, Florence, 1997), 31ff. 'Osmosis' expresses the idea of a State constantly seeking an internal equilibrium, as opposed to being a monolith, in full control of its internal hierarchy of powers. Competition rules are central to this new institutional balance and functional to the protection of other constitutional values.

<sup>31</sup> O. Kahn-Freund refers to 'consumers as an amorphous mass', underlining the fact that unions only represent workers as producers. See *Labour Relations, Heritage and Adjustment* (OUP, Oxford, 1979), 82.

<sup>32</sup> Collective agreements, especially at plant level, may link pay increases to productivity; in the third sector clauses of this kind may have a potentially disruptive effect on the quality of the service. On the other hand, collective agreements may aim at the improvement of the service providers' performance, specifying managerial responsibilities, especially at a decentralized level. See the description of such trends, common to several European countries, in Moreau, n.3 above, 165ff. Another example is the inclusion in collective agreements of codes of conduct or deontological rules, as in the Italian experience following the so-called privatization of public employment contracts. See section below. In the first national collective agreements signed during 1995 and 1996 clauses have been included in the health sector in order to promote decentralized bargaining dealing with the duty to inform consumers' organizations of for the number of employees to be kept at work during strikes, in order to guarantee provision of essential services. See G. Albenzio, 'I principi e gli istituti comuni nei contratti collettivi dopo la riforma del pubblico impiego' [1997] 93.



Similarly, a new shadow is cast on the right to strike: when limits to its exercise are balanced against consumers' rights to have access to public services, we are obliged to redefine its original function. As a 'species of the right to freedom of association, not a way of furthering that right',<sup>33</sup> the right to strike acquires its own independence and becomes adaptable to different and variable working environments. Although more exposed to judicial - and sometimes quasi-judicial - decisions, it acquires a new dimension in the public space. Structured as a more flexible right, aimed at reaching and interpreting the general interest, it responds better to legal reformulation in systems characterized by an individual entitlement, rather than by 'organic' notions,<sup>34</sup> where it is for the associations to resort to collective action and thereby shape individual employees' behaviour.

Two further notions have been introduced and need to be clarified. The notion of individual rights exercised collectively is typical of some - not all - European legal systems. Whether applied to freedom of association or to the right to strike, this, purely apparent, contradiction in terms proves immensely helpful for the purposes indicated earlier in this book, namely the construction of a new legal paradigm, while defining new citizenship rights. It is useful to recall that, in a wider perspective, this approach should help to avoid what proves to be a historically recurring contraposition between expansion of public services on the one hand and consolidation of social rights on the other.<sup>35</sup> Earlier on, it was suggested that a 'socio-economic' notion of citizenship could be attached to the status of lawfully resident citizens and also to that of citizens employed by European enterprises, even when working outside national territory.<sup>36</sup> This stimulating and challenging interpretation allows us to introduce further thoughts on Community developments in the field of fundamental social rights and the construction of a theory of labour law capable of crossing national frontiers and expressing a supranational concept of individual guarantees.

The second notion to be investigated more closely is that of public space, which has been adopted in legal theory as well as in theories on democracy. In this specific context, we can assume that public space is the one occupied by the third sector, and that it is partially controlled by private associations - such as employers' and employees' associations - when it comes to dealing with those

<sup>33</sup> Framed in a wider and more general theoretical analysis of collective rights, this is the interpretation suggested by S. Leader, *Freedom of Association* (Yale Univ. Press, New Haven, Conn., 1992), 180ff. (the quotation is at 209).

<sup>34</sup> Lord Wedderburn, *Employment Rights in Britain and Europe* (Lawrence & Wishart, London, 1991), 276ff.

<sup>35</sup> E. Santoro, 'Le antinomie della cittadinanza: libertà negativa, diritti sociali e autonomia individuale' in D. Zolo (ed.), *La cittadinanza* (Laterza, Roma-Bari 1994), 93ff.

<sup>36</sup> Supiot, chap. 9 in this vol.

limited collective interests defined by the scope of the associations themselves. The characteristics of the third sector, as we describe it in this book, have significant effects on the attitudes of the traditional social partners. When acting within the sphere of public services, these associations are often forced to go beyond their original mandate and look at a wider angle of interests to be taken into account. Public space is the intersection of citizenship rights with social rights; it is an area of mutual reference for consumers and employees; it is a condition according to which their identities and aspirations may be confronted but not confused, nor unified in one amorphous notion of public interest.

In the public space a dominant role has been occupied by the media, whenever there has been a decline in other democratic institutions such as trade unions.<sup>37</sup> Public services attract the media in a very powerful way, inasmuch as they rely on information and use it as a permanent link with consumers. Consumers, on the other hand, are dependent on the media as the most visible and immediate channel through which their aspirations and demands are expressed and included in the political agenda. An even more spectacular impact is that wielded by the media when dealing with strikes restricting consumers' rights to the delivery of public services.<sup>38</sup> Informing consumers through the media is often the most efficient way of reaching all those potentially interested and therefore of partially protecting consumers' rights, giving them notice of the planned collective action and informing them of detailed arrangements for the delivery of services.

Labour law is present in the public space as one of the resources to which all interested parties - consumers, employees, the media - have to refer, in order

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<sup>37</sup> A. Touraine, *Qu'est-ce que la démocratie?* (Fayard, Paris, 1994), 213-5. When public services are at stake 'le spectacle' of media is at its best, according to A. Supiot, 'Malaise dans le social' [1996] *Droit Social* 119. In the shaping of public opinion, following Habermas and his ideas of free associations communicating among themselves without the State intervention, public space is the place in which 'the State has no responsibility', as indicated by P. Ladrière, 'Espace public et démocratie', in A. Cottureau and P. Ladrière (eds.), *Pouvoir et légitimité*, Ecole des Hautes Etudes en Sciences Sociales (Paris, 1992), 42. In this theoretical environment, citizens get involved in common decisions, rather than in individual exchanges, pursuing common goals. We argue that the State may have indirect responsibilities in the public space, due to the public relevance of the interests concerned. One way to prove this is through the creation of independent bodies, whose powers lie between administrative machinery and judiciary constraints. An interesting approach is that chosen by J. Lenoble and A. Berten, 'L'espace public comme procédure', in the above-quoted Cottureau and Ladrière, at 83ff.

<sup>38</sup> Art.2.6 of Italian Law 146/1990, discussed below in section 2, imposes an obligation on public radio and television services to release information about strikes as well as about available alternative services.



to establish legal responsibilities and to expose all the actors to fair rules. Fairness may not depend on the media alone; it however, may nevertheless be acquired through them as a value, exposed to criticism and to political evaluation, as well as to judicial responses. The public space is, as one can see, an open environment in which individuals seek a link with institutions, be they the unions, the providers of public services or the media, and reflect upon issues of democracy, such as new citizenship rights. The 'intermediate' responsibility of the State, referred to in Chapter 1, is discernable in relation to labour law as it is for the provision of services. We do not wish to describe a hierarchy of powers within the public space; rather, we want to show that concurrent sources of regulation are necessary for developing the legal discourse on constitutional citizenship. We also want to prove that the self-referential exercise put into action by the State when decentralizing public services is improved by the active role played by intermediate bodies, acting as regulators of the market.<sup>39</sup>

The debate on whether consumers' rights are better protected through very broad rules banning distortions of competition, or whether specific rules must be made enforceable for limited sectors of the market, illustrates the difficulty for the State of abandoning completely the politicization of its administrative machinery and accepting coexistence with private institutions, enabling the latter, to compete with public bodies on equal terms. Public services are the image of a 'compromise', a difficult co-ordination between the efficiency of specific sectors of the market and efficiency for the community as a whole.<sup>40</sup>

We maintain that changes in the structure of the State, as well as in procedures which bring citizens into contact with new manifestations of the State itself, are influenced by groups such as consumers' associations, single-issue organizations, or trade unions, and that these phenomena are slowly transforming legal systems, allowing for constant interpretation of legal principles. The new feature to be underlined is that interpretation of the law is not left exclusively in the hands of the judiciary. From the perspective of labour law, this implies a reformulation of its function and the introduction of more flexible rules, slowly taking the place of previous mandatory rules. The perspective of public law

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<sup>39</sup> It is useful to recall once more the idea of the 'osmotic' State suggested at n.13. Independent bodies are within the context of the conflicting interests to be regulated; procedures improve the participation of different groups, whereas judges tend to remain isolated from the differentiated realities they need to evaluate. This is the point of view of Lenoble and Berten, at n.20 above, 103-5.

<sup>40</sup> Moreau, n.3 above, 188, when drawing the conclusions of a comparative analysis dealing with several European countries and with several public services.

changes, too, since new powers are recognized for citizens in bringing claims for the recognition of agreed standards in the delivery of public services.<sup>41</sup>

#### **4. In Between Networks and Hierarchies. Agencies, Authorities, Independent Bodies, and the State of the Community Debate**

In the highly differentiated Community legal system, lawyers are currently forced, even more than in previous phases of transition, to understand the reasons behind legal changes and to relate the latter to new functions of the law. The complexity of such a supranational system, combined with the pressures and intrusions of the global system, through market competitiveness and constant technological challenge, favours the emergence of new institutions as an answer to new social and economic needs. The third sector - as we have repeatedly maintained in this book - is a significant example of how to construct a new paradigm for constitutional citizenship, while facing the emergence of market citizenship. It is clear by now that we are attempting to answer the question what to do with citizenship, rather than what citizenship means;<sup>42</sup> the very specific angle of our analysis is, despite its specificity, a way of looking at important institutional changes affecting the legal system as a whole.

It is our intention to show that in the European Union a transition is occurring from state-based to supranational constitutional citizenship, and that social rights, though still very marginal in terms of enacted reforms as well as in the discussion of future policies, are likely to acquire a more central relevance. In the debate which has taken place in most European countries during the last

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<sup>41</sup> See Ch. 3 by C. Harlow in this volume, discussing the Citizens' Charter in the British experience. As for the Italian counterpart, a Charter was adopted in 1994 as a guideline issued by the Prime Minister. See S. Cassese, *La nuova costituzione economica* (Laterza, Rome-Bari, 1995). The Charter sets 6 fundamental principles: equality among consumers, objectivity and impartiality, continuity and regularity in the delivery of services, consumers' right to choose between service providers, consumers' participation in the delivery of services, access to information, and efficiency. One of the purposes of this book is to co-ordinate the logic of a citizens' charter with the rights of employees, in order to build up a constitutional framework which eliminates all conflicts or inconsistencies between different and often overlapping spheres of rights, as anticipated in O. Kahn-Freund's seminal work, at n.14 above, particularly at 78, where the metaphor is that of the double mask worn by employees in the 'ghost play' of social relations.

<sup>42</sup> As suggested by P. Costa, 'La cittadinanza: un tentativo di ricostruzione "archeologica"', in Zolo (ed.), n.18 above, at 50. This author adopts the view, largely shared in this chapter, of moving the research focus from the centre to the periphery, namely from the peak of the political system to its bottom, where individuals seek to enter the system itself and to find their own allocation, while defining their affiliations and their needs.



twenty years, neo-liberal theories have placed the emphasis on free competition and attempted to evaluate individuals with regard to their ability to survive in the market, granting them rights with totally different goals from those envisaged in early European labour law traditions.<sup>43</sup> Following this line of thought, consumers are better protected when no barrier is built which could impede their access to services of general interest; if labour law appears as an obstacle, it must be bent and adapted to broader needs and demands.

At the other end of the spectrum, theories which can be broadly described as social-democratic place emphasis on social cohesion within the European Union and display a special concern about social exclusion from the floor of rights which are slowly and often unsatisfactorily emerging at supranational level. In addition to the extension to citizens of social rights which are marginal to the creation of a new political entity and to its social sphere, these theories are also concerned with the quality of public services to be delivered and praise labour law rules as those which are better aimed at the protection of individuals, seen in their entire and rich dimension of employees and consumers at the same time.<sup>44</sup>

When looking at public services, neo-liberals overestimate consumers in their capacity for setting new universal standards in the provision of services and consequently creating an abstract legal order in which a durable definition of public interest can be found; in so doing, they obscure all clear goals pursued by labour law, ignoring the fact that previous compromises and legislative reforms have already changed the state of the discipline considerably, bringing it closer to modern systems of production and new organizational facets of the employing enterprise. They also pay very little homage to collective bargaining, both as an institution capable of adapting itself to the market and as a machinery adjustable to different industrial strategies. Social democrats,<sup>45</sup> on the other hand, are split

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<sup>43</sup> References to the British case are in S. Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' [1992] *Oxford Journal of Legal Studies*, 24ff. Criticism of the neo-liberals is expressed, among others, by S. Deakin, 'Labour Law as Market Regulation: The Economic Foundation of European Social Policies', in P. Davies et al., at n. 11, 63ff.

<sup>44</sup> Early and significant samples of this literature can be found in K.W. Wedderburn and W.T. Murphy (eds.), *Labour Law and the Community* (Institute of Advanced Legal Studies, London, 1982); more recently Moreau, n.10 above. A documented critique of neo-liberal theories is offered by Wedderburn, n.17 above, 198ff. A comparative perspective is offered by E. Ales, 'Tutela dei diritti del cittadino e sciopero nei servizi pubblici' [1997] *Giornale di diritto del lavoro e di relazioni industriali*, 139 ff.

<sup>45</sup> The European Commission has recently favoured discussion along these very broad lines. See the Report by the Comité des Sages, *For a Europe of Civic and Social Rights*. (EC Commission, Brussels-Luxembourg, 1996.) With regard to the strategies of social democratic governments of Western Europe during the 1970s especially in relation to full employment, an

between the aspiration to reconstruct social rights from the bottom in the hierarchy of norms and the conviction that fundamental principles must guide such an important new founding phase, linked to necessary but still unfinished reforms of the Treaty on European Union.

Both theories are still lacking a 'constitutional ordering', a governance structure which, overcoming the limits of markets and hierarchies, can show a new pattern of adjustment to changes 'in its context of operation, as opposed to changes within a particular context'.<sup>46</sup> The metaphor of the 'osmosis' occurring within the State, in the process of constructing new internal equilibria and recognizing new collective interests to be taken into account, suggests that new legal techniques are necessary in order to establish coherent patterns of change. It has been suggested that a new pluralism is emerging, not only because of the growing number of different interest groups making their voices heard, but also because of the ways in which the representation of interests is organized, ranging from political representation to union and management associations, to opinion polls and referenda, and even to judicial activism.<sup>47</sup>

A significant reaction of the State to all these different levels of representation and to their fragmentation is to be found in the creation of independent - or quasi-independent - agencies. These are not an alternative to constitutional ordering, but contribute to its construction, suggesting rules of compatibility between competing powers; their independence from the State makes them more objective and, where necessary, more pragmatic, when it comes to understanding the functioning of the economic system and favouring changes which can improve its transparency and competitiveness; the relatively new element, useful in the context of the present analysis, is that they maintain some form of coercive power, even when dealing with private interests.

They lie between markets and hierarchies; in such a position they are asked to provide efficient rules, valid for the solution of specific conflicts of interest,

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enlightening analysis is to be found in F. Scharpf, *Crisis and Choice in European Social Democracy* (Cornell University Press, 1991).

<sup>46</sup> This expression is taken from C. Sabel, 'Constitutional Ordering in Historical Context' in F. Scharpf (ed.) *Games in Hierarchies and Networks* (Campus Verlag, Frankfurt, 1993), 65ff., in particular 79-80. His overall analysis of how to overcome the dichotomy of markets-hierarchies, is very relevant to the idea put forward in this book, namely to reflect upon a third sector in which public services are taken as indicators of emerging citizenship rights. Changes occurring in each constitutional order 'may require a reordering of the order itself: a redefinition not just of which unit is responsible for what . . . but also and more importantly a redefinition of who is entitled to be heard on which questions' (at 80).

<sup>47</sup> Predieri, n. 13 above, 33 ff.



without being detached from the fulfillment of general interests. Independence from the State should then imply independence from the political system - not easy to achieve, especially when appointments occur through parliament - thus favouring the adoption of technical decisions, taken by people who are guided solely by their expertise, rather than by loyalty to a political apparatus. It is no strange coincidence that supranational institutions, whose task is to govern the global economy while monitoring changes within regional or national economic systems, have paid attention to the decentralization of state prerogatives and to all processes 'bringing policy-making and implementation closer to the communities they serve'. In indicating that priority areas - such as health, education, and the creation of infrastructures in all relevant fields - should be chosen, it is also underlined that consultative mechanisms should be established, in order fully to understand the preferences of the affected groups and to make all reforms intelligible to citizens.<sup>48</sup>

Desirable as these very general orientations for state policies may appear, they cannot be separated from broader reforms, such as those occurring at supranational level. Within the Community, it proved relatively easy to co-ordinate national laws with supranational antitrust legislation, the former being functional to the aims of the latter, namely banning distortions in competition and the abuse of dominant positions within an integrated market. The example of competition law is a good one: it does not take concrete form in policies, which offer only broad guidelines to Member States, but translates itself into binding norms to be complied with at national level.<sup>49</sup> The presence of intermediate bodies between markets and consumers has hitherto favoured the linking of legal rules to communities as well as to individual citizens. Whereas competition needs to be governed in a strategic way, the functioning of public services has been viewed as 'tactical',<sup>50</sup> subordinate to the contingent needs of specific sectors and lacking co-ordination with an harmonic and comprehensive regulation of the market.

<sup>48</sup> World Bank, *World Development Report, The State in a Changing World* (OUP, Oxford, 1997), 28 and 129-30.

<sup>49</sup> S. Cassese, n. 24 above, 41.

<sup>50</sup> This is one of the main criticisms levelled at Community initiatives on public services by CEEP, following an analysis of secondary legislation referred to specific sectors, such as transport, postal services, telecommunications, energy, and the media. See CEEP, *Europe, concurrence et service public* (Masson, Paris, 1995), 35. The Commission's point of view is in the Communication of 11 Sept. 1996, *Services of general interest in Europe*, COM(96)443 final. Whereas universal services in telecommunications must provide for 'affordable access', with a view to protecting disadvantaged users, other general-interest services (health, welfare, education, water, and housing) must be left to national or regional responsibilities. The paradox is that, while universal services must reach the socially excluded, nothing is provided to promote the inclusion of marginal citizens within the provision of public services.

The suggestion put forward during the IGC prior to the Amsterdam summit, namely to introduce a European charter of public services, was associated with the creation of an evaluating body, empowered to monitor the enforcement of national and Community policies, in conjunction with all interested parties.<sup>51</sup> The attempt in this proposal was to introduce a new 'synthesis' in what appeared to be an uncoordinated field of legal intervention and to specify leading principles from which public services should draw inspiration. The intention to link public services to other important areas of Community action, such as consumers protection, the environment, and research, and social policies, to name but a few, was also favoured by the unsatisfactory notion of universal service<sup>52</sup> which was gaining ground in view of the reform of the Maastricht Treaty.

It is at this point in the story that the new centrality of labour law, which was suggested earlier, should again be stressed. Principles inspiring a new Community definition of public services must include continuity of provision, equal access (regardless of national origins and linguistic or cultural diversities), efficiency, quality, adaptability to new consumers' needs, transparency, and participation. Labour law is, in many respects, instrumental to all this. Services of general interest must combine competitiveness with efficiency, quality of service with modernization of management. Labour law issues are hidden between the lines: not only must strikes be regulated, in order to guarantee the continuity of the service concerned, but training must also be provided and human resources must be improved.<sup>53</sup>

Within this very broad framework, which has not fully developed into reform of the Treaty, it proves indispensable, on the one hand, to further the process of national reforms, and, on the other, to elaborate on the impact of Community social policies and on the consolidation of fundamental social rights within the Community legal order. The aim is to balance the functioning of the market against new concepts of constitutional citizenship.<sup>54</sup> At national level

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<sup>51</sup> CEEP, n. 33 above, 49-50.

<sup>52</sup> See Ch. 7 by W. Sauter.

<sup>53</sup> CEEP, n.33 above, 42-3, 48. The full proposal of the European Charter of services of general economic interest is in Annex II, 67ff. This proposal, based on the inclusion of public services in the Treaty, different from the exception envisaged in Art.90(2) of the EC Treaty, remains on the agenda of political and academic discussion. For a brief account of the limited changes in the Amsterdam Treaty, see W. Sauter's concluding remarks and in particular n. 63 and Freedland.

<sup>54</sup> The Maastricht Social Chapter (Art. 2(6)) explicitly excluded from Community competence wages, the right to organize, the right to strike, and lockout. Its inclusion in the Amsterdam



public services represent a testing ground in which to prove that the lowering of labour standards brings about false efficiency and does not add new ideas to the creation of a supranational legal system. In the following sections an attempt will be made to prove the validity of the theories presented so far by examining them against specific examples of legislation - the Law on the right to strike in public services and the Law on the privatization of employment contracts in the former public sector - taken from the Italian legal system.

No strict link can be established between the two statutes chosen for this exercise. Since both of them rely heavily on collective bargaining as a means towards better protection of consumers' rights, the opportunity will be offered to speculate on the role of private governance in the fulfillment of public and general interests. Furthermore, since both of them rest on a solid constitutional basis, to be found in the 1948 Italian Constitution, it can be argued that the combination of labor law with public law principles - right to strike v. guarantees of the fundamental freedoms of individuals, right to collective bargaining v. fair and impartial functioning of the public administration - is a challenging one, to be taken into account while discussing constitutional citizenship at Community level.

## **5. The Italian Law on the Right to Strike in Public Services: Proving the Centrality of Labour Law**

The first item of legislation<sup>55</sup> chosen as an example to test the theories developed so far is the product of social unrest at the end of the 1980s, especially in rail and air transport, but also in other public services. It marks a historical turning-point in Italian labour law, which had previously been characterized by abstentionism in the field of industrial conflict; that is why a symbolic value is attached to this statute, which, for the first time in more than forty years since the enactment of

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Treaty does not change the substance of such exclusions, although the debate is open on whether ratification of the Treaty should include a phase of renegotiation of the Protocol and Agreement on social policy. As for the academic debate addressed to the IGC, reference can be made to R. Blanpain, B. Hepple, S. Sciarra, and M. Weiss, *Fundamental Social Rights: Proposals for the European Union* (Peeters, Leuven, 1996), and to B. Bercusson, S. Deakin, P. Koistinen, Y. Kravaritou, U. Muckenberger, A. Supiot, and B. Veneziani, *A Manifesto for Social Europe* (European Trade Union Institute of the ETUC, Brussels, 1996).

<sup>55</sup> L. 12 June 1990, n.146, Norme sull'esercizio del diritto di sciopero nei servizi pubblici essenziali e sulla salvaguardia dei diritti della persona costituzionalmente tutelati. Istituzione della Commissione di garanzia dell'attuazione della legge, GU 14 June 1990, no.137. The ILO English translation - which does not take account of later amendments - can be found in Labour law documents 1990-ITA 1.

the Constitution, ventured into a highly sensitive area of collective labour law.<sup>56</sup> The primary function of the statute is to grant a wide range of personal fundamental rights, which must be balanced against the right to strike. The individual nature of the right to strike makes its comparison with other fundamental rights - all likewise enshrined in the Constitution - a particularly challenging legal exercise, aimed at comparing different angles of the individual's sphere of constitutional prerogatives.

There were two notable reasons, underlying the widespread discontent which at the time opened the way to legal intervention: one had to do with inadequate salaries, especially in key state areas (such as schools and health services); the other concerns the attack on the main large confederations of unions by new groups, not yet organized into associations but nevertheless very militant and conflictual. Although these reasons may not be deeply explored in this Chapter, they need to be borne in mind for a better understanding of the social reality the legislature had to face. Another element must be mentioned: the media played an extraordinary role in accentuating the reasons and the effects of conflict. Through them, public opinion had to face a situation of national emergency, caused mainly by strikes. Unions had to confront their own divided loyalties, on the one hand feeling responsible for their members, while on the other being cautious and sympathetic towards consumers.

These conflicting social demands meant that a balance had to be struck between different rights, all of constitutional relevance. Doubts were expressed, by theorists as well as by employers' and employees' associations, as to the tools to be adopted, namely recourse to legislation instead of case law. The latter had previously acquired an important role, particularly through key decisions of the Italian Constitutional Court, and filled the gap in existing legislation, demonstrating that conflicting interests could be regulated on a case-by-case basis, yet establishing principles of general import.

Similarly, other voluntary means, such as the unions' private codes of conduct for the regulation of strikes in key areas of the economy, proved to be of little relevance for lack of effective sanctions owing to the private nature of the codes, which were enforceable only among union members. The latter point is more significant than might at first appear. In public opinion and particularly

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<sup>56</sup> A complete account of the relevant bibliography would be disproportionate to the purposes of this chapter. Materials for both historical and legal analysis are offered by U. Romagnoli and M.V. Ballestrero in their commentary on the law in G. Branca and A. Pizzorusso, *Commentario della Costituzione, sub art.40, Supplemento* (Zanichelli, Bologna-Rome, 1994). The sociological reasons leading to social unrest in relevant areas of Italian public service are offered by L. Bordogna, *Pluralismo senza mercato* (F. Angeli, Milan, 1994).



among advocates of legal abstentionism, the weakness of union sanctions proved that at the origin of social unrest there was an unresolved problem of conflict within the conflict. A bitter and often hard confrontation between employees belonging to different associations was taking place, demonstrating the collision between differing industrial cultures and opposing union traditions.

In the past, the long established main confederations had been able to enforce codes of conduct and exercise control over their own members, while keeping access to conflict open, thus confirming the tradition of an individual right to strike which found expression only in concerted and collective industrial action. Spontaneous groups, by contrast, did not consider themselves bound by any code of conduct, and felt free to adopt an aggressive attitude towards the confederations. Conflict within the conflict resulted in an assault on consumers' rights and provoked uncertainty among the unions, in search of an identity as guarantors of general welfare, as well as vouching for the interests of their members.

This brief analysis of the reasons behind the Italian statute being examined here confirms the centrality of industrial action in the Italian constitutional tradition, similar to that of other European countries and yet unknown to some of them. It can be argued that, owing to established legal traditions stronger in some legal systems than in others and because of practices enforced by unions, the dilemma between consumers' rights and the right to strike remains - to a certain extent - unresolved. Legal rules, effective in some systems, are nothing but experiments in others, subject to unpredictable responses from social rules.

That is why a combination of different measures - both legal and voluntary - has often been envisaged in the Italian labour law tradition, in order to respond to employees demands and at the same time respect consumers' rights. As indicated above, voluntary measures may encounter a contradiction when they try to impose general rules, while lacking general enforceability. When dealing with consumers' rights, unions tend to rely on the bargaining power they have acquired as employees' representatives; they imply that a public role is the consequence of private governance and that competence in industrial relations matters brings with it a constitutional culture, broad enough to understand and interpret consumers' demands.

Regulatory techniques combining law with collective agreements or private codes of conduct often include very powerful procedural devices; rather than endowing individuals with positive rights, they rely on collective entities to shape aspirations, passing through different phases of progressive clarification as to what the outcomes of legal enforcement might be. The right to recourse to

differing sanctions, including non-binding ones, is parallel to the construction of procedures; when industrial conflict is at stake, the relevance of moral sanctions may become of some importance and be included among the available answers offered by the legal system.

In the parallel debate taking place in public law, particularly when the privatization of public services occurs, procedural elements also become very central, and open to the contribution of collective organizations. This further point of contact between two different legal approaches again shows the peculiarities of the third sector. From two different perspectives - of consumers' and of employees' - procedures are seen as a guarantee of fairness and exactitude. Procedures bring the individual closer to the public service, passing through the selective filtre of large organizations, as well as smaller but powerful interest groups. The crucial question remains how to transform this open and dynamic process into a stable system of constitutional citizenship, not dependent on the changeable strength of private bodies, nor on the unpredictable consequences of countervailing powers.

## **6. Which Consumers' Rights, Which Public Services?**

A key element in interpreting the Italian statute is the definition of public services as regards setting limits on the right to strike; this operation is functional to the guarantee of constitutional rights referred to in the statute itself. The catalogue of rights and the wider description of services<sup>57</sup> are by no means to be considered exhaustive nor mandatory; it is rather the expression of significant choices which should bind those interpreting its content and preclude excessive argument over interpretation. The notion of public service, irrespective of the private or public nature of the employment relationship, derives from such a preliminary choice of the legislature, so that all measures aimed at limiting the right to strike have to be framed within this coherent scheme.

For this purpose concurrent sources of regulation are available. First of all, the statute delegates to collective agreements the definition of important matters, without ignoring the fact that recourse to employers' unilateral decisions is the outcome of unsuccessful bargaining. This also implies that a variety of sanctions

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<sup>57</sup> As in Art.1, ss.1 and 2. Public services, described as 'essential' in the statutes, aim at guaranteeing the enjoyment of personal constitutional rights, ranging from the right to life, health, personal freedom and safety, to freedom of movement, social security and welfare, education to freedom of access to telecommunications. In ss.2 all these very broad personal rights are further exemplified in more specific corresponding public services in which limits to the right to strike need to be established.



is envisaged, as we shall see later. Furthermore, an independent administrative agency<sup>58</sup> is established, with rather weak mandatory powers, although potentially able to gain moral force in public opinion.

Articles 1 and 2 of the statute are structured so as to be closely interrelated: guarantees provided for personal constitutional rights must imply limits on the right to strike. Therefore, notice of at least ten days is made compulsory as well as an indication of the expected duration of strikes. Essential levels of public services, preferably to be specified in collective agreements, must still be provided, even during the strike. In the rationale of the law 'indispensable' service means, in concrete terms, requiring a certain number of employees to continue to work during the strike; it may also mean that such services must be provided in accordance with certain patterns of frequency and recurrence. In both cases, the technicalities (how to choose those employees who are not to stop to work, how to organize the periodical provision of the service) have to be agreed collectively. Since no duty to bargain is envisaged under Italian law, agreements, although favoured by the law, are by no means a compulsory outcome of negotiations.

Despite the lack of a generalized legal enforceability of collective agreements under Italian law, voluntary sources are meant to play a central role in the protection of personal constitutional rights. In one of the very first opinions delivered by the Commission, it was stressed that the obligation to provide public services 'precedes' collective agreements and is somehow 'independent' of them. In an overall interpretation of the law, this very general principle leads to seeking final responsibility for the guarantee of individual constitutional rights in the employer's behavior - namely in the provision of essential or indispensable quotas of the public service concerned, even when no collective agreement has been signed. This wide discretion is counterbalanced by the fact that the right to strike remains a protected constitutional right throughout. Because of the strong bias of the Italian legislature towards unions, the employer may be exposed to sanctions

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<sup>58</sup> Which will be referred to in the text as the 'Commission'. It is made up of 9 members, to be chosen from among experts in the field of constitutional and labour law and industrial relations, appointed by the President of the Republic, following the indications of the two branches of Parliament. Members of the Commission are independent of the political system and cannot serve in other public bodies or be members of political parties, trade unions, or employers' associations. The Commission may request specialized opinions from experts in the specific public services in which conflict is at stake, as well as from leading figures in consumers' associations.

<sup>59</sup> *Acotral*, decided on 9 Oct. 1990, is reported at [1991] 528.

for anti-union activity if he goes too far in striking a balance in favour of consumers, thereby unnecessarily limiting the right to strike.<sup>60</sup>

Judges occupy an important position in the whole edifice of the 1990 statute. Case law has to set the borderline between two areas of equally protected constitutional rights. In order for it to do this, very pragmatic elements must be taken into account for the evaluation of the employer's behaviour, such as the designation of which sectors of the public service which are instrumental to the protection of personal constitutional rights, and the correct minimum number of employees who should be required to work during the strike.

Judicial decisions may become very detailed, seeking rational criteria among the rules governing work organization and paying attention to job descriptions, as in a fact finding exercise; yet, since they deal with extremely delicate balances between constitutional values, they must reflect the common understanding of what is thought of as 'indispensable' for consumers. It thus happens that court cases examining a particular workplace's organization and the terms and conditions of its employment contracts are made to express a general and overall conception of public interest. Even when the notion of public and 'indispensable' service is kept very broad, in order to meet the widest possible notion of general interest, the concrete definition of consumers' rights is linked, on a case-by-case basis, to local providers of public services and dependent on the concrete ways in which they are geographically distributed, efficiently organized and properly and sufficiently funded.

When a closer look is taken at this extremely complex balancing exercise, we discover that, in order to prove effective for consumers, solutions become optimal when framed in a decentralized scheme of reference; at this level the general guidelines provided for in the law and in centralized agreements must be translated into concrete measures, so as to become directly functional to consumers' rights. In this respect, a gap in the statute must be pointed out: the role of consumers' associations is kept very marginal. This choice by the legislature may evidence a cultural preference for dealing with industrial organizations and a willingness to depend on their well-established capacity to resolve all disputes within a framework of agreed standards.

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<sup>60</sup> The reference is to Art.28 of the Workers' Statute (L. of 20 May 1970, no.300). Some courts followed this interpretation, which is not unanimously accepted. The opposite tendency is to consider the employer's behaviour legitimate, whenever it complies with the Commission's proposal, viewed by the courts as immediately binding and used as a parameter for judicial decisions. Early case law on the 1990 statute is analysed by P. Pascucci, 'L'esercizio del diritto di sciopero nei servizi essenziali: una prima ricognizione' [1993] *Giornale di diritto del lavoro e di relazioni industriali* 369ff.



A case-by-case analysis and at times a fact-finding exercise is one of the tasks assigned to the Commission, which must evaluate all agreed solutions on quotas of the public service concerned to be provided during the exercise of the right to strike and, if it disagrees, issue a proposal to be notified to the parties. It can do the same when no collectively agreed solution has been reached. The problem here is to strike yet another delicate balance since the Commission's initiative, although provided for in the statute, must not be too invasive of the autonomy of the parties, when they bargain collectively; no obligation to accept the Commission's proposal can be envisaged, since the law explicitly favours a collectively agreed definition of 'indispensable' services.

The Constitutional Court was asked to evaluate conformity with constitutional principles of the very peculiar typology of collective agreements introduced by the 1990 statute.<sup>61</sup> Article 39 of the Constitution deals with the right to organize collectively and refers to future legislation the definition of criteria for granting *erga omnes* enforceability to collective agreements. The fact that no such legislation was ever enacted - as also happened with Article 40 on the right to strike, which still lacks legal regulation outside the area of public services - creates an anomaly in the entire system of labour law, the effects of which can be seen even in the interpretation of the 1990 statute. With regard to the latter, the court ruled that collective agreements, as presented within the statute, are in no way related to the category described in Article 39, because their clauses are subject to the final evaluation of the Commission, holding a negative power of veto but, nevertheless, required to assess the conformity of collectively agreed formulas with the guarantee of personal constitutional rights.

Should the interested parties not accept the Commission's negative evaluation and its proposals, reference should be made to Article 8 of the statute, providing for the intervention of public figures (ministers or local authorities, according to the national or local relevance of the conflict in question), having the final power to impose on service providers the duty to maintain 'essential services' and 'adequate levels' in the functioning of the services themselves, while still guaranteeing exercise of the right to strike. Non-compliance with these orders is attended by administrative sanctions; there is also a right of appeal against orders issued by public authorities in administrative courts.

The multi-level system of regulation deployed here by the Italian legislature is both original and complex, especially in the attempt it makes not to ignore any of the private and public actors hit by conflicts or those initiating conflicts. A

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<sup>61</sup> Corte Costituzionale, 18 Oct. 1996, no. 344 [1997].

number of ideas can be framed with reference to what has been said earlier in the way of general and more theoretical remarks. The right to bargain collectively, even when used for the protection of general and public interests, does not lose its original significance, namely of being the most important and valuable outcome of a constitutionally guaranteed right to organize. Consequently, it does not give way to other powers, such as those stemming from independent agencies, the legal nature of which still appears indistinct, at least in the example of the 1990 Italian statute.

When independent bodies are asked to step onto the scene because collective bargaining has failed, the ambiguity of their role is even more evident. It demonstrates tension, if not an actual division, between expectations and rights and suggests that, at least in the solution found by the Italian legislature, rights are potentially better enforced when rooted in collective agreements. It is also true that collective bargaining does not, by itself, have the solidity of a 'constitutional ordering': voluntary means, particularly when confronted with issues of public relevance and oriented towards the guarantee of personal constitutional rights, give way to public law and ultimately depend on the power of administrative sanctions to complete what, in the end, appears as a virtuous circle.

We shall see in the following section that recourse to private means, such as disciplinary measures available to the employer by virtue of the contract of employment, becomes more debatable, when they are intended to be functional to the protection of public interest. It is equally debatable whether the pendulum swinging between collective agreements and an independent agency appointed through parliament should be so clearly oriented towards the former. Reasons behind the reluctance (very visible in the statute) to grant stronger powers to the Commission, can be found in the need felt by the legislature to win social consensus, when venturing into a highly sensitive field of industrial relations, and to do so through the best-established system of private governance.

This choice confirms a prejudice, pervasive in Italian labour law, against the third-party settlement of labour disputes, even when the primary function of the law goes beyond private interests and aims at protecting personal constitutional rights. Despite all this, the legislature succeeded in having private, public, and quasi-public actors play at different tables, while all being part of the same game. This is a point to be stressed in the present analysis, since it proves that the 1990 Italian statute represents an exemplary case in discussing how citizenship rights can be shaped in the third sector.

If we try to summarize the main elements put forward in what is not meant to be a complete exegesis of the 1990 statute, we can see that the normative



function of collective agreements, despite the uncertainties of a constitutional norm never fully enforced, has its origin in the law. It is a legal provision which identifies collective agreements as the proper source to which such matters should be referred; delegation to bargaining by private parties on subject matter dealing with the limits to be applied to industrial action is a consequence of deeply rooted constitutional rights, the right to organize and the right to strike; technical expertise as expressed by an independent agency, finds its place in the interstices of such atypical collective agreements, trying to fill the gaps left by negotiators with purely persuasive powers.

The hierarchy of powers and the role assigned to each player within it both receive an *imprimatur* from the Constitutional Court, which has been successful, as was shown earlier, in raising the Commission's negative powers to the maximum point of equilibrium in the entire structure of the law, while being aware of the need not to interfere with a constitutionally based right to bargain. Finally, the courts are visible and active in administering the law; labour law and administrative law are both reflected in case law, thus proving that the third sector needs to be analysed from a multi-disciplinary perspective.

## 7. Sanctions. Who is Responsible for What?

It was stated in the previous section that, where consensus on minimum services to be provided during a strike cannot be achieved, the employer, and more generally the service provider, has the power to implement all organizational measures aimed at guaranteeing personal constitutional rights. This provision in the statute is very relevant when interpreting the scope of collective agreements on the definition of 'indispensable' services and placing them in a legal category of their own, not comparable to the category of collective agreements for the definition of terms and conditions of employment.

Together with the unilateral power to provide 'indispensable' services, the 1990 Italian statute has also granted the employer new disciplinary powers.<sup>62</sup> These are directed at individual employees who go on strike ignoring the legal and contractual requirements provided for the guarantee of personal constitutional rights. Furthermore, it is the employer's duty to enforce sanctions against unions which call an unlawful strike, regardless of the limits set in the law and in collective agreements. This implies suspending the payment of union dues and stopping paid leave for union activities for at least one month.

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<sup>62</sup> Art. 4, ss. 1, 2, and 3.

A third type of sanction - in the enforcement of which the employer is less actively involved - is provided against groups other than unions which call an unlawful strike; it consists in excluding such groups from negotiations for two months. The fact that this sanction, unlike the previous one, must be used against groups calling a strike on the basis of an 'indication' from the Commission does not have a rational justification. Such different treatment is reserved to spontaneous groups, which are less accustomed to negotiations than large unions, and is meant to penalize them in their attempt to acquire bargaining power. We may recall once again what was said above about an unresolved conflict within the conflict, hidden behind certain provisions in the law; even in the definition of sanctions one senses an uneasiness on the part of the legislature, sensitive enough to understand the symptoms of the disease affecting union representativeness but certainly not able to cure the disease itself.

The employer's direct involvement in issuing sanctions against unions has been challenged before the Constitutional Court on many grounds. The Court held Article 4, section 2, to be unconstitutional as no reference is made in it, in contrast to section 3, to the Commission's power to 'indicate' sanctions.<sup>63</sup> Beyond the technicalities, this decision is worth mentioning for reasons which go back to the original hypothesis put forward in this Chapter, namely the role of labour law in setting a new paradigm of citizenship rights in the third sector. First, the court states that the right to strike acquires an even stronger procedural element when it is exercised in public services: a whole series of intermediate requirements must be met before a stoppage of work. That is why sanctions are constructed in such a way that they can follow procedures and be differentiated according to the various phases of the procedure. Their legal nature changes too, ranging from administrative, to disciplinary, to punitive. Whereas sanctions directed at the individual employee find their justification in contracts of employment and are one further expression of a managerial prerogative, sanctions directed at the unions lack any such origin and are in fact a threat to constitutionally guaranteed union freedoms.

The court does not think that a comparison can be drawn between individual employees and unions; it stresses, though, the irrational diversity of sanctions provided for unions in Article 4, section 2, and for other 'subjects' in Article 4, section 3. In this latter case the Commission's 'indication' must depend

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<sup>63</sup> Corte Costituzionale 24 Feb. 1995, no. 57 [1995] 2407. In this decision Art. 13, related to the Commission's powers of initiative, including the one to 'indicate' sanctions, was held unconstitutional only with respect to section (c). 'Indication' is a very unusual term in public law: what it really implies in this specific context is that the employer, unlike in other cases where no power is recognized as residing in the Commission, is bound by the Commission's indication.



on the knowledge and evaluation of facts, whereas such elements are not taken into account when unions have to be sanctioned. This implies that, only with regard to unions, a discretionary power is accorded to the employer, who is also freed from any procedural requirement before enforcing the sanction. The court is thus implying that unions should have the same right to be heard and to present their own reasons as that granted by Italian law to employees undergoing disciplinary measures. This comparison between individuals and organizations can only be read between the lines of the court's decision; what the reasoning of the court is more openly aimed at is discovering whether there is a clear line distinguishing economic sanctions directed at unions from punitive sanctions consisting in the exclusion of other groups from negotiations.

In the court's decision the employer's power to sanction employees is nothing but an 'instrumental power' to ensure that limits are placed on the right to strike; as such it is strictly linked to the guarantee of a 'public interest'. It is also functional to the guarantee of quotas of public services, aimed at the protection of consumers' rights, rather than at fulfilling private interests of the employer. This implies that, as a necessary condition for applying the sanction, the Commission must intervene and evaluate the infringement of the law. This is an example of labour law bridging the gap between public services and citizenship rights: the employers' powers, born within the contractual scheme of employment, acquire a public relevance when sanctioning an employee's unlawful behaviour. This is so because the employee's choice to act unlawfully, infringing but sometimes simply diminishing - consumers' rights to have access to public services is relevant outside the employment contract.

The lack of alternatives for the enforcement of consumers' rights leads to an abuse of labour law instruments and provokes an expansion of what were intended of as private means of self-protection within employment contracts. The employer's direct power to sanction employees does not - and should not - match the definition and purpose of an administrative sanction; nor is the Commission's 'indication' a magic tool which transforms managerial prerogatives into public powers. The escape route, which makes the employer's initiative compatible with individual guarantees, is the protection granted to the employee as part of the employment contract.<sup>64</sup> No similar procedural guarantee exists for unions, but the constitutional right to organize is an even stronger point of reference; that is why the court underlines that sanctions in this case are directly 'functional' to consumers' rights and must be preceded by the Commission's evaluation.

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<sup>64</sup> Art.2106 of the Civil Code, as amended by Art.7 of the 1970 Workers' Statute, n.43 above.

The role of an independent body, such as a Commission of wise men called upon to give an expert - not a political or administrative - judgement, is in itself full of ambiguities,<sup>65</sup> and yet crucial in the construction of the new paradigm of constitutional citizenship. We must remember that the primary aim of the statute establishing such a body is to protect personal constitutional rights, while maintaining the right to strike in full operation. Because of this double mandate, self-restraint becomes a golden rule when evaluating essential quotas of public services negotiated in collective agreements, as well as indicating sanctions to be directed against those initiating strikes.

Labour law dominates the scene, as a consequence of the still too timid attempt made at creating an intermediate body between consumers and public services. Service providers are asked to act using employers' prerogatives, because contracts of employment are the only mediation between personal constitutional rights and the practical and technical organization of the service itself. Labour law then becomes a bridge between public and private spheres of the law: it serves the purpose of protecting a public interest, but in order to do so it relies on a third subject.

The missing actors in this play are consumers, ignored by the Italian statute even though they would seem to be centre stage. A new culture of conflict must be confronted with the willingness of these new characters to be effectively on the scene and to find new forms of collective representation. This is an issue for comparisons between European legal systems and inventive solutions at Community level. Public authorities could be made more active at local level; measures of conflict resolution could be put into action and experimented with, extending if necessary to compulsory arbitration. In all instances, consumers should be heard in order to remind labour lawyers that they have entered the discipline and represent a new core of it. Even under these new circumstances, the right to strike should not cease to be a strong social sanction, an extraordinary collective device which makes a collective voice heard. Consumers cannot be considered a counterpart to strikers: even when protected in the exercise of their constitutional rights, they may, nevertheless, be affected by conflict and undergo some inconvenience. This implies that the concrete modalities of the right to strike, without interfering with consumers' fundamental rights, help to redefine the latter's expectations and require that their needs be temporarily reshaped.

Another decision of the Constitutional Court will be analysed in the following section, as a useful example of expanding consumers' rights through the

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<sup>65</sup> See critical comments by A.Travi, 'Corte costituzionale e legge sullo sciopero' [1995] *DLRI* 346ff.



inclusion in the statute's scope of a specific and rather different form of conflict. This new change in the 1990 statute will help us to draw some conclusions regarding the imitative effect that the right to strike has had among professional groups different from subordinate employees and therefore not bound by contracts of employment.

## 8. A Further Example of Concerted Action and the Expansion of Citizenship Rights

In 1996 the Constitutional Court entered a new controversial field, in the attempt to apply the 1990 statute to 'abstentions' by solicitors and barristers from practising the legal profession.<sup>66</sup> The 'administration of justice' is listed in Article 2(a) among public services, with regard to the granting of personal fundamental freedoms, especially for citizens who have been imprisoned, but also for those subject to interlocutory injunctions. Any delay in the delivery of courts' decisions, if caused by a protest by solicitors and barristers resulting in the lack of assistance during the trial, may infringe consumers' constitutional rights and give rise to claims by the consumers themselves.

The core of the decision is whether a concerted protest of this kind can be assimilated to the right to strike and consequently be balanced against other constitutional rights. Following previous leading cases, the court specifies that whenever the right to strike may not be technically referred to, it is freedom of association which helps to interpret the abstention from work of other professional groups. Protest is lawful, even when no socio-economic dependence can be proved, just as it is for employees who are parties to contracts of employment; since the 1990 statute, it has a constitutional relevance, because the principles in its Article 1 can be widely interpreted, so as to provide concrete protection to consumers. The court holds Article 2, sections 1 and 5 to be unconstitutional, inasmuch as they do not impose any obligation to give notice, nor set any reasonable time limit in cases of concerted abstentions by solicitors and barristers, nor do they provide for the definition of essential quotas of the service to be delivered and sanctions to be enforced.

The court could not go any further in its decision, other than expressing the urgent need for legislative intervention on the matter, so that the gap could be filled and consumers could be fairly treated. A statute is considered necessary, because of the lack of *erga omnes* enforceability of the codes of conduct adopted by professional associations. Codes normally include ethical and deontological

<sup>66</sup> Corte Costituzionale, 27 May 1996, no.171 [1996] 543.

rules which acquire a public relevance in setting standards for the whole profession; the problem is the lack of any sanction apparatus and the consequent non-enforceability of consumers' rights. The interesting story to report is that this decision prompted reactions from several institutional actors and opened up a confrontation which demonstrates once again the centrality of labour law in the settlement of disputes in which consumers - and not necessarily employers and employees - are key actors.

The Commission had indeed made its voice heard before the Constitutional Court's decision,<sup>67</sup> claiming its right to intervene whenever consumers' rights were seriously threatened, should this occur as a consequence of protests other than strikes. The dialogue between the Commission and the organizations of professional lawyers involved in protests developed into an exercise in setting limits to each other's competence: the Commission went beyond its powers in interpreting the court's decision and proceeded to give itself the role of conflict mediator, despite its unclear jurisdiction.

The effect of all this was to make both public opinion and the government aware of the urgency of intervening with appropriate legislation. The Minister for Justice reluctantly responded with the insertion of certain measures in his ongoing proposals for reform: codes of conduct should include notice of at least ten days; the Minister himself was to be entitled to notice of detailed procedures to be followed in plans for abstentions involving the legal professions; no protest should last longer than thirty days or be followed by another within ninety days; and criminal sanctions should be provided for those who do not comply with the new rules.

The Commission's activism, followed by the threat of legislative intervention, drove all associations active in the legal professions into making a united response, where divisions and contrasts had previously been shown, mainly related to the still uncertain nature of different groups within the professions. This detail is not irrelevant in our perspective: no clear function can automatically - and perhaps imitatively - be attributed to collective organizations

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<sup>67</sup> The deliberation in question is that of 15 June 1995, n.3.1. After one year, referring to the Constitutional Court's decision, the Commission intervened again, requiring the termination of a very long protest 'in compliance with the law as modified by the Constitutional Court' (deliberation of 13 June 1996, published, together with other documents of organizations active in the protest, in [1997] *Argomenti di diritto del lavoro* 338ff.). It is interesting to stress that the Commission, despite its weak institutional role, went as far as interpreting extensively a decision of the Constitutional Court which has not as such modified the law. This caused a lively reaction from a national association of solicitors and barristers, disagreeing with the interpretation of the decision, which had not, in its view, 'added' anything to the law.



not forming part of industrial relations practices. Organizations of professionals may have a political role and leave members of the profession free to join or not; they may have an institutional relevance, as in professional 'orders' which are empowered to co-opt members on the basis of specific requirements and of which membership is compulsory. The effort to gain recognition in the public sphere is linked to the capacity of new collective actors to prove that they obey the rules of the game and are able to be representative of their members, namely in enforcing rules and exhibiting credibility to consumers.

The easier way to gain visibility, while lacking an established representativeness, was to start political negotiation with the legislature, trying to influence the making of the law through lobbying. This is still an open forum, while many questions have remained unanswered. In particular the Commission continues to fight its fierce battle: not to be interpreted as a sign of arrogance, its determination not to abandon the scene must be seen as a commitment towards consumers, perhaps a way to help them develop trust towards a body with limited binding powers, and yet with a special capacity to act as an effective protagonist.

What is being achieved, through acts of a symbolic rather than a binding nature, is forcing the media to report on suggestions and evaluations given by the Commission, thus making ideas circulate on how consumers' rights could be better protected in an area which is not yet clearly covered by the law. Furthermore, the Commission is obliged to keep parliament informed of its activity: deliberations addressed to the professional lawyers' organizations regardless of their willingness to obey them, thus become part of a discursive body of law, open to constant changes and available for observers of the political and legislative process.

## **9. The Role of Collective Agreements in the Privatization of Public Employment. Are Consumers' Rights Relevant?**

The Italian decree which has privatized the legal regime of employment contracts in what was once described as the public sector would merit a very long and detailed presentation. For the purposes of this Chapter, only a few remarks will be offered, as a further confirmation of the arguments developed above. It must first be recalled that the decree regulating this matter finds its origins in a statute<sup>68</sup> empowering government to issue legislation on various matters, ranging from health and social security to local finances and public-sector reform. It was the legislature's intention to prove that there is an interdependence of all such

<sup>68</sup> D. Legislativo, 3 Feb. 1993, no.29, amended by D. Legislativo 4 Nov. 1997, no.396. The statute delegating to intervention by decree is L. 23 Oct. 1992, no.421.

measures, relevant for intervention both in modernizing and in rationalizing important state functions. This is yet another way of achieving the general aims inherent in public services, pointing to the necessity of adopting an overall view of them, whenever a legislative reform is being conceived. The intention of the legislature in 1992 was in fact to begin a long-lasting review of existing laws in strategic areas, aimed at increasing efficiency and cutting expenditure, in order to improve the public budget.

Citizenship rights should inspire the whole reform of the former public sector, although it is no easy task to extrapolate them from the intricacies of this very complex piece of legislation. The much stronger position acquired by collective bargaining, especially after the reform of 1997, is in itself an indication of the new functions that such a consolidated form of private governance is capable of performing, even in the arena of public administration. The idea of privatizing contracts of employment implies that the same tools as those used in the private sector must be made available; although adaptation is required, given the different aims inherent in the running of a public apparatus, the dominant intention of the legislature is to narrow the gap between the two sectors and to favour co-ordination of bargaining activities.

The changes in the law brought about by the 1997 decree are a significant confirmation of the fact that straightforward transplants between different spheres of economic activity are neither productive nor possible. The current state of affairs is that collective bargaining in the former public sector is acquiring its own identity and is shaping the relationship between centralized and decentralized agreements in an original way, different from the rigid hierarchy of sources indicated in the 1993 decree. One of the crucial elements is establishing procedures and principles of representation in negotiations. Previous provisions on binding governmental guidelines, which were aimed at encapsulating the whole bargaining process, soon proved incompatible with the very notion of collective bargaining; they have now been replaced by more flexible regulations which enable the administration to relate more closely to its bargaining agent.

Nevertheless, procedures are lengthy and detailed. An 'agency'<sup>69</sup> stands as a representative of the public in the negotiations; its members are appointed by

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<sup>69</sup> Art. 50 of decree no. 29 is devoted to the agency's functioning and composition and was amended in 1997. Art. 51, as amended, deals with collective bargaining procedures and with the guidelines the agency receives from sectoral organizations within the administration. This change is a significant one, when compared with previous rules according to which binding guidelines were imposed by government. The latter must now express its evaluation on the general guidelines suggested by the administration prior to the renewal of national collective



the Prime Minister; its functions are specified in the decree and result in more limited autonomy, if compared with the private sector. Decentralized bargaining takes place as a result of rules agreed at national level and within the budgetary constraints of each administration. This still implies a hierarchy of different bargaining levels, whereby the broader and higher level indicates matters to be dealt with at the lower level, subject to the available financial resources; in a transitional phase, experimental bargaining is favoured even before the signing of national agreements on matters such as the reorganization of the services provided, particularly in relation to personnel training, flexible working time, part-time work, the working environment, and equal opportunities.

If we go back to what we said earlier about public services very often being dependent on a decentralized organization of the service provider and on local users' demands and expectations, we realize how important collective bargaining can be in the definition of citizenship rights. The fact that this particular area of activity is undergoing such significant changes in the regulation of employment contracts, while maintaining the public nature of employers, opens up room for further reflection. Previous references in the decree to ways of preventing the lowering of standards in the quality of services as an effect of privatization have disappeared in the new amended version. This may be taken as a sign of pragmatism on the part of the legislature, a way of acknowledging that references to the compatibility of efficiency in the public administration with consumers' demands are often purely nominal and difficult to translate into concrete and actionable rights.

Furthermore, the privatization of employment contracts in the public sector throws a new light on the anomalies of the Italian collective bargaining system - namely the lack of *erga omnes* enforceability of collective agreements - especially when these voluntary sources attempt to regulate issues of public relevance, including consumers' rights. All this implies that recognition of the general and public interest in a well-run administration does not disappear from the catalogue of constitutional values, but must be constantly confronted with private means, such as collective agreements, for the implementation of employees' rights and, at the same time, for the satisfaction of consumers' demands.

These only seemingly conflicting ambitions harboured by the legislature reveal that the regulatory technique chosen in such a particular case, similar to that with the 1990 statute on the right to strike in public services, consists in the

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agreements. The leading criterion is compatibility between the goals of the negotiation and general economic and financial policies.

balancing of constitutional rights and bringing them to a new equilibrium. Rather than reducing the scope of separate - but not conflicting - spheres of constitutional values, these new attempts by the legislature may, in the long run, reveal new dimensions of the values themselves. The right to bargain collectively, as an expression of the right to organize, consolidates its own constitutional relevance, especially when exposed to the regulation of public interests.

In this new legal framework, emphasis must be placed on the strengthened and now very visible quasi-public relevance of employees' organizations, an inevitable consequence of the more institutionalized bargaining procedures laid out in the decree. The 1997 reform has taken these new union functions into account and opened up the way for future legal intervention in the private sector, introducing for the first time rules aimed at measuring the representativeness of employees' organizations, for the purpose of bargaining collectively.<sup>70</sup> The quasi-public role played by private associations is also a necessary answer to the new model of bargaining agent on the employers' side, introduced by the decree. The 'agency' is yet another example of a body appointed on the basis of expertise rather than political affiliation; although its tasks were thought of as purely technical ones, they result in very delicate balancing powers extending beyond the compatibility of wage costs with general budget constraints.

Even when the law - such as the decree so far analyzed - does not offer any clear ground for citizenship rights, their grant comes as a result of strong constitutional traditions, such as the Italian one. Labour law contributes immensely to building the bridge that first inspired the title of this Chapter.

## 10. Concluding Remarks

One of the threads linking the various chapters of this book is the search for a new paradigm of citizenship rights, in dealing with public services and with the labour law implications in their organization. The centrality of industrial enterprises has been questioned, following the diversification of production techniques and market needs. Yet, the core of constitutional rights and the construction of labour law traditions were built around the enterprise, the place in which opposing powers and interests had to be balanced and measured in concrete terms. The outcome was different in different legal systems, although

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<sup>70</sup> Art.7 of Decree no.396, now Art.47 bis of d. legislativo 29/1993. Only unions which can show a minimum of 5%, an average between membership and votes gained in elections of union representatives, may be admitted to the bargaining table.



centred around a small number of principles which also emerge from the present analysis.

Collective bargaining is undoubtedly very central in laying the foundations of constitutional values which may be disseminated in spheres of public relevance. We have underlined the fact that, as a mere expression of private governance, collective bargaining cannot by itself be the only pillar on which rights may be built, nor the only source of regulation. Yet, we have also stressed - particularly in relation to the Italian legal system and the examples taken from it - that there is a tendency to rely on this well established system of interest representation for the solution of problems which are not within its original scope. This leads to the rediscovery of collective bargaining and the placing of it in a new perspective: issues of public relevance are slowly being incorporated into its procedures and tending to be shaped by its inherent normative function.

A different legal discourse is linked to the right to strike. We are aware of the uniqueness of the Italian example in comparative terms, although functional equivalents can be found in other legal systems, whenever the provision of public services is at stake. Despite the specificity of this example, we feel that it is extremely useful in demonstrating the theory of proportionality as between citizenship rights. Whenever we want to make sure that new rights are established, especially in emerging new areas, such as public services, we must also be certain not to destroy previous rights; on the contrary, we must adapt them and revisit their tradition, so as to bring out the full potential of their regulatory scope.

Proving that labour law is a very fertile ground for experimenting with new balances of powers and new relationships between different legal and non-legal sources has been one of the aims of this Chapter. Whether it will be possible to favour such an experiment at Community level still remains to be seen. At this stage in legislative and political developments, it may suffice to say that the dissemination of constitutional values, even in the absence of a catalogue of constitutional rights, is essential in creating a favourable environment in which new traditions may develop and new liberties may be granted. The lesson taught by labour law, as indicated earlier, in the first Chapter of this book, should be that, in overcoming the historical divide between public and private spheres of regulation, individuals become citizens both within the place of work and outside it, and establish their own rights as full members of the working environment as well as of the consumers' community.



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