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Fundamental Labour Rights after the Lisbon Agenda

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I. Introduction: Within and Without the Open Method of Co-ordination: How to Establish a Language of Rights in Labour Law Reforms

This chapter is focused principally on current developments in European social and employment policies. The intention is to consider the original character of EU legal approaches in these fields and to investigate whether, using the notion of fundamental labour rights, there can be a beneficial expansion of this notion by means of a broader circulation of international sources. 'Circulation' is a notion grounded on the necessary interrelation – and in some cases the interdependence – of sources generated within different legal systems. A 'pluralistic' point of view, not new in Western European legal traditions, reappears in current legal discourse. The main objective of this chapter is to capture developments occurring within national and supranational legal orders, and to interpret their possible outcomes in terms of new entitlements both for individuals and for groups.

The hypothesis on which this chapter is based is that the evolution of labour law at national level has been influenced by EU law, while maintaining its own dominant characteristics. This observation suggests that national diversities enrich the multi-cultural and multi-level legal environment in which law-making takes place. In the first phase of the so-called Lisbon strategy, national legislatures have been extremely active in furthering labour law reforms. Legislation adopted over the years has intervened significantly in the regulation of individual contracts of employment and, more broadly, has had an impact on the reform of national labour markets.¹ If one bears in mind the original four pillars of the European employment strategy (EES),² one soon realizes that there has been a convergence of national legislatures towards similar areas of intervention. A related argument is that national legislatures had a rather predictable canvas on which lines could be drawn and colours could be mixed.³

Even areas of labour law, such as working time, which was regulated by secondary legislation prior to the Lisbon strategy⁴, have

¹ Reforms have been adopted, for example, in Spain, Italy, Denmark, Germany, Poland. Information available at www.eiro.eurofound.eu.int.

² Employability, entrepreneurship, adaptability, equal opportunities.

³ For example reforms in Spain and Poland, available at: www.eiro.eurofound.eu.int. See also the General Report based on national country studies in 15 Member States: S. Sciarra, *The Evolution of Labour Law (1992-2003) General Report* (2004) at http://europa.eu.int/comm/employment_social/labour_law/docs/generalreport_en.pdf.

⁴ Council Directive 93/104 EC concerning certain aspects of the organisation of working time, OJ 1993 L 307/18.

become part of a complex multi-level process of policy-making, whereby the protection of the right to health and safety at the place of work has been confronted by overall objectives such as the 'modernization' of national legal systems and of the European social model.⁵ It can also be argued that a common concern, shared by all Member States, to decrease unemployment and increase employment would have brought them towards similar solutions in their national interpretations of the choices to be made and of the priorities to be set.

However, the fact that, from Lisbon onwards, following the Luxembourg process, there was a European strategy and that this was pursued actively and with renewed energy by both the Commission and the Council changed the nature of national responses and framed them within a scheme which slowly acquired its own legal relevance. This point needs to be stressed in response to commentators trying to portray a negative image of soft law techniques. Such portrayals draw a very blurred picture of the duties and obligations of the actors involved in the Open Method of Co-ordination (OMC). In particular they point to the lack of sanctions against the failure to respond or the incomplete response of national governments. The notion of 'moral' sanction, familiar in international law when the dispute concerns variable interpretations of legal standards and different ways of enforcing them, does not seem strong enough. Neither does it appear convincing to the detractors of the OMC to take into account the delicate equilibrium on which national governments have to base their choices, bringing together constraints imposed by budgetary laws and the growing social expectations of citizens. Such a theoretical dispute on the role of soft law hides, in some cases, a deeper - and perhaps unconscious - fear that Europe is at the origin of all evils and disruptions in national labour law. Rather than falling into the banal category of euro-scepticism, this point of view paradoxically may express the aspirations of those who want more from Europe, and in a more tangible form. It is to such questions that labour law reforms have to refer, within or without the OMC.

I shall argue in favour of maintaining and strengthening the soft law regime in which the EES first flourished. I shall also submit that in such an open process labour law should rediscover a 'language of rights'. In this framework of analysis a comparison with sources external to the EU, such as the European Social Charter (ESC), becomes a way of expanding the understanding of an evolving notion of labour rights. The language of rights, therefore, is not self-referential nor limited to the

⁵ A national case study is presented by Barnard, 'The EU Agenda for Regulating Labour Markets: Lessons from the UK in the Field of Working Time', in G. Bermann and K. Pistor (eds), *Law and Governance in an Enlarged Union* (2004) 177.

European legal system. Labour standards have been influenced by legal discourses taking place in a broader international context. Similarly, the original discourse evolving within the boundaries of EU law has been listened to and absorbed by other international sources. An historical analysis of European social law and of its evolution confirms the feasibility of such a scheme and of the broader international sources to which reference must continue to be made. The suggestion is to frame Lisbon and the current post-Lisbon review in a line of continuity with previous steps in the consolidation of a European model of multi-level policy-making. This trend should find an interface in the most recent attempts to develop multi-level Constitution-making, and to do so by incorporating sources external to the EU, such as the ECHR.

In a number of European legal systems, in parallel with the vivacious discussion taking place at a supranational level on ways to bind the EU to the observance of international standards on fundamental rights, the ECHR has been viewed by individual Member States as a reliable source to acquire and include in domestic legal systems. This is the case with the Human Rights Act of 1998, which entered into force in the UK in 2000, and which aims at giving further effect to rights already enjoyed under the Convention. Denmark incorporated the ECHR into national law in 1997 and Finland did the same in 1990. In 1995 Finland also promoted a constitutional reform which led to the inclusion in the Constitution of a new chapter on fundamental rights, followed by a review in 2000. Sweden incorporated the ECHR into its national law by means of an Act of Parliament in 1994. Notwithstanding the fact that such a source is not constitutional, courts may not apply legislation which conflicts with the ECHR, since national legislation must comply with its principles.⁶ It is neither repetitious nor irrelevant to note that national legal systems were not equally motivated to pay attention to the ESC. Even though the reason may be found in the rich heritage of national constitutional traditions in the field of social rights, the discrepancy between these two Council of Europe sources continues to be striking.

II. Rights and Policies

The interesting – and probably not accidental – combination of rights and policies in the most recent evolution of labour law at the European level is something to be considered before entering into a more detailed analysis

⁶ More detailed information on such developments in these Nordic countries can be found in N. Bruun and J. Malmberg, *The Evolution of Labour Law in Denmark, Finland and Sweden 1992-2003*, http://europa.eu.int/comm/employment_social/labour_law/docs/ell_da_fi_sv.pdf.

of the OMC. Two framework Directives - the fixed-term work and the part-time work⁷ Directives – refer in their preambles to clause 7 of the Community Charter of the Fundamental Social Rights of Workers, providing for an improvement in working conditions by way of an ‘approximation of these conditions while the improvement is being maintained’. They also refer to the Essen European Council, where the notion of employment policies linked to a more flexible organization of work was first conceived. The fixed-term work Directive also takes into account the 1999 Council Resolution on Employment Guidelines, inviting the social partners to negotiate ‘flexible working arrangements’ with particular emphasis on the balance between flexibility and security. This is to say that both Directives, even before the official birth of the OMC at Lisbon, have been framed within employment policies, while reproducing the classical formula, compatible with the completion of the internal market, according to which approximation of legal standards is parallel to improvement.

Both Directives are built around the principle of non-discrimination ‘to improve the quality’ of work. The part-time work Directive at Article 5 specifies that, in order to remove discrimination against part-timers and to facilitate recourse to such contracts of employment, Member States shall ‘identify and review obstacles’ impeding the expansion of part-time work and try to eliminate them. The fixed-term work Directive at Article 5 has a slightly different approach and aims to introduce objective limits in the recourse to such contracts, so as to justify the renewal or the maximum number of renewals of successive contracts.

These measures are different, and so is the nature of the legal command addressed to Member States. Whereas the expression adopted in the part-time work Directive is such as to rely on national choices in a soft law mood, the fixed-term work Directive indicates clear legal requirements which have to be taken into consideration by national legislatures in transposing the Directive into domestic law.

It is important to underline that in both approaches, while pursuing the expansion of flexible contracts of employment, the quality of such contracts must be maintained and improved. If we correctly interpret the language of employment policies, we can translate into clear legal obligations the vague exhortation addressed to Member States to create ‘better jobs’ and - one could add in the official language of EU law - jobs governed by ‘improved’ and ‘approximated’ standards, so as to

⁷ Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP, OJ 1999 L 175/43; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time Work concluded by UNICE, CEEP and the ETUC, OJ 1998 L 14/9.

enhance the efficient functioning of an integrated market. What is new, in comparison with the 'old' Article 117, now Article 136 TEC? Starting from this wide platform of social policies, partially strengthened, after Amsterdam, by the reference to the 1961 European Social Charter (ESC), harmonization emerged as the most efficient technique. The historical importance of legislation in social policies must be the object of some reconsideration in the current debate. Negative integration, the most unsettling and unwanted outcome of a closer Union, is not the result of obscure plans put in motion by European institutions, nor the result of an aggressive policy put forward by the ECJ. It is a dangerous symptom of a lack of social cohesion and of uncontrolled competition among social systems, owing to the absence of a minimum platform of rights.⁸

One could argue that significant achievements were reached when harmonization was the leading regulatory technique. The consolidation of the *acquis* in social policies - that on which we base and expand the interpretation of fundamental social rights - was brought about by the so-called 'structural' directives of the 1970s, by the extraordinary evolution of directives on equal treatment, and, later on, by directives on health and safety. Significant examples of secondary legislation expanding beyond social policies - such as the European Works Council Directive and the Posted Workers Directive - are now, not by chance, the object of interesting review by the Commission.⁹ Criticism addressed by scholars - including the present writer¹⁰ - against the 'minimalism' of that legislation meet now a worrying silence on the part of both the legislature and the social partners at the European level.¹¹

These critical observations about the present, in the light of a reconsideration of the historical premises of social policies, lead us towards one specific point of the analysis to be developed. The OMC was born as an alternative to harmonization. Article 137(2) TEC, as amended at Nice, explicitly keeps harmonization out of the Council's options when dealing with social inclusion and modernization of social protection systems. When harmonization is kept out of the picture, soft law forces interpreters to become familiar with notions such as exchange of information on best practices and mutual learning. Even such language -

⁸ Poiares Maduro, 'Europe's Social Self: "The Sickness unto Death"', in J. Shaw (ed), *Social Law and Policy in an Evolving European Union* (2000) 329.

⁹ See: http://europa.eu.int/comm/employment_social/news/2004/apr/ewc_en.html.

¹⁰ Sciarra, 'Social Values and the Multiple Sources of European Social Law', 1 *ELJ* (1995) 60.

¹¹ For example, the Proposal for a Directive on temporary workers encountered significant difficulties which led to the submission of an amended proposal for a directive. Compare the original document, COM(2002)149 of 20 March 2002, with the amended proposal for a Directive of the European Parliament and the Council on Working Conditions for Temporary Workers, COM(2002) 701 final of 28 November 2002.

nebulous and a-technical as it is in the eyes of black-letter lawyers - represents a step forward, when compared with expressions previously adopted in the TEC, such as 'encouragement' and 'promotion'.¹²

The real novelty in the most current debate on rights and policies must be found in a rising awareness of how to avoid the soft law regime in which policies on employment and on social inclusion are flourishing and affecting the structure of rights on which those policies were built and from which they historically originate. Even this novelty is not an historical accident. The strict correlation between rights and policies has been sought and pursued by those who believed in reforming the Treaties, and in doing so by expanding both the 'objectives' of the EU and the reference to external international sources.¹³

We should inquire into why interpreters are alarmed – now more than in the past – by a possible interruption of this slow, and yet significant, interchange between rights and policies. The 'shift' from social policy to employment policy,¹⁴ which took place in a more visible fashion after the launch of the OMC, can, in fact, be perceived as a threatening sign or, even worse, as an obscure and malicious plan of institutional actors. I shall attempt to answer this inquiry by looking at some specific examples arising out of the transposition of the two previously mentioned Directives. I shall then analyse how the lack of traditional sanctions in the OMC soft law regime has been counterbalanced by monitoring mechanisms and how this can be beneficial for the strengthening of fundamental social rights.

III. Employment Policies and the 'Non-regression Clause' in the Directives on Fixed-term Work and Part-time Work

¹² 'The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained...', Article 136 TEC.

¹³ See De Witte's paper in this volume and De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston, with M. Bustelo, J. Heenan (eds), *The EU and Human Rights* (1999) 859-898.

¹⁴ Ashiagbor, 'EMU and the Shift in the European Labour Law Agenda: From 'Social Policy' to 'Employment Policy'', 7 *ELJ* (2001) 311; Regent, 'The Open Method of Coordination: A New Supranational Form of Governance?', 9 *ELJ* (2003) 190.

These two Directives have been chosen as examples, in order to verify the feasibility of a combination of rights and policies. The result is unique: hard law forces Member States to comply, but soft law implications are such - particularly in the part-time work Directive – as to leave legislatures ample room for manoeuvre.

The right not to be discriminated against may be linked to specific compliance mechanisms; obligations generated by soft policies may deviate from legal principles showing a dominant need to comply with non-legal targets, such as an increased flexibility in employment contracts. The scenario is such as to create a trade-off between levels of protection and promotion of employment. Let us look at some specific cases, bearing in mind that in most European countries legislation adopted in both fields provoked adaptations of previous legislation. In civil law countries this also meant amending clauses and regulations in civil or labour codes.

The excessive increase of fixed-term contracts in Spain,¹⁵ saluted as one relevant feature of the new dynamic labour market enhanced by the Conservative government's reforms, had to be counterbalanced by disincentives to enter into such contracts. Collective agreements were chosen as the right sources in which to specify the objective reasons for employing such contracts. In Portugal, too, in the new 2003 Labour Code, the attitude is not in favour of fixed-term contracts.¹⁶ In Italy, on the contrary, in the transposition of the Directive - one of the first manifestations of the centre-right administration in the labour law field – the recourse to such contracts has been widened, so as to raise the suspicion that the way in which 'technical, productive organisational and substitutive reasons' has been interpreted may far transcend the purpose of the Directive.¹⁷ In this last example the most debatable innovation consisted in abandoning the previous legal technique – implying a legal definition of cases in which fixed-term contracts were allowed – in favour of a wide formula leaving ample space on this issue to the parties to

¹⁵ Nearly a third of Spanish employees are on temporary contracts, <http://www.eiro.eurofound.eu.int/2004/09/feature/es0409104f.html>. See the comments by F. Valdés Dal-Ré, 'Recenti riforme del diritto del lavoro in Spagna', *Giornale di diritto del lavoro e di relazioni industriali* (2005, forthcoming).

¹⁶ On new developments in the Portuguese Labour Code see: <http://www.eiro.eurofound.eu.int/2003/05/inbrief/pt0305101n.html>. Additionally, on the basis of order No. 255/2002 of 12 March 2002 there are financial incentives for employers who convert a fixed-term contract, on expiry, into an open-ended contract. See: <http://www.eiro.eurofound.eu.int/2002/05/feature/pt0205102f.html>

¹⁷ Decree 368 of 6 Sept. 2001, transposing European Directive 99/70 and comments in S. Sciarra, *The Evolution of Labour Law (1992-2003) Report on Italy*, at http://europa.eu.int/comm/employment_social/labour_law/docs/ell_italy.pdf .

individual contracts of employment. One of the limits set by the Directive at clause 3 of the annexed framework agreement – namely the existence of ‘objective conditions’ for entering the fixed-term contract – is therefore left to the individual parties entering into a contract of employment. This is a reference to a critical interpretation of the non-regression clause, in which comparisons among standards of protection are left to the courts. The non-binding nature of the European Council’s guidelines on employment policies within the equally non-binding EES can, however, imply that courts frame their interpretation of legislation within this context. While letting hard law prevail over soft law, they may introduce a value judgement on the balance between flexibility and security. In Germany, in an attempt to favour workers over the age of 52 at risk of losing their jobs, no objective reasons are required for entering fixed-term contracts. The 2003 reform introducing this amendment could be challenged on the ground of age discrimination.¹⁸ This is yet another reference to the potential tensions arising from labour market reforms, all having to do with varying – at times conflicting - interpretations of individual fundamental rights. In the UK the apparent compliance with the Directive in indicating a maximum number of years when stipulating subsequent contracts may be overcome by Article 8 (5) of the Regulation, allowing the removal of this limit in collective or workforce agreements.¹⁹ A lot would need to be said in this regard on the scope of such agreements and on how legislation connected to employment policies forces a hierarchy among legal and voluntary sources, allowing the latter ample room for manoeuvre, even when their effect is to lower legal standards.

Such complex interpretations of national legislatures’ choices, involving multiple sources and multiple levels of enforceability, are framed within evolving patterns of employment guidelines and of subsequent responses in national policies. The 2004 Employment Guidelines, more focused on ‘effective implementation of reforms through governance’, recommend in some cases - France is one example – the facilitation of the transition from fixed-term to open-ended contracts.²⁰ Once more, the political willingness of all actors involved in the process strikes a balance in favour of a successful Open Method, based on totally unpredictable variables.

Other examples can be selected, when looking at the transposition of the part-time work Directive. The range of solutions adopted is wide.

¹⁸ Skidmore, ‘The European Employment Strategy and Labour Law: A German Case-study’, 29 *ELR* (2004) 52.

¹⁹ Kilpatrick, ‘Has New Labour Reconfigured Employment Legislation?’, 32 *ILJ* (2003) 135.

²⁰ Proposal for 2004 Employment Guidelines, COM(2004) 239 final, of 7 Apr. 2004, at 16.

We move from the Dutch approach - we all recall the emphasis placed on the 'miracle' which occurred in that country in the 1990s²¹ - where the intent is to favour voluntary part-time employment, to the Italian recent reform, which moves in a completely opposite direction. In 2003 the Italian legislature, amending legislation previously enacted for the transposition of the Directive, introduced very flexible clauses - described as 'elastic clauses' - whereby individual workers, even in the absence of collective agreements, may give their consent to the employer's request. Overtime, too, can be agreed upon at an individual level. The Italian example shows very clearly that the interpretation of Article 5 of the Directive, namely the removal by the state of obstacles impeding the expansion of part-time work, can raise serious doubts about the lower standards guaranteed to individual workers. The notion of what should be described as compliance on the part of Member States, when soft law policies are intertwined with the enforcement of fundamental rights, needs to be investigated further.

A very controversial provision, present in both Directives under discussion, is the so-called non-regression clause, according to which implementation of the Directives 'should not constitute valid ground for reducing the general level of protection afforded to workers'. This clause may give rise to opposing views. It may appear that EU law interferes with the choices of national legislatures, setting a platform of rights which is not to be lowered. This would not, however, represent an impediment to national parliaments in legislating. They should remain sovereign and free to intervene, even amending previous legislation in accordance with their own standards of what a 'valid ground' is.

The fundamental right not to be discriminated against, the inspiring principle in both Directives, finds itself at the crossroads of opposing policies. It is not as easy as it may appear to argue that measures attempting to treat part-time and fixed-term workers in a disparate way, lowering pre-existing individual and collective guarantees, should be considered illegal. The notion of lower standards itself is at stake, when it falls between other measures adopted by national legislatures to remove obstacles to the introduction of more flexible working conditions.

It remains to be seen how national courts will be able to refer cases to the ECJ, specifying how non-compliance of national law with EU law occurs by reason of the violation of a fundamental right. The principle of equal treatment among comparable workers, a powerful binding

²¹ J. Visser and A. Hemerijck, *A Dutch Miracle. Job Growth, Welfare Reform and Corporatism in the Netherlands* (1997).

principle for national judges, must therefore include the evaluation of the objective criteria according to which fixed-term workers entered into their contracts. Similarly, the violation of the fundamental right not to be discriminated against may be grounded in national legislation lacking measures 'to prevent abuse' in the excessive use of successive fixed-term contracts, as is stated in clause 1 of the framework agreement.

It can be argued that, for those who are entitled to the fundamental right in question, the organizational rules observed at the place of work represent the precondition for access to the right itself. Managerial discretion – as in the case of non-objective reasons leading to fixed-term contracts – should be held to be contrary to the principle of equal treatment. It is hard - but not impossible - to maintain that such an interpretation of a fundamental right could even open the way to a preliminary ruling procedure. As for part-time work, the non-regression clause is followed by a caveat indicating that Member States and social partners, 'in the light of changing circumstances', should not see their 'right' to adopt different provisions circumscribed. This truism, which confirms Member States' sovereign legislative powers, finds a limit in the principle of non-discrimination between comparable full-time workers. If nothing else, this confirms the role of fundamental rights not only as a binding guideline for national legislatures, but also as a limit to all deregulatory policies which may imperil the full enforceability of the principle itself. The difficult comparison among legal standards and the equally difficult evaluation of what less favourable treatment may be must be left to national judges, steeped as they are in the historical and interpretative context of the overall system of individual and collective guarantees in each legal system.

A first conclusion to be drawn after looking at these selected examples is that a-technical notions such as flexibility or modernization, widely adopted in the language and in the practice of European soft law, do not provide a serious guide for the interpreter, whereas fundamental rights and principles do. At the present stage of European integration through law a virtuous combination of soft policies and hard law implementation mechanisms seems a valuable solution. It may lead us towards a fundamental rights strategy, capable of feeding and strengthening the employment strategy.

IV. Monitoring and Sanctioning in the European Employment Strategy

In the absence of traditional sanctions to be imposed on Member States involved in the European Employment Strategy, there was a need

to attract them into an open co-ordination scheme, thus urging them towards the achievement of common targets. The peer review mechanism, an important requirement within the process of co-operation among Member States enhanced by the EC, cannot be described as a traditional sanction. In the evaluation of National Action Plans (NAPs) the Council wields its institutional powers in its capacity as 'soft regulator'. The lack of specific indicators in employment policies – unlike those applied to social inclusion policies within the OMC²² proved that the analysis of legislation in the process of being enacted or simply announced by national governments as part of their political agendas, had to be based on changing parameters. Similarly, the impetus that the Council wanted to give to change existing laws was not inspired by strictly legal criteria and has been abandoned. Since 'open' meant that the method had to respect states' prerogatives and competence, the co-ordination could be no more than a mere indication of possible common directions to follow, and not of how to follow them. Consequently, unlike in the co-ordination of macro-economic policies, no real warnings or sanctions could be issued against Member States. The request put forward at the Nice Council was to arrange a mid-term review of the Luxembourg process, which began at Lisbon, and to investigate even further into the actual impact of the OMC on national performances. The Nice Social Agenda²³ pursued 'quality in work' as an important objective, and so did the Employment Committee, working on quality indicators.²⁴

All this activism inside European institutions and other relevant bodies prepared the ground for a series of country studies. They disclosed, in some cases, that interesting changes were taking place inside national administrations in order to comply with the OMC.²⁵ Member States took seriously their duty to comply with soft policies, at least in building up their own internal infrastructures and in promoting adaptations of domestic deliberative procedures. In this exercise one can find traces of significant self-criticism by the Commission, which has developed in several Communications into possible ways to improve the

²² Social Protection Committee, *Report on Indicators in the Field of Poverty and Social Exclusion*, October 2001, available at: http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/indicator_en.htm. Comments in M. Ferrera, M. Matsaganis, S. Sacchi, 'Open Coordination against Poverty: The New EU "Social Inclusion Process"', *Journal of European Social Policy* 12 (2002) 227.

²³ Presidency Conclusions, Nice European Council Meeting 7, 8 and 9 December 2000, Annex I, European Social Agenda, para. 26.

²⁴ Report by the Employment Committee, Indicators of Quality in Work, 23 Nov. 2001.

²⁵ Impact evaluation of the European Employment Strategy, http://europa.eu.int/comm/employment_social/employment_strategy/impact_en.htm

means and – mostly importantly - to reach the objective of a ‘high level of employment’.²⁶ A practice of monitoring, applied to employment policies, is yet another way of governing complex processes of change by learning and by adapting to such complexity. The Commission does not make light of the difficulties of guaranteeing a transition between different forms of work, nor can it deny that the two worlds of standard and non-standard contracts may end up mirroring two separate labour markets.²⁷

Labour law remains central to all adjustment and change, and so does anti-discrimination law. However, through the analysis of soft law documents produced in the realm of the OMC, labour lawyers perceive a distinct shift in the adoption of regulatory techniques. Rather than pursuing outcomes – as in directives – the aim is to promote ‘processes and methods’.²⁸ This change of perspective is not without worries, even when it is contextualized and made functional to specific – possibly temporary – needs of the supranational legal order and to its re-organization of political priorities. To quote another example, a close examination of the employment strategy related to EU anti-racism policy and to the implementation of the Race Directive gives rise to criticism, in as much as it shows that there are points of divergence, despite the apparently common objective of combating discrimination by way of including the excluded in the labour market.²⁹

I want to describe as ‘co-ordinated reformism’ the combination of soft promotion of national responses and hard implementation of fundamental rights. In this interchange of regulations, external and objective expertise is required in order to strengthen a criticism which cannot otherwise be translated into sanctions.³⁰ A recent product of this course of action is the report produced by the Employment Taskforce

²⁶ Communication from the Commission, *Strengthening the Implementation of the European Employment Strategy*, COM(2004)239 final, 7 Apr. 2004.

²⁷ Communication from the Commission, *The Future of the European Employment Strategy. A Strategy for Full Employment and Better Jobs for All*, COM(2003) 6 final, 14 Jan. 2003, at 14.

²⁸ Ashiagbor, ‘The European Employment Strategy and the Regulation of Part-time Work’, in S. Sciarra, P. Davies, and M. Freedland (eds), *Employment Policies and the Regulation of Part-time Work in the European Union* (2004) 37. See also Regent, *supra* n. 14.

²⁹ Bell, ‘Combating Racial Discrimination Through the European Employment Strategy’, 6 *Cambridge Yearbook of European Legal Studies* (2004) 55.

³⁰ I have analysed the role of expertise in the elaboration of social inclusion policies and found that it has a significant impact on setting the agenda of the Commission. See Sciarra, ‘The ‘Making’ of EU Labour Law and the ‘Future’ of Labour Lawyers’, in C. Barnard, S. Deakin, and G. Morris (eds), *The Future of Labour Law. Liber Amicorum Sir Bob Hepple QC* (2004), 201.

chaired by Wim Kok.³¹ The already mentioned 2004 Employment guidelines were inspired by this Report and referred to it when revitalizing the European strategy and calling on Member States to make a renewed common effort. This is a confirmation of the fact that the OMC uses monitoring in place of sanctioning. Within the employment strategy the adjective 'open' seems to dominate the noun 'method' and consequently transform the final outcome into a looser co-ordination. The acknowledgement of diversities - among national legal systems as well as among regulatory techniques inside each national system - may seem to contradict the obligation to co-ordinate. Such an obligation, referred to by both the Commission and the Council, appears now - almost paradoxically - to be expanded and in a sense complicated by the appearance of the OMC in other fields, in particular in the co-ordination of social inclusion policies. The links between the latter and employment policies make them complementary to each other in several cases.

In this unsettled scenario the 'constitutionalization' of the OMC in part I of the Treaty establishing a Constitution³² may make it a victim of its own success. The OMC will be symbolically visible as a constitutional provision, and yet remain a method, as such unenforceable and non-binding. Its acquired relevance in the Treaty will, perhaps, impose on EU institutions - the Commission and the Council, but not the ECJ - the obligation to search for more precise and normative monitoring mechanisms. It is therefore of some importance to suggest that this innovation in Part I should be closely linked with the new opening Articles in Part III. Bringing about mainstreaming as an alternative technique to traditional sanctions, the opening Articles of Part III may indicate a new path to national courts. The 'aim' to eliminate inequalities and to promote equality between women and men, as in Article III-116, is common to all activities referred to in Part III. Mainstreaming also applies to employment, social protection, and social inclusion policies, as well as to education, training, and the protection of health (Article III-117). A broad anti-discrimination clause is provided in Article III-118, while the three following Articles deal with environmental and consumer protection and with animal welfare. The inclusion of mainstreaming Articles in the Treaty, like the constitutionalization of the OMC, appears to be a confirmation of existing practices. The EU Race Directive³³ and the

³¹ European Commission, *Jobs, Jobs, Jobs, Report of the Employment Taskforce chaired by W. Kok*, November 2003, at http://europa.eu.int/comm/employment_social/employment_strategy/pdf/etf_en.pdf.

³² Treaty Establishing a Constitution for Europe, OJ 2004 C 310/1, Article I-15.

³³ Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, OJ 2000 L 180/22.

related anti-racism policy are linked and connected with other measures and actions by reason of a mainstreaming principle.³⁴ Gender mainstreaming has also been adopted in European social policies³⁵

If we connect the OMC with a close observation of mechanisms of integration through hard law, we can see new perspectives ahead, despite the apparent institutional weakness of social and employment policies. Enforcement could become a widespread technique and the object of monitoring through independent bodies. It is for this reason that another process, parallel to that described so far, becomes relevant for the present analysis.

V. ...And in the Enforcement of Social Rights

The Charter of Fundamental Rights approved at Nice opened a wide-ranging and unprecedented discussion among lawyers and created a beneficial interchange among different disciplinary approaches. Social rights included in the Charter are another sign of a slow and yet continuous progression, allowing social and employment policies to emerge and gain autonomy from other policies. We need to investigate how monitoring the enforcement of social rights and sanctioning Member States when they do not respect them can contribute to strengthening soft law regimes under the OMC.

A group of independent experts, chaired by O. De Schutter, is currently experimenting with a widespread monitoring of fundamental rights in EU Member States.³⁶ Both the methodological and the theoretical implications of this sophisticated exercise are very relevant in the field of social and labour law, particularly when it comes to establishing criteria of comparability among labour standards in the enforcement of employment policies. While adopting fundamental rights as parameters in the implementation of the OMC, the independent experts are looking for ways of strengthening the weak basis of soft law

³⁴ Bell, *supra* n. 29. See also J. Shaw, *Mainstreaming Equality in European Union Law and Policymaking* (2004), in particular at 22ff.

³⁵ Mückenberger, 'Gender Mainstreaming', in U. Mückenberger, *Manifesto Social Europe* (2001) 269. See also Bell, 'Equality and the European Union Constitution', *ILJ* 2004, at 252, indicating that: 'Aside from anti-discrimination legislation, the mainstreaming concept is a parallel attempt to secure equality through means other than litigation'.

³⁶ E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF) *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002* (2003) at http://europa.eu.int/comm/justice_home/fsj/rights/network/rapport_2002_en.pdf and E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF) *Report on the Situation of Fundamental Rights in the European Union in 2003* (January 2004), at http://www.fd.uc.pt/hrc/network/report_2003.pdf.

machinery. 'Guiding policies in a more systematic manner in such a way that they are drawn up to take into account the objective of implementing fundamental rights'³⁷ is what the experts aim at. In the future this whole process could beneficially be monitored by an independent agency.³⁸ This rich collection of data could bring about a circular, self-reproducing, perfect harmony between rights and policies.

The point to be emphasized is that 'mutual evaluation' and 'collective learning' should be based on objective criteria and on comparable standards of implementation. This would subtract evaluation – so far the only available sanction - from the climate of political negotiation which seems to characterize the OMC. One cannot ignore that soft law procedures in the co-ordination of employment policies are thought of as functional to the Council's broad economic guidelines, thus permitting mutual learning among national governments in a limited and restricted area whose borders are defined by EU macro-economic priorities. The starting assumption is that the OMC – as previously stated – is a regulatory technique alternative to harmonization. This does not imply that the market has already reached an ultimate level of integration. It can be argued, in fact, that a final and conclusive period of market integration is almost incompatible with the unique nature of the EU, characterized by the fact that integration at all levels is a permanently open process. Positive integration appears to be the only elective way of avoiding distortions of competition in a changing legal environment, when fundamental rights are at stake.

I suggest that the OMC, by insinuating flexible measures into the regulation of employment contracts, may create a potentially less stable environment for the guarantee of fundamental rights. I therefore submit that the OMC should be driven by policies which gradually implement a minimum level of rights, in order to establish minimum guarantees for individuals. Fundamental rights of the last generation, such as the right

³⁷ Section 5 in the Introduction to the *Report for 2002, ibid.*, at 25.

³⁸ See now the Communication from the Commission, The Fundamental Rights Agency. Public Consultation Document, COM(2004) 693 final, 25 October 2004. See also the recent proposal put forward by President Barroso for 'locking in' a culture of fundamental rights in EU legislation. The idea is to screen systematically all Commission legislative proposals for compatibility with the Charter of Fundamental Rights and favour 'impact assessment' of the impact of legislation on individual rights. See European Commission Presse release, Brussels 27 April 2005 at www.europa.eu.int/rapid/pressReleaseAction.do. Compare also the critical analysis of A. Andronico e A. Lo Faro, *Defining Problems: Open Method of coordination, Fundamental Rights and Governance*, in O.De Schutter and S. Deakin, *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels, Bruylant **2004(?) or 2005??** Their auspice is that fundamental rights be expanded as procedural rights within OMC, rather than leaving to such a 'method' the function to protect them.

to training, follow individuals throughout their working lives and have become increasingly relevant in allowing transition from one occupation to another one. They should, therefore, be constructed and implemented as rights detached from employment contracts and attached to working and career paths of a flexible nature. The right to the protection of personal data – to take another relevant example - can be enforced differently in different phases of the working life and should follow the individual, rather than the contract of employment. The right to the reconciliation of family and working life can also have a different impact in different cycles of the individual's professional development and become an essential link to the fulfilment of other fundamental human rights. Even the right of access to employment services should be thought of as a fundamental right responding to the different needs of individuals in different phases of their working lives.

Within the framework of the OMC we can re-think a traditional distinction between fundamental freedoms and fundamental rights of a procedural nature, the latter being dependant for their full enforcement on the state's active intervention. Drawing on this distinction it is possible to see how fundamental freedoms – positive and negative freedoms of association – rather than being constructed, as happens under most European national constitutions, as preconditions for the exercise of other rights, are in reality inaccessible to marginal workers and to the socially excluded. In the new, vast universe of precarious and flexible workers an historical paradox can be presented as a theoretical framework in which to develop a practice of fundamental rights. Procedural rights, such as the right to training, the right to re-conciliation of work and family life, and the right of access to employment services, may gradually become instrumental to the progressive emancipation of precarious and economically dependant workers. When such fundamental rights are fully granted by active state intervention, even access to fundamental freedoms may become enforceable in practice. What we are witnessing at the moment in most countries is the inability of traditional social partners to represent in traditional ways the most marginal and precarious groups within the labour force and the newly emerged economic actors, such as employment and temporary work agencies.

VI. Concluding Remarks: The Relevance of the European Social Charter

One of the most positive remarks made by commentators on the Nice Charter has to do with the fact that all fundamental rights are assembled in a single document, thus overcoming the segregation of

social rights in a different source document, as in the Council of Europe's European Social Charter. The latter has, however, been an interesting point of comparison and inspiration, both for the monitoring exercised by independent experts and for the Collective Complaints Protocol, which was added in 1995 and entered into force in 1998.³⁹ The original system of monitoring and sanctioning enforced under the ESC has always been praised by European labour lawyers, including among them leading figures who served on the Committee as independent experts.⁴⁰ In the academic discussion preceding the 1996 IGC, an independent evaluation of the enforcement of social rights – as opposed to rights justiciable in courts – was advocated by a group of labour lawyers.⁴¹ That reference was intended to pave the way for innovative solutions within the European debate on fundamental rights, with an emphasis on so-called collective social rights, some of which were – and still are – explicitly left out of EU competence.⁴² That debate also yielded arguments in favour of a clearer visibility of the ESC among the external sources referred to in European Treaties. The latter suggestion was partially followed up in subsequent reforms of the Treaties and even in the drafting of the Constitution,⁴³ but the impact of this source remains inadequate.

The current discussion, in view of the ratification of the Treaty establishing a Constitution, seems to go into different directions, when accession to the ECHR – not to the ESC – is envisaged. Social rights are still at the crossroads of differing interpretations especially because of the unclear distinction between principles and rights inserted into the final clauses of the Charter, now inserted in Part. II of the Constitution. Meanwhile, several links can be established in EU law between social rights and employment policies. A number of possible future expansive interpretations are possible to imagine. Article 125 TEC describes the employment strategy, specifying that it is 'particularly for promoting a skilled, trained and adaptable workforce'. Legal measures adopted to enhance flexibility, thus improving employment figures, should not lead

³⁹ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, European Treaty Series - No. 158.

⁴⁰ Kahn-Freund, 'The European Social Charter', in F. G. Jacobs (ed), *European Law and the Individual* (1976) 10ff.

⁴¹ R. Blanpain, B. Hepple, S. Sciarra, and M. Weiss, *Fundamental Social Rights: Proposals for the European Union* (1996).

⁴² The right to organize and the right to strike and lock out are excluded from EU competence (Art. 137(5) TEC). Criticism of the notion of 'collective' social rights is voiced by T. Novitz, 'Are Social Rights Necessarily Collective Rights? – A Critical Analysis of the Collective Complaints Protocol to the European Social Charter', *EHRLR* (2002) 50.

⁴³ References are in Sciarra, 'La constitutionnalisation de l'Europe sociale, entre droits sociaux fondamentaux et soft law', in O. De Schutter and P. Nihoul (eds), *Une constitution pour l'Europe. Reflexions sur les transformations du droit de l'Union européenne* (2004).

to degrading working conditions or to diminished guarantees. One could argue that the fundamental right to dignity, much emphasized in the structure of the Nice Charter, is infringed when no fair balance can be established between management prerogatives and workers' compliance with them. Jobs 'on call' or extreme forms of part-time work may be taken as examples. In such employment contracts there is often disproportionate discretion left to the employer, both in the working time arrangements and more generally in establishing working conditions. In all such cases there may be an instrumental reference to the supremacy of EU law and EU targets. Choices of national legislatures that do not respect fundamental social rights may not be justified as a necessary compliance with the Council's guidelines issued under the OMC.

Furthermore, recourse to descriptive and non-legal terms such as 'modernization' does not justify the adoption of legal measures which infringe fundamental rights. Specific social indicators must correspond to such broad definitions of political programmes, so that the evaluation of national responses to the OMC remains based in a well grounded measurement of social change. The issue of comparability must, once more, be recalled as a necessary starting point in all attempts to learn from one another. It can be argued that monitoring and reporting, especially when such actions are carried out by truly independent bodies, can be a way to alert national actors – be they individuals or groups – to pursue litigation before national courts. These are cases in which fundamental social rights can be interpreted by national courts as minimum levels of guarantees not to be waived nor reduced. Fundamental social rights can also be sources of inspiration for national legislatures, even though no duty to legislate can be envisaged. In fields in which secondary law is already enforceable, further improvements of existing standards could become a strategy for mutual learning. A good example is the reconciliation of family and working life, a field in which numerous links with employment policies can be discerned.

Circulation of international standards, an idea proposed in the opening of this chapter, is one way to enhance further developments in the language of rights. However, one cannot deny that the collective complaints procedure, the most challenging novelty in the apparatus of ESC sanctions, in the field of labour rights, has not yet fulfilled its full potential, due also to a lack of activity on the part of the European social partners.⁴⁴ The list of organizations listed in Article 1 of the Additional Protocol may also need re-thinking, if one had to take into account groups of non-standard workers and other categories of economically

⁴⁴ See the contributions by Akandji-Kombé, Brillat and De Schutter in this volume.

dependent workers, or other groups at risk of being discriminated against on all grounds provided for by EU law. I have tried to indicate how raising awareness of the respect for fundamental social rights may also result in interventions of national courts, by way of preliminary ruling procedures.

Moreover, the originality of regulatory techniques in the EU, as indicated in the description of OMC and its current enforcement, requires that unique forms of monitoring be put in place. Recourse to independent expertise should not be left in the discretion of governments alone. Independence should result from a combination of well established expertise in the field and distance from governments and the social partners. In the EU tradition independent agencies have the role of making specialized contributions in specific fields, relieving European institutions of the urgent need to sanction or to evaluate Member States' performances. The proposal to establish a Fundamental Rights Agency follows in this direction. In expanding the remit for the creation of a Centre on racism and xenophobia, it is suggested that the Agency be organized on thematic lines. This trend could be confirmed by the announced creation of a European Gender Institute.⁴⁵ It is also worth noting that one of the main tasks of the Agency should be the 'collection and analysis of objective, reliable and comparable data at European level'.⁴⁶

One of the points that has been strongly advocated in this chapter is the objectivity of data on which all evaluations and possible complaints should be based. There may be a need to bring the culture of fundamental labour rights more closely to the attention of institutions active in pursuing further protection of human rights. A separation among areas of fundamental rights and the means of enforcing them may seem counter-intuitive if we look at their universality, which is aimed at in the Charter of Fundamental Rights and in the yet-to-be-ratified Constitution. However, international sources proceed in the direction of specifying areas and means of protection, sometimes exposing new spheres of human rights to the challenges of international law.⁴⁷ It may be worth exploring the specificity of social rights at the present stage of evolution in national and supranational law, and to do so while leaving behind the inferiority complex that, over the years, has characterized such a large

⁴⁵ COM(2004) 693 final, *supra* n. 38, at 4 and 5. See also the conclusions of the European Council of Brussels (17-18 June 2004) for the creation of a European institute specializing in equality between men and women, para. 45.

⁴⁶ COM(2004) 693 final, *supra* n. 38, at 8.

⁴⁷ An example, relevant to the present discussion, is the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal data, ETS - No. 108.

area of scholarship and policy-making. To avoid the separation of labour rights, we must learn to treat them as citizens' rights.