European Community Labour Law: Principles and Perspectives

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Instruments of EC Labour Law

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I. Does Labour Law Have Specific Instruments?

As part of the legal order, national labour law appears to share the nature of other fields of the law: the observer will find some constitutional provisions, a number of acts, regulations and decrees—and a good deal of judge-made law, which may either be formally binding, as in Britain, or have a nearly equivalent effect, as on the Continent.

On the basis of a very narrow conception of the legal order, there is no difference from, say, company law and civil law, which have structures that are roughly the same as this. If, however, we take a broader approach and ask what are the labour law rules that are applied in practice, the perspective changes. First and foremost, we find collective agreements at various levels—some of them applicable to the entire economy, others to a particular sector or industry, and yet others just to a single enterprise or even shop floor. In continental Europe, these agreements contain legally binding rules; in Britain, they are incorporated into the contract of employment, which under normal circumstances makes for a comparable result. In some legal systems, for instance the Danish one, the scope of collective bargaining is so far-reaching that traditional fields of labour law, such as protection against dismissal, are covered exclusively by collective agreements. In all EC countries the State-imposed law is complemented by autonomous law.

Collective agreements, however, are not the only specific labour law instrument. In everyday life on the shop floor as well as at enterprise level, rules exist which are respected but whose legal status is uncertain; their only 'source' and legitimation stem from the behaviour of employer and employees. Such rules may concern fringe benefits, trade union rights, or work performance; they may be the result of negotiation or imposed unilaterally. These informal rules make up an important part of working life even though lawyers tend to minimize their significance or ignore it completely. Here again, therefore, State-imposed law is complemented by special rules outside the range of State legislation, in terms of both form and substance. There is no guarantee that these informal rules will comply either with laws or with collective agreements.

To argue that all this makes labour law defective would, however, be

misleading. The different levels of rule-making tailor it to particular conditions with a high degree of flexibility. At the same time, they mean that formal changes in the law may have a very limited effect: the social partners may react in a way that re-establishes the status quo; shop floor rules may continue as if there had been no new legislation. This is, of course, by no means an automatic reaction, because it depends on the relative strength of management and of trade unions and other workers' representatives. The point to bear in mind, however, is that the law does not always present a binding guideline for the real-life behaviour of employers and employees.

II. Sources of EC Labour Law

Rules created by the EC concerning employees are legal rules in the formal sense. They are comparable to statute law and judge-made law within a national context. The complements described in Section I are, however, absent: there are normally no European collective agreements that apply directly to individual employment relationships and there are no Europe-wide informal rules, although they are conceivable in multinational corporations. That does not mean, however, that European labour law has more direct impact than national law. The fifteen national systems, comprising their laws, collective agreements, and informal rules, may delay or block the implementation of European legislation. This is obvious when Member States fail to fulfil the duties deriving from the Treaty or certain directives, but it may occur with even greater effect in less obvious cases where collective bargaining or informal rules do not comply with EC rules. The instruments of EC labour law are thus very fragmentary; they may be able to add some elements to national systems, but they cannot replace national labour law—not even in a very circumscribed field like sex discrimination or acquired rights in the event of the transfer of enterprises. This situation could well change with the advent of European collective agreements, especially at the level of multinational enterprises, but as we shall see, we are still some distance from that at present.

The monopoly of 'State'-imposed rules in EC labour law has many causes that cannot be analysed in detail. One of them may be the weakness of the trade union movement at European level compared with the national level: as yet, there has not even been any co-ordination of national collective bargaining across different Community countries, although it would have required relatively little effort. That there are any labour law rules at all is due not so much to pressure from a well-organized labour movement as to the fact that the Community needs support from the populations of the Member States. There are political reasons for closing the legitimation gap created by the

underdeveloped democratic structure of the EC.[1] The traditional argument in favour of international labour standards, namely, equalizing the conditions for competitors in the world market, seems to be of very limited importance. Except in the field of health protection, EC labour law does not provide for substantive standards like a five-week holiday entitlement or protection against dismissal, in acknowledgement of the differing level of labour costs in individual Member States. Basically, it guarantees rights of equality for such groups as migrant workers and women that do not interfere with the high degree of difference between protective rules in separate Member States.

The fact that the only labour law is that created by the EC institutions implies that the 'instruments' used are not of a specific nature: we find almost every kind of legal technique, as also applied in other fields such as free movement of goods or competition law within the EC. The only reason we do not refer in a general fashion to well-known treatises of EC law is that EC labour legislation is concentrated in certain instruments and more or less abjures others (albeit not entirely).

We shall start with primary EC law, including international treaties and agreements made by the EC (Section III below), and then move on to secondary EC law as described in Article189 of the EC Treaty (Section IV). Some atypical instruments are discussed next (Section V), followed by the legal status of agreements between the social partners in accordance with Article 118b of the EC Treaty (Section VI). We shall conclude with some remarks about the future (Section VII). All instruments will be described, as well as the decisions of the Court of Justice that implement them.

III. Primary Community Law

1. EC Treaty and EU Treaty

The EC Treaty contains some labour law-related rules with highly differentiated degrees of abstraction.

(a) Global Social Aims

According to the second and third statements of intent in the Preamble to the EC Treaty, the Community is resolved to ensure not only economic but also social progress, which is to be reflected in a constant improvement of living and working conditions. Reference to this objective is also made in Article 2 as amended by the EU Treaty, which includes among the declared tasks of the Community the promotion of 'a high level of employment and of social protection'. In the Single European Act, this is supplemented by the mention

[1] For more details, see W. Däubler, *Market and Social Justice in the EC—the Other Side of the Internal Market* (Gütersloh, Bertelsmann 1991), 73.

in its Preamble of 'social justice' as an objective, and one that is placed in the context of the Member States' constitutions and of human rights as guaranteed by international law.[2] The Treaty on European Union also mentions in its Article B the objective 'to promote economic and social progress'.

These broadly worded statements yield very few concrete conclusions. Essentially, their only effect is a general obligation on the EC institutions not to ignore the attendant social consequences inherent in policies implemented in various fields. People who are fond of formulae may see in these provisions a ban on Manchesterism, but it is difficult to imagine a decision of the Court of Justice declaring a regulation or directive invalid as conflicting with Article 2 of the EC Treaty. The way in which social objectives should be pursued, and their relative value in comparison with other goals, are left open.

(b) Concrete Policy Objectives

In Article 117—one degree of abstraction lower—the EC Treaty advocates an independent social policy that is basically entrusted to the Member States. Despite its cautious wording,[3] Article 117(1) is not just a political declaration of intent but a legally binding commitment. This is manifested more clearly in the French version of the text, where the use of the word *conviennent* carries the implication of 'convention'. In terms of substance, the general objectives of the Treaty are specified not only by the stipulation of an independent social policy, but also by the provision that there should not simply be harmonization or approximation of living and working conditions; rather, this harmonization is to be achieved 'while the improvement is being maintained'. This means, in addition, that the Community not only has to intervene to compensate for potential distortions of competition due to differences in social costs, but also has a mandate for promoting social evolution even where this precondition is not present.

According to the Court of Justice, however, this mandate does not create concrete obligations for the Community or for the Member States. Even if Member States lower their labour standards in a very substantive way (in the actual case concerned, allowing third-world working conditions on ships

[2] The precise wording of the third statement of intent in the Preamble reads as follows: '[d]etermined to work together to promote democracy on the basis of fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice'.

[3] Art. 117 reads:

'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.'

sailing under their national flag), nobody can invoke Article 117 as a barrier against social retrogression: Article 117 has a binding effect only as a guideline for the interpretation of other Treaty provisions.[4] Social aspects have to be taken into account not only in the framework of an independent social policy, but also in the context of economic policy action. With reference to Article 2 of the Treaty, the binding force of provisions like Article 102a and Article103(1) is no greater than that described above. The same is true of Article 75(1) dealing with common transport policy and Article39(2)(a) dealing with agricultural policy.

(c) Clear-Cut Powers: Freedom of Movement for Workers, Equal Pay, and the European Social Fund

The freedom of movement for workers laid down in Articles 48-51 is one of the 'fundamental freedoms' of the Common Market: a single economic area necessarily implies labour mobility. In 1970, Article 48 of the Treaty became directly applicable law in all Member States.[5] Equal treatment of migrant workers, i.e. a labour law rule, can thus be derived directly from the EC Treaty.

Article 119 of the Treaty contains the principle that men and women should receive equal pay for equal work. As the Court of Justice decided in the second *Defrenne* case, this Article is binding not only on the Member States but on private parties as well, especially employers and employees.[6]

A third relatively concrete provision refers to the European Social Fund, whose task under Article 123 of the Treaty is 'to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living'. According to the provisions of the Single European Act, this Fund is one of the so-called structural funds that grant subsidies to promote, in particular, government intervention in regions with high unemployment or in favour of problem groups.[7]

(d) Enabling Provisions, especially the Agreement on Social Policy

The Single European Act added Article 118a to the Treaty to enable the Council to enact directives by qualified majority voting in the field of the 'working environment'. The Commission and the Council have restricted their own powers to health and safety matters, leaving aside such important topics as 'humanizing the world of work'.[8] The absence of other specific

[4] ECJ, *Europäische Zeitschrift für Wirtschaftsrecht* (Beck, Munchen 1993), 288, Sloman Neptun; see X. Lewis, 'The Employment of Foreign Seamen on Board Vessels of a Member State' (1993) 22 *Industrial Law Journal* 235.

[5] [1974] ECR 359 and 1337.

[6] [1976] ECR 455.

[7] For more details see [1993] OJ L93/5 and 39.

[8] It must, however, be noted that EC health and safety legislation is very important and has added a great many protective measures to current law in countries like Germany or Italy. The most important text is the so-called Framework Dir. ([1989] OJ L183/1), but the dirs. concerning the handling of heavy loads ([1990] OJ L156/9) and visual display units ([1990] L156/14) also merit mention.

labour law provisions in the Treaty made it necessary to have recourse to the provision on the approximation of laws (Article 100) or to the general clause of Article 235. Both routes were accepted by the European Court of Justice, but they require a unanimous decision by the Council. The power of veto thus given to every Member State was upheld by the Single European Act, because Article 100a(2) excluded from the new qualified majority rule all 'provisions relating to the rights and interests of employed persons'.[9]

In its decision on Maastricht, the German Constitutional Court heavily criticized the broad interpretation given to Article 235[10] and has stated that such ECJ decisions would have no binding effect on the Federal Republic's courts, administration, and Parliament. The impact of this quite unusual reasoning is, however, relatively minor in the field of labour law: the Maastricht Agreement on Social Policy between eleven Member States (excluding the United Kingdom) contains, in its Article 2, a list of specified fields where directives may be enacted.[11] Even though it may not exhaust the whole of labour law, the subject fields are as broad as 'working conditions', 'information and consultation of workers', and 'protection of workers where their employment contract is terminated'. The Agreement is based on the assumption that the UK veto has to be overcome without imposing any obligation on the United Kingdom; its objective is not to extend the scope of Community legislation to new fields. This means that the matters covered by the Agreement may be equally well treated within the framework of the Treaty itself in instances where the UK Government is in agreement.

2. Treaties with Third States

On the basis of Articles 228, 238, and other provisions of the Treaty,[12] the Community has concluded a considerable number of treaties and agreements with non-member countries. Some of these agreements deal with labour law matters, and the following merit mention:

(a) The Agreement on the European Economic Area, which came into force on 1 January 1994. It extends all the Treaty provisions mentioned above to the signatory States, thereby establishing, for instance, free movement of workers across the whole area covered by the Agreement.[13]

(b) The Association Agreement between the Community and Turkey contains a vague programme to establish free movement of workers. There is a Second Protocol, with wording close to that of Article 48 of the EC Treaty; it was, however, held not to be self-executing by the European Court of Justice.[14] On the other hand, there is a decision made by the Association Council that considerably improves the legal situation of Turkish workers within the Community.[15]

(c) The Co-operation Agreement between the Community and Morocco contains provisions giving equal rights to Moroccan workers living legally in one of the Member States. According to the Court of Justice, at least some of these provisions have direct effect and can be invoked in national courts.[16]

(d) According to the Court of Justice,[17] the Community is entitled to conclude ILO Conventions in accordance with its powers as granted by the EC Treaty. In cases of joint competence, Member States and the Community have to act together; where the subject matter falls within the exclusive scope of (primary or secondary) EC law, it lies with the EC institutions to negotiate, sign, and ratify such Conventions. To date, there have been no concrete examples—a fact that should not surprise anyone, given the practical difficulties: the EC is not a member of the ILO and cannot easily provide for the tripartite representation required by the statutes of the ILO.[18] It has to be added that following the Court's decision it remains unclear whether a jointly concluded convention is part of primary Community law or has a legal status *sui generis*.

3. Fundamental Rights

Are there any fundamental workers' rights in EC law such as freedom to organize? Rights of this kind have been one of the most important instruments in developing the legal field that we nowadays call labour law.

Like the two other Community Treaties, the EC Treaty does not include a separate list of fundamental rights. The reason originally given was that, unlike political organizations, a purely economic community does not perform any acts for which fundamental rights would be relevant. This reasoning reflects a peculiarly narrow perception of fundamental rights, restricting them

[9] On the respective scope of Art. 118a and Art. 100a(2), see the differing positions of R. Blanpain, *Labour Law and Industrial Relations in the European Community* (Kluwer, Deventer, 1991), 146 and E. Vogel-Polsky, *L'Europe Sociale 1993: Illusion, Alibi ou Réalité?* (Editions de l'Université de Bruxelles, Brussels 1991), 129 ff.

[10] See M. Weiss, 'The German Federal Constitutional Court's Approach to Maastricht,' (1993) 9 *The International Journal of Comparative Labour Law and Industrial Relations* 351.

[11] For a critical evaluation, see M. Weiss, 'The Significance of Maastricht for European Community Social Policy' (1992) 8 *The International Journal of Comparative Labour Law and Industrial Relations* 3; B. Bercusson, (1994) 10 *Industrial Law Journal* 23; the conformity with fundamental structures of the EC is stressed by T. Schuster, 'Rechtsfragen der Maastrichter Vereinbarungen zur Sozialpolitik', *Europische Zeitschrift für Wirtschaftsrecht* (1992), 178.

[12] An overview of all relevant provision is given by G. Bermann, R. Goebel *et al.*, *Cases and Materials on European Community Law* (West Publishing, St. Paul/Minn., 1993), 891.

[13] Cf. O. Jacot-Guillarmod, *Accord EEE* (Schulthess, Zürich 1992).

[14] Case 12/86 *Meryem Demirel* v. *Städt Schwäbisch Gmünd* [1987] ECR 3719.

[15] Case C–192/89 *S. Z. Sevince* v. *Staatssecretaris van Justitie* [1990] ECR I–3461.

[16] See Case C–18/90 *Office national de l'empoi* v. *Bahia Kziber* [1991] ECR I–199.

[17] Opinion 2/91 [1993] OJ C109.

[18] Cf. L. Betten, (1993) 9 *The International Journal of Comparative Labour Law and Industrial Relations* 244.

to guarantees of participation in politics and protection against unjust imprisonment, seizure, and other forms of State action. The 'freedoms' covered by the Treaty are basically confined to national treatment; they are rights of equality that ignore all other possible needs for protection.

Subsequent legal developments have likewise had little positive impact on this situation. The fact that all Member States have ratified the European Convention on Human Rights does not mean that the Convention is now an integral part of Community law. This would presuppose that the Member States agreed to being 'succeeded' in their legal status by the Community; such an attitude seems fictitious. It would also presuppose a change in the Convention itself, which admits nobody but individual sovereign States to membership. The Preamble to the Single European Act, which mentions not only the European Convention on Human Rights but also the European Social Charter, is generally not interpreted as having integrated these two conventions into Community law.

In keeping with the EC Treaty's 'blindness to fundamental rights', the Court of Justice at first refused to monitor Community measures for their compatibility with fundamental rights.[19] It was not until 1969, in the context of the *Stauder* case, that the Court ruled that the provision at issue did not contain any elements capable of 'jeopardizing the fundamental human rights enshrined in the general principles of Community law and protected by the Court'.[20]

In its 1970 *Internationale Handelsgesellschaft* decision, the Court of Justice emphasized once again that it was its task to ensure the observation of fundamental rights as part of the general principles of law.[21] How these fundamental rights could be identified was paraphrased as follows: they would have to be inspired by 'the constitutional traditions common to the Member States', but they would also have to fit in with the structure and objectives of the Community.[22]

In the 1974 *Nold* case this was underlined once again, based on the following reasoning:[23]

'It [the Court of Justice] cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.'

[19] Case 1/58 *Friedrich Stork & Co.* v. *High Authority of the European Coal and Steel Community* [1959] ECR 17, 26; Joined cases 36, 37, 38 and 40/59 *Präsident Ruhrkohlenverkaufsgesellschaft mbH, Geitling Ruhrkohlen - Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen - Verkaufsgesellschaft mbH and J. Nold KG* v. *High Authority of the European Coal and Steel Community* [1960] ECR 423; Case 40/64 *Marcello Sgarlata and Others* v. *Commission of the EEC* [1965] ECR 215.

[20] Case 29/69 *Erich Stauder* v. *City of Ulm, Sozialamt* [1969] ECR 419, 425.

[21] Case 11/70 *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, 1134.

[22] [1970] ECR 1134.

[23] Case 4/73 *J. Nold Kohlen - und Baustoffgroßhandlung* v. *Commission of the European Communities* [1974] ECR 491, 507.

This reference to international conventions was specified in subsequent decisions, in particular with regard to the European Convention on Human Rights. In the *Rutili* case,[24] for instance, measures taken by alien-registration authorities were assessed on the basis of Articles 8 to 11 of the European Convention on Human Rights, and the Court decided for the first time that the right to organize is part of Community law.

By and large, the Court's decisions deserve commendation, but significant deficiencies of protection remain. Is the collective autonomy of the social partners a general principle which EC legislation has to respect? Can fundamental rights be invoked against social powers provided that their exercise is regulated by EC law? What is the precise meaning of freedom to organize? Does it also include the right not to unionize? None of these questions can be answered with certainty from the existing decisions of the Court of Justice.

In addition to these 'intrinsic' points of criticism, there is also an objection to the basic assumptions of the model. Problems relating to fundamental rights have so far mainly arisen in the context of atypical Community actions, for instance with respect to bans on agricultural crops, Member States decrees based on Community law regarding migrant workers and particular decisions taken by the Community *vis-à-vis* specific companies or their employees. However, this still leaves typical Community action—the opening up of markets. Even if construction or transport companies are exposed to cut-throat competition, for example, it is not possible according to the current interpretation of fundamental rights to define the opening-up of markets as such as an infringement of fundamental rights, even though the disruption of workplaces and workers' lives may be as devastating as direct (and possibly illegal) State action. It will not be possible to deal with the real problems of the Common Market and Monetary Union on the basis of a traditional list of fundamental rights. Instead, certain social and economic minimum standards need to be set, both at Community and at Member State level, in order to prevent or reduce labour cost competition, social dumping, evasion of legal provisions, and hardship generated by processes of restructuring.

To date, the Community has not yet created such a text. The 'Community Charter of the Fundamental and Social Rights of Workers', adopted by the Member States with the exception of the United Kingdom at the Strasbourg summit in December 1989, is a declaration of good intent without any direct binding effect.[25] It may become a guideline for the interpretation of EC labour law, but its political impact is much more important than its legal content.

IV. Secondary Community Law

Article 189 of the EC Treaty gives the Council and the Commission a series of specific instruments as a way of enacting legislative and quasi-legislative

[24] Case 36/75 *Roland Rutili* v. *Minister for the Interior* [1975] ECR 1219, 1232.

[25] The text can be found in: *Social Europe* 1/1990 and in G. Bermann *et al.*, *European Community Law, Selected Documents* (West Publishing, St. Paul/Minn., 1993), 661.

measures. These enactments constitute secondary EC law, the validity of which depends on compliance with the EC Treaty and other primary EC law sources. They comprise binding regulations, directives, and decisions and non-binding recommendations and opinions. In labour law, these various instruments have been used in quite specific ways. Relatively detailed directives are the most commonly used form of legislative intervention.

1. Regulations

According to Article 189(2) of the EC Treaty, a regulation shall have 'general application' and be 'binding in its entirety and directly applicable in all Member States'. This means that regulations can create rights and obligations for individuals comparable to acts of national parliaments.

Regulations play a certain but not decisive role in labour law. They have been issued in the fields of freedom of movement for workers[26] and social legislation relating to trans-frontier road transport.[27] To date, there has been no regulation in the field of equal treatment for men and women, although Article 235 of the Treaty, normally taken as the legal basis in this field, would enable the Council to enact a regulation. The proposed European Company Statute[28] is to be in the form of a regulation, but employee participation has been excluded and placed once more in a separate directive.

2. Directives

According to Article 189(3) of the EC Treaty, a directive shall be binding 'as to the result to be achieved', but shall 'leave to the national authorities the choice of form and methods'. The Member States are therefore to keep some decision-making power over implementation, and not to be confined to mere execution of the directive. The Treaty is silent on the subject of sanctions in the event of a Member State failing to fulfil its obligations under a directive; the only way of enforcing a directive seems to be the procedure in Article 169.

The reality is far removed from this legal pattern. In the field of labour law in particular, directives have been used to impose relatively specific obligations on the Member States that leave them almost no decision-making power. The directives on the approximation of laws relating to the principle of equal pay for men and women[29] and on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[30] serve as examples. The Court of Justice accepts this way of using directives, following its general inclination to strengthen the powers of the European institutions (while staying within the bounds of what still seems to be acceptable to the Member States).

[26] The most important one is Council Reg. 1612/68 on freedom of movement for workers within the Community [1968] OJ L257/1.

[27] Reg. 3820/85 [1985] OJ L370/1.

[28] Cf. Leupold, *Die Europäische Aktiengesellschaft unter besonderer Berücksichtigung des deutschen Rechts. Chancen und Probleme auf dem Weg zu einer supranationalen Gesellschaftsform* (Aachen, 1993).

[29] Dir. 75/117 [1975] OJ L45/19.

[30] Dir. 76/207, [1976] OJ L39/40.

To allow detailed rules was only a first step for the Court. If a Member State omits to comply with a directive after the 'adaptation period' normally allowed has expired, individuals are entitled to invoke the provisions of that directive in their relations with a Member State or other public authority: the State concerned may not, according to the Court, rely on its own failure to fulfil the obligations that a directive requires.[31] The only condition is that the provision in the directive concerned must be unconditional and precise enough to be applied without further State intervention. There is, however, no 'horizontal' effect in such instances: an employee cannot invoke a provision of the directive against his private employer. This would mean imposing obligations on the employer, a consequence deemed inappropriate by the Court of Justice.[32] The national judge is, however, obliged to interpret national law in conformity with the requirements of the directive, which in many cases may make for a similar effect.[33]

In certain situations, where a directive that is not self-executing has the purpose of attributing concrete rights to individuals, a non-complying Member State has been held liable in damages to citizens who would be better off if the directive had been implemented in due time. The most prominent case deals with a labour law matter. When Italy had failed to implement Directive 80/987 on the approximation of laws relating to the protection of employees in the event of their employer's insolvency,[34] three employees sued the Italian Republic for not having fulfilled its duty to create a guarantee institution that would have paid the employees' outstanding claims for the three months immediately preceding the bankruptcy judgment. On referral under Article 177 of the Treaty, the Court stated that Community law provides for damages in such a case.[35]

Viewed as a whole, directives have become increasingly similar to regulations. To cross the borderline between the two and enact regulations instead of directives would, however, be pointlessly to provoke at least some Member States: the fact of having no horizontal effect and of offering the Member States at least a symbolic power of decision makes directives politically more acceptable than regulations. Recent legislation (for instance, on European

[31] Case 148/78 *Pubblia Ministero* v. *Tullio Ratti* [1979] ECR 1629.

[32] Case 152/84 *M. H. Marshall* v. *Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723; Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3969.

[33] Case 14/83 *Sabine von Colson and Elisabeth Kamann* v. *Land Nordrhein/Westfalen* [1984] ECR 1891; Case C-106/89 *Marleasing SA* v. *La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.

[34] [1980] OJ L283/23.

[35] Joined cases C-6/90 and C-9/90 *Andrea Francovich e.a.* v. *Italian Republic* [1991] ECR 5357.

works councils[36] and data protection[37]) continues to follow this trend. Under the Maastricht Treaty it may even correspond to a legal obligation, since the principle of subsidiarity enshrined in Article 3b of the EC Treaty obliges the Community to restrict 'centralized' European rules to fields where Member State activity is insufficient to achieve the proposed objective. The dominant position of directives in social policy matters is underlined by Article 2 of the Maastricht Agreement on Social Policy, which provides for the enactment of directives, but not regulations or decisions.

3. Decisions

According to Article 189(4) of the EC Treaty a decision shall be 'binding in its entirety upon those to whom it is addressed'. If a decision is addressed to a Member State, citizens may invoke its provisions against the non-compliant State under the same conditions as directives[38]. In labour law, decisions play a minor role; to the best of my knowledge, they are used only when the Commission is granting money from the European Social Fund. A rather important exception, however, was the Commission's attempt to set up a communication and consultation procedure on migration policies in relation to third-State citizens by a decision based on Article 118 of the Treaty. The Court pronounced part of the decision void because the Commission was not entitled under that article to prescribe the objectives of the procedure and to extend it to the cultural integration of foreign workers.[39]

4. Recommendations and opinions

According to Article 189(5) of the Treaty, recommendations and opinions 'shall have no binding force'. This wording, however, does not explicitly exclude the use of these instruments in certain circumstances as guidelines for the interpretation of EC law or national law. The Court of Justice has stated this principle in a case relating to occupational illness;[40] the German Federal Labour Court has followed it in a case concerning the age of retirement.[41] The fact that recommendations and opinions are thus a kind of soft 'law' may be an incentive to avoid directives in matters where Member States might be hostile to specific measures. The problem of sexual harassment in the work-place is an example: despite the undisputed importance of the problem, the

[36] [1994] OJ L254/64.
[37] See W. Däubler/Th. Klebe, P. Wedde, *Kommentar zum Bündesdatenschutzgesetz*, (Bund, Kuln, 1996).
[38] Case 9/70 *Franz Grad* v. *Finanzamt Traunstein* [1970] ECR 825.
[39] Joined cases 281, 283 to 285 and287/85, *Federal Republic of Germany and Others* v. *Commission of the European Communities* [1987] ECR 3203.
[40] Case C–322/88 *Salvatore Grimaldi* v. *Fonds des maladies professionnelles* [1989] ECR 4407, 4419.
[41] Federal Labour Court (=BAG) [1993] *Der Betrieb* 1993, 443, 444.

Commission and the Council have so far resorted only to non-legally binding acts.[42]

V. Atypical Acts

The list of instruments in Article 189 of the Treaty is not exhaustive. In practice, EC institutions often use non-specific forms of action whose binding force depends on the circumstances.[43] There are 'resolutions', 'programmes' and 'declarations'. There are 'decisions' in a broad, non-technical sense, encompassing what the Germans (and the German version of the texts) call *Beschlüsse* and merely expressing the will of the decision-making body without referring to Article 189(4). In the social policy field, the Council Decisions establishing Community action programmes for the disabled,[44] and the educational programme to promote the mobility of university students ('Erasmus'[45]) are notable examples.

The 'rules' established by this route have been dubbed *droit européen souterrain*;[46] they merit careful analysis in all cases where the Community grants subsidies without any other legal basis. It seems clear that the Council and the Commission are bound by their own declarations and have to respect fundamental rights, especially the right to equal treatment. But the temptation to implement or foster social policy measures through financial intervention alone, in order to avoid the complicated legislative process with all its stumbling-blocks, may be great. In the future, the Community will probably be obliged to create clearer structures that imply not only transparent rules but also independent institutions: as in a nation State, EC social policy needs institutional differentiation to achieve higher efficiency and better control. Nobody would seriously propose that all national social policy should be concentrated in a single Ministry and a few 'social funds'. The more the Community plans to act in the social arena the more it must follow the example of the nation State or develop comparable instruments.[47]

It seems appropriate to mention in the context of 'atypical' acts Conventions between the Member States, which may or may not be based on Article 220 of the Treaty but are all closely related to EC activities. Two of them have an important impact on labour law:

[42] Details and references in: W. Däubler, M. Kittner, K. Lörcher, Internationale Arbeits- und Sozialordnung (2nd edn., Bund-Verlag, Cologne, 1994), No. 420.
[43] Overview in Th. Oppermann, *Europarecht* (Beck, Munich, 1991), No. 487.
[44] See e.g. the Council Decision of 18 Apr. 1988 concerning 'Helios' [1988] OJ L104.
[45] Council Dec. of 14 Dec. 1989 [1989] OJ L395.
[46] G. Lyon-Caen, 'L'avenir de l'Europe Sociale', in *Actes du Colloque européen, Quel Avenir pour l'Europe Sociale: 1992 et après?* (Editions CIACO, Brussels, 1992), 56.
[47] Cf. D. Merten, R. Pitschas (ed.), *Der Europäische Sozialstaat und seine Institutionen*, (Duncker und Humblot, Berlin, 1993).

(1) The Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[48] as amended by the Convention of San Sebastian of 26 May 1989,[49] regards lawsuits concerning the employment relationship as falling within its scope. It is completed by the Protocol on its interpretation by the Court of Justice,[50] which confers on the Court the same powers as under Article 177 of the EC Treaty. The very existence of the Protocol proves that the Convention, though relying explicitly on Article 220 of the Treaty, is not part of Community law.

(2) The Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations[51] contains, in its Article 6, rules on the employment relationship. It is not based on Article 220 of the EC Treaty, and the Second Protocol relating to its interpretation by the Court of Justice has not yet been ratified; nevertheless, the close connection with the legal system of the EC is obvious.[52] The Convention does not harmonize labour law as such but merely co-ordinates the different legal orders. The idea is that at least the choice of applicable law should not depend on different national rules within a common market.

VI. 'Agreements' in the Framework of the Social Dialogue

According to Article 118b of the Treaty, the Commission is to endeavour to develop the dialogue between management and labour at European level 'which could, if the two sides consider it desirable, lead to relations based on agreement'. Article 4 of the Maastricht Agreement on Social Policy seems more precise: '[s]hould management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements'. Does the Community have, here, a new instrument for developing labour relations?

It may initially seem easy to answer in the affirmative on reading the text of the Maastricht Agreement. Not only is the social dialogue to be promoted by the Commission, but according to Article 3(4) of the Maastricht Agreement the social partners are entitled to 'interrupt' the drawing up of a proposal by the Commission for a period of nine months, while they attempt to reach their own solution. Furthermore, the effectiveness of their talks has been upgraded by the provision in Article 4(2) permitting them to request the implementation of their common position by Council decision.

However, without going into details here,[53] the reader's initial impression

[48] [1978] OJ L304/77.
[49] [1989] OJ L285/1.
[50] [1971] OJ L304/97.
[51] [1980] OJ L266/1.
[52] Cf. R. Plender, *The European Contracts Convention. The Rome Convention on the Choice of Law for Contracts* (Sweet and Maxwell, London, 1991), 105.
[53] See the contributions by Treu, Sciarra, and Weiss to this volume.

must quickly be corrected. The new 'instrument' lacks almost all the characteristics necessary for it to be used: apart from the fact that this agreement is a contract, we know nothing of its other features. Which legal system is to apply to it? Are the parties entitled to a choice of law? Can there be any binding effect on the member organizations of the social partners? Perhaps even on the individual employment relationship? Must a 'European collective agreement' respect national laws, or does it share the supremacy of Community law? Is the Council obliged to issue such an implementing decision at the joint request of European employers and unions? May it add or delete any provisions? What does 'decision' mean? Is it conceived in the broad sense as encompassing directives and other acts in accordance with Article 189 of the Treaty, or is it confined to 'decision' in the narrow sense of Article 189(4)? The list of questions can easily be continued.[54]

It would, of course, be possible to find an answer to all these questions without resorting to pure speculation or wishful thinking. But the effort seems premature. So far, the social partners have consistently preferred 'joint opinions',[55] which can hardly be called 'agreements'. To do more would require, at least on the employers' side, a new definition of the role of UNICE and CEEP. Surely, however, national employers' organizations and unions will, like others, rely on the subsidiarity principle. Are they likely to defer power to Brussels when everybody else tries to get it back to London, Madrid, Paris or Bonn? If in the future they reach agreement on certain issues, it will only be to combine their lobbying power. Whether this proves useful or not, a joint visit by employers and unions to the Commissioner's office will not need an elaborate legal framework. The EC will continue to use the traditional instruments.

VII. Prospects for the Future

The overview of sources of EC labour law given here reveals a wide variation in the legislative instruments concerned. This variation lies not only in the use of primary EC law as well as international agreements and various forms of secondary EC law, but also in their considerable differences as to the content: in some cases broadly worded statements, and in other precise and detailed provisions.

EC labour law has nothing of the nature of a European *code du travail*—there is no 'system', no clear and comprehensive concept behind it. This may be explained by the fact that EC social policy has always occupied a precarious

[54] For further questions see: W. Däubler, 'Europäische Tarifverträge nach Maastricht' [1992] *Europäische Zeitschrift für Wirtschaftsrecht* 329 ff.; A. Ojeda Avilés, 'European Collective Bargaining: A Triumph of the Will?' (1993) 9 *The International Journal of Comparative Labour Law and Industrial Relations* 279 ff.
[55] See the documentation in Commission of the European Communities, *Community Social Policy, Current Status 1 January 1993* (Luxembourg, 1993), 120 ff.

position within the activities of the Community. On an abstract level, the decision-makers have always recognized the necessity of certain steps in the social field, but their will to take concrete measures has not—to put it diplomatically—always been evident. In the absence of a well-organized European labour movement, the main political reason for taking action in the field of labour law is the need to win support from the populations of the Member States. Unfortunately, this need is defined in quite a different way according to whether the example followed is that of Bismarck or of Governments which react only to upheavals and riots.

In reality, there are good reasons for the Community to develop its social policy. And, as we have shown, the EC Treaty contains sufficient provisions to enable this to be done. To banish social policy to the bottom of the list of priorities would seriously undermine the legitimacy of the Community in the event of anything other than favourable circumstances. Its position is different from that of a nation State. As a 'fragment of a State', its activities are essentially restricted to the economic sphere; even the Maastricht Treaty has not changed it for the time being. If expectations in the critical area of the economy prove to be disappointed to any great extent and the Community is consequently perceived as the (actual or supposed) creator of unemployment and other social problems, it has no real power to take countermeasures. It lacks the capacity to gain the loyalty of the vast majority of its citizens through shared cultural values or the provision of public benefits such as internal and external security. There are three further areas of deficiency:

(1) Although the European Parliament is democratically elected, it has only a limited right of veto over Community moves to lay down standards. It possesses no right to initiate legislation and is able to block only quite specific projects; to that extent, even the German Reichstag was in a stronger position under the 1871 Constitution.
(2) Community decision-making lacks transparency. The Council of Ministers, the actual legislature, meets behind closed doors; interested citizens cannot discover, as they can in the various Parliaments of the Member States, who supported or who contested particular decisions.
(3) This lack of democracy and lack of transparency are both heightened by the absence of European-level media. Press, television, and radio, as well as most interest groups, are still organized along national lines. This means that their controlling function can be exercised effectively only at national level. Brussels, Luxembourg, or Strasbourg are treated as 'spheres' outside their own countries—a change in the composition of the Commission is little more important than a vote of confidence in the Belgian Parliament.

An institution built on such weak foundations must ensure that the interests and wishes of individual citizens are somehow fulfilled within the Community

(not fully, of course, but to a certain extent at least). The first Danish referendum on the Maastricht Treaty made it clear that the Community needs to exercise regard for the individual and that it will be putting its own existence in jeopardy if it continues to rely solely on market mechanisms, confining itself in other respects to a kind of background function. This does not mean that an effective social policy would be enough in itself to remedy the lack of legitimacy and bring about stability: without such a policy, however, the Community's future prospects will look even less certain.[56]

The Community's problems have intensified with the Maastricht Treaty. The increase in its powers means that its lack of legitimacy will become more and more obvious.[57] Even before the advent of currency union, the restrictions on national government deficits laid down in the new Article 104c of the EC Treaty will considerably reduce the scope for action in the field of social policy at present enjoyed by many Member States. Once a single currency for some or all Member States has been introduced, the exchange rate mechanism will no longer exist as a means of compensating for different productivity levels. A declining level of productivity, whether relative (i.e. in comparison with other Member States) or absolute, will have to be offset by 'cost reductions', particularly cuts in labour costs. In addition, it will no longer be possible for individual Member States to adopt a counter-cyclical economic policy.[58] When they cease to be able to 'compensate' in the traditional way it will rest on the Community to take the appropriate measures.

This increased pressure for action will now, however, be matched by what has been only a modest improvement in the instruments available. Although the decision-making process is, in principle, made easier by the Maastricht Protocol on social policy, the Treaty itself does not provide for any improvements in this sphere. In particular, it creates no new institutions, apart from the so-called 'cohesion' fund. This means that the Community will very probably find itself in a predicament, since it has only modest methods at its disposal to counter the enormous socio-political risks. The Community's strategy on the path to currency union is reminiscent of that of a wayfarer journeying through a primaeval forest who convinces himself that his merry songs will turn snakes and other beasts into harmless creatures. More soberly, the Community will be putting its very existence in jeopardy if it pursues its monetary and economic policy as if it were a federal State but without possessing the opportunities for adjusting social policy that are properly available to such a State.

[56] On the importance of social policy as a means of establishing legitimacy, see R. Pitschas, *Die öffentliche Verwaltung* (1992), 277.
[57] Cf. P. VerLoren van Themaat, 'Les Défis de Maastricht. Une nouvelle Étape importante, mais vers quels Horizons?' [1992] *Revue du Marché Commun (RMC)* 205.
[58] Ibid.