

Hard and Soft Law in the Construction of Social Europe

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Much of the debate concerning the Open Method of Coordination in general and the European Employment Strategy in particular concerns the respective merits of “hard” and “soft” law in the construction of Social Europe. Both those who favor the OMC as a mode of governance and those who question compare it, implicitly or explicitly, with the Community Method. The Community Method is thought of as “hard law” because it creates uniform rules that Member States must adopt, provides sanctions if they fail to do so, and allows challenges for non-compliance to be brought in court. The OMC, which has general and open-ended guidelines rather than rules, provides no formal sanctions for Member States that do not follow the guidelines, and is not justiciable, is thought of as “soft law”. Proponents of the OMC argue that it can be effective despite – or even because of – its open-ended, non-binding, non-justiciable qualities. Opponents question that conclusion. They argue not only that the OMC cannot do what is needed to construct Social Europe and that “hard law” is essential; they also contend that use of the OMC could undermine efforts to build the hard law they think will be needed.

On close analysis, this debate turns on a number of highly contested issues. These include the relative effectiveness of the Community Method and the OMC, the goals for Social Europe, and the nature of the obstacles to reaching those goals. When proponents of the OMC contend that it is better suited than the Community Method for certain tasks, they are not only making assumptions about the nature of the tasks and the capabilities of the open method; they are also implicitly or explicitly making assumptions about the capabilities of the Community Method. Similarly, when opponents of the OMC argue that its use should be limited in order to prevent erosion of the *acquis* or block future efforts to use hard law, they do so because of beliefs both about the OMC and the Community Method as well as assumptions concerning the proper role of the Union in social policy.

To a large degree, the people in this debate seem to be talking past each other. The policy discussion should be about the goals for Social Europe and the tasks needed to reach those goals. The institutional debate should be about the *relative* capacities of different modes to handle specific certain governance tasks, and discussion should focus on

evidence relating to those capacities. Yet one often sees people on both sides making *a priori* assumptions about goals and unsupported assertions about the superior capacity of the mode they favor with little reference to data or alternative views. As a result, issues sometimes get framed in an either/or fashion: either one should only use soft law, or one should only employ hard law. Such framing not only cuts off much-needed empirical inquiry into relative capacity; it also deters exploration of possible inter-modal synergy and hybrid (hard and soft) governance modes.

The goal of this paper is not to resolve this debate, but to help clarify the issues and identify questions for further work. We want to unpack the arguments on both sides, identify contestable assumptions, and expose false dichotomies. While we favor continued use of “soft law” as well as hard/soft hybrids, we recognize that further work on relative capacities must be done before any final conclusions are reached.

The debate over hard and soft law has recently come to a head. The issue took on special importance because it was injected into the discussion of the future Constitution of the European Union where there has been substantial discussion concerning the Open Method of Coordination. As the debates in the European Constitutional Convention have revealed, the debate is not just about governance modes: it is also about policy options with many who favor hard law also holding a very different policy position than the proponents of softer methods.¹

1) Issues for Social Policy After the EU’s Lisbon Summit

To understand the OMC and the debate around it, we must first look at the changing nature of social policy at the EU level and the factors that led up to the Lisbon Summit’s endorsement of the OMC as an important tool for EU governance. At the Lisbon Summit the Member States pledged that Europe would become the most competitive knowledge-based economy in the world by 2010 while at the same time maintaining a commitment

¹ As of the date of writing these issues were unresolved. The final draft of the paper will include an account of the OMC debate in the Convention and its outcome.

to solidarity and equality. Needless to say, the challenge of restructuring the economy while preserving the “European social model” is a daunting one.

Among the areas thought to need substantial reform if the EU is to meet the broad goals set in Lisbon are employment and social policy. In those areas Europe confronts such problems as: high rates of unemployment, low levels of labor market participation, high and rapidly mounting expenditures for social welfare and state pensions, inflexible labor markets, inefficient public services, and serious skill shortages. Something had to be done to create more jobs, cut unemployment, get a larger percentage of the population into the workforce, and cope with mounting pension costs.

2) Monetary Union and Interdependence

Whatever may have been the way to deal with these issues in the past, the creation of the single market and the single currency led to a new context for social policy, generating new constraints and creating new interdependencies. The *constraints* came from monetary integration. Because of the common currency, national governments no longer could use monetary policy as a tool for job creation. And because of the Stability and Growth Pact they were also constrained in their ability to use fiscal policy for the same ends. The increased *interdependence* derived both from the common currency and the single market. Each country in the euro has an interest in the fiscal stability of the others since major budget deficits anywhere would threaten the euro. And that gives them an interest in each other’s social and employment policies.

For most European countries, social costs represent a major part of state expenditures. These costs are already high as a result of generous income maintenance plans and state pensions combined with low levels of labor market participation and relatively early retirement ages. They will get higher as populations age unless policies are changed and labor market participation rates increased. So many countries face the need to change their policies on work and welfare to ensure fiscal sustainability in the face of these mounting costs.

While this is primarily a concern of the individual Member States, it has become a EU level issue because of the single market and common currency. The euro zone countries, at least, have an interest in ensuring that other countries in the common currency maintain fiscal sustainability. And all countries in the single market have an interest in ensuring that other countries do not achieve that sustainability by radically lowering standards and slashing social charges, thus setting off a race to the bottom.

These factors create significant functional interdependencies. At the same time, the emergence of a European context for discussion of social policy creates another, very different kind of “interdependence” – since there is great variation in the degree to which countries have solved these problems, Member States may see the possibility for mutual learning .

3) The “new social policy vision” and its governance challenges

As a result of the challenges, constraints and interdependencies, major changes have occurred in the way the EU and Member States deal with employment and social policy. The first is the emergence of a new social policy vision. In contrast to prior “welfare state” policies, this vision stresses the importance of a more skilled and adaptable workforce, gives greater attention to increasing labor market participation, places much more emphasis on active welfare state measures, introduces supply side efforts at job-creation, seeks measures to provide security other than life-time job tenure, adds efforts to combat social exclusion and gender discrimination in the workplace, and recognizes the necessity of reforming state pensions. The second is the “Europeanization” of social and employment policy: In the wake of EMU and the consolidation of the single market, the EU began to recognize that it had to play a role in developing and implementing this vision and that the OMC might be an appropriate tool for that end.

The new social vision holds promise as a path towards the Lisbon goals and the OMC may have a vital role to play. But to understand the OMC and the debate around it, we

must first look at the changing nature of social policy at the EU level and the factors that led up to the Lisbon Summit's endorsement of the OMC as an important tool for EU governance.

The new vision presents a real governance challenge for the EU. Traditionally, the EU has played a limited role in social and employment policy. To the extent that it has intervened, however, it has tended to use "hard law" through the Community Method or the Social Dialogue. Using what Scott and Trubek (2002) have called the Classic Community Method², proposed directives setting EU-wide standards were initiated by the technocrats in the European Commission and approved by the European Council with some participation of the European Parliament. A few directives emerged from the neo-corporatist track called "Social Dialogue" that allows peak organizations representing labor and management at the EU level to prepare directives for Council approval. However crafted, these employment and social policy directives usually led to more or less uniform rules which have been incorporated ("transposed") into national law creating, at least in theory, a relatively harmonized area of law throughout the Union.

The new social vision presents immense problems for a governance approach based on the classical Community Method or the Social Dialogue. It takes the EU into areas that have traditionally been the exclusive province of the Member States and where they are leery of extending legislative competence to the Union. It deals with areas of policy in which there are great differences among the Member States, and calls for reforms in areas of high political salience. It enters into areas where few preexisting formulae exist and in which the experts do not have all the answers. To succeed, the EU's new social policy initiatives would probably have to engage all stakeholders, seek new solutions to seemingly intractable problems; spread best practices, seek common goals without insisting on uniform measures, and ensure easy and rapid revisability of norms and objectives as new knowledge accumulates.

² The Community Method has been changing in recent years, and those changes bear on the comparative analysis of "hard" and "soft" law. For a discussion of the "Classic Community Method", see Scott and Trubek (2002)

4) The European Employment Strategy and the Emergence of the “Open Method”

The EU has begun to respond to this challenge by crafting a new governance model that differs radically from the top-down, rule-based, centralized approach used in social policy heretofore. Zeitlin and Sabel (2003) have summarized the essential elements of this method as follows:

- a) Joint definition by the member states of initial objectives (general and specific), indicators, and in some cases guidelines.
- b) National reports or action plans which assess performance in light of the objectives and metrics, and propose reforms accordingly.
- c) Peer review of these plans, including mutual criticism and exchange of good practices, backed up by recommendations in some cases.
- d) Re-elaboration of the individual plans and, at less frequent intervals, of the broader objectives and metrics in light of the experience gained in their implementation.

The first and most developed example of this “open method of coordination” is the European Employment Strategy. The EES emerged in the 1990s when concern about unemployment was great and the EU was getting ready to launch the single currency. At that time, it was felt that for both political and economic reasons the EU had to tackle the growing problem of unemployment. This decision to Europeanize employment policy was a major change from the past. Theretofore, employment policy had been seen as the exclusive preserve of the Member States. But by the 1990s a consensus emerged that EU level action was needed.

While the Member States saw they had common problems in the employment area, and agreed that this issue demanded attention at a European level, they also recognized that it would not be easy to craft common solutions or pass uniform rules (Trubek and Mosher, 2003). There were several reasons for this conclusion. First, it was understood that the employment problem would require changes in many areas of law and policy, ranging

from the rules governing welfare provision to those structuring tax systems. In many of these areas the EU lacked legislative competence. Moreover, the systems that needed changing vary greatly among the Member States: there are at least three major types of welfare state structures in the EU and equally great variation in their industrial relations systems (Esping-Anderson, 1990; Ferrerra, Hemerick, and Rhodes, 2001). So even if the EU had legislative competence, it would be hard to craft uniform rules for such diverse systems. Finally, no one was sure of the best way to deal with unemployment, so for many problems there was no ready-made set of solutions that could be legislated at any level of government. Faced with problems that were not well understood, whose solutions involved changes in many areas of law and policy and were sure to differ from country to country, and for which its legal competence was extremely limited, the EU could not rely exclusively on the Community Method. Instead, it had to craft another approach (Trubek and Mosher, 2003)

a) how does the EES work?

The result was the EES. Under this system, the Member States and the European Commission agree to a series of common objectives but each state is free to reach those objectives in its own way and more or less on its own timetable. Instead of uniform rules, the EES employs *guidelines*. Up to now, these guidelines have been grouped into four pillars that represent the four major axes of the strategy: employability, entrepreneurship, adaptability, and equality. Under employability, the EES seeks to make unemployment systems more active and increase skills; under entrepreneurship it aims to make it easier to create new businesses and make tax systems more employment-friendly; under adaptability it seeks to increase the flexibility of work organization; and under equality it promotes gender equality. Within each pillar, there are more or less detailed guidelines.³ In addition to the individual strategy elements embedded in pillars and specific guidelines, the more recent horizontal objectives specify a set of overarching goals that include: 1) setting specific overall employment rate targets and separate ones for women and older workers in 2005 and 2010; 2) promotion of quality of work; 3) promotion of

³ The guidelines deal with such issues as employment participation rates, active unemployment systems, better skills development, more employment intensive growth, fewer obstacles to low skill work, flexibility with security, encouragement for creation of small companies, and gender equity.

lifelong learning; 4) further incorporation of the social partners into the process; 5) translation of the guidelines into action by the Member States in a balanced and integrated manner; and 6) development of better common indicators to gauge progress⁴

The EES also includes a series of indicators. These are agreed upon by the Employment Committee. Currently, there are 35 key indicators and 64 “context” indicators. The key indicators measure progress in relation to the objectives in the guidelines. For example, there are indicators that measure the total employment rate, the employment rate for people 55-64, the share of young adults still unemployed after six months, the tax rate on low wage earners, and several of dimensions of the gender gap in employment. The resulting tables are made available annually. They show the relative position of all Member States on these dimensions. They bring to light areas where improvement has occurred and document areas where Member States are not reaching common objectives and lag behind their peers.

Each year, each Member State must produce a National Action Plan (NAP) in which it lists progress in prior years towards the goals set by the guidelines, and sets forth plans for the coming years. These plans are discussed at national and EU level. Member States also review each other’s plans and exchange ideas about “good practices”. If the Commission and Council conclude there are problems that State is not addressing, they will make recommendations for policy change. While some of the guidelines are very specific and progress under them can be monitored using quantitative indicators, others are very general. The recommendations draw attention to poor performance, but neither the guidelines nor the recommendations are legally binding and there are no formal sanctions for countries that fail to make progress towards common objectives,

The overall goal of the strategy is to maintain generous European welfare states by reforming them. The Commission wrote in the preparatory documents for the extraordinary Luxembourg Employment Summit that "meeting the challenge of insufficient growth and intolerable unemployment requires a profound modernization of

⁴ The Commission has recently proposed a major revision of the guidelines that would eliminate the pillars, reduce the total number of guidelines, place emphasis on 10 key priorities, and add some new numerical targets. (European Commission, 2003b) We will know this summer if the Council accepts the new approach.

Europe's economy and its social system for the 21st century without giving away the basic principles of solidarity which should remain the trademark of Europe" (European Commission, 1997)

The EES approaches the task of change and reform in a pragmatic fashion. The guidelines provide general direction. But each state is encouraged to experiment on its own and to shape solutions that fit its national context. The process is designed to make reform more transparent and to encourage sharing of information and practices from country to country. Thus, countries are encouraged to report successful experiments or "good practices" and share their experiences with others. The NAPs are supposed to be circulated widely with opportunities for comment by various levels of government, social partners, and civil society. The indicators provide transparent comparative data and facilitate benchmarking. Through a process of "multilateral surveillance," the Member States comment on each other's NAPs, the European Commission reviews them all, and the European Council issues recommendations to Member States whose performance is deemed to be wanting.

5) EES is judged a qualified success and the OMC expands to other areas

The EES has been in operation for over five years. It has not brought about sweeping changes but has been credited with contributing to reform in some areas in some countries.⁵ The Commission conducted a comprehensive review in 2002 of the first five years. Its report was positive:

“...there have been significant changes in national employment policies, with a clear convergence towards the common EU objectives set out in the EES policy guidelines. ... Employment policies and the role of public employment services have been reshaped to support an active and preventive approach. In some Member States tax-benefit systems have been adapted.... Labor taxation started to become more employment friendly. Education and training systems increasingly adapted to labor market needs. Progress in

⁵ Assessing the impact of the EES presents complex issues of causation. It is easier to say it had no effect than to gauge how much it contributes to any change. If a country had a policy specified by the guidelines before the EES, or if it does nothing at all in a field, then it is fair to say the independent effect of the EES is nil. But as Milena Buechs has pointed out in a personal communication, when a country institutes a policy called for by the EES after the guidelines have been issued, it is a complex matter to determine if the EES is the cause of the change, and if so, to what degree. In such cases domestic factors will always play a role, and may be the dominant reason for change. One has to avoid falling into the logic of *post hoc ergo propter hoc*.

modernizing work organization has occurred, notably in terms of working time arrangements and more flexible work contracts. Gender mainstreaming has become generalized, with various initiatives taken to tackle the gender gaps, including the provision of childcare facilities to improve the reconciliation of work and family life. And new common paradigms such as lifelong learning and quality at work were recognized as policy priorities; with convergence in these areas starting to take place... the Strategy has brought a shift in national policy formulation and focus – away from managing unemployment, towards managing employment growth.” European Commission (2002)

.At the same time, the Commission noted that employment problems persist and there was a need to restructure the EES to make it more effective:

“In order to cope effectively with these challenges, the Luxembourg process has to be refocused on its main priorities: creating more and better jobs, and promoting an inclusive labour market. To this end, the Communication identifies four main issues for the EES reform: (a) the need to set clear objectives in response to the policy challenges, (b) the need to simplify the policy guidelines without undermining their effectiveness, (c) the need to improve governance and partnership in the execution of the strategy and (d) the need to ensure greater consistency and complementarity with respect to other relevant EU processes, notably the Broad Economic Policy Guidelines.” European Commission 2002

Academic assessments are still coming in but they are mixed. A cautiously positive evaluation comes from a knowledgeable academic observers, Swedish sociologist Kerstin Jacobsson (2003) who notes the following positive effects:

- All countries have complied with the process
- It has facilitated cross-Ministry and multi-level cooperation
- It has influenced the policies of the European Social Fund
- National civil servants are deliberating with and learning from their peers in other countries
- The EES has made a difference in policy change in some countries
- EES-linked networks are developing common frameworks for policy planning and assessment
- New issues have been added to the EU agenda.

She concludes that “the EES can be said to have fostered a cognitive consensus around common challenges, objectives, and policy approaches” and says that is its major achievement so far. While Jacobsson echoes the Commission’s conclusion that the EES is a qualified success, it is important to note that others have been more critical and there is no academic consensus yet either on whether the Strategy works or – if it does –how it brings about change.

The EU has moved ahead with the OMC. Not only has it decided to continue the EES process; it has also created similar processes in other fields. The OMC has now been expanded beyond employment to cover a wide range of policy domains. These include pensions, health, social inclusion, and education. Of course, what is being done is very varied. Although all the OMCs have some common elements, including EU-wide objectives, national action plans, and peer review, the processes vary considerably. For example, the OMC in social inclusion does not have specific guidelines, reporting and plan revision is on a two year, rather than one year cycle, and there is no provision for EU- level recommendations. The OMC on pensions, just getting started, is even more informal and open-ended so far.

6) The battle over hard and soft law— competing visions of the pursuit of the social in the EU and over the place of the OMC in the EU Constitution

The spread of the OMC has generated real concern in certain circles in Europe. Included among the critics are some groups on the left. For a long time, many people on the left in Europe have tried to give the EU a “social dimension”. They felt that the Union was too focused on economic matters and EU economic policy could, if not counteracted by an active social policy, undermine the welfare state in the Member States. To be sure, proponents of Social Europe have very different ideas about what this concept means and how best to accomplish it. They all believe that the Union has a role to play in the maintenance and development of the “welfare state” and the preservation of Europe’s commitment to solidarity. But there are very different ideas about how best to do that. While there are many approaches, they tend to stand between the poles set by two ideal-

typical alternatives which we shall call “euro-corporatism” and “decentralized concertation”.

a) Two ideal-typical visions of Social Europe and how to get there

The *euro-corporatist* imagines Social Europe in terms drawn from the structure of *national* welfare states. In this vision, the European Union would have plenary power to act in all fields of industrial relations and social policy, using all appropriate modes but with a heavy emphasis on legislation. The Union’s role would be to set social welfare and industrial relations standards that would have to be met in all Member States. This would be done through a corpus of uniform and binding social law passed at the EU level that creates justiciable rights. Moreover, not only would the Union develop a major corpus of uniform social standards; to the extent possible, social laws would be created not through the Community Method, but by agreement between peak organizations representing labor and capital in the Social Dialogue.

To this vision, let us contrast an ideal-typical alternative. In the *decentralized concertation* approach, the EU would still have an important role to play in social policy, but it would be limited primarily to supporting and coordinating national-level activity while supplementing it in a few limited cases. The approach would include efforts to develop cooperative relations among the various stakeholders, but would reach out to a broader range of interests and groups and concertation would be focused at the national level. In this approach, there would very little legislation at the EU level: to the extent that binding rules were thought to be desirable they would primarily be promulgated by the Member States. The Union’s role would be to establish broad objectives and then facilitate policy reform and experimentation at the local level. By setting some objectives, and monitoring progress towards them, the Union would ensure that Member State social policy was sensitive to concerns of the whole and Member state policy-makers learned from each other.⁶

⁶ To these two extreme visions, one might want to add a third model which might be called “networked technocratic governance”. In this model, the primary work of social and employment policy would be done by networks of technocrats at both the national and EU levels. The technocrats might employ guidelines not rules, and allow diversity, but they would rely more on expert knowledge than on broad participation and would look towards convergence.

b) The roots of these visions

These two positions are based on very different ideas about what is needed to preserve the European Social Model, and very different ideas about the various instruments and modalities available to tackle the challenges that goal involves. Thus, euro-corporatist proponents of a European role in social policy assume that without central legislation, there will be a race to the bottom in social standards. They think that uniform rules in these policy domains are both feasible and desirable. They do not see a need for much experimentation, assuming that the rules and policies needed to preserve the social model are pretty well understood and the only problem is creating the political will to impose them. They believe that formal rules and justiciable rights are the only way to deal with the asymmetric relations of power that exist between labor and capital. They think that such rules, approved in co-decision by the European Council and European Parliament, alone have democratic legitimacy at the EU level.

Contrast those views with ideas that animate proponents of decentralized concertation in European social policy. They think that there is a vast amount of diversity among Member States in social policy and industrial relations. They see the stakeholders as more varied than the traditional social partners. They see these factors not as a problem to be overcome by centralization, but a lucky situation to be taken advantage of in the search for *new* solutions to seemingly intractable problems. They stress the need for experimentation and believe this is best accomplished by fostering divergent models at national or sub-national levels. They think that the widest possible public participation in policy development is likely to lead to the most salutary results. They think policy has to be flexible and revisable to cope with an increasingly complex and volatile world and that traditional forms of regulation may lack the necessary flexibility. They believe that, with encouragement from the Union and advice from their peers, Member States have the capacity and will to restructure their welfare states. They think Member States can fend off any “race to the bottom” pressures without the need for a centralized straight-jacket and have already done so successfully in some areas. They believe that some degree of coordination and monitoring at the EU level, combined with peer review and exchange of

best practices, will strengthen Member State capacities and thus enhance their ability to resist pressures for a race to the bottom.

c) For each vision, the other is a distopia

From each of these viewpoints, the other is a distopia. If you think that centralized legislation is the only way to avoid a race to the bottom, you are not likely to be enchanted by approaches that downplay EU-level law making. If you think that solutions are well known and all that is missing is the will to impose them on the Member States, you are likely to be suspicious of those who call for local experiments. If you feel that social policy is basically a deal between organized labor and capital to be struck in the shadow of the state, you will see widespread participation of NGOs in policy processes as at best a distraction. If, on the other hand, you think that only through experiments and mutual learning, Member States will discover new solutions that will avoid races to the bottom, if you feel that there is an irreducible degree of diversity in social policy, and if you think that experimental governance to be effective must involve all stakeholders, then you will be attracted to open processes and local autonomy and distrustful of uniform solutions coming out of deals which may affect all citizens yet are set behind closed doors by unions and management

d) Social Policy, the OMC and the EU Constitution

The European Convention is now considering whether to include social policy as a major objective in the proposed Constitution for the Union, and whether to give constitutional status to the OMC. What might people with these competing viewpoints have hoped for in such “constitutionalization”? A hypothetical euro-corporatist would have hoped that the Convention would significantly expand the EU’s competence so that it could legislate in all areas of social policy and industrial relations if needed, and expand the role of Qualified Majority Voting (QMV) to remove excessive veto possibilities that could block needed laws. On the other hand, a proponent of “decentralized concertation” would have hoped for a ringing endorsement of the processes and policies needed to make decentralized experimentation work. In the current context, this would mean embracing and strengthening the open method of coordination (OMC).

It is too soon to determine how all this will come out. But so far, neither of these approaches has prevailed. The Convention has shown little enthusiasm for a major expansion of EU competence in the social field, or for reducing the barriers to central legislation created by current requirements for unanimous approval. On the other hand, to the extent that the OMC has received attention, it has been as much—if not more-- to erect limits to its use than to make it a fundamental mode of governance.⁷ The reasons for this strange set of decisions are complex but we think that ideas about the relative merits of hard and soft law have played a role. In this debate, the relative merits of the Community Method and Social Dialogue on the one hand (“hard”), and the OMC (“soft”) on the other have been aired.

Those who seek to limit the OMC do so because they think that unless the “soft” option is severely restricted, it will crowd out opportunities for “hard” legislation. In such a view, the OMC is sort of like a virus that needs to be quarantined before it infects the whole community. If it were let loose in areas of existing legislative competence, it would sap the Union’s will and capacity to do what really needs to be done which is to pass uniform, binding, and justiciable laws. If that competence exists now, it must be saved from OMC infection. If it is not there now but might be authorized in the future, the Constitution should stop any use of the OMC in the future competence expansion areas. Those opposing the OMC want to set up rigid border controls, ensuring that no infection can occur in any area with legislative competence. That way, existing areas of competence are rendered safe, and future ones will not come with a built-in tendency to “go soft”.

⁷ This conclusion is based primarily on the Report of the Convention Working Group on Social Europe. On the one hand, the WG concluded that by and large existing competences were sufficient and it refused to support extension of QMV to areas like social security and social protection of workers, thus defeating the hopes of my hypothetical euro- corporatist and leaving the core of social policy at the Member State-level. On the other, it proposed restrictions on the use of the OMC in part to avoid undermining possible future EU legislation because OMC might offer a “soft” alternative that could undermine the quest for uniform and justiciable EU social law to be sought in some future time. By doing that, the WG seemed to reject any robust endorsement of a participatory, decentralized, and experimental approach to social policy. The WG report is unclear on key points, and is not the final word on how this issue will come out in the end.

7) Transcending the “hard/soft” law debate

While the hard/soft law debate has raised important issues concerning the future of the Union, both sides seem stuck in untenable positions. However, there is evidence that some people have sensed that it is possible to transcend the debate. This section explores such efforts and their significance.

a) seeking theories of OMC operation and legal impact underlying the move to quarantine OMC

The first step is to get a better understanding of the some of the assumptions underlying efforts to “quarantine” the OMC. What are the views about the OMC on the one hand, and traditional EU legislative routes, on the other, that might lead one to reach such a conclusion? That is what the debate about hard and soft law is all about. Those who want to curb the use of soft law do so because they think the OMC can never “deliver the goods” the way “hard law” can. On the one hand, it is argued, the OMC cannot bring about real change or create real rights. On the other, legislation does. So to choose one over the other is to chose the simulacra of action (OMC) over the reality (law).

It is our view that this position is wrong on both counts. We suggest that the OMC may not be a paper tiger, but rather could emerge as a powerful tool. And the idea that all EU legislation creates hard and fast uniform rules that are easily enforced and will bring about change is a chimera that flies in the face of the record of implementation of EU directives, recent developments in the Community Method, and much of the learning in the sociology of law ever since the famed gap between the law on the books and the law and action was discovered.

(b) Soft law may be harder than you think

If you look at the OMC you may say: how can this change anything? Some of the OMCs do not even have guidelines, and those that do have few that are highly specific or yield benchmarks that are easily measured.⁸ So how can one say if a Member State is

⁸ It is, however, worth noting that the Commissions’ proposed revision of the EES includes increased use of quantitative targets. Commission (2003b)

“complying”? And the Member States are not subject to any formal sanctions if they do not conform to the guidelines so why do we think they would comply (assuming they knew what it would mean to “comply” with some of the guidelines, vaguely worded as they are) if they do not want to do so? Isn’t the whole thing, asks the skeptic, just a charade in which the Member States pretend to make changes and the Commission pretends the EU has had an impact?

Not for those who are developing theories of how and why the OMC may bring about change, and do it in ways that might even be better than traditional legislation. While the OMC is too new for us fully to understand its dynamics, scholars have pointed to several features that could explain why, despite a lack clear and uniform rules or formal sanctions, it might work to bring about change. The literature identifies at least five different ways change may occur as a result of the OMC: diffusion, shaming, networks, deliberation, and learning.

These mechanisms are not mutually exclusive and scholars may deploy several of them. But it is worth noting that these accounts fall into two broad categories. Some theorists emphasize the top-down effects of the OMC, stressing how ideas developed at the EU level gradually influence developments at national or sub-national level. Others assume that the transmission of ideas and the vectors of influence for policy change may be as much bottom-up as top-down. Thus in the top-down approach, we find more stress on diffusion, shaming and one version of network theory. In the bottom-up category we find more attention to experimentation, deliberation, and learning and another version of network theory.

The *diffusion* approach assumes that national policy change comes about through the diffusion of models developed in other polities and/or promoted by international organizations. This may occur through mimesis or discursive transformation and the OMC can be seen to foster both. The EES processes for benchmarking and peer review should facilitate mimesis since it requires Member States to study the experiences of others and enter into a dialogue with them. Similarly, the several mechanisms promote discursive transformations. When national administrations see their performance

measured qualitatively through peer review and Council recommendations and quantitatively through indicators and league tables they must confront new policy paradigms and take on board new concepts and vocabularies. This process requires them to adopt new cognitive frameworks, a transformation facilitated and reinforced by the need to prepare annual National Action Plans. Such changes in the way issues are conceptualized may lead to policy change.

A second explanation for how the OMC might bring about change is through “*shaming*”. This account is closest to the “hard law” model because it treats the clarification of guidelines through preparation of specific recommendations as somewhat similar to a judicial interpretation of general statutory language and the informal sanction of “shaming” as more or less equivalent to formal sanctions. In this account, Member States will seek to comply with the guidelines in order to avoid negative criticism in peer reviews and Council recommendations. The recommendations are often rather pointed observations about poor performance; the assumption is that nations will seek to avoid such negative publicity and thus will either make policy changes in advance to avoid recommendations or quickly adopt the recommendations once issued in order to limit the negative publicity they generate.

A third account of how the OMC might bring about change is through the creation of *new policy networks*. The networking generated by OMC occurs at several levels. In the EES, because the NAPs require cooperation from many ministries, EES can create new networks of government officials at the Member State level. Second, since the EES procedure requires input from social partners and civil society, it can expand the national level networks to reach beyond government. Finally, through the Employment Committee and otherwise, processes operate to link civil servants and others from all Member States with the Commission and Council staff in a multi-level, public/private transnational network through which new ideas diffuse and from which a common set of policy positions emerge (Jacobsson, forthcoming). If the process works as it should, people from Labor, Welfare and Finance Ministries will cooperate at national level, and then meet with counterparts from other EU Member States to deliberate about the best way to deal with common problems. At the same time, employers, unions, and NGOs

would have an opportunity to engage with the process at both levels. Finally, as these contacts go on, a common European way of thinking about employment should emerge and eventually affect actions at the national level.

The network idea is really a part of other approaches and thus there are different ways to conceptualize the function of networks in the OMC. Networks can be seen as part of a top-down diffusion model, with the networks serving as transmission belts for ideas coming from the top. But in alternative accounts, they are the settings for deliberation and mutual learning, and thus can be channels to move ideas “up” as well as “down”.

That takes us to a very different set of theories about how the OMC may bring about change. Where diffusion and shaming approaches focus on how the ideas originating at the top and embedded in the guidelines “diffuse” throughout the EU, alternative accounts stress ways in which the new processes foster *experimentation, deliberation and learning*. These accounts see the policy-change process not as a strictly top-down enterprise, but rather one in which forces for change operate in both directions. In this approach, the diversity of the EU is a great asset, for it means that there will be many different policies being tried out at any time. In such a context, the process of annual planning and review, the exchange of best practices, and the system of multilateral surveillance all help Member States find new solutions to problems often thought to be unsolvable. Trubek and Mosher (2003) note that policy learning is facilitated by:

“...mechanisms that destabilize existing understandings; bring together people with diverse viewpoints in settings that require sustained deliberation about problem-solving; facilitate erosion of boundaries between both policy domains and stakeholders; reconfigure policy networks; encourage decentralized experimentation; produce information on innovation; require sharing of good practice and experimental results; encourage actors to compare results with those of the best performers in any area; and oblige actors collectively to redefine objectives and policies.”

The EES contains all these elements to one degree or another. The guidelines challenge national policies in many countries. The process engages diverse groups and crosses intra-public and public-private boundaries thus creating opportunities for policy dialogues. Indicators, benchmarking, peer review and exchange of good practices brings

new ideas to the surface and encourage poor performers to rethink their strategies. Moreover, the EES process is iterative and iteration fosters deliberation.

The theoretical discussion suggests that if the EES worked as it is supposed to, it can bring about change. And there is empirical evidence that supports the claim that it has made a difference in some countries in some areas. Yet there remains disagreement about how much change in employment policy has actually occurred since EES was created; to what degree any change that has come about can be attributed to the EES rather than purely domestic factors; and just how the EES influenced change when it can be shown to have been a factor.

There is evidence that suggests that it does not always work as it is ideally pictured, and that in some areas it has little, if any, impact. Governments may treat the NAPs as a routine administrative burden, not an opportunity for real debate and deliberation; peer reviews and benchmarking may be paper exercises; social partners may be unwilling to participate actively; some countries may resist change because they think the EES model does not fit their labor markets; others may feel they need not change because they have largely met the EES goals. (Trubek and Mosher, 2003)

Nonetheless, we think the theoretical discussion is robust, and the limited empirical data positive enough, to erect a presumption that in the current situation of EU governance in social policy, “soft law” in the form of the OMC can make a difference and that the EES can be a useful instrument to deal with the employment problem. This view is strengthened by recent developments, which indicate that the Commission is seeking to recalibrate the EES to make it more focused and effective.

c) How hard is hard law anyway?

In any overall assessment of the hard-soft law debate, one also has to take into account how “hard law” really works. Since by definition the case against “soft law” in general is also a case for some kind of “hard law”, and thus the case against the OMC is largely a case for the Community Method, we have to ask what assumptions are being made about that method and its capabilities. Here we must examine two very different issues.

The first are the changes in the Community Method in recent years. Note that like the OMC, the Community Method is, in part, a process designed to bring about changes in *national* law. To become law, directives must be transposed into national law. Under what Scott and Trubek (2002) call the “Classic Community Method”, this process led to the creation of more or less uniform rules throughout the Union. But in part under the influence of the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, the Community Method has changed and, as a result, many newer directives are quite open-ended, leaving Member States with much more flexibility and discretion in shaping national legislation than under the “classic” approach. At the same time, these new directives may mandate broad participation in the processes by which general principles are incorporated into national law. By allowing Member States more flexibility and diversity and relying heavily on participation to provide legitimacy, the new approach to Community legislation has somewhat blurred the distinction between “hard law” and the OMC. (Scott and Trubek, 2002; Sabel and Zeitlin 2003)

A second issue that must be taken account of in making the relative assessment of the capacity of hard and soft law is the famed gap between law on the books and law in action. Proponents of “hard law” tend to assume that if uniform rules could be passed through the Community Method, they would be automatically transposed into binding national law which would then be effectively enforced. This seems to be an heroic set of assumptions, especially in view of what is known about the problems of transposition of EU law as well as those of implementation in all legal systems. There is substantial room for delay and slippage in the transposition process. And even if EU-level hard law is successfully transposed, enforcement may prove difficult. Anyone familiar with the sociology of law knows that behind the façade of formal law operate many informal processes. That may modify or even negate the impact of formal rules. To say there is a rule or a right on the law books is not to say it is enjoyed in reality. For example, Claire Kilpatrick (2003) has noted that, even with clear and uniform norms in an area like

employment discrimination, a purely rights- and litigation-based enforcement system may not be fully effective in achieving the equality goals.⁹

In any comparison of governance modes, it is important to be sure we are contrasting a realistic picture of hard law, not an idealized model. When opponents of the OMC suggest it is weak in comparison with the hard law of the Community method, they may be comparing an idealized version of the capacities of the mode they prefer, not a realistic picture.

d) Hybrid Constellations: Can the EU combine hard and soft mechanisms for optimal results?

Finally, we have to get beyond the idea that there must be a choice between hard and soft law. These are not mutually incompatible and perhaps the most promising ideas are those that would yoke the two together. This possibility has been recognized by policy makers: thus, in a report to the European Convention on the OMC, the Convention Secretariat noted that:

“The open method of coordination therefore proves to be an instrument of integration among others. For the same subject matter and within the limits of the Treaties, it can therefore be combined with and linked to other instruments of Community action, including traditional Community legislative action.”
(Secretariat, 2002)

Scholars have also suggested the utility of hybrid combinations. For example, Fritz Scharpf (2002) has proposed the use of framework directives combined with an OMC to monitor and coordinate national responses under the framework which could, in turn, provide information for revision of the framework itself. And Claire Kilpatrick (2003) has shown that such coupling has already started to occur in the area of employment law and employment policy. Kilpatrick notes that hard and soft law can play different but mutually reinforcing roles in dealing with issues such as part-time work and gender discrimination. She demonstrates that such hybrid combinations have existed at Member

⁹ The literature on the limits of litigation as a tool to reduce employment discrimination is voluminous. (add cites)

State levels for some time and suggests that the EU's adoption of hard/soft hybrids may be a continuation of a general trend.

One area where soft law is being used with hard law, and hybridity seems to be well-developed, is EU environmental law. This area is especially important because unlike employment where the EU's legislative competence is quite limited, this is an area where the EU has substantial legislative powers. In that context, the fact that nonetheless the EU has chosen to proceed in part through OMC-like mechanisms suggests that it is fully aware of relative functional capabilities and prepared both to use different modes for different issues and to combine them when they are complementary. (Scott and Trubek 2002; De Burca 2003)

e) The OMC and the EU Charter of Fundamental Rights

One area that has recently attracted attention is the possible use of the OMC to strengthen fundamental rights. Grainne de Burca (2003) has suggested two ways the OMC might be used in conjunction with the EU Charter of Fundamental Rights if—as expected—the Charter becomes part of the EU Constitution. One approach would include a role for the European Court of Justice; the other would use the OMC in lieu of judicial enforcement. In both cases, OMC processes would be used to develop more concrete standards and benchmarks for determining if broadly defined rights like the right to preventive health and the right to work were being effectively promoted.

In one approach, nothing further would be done and no judicial role would be envisaged: further action would be left to the discretion of EU and Member State policy makers. In the second, more ambitious approach, the Court would play a role in standard setting by monitoring all OMC processes to ensure that they have adequately taken account of relevant fundamental rights in setting guidelines and preparing national action plans. She suggests that:

“...the judicial role could at least involve imposing an obligation to demonstrate that the rights specified in the Charter had been taken into account within the OMC process, to indicate how this was done, and to explain in what way the outcome was considered to satisfy the normative requirements of the right in question.”(de Burca, 2003)

8) Legal theory, hybrid solutions, and integration through law

If we examine the views of people like Scharpf, DeBurca, and Kilpatrick, we can see that unlike euro-corporatists, they do not see a fundamental cleavage between hard and soft approaches. And once we see that there may not be a need to choose between these approaches, we have to ask: what is really going on in debate over hard vs. soft law in the EU? Is it possible that those who object to soft law are seeing these phenomena through a theoretical vision that precludes any possibility of casting it in positive terms? At the same time, is it possible that some proponents of soft law are so wedded to their approach that they fail to see the importance of hard law?

To the extent that this is true, it would represent a failure both of theoretical vision and empirical inquiry. Proponents of hard law have a theory of the nature of law that makes them incapable of grasping the value of soft law processes. When this theory of law is linked to a theory of European integration that stresses the importance of law in promoting and sustaining European integration, we can see how the OMC could unsettle conceptual frameworks for it purports to be a tool of integration while lacking key features of prior legal mechanisms. We suspect that it is the combination of these two theoretical commitments leads to the observed hostility to the OMC and similar soft law processes.

It is not hard to see why soft law processes challenge both aspects of this body of thought. First, if one thinks that law by its nature must establish uniform rules, the rules must bind the behavior of all to whom they are addressed, the rules, to be legitimate, must have the sanction of elected representatives of the people, that the rules cannot be changed without the consent of those representatives, and that to the extent that the rules create rights, they must be enforceable by courts or quasi-courts, then whatever else a “soft” mechanism is, it cannot and should not be called “law”. Second, if one believes that law, so defined, has been important to the integration of Europe, and that the progress of integration can in part be measured by the number of areas that are brought under uniform rules originating at the EU level, then any shift from hard to soft “law” means a decline in the possibility of integration itself.

At the same time, it is possible to understand why proponents of soft law may ignore the continuing importance of binding, uniform, and justiciable norms. Because of the dominance of the hard law model in our imaginations, proponents of the newer, soft measures have had to carry a heavy burden of proof. That has included efforts to demonstrate the weaknesses of traditional regulatory measures, perhaps clouding their ability to pay attention to the positive features of such regimes and the situations in which they will be most needed and effective. What we need is more careful attention to the relative capacities of the different modes in operation and to their combination in hybrids. Until we have a more realistic assessment of relative capabilities, as well as complementarities between modes, people will keep talking past one another.

Especial attention needs to be given to developing a theory of hybrids. The discussion of hard/soft hybrids is just beginning. We are seeing more and more instances of such hybrids, suggesting this constellation represents an adaptation of legal culture to new circumstances and challenges. Scholars have yet to develop explanations for this trend, or to craft the robust theories concerning the relative capacities of hard and soft law that is necessary to create a functional theory of hybrids.

We know that such combinations exist. And we know their interrelationship depends on the objectives sought and is context-specific. Thus, for example, Kilpatrick (2003) notes that the EU went from a hard law to a hybrid hard-soft approach to part-time work when it shifted from a largely negative approach to one that promotes part-time work as a means towards employment stimulation and increased competitiveness. And she shows that effective hybridity in this area may operate differently than in employment discrimination, another context in which hard/soft hybridity has emerged. These observations should help us as we seek to move past dichotomous thinking and fully engage hybrid constellations.

Once we understand the limits of approaches that stress one mode at the expense of the other, recognize that every judgment must be comparative and look at relative capacity for specific objectives in varied contexts, see that there are ways these approaches can be combined, and recognize that such combinations may be essential to accomplish specific

goals, we should be able to transcend the terms of the hard/soft debate. And in doing that we will find ourselves with a new and richer understanding of what we mean both by “law” and “European integration”.

References

DE BURCA, GRAINNE, (2003), ‘The Constitutional Challenge of New Governance in the European Union’ paper presented at workshop on New Governance and Law in EU, Minda de Gunzburg Center for European Studies, Harvard University, February 28 2003

ESPING-ANDERSON, GOSTA. (1990) *The Three Worlds of Welfare Capitalism*. Princeton, New Jersey: Princeton University Press

European Commission, (1997) *An Employment Agenda for the Year 2000, Issues and policies*. http://europa.eu.int/comm/employment_social/elm/summit/en/papers/emploi2.htm

European Commission, (2001) *European Governance — A White Paper*. COM (2001) 428 Final.

European Commission, (2002) *Taking Stock of Five Years of the European Employment Strategy*. COM (2002) 416 Final.

European Commission, (2003a) *The Future of the European Employment Strategy (EES): “A strategy for full employment and better jobs for all”*, Communication from the Commission to the Council, The European Parliament, the Economic and Social Committee, and the Committee of the Regions (COM 2003)
http://europa.eu.int/comm/employment_social/news2003/jan/ees_03_com_en.pdf

European Commission, (2003b) *Proposal for a Council Decision on Guidelines for the Employment Policies of the Member States*. COM (2003) XXX

FERRERA, MAURIZIO, ANTON HEMERIJCK, and MARTIN RHODES, (2001) *The Future of Social Europe: Recasting Work and Welfare in the New Economy*. Oxford: Oxford University Press.

GOETSCHY, JANINE. (2003) ‘The European Employment Strategy, Multi-level Governance and Policy Coordination: Past, Present, and Future’ in J.Zeitlin and

D.M.Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments*. Oxford: Oxford University Press.

JACOBSSON, KERSTIN (forthcoming) ‘Soft Regulation and the Subtle Transformation of States: the Case of EU Employment Policy’ in B.Jacobsson and K.Sahlin-Andersson (eds) *Transnational Regulation and the Transformation of States*.

KENNER, JEFF (1999). ‘The EC Employment Title and the “Third Way”: Making Soft Law Work?’ *The International Journal of Comparative Labour Law and Industrial Relations*. 51(1): 33-60.

KILPATRICK, CLAIRE (2003), ‘Hard and Soft Law in EU Employment Regulation’, paper presented at the 8th Biennial International Conference of the EU Studies Association, Nashville TN March 2003

SABEL, CHARLES and JONATHAN ZEITLIN (2003) “Active Welfare, Experimental Governance, and Pragmatic Constitutionalism: The New Transformation of Europe” (unpublished MSS—April 24 2003 draft)

SCHARPF, FRITZ (2002), ‘The European Social Model: Coping with the Challenges of Legitimate Diversity’ 40 *Journal of Common Market Studies* 645

SCOTT, JOANNE and TRUBEK, DAVID M. (2002) ‘Mind the Gap: Law and New Approaches to Governance in the European Union’. *European Law Journal* 8/1: 1-18.

Secretariat, The European Convention (2002) *Coordination of national policies: the open method of coordination*. WG VI, WD 015 Sept 2002

TRUBEK, DAVID M. and JAMES MOSHER, (2003) ‘New Governance, Employment Policy, and the European Social Model’, in J.Zeitlin and D.M.Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments*. Oxford: Oxford University Press

