

New EU Employment Governance and Constitutionalism

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This chapter's point of departure is that it is important to distinguish between different ways in which EU employment regulation can be presented as 'new'. This part of the analysis, carried out in the first section of the chapter, concludes that identifying the important *but limited and specific* ways in which EU employment regulation is new provides the necessary foundations for considering both the governance and constitutionalism implications of those changes which have occurred.

In terms of governance, recognition of this 'limited newness' substantially adjusts some of the central claims made about the changes to EU employment regulation. In particular, it is misleading and incorrect straightforwardly to assert or assume that we are witnessing a shift from hard law (the Classic Community Method) to soft law (the Open Method of Co-ordination) in the arena of EU employment regulation. Instead, I identify the key characteristics of new EU employment governance as being:

- (a) a dramatic expansion of the EU governance tool-kit;
- (b) hybridization of the objectives and internal structures of those EU governance tools;

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(c) a shift from responsibility for certain employment governance tasks primarily resting with public institutions (executives, legislatures, courts, public administrations) to the design of more participatory governance spaces for the elaboration of EU employment norms.

Each of these characteristics is explored in more detail in the second section of this chapter.

The last part of the chapter considers the different ways in which EU constitutionalism can be or has been connected to new EU employment governance, and what this tells us both about EU constitutionalism and new EU employment governance.

1. Exploring what's new about EU employment regulation

What is new at EU-level

Over the past decade employment governance has been radically transformed at EU level. This is easily demonstrated by considering what was not present at EU level just over a decade ago. Before the end of 1993 there was:

- no general set of legal bases in the EC Treaty for creating EU employment law;
- no possibility for the social partners to make EU employment law;¹
- no European Employment Strategy (EES), no Lisbon strategy and no Open Method of Co-ordination (OMC);

¹ The expanded roles of the social partners in EU-level employment governance are not explored in detail in this chapter. However, the chapter does address the roles social partners play in employing enterprises and in national contexts in relation to EU norms.

- no set of constitutional social rights destined to have a hard law status as now found in the EU Charter of Fundamental Rights (now Part II of the Constitutional Treaty).

From this perspective, therefore, *everything is new* in the sense that none of these governance tools existed before at EU level. It is worth dwelling a little further on the first of these: the absence of a general set of legal bases in the EC Treaty for creating EU employment directives. What is most interesting about this lack of competence is that it actually corresponds with extremely little utilisation of the Classic Community Method (CCM) in the employment law field.² Outside the area of health and safety, only six employment law directives were created before the new powers introduced at Maastricht took effect.³ Often it is accurate to present EU law as undergoing a shift from use of the CCM to greater use of ‘new old governance’ tools such as framework directives as well as other new governance

² This can be contrasted with the situation in the field of environmental law where lack of a custom-made competence did not impede the production of almost 200 directives, regulations and decisions before the SEA: for discussion see eg G. Majone, ‘The Rise of the Regulatory State in Europe’ in R. Baldwin, C. Scott and C. Hood (eds) *A Reader on Regulation* (OUP, 1998) 192 at 200.

³ Before entry into force of the SEA, employment law measures were based on Article 94 EC (the ‘common market’ creation competence) or Article 308 EC (the residual common market competence). The SEA added the possibility of adopting measures at EU level relating to the health and safety of workers. The six directives were: two on gender equality at work (one on equal pay (Directive 75/117/EEC), one on equal treatment), three on business restructuring (collective dismissals, transfers of undertakings, insolvency) and one on providing employees with information about their terms and conditions of employment (Directive 91/533/EEC). All but two of these have been extensively revised in the more active post-Maastricht period. See now on equal treatment between men and women, Directive 76/207/EEC as amended by Directive 2002/73/EC; on business restructuring: Directive 98/59/EC (collective dismissals), Directive 2001/23/EC (transfers of undertakings), Directive 80/987/EEC as amended by Directive 2002/74/EC on insolvency.

tools.⁴ However, it can be seen that such a description works less well in the employment arena where very little EU employment law had been created prior to Maastricht, partly as a result of competence constraints.

Moreover, even entry into force of that treaty on 1 November 1993 did not permit straightforward use of the CCM in the employment field. The opt-out by the UK's Conservative Government from the employment law legal bases introduced at Maastricht meant that they did not fully become part of EC law until 1997 when Prime Minister Blair removed UK opposition to these new employment law legal bases being used on a Community-wide basis, and led to the extension of all the directives adopted between 1994 and 1997 to the UK. Furthermore, the general Treaty competence to create anti-discrimination directives on a wide range of protected grounds was not introduced until the Amsterdam Treaty came into force in May 1999. Therefore, in many significant senses, secure production of EU employment law has been a very recent phenomenon.

Two caveats must be placed on this 'all-new' presentation of EU employment regulation. First, much was done by the courts with the little employment law in existence prior to Maastricht. The European Court of Justice and the national courts developed a flourishing judicial dialogue on some of the 1970s employment law directives.⁵ Second, another important source of EU employment regulation has existed with a proper Treaty base since

⁴ J. Scott and D.M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', 8 *ELJ* (2002) 1.

⁵ Especially gender equality and transfers of undertakings: see S. Sciarra (ed.) *Labour Law in the Courts* (Hart Publishing, Oxford, 2001), Chapters 2 and 3.

1957, although it has frequently been neglected in legal scholarship. This is the European Social Fund. Unlike the government by *imperium* (attaining policy objectives through legal commands backed by sanctions) which is the traditional focus of legal scholarship, the ESF utilises the technique of government by *dominium* whereby the wealth of government is used to attain policy objectives.⁶ While it is important to include the ESF in our analysis because it constitutes a different kind of source to traditional legal sources, its significance is tied to and limited by the smallness of the EU budget.⁷

Caveats notwithstanding, the sheer magnitude of the changes to EU employment regulation makes it plausible to assert that almost all of the tools for EU employment governance were created in the course of the last decade and that the thickness of EU employment governance increased dramatically as the decade progressed. In other words, ‘old governance’ tools (such as the legal bases to create directives) and ‘new governance’ tools (such as the OMC) were in fact all created within the same short time-span at EU level in the field of employment. In this sense, almost all EU employment governance is new. And that significant part which is not new - the ESF – has not only altered its own internal governance structure but has also taken on a very different aspect in its new EU governance setting, as we shall see.

⁶ See, on this useful distinction, T. Daintith, ‘The Techniques of Government’ in J. Jowell and D. Oliver (eds) *The Changing Constitution* (3rd edn, 1994, OUP) 209.

⁷ The EU budget has never been more, and currently is less, than 1.3% EU GDP. EU Member States spend around 45% GDP; the US around 34% GDP.

What is not new in the EU and its Member States

It is important to recognise that the kind of governance tools and structures created at EU level over the past decade have existed before. Turning first to employment policy, this becomes obvious if we look at the governance of employment policy in non-EU governance sites. States have always had employment (or labour market) policies aimed at activities such as vocational training and retraining, job-matching and income replacement in periods of unemployment, underemployment, incapacity or old age. The point being made here is that employment policies have never typically been associated with a hard law ‘command and control’ model. Instead, the governance tasks employment policies perform generally require, on the one hand, the spending of money and, on the other, the creation of guidelines, targets, indicators and plans in attempts to steer labour markets in directions considered desirable. Both these tasks tended to be carried out in public administrative bureaucratic or tri-partite decision-making processes. Therefore, it should come as no surprise that employment policies at EU level similarly predominantly involve the same set of tools. Hence, the European Social Fund involves spending EU money ‘in order to improve employment opportunities for workers in the internal market’ (Article 146 EC Treaty). And OMC in the employment field (the European Employment Strategy) involves creating guidelines, indicators, targets, National Action Plans and recommendations to enable the Member States and the Community to ‘work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change’ (Article 125 EC Treaty).

Accordingly the novelty of the European Employment Strategy lies precisely in its creation at *EU* level. In saying this I do not wish to underplay its newness as a governance tool. First, although Member States already had employment policies as we have discussed, Gerstenberg and Sabel are right to emphasise that few if any systematically compared their employment policies with those of other Member States.⁸ Second, because the EES is structured as an iterative process, providing rich information that is subject to peer review, it aims to promote cross-national deliberation and experimental learning. Whilst the Member States deploy similar employment governance tools, they use them in highly distinctive ways and with widely differing emphases. As a result, the *potential* impact of systematic cross-national comparison and learning between Member States through the OMC is high.

Turning to social rights, the ‘not really new’ thesis is even truer of the inclusion of fundamental EU social rights in the EU Charter of Fundamental Rights, created in 2000 and, in revised form, now Part II of the EU Constitutional Treaty. Although it is of great interest, as we shall see, that the Charter contains a range of EU fundamental social rights, it is not all that surprising that this is the case. For a start, the constitutionalisation of social rights is one of the most notable features of modern constitutions: the more recent a list of constitutional fundamental rights, the more likely it is to contain an increasing number of social rights. The most striking example of this is the South African constitution.⁹ Just as importantly, the EU was *particularly* likely to choose to include social rights in any fundamental rights catalogue. However, and distinguishing the EU Charter of Fundamental Rights from the social rights

⁸ O. Gerstenberg and C.F. Sabel, ‘Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?’ in C. Joerges and R. Dehousse (eds) *Good Governance in Europe’s Integrated Market* (OUP, 2002) 289 at 333.

⁹ See C. Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (OUP, 1999).

provisions in other bills of rights, the EU's historical development made it likely that *workers' rights* would be more prominent in its set of social rights than is normally the case. Fundamental social rights typically refer to rights to food, health, education, housing and a minimum income rather than to workers' rights.¹⁰ Yet the EU's historical trajectory has placed workers' rights in a more central position than is typically the case.

Once the market-making mission of the European Community got under way, its constant companion, decade after decade at Community level, has been the need to legitimise the social dislocation created by market integration by having 'a social dimension'. Hence, at the Paris Summit of 1972, which led to the Social Action Programme of 1974 and almost all of the employment directives created before Maastricht, the Heads of State and Government urged the Community institutions to make generous and inventive use of the competences they possessed. As Michael Shanks, Director-General for Social Affairs in the Commission in this period, commented on what lay behind the legislation emerging from the 1974 Social Action Programme:

The Community had to be seen as more than a device to enable capitalists to exploit the common market; otherwise it might not be possible to persuade the peoples of the Community to accept the common market.¹¹

¹⁰ The EU Charter does also contain some of these more typical fundamental social rights: see for example Article II-74 (right to education), Article II-94 (recognition and respect of entitlement to social security and social assistance), Article II-95 (health care).

¹¹ M. Shanks, 'Introductory Article: the Social Policy of the European Communities' 14 *Common Market Law Review* (1977) 375 at 378.

This strongly felt need to have a social rights agenda has, as is well-known, been accompanied by great difficulties, of both a jurisdictional (the difficulty of justifying supranational action) and political (the difficulty of agreeing what Community regulation should do) nature, to deliver on social rights. However, this should not blind us to the ongoing attempts to match in some way market-making initiatives with workers' rights. Indeed, before the creation of the EU Charter of Fundamental Rights, the only Charter of Fundamental Rights the Community had previously succeeded in creating, in 1989, was aimed specifically at workers. Creation of the 1989 Community Charter of the Fundamental Social Rights of Workers was closely linked to the intensification of market integration signalled by the Single European Act as successive European Councils, 'considered that, in the context of the establishment of the single European market, the same importance must be attached to the social aspects as to the economic aspects'.¹² It is true that the Workers' Charter was only a solemn declaration, and that only 11 of the then 12 Member States were prepared to sign up to it (not the Thatcher administration). The Workers' Charter has primarily been used as a justificatory resource for Community employment legislative activity and as an interpretative resource by the European Court of Justice. Nonetheless, it was seen as a step 'towards a "social constitution" for Europe' by contemporary commentators.¹³ Given this background, it would have been unlikely not to see social rights, and in particular workers' rights, included in the EU Charter of Fundamental Rights.

¹² Second Recital of the 1989 Charter's Preamble.

¹³ B. Hepple, 'The Implementation of the Community Charter of Fundamental Social Rights', 53:5 *Modern Law Review* 643 at 653 adding, 'It is difficult not to see the Community Charter as a step towards the creation of a European "social State"'.

Analysing more carefully the distinctive nature of different kinds of employment law and policy substantially adjusts common analyses of current EU employment governance developments. Such analyses view current developments as signalling a shift from hard law (the CCM) to soft law (the OMC), or as the price that had to be paid for an expansion of EU competence in the employment field.¹⁴ Instead, it becomes evident that there are different kinds of soft and hard employment law in the EU.

Some kinds of soft law instrument, particularly those containing workers' rights such as the 1989 Community Charter of the Fundamental Social Rights of Workers and the 2000 EU Charter of Fundamental Rights, are hard law of a constitutional nature in the making. They are often crafted so that they could be judicially enforceable in some way or another, but are denied hard law status on a permanent or temporary basis for political reasons. Indeed the ultimate fate of the EU Charter of Fundamental Rights, and especially the social rights in it, demonstrates that what counts as 'hard' enforceability in a polycentric constitutional setting is a complex and highly contested issue.¹⁵

¹⁴ J. Mosher and D.M. Trubek, 'Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy', 41 *JCMS* (2003) 63 at 64, 71: 'It could be said that the EES gives up the legal force of traditional regulations in order to allow the EU to deal with some core areas of social policy that were hitherto solely reserved for the Member States.' In subsequent work, D. Trubek and L. Trubek develop their analysis to consider different jobs performed by hard and soft law: 'The Open Method of Co-ordination and the Debate over "Hard" and "Soft" Law' in J. Zeitlin and P. Pochet with L. Magnusson (eds) *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, 2005).

¹⁵ See below Section 3.

But other kinds of soft law, of which employment policy measures have always been a central example, derive their regulatory strength from government powers or capacities that do not require hard, in the sense of judicially sanctionable, legal powers. This strength may derive from providing money on the fulfilment of certain conditions laid down by the administration, or from setting up guided reporting structures to encourage the pursuit of defined policy goals, and to facilitate knowledge transfer and policy learning. Neither the ESF nor the OMC constitutes a hard law opportunity *manqué*. In these instances, soft law is shorthand for ‘different from law (in its classical conception)’, not ‘less than law’.

What is new in both the Member States and the EU

One of the most profoundly interesting developments in employment governance is the increasingly deep and explicit integration of macro- and micro- competitiveness and social justice (with a new focus on its social inclusion variant) objectives in both traditional ‘social policy’ measures and traditional ‘employment policy’ measures. The greater integration of those objectives changes significantly the structure of the traditional instruments used to deliver social and employment policy. Employment governance can be seen as pursuing four objectives: worker protection; increasing the employment rate and lowering unemployment; including excluded groups in the labour market; increasing the competitive efficiency of employing enterprises.¹⁶ Traditionally, worker protection was associated primarily with hard

¹⁶ For a different classification, on which mine draws, see P. Davies and M. Freedland, ‘The role of EU employment law and policy in the de-marginalisation of part-time work: a study in the interaction between EU regulation and Member State regulation’ in S. Sciarra, P. Davies and M. Freedland (eds) *Employment Policy and the Regulation of Part-time Work in the EU: A Comparative Analysis* (CUP, 2004) 63.

law (employment law or ‘social policy’ in EU parlance) whilst job creation and combating unemployment was associated primarily with soft law (employment policy). Hence, these two objectives were divided between different tools of governance and the other objectives – competitiveness, social inclusion, increasing the employment rate - were much less visible in the employment field. Although the competitiveness of firms did inform employment law it did so in rather different and less explicit ways than it does today.¹⁷ The same can be said of the relationship between worker protection and employment policy. Similarly, social justice within employment governance is increasingly not simply defined as worker protection: both employment law and employment policy today place greater stress on removing obstacles to labour market participation for socially excluded groups such as single parents and the disabled even if those groups might not officially count as ‘unemployed’ when not economically active. Concomitantly, there is a greater emphasis on increasing the employment rate rather than on simply lowering unemployment. In sum, there has been a noticeable reorientation of the objectives of employment governance which has led to a refashioning of the tools of employment governance.

But, in developing its employment governance tools – the OMC, employment legislation, the ESF - to deliver these reoriented competitiveness and social justice objectives, did the EU lead, follow or travel alongside its Member States? The former is very often the impression given in analyses of the OMC. However, this may give a misleading impression of the

¹⁷ On competitiveness as a new task for employment law see H. Collins, ‘Regulating the Employment Relation for Competitiveness’, (2001) 30 ILJ 17 and C. Kilpatrick, ‘Has New Labour Reconfigured Employment Legislation?’, (2003) 32 ILJ 135.

development of employment policy in the EU by underplaying the central role of state and other governance sites in employment policy innovation.

In their analysis of the regulation of part-time work, Davies and Freedland suggest a reading based firmly on state employment regulation innovation.¹⁸ They argue that the change in EU employment law and policy occurred because of a diversification, *which happened first in the Member States*, of employment regulation objectives which in turn produced the need for a different set of regulatory techniques at national and, *subsequently*, EU level. Hard and soft law was refashioned at national and EU level to meet these new objectives.

Their argument – focused on the regulation of part-time work – is worth outlining a little more fully. Drawing on national case studies, they plot a shift in several Member States¹⁹ over the last few decades. At the beginning of this period, and conforming to a traditional regulatory pattern, Member States generally pursued the objective of worker protection by using the technique of hard law to discourage part-time work. Subsequently, there has been a common tendency in all the Member States to place a new or increased emphasis on the objectives of employment stimulation and employer flexibility, a change in approach towards moderating and encouraging part-time work and a use of the techniques of both hard and soft law to pursue these new objectives and approaches. Obviously, each Member State pursued this course in its own specific way. However, this course had been firmly set by

¹⁸ Above n.16.

¹⁹ The Member States analysed in the book are France, Germany, Italy, The Netherlands, Spain, Sweden and the United Kingdom.

domestic policy generally well before and, in any event, largely autonomously from EU employment governance developments.

Their conclusions have been reiterated in the context of a broader discussion of the recalibration of welfare regimes in Europe by Ferrera and Hemerijck who note that ‘the successes achieved through domestic policy innovation in turn shaped the employment and social policy agenda of the European Union’.²⁰ This does nothing to diminish the interest of that developing EU employment and social policy agenda: indeed it is a primary example of policy learning in action albeit with its focus on the *EU learning* from its Member States how to develop an appropriate employment policy regime.

Conclusions

In this first section we have rejected the often-made assertion that recent developments in EU employment governance can be characterised as a shift from hard to soft law. Instead, we have noted other much more interesting developments in EU governance. There has been a dramatic expansion of the EU governance tool-kit. This expansion, and particularly the creation of the EES and the EU Charter of Fundamental Rights, has pushed a former EU Cinderella into the limelight in studies of new governance and the EU’s evolving constitutional order. This expansion of the EU employment governance tool-kit took place

²⁰ ‘Recalibrating Europe’s Welfare Regimes’ in J. Zeitlin and D.M. Trubek (eds) *Governing Work and Welfare in a New Economy: European and American Experiments* (OUP, 2003) 88 at 125. Of particular relevance to the subject-matter of this paper is their discussion of the decentralization and broadening of the participation base in formulating and delivering active labour market policy in Denmark (at 99).

in the context of a general reconfiguration of employment policy and employment legislation around a new more integrated and expanded competitiveness-social justice paradigm. Both these developments are fundamental to understanding the construction of the new EU employment governance regime and its two other principal characteristics, both of which were noted in the introduction: hybridity and the creation of peopled governance spaces for EU norm elaboration and revision.

2.The new EU Employment Governance Regime

Over the last decade or so the EU has been redefined. It definitively stepped away from being an internal market with a social dimension and towards being a macro-economic area in its own right, largely because of the introduction of EMU. This new Euro-economy required an EU level employment policy, not least because, as an economic area, it was coming out badly in comparisons with the US on growth, employment and unemployment rates. In part this is because the design of welfare systems in some Member States appears to price low-skilled workers out of jobs and to heavily discourage female labour market participation. Compliance with the convergence criteria for EMU has also been identified as a significant factor in the EU's worsening growth and employment performance relative to the US during the 1990s.²¹

Its Member States also faced two other issues requiring an overhaul of welfare states, tax systems and labour market regulation. First, the European demographic situation is very troubling. Increasing numbers of older people and decreasing numbers of younger people

²¹ P. De Grauwe, *The Economics of Monetary Union* (2nd edn, OUP, 2000) 136-9.

lead to a new search for workers, such as women, the disabled and older workers. This requires rethinking child and elder-care provision as well as the development of flexible working models for parents, carers, the disabled and older workers. It also entails reconsideration of early retirement policies and the age at which pension rights should accrue. Second, the EU needs to find a niche in a world economy where new modes of production and consumption mean that the EU can only compete on quality and innovation. This creates needs to address low-skills, skills enhancement, educational attainment, and the maintenance of the value of human capital through life-long learning and training.

Self-identification as an ‘EU-economy’ in need of a labour market policy required, however, a distinct response to that pursued in state sites. The EU has very limited resources to pursue major *dominium*-led labour market reshaping; most of this money is in the hands of the Member States.²² Nor would it be feasible, effective or legitimate to manage labour markets from Brussels. The ‘innovative hybridization’²³ of employment governance in the Member States would have to find its own EU-specific translation.

Hybridization of the objectives of EU employment governance

In the ‘old governance’ EU, there was little integration of policy objectives across governance tools. Instead disparate interventions occurred in the areas of social policy

²² See above n.7 and the discussion in Section 3 below.

²³ J. Zeitlin, ‘Introduction: Governing Work and Welfare in a New Economy: European and American Experiments’ in Zeitlin and Trubek (eds) (2003) above n.20 at 14.

(primarily through legislation, plans for legislation and social rights documents) and employment policy (primarily through the European Social Fund).

Most of the literature on new employment governance in the EU has focused on the OMC (the European Employment Strategy). However, this OMC-emphasis has tended to present the OMC as a separate governance tool which will therefore be used instead of other possible EU governance tools, most particularly, the hard law of EU employment legislation. This perception – of OMC as an alternative to law - has been so strong that many influential voices have argued that it should not be allowed to happen. The European Commission therefore argued in its White Paper on Governance that the OMC ‘should not be used when legislative action under the Community method is possible’.²⁴ Scharpf has argued that the way ahead for the European Social Model is to combine a new kind of ‘softer’ hard law - differentiated framework directives - with the Open Method of Co-ordination. This would, he argues, diminish the problems which might be associated with a shift to ‘softer’ forms of hard law regulation:

since progress towards their realization would be directed by Council guidelines, while Member States would have to present action plans or reports on their effects would be periodically assessed by peer review. If evaluation should reveal general problems, the framework legislation could be amended and tightened.²⁵

²⁴ *European Governance – A White Paper* COM (2001) 428 final 22.

²⁵ F. Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’, 40 *JCMS* (2002) 645 at 664. See also J. Goetschy, ‘The European Employment Strategy: Multi-level Governance and Policy Co-ordination: Past, Present and Future’ in Zeitlin/Trubek (eds) (2003) above n.20, 59 at 80: ‘The best way to address these concerns [of a shift from hard law to soft law] is to link the OMC closely to other instruments of

These proposals ignore what in my view is the most significant characteristic of the new EU employment governance: that it is already a self-consciously *integrated regime* where the OMC, ESF and employment law measures each play distinctive and overlapping roles in realising social justice and competitiveness objectives. From this perspective, one of the most central achievements of the EES is that it builds bridges between employment legislation (*imperium* measures) and the European Social Fund (*dominium* measures). The Commission's observation on OMC appears to miss the point that in a hybridized governance regime, particularly a polycentred one, all governance tools are aimed at the effective and legitimate delivery of the same broadly defined set of goals. Scharpf is therefore correct to point out that the OMC can be complementary to employment legislation. However, Scharpf overlooks the extent to which integration of governance tools constitutes already, in a very significant number of employment areas, actual practice. Moreover, he is wrong to assume that only 'soft' hard law, or what Scott and Trubek term 'new old governance', such as framework directives, couples itself with the OMC.

The first clear instances of the explicit coupling between employment directives and OMC—the directives on part-time work and fixed-term work – do indeed follow the pattern identified by Scharpf, that is, that OMC fits best with 'softer' hard law. But this may also be explained by two facts specific to these two directives. The atypical work directives, as is well known, were the products of social partner agreements under (now) Articles 138 and 139 EC. These actors may have been particularly keen to explicitly link the newly strengthened

Community action. It would be helpful if the EES were to be associated with the other methods rather than operating in isolation?.

and institutionalised EES with their agreements. In addition, it is also important to bear in mind the subject matter of regulatory intervention. The purpose of the part-time work directive was not simply to protect part-time workers. It was also designed to give employers the opportunity to make use of part-time work and to give workers the option of moving between full and part-time work in accordance with their needs. These broadened objectives meant that a departure from the regulatory structure found in traditional employment law instruments was required. As Davies and Freedland remark, there is an ‘integral continuity’ between the Part-time Work Directive and the elements in the EES which concern part-time work.²⁶

However, EU discrimination regulation demonstrates, in contrast to Scharp’s analysis, that it is not always the case that only ‘softer’ hard law is suitable for coupling with OMC in the employment field. A strong coupling between the OMC and employment law to achieve other objectives may require very different hard law models. For instance, the strong, and long-standing, set of EU ‘hard law’ commitments to gender equality is matched by an extensive focus in the EES on equal opportunities for men and women.²⁷ And the 2000 directives prohibiting (*inter alia*) age, disability and race discrimination explicitly extract the immediately preceding European Council’s Conclusions on the Employment Guidelines.²⁸

²⁶ Above n.16. Part-time work has played three roles in the EES: to keep older workers in the workforce, to make enterprises more adaptable and competitive and to permit effective reconciliation of work and family life.

²⁷ See Priority Action 6 on Gender Equality of the Employment Guidelines in effect from 2003-5.

²⁸ In the Race Directive (Directive 2000/43/EC) the European Council stressed ‘the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities’. While, in the framework directive (Directive 2000/78/EC), the European Council stressed ‘the need to foster a labour market favourable to social

Moreover, it is not just recently created EU hard law or equality rights that have been connected to the EES. Links have also been made between 'old' EU hard law in other areas and the EES as it develops. The best example concerns the Community's substantial body of law on health and safety at work. In 2002, when indicators of job quality were introduced into the EES for the first time, one of these involved measuring accidents at work, and the provisions on adaptability in the EES have also been remodelled to include health and safety. Similarly, while the social partners did not explicitly link the Parental Leave Agreement and Directive with that part of the EES dealing with equal opportunities between men and women, such a link can be and has been made in the Employment Guidelines and the National Action Plans.

Finally, it is not just OMC and Community legislation which have been mutually remodelled. The objectives of the European Social Fund have also explicitly been recast to match those of the EES and employment legislation. Moreover, this remodelling has become more focused and precise over time. The Regulation on the ESF for the current programming period 2000-2006 noted the introduction of the EES in 1997 and stated that it was therefore 'necessary to redefine the scope of the Fund...to support the European employment

integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability...and to pay particular attention to supporting older workers, in order to increase their participation in the labour market'. In the EES see Priority Action 7, 'Promote the Integration of and Combat the Discrimination Against People at a Disadvantage in the Labour Market' and Priority Action 5, 'Increase Labour Supply and Promote Active Ageing'.

strategy and the national action plans for employment linked to it'.²⁹ However, the proposed Regulation on the ESF for the next programming period (2007-2013) adopts a much more tailored approach to use of the ESF to achieve EES objectives.³⁰ The Member States are required, under Article 4 of the proposed Regulation, to ensure that actions supported using the ESF 'promote the objectives, priorities and targets of the Strategy in each Member State and concentrate support in particular on the implementation of the employment recommendations made under Article 128(4) of the Treaty as well as of the relevant objectives of the Community in the field of social inclusion'.

The potential of the overall strength of this hybrid employment regime is formidable. Hard law – EU workers' rights – has already played an historically important role not only in liberating workers from uncongenial national employment practices but also in creating or strengthening alliances of national and transnational groups of workers and their intermediaries, often through litigation strategies.³¹ Moreover, in its new hybrid environment, EU legislation can act as a seed or an anchor for a wider range of linked policy initiatives, rather than being viewed as the only game in town for EU intervention.

²⁹ Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund (OJ L 213/5), Recitals (4) and (5) of the Preamble.

³⁰ Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund, COM (2004) 493 final, Brussels 14.7.2004.

³¹ C. Kilpatrick, 'Emancipation through Law or the Emasculation of Law? The Nation State, the EU and Gender Equality at Work' in J. Conaghan, K. Klare and M. Fischl (eds) *Labour Law in an Era of Globalization* (OUP, 2002).

OMC's tools – unlike those of hard law – are ideally suited to find out whether law, or other State or public/private intervention, really works. Unlike hard law, it *can* focus on an agenda to create crèches and decent jobs. Member States have a large degree of freedom in choosing how to narrow the gender pay gap, provide genuine opportunities to reconcile work and family life and give people with disabilities the chance to participate meaningfully in the labour market but, ultimately, OMC can be used to ask whether they can show that their methods have worked. The enriching of the EES' governance tools - in particular, the combined use of quality indicators and recommendations - increase its suitability for these tasks. OMC provides a way of testing whether hard law or budget expenditure really works and, more broadly, of holding Member States to account on ways of achieving common policy objectives. Unlike the structural funds, OMC can measure macro-level changes instead of largely micro-level improvements.

Finally, the structural funds' governance processes and outcomes are attractive on many grounds. Unlike OMC, they provide concrete incentives for Member States to develop structured participation by a range of interested actors and institutions to work together to create progressive change on a local basis.³²

In sum, in policy design terms, the most central characteristic of new EU employment governance is its integration. This integration gives it a regulatory strength and potential it did not previously possess. I have set out a strong version of the policy integration thesis here, because it differs so much from most analyses of new EU employment governance. However, to counterbalance this, it must be stressed that it is much easier to design joined-

³² J. Scott, 'Law, Legitimacy and EC Governance: Prospects for 'Partnership'', 36 *JCMS* (1998) 175.

up EU government on paper than it is to realise it in practice. This is particularly the case in a hybrid, polycentred employment governance regime. Failure by one part of the whole to play its allotted role skews the objectives and balance of the overall hybrid regime. Hence, choosing the appropriate policy mix to deliver an employment objective will be very different in a scenario where each governance tool is expected to do its job, and in a scenario where one or all of the governance tools is not, or is perceived not to be, working. Therefore, when the UK Government presses for OMC to be privileged as a mode of policy intervention over EU employment legislation, suspicions are appropriately aroused that this is because it perceives the OMC to be less effective in practice than other EU governance tools.³³ In part, it may be fears and concerns of this kind that motivated the Commission in its White Paper on Governance to argue against the OMC ousting legislative action.³⁴

Peopled governance spaces for norm-elaboration and revision

The last fundamental change in the EU employment regime we wish to highlight and to analyse is a shift away from conceiving of legal standards, expenditure activities, or labour market management as being definitively in the hands of public institutions which create and interpret norms relating to these activities. A new characteristic can be discerned across EU instruments in the employment field: legislation, expenditure and labour market management. This characteristic is explicitly requiring *both public and private actors* to be involved in EU normative instructions through activities such as elaboration,

³³ See C. Kilpatrick and M. Freedland, 'How is EU Governance Transformative? Part-time Work in the UK' in Sciarra/Davies/Freedland (eds) above n.16, 299 especially 343ff.

³⁴ See above n.24 and accompanying text.

implementation, adjustment, review and comparison. Moreover the range of both public and private actors involved in EU employment governance has expanded. The public actors include the executive, the legislature, Parliaments, public administrations at all levels, agencies and courts. The private actors include unions, employers, groups of workers or their elected representatives and other civil society associations.

Employment legislation

The four principal areas of EU employment legislation over the last 'long' decade concern equality legislation,³⁵ atypical work³⁶, working time³⁷ and worker representation.³⁸ In each of these areas, new linked roles have been given to public and private actors. Before examining these linkages in more detail it is worth underlining that none of these roles existed at EU level in pre-Maastricht EU employment legislation. Moreover, while similar public-private links to those recently introduced at EU level had been made before in the legislation of some Member States, the model used in the worker representation directives is new at both EU level and in the Member States.

³⁵ The Burden of Proof Directive (97/80/EC), the revised Equal Treatment Directive (both on gender equality), the Parental Leave Directive (96/34/EC); the Race Equality Directive (2000/43/EC); the Framework Directive on age, disability, religion/belief, sexual orientation (2000/78/EC).

³⁶ The Part-time Directive (97/81/EC); the Fixed-term Directive (99/70/EC); the telework agreement (2002).

³⁷ The Working-time Directive of 2003 (2003/88/EC) which consolidates the original 1993 Directive and subsequent amending directives; the Young People at Work Directive (94/33/EC).

³⁸ The European Works' Councils Directive (94/45/EC); the Information and Consultation Directive (2002/14/EC); Directives requiring worker involvement in the new European Company (2001/86) and European Co-operative (2003/72/EC, OJ L 207/25)).

One set of linkages emerges from the new discrimination directives. The effectiveness of the judicially enforceable rights created by the race and gender equality directives is to be given greater weight by creating a new public enforcement agency in each Member State.³⁹ Moreover, these agencies, along with voluntary associations engaged in combating discrimination, are given new rights to support or act on behalf of individuals in judicial and administrative proceedings.⁴⁰ It is in the nature of many central anti-discrimination concepts that they require, and have received in the EU judicial context, extensive and revisable elaboration. However, this elaboration was patchy in the past, often because of the absence of an adequate nexus of informed local actors to organise litigation strategies. A further linkage between Member States and private actors is created by providing that the Member States should encourage and promote the social partners and non-governmental organisations to engage in dialogue on combating race and gender discrimination and promoting equality.⁴¹

A very different linkage between public and private actors is created in the directives on atypical work, parental leave and working-time. In these directives, the most distinctive new feature is that bargained agreements between, depending on the directive, ‘management and labour’, ‘the social partners’ or ‘the two sides of industry’ can set or derogate from a wide range of legislative standards. These legislative standards are either laid out in detail in the Directive (working-time) or sketched out in the Directive (atypical work, parental leave) and

³⁹ Article 13, Directive 2000/43/EC; Article 8a ETD.

⁴⁰ Article 7(2), Directive 2000/43/EC; Article 6(3) ETD.

⁴¹ Articles 11 and 12, Directive 2000/43/EC; Articles 8b and 8c ETD.

left to the Member States to flesh out, either legislatively, through bargained standard-setting, or through a mixture of legislation and bargained statutory adjustment. The most far-reaching use of the bargained statutory adjustment technique is in the Working-time Directive. The Directive lays down a series of detailed basic entitlements to *inter alia* a maximum working week of 48 hours, rest-breaks, daily rest and weekly rest as well as additional protection for night-workers. However, it then provides that all of these standards can be adjusted by bargained agreement either at industry level or in individual enterprises and workplaces.⁴² In other words, the legislative standard functions primarily as a starting-point for the working-time standards which will ultimately be applied to workers in the EU as a result of bargained agreements.

This technique is taken one step further in the worker representation directives of the post-Maastricht period. These directives all aim to ensure that employing enterprises inform and consult their workers on important decisions in the life of the enterprise. Each directive deals with a different kind of employing enterprise: Community-scale undertakings, European Companies and, most recently, all enterprises with more than 50 employees. Each directive contains a legislative information and consultation model. However, this legislative model is explicitly set up as a default setting, to operate only where no information and consultation arrangement bargained between employers and their workforces has been created. Moreover, the directives provide additional regulatory incentives for the creation of rapid bargained agreements on information and consultation.

⁴² In relation to the 48-hour limit, bargained agreements can only adjust the length of the reference period over which the 48 hr maximum will be averaged, up to a maximum of 12 months (the basic reference period is set at 17 weeks).

We can illustrate this more clearly by looking at the European Works Council Directive of 1994. Community-scale undertakings can comply with the directive's goal that they should inform and consult their workforces in one of three ways: through statutory compliance, bargained compliance or rapid bargained compliance. Incentives for bargained compliance are created by the possibility of avoiding the detailed arrangements on information and consultation in the statutory default model. For instance, under a bargained agreement there is no requirement (as there is under the default model) to hold an information and consultation meeting with worker representatives covering 'the economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.'⁴³ However, standard bargained compliance remains subject to certain legislative constraints as to who can make the agreement and what it should cover.⁴⁴ These constraints are removed in the case of rapid bargained compliance, that is, compliance with the Directive before its date of transposition. Here the only requirements are that the Community-scale undertaking has an agreement, with any employee-side signatory, providing for the transnational information and consultation of the entire workforce.⁴⁵ The role played by the legislative standard in this setting, where the legislative design incentivises intra-firm compliance with a broadly defined

⁴³ Annex EWC Directive, paragraph 2.

⁴⁴ Article 6 EWC Directive.

⁴⁵ Article 13 EWC Directive.

legislative goal, is very different from the traditional obligation-sanction role played by legislative standards. The workings of the European Works Council Directive in practice clearly demonstrate this. At present, almost three-quarters of the Community-scale undertakings in which the information and consultation obligations have been triggered⁴⁶ have taken the rapid bargained compliance route and almost all of the remainder have taken the bargained compliance route.⁴⁷ The statutory default model has played two main roles: to act as an incentive to reach agreement and to provide a flexible template for those bargained agreements.

The structural funds: the ESF

The structural funds demonstrate even more clearly than employment legislation the need to bring together a relevant set of public and private actors in order to obtain the means to carry out broadly defined EU employment objectives.

The critical staging post here is the significant reforms of the structural funds in 1988. These introduced the principle of partnership, a principle that has been retained in the 1993 and 1999 rounds of reforms. The Regulation laying down general provisions governing the structural funds states that Community actions under the funds shall be drawn up in a partnership between the Commission, the Member States and a ‘representative partnership’

⁴⁶ The directive must be triggered either by management or workers, and this has happened in just under one third of the two thousand or so enterprises covered by the Directive.

⁴⁷ See P. Lorber, ‘Reviewing the European Works Council Directive: European Progress and UK Perspective’, 33 *ILJ* (2004) 191.

designated by the Member State. In designating this partnership at national, regional, local or other level Member States are required to ‘create a wide and effective association of all the relevant bodies, taking account of the need to promote equality between men and women.’ The partnership covers the preparation, financing, monitoring and evaluation of assistance.⁴⁸

Aside from this general regime, the 1988 reforms also created a new instrument: the Community Initiatives. These are programmes with an earmarked budget (between 5-10% of the Structural Funds budget depending on the programming period) to be spent on specified themes. In the current period (2000-6) one Community Initiative is ESF-funded. This is the EQUAL initiative.⁴⁹ EQUAL is a transnational programme which promotes new means of combating all forms of discrimination and inequality in the labour market, as well as focusing on the position of asylum seekers and refugees. According to the Commission, EQUAL differs from the European Social Fund mainstream programmes in its function as a laboratory (principle of innovation) and in its emphasis on active co-operation between Member States.⁵⁰ Its themes mirror the EES. It is implemented by strategic partnerships called EQUAL Development Partnerships (EDPs), which may operate at a local, regional or national level. An EDP can be funded to pursue one of the specified themes. To obtain funding it must state the rationale for its project, the EDP’s objectives, what is innovative about the project, who will benefit, explain how it will empower the partners and its

⁴⁸ Article 8 of Regulation 1260/1999 of 21 June 1999 laying down general provisions of the Structural Funds (OJ L 161/1).

⁴⁹ See http://europa.eu.int/comm/employment_social/equal/index_en.html.

⁵⁰ However, in the 2007-13 programming period it is proposed to move EQUAL back into the mainstream ESF programmes: Inforegio, *Factsheet 2004*, 1.

beneficiaries and enter into transnational co-operation agreements with EDPs in other Member States pursuing the same theme.

To show the potential of the ESF, I briefly outline one of these Equal Development Partnerships (EDPs) in the UK: *Building London: Creating Futures*. Altogether, there have been 195 EDPs in the UK, 82 in the first round in 2002 and 113 in the second round in 2005. The *Building London: Creating Futures* EDP pursues the adaptability theme. It aims to formulate a sub-regional co-ordinated programme to ensure that disadvantaged people have equal opportunities to access, retain and progress in present and future Central London construction jobs. For example, the EDP notes that of 145,000 Construction Skills Certification Scheme Cards issued only 404 of them went to women because of disempowerment and childcare responsibilities. The EDP also deals with barriers faced by ethnic minorities and older workers in accessing Central London construction jobs. The EDP has 14 partners comprising training providers, employers, local authorities, community groups and unions. The lead partner is the London Borough of Southwark. Other partners include the Construction Industry Training Board, the Union of Construction and Allied Trades and Technicians (UCATT), the Lambeth Women's Workshop and Women's Education in Building. Beneficiaries are to be identified through outreach and referral measures, trained and supported in training and at work, and given help with dependent care, travel and equipment costs. One of the aims is to ensure that trained individuals retain a job for six consecutive months. The trade union, UCATT, for instance, will train and develop individuals as 'learning representatives' in the workplace. The London EDP has transnational co-operation agreements with EDPs in France and Germany. It was approved to spend between 2 and 5 million euros.

Good governance and partnership is even more thoroughly integrated into the proposed operation of the structural funds for the next programming period which runs from 2007-13. We have seen that the 1999 ‘parent’ Regulation for the structural funds 2000-2006 contains the principle of partnership.⁵¹ However, its accompanying ‘daughter’ Regulation on the ESF is silent on issues of governance and partnership.⁵² This is not true of the ‘daughter’ Regulation on the ESF proposed for the 2007-13 period, Article 5 of which is dedicated to ‘Good Governance and Partnership’.⁵³ Three aspects are worth mentioning. First, stress is placed on the territorial - local and regional - dimension of the ESF. Second, in programming, implementing and monitoring the ESF, Member States should ensure that the social partners are ‘involved’ and that non-governmental stakeholders are ‘adequately consulted’. Third, and most interestingly, those managing the Member State’s programme must encourage ‘adequate participation and access’ to funded activities by the social partners and NGOs. For NGOs this is particularly to be the case in the domain of social inclusion and gender equality. For the social partners, ‘adequate participation and access’ is further underwritten by fencing off a percentage of the ESF solely for activities jointly undertaken by the social partners, in particular to promote adaptability of workers and enterprises.

The European Employment Strategy

⁵¹ Above, n.48.

⁵² Above n.29.

⁵³ Above n.30.

The Employment Guidelines 2003-5 devote a special section to ‘Good Governance and Partnership in the Implementation of the European Guidelines’ calling on the involvement of parliamentary bodies, social partners and other relevant actors in the implementation of the EES.⁵⁴ The Commission has been keen to stress that ‘from the very beginning the EES was an open process’.⁵⁵ However, one of the EES’ major problems has been that it has been seen, and has generally proved in practice, to be an activity carried out, with varying degrees of commitment, solely by government officials.⁵⁶ The disjunction between theory (involvement by a wide range of public and private actors) and practice creates three serious problems for the EES as a governance tool. The first is an effectiveness problem: without public and private actors ‘buying into’ the EES it simply will not function particularly as it lacks the more obvious sticks and carrots generally available under legislation and the ESF. The second is a legitimacy problem: without enough relevant public and private actors being involved, the EES risks having very little legitimacy. The third is a visibility problem: until

⁵⁴ Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States (OJ L 197/13). However, see G. de Búrca who points out that the stronger commitment to wider participation in the Commission’s proposed Guidelines was watered down by the Council: ‘The constitutional challenge of new governance in the European Union’, 28 ELRev (2003) 814 at n.99.

⁵⁵ Paragraph 1.4, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: *The future of the European Employment Strategy (EES) “A strategy for full employment and better jobs for all”* COM (2003) 6 final, Brussels 14.1.2003.

⁵⁶ For an excellent detailed assessment see J. Zeitlin, ‘Conclusion: The Open Method of Co-ordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy’ in J. Zeitlin and P. Pochet with L. Magnusson (eds) *The Open Method of Co-ordination in Action: the European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, 2005).

the EES is owned and deployed by a wide range of relevant public and private actors it will be largely ignored by the media and the general public.

These problems, and the costs of the non-EES,⁵⁷ have had two perceptible effects on its development. First, it has pushed the issue of who participates in the EES higher up the political agenda. Second, a change has occurred in which public and private actors are seen as relevant and how they should be included in the EES. While the 2003-5 Employment Guidelines state that good governance and partnership is important, in practical terms this amounts to little more than exhorting the *relevant actors* ‘in accordance with national tradition and practices’ to *implement* the EES. In 2004, both the Spring European Council⁵⁸ and the Council’s Recommendations to the Member States under the 2003-5 Employment Guidelines,⁵⁹ took a different tack. In order to ensure that support and advocacy for change reaches beyond Governments, the Member States were called upon to build *Reform Partnerships* involving *the social partners, civil society and the public authorities*. We can see here that a richer set of public and private actors is enumerated as having a role to play. Moreover, that role is not simply to ‘implement’ the Employment Guidelines; instead their envisaged role is to be involved in a more structured and far-reaching partnership with the Government of each Member State.

⁵⁷ See, in particular, the two reports of groups led by Mr Wim Kok. The first, requested by the Spring European Council of 2003, reported in November 2003: *Jobs, jobs, jobs. Creating more employment in Europe*. The second, a broader report on how to revitalise the Lisbon Strategy, was set up by the Spring European Council of 2004, and reported in November 2004, *Facing the Challenge. The Lisbon Strategy for Growth and Employment*.

⁵⁸ Presidency Conclusions, Brussels, 25/26 March 2004, paragraphs 43 and 44.

⁵⁹ Council Recommendation 2004/741/EC of 14 October 2004 on the implementation of Member States’ employment policies (OJ L 326/49)

Even more far-reaching changes are in prospect as a result of the Kok Group's Mid-term Review of the Lisbon Strategy⁶⁰ and the decision of the new Commission President, Mr Barroso, to prioritise the revitalising of Lisbon. The 'new start' for Lisbon proposed by the Barroso Commission rotates around three central concepts, one of which is mobilising support for change.⁶¹ In the Commission's view, 'establishing broad and effective ownership of the Lisbon goal is the best way to ensure words are turned into results. Everyone with a stake in Lisbon's success and at every level must be involved in delivering these reforms. They must become part of national political debate'.⁶² Three significant changes are proposed to make this happen. First, there will be a shift away from *implementation* of EU Employment Guidelines towards *elaboration* at Member State level, after *broad discussion*, of the action needed to create more and better jobs and the commitments and targets that should be made in that specific Member State to achieve that goal. Second, these new integrated programmes for growth and jobs (national Lisbon programmes) should be given a higher public profile by being looked after by a 'Mr' or 'Ms Lisbon' in each Member State. Third, greater legitimacy and visibility should be given to the national Lisbon Programmes by discussions with the social partners and by their being adopted by Government following a debate in the national Parliament.⁶³

⁶⁰ Above. n.57.

⁶¹ The other two are more focus (ie just two overriding priorities: growth and jobs) and simplifying and streamlining Lisbon.

⁶² Communication to the Spring European Council, 'Working Together for Growth and Jobs – A New Start for the Lisbon Strategy', COM (2005) 24.

⁶³ The Spring European Council of 23/24 March 2005 endorsed a weaker version of these proposals: see paragraph 38(c) of the Presidency Conclusions: 'Member States will draw up, on their own responsibility,

Conclusions

I have set out in some detail the linkages drawn between public and private actors in EU employment instruments in order to demonstrate what an important and transversal characteristic of EU employment governance it now is. To be sure, legislation, the ESF and the OMC link public and private actors in distinctive ways. Nonetheless, a general feature of EU employment governance is that more heavily populated governance spaces have been designed to deliver employment objectives that combine in new ways competitiveness and social justice.

3. Constitutionalism and New EU Employment Governance

What has new EU employment governance got to do with EU constitutionalism and the documentary constitutional activity that has recently taken place in the EU, resulting in the EU Charter of Fundamental Rights and the Constitutional Treaty which now contains that Charter?

This raises a preliminary question: why has constitutionalism been connected to EU employment governance at all? It is not immediately obvious why any positions have or need

“national reform programmes” geared to their own needs and specific situation. Consultations on these programmes will be held with all stakeholders at regional and national level, including parliamentary bodies in accordance with each Member State’s specific procedures. The programmes will make allowance for national policy cycles and may be revised in the event of changes in the situation. Member States will enhance their internal coordination, where appropriate by appointing a Lisbon national coordinator’.

to be taken on the relevance of constitutionalism to EU employment governance. The connection rests, it seems to me, on what Neil Walker has termed ‘the sheer open-ended inclusiveness of what may be signified under the constitutional sign’.⁶⁴ While questions about what the EU does in the employment field, and its relationship with its States and its citizens in that arena, ‘can be in fact be framed in a variety of different discourses, [they] are also capable of being brought together, or condensed, under the wide umbrella of a constitutional register’.⁶⁵ That is to say, in recent years choices have been made - by politicians and scholars in particular - to bring the language of constitutionalism to bear on the EU⁶⁶ in order to explain and enhance its legitimacy.⁶⁷ The place given to employment governance in those analyses of constitutionalism depends on how one explains the EU and what is accordingly prescribed to enhance its legitimacy.

⁶⁴ N. Walker, ‘Europe’s Constitutional Momentum and the Search for Polity Legitimacy’ in J.H.H Weiler and C. L. Eisgruber (eds) *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 05/04, 22.

⁶⁵ Ibid.

⁶⁶ M. Poiares Maduro notes that ‘The currency of constitutionalism has become the dominant currency of the debates on European integration’: ‘How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union’ in J.H.H. Weiler and C.L. Eisgruber (eds) *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 05/04, 1.

⁶⁷ This is not to deny the importance presence of constitutional denial in relation to the EU: see N. Walker above n.64 at 26-7 discussing *inter alia* D. Grimm, ‘Does Europe Need a Constitution?’, 1 ELJ (1995) 282. As Walker notes (27) the very invocation of a constitutional frame in relation to the EU is not innocent of social meaning as it ‘conveys the message that the EU is the kind of entity which is suitable for constitutional treatment’.

What strikes me as most interesting is that it is entirely possible to construct a range of respectable arguments on the relationship between EU governance and constitutionalism. In this section I explore these different positions on EU employment governance and constitutionalism. Before doing so, it is worth thinking about the reasons lying behind the existence of such a wide range of positions. Part of the explanation for this range of positions lies in how EU employment governance is focused on in constitutionalism discussions. First, is the focus on EU employment governance as it is and how it actually operates, as it is and could operate or as it should be? Second, is attention directed to the *substantive focus* of EU employment governance or on how various actors are involved in EU employment governance? Approaches most interested in the substantive focus of EU employment governance will think about issues such as the policy areas on which EU employment governance has focused, whether ‘hybridity’ constitutes a threat to social justice and so on. Those whose primary concern is the identification of the *appropriate actors* of EU employment governance will be interested in issues such as the roles given to those actors, how the actors are selected, and how those actors interact over time. Third, what is the constitutional position focused upon? Is it the extant formal constitutional framework, the ‘living’ constitution and practices of governance, the position in the Constitutional Treaty, or some other possible constitutional settlement containing a different set of EU employment governance instruments which reflect a different set of EU aspirations and goals in the employment field?

My limited purpose is to demonstrate the possibility of cogent, though differing, constitutional positions on the EU and illustrate the place and treatment which EU employment governance receives within those positions. I group these positions into two

broad categories: transformative EU constitutionalism and intergovernmental EU constitutionalism.

Transformative EU constitutionalism and new EU employment governance

I use the term transformative EU constitutionalism to embrace a range of positions which see the EU as ‘becoming’ constitutionalised and which take an expansive approach to constitutionalism. For transformative constitutionalists, the debate provoked by the current Constitutional Treaty is not in any sense an end-point of EU constitutional discussions. Moreover, that debate and its outcomes are not exhaustive of EU constitutionalism; instead, they imperfectly reflect some of the concerns of that broader and ongoing debate. Two quite different variants of transformative constitutionalism are identified: ‘state of nation-states’ constitutionalism and processual constitutionalism.⁶⁸

‘State of nation-states’ constitutionalism

One variant of transformative EU constitutionalism urges the EU to be more ‘state-like’ in providing an adequate set of employment and social welfare guarantees: what Habermas calls a ‘state of nation-states’.⁶⁹ It focuses both on the need to improve the substantive content of the EU component of the ‘European social model’ and on the need to stimulate a genuinely transnational civil and political society. Perhaps the most distinctive substantive proposal of this brand of EU constitutionalism is its bolder social spending plans for the EU. Hence Philippe Schmitter has proposed that the monies currently allocated to agricultural subsidies

⁶⁸ I borrow ‘processual constitutionalism’ from Neil Walker above n.64 at 29.

⁶⁹ J. Habermas, ‘Why Europe Needs A Constitution’, 11 *New Left Review* (2001) 5 at 8.

and structural and regional funds should be redirected to giving a Euro-stipendium to any citizen of the EU whose income is less than one-third of the average EU income.⁷⁰

It is clear that this vision departs radically from the current EU position and the position in the Constitutional Treaty, in particular by allocating a large role to the EU in visible citizen-directed social spending. It views it as important for social and employment rights and other instruments to be provided by the EU, and not to rely primarily on alternative sources such as the Council of Europe or national sources. Two main reasons seem to underpin this strand of constitutionalism's prescription of EU-provision of a much more extensive set of social rights. One is the need to build a stronger feeling of 'we' amongst the citizens of the EU, to make them more of a 'people' than the 'peoples' of Europe. The second is the need for the EU to provide for the citizens of Europe what its States increasingly cannot or will not be able to provide because of global economic integration. The EU is seen as both a cause and a product of this global economic integration. The EU's role becomes one then of *conserving* the *distinctive* European social model that has been developed by its Member States.⁷¹

Although the Constitutional Treaty most certainly does not fulfil these aspirations, it can be examined to see whether it takes any steps towards fulfilling such state-supportive aspirations. The main new source pointing in this direction is the set of social rights

⁷⁰ P. C. Schmitter, *How to Democratize the European Union...and Why Bother?* (Rowman and Littlefield, 2000) 44ff. See also Habermas above n.69 at 17 who notes that in his new EU, 'full budgetary powers would not be necessary in the beginning'.

⁷¹ See eg Habermas above n.69 at 6.

contained in the EU Charter of Fundamental Rights.⁷² This contains rights supporting transnational civil society as well as substantive social rights. So far as substantive rights are concerned, the Charter contains a significant number of employment rights including rights to equality on a wide range of grounds, rights to fair and just working conditions and to reconcile family and professional life. In relation to transnational civil society, the Charter contains rights to collective bargaining, collective action and to freedom of association.

However, this strand of constitutionalism would wish the Charter to contain a strong set of justiciable EU social rights binding on both the EU itself and its Member States in a wide range of circumstances. Its proponents would therefore be particularly concerned about the potentially large hurdles placed in the way of the EU Charter fulfilling the role they would like to see it play in the Member States by the horizontal clauses of the Charter. In particular, Article II-111 states that the provisions of the Charter are addressed to the Member States ‘only when they are implementing Union law’ and states that the Charter ‘does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in other parts of the Constitution’.

Moreover, the Constitutional Treaty places additional obstacles on the fostering of transnational civil society. While freedom of association is protected in the EU Charter of

⁷² Though see also Article I-47 on ‘The principle of participatory democracy’, in particular, its citizens’ right of legislative initiative and Article I-48 on ‘The Social Partners and autonomous social dialogue’.

Fundamental Rights,⁷³ since Maastricht the EU has explicitly excluded its competence to act in this area.⁷⁴ Moreover, one of the main last-minute changes to the Constitutional Treaty, at the insistence of the UK Government, was to require courts using the EU Charter of Fundamental Rights to have due regard to the explanations drawn up by the Conventions involved in the drafting of the Charter and subsequently the Constitutional Treaty.⁷⁵ This change was primarily intended to ensure that courts would not extensively interpret the rights to freedom of association and to strike in the Charter in a way that would allow national limits on collective action by unions to be challenged, in particular in relation to *transnational* collective action.⁷⁶ These limitations on transnational activities by unions are significant in themselves. However, these restrictions clearly have broader implications for all of the voluntary associations making up a nascent transnational civil society.

⁷³ See Article II-72 EU Constitutional Treaty: ‘Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular, in political, trade union and civic matters, which implies the right of everyone to form and join trade unions for the protection of their interests’.

⁷⁴ Article 137(6) EC Treaty; retained as Article III-210(6) EU Constitutional Treaty: ‘This Article shall not apply to pay, the right of association, the right to strike or the right to impose lockout’.

⁷⁵ See new Article II-112(7): ‘The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States’ and the Declaration on the Charter annexed to the Constitutional Treaty which contains the Explanations.

⁷⁶ See eg that the Explanations tie the meaning of freedom of association to the more restricted meaning in Article 11 ECHR rather than the meaning given to it by the ILO’s Committee of Experts on Freedom of association. Note also in relation the Charter’s guarantee of collective action (Article II-88 EU Constitutional Treaty) that the Explanations provide that ‘The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, *including the question of whether it may be carried out in parallel in several Member States*’.

Processual constitutionalism

The ‘state of nation-states’ variant of transformative constitutionalism can be contrasted with processual constitutionalism.⁷⁷ Processual constitutionalists are not simply making the point that ‘constitutional’ practices should be more expansively defined so as to go all the way down from formal constitutional documents to micro-processes of governance. Their point is that constitutional practices are in fact *primarily located and produced* in these micro-processes of governance rather than in formal constitutional texts.

In both its substantive and procedural focus, processual constitutionalism can be contrasted with state-building transformative constitutionalism. It is less exercised about pinning down precise social ‘positive integration’ gains. It also focuses more on the identification of *already instituted* governance sites as ‘constitutional’ than on the stimulation of transnational civil society stressed, *inter alia*, in the ‘state of nation states’ literature. From this point of view, the new peopled governance spaces we have identified as a key characteristic of new EU employment governance are central constitutional practices in the EU. So far as employment is concerned, the focus so far by processual constitutionalists has rested almost exclusively on the OMC.⁷⁸ Nonetheless the constitutional prescriptions of processual constitutionalism in relation to the OMC may be useful in relation to the ESF and EU employment legislation too. Although this view of constitutionalism sees the real constitutional action as going on below the surface of formal constitutional documents, and argues that such practices should

⁷⁷ I borrow this term from Neil Walker above n.64.

⁷⁸ Gerstenberg and Sabel above n.8; de Búrca above n.53.

be included in the concerns of mainstream constitutional law scholarship, it also views it as important to afford appropriate recognition and support to these constitutional practices in formal constitutional texts.⁷⁹ Gráinne de Búrca charts how the Convention failed to introduce into the Constitutional Treaty general requirements of transparency and participation across all the OMC processes. Indeed, the OMC receives no explicit mention in the Constitutional Treaty at all.⁸⁰ Although its *tools* – guidelines and so on – are recognised in the Constitutional Treaty’s provisions on the Broad Economic Policy Guidelines,⁸¹ the Employment provisions⁸² and in the new wording of the clauses on social policy,⁸³ no constitutional *values* underpinning these OMC processes were enshrined in Part III of the Constitutional Treaty. Nor are the types of constitutional values sought by processual constitutionalism found in Part II of the Constitutional Treaty: the EU Charter of Fundamental Rights. Rights protecting freedom of association are actually of limited use in deciding who should be allowed to participate, to deliberate or to act as representatives in a particularly constituted governance space. Who, for instance, should be allowed to bargain

⁷⁹ See eg J. Holder and J. Scott’s chapter on environmental governance in this volume where they discuss ‘embedded constitutionalism’ in which ‘the practice of governance has spawned a process of constitutionalization from within’. Yet these new governance processes ‘have failed even to ripple the constitutional surface of the EU’.

⁸⁰ Above n.54.

⁸¹ Article I-15(1) and Article III-179.

⁸² Article I-15(2) and Article III-206.

⁸³ Article I-15(3) and Article III-213.

away the statutory limits on night work contained in the Working-Time Directive on behalf of the workers who will otherwise be protected by those limits?⁸⁴

Intergovernmental constitutionalism and EU employment governance

In intergovernmental constitutionalism the focus is placed more on analysing the constitutional framework as traditionally defined (not the expansive definition of ‘constitutional’ used by processual constitutionalists) and on the EU as it is (not as it should be as in ‘state of nation-states’ constitutionalism). In sum, the focus is on the existing Treaty framework, on the changes wrought to that framework by the Constitutional Treaty and on the relationship set up by those sources between the EU and its Member States.

Distinctive strands of intergovernmental constitutionalism emerge for two important reasons. First, there is descriptive disagreement over *how intergovernmental* the EU currently is: this affects how employment governance is viewed and what kind of constitutionalism the EU needs. Second, different positions can and are taken on the desirability of social and employment protection and governance in a market economy.

Maduro argues that, looking back, we can now see that the EU obtained legitimacy in the past from a strong version of intergovernmental constitutionalism. In that set-up, the policies of the EU were both enforced and constrained by a limited form of constitutionalism, providing regime legitimacy to the EU. However, what those EU policies were to be was largely decided under the logic of intergovernmentalism, in bargains between

⁸⁴ On the very difficult issues raised by such questions in specific national contexts see eg P. Davies and C. Kilpatrick, ‘UK Worker Representation after Single Channel’, 33 *ILJ* (2004) 121.

democratically legitimate states that represented their publics, and provided polity legitimacy to the EU.⁸⁵

Now there can be no doubt that intergovernmentalism has not gone away. No-one is arguing that there has been a shift to a position in which the EU is a *pouvoir constituant* that no longer needs the agreement of the Member States to change its formal operating framework and acts on behalf of its 'people'.

The concerns highlighted by an intergovernmental legitimacy set-up, in which EU constitutionalism plays the role of policing the effective and appropriate exercise of functionally limited, delegated, EU powers have been and will continue to be important in assessments of the EU's actions in the field of employment. From this perspective, it is no easy task to see how provision of employment rights by the EU can be justified given the division of labour between the EU and the Member States set out both in the current constitutional framework and clarified and strengthened by the Constitutional Treaty. This is reflected in arguments noting that the justifications for introduction of many pieces of EU employment legislation in the past were 'in truth rather weak'.⁸⁶ Even when, post-Maastricht, it has become easier to find an appropriate legal base for employment legislation, resolving the competence problem, it is difficult to fulfil the requirements of the subsidiarity principle, according to which the EU should act 'only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States'.⁸⁷ Some variants of

⁸⁵ Above n.66.

⁸⁶ P. Davies commenting on the distortion of competition argument used to introduce the collective dismissals directive in 1975, 'The Emergence of European Labour Law' in W. McCarthy (ed.) *Legal Interventions in Industrial Relations: Gains and Losses* (Blackwell, Oxford, 1992) 330.

⁸⁷ Article 5(2) EC Treaty. See the expanded definition in Article I-11(3) of the Constitutional Treaty.

intergovernmental constitutionalism are also conservative in political terms. This leads to worries that the EU could confer rights on citizens, workers and unions additional to those currently provided at national level, and that this is an unwarranted and unacceptable intrusion of EU law into sensitive political choices properly left to the Member States.⁸⁸ Such concerns have left an extremely heavy imprint on the EU Charter of Fundamental Rights and explain in particular the additional restrictions placed on the rights to freely associate and to engage in collective action.⁸⁹

The question therefore is not whether intergovernmentalism is present or absent in the EU constitutional framework. The question is whether the EU can continue to be legitimised *solely* by reliance on this ‘intergovernmentalism & functional EU constitutionalism’ model. EU employment governance has become part of a descriptive disagreement over the extent to which the EU can continue to be solely legitimised in this way. Those who argue that this is still largely the way the EU works tend to argue that there is not very much EU employment governance and nor is there likely to be.

Moravcsik provides an argument at the strong intergovernmental end of this spectrum.⁹⁰ In his view, the development of the EU over the last five decades has given us the EU its Member States want – no more, no less. The old legitimacy set-up is therefore still the

⁸⁸ At their most extreme, such Euro-sceptic stances, exemplified by parts of the UK Conservative party, become transformative in their advocacy of the abolition of substantial parts of the EU employment governance structure and, more broadly, their desire to turn the EU into a much looser free trade association.

⁸⁹ See above nn.73-76.

⁹⁰ A. Moravcsik, ‘The European Constitutional Compromise and the Legacy of Neo-functionalism’, 12 *JEPP* (2005) 1.

appropriate legitimacy set-up. The Constitutional Treaty's role is to clarify and synthesise this stable and *constitutionally mature* framework in which the States provide polity legitimacy and EU constitutionalism provides regime legitimacy by ensuring the proper exercise of those EU powers. Moreover, the EU system is also stable because those powers are unlikely to expand anytime in the near future. In his view, developments in social and employment policy do not belie that assessment. Hence, the substantive results of employment and social policy by co-ordination have 'been extremely modest, if present at all'.⁹¹ EU employment and social expenditure is limited and looks very unlikely to increase: there will be no European minimum citizens' income or welfare state.⁹² Why? There is simply no functional pressure for the States to give the EU greater powers in this field.⁹³

However, Maduro argues that the current EU constitutionalism debate has arisen precisely because the EU can no longer simply rely on its previous legitimacy set-up. This is because that legitimacy set-up relied upon the EU's actions being clearly traceable to a set of limited functions. However, because of the significant expansion in EU competences (express and implied), increased recourse to majoritarian decision-making at EU level, and the spillover effect of the rules on market integration:

⁹¹ Ibid, p.18.

⁹² Accordingly he comments (p.28) on Schmitter's EU minimum income proposal (above n.70): 'Such schemes would surely succeed in "democratizing" the EU, but only at the expense of its further existence. The impracticality of such schemes demonstrates the lack of a realistic alternative to current, indirect forms of democratic accountability'.

⁹³ See also G. Majone, 'Europe's "Democratic Deficit": The Question of Standards', 4 ELJ (1998) 5 at 10: 'The attempt to legitimate the Community by developing European standards of social justice is bound to fail under present circumstances because it goes against the clearly expressed preferences of the governments and the citizens of the Member States'.

The borders of Union action are no longer defined by the express competences that the States have attributed to it and are, instead, the flexible product of the political action of a broad range of social actors that attempt to promote their interests in a new level of decision-making whose political authority is such as to allow for the pursuit of a broad and highly undetermined set of public goals.⁹⁴

Such an approach, transposed to the employment context, envisages a more expansive role for the EU in employment governance from that emerging from stronger versions of intergovernmentalism. The result, for the foreseeable future, will be the pragmatic, and potentially uneasy, co-existence of intergovernmentalism with the broader pursuit of EU polity-building actions. This is the kind of assessment made of EU employment law by Hugh Collins. He argues that we should not be surprised that the Member States are reluctant to cede competence over central areas of historical industrial compromise as reflected in national strike laws. Accordingly the solution proposed in the Constitutional Treaty - to continue to exclude competence over freedom of association, strikes and lockouts while providing fundamental rights oversight by the EU in these areas - is a sensible recognition for the foreseeable future of both the rights at stake and the diversity of the States' positions.⁹⁵ However, outside these sensitive areas, 'the remainder of employment law, particularly those parts that are perceived to constitute essential ingredients in the themes of social inclusion, competitiveness and citizenship, seem destined to become subject to processes and dialogue at a European level with a view to the creation of common minimum standards.'⁹⁶ While the EU can appropriately set out broadly defined employment governance principles, it will often best be left to the social partners and the Member States

⁹⁴ Above n.66 at 10.

⁹⁵ H. Collins, *Employment Law* (Clarendon Law Series, OUP, 2003) 251-252.

⁹⁶ *Ibid.*

to flesh out the details of that framework.⁹⁷ This also indicates that the peopled governance spaces which are so central to processual constitutionalism and are a key feature of EU employment governance may receive less attention in even socially progressive versions of intergovernmental constitutionalism. This is not only because this kind of constitutionalism tends to be less focused on identifying governance practices of this kind as ‘constitutional’. It is also because intergovernmental constitutionalism is more likely to identify the State as the place where these practices are to be carried out and where *better choices* about who should participate, deliberate or represent the relevant ‘people’ will be made: where workplace agreements adjusting statutory standards will be made, where Employment Guidelines will be implemented, and where European Social Fund partnerships will be constructed.

4. Conclusions

This chapter has sought to demonstrate that the transformation of employment regulation at EU level since Maastricht is fertile ground for studies of both ‘new governance’ and of EU constitutionalism. One of the most difficult, but also stimulating, problems I faced when writing this chapter was that, in considering the relationship between new governance and constitutionalism, the ‘new governance’ path can seem to lead down one constitutionalism path only: that of processual constitutionalism. Although this is a deeply interesting path, it did not seem fully to capture the range of ways in which employment governance was important to debates on EU constitutionalism. This is because EU employment governance is ‘new’ in the other ways outlined in this chapter as well: there is much more of it than there

⁹⁷ Ibid: ‘Although the European Community has a vital role to play in articulating the broad reach of these principles [of competitiveness, social inclusion and citizenship], their detailed implementation can be achieved through a variety of methods and levels of governance’.

was pre-Maastricht, its objectives are different, and a much wider range of tools exists to pursue those new objectives in an integrated manner at EU level. My core argument has been that to understand EU governance properly and to assess the wide range of constitutional positions in which employment governance plays a role, it is vital to consider the full range of EU employment governance tools and the objectives they are called upon to pursue. The four tools focused on in this chapter are legislation, expenditure, the OMC and fundamental social rights. Consideration of all of these governance tools provides, in turn, the constitutional tools for an important debate on how these activities should best be carried out in the EU in order to ensure, in the words of the Constitutional Treaty, ‘unity in diversity’ in a ‘social market economy’.