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From Strasbourg to Amsterdam:
Prospects for the Convergence of
European Social Rights Policy

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I. A Historical Introduction: The Circulation of International Labour Standards

The main purpose of this paper is to demonstrate the persistent circulation within the European Union of international labour standards which are either inherent in the cultural and legal traditions of Member States or have become a relevant part thereof because of the slow and yet penetrating influence of international organisations. This argument will be developed in order to show that the interdependence of international legal sources is one of the many variables characterising the construction and consolidation of social rights within the European Union. The existence of different levels of decision-making, whereby nation states strenuously defend the competence and indeed the better ability of domestic legislatures to intervene in social matters, is a significant sign of the specificity and perhaps of the unpredictability of European integration in this field.

It will also be argued that, because of this specificity, justifiable on historical as well as political grounds, the most delicate task assigned to the reformers of the European legal order is to look for changes and adaptations, while not dispersing deeply rooted European legal values. Challenging in itself, this task must be pursued under the pressure of globalised markets, taking into account the uncertain borders of supranational legal systems. Nonetheless, the debate preceding the signature of the Amsterdam

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Treaty showed signs of a stronger commitment, both in political and academic circles; it is important to underline this, even when facing disillusion for the lacunae which have not yet been filled.

The process of expanding social rights is an endless one. As such, it attracts the attention of all political actors and provokes the activism of institutions. It also represents for the present writer the best historical link with the Universal Declaration of Human Rights¹, which is at the origin of this collective effort to suggest a critical analysis and to advance new proposals, taking it as a source of inspiration for its 'universal' and 'positive' affirmation of rights addressed to all men, rather than to citizens of a country or of a region. The language adopted for universal human rights usefully applies to social rights: 'freedoms' rest on the assumption that states will abstain from intervening, 'powers' require active state policies for their enforcement.²

This paper will concentrate on social rights and social policies resting within the domain of employment contracts: both the increasing activity of EC legislature and the attention paid to it by national labour law systems have opened up a wide research field. Active employment measures, as well as measures to fight unemployment must be included in this wide angle of legal analysis. This will bring new evidence to the philosophical distinction between 'freedoms' and 'powers' and will transfer the practical consequences of this to the process of expansion and enrichment of a supranational legal order.

A. The Treaty of Paris and the Treaty of Rome: Two Early Visions on Social Rights

¹ Adopted and proclaimed by GA Res. 217 A (III) (1948). In United Nations, *A Compilation of International Instruments*. Volume 1, Part 1 (1994) 1.

² N. Bobbio, 'Presente e avvenire dei diritti dell'uomo', in *L'età dei diritti* (1990) 17, and especially 41. Mengoni argues that social rights are an expansion of the principle of equality and are linked to emerging needs of the civil society, whereas fundamental freedoms are historically meant to protect the individual against political power. Unlike the latter, social rights do not bring about direct enforceability as individual subjective rights, but objectively bind the legislature. Mengoni, 'I diritti sociali', *Argomenti di diritto del lavoro* (1998) 1.

In looking back at the early days of the European Coal and Steel Community (ECSC) we find a valuable confirmation of the theory according to which European integration was oriented towards functional objectives, reflecting specific national interests, rather than well identified common interests. Furthering a broader political plan and achieving a more consistent interdependence of the economic systems appeared a very improbable objective because of the dominating strength of national interests. Specific peculiarities were nonetheless visible within the European Community; nothing but a 'false analogy' could be made when comparing the EC with other international organisations active at the same time, since none of them raised the problem of limiting national sovereignty while achieving co-operation.³

This is a crucial point in the understanding of social policies developments and must be read in conjunction with the introduction in the Treaty of Rome of unanimity as the golden rule in decision making within the European Council. If we go back to the Coal and Steel Community, we find an interesting key for the interpretation of early social measures, which can also be used in framing later developments in the field. As part of the aids addressed by the Community to the two industrial sectors in question, social measures were subordinate to the fact that major economic choices had to be favoured within some nation states, in order to enhance the competitiveness of the newly born common market, by favouring free trade of coal and steel.

Restructuring or closure of activities brought with it unemployment benefits for coal miners, training for dislocated steel-workers, financial aid to move to other jobs and similar measures which showed the purely instrumental nature of social protection. The main guarantee for workers had to do with the availability of resources allowing them to change occupation⁴; this was quite an extraordinary measure, when we think that at the time in which it

³ A.S. Milward, 'L'Europa in formazione', in M. Aymard, P. Bairoch, W. Barberis and C. Ginzburg, *Storia d'Europa* (1993) 196.

⁴ G. and A. Lyon-Caen, *Droit social international et Européen* (1993) 160.

was conceived, the prevailing pattern was that of permanent and never changing employment. Since the High Authority did not have any power to intervene in social policies, it was remarkable to achieve all this through co-operation among nation states. What was favoured, in the absence of normative powers, was the gathering of information on national labour law systems which resulted in very interesting early attempts to build up a common legal culture, through comparative analysis.⁵

It can be maintained that a negative - albeit very pragmatic - rationale inspired social measures at that time, since social aids were considered to be a mere repercussion of broad industrial policies, lacking in continuity and in autonomy, linked as they were to decisions of a political and economic nature, taken at the national level. This explanation can also be read in the light of contemporary events and measured against the aforementioned inability of states to surrender sovereignty in favour of common social goals.

This is still a reality within the European Union, particularly, as we shall see further on, when measures on employment are at stake.

In the Treaty of Rome, the debate on European social rights was influenced by the weakness and narrowness of the legal basis and by the strict connection established with mechanisms of market regulation, in order to avoid distortion in competition. These two points made the development of social policies largely dependent on competition rules; principles of fairness and efficiency within the market included only a limited number of social rules and made them functional to goals which would, otherwise, be considered outside the scope of national labour law systems.

The Spaak Report (1956)⁶ is an illuminating document in this respect, inasmuch as it shows the theoretical inspiration which then

⁵ Sciarra, 'European Social Policy and Labour Law: Challenges and Perspectives', in 4 *AEL* (1995) 312.

⁶ Spaak Report: Comité Intergouvernemental créé par la conférence de Messine, Rapport des Chefs de Délégations aux Ministères des Affaires Etrangères de 21 avril 1956. The Committee, comprising of the heads of delegations, was

led the founding fathers to draw a map of social rights within the borderlines of economic efficiency. The Report thought that a 'gradual coalescence' of social policies would become one of the elements of a well functioning common market. The pre-condition was that harmonisation could be furthered only where specific distortions in competition were visible. As a result of this the French government could ensure that labour law rules to be inserted into the Treaty would be measured against its own internal system, particularly with regard to parity of wages and social costs. It all resulted in the compromise of Article 117, characterised by its two sides, the first one being more prescriptive, the second one more predictive.⁷

This analysis, albeit from the very specific and perhaps limited perspective of social rights, confirms the overall interpretation, highlighted before, which sees the creation of a common market as the outcome of strong national economic interests, particularly French ones. First with the ECSC, then with the EEC, national post-war reconstruction had to proceed and be favoured, without obstacles in its way.⁸ It is not surprising that relevant articles in the Rome Treaty would be inspired by this philosophy and produce a mechanism whereby assimilation of national legal systems should be the last resort and the Commission should only be given the power either to grant subsidies to correct distortions or to promote collaboration among member states in the social field, as stated in Article 118.

Even Articles 119 and 120 - the former then become a cornerstone for equality legislation - were inspired by French legislation and forced into the Treaty by the representatives of the French government. Both aimed at establishing equal rules governing

established at the Messina conference in June 1955 under the chairmanship of M. Paul Henri Spaak, then Belgian foreign minister.

⁷ Kahn-Freund, 'Labour Law and Social Security', in E. Stein and T.L. Nicholson (eds), *American Enterprise in the European Common Market. A Legal Profile*, Volume 1 (1960) 300.

⁸ Milward, note 3 above, at 191-192.

contracts of employment, which would ensure the cohesion of the market.⁹

An important provision in the Treaty - regarded as the most significant achievement in the field¹⁰ - was Article 51, establishing the right of employees to social security measures, while moving freely within the common market. Both as the origin of very relevant legislation and as a fundamental principle established in order to counterbalance the risks inherent in labour mobility, this measure opens up a wide and complex scenario, the implications of which are still at the heart of institutional reforms both at a national and supranational level.

A strict unanimity rule had to govern the whole field, at least until the reforms brought about by the Single European Act in 1986. Before the timid derogation to such a principle, expressed in Article 118a (introduced by the SEA), Article 100 was the only legal basis for the approximation of social legislation. Unanimity was required for the directives on collective dismissals and transfers of undertakings adopted during the seventies. No doubt this legislation must be included in the list of important achievements of the Commission in the framework of its social action program. The attention shown towards important employees' rights had nevertheless to be ascertained against the background of economic instability and industrial restructuring; distortions in competition, even at that later stage of economic integration, had to be avoided, the result being that social rights were once again made adaptable to the prevailing interests of companies, put under pressure by new market demands.

The marginal position of social rights within the Treaties of Paris and Rome can fruitfully be compared with other international sources. A line is drawn between economic, social and cultural rights on one side, and civil and political rights on the other, in the

⁹ Barnard, 'The Economic Objectives of Article 119', in T.K. Hervey and D. O'Keefe (eds), *Sex Equality Law in the European Union* (1996) 32.

¹⁰ Kahn-Freund, note 7 above, at 320-321.

United Nations human rights covenants of 1966.¹¹ Although a lot has been said on the generation gap dividing the former rights from the latter, pointing out that values inspiring all human rights are by definition 'variable' and open to absorb changes due to cultural and social factors,¹² it still remains true that the evolution of social rights continues to be much slower and highly controversial even in advanced legal systems.

Various historical reasons are behind this assertion, some of which may prove central to the argument which is developed in this paper, namely the importance to balance national traditions against the supranational construction of social rights and to keep this exercise in law making within a multi-level framework of competencies and compatibility. It will be maintained throughout this paper that when it comes to social rights the process of European integration must not be such to preclude national initiatives and obscure national traditions. In order to move into this direction, a digression will be necessary towards other international sources, different from Community sources and yet relevant for the understanding of current trends in the field.

Rather than attempting to offer a complete overview of relevant sources and of their enforcement, a few cases will be selected. This will be done in relation to one European country in particular, as far as ILO sources are concerned. The United Kingdom has in fact acquired a unique position in comparison to other countries of the Community, because of the drastic changes in labour legislation

¹¹ See International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, adopted by GA Res. 2200 A (XXI) (1966). *International Instruments*, note 1 above, at 8 and 20; and Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights* (1995) 21. From this distinction, different from the overall approach followed in the Universal Declaration of Human Rights assumptions then followed according to which civil and political rights were to be considered 'absolute' and 'immediate', whereas social, economic, and cultural rights were 'programmatic' (Eide, at 22). Similar terms are adopted when describing the latter category of rights in Community sources. See below.

¹² Bobbio, note 2 above.

brought about by the Conservative administrations, from 1979 onwards.

Testing the new labour law regime against ILO standards proved to be a very important exercise, both for the quantity and the quality of condemnations undergone by the UK. The implications for European social rights are indirect and yet very relevant, as will be shown in the next section.

B. Renewed Centrality of ILO Standards - The Case of the United Kingdom

In the history of European social policies, the obstinate opposition shown by both the Thatcher and Major administrations to approving legislation in the social field leaves a very precise mark. On the one hand the limits inherent in unanimity voting and the difficulties to operate on the narrow and contested terrain of Article 118a became progressively more evident. This led to the Maastricht compromise which, by way of derogation to Article 148(2) of the Treaty, excluded the United Kingdom from the scope of the Agreement on Social policies.

On a different - and yet connected - side of labour law policies, the UK showed its reluctance to ratify new ILO Conventions (only one of the 25 Conventions adopted between 1979 and 1996 was ratified) and its readiness to denounce previous Conventions.¹³ While vetoing the approval of Community law, the UK wanted to prove the impenetrability of the system by international labour standards and, at the same time, wanted to show its ability to legislate against the main stream of fundamental principles shared by the majority of countries within the Community.

Two Conventions in particular were in the middle of the hurricane affecting the UK: conventions No. 87 (1948) and No. 98 (1949), dealing respectively with Freedom of Association and Protection of the Right to Organise and Right to Organise and Collective

¹³ Hepple, 'New Approaches to International Labour Regulation', 26 *ILJ* (1996) 356.

Bargaining¹⁴. Leading cases started in the public sector and had to do with the Government's attempt to exclude some categories of public servants from the scope of Convention No. 87.¹⁵ They were intertwined with cases on the limitation of the right to strike¹⁶ with the result that the whole conservative legislation in collective labour law was put under recurrent scrutiny and led to a series of condemnations.

Later on, the 1993 Trade Union Reform and Employment Rights Act and particularly the narrow interpretation of this Act offered by the House of Lords¹⁷ kept busy all ILO bodies in order to preserve freedom of association from the invasion of limiting employers' practices. It was held that Article 13 of the Act would 'discourage' collective bargaining if it was to be interpreted in the direction to allow the payment of incentives for employees moving from collective agreed terms and conditions of employment to individual contracts. Annual condemnation from the ILO towards the UK government became an exhausting ritual, in which the ILO showed

¹⁴ In ILO, *International Labour Conventions and Recommendations*, Volume 1 (1996) 435 and 524.

¹⁵ The *Government Communications Headquarters (GCHQ)*, Case No. 1261, 234th Report of the Freedom of Association Committee, ILO, 87, on which see particularly Lord Wedderburn, *The Worker and the Law* (1986) 276. This case did not reach the Strasbourg Court due to the Commission on Human Rights' decision that the restrictions in question were justified under Art. 11(2), ECJHRF or the consequences of this leading case and the still ongoing debate, see Mills, 'The International Labour Organisation, the United Kingdom and Freedom of Association: An Annual Cycle of Condemnation', 2 *EHRLR* (1997) 43. See also *Report of the Committee of Experts on the Application of Conventions and Recommendations* (1995) and (1996); and *Schoolteachers' Pay and Working Conditions Case*, Case No. 1391, 256th Report of the Freedom of Association Committee, ILO, 39-89.

As for GCHQ, the initiative was taken by the Government in the summer of 1997 to restore the right to belong to a trade union, although with some restrictions. See briefly on this, Hepple, note 13 above, at 365.

¹⁶ All analysed by Creighton, 'The ILO and Protection of Freedom of Association in the United Kingdom', in K. Ewing, C. Gearty, and B. Hepple (eds), *Human Rights and Labour Law* (1994) 10.

¹⁷ *Associated Newspapers Ltd v. Wilson and Associated British Ports v. Palmer*, discussed in Mills, note 13 above, at 39.

its commitment and proved to have had long term perspective, waiting for substantial innovations to take place, once a change of government would occur.

In the early cases, the Committee on Freedom of Association and the Committee of Independent Experts were both called upon and made to play a very interesting institutional game, as for the competence each of them had on the matter, forcing the British Government to amend legislation when in breach of ILO Conventions.¹⁸ In the later cases too the ILO was able to substantiate its position with wide and well argued criticism of the legislation in its entirety. As a consequence of this long and controversial confrontation, a critical ground has been prepared for the new Labour Government; on its side, it would be hard to show scepticism and disregard towards international labour standards and to leave things as they are. There will be a need to go through previous legislation and revise it, while keeping a very close scrutiny of new legislation to be adopted in the field. Furthermore, ratifying ILO conventions will appear as an opportunity to gain consensus in the international community.

The widespread and convinced opposition expressed in scholarly work against the lowering of ILO standards¹⁹ was also accompanied by a militant view on the side of the unions. Such a discovery of a new centrality for the ILO and for its labour standards has run parallel to a more balanced and inspired position of British academia towards the EC. The contribution of British scholars, particularly labour lawyers, in building up a critical - and yet constructive - evaluation of Community social policies was remarkable. An analogy can be drawn with a similarly active role of practising lawyers, interest groups and specialised agencies in bringing cases to the ECJ, through preliminary ruling procedures.

¹⁸ Creighton, note 16 above, at 11.

¹⁹ K. Ewing, *Britain and the ILO* (1994); Wedderburn, 'Labour Standards, Global Markets and Labour Laws in Europe', in W. Sengenberger and D. Campbell, *International Labour Standards and Economic Interdependence* (1994) 245.

Both examples show the misgiving of the British legal system to accept structural changes in labour law and the wish to keep some of its characteristics intact, by referring to international and Community sources.

This was a test of some importance for the ILO, especially at a time in which its political role appeared weaker, in the light of the new political order following the collapse of Eastern States, and because of the reduced weight of employees' representatives within it.²⁰ In a sense, the role played by the ILO with respect to British legislation would go against both these elements and indicate that, despite its feeble capacity to inflict sanctions, an international organisation can maximise its supervisory machinery and use its power to expose national governments to moral condemnation²¹ and to help them towards the implementation of international standards.

However, despite the peculiarities inherent in a tripartite organisation like the ILO, in which standards are constantly revised and the voice of non-governmental organisations is regularly heard, the notion of 'best practice', as the final outcome of political options made in enforcing labour standards, might need to be revisited.²² This policy suggestion is also related to the increasingly stronger position of new organisations such as the WTO. The inclusion of labour standards within the regulation of free trade, despite the proclaimed commitment to the observance of ILO standards, may introduce dangerous limitations to the latter²³.

²⁰ Nussberger, 'Summary of Discussions: Is the International Labour Organization in a State of Transition?', in B. Maydell and A. Nussberger (eds), *Social Protection by Way of International Law: Appraisal, Defecits and Further Development* (1996) 213-215.

²¹ Gaja, 'Organizzazione internazionale del lavoro', XXI *Enc. Dir.* (1981); Bartolomei de la Cruz, 'Standard Setting Activities in the Field of Social and Labour Law: International Labour Law: Renewal or Decline?', in Maydell and Nussberger, note 20 above, at 46.

²² Swepston, 'Supervision of ILO Standards, 13 *Int. Jour. of Comp. Lab Law and Ind. Rel.* (1997) 344.

²³ See, for example, the Singapore Ministerial Declaration of 13 December 1996. WT/MIN(96)DEC.

Regional legal systems - like the Community system - need to be carefully evaluated, whilst questioning also the efficiency of international enforcement mechanisms. Homogeneity of technical standards can best be reached at a regional level, while maintaining a common core of fundamental principles. To take one example, currently in the public eye, flexibility within the labour market must be measured against binding minimum rules rather than being left to national legislatures with wide options.

This exercise becomes even more crucial for the cultural identity of a regional legal system if we look at the very general and often vague indications addressed to governments by institutions such as the World Bank.²⁴ This is why the political and legal confrontation between the ILO and the UK becomes an exemplary case. It supports one of the main arguments in this paper, namely the need to strengthen fundamental social rights - and in particular the right to organise - at Community level and to adopt specific monitoring mechanisms which should aim at the convergence of international labour standards.

C. Article 11 of the ECHR: Shall We Listen to the Strasbourg Court?

In referring to the relevant sources of the Council of Europe, there is a tendency to confirm a separation of territories, historically significant, as well as politically remarkable: on one side the prevailingly individualistic approach of the 1950 European Convention on Human Rights, on the other side the opening up of some collective rights in the 1961 European Social Charter.

Particularly if we take Article 11 of the ECHR, the most relevant within the general framework of this paper, we are bound to see the close correlation with the provisions of the ESC and the way these

²⁴ The World Bank, *World Development Report 1995: Workers in an Integrating World* (1995); ID, *The State in a Changing World* (1997). A classification of labour standards is offered by K.E. Maskus, 'Should Core Labour Standards be Imposed through International Trade policy?', *The World Bank Development Research Group* (1997) 8.

two sources are made to function separately and yet in such a way that they can supplement each other.²⁵ The 'flavour of liberal principle combined with uncertainty of meaning',²⁶ which can be tasted also in reading Article 11, makes the Charter an essential supplement to the ECHR. First defined as a big foot-note to the Convention,²⁷ the Charter has been constantly improving its moral and legal standing and acquiring a position of its own among international sources.

Dynamism in this development is confirmed at first by the 1988 Additional Protocol, which had the merit to expand the competence of the Charter to information and consultation rights, the most contemporary expression of the right to organise collectively.²⁸ A Protocol amending the Charter followed in 1991, bearing important consequences for a more effective functioning of the Committee of Ministers and for the sanctions to be applied in cases of non-compliance.

Finally, we should mention the innovations brought about by the 1995 Protocol on collective complaints, empowering NGOs, international and national organisations of workers and employers to bring complaints directly. This 'model' can be particularly useful in the discussion following the incorporation of the Maastricht Social Agreement into the Amsterdam Treaty. If we take the words of Article 1 of the 1995 Protocol, we can see an analogy with the status of the European social partners, namely that of 'international organisations of employers and trade unions'. As much as the definitions coincide, the European organisations are given important

²⁵ D. Harris, *The European Social Charter* (1984); D. Gomein, D. Harris, and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996).

²⁶ Wedderburn, 'Freedom of Association or Right to Organise? The Common Law and International Sources', in Lord Wedderburn, *Employment Rights in Britain and Europe* (1991) 140.

²⁷ Kahn-Freund, 'The European Social Charter', in F.G. Jacobs (ed), *European Law and the Individual* (1976) 182.

²⁸ Embarrassment for the non-ratification of the Protocol by the UK is reported by Shrubbsall, 'The Additional Protocol to the European Social Charter - Employment Rights', 18 *ILJ* 39 (1989).

tasks within the overall architecture of the Treaty without any power to complain. Indeed, the ECJ's competence to review collective agreements was debatable under the Maastricht Treaty²⁹ and still remains so, under the new provisions, in the absence of any explicit mention to this effect.

In May 1996 a new version of the ESC was adopted, which should be running parallel to the previous one. New rights have been added at the end, in order to leave untouched the structure of the text and the division in parts I and II. Some of the new provisions are inspired by other international sources.³⁰

The Council of Europe Parliamentary Assembly has expressed a strong commitment towards speeding up the process of ratification and introducing a distinct European Court of social rights to guarantee observance of obligations under the Charter.³¹

These recent developments should be kept in mind by observers and commentators of Community law developments; especially after the reference to the ESC introduced in the Amsterdam Treaty, an approach oriented towards future changes should be adopted. While indirectly absorbing these new values into the ECJ's frame of reference, account should be taken of a process which will bring about innovation,³² although the process of ratification of the new Charter might prove very slow and possibly disappointing. In

²⁹ Sciarra, 'Collective Agreements in the Hierarchy of European Community Sources', in P. Davies, A. Lyon-Caen, S. Sciarra, and S. Simitis, *European Community Labour Law Principles and Perspectives, Liber Amicorum Lord Wedderburn* (1996) 193.

³⁰ Some examples of convergence can be quoted. Protection of employees in case of the employer's insolvency draws inspiration from ILO Convention No. 173, in ILO, *International Labour Conventions and Recommendations 1977-1995* (1996) 374. The right to be informed on conditions of work partially recalls EC Directive 91/533, OJ 1991 L 288/32.

³¹ Council of Europe Parliamentary Assembly, *Future of the European Social Charter*, Doc. 7980 (1998).

³² Harris, 'The European Social Charter and Social Rights in the European Union', in L. Betten and D. MacDevitt (eds), *The Protection of Fundamental Social Rights in the European Union* (1996) 110.

particular, the new procedure for collective complaints should be looked at very closely, in view of the increasingly active role played by employers and labour organisations in the social policy field.

The paradox of the European debate, as we shall see further on, is that two core social rights explicitly expelled from the Community competence - namely the right to organise and the right to strike - are the ones better enshrined in the Council of Europe sources. It is the interpretation of these rights which has given rise to an interesting case-law of the Strasbourg Court, in convergence with the activity of the Committee of Independent Experts.

We shall emphasise only a few sides of this case-law, in order to demonstrate to which standards in concrete terms the European Court of Justice would have to refer, should it want - or need - to take into account social rights kept outside the territory of European law.

Article 11 of the ECHR includes the rights to 'form and join trade unions' within the more general right to 'freedom of peaceful assembly and to freedom of association with others'. The most interesting outcome of the case-law, for the limited purpose of this paper, has to do with the negative freedom of association and with the possible expansion of the right to form a union in the direction of neighbouring territories, such as the right to bargain and the right to strike. Both developments, relevant in themselves, are marginal in the European debate and must be contextualised in the most current developments.

It is historically interesting to look at the impact of the *Young, James and Webster* decision³³ on British academia and on British trade unions.³⁴ The strenuous defence of the closed shop system, alien to the majority of continental systems, was so effective to convince even the most determined critics and to prove that pluralism was a

³³ *Young, James and Webster v. United Kingdom*, (1981) 4 EHRR 38.

³⁴ Von Prondzynski, 'Freedom of Association and the Closed Shop: the European Perspective', 41 *Columbia L. J.* (1982) 256 and 259; Wedderburn, note 26 above, at 144.

genuine and solid part of European traditions, in which it was possible to combine different forms of protection of the individual, while exercising his/her right to join or not to join a union.

The Conservative administrations, from 1979 onwards, in some way pulled out the plant by its root, progressively diminishing the role and the function of the closed shop. The value of the negative freedom, even in the light of such legislative changes, remains incommensurable and needs to be kept alive within the Community, with particular emphasis on the constitutional traditions of member states, which are also the result of deeply rooted practices inside national labour movements.

If we look at *Sibson*³⁵ 1993 (again a British case), we discover that it is not a violation of Article 11 to dismiss a vehicle driver from his union for reasons of dishonesty and to threaten him with strike action if he continued to work at the same depot, having joined another union. The employer requested the applicant to either rejoin the union or work in a different depot; both options were refused and a dismissal followed, which gave rise to the claim. The European Court, declaring that there was no violation of Article 11, made a significant reference to *Young*, a case which dealt with the very substance of the freedom of association' interfering with the freedom guaranteed by Article 11, thus implying that *Sibson* did not and that it would be risky to expand the interpretation of the negative freedom.

Another series of cases touch upon breaches of Article 11 for lack of consultation with the unions. In *National Union of Belgian Police*³⁶ the claim was that the Belgian Government had refused to classify the Union in question as representative and had not consulted with it on some questions related to the contract of employment. The Court held that the Union's freedom to present claims for the lack of consultation was a sufficient sign of its presence and of its right to be heard. The same conclusion was

³⁵ *Sibson v. United Kingdom*, (1993) 17 EHRR 193.

³⁶ *National Union of Belgian Police v. Belgium*, (1975) 1 EHRR 578.

reached in Swedish Engine Drivers Union³⁷, whereby the alleged violation of Article 11 was the refusal of the negotiating body to conclude agreements with the applicant. The Court indicated that the union, once excluded from the bargaining table, could engage in other activities and demonstrate otherwise to be fulfilling an active role towards its members.

What emerges from this case law is how the Court succeeds in releasing the pressure to expand the scope of Article 11. The Court adopts a very narrow definition of freedom of association, proposing an individualistic rather than collective interpretation³⁸ which could have the effect of lowering the potential of the freedom itself. Article 11 is not seen as a supportive or auxiliary measure for trade unions, but rather as a source of individual guarantees. Intervention of the states is indispensable for the effectiveness of this right, which would, otherwise remain an empty principle.

If we move on to cases dealing indirectly with the right to strike, we have a clear picture of the Court's self-restraint while engaging in interpretation which would overly broaden the horizon of Article 11. In *Gustafsson*,³⁹ the applicant, not bound by any collective agreement and having refused to sign one regarding a labour market insurance scheme, was hit by a boycott declared by the unions and by sympathy industrial action. The Court held - by 12 votes to seven - that Article 11 was not violated for the lack of state protection against strikes, which, according to the applicant, would have caused a limit to his freedom of association.⁴⁰ The result of this case is that a refusal to enter negotiations and collective bargaining is implicitly admitted; quite a dangerous counter effect to the correct self-restraint of the state in not entering the delicate field of industrial relations.

³⁷ *Swedish Engine Drivers' Union v. Sweden*, (1976) 1 EHRR 617.

³⁸ This critique addressed to the Court and Commission is presented in D.J. Harris, C. Warbrick and M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (1995) 432.

³⁹ *Gustafsson v. Sweden*, (1996) 22 EHRR 409.

⁴⁰ Critical remarks on the applicability of Article 11 in Novitz, 'Negative Freedom of Association', 26 *ILJ* (1996) 86.

In *Schmidt and Dahlström*⁴¹ the crucial point to decide was whether members of a union could be denied certain benefits, because of a strike to which they had not adhered. The Court had to confirm, as in previous cases, that the right to strike is only one of the many expressions of the freedom of association, having to choose whether to give flesh to a right which is not part of the ECHR, or whether to adopt a more moderate view which reduces the meaning of the expression 'for the protection of his interests', referred to in Article 11. The Court went for a minimalist interpretation.

Only limited protection is provided and the freedom of association is somehow unnaturally separated by some of its own contents. The Court was not prepared 'to read into the Convention a code of industrial relations law',⁴² nor to invade the territory of the ESC.

A tentative conclusion, following this brief account of the case law on Article 11, indicates that the lack of a fundamental social right in Community sources is not totally compensated for by reference to the ECHR. The circulation of international labour standards serves also the purpose to show that solutions internal to specific legal systems must be tailored, whenever they reflect specific traditions and practices.

On the road to Luxembourg new landscapes need to be discovered.

II. Globalization versus Europeanization of Social Rights

A dilemma is at the centre of what has been described as the third period of post-modern legal pluralism.⁴³ Whereas in the first period it is relatively easy to distinguish between legal orders, in the second one it becomes more difficult to draw a line between state and non-state social regulation through law. In the third period, the

⁴¹ *Schmidt and Dahlström v. Sweden*, (1976) 1 EHRR 632.

⁴² J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (1993) 142.

⁴³ De Sousa Santos, 'State, Law and Community in the World System: An Introduction', 1 *SLS* (1992) 132.

state becomes a 'contested terrain': many external constraints are imposed on it by trans-national practices, while there is a need to expand and reproduce its own role. Globalization brings about a contrast between the local and the trans-national which may threaten the solidity of fundamental rights, as if a change in legal tradition was an inevitable fee to pay for the opening up of wider and more competitive markets.

The argument to be developed in this regard, when looking at Europe as 'the local' within 'the global', is that there is a specificity of European legal culture to be maintained despite the impelling power of the external markets.⁴⁴ This specificity emerges in an even clearer perspective when dealing with social rights. The main reasons for this can be tentatively suggested.

a) Social rights are 'embedded' in local traditions and reflect - possibly more than economic and political rights - the history of deeply rooted associations and interest groups. The attempt is being made to co-ordinate more closely national organisations within European associations; significant at this regard is the reform of the statute of ETUC, which aims at balancing the power of national membership in order to specify the mandate of the supranational confederation. In spite of all this and notwithstanding the active role of all interest organisations in proposing reforms and in ascertaining a well informed presence in the institutional debate, there is no new supranational culture and nothing which yet resembles a European labour movement. The weight of national traditions, very heavy for employers' organisations too, make the search for a common core of interests to be defended, a very challenging one.

b) The institutional role of the social partners, traditionally very strong in most European countries, is acquiring its own standing at a Community level. This quasi-public function of management and labour, when it comes to being interlocutors of the European institutions, has gained ground over the years and it now results a

⁴⁴ Sciarra, 'How Global is Labour Law?', in T. Wilthagen (ed), *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (1998) 99.

coherent attitude towards social policies, as well as towards macro-economic policies.

This latter attitude has been particularly visible after the Maastricht Treaty and the enforcement of Article 103, on economic policies and criteria for their convergence⁴⁵ and could, by analogy, produce important consequences for the implementation of employment policies under the Amsterdam Treaty. A practice in the consultation of the social partners was started, beyond the requirement of the law, but within a political climate prospered at Community level, which also reflects national practices, accurately described as 'technical' concertation.⁴⁶

The 1998 Employment Guidelines,⁴⁷ anticipating the implementation of the new provisions in the Treaty, openly indicate that social partners at all levels have an important contribution to make, the outcome of which will be regularly assessed every six months - as it was the case under the previous procedures for macro economic policies. They are also urged 'to conclude as soon as possible agreements' at various levels, with a view to increasing all means indicated by the Council for 'employability', flexibility, improving work organisation and the like.

⁴⁵ Sciarra, note 29 above, at 208. A recent resolution of the European Council of 13 December 1997 (OJ 1998 C 35/01) on economic policy co-ordination in stage 3 of EMU and on Treaty articles 109 and 109b of the EC Treaty indicates that despite the likelihood of closer convergence of cyclical developments, as a consequence of EMU, wage determination should remain a national responsibility and yet be subject to Community surveillance should it influence monetary conditions. This is a meaningful indication of the implications that will be brought about by the single currency and by the new centralised powers of the Central European Bank. With regard to social partners and national collective bargaining the implications might be quite relevant, both in setting homogeneous wage standards in homogeneous sectors of the economy and in keeping inflation under control, in close co-ordination with the guidance which will no longer come from a national central bank.

⁴⁶ Crouch, 'The Unloved but Inevitable Return of Social Corporatism', in *Festskrift för Voitto Helander* (1997).

⁴⁷ COM (97) 676 final. See also COM (98) 316 final, at 2, for examples of countries which have adopted the method of consultation with social partners.

c) Rather than emphasising an a-critical dependence of the social partners from macroeconomics, in view of the achievement of monetary union, attention should be paid to the co-ordination established between national economic policies and supranational targets, through the active role of unions and employers associations. The extraordinary opportunity offered to the social partners in the years to come, is for them to be actors rather than spectators in the launching of the single currency, while monitoring very closely the first stage of implementation of the new Community measures on employment. The historical divide between monetary and social policies, whereby the latter would be graded on a lower scale and be rarely mentioned on the political agenda, still exists and has been criticised while looking at recent developments of Community law.⁴⁸ After the introduction of the single currency, this divide deserves new attention and requires further action on the side of the social partners.⁴⁹

d) This analysis should be kept very central when writing an agenda of social rights for the new millennium. The argument developed in this paper is that Europe is slowly and yet unceasingly searching for its own political and cultural identity; this implies the reconsideration of fundamental rights, as for the entitlement, the function and the legal enforcement of the rights themselves. The specificity of social rights, within the broader definition of fundamental human rights,

⁴⁸ A. Calon, L. Frey, A. Lindley, A. Lyon-Caen, A. Markmann, H. Perez Diaz, and S. Simitis, *The Social Aspects of Economic and Monetary Union*, Report prepared for DGV of the EC (1992).

⁴⁹ T. Padoa Schioppa, *The Genesis of EMU: A Retrospective View*, Jean Monnet Chair Papers 40, Robert Schuman Centre (1996). The argument in this paper is that the 'inconsistent quartet' - as the author describes the combination of fixed exchange rates, free trade, complete capital mobility and national independence in monetary policies - is what the launching of EMU should consider, transforming inconsistency into the reconciliation of the four elements of the quartet. The argument to be added is whether in such a reconciliation a fifth player should be included, making the quintet play the music of employment policies as well. This should be the implied indication when talking of co-ordination among the two relevant titles of the Amsterdam Treaty

requires at times the adoption of different legal parameters and of a different legal language.⁵⁰

If we take the points made in b) and c), we are made to face a practical reality, well beyond the black letter of the law. Spaces are opened up for actors - the social partners - which are not mentioned among Community institutions. They interact with national governments as much as they do with the Commission, the Council, the Parliament, possibly with the ECJ. Procedures are informal and yet their transparency and well functioning becomes a crucial element within the complex decision-making machinery which then leads to opting for one particular solution or for maintaining the status quo. It can be argued that procedures leading to the creation or consolidation of political consensus are a modern - and still mysterious - side of supranational collective labour law.

Because of the mysteries hidden behind this new practice of concertation and sometimes because of the limited impact the social partners may have on very relevant issues, it must be maintained that procedures can only function at their best, when they rest on a solid ground of positive norms. Some of them constitute a pre-condition for the well functioning of the procedures themselves,⁵¹ some others are to be viewed as a point of arrival. Social rights create the natural habitat in which procedures may flourish and be effective; on the other hand, ways to implement social rights may at times be the content of procedures, thus representing the final result all actors should be jointly aiming at. We can project this last point into the new title on employment, in the Amsterdam Treaty and see whether it will generate similar

⁵⁰ It also forces labour lawyers to fully understand and adopt the distinction suggested in the so-called 'Limburg Principles', a guide for the interpretation of economic and social rights, as stated in the United Nations Covenant on Economic, Social and Cultural Rights, as far as state obligations are concerned. Obligations of result imply an immediate justiciability, whereas obligations of conduct allow this to happen over time. See Eide, note 11 above, at 39. Interesting implications may be envisaged for the new title on employment in the Amsterdam Treaty

⁵¹ See below, Recommendation No. 3 arguing in favour of the introduction of the right to organise as a fundamental right in the EU.

procedures to the ones set in motion by economic and monetary policies.

e) If we accept that consensus-building mechanisms and procedures to establish co-operation with the social partners are so very central for the furthering of political and economic objectives within the Union, we should then look at other and inter-dependent sides of the same machine.

This procedural apparatus inevitably ties the social partners to the institutions, it almost confuses different actors' languages into a common expression of political intentions. In order to reconcile this quasi-institutional role of the social partners with well established legal traditions in member states, it must be argued that rights exercised collectively and often built on a constitutional basis at a national level should not be infringed, nor diminished. Although national collective bargaining machinery were asked to function in compliance with the Maastricht convergence criteria, adopting wage moderation as a leading criterion and helping to combat inflation, macroeconomic policies should not invade the social partners' autonomous sphere of action, or impose on them pre-manufactured solutions.

At this regard, it may be interesting to quote a complaint brought by the Federation of Public Services of the General Union of Workers (FSP-UGT) and the State Federation of Teaching (FETE-UGT) against the government of Spain, for non-compliance with ILO conventions, when deciding unilaterally not to increase the salaries of public employees for 1997. The Committee on Freedom of Association, while analysing the case, mentions that the decision was taken 'to protect the predominant general interests which require moderation of the public deficit' and that the respect of the economic convergence criteria imposes a 'sacrifice painful but necessary'. The Committee's recommendation indicates to the Spanish government to return to the practice of 'mutual respect' in

collective bargaining, stating, however, that no infringement of ILO Conventions had occurred.⁵²

f) One last example can be taken in this non-exhaustive list, which should serve to identify some significant 'local' traditions and to strengthen the argument that the Europeanization of social rights is an open process, reactive towards globalization and 'emancipatory', in its own peculiar way.⁵³

The debate on market efficiency, on the one hand, and the consolidation of workers' rights, on the other, has lit again the light of workers' participation at company level. Hidden in the dossier on the European Company Statute, this issue has been at the center of a long and passionate confrontation among member states during the seventies and onwards. The way the debate has been recently re-opened in the Davignon Report⁵⁴ shows that there may be an original way to introduce a social right, while furthering market integration and offering to companies the opportunity to acquire a European statute.

Whereas information and consultation rights have already been absorbed in the Community legal practice, through the Directive on the European Works Councils,⁵⁵ participation, even in the mild and flexible proposal put forward in the Davignon Report, still finds strong opponents on its way. The importance of this controversial innovation may be better understood if framed within the consensus-building scheme previously described. Participation could serve the purpose of establishing good practices of industrial relations at company level, while being part of a wider machinery of bargaining and concertation. The danger, never fully admitted by

⁵² Case No. 1919, 308th Report of the Committee on Freedom of Association, ILO (1997).

⁵³ De Sousa Santos, 'Toward a Multicultural Conception of Human Rights', 24 *Sociologia del diritto* (1997).

⁵⁴ Following the appointment by the Commission of a *Comité des sages* and the publication of the final report of the group of experts, *European Systems of Worker Involvement* (May 1997).

⁵⁵ Council Directive 94/45/EC, OJ 1994 L 254/64.

the proponents of these new rights, is that the way in which they will be exercised at Community level might tend to diminish the role of trade unions. The EWC Directive leaves the option open as to whether workers' representatives should be elected or appointed and even attracts some criticism as to whether the exercise of information rights might, in the long run, pre-empt collective bargaining.⁵⁶

Dilemmas faced by the advocates of new European social rights must also take into account the fear that some solid pillar in national buildings of rights might be seriously shaken and even collapse. This is where legal theory can help us again to find the right way. It has been argued that progressive forces which resort to human rights reconstitute 'the language of emancipation' at a time when tensions occur between the state and civil society, as well as between nation states and wider legal orders, be they regional or global systems.⁵⁷ The aim should be to adopt the emancipatory potential of human rights theories, apply it to social rights as part of this larger family of rights and prove that wherever one sees cultural fragmentation there must be attempts to reconstruct social relations around strong legal identities.

In the multicultural scenario of the European Union the Europeanization of social rights may create the basis for new emancipatory politics of rights: emancipation from the external impositions of the global market, emancipation from an approach to market-building which, as history proves, has often been the reflection of national interests, rather than the fulfilment of a common goal.

The European Union and the future stages of its integration, constitutes a peculiar and original response to globalization; the more we look at this process with the eyes of local legal traditions, the more we are likely to adopt emancipatory policies, for the very reason that they are closer to the needs of people and respectful of

⁵⁶ Wedderburn, 'Consultation and Collective Bargaining in Europe: Success or Ideology', 26 *ILJ* (1997) 1-2 and 6.

⁵⁷ De Sousa Santos, note 53 above, at 27-28.

their cultures. The agenda of European human rights is now filled with new intentions and with universal aspirations; this allows us to turn to a more technical analysis of expected reforms and of changes occurring in the Amsterdam Treaty.

III. The IGC and the Treaty of Amsterdam

The debate preceding the IGC was fairly rich in relation to social rights and engaged both academic circles and European institutions. Some of the most relevant proposals will be presented in this section, with the main purpose being to highlight points of convergence and to indicate further work that needs to be done. Despite the marginal impact of such proposals, some changes are visible in the overall philosophy inspiring the Amsterdam Treaty. If this perception of moderate - and yet progressive - change is correct, some conclusions can be drawn for the future of social rights and some further projects can be pursued for the years to come.

In a pamphlet, written by four academics and signed by a number of professors and experts in labour and social law from various countries of the European Union⁵⁸, a few suggestions were presented to the IGC. The leading idea put forward in this proposal is that reformers of the Treaty could not ignore the revision of Article 117 of the EC Treaty, whose inspiration and purpose appeared more and more in contrast with the evolution of social policies. Harmonisation as a magical outcome of market integration could be envisaged in the early days of the Communities when, as previously indicated (Section 1.1, above), functional objectives were leading the most powerful nation states; that approach was the engine of a social policy which proved ancillary to market needs and never acquired a strong identity of its own.

It was underlined that, because of the constraints caused by market building, the programmatic function of Article 117 proved of limited

⁵⁸ R. Blanpain, B. Hepple, S. Sciarra, and M. Weiss, *Fundamental Social Rights: Proposals for the European Union* (1996).

strength in favouring legislation,⁵⁹ despite the attempts made by the ECJ in leading cases. No mention of social policy was made among the activities of the Community (Article 3 ECT), neither, later on in the Maastricht Treaty, among the objectives of the Union (Article B). It is of some significance, therefore, that the suggestion was made to start the whole reform process revisiting Article 117.

According to the authors of the proposal, ten fundamental rights should have been written in it. Some of them may appear provocative in the wording adopted and perhaps inconceivable even in a highly developed supranational legal system, whereby nation states would still be defending their spaces of sovereignty in adopting legislation (the right to work, the right to life-long education, the right to equitable remuneration); some others may be seen as a completion and enlargement of existing provisions (the right to equality of opportunity and equality of treatment, without distinction of any kind, the right to health and safety in the working environment); some others may be projected in the future, such as the right to protection for children, young persons, women who have recently given birth and the elderly, the right to personal privacy).

The incipit of the suggested new Article 117, in particular, may attract criticism from the most disenchanted commentators, for the romantic reminiscence it makes of the 1944 Philadelphia Declaration, which became part of the ILO Constitution. 'Labour is not a commodity', as it has been recently proved in well-documented and enlightening scholarly work,⁶⁰ is much more than a principle or an aim stated in an international source. It has been so powerful as to inspire other sources and to favour the inclusion in them of the right to fair remuneration for workers, 'such as will give them and their families a decent standard of living', as in Article 4 of

⁵⁹ S. Simitis and A. Lyon-Caen, 'Community Labour Law: A Critical Introduction to its History', in Davies, Lyon-Caen, Sciarra and Simitis, note 29 above, at 4. References to relevant ECJ cases can be found in Poiares' contribution to this volume.

⁶⁰ O'Higgins, "Labour is not a Commodity" - An Irish Contribution to International Labour Law', 26 *ILJ* (1997) 225-234.

the 1961 European Social Charter, echoed later by the Community Charter.

The words 'rights' and 'principles' are used interchangeably in this document; the same semantic device is adopted by a later report, which will be examined shortly. Both documents, albeit with different expressions, make a distinction between fundamental rights and other objectives of social policies or 'instrumental' rights, thus distinguishing between different levels and different stages of implementation.⁶¹ This aspect of the overall proposal is a very delicate one⁶² and could lead to the maintenance of the status quo, if no precise responsibilities were set between the states and the Community.

The indication is also made that the 1961 Social Charter of the Council of Europe be referred to in Article F.2 TEU, together with the 1989 Community Charter of Fundamental Social Rights for Workers, following the already existing reference to the 1950 ECHR. As for expanding the competence of the Court of Justice, amending Article L in the TEU, the proposal is intentionally weak. The proponents' self-restraint runs parallel to the consideration that the hearth of very delicate institutional mechanisms could only be felt by political reformers, who could properly balance the expansion of judicial powers in this as well as in other fields of law.

The suggested new version of Article 117 is drawn upon common constitutional traditions of the member states and existing international labour standards. This safety net, built on the convergence of existing sources, is wider than Community law and is meant to be the reference point for the ECJ, whose responsibility would also be to indicate which fundamental rights are capable of direct effect. In order to prove the dynamic nature of the same rights, a new method of implementation is envisaged in assigning to

⁶¹ This point is stressed in particular by M. Weiss, *Fundamental Social Rights for the European Union* (1996) at 14-15.

⁶² As correctly pointed out by B. de Witte, 'Protection of Fundamental Social Rights in the European Union: The Choice of the Appropriate Legal Instrument', in Betten and MacDevitt, note 32 above, at 71.

a Committee of experts the power to review regularly the compliance of national laws with the obligations arising from Article 117.

Finally, while suggesting the incorporation of the Maastricht Social Agreement into the Treaty, the authors did not go into the details of how the Treaty should be consolidated, since the purpose of this concise publication was to air the problems and to favour discussion. They did, however, indicate the cumbersome presence of Article 2(6), (excluding Community competence for the right of association, the right to strike and lock out, pay) in the Social Agreement and the need to abrogate this provision, while writing fundamental social rights in the Treaty.

In the second Social Action Program, adopted in April 1995, the Commission decided to set up a Comité des Sages, with the particular aim to look at the future of the Community Charter of Fundamental Social Rights of Workers, in the light of incoming reforms of the Treaties. The Comité, chaired by Maria de Lourdes Pintasilgo and composed of leading figures from different countries, decided to extend the scope of its remit and to open up to the consideration of broader social policy issues. The result was a very articulated and intense report,⁶³ which took into account a large selection of topics and even indicated different stages for the implementation of social rights.

A point of similarity with the pamphlet examined before can once again be underlined, inasmuch as both documents are aware of the fact that for some social rights there is an urgent need to become visible in the treaties, whereas for others an active intervention on the side of individual member states is necessary. Institutional reforms, such as those required to amend the treaties (expand the qualified majority voting, insert a new chapter on employment, ban discrimination based on all grounds, and so on) should not be kept separate from other legislative reforms, for which costs are involved

⁶³ Comité des Sages, *For a Europe of Civic and Social Rights*, European Commission, Directorate General for Employment, Industrial Relations and Social Affairs (1996).

in order to provide benefits and services (training and education, health care, work and fair conditions of work and pay, minimum income and pensions). The latter are, however, different kinds of reforms, based on the assumption of fundamental rights and dependent on them, but projected in the sphere of national legislative initiatives.

A list of eight rights is indicated which should have 'full and immediate effect': together with equality of treatment, equality between men and women, ban on discrimination, freedom of movement and the right to choose one's occupation, some collective rights - so described in the most common labour law terminology - make an appearance, namely the right to organise and the right to collective bargaining and action. The 'objectives', different from the rights in terms of enforceability, are described as long-lasting projects which should be deferred to the second stage as for the definition of minimum standards and contents⁶⁴.

The point of contact, in terms of feasibility of both plans, albeit in different stages, lies in the urgency and coherence of political choices, which need to be made both at a supranational and at a national level. One of the original points of the report is the suggestion that, after the first stage, culminating in the work of the IGC preceding the Amsterdam summit, such choices should be the result of a widespread consultation all across Europe, favouring the identification and the rise of new social rights from the bottom of civil society to the top of the institutions. This is an insightful suggestion, which might be linked to the idea that there should be constant opportunities to review European sources, making the IGC a safe point of arrival of an open process, during which other mechanisms for adjusting and ameliorating the Treaty could be envisaged.⁶⁵

While emphasising the need to open up a broad and enriching process of amplification for social rights, the sages are aware of the

⁶⁴ Following the 'Limburg Principles', note 50 above, the 'objectives' indicated by the Sages should form the content of an obligation of conduct on the side of the states.

⁶⁵ Weiler, 'Editorial: Amsterdam, Amsterdam', 3 *ELJ* (1997) 310.

judicial implications, as for the existing legal basis, with regard to ECJ's competence. The report suggests, on the one hand, to expand the scope of Article F, including references to the Community Charter of Fundamental Social Rights of Workers and to other international agreements signed by the member states; and on the other hand to free Article F from the restrictions of Article L which explicitly indicates the areas on which ECJ's competence is to be exercised and which does not include Article F.

Through these proposals, the report puts forward a very lively vision of social Europe, not only based on new rights and principles to be enforced, but also supported by real people, whose voices should be heard and taken into account. There are signs of innovation in this report which go beyond the rituals of exercising political pressure on law-makers. Since some of the proposals have now become part of Community law, there is a hope that a red thread has been thrown and will continue to be followed in pursuing social goals.

In between the two proposals examined so far, a third one must be mentioned,⁶⁶ which occupies 'a particular place in this discussion', in between academics and institutions.⁶⁷ The Manifesto, written by academics under the auspices of the European Trade Union Institute, expresses both the authors' concern for the separation of social from economic integration and their commitment to bringing about new approaches. Rather than engaging in detailed technical suggestions addressed to the IGC, they chose to offer a careful explanation of the changes that have occurred to 'work' in the whole of Europe. The result is a collection of essays, attractive for a militant and well documented style and for melting together different national and professional experiences.

The Manifesto is built around the idea of incorporating the 1989 Social Charter into the Treaty, despite the fact that it originated as a

⁶⁶ B. Bercusson, S. Deakin, P. Koistinen, Y. Kravaritou, U. Muckenberger, A. Supiot, and B. Veneziani, *A Manifesto for Social Europe* (1996).

⁶⁷ This is the comment by Lo Faro, 'The Social Manifesto: Demystifying the Spectre Haunting Europe', 3 *ELJ* (1997) 300.

contested political declaration - not signed by the UK - and was afterwards successfully referred to as a program for social policies, rather than as a declaration of fundamental rights. The authors argue that the nature of social and economic rights has changed during the 1970s and 1980s in revised constitutions of the member states, becoming essentially programmatic. In the light of this assumption, a series of alternatives is presented, as to whether the Charter should be 'Commission-oriented' or 'European Court' oriented, ending up with the indication that in both cases it would have to be deeply transformed in order to be addressed to 'non-standard' workers, not included within its present scope.⁶⁸

Especially in view of these changes, the technicalities of the incorporation remain unclear; the real aim of the authors is to prove the Charter's lasting validity as far as the fundamental principles enshrined within it. Even less clear - and perhaps slightly contradictory⁶⁹ - is the combination of this strategy with the incorporation of the Maastricht Social Agreement; the latter, it is said, should work as an implementation mechanism, whereas the programmatic fundamental rights would be provided for in the Charter.

One other publication must be mentioned, among the one specifically addressed to the IGC. In a book hosting the proceedings of a colloquium held in Amsterdam, several points of view are taken into account and an attempt is made to summarise the debate, while formulating a proposal, which does not come from all the authors in the book, but from the first of the two editors only.⁷⁰ According to Betten there should be a Bill of Rights in the TEU, enforceable throughout the Union by way of amendment to Article L; the 1961 European Social Charter should be mentioned in Article F. As one can see, even though the proposals came from different circles and groups of experts, not working together at the same time, a few points of convergence were the result of this intense and diversified research.

⁶⁸ Bercusson *et al*, note 66 above, at 149-151.

⁶⁹ As implied by Lo Faro, note 67 above, at 303.

⁷⁰ Betten and MacDevitt, note 32 above.

Some of the issues discussed so far were echoed during the IGC and even amplified, leading to reforms of the Treaty which will certainly bring about further changes and will long be debated.

A Reflection Group chaired by Carlos Westendorp, at the time Spanish State Secretary for European Affairs, presented a Report⁷¹ at the Madrid Summit, in December 1995; the group was highly representative of national governments and European institutions and proved to be an open forum for discussion.⁷² In this document the idea was put forward to rewrite Article 103 of the Maastricht Treaty and to include employment among the objectives of the Union, as one of the economic choices to be shared by member states.

The proposal of the Swedish representative was more precise, suggesting that a new title on employment should be inserted in the Treaty and that social partners should be involved in its implementation, both at a Community and at a decentralised level. The Finnish position was even more straightforward and indicated that the Union should have the obligation to examine horizontally employment policies and enact a European strategy, including in the Treaty specific provisions on monitoring the existing situation.⁷³

⁷¹ General Secretariat of the Council of the European Union, 1996 *Intergovernmental Conference: Reflection Group report and other references for documentary purposes* (1995).

⁷² Petite, 'Le traité d'Amsterdam: ambition et réalisme', *RMUE* No. 3 (1997) 19-20, and 23.

⁷³ The Swedish position was expressed in a note of July 1995 on the fundamental interests of Sweden with a view to the 1996 Intergovernmental Conference, the Cabinet Office. See also the report of the Finnish Government, 27 February 1996 on Finland's objectives for the IGC. The overall role played by Nordic countries in the IGC seems to have led to a very positive contribution, coming from states with a long lasting tradition of efficient welfare states. The British position is taken into account by Barnard in 'The United Kingdom, the "Social Chapter" and the Amsterdam Treaty', 26 *ILJ* (1997) 275.

At the European Council held in Turin in March 1996 the French 'Memorandum pour un Model Social Européen'⁷⁴ was put forward and specified even further the need to make employment the main priority for the European Union and use it as a 'criterion' of all European initiatives.

Furthermore, it is reported that the Renault-Vilvoorde case⁷⁵ had a tremendous political impact on the discussion and pushed decisions forward, so that in the last two weeks the Growth and Stability Pact was completed on the employment side. A determined opposition was maintained to link formally the new employment chapter with EMU;⁷⁶ this serious limit in the reform of the Treaty must be taken as a starting point for current policies and for future revisions.

A. Innovations in the Treaty of Amsterdam

It is fair to believe that a widespread circulation of ideas, like the one summarised before, had an impact on the IGC; this more policy oriented discussion had indeed been preceded by solid academic research in all member states, mainly oriented to prove the need for substantial changes in the Treaty and the limits suffered by social policies because of the still too strong unanimity principle.⁷⁷

⁷⁴ See also the Commission's position on this matter in its opinion 'Reinforcing Political Union and Preparing for Enlargement', COM (96) 90 final; and the European Parliaments in its resolution A4-0068/96 of 13 March 1996. OJ 1996 C 96/77.

⁷⁵ Whereby rights to information were infringed by the management of the Belgian company, and massive lay-offs were announced; see Moreau, 'A propos de "l'affaire Renault"', *Droit Social* No. 5 (1997) 493-509.

⁷⁶ Observatoire social européen, *Analytical Review of the Treaty of Amsterdam*, Working Paper (September 1997).

⁷⁷ References cannot be exhaustive: W. Däubler (ed), *Market and Social Justice in the EC - the other Side of the Internal Market* (1991); Wedderburn, 'European Community Law and Workers Rights after 1992: Fact or Fake?', in Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (1995); Lyon-Caen and Simitis, 'l'Europe sociale à la recherche de ses références', in *RMUE* No. 4 (1993) 109-122; Rodriguez-Piñero and Casas, 'In support of a European Social Constitution', in Davies *et al*, note 29 above; Weiss, note 59 above; and A. Ojeda Aviles, *La calidad social europea desde la perspectiva de los derechos fundamentales* (1998).

It is with this open minded approach that we shall look at the main innovations in the Amsterdam Treaty; criticism for what has not yet been achieved must be placed within an ongoing discussion, which sees academic research oriented towards an expansion of social rights.

a) The Treaty establishing the European Community and the Treaty on European Union have been consolidated and articles have been renumbered (references will be made to this version).⁷⁸

b) Article 6 TEU (formerly Article F) refers to ECHR only. The choice made at Amsterdam confirms the previous position of the Community and of the Union with respect to the Convention: the Union is not subject to it, unlike all member states, but the Court of Justice has the power to review respect for fundamental rights by the Community institutions. The ECJ's Opinion⁷⁹, dealing with the accession by the Community to the ECHR, had a freezing effect on a long lasting debate. The acknowledgement, on the side of the Court, of the 'constitutional significance' that the Community's entry into a distinct international system would have had, was not taken by the IGC as an invitation to amend the Treaty; the result is that, in the words of the Opinion, the Community has no competence to accede to the ECHR.

This implies that some questions are left open. Would it still be desirable to establish better links between the Luxembourg and the Strasbourg Courts? Should the ECJ take into account the ECHR's principles in a dynamic perspective and consider the case-law of the Court in Strasbourg as equally relevant? Would this be the only

⁷⁸ Research had been carried on in this direction, in order to enhance the readability of European primary law and the transparency of the Community legal system. See 'A Unified and Simplified Model of the European Communities Treaties and the Treaty on European Union in Just One Treaty' 1996, a report prepared under the auspices of the Robert Schuman Centre at the EUI and submitted to the European Parliament in September 1996.

⁷⁹ Opinion 2/94 of 28 March 1996.

way to verify that principles of the ECHR are truly incorporated into domestic legal systems? What to do in cases of non-incorporation of the ECHR by member states?⁸⁰

c) Following a suggestion of the Reflection Group, in view of the accession of new states with weaker democratic traditions (see the amendment to Article O, setting the conditions for applicant countries), Article 7 brings about penalties for member states failing to respect fundamental rights. These measures, to be considered exceptional, even though the possibility to expel a member state is not envisaged, are - not surprisingly - kept within the competence of the Council.⁸¹ It could be argued that a similar measure should be applied for the violation of the social rights enshrined in the Treaty, as well as of those protected by the ECHR and by the constitutional traditions of member states.⁸² It seems unlikely that the Council should undergo an extensive interpretation of this norm; therefore the issue should be raised in relation to the new agenda and to the new sanctions to be thought of for the protection of social rights.

d) Article 46 (formerly Article L) in its new letter d) includes Article 6.2 among the new areas of law within the competence of the Court. This amendment is little more than an optical illusion, if we consider that the respect for fundamental rights 'as general principles of Community law' will not change considerably the current situation. The Court now has such rights within the written sources to which it can refer; as general principles they can only inspire the Court's decisions, not bind it to precise enforcement mechanisms. This does not lead to an incorporation of the 'rights', but to a stronger relevance of the 'principles', albeit with two limits: the Court can only

⁸⁰ For the Irish abortion case and for a thorough analysis of the open questions see De Burca, 'Fundamental Human Rights and the Reach of EC Law', 13 *OJLS* (1993) 283-319. For the British debate on incorporation see Bingham, 'The European Convention on Human Rights: Time to Incorporate', in 109 *LQR* (1993) 390-400. In general see B. Dickson, *Human Rights and the European Convention: The Effect of the Convention on the United Kingdom and Ireland* (1997).

⁸¹ Petite, note 72 above, at 25-26.

⁸² See below, Recommendation No. 1.

review the acts of the institutions and must remain within the boundaries of its jurisdiction.

The voice of the sages has been - at least partially - listened to on this matter, although other articles of the Treaty, which now introduce the reference to the 1961 ESC, will not be covered by judicial review. The indirect relevance of external international sources puts the Court in the position to choose how and when to take them into consideration, incorporating the principles in its judgements, without being bound by the source itself. This point will be considered again in the recommendations⁸³ as one of the most controversial items to be inserted in a new agenda for social rights.

e) Article 13 TEC, introduces a new non discrimination clause. It includes a very broad ban on discrimination based on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. It does not have direct effect; furthermore secondary legislation based on it still requires unanimity. This choice reflects the ambiguities of the IGC as for freeing new areas of social rights from the 'unanimity trap'⁸⁴. In view of further steps to be taken, it is now the responsibility of the member states to give flesh and bones to this innovative measure. Another weak side of this norm has to do with the merely consultative role of the Parliament, wanted by national delegations for the fear to be caught in co-decision mechanisms.⁸⁵

f) As expected after the change of government in the UK, the Maastricht Social Agreement has been incorporated within the Treaty, under Title XI, which also includes articles on social policy from the TEC. Some of these have been deleted, either because they are superfluous (such is the case of Article 118a on health and safety) or because they are replaced by a corresponding article (Article 138, which also includes the former Article 118b on the so-called social dialogue). This new order in the relevant sources

⁸³ See below, Recommendation No. 1.

⁸⁴ Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', 66 Public Administration (1988) 239-278.

⁸⁵ Petite, note 72 above, at 26.

should also favour a more dynamic approach as for the choice of the legal basis, although unanimity is still required for key subject matters, such as legislation in the case of termination of the employment contract, representation and collective defence of workers, including co-determination.⁸⁶

Among the subjects to be decided with a qualified majority, social exclusion makes its appearance, albeit not in the original wording, which included the elderly and the handicapped. This is a field of remarkable potential for developments in social policies, considered very urgent and for which a special heading of the financial perspective is addressed.

g) Some incoherence can still be revealed: the last section of Article 136 still mentions the harmonisation of social systems as an outcome of the functioning of the common market; the first section of the same article proclaims that harmonisation and improvement must be maintained while pursuing the objectives of promoting employment, living and working conditions, whereas Article 137.2 still mentions minimum requirements for gradual implementation. The impression is that two souls are kept alive inside one body; this can be intriguing at times, although it should not be too difficult to offer a systematic interpretation of the whole new Title.

Article 136 recalls the 1961 Social Charter and the 1989 Community Charter (see above, under b)). This is an innovation of symbolic value which cannot be under-evaluated. It must be noted, however, in the attempt to re-establish an equilibrium among all Council of Europe sources, that the choice of the *sedes materiae* seems to prove that even symbols are made to have a different impact:

⁸⁶ A proposal to make qualified majority voting the rule, when deciding on all Union policies, was presented to the IGC by the Commission. On the contrary, the UK maintained throughout the IGC a strong opposition to the expansion. See respectively Commission Opinion, note 72 above, and Foreign and Commonwealth Office, *A Partnership of Nations: The British Approach to the European Union Intergovernmental Conference 1996*. See also the Labour Party's *Business Manifesto* (1997) expressing unwillingness to change unanimity voting on key matters such as social security and co-determination.

whereas the ECHR is mentioned in Title I on Common Provisions, the Social Charter is placed in the niche of social provisions. Furthermore, the exclusion of Community competence on right of association, the right to strike and pay, confirmed in Article 137.6, is in sharp contradiction with some of the fundamental social rights proclaimed by the Social Charter⁸⁷. Again, we have to rely on the indirect relevance of international sources, which, particularly in the case of the right to organise and the right to strike, must be read in conjunction with the constitutional traditions of the member states, which, even if not mentioned in the opening of Title XI, are always in the horizon of the ECJ.

h) The new Title VIII on employment follows the Title on economic and monetary policy and introduces new procedures according to which member states and the Community 'shall work' together for the co-ordination of new strategies, within the general objectives set in Article 2. A 'high level of employment' is now one of the objectives of the Union. Relevant in itself and also in view of future involvement of the social partners, as it happened for economic and monetary policies (see above, Section 2 b) and c)), this Title is already being implemented, before the ratification of the Treaty. A special Employment Committee, with an advisory status, has been created (Article 130) to promote co-ordination among member states and is indeed already operating, ideally in strict connection with the Economic Policy Committee. This is only an informal string, which should bind together two key bodies, potentially very important in view of achieving formal co-ordination in the two policy fields. The Committee should also monitor employment initiatives in Member States, while consulting with the social partners. We are clearly facing a situation in which multi-level policy making is conceived by a variety of institutional and quasi-institutional actors. This open-ended procedure, whereby it is difficult to conceive a 'right to work' in traditional terms, does not specify sanctions against Member States, neither specific enforcement mechanisms for individual rights.

⁸⁷ Similarly Ryan, 'Pay, Trade Union Rights and European Community Law', *Int. Jour. of Comp. Lab. Law and Ind. Rel.* (1997) 305.

Activism on the side of the Commission is expressed through soft law measures which have preceded the employment chapter⁸⁸ and which are now part of the implementation of the same.⁸⁹

IV. Concluding Remarks: Further Proposals to Expand Social Rights in the Human Rights Agenda for the Year 2000

In the course of this paper an empirical debate has been confronted with a more theoretical approach. The latter can be summarised in two points:

1) The strategy to incorporate broad international legal principles into the European legal order is still a current one, as it results from some of the innovations in the Amsterdam Treaty. Especially when related to social rights, this strategy brings about the idea of adaptation of international sources to distinctly European legal traditions.⁹⁰ It also proves that member states belonging to a wider international legal order have potential advantages in making recourse to sources different from Community sources. From Strasbourg to Luxembourg, passing through Geneva, the road is paved with good intentions, but travelling across these places may still not be an easy task for the individual citizen, whose rights are infringed or threatened.

2) The 'emancipatory' function of human rights, as opposed to the mere dependency of the same on market mechanisms, helps legal scholarship to re-discover the centrality of social rights and to look ahead for new measures to strengthen their enforcement. In

⁸⁸ COM (95) 273 final.

⁸⁹ COM (97) 676 final.

⁹⁰ It would suffice to quote Article 23 of the Universal Declaration (right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, right to equal pay for equal work, right to just and favourable remuneration) in order to have a sufficiently broad floor of rights from which the European legislature should draw inspiration. The concept of adaptation of international sources is used in this paper as equivalent to that of convergence: both concepts imply that initiatives should not be taken at the European level without consideration of the implications of wider international sources.

particular, the European Union represents a test of how to create an internal coherence among principles and objectives, thus offering an answer to the dispersion of legal values and the weakening of rights within the global legal order.

Emancipatory theories should modify the definition of rights at the place of work, as well as the expansion of minimum standards world-wide.

In interpreting Community sources and in tracing new policies, the challenge is to reconcile the old and the new: in the wider circle of international sources, Community sources are included and form a smaller circle, delimited by its own circumference.⁹¹ In the process of European integration the adoption of new social rights is very slow and may not coincide with the emergence of new rights which expand the circumference of the wider circle.

It can be argued that an emancipatory theory of social rights in the European Union rests on all the rights mentioned in the Treaty and on those indirectly included in it through the free and discretionary interpretation of the Court of Justice. The fact that the latter must also take into account the 'constitutional traditions common to the Member States' as a further and necessary criterion in its decisions, forces the 'emancipatory' theory to go a step forward and to insist on the peculiarities of the European debate. The most suitable suggestion for the years to come is that the concentric circles be kept as they are, the smaller included in the wider one and yet autonomous with regard to the implementation of social rights and for reviewing acts of the Community in breach of international standards. The surface common to the two circles could become an even more homogeneous ground for the ECJ, if other reviewing mechanisms were introduced into the scene. These new bodies should have the function to fill in the ground with converging and coherent standards, through interpreting all relevant legal sources and closely following their implementation in member states.

⁹¹ The metaphor of concentric circles has been used by Lenaerts and re-interpreted here. See Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue', 16 *EL Rev.* (1991) 367.

Out of the metaphor of the circles, the indication can be drawn to strengthen those sources within the smaller circle, by way of insertion of some fundamental social rights in the Treaty and by ensuring the appropriate means of enforcement, especially through new monitoring mechanisms.

The remarkably rich and varied range of proposals circulated before the IGC and the innovations in the Amsterdam Treaty continue to leave unanswered several questions. Only a few points will be selected as urgent items to be inserted in the agenda for the year 2000, in the understanding that institutional reforms have wider priorities than the ones indicated in this paper.

V. Recommendations

1. In the Amsterdam Treaty references are made to the ECHR and the ESC. This indirect inclusion of international sources into the Treaty - which could also be described as a tendency to convergence - leaves untouched the competence of the Strasbourg Court on the ECHR and the monitoring of the ESC by the Committee of Independent Experts, while expanding the standards to which the ECJ may refer. There is no indication in the Treaty that the concrete implementation of human rights should inspire the ECJ, even less bind it. The ECJ's opinion on accession by the Community to the ECHR reflects a careful internal balance among institutional powers and frees the ECJ from obedience to the rulings of institutions external to it.

Furthermore, the limited consideration shown by the IGC for amending Article L TEU, with regard to the expansion of the ECJ's competence, is a strong political indication, inspired perhaps by realism. It is also coherent with the choice of the EU not to accede to the ECHR. The fear has prevailed that two legal orders governing fundamental rights, running parallel to each other for quite some time, could suddenly collide and clash.

Rather than insisting on the politically impracticable solution aimed at expanding the ECJ's competence, efforts should be concentrated on the creation of new bodies, similar to the European Social Charter's Committee of Independent Experts.⁹² It has been correctly underlined that when referring to a source external to the EU, its entire range should be kept present, particularly with regard to its concrete translation into the living law of the states bound by it.⁹³ The suggestion is not to duplicate procedures, but to make them converge towards institutional co-operation. In concrete terms, the new body should have both monitoring powers and powers to refer to the Commission, when infringements of social rights are discovered. It should be built within the Community legal order and include representatives from other international organisations, such as the Council of Europe and the ILO, thus enhancing convergence of international standards.

If an analogy with Article 7 of the Amsterdam Treaty were to be drawn, one could envisage that this monitoring mechanism could also bring, in exceptional cases, to the indication of sanctions to be applied to Member States failing to respect fundamental social rights.

2. References in the Amsterdam Treaty to the 1989 Social Charter cannot be compared to the ones made to Council of Europe sources. Notwithstanding the symbolic value attached to this innovation, we should not confuse the legal nature of these different sources. The Community Charter remains a programmatic and political document which has given flesh and bones to Community social policies; it will need to be revised also in the light of the achievements made so far in adopting legislation in various fields and in view of new emerging needs, especially related to active employment policies. A careful reading of the Charter confirms the validity of the two levels of analysis previously suggested in the search for new and more efficient means of implementation of social rights. What the Sages describe as different stages in what should

⁹² See the proposal by Blanpain *et al.*, note 58 above, and the further indications of the report by the Sages, note 63 above.

⁹³ Harris, note 32 above.

be a new and beneficial reform of the Treaty are indeed different levels of legal analysis and force us to re-consider the distribution of powers within the Union and the member states.

The Protocol on the application of the principle of subsidiarity and proportionality, annexed to the Amsterdam Treaty should be interpreted in innovative terms, when it comes to considering social rights. Article 5 indicates that Community action is justified when the objectives in question cannot be sufficiently achieved by Member states' action. This difficult balancing exercise is facilitated by some guidelines, which would need to be read in the light of a broad program of action, a new social rights agenda for the Commission, with the indication of political priorities.

In particular, following Article 5 of the Protocol, in order to justify Community action, the transnational relevance of the issue should be recalled as well as the possible conflict with the requirements of the Treaty, due to lack of Community action, such as to correct distortion in competition or to strengthen economic and social cohesion.

Employment is again the field to investigate for an innovative definition of the borderline between the powers of the Community and of the Member States, in the light of Article 5 of the Amsterdam Treaty (formerly Article 3b EC), which must be looked at as the most solid constitutional ground for subsidiarity. In this field a regime of shared competences, such as the one which is taking shape in this early stage of enforcement of the new Title VIII, opens up space for yet a new form of co-ordination of policies. It should be maintained, though, that an incumbent and unavoidable priority must be given to Community action and such a power must be accompanied by precise monitoring mechanisms on national employment plans.

3. The peculiar nature of certain social rights (collective rights, procedural rights), confirms that a mere abstention of the nation states - or of the EC as such - could not suffice to guarantee a true enforceability of the same. The right to organise and, more

recently, the right to information and consultation are examples of individual rights to be exercised collectively, which, because of this peculiarity, can only be enforced through legislation at the national level. Emancipation consists in providing deep Community roots for social rights and, at the same time, assigning competencies to national and supranational legislatures.

It must be maintained that what for some commentators appears to be the most daring reform of the Treaty and for others the most unnecessary, namely to insert the right to organise among the EU fundamental social rights, is indeed the most urgent and important one.

Several reasons support this recommendation:

- this right would acquire a new function in an evolving supranational legal order, whereby private associations are asked to be present and active and to fulfil quasi-institutional roles
- this fundamental right, as suggested earlier on,⁹⁴ does not receive sufficient support from the mere convergence of other international sources. Its specificity within the European legal debate can certainly be drawn from constitutional traditions in the member states, but an even more specific function is emerging at Community level, where the right to organise appears as a precondition for exercising other collective rights (the right to bargain, the right to be informed and consulted) which are at the moment lacking full institutional legitimisation. In adopting again the distinction between freedoms and powers, suggested earlier on,⁹⁵ the fundamental right to organise would fall in the second category and require specific supportive legislation at Community level.

A renewed and stronger legitimacy of supranational associations, whose representativity should be ascertained following the criteria established in soft law, would also entitle them to new rights, such

⁹⁴ See the criticism of Article 11 ECHR, as it emerges from the case-law of the Strasbourg Court. Part I, Section C, above.

⁹⁵ See Section I, above, and Bobbio, note 2 above.

as introducing collective complaints when social rights are infringed by member states as well as when no sufficient action is taken to allow the correct exercise of the rights themselves. It would be advisable that such complaints were filed with the Commission, whose monitoring exercise on the state of enforcement of social rights should become even more alert and punctual.

The Council of Europe Social Charter will undergo changes in the years to come, to which attention should be paid. Particularly the new procedure on collective complaints could prove a useful analogy and an occasion for bringing closer international standards and making them converge towards more cohesive measures of human rights protection.



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