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The Labour Constitution

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I Introduction

1 European constitution and social order

This volume attempts to conceptualise European primary law as constitutional law.[1] The project is a conceptually challenging one, as it implies to loosen the traditional close link between the concept of constitution and the notion of the nation state. This move allows conceiving constitutions and constitutional law even beyond the state;[2] at the same time, it signifies that the established dichotomy between confederation (*Staatenbund*) and federal state (*Bundesstaat*)[3] has become obsolete under constitutional law. Therefore, the concept of a federal union (*Bund*) has recently regained attention, as it represents a legal entity that can come with its very own constitution, besides and above the state.[4] The main feature of a suprastate federation is its ability to generate autonomous law, which takes precedence over the laws of its Member States but does not abolish the autonomy of their legal systems. Hence, the European Union conceived as such a federation can have a constitution that is independent of Member State constitutions but at the same time legally affiliated with them.[5]

The term 'constitution' is here ambitiously defined as the legal justification and constitution of public authority.[6] But the modern concept of constitution does not end with these functions, as a constitution institutes both public authority and social order; it generates a 'social constitution' (*Gesellschaftsverfassung*) or a 'societal overall-constitution' (*gesellschaftliche Gesamtverfassung*).[7] Especially,

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1 See A von Bogdandy in this volume, at ***.[at V and 149 *et seq*.]

2 C Möllers in this volume, at ***. [18 *et seq*.]

3 P Kirchhof in this volume, at ***. [904 *et seq*.]

4 C Schönberger, 'Die Europäische Union als Bund', (2004) 129 *Archiv des öffentlichen Rechts* 81.

5 I Pernice, 'Bestandssicherung der Verfassungen', in R Bieber and U Widmer (eds), *Der europäische Verfassungsraum* (1995), 225 at 261 *et seq*; see also S Oeter in this volume, at *** ('XXXXXXXXXXX'). [110 *et seq*. ('*Verbundverfassung*')]

6 See C Möllers, in this volume, at ***. [3 *et seq*.]

7 R Scholz, 'Koalistionsfreiheit', in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrecht* (2001) vol VI, § 151, sub A. II. (paras 21–35) ("*Gesellschaftsverfassung*"); H Ridder, *Die soziale Ordnung des Grundgesetzes* (1975) 40 ("*gesellschaftliche*

the restriction of public authority by basic rights concomitantly establishes a societal space and provides it with particular normative structures. Being part of classical constitutional doctrine, concepts such as the horizontal effect of constitutional rights[8] or the notion of institutional guarantees of constitutions[9] highlight this social dimension of state constitutions. Hence, the challenge for European constitutional theory and constitutional law is to separate the notion of a constitution also in its sense of a constitution of social order from the established framework of the state and to reformulate it in a multi-level context for a *Verfassungsverbund* (literally, a "compound of constitutions", i.e., an association of constitutions). However, a central idea of the constitution of public authority in Europe, namely the division of sovereignties between the Member State and the European level,[10] cannot be applied to a multi-level constitution of social order, as the implied notion of a societal sphere that is split into a European and Member State part would hardly make sense. Rather, the theory of European constitution has to be able to explain how the interplay of Member State and Union constitutions establishes a *single* social sphere, and it has to reflect the latter's particular normative structure.

At present, the matter of a societal overall-constitution of the European Union represents nothing less than the central *problématique* of the integration process. It is raised in form of an amplified demand for a 'social Europe' by a – for the continuation of the European integration process – critical mass of citizens among the pro-European majority mainly.[11] This demand rests in the empirically substantiated diagnosis that the economic benefits of market integration come at the expense of an increasing social inequality. Whereas in the era of relatively closed national economies, from the end of World War II until the 1970s, the factors of (domestic) growth and increasing (domestic) earned income were linked, they are now visibly detached through processes of European and global market integration. This 'golden era' of modern statehood[12] enabled most old Member States to establish a social compromise between capital and labour, which left economic property rights untouched but gave employees their fair share of the growing wealth in return. From the 1970s onwards, the foundations of these compromises have been eroded step by step. Hence, for many the positive vision

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Gesamtverfassung"); the term labour constitution as developed sub 2 below, focuses on a relevant aspect of '*gesellschaftliche Gesamtverfassung*'.

8 HJ Papier, 'Drittwirkung der Grundrechte', in D Marten and HJ Papier (eds), *Handbuch der Grundrechte* (2006) vol II, § 55.

9 M Kloepfer, 'Einrichtungsgarantien', in *ibid*, § 43.

10 See S Oeter in this volume, at ***. [83 *et seq*.]

11 The constitutional treaty failed in the French referendum, as it was not able both to take up these demands visibly and convincingly, and to accommodate them substantively.

12 The term 'golden era' of statehood can be found in S Leibfried and M Zürn, 'Von der nationalen zur post-nationalen Konstellation', in *id* (eds), *Transformation des Staates* (2006), 19 at 23. The authors refer to E Hobsbawm, *The Age of Extremes* (1994) 225 *et seq*. Hobsbawm has coined the term 'golden age' for the period from 1950–1975.

of a 'social Europe' is to re-establish such a social compromise at the European level, although its institutional contours remain rather vague. The social acceptance of the Union as a legitimate order and, hence, the future of European integration itself depends probably upon successfully providing the current chiffre of a 'social Europe' with a distinct content.[13]

In this respect, the matter of a societal overall-constitution in general and a European labour constitution in particular is part and parcel of a socio-political quest, which aims to reveal the relevant constitutional framework and its realistic potential for future development. The previous edition of this volume has contributed an important part of this endeavour by including two chapters on the economic constitution of the Union.[14] This chapter on the shape of the European labour constitution adds a further step. However, such a project immediately faces the obstacle that labour constitutions[15] have thus far only played a marginal role in the legal debate.[16] This applies to the disciplines of labour law[17] and of constitutional law[18] alike. Too often 'labour constitution' is only used as a title or magniloquent catch phrase. Therefore, the term has to be briefly explicated in the following.

2 The concept of labour constitution

The term 'labour constitution' can be traced back to the Weimar labour lawyer Hugo Sinzheimer. In his conception, the labour constitution stands side by side with the contract of employment.[19] While the contract of employment provides the foundation for labour performance, the function of the labour constitution is to

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13 See also U Haltern in this volume, at ***.

14 See A Hatje and J Drexel in this volume, respectively.

15 This approach of critical legal studies assumes that the form of a field of law provides a basis for criticising legal reality. For an example focusing on private law see F Rödl, 'Normativität und Kritik des Zivilrechts', [2007] *Archiv für Rechts- und Sozialphilosophie* suppl 114, 167.

16 In the German *Grundgesetz*, the labour constitution has been discovered significantly later than the economic constitution (Scholz, above n 7, para 24). The first monograph dealing with the labour constitution of the *Grundgesetz* was published in 1965 (D Conrad, *Freiheitsrechte und Arbeitsverfassung*). The pertinent volume 'Die Wirtschafts- und Arbeitsverfassung' edited by K Bettermann *et al* as part of a compendium (*Die Grundrechte*, vol III/1, 1958) did only mention it in its title.

17 The exception is R Richardi, *Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses* (1968); *id* (ed), *Arbeitsrecht als Teil freiheitlicher Ordnung* (2002); also E Picker, *Die Tarifautonomie in der deutschen Arbeitsverfassung* (2000).

18 The exception is R Scholz, *Die Koalitionsfreiheit als Verfassungsproblem* (1971); *id*, *Pressefreiheit und Arbeitsverfassung* (1979); *id*, *Die Aussperrung im System von Arbeitsverfassung und kollektivem Arbeitsrecht* (1980).

19 H Sinzheimer, *Grundzüge des Arbeitsrechts* (1927) 107. Both combined constitute the 'labour association' (*Arbeitsverband*).

establish a community of employers and employees that exercises jointly the employer's as owner's rights of disposal.[20] Hence, the labour constitution consists of the collective dimension of labour law, i.e. the level of establishment and company management and the level of collective bargaining, which includes the law governing collective agreements, industrial conflicts and mediation.

Thereby, Sinzheimer's reference to a labour constitution has a primarily substantive meaning, even if the foundation for a collective labour law could be found in the Weimar Constitution itself (Article 159; Article 162(1), (2) Weimar Constitution). The collective dimension of labour law is the labour constitution, not because it can be found in the written constitution itself, but because, from a substantive point of view, its formal foundations have a constitutional function. The power position of employers is a subject of the constitution due to their ownership of the means of production. In Sinzheimer's understanding, the position as owner of the means of production does not only constitute a position of power over objects but, as it is unequally distributed, also a position of power over people.[21] The function of the employer's power over objects and people corresponds with the function of limiting the exercise of existing public power.[22] Similar to the merely power-shaping constitution which infringes little upon the sovereign rule of its holder and only limits its exercise by juridification, the labour constitution should not infringe upon both the position of employers as proprietors, i.e. the possession and the administration of property; rather, it is only meant submit the administration of property to the control of a community of employers and employees.[23]

However, this Sinzheimerian concept turns the labour constitution into a mere conceptual complement of a liberal, free market, economic constitution,[24] centring on the guarantee of the ownership of the means of production. This perspective changes as soon as one includes, in contrast to Sinzheimer, the constitutional foundation of individual employment into the definition of the labour constitution, so that the interdependence of both, the orders of economy and labour, becomes apparent. Then, the labour constitution does not only restrain the power of the private owner-employer, rather it constitutes the social actors within the societal field of labour themselves and determines their relationship. According to such an understanding, the guarantee of private property and the freedom of contract

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20 *Ibid.*

21 *Ibid*, 22 *et seq*.

22 C Möllers in this volume, at ***. [9 *et seq*.]

23 Sinzheimer, above n 19, 208 *et seq*.

24 In contrast, the renaissance is remarkable the term 'labour constitution' underwent in national socialist labour law – for instance AB Krause, *Die Arbeitsverfassung im neuen Reich* (1934), and W Siebert, 'Die deutsche Arbeitsverfassung', in ER Huber (ed), *Idee und Ordnung des Reichs* (1943) vol II. Its application should apparently signify the departure from a liberal paradigm of individual and collective labour law. On this contrast see M Becker, *Arbeitsvertrag und Arbeitsverhältnis während der Weimarer Republik und in der Zeit des Nationalsozialismus* (2005) 382 *et seq*.

provide not only cornerstones of a liberal economic constitution, but, with the guarantee of the ownership of the means of production and the freedom of contract of employment[25], simultaneously the central element of a liberal labour constitution.[26]

Before the backdrop of the present question, it seems also appropriate to limit considerations to a formal understanding of constitution. While Sinzheimer's concern was mainly with the restriction of the power of proprietors, the analysis here is concerned with the constitutionally stabilised (European) order of social conditions. Thus, the concept of labour constitution, as it will be employed in the following, encompasses all norms of constitutional rank, the fundamental decisions on the makeup of social forces and their interrelation in the societal field of employment.

The individual and collective rights of social actors constitute the foundation of the labour constitution. Logically prior are those individual rights that constitute social actors in their social roles. Under liberal conditions, these are the guarantee of private ownership of the means of production, on the one hand, and the freedom of contract of employment, on the other hand; both constitute the roles of the employer and the employee. In addition, there are collective rights in the sphere of workers' participation, which restrict the employer's power of disposal procedurally. Finally, those rights are part of the labour constitution that regulate the collective representation of employees regarding their contractual working conditions, i.e. the constitutional guarantee of free collective bargaining.

Besides these fundamental rights, labour-constitutional 'guiding norms' (*Leitnormen*) exist. The term 'guiding norms' encompasses all constitutional norms, which can affect the legal structures of the field of employment and, hence, it includes principles as well as norms determining state goals and tasks. The most important example of a guiding norm in the German constitution is the principle of social statehood (*Sozialstaatlichkeit*) (Article 20(1) German Basic Law).[27]

Finally, the labour constitution also includes the legislative competences in the area of labour law and judicial competences regarding labour disputes, for as all constitutional norms, the rights and guiding norms of the labour constitution also require 'articulation'. In the given context, this term shall be understood as the concretisations of fundamental rights and guiding norms in different historical

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25 The conjunction of the private ownership of the means of production with the freedom of contract is certainly not imperative. The freedom of contract can be replaced by slavery, peonage and forced labour, as history shows.

26 In Austrian labour law, such a narrow concept of 'labour constitution' as unity of all collective labour law has remained intact until the present. See the Austrian labour-constitutional law of 14 December 1973, österr. BGBl. [Austrian law gazette] No 22/1974, and the definition by the Austrian T Mayer-Maly, entry 'Arbeitsverfassung', in A Klose *et al* (eds), *Katholisches Soziallexikon* (1980), 126.

27 For a definition that includes principles authoritative for labour law, see Scholz, above n 7, para 24.

contexts and for specific social constellations,[28] which can be generated by the legislature and courts alike. The term articulation, hence, encompasses both legislative and judicial acts. It is of fundamental importance for the effect and dynamic of a norm, to what extent and under what circumstances the legislature and courts are competent to articulate it and to shape, with this, the social field of labour; the respective competence norms are thus part of the labour constitution itself.

To sum up: The concept of a labour constitution, which informs the following, includes the individual and collective fundamental rights of social actors in the field of employment, the constitutional guiding norms governing the contractual relationship between employers and employees and, finally, the competences of the legislature and courts to articulate these constitutional norms.[29]

II The EEC labour constitution and the social compromise for integration

The original labour constitution of the EEC provides not only a historical starting point for the following considerations. Rather, the explanation of the concrete shape of the EEC labour constitution allows reconstructing the social function of a European labour constitution that remains significant for the present. Accordingly, the essential norms of the EEC labour constitution are at first outlined in the following (1). Then, it is explicated that the norms of the EEC labour constitution can be derived from their function to realize a 'social compromise for integration' (2), which enabled the establishing of the European integration process in the first place. Before this backdrop, implications for the form and shape of the current European labour constitution can be developed (3).

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[28] The term 'articulation' is chosen to stress the creative moment of the concretisation of fundamental rights, in contrast to a merely deductive approach, yet without abandoning the idea that fundamental rights remain a yardstick for such creative achievements.

[29] The concept of the labour constitution contains a blind spot, which cannot be eliminated here for reasons of constrained time and space. This blind spot is the eminently relevant impact on the constitution of social power relations from the part of public administration by way of controlling labour immigration (for an account to the social function of controlling labour immigration see K Dohse, *Ausländische Arbeiter und bürgerlicher Staat* (1981) 412). In the European Union this field has just become a highly contested one.

1 The Basic Norms of the EEC Labour Constitution

The central norm of the EEC labour constitution was Article 117 EEC Treaty (Rome version). It stated:

> "Member States hereby agree upon the need to promote improved working conditions and an improved standard of living for workers so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action."

Primarily, this norm entails a social promise, namely the advancement towards more equal living and working conditions of workers. This is linked to the prediction that such progress comes as a consequence of the Common Market. Additionally, the 'procedures provided for in this Treaty' should play a role, which refers to, e.g., the European Social Fund (Article 123–128 EEC Treaty) or the European cooperation of Member States (Article 118 EEC Treaty)[30] and which transcend the field of a labour constitution developed here.[31] Finally, the approximation of legal and administrative provisions was meant to come to bear. However, the EEC did not provide any competences for the approximation of Member State labour laws in the subsequent chapter 'Social Provisions' (Article 117–122 EEC Treaty). Hence, the subset refers to provisions in other parts of the Treaty and especially to the competence under Article 100 EEC, which generally authorises the European level to harmonize legal provisions, provided that the establishing or functioning of the Common market requires so. The European approximation of Member State labour laws was therefore no aim *per se*, rather European labour law should only come to the fore sporadically and justified by the functioning of the Market. Consequently, the Common Market and not a comprehensive European labour constitution was meant to function as the actual guarantor of the promised social progress.

Article 117 EEC Treaty can be considered as the central norm of the EEC labour constitution, as it represents the basic decision that there is no need for a similarly integrated labour constitution besides the European economic constitution. Apart, the EEC only entailed two further norms which can be considered part of its labour constitution and which in essence persist unchanged to date. The first one is the free movement of workers, Article 48 EEC Treaty (Article 39 EC, Article 45 TFEU). It introduced the fundamental right for all citizens of the Member States to enjoy their freedom of exercise of profession

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30 J Pipkorn, in H von der Groeben *et al*, *Kommentar zum EWG-Vertrag* (3rd ed 1983), pre Arts 117–122 EEC Treaty para 7 *et seq*.

31 For the notion of a post-regulatory labour constitution whose backbone is constituted by 'soft' political coordination, see below IV. 2.

community-wide after a transitional period (until end of 1969). This right indeed touches upon the field of labour constitution, as Article 48(2) EEC Treaty grants protection against direct and indirect discrimination regarding the legislature, the parties of collective agreements and individual employers.[32] The second norm, Article 119 EEC Treaty entails the precept to guarantee the equal remuneration of men and women (Article 141 EC, Article 157 TFEU). As its wording addresses the Member States, the European Court of Justice has interpreted it early as a right to equal pay with horizontal effect on private employers.[33]

From the large number of possible labour-constitutional provisions, Article 48 and Article 119 EEC Treaty have not arbitrarily found their way into the EEC labour constitution. Rather, they are a part of the program expressed in Article 117 EEC Treaty: Article 48 EEC Treaty served the founding of the Common Market, namely the European Market for labour. Article 119 EEC Treaty served to eliminate the competitive advantages of those companies in the European Market that offered no equal pay to women due to legal provisions, collective agreements or contracts. The kernel of the EEC labour constitution thus comprises of a coherent ensemble of provisions including the programmatic principle of Article 117 EEC Treaty, the market-functional rights of Articles 48 and 119 EEC Treaty and the also market-related competence norm of Article 100 EEC Treaty.

2 The Foundation and Function of the EEC Labour Constitution

a) The Promise of Neoclassical Economics

With its promise of an upward harmonization of workers' living and working conditions, Article 117 EEC took up and condensed an economic narrative common in the prevailing neoclassical variant of the 'pure theory of international trade' at the time. It can be found in an expert report of the International Labour

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[32] It is not entirely clear whether the non-discrimination principle of Art 48 EEC Treaty/Art 39 EC directly binds the social partners and private employers. However, such a binding effect is constituted for collective agreements and individual labour contracts by Art 7(4) Council Reg 1612/68 on the free movement of workers within the Community, [1968] OJ L 257, 2. Accordingly, the ECJ has expanded the horizontal effect of the non-discrimination principle on private employers in Case C-281/98, *Angonese* [2000] ECR I-4139. In turn, the ECJ seems to apply a lower standard for justification (para 42); see A Randelzhofer and U Forsthoff, in E Grabitz and M Hilf, *Das Recht der EU* (looseleaf, last update Jan 2008), pre Arts 39–55 EC para 80.

[33] Case C-43/75, *Defrenne II* [1976] ECR 455, paras 80 *et seq*.

Organisation (ILO)[34] – which proved to be instrumental for the shape of the EEC labour constitution, as will be explained further below.

Already before the foundation of the EEC, there was concern that transborder free trade would economically harm those enterprises in Member States with better working conditions and, hence, that this would jeopardise those social standards already achieved in these Member States.[35] The worry was that companies in other Member States could produce the same goods cheaper due to their inferior working conditions, which would render domestic production non-competitive at home and abroad. Neoclassical economics held three fundamental assertions regarding these concerns about the social effects of a common European market. According to the first assertion, existing differences in average labour costs would cause no competitive advantage for companies in countries with lower costs: as the difference of average labour costs would merely mirror the difference of the average productivity of labour, which depended upon available resources, the qualification of employees and the available capital in the respective Member States, whereas the average actual labour costs, in which different levels of productivity are included ('unit labour costs'), were rather equal in all Member States.[36] Such argument would prospectively apply under the assumption that the mobility of capital remained small despite the Common Market.[37] In case differences of actual labour costs would arise in exceptional cases due to economic structural change, it would be the task of national central banks to adjust the exchange rate of their own currency according to their long-term goal of an even balance of trade (see Article 104 EEC Treaty).[38]

This first assertion was able to dispel doubts about a social regress triggered by the Common Market. However, the neoclassical theory of international trade held a second assertion that seemingly challenged this message. It stated that the real earned income would drop in those countries with higher wages before the opening of the borders. This prediction was based on the essential theoretical advancement of the neoclassical theory of international trade vis-à-vis its classical antecessor; it concerned the explanation of the 'comparative cost advantages', which were meant to be central for the increase of welfare by free trade. In Ricardo's classical theory, domestic labour productivity was the foundation for 'comparative cost advantages'.[39] Different labour productivity is reflected

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34 International Labour Organisation, Social Aspects of European Economic Co-operation: Report of a Group of Experts, Studies and Reports, New Series, No 46, 1956.

35 International Labour Organisation, 'Social Aspects of European Economic Co-operation: Report by a Group of Experts (Summary)', [1956] *International Labour Review* 99.

36 International Labour Organisation, above n 34, § 99.

37 *Ibid*, § 261 *et seq*.

38 *Ibid*.

39 D Ricardo, *On the Principles of Political Economy And Taxation* , ([1817] 1977) 114 *et seq*. [check Seitenzahl]

differently in different products (in Ricardo's seminal example its impact is higher on English cloth than on Portuguese wine), which constitutes comparative in contrast to absolute cost advantages and, hence, even renders the free trade between two countries beneficial, of which one cannot produce a single product absolutely cheaper than the other. The neo-classical theory had additionally argued that even a different supply of production factors (i.e., land, capital and labour) among states could constitute comparative cost advantages.[40] As the factor supply differs from state to state, their prices differ as well, which is reflected differently in products depending on their specific composition of factors. In these cases, the consequence of free trade is that the relative factor prices, i.e. the relationship of factor prices in one country, would converge in those countries involved (so-called factor price equalisation theorem)[41]. This means that the factor labour becomes cheaper, where it had been more expensive before. This implies a drop of real income in the involved countries with previously higher wages.

Finally, the third assertion stated, however, that the Common Market would enable an intensified transborder division of labour, whose economies of scales would lead to substantial welfare growth in all economies involved.[42] Due to the social ambitions of the Member State governments and the strength of national trade unions, trade benefits would internally be redistributed in such a way that it would increase the living and working condition of employees.[43] This argument turned the critical implications of the factor price equalisation theorem into the merry promise of Article 117 EEC Treaty: upward harmonization as a consequence of the Common Market.

b) The social compromise for integration

The above explicated interrelation between the neoclassical predictions of the social effects of the Common Market and the actual shape of the EEC labour constitution is in no way of only historical interest. It rather represents a social compromise that not only enabled the project of European integration, but also provides an indispensable element of its development and future trajectory.

As has been shown, the exact wording of Article 117 EEC can only be understood before the backdrop of the neoclassical theory of international trade. This allows claiming that these economic theories have been given constitutional relevance by anchoring their prognostic core into the Treaty itself. But this thesis finds support not only in the wording of the Treaty itself but also in the Spaak

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40 B Ohlin, *Interregional and International Trade* (1933) 7.

41 Most lucidly explained in PA Samuelson, 'International Trade and the Equalization of Factor Prices', [1948] *Economic Journal* 163.

42 International Labour Organisation, above n 34, § 210.

43 *Ibid*.

report of 1956.[44] At the conference of Messina in 1955, the ECSC founding states commissioned the Belgian foreign minister Spaak to chair a committee, whose report was meant to become, and indeed became, the foundation for the shape of further economic integration.[45] For this reason, the Spaak report represents something like the constitutional materials of the EEC, which have to be consulted in order to extract the deeper meaning of its provisions. Concerning the social effects of the Common Market, the Spaak report itself referred to a report of the ILO.[46] In turn, the ILO expert committee was chaired by Bertil Ohlin, who was at this time not only the most prominent proponent of the neoclassical theory of international trade[47] but also the chairman of the Swedish Liberal People's Party, whose general political orientation was social-liberal. The Ohlin report had to gain high social credibility and acceptance, as it was issued by a tripartite organisation, encompassing unions, companies and states, as it was compiled by a committee chaired by a man of the (then) political centre ground and as it met the highest scientific standards. In conjunction with its role as a substantial preliminary work for the Spaak report, which corroborated the founding of the integration project, the Ohlin report did not represent the opinion of some arbitrary experts, but a legitimising foundation of the project of economic integration.

Yet another aspect provides the neoclassical promises with constitutional relevance. Often the shape of the EEC labour constitution is also described as a compromise between the German and French delegations. Accordingly, the French demanded a more comprehensive convergence of the Member States labour and social provisions as a precondition for market integration, while the Germans dismissed such claims. In the compromise, the French side obtained at least the inclusion of the provision of equal remuneration (Article 119 EEC Treaty), a declaration of intent regarding Member State labour and holiday regulations (Article 120 EEC Treaty) as well as the reference to the general harmonisation competence in Article 100 EEC Treaty.[48] But although, according to this description, this result reflects the outcome of a political bargain, the inclusion of these provisions into the EEC mirrors exactly the position of the Ohlin report. Indeed, the report had argued that the opening up of the market did not require a convergence of labour and social regulations and it had

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44 Comité Intergouvernemental Créé par la Conférence de Messine, Rapports des Chefs des Délégations aux Ministres des Affaires Etrangères, 1956.

45 R Streinz, *Europarecht* (2008) para 20.

46 See for example Comité Intergouvernemental Créé par la Conférence de Messine, above n 44, 233 *et seq*; see P Davies, 'The Emergence of European Employment Law', in W McCarthy (ed), *Legal Intervention in Industrial Relations* (1993), 313 at 318 *et seq*. **CHECK**

47 See Ohlin's main work as cited in n 40. In 1977 Ohlin received, to honour his contribution to the theory of international trade, the Nobel Prize for economics.

48 Pipkorn, above n 30, Art 117 EEC Treaty para 18 *et seq*. The introduction of the German pension system turned out to be an important trailblazer (see AS Milward, *The European Rescue of the Nation-State* (2000) 212 *et seq*).

recommended to minimize the gap between working hours, to ban gender wage discrimination as distortions of competition and, finally, to introduce a harmonisation competence for individual distortions of competition.[49] Therefore, the Ohlin report provided the said compromise, being the decisive political breakthrough, with substantive rationality.

At this point, it has indeed to be clarified what the exact constitutional significance is of the established nexus between the neoclassical predictions and the shape of the EEC labour constitution: as economic predictions are only confirmed or refuted by real developments, without their constitutional aspects able to change this matter. A constitutional meaning can however be derived from the fact that the project of a comprehensive European economic integration could not have been set off without the neoclassical predictions; that this is historically true indicated by their anchoring in Article 117 EEC, their prominence in the constitutional materials of the Spaak report and their role as a rational foundation for the Franco-German bargain. From such a perspective, the neoclassical promise can and has to take a turn into the normative.

Taken normatively, the neoclassical thesis stating that Member States differences in labour costs constitute no competitive factor implies nothing less than that the competition triggered by the Common Market is not allowed to play out on the basis of labour costs. As labour costs derive from wages and other working conditions, which are themselves the result of social and political struggles which are enabled and pre-shaped by Member State labour constitution, this implies at a second level that the functioning of Member State labour constitutions is not allowed to be affected by the Common Market. The Member State labour constitution shall thus remain both legally autonomous from the constitution of the Common Market and factually autonomous from its effects. At a third level, the exclusion of labour cost competition and the autonomy of Member State labour constitutions finally imply that the economic integration of Europe is not allowed to shift the social balance of power between labour and capital in a partisan manner in favour of the latter.

This is the normative substance of the historical interrelation between the neoclassical theory of international trade and the EEC labour constitution, and it represents – in a term deliberately referring to the talk of constitutional compromises of the Weimar Republic and the German *Grundgesetz* in constitutional theory[50] – the *social compromise for integration* underlying the European project.

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[49] International Labour Organisation, above n 34, at 107, 110 and 113.

[50] For the Weimar Republik, see H Heller, 'Grundrechte und Grundpflichten', in *id* *Gesammelte Schriften* (1971) vol II, 281 at 312; *id*, 'Genie und Funktionär in der Politik', *ibid*, 611 at 621; F Neumann, 'Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung' (1930), in *id*, *Wirtschaft, Staat, Demokratie* (1978), 57; *id*, 'Der Funktionswandel des Gesetzes im Recht der Bürgerlichen Gesellschaft', in *id*, *Demokratischer und autoritärer Staat* (1968), 31 at 55. For an account of the German *Grundgesetz*, see W Abendroth, 'Zum Begriff des demokratischen und sozialen

3 The form of the European labour constitution and social change

The social compromise for integration, explicated above, not only explains the historical shape of the EEC but also provides, as an extralegal, social foundation of the European integration project, the normative yardstick for the present and future labour constitution of the Union. It is the very purpose of the European labour constitution to realise the social compromise for integration, and the concrete shape of the labour constitution can be critically judged by whether and to what extent it is able to realize this goal.

Under neoclassical predictions, the social compromise for integration had to be legally institutionalised in form of the EEC labour constitution. The above mentioned three essential empirical assertions of these predictions have however become completely outdated, provided they were at all valid in the first place:[51] the enduring correlation of labour costs and productivity requires a low mobility of capital and a system of fixed adaptable exchange rates. At present, the intra-European freedom of capital is used effectively, both in form of investment capital (Article 56 *et seq* EC, Article 63 et seq. TFEU) and fixed capital (as a shift of production sites, Article 43 *et seq*. EC, Article 49 *et seq* TFEU). The currencies which were once adaptable to the respective levels of productivity ceased to exist in 1999 with the introduction of the Euro through the European Monetary Union. Finally, the domestic redistribution of trade benefits required socially ambitious governments and strong unions, which might have been a justified expectation at the end of the 1950s, at the prime of Keynesian-Fordist macro economic governance. But this nexus was valid only as long as its underlying governance paradigm, which lost its appeal from at least the 1980s onwards.[52]

With these developments, the assertion turns out wrong that the EEC labour constitution provides the appropriate institutionalisation of the social compromise for integration. Hence, it was and is the task of critical European constitutional law to analyse the change of the European labour constitution and of European labour law in the light of the social compromise for integration. In this context, it might be empirically established that the compromise cannot be completely realized any more due to the changing socio-economic circumstances. Companies from the member states are now able to operate on a European level without any substantial problems. The freedom for goods, services and capital enables them to

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Rechtsstaates', in *id*, *Antagonistische Gesellschaft und politische Demokratie* (1972), 109 at 125 *et seq* and 139 et *seq*.

51 In this context, the criticism of the full-bodied promises of the neoclassical foreign trade theory by the neoclassical 'new theory of international trade' (PR Krugman and M Obstfeld, *Internationale Wirtschaft* (2006) ENGLISCH) has to be omitted; the same applies to the criticism of the neoclassical paradigm of international trade in general. For the latter, see M Heine and H Herr, *Volkswirtschaftslehre* (2003) 615 *et seq*.

52 B Jessop, 'Die Zukunft des Nationalstaates', in S Becker *et al* (eds), *Jenseits der Nationalökonomie?* (1997), 50 at 60 *et seq*; AS Milward, above n 48, 439 *et seq*.

combine high productivity with low labour-costs.[53] The actual state of mobility for the production factors labour and capital makes it impossible to abolish competition based on labour-costs completely, a fact which represents a fundamental shift in the power relation between capital and labour.[54] However, this state of affaires does certainly not diminish the normative relevance of the social compromise for integration. On the contrary it strengthens the need to achieve what ever remains possible under given circumstances.

III The Current State of the EU Labour Constitution

After portraying the labour-constitutional norms of the EEC as an instantiation of the social compromise for integration, the following offers an overview of the current EU labour constitution (1).[55] Thereafter, the central problem of these norms is explicated, namely the lack of congruence between rights and guiding norms on the one hand and competences on the other hand (2).

1 A survey of the relevant norms

a) Rights

As in the past, the freedom of movement and the abolition of discrimination (Article 39(1), (2) EC)[56] for Member State citizens as well as the legal guarantee

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53 H Flassbeck and F Spieker, 'Die Irrlehre vom Lohnverzicht', [2005] *Blätter für deutsche und internationale Politik*, 1071.

54 One of many evidences is the growing disparity of income distribution (see U Klammer, 'Armut und Verteilung in Deutschland und Europa', [2008] WSI-Mitteilungen, 19), another the decrease of the labour's share in national incomes in entire Europe (see F Breuss, 'Globalization, EU Enlargement and Income Distribution', WiFo Working Paper 296 (2007), available at www.wifo.ac.at/wwa/jsp/index.jsp (19 August 2008) – even on the basis of neoclassical economics).

55 Outlined is the state of European constitutional law before a potential entering into force of the Treaty of Lisbon. For changes see below, IV. 1. a) dd).

56 The freedom of movement and the abolition of discrimination, pursuant to Art 39 EC, is *lex specialis* both to Art 18 EC (M Hilf, in Grabitz and Hilf, above n 32, Art 18 EC para 5) and Art 12 EC (Case C-131/96, *Romero* [1997] ECR I-3659, paras 10–12).

of equal pay for men and women (Article 141(1) EC)[57] belong to the fundamental norms of the EU labour constitution. Besides, no further individual or collective legal position has up till now been included in the primary law of the Treaties.[58] This situation only changed with the EU Charter of Fundamental Rights, which meanwhile has been valorised by the European Court of Justice as a source for the cognition of basic rights as general principles of Community law (Article 6(2), (3) EU).[59] Important for the labour constitution are here especially the provisions regarding the right to property (Article 17(1) of the EU Charter of Fundamental Rights), the freedom to choose an occupation (Article 15(1) of the EU Charter of Fundamental Rights), the protection in the event of unjustified dismissal (Article 30 of the EU Charter of Fundamental Rights) and the right to fair and just working conditions (Article 31(1) of the EU Charter of Fundamental Rights), the right to industrial codetermination (Article 27 of the EU Charter of Fundamental Rights) as well as the right to collective bargaining and collective action (Article 12(1), Article 28 of the EU Charter of Fundamental Rights).[60]

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[57] Art 141(3), (4) EC furthermore assume a general principle of equal treatment under labour law (S Krebber, in C Calliess and M Ruffert (eds), *EUV/EGV* (2007), Art 141 EC paras 75 *et seq*). In its ruling in Case C-144/04, *Mangold* [2005] ECR I-9981, paras 74 *et seq*, the European Court of Justice established the general principle (Art 6(2)) of the prohibition of age discrimination in Community law.

[58] Some studies of European labour law stress social dialogue (Arts 138, 139 EC) under the subheading of collective labour law (M Fuchs and F Marhold, *Europäisches Arbeitsrecht* (2006) 202 *et seq*; D Krimphove, *Europäisches Arbeitsrecht* (2001) paras 599 *et seq*; E Szyszczak, *EC Labour Law* (2000) 31 *et seq*; R Blanpain, *European Labour Law* (2006) 643 *et seq*). The social dialogue grants European trade unions and employer associations particular privileges within European legislation, among those the remarkable right of negotiated legislation (see O Deinert, 'Partizipation europäischer Sozialpartner an der Gemeinschaftsrechssetzung', [2004] *Recht der Arbeit* 211). These rights have however no impact on the balance of power between the involved parties, especially as negotiations on legislation cannot be exposed to collective action (E Eichenhofer, in R Streinz (ed), *EUV/EGV* (2003), Art 139 EC para 9; B Bercusson, *European Labour Law* (1996) 542; KW Wedderburn, 'Consultation and Collective Bargaining in Europe: Success or Ideology?', (1997) 26 *Industrial Law Journal* 1 at 29 *et seq*). As to whether Art 139(1), (2) EC already establish the freedom to collective bargaining at the European level, see n 184 below.

[59] Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633, para 46; Case C-432/05, *Unibet* [2007] ECR I-2271, para 37; Case C-540/03, *Parliament v Council* [2006] ECR I-5769, para 38. For the changed situation due to the fact that the Charter of Fundamental Rights has been formally anchored in the Treaty of Lisbon see J Kühling in this volume ***.

[60] The Charter includes a number of further, concrete, individual rights, for instance the right to limitation of maximum working hours (Art 31(2) of the EU Charter of Fundamental Rights) and a right to paid maternity leave (Art 33(2) of the EU Charter of Fundamental Rights). With a few exceptions, they reflect subject matters of the current *acquis* of secondary law in European individual labour law – which can however create problems for the normative scope of fundamental rights (for an instructive example, see

The guarantee of central collective rights (Articles 27, 28 of the EU Charter of Fundamental Rights) and of dismissals protection (Article 30 of the EU Charter of Fundamental Rights), both essential for the social balance of power, is provided 'in accordance with Union law and national laws and practices'. Thus far, the meaning of this wording has not been clarified. Three positions have emerged. According to the first, the respective rights would be nearly completely deprived of an autonomous substance by the caveat;[61] they are watered down to a 'teleological interpretative directive'[62] for other provisions in European law. According to the second position, the caveat signals that the right needs further concretisation (*Ausgestaltungsvorbehalt*), while such concretisation has to respect the autonomous guarantee of the fundamental right.[63] Based on this position, a normative kernel has to be distilled out of the respective fundamental rights;[64] this type of right is well known in German constitutional law, not at least from Article 9(3) German Basic Law.[65] According to the third position, it is a limiting regulation (*Schrankenregelung*), which competes with the general limiting provision in Article 52(1) of the Charter. The competition should be resolved by establishing which limiting regulation offers the superior protection of fundamental rights, as only this would do justice to the coexistence of two limitations.[66]

It seems correct, however, to suggest that the cited reference to Union and national law and practices leaves the normative substance of the respective fundamental right untouched; it rather refers to the distribution of competences between the European and Member State level for the enabling and limiting

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E Riedel, in J Meyer (ed), *Charta der Grundrechte der Europäischen Union* (2006), Art 31 paras 19 *et seq*).

61 Krebber, in Calliess and Ruffert, above n 57, Art 27 of the EU Charter of Fundamental Rights para 5; P Goldsmith, 'A Charter of Rights, Freedoms and Principles', (2001) 38 *CML Rev* 1201 at 1212 *et seq*); E Pache, 'Die Europäische Grundrechtscharta ein Rückschritt für den Grundrechtsschutz in Europa?', [2001] *Europarecht* 475 at 481.

62 H Lang, in P Tettinger and K Stern (eds), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* (2006), Art 27 para 8.

63 S Rixen, in Tettinger and Stern (eds), above n 58, Art 28 para 14; for the extraordinary discretion of the national legislature, see R Rebhahn, 'Überlegungen zur Bedeutung der Charta der Grundrechte der EU für den Streik und die kollektive Rechtsgestaltung', in A Söllner *et al* (eds), *Gedächtnisschrift für Meinhard Heinze* (2005), 649 at 654 *et seq*; see also J Kühling in this volume.

64 For initial indications of such an argument, see C Hilbrandt, in FSM Hesselhaus and C Nowak (eds), *Handbuch der Europäischen Grundrechte* (2006), § 35 para 42 *et seq*.

65 *Entscheidungen des Bundesverfassungsgerichts* 84, 212 at 225; *Entscheidungen des Bundesverfassungsgerichts* 92, 365 at 393 *et seq*; W Höfling, in M Sachs (ed), *Grundgesetz* (2007), Art 9 paras 71 *et seq*; H Otto, *Arbeitskampf- und Schlichtungsrecht* (2006) § 4 paras 20 *et seq*.

66 S Peers, 'Taking Rights Away? Limitations and Derogations', in S Peers and A Ward (eds), *The EU Charter of Fundamental Rights* (2004), 141 at 165: 'higher standard approach'.

articulation of those rights. For the sensible area of collective rights and dismissals protection, it is again stressed – in addition to the already redundant array of references in Article 51(1), 2nd sentence, Article 51(2) (and Article 52(6) of the Charter according to the Lisbon Treaty) – that the new European guarantees of these rights does not overwrite the distribution of competences between the European and the Member State level. According to the justifications significant in the deliberations of the Fundamental Rights-Convention, the arrangement of competences was crucial for the inclusion of this reference,[67] while none argued for the case that the rights should only guarantee a kernel or nothing at all. This interpretation as a reiterated reference to the preservation of competences is also supported by the explanations of the chair of the Fundamental Rights-Convention: as they contain no indication that the reference to the responsible legal level has a different meaning than clarifying competences, especially one that would limit its normative substance.[68] In sum, this means that all limitations, also Member State limitations, must withstand Article 52(1) of the Charter.

Such scrutiny remains, however, under the significant general precondition that a given case falls within the scope of application of the Charter has been enabled (Article 51(1), 1st sentence of the Charter). And this, as must be noted with emphasis, constitutes the genuine problem of all labour-constitutional rights in the Charter (see subpoint 2 below).

b) Guiding norms

As stated at the beginning, guiding norms are here conceived as those constitutional norms beyond the constitutive basic rights of social actors that can exert judicial effects in the field of labour. In current European constitutional law, there is no lack of principles concerned with the social dimension of Europe. Yet, only a few refer directly to the field of labour relations. In Article 136(1) EC not only the Members States but also the Community commits itself to the improvement of working conditions and to social dialogue. Article 2 EU states as a general aim of the Union the advancement of social progress, which should also have some impact on labour relations.

While the labour-constitutional importance of the German reference norm, the principle of social statehood in Article 20(1) German Basic Law, has had clear

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[67] CONVENT 18 of 27.03.2000; see also the contribution of the Convention Member Jürgen Meyer, who was instrumental for the inclusion of social rights, arguing that the reference was equivalent with Art 51 *et seq* of the EU Charter of Fundamental Rights and hence redundant (N Bernsdorff and M Borowsky (eds), *Die Charta der Grundrechte der Europäischen Union* (2002), 370. Also: Riedel, above n 60, paras 9 *et seq*.

[68] CHARTE 4473/00 CONVENT 49, available at www.europarl.europa.eu/charter/pdf/04473_de.pdf (10 March 2008), 26 *et seq*.

contours since long,[69] the normative effect of the European social principles have overall not been inquired yet.[70] As far as the literature discusses the overall European legal principle of solidarity,[71] it focuses on characterising the mutual relationship of Member States as solidary but does not consider solidarity within a European society as a whole.

c) Competences

An overview of the current legal competences of the Union in the field of its labour constitution must differentiate. On the one hand, there are those competences that explicitly concern the field of employment. This includes competences pursuant to Article 137(2)(b), (1) EC, which with reference to the aims of the principle in Article 136 EC allows the Union to establish minimum standards in the fields of technical and social occupational health and safety, of working conditions, of dismissal protection, of the information and consultation of employees and of the representation of collective interests. Further competences are established by Article 141(3) EC in the field of gender discrimination[72] and by Article 40 EC in the field of freedom of movement within the EU. The established competences normally have to go through the co-decision procedure (Article 251 EC). An important exception is the competences in the field of dismissal protection and collective interest representation: in these cases the consultation procedure applies, which requires unanimity in the Council.

Besides the mentioned autonomous competences under labour law, also other competences of the Treaty can be employed. In the light of the previous European legislation, the following competences have to be highlighted: antidiscrimination measures (Article 13 EC), market related legal approximation (Article 94, Article 95(1) EC), regulations concerning the exercise of other market freedoms (Article 44, 47, 55 EC) in conflict of labour laws (Article 65(c) EC), as well as the residual provision (Article 308 EC). Here, the co-decision procedure only applies to market related labour law; all other competences are employed in the consultation procedure with unanimous Council decisions.

Before the backdrop of the last mentioned competences, the significance of the barring norm in Article 137(5) EC has to be discussed in more detail. Article 137(5) EC blocks the competences established in Article 137(2)(b) EC for the issues of remuneration, association and industrial conflict. This prevents, for

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69 See A Hueck, 'Der Sozialstaatsgedanke in der Rechtsprechung des Bundesarbeitsgerichts', in E Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit* (1968), 411.

70 In selected cases namely Art 136 EC has gained relevance, see eg Case C-43/75, above n 33 (adjustment in the case of wage discrimination).

71 See A von Bogdandy in this volume, at *** [182 *et seq*] with further references.

72 In addition to Art 141(3) EC, Art 137(1)(i) EC shows no autonomous substance and is hence actually redundant: Eichenhofer, above n 58, Art 137 EC para 21.

instance, that a unitary European minimum wage is introduced on the basis of the competence for minimum working conditions (Article 137(1)(b) EC). It remains unclear what effect this norm has for the employment of competences beyond Article 137(2)(b) EC. On the one hand, one could conceive the barring norm as a negative competence norm prior to all competences,[73] which would however contradict its own clear wording ('The provisions of this article shall not apply …').[74] On the other hand, one can regard the restricting norm merely as a negative criterion of Article 137(2)(b) EC and therefore deny any impact on other competencies.[75] A third position assumes that the barring norm possesses a certain impact for the interpretation of other competences.[76] This can be rendered more precisely: Legislation regarding subject matters of Article 137(5) EC may be based on other competences than Article 137(2)(b) EC, if their regulation is necessarily linked to regulations of the actual subject matter which belongs to the involved competence.[77] This understanding of Article 137(5) EC results from a historic-teleological interpretation of the provision: Article 137 EC was intended to extend the competencies of the EU in the area of labour legislation, while Article 137(5) EC at the same time excluded certain matters. Both can be explained by the fact that the matters of Article 137 EC were – following the compromise of social integration – not intended to be regulated by the EU at all. Therefore Art 137(5) EC makes explicit a structure of competencies underlying the EC as a whole, what had solely become necessary because of the introduction of Art 137 EC. In the light of the openness of other competences and of the wording of the norm suggests that Art 137(5) EC does not function as a negative competence norm, but it affects the other competencies in the above mentioned manner. Therefore European legislation in the areas of minimum wages, labour relations and collective bargaining is only admissible selectively and as an exception. The Treaty of Lisbon, if once entering into force, will not lead to any changes insofar.

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73 In this vein, CW Hergenröder, in H Oetker and U Preis, *Europäisches Arbeits- und Sozialrecht*, B 8400 (looseleaf, last update July 2000), paras 39, 41, at least in relation to Arts 94, 308 EC.

74 A von Bogdandy and J Bast, in Grabitz and Hilf, above n 32, Art 5 EC para 27. The suggestion of a European legislation on collective bargaining on the basis of Art 308 EC by R Kowanz rests on a similar position (see R Kowanz, *Europäische Kollektivvertragsordnung* (1999) 313 *et seq*).

75 von Bogdandy and Bast, *ibid,* arguing that the Community law does in general not constitute a 'bipolar' order of competences.

76 C Langenfeld and M Benecke, in Grabitz and Hilf, above n 32, Art 137 EC para 97; R Rebhahn, in J Schwarze (ed), *EU-Kommentar* (2000), Art 137 EC para 22.

77 In this vein, GA Mengozzi in Case C-341/05, *Laval* [2007] ECR I-0000, para 57.

2 The core problem of missing congruence

The labour constitution of the Union thus encompasses a comprehensive catalogue of labour-constitutional rights[78], some principles and a range of competences. Therefore, one could assume that it is in no way inferior to the labour constitutions of the Member States. Its core problem, however, is the lack of congruence of the labour-constitutional Union norms.[79] The array of constitutional rights and principles in the EU indicates that there is a substance to an EU labour constitution, which is seemingly modelled after Member State labour constitutions. Yet, the EU constitutional competences contradict such an impression. As explicitly stated at the beginning, a labour constitution does not only consist of its rights and principles, but also of the competences for their articulation. In constitutional nation states, the relevant competences of the national legislature and of the courts are in general unproblematic, which is why their possible congruence is not an issue of debate. Matters are different in the case of the federation of the European Union, in which the European level can only become active on the basis of individually granted competences[80].

This problematique shall at first be explicated for the European legislature. The European fundamental rights include essential rights of a modern labour constitution: the individual freedom of exercise of profession, collective participation rights, collective bargaining rights and the freedom of collective action. This array of rights, which are supposed to appear as European rights due to their anchoring in the Charta of Fundamental Rights, is however not represented in a congruent way in the order of competences of the European legislature; rather this order represents a kind of negative climax. For the articulation of the individual freedom of exercise of profession, there exists the competence for minimum working requirements together with the dismissals protection (Article 137(2)(b), (1)(b) EC)[81], the latter requiring unanimous

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78 This is the case if the Nice Charter of Fundamental Rights is put on par with the formally binding Community law, which can be justified with the Charter's role as a source of insight into the basic principles of the Community law (see above text accompanying n 59), although the Charter itself is not legally binding.

79 In the broad frame of the European social model, also R Blanpain, 'The EU Competence Regarding Social Policies', in *id et al* (eds), *The European Social Model* (2006), 57 at 82 *et seq*.

80 Of course, it could be the same with federal states. But assumingly it is not a conicidence but a result of the intrinsic logic of the development of modern welfare states (such as Germany or the USA) that the competence for labour legislation is located at the federal level.

81 Here, the individual labour law is conceived as the concretising articulation of the freedom of contract and the freedom of the exercise of profession. On the classification of the freedom of contract in Article 12 German Basic Law see *Entscheidungen des Bundesverfassungsgerichts* 81, 242 at 254; also R Scholz, in T Maunz and G Dürig, *Kommentar zum Grundgesetz* (looseleaf, last update June 2007), Art 12 para 58.

decisions in the Council. For the collective codetermination of employees a competence exists (Article 137(2)(b), (1)(e)/(f) EC), which also requires a unanimous Council decision. Finally, for the regulative realisation of collective bargaining rights at most only a competence for selective legislation exists by virtue of a necessary factual connection[82]. In sum, an array of European labour-constitutional rights can be found, yet essential rights cannot be articulated at all or can only be articulated under qualified conditions by the European legislature.

In addition, the European Court of Justice could also articulate the norms of the EU labour constitution. This happens, firstly, in competition with the European legislature to the extent that the Court decides about the interpretation and validity of legislative acts on the basis of labour-constitutional fundamental rights. Although such a constellation can occur, as the past has shown,[83] the articulation capability of the European Court of Justice does not exceed much the one of the European legislature.[84] Moreover, the European Court of Justice cannot replace the European legislature, which remains without competences, in the way national courts would (have to) replace an inactive national legislature. It is true that in the course of the preliminary ruling procedure (Article 234 EC), legal disputes might be decided upon which directly touch upon labour-constitutional rights included in the Charter of Fundamental Rights. Leaving aside the cases referring to secondary law just mentioned the Court can only enforce these Charter rights if the scope for

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82 For the scope of the restricting effect of Art 137(5) EC, see above, 1. c).

83 So, the European Directive concerning the posting of workers (Parliament and Council Dir 96/71, Posting of Workers, [1997] OJ L 18, 1) constitutes an infringement of Member State rights to collective action according to an adventurous interpretation by the ECJ (Case C-341/05, above n 77). Therefore, the Court should have taken Art 52(1) of the Charter of Fundamental Rights as yardstick for the Posting Directive. However, it simply refrained from doing so.

84 This possibility of articulation does not correspond, but has a much broader scope since national law, in case that it was once also serving the implementation of an only partially harmonised directive, is as a whole measured by European fundamental rights (see Case C-144/04, above n 57, para 75: The unrestricted possibility to engage on a fixed-term contract with employees older than 52 without objective justification is to be measured before the backdrop of the European principle of equal treatment, because the national law regulating part time-work and fixed-term contracts (*Teilzeit- und Befristungsgesetz*) served the implementation of a European directive). Whether or not this expansion of the protection by European fundamental rights represents a positive development remains to be seen at this point (for a positive account see Kühling in this volume, *** [606 *et seq*.]; for a critical account see T Kingreen, in Calliess and Ruffert (eds), above n 57, Art 51 paras 11 and 16, U Haltern, *Europarecht* (2007) para 1090 *et seq* and C Franzius, Der Vertrag von Lissabon am Verfassungstag: Erweiterung oder Ersatz der Grundrechte, ZERP-Diskussionspapiere **CITE**/2008 **[DE],** available at XXX). However, this selective control of national legal norms does not pave the way towards a unitary articulation of European rights.

the application of the EC has been opened up.[85] However, this restricts from the outset the potential articulation of labour-constitutional fundamental rights by the European Court of Justice to transborder labour relations. Pureley domestic individual and collective labour relations can therefore not be affected by the jurisprudence of the Court due to its limited possibilities of legal articulation at European level. Thus, neither the European Court of Justice will be able to create an integrated European labour constitution.

In sum, this implies that the labour-constitutional rights and principles give the impression of a fully-fledged labour constitution on European level, which could be comparable to those labour constitutions constituted by Member States' constitutional law.[86] But this impression turns out as a camouflage considering the missing congruence of rights and guiding norms with the labour-constitutional articulation competences of the European legislature and the European Court of Justice.

IV The form of the European labour constitution

It has now to be shown in how far and in which respect the EU labour constitution adequately actualises the social compromise for integration. The above mentioned decline of the main preconditions for the actualisation of the social compromise for integration in shape of the EEC labour constitution is reflected in the legal change culminating in the pertaining EU labour constitution. The latter apparently departs from the market-functional labour constitution of the EEC, yet a clear indication of the shape of the EU labour constitution cannot be recognised. The following section (1) deals with the obvious notion that the

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85 The same matter is reconsidered in the debate about the binding effect of Community fundamental rights on Member States, see G de Búrca and P Craig, *EU Law* (2008) 395. See also Kühling, in this volume ***.

86 Strengthening the basis for justification for the restriction of fundamental freedoms by the Member States has been described as one possible function of social fundemental rights (the same could count for the guiding norms): see JE Fossum and AJ Menéndez, 'Still adrift in the Rubicon? The Constitutional Treaty Assessed', in EO Eriksen *et al* (eds), *The European Constitution* (2005), 97 at 135 *et seq*; O de Schutter, 'La garantie des droits et principes sociaux dans la Charte des droits fondamentaux de l'Union Européenne', in JY Carlier and O de Schutter (eds), *La Charte des droits fondamentaux de l'Union Européenne* (2002), 117 at 119 *et seq*. A lot of work has to be done in this field. Until now the European Court of Justice has been depriving the social fundamental rights of any overshooting potential by deforming them into mere institutions for the realisation of common interests. For an example see Case C-438/05, *Viking* [2007] ECR I-0000, para 77.

current EU labour constitution is an evolutionary step towards a unitary European labour constitution, which integrates and corresponds to Member State labour constitutions. Subsequently (2 and 3), alternative concepts are discussed.

1 An integrated European labour constitution 'in the making'?

It was just mentioned, that the EU labour constitution gives the impression of an integrated European labour constitution but actually does not realise it. Therefore the prognostic question becomes pertinent, whether this phenomenon is the harbinger of some future reality, put differently: whether the current EU labour constitution is an integrated European labour constitution in 'the making'. To assess this point, a glance at the constitutional development is helpful, which has played itself out differently in the three categories of labour-constitutional norms.

a) Milestones in the development of the EU labour constitution

aa) The introduction of autonomous labour-constitutional competences: The Single European Act (1987) and the Social Agreement of Maastricht (1993)

For a long time, the European legislature was able to cope with the competence pursuant to Article 100 EEC Treaty (Article 94 EC/Article 115 TFEU) also in the field of labour law legislation. This was until the Single European Act, whose motive was to revive economic integration.[87] It was the Act's central element to subject only essential issues of market regulation to qualified majority decisions (Article 100a EEC Treaty, now Article 95 EC/Article 114 TFEU). Already at this time, it was recognised that such a move would reduce European integration to the Single Market project, which in turn would increase the pressure on workers.[88] Regardless, Article 100a(2) EEC Treaty did exclude the 'rights and interests of employed persons' from the newly introduced procedural facilitation of market-functionally justified harmonisation; in this respect the unanimity rule of Article 100 EEC Treaty (Article 94 EC) remained in force. In return, Article 118a EEC Treaty (Article 137(1)(a) EC) was established as the first formally autonomous Community competence under labour law in the field of technical and social, occupational safety and health. This was actually a counter-exception to the

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87 See CD Ehlermann, 'The Internal Market Following the Single European Act', (1987) 24 *CML Rev* 361.

88 The Single European Act remained a residual project vis-à-vis the more ambitious Treaty on the European Union, then already envisaged by the Parliament. See the so-called Spinelli Plan, [1984] OJ C 77, 34. See AJ Menéndez (ed), Altiero Spinelli: From Ventotene to the European Constitution, [2007] 1 RECON Report, available at www.reconproject.eu/projectweb/portalproject/Report1_Spinelli.html (30 May 2008).

restricting norm of Article 100a(2) EEC Treaty, which is emphasised by the application of the same decision procedures in the case of Articles 100a(1) and 118a EEC Treaty: 'rights and interests' of employees were excluded from facilitated harmonisation, unless issues of technical or social occupational safety and health were concerned. The application of the new competence in Article 118a EEC did indeed not need proof of the market-functionality of the rule; yet it was not based on a new constitutional decision leading towards a gradually integrated labour constitution.[89] Rather, the formal validity of the legal foundation derived from Article 100 EEC has been challenged in the past, although the subject matter itself remained uncontested.[90]

The shape of the labour constitution did not change until the Treaty of Maastricht came into effect. The Treaty deepened economic integration by complementing the Single Market with the Economic and Monetary Union. In advance and during Treaty negotiations, much effort was put in strengthening the social dimension materially and in making such endeavours public.[91] The most important element was meant to be the comprehensive extension of competences under labour law. But this plan failed due to a veto by the United Kingdom. The initially intended new competence norms could only be put into an agreement between the eleven other Member States, which was then formally linked to the Maastricht Treaty via the 'Protocol on Social Policy'.[92]

Apart from the integration of the European social partners into the process of European legislation,[93] the Social Agreement mainly contained two innovations. The first innovation was the extension of autonomous competences under labour law beyond health and safety at work. According to the Social Agreement, the competences encompassed the subject matters which are also presently covered, and excluded alike the issues of pay, the right of association, the right to strike or to impose lock-outs, and they were linked to the same procedures that apply today (Article 2(2), (1)(2–4) and (3)(2,3) Maastricht Social Agreement; now Article 137(2), (1)(b), (d)–(f), (i) EC/Article 153 TFEU). The second innovation was the determination of the form of the possible European regulation as minimum provisions.[94] Until then, the market-functional regulation of provisions under labour law in Article 100 EEC gave actually no formal guideline. Therefore, the Article (now Article 95 EC/Article 114 TFEU) still provides for highest standards

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89 J Curall, in H von der Groeben *et al* (eds), *Kommentar zum EWG-Vertrag* (4th ed 1991), Art 118 EEC Treaty para 62.

90 J Pipkorn, in von der Groeben *et al* (eds), above n 89, Art 118a EEC Treaty para 2.

91 J Kenner, *EU Employment Law* (2003) 219 *et seq*.

92 *Ibid*, 223; see also D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (2004) 194 *et seq*.

93 See above n 58.

94 A Lyon-Caen and S Simitis, 'Community Labour Law', in P Davies *et al* (eds), *European Community Labour Law* (1996), 1 at 8; S Giubboni, *Social Rights and Market Freedoms the European Constitution* (2006) 238 (Art 118a EEC Treaty authorises only to establish minimum standards).

and full harmonisation, if the European Market so requires. This change assumed, at the level of constitutional law, that national labour standards would need European support given the pressures by the Single Market and the Economic and Monetary Union. This is a very different justification for European labour law than the market-functional one given for the convergence of standards, in order to eliminate competitive distortions. In this respect, the insertion of autonomous competences to enact minimum provisions under labour law documents the departure from the market-functional paradigm of the EEC labour constitution, which was again confirmed by the inclusion of the Social Agreement into the text of the Amsterdam Treaty.[95]

bb) The constitutionalisation of rights: the Community Charter of the Fundamental Social Rights of Workers (1989) and the Charter of Fundamental Rights (2001)

Even before the Monetary Union, namely in the run-up to the passing of the Single European Act, many European actors considered the social dimension of European integration to be underdeveloped.[96] In this context, for many the still authoritative notion emerged that the representation of this social dimension should be achieved by constitutionalising social rights.[97] This found its first expression in the Community Charter of the Fundamental Social Rights of Workers,[98] which was proclaimed by the Member States in 1989 initially under exception of the United Kingdom.

Although the Community Charter possesses no binding effect, it adopts the language of individual and collective rights. In its first part, it enumerates a number of essential rights, especially the individual freedom to choose and engage in an occupation (Article 4 Charter of Social Rights), additionally even a right to 'fair remuneration' (Article 5 Charter of Social Rights), in the collective field rights to participation (Article 17, 18 Charter of Social Rights) as well as the

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95 The Treaty of Nice provided the opportunity to move to a procedure of co-decision via qualified majority in the council (Art 137(2) EC) in the fields of employment protection and the collective interest representation of employees without altering the Treaty. However, the matter remained unchanged.

96 J Curall and J Pipkorn, in von der Groeben *et al*, above n 89, pre Arts 117–128 EEC Treaty para 38; for a statement by an institution, see Opinion of the Economic and Social Committee on the Social Aspects of the Internal Market (European Social Area), CES(87) 1069.

97 Taken up by the Commission in European Commission, Working Paper – Social Dimension of the Internal Market, SEC(88) 1148, available at http://aei.pitt.edu/1346/01/social_internal_market_SEC_88_1148.pdf. See W Däubler, 'Sozialstaat EG? Notwendigkeit und Inhalte einer Europäischen Grundrechtsakte', in *id* (ed), *Sozialstaat EG?* (1983), 35.

98 European Commission (ed), *Social Europe* 1/90. The United Kingdom signed the Community Charter in 1998.

freedom of association and collective bargaining and collective action (Article 11–13 Charter of Social Rights). In regard to the articulation of these rights, the Community Charter however explicitly supported the division of competences under primary law at the time: the guarantee of the fundamental rights in the Community Charter was primarily the task of the Member States (Article 27 Charter of Social Rights). Irrespective of this matter, the Commission was instructed to submit– within the competence of the European level – initiatives concerning the effective implementation of the rights of the Community Charter (Article 28 Charter of Social Rights).

And this is what happened: the social action program of the Commission[99] following the Community Charter constituted the starting point for an extraordinary phase of legislative activity in the European field of labour law. For the legislative implementation of the program, however, the European institutions were dependent on those competences provided for in the Single European Act of 1987 (Articles 100a, 118a EEC Treaty), at least until the Maastricht Treaty together with the Social Agreement came into force (1993).[100]

After the implementation of the Commission's social action program, the political potential of the legally non binding Community Charter was exhausted.[101] This encouraged actors especially from legal scholarship to inquire into different ways to come to legally binding social rights at the European level.[102] Then, social rights became more prominent through the amendment of the old Article 117 EEC Treaty (now Article 136 EC) in the Amsterdam Treaty. The aim of Article 117 EEC Treaty should in future be sought 'having in mind fundamental social rights' following the Council of the European Union's European Social Charter of 1961[103] as well as the Community Charter. This seemed still not enough, as the aim was and remained to establish a constitutional stock of social rights.[104] This endeavour tied in with a general process, which aimed to give the free-floating jurisprudence of the European Court of Justice a legal-positive foundation based on the European fundamental rights. Although the European Court of Justice mentioned social rights guaranteed under international law only as a source of inspiration in its case-law and had not declared any European social rights as general legal principles of the Community law relevant

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99 Communication from the Commission concerning its Action Programme relating to the implementation of the Community Charter of basic social rights for workers, COM(1989) 568.

100 M Rhodes, 'Das Verwirrspiel der Regulierung', in S Leibfried and P Pierson, *Standort Europa* (1998), 100. **ENGLISCH**

101 Giubboni, above n 94, 102; M Rodríguez-Pinero and E Casas, 'In Support of a European Social Constitution', in P Davies *et al* (eds), above n 94, 23 at 35.

102 Lyon-Caen and Simitis, above n 94, 14; R Blanpain *et al*, *Fundamental Social Rights: Proposals for the European Union* (1996); B Bercusson *et al*, *A Manifesto for Social Europe* (1996).

103 European Social Charter (1961), ETS No 035.

104 Giubboni, above n 94, 105 *et seq*.

for decisions,[105] it remained certain that the European Charter of Fundamental Rights would contain not only civil and democratic but also social fundamental rights, considering the continuously felt social asymmetry of the integration process.[106] Many therefore welcomed the proclamation of the Fundamental Rights Charter in 2001 due to its codified social rights. As above outlined, it does indeed list a number of important individual and collective labour-constitutional rights. For many pundits, however, its fault until today lies (solely) in its legally non-binding nature.[107]

cc) The increase of guiding norms: the Social Agreement of Maastricht (1993) and the Amsterdam Treaty (1999)

As already outlined, Article 117 EEC Treaty is the labour-constitutional principle of the founding Treaty. In this respect, the Single European Act involved no changes. The establishing of the European Union in Maastricht entailed in Article B EU Treaty the commitment of the Union to foster the harmonious, balanced and sustainable development of social progress. Article 117 EEC Treaty was amended in the Social Protocol and not already in the Maastricht Treaty. According to Article 1 Social Protocol, the aims of Article 117 EEC Treaty are not only conceived as a shared concern of the Member States, but also as an aim of the Community itself. In addition, 'social dialogue' was introduced as a new, labour-constitutionally significant aim. Since Amsterdam, all subject matters named in Article 136(1) EC are framed as mutual goals of the Community and the Member States. Apart, no further amendments were made – neither here nor in the Nice Treaty.

dd) Innovations by the Treaty of Lisbon

The labour-constitutional amendments of the Treaty of Lisbon can be outlined quickly. Again, there are no changes at the level of competences, both with regard to subject matters and decision-making procedures. The Charter of Fundamental Rights will be formally incorporated into the constitutional law of the Union

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[105] E Szyszczak, Social Rights as General Principles of Community Law, in NA Neuwahl and A Rosas (eds), *The European Union and Human Rights* (1995), 211.

[106] The same tenor can be found in two expert reports of the Commission: European Commission (GD V), *For a Europe of Civic and Social Rights*, Report by the Comité des Sages (1996) and European Commission (GD V), *Affirming Fundamental Rights in the European Union*, Report of the Expert Group on Fundamental Rights (1999) („Simitis Report").

[107] Instead of many, M Weiß, 'Grundrechte-Charta der Europäischen Union auch für Arbeitnehmer?', in [2001] *Arbeit und Recht* 374 at 378; U Zachert, 'Die Arbeitnehmergrundrechte in einer Europäischen Gemeinschaftscharta', [2001] *Neue Zeitschrift für Arbeitsrecht* 1041 at 1046.

(Article 6(1) TEU-Lis).[108] Significant changes can only be found at the level of labour-constitutional guiding norms, whose array vary and are extended. Article 136 EC remains however unchanged as Article 151 TFEU. Concerning the goals of the Union and combining Article 2 EC und Article 2 EU, Article 3(3) TFEU still includes the aim of social progress, which now is qualified by the aim to work towards 'a highly competitive social market economy'[109] (Article 3(3)(1) TFEU); apart, the Union shall now also promote social justice (Article 2(3)(2) TFEU). Added is finally a new norm concerning the values of the Union (Article 2 TFEU), in which although the principle of 'solidarity' has not been promoted to those values founding the Union, it is listed as one of those principles characterising European society.[110]

b) A historically and politico-economically hardened asymmetry

Since the revision of the Amsterdam Treaty, the significance of labour-constitutional rights and principles has continuously increased. In the field of rights, the Amsterdam reference to the European Social Charter and the Community Charter in Article 136 EC was followed by the proclamation of social rights in the Charter of Fundamental Rights of Nice; their formal anchoring in the Treaty of Lisbon is imminent. This would arguably conclude the constitutionalisation of social rights.

The similar can be said about labour-constitutional guiding norms. Their extension began with the Social Agreement of Maastricht, continued to a rather modest extent in Amsterdam and went through a new heyday in the Reform Treaty. Ultimately, the number of similar principles could be increased *ad infinitum*; yet, it can also be said that the project to commit the EU to duties, goals and principles that at least correspond with the intention of the welfare state principle has largely been achieved by now. Contrary to the expansion of rights and principles of a European labour constitution, the autonomous competences under labour law stagnated after the Social Agreement of Maastricht.[111] The Social Agreement is the first and one-off extension of European legal competences in the field of the labour constitution; and this applies even more if one takes the recent Reform Treaty into account. Hence, the labour-constitutional development of the EU since Maastricht can be characterised by the asymmetric development of the expansion of rights and principles on the one hand, and the

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[108] For an account to the protocoll regarding the application of the Charta on Poland and the UK see C Möllers, in this volume, ***; J Kühling, in this volume, ***.

[109] On this curiosity, see F Rödl, 'Europäisches Verfassungsziel 'Soziale Marktwirtschaft'', [2005] *Integration* 150.

[110] C Calliess, in C Calliess and M Ruffert, *Verfassung der Europäischen Union* (2006), Art I-2 CT para 34.

[111] This is also the focus of a tartly phrased analysis by von W Streeck, 'Vom Binnenmarkt zum Bundesstaat?' in St Leibfried and P Pierson (eds), *Standort Europa* (1998), 369.

stagnation of competences on the other; the historical trajectory implies that this state will hardly change in the future: initiatives for more comprehensive competences under labour law were tabled at all Treaty conferences, but with the exception of Maastricht they all failed. Even in the European Convention the extension of competences was beyond reach, although it probably offered the most fruitful terrain for such fundamental initiatives.[112]

However, some might have counted on the fact that an integrated European labour constitution can be established on the basis of those competences already in effect since Maastricht. This assertion presupposed that the dynamics of European legislation interpreted their formal competences in a wide sense and their functions in a creative manner, transcending the very boundaries intended by the masters of the Treaties, supported and encouraged even by the social rights of the Charter of Fundamental Rights and by the newly introduced guiding norms. The antetype for such expectations was the Community Charter of Fundamental Social Rights for Workers, which indeed triggered an ambitious legislative program, thereby using already existing competences in a creative manner. Factually, the social fundamental rights of the Nice Charter of Fundamental Rights did in contrast not trigger any comparable legislative activity.[113] Rather, the extent of legislation under labour law continuously decreased since the Treaty of Amsterdam, and furthermore the new autonomous competences of Article 137 EC have hardly been used in this time. Also for the next years, the Commission plans no relevant legislative activity in labour law.[114] Retrospectively, the hopes for a catalytic effect of the social rights of the Charter of Fundamental Rights were in vain.

Both the stagnation of competences *per se* and its perception by the legislator are however not (solely) the result of contingent political compromises but is rather caused by socio-political factors. For the particularly relevant matter of pure labour costs, it should be considered that differences in labour costs encompass differences in productivity.[115] For example unitary European minimum wages can therefore not been agreed upon: if they conformed to the Member State with the lowest wage level, they would be ineffective for all other Member States; if they conformed to the Member State with the highest wage level, they would turn into

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[112] See the final report of the working group 'Social Europe': CONV 516/1/3 REV 1, available at www.european-convention.eu.int.

[113] Also B deWitte, 'The Trajectory of Fundamental Rights in the EU', in G de Búrca and B deWitte, *Social Rights in Europe* (2005), 153 at 166 *et seq*.

[114] See the Green Paper of the European Commission: 'Modernising labour law to meet the challenges of the 21st century', COM(2006) 708, and the Social Agenda 2005–2010 [2006] OJ C 117, 256. An exception will be the Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights (COM(2007) 603), which refers to the freedom of movement and competition, and hence to Arts 42, 94 EC.

[115] This theorem of the Ohlin report remains valid, despite its outdated economic and legal implications (see above II 2/3).

competitive disadvantages for all others; if they assumed a middle position, both effects would be caused.[116] Therefore, almost all Member States would be concerned to be disadvantaged.

Moreover, European welfare states have been characterised as complex systems, which can follow different basic models.[117] As internal regulatory arrangements and their numerous interdependencies are typical for these models, for the superior European level it becomes problematic to intervene in particular areas in order to harmonise standards. The norms of the national individual and collective labour law interact in numerous ways with other social and public regulations (e.g. of social insurance, employment promotion, social welfare, vocational training) and those in turn are linked to the national production regime,[118] so that extensive European interventions into national labour law can be expected to have disintegrative and dysfunctional effects because of the integrated European labour constitution.[119]

In contrast to the image of a slow but continuous progress, the previous account highlights that there was only one phase of real dynamic in the history of the European labour constitution. Taking into account its antecedent and descendant, it is a phase that stretches from the Single European Act to the inclusion of the Social Agreement in the Amsterdam Treaty, i.e. from 1986 to 1996.[120] Thereby, this dynamic supported those fundamental changes in European constitutional law between the start of the project of the Single Market in 1986 and the introduction of the Monetary Union in 1993. Both steps constituted quantum jumps in economic integration that required material and legitimatory compensation under labour and social constitutional law. But, such compensation remained small for politico-economic reasons, and so all attempts failed to remedy the situation in Amsterdam, Nice and also in the constitutional Treaty. Comparable quantum

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[116] F Scharpf, *Regieren in Europa: Effektiv und demokratisch?* (1999) 76 *et seq*; K Busch, 'Perspektiven des Europäischen Sozialmodells', HBS Working Paper 92 (2005), 44, available at www.boeckler.de/pdf/p_arbp_092.pdf (1 September 2008).

[117] The fundamental work by Esping-Andersen identifies three baisc models: G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990), the critical discussion by Ferrera four models: M Ferrera, 'A New Social Contract? The Four Social Europes', RSCAS Working Paper 36 (1996), available at XXX. The eastern enlargement constitutes at least a forth model.

[118] P Hall and D Soskice, 'An Introduction to Varieties of Capitalism', in *id* (ed), *Varieties of Capitalism* (2001), 1 at 38 *et seq*. With particular reference to the regime of industrial relations T Blanke and J Hoffmann, 'Auf dem Weg zu einem Europäischen Sozialmodell', [2006] *Kritische Justiz* 134 at 141 *et seq*.

[119] W Streeck, 'Industrial Citizenship under Regime Competition', (1997) 4 *Journal of European Public Policy* 643; C Offe, 'Demokratie und Wohlfahrtsstaat: Eine europäische Regimeform unter dem Stress der Integration', in W Streeck (ed), *Internationale Wirtschaft, nationale Demokratie* (1998), 99.

[120] Even more critical Wolfgang Streeck, who identifies already this phase as a 'decline of the social dimension', W Streeck, above n 100 at 377 *et seq*.

jumps in the constitution of economic integration, which could reinvigorate political pressure for compensation, cannot be expected for quite some time.

The notion that the EU labour constitution represents an integrated European labour constitution in the making requires therefore an alternative. For this purpose, there are two choices: the notion of a post-regulatory labour constitution of the Union (2) and the new notion of a European association of labour constitutions, which has to be elaborated here (3).

2 A post-regulatory labour constitution for the EU?

Apart from the inclusion of the United Kingdom into the provisions of the Social Agreement in the fields of labour and social policy, the amendments to the Treaty of Amsterdam entailed above all a new chapter on employment (Articles 125–130 EC/Articles 145–150 TFEU). The chapter contains no labour-constitutional norms in the outlined sense, i.e. rights, principles and competences constituting and shaping the power relations between capital and labour, rather they relate to the coordination of Member State employment policies (see Article 126(2) EC/Article 146 TFEU) and are therefore not immediately relevant in the present context. Nevertheless, the employment chapter was for many the first indication that the social dimension of European integration was strengthened in addition to the economic one.[121]

The European coordination of employment policy follows a fixed cycle of European employment guidelines, Member States' annual reports, the examinations of these reports, the legally non-binding recommendations to Member States as well as a Community employment report (Article 128 EC Article 148 TFEU). Thereby the European level can foster Member State cooperation through initiatives 'aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences' (Article 129 EC/Article 149 TFEU). These two features are by many seen as a new and groundbreaking *modus operandi* of the European level, raising high normative expectations.[122] With the

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[121] For instance, I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam', (1999) 36 *CML Rev* 703 at 733 *et seq*. For the political genesis of the employment chapter, see J Goetschy, 'The European Employment Strategy: Genesis and Development', [1999] *European Journal of Industrial Relations* 117.

[122] For instance, C de la Porte and P Pochet (eds), *Building Social Europe through the Open Method of Coordination* (2002); J Zeitlin and DM Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments* (2003); CF Sabel and J Zeitlin, 'Learning from Difference: the New Architecture of Experimentalist Governance in the European Union', (2008) 14 *ELJ* 271.

Lisbon European Council, it was extended to several areas of social policy[123] and got the now common name 'open method of coordination'.

At this point, the open method of coordination in the area of employment and labour law[124] deserves attention, because given the backdrop of socio-political and economic differences among the Member States it is by some observers seen as a real alternative to a comprehensive EU labour constitution, as a post-regulatory[125] renewal of the social promise of European integration. One perspective under labour law, which is somewhat typical in its style and contents, can be summarised as follows:[126] the open method of coordination opens up a space in which the Member States learn from each other in the areas of employment law and employment policies through deliberative debate; this process is normatively guided by the relevant social rights. On the basis of common goals, specific solutions for the Member States are sought that reflect the characteristics of the traditional Member State constitution of industrial relations.

There is, however, much that contradicts the view that this is an accurate description of the present or at least a future reality. First, coordinating procedures, which supposedly constitute the entirely new integration mode of the open method of coordination, are stipulated for labour law (even including collective labour law) and employment since the founding of the EEC (Article 118 EEC Treaty), but this coordination mandate of the European level has not produced any relevant results, which gained much public attention. In this respect, the question should be answered of why comparable coordination powers of the European level should today lead to totally different results. The thesis that the open method of coordination documents the lacking willingness of Member States to subject their own systems to changes initiated by the European level seems much more plausible.[127] Second, the description is based on the erroneous notion that the main problem in the area of labour law and employment policies is inadequate knowledge, which could be remedied by cognitive learning.[128] Instead,

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[123] European Council, Presidency Conclusions of the Lisbon European Council 23 and 24 March 2000, paras 37–40, available at www.europarl.europa.eu/summits/lis1_de.htm (2 June 2008); prominently included by the Commission in European Commission, White Paper: European Governance, COM(2001) 428, 28 *et seq*.

[124] See also Art 137(2)(a) EC, introduced by the Treaty of Nice, whose potential lags behind Art 140 EC (previously Art 118 EEC Treaty); see Krebber, in Calliess and Ruffert, above n 57, Art 137 EC para 36.

[125] See C de la Porte *et al*, 'Social Benchmarking, Policy Making and New Governance in the EU', (2001) 11 *Journal of European Social Policy* 291 at 293.

[126] Giubboni, above n 94, 245 *et seq*, 266 *et seq* and 277 *et seq*.

[127] A Schäfer, *Die neue Unverbindlichkeit* (2005) 179 *et seq* and 215.

[128] Important proponents of the concept of European politics as a process of experimental learning, in which social contradictions and underlying forces play no role, are Joshua Cohen, Charles Sabel and Jonathan Zeitlin. See, eg, J Cohen and C Sabel, 'Directly-Deliberative Polyarchy', (1997) 3 *ELJ* 313, and J Zeitlin, 'Introduction: Governing Work and Welfare in a New Economy', in Zeitlin and Trubek, above n 122, 5. For a

both areas are to a high degree shaped by normative conceptions, and at the same time social and political forces pre-structure the ways for their political handling. A real problem therefore emerges, with a high ideological potential, if the open method of coordination does not create European arenas for social and political debate, but only spaces for, at best, a mutual learning of national labour bureaucracies. Finally, the idea remains completely unfounded that social rights should normatively guide the coordination processes of labour law and employment policy. Since such normative guidance is not carried out in a legal binding and controlled manner, such notions come close to wishful thinking.[129]

The notion of a post-regulative labour constitution seems hence to be fundamentally misguided.[130]

3 The EU labour constitution in a association of labour constitutions

As indicated in the introduction, the concept of "multilevel constitutionalism" (*Verfassungsverbund*) developed for the constitution of public authority shall here be applied to the labour constitution. The analysis of the EEC labour constitution shows that the basic function of the Union level of the European association of labour constitutions is to realise the social compromise for integration under changing social and economic conditions. Here, the social compromise for integration consists of the fact that there is no competition in the Single Market on the basis of labour costs that the labour constitutions of the Member States remain

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critical account see C Offe, 'The European Model of "Social" Capitalism: Can It Survive European Integration?', [2003] *Journal of Political Philosophy* 437 at 462 *et seq*.

[129] The optimistic distortions of the OMC seem to hamper down-to-earth insights: European employment policy is characterised by a turn from the paradigm of 'full employment' to the paradigm of 'employability' (for an explication of this difference, see R Salais, 'Reforming the European Social Model and the politics of indicators', in M Jepsen and A Serrano (eds), *Unwrapping the European Social Model* (2006), 189). This turn is caused by the structures of the European labour and social constitution themselves: the Union provides for almost no instruments for an autonomous full employment policy and the European coordination of Member State full employment policies is unfeasible due to political and socio-economical differences. As a matter that can be taken up at the European level, individual employability remains (Offe, above n 128, 437 at 457 *et seq*; A Somek, 'Concordantia Catholica: Exploring the Context of European Anti-Discrimination Law and Policy', [2005] *Transnational Law and Contemporary Problems* 959 at 982 *et seq*).

[130] Ideas of 'post-regulatory' politics produce a problematic de-juridification, which undermines the endeavour for consitutional ties beyond the nation state. However, a more detailled discussion of this problem is omitted at this point. For a critical account see C Joerges, 'Integration durch Entrechtlichung?' (gibt es nicht einen neuen englischen Text von Joerges unter dem gleichen Titel in ELRev 2008, June?), ZERP-Diskussionspapier 1 (2007), available at www.zerp.uni-bremen.de.

autonomous in determining national labour costs and that European economic integration does not deliberately shift the balance of social power towards the part of the capital. Against this backdrop, it is argued in the following that the EU labour constitution can today perform three functions: first, it legally supports the autonomy of Member State labour constitutions. Second, it harmonises national labour laws, if and in so far their differences constitute in individual cases labour cost related competitive distortions. Third, it finally ensures that the scope of the social rights of workers in Europe drags not behind the activity range of companies. Put in labour-constitutional terms, the EU labour constitution legally supports the effective development of Member State competences in the labour-constitutional field (a); it has legal competences for market-functional harmonisation (b) and guarantees the transnational dimension of the labour-constitutional rights of workers (c).

a) Protection of the autonomy of Member State labour constitutions

The social compromise for integration requires that those competences are effectively exercised that have remained with the Member States with good reasons. This means above all else that the norms of the Member States generated on a labour-constitutional basis shall not be threatened by restrictions that did not exist before the beginning of the project of European integration. What is needed is therefore an effective protection of the autonomy of Member State labour constitutions. This protection of Member State autonomy is required in two directions, on the one hand, in a horizontal direction in relation to other Member States and, on the other hand, in a vertical direction in relation to the Union.

aa) Horizontal protection: conflict of labour laws and fundamental freedoms

The opening of intra-European borders for goods (Article 28 EG/Article 34 TFEU), persons (Articles 39, 49 EG/Articles 45, 56 TFEU) and capital (Articles 43, 56 EG/Articles 49, 63 TFEU) raises the question of the transnational scope of application of Member State labour law and of the horizontal range of Member State labour constitutions. Put differently, the matter is whether and to what extent goods, persons and capital can disperse the law of labour relations, by way of exercise of fundamental freedoms, from one Member State to another. Via the fundamental freedoms, a conflict ultimately ensues about the respective scope of Member State labour constitutions in their interrelation.[131] In the association of labour constitutions, it is the function of the EU level to regulate this horizontal conflict through a superior law of conflict of laws in a way that does justice to the social compromise for integration.

[131] See F Rödl, *Weltbürgerliches Kollisionsrecht*, PhD-Thesis EUI Florence (2008) 225 *et seq*; on file with the author.

The European level can indeed cope with this function both with the aid of legal provisions allowing for justified restrictions to fundamental freedoms and the European international law concerning contracts of employment. The integration compromise also specifies the main substance of the European conflict of labour laws: in order to avoid labour cost competition, the law of the place where required labour is performed has to be applied, so that at the same place the same pay for the same work is rewarded. Article 8 of the new Rome I Regulation[132] (corresponds to Article 6 Rome Convention[133]) implements this principle technically in form of the so-called principle of favourability which guarantees employees the level of working conditions at their place of employment, but allows more favourable working conditions pursuant to a law chosen by the involved parties.

For those national norms under labour law that do not fall under the law governing the employment contract, among them the overriding mandatory provisions (see Article 9(2) Rome I Regulation) but also the norms of collective and public labour law, it are the fundamental freedoms that provide the conflict of laws, which solve the horizontal conflicts and protect autonomy. It has in fact been argued that the validity of national labour law is *ab initio* excluded from the scope of application of fundamental freedoms;[134] and this suggestion stands in accord with the here suggested notion of a guarantee of Member State autonomy in the area of their labour constitution. But, the European Court of Justice ruled differently and subjected the norms of national labour law to the usual test for national restrictions of fundamental freedoms. This does, however, not reject the view presented here. Rather, the examination according to the test serves only the aim to prevent the abuse of Member State labour law for protectionist purposes. The national labour law is subject to the said test, but as the protection of workers, the basic function of all labour law, provides an aim which justifies the restriction of fundamental freedoms,[135] the further examination of proportionality and adequacy ensures only that workers' protection is not used as a pretext. Only in very exceptional cases,[136] the test would lead to significant intrusion into national law.

In this context, the posting of workers provides an important illustration. In the case of the temporary posting of workers, the usual place of employment,

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[132] Parliament and Council Reg 593/2008, Rome I, [2008] OJ L 177, 6.

[133] As Convention on the Law Applicable to Contractual Obligations (Rome Convention) ([1980] OJ L 226, 1) in form of an international treaty between member states without a basis in Community law

[134] B Hepple, *Labour Laws and Global Trade* (2005) 214 *et seq*; S Deakin, 'Labour Law as Market Regulation' in Davies *et al* (eds), above n 94, 63 at 73.

[135] Case 279/80, *Webb* [1981] ECR 3305, para 19.

[136] This concerns mainly cases in which companies carry a double burden that, notably, cannot be justified by the social compromise for integration, for instance Cases C-369/96 and C-376/96, *Arblade* [1999] ECR I-8498, para 34, and Case C-165/98, *Mazzoleni*, [2001] ECR I-2213, para 25.

significant for the applicable contract law under Article 8 Rome I Regulation, lies not in the host but in the home country (Article 8(2)2Rome I Regulation), so that the posting of workers provides the opportunity for a pure labour cost competition. In the aftermath of the second enlargement of the Union by Portugal and Spain in 1986, concerned Member States opposed this development in the form of national laws on posted workers, and stipulated that their labour laws also apply to posted workers. Beginning with its ruling *Rush Portuguesa*, the European Court of Justice ruled that these laws are fundamentally compatible with the freedom to provide services. [137]

However, at least for a certain period of the legal integration process, the autonomy of national labour constitutions was under pressure due to an instrumentalisation of fundamental freedoms against public labour law. In the area of the free movement of goods, cases of reference are the rulings in *Nachtbackverbot*[138] concerning the German ban on night baking in bakeries and cafés and *Conforama*[139] concerning the ban on Sunday work under French law. In both cases, the European Court of Justice saw the working time regulations as justified.[140] Even the free movement of workers was mobilised, in order to restrict Member State autonomy. But this attempt also failed:[141] in the case *Graf,*[142] an Austrian regulation had to be judged upon, which concerned the deprivation of the claim to a redundancy payment in the case of workers leaving their job voluntarily. Only the deprivation renders the payment an instrument of dismissals protection. To declare it a breach of European law would have overridden this purpose and transformed it into a (as such senseless) termination bonus. Although its compliance with the fundamental freedoms should been also examined, the European Court of Justice found this rule not even apt to restrict the free movement of workers so that it needed no further justification.

Although national labour law was not exempted from the examination of compliance with the fundamental freedoms, thus far it has endured the particular

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[137] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417, para 18; confirmed eg by Case C-164/99, *Portugaia Construçiões* [2002] ECR I-787, para 21.

[138] Case 155/80, *Oebel* [1981] ECR I-1993.

[139] Case C-312/89, *Conforama* [1991] ECR I-1021; see also Case C-332/89, *Merchanidse* [1991] ECR I-1027, treating a comparable ban in Belgian law.

[140] Before the Maastricht Treaty and the Social Protocol came into force, the Court, referring not to the 'protection of workers' but to a more competence-related vocabulary, argued that it was the responsibility of the Member States to regulate working hours. The free movement of goods was also subject to Case C-188/84, *Commission v France*, [1986] ECR I-419, which was concerned with technical health and safety regulations as hindrance for the import of goods.

[141] S Roloff, *Das Beschränkungsverbot des Art. 39 EG (Freizügigkeit) und seine Auswirkungen auf das nationale Arbeitsrecht* (2003) 149 *et seq*.

[142] Case C-190/98, *Graf* [2000] ECR I-493. For a convincing critical view, from a perspective of the doctrine of fundamental freedom law, see Kingreen in this volume, at *** [661].

examinations mainly intact. Up to this point, it is plausible to interpret the general application of the compatibility-test as a mere control against through concealed protectionism. Even the ruling in *Viking*[143] remained in this frame, though the decision deserves, in a different context, strong criticism due to the exorbitant horizontal direct effect of market freedoms[144] stated therein. Here, it was at stake whether the Finish law of collective action, which allows strikes aiming at the hampering of intra-European plant relocations, violates the freedom of establishment. The European Court of Justice answered this question not bluntly in the negative only because of the particular circumstances of the case;[145] however, it confirmed that the right to strike, understood by the Court as an instrument of worker protection, can justify the restriction of the right of establishment.

bb) Vertical protection: European competition law and secondary law

The Member States' labour constitutions, especially the effective exercise of Member State competences, require not only horizontal protection, but also vertical protection against the substantive secondary law of the European Union including European competition law.[146]

In this context, the systematic problem is caused by the primacy in application of Community law. Although the primacy of the superior legal level is well known from federal constitutional law,[147] its unconditional application to the relation of Member State and Union is precarious, whereat the latter acts upon the basis of limited and diligently chosen competences. Many Union provisions under primary and secondary law concern areas in society for which they are not responsible according to the prescribed competences. In these constellations,[148] the mere enforcement of primacy equals the extension of societal functional logics that are subject to Union law and competences (competition and Single Market) at

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143 Case C- 438/05, above n 86.

144 See Kingreen, in this volume ***.

145 The relevant considerations of the ECJ show, however, some problematic reductions of the fundamental right to strike. See C Joerges and F Rödl, 'Das soziale Defizit des europäischen Integrationsprojektes', [2008] *Kritische Justiz* 149.

146 For the irregular constitutional status of the European competition law, see J Bast, 'The Constitutional Treaty as a Reflexive Constitution', (2005) 6 *German Law Journal* 1433 at 1441

147 See Art 31 German Basic Law: 'federal law shall take precedence over Land law' – characterised by the Federal Constitutional Court as fundamental norm of the 'Grundgesetz': *Entscheidungen des Bundesverfassungsgerichts* 36, 342 at 365 *et seq*.

148 For these constellations, Christian Joerges coined the term 'diagonal conflicts'; see, for instance, C Joerges, 'Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin', in A Furrer (ed), *Europäisches Privatrecht im wissenschaftlichen Diskurs* (2006), 133.

the detriment of those functional logics that are to be instantiated by Member State according to the order of competences.

This fundamental problem has particular repercussions for the labour constitution. Under primary law, it was especially the European competition rules whose range had to be determined in relation to Member State labour constitution. Accordingly, the European Court of Justice ruled that exemptions in national labour law do not constitute notifiable state aid under Article 88(3) EC/Article 108 TFEU.[149] The central conflict between European competition law and Member State labour constitutions is exemplified in the *Albany* case.[150] The dispute concerned the statutory membership in an occupational pension fund established by collective bargaining. In this context, the European Court of Justice had also to tackle the question of whether the underlying collective agreement was in breach of Article 81 EC/Article 101 TFEU. This was negated by the Court at a fundamental level: labour agreements that serve the social objectives of the EC are *per se* not covered by the ban of anticompetitive agreements.[151] The same applies in case of a declaration of universal applicability of collective agreements.[152]

The result of the ruling could not have been different. It would be unthinkable to interpret national collective agreements as agreements under Article 81 EC, which would then only be valid if they did not affect the Common Market under exceptional circumstances. It would have meant a blatant revocation of the social compromise for integration, which would have demolished the European integration project politically, if the European Court of Justice had annihilated the foundation of every national labour constitution by way of attacking collective agreements. In doctrinal terms, the Court derived its solution solely from the wording of Community law and referred in a methodologically rather lose manner to the principles of Article 2 EC, Article 3(j) EC, Article 136 EC, as well as the norms determining competences and tasks in Articles 137 and 138 EC (at that point still in the shape of the rules of the Maastricht Social Protocol).[153]

More controversial than the precedence of national collective bargaining law over European competition law deduced from *Albany* were the solutions of conflicts between Member State labour constitutions and European secondary law, especially in the form of directives. A highly intense conflict of such a kind was the *Laval* case,[154] in which a Latvian company demanded Swedish unions to pay

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[149] Case C-189/91, *Kirsammer-Hack* [1993] ECR I-6185, concerning the exemption of small enterprises from the general dismissals protection, and Cases C-72/91 and C-73/91, *Sloman Neptun* [1993] ECR I-887, concerning the conflicts of law with regard to the German *Flaggenrechtsgesetz* ('Law on the governing of the flag').

[150] Case C-67/96, *Albany* [1999] ECR I-5751.

[151] *Ibid*, para 60.

[152] *Ibid*, para 66.

[153] At this point, it may be assumed that the ruling in *Albany* fostered the opinion that the social dimension of Europe can be strengthened with the aid of norms determining values, goals and tasks.

[154] Case C-341/05, above n 83.

compensation for damages caused by industrial action. The decisive factor for the outcome of the proceedings was not least the question of what regulatory contents the European Posted Workers Directive entailed.[155] The Directive was filed on the basis of Article 55 and Article 47(2) EC (Articles 62, 53 (1) TFEU), i.e., on the basis of the competence for the coordination of Member State legal and administrative provisions concerning the provision of services. With reference to the above mentioned legislation beginning with *Rush Portuguesa*, the Directive stated the obligation of Member States to extend both legal minimum working requirements in general and general collective agreements to the posting of workers in the building industry, as far as they touch upon a core area of working conditions (see Article 3 European Posted Workers Directive). In the *Laval* case, the European Court of Justice surprisingly turned the European Posted Workers Directive into a Right-to-Strike-Restriction Directive. The Court saw in it a full harmonization of national laws of cross-border labour disputes vis-à-vis foreign service providers, which gives unions the possibility of collective action only under very restrictive conditions.

The ruling in *Laval* is thus a flagrant breach of the principle of the protection of Member State labour constitutions against European law, which is functionally bound by other objectives and foundations. The politico-legitimatory damage of the decision can still not be fully assessed.[156] In any case, it is an urgent desideratum of European constitutional law to give those competence provisions reflecting the social compromise for integration of the Community justified supremacy over the technical primacy of European law.[157]

b) Competences for a market-functional substantive labour law

According to the EEC labour constitution, substantive European labour law should be nothing more than market-functional labour law.[158] As the account of its historical development and politico-economic circumstances has shown, it can hardly be otherwise in the current situation. Thus, the second achievement of the EU level in the association of labour constitutions is creating market-functional labour law on the basis of the relevant competences. Four categories can be devised. The first consists of those parts of anti-discrimination law that regard

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[155] See the reference in above n 83.

[156] The following ruling appears as a downright deliberate aggravation of the situation, Case C-346/06, *Rüffert* [2008] ECR I-0000, concerning the inadmissibility of wage-related social clauses in public procurement.

[157] The principle of subsidiarity can apparently not achieve this function – contrary to T Oppermann, Europarecht (2nd ed 1999), para 624. In this context it appears to be quite helpful to remember a more moderate approach to justify the restricting impact of European directives, previously held by the ECJ, see A Furrer, *Die Sperrwirkung des sekundären Gemeinschaftsrechts auf die nationalen Rechtsordnungen* (1994) 90 *et seq*.

[158] See II. 1. above.

European labour law, the second forms the European harmonisation of standards under labour law required for the functioning of specific markets, the third encompasses health and safety regulations, and the fourth consists of standards in the field of co-determination which are a necessary annex to European company law.

aa) Anti-discrimination law

Anti-discrimination law provides the comparatively biggest part of substantive European labour law. The market functionality of anti-discrimination law under labour law has already been explained, as far as it relates to pay discrimination: discrimination is the underestimate of work and thus provides the basis for a pure labour cost related and hence unfair competitive advantage. This point of view is therefore the foundation for all European anti-discrimination legislation,[159] given they concern pay, the costs of social security and other cost related working conditions. The same applies to the directives concerning part-time work and fixed-term employments, which shall also prevent the undervaluation of work in atypical working relations. Compared with the original EEC-labour constitution, only the array of prohibited discrimination features has been expanded until today.

Despite the classification of anti-discrimination law as law functional to the market it is important to be aware of the fact, that European anti-discrimination law fulfils another function, which is important with regard to the labour constitution. To put it briefly, anti-discrimination law is a corrective against a dominant culture[160] characterised by the socio-cultural primacy of the national, white and male, which often is supported by Member States' corporate models. Fulfilling this function, anti-discrimination law serves the employees by preventing segmentation of the workforce along the lines of the dominant culture mentioned. It can be doubted, that all Member States would have implemented comparable anti-discrimination laws under their own steam.[161]

bb) The harmonisation of machinery, production material and facility sites

There are particular markets, in which standards under labour law constitute basic conditions in a different way than in the case of ordinary markets for goods and services. The most important examples are on the one hand the markets for machinery and production materials, and on the other hand for productive capital

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[159] Parliament and Council Dir 2006/54, equal opportunities and equal treatment of men and women, [2006] OJ L 204, 23; Council Dir 2000/78, general framework for equal treatment in employment and occupation, [2000] OJ L 303, 16; Council Dir 2000/43, equal treatment irrespective of racial and ethnic origin, [2000] OJ L 180, 22.

[160] On the concept, see B Rommelspacher, *Dominanzkultur* (1998).

[161] This aspect has been overlooked by Somek (above n 129) who has impressively criticised European anti-discrimination politics for functioning as a surrogate for genuine social policies, which is in turn compatible to neo-liberalism.

investments, i.e. entire companies or production sites, or detachable parts thereof. Technical provisions for occupational health and safety are relevant for facilities, machinery and production materials. The compliance with health and safety regulations is an essential precondition for their marketability. For such goods, machinery and production materials, therefore only the European harmonisation of technical safety at work enable genuine European markets.[162] Therefore, the field of technical protection of labour has developed at the European level[163] and has been expanded continuously.[164]

In the case of markets for productive capital investments, those provisions of labour law play a role that are concerned with corporate restructurings, such as changes in operations or the transfer of an enterprise. These provisions act as transaction costs of such restructurings. If the social protection of workers and, hence, the transaction costs among Member States diverge too much, these differences replace economic aspects that should actually be decisive. This is the backdrop for the European provisions in the law of the transfers of undertakings, of collective redundancies and of the insolvency of employers.[165]

cc) The harmonisation of other technical and social occupational health and safety provisions

The area of the technical health and safety provisions that cannot be traced back to their functional relevance for particular markets of production materials, facilities and machinery, can still be interpreted as market-functional. They prevent competitive advantages based on low health and safety standards.[166] Unlike conditions under a contract of employment, standards of health and safety, which do not concern the cost but the protection of labour, can be established Europe-wide: this is because the production-related price of labour is not concerned, but rather the costs of the conditions for production and services. Furthermore, the extensive technical protection of labour at the European level can

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[162] Streeck, above n 100, at 383; F Scharpf, 'Politische Optionen im vollendeten Binnenmarkt', in M Jachtenfuchs and B Kohler-Koch (eds), *Europäische Integration* (2003), 219 at 230.

[163] After the Single European Act came into force, the following Directives are seminal: Council Dir 89/391, improvement in the safety and health of workers at work, [1989] OJ L 183, 1 and Council Dir 89/392, approximation of the laws relating to machinery, [1989] OJ L 183, 9.

[164] See the cyclopaedic descriptions by W Kothe *et al*, in Oetker and Preis, above n 73, B 6100–6400.

[165] Council Dir 2001/23, safeguarding of employees' rights in the event of transfers of undertakings , [2001] OJ L 82, 16; Council Dir 98/59, approximation of the laws relating to collective redundancies, [1998] OJ L 225; Council Dir 80/987, protection of employees in the event of the insolvency of their employer, [1980] OJ L 283, 16.

[166] Krimphove, above n 58, para 517.

be seen as a case of a true spill over of European regulation, inasmuch as a functional distribution of competences would cause practical difficulties.

The social protection of labour mainly includes the European Directives on working hours, maternity protection and the protection of minors.[167] The individual contractual working hours of employees is a first element for determining labour costs. In this respect, a European regulation of the regular operational work hours would at first glance be similarly implausible as a European regulation of the wages. A different case are however maximum working hours and the special working arrangements for mothers and young people. Excessive working hours threaten both the health of the affected employees and, in many cases, the safety of third parties. But great differences in the Member States' regular working hours lead also to distortions of competition, even if the actually paid wage is crucial,[168] because wages are based on the legitimate demands and needs of full-time workers, in a certain relation to the regular working hours of a full-time employment. A national culture of excessively long full-time working hours therefore constitutes an unfair competitive advantage, which is ultimately based on undervalued labour similar to the case of discrimination.[169]

dd) The labour law annex to European company law

The fourth area is workers' participation as annex to the European company law under collective labour law. Without a European regulation of the workers participation, legislation regarding original European corporate statutes, notably in the shape of the European Company (SE) and the European Cooperative Society (SCE), would not have been politically possible.[170] However, it is symptomatic that European legislature could not agree on real substantive requirements. Here again the different traditions of Member State labour constitutions, especially in

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[167] Parliament and Council Dir 2003/88, organisation working time, [2003] OJ L 299, 9; Council Dir 92/85, maternity protection, [1992] OJ L 348, 1; Council Dir 94/33, protection of young people at work, [1994] OJ L 216, 12.

[168] This renders intelligible the inclusion of the provisions of Art 120 into the EEC Treaty (Art 142 EC, Art 158 TFEU), also suggested by the Ohlin report, according to which Member States should keep the regulations concerning paid spare time equivalent.

[169] However, the market-functional relation of general and specific maximum working hours is less compelling as in the previous cases. In this respect, it is characteristic that the Directives on working hours (originally as Council Dir 93/104, [1993] OJ L 307, 18), maternity protection and the protection of minors have all been adopted in the uniquely dynamic phase following the passing of the Community Charter and in the context of the Maastricht Treaty (see s 1. c. above).

[170] Council Reg 2157/2001, Statute for a European Company (SE), [2001] OJ L 294, 1 and Council Dir 2001/86, SE-involvement of employees, [2001] OJ L 294, 22; Council Reg 1435/2003, Statute for a European Cooperative Society (SCE), [2003] OJ L 207, 1 and Council Dir 2003/72, SCE-involvement of employees, [2003] OJ L 207, 25.

the field of industrial codetermination, showed their effect. Against this backdrop, the quite resourceful idea of "negotiated co-determination" emerged.[171] Negotiated co-determination is characterised by the fact that the law itself contains no substantive co-determination rules, rather it is limited to methods of negotiation procedures and minimum contents, and states, for the constitution of workers' bargaining power, standard rules and for cases of conversions and mergers the prohibition of impairment.

These are the four categories that divide market-functional substantive labour law, which has to be provided in the European association of labour constitutions by the EU level. As presented, it is this conception and not the notion of a Social Union with an integrated labour constitution 'in the making' that renders intelligible the existence and the contents of almost all EU legislation under labour law. The positive confirmation of this idea, which was already fundamental for the reference in Article 117 EEC Treaty to the market-functional legal harmonisation pursuant to Article 100 EEC Treaty, is therefore of essential use in the reconstruction of the functions of the EU level in the European association of labour constitutions.

c) Transnationalisation of labour-constitutional rights

The normative effects of the rights of the European Charter of Fundamental Rights should not be overestimated.[172] For the societal sphere of dependent labour, those labour-constitutional rights remain authoritative that have been established at the national level. But these rights are just conceptualised for the national context. They constitute a system of national industrial relations and are not designed as a framework for cross-border industrial relations.

European market integration made cross-border business orientation the central element of its program. If, in accordance with the social compromise for integration and taking social forces into account, European law attempts not to be openly biased, it has to compensate for the Europeanization of the room for manoeuvre of enterprises.[173] As this compensation can actually not lie in a

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[171] T Blanke, 'Dynamik und Konturen des europäischen Sozialmodells', [2006] *Neue Zeitschrift für Arbeitsrecht* 1304 at 1306.

[172] See above, sub III. 2.. The European trade unions seem to agree upon that insight and have recently begun to advocate for a social protocol in addition to the treaty (see B Bercusson, 'Scope of Action at the European Level', Paper presented at a Symposium of the German Federal Ministry of Labour and Social Affairs, Berlin 26th June 2008, on file with the author). The aim is to establish the priority of social rights over the fundamental freedoms. Even speaking reluctantly, even the medium-term perspectives of this endeavour seem to be uncertain.

[173] With the same emphasis FW Wedderburn, 'European Community Law and Workers' Rights after 1992: Fact or Fake?', in *id* (ed), *Labour Law and Freedom* (1995), 247 at 249.

uniform system of European industrial relations, the only remaining alternative is to introduce a transnational dimension in Member State labour constitutions. The transnationalisation primarily aims at the fundamental rights of Member State labour constitutions, i.e. the individual freedom of exercise of profession, collective participation rights and collective bargaining rights including the right to collective action. As far as the transnationalisation is not provided for in Member States labour constitutions, this function has to be covered by the Union level. In the following, the relevant European rights connected to this kind of transnationalisation as well as the associated competences needed for their articulation are explicated.

aa) Transnational freedom of exercise of profession

While the need for a transnationalisation of collective rights can easily be understood as a counterweight to the European reach of business opportunities, the systematic inclusion of the transnationalisation of the freedom of exercise of profession requires an additional explanation: because historically, it started as the free movement of workers (Article 48 EEC) based on the intention to also increase the efficiency of the allocation of labour. Nevertheless, the transnationalisation of the individual freedom of exercise of profession at the same time serves to constitute European workers as a unitary, i.e. a not internally segmented, group.[174] Since, after what has been outlined so far, this cannot be achieved by granting substantive European rights, all Member State labour constitutions have to represent this unit individually. Consequently, Member State law has to extend its own freedom of exercise of profession to potentially all European workers according to European provisions.

Normally, the freedom of exercise of profession, as a right to exercise an occupation in depended labour, is granted only for the own nationals within the particular national borders.[175] Foreign nationals are given entry at the states discretion. Within the Union, however, the freedom of exercise of profession has been transnationalised together with the free movement of workers. As Union citizens, all Member State nationals are entitled to work as employees all over the Union. In conjunction with the comprehensive prohibition of discrimination inscribed in the freedom of movement (Article 39(2) EC), workers can at the same time enjoy all those rights that the respective Member State guarantees domestically for individual labour relations.

For this transnationalisation of the freedom of exercise of profession already guaranteed under primary law, there also exist legislative competences at the EU level (Article 40 EC/Article 46 TFEU). On this basis, the Regulation on the Free Movement of Workers[176] was adopted; it entailed most important provisions for

[174] See above, sub 3. b) aa).
[175] See Article 12(1) German Basic Law.
[176] Reg 1612/68, above n 32.

the given context, especially Articles 7 and 8, which required the equal treatment of domestic and foreign nationals with regard to working and employment conditions as well as individual trade union rights.

bb) Transnational participation rights

The current constitutional law of the Treaties includes no provision that could provide a similar function for participation rights as the free movement of workers did for the freedom of exercise of profession. In this respect, the transnationalisation of co-determination rights has not undergone real constitutionalisation.[177] Therefore, attention rests immediately on the European competence to legislative regulation, as due to its primacy over national constitutional law also secondary European law could achieve equivalent results. As already presented, the competences of the Union are narrow. One competence, which can be exercised within the relatively dynamic regular legislative process, exists only for the general information and consultation of workers (Article 137(2)(1)(e) EC), which of course includes the regulation of rights to transnational hearing. Much more relevant for the balance of social power is the also existing legislative competence for (transnational) business and operational codetermination, yet its exercise requires unanimity in the Council (Article 137(2), (1)(f) EC).

Accordingly, the results of previous legislation have remained modest. Besides the already mentioned provisions for the participation of workers in original European companies, directives for the introduction of European Works Council[178] and on cross-border mergers[179] were adopted. As in the law of the original European corporate statutes, the legislature could not find a different solution as the one of 'negotiated co-determination', in which the bargaining power of the employees is constituted by a default norm, which becomes effective once negations remain without result. In the case of cross-border mergers, this default norm is constituted by the most potent concerned Member State co-determination law[180], in the case of European Works Councils by the law of the headquarters' host country, which in turn is not allowed to fall below a substantive threshold set by the EU level.[181]

In both Directives, the default rules correspond to the form of the transnationalisation of labour-constitutional rights which has been developed

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[177] Due to the dominating competence provisions, Art 27 ChFR cannot develop much effect, furthermore the right to timely information and consultation, promised in the Charter, is not particularly strong (different is Art 28 ChFR, whose potential is explicated below, sub cc).

[178] Council Dir 94/45, European Works Councils, [1994] OJ L 254, 64.

[179] Parliament and Council Dir 2005/56, cross-border mergers, [2005] OJ L 310, 1 (Art 16).

[180] Dir 2005/56, above n 179, Art 16.

[181] Dir 94/45, above n 178, Art 7.

above: it is not the EU level but Member States that provide the relevant substantive law for the transnational collective labour relations at establishment and company level. The EU level provides only for the respective legal obligations of the Member States. Regarding the European Works Councils, however, there remains the problem of the contents of the default norms. Here, Member State law does not extend domestically effective legal positions to the transnational context; rather, it creates specific standards, which in turn comply with minimum standards prescribed by the EU level.[182] Although this European standard does not represent the lowest common denominator decision, it settles on a comparably low level.[183]

Therefore, the bargaining position of workers has to be strengthened by another mechanism: in fact by opening the possibility that the agreements concerning the European Works Councils can become the subject of transnational collective action. The transnationalisation of collective bargaining rights within the European association of labour constitutions, finally discussed here, is therefore of paramount importance.

cc) Transnational collective bargaining rights

The Treaties themselves offer no basis for the transnationalisation of collective bargaining rights. The right of the social partners to establish contractual relations and to fulfil them autonomously (Article 139(1)(2) EC) is however recognised in the constitution, and some legal attention has therefore focused on the question of whether these relationships could constitute European collective agreements.[184] The question of a European right to autonomous collective bargaining under Article 139 EC is in itself, however, of no major practical relevance, as long as the issue of the right to collective action remains unresolved.[185] In the long run, no European employers association will conclude European collective agreements

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[182] Dir 94/45, above n 178, Annex: subsidiary requirements referred to in Article 7 of the Directive. The implementation in national laws could have exceeded the minimum standard. But this has only happened in some minor cases. For an overview see Europäischer Gewerkschaftsbund (ed), *Die Umsetzung der EBR-Richtlinie in nationales Recht* (1999), table no 8-14 [ENGLISH?].

[183] A Höland, *Mitbestimmung in Europa* (2000) 135.

[184] An innovative proposal suggests that the European social partners decide themselves about the normative effects of European collective agreements by agreeing on a framework for European collective bargaining (D Schiek, 'Einleitung', in W Däubler, *Tarifvertragsgesetz* (2006), para 790 *et seq*; Krimphove, above n 58, para 604). Closer to the wording of the Treaty and, hence, more convincing is the position that the legal effect of a European collective agreement is determined by national collective bargaining rights and is therefore different from Member State to Member State: O Deinert, *Der europäische Kollektivvertrag* (1999).

[185] See above n 58.

voluntarily.[186] The freedom of collective agreement and the right to collective action constitute a unity; the first without the latter is of no relevance for social power relations.[187] The bargaining power of workers and with this the possibility to achieve transnational collective agreements at all in controversial matters rest on the right to collective action.

A legislative competence of the Union for an EU-wide transnationalisation of free collective bargaining, including the right to association, collective bargaining rights[188] and the right to collective action, is explicitly excluded under current constitutional law.[189] A European order of collective bargaining and collective action rights can therefore not emerge on the basis of European legislation. This means nothing less than that it is the Member State labour constitutions which have to develop the standards providing a legal framework for intra-European transnational labour disputes and transnational collective agreements. Within the European association of labour constitutions, cross-border collective actions concerning transnational collective agreements have in principle to be legally permissible, and European collective agreements must be recognised as such. This suggests putting transnational collective labour relations on an equal footing with domestic ones.[190] Transnational labour disputes should not be subject to more stringent requirements than national labour disputes, European collective agreements should have the same legal effect than domestic collective agreements.

The constitutional link of the transnationalisation of Member State bargaining can be found in Article 28 of the Charter of Fundamental Rights.[191] It guarantees

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[186] The autonomous agreements between the social partners established under Art 139 EC confirm this impressively. These are three 'framework agreements', concerning telework (2002), work-related stress (2004) and harassment and violence at work (2007), and two 'frameworks of action' for the lifelong development of competencies and qualifications (2002) and on gender equality (2005). They are not even in their shape conceived as law-like and also the formal monitoring of their implementation shows no signs that they are legal agreements.

[187] Bundesarbeitsgericht, Case 1 AZR 822/79, [1980] *Neue Juristische Wochenschrift* 1642.

[188] This is contested. For a preferable stance, see U Preis *and* M Gotthardt, in H Oetker and U Preis (eds), *Europäisches Arbeits- und Sozialrecht* (July 2000) B 1100, para 43. For a different opinion, see Langenfeld and Benecke, above n 76, Art 137 para 97; Rebhahn, above n 76, Article 137 para 19; and E Högl, in H v.d.Groeben and J Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (6th ed 2003), Art 137 EC para 43. Apart from the factual interdependence of the three subjects, the major problem for the opposing view is that minimum provisions – which are solely allowed by Article 137(2)(b), as is rightly emphasised by Langenfeld and Benecke, above n 74, Art 137 EC para 7 – are hardly conceivable for the legal effects of collective bargaining agreements.

[189] See above, sub III. 1. c).

[190] First developed for collective bargaining rights by Deinert, above n 184.

[191] Rixen, in Tettinger and Stern (eds), above n 62, Art 28 para 14; Fuchs, in Marhold and Fuchs (eds), above n 58, 152 and 158.

the right to negotiate collective agreements 'at the appropriate levels'. With regard to the function of collective labour relations, it cannot be said that the transnational level is not an appropriate one. The right of industrial action is, in turn, granted even without such reference to appropriate levels. Taken separately, Article 28 of the Charter of Fundamental Rights requires to provide a legal framework for European labour disputes and collective agreements. As long as the European level cannot step in due to its lack of competences, the transnationalisation of collective bargaining rights has to be an achievement of Member State labour constitutions.[192] Member State law that would exclude or disproportionately limit cross-border labour disputes and collective agreements (Article 52 of the Charter of Fundamental Rights) constitutes therefore a breach of Article 28 of the Charter of Fundamental Rights.[193]

It is still to be clarified, in how far civil disputes in the area of transnational industrial struggle or collective agreements open up a field of application for Community law in way that, Article 28 of the Charter of Fundamental Rights gains legal relevance. The solution is delivered by an analogy to the jurisprudence of the Court on the Union citizenship. The general rule might read: In so far as the European constitutional law contains fundamental rights positions that *cannot* have an equivalent at the national level, a breach of these positions opens up the scope of application for Community law. This applies to the Union citizenship as well as to the guarantee of a Union-wide right to collective bargaining.

V Conclusion

The process of European integration is based on a social compromise for integration whose renewal is fundamental to the acceptance as well as to the future development of European integration. According to the reconstruction of this compromise against the backdrop of present-day conditions the EU labour constitution consists of three elements: constitutional figures to support the autonomy of Member State labour constitutions, legislative competences for the harmonisation of labour regulation in the case of labour cost induced competitive

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[192] The competence of Member State labour constitutions for the articulation of the right to transnational collective bargaining is confirmed by the statements of the presidency of the Charter Convention, according to which the arrangement and limitations of transborder collective action has to be determined by Member State law. CHARTE 4473/00, CONVENT 49, 27, available at www.europarl.europa.eu/charter/pdf/04473_de.pdf (29 July 2008).

[193] Case C-85/96, *Martínez Sala* [1998] ECR I-2691, and Case C-184/99, *Grzelczyk* [2001] ECR I-6193.

distortions, and the transnationalisation of fundamental, labour-constitutional rights of workers.

The precise determination of the shape of the EU labour constitution, as constitutional institutionalisation of the social compromise for integration, realises the systemic function of modern labour law in a transnational context. Labour law aims to prevent the antisocial and unfair competition for low labour costs as far as possible, in order to not interfere with fair and productive competition in all other fields concerning ideas, technology and organisation. Applying the same function, however, the shape of labour law changes, depending on whether it is concerned with the competition of companies in the same national economy or in different economies, i.e. whether domestic or supranational labour law is at issue. In the first case, domestic labour law provides unitary general or sectoral minimum working conditions. The second case concerns the prevention of a competition related downward pressure on domestic minimum working conditions by supranational law through domestic labour law. The absolute level of wages and working conditions remains a matter of societal power relations, whose legal framework also in the supranational Union are primarily constituted at the national level and which are not allowed to be shifted in a biased manner by the constitutional law of the Union.

The European association of labour constitutions establishes through the interplay of its Member State and Union level a European social space of dependent labour, in which it reflects the economic fragmentation of the European market. However, it prevents this fragmentation from overriding the social contradictions inscribed in this space. Future conflicts about the shape of the European labour constitution will be about overcoming the misleading model of an EU labour constitution modelled after national labour constitutions. This model has had an effect in the dispute about social rights and guiding norms at the European level for a long time. Instead, those who advocate a strengthening of the social dimension of European integration will have to focus even more resolutely on those parts of the EU labour constitution which it can actually play in the re-constitution of a viable social compromise. This task is intellectually and practically demanding enough.