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The Case of Social Dialogue

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The Case of Social Dialogue

1. Rights of Citizenship, Industrial Citizenship and Collective Representation

T. H. Marshall, when developing his concept of citizenship (Marshall, 1965: pp 71 ff.; cf. Bercusson et al., 1996; Mückenberger, 2001), distinguished three layers of rights which corresponded to the historical development of citizenship: civil rights concerning freedom of market, contracts and property; political rights concerning political participation and the right to vote and social rights concerning rights of economic welfare and security and the right "to live the life of a civilized being according to the standards prevailing in the society" (p. 78). What is less discussed is that he added to those individualized elements the concept of "industrial citizenship". Industrial citizenship links, in a sometimes paradoxical way, the three above mentioned layers of citizens' rights. The recognition of the right of collective bargaining implied "the transfer of an important process from the political to the civil sphere of citizenship" (p. 103). "This meant that social progress was being sought by strengthening civil rights, not by creating social rights; through the use of contract in the open market, not through a minimum wage and social security… Trade unionism has, therefore, created a secondary system of industrial citizenship parallel with and supplementary to the system of political citizenship" (p. 104). "Collective civil rights could be used, not merely for bargaining in the true sense of the term, but for the assertion of basic rights." The early twentieth century however "fully endorsed collective bargaining as a normal and peaceful market operation, while recognizing in principle the right of the citizen to a minimum standard of civilized living" (p. 122).

Industrial citizenship thus implied both social rights of workers and a certain collective element of voice (Hirschmann, 1970) and representation. The three elements of citizenship, in Marshall, were regarded as preconditions and requirements of autonomy and, we come back to that in the last part of this paper, of responsibility of citizens vis-à-vis the community. In the case of workers therefore, autonomy seemed to require means and instruments of self-regulation. Self-regulation of workers, at least when Marshall wrote his essay, could not be considered without a view to their collective representation. This is why Marshall connected his idea of industrial citizenship with trade unions and collective bargaining.

Today – in the post-fordist regime of work and in a globalising world – all elements and certainties of industrial citizenship – collective representation, trade unionism, collective bargaining etc. – are at stake and in upheaval. We currently experience a devaluation of collective representation of workers in which trade unionism as such is losing legitimacy because its "representativity" is biased: men are better represented (hence protected) than women, blue collar workers better than white collar staff, senior workers better than younger ones. This is true on the EU Member States level. It is still truer on the European level. We live in paradoxical times where industrial citizenship is *no longer* fully accepted and effective in the framework of the Member States, but where it is *not yet* accepted and effective on a transnational and supranational European level.

There are still a couple of good reasons for collective bargaining as a prerequisite for industrial citizenship. Collective bargaining – or collective self-regulation –, according

to contemporary research (cf. High Level Group, 2002), has at least the following *rationales*. What is paramount for both sides in times of globalisation and a dynamic economic environment (Castells, 2001, vol. 1) is the reduction of uncertainty brought about by collective regulation of working conditions: for employers with respect to wage cost and continuous supply of skilled labour; for employees with a respect to working conditions and the stability of their social setting. Other good reasons for employers are: better conflict resolution, enhancement of legitimacy of their managerial prerogatives, both contributing to a more reliable basis of planning. For employees collective bargaining implies *voice* with a positive outcome in both social protection and the sharing of the fruits of collaboration.

Despite these advantages of collective bargaining systems, one has to rethink which type of collective self-regulation leads to – or at least optimise – them. On the level of national labour law, all Member States have experienced a particular combination of market-based "civil law" self-regulation ("autonomy") and state-based "public law" self-regulation ("protection") (cf. Supiot, 1999; Mückenberger, 2004: ch. 6). The former is represented by voluntary collective bargaining, the latter by statutory provision for plant representation, health & safety, equal opportunities, for the extension of coverage of collective agreements (*erga omnes-effect* instead of *inter partes-effect)*, certain statutory privileges of trade unions in plant representation etc.

Britain stands apart from the rest of Europe in that the two poles, though equally co-existing, over a long period of time remained distinct and separate from one another. In the other European labour and labour law cultures however the two poles prevailingly developed a certain interplay which provided for both collective autonomy and the generalisation of social and economic progress (which autonomous actors can never effectively provide). The interplay was mainly based on a more or less strong "social" movement which brought about solidarity, a sort of collective reasoning and hence a certain "unity" vis-à-vis the employers' side. This life-world based social movement was a prerequisite for the process of collective self-regulation, because otherwise a collectively articulating, hence reliable partner would not have existed – agglomerated capital was just this in its proper existence. On the basis of this social movement state activity could function: via recognising and legally shaping the self-regulation, via extension mechanisms, via adding certain types of "ordre public"-representation etc to the social movements.

It is true that the concrete shape of this interplay between autonomy and state-regulation can vary enormously. But for all cases we are able to reconstruct the system of collective self-regulation according to the two poles. And we can associate with them a certain coherence of "life-world"-drive and "system"-drive – hence a certain coherence (in David Lockwood's well-known terms - cf. 1999) social integration and system integration.

In Europe we observe a system of collective self-regulation emerging (surprisingly quickly emerging as I will show in my paper). Contrary to the historical development in the Member States however, this system is emerging without a pre-existing social movement. There are such movements on Member States level which the European actors, to a certain extent, can rely on – but there has never been a coherent European social movement. There seems to be a strong need for social self-regulation at a European level. How this requirement can be explained is all but clear. It may be interpreted as a reaction to excessive European bureaucratic regulation. It may have to do with efforts to foster trust cultures on plant and enterprise levels in order to stimulate innovation which is paramount for global competitiveness. It may equally be explained

by the lack of legitimacy of the European project which does not seem to be socially and culturally embedded (in Polanyian sense) in the European societies. But in all these respects, the need for self-regulation seems to express a *system integration-need* (i.e. a need of economic and bureaucratic elites) rather than a s*ocial integration-need* (i.e. a need of citizens and of civil society associations). There are no genuine "civic" actors prepared to assume this burden. The social movements – if ever – exist on a national level, but not on a European one.

This is why Europe has invented a new type of industrial representation. It is nearer to the French "republican" type rather than to the German "communitarian" type of representation (cf. Mückenberger/Supiot, 1999: pp. 99 ff.). Representation thereby does not function in a way that the representatives express ("represent") the views and interests of the represented, but rather in the contrary way: representatives, by expressing their version of assumed views and interested of the represented, actually constitute the represented, pre-formulate their potential views and interests.

Social dialogue, thus far, is an artificial substitute for a set of rights and entitlements, responsibilities and outputs which were formerly connected with industrial citizenship. When regarding it properly we discover that it differs remarkably from the Marshallian industrial citizenship. The latter was a political stimulation of civil rights to enhance market power of workers through the collective execution of their freedom of contract. As opposed to that, social dialogue – though equally a political innovation – does not lead to an increase in market power and collective self-regulation of the employees, but rather to a new political mechanism of social regulation under participation of social partners. The linkage between the represented and the representatives, clearly implied by the Marshallian concept of industrial citizenship, is, to a large extent, missing in the constitution and practice of social dialogue.

We live in times where the equilibrium to which we have become accustomed to can no longer be taken for granted. Hauke Brunkhorst (2002) claims that Europe – even before and without a Constitution (cf. Liebert et al., 2003) – has already developed a constitution – a constitution without a state. Why couldn't we equally imagine that Europe has already developed a type of social self-regulation – despite the fact that the traditionally integrating actors are missing. Therefore it is interesting to ask whether there are indicators for a newly emerging knowledge-based societal industrial citizenship in Europe.

2. Globalisation or Labour Law – A Misleading Alternative

Labour law has always had a close relationship with the different facets of citizenship. It presupposes the civil and political layers of citizens' rights (which are the civil and constitutional law fundaments of labour law). It adds to them individual social rights (social protection and participation) and those collective rights which form the legal body of industrial citizenship. Under the citizenship-perspective it is important to know what happens with labour law under conditions of Europeanisation or, in a wider sense, globalisation. The argument on economic globalisation frequently suggests that globalisation inevitably leads to an erosion of the regulatory competency of the state and thus to deregulation and a downward-spiral – particularly in the field of labour law. On the contrary, I will demonstrate that Europeanisation is not incompatible with the development of labour law – however it is developing labour law in a manner that creates tension with the classic conception of citizenship.

It is true that globalisation threatens the level of national regulation – in a double sense. Obviously, to a certain extent it enables multinational firms to choose (or not to choose)

the locations for their activities and thus the type of regulation connected with them ("regime hopping"). The extent to which they make use of this opportunity, however, is all but well–studied and clear precisely due to labour law as opposed to other factors. There is no methodological way yet to isolate, when studying location decisions of firms, the factor of the actual impact of the labour law regime. We cannot therefore clearly weigh its impact on management's decision-making.

It is equally true that supranational regulation, by shifting norm-setting power partly or wholly to a superior supranational level, threatens sovereignty as the basic source of norm-setting power. However this shift again is not necessarily connected with a decrease in state based labour standards. There are two reasons for this. Firstly, supranational standards can well be beyond the state level (and in most cases they are introduced to improve certain Member State standards). Secondly, supranational social standards can be – and most frequently are – legally conceived as minimum standards in a way that they derogate less Member State standards, but not more favourable ones.

Therefore thorough and differentiated consideration as to the relationship between globalisation and labour law regulation is required. In the European context, this relationship has the particularity – the reasons of which cannot be discussed here – that the European Monetary Union (EMU) was introduced in a straightforward manner, whereas the labour and social policy framework always exhibited asymmetric development and at least a substantial time-lag (cf. Bercusson et al., 1996; Magnussen/Strath, 2001; Castells, 2003). When considering the European potentials for labour law regulation I shall not only deal with regulatory state policy (i.e. normal EU regulations and directives according to art. 230, 251 and 252 EC-Treaty – ECT – ; cf. Majone, 1996), but also with relatively new instruments like social dialogue. There is some evidence for the assumption that direct substantive regulatory state policy is increasingly both pushed back and replaced by a procedural policy in favour of non-state or semi-regulation under participation of those who are immediately involved.

It is true that labour law regulation – though piecemeal and scattered rather than well-elaborated – started early in the EEC/EC. It was substantive rather than procedural regulation. The points of departure were areas with regard to which regulatory policy seems to be adequate. Some regulations concerned the preconditions of labour law rather than labour law itself. This holds for the free movement of labour legislation[1] and for social security of EEC migrant workers.[2] Free movement of labour focuses, in Marshall's terms, on the civil rights of workers rather than on their social rights. Interestingly enough at this stage the strict instrument of *"Regulation"* prevailed – whereas the bulk of the following labour law developments made use of the softer legal instrument *"Directive"*.

A large share of the traditional European labour law culture (legislation as well as case law) had developed in the field of equal opportunities of men and women in working life and anti-discrimination law. Primary law cornerstone was art. 119 EEC-Treaty <now Art. 141 ECT>, which was included in the Treaty at the demand of France. The field of application and coverage of this Article was widely extended via the directives on equal pay, working conditions, access to employment, social security and plant level social security.[3] Interestingly enough, within this extensive application frequently legal

[1] Cf. Reg. EEC 1612/68 und Dir. 68/360/EWG, Reg. EEC 1251/70 - see Becker 2000.
[2] Reg.s EEC 1408/71, 574/72.
[3] Dir.s 75/115/EEC (Equal pay), 76/207/EEC (working conditions, access to employment), 79/7/EEC (social security) and 86/378/EEC (plant level social security).

recourse was made – besides to art. 100 (in case of the dir.s 1975 and 1986) – to art. 235 (dir.s 1976, 1979 and 1986) as empowering norm, which, as a generic and vague appendix competency, exists in a precarious legal relationship with the principle of "specified empowerment" (cf. art. 5 ECT).[4] Equally in the field of anti-discrimination law interplay developed between directives, their national transformation and the preliminary ruling practice of the Court of Justice (ECJ). Within this framework the basic features of ECJ-case law and doctrines emerged as an immediate effect of art. 119, "direct effect"-doctrine, doctrine of "effet utile", legal concept of indirect discrimination.

Workers' protection (particularly, if not exclusively health and safety) was the other field of application where original (i.e. substantive) EEC labour law regulation emerged. Workers' health & safety protection primarily dealt with "technical" protection (i.e. protection with a view to dangerous machinery or agents).[5] But to a certain extent from the very beginning also „social" protection (i.e. protection, specifically of persons or groups at risk) played a role – exemplarily in the cases of mass redundancies, of transfers of undertakings and of insolvency of employers.[6]

Most of these regulations were motivated by reasons of competitiveness rather than by reasons of social policy. This had been the case with Art. 119 EEC – France lobbied for this provision in order to prevent their anti-discrimination legislation from becoming disadvantageous to French industry in international competition. It is equally important to note that these forms of regulation were acceptable for such diverse law cultures as the British and the Continental ones (in Britain health & safety-legislation and Equal Opportunities-legislation existed long before, even instead of, a labour law legislation – cf. Deakin and Morris, 2001: ch. 4.7 and ch. 6). These regulations were far from a European labour law model – they were an economically motivated patchwork. Their extension in recent years has been consequently disputed. And within primary law, there was no legal basis or legitimation for such a labour law model at all.

Nevertheless, under the perspective of citizenship, these rights have much in common with what Marshall called the third layer of citizenship: social rights. Despite their economic motivation, these labour law regulations attributed to individual workers' rights and entitlements which they would not have achieved under the pure rules of the market. But at the same time, they were far from industrial citizenship rights. They did not thematise collective representation and negotiation at all, leaving them to national prerogative.

[4] See Oppermann 1999: pp. 201 ff.

[5] Like in the case of Dir.s 80/1107 EEC (agents), 89/391/EEC (Council Framework Directive Safety and Health).

[6] Mass redundancies (Dir. 75/129/EEC <suspended together with amendment Dir. 92/56/EEC by Dir. 98/59/EC>), transfers of undertakings (Dir. 77/187/EEC <see Dir. 98/50/EC>) and of insolvency of employers (Dir. 80/987/EEC). Compare the following Health & Safety Directives showing the legislative activity since the Framework-Directive 1989: Council Framework Directive 89/391/EEC of 12 June 1989 Safety and health; C. D. 89/654/EEC workplace; C. D. 89/655/EEC work equipment; C. D. 89/656/EEC personal protective equipment; C. D. 90/269/EEC manual handling of loads; C. D. 90/270/EEC display screen equipment; C. D. 90/394/EEC exposure to carcinogens at work; C. D. 90/679/EEC biological agents at work; C. D. 92/57/EEC h & s at temporary or mobile construction sites; C. D. 92/58/EEC safety or health signs at work; C. D. 92/85/EEC pregnant, breastfeeding workers; C. D. 92/91/EEC mineral-extracting industries – drilling; C. D. 92/104/EEC mineral-extracting industries; C. D. 93/193/EEC board fishing vessels; C. D. 98/24/EC chemical agents at work; Directive 1999/92/EC risk from explosive atmosphere; Directive 2000/54/EC exposure to biological agents.

In this respect, a clear paradigmatic change has taken place. Since the 1990s, a shift towards procedural and collective regulation can be clearly discerned. In fact there has been a tremendous and unforeseen development in European procedural labour regulation in recent years – whereas substantive regulation has lost momentum. There has been regulation with a view to five levels (cf. High Level Group 2002; Industrial Relations in Europe 2002). 1. Social dialogue as provided for in the Maastricht Protocol and Agreement on Social Policy (1991/93) was made primary EU law in the Amsterdam Treaty (1997/99).[7] 2. The same was the case with respect to sectoral social dialogue.[8] 3. The law on European Company (Societas Europeae – SE) and workers' participation within it was passed in 2001.[9] 4. The forerunner of the whole procedural system was the European Works Councils (EWC) system.[10] 5. The system of information and consultation of employees was extended to community-wide operating undertakings with a threshold of 50 resp. 20 employees in 2002.[11]

All five levels concern the collective representation of employees. They cover all levels – from the establishment level through industry-wide social dialogue. But what is missing – despite all these regulatory activities – is voluntary collective bargaining (be it on a sectoral level or on an inter-professional level) on a European level. It is true that one important tendency can be reported with respect to that. Social dialogue recently tends to clearly distinguish between "tripartite" consultation and "bipartite" negotiation and to focus its activities on "bipartism".[12] This attitude seems to include an orientation towards "voluntarism" which is relatively new in the European model of social dialogue and has important analogies to the collective bargaining system. Under given circumstances however, this lack of voluntarism in European collective labour regulation makes it doubtful to identify the current European development with industrial citizenship in the Marshallian sense; we will return to this point.

Let me explain the thesis of proceduralisation of European labour law with a view to the pioneer institution – the EWC system as established by the European Works Councils Directive in 1994. What is interesting from a normative point of view is the following mode of regulation. The type of regulation is indirect, incentive-oriented rather than regulatory. The Directive distinguishes three types of agreements between management and labour. 1. So-called "art. 13 agreements" concluded before the directive enters into force via the due transformation legislation of the Member States: Agreements meeting this deadline are totally free from any requirement of European legislation. 2. "Art. 6 agreements" are freely negotiated between management and labour and even have priority over the mandatory requirements laid down in the appendix of the EWC directive. Art. 6 ECT gives wide regulatory space of manoeuvre to the social parties – provided there is a consensus between management and the negotiating body. 3. Only if there is no such consensus (or a refusal to negotiate at all etc.) the subsidiary rules of the appendix to the Directive apply and can be legally enforced. The principle upon which this Directive in founded is "bargaining in the shadow of the law". A legal incentive is thereby provided to find consensus – a sort of informal duty to negotiate. Interestingly enough, the same normative principle reappears in both recent pieces of Community legislation – the one on the European Company 2001 and the one on Information and Consultation of Workers 2002.

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[7] Art.s 137 para. 4, 138 and 139 EC-Treaty.
[8] Same legal sources - cf. above all Industrial Relations in Europe 2002, pp. 49 – 86.
[9] Reg. No. 2157/2001 of 8 Oct. 2001 – OJ L 297/1 – and Dir. 2001/86/EC – OJ L 294/22.
[10] Dir. 94/45/EC of 22 Sept. 1994 based on the Social Policy Protocol no. 14; Dir. 97/74/EC of 15 Dec. 1997 – with extension to UN and N. Ireland.
[11] Dir. 2002/14/EC of 11 March 2002 – OJ L 80/29.
[12] Cf. the Laeken Declaration 2001 – Industrial Relations in Europe 2002: pp. 128 ff.

The social partners reacted with surprising vehemence to this new normative mode. As the Commission states in their first report on the implementation of the Directive 94/95/EC (European Commission 2000), two facts can be observed. Firstly, out of the 600 firms which established EWC`s in accordance with the Directive, 450 concluded art. 13 agreements, the bulk of the rest art. 6 agreements. Secondly, in the beginning there was a rush to conclude agreements before the deadline as set by art. 13. Following of the deadline, however, the speed of conclusion of agreements slowed down remarkably and a type of hostile and slow bargaining process began. The same observation – with a time-lag of three years – was made after the entry of the UK into coverage of the Directive (cf. Deakin/Morris, 2001: ch. 9.4). This shows that the new type of indirect and "subsidiary" legislation on collective representation has clearly met the demand of the social partners – at least from big firms (European Commission, 2000).

To sum up: Contrary to the historical point of departure, Europe now has a developed labour law structure. This “labour law model” is characterised by the transition from (and to a certain extent: the doubling, "over-lapping") a substantive and individual regulatory mode to a procedural and collective regulatory mode, of European labour law. Such transitions (equally in the sense of doubling substantive individual by procedural collective labour law) had taken place much earlier in the national labour law systems (Mückenberger, 1985: 262 – 71; Supiot, 2004: ch. 1). Is there an analogous development on a European level, where are the similarities and differences with respect to citizenship?

3. The Rise of Social Dialogue[13]

We face a situation where neither Member States' nor European action is capable of competently dealing with urgent social problems and effectively solving them. In this situation the social partners could gain the impetus in their problem-solving capacity. Social dialogue, i.e. deliberations and negotiations of management and labour on EU level, has become progressively more important in the 18 years since the Single European Act (SEA) was ratified. The Amsterdam Treaty effectively passed on to social dialogue substantial parts of the role of a normsetting power in the EU social area. UNICE and CEEP concluded a series of agreements with the ETUC which were later incorporated into secondary EU legislation: on parental leave, part-time work and fixed-term contracts.[14] Negotiations concerning temporary employment agencies failed – although they reached an advanced stage allowing the Commission to take up the subject-matter again and retry a norm-setting process broadly on the lines of the agreement between the social partners.[15]

Social dialogue has thus increased significantly since the ratification of the Treaties of Rome in 1957. Compare only the pre-SEA situation (1986) with the one after the SEA, the Maastricht Social Policy Protocol and Agreement and the Amsterdam Treaty.

The EEC-Treaty (art. 117 ff.) only gave very limited legislative competency to the European actors with a view to social regulation. Art. 117 EEC Treaty merely programmatically stated that "Member States agree upon the need to promote improved

[13] The term "Social Dialogue" does not appear in the Treaty which only uses "Management and labour" or "consultation of management and labour" – as against that scientific literature equally apply the term (e. g. High Level Group 2002; Industrial Relations in Europe 2002).

[14] Agreement on parental leave (cf. dir. 96/34/EC), part-time work (Dir. 97/81/EC) and fixed-term contracts (1999 – dir. 99/70/EC).

[15] Cf. COM (2002) 149 final, dating from 20th march 2002; cf. Wank, 2003. The outcome of this piece of legislation is uncertain.

working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained". Art. 118 only provided co-ordinative power to the Commission; it did not transfer any regulatory power and competency to the legislative bodies of the EEC, with a view to labour law. The only "hard-law" provision of the EEC-Treaty was art. 119 EEC-Treaty concerning equal pay for equal work (which was dealt with in part 2). Equally the European Social Funds provisions (art. 123 ff. EEC-Treaty) allowed for social policy activities. These provisions however remained limited to redistribution processes within regions and Member States with a view to develop structurally underprivileged territories – they abstained from providing any instruments for regulatory policy.

The SEA 1986 for the first time mentioned social dialogue in primary EEC law. It introduced for a certain range of social areas the principle of qualified majority vote in the Council (above all art. 100a and 118a EEC-Treaty). This instrument overcame the blockade power of individual Member States. Although qualified majority vote only covered measures concerning the achievement of the objective of the Single European Market (SEM) (again primarily economic aims). The socially reductionist approach was expressed by art. 100a EEC-Treaty which provided for majority decision with a view to the SEM, yet exempted from this rule, in para. 2, "provisions … relating to the rights and interests of employed persons". Art. 118a EEC Treaty provided regulatory power with a view to "improvements, especially in the working environment". Here too the majority vote was applicable. After this amendment there was a legal argument whether "working environment" remains limited to health & safety at work or whether it includes environmental issues raised at the workplace. Neither of the two versions, however, included working conditions and the work organization as fields of European regulation.

As a result, there was no common European labour law after the SEA 1986. There were elements which provided the Community actors single and enumerated powers to regulate. But there was no coherent labour law system. This is the reason why in certain areas (e.g. "atypical work") a real "game" started concerning the legal basis upon which the Commission and the Council could act when regulating ("treaty base game") (Leibfried/Pierson, 1998). Thereby the Commission – in alliance with pro-European und progressive majorities in the Council – tried to circumvent the vetoing power of reluctant Council minorities and to end up with further supranational social legislation. We experienced, however, that this strategy led to a nearly meaningless piece-meal legislation (cf. for a contemporary assessment Mückenberger, 1991: pp. 5 ff.).

The status of European labour law has changed substantially with the Social Policy Protocol which was appended to the Maastricht Treaty (1991/93). The Protocol contained the Agreement on Social Policy concluded by all Member States apart from the UK. The Social policy agreement itself had its roots in social partner proposals (cf. the appraisal in the Laeken Declaration 2001). It gave way to two “innovative splits” concerning labour regulation. Firstly, a split emerged between common European labour law of the EC and the labour law which covered all Member States apart from the UK. It is well known, and needs no specification here, that the UK signed the Social Policy Protocol, but not the Social Policy Agreement – thereby allowing the parties to the Agreement to make use of the Community instruments and organs for the implementation and enforcement of the provisions of the Agreement, without however covering the UK. Secondly, a new split within social regulation emerged due to which social dialogue would later, for the first time in its short history, be provided with regulatory powers in the field of European labour law. Actually the Agreement provided for, besides regulatory power of the legislative Community actors, regulatory power of

the social partners and an instrumentation of this normsetting power by European secondary law instruments of implementation and enforcement.

The first of these splits – the separate role of the UK with a view to European labour law – was overcome in the Amsterdam Treaty. After the victory of Tony Blair, the UK had given up their resistance to the "Social Chapter" in the EC-Treaty – resulting in unified EU labour law.

The second split – the one between state legislation and social partner consultation – however remained within European primary law and was even extended to all Member States, by the Amsterdam Treaty: There are two relatively independent social norm-setting competencies in the EU. This is important for the role of social dialogue in Europe today. The Maastricht Treaty ushered in important steps for the Member States apart from UK:[16] 1. The Social Policy Agreement for the first time introduced a coherent system of supranational norm-setting power in the field of European labour law. Art. 2 para. 1 contained as important subject-matters as: improvement of the working environment; working conditions; information and consultation of workers; equality between men and women with regard to labour market opportunities and treatment at work; integration of persons excluded from the labour market. With a view to these areas qualified majority decision of the Council was sufficient (Art. 2 para. 2). The Agreement equally contained EC competencies with regard to the social security and social protection of workers; employment protection; representation and collective defence of the interests of workers, including co-determination; conditions of extra-communitarian workers; financial contributions for promotion of employment and job-creation (art. 2 para. 3). Here however unanimous vote was required. The only (if important) fields of exemption from applicability of the Agreement were: pay; the right of association; the right to strike or the right to impose lock-outs (art. 2 para. 6). Here no EC legislation was allowed.

Under the focus of industrial citizenship, the latter exemption is substantial – it concerns core elements like a minimum wage or a European system of enforcement mechanisms in industrial disputes. Nevertheless the Agreement on Social Policy provided a European labour law norm-setting machinery which had not existed before in any shape or form. This is why we can associate with the Agreement the birth of an explicit European labour law.

Simultaneously the Agreement put on the agenda of a mandatory legal European labour policy the European social dialogue. At first glance there is not an enormous difference between Art. 4 para. 1 of the Agreement “Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements“ and art. 118b EEC-Treaty as introduced by the SEA 1986: "The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if both sides consider it desirable, lead to relations based on agreement". However within the Agreement this provision is enshrined in a framework of provisions of participation and implementation which modifies the character of the instruments so fundamentally that we since have had to speak of a new quality of social dialogue. Again one has to keep in mind that these provision were incorporated into the Amsterdam Treaty and thus nowadays cover the EU in general.

[16] These features are not only of historical interest – as the bulk of the provisions of the Agreement is now the "social chapter", art. 137 ff. ECT.

In order to show that there are clear divergences between the concept of industrial citizenship and the rise of social dialogue, we will enter into some specific legal issues of social dialogue. The basic structure is as follows. The social partners acquired, via the Agreement on Social Policy, manifold new competencies and rights.

1. According to Art. 2 para. 4 "a Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to para.s 2 and 3." This implied that the Member States were not obliged to implement supranational law by means of proper governmental legislation, but that they were entitled to transfer implementation to state-wide social dialogue –with the responsibility to supervise and enforcement its implementation.

2. The social partners received the right to a double step consultation by the Commission: firstly concerning the "possible direction of Community action", secondly concerning the "content of the envisaged proposal" (Art. 3 para. 1 to 3).

3. Art. 3 para. 4 – the most important and innovative part of the Agreement – provided social partners the opportunity to draw into their normsetting-prerogative possible subject-matters of Community legislation for a period of nine months and to try to achieve an agreement within social dialogue, instead of Community action. The social partners, under certain conditions, thus were empowered to act with norm-setting power instead of the European institutions.

4. The Agreement finally provided the legal possibility that social partner agreements on Community level are implemented, at their joint request, by a Council decision on a proposal from the Commission (art. 4 para. 2). The social partners, thus, were allowed not only to replace Community activity by social dialogue activity. They were also permitted to use the Community organs, within the boundaries of their competency, as an instrument of both transformation of their agreements into regulations and enforcement of their agreements.

The Treaty of Amsterdam did not alter this architecture. It incorporated the content of the Agreement on Social Policy (slightly modified) into the chapter "Social Provisions" (art. 136 ff. EC Treaty) (cf. Bercusson, 1996; Däubler, 1994; Krimphove, 2001; Schiek, 1997). The intention to integrate a social chapter had prevailed before the Maastricht Treaty, although it did not receive British support. The 1997 incorporation overcame the temporary division of European labour law. The rise of the importance of social dialogue will therefore hold for all Member States, in the future. Social dialogue has thus gained the potential to be an important instrument of European labour law. But obviously it plays more the role of a European norm-setting device than the one of an autonomous civil society actor. In our context therefore it is important to ask what potential social dialogue bears with a view to developing industrial citizenship, on a European level. A collective autonomy – in the sense of a voluntary bargaining system – does not yet exist on a European level. Despite their historical origin, Art. 137 to 139 EC-Treaty are based on state legislation. The actors provided in Art. 137 – 39 are not backed by a process of voluntary and associative legitimation which is a backbone of collective autonomy in the European Member States tradition. Equally a system of enforcement in cases of non-achievement of consensus is lacking. All these elements are obstacles to what T. H. Marshall would have called industrial citizenship.

To assess potential perspectives for the development of industrial citizenship on a European level we shall briefly discuss a few legal issues. We focus on the issues which concern the path of industrial citizenship – i.e. elements of autonomy in European

collective negotiation and regulation. Art. 137 – 139 ECT to a large extent correspond to Art. 2 to 4 of the Social Policy Agreement. The scope of competency laid down in Art. 2 of the Agreement is now binding for the entire Union and its labour law. Therefore social dialogue remains a privileged norm-setting body at a European level (Art. 138 and 139). Interestingly, Art. 138 para. 1 ECT – corresponding to Art. 3 para. 1 of the Social Policy Agreement – provides for the duty of the Commission to "take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties." This clause may be read as providing for a balance of power between the social partners. It implies two points of view. Firstly, it is a clear sign that European primary law envisages a proactive rather than a passive principle of "subsidiarity" (Bercusson et al., 1996; Mückenberger, 2001). The institutions of the EU are obliged to actively foster the capability of social partners to dialogue, negotiate and achieve agreements – instead of passively awaiting such capabilities to emerge. Secondly, Art. 138 para. 1 ECT can be regarded as a basic and general legitimation to create the preconditions of a European voluntary collective bargaining system. Some legal scholars even draw from this clause the obligation of the EU to establish a collective agreements law on the Community level (Lenz-Coen, 1999: 1151).

From the point of view of autonomy of policy-making, there is an important difference between social partners und EU institutions with a view to their respective norm-setting competency. Commission and Council are bound to the principle of "enumerative detailed empowerment" (Art. 5 and 6 ECT – cf. Krimphove, 2001). This boundary does not apply to social dialogue (Schwarze, 1997, nr. 29). Art. 139 does not contain any legal limitation of the scope of possible actions and agreements. The only boundary is procedural: the Commission and the Council cannot decide on the transformation into regulations/directives of agreements the subject-matter of which are beyond their proper competency. Where the rules of Art. 137 para. 3 (unanimous vote) and 6 (no Community legislation) apply, Commission and Council have to meet these requirements. When EC-institutions are not allowed or not able to transform agreements into EC-legislation, the social partners have to provide their own mechanisms of implementation and enforcement. Nevertheless it is important to note that particularly in the fields of wage regulation and the regulation of labour disputes – fields where EU institutions have no competency for regulation, but which are essential for industrial citizenship – there is a potential space of social dialogue action.

Social dialogue correspondingly has a "right of initiative". They do not have to expect a Commission initiative as mentioned in Art. 138. They also can promote proper initiatives. But again in order to use Community support for the transformation of social partner agreements, they have to honour the Community competencies.

A last issue with a view to the autonomy of social dialogue are the relationships among agreements between the social partners and the transformation decisions of the Council. In the early phases of the new procedural regulation – after the promulgation of the Amsterdam Treaty and the Protocol and Agreement on Social Policy – there was a dispute over that issue. Do the Commission and the Council when transforming social partner agreements into EC legal instruments have legal discretion – and to which extent (Bercusson, 1996: S. 548 ff.; Schwarze, 1997: Rd.-Nrn. 44 ff.)? Are they entitled to modify the text of the agreement or parts of it? It is interesting and surprising that – despite this dispute – the practical law culture has come to a clearcut solution – in favour of the autonomy of social dialogue. The current practice is that the Council, when asked for transformation of a social partner agreement, takes a formal decision to transform the agreement into a EC Directive via incorporation. The agreement is appended to the Council decision (i.e. incorporated into secondary European law) and

hence remains unmodified. Today, in all cases of a joint request of the social partners (parental leave, part–time work; fixed-term contracts), Commission and Council have accepted the entire content of the agreement without any change and have incorporated them into a Community legal instrument.

All legal points of view mentioned above demonstrate a high degree of autonomy and discretion of social dialogue. Despite the facts that the dialogue has its origin in European law, that it is deeply involved in the EU-normsetting machinery, it permits considerable autonomy. Above all, this is the case where the social partners do not intend to make use of EC-institutions in order to set or implement autonomous agreements. But to a certain extent it is equally true in cases where they make use of these institutions. This high degree of autonomy and discretion of social dialogue can, at least from a legal point of view, be regarded as a potential with a view to the development of industrial citizenship.

4. Are there Perspectives of a European Industrial Citizenship?

Our analysis of the development and shape of European labour law and relations revealed ambivalences which seem hard to assess. Obviously – and contrary to the total absence of a "social model" in the origin of the EU – there has been a strong increase of labour law in the labour relations of the EU. This increase consisted of considerable pieces of substantive regulation since the early 1970s. It has experienced a shift from substantive and individual to procedural and collective regulation, within the last fifteen years or so.

Under the criteria of collective self-regulation this development could be assessed as a remarkable progress – were certain deficits not inherent to the emerging system? Collective representation and bargaining lacks voluntarism and effective involvement of those represented; there is no autonomous negotiating and dispute-solving structure comparable to the Member States' collective bargaining systems. Social dialogue – though composed by representatives of the social partners – to a certain extent functions as an "externalised legislator". As in the French and Italian practice of "législation négociée" (Pélissier/Supiot/Jeammaud, 2000: 774 ff.) and "legislazione contrattata" (Ghera, 2000: 23 ff.) it cannot effectively refer to respective constituencies from which it could draw legitimacy and executive power.

Under the focus of industrial citizenship, which we followed from the outset, these ambivalences are crucial. There are, to a certain extent, substantive social rights[17] and there is an increasing amount of collective representation and dialogue on the EU agenda. But each area resembles a separate entity, there is no proper link between individual and collective representation. T. H. Marshall had such a link in mind when he noted that collective bargaining meant "that social progress was being sought by strengthening civil rights, not by creating social rights; through the use of contract in the open market, not through a minimum wage and social security" (ibid., p. 103). "Strengthening civil rights" implied a socio-cultural tie between individuals and their collective representation. It even implied a life-world based process of integration (a social bond[18]) within the emergence of new collective industrial relations. Obviously

[17] Compare only the two Fundamental Rights Charters of 1989 and 2000.

[18] Marshall evokes the "bond" and "loyalty" connected with citizenship (ibid., p. 101) which implies both rights and responsibilities of the citizen vis-à-vis the community he is citizen of. "Citizenship requires a bond of different kind, in a direct sense of community membership based on loyalty to a civilisation which is a common possession." He underlines the importance of this loyalty particularly in the context auf industrial citizenship (ibid., p. 131).

this bond is absent today. There may be new opportunities for an effective social policy via social dialogue in co-operation with other legislative EU-institutions. But they are neither based on industrial citizenship nor properly linked to it within the autonomy/generalisation mechanism which was described in the first part of this article.

One field of industrial citizenship attests particularly to this ambivalence: gender equality. The link of gender equality (or what should be recognised as closely linked) with citizenship, has only recently entered academic debate (cf. Bercusson et al., 1996: ch. 6; Bussemaker & Voet, 1998; Lister, 1998; Fraser, 1999). This approach has gained momentum through recognition, by the Amsterdam Treaty, of Gender Mainstreaming as a legally binding commitment with respect to all Community activities (Art. 3 para. 2 ECT). This commitment was reaffirmed by the 2000 EU-Fundmental Rights Charter (Mückenberger, 2001: ch. 8). It is true that gender equality, let alone gender mainstreaming, is something like a blind eye in Marshall's thinking. This is why we, when revisiting the concept of citizenship in a European context, enlarged it with a view to gender equality and proactive equal opportunity rights (Bercusson et al., 1996: ch. 6). There are objective reasons to stress this issue. Male and female employment rates, within the EU, are still far from equal (Eurostat, 2002: 101). The female share in part-time employment is still extremely higher (33,7% of all employed women: Eurostat, 2002: 107) than the one of men (6,3%: Eurostat, 2002: 106). Gender-related employment strategies still leave much to be desired in all Member States (Behning & Pascual, 2001). This is why a citizenship-oriented European strategy would have to devote considerable attention to gender issues.

If we choose the gender issue as a point of reference for the recent developments of EU labour and social law, as described earlier in this chapter, we shall inevitably find ourselves disappointed. Particularly the shift from substantive to procedural regulation, and from state regulation to social dialogue concentration, has by no means had positive effects upon gender related inequities. As we assessed earlier in this paper, the development in substantive EU-law concerning equal opportunities for men and women, has advanced remarkably over the last three decades or so. As opposed to that, the activity of social dialogue remained relatively undeveloped vis-à-vis gender equality. Even in the gender-related areas of negotiation (parental leave, part-time), the agreements confined themselves to abolish discrimination – they do not contain any proactive element to challenge the gender-hierarchical division of labour between men and women.

Thus it would be important – as in other branches of Europeanisation (Liebert, 2003) – to "gender" equally the process of building industrial citizenship in Europe. This implies policies like those discussed earlier (cf. Bercusson et al., 1996). But it also implies "gendering" the composition of negotiating committees in the general and sectoral social dialogues. According to UNI-Europa statistics proportionately few women took part in the social dialogue Meetings in 2000/2001 (UNI-Europa, 2001). Higher proportions of female representation (over 50%) occurred only in the sectors of Commerce and Hair & Beauty Care whereas in most of the other fields female representation was under 20%, often under 10%. It is all but surprising that the outcome of social dialogue negotiations had nearly no gender equality, let alone gender mainstreaming, implications.

My conclusions following these considerations are easy to formulate, yet all but easy to implement. Let us exclude a way back from procedural to substantive regulation. There is no political power on a European as well as on Member States' level which could enforce a straightforward regulation programme; and such effort would and could not

take properly into account that modern societies need collective representation and decentralised self-regulation in order to cope with their complexity and legitimacy problems. We can equally exclude the way of a mere continuation of procedural collective representation à la EU social dialogue. This strategy fails to solve the increasing legitimation problems of European regulation and of collective representation without social bonds. It lacks even practical effective results where consensus cannot be achieved either among the social partners or between them and the EU-institutions.[19] And it does not tackle problems of "representativity" as they are brought on the agenda by the gender, and gender mainstreaming, issue. The only solution to this deadlock is the development of means for European autonomous collective self-regulation as suggested by the industrial citizenship approach – i.e. collective autonomy as a social bond bringing forth rights and responsibilities of both represented and representatives. This strategy would imply at least two requirements: firstly "opening-up" the existing forms of collective representation vis-à-vis the represented (e.g. equally to claims of working women, highly qualified workers, and young people); secondly "embedding" them into modes of autonomous integration on the Member State as well as European level.

These two requirements are practiced in some sectors of European industrial relations, but are altogether too weak to effectively cope with the problem. Opening-up the existing forms of collective representation vis-à-vis the represented would imply assessing the progress in the different forms of procedural regulation (EWC, information and consultation, SE and participation, social dialogue) under the – equally "gendered" – perspective of how they could contribute to a co-ordinated collective bargaining basis on the will of the represented. There are indicators for the increased activity of actors like social dialogue or the EWCs (cf. Lecher et al., 1998; Keller, 1998; European Commission, 2000). They demonstrate that the European social development has not arrived at a total deadlock.

Embedding these forms of collective representation into modes of autonomous integration on the Member State as well as European levels equally has certain precedents. There are certain steps towards synchronization of national negotiation, towards a European wage formula and cross-border co-operation among trade unions (cf. Dufresne and Mermet, 2002). The difficulty and challenge will be how to overcome the reluctance of private employers. Is it thinkable to establish a duty to negotiate – as it exists, to an extent, in French labour law (Pélissier et al., 2000: 783)? Are there indirect instruments like incentives to foster preparedness for bargaining? How could we empower those "stakeholders" in collective bargaining (like women) who, it appears, lack sufficient and "voice".

It is interesting that the European social partners have given signs of their commitment for change in the direction of autonomy. The Laeken Declaration hints at a new self-confidence of the social partners in their "autonomy" of "bipartism". Moreover the social partners have agreed upon a common work programme for the year 2003 – 2005 dating from 28 November 2002 (ETUC, UNICE/UEAPME, CEEP 2002). Both signs show a degree and an intention of institutionalization that did not exist before. According to our experience there are two preconditions for this progress. The national federations of the social partners must be more prepared to transfer negotiating power and mandate to their European representatives. And sectoral (branch) federations must be prepared to pass negotiating power and mandate to the interprofessional level, on a

[19] Both seem to be the case now with the temporary agency work issue where the agreement between the social partners failed and where the Commission seems to feel unable to finish the dossier.

national as well as on a European level (Mückenberger et al., 1994). Without such preparedness the European social concentration will not achieve the progress which could make it a step forward towards industrial citizenship.

Those will be crucial points for the future of industrial citizenship in Europe. This is why I stressed in the legal reflections the duty of the Commission to contribute to balanced social relationships (Art. 138 para. 1 ECT). This might imply a proactive role of the Commission in favour of autonomous collective labour relations in Europe.

As I demonstrated earlier, the obstacles against European collective bargaining are not of a legal nature. They stem from power and cultural relations. Above all EU employers – and particularly those in the private sector – are not yet inclined to accept, on an EU level, an effective system of voluntary collective bargaining including the conclusion of voluntary collective agreements (Mückenberger et al., 1994). Moreover both social partners lack the commitment to gender-related perspectives and action. Thus far, neither the Member States' employers' federations nor the Member States' trade union confederations are prepared to confer to the supranational level – let alone to social dialogue in Brussels – the real mandate which could transform social dialogue into an effective instrument of collective social self-regulation and give to Europe the vision of industrial citizenship.

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