

Social law in the wake of the crisis*

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1. Social law as a test case

Current discussions originated by the crisis place social law at the crossroad of other critical evaluations and proposals. This paper looks at how in the wake of the crisis EU legal methods related to employment and social policies are undergoing changes. Following a well-established tradition at the University of Copenhagen, EU legal methods are enriched in interdisciplinary approaches. For this reason, actions and policies in areas wrongly perceived as ancillary to the integration of the market, should not be marginalised in a coherent theoretical framework.¹⁷⁷

In this paper I select two main areas of reflection, starting from the observation that the economic and financial crisis has shaken the order of legal sources, raising issues of democratic legitimacy and accountability for all institutional actors.

In a first step I look at the current state of EU social dialogue, one of the most original features in the evolution of market integration, according to Jacques Delors' early intuitions, and not extraneous to the construction of a monetary union, as indicated in the Werner Plan.¹⁷⁸ I follow this route in order to show that the lack of political consensus, accentuated by the crisis, caused a decline in the law-making process (articles 154-155 TFEU) and limited the quasi-institutional role of the social partners. Other processes were expanded, among all the European Semester, in which the social partners were not involved, as they should have been.

I then observe some changes taking place in employment policies, which confirm the decline of the Open Method of Coordination (OMC).

In a second step I look at the impact of austerity measures on fundamental social rights. The European Semester deals with an *ex ante* examination of Member States performances and attempts to rationalise *ex post* consequences. Recommendations sent to national governments follow a path not comparable to the regulatory technique enshrined in Title IX TFEU, despite the fact that they often interact with employment policies. Furthermore, the European Stability Mechanism (ESM), agreed by Euro area Member States, gave rise to a complex procedure, to be initiated by the country experiencing serious economic instability. Memoranda of Understanding (MoUs), signed by the Troika and the Member States concerned to grant financial support (art. 13.3 ESM), reiterated controversial emergency measures. The effects caused by all these manoeuvres are now under the scrutiny of courts and international organizations and reveal a fragmented picture, both in the choice of litigation and in the results to be achieved. Decoupling economic governance from respect of individual and collective social rights can give rise to infringements of art. 2 TEU, art. 9 TFEU, and of relevant articles in the Charter of Fundamental Rights (CFR). New experiments in social law are in need of careful evaluation. The state of emergency cannot justify renouncing the rule of law.

¹⁷⁷ U. Neergaard, R. Nielsen (eds), *European legal method. Towards a New European Legal Realism*, Copenhagen: DJØF Publishing, 2013, in which mention is made of all previous books in a series covering an overarching interdisciplinary research field.

¹⁷⁸ Report to the Council and the Commission on the realization by stages of Economic and Monetary Union in the Community - "Werner Report" - (definitive text) [8 October 1970], Bulletin of the European Communities, Supplement 11/1970.

2. First step: EU social law despite the crisis

There is urgency to contextualise social law in a theoretical framework, which also reflects an historical appraisal of the space covered by social policies in the EU. Historical reconstructions are controversial and commentators are divided. Wolfgang Streeck, for example, in a recent book in which he draws on arguments previously developed,¹⁷⁹ puts forward a history of defeats, started in the Nineteen Seventies, when – as he claims – the European post-war settlement fell apart.

A very weak resilience of national states to the reformulation of social policies imposed by EU institutions and a growing rate of unemployment shows, in his view, the lack of centrality of trade unions in representing collective interests. A concrete confirmation of this negative trend is the fading away of centralised bargaining on wages, which runs parallel to the increase in public debt. Hence the transformation of the fiscal state in a debtor state, in which wage policies do not counteract the introduction of a single currency. Social partners are portrayed in Streeck's analysis as actors not well equipped to defend the autonomy of collective bargaining and to strengthen it against recurring interferences of EU institutions.

Jürgen Habermas has criticised Streeck's 'nostalgic' attitude, pointing to the paradox that going back to nation states would imply demolishing all that has been built in terms of democracy and constitutional norms at supranational level.¹⁸⁰ His plea for solidarity, passionately circulated through recent writings and expressly addressed as a response to Streeck's latest book, is very close to the voices of those European social lawyers, who are critically considering the devastating impact of the crisis, while attempting to rebuild a system of rights.¹⁸¹

Even before the explosion of the crisis, a CJEU's controversial case law, originated by *Viking* and *Laval*, brought into the public eye the dramatic phenomenon of social dumping. Apart from blaming this practice, the emphasis can retrospectively be placed on short-sighted forecasts by groups representing organised interests and on the lack of a clear-cut social policy orientation in secondary legislation. A partial answer is now in the compromise reached under the Greek Presidency to reinforce the Directive on posting of workers in the free provision of services.¹⁸² Member States should be able to impose to service providers requirements and control measures, which are deemed strictly necessary. In the construction sector, subcontracting liability will apply for posted workers with regard to pay.¹⁸³ Meanwhile, national legislatures are introducing measures going even further than the new enforcement Directive.¹⁸⁴ This issue will need to be further discussed at a supranational level and framed within additional measures to overcome the crisis,

¹⁷⁹ W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*. New York, London: Verso Books 2014.

¹⁸⁰ J. Habermas, *Demokratie oder Kapitalismus? Vom Elend der nationalstaatlichen Fragmentierung in einer Kapitalistisch integrierten Weltgesellschaft*, *Blätter für deutsche und internationale Politik*, *Blätter für deutsche und internationale Politik* 5 (2013), pp. 59-70. English version available at <http://www.resetdoc.org/story/00000022337>.

¹⁸¹ N. Countouris, M. Freedland (eds), *Resocialising Europe in a time of crisis*, Cambridge: CUP 2013.

¹⁸² Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), [2014] OJ L 159/11.

¹⁸³ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lssa/141319.pdf.

¹⁸⁴ Most lately cf. for example in France the so-called 'Savary' law, which – at the time I am writing – is under parliament's approval procedure, <http://www.vie-publique.fr/actualite/panorama/texte-discussion/proposition-loi-visant-renforcer-responsabilite->

taking into account the potentialities of EU social dialogue even in this field.

Contemporary discussions related to the crisis pay a lot of attention to wage bargaining. It can be disputed that the Euro Plus Pact interfered with national collective bargaining, when it recommended that increases in wages should be linked to productivity and should be dealt with at a decentralised level.¹⁸⁵ Even more problematic are the circumstances, which brought the ECB to surpass its own competence, addressing letters to national governments affected by serious economic instability, arguing for wage moderation, the decentralization of collective bargaining and labour market reforms.¹⁸⁶

In different ways EU institutions aimed at controlling wage policies and reducing autonomous spaces for national bargaining agents. This is a counterintuitive model for a large part of European labour law scholarship, which built on collective autonomy its own post war identity. Voices of democratic groups representing collective interests were heard as a response to authoritarian regimes,¹⁸⁷ or as a confirmation of 'countervailing powers' connected to a well established practice of collective bargaining, resistant against state interference.¹⁸⁸

Entering the sphere of wage bargaining is also in potential breach of 'collective autonomy', namely the autonomy of the social partners, as it is now enshrined in EU primary law (art. 152 TFEU, art. 28 CFR). These sources indicate very clearly that the exclusion of competences in the Treaty for matters such as pay and freedom of association do not impede the initiative of autonomous collective organizations. In other words, autonomy as an expression of a fundamental right – the right to associate and bargain collectively – prevails as a principle of EU law on the exclusions dealt with in art. 153.5 TFEU. Hence, there is no legal basis in the Treaty to propose secondary law on excluded subject matters, but bargaining on any matter, based as it is on primary law, cannot be the object of interferences by EU institutions.

2.1 European social dialogue

Within this critical scenario it is instructive to test how the social partners respond and how collective autonomy in the EU can be considered an essential part of a constitutional theory. When national systems of collective bargaining, badly affected by the crisis, are confronted with low wages and poverty traps, supranational bargaining follows different paths. A few examples of the

maitres-ouvrage-donneurs-ordre-cadre-sous-traitance-lutter-contre-dumping-social-concurrence-deloyale.html and <http://basedoc.diplomatie.gouv.fr/exl-doc/FranceDiplomatie/PDF/baen2014-03-07.pdf>.

¹⁸⁵ The commitments under the Euro Plus Pact are expressed in Annex 1 of the European Council Conclusions of 24/25 March 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf.

¹⁸⁶ K. Tuori, K. Tuori, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge: CUP, 2014, p. 102 ff. See also D. Tega, *Welfare rights in Italy*, in C. Kilpatrick, B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Department of Law Research Paper No. 2014/05, pp. 51-52, and M.L. Rodríguez, *Labour rights in crisis in the Eurozone: the Spanish case*, in C. Kilpatrick, B. De Witte (eds.), *cit.*, pp. 108-109.

¹⁸⁷ Italy and Spain are two interesting, albeit different, examples. See S. Sciarra, *The 'Autonomy' of Private Governments. Building on Italian Labour Law Scholarship in a Transnational Perspective*, in A. Numhauser-Henning, M. Ronnmar (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, Oxford: Hart Publishing; S. Sciarra, G. Cazzetta, *Un 'punteo doctrinal'. Scienza giuridica ed evoluzione del diritto del lavoro. Intervista a Miguel Rodriguez-Piñero y Bravo-Ferrer*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno* 2013, p. 739 ff.

¹⁸⁸ O. Kahn Freund, *Labour and the Law*, London: Stevens, 1972; Lord Wedderburn, *The worker and the law*, Harmondsworth: Penguin Books, 1986 (III edition).

latest outcomes, within the so-called sector social dialogue,¹⁸⁹ prove that European collective autonomy can take imaginative routes even in the difficult times we are experiencing.

The social partners in air transport have been successful in influencing European institutions on changes to be made in existing Regulations,¹⁹⁰ in order to adopt the 'home base' criterion as the only one in determining applicable legislation for flight crew and cabin crewmembers. This measure aims at fighting social dumping and creating legal certainty in a very critical area of transport, in which litigation has been recurring in the last few years.

In the social dialogue committee for Central government administrations a framework agreement was signed. It sets 20 commitments to update Protocol n. 26 on Services of general interest, in compliance with the fundamental right to good administration and in response to budgetary constraints during the crisis.¹⁹¹

Finally, European social partners in the temporary agency sector have prompted better cooperation between private and public employment agencies, to become pivotal in employment policies and obtained in a very short time the proposal for a Regulation.¹⁹²

Measures originated by sector social dialogue are not extraneous to the crisis, as much as they may appear a detour from other more relevant issues. They often refer – as in the examples I selected – to matters of broad institutional relevance.

2.2 A network of Public Employment Services. From harmonization to co-operation

Improved labour mobility through EURES, facilitated by sector social dialogue in the temporary agency sector, is complementary to another legal act. A recent Decision,¹⁹³ having regard in particular to art. 149 TFEU, creates a network of public employment services (PES) and assigns to this new supranational structure the task to support employment guidelines, referred to in art. 148.4 TFEU, until 31 December 2020. Such a revisited form of co-operation should also facilitate initiatives within the Youth Guarantee scheme,¹⁹⁴ particularly for skills matching, labour mobility and transition from education and training to work.

¹⁸⁹ P. Craig, *EU Administrative Law*, Oxford: OUP, 2012 (II edition), pp. 238-241 devotes attention to these autonomous practices. See also A. Jobert (ed), *Les nouveaux cadres du dialogue social*, Brussels: P.I.E. Peter Lange, 2008; S. Clauwaert, I. Schömann, *European social dialogue and transnational framework agreements as a response to the crisis?* Policy Brief – European Social Policy 4, ETUI, Brussels 2011.

¹⁹⁰ Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, OJ L 149, 8.6.2012.

¹⁹¹ The text of the agreement is accessible at www.epsu.org/r/569; see also www.cesi.org/index.html.

¹⁹² In 2012 Eurociett and Unieuropa global union, the social partners in the temporary agency sector carried on a project on labour market transitions in Europe and produced recommendations to EU policy makers. See European Commission, Social Europe, Newsletter n. 5, January 2014, p. 90-92. The Commission has proposed a Regulation, based on art 46 TFEU, which should facilitate labour mobility through EURES. See COM (2014) 6 final 2014/0002 (COD), 17.1.2014.

¹⁹³ Decision No 573/2014/EU of the European Parliament and of the Council of 15 May 2014 on enhanced co-operation between Public Employment Services (PES), OJ L 159/32, 28.5.2014.

¹⁹⁴ Council Recommendation of 22 April 2013 on establishing a Youth Guarantee, OJ C 120, 26.04.2013, p. 1–6.

This mixture of sources deserves some attention. The diminished impact of Title IX on employment policies has shown the weak side of a EU legal method, which took for granted the propensity of national administrations to interact and enhance best practices. In the body of Title IX a new binding legal act has now been implanted. The Decision establishing the PES network is addressed to Member States and accompanied by an Annex on benchmarking indicators, which can be amended by delegated acts of the Commission (art. 290 TFEU). The delegation of powers is conferred to the Commission until 31 December 2020, the established 'expiring date' of the PES system. Albeit for a limited time, the Commission is once more in the driving seat, if we accept that benchmarking – or 'bench-learning', as another neologism suggests – is not a mere statistical exercise.

The enhanced co-operation established under this Decision is different from the employment strategy, which nourished the OMC. This new partially revised method is targeted to provide new strength to employment policies in compliance with the agenda set in Europe 2020,¹⁹⁵ hence it expires at the end of 2020 and it concentrates on rather specific issues. Furthermore, projects developed by the network should have access to funding from the European Social Fund (ESF), the European Regional Development Fund (ERDF) and Horizon 2020. It is worth emphasising that this new co-operation requires very technical expertise.

However, that expertise should be finalised towards a political aim, namely to bring to the surface and to privilege employment policies in specific fields, as an answer to the dramatic impact of the crisis. Therefore, the selection of those who will become members of the network should mirror the competence of state administrations politically responsible for actions to be taken. Furthermore, this co-operation should aim at a fair distribution of funding. Employment policies in the wake of the crisis are meaningless without well-targeted financial support. From now to 2020 a new cooperative federalism, based on policies of social inclusion and support for the weakest groups hit by the crisis and marginalised in national labour markets, could emerge from the disillusion of employment policies under OMC.

Rearrangements, taking place in social and employment law sources, reveal a shift from harmonization to co-operation. The core nature of governance is changing, as a consequence of the crisis.¹⁹⁶ The creation of an *ad hoc* specialised network of employment services could impoverish the role of the Employment Committee, which should operate in consultation with management and labour (art. 150 TFEU) and could even more contribute to de-politicise the deliberative process. However, if we take a constructive view, this new technical structure could profitably become the emanation of well-defined political decisions, should the Council adopt in the future clear-cut positions on employment and coordinate them within its different configurations. This should be part of reformed economic governance in the EU.

I mentioned before that emergency decisions to be taken during the crisis have increased the difficulty to gather political consensus around legislative proposals and have weakened the har-

¹⁹⁵ Communication from the Commission of 3 March 2010, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020 final.

¹⁹⁶ K. Armstrong, *Differentiated Economic Governance and the Reshaping of Dominium Law*, in M. Adams, F. Fabbrini, P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Oxford and Portland, Oregon: Hart Publishing, 2014, p. 65 ff.

monisation of social policies. EU institutions are adjusting the legal methods enshrined in Chapters IX and X, exactly at the time when they lack the necessary accountability to do so. Changes should, on the contrary, be brought to the public attention in a more transparent way.

A reduced impact of harmonization as a regulatory technique leads to the adoption of 'quality frameworks'. Two recent examples are directly relevant for the discussion on measures to boost employment as a reaction to the crisis. One is the Youth Guarantee, based on art. 292 TFEU, dealing with a 'good-quality offer of employment, continuous education, an apprenticeship or a traineeship within a period of four months of becoming unemployed or leaving formal education'.¹⁹⁷

The other example is the Recommendation on traineeship, based on art. 153 of TFEU's Social Policy chapter. Adopted in response to the Annual Growth Survey 2014,¹⁹⁸ this source is characterised by the intent to improve transparency and to encourage the conclusion of written agreements for the definition of educational objectives, working conditions and a reasonable duration of traineeships.

The noteworthy detail in both Recommendations is the encouragement addressed to Member States to make use of European Funds, namely the ESF and the ERDF, and to seek for technical assistance from the EU. Actions to facilitate access to employment, particularly when they enter the dramatic dimension of youth unemployment are meaningless without financial support from the EU. For too long this synergy has been under evaluated, but it cannot be ignored in the current discussion.

2.3 The Tripartite Social Summit for Growth and Employment

The space of deliberative democracy emerging from EU sector social dialogue despite being partial is, nevertheless, supported by criteria of representativeness and legitimacy of the social partners. These criteria, unlike for other deliberative processes, are established in a Decision addressed to the social partners.¹⁹⁹ Hence, the point can be made that a binding EU legal act has generated the practice of sector social dialogue, which enforces the fundamental right to collective bargaining. Primary and secondary EU law are supportive to autonomous collective autonomy. While all this takes place in the area of social dialogue, the procedure provided for in articles 154 and 155 TFEU, to pursue legislative initiatives in social policy, suffers from a declining political consensus.²⁰⁰

¹⁹⁷ Council Recommendation of 22 April 2013 on establishing a Youth Guarantee, OJ C 120, 26.4.2013, *whereas* (5).

¹⁹⁸ Council recommendation of 10 March 2014 on Quality Framework for Traineeships, OJ C 88/1, 27.3.2014. Harsh criticism has been expressed by youth organisations <http://www.youthforum.org/pressrelease/joint-letter-condemning-council-recommendation-on-quality-framework-for-traineeships/>.

¹⁹⁹ Commission Decision 98/500 CE of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level, OJ L 225/27, 20.05.1998. Empirical research is referred to in E. Léonard, E. Perin, P. Pochet, *The European Sectoral Social Dialogue: Questions of Representation and Membership*, in 42 *Industrial relations Journal* 2011, p.254 ff.

²⁰⁰ For example, failure to adopt legislation on restructuring, after lengthy investigations into this area caused a complaint by ETUC to the European Ombudsman, following a previous initiative of the European Parliament, as for Art. 225 TFEU, namely the formal request to 'submit any appropriate proposal' on matters relevant for the implementation of the Treaty, http://petition.etuc.org/IMG/pdf/ETUC_complaint_to_EU_Ombudsman_on_European_Commission.pdf.

One further contradiction to highlight is the imperfect composition of the Tripartite Social Summit for Growth and Employment, which includes representatives of employers and labour. The specific composition of this Council²⁰¹ can be considered an anomaly, when compared with other Council's 'configurations' indicated in art. 16.6 TEU. The Commission seems now aware of this and is proposing a more visible role of the tripartite summit within the overall architecture of economic governance.²⁰² It is, in fact, hard to deny that employment and growth constitute essential elements of macroeconomic strategies.

In the attempt to facilitate coordination of policies and set targets within specific deadlines, the European Semester has progressively ignored the involvement of social partners. The strengthened economic governance program, part of the Stability and Growth Pact, incorporates the so-called Macroeconomic Imbalance Procedure, in order to detect problems at an early stage. The instrument adopted by the Commission is the Alert Mechanism Report, which, at the beginning of the fourth European Semester in November 2013, brought the Commission to the screening of all Member States, on the basis of a scoreboard of indicators.²⁰³ But social rights were not part of that assessment, despite the Commission's declared intention to strengthen the social dimension of economic governance.

In a Resolution, followed by specific Recommendations to the Council,²⁰⁴ the EP acknowledges critically its own limited involvement and develops a detailed critique of the European Semester. Social indicators, unlike in the Macroeconomic imbalance procedure scoreboard, are not binding. They are inadequate, in particular with regard to inequalities due to lowering wages and in-job poverty. Wage increases are not sufficiently encouraged, despite the beneficial impact they could have in increasing propensity to spending.²⁰⁵ The EP also underlines a critical unbalance and lack of coordination among Ecofin, on the one hand, and Employment and social affairs council meetings, on the other.

The EP stigmatizes institutional imbalances – for example the lack of coordination among different configurations of the Council – as a consequence of the exceedingly strong position assigned to the Commission, seen as the leading actor in running the show of the European semester. The criticism raised by ETUC runs along similar lines.²⁰⁶ Furthermore, a recent study²⁰⁷ shows the

²⁰¹ Council Decision 2003/174/CE of 6 March 2003 establishing a Tripartite Social Summit for Growth and Employment, OJ L 70/31, 14.3.2003. It can be worth to recall that in European Council Decision 2010/594 EU of 16 September 2010, OJ L 263/12, 6.10.2010, amending the configuration of the Council to reflect changes provided for in the Lisbon Treaty, no mention is made of the Tripartite Social Summit.

²⁰² Communication from the Commission to the European Parliament and the Council, Strengthening the Social Dimension of the economic and monetary union, of 2 October 2013, 690 (2013) final, 14. The EP Committee on Employment and Social Affairs, in its Motion for a Resolution of 6 January 2014, 2013/0361 (APP) suggested to expand even further the competences of the Summit.

²⁰³ http://ec.europa.eu/economy_finance/economic_governance/documents/2014-03-05_in_depth_reviews_communication_en.pdf.

²⁰⁴ European Parliament resolution of 25 February 2014 on the European Semester for economic policy coordination: Employment and Social Aspects in the Annual Growth Survey 2014 (2013/2158(INI)).

²⁰⁵ See, for instance, Building growth: Country-specific recommendations 2014, Commission Press Release, IP/14/623, 6.2.2014.

²⁰⁶ <http://www.etuc.org/documents/etuc-position-european-commission-communication-strengthening-social-dimension-economic#.U2-wFyidSbk>.

²⁰⁷ ETUI, *Benchmarking Working Europe 2014*, Brussels: ETUI aisbl., 2014.

contradictions emerging from the implementation of austerity measures. The largest cuts in social spending took place in countries with a high risk of poverty and social exclusion. Limitations put on public spending prevailed on measures for social inclusion and no attention was paid to the increasing level of poverty among working people. All these missed opportunities in further enhancing social law demonstrate that inequalities among weak groups in the labour market are the prevailing outcomes of current economic governance.

There is enough evidence to prove that the European Semester does not interact in a constructive way with social dialogue and in some cases puts severe limits to it. However, if we look at the implantation of social dialogue in EU primary law and in the practice of EU social partners, the indication is that there are ways to pursue democratic forms of collective interests representation. The auspice for the future is to expand social dialogue even further, with a view to creating a legal framework for transnational agreements signed by large multinationals operating within the EU and by European sector and cross-sector federations. This practice, yet another imaginative expression of collective autonomy, is increasingly expanding inside and outside the EU.²⁰⁸

3. Second step: the role of international and EU law

In taking the first step, I started from the legal preconditions allowing some expansion of social law despite the crisis. In social law I have included social dialogue, a clear manifestation of the fundamental right to collective bargaining. I now turn to austerity measures affecting social law, both at national and supranational levels.

The negative impact of the crisis has been visible in all countries of the EU, albeit with varying degrees of infiltration within welfare and labour law systems.²⁰⁹ Austerity measures dealing with fundamental social rights also affect institutional balances, whenever they come into collision with EU law. The route chosen by different actors to challenge austerity measures, relying on ILO²¹⁰ and Council of Europe sources, while at the same time sending preliminary references to the CJEU, is an indisputable sign of the widespread fear that democracy and the rule of law are being threatened.

It has been suggested that a 'legitimacy dilemma' lies behind fiscal and economic policies adopted in the EU.²¹¹ The option to de-politicise choices and solutions to be taken as a response to the

²⁰⁸ S. Sciarra, M. Fuchs, A Sobczak, *Towards a legal framework for transnational company agreements*, Report to the ETUC, with the support of the European Commission DG Employment, Brussels 2013, <http://www.etuc.org/documents/etuc-resolution-proposal-optional-legal-framework-transnational-negotiations-multinational#.U4lM1SidSbk>, I. Schömann et al., *Transnational collective bargaining at company level*, ETUI, Brussels 2012.

²⁰⁹ M.-C. Escande Varniol, S. Laulom, E. Mazuyer (eds.), *Quel droit social dans une Europe en crise?*, Brussels: Larcier, 2012; Z. Darvas, G. B. Wolff, *Europe's social problem and its implications for economic growth*, Bruegel Policy Brief 2014/3, April 2014, <http://www.bruegel.org/publications/publication-detail/publication/823-europes-social-problem-and-its-implications-for-economic-growth/>.

²¹⁰ On austerity measures and ILO sources see for example A. Koukiadaki, L. Kretsos, *The case of Greece*, in M.-C. Escande Varniol, S. Laulom, E. Mazuyer (eds.), cit., fn n. 33, pp. 199-200.

²¹¹ K. Tuori, K. Tuori, cit., fn n. 10, p. 211.

crisis can go into the direction of applying specialised and technical expertise, instead of strengthening political deliberations. The state of emergency ends up justifying the abandonment of a European legal method. This analysis is confirmed by the examples I gave above.

In this process social law is the 'eternal loser'.²¹² The voice of the Commission, in the attempt to offer answers, is fragmentary and not too coherent. Proposals, such as the ones discussed before dealing with the reform of the European Semester and of economic governance, do not seem to reach the core problems. The lack of political consensus in the Council jeopardizes legislative initiatives in the social field and gives rise to all sorts of weak experimental solutions. Social law should instead offer valid countermeasures in the wake of the crisis and at least limit concerns among those who see their entitlements to fundamental rights shaken if not diminished.

In a recent study the evocative figure of a 'triangular prism' is suggested to connect the rule of law with democracy and fundamental rights in the EU.²¹³ The study develops a critique of instruments, such as monitoring and benchmarking, used in the assessment of country performances, within the overall architecture of the European Semester. The marginal role of the EP is also stigmatised and seen as yet another sign of weak democratic legitimacy. A way of controlling the enforcement of art. 2 TEU by Member States – it is suggested – is in art. 7 TEU.

Art. 7, added in 1997 by the Amsterdam Treaty to the TEU to provide a monitoring mechanism for countries of enlargement, is situated by the authors at the centre of a discussion on austerity measures, which have affected in different ways a large number of Member States. That Treaty amendment has not coincided with reinvigorated human rights policies within the EU, notwithstanding the establishment of the Fundamental Rights Agency. Nevertheless, it could still play a significant role in a new and perhaps stronger strategy.

Issues related to the breach of social rights are not specifically addressed in this study, but the critique of surveillance mechanisms within the scheme of the European Semester developed by the authors is applicable to social policies, which are an integral part of economic manoeuvres. However, actions for the prevention of violations in the national textures of fundamental rights were not put in place by means of existing EU instruments in the bailout countries, nor in other countries coming under the scrutiny of EU institutions. The point to make clear, in fact, is that all different sources adopted in the aftermath of the crisis generate parallel discussions on breaches of fundamental rights.

A survey focused on MoUs, which, as already mentioned are negotiated by the Troika and the countries required to adopt austerity measures, is developed in a 'legal opinion' commissioned to the Bremen centre of European law and Politics (ZERP).²¹⁴ References in this study are to infringements of EU law and to responses found in a systematic interpretation of international law

²¹² Ibid., p. 231.

²¹³ S. Carrera, E. Guild, N. Hernanz, *The triangular relationship between fundamental rights, democracy and the rule of law in the EU. Towards an EU Copenhagen mechanism*, Study commissioned by the EP Committee on Civil liberties, Justice and Home affairs, CEPS 2013.

²¹⁴ A. Fisher Lescano, *Human Rights in Times of Austerity Policy. The EU institutions and the conclusion of Memoranda of Understanding*, Bremen 17 February 2014. The opinion was commissioned by the Vienna chamber of labour, in cooperation with the Austrian trade union federation, ETUC, ETUI.

sources, with an aim to expanding the scope of protection of fundamental rights and establishing responsibilities. The underlying allegation is that a state of emergency cannot lead to suspending the rule of law, nor can affect the foundations of democracy. Troika is not accountable in international law, but the ECB and the Commission are. The latter have acted as EU institutions in the crisis and must be considered responsible for breaches of fundamental rights ex art. 6 TEU. Their obligation is at the same time towards Member States and citizens.²¹⁵

Proposals put forward in this legal opinion try to respond back to the disillusion generated by austerity measures among EU citizens and to the serious attacks perpetrated to States' sovereignty. A systematic interpretation of all EU and international law sources, with a view to creating a safety net around fundamental rights, must, nonetheless, take into account the very weak position of individuals affected by MoUs and the uneven capacity of organised groups to pursue strategic litigations.

Results can be very fragmented, as it appears from the analysis of national cases.²¹⁶ In a preliminary reference, which is still pending, the *Tribunal do Trabalho do Porto* in Portugal asks the CJEU to evaluate whether the right to equal treatment has been breached, following wage cuts in the public sector, required by the 2012 budget law. It is argued, with reference to art 31.1 CFR, which guarantees fair working conditions, that fair wages should also be protected, to avoid the undermining of families' stability.²¹⁷ The CJEU had declined a similar reference, coming from the same court, since it 'did not contain any concrete element allowing to infer that the Portuguese law was aiming to apply Union law'.²¹⁸ The interaction among courts is further complicated by the views of the Portuguese Constitutional Court. Ruling on a complaint filed by some members of Parliament, the Court decided that the 2011 budget law was not in violation of the right to equal treatment, since measures addressed to the public sector were in line with the agreements signed with the Commission and the IMF, which assigned more sacrifices to civil servants. The latter are regarded as citizens more observant than others towards the public common good. In 2012 the Court ruled differently on wage cuts – holidays and Christmas allowances – highlighting the increased hardship imposed on citizens and the unfairness in sharing sacrifices.²¹⁹ In 2013 the Constitutional Court was asked to evaluate the constitutionality of the 2013 budget law, this time on a complaint filed by the President of the Republic, Members of Parliament and the Ombudsman. Despite the fact that the economic conditions had not drastically changed from the previous budget law, the Court found that the equality principle had been breached, in assigning more sacrifices to civil servants.²²⁰ In 2014 once more the Court ruled unconstitutional articles in the

²¹⁵ Ibid., pp. 5-7.

²¹⁶ A wide-ranging and deep analysis of national cases in C. Kilpatrick e B. De Witte (eds), cit., fn n. 10.

²¹⁷ CJEU, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros*, pending.

²¹⁸ CJEU, Case C-128/12 *Sindicato dos Bancários do Norte*, [2013] ECR nyr.

²¹⁹ J. Gomes, *Social rights in crisis in the Eurozone. Work rights in Portugal*, in C. Kilpatrick, B. De Witte (eds.), cit., fn n. 10, p. 81.

²²⁰ G. Coelho, P. Caro de Sousa, 'La morte dei mille tagli'. *Nota sulla decisione della Corte Costituzionale portoghese in merito alla legittimità del bilancio annuale 2013*, in *Giornale di diritto del lavoro e di relazioni industriali 2013*, p. 527 ff. See also R. Cisotta e D. Gallo in C. Kilpatrick, B. De Witte (eds.), cit., fn n. 10, pp. 90-94.

budget law introducing cuts to state sector workers who earned over a certain ceiling and reducing pensions and welfare benefits.²²¹

It is impossible to enter the technicalities of these decisions, which have attracted a lot of attention and will continue to do so, waiting for the CJEU's ruling, still to be delivered. They prove, once more, how difficult it is to establish equilibrium between the judiciary and the lawmakers in the wake of the crisis. Despite all these uncertainties in the judicial arena, Portugal is a success story for the Troika, since in the last three years the country regained both international credibility and financial stability, ending the bailout program.²²² However, there are a few clouds in this sky, if one considers that, despite welfare and wage cuts so unevenly distributed, unemployment remains very high. If Portugal was to be taken as a paradigm, the EU institutions should now enter a post emergency phase and activate supportive social measures. A different dialogue should start with the same actors – be they judges or members of parliament or civil society organizations – which fought back austerity measures, trying to keep alive democracy and the rule of law.

In the Greek case other contradictions emerge. The European Committee of Social Rights (ECSR), following a collective complaint filed by Greek unions, decided for the discriminatory nature of lower wages paid to workers under 25 years and invited national courts not to apply national law. The same was suggested for measures degrading living conditions. The Committee had to adopt a proportionality criterion and clearly stated that 'measures taken to encourage greater employment flexibility with a view to combating unemployment should not deprive broad categories of employees of their fundamental rights in the field of labour law, which protect them against arbitrary decisions by their employers or the worst effects of economic fluctuations'. It also referred to the position taken by the Greek national commission for human rights, which had expressed 'the imperative need to reverse the sharp decline in civil liberties and social rights'.²²³ This citation shows that the domestic alert mechanism, assigned to a body in charge of guaranteeing compliance with human rights, was not taken into consideration by the legislature, constrained within the scheme of the MoU, which took precedence as an emergency measure.²²⁴

The language of the ECSR in another case filed by Greek trade unions is even more specific, when it addresses the cumulative impact of austerity measures as a criterion to evaluate the breach of social security rights. The arguments brought by the Committee are once more illuminating as for the role that should be assigned to *ex ante* empirical examinations of the overall impact of emergency decisions. The point made is that 'the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures, that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society.' And '(n)either has it discussed the available studies with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue'.²²⁵

²²¹ Tribunal Constitucional de Portugal, Acórdão nº 413/2014 of 30.5.2014; <http://euobserver.com/news/124434>.

²²² II Sole 24 ore, 6 May 2014.

²²³ ECSR, General federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint n. 66/2011, Decision on the merits of 23.5.2012. Comments in K. Tuori, K. Tuori, cit., fn n.10, p. 239.

²²⁴ See M. Yannakourou and C. Tsimpokis, *Flexibility without security and deconstruction of collective bargaining. The new paradigm of labour law in Greece*, in 35 Comparative Labour Law and Policy Journal 2014, p. 339 ff.

²²⁵ ECSR, Federation of employed pensioners of Greece (IKA- ETAM) v. Greece, Complaint n. 76/2012, Decision on the merits of 7.12.2012.

The results of judicial activism and social mobilisation in countries badly hit by austerity measures deserve careful evaluation. The ECSR in particular has developed very relevant legal analysis, which should be now considered by the EU institutions as a starting point for a new strategy in social law. The non-binding nature of this Committee's decisions does not obscure the moral value that should be attached to them. Labour standards should be restated as a clear response to the detrimental effects of the crisis.

4. An institutional disorder. Some concluding remarks

A plea for solidarity, in response to sceptic and nostalgic views on the future of the EU, entails the construction of stronger supranational institutions, transparently empowered in redistributing resources and in reconstructing clear links of representation. Measures dictated by the crisis have, on the contrary, changed the nature of states' competences in recognising specific entitlements both to individuals and collective organizations and have not fully clarified under which conditions weaker groups in the labour market will be the addressees of supportive measures.

The examples offered in this paper show an institutional disorder, which has been provoked by recourse to emergency measures of different nature and weight. Social law has been taken as a test case, with special regard to the functions traditionally assigned to the social partners, re-invented despite the crisis. One point to make is that attempts to regain social emancipation in the countries most affected by austerity measures have been made by trade unions and other collective organizations. In such a way new inequalities and serious exclusions from basic welfare services have emerged and now are being discussed in the public sphere.

The crucial point is how to recover from the institutional disorder, disclosed by these new forms of judicial activism and social protest. 'The shift from legislation to contract'²²⁶ clearly underlined with references to present institutional circumstances, shows the many risks inherent in negotiations undertaken in a state of emergency. Hence, there is an urgent need to regain space for legislation inspired by the fundamental values of the EU. We should recall that solidarity is a source of social integration, besides money and administrative power. In this perspective EU legislation should re-assign entitlements to individuals and to groups representing collective interests and should do so with full respect for democracy and the rule of law.²²⁷

²²⁶ P. Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in M. Adams, F. Fabbrini, P. Larouche (eds.), cit., fn n. 20, p. 29.

²²⁷ J. Habermas, cit., fn. n. 4. See also J. Habermas, *Between facts and norms, Postscript (1994)*, Cambridge: Polity Press, 1997, p. 449 ff.