

Is the European Court of Justice moving towards specialisation in the social field?

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The Court of Justice of the European Communities (CJEC, or more commonly ECJ) has from the very beginning occupied a central place in the European institutional set-up. Enjoying real authority¹, it has over the years developed a creative jurisprudence, which forms the cornerstone of the European construction project: whether in crafting the fundamental principles of European law, or in the strength of its case-law on secondary legislation, the Court has an essential part to play. Under the Treaty, the Court is entrusted with ensuring the correct application and interpretation of Community law (Article 220 EC). It therefore fulfils an uncontested regulatory function, leading it to intervene in an extremely wide range of disputes, acting as a constitutional court when interpreting the Treaty of European Union, and as an international court in regard to the interaction between international treaties and EU law.

The ECJ has nevertheless seen its role increase, and its caseload become heavier, as the process of integration has intensified (Azoulai, 2003: 262; on the need for the Court to evolve, see Dashwood and Johnston, 2001), and as a result of the various enlargements. The number of national courts likely to seek interpretations of EU law by submitting a request for a preliminary ruling has increased considerably², as has the number of countries subject to monitoring by the Commission under infringement proceedings. If we add to this ‘the thirst for justice on the part of better-informed litigants, legislative inflation, the Commission’s vigilance in monitoring competition, the emergence of new branches of Community law, and hence of unprecedented sources

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1. Isaac and Blanquet (2006: 349); Mehdi (2007: 110f.); Bergé and Robin-Olivier (2008); and on the role of the Court, Dehousse (1994).
 2. There is a large body of literature analysing the reactions of national courts when faced with EU law, and their reluctance to apply the Social Directives; for a comparative approach, see Sciarra (2001) and Rodière (2008).

of disputes' (Mehdi, 2007: 113), we can understand why major debates have arisen about the transformation that the Court has undergone in the last fifteen years or more³. The establishment of the Court of First Instance (CFI) in 1989⁴ was constitutionally enshrined in the Treaty of Maastricht, and was the subject of revision by the Treaty of Nice in 2000 (Article 220, para. 2 and 225a EC), which opened the way to the establishment of judicial panels.

The EU Civil Service Tribunal, attached to the CFI, came into existence in November 2004. Another specialist panel is being set up to deal with intellectual property issues. It should become operational in 2009 (Lavranos, 2005). The possibility of developing other specialist panels is provided for under the Treaty: thus the idea of one specialising in private international law has been floated, because of the way rules on choice of laws have become an EU matter (Bergé and Robin-Olivier, 2008: 519) (Rome I, Rome II, Regulation 2000/44); and more recently, one specialising in social law.

General considerations arising from the volume of litigation and the degree of specialisation involved are contributing to this process. But there are also fresh anxieties linked to the development of transnational disputes in labour relations, which suggest that the Court is once again having difficulty in understanding the original nature of labour relations in the EU. It is therefore important to ask questions, in the first instance, about the link between these anxieties and the development of protection for European citizens in the social sphere, given the particular nature of labour relations, and then to analyse the risks involved in setting up a court specialising in social issues.

1. The particular nature of labour relations in Europe and some anxieties raised by recent case-law

The development of labour laws in the course of the 20th century has shown that affirming the particular nature of labour relations has led to the setting-up of specialised courts. One may well ask whether, in the

3. Johnston (2001), Versterdof (2003), Craig (2001).

4. After 15 years of discussion.

light of questions raised by recent case-law of the Court of Justice, such a demand for specialisation should be transposed to the European level.

1.1. Autonomy of labour tribunals in Europe and subsidiarity

The question of whether it is appropriate to develop a European court specialising in labour relations builds on the experience of a number of Member States at national level, and on the forms that the distribution of powers currently takes in the EU. The vast majority of Member States have developed avenues of specialisation in the form of labour tribunals and courts specialising in social security matters. The models used are of course very diverse, since they are invariably the result, not only of the ways in which industrial relations have historically evolved in the different countries, but also of the institutional structure of the judicial system, and the part played by the trade unions in forming the concept of social justice. The fact that countries with very different structures of labour law have chosen the path of specialised courts or judicial panels nevertheless suggests that, irrespective of the sources of law (statute, regulation or common law), the legal structure relating to labour relations shows a certain 'particularism', due to the interaction between the sources and actors involved (Villebrun, 1998). Specialised courts are not an obstacle to guaranteeing uniformity of case-law within legal systems, because of possible appeals to supreme courts and/or constitutional courts.

The same reasoning can in some respects be legitimately transposed into European law, since the principle of subsidiarity controls the way in which EU rules operate: Article 137, emanating from the Social Protocol adopted at Maastricht (and not amended since, despite the various re-negotiations of the Treaty), gives a restricted list of the fields in which the Union may intervene by adopting common rules in respect of labour relations⁵. The Commission must demonstrate that 'the

5. Qualified majority required, Article 137(1): improvement of the working environment to protect workers' health and safety, working conditions, information and consultation of workers, integration of persons excluded from the labour market, equality between men and women with regard to labour market opportunities and treatment at work; Article 137(3), unanimous vote required: social security and social protection, termination of employment contract, representation and collective defence of workers, conditions of employment for third-country nationals.

objectives of the proposed action cannot be sufficiently achieved by the Member States' (Article 5 EC). This demonstration is usually set out in the preamble to the Social Directives. Because of the principle of subsidiarity, and also the difficulty of harmonisation at EU level⁶, the European social Law is currently fragmented, being limited to four essential areas⁷; as a result, the corpus of labour laws remains a matter of national competence. The social partners' institutional participation (Articles 138 and 139 EC) does not substantially change this scenario, because of the limited number of legally binding agreements negotiated in the EU⁸. As a result, the rules and dynamics governing negotiation remain essentially national.

In addition, the Social Directives frequently make reference to 'national practices and legislation' when establishing a link between the Community rule and the diverse models of industrial relations in Europe⁹; this poses a number of tricky problems concerning the scope of harmonisation in the social sphere.

Finally, Article 137 *in fine* excludes from the field of Community competence specific questions involving industrial relations: the exclusion is total in the case of pay – which in many Member States is subject to regulation by collective agreements – the right of association, the right to strike and the right of lock-out. Member States have thus rejected any prospect of harmonisation in those areas of industrial relations by means of the Social Directives.

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6. This is not the place to reiterate the difficulties of voting on the various Directives over time. On this point, see Rodière (2008). We simply observe that the Directives adopted at the end of 2008, on the extension of maternity leave, temporary agency work, the revision of the European Works Council, and the revision of the Working Time Directive, were all negotiated concomitantly, in order to achieve negotiated compromises. The European Parliament adopted the first three Directives, but opposed the Working Time Directive. The Parliament wants to do away with the derogation allowing people to work more than 48 hours per week under an individual contract (a clause demanded by the United Kingdom). It also refused to accept the provision regarding on-call time, which drew a distinction between active and inactive periods, considering that it was all working time, but allowing derogations to be negotiated for inactive periods (*Liaisons sociales Europe*: 215-216, 7 January 2009).
 7. Discrimination, health and safety, information and consultation of workers, and various texts relating to the contract of employment and working conditions (Rodière, 2008).
 8. See however the very detailed studies by Mélanie Schmidt (2007), Ahlberg *et al.* (2008), Mazuyer (2007: 476), Moreau (2008: 73).
 9. Numerous examples can be found in the Directives on the Posting of Workers, the European Works Council, Health and Safety, etc. The most frequent references concern the appointment of worker representatives and the definition of a worker.

Because of the need to respect the rules of democracy in the EU, as proclaimed and instituted in the Treaty, we must also conclude, according to Antoine Lyon-Caen (2008), that by adopting this measure the EU is ruling out any intervention in those fields of collective rights in Europe. The consequences of this are important, as can be seen from an analysis of judgments handed down by the Court at the end of 2007 and in 2008. These judgments, *Laval*, *Viking* and *Rüffert*, which have been much commented on¹⁰, bring together a number of anxieties about the Court's approach to industrial relations in Europe.

1.2. Anxieties

These anxieties are based, firstly, on the fact that the Court is showing great difficulty in apprehending the specific nature of rights relating to collective bargaining, the right to strike, and the rights of trade unions, and secondly on a distressing ignorance of the machinery inherent in the process of harmonisation in the social field, which demands that a distinction be made between the rules on choice of laws and on harmonisation. The latter permit the application of measures favourable to workers by virtue of the social objectives contained in the Treaty.

1.2.1. The Court's failure to recognise the singularity of national collective rights

In this series of judgments relating to the freedom of movement of services¹¹, the Court has undertaken an extensive analysis of economic freedoms and the notion of 'obstacle', and a restrictive analysis of the social objectives contained in the Posting Workers' Directive, and in the Treaty.

10. A detailed analysis of these judgments appears elsewhere in this edition; this will therefore not be further developed here. Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 18 December 2007; Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, 11 December 2007; Case C-346/06, *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen*, 3 April 2008. For commentaries, see in particular Chaumette (2008), Lafuma (2008), Laulom (2007), Robin-Olivier and Pataut (2008), Teyssie (2008), Moizard (2008), Robin-Olivier (2008), Jault-Seseke (2008), Lhernoud (2008), Syrpis and Novitz (2008), Malmberg and Sigeman (2008), Joerges and Rödl (2008), Deakin (2008), Bercusson (2007), Blanke (2008).

11. For a summary of the case-law relating to the Posting Workers' Directive, see Lernhould (2008).

In these judgments the Court found itself confronting a new kind of conflict; it was no longer simply a matter of interpreting Community rules and testing national law against these¹². The social situations at issue here were transnational; this pre-supposed that they should be analysed in the light of the co-ordination of laws allowed for under national law, by PIL, taking account of EU law, but at the same time demanding an innovative form of interaction¹³ which satisfies the requirements both of the logic underlying fundamental national rights in the social sphere, and of the economic and social objectives inherent in Community integration. The balance struck by the Court in applying the principle of proportionality has given rise to a far-reaching debate at European level, the details of which need not be repeated here. Only those concerns that relate to the Court's approach in terms of internal market, rather than collective labour relations, will be emphasised in what follows.

In *Laval*, the point at issue was the originality of the system of industrial relations existing in Sweden. These are characterised not only by their autonomy, but also by the very high level of organisation displayed by the social players in ensuring respect for collective agreements (Malmberg and Sigeman, 2008). The autonomy of collective relations is ensured by means of the inherent link which is recognised between the trade unions and employers' organisations in the Swedish negotiating system, which excludes any intervention by the law in relation to either minimum rates of pay or the implementation of collective agreements. Industrial relations are organised through the interplay of the negotiating forces on both sides and their ability to marshal coercive collective action. Boycotts are allowed, as are solidarity actions designed to put pressure on the employers, whether or not they are members of the Swedish employers' organisations. The way this system of industrial relations operates reflects a strong concept of autonomy for the social partners, non-intervention by the State, and a high level of trade union membership: in Denmark, Sweden and Finland 70 % of employees are union members.

12. See the comparative studies in Sciarra (2001) and O'Leary (2002). See also Hepple (1986).

13. On the specific features of the transnational approach, see Moreau (2006: 401f.).

The Court did not choose to take account of the singularity of the Swedish system, which lay at the very limit of the regulatory framework set up by the Directive. The Court was in fact called upon to interpret the posting workers' Directive adopted on the 16 December 1996¹⁴ with regard to the specific way in which collective agreements are applied in Sweden and the level of wages imposed on all companies operating in Sweden.

Directive 96/71 had the clear objective of instituting a minimum level of protection in the country where services are provided. This 'hard core' is defined in a restrictive and limited way by the list in Article 3(1), covering matters which, with the exception of minimum rates of pay, had been the subject of social harmonisation. The Directive was adopted with some difficulty because of differences of interest – even at the time – between Member States; it succeeded as best it could, with obvious compromises along the way (Moreau, 1996), in establishing a principle of minimum guaranteed protection at the place where the service is provided, under Articles 3(1) and 3(7). The Directive was based on the settled case-law of the Court, as established since 1991 in the *Rush Portuguesa* judgment, concerning the strength of the principle of equal treatment between undertakings operating on the same territory, and served to consolidate both the principle of a minimum level of protection and that of equal protection for workers at the place where services are provided. On collective agreements, because of the extremely diverse nature of national laws, Article 3(8) allowed for either an extension of generally applicable arrangements, as exists in France and Belgium, or a system based on a general declaration, which was not used by Sweden because it had its own system based on the autonomous nature of collective labour relations.

By taking the view that the minimum rate of pay cannot be determined either by Article 3(1) or by Article 3(8), the Court is depriving the Member State of the possibility of imposing negotiation on a case-by-case basis on the service provider; this, however, lies at the heart of the

14. Studies of the context in which the Directive was drafted remain highly relevant for an assessment of current case-law: Moreau (1996), Meyer (1998: 73); for a detailed analysis of the way the issue has developed in France and the relevant legislation, Lernhoud (2005).

system of industrial relations applicable on its territory¹⁵. Basing itself on a narrow reading of the concept of unfair competition¹⁶, the judgment gives a strict interpretation of Directive 96/71 which is at variance with the social objectives of protecting workers in the case of mobility of service activities¹⁷.

This gives rise to a major anxiety: despite the distribution of powers in the collective sphere which is recognised for Member States, the Court did not attempt to find room for the original way in which industrial relations are organised in Sweden when assessing the transnational conflict¹⁸. There may be several reasons for this: poor knowledge of the diversity of systems in place, the desire to allow the market to operate freely¹⁹ given the new construction placed on this following the enlargements of 2004²⁰, or indeed the desire to blank out the particular features of activities linked to labour relations in order to maintain the approach adopted in the *Omega* and *Schmidberger* cases²¹, which did not involve private participants (in this case, trade unions).

In any event, Sweden – like the other Scandinavian countries – probably did not fully realise the risk posed by the singularity of its system of industrial relations, given the stated aim at European level of maintaining national diversity in the social sphere²².

The specific nature of trade union activity also appears to have been poorly apprehended by the Court: it is clear that the objective pursued by trade unions, when they go to the extent of organising a strike or other

15. Point 71 of the judgment.

16. Point 75 of the judgment, cf. Malmberg and Sigeman (2008: 1137).

17. On this matter, Moizard (2008: 869), Laulom (2007) and Lafuma (2008).

18. This does not only affect Sweden, but potentially any system of collective relations, see in this connection Syrpis and Novitz (2008: 423).

19. See in this connection Lyon-Caen (2008).

20. We refer here to the analysis carried out by Brian Bercusson (2007) on the positions adopted by the Member States in the *Viking* case, which showed the older Member States clearly and systematically opposed to the new Member States, thus revealing deep divisions of economic and political interests that go beyond the legal arguments.

21. Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 14 October 2004, and Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, 12 June 2003. See especially Syrpis and Novitz (2008).

22. One might suppose, therefore, that Sweden and Finland would subscribe to this general declaration, or succeed in modifying Directive 96/71.

form of collective action, is to cause damages to the employer: the modalities of how this is done, as understood in French or Swedish law, may be different (especially with regard to picketing of sites or lock-outs), but the aim of trade union action is always, in the last resort, to exert inordinate economic pressure on the employer. The link between the recognition of a fundamental right and the exercise of that right is so close that some authors take the view that to place restrictions on the exercise of a fundamental right is tantamount to denying its recognition. The right to strike is essentially a right to cause harm which has to be spelt out in terms of the modalities under which it is exercised²³.

A case-by-case, *a posteriori* examination of the conditions under which the obstacle engendered by the collective movement may be considered legitimate and justified poses an extremely heavy risk for trade union organisations²⁴. This contradicts the logic implied in recognising the fundamental right.

Following a line of argument which is far from convincing (Robin-Olivier and Pataut, 2008: 87), the Court is keen to extend the application of economic freedoms across the board to trade unions, in recognition of their normative power. Direct effect is justified on the grounds that States or public bodies, as emanations of States, can compromise economic freedoms²⁵ by obstructing the development of the internal market. The Advocate General proposed a case-by-case analysis of the various forms of transnational trade union action. As Sophie Robin-Olivier has demonstrated, the Court has not clearly established a satisfactory criterion, but has emphasised the need for economic freedoms to apply across the board, thus disregarding the specific role played by trade union organisations.

The Court has not enabled a general line of conduct for trade unions to be developed for the future at European level: they will systematically have to justify their actions, something which is strongly at variance

23. As Lord Wedderburn observed (2007): 'People who have never been on a picket line tend to think that all industrial action is disproportionate if not indecent'.

24. See the majority of writers already cited, especially Blanke (2008: 449).

25. In this connection see the Opinion of Advocate General Maduro in Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, 23 May 2007 (points 41-42).

with the context of social relations as these have emerged from the internationalisation of economic activity²⁶. We have here a reversal of the burden of justification which runs counter to the logic of collective action.

Finally, the Court, especially in the *Rüffert* case, has altered the logic of the Posting Workers' Directive regarding conflict of laws, by stating that the Directive imposes minimum substantial rules; it clearly refused to take account of the principle posited in Article 3(7) of the Directive, which allows the State where the services are performed to impose measures more favourable to workers, taking the view that the Directive cannot be interpreted as allowing the host Member State to go beyond the 'hard core'. By imposing a logic of minimum harmonisation, the Court is only allowing the possibility of applying more favourable provisions of the State of origin, or those of collective agreements which are universally applicable.

But Directive 96/71 did not have as its direct objective the imposition of a minimum level of protection: rather its aim was to impose beyond the conflict of laws the law of the place where the services are performed for specific issues, which are spelt out in this 'hard core' of protective measures. The Court is therefore moving the goalposts as regards the mandatory provisions of the host country, which must not give rise to unfair competition at the place where services are provided. The Court does not seek to reconcile its case-law with the conflict of laws' rules relating to contractual obligations (Moreau, 1996), not regarding this measure as an enhanced national protection clause²⁷.

In this judgment the Court followed the lines of the question posed in the preliminary rulings: Community law is thus being used as an instrument to destabilise domestic law and bring about a clear diminution in protection for workers in Germany (Robin-Olivier, 2008: 487). In this case the aim was to render inoperable the obligation to observe social standards in public procurement. Here the Court is once

26. Especially in the maritime sector; on this point, see the comments of Alexandre Charbonneau (2008).

27. Opinion of Advocate General Bot in Case C-346/06, *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen*, 20 September 2007 (point 84), Moizard (2008: 869) and (2000).

again shifting its reasoning between examination of a minimum necessary level of protection ('necessary for all') and protection by way of collective agreement in order to improve worker protection in the framework of public procurement. The Court confuses minimum living wage (decent one) with minimum wage ('salaire minimum') (Robin-Olivier, 2008: 489). It is deliberately blocking the operation of the social clause in public procurement, which is seen as a way of improving the lot of workers by affirmative action on the part of the State. The principle of equal treatment nevertheless should have permitted those social clauses, because they spell out the social conditions which are required of all service providers, whatever their origin.

The ECJ, however, has chosen not to move in the direction allowed for in the Directive of 31 March 2004 on coordination of public procurement contracts, which authorises the introduction of social and environmental clauses. It is thus opposing a form of social regulation which positively allows the State to make its public procurement conditional on a policy of social or environmental quality. The concern raised by these judgments is justified, because through them the ECJ is undoubtedly playing an active role in regulating transnational social conflicts. This takes the following forms:

- 1) adopting a general approach to Community law, disregarding the international context inherent in the transnational dimension of these conflicts;
- 2) making a technical choice in favour of the pre-eminence of economic freedoms and restricting the social protection arrangements introduced in the framework of transnational labour relations;
- 3) showing a lack of consideration for the territorial logic of collective relations which underpins the fundamental right.

Is the Court's lack of specialisation in social matters an issue here? The question may well be asked. Should these observations lead to the Court becoming more specialised in functional terms? The answer, nonetheless, does not appear to be self-evident.

2. Legal unity and Court's creativity on social disputes

The requirements of maintaining the unity and consistency of the Court's case-law are the chief obstacle to setting up a specialist panel. But it would be wrong to minimise the difficulties raised by the way in which the scope of such specialisation is defined.

2.1. The unity of case-law

The Treaty compels the Court to build unity and consistency into its case-law. This objective of unity in building the Community is based on the principle of the primacy of Community law (Pescatore, 2005) as established by the ECJ. Social disputes has given the Court ample opportunity to set out the main issues representing as many stages in the integration of EU law²⁸: one need only cite cases such as *Defrenne*²⁹, *Johnston*³⁰, *Von Colson*³¹, *Marshall*³² and *Francovich*³³, followed by *Bosmar*³⁴, *Baumbast*³⁵ and *Martinez Sala*³⁶ to realise that the contribution made by social case-law is not only important for European citizens in terms of rights, but also for defining the principles of efficiency of Community law, effective judicial protection, State liability, freedom of movement of persons, etc.

Social litigation, although specialised, may at any moment throw up highly sensitive issues of principle, as has been shown in the *Laval* and *Viking* judgments³⁷: what is at issue is the concept of the economic and social integration of the EU in terms of the balance struck between

28. Dubouis and Gueydan (2005, see Part 3, sources, case-law, p.403f.); Vesterdorf (2003) draws consequences from the way the Court's case-law has evolved, showing for each period in the last 40 years the fundamental contributions made by case-law, and the volume and significance of litigation.

29. Case C-43/75, 8 April 1976.

30. Case C-222/84, 15 May 1986.

31. Case C-14/83, 10 April 1984.

32. Case C-152/84, 26 February 1986.

33. Joined Cases C-6/90 and C-9/90, 19 November 1991.

34. Case C-415/93, 15 December 1995.

35. Case C-413/99, 17 September 2002.

36. Case C-85/96, 12 May 1998.

37. *Cit. supra*.

economic freedoms and fundamental rights, seen in the context of a narrow interpretation of the principle of proportionality.

It may even be argued that social litigation has a strong tendency to justify evolutions of general principles in Community law. In general terms it is most often concerned with the rights of persons who are acting to preserve subjective rights, either against the State which is not respecting Community law, whether primary or secondary, or in a way which involves the creation in the EU of fundamental freedoms that take account of mobility (essentially, freedom of movement of workers, freedom to provide services, and freedom of establishment).

With regard to the first scenario, the case of *Mangold*³⁸ involved a challenge to the German law on employment contracts for older workers: on this occasion the Court was able to rule that the principle of non-discrimination on grounds of age was a general principle of Community law, thereby contributing to the assertion of fundamental social rights in Europe. In the *Laval* case, the Court also ruled that the right to strike was a general principle of Community law, thus enabling this fundamental social right to be recognised in Europe.

Clearly the reach of these two judgments goes beyond the social purpose of the litigation, in that it enables the fundamental social rights proclaimed in the Social Charter to be given a legal basis³⁹. This case-law thus provides these fundamental rights with their own legal basis in Community law, demonstrating that the Court can find a way of circumventing the controversy surrounding the scope of the Charter. It makes it imperative to re-visit the scope of the United Kingdom opt-out, based on general principles of Community law (Burgogue-Larsen, 2007: 58; Barnard, 2008).

The recognition of the right to strike in the *Laval* case-law is not without its consequences, since it immediately provides a weapon for trade unions to use. In the event of an employer failing to observe provisions derived from Community law, unions are entitled to call a strike and to rely on the fundamental right as recognised by the Court:

38. Case C-144/04, 22 November 2005, *RJS* 4/06, note H. Tissandier: 362-364, Martin (2006).

39. The reach of these judgments also causes other difficulties, in relation to the *Mangold* judgment. See the case-law handed down by the Court in the last two years, Martin (2008: 947).

for example, going on strike because of failure to consult workers' representatives, either in the context of a general right to information or of the European Works Council. The conditions required by the Court restricting the exercise of the right to strike must also be met: besides justification, these include necessity, and striking only as a *ultima ratio*. Although these conditions are restrictive, they should not disguise the importance, in terms of constructing fundamental collective social rights at European level, of recognising the right to strike as a general principle of Community law⁴⁰.

Turning to the second scenario, the fact that it is possible, by using the notion of European citizenship, to sidestep the limits set in practice to the free movement of persons also shows the importance of linking social litigation to the actual wording of the Treaty. There are countless examples, drawn from the Court's rulings on the issue of non-discrimination, which also serve to illustrate how the requirement for unity of the Court's case-law goes beyond the specific features of social questions. The recent case *Coleman*⁴¹, creating the notion of discrimination by association shows this creative capacity of the court for adapting its rules to the evolution of the society (or the internal market). It is to be feared, therefore, that procedural specialisation may limit the creativity of Community case-law in social matters.

2.2. Specialisation and the creativity of EU case-law

It might be objected that this requirement for unity and for preserving the creativity of case-law applies in a similar way to questions submitted to the Court of First Instance or to the specialist panels, either existing (EU Civil Service) or yet to be set up (industrial property). The possibility of referring back to the Court of Justice, at the request of the Advocate General, issues involving principles of Community law enables the unity and consistency of Community law to be safeguarded. The use of this channel, like the appeals mechanism, offers procedural options in the interests of unity while allowing for specialisation.

⁴⁰. Or even as a human right, see in this connection Novitz (2007).

⁴¹. Case C-303/06, *Coleman v. Attridge Law and Steve Law*, 17 July 2008, RJS 11/08, obs Le barbier Le Bris, p. 883.

The arguments against establishing a specialised judicial panel are also linked to the current logic of the Treaty, which binds specialisation to the CFI (although for every new body set up, appropriate Rules of Procedure have to be put in place).

A more serious difficulty is deciding where to draw the boundaries of social issues: should this line of specialisation include only labour relations, or should social protection be included as well? Questions related to the co-ordination of social security systems can be highly technical, as is universally recognised, and account for a great deal of litigation. Recently, however, it has proved necessary to link the idea of economic freedom to the right to receive care, in the context of the Court's case-law on access to healthcare in establishments situated in European countries other than the state of residence or of affiliation (see cases *Kohl and Dekker*, *Müller and Fauré*, *Lechte*) (Hatzopoulos, 2005; Hervey, 2006 and 2007, and also De Búrca, 2007).

Unlike the shift brought about by the *Laval*, *Viking* and *Rüffert* judgments in the context of free movement of firms and workers within the EU, which led to a reduction in the level of protection afforded to workers and trade unions by strictly monitoring their activity because of the obstacles caused to the exercise of economic freedoms, the Court's case-law on access to healthcare extends the rights of individuals in the field of social protection. It is therefore difficult to argue that the clash between economic freedoms and the rights of individuals or citizens is entirely straightforward. In both cases, however, national models are being challenged by a forced 'opening-up' of the market.

Setting the boundaries for specialisation is by no means impossible, but it is certainly a delicate operation, since many international treaties or association agreements directly or indirectly affect the social rights of individuals, and the increasing Europeanisation of private international law contains provisions affecting labour relations. Cross-cutting issues relating to equality and citizenship are central to the debate, as are those relating to democracy within the European Union⁴².

42. Take for example the questions regarding democratic deficit raised by the Court in the *UEAPME* case (1998) relating to the representativeness of trade union organisations at the negotiating table when concluding European collective agreements.

A brief glance at this difficult issue serves to highlight the difficulty of having a social specialisation within the Court. Nevertheless it appears to be important for new balances to be established so as to reconcile within the current framework of the Treaty fresh caseloads of litigation, the need for specialisation, and the unity of case-law. Successive enlargements and the arrival of 'new judges' are raising fears that the ways in which Community law has been built up will be abandoned in favour of a development which is not in accordance with the Treaty, and that EU values will be jettisoned in favour of market imperatives. These fears cannot however be grounded on the *Laval* and *Rüffert* judgments, given the composition of the Court.

The Court's internal rules are also designed to enable account to be taken of a high degree of technical complexity when cases are allocated (tax cases, or cases about the co-ordination of social security systems, for example)⁴³. But it seems that this is not sufficient in present circumstances. It seems urgent for the judges of the Court to have access to detailed knowledge of national law on social issues, and in particular of collective relations as they exist in a number of EU countries⁴⁴. The Court's judges choose their own *conseillers référendaires* (legal secretaries) but do not have any specialist advisers available to them. The creation or appointment of specialist *conseillers référendaires* would undoubtedly facilitate judicial understanding of many thorny issues linked to specific national contexts.

A generalised appeals system or a system of co-ordination for exchanges of information with supreme courts, and the use of the concept of *amicus curiae* have also been proposed (Vesterdorf, 2003: 320ff.). On social matters, it seems important for trade union organisations to be heard. The ETUC for the first time produced a written submission in the *Laval* and *Viking* cases. Active involvement of the ETUC in the judicial process will undoubtedly be essential in the future.

43. As a general rule, analysis does not focus on social litigation (Jacobs, 2004).

44. This does not appear to be something demanded by the judges; see a recent interview given by Judge Bonnichot, *Conseiller d'État* and judge at the Court of Justice (*Liaisons sociales magazine*, January 2009, p.32). He expresses the view that the Court plays an essential and a protective role in social matters and is confronting new issues, taking as an example the *Mayr* judgment of 26 February 2008 (discrimination on grounds of sex involving dismissal of a woman absent from work while undergoing *in vitro* fertilisation) and the *Coleman* judgment of 17 July 2008, previously cited (harassment of an employee whose child is disabled).

Conclusion

In conclusion, it seems useful to continue thinking not only about the procedural implications of a specialisation in EU social law, but also about the method of construction that the social dimension of the European Union will require in the future. The fact that the normative power of the European social partners is recognised in the Treaty has not been reflected in any significant extension of social protection for European workers and citizens. Their role remains, nonetheless, crucial if the EU is to make progress in the search for a *real* balance between economic freedoms and fundamental rights. The fundamental concept of economic integration in Europe is at stake, between optimising economic freedoms and seeing harmonisation as a maximum ceiling for protection and construction, integrating both social and economic objectives without implying any downgrading of the latter, and taking into account the diversity of rules that exist, the differences between them (Dougan, 2008; see also Deakin, 2008) and the ‘constitutional asymmetry’ (Sharpf, 2002) that has existed from the outset between the social and economic dimensions of the European Union.

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