

Alan C. Neal (Ed.)

# The Changing Face of European Labour Law and Social Policy

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INTERNATIONAL

**Studies in Employment and Social Policy**

# **The Changing Face of European Labour Law and Social Policy**

Edited by  
**Alan C. Neal**

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*Published by:*

Kluwer Law International

P.O. Box 85889, 2508 CN The Hague, The Netherlands

sales@kluwerlaw.com

<http://www.kluwerlaw.com>

*Sold and Distributed in North, Central and South America by:*

Aspen Publishers, Inc.

7201 McKinney Circle, Frederick, MD 21704, USA

*Sold and Distributed in all other countries by:*

Extenza-Turpin Distribution Services

Stratton Business Park, Pegasus Drive, Biggleswade,

Bedfordshire, SG18 8QB, United Kingdom

**A C.I.P. Catalogue record for this book is available from the Library of Congress.**

*Printed on acid-free paper.*

ISBN 90-411-23121

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Printed in The Netherlands.

### Marco Biagi (1950 – 2002)

A sad poignancy hangs over this volume, marking as it does the published fruits of the last international collaboration between a long-standing group of friends and colleagues only a month before the brutal assassination of Marco Biagi.

It is to Marco's memory that this volume is dedicated, in a spirit of determination that the values which he held, and which we have for so long shared with him, should not die with him.



*The Changing Face of European Labour Law and Social Policy  
University of Warwick, Saturday 9th February 2002*

*Back row (left to right): Alan C. Neal, Marco Biagi, Antoine Jacobs, Melanie Pine,  
Niklas Bruun, Jacques Rojot, and Stein Evju*

*Front row: Roger Blanpain and Manfred Weiss*

## Preface

During the early part of 2002, the Employment Law Research Unit in the University of Warwick organised a group of colloquia in London and Warwick, with a view to focusing upon the trends at a European level in labour law, industrial relations, and workplace-related social policy. Those meetings, which were addressed by some of the leading figures in the field of European labour law and social policy, also brought together an audience consisting of most of the United Kingdom's leading employment law practitioners (from the judiciary, the bar and the ranks of the solicitors' profession).

The result was a rich set of contributions, ranging from insights into the work of the ILO (*Arturo Bronstein*), the latest policy developments and initiatives within the social affairs directorate of the European Commission (*Fernando Vasquez*), and the work of the Council of Europe in the employment-related aspects of human rights promotion under the European Charter (*Rolf Birk*), to the work of specialist agencies in the drive to promote equal rights at the workplace (*Melanie Pine*) and initiatives at the European level to promote the use of alternative dispute resolution in areas of social policy (*Stein Evju*).

At the same time, important trends in relation to trans-national collective bargaining (*Jacques Rojot*) and workers' participation (*Manfred Weiss*) were placed under the spotlight, along with problems arising in the context of the Nice Charter (*Alan Neal*), dramatic new tools for delivering "equality" at the workplace (*Niklas Bruun*), fresh initiatives dealing with termination of employment at the initiative of the employer (*Antoine Jacobs*), and the attempts to establish enforceable protections in relation to the working environment (*Alan Neal*).

Nor was the contemporary context for United Kingdom developments overlooked, particularly in the light of reform for the institutions of domestic employment law, in the shape of the Employment Tribunals (*Janet Gaymer*).

However, what transpired in hindsight to have been perhaps the most poignant feature of these events was the presentation by *Marco Biagi* of the results from the study by a high level group of experts on reform of the European labour market – a contribution which turned out to be his last in the company of the colleagues with whom he had worked so closely over a decade and a half. Little more than a month after the final colloquium, Marco was assassinated on his doorstep at the hands of Italian political terrorists, robbing us all of a close and greatly valued friend.

During the course of the colloquia it became clear that a number of significant shifts had been, and were, taking place in relation to European labour law and social policy. A yardstick against which to assess some of those shifts was the publication to which several of the contributors had contributed in 1994,<sup>1</sup> at the time of the social action programmes designed to carry social policy forward in the wake of the institutional

<sup>1</sup> Alan C. Neal & Sten Foyen (eds), *Developing the Social Dimension in an Enlarged European Union* (Scandinavian University Press, Universitetsforlaget AS, Oslo 1995), containing contributions by Roger Blanpain, Niklas Bruun, Stein Evju, Bob Hepple, Antoine Jacobs, Alan Neal, Bruno Veneziani and Manfred Weiss. That volume drew together contributions presented to a seminar on European Labour Law, organised by the Centre for European Law in the University of Oslo, Norway, and held at Leangkollen on 25 and 26 November 1994.

*The Changing Face of European Labour Law and Social Policy*

reforms at Maastricht and in the face of trenchant opposition from “opt-out Britain” to developments in the field of employment and social protection.

This volume – which constitutes, in many ways, a follow-on from the Oslo work – brings together a selection of some of the contributions to the Warwick colloquia, and offers some observations about the current state of European labour law and social policy and the direction in which those areas appear to be heading.

Alan C. Neal  
Segromigno, 2003

## Foreword

The approval of a "Social Policy Agenda" at the Nice Summit of 2000 marked the political climax for developments which had begun with a Commission announcement to the European Parliament in the previous February.<sup>1</sup> Tucked away behind the headline-grabbing agreement to ratify the *Charter of Fundamental Rights of the European Union*,<sup>2</sup> this 5-year programme for the period 2000-2005 has, so far, received somewhat less detailed attention than some of the Commission's previous action programmes in the field of social policy. Nevertheless, this Social Policy Agenda came as the latest in a series of programmatic initiatives which have underpinned a radical transformation in the nature and quality of "Social Europe".<sup>3</sup> Furthermore, it has set out clear pointers to the likely future direction for European social policy in the 21st Century.

In many respects, this latest action programme confirms a stability and continuity in the approach towards social policy across the still-growing European Union. Certainly, as regards many of the specifically "work-related" aspects of the programme, a number of "core strands" can be traced from the earliest Action Programme in 1974.<sup>4</sup> So, too, is there explicit recognition of a role for a European layer of "Labour Law" as part of the regulatory mechanisms available to influence the balance between the "economic" and the "social" dimensions of the continuing European adventure.<sup>5</sup> Many of the substantive fields touched by proposals in the Social Policy Agenda bear a familiar ring. Thus, concern is expressed for key areas such as the promotion of gender equality, the removal of barriers to free movement for workers, and the improvement of health and safety in the workplace. Meanwhile, specific consideration is devoted to such well-established issues as the detailed regulation of working time, financial participation for workers, and potential improvements for the industrial relations and "social dialogue" models in

<sup>1</sup> *Social Policy Agenda*, annexed to the *Presidency Conclusions*, Nice European Council Meeting, 7, 8 and 9 December 2000. See also the linked *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Scoreboard on Implementing the Social Policy Agenda* – COM (2001) 104 final.

<sup>2</sup> *Official Journal* 2000/C 364/01.

<sup>3</sup> For a presentation of the roots of this process, see, *inter alia*, Alan C. Neal, "In Search of the 'Social Dimension'", in Arbetsrättsliga Föreningen, *Studier i Arbetsrätt tillägnade Tore Sigeman* (Uppsala 1993) 219, and Anthony Arnull, "Integration with a Human Face", (1987) 3 *The International Journal of Comparative Labour Law and Industrial Relations* 243. The extent of the transformation after twenty years of action programmes is considered by the contributors to Alan C. Neal & Sten Foyen (eds), *Developing the Social Dimension in an Enlarged European Union* (Oslo 1995).

<sup>4</sup> Council Resolution of 21st January 1974 concerning a social action programme (*Official Journal* 74/C 13/1).

<sup>5</sup> A controversial "balance" which initially received explicit recognition when emphasis was placed by the European Council, at the Hanover summit in June 1988, upon "social aspects of the single market". This was followed by a declaration, at the Rhodes summit of December 1998, to the effect that "realisation of the single market should not be regarded as a goal in itself", and eventually gave rise to the declaration of the Madrid Summit, in June 1989, that, "... in the course of the construction of the single European market, social aspects should be given the same importance as the economic aspects and should accordingly be developed in a balanced fashion" (*Madrid Summit, "Conclusions"*, 26/27 June 1989, Point 2).

operation at the European level. These immediate concerns are further reflected in the Annex, setting out concrete proposals for action during the currency of the programme.

However, on another level, this 21st Century Social Policy Agenda marks the dramatic extent to which European social policy is now regarded as falling within frameworks which no longer build exclusively (or even primarily) upon a “work-related” basis. One finds, too, clear confirmation of a trend throughout the 1990s towards much broader perceptions of “social policy” and the role of the European Union exercising the powers granted for the promotion of this field by the revised Treaties.

Some of this shift is in terms of presentation, with expressions such as “improving the quality of work”, promoting “social cohesion”, and encouraging “investment in people” abounding throughout the Commission’s policy documents. However, there are real shifts as well – and none more distinct than the commitment to “putting employment at the centre of the economic policy agenda of the Union”. Here, the quite remarkable dominance of the post-1997 European Employment Strategy over any more traditional “social protection” or “employment protection” approaches is made uncomfortably clear. Nor, indeed, can the Commission resist the temptation to undertake a certain degree of “historical revisionism”, with the proposition that, “The most recent Social Action Programmes of the 1990s pursued an agenda which had employment at its core” – an observation which, at its lowest, could be said to exaggerate the evolutionary nature of the swing back towards prioritising “economic” over “social” dimensions of the post-Maastricht landscape. Whatever the justification for this manner of presentation, however, the point remains valid that, in the wake of the Commission’s two key policy papers of 1994,<sup>6</sup> there has been a steady, and accelerating, shift back in favour of the “economic dimension”, to the alarm of commentators who fear an undermining of the social “floor of rights” and protections already achieved at the European level.<sup>7</sup>

The increasing prominence of the “employment” strategy is, itself, placed in the context of “globalisation” – where the challenges for the European economy (seen as an integrated unitary whole) are presented in the terms of the Lisbon objective to “become the most competitive and dynamic knowledge-based economy capable of sustainable economic growth with more and better jobs and greater social cohesion”.

This contextual challenge forms the focus for *Roger Blanpain’s* contribution, looking at the Social Policy Agenda in a global setting, and raising some of the problems facing any efforts to modernise the “European social model”. During the course of identifying some of the specific issues which have to be addressed, the author illustrates the particular importance of seeing European Union developments in a broader institutional context which includes the International Labour Organisation. Here, the common heritage of the EU Member States, in terms of declaring a commitment to the “core” labour

<sup>6</sup> The “social dimension” *White Paper on European social policy: A way forward for the Union*, COM (94) 333 final – which developed out of the consultation conducted over a *Green Paper on European social policy: Options for the Union*, COM (93) 551 final – and the “economic dimension” *White Paper, Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* (94/C 295/10).

<sup>7</sup> See, for example, the comments in *Alan C. Neal*, “Labour Law in the 1990s: An Unweeded Garden that Grows to Seed?”, (1997) 13 *The International Journal of Comparative Labour Law and Industrial Relations* 11.



standards developed through the ILO, becomes an important strength – particularly as the debate over the significance and normative status (if any) of the recent *Charter of Fundamental Rights of the European Union* moves ever higher up the political agenda. Yet, the reliance upon generally-declared, but weakly enforced, international “standards” does not stand alone. Similarly of importance are the development of employment opportunities through well-established programmes promoting equality between men and women, as well as the potential unlocked by various species of “social dialogue”.<sup>8</sup>

Having provided a perspective in which he feels able to suggest that, “the European Social Model is the EU’s answer to the challenges of the globalisation of the economy”, *Roger Blanpain* then proceeds to address the fundamental premises underlying any claim that there exists something which can be designated “the European social model”. Here, the all too familiar problems of competence and the legitimacy of the institutionalised actors on the European Union stage are highlighted, as well as the political problem of “qualified majority voting” and the shortcomings of non-Treaty-based instruments such as “the open method of co-ordination” and variants of so-called “soft law”. Hardly surprising, therefore, that, in *Roger Blanpain’s* eyes, the future is seen as being in need of “miracles”, and that, with a perceived lack of “political will” to increase the European Union’s social policy competences, the sense of scepticism weighs heavily over any attempt to predict future developments.

Yet, as have a number of other commentators over the last decade, *Roger Blanpain* does offer one possible route forward – the path of what he describes as “more binding fundamental social rights”. This perspective, which emerges as an interesting new dimension of formal European Union social policy since the mid-1990s, is discussed in more detail during the course of presentations by *Rolf Birk* and *Alan Neal*. These contributors look, respectively, at the development of “human rights” at the workplace, in the context of the work of the Council of Europe, and at the trend within the social policy of the European Union towards reliance upon “declarations of rights”, as epitomised in the 2000 *Charter of Fundamental Rights of the European Union*.

*Rolf Birk’s* canvas is the application of the 1950 European Convention on Human Rights and the European Social Charter of 1961. Taking the laboratory of the United Kingdom’s inhalation of the Convention, through a Human Rights Act 1998, he illustrates the difficulty of limiting any discussion to something described simply as “fundamental social rights”, and stresses how the much broader scope of “fundamental civil rights” also impacts upon the employment relationship and the worker’s position in relation to his employer and his co-workers. Against this background, he then presents some of the “core” rights enshrined in the European Social Charter, and grapples with the problematic notion of how “fundamental” can be said to be some of the “economic rights” (such as the right to a reasonable period of notice for termination of employment)

<sup>8</sup> Although, in this particular respect, great caution has to be exercised in the use of such terminology – with ILO documentation arguably bearing a very different import from the “social dialogue” aspirations of the European Union in the period since an Article 118b was inserted into the Treaties through the 1986 Single European Act. See, for consideration of these issues, *Alan C. Neal*, “We Love You Social Dialogue – But Who Exactly Are You?”, in Fondazione Giulio Pastore, *La contrattazione collettiva europea: Profili giuridici ed economici* (Milan 2001), p.113 ff.

accorded to workers. This discussion carries echoes of the framework within which *Bob Hepple* presented some of these issues during the course of the 1994 seminar in Oslo, where several of the contributors involved with this present volume developed a number of the key "social policy" themes in the context of a post-Maastricht European Union.<sup>9</sup>

The observations in relation to the "right to work", the "right to fair working conditions", the prohibition of discrimination, the promotion of "job security", and trade union rights, lead the author to the same optic as that identified by *Roger Blanpain* – namely, "How the range of economic and social fundamental rights and their effective enforcement can be further developed in view of the overall globalisation". That underlying challenge is set against the pattern of "changes in economy, society and technology", and the widely acknowledged need to respond effectively, but flexibly, indicates the pressures under which the draftsmen of the European Union's Social Policy Agenda have been operating.

However, serious question-marks are raised by *Rolf Birk* in relation to the effectiveness of enforcement for any "fundamental rights" system, and it is made abundantly clear that "the jury remains out" on whether the procedures introduced by the 1995 Additional Protocol to the Council of Europe Charter mark any significant step forward in this regard.

The question of the appropriate mechanisms for delivering "declarations of rights", and the reliability of any effective enforcement arrangements for such "rights", is central to the consideration by *Alan Neal* of recent tendencies in this context within the European Union. In the wake of suggesting that there can be discerned a shift of policy approach from "protective Labour Law" to such declarations of "rights", the author takes a sceptical stance on the value of the Nice 2000 *Charter of Fundamental Rights of the European Union* as an instrument for delivering and developing protection for citizens in the context of their working lives. Commenting on the "mixed bag" of provisions contained in the Nice Charter (as, in the context of the Council of Europe, does *Rolf Birk*, and, in the light of the immediate EU post-Maastricht arrangements, has *Bob Hepple*), it is noted that there is an apparent willingness to include in those arrangements a number of declarations concerning collective labour relations. However, given the track-record of the European Union to date, and, specifically, the reluctance to take any meaningful action on such a front in the context of the 1989 *Community Charter of Fundamental Social Rights of Workers*, it is suggested that this has to give rise to a profound sense of cynicism concerning the realistic prospects for advancement of such a kind.

Certainly, it is maintained, if one takes account of European Union social policy initiatives and rhetoric over the past decade, everything points to a situation in which "the future lies in 'grand declarations', rather than in a continuation of the 'old approach' to social policy at the European Union level". However, in *Alan Neal's* view, this carries the risk that "the declaration is not matched by concrete measures to deliver the promises set

<sup>9</sup> Leangkollen, Norway, 25th and 26th November 1994. See the contributions to that seminar, published in Alan C. Neal & Sten Foyen (eds), *Developing the Social Dimension in an Enlarged European Union* (Oslo 1995), including, in particular, *Bob Hepple*, "The Development of Fundamental Social Rights in European Labour Law", at pp.23-34.

out in declaratory form” – at which stage “hard Law” will not merely have become “too soft at the edges”, but will have been ousted by a demonstrably lower “floor of rights” for workers, accompanied by less effective enforcement procedures, and a perceptible return to the “economic dimension” dominated vision of a European Union which informed the original provisions of the Treaty of Rome in 1957.

When one turns to consider the evolution and development of European Union frameworks for promoting “equality” at the workplace, one might have anticipated – given the sheer volume and high profile of this area – a glowing endorsement of recent trends as they have preceded the period for the current Social Policy Agenda. Yet, perhaps surprisingly, *Niklas Bruun* offers the assessment that, here, too – especially having regard to the flurry of activity which has been witnessed in the wake of the new “Article 13 powers” inserted by the Treaty of Amsterdam – “the legislation is an interesting combination of continuation and innovation”.

Particular criticism is reserved for the “quite complicated legal framework”. Meanwhile, the challenge for Member States to adapt their national legal provisions, in order to take into account the wide range of aspects encompassed within the “general framework” created by Directives 2000/43/EC and 2000/78/EC, is presented as being “a real challenge”. Indeed, the author argues that the new legal framework which has emerged for the fields of equal opportunities and non-discrimination “marks a fundamental, although to some extent inconsistent, shift in the EC approach to these issues”. This is particularly evidenced in relation to the “general encompassing approach” adopted for the regulation of this area, the tendency towards “codification of court practice”, the changing emphasis towards a “social and human rights rationale”, and a move from “protection” to “promotion”.

The dangers inherent in this latter shift of approach become self-evident if one accepts the perception that “EC policy for equal treatment and non-discrimination is trapped in a certain ambivalence between adopting a passive reactive approach and, on the other hand, an active promotional approach”. As *Niklas Bruun* predicts, the “acid test” for this stance is likely to present itself when the provisions on age discrimination come into force – an aspect of differential treatment where the borderline between “discrimination” and “promotional efforts” constitutes “a line drawn in water”.

Similar concerns about the shift from “protection” to “promotion”, and the setting of European Union initiatives within a “general framework”, developed as a sub-unit of social policy, are to be found when attention turns to protection for workers in relation to their working environment – the traditional field of “health, safety and hygiene at work”. Drawing upon experience with the specifically focused “programmatic approach” which has characterised the activities of the European Commission in this area for a quarter of a century, and setting the scene for the latest (2002) Community strategy on health and safety at work,<sup>10</sup> *Alan Neal* indicates how this component of the Social Policy Agenda, too, has been shaped by new frames of reference for the future development of social policy at the European level.

<sup>10</sup> Communication from the Commission, *Adapting to change in work and society: a new Community strategy on health and safety at work 2002-2006*, COM (2002) 118 final, published on 11 March 2002.

In the case of the working environment, however, the contextual and institutional changes have, arguably, been even more dramatic than is the case for equal opportunities and non-discrimination. Thus, not only has the “economic dimension” focus of the European Employment Strategy been brought to bear in the field of health and safety at work, but the very structures for handling this policy area within the European Union have undergone far-reaching reform. It is argued that leadership shortcomings within the European Commission responsible for this area of activity have resulted in a diminution of influence within policy-making circles, while the insertion of new Treaty powers to deal specifically with “public health” (particularly, the provisions of Article 152) has been followed by a redirection of priorities and resources to the detriment of “traditional” health and safety activity. Coupled with the establishment of a new Agency, whose activities and aspirations have remained largely at the level of information provision and data collection, *Alan Neal* draws the pessimistic conclusion that these institutional developments carry the danger of leaving concern for the physical integrity and protection of workers in the European Union at the mercy of a (by no means guaranteed) political goodwill to deliver enforceable protective measures throughout the Member States. When the only directly relevant provision of the 2000 *Charter of Fundamental Rights of the European Union* turns out to be as weakly-worded as the present Article 31,<sup>11</sup> this lurking doubt turns to real fear for the future of the European working environment in an era of enlargement.

Yet, even in the absence of paradigm shifts such as that from “protection” to “promotion”, or the introduction of the rhetoric of “fundamental rights” into core European Union social policy-making, the developing picture offers little in the way of optimism that this current Social Policy Agenda is likely to deliver much-needed, but high problematic, structural change for the existing systems of industrial relations and “social dialogue” across the European Union. As *Jacques Rojot* illustrates, in his analysis of the changing face of industrial relations at the European level, the prospects for “European collective bargaining” appear as remote as ever. What is more, even as enthusiastic a proponent of “employee participation” in the framework of European social policy as *Manfred Weiss* finds it difficult to herald the undoubted progress being made on this front as sufficiently encouraging to dispel the nagging doubt that instruments designed to deliver phenomena such as “financial participation” for workers might be little more than devices to “transfer risks from the employer to the employees”.

Both authors consider experience with the Directive on European Works Councils,<sup>12</sup> along with the experience in shaping the most recent Directive on establishing a general framework for informing and consulting employees in the European Union,<sup>13</sup> as the laboratory in which to test whether “international collective bargaining” appears to be improving its prospects for success, and for whether various species of “worker

<sup>11</sup> Article 31 (*Fair and just working conditions*) provides that, “Every worker has the right to working conditions which respect his or her health, safety and dignity”.

<sup>12</sup> Directive 94/45/EC, in the wake of adherence by the United Kingdom, through Directive 97/74/EC, to this measure.

<sup>13</sup> Directive 2002/14/EC.

participation" – including "financial participation", as under discussion in the wake of a Commission memorandum on the subject – might be establishing a more optimistic basis for facilitating the emergence of a new "European social model", in respect of which *Roger Blanpain* declared himself so sceptical in the course of his contribution.

On all fronts, however, the conclusion drawn tends towards the pessimistic. *Manfred Weiss* makes the important point that "there is no longer any doubt that the promotion of employees' involvement in company decision-making has become an essential part of the Community's mainstreaming strategy in its Social Policy Agenda". However, he has to concede, at the same time, that "up to now, the Community instruments on the European Company and on the national framework for information and consultation have not yet been implemented into reality", and that "it remains an open question to what extent it will become actual practice". Nor does his observation that "the experience with the Directive on European Works Councils offers an optimistic indication" necessarily engender high optimism for those whose natural inclination is to see the "economic dimension" objectives of a European Union driven by its employment strategy tempered with "social justice" – particularly if the assessment of *Jacques Rojot* is heeded that, "paradoxically, international collective bargaining might be facilitated by flexibility and deregulation, where regulation has all but failed".

Looked at in the round, the messages emerging from the contributions to this volume indicate dramatic changes to the frameworks of reference within which European Union social policy is being presented for the 21st Century. The Social Policy Agenda, setting out the path for the first five years of the new Millennium, makes explicit many of the trends detected during the period immediately following completion of the Single Market and publication of the two "economic" and "social" White Papers in 1994.

Ostensibly attractive "general frameworks" for equal treatment or non-discrimination appear to lack associated mechanisms for delivering "tangible protection" for citizens in their working lives. The same can be said for as lofty a declaration as the *Charter of Fundamental Rights of the European Union* "solemnly proclaimed" by the Institutions of the European Union at Nice in December 2000. So, too, does a shift in the policy approach from "protection" to "promotion" seem to carry the risk of undermining the social protection arrangements already fought for and achieved over the past three decades. Indeed, the "Trojan horse" of "soft Law" would seem to be grazing ominously at the gates of "Social Europe".

The contributions to this volume were presented relatively early in the period of the current Social Policy Agenda. With the aid of the "scoreboards" on progress with implementation of the initiatives outlined by the action programme, it will be possible to measure the substantive success of the Commission in "seeing through" its ambitions for social policy as the European Union moves towards enlargement into a community of twenty-five Member States. The question remains, however, what demonstrable impact will this Social Policy Agenda have upon the quality of work, the quality of life for Europe's working population, and the quality of regulation at the disposal of those charged with confronting "the new challenges to social policy resulting from the radical transformation of Europe's economy and society".

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