

CAMBRIDGE STUDIES IN EUROPEAN LAW
AND POLICY

This series aims to produce original works which contain a critical analysis of the state of the law in particular areas of European Law and set out different perspectives and suggestions for its future development. It also aims to encourage a range of work on law, legal institutions and legal phenomena in Europe, including 'law in context' approaches. The titles in the series will be of interest to academics; policymakers; policy formers who are interested in European legal, commercial and political affairs; practising lawyers including the judiciary; and advanced law students and researchers.

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SOCIAL RIGHTS AND
MARKET FREEDOM IN THE
EUROPEAN CONSTITUTION

A Labour Law Perspective

STEFANO GIUBBONI

Translated by
RITA INSTON



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SOCIAL RIGHTS AND MARKET FREEDOM IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE

This is a timely and innovative account of the development of European labour and social security law as it interrelates with the evolution of market integration in the European Union. Giubboni presents, from a labour law perspective, a case study of the changes the European Community/European Union has undergone from its origins to the present day and of the ways these changes have affected the regulation of European Welfare States at national level. Drawing on the idea of 'embedded liberalism', Giubboni analyses the infiltration of EC competition and market law into national systems of labour and social security law, and provides a normative framework for conceptualising the transformation of regulatory techniques implemented at the EU level. This important, interdisciplinary contribution to research in EU social law illustrates how the vision of social protection and solidarity is changing.

STEFANO GIUBBONI is Professor of Labour Law in the Law Faculty, University of Florence.

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To Leonardo

'Raising his son [Hector] kissed him,
tossed him in his arms and
lifted a prayer to Zeus . . .'

Iliad Book VI, 474–5

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SERIES EDITORS' PREFACE

This timely book addresses a number of enduring debates regarding the political and legal trajectory of the European Union's evolving constitutional framework, namely the role and nature of social policy. On the one hand, the purse strings of the national welfare states are still firmly guarded by the Member States, which retain the power to tax and grant benefits. On the other, the logic of the liberalisation of markets has placed a number of competitive pressures upon welfare states, upon national systems of labour law, and upon labour markets, which remain largely national in character. Such national systems are, by their very nature, diverse, notwithstanding the competitive pressures coming from intra-EU market liberalisation and, more recently, globalisation and the effects of the WTO. Many have therefore asked the question about the possible nature and character of any putative 'European social model', and the position of such a model under the EU's evolving constitutional settlement, in which market integration has played such a central role.

The book takes the story from the beginnings of the European integration process, with the ECSC Treaty, the work of the ILO, and other precursors to the initially minimalist social provisions of the EEC Treaty, right through to the present day. It charts the ongoing pressures for change, and the reactions of various key actors, including the political institutions of the European Union, the European Court of Justice, and the national governments. Different styles of regulation have evolved, with a decisive shift towards soft regulation. Yet, at the same time, there has been proposed an important strengthening of the social rights-basis of the EU, in the form of the proposed embedding of the 2000 Charter of Fundamental Rights as Part II of the Constitutional Treaty, agreed by the Member States in June 2004, and undergoing a painful process of ratification at the present time. This paradox constitutes a key theme of the book. Interestingly, many of the underlying themes of the book were canvassed, albeit in more emotive terms, during the French referendum debate in May 2005. However, the troubles of the EU's Constitutional Treaty do not in any way detract from

the importance of a work which is located in a much longer timeline of history.

This is the second book in the new CUP series *Cambridge Studies in European Law and Policy*, edited by Laurence Gormley and Jo Shaw, and represents an important contribution to the discussion of the future direction of European social policy.

LAURENCE GORMLEY AND JO SHAW
Series Editors

FOREWORD

SILVANA SCIARRA

A foreword written by an older academic who followed and supervised a younger colleague's work conceals a very subtle dilemma. Praising too much or too little may reveal differing degrees of involvement in someone else's work and even a concern not to interfere with a distinct and separate intellectual enhancement. And yet, sharing the doubts, the aspirations and the fears of the lengthy enterprise leading to the publication of a book means, in a sense, becoming part of that journey, while at the same time maintaining a sufficiently detached critical eye.

When the final result – as in the present case – follows a rigorous, well-balanced and deeply investigated line of research, self-restraint must give way to enthusiasm and joy. A wide community of readers now becomes the addressee of what the author delivers. The circulation of ideas thus starts to follow an unpredictable route, since this book challenges the curiosities of scholars in both labour law and European law.

Stefano Giubboni is a member of a very special generation of European labour lawyers, whose interests spread well beyond the boundaries of domestic law. The stimulating environment of the European University Institute contributed, in expanding the research questions and adding new dimensions to both national and European legal research.

However, Stefano Giubboni's writing is characterized by an inborn personal instinct to seek out the historical and social reasons behind the law. This enables him to shake up some convention-ridden versions of historical events and to throw new light on significant documents which paved the way to the birth of European social policies. One move in this direction is represented by the original analysis of the interrelation between the Ohlin and the Spaak Reports, both of them relevant to an understanding of the Common Market's social and economic foundations. Similarly inspiring is the analysis of the European Court of Justice's case-law dealing with the delicate balance between social values and competition rules.

In the updated, albeit as yet tentative, interpretation of the social rights enshrined in the Treaty establishing a Constitution for Europe one can very

clearly feel how Stefano Giubboni's scrupulous historical reconstruction is still the best companion for an understanding of current events.

A highly personal touch added by the author of the present book has to do with the attention he pays to the language of labour law. Although this singularity owes much to the exceptional skills of the translator, it must be underlined how such a language returns on the scene as a protagonist, showing its remarkable power. Linguistic metaphors assist the author throughout his work, as if he were seeking to express a new centrality of this legal discipline which also coincides with the construction of its new identity. Indeed, in the light of the new centrality of labour law it is greatly to be hoped that the present Cambridge University Press series will, given its aims, host other future contributions in the same field.

This foreword is therefore an opportunity to voice a sense of trust in scholarship – such as that achieved by Stefano Giubboni – which succeeds in keeping alive the discussion in European labour and social law and in strengthening the role of critical legal thinking. This invigorates the hope that social justice may remain both an aim and a methodology in the evolution of European law and enhance European integration even farther.

ACKNOWLEDGEMENTS

The book here presented to an English-speaking readership was originally published in Italian in 2003 by Il Mulino of Bologna under the title *Diritti sociali e mercato. La dimensione sociale dell'integrazione europea*.

However, the research that forms its basis was begun and almost entirely carried out, starting from an unforgettable late summer in 1996, at the European University Institute, Florence. And whereas the course of any research includes (above and beyond the essential solipsistic process of writing it up) a close interpersonal and collective dimension, the path that led to this book was from the very outset marked more than ever by the community dimension which is so typical of and, I may venture to say, so magically special to the European University Institute.

I find it hard to imagine any environment more conducive to the circulation and free exchange of ideas than the Renaissance humanistic ambience, nurtured by harmony, of the Villa Schifanoia and the Badia Fiesolana. The spirit of intellectual freedom and intimacy that imbued the small community of European labour lawyers who experienced personal development together during those intense years spent at the Villa Schifanoia constituted, for me, an enduring and highly prized source of inspiration and ideas.

Of the numerous individuals to whom I owe so much, I wish to express public acknowledgement here of my gratitude to at least Giovanni Orlandini, Sabrina Régent, Diamond Ashiagbor, Eeva Kolehmainen and Samuel Engblom for the friendship and generosity with which, on so many occasions, they shared with me the starting assumptions and results of their personal and original paths of research.

Alan Milward, Maurizio Ferrera and Maximilian Fuchs all contributed equally, albeit at different stages and in different ways, to the development of many of the ideas contained in this book, not only with their suggestions but even more so through the example of their own writings.

Silvana Sciarra exercised her *ars maieutica* on me with grace and affection, offering me the continual example of her irrepressible curiosity and

intellectual rigour. This study, so different from what I had imagined when I first arrived at the Institute, is in large measure an endeavour to respond to the inspiration she gave me.

Last, but by no means least, my warmest thanks go to Rita Inston, who in preparing the English version, revised and updated, of the book originally published in 2003 has made me realize how great a part of our intellectual experience lies in the activity known as 'translating'.

STEFANO GIUBBONI,
Florence/Perugia, December 2004

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INTRODUCTION

This book presents a study of the complex and changing relations that have successively prevailed – in the magmatic development of European integration – between the construction of the Common Market and social rights and policies. In essence, it examines the nature of the space and role that have been, are and are likely to be allocated, in the construction of the Community, to social rights and policies at national and supranational level.

The focus of the analysis is centred on the constitutional dimension of the relations in question. This is reconstructed both (and primarily) from the dynamic perspective offered by an examination of the changes that have effectively remoulded the Community's economic constitution since its beginnings up to the present day, and from the static perspective ensuing from a comparison of the various ideal – or, more accurately, ideal-type – models of that constitution which, although obviously not claiming to explain the historical realities of the changes, nonetheless help to categorize them from a normative point of view.

The book develops a research perspective that could be described as intrinsically interdisciplinary.

Labour law – perhaps more than other legal disciplines – has in fact always found in the interdisciplinary and comparative method one of the features that best connote and specify its identity and its cognitive status, immersed as they are in the reality of more deep-seated social dynamics.

As one author (Collins) has written recently, labour law congenitally represents 'a contextual field of study rather than a rigid doctrinal category'. It has always not merely allowed but axiomatically demanded and, as it were, imposed a fundamental freedom of method and research. The very plurality of sources and heterogeneity of levels and dimensions that define its underlying identity have always made it fertile ground for disseminating and experimenting with new approaches and methods of analysis and regulation.

The Community dimension adds yet another element of complexity to what has always been the composite, multitiered and extraordinarily dynamic framework of labour law and means that, now more than ever, the original multidisciplinary nature of the subject is necessarily extended still farther.

The present study follows in the path of this methodological tradition, in full awareness that, for a proper understanding of the profound changes that Community integration has brought and is bringing about in the field of labour and social-security law, there needs to be continual comparison with other disciplines, both legal and non-legal.

The historical research and political theory of European integration constitute the natural hinterland of any study of Community law in context. They have been decisive factors in defining the keys to an interpretation of those changes in the Community's economic constitution in whose light European social law is analysed and 'contextualized' here. From the same point of view, comparison with constitutional doctrines of European integration and also with the disciplines – legal and economic – dealing more specifically with the form and content of the construction of a single market proved equally necessary.

Albeit in new forms, the language of labour law appears to have regained, in today's scientific and political debate on Europe, a centrality that seemed irrevocably lost.

This is being evidenced in a number of different contexts, variously linked with the requirements, opportunities and restraints deriving from economic integration.

It is happening, in particular, in the context of the open method of co-ordination for national employment and social policies and also the laborious process of Community-level constitutionalization of fundamental social rights. Both cases involve processes which are open and fluid and, as things stand, similarly characterized by a predominance of Community soft law, and yet which are capable of reactivating virtuous mechanisms converging towards the necessary new balance between negative integration and positive integration.

They prefigure, in point of fact, a competitive market firmly based on a common constitutional space in which economic freedoms and social rights, the values of efficiency and solidarity, are able to find a more evenly balanced position within the construction of the Community. However ambiguous, the formula of a 'highly competitive social market economy' introduced by Article I-3 of the Treaty establishing a Constitution for

Europe is in a way expressive of this tendency, in so far as it seeks to distil such a 'rebalancing'.

This recovery of the necessary autonomy of the fundamental principles of labour law as against the dictates of purely negative integration denotes a reaffirmation of the very identity of the European social model. It also reaffirms the notion – on which the original compromise of embedded liberalism devised by the founding fathers was itself manifestly based – that strong social rights, in addition to being an expression of the insuppressible calls for fairness and solidarity embodied by the various traditions of the European welfare state, also constitute one of the most important institutional preconditions of the long-term competitiveness of European economies.

Be that as it may, the processes in question are still weak and very much stamped by 'experimentation'. If the 'reformist' heritage of European labour law is to be safeguarded and enriched, they need to find a more solid anchorage in the full constitutionalization of a strong and comprehensive catalogue of fundamental social rights at EU level and the definition of effective policies supporting their translation into practice.

The book is divided into two parts (and four chapters) which are, as it were, connected in form and substance in that Part II examines more closely – in both analytical and theoretical terms – concepts treated in Part I from a mainly historical perspective.

Chapter 1 sets out to recount the evolving nature of the relationship between construction of the market and social rights in general terms, seeking to trace the thread that links the profound changes undergone by the Community's economic constitution since its beginnings up to the present day. It explains at length the content of the original compromises represented by embedded liberalism and the reasons for its crisis.

Chapter 2 starts out from the conclusions of Chapter 1 in an attempt to re-establish the guiding thread of the present phase of the Community integration process, which appears to be characterized by the quest, from outlines that are still uncertain and very fluid, for a new balance between the negative and positive integration of national welfare states. This guiding thread is investigated with particular reference to the need to reaffirm – albeit in new forms adapted to the extraordinary changes of our era – the centrality of the values of labour law and welfare institutions, as the common heritage of European democracies, which was at the very basis of the construction of the Community. The innovations introduced