Discussion about the future of the European Social Model (ESM) needs to be precise with this so-debated notion. If presented as ‘European social models’, the plural refers to the diversity and the differences of the national social models in Europe and the movement of classification of these models, through limited convergence or common denominators. It has been possible following Espin-Andersen to identify three different models\(^1\) for welfare policies, but the building of ‘families’ or ‘models’ of industrial relations systems and labour law systems is highly debatable, especially with 27 member states, because of the original combination in each system between industrial relations, market forces, state intervention and collective bargaining (Hyman, 2009).

The book considers that the ESM is the result of the process created by EU law and EU policies: the reference here to the ESM is not just a political discourse for the future (Jepsen and Serrano, 2006) nor the common denominator of these national models. Then, even the definition giving by Hyman of the four main characteristics of the ‘European social model’, through industrial relations, market forces, state intervention and collective bargaining is useful to compare the European main tendencies with American or Japanese ones: it is elaborate from a substantial comparative and simplified analysis of the national systems, without a focalization on the process created by the EU Law and the substantial content of EU Law through the Europeanization process.

The European social model is the result of a social and legal construction at the community level. This, as we all know, has been a gradual and fragmented process, marked by institutional advances from Maastricht to Lisbon (Rodière, 2009; Goetshy, 2009). The European social model is based, according to Brian Bercusson, on the ‘institutional architecture’, which gives social actors an impetus to real action (Bercusson, 2009a).\(^2\) It

\(^1\) Nordic, Continental, Anglo-Saxon (Espin-Andersen, 1990) and we now need to add Mediterranean (Meda, 2009).

\(^2\) The concept of a ‘European social model’ is attributed different meanings
Before and after the economic crisis

is the result of a complex interplay articulated by the treaties, harmonization processes which have led to the introduction of the *acquis communautaire* with respect to social rights, European social dialogue and national interactions, open method of coordination (OMC) and, finally, the current construction of fundamental social rights in the European Union.\(^3\)

Since the beginning of the millennium, the Lisbon Strategy has become a central axis. The successive enlargements of the Union show that a new era is emerging in the European Union, an era in which the unstable equilibrium which had allowed the original normative construction concerning social rights is being challenged. The Lisbon Strategy has opened the road for the ‘new governance approach’ (Ashiagbor, 2005; Kilpatrick, 2006), increasing the EU learning process and some areas of convergence in the field of employment measures, but without changing the deep diversity of the national models in labour law (Sciarrà, 2005), nor the differences of the employment measures and policies in different institutional contexts (Auer and Gazier, 2006; Meda, 2009).

The European Union is being subjected to tensions between the economic interests of member states, compounded by the ‘varieties of capitalism’ which they represent (Hall and Soskice, 2001; Blackett and Levesque, 2010); added to this are the structural asymmetries of powers between the employer and the employees which have increased considerably due to the international functioning of enterprises (Moreau, 2010).

The European social model, as a result of this complex institutional architecture after the Lisbon Treaty, is therefore subject to new developments in view of strong internal tensions between member states, between social and institutional actors and between various normative methods which characterize it.

Undoubtedly, a new turn was taken when the *Viking* and *Laval* rulings were released in 2007. This has caused a large number of countries in the European Union to seek ways to identify not only the trends that affect the social construction of the Union but also the prerequisites for the preservation in the future of the European social model, a model whose function has traditionally been the protection of workers and, more generally, the most vulnerable persons.

\(^3\) The Charter of Fundamental Rights was incorporated into the Treaty of Lisbon (see Damjanovic and De Witte 2009).
The research here is based on the belief that the social construction of the European Union structured by the treaties presents a real force which, in the past, enabled the demarcation of the European Union from all other forms of regional integration (Blackett and Levesque, 2010).

This institutional architecture has however been under threat since 2007. Even the most active of its adherents, and/or the most optimistic about the European building, such as Brian Bercusson and Yota Kravaritou, are now strongly concerned or even desperate about the current transformations affecting this architecture.

It is therefore essential to try to identify the underlying trends that have emerged since the early 2000s – before and after the financial and economic crisis. The EU social construction is the result of an evolutionary process marked by the mobilization of institutions and norms by the actors, whether trade unions, workers and citizens, or institutions and judges. In particular, the Commission and the Court of Justice are central actors and their choices since 2007 and during the crisis show the abandonment in social matters of the founding postulates of the Treaty of Rome.

In 2009 when the economic and financial crisis was in full swing until the end of 2010, economic experts were divided between the optimists, often close to governments, who analysed the situation as ‘the end of crisis’ and the pessimists who stated that if measures were taken to allow the financing of the banking and financial sectors, there is no evidence that this crisis has actually passed. From the social point of view, all the European indicators show a strong deterioration in the terms of employment: not only have unemployment rates remained high but working conditions have dramatically worsened (9.1 per cent unemployment in 2009, Eurostat, 2010).

The situation of crisis proves to be a strong indicator of the capabilities and choices of the Member States of the European Union in legal responses to issues of the deterioration of working and employment conditions and the rise in the social inequalities in the European Union, in general. It highlights the profound ambiguity of the European Union which consists in proposing the construction of a ‘social market economy’ which embraces both the economic and social objectives of the Treaty.

The authors of this book have sought to analyse the evolution of the European social model within the framework of this new turn: the responses to the economic crisis have declined at the national level, which shows that the emphasis since the beginning of the millennium has been placed on the Lisbon Strategy which foresees an articulation of national policies within the complex procedural framework of articles 154–155 of the TFEU. The decline in the national choices is explained by the diversity of the systems of professional relations in Europe, the fragmentation of
the EU instruments and the lack of consensus in terms of social policies in Europe. Profound political and ideological tendencies which one can see in Europe nowadays lead to the development of fractures which are seriously undermining the EU social objectives. They raise a multitude of issues, both political and legal.

THE NATIONAL LEVEL AS A LEVEL OF REGULATION IN TIMES OF CRISIS: AN OPTION OF THE EUROPEAN SOCIAL MODEL

The crisis has brought to the fore the role of the nation-state. The latter has become an important generator of policies to fight the effects of the economic crisis. The crisis has also evidenced that national policies in the field of employment and working conditions are driven by choices from the national law rather than EU law.

The Return of National Social Policies

In many Member States, the State is directly involved in the ‘package of labour market crisis measures’, either through national social policies or tripartite pacts (Glassner and Keune, 2010). The nation state regains its position as a central economic actor. It plays an active role in order not to leave the regulation to market forces. Clearly, the financial crisis followed by the multiplication of state policies is proof of the complete failure of the theories based on the ability of social regulation by the market.

Social dialogue and, more broadly, collective bargaining have been mobilized in search of responses to the social effects of the crisis. The framework of collective bargaining remains highly diversified in Europe. The same can be said of the context in which this bargaining has taken place because of the broad variety of anti-crisis public policy measures, particularly in financial, banking and tax sectors.

The first studies show that these responses are very diverse both in their content and orientation and that they are strongly determined by the nature of the industrial relations system of the Member State (Glassner and Keune, 2010). Thus, tripartite pacts have been concluded or negotiated in Austria, Belgium, Netherlands, Italy, Slovenia, Slovakia, Poland, France, Hungary, Ireland, Lithuania, Estonia, Romania and Luxembourg (Glassner and Keune, 2010). This long list of countries indicates both the centrality of social partners in Europe and the choice of governments to rely on social dialogue to facilitate the adoption of measures to respond
Introduction

effectively to the social effects of the crisis. This place of social partners is considered an important indicator of the European social model, even though the conditions of their action vary greatly depending on the national model of industrial relations (Bercusson, 2009a).

Many measures have been short-term measures, and they rely primarily on the broadening of the role of the mechanisms already in place (for example, partial unemployment allowances (*chômage partiel*) in France or extraordinary wages guarantee funds (*cassa integrazione straordinaria*) in Italy). From the first responses to the crisis, it became apparent that Member States which managed to mobilize social institutions were able to limit the social impact of the crisis, at least in the short term (Glassner and Galgoczi, 2009).

Collective agreements as a response to the crisis also take different forms. They include negotiations on restructuring, on wage bargaining, on working time, on flexible working conditions and training. Furthermore, they can be concluded at different levels, including at the company level, the sectoral level and the inter-sectoral level. It appears, however, that here as well, if the specificity of the industrial relations system strongly affects these negotiations both with regard to their content and impact, a strong trend towards decentralization of collective bargaining is confirmed (Glassner and Keune, 2010). This trend is evident even in countries like France and Germany, traditionally very different from countries like Ireland or Britain, and it is combined with structural transformations of decisions of enterprises and their shareholders (Mestre, 2009).

When the coverage rates of collective agreements are too low (Poland, Bulgaria, Great Britain, Hungary), state or unilateral measures by the employer have to be adopted.

Other forms of the adjustment to the crisis appear. The quality of work has been greatly affected by the intensity and increased workloads which become obvious when we take into consideration increased psychosocial risks. Permanent jobs have been replaced by temporary jobs in countries like France, Italy, Bulgaria and the Baltic countries (see Vaughan-Whitehead’s chapter). There have been greater wage differences in some countries (France, Bulgaria, UK), while other countries have imposed wage freezes. Some countries, like Poland or Portugal, however, have raised the minimum wage to protect vulnerable workers (see Vaughan-Whitehead’s chapter). The adjustments in the internal organization of enterprises, such as work-sharing in Germany, also showed that providing a margin of flexibility may be useful in order to maintain the enterprise.

The crisis finally shows the limits of flexicurity. Training programs have often been reduced (especially in Estonia) and groups of workers already experiencing difficulties finding work have been put into a situation of
even greater vulnerability whenever the institutional system lacked solid and proven foundations.

It therefore appeared that within this diversity of responses, significant synergies had been used to meet the urgent needs of employers and employees, through different modes of interaction between governments and social partners. Pacts, negotiations and state measures are all various forms of responses to the crisis in the social field deployed within nation-states. We do not talk here, as we did in the early 2000s, about negotiations on deregulation or flexibilization, adaptation to global economic changes, but we talk here about how to survive (Zagelmeyer, 2010).

The conclusion which one can draw from this broad spectrum of responses is two-fold. First, it shows that the state has remained an important actor; and, second, that there exists certain resistance to the crisis nourished by the mobilization of social institutions.

However, these conclusions do not question the plausibility of the analysis concerning the decentralization of the state (Mückenberger, 2010) or the transformation of its function (Chevallier, 2008). They show that the state is capable of remobilization under the pressure from social and economic actors. The institutional response leads to the strengthening of the labour market mechanisms structured by strong social institutions. Social regulation at the national level, on the other hand, even if it does not question the existence of the European social model, and is in line with the principle of subsidiarity, shows the weakness of community responses.

The Reasons for the Absence of Specific EU Social Policies

In 2009 the only tangible response to the economic crisis was changing and softening the conditions of access to the European Globalization Adjustment Fund and integrating the issue of enterprise restructuring in many policy areas (Moreau et al., 2009). But the Commission guidance on best practices for restructuring is more like the deafening silence of the EU social policies in response to the crisis.

The social regulation of the crisis is, thus, purely national. Although it relies on the logic of the principle of subsidiarity and the Union’s desire to limit the harmonization process by its narrow competencies in social matters, the lack of European anti-crisis policy stems from several other substantive reasons. It is the result of present-day reliance on liberalism, described by Alain Supiot as ultra-liberalism (Supiot, 2010).

In terms of the Community method, it is consistent with the OMC, which refers the choice of labour market regulation to the sphere of competence of the Member States (De la Rosa, 2007) and shows the inability of the OMC to coordinate anti-crisis measures.
The result of the coordination of the national plans by the Commission in 2010 has not shown visible results at this stage, but it is possible to think that the learning process helped to push Member States into mobilizing their national forces to limit unemployment, and that mimetism has played a role in the choices made by the Member States and/or the social partners in the choice of policies during the crisis. Surprisingly, the new 2020 strategy seems to ignore the impact of the crisis to impose economic objectives.

In January 2011, in the reports published by the Commission, it appears that the reactions of the Member States have been oriented towards minimizing the social consequences, at least in the short term. Despite those policies, the unemployment rate is extremely high – 9.6 per cent – with an important increase of poverty in the EU. Some lessons about the need to avoid temporary contracts and to promote long-term policies for qualification of workers show the huge failure of the European Commission discourse, before the crisis, on the flexibility of the labour market.

It shows the preference of European social partners for national actors who have bargained for a European collective agreement, adopted 25 March 2010, on orientations for an inclusive labour market: this agreement is a general framework for the national social partners, showing clearly that the function of the European social dialogue could only be a source of guidelines, not the creation of an anti-crisis program for a European labour market which does not exist.

These evolutions further demonstrate the preference of European social partners for national actions.

Finally, it also illustrates that the Commission in its social policy plays the role of coordinator of good practices desired by European employers and is not an efficient actor in a period of crisis: the choices made in the field of corporate restructurings, through the elaboration of a ‘toolkit’ of instruments given to employers and other actors, is a significant example of its role during the crisis.

The absence of specific EU policy is more generally explained by the withdrawal of the European community in the midst of the crisis when even the mighty competition law proved incapable of acting as a real force, leaving state aid regulations unimplemented under the guise of flexibility.

The extraordinary paradox is, as pointed out by Alain Supiot below, that the absolute failure of the regulation by market forces advocated

---

5 On the flexicurity policy of the EU Commission, see Hos (2011).
by the European Commission does not lead the latter to recognize these failures.

Still, it is not so much the return of the nation-state as an actor in the anti-crisis regulation that raises concerns about the future of the European social model. The specificity of the European social model actually lies in its dual dimension, national and European, and the interplay it allows between the Member States, the Commission and the social partners. The anxiety is caused by the ‘seismic shifts’ which undermine the foundations of the European social model.

THE EUROPEAN SOCIAL MODEL ROCKED BY ‘SEISMIC SHIFTS’ FROM BELOW

In order to reflect on the future of the European social model, it would seem appropriate to give some thought to the ‘seismic shifts’ which undermine it.

Undoubtedly, the blow delivered by the *Laval*, *Viking* and some other judgements is like a systemic shock which traces its origins to the structural evolution of the European Union, the inadequate evaluation of the impact of the enlargements of 2004 and 2007 and, finally, the casting away of the historical foundations of positive integration.

The European Social Model in the Turmoil of Globalization

Generally, the place of the European Union in the framework of the globalized economy has justified its repositioning. Economic theories anchored on Washington consensus have taken root in Europe, particularly in the directions taken by the Barroso Commission (Supiot, 2010). The proliferation of multinational enterprises since the beginning of the millennium, their globe-wide scale of operation and the transformations caused by the development of emerging markets have led to revolutions in the social field: not only the international organization of the means of production caused profound changes in labour rights, but it has also diverted the methods of protection of workers which are largely national (Moreau, 2006).

The asymmetries of power have been greatly enhanced by the interna-

---

tionalization of enterprises. This is despite EU efforts to take into account the internationalization of enterprises in the field of workers’ representation (Moreau, 2010; see also Laulom’s chapter, this volume). The community social construction was articulated by national social models and European harmonization unable to perceive the intrinsic transformation of labour relations linked to their transnational character.

Despite the adoption in the European Union of the original transnational norms concerning workers’ representation in multinational enterprises established in Europe, the implications related to the transnational nature of working relations have clearly found their reflection in legal norms only recently, following the conflicts connected with the adoption of the services directive (2006) and Laval and Viking judgements (2007–2008).

The argument that the European Union was and could be a social space of transnational regulation without responding to a different logic emanating from national laws (Moreau and Trudeau, 2000; Moreau, 2006; Alberg et al., 2008) is relatively new. It justifies the necessity of transforming the articulation of norms and their structural evolution.

To simply mention the ‘deterritorialization’ of social norms (De Burca, 2005; see Barnard and Deakin’s chapter, this volume) appears insufficient because the underlying model of reference still leaves out national territorial law. Yet, normative transformations require a more considerable change, the acknowledgement of the existence of the original transnational space.

The economic crisis has demonstrated that the financialization of the economy entailed interdependence between national economies and that national divisions were shattered by the transnational overlaps between transnational economic actors and transnational strategies in place.

Paradoxically, the economic crisis has caused the isolation of nation-states although the crisis clearly demonstrates the strength of interdependencies and the need for global and transnational policies. To this day the European Union has not drawn any conclusions in the social field, either theoretical or political.

The Underestimation of the Impact of the EU Enlargements of 2004 and 2007

By 2007 it became clear that the EU wanted to keep some form of regional economic integration which combines the social and economic dimensions. Although from the very beginning one could observe a certain ‘constitutional asymmetry’ (Scharpf, 2002) between policies promoting economic freedoms and policies promoting social construction, the choice
of integration which, in respect for the diversity of national social models, is based on the rights harmonized in favour of workers, was a mark of ‘social regionalism’ (Blakett and Levesque, 2010).

Moreover, the capacity of social partners to participate in the development of European law under articles 138 and 139 (154–155 TFEU) showed that the Union could justify its choice of the social model by the theory of Reflexive Law (Deakin, 2008). It also proved that the participation of European social partners in tripartite institutions of the Union and in the legislative process was seen as important from the very beginning (Bercusson, 2009a).

In the political context in which the enlargements were decided upon (which was not subject to a democratic process) Member States of the Union greatly minimized the impact of the two recent enlargements on the social dimension. The requirement for new member states to incorporate the acquis communautaire and not the institutional framework seemed to provide strong guarantees, supported by past examples of successful social integration of Spain and Portugal.

There have been difficulties in the adoption of directives and a charter of fundamental rights since the times of the accession of Great Britain into the Union. Caused by the confrontation of strong economic interests, these difficulties have been in place since 1990, the year of the first true discussions on the directive on posting of workers in the framework of the provision of services, adopted later in 1996.

The institutional aspect has therefore been understood and has brought about the OMC and an approach based on governance rather than on the rights of workers. This has represented a certain shift the consequences of which we are now beginning to face (Hos, 2011).

We can thus conclude that both the impact of political orientations with regard to the market economy and the deregulation and the actual weakness of the social rights of some new EU Member States have been largely underestimated.

Similarly, worker mobility, the subject of numerous controversies and the object of the adoption of transitional measures restricting the exercise of this freedom for a maximum of seven years, has been poorly evaluated, especially in countries like Great Britain and Ireland. Transport facilities and organizational mobility, the hostile policies of some countries geographically closely situated to the new Member States, coupled with the needs of labour markets based around social competition have all contributed to this phenomenon.

In the same way, so far it has not been easy to evaluate the impact of inappropriate modes of worker participation in the new Member States on the evolution of the European social dialogue (Hos, 2008).
Finally, the enlargements have increased the social differences in Europe and have not led to the adoption of adequate policies of social cohesion which would allow the differences between the regions to be limited, as was the case in Germany with the eastern Länder after the fall of the Berlin Wall.

In the context of the policy of normative competition practised by the European Union from the outset, the gap between the standards of living or survival of workers in the EU has serious consequences in terms of increasing inequality. The economic crisis has accentuated these inequalities based on the immediate exclusion of precarious jobs from the labour market. The most vulnerable populations in Europe (who were so even before the crisis: those with the lowest wages, those who are least qualified and engaged in most precarious jobs) signal the existence of a dual labour market, which excludes young and senior people, women, ethnic minorities and migrant workers (Eyraud and Vaughan-Whitehead, 2007).

Although EU law has the will to enforce equal treatment and to fight against discrimination, migration law is still not included in discrimination law. What is more, the anti-discrimination standards are limited by an interpretation of the comparability of different situations and possible economic justifications given by the employer.

The enlargements of the EU have therefore laid the ground for a change of attitude to the issue of social Europe. The most recent ruling of the European Court of Justice (ECJ), namely Commission v. Germany 15 July 2010, shows that the values that were at the heart of positive integration belong to the past.

The Abandonment of the Original Foundations of Positive European Integration in the Field of Labour Relations

This abandonment is well described by much of the doctrine and in this book by Catherine Barnard and Simon Deakin (Chapter 16). The Spaak Report accepted national differences but required their coordination at the EU level. The compromises reached under the influence of Jacques Delors entailed a manner of articulation limited by EU competencies and a large role was foreseen for the principle of subsidiarity (Schmidt, 2009). The use of EU social construction to limit social protections conferred by the national labour laws was excluded (Moizard, 2000).

Until 2007, it was unimaginable that the EU mechanisms aimed at

7 Commission v. Germany, case C-271/08.
providing more effective protection of workers’ rights would be reviewed by the Court in favour of economic freedoms (Valdés Dal-Ré, 2009). Since 2007 the Court has used the principle of proportionality in a restrictive sense which shows that fundamental social rights, even though they are recognized as a general principle of EU law, must be weighed against the judicial assessment (Hos, 2010). The Court which has traditionally been appreciated for its creative function allowing the building of a Praetorian Europe, has chosen to change the already unequal balance between the social and economic rights to accelerate the expansion of the internal market.

Social issues have become issues of the internal market. The social dimension, which in the origins of the Treaty was centred on the protection of workers, is now dissolved in a new societal understanding of the citizen as a consumer (Micklitz, 2009). Trade unions are treated like ordinary organizations, unless they are directly confronted with economic freedoms. The Court rejects the idea that collective agreements could benefit from a regime which excludes them from the public procurement law by negating that solidarity may have an efficient role to play in Europe.8

The Court therefore rejects the non-economic values which actually brought about the whole process of positive integration. Work has become a ‘commodity’. The dissolution of social issues in the market laws and the internal market laws has led to queries about the need for creating a special chamber on labour rights (Bercusson, 2009a). But it seems that the cause of changes is not a misunderstanding of the labour laws of Member States but rather a denial by the Court of the specificity of work relations in view of their commodification.

The philosophical opposition between the principles of the ILO (Supiot, 2010) and the directions taken by the Court of Justice is obvious. The role of the Court of Justice raises concerns in terms of democratic legitimacy and the Court’s own role in the EU legal order.

The judge here is an actor in the social regulation of globalization. It is important, however, to stress that the Court of Justice does

---

8 In Gisela Rosenbladt v. Oellerking Gebäudereinigungsges mbH, C-45/09, 12 October 2010, the Court accepted the recognition of collective agreements as legitimate instruments to decide the orientation of national social policies in favour of privileged groups, subject to the scrutiny of the Court on the discrimination on age. The recognition does not modify the orientation of the Court when there is a conflict between collective agreements and economic freedoms. The case is an illustration of the choice made by member states of the legal instruments they choose for national policies.
not follow in its choices the logic adopted in 2008 by the ECHR or by other constitutional courts around the world (Moreau et al., 2010). The legal field has, thus, become a field in which judicial strategies have increasingly been used to advance liberalism in its current form, including in cases of protections against abuses by multinational enterprises.

And although these judicial forces have not always taken the ultra-liberal form, one cannot but be deeply concerned about the direction the Court of Justice is taking.

THE FUTURE CHALLENGES

This book takes an activist position. In this it resembles Brian Bercusson and Yota Kravaritou whose ideas and actions were marked by high-level activism. This book is pro-active because it tends to highlight not only the major issues to be tackled in the future but it also proposes legal responses which could be an option for the European Union.

All the authors have sought to assess the long-term ramifications of the Laval and Viking judgements (and others). It becomes clear that the evolution of the Court is not only a timely turnaround. The values of the Union are at stake, to say nothing of European solidarity, which was already fragile (Barnard, 2006).

After the Commission v. Germany judgement, which followed the outcry from the world of work and the labour doctrine against the Court’s favouring of economic freedoms and its denial of the need for solidarity as a value in Europe, one must be profoundly European or even utopian to expect changes favouring the protection of workers. Nonetheless, in the opinion of the majority of the authors of this book several avenues of hope are emerging.

The first comes from the opportunities which the EU accession to the European Convention on Human Rights presents. Even if there are still technical issues to be finalized, Article 6 para.2 of the Treaty envisages that consistency between the jurisprudence of the two courts shall be assured. The turnaround made by the ECHR in 2008 concerning Article 11 means that the Court will effectively enforce fundamental collective rights, whether the right to strike or the right to collective bargaining (Robin-Olivier, 2009; Moreau, 2006). It also envisages a shift in focus that could enable the Court of Justice to transform the use of the principle of proportionality.

The second is connected with the integration of the Charter in the Treaty of Lisbon. The Advocates-General in the recent cases Santos...
Palhoha\textsuperscript{9} and Commission v. Germany\textsuperscript{10} based their argumentation on the need to strengthen human rights. The fundamental rights of workers must constitute a minimum protection which justifies the articulation of workers’ rights at the European and transnational levels. There is therefore a double challenge: to strengthen human rights is not enough. We must also ensure their impact in the context of labour relations in Member States and at the transnational level.\textsuperscript{11}

Finally, the European Union should align itself with the ILO, which represents the real objective of social justice in the Union (Novitz, 2007; Supiot, 2010).

The ideas in this book are directed towards the long-term perspective. Crucial questions for the future of the European construction will be raised here: the human dimension of the European integration in the context of changing economic relations in the times of a crisis, the democratic legitimacy of the social construction and Praetorian construction, the place of workers and trades unions in the EU from the perspective of a multi-level governance and a system of complex industrial relations, which are multi-level too.

The reflection of the above issues in legal terms is also in the focus of the discussion. Attention has been drawn to the means which should be put in place to reduce inequalities, to strengthen fundamental social rights in the field of European and transnational collective action, to provide a proper place to equal treatment and guarantee a future to the European social dialogue, to rethink the governance and the Lisbon strategy in order to enable the emergence of the quality of work against the winds and tides of the search for productivity and expansion in Europe.

This approach, which is intended to be constructive and activist, is based first and foremost on the analysis of the fears that hang over the sustainability of the European social model.

Jonas Malmberg analyses the shock caused by the judgements of the Court on the Swedish system and the tensions between national law and EU law. He focuses on the issue of the articulation of actors at the national and European levels in a multi-level governance system. He questions the

\textsuperscript{9} Commission v. Germany, case C-271/08. In reaction to this ‘post-Laval’ debate, the Commission in January 2011 proposed guidelines to implement the directive on public procurement (2004) and to help the introduction of social clauses.

\textsuperscript{10} C-515/08, conclusions of the Advocate-General M. Villalon.

\textsuperscript{11} Scharpf (2009) explains from a political perspective that it is impossible to attempt to reconcile the three main systems existing in Europe through liberal market economies, social market economies and the emerging European market economy.
Introduction

choice made by the Court in favour of integration, notwithstanding the fact that this choice is clearly hostile to one country – Sweden – which was not conducive to the free provision of services. The legislative changes in both Sweden and Denmark show a willingness to accept a reasonable adjustment of national legislation to the EU requirements.

Daniel Vaughan-Whitehead shows that the rising inequality in Europe since the 1990s has been continuous and structural. The causes and symptoms of this inequality are well manifested in wage policies, the inequitable distribution of growth benefits, inequality in average revenues between the Member States, the transformation of the labour market into a dual two-gear market, new worker poverty, and so on. The crisis has increased unemployment and has had a particularly negative impact on a large number of workers in precarious jobs and the most vulnerable workers, especially in Spain, Germany, Hungary and France.

The panorama of the rising inequality in Europe, aggravated by the economic crisis reveals a more than alarming situation: the development of a minimum wage to protect the most vulnerable workers was already in place in 21 out of 27 Member States. This could not be ignored by the European Union. The development of social dialogue is yet another necessary measure when trying to fight against inequality, together with the development of training programs.

Haris Kontouros recalls that the objectives of the Lisbon Strategy, as established in 2000, required compromises to be reached to combine economic development and social objectives, particularly the preservation of the quality of work through the development of ‘strong labour standards’. The social partners were to be their guarantors. The failure of the Lisbon Strategy lies essentially in the absence of positive synergies expected in the field of employment and the lack of sufficient coordination with social partners in many countries. More worrying still is the Europe 2020 program. It incorporates the same techniques, notwithstanding their proved ineffectiveness, and states economic objectives to be achieved, from a purely neoliberal position, without bothering to secure at least some democratic legitimacy. The social dimension, the preservation of the rights of workers, is completely absent. And of course the preservation of the European social model is ignored. If the Union has the ability to overcome the economic crisis, another strategy must be adopted to preserve the quality of employment.

Antonio Lo Faro discusses the ‘de-fundamentalisation of collective labour rights in European Social Law’, taking up step-by-step the debate stirred by the ‘Nordic cases’ and questions the solidity of the principle of equal treatment in EU social law. He shows the need for an approach in relative and not absolute terms. He demonstrates the paradox in
proclaiming in the European Union the principle of equality and non-discrimination based on nationality while rejecting the principle of equal treatment when it comes to access to the labour market. He also argues that the rights which are recognized as fundamental rights no longer seem to be fundamental at all and regrets that the European social policy is ‘left to judges and the markets’.

Finally, Nikitas Aliprantis presents a vivid indictment against the Court of Justice and its excessive expansionism endangering the very foundations of the EU social construction. He proposes that the Constitutional Courts of Member States of the European Union should make efforts to block the dismantling of fundamental social rights by the Court of Justice. He demonstrates the need at the institutional level to control the Court of Justice to maintain consistency between the logic behind fundamental social rights at the national level and the EU legal order.

The second part of the book seeks to assess the place of fundamental rights in the European social model by raising the themes of equality, dignity and citizenship, and finally workers’ participation.

Lisa Waddington demonstrates the limits of the European construction in terms of equality and the fight against gender discrimination in the field of career development in Europe. She notes that apart from the general principle, discrimination in career-building is mostly left to national legislation. However, the jurisprudence of the Court since the Coleman judgement allows comparisons to be built. Positive actions can also be compatible with Community law.

Anna-Maria Konsta develops the concept of ‘plastic citizenship’. The concept based on transsubjectivation proposed by Foucault is used to explain the new requirements posed by gender issues in Europe. The proliferation of ‘multiple discrimination’, particularly related to working times and the position of migrant workers, calls for a new theoretical approach which would take these vulnerable groups into consideration. The policy of formal equality, the use of soft law and the fragmentation of the jurisprudence of the European Court of Justice limit the equality of rights of certain vulnerable groups. Citizenship must evolve and not be limited to obtaining political rights; it should be oriented towards the search for social rights.

Piera Loi ponders on the principle of reasonableness in the jurisprudence of the Court of Justice and in particular on the difficult issue of discrimination based on age. She shows how the principle is reconciled with the proportionality principle and stresses the huge autonomy left to the judges in the Member States to assess differences in the treatment which result in privileging or discriminating certain categories of people.

The principle of non-discrimination is also analysed by Mark Bell in the
context of fixed-term contracts. He shows that behind a broad consensus of acceptance of the principle of equality within the Member States, it is still difficult to apply this principle in non-standard contracts which follow a logic different from that developed in other areas, particularly in the area of gender equality. Mark Bell discusses in detail the jurisprudence of the Court, the difficulties of comparison and analysis of justifications based on ‘objective grounds’ which may be invoked by the employer. He concludes that the Fixed-Term Work Directive is different from other directives on matters of equality because it entails changes in behaviour in the employment field rather than equality itself.

Bernard Ryan analyses the development of English law with regard to mobility of migrant workers in light of the conflicts which occurred in Great Britain in 2009: the requirement of representation, collective protection, the right to effectively invoke the discrimination law. Bernard Ryan depicts the interplay between the issues of employment law and those governed by migration law.

Claire Marzo examines the evolution of European citizenship and the development of European social citizenship, as proposed by the doctrine. She shows the capacity of the expansion of European citizenship in light of the jurisprudence of the Court which allows the use of legal foundations of citizenship in areas that fall under a broad conception of the social field: education, social security, services of general interest, non-discrimination. Confronted with the Charter of Fundamental Rights, the concept of citizenship reveals a strong ambivalence from the point of view of fundamental rights of third country nationals. As a result, the Court, following the doctrine, requires residency as a condition for granting rights on the ground of citizenship. Another strong ambiguity is revealed in the use of nationality or residence as a criterion for the recognition of rights. This dual approach is explained by both theoretical and historical reasons. But it also shows that a conceptual shift could be possible by bringing together the two concepts that have developed, namely social citizenship and European citizenship.

Sylvaine Laulom reflects on possible synergies in the field of workers’ representation. She shows the strength of the framework gradually developed in the field since 1975, with a particular reference to the right to information and workers’ consultation and their transnational representations. She also identifies the limits of the European framework which should or could have been strengthened and draws attention to its peculiarities in times of economic crisis. The massive and transnational restructuring, however, necessitates that the European Union should strengthen the protection of workers.

Jean Jacques Paris ponders on the new developments of European social
action after the *Laval* and *Viking* cases and proposes two new directions: the first is connected with the international framework agreement and the development of transnational collective bargaining; the second is linked to the possibility for the social partners to bargain after the agreement on stress and harassment, on the socio-psychological risks, to improve the conditions of working in Europe.

Finally, Christophe Vigneau looks closely at the future of European social dialogue. He outlines a broad spectrum of different forms which social dialogue, a key element of the European social model, can take. He then shows that the conditions are lacking the effective development of social dialogue, particularly in times of crisis. The opposition of Business Europe, relayed by the Commission, does not allow negotiation ‘in the shadow of the law’. The possibility of collective action at the European level is also missing, together with a clear legitimacy of representatives in the context of transnational negotiations.

Part III explores the capacities of the evolution of the European social model.

Filip Dorsemont shows the need for the European Union to stand out from the current jurisprudence of the Court with regard to the right to take collective action. He analyses in detail the changes that may occur as a result of the accession of the European Union to the European Convention on Human Rights: from despair to hope. The analysis of the jurisprudence of the ECHR allowed the building of a constitutional bridge to a real recognition in Europe of the right to take collective action. It seems necessary that the EU shall not be at odds with the rights envisaged by the ILO.

Catherine Barnard and Simon Deakin assess the state of social Europe after the ravages of the recent judgements of the Court of Justice. They explain in a historical perspective that the compromises respected by the jurisprudence until 2007 were rejected by the Court. The analysis of the judgements in light of the choices made in the USA shows that the choices the ECJ made with respect to decisions concerning labour and social law issues of the Court could have been avoided. The authors analyse the function of the deregulation practised by the Court and its effect on national law. They conclude that evolution can take different directions, including preventing a ‘race to the bottom’ by social dialogue and, at the transnational level, by the impact of the jurisprudence of the ECtHR and the Treaty of Rome. The authors adhere to the conclusions of the Advocates General who called for the effective implementation of the Charter and therefore of fundamental social rights.

Ulrich Mückenberger shows that the ideas which were originally expressed in the first Manifesto in 1996 and in the second in 2001 (in the
drafting of which Brian Bercusson took part) belong to a past in which the values of European construction were respected. This was before the enlargements and ‘the remarketisation of the EU and the anti-social change in the ECJ jurisprudence’. He shows the erosion of the founding pact of the European Union and the reasons (accession of former communist countries, neoliberal approach, the Court’s shifting to ‘a free market fundamentalism’ and the need to rethink European issues from a cosmopolitan perspective). He advocates the necessary ‘democratization beyond the state’, the social character as an essential element of Europe, the need to build a European polity construed from the humane and on the basis of cosmopolitan solidarity. The author also demonstrates the need to rethink the value of collective voices, the democratic foundations of the EU while taking into account the profound changes of the legal orders and the European society.

Alain Supiot agreed to write the conclusion for this book. His magisterial and radical conclusion is worthy of his friendship with Brian Bercusson and Yota Kravaritou and their readiness to engage in a lively intellectual debate.

‘Europe’s Awakening’ is a strong manifesto which goes a long way in exposing the misdeeds of ultra-liberalism, the birth since the recent enlargement of what Alain Supiot aptly calls ‘a communist market economy’. First, the author denounces the radical nature of the jurisprudence of the Court, the relative conception of the principle of equality, which in its essence is absolute. He then expresses regrets that through its judgements the Court has lost all the legitimacy which had been acquired over time. It is also in the field of democratic legitimacy that the evolution is unacceptable to the author. He shows the risk of a policy that rejects social democracy and political implications of social injustice. Alain Supiot explores the possible changes: the need to control the Court of Justice by national constitutional courts, as it did in its decision of 30 June in the German Constitutional Court, the impact of the jurisprudence of the ECtHR, the strong position of the ILO in limiting the ideological excesses of the European Union. Finally he calls for the development of institutional counterweights and regrets that the crisis did not present an opportunity to awaken Europe.

This book thus strives to show the doctrinal resistance to a shift to a European Union which will build a Community that is not founded on social justice and social democracy.
REFERENCES


De la Rosa, S. (2007), La méthode ouverte de coordination dans le système juridique communautaire, Brussels: Bruylant.


Hos, N. (2008), ‘The Impact of European Law on Regulating Labour Law Dimension of Corporate Restructuring in Central and Eastern Europe’, in

Marie-Ange Moreau - 9781849809955
Downloaded from Elgar Online at 03/16/2019 09:54:13AM
via free access


Scharpf, F.W. (2009), ‘The Double Asymmetry of European Integration, or:
Before and after the economic crisis

Why the EU cannot be a Social Market Economy’, Working Paper 09/12, Max-Planck-Institut für Gesellschaftsforschung.


