Global Workplace Law & Policy

What if we make the European Pillar of Social Rights legally binding? Overcoming the paradoxes of European labour law

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On 17 November 2017 the 'European Pillar of Social Rights' ("EPSR") was officially proclaimed by the EU leaders at the occasion of the Social Summit held in Gothenburg, Sweden. Three years later, the European Union is set to deliver an action plan. In a Communication of 14 January 2020, the European Commission launched a communication[1] to set out the road towards an Action Plan to implement the European Pillar of Social Rights. It not only presented EU level initiatives that support the implementation of the Pillar but also launched a broad discussion within the EU. The action plan should be there in early 2021.[2]

The initiative looks promising for the EU's social policy, as well for labour law and industrial relations. On 16 November 2020, the ETUI dedicated an online conference to the EPSR.[3] Hereafter are the notes of my presentation and reflections.

The economic realm as a problem issue

It has become a general understanding that, in a European context, the economic realm can be identified as a problem issue for labour law and social policy. How is that so? The 21st Century brought new challenges for labour law, or more generally, for labour rights both locally and globally. A major element has been the phenomenon of globalization. It has brought the debate of the changing world of work, with enormous challenges for our economies, labour markets, industrial relations actors and policy makers. Gradually, we have realised the importance of the climate debate and on top of it came the pandemic, with not only a tremendous health crisis but also a major economic impact.

Labour law is not only facing the challenges like these for the world of work. It also has been facing, alongside this, the imperatives of economics. Economics, economic growth and competitiveness have challenged the issue of 'regulating globalisation' since a long time and this also includes the approach towards labour law. Covid-19 or climate change and its consequences will not diminish this. The problem definition may thus go as far as encompassing the future outlook of globalization.

EU as mini-globalization

In a way, the European Union can be seen as form of mini-globalisation. It was originally designed as a project to intensify economic cooperation and market integration. The strategy of the

European economic integration project would imply the abolishment of barriers and borders. It obviously has led to a discussion about the regulation of labour markets and, broader, the world of work in light of European social goals. Central in the European integration discussion stands the well-known question of how to strike the balance between economic and social integration. The complexity of this question is increased by the double face of the European Union: it is a global actor, but at the same time it has to deal with its own (internal) European integration ambitions.

The EPSR reminds us somewhat at the 1989 Community Charter of Fundamental Rights for Workers, a social rights declaration, as a strategy to boost 'social Europe' and to ease the pathway for new hard law initiatives. But it also announced a new era. By the turn of the Century, the role of labour law was questioned in light of an economic performance agenda. Employment-intensiveness of growth, and flexible rules for labour markets, would fulfil both the wishes of workers and the requirements of economic competition.[4]

Labour law put to the test

It would turn labour law into a new policy dilemma and also to a test. While in principle labour law is conceived as a *corrigendum* to the market forces or a counterforce to the economy, now labour law was (also) viewed as a competitiveness factor. This certainly changed the approach towards labour law and created a dilemma of making a compromise, or even a choice, between protection versus economic competitiveness. And since then, we discussed more intensively the dilemma: how to balance social versus economic policies in the EU, also reflected with regard to the role of labour law in Europe.

If the answer comes from the European Pillar of Social Rights, it will need to overcome the triple paradox of European labour law.

Triple paradox of European labour law

I have proposed before that the notion of European labour law suffers from a triple dilemma, or better called, a triple paradox.[5] What we call 'European labour law' might not be so 'European' in reality, might not be based on real 'labour' policy or foundation, and, at least part of it, might not be 'law' after all.

The first paradox has to do with the division of responsibilities between the state and the European Union level. In the absence of a harmonised approach of labour law, European Union Member States remain key actors with relatively strong sovereign powers in areas such as employment law, labour relations, labour cost, pensions and welfare services. The preservation of the 'European social model', often called for, also contains a desire for protecting national autonomy and control over social issues, labour costs and integrity of the own industrial relations system.

The second paradox involves the conceptualisation of European labour law. Indeed, at the European Union level, the legal product that we call labour law, has many faces and various contextual reasons of existence. With a 'plurality of positions', labour law is subject to own dynamics in areas such as social policy, internal market policy and employment policy.

In the third paradox, 'European labour law' may not always be seen as 'law' understood in the tradition of labour law. The area of European employment policy delivers 'soft' law strategies such as the 'open method of coordination' (OMC) with guidelines or recommendations, later evolving further in 'economic governance structures' beyond traditional approaches of law.

Overcoming the triple paradox: adapt our thinking and strategy

Europe is to be viewed as an ever closer union in which economic, social *and* political progress go hand in hand. Social integration cannot occur without political integration. Political integration cannot occur without social integration. This means a few things. First, it means that we are dealing with a union of values. Second, a union of value implies important social policy benchmarks. Third, those values and social policy benchmarks should be legally translated into rights, or at least a proper rights discourse.

Strategically, one may also need to take a different approach. One might argue for radical change and a new 'grand design' for Europe. In such a view, one might be pessimistic too and see all the obstacles for European integration, the disagreement and the lack of powers of the EU. But it may be that the more useful next step is, in a realistic view, a focus on the current European legal and policy order and on making use of what we presently have. And then see what can happen.

There is an important political benchmark, the EPSR. The Pillar obviously has the potential of bringing about a new policy dynamic. And within an EU context, labour law needs more than just new labour rights. As we have argued before, words are not enough, even if they are written in the law. The Pillar has been linked to concrete legislative initiatives in the area of labour law. These initiatives are taken on the basis of existing EU competences and the EPSR has increased the political consensus, often more crucial than having a legal basis.

An important legal benchmark also exists, with the Charter of Fundamental Rights of the EU on top. In a political project, these fundamental rights are to be perceived as having a proactive and promotional function. They give the Union, including its institutions, the task to actively promote these rights. Fundamental social rights are constructive for a new 'European' approach of labour law. This approach can be complemented with a next step.

Making the Pillar binding

As we know, the EPRS is a political document, a 'compass'. It has no legal effect as such. However, the Pillar is a formulation of social rights. What if we make the EPSR legally binding? It looks like a long shot. But at the same time, the question is why this would not be possible. The EU has a longstanding tradition of guaranteeing fundamental social rights. It would not only fit a tradition, fundamental rights can also make a difference.

Fundamental rights have a privileged status over other rights and principles, also in European Union law. A binding EPSR can change the narrative of European labour law and bring nuanced changes to the European legal order.

The question resonates with the task of the 'Comité des Sages', put forward in the nineties in order to deal with the question of turning the 1989 Community Charter into a legally binding instrument. It ultimately led to a broader discussion on the role of fundamental rights in the EU. It raised, indeed, the political context of EU integration. One could argue that we thus already have fundamental (social) rights, laid down in the Charter of Fundamental Rights of the EU (CFREU). These rights must certainly remain. But the Pillar is a broader and also more specific fundamental social rights document, with an own logic and understanding. Similarly, the Council of Europe created a social charter (ESC) in addition to another fundamental rights document (ECHR) as part of a useful strategy.

Legally ‘binding’ should not necessarily mean individually enforceable in court. Many fundamental social rights are said to be of a programmatic nature, not directly enforceable, as they oblige the state to pursue a policy instead of providing claims from one individual against another. Let us look at the upside of this and value this ‘programmatic’ nature of social rights. Social rights give binding instructions to governments in pursuing their policies. They create potentially powerful effects. A positive legal obligation for the Union, including its institutions, would be a much stronger basis for realising the EPSR and social Europe. The EPSR will thus also be legally binding on EU economic governance mechanisms, as well as for institutions like the Court of Justice of the EU, or the European Commission or Council, with a view to maximize the Treaty competences. It may make legislative initiatives, like a European minimum wage under article 153(1) (b) of the TFEU, more comfortable.

Of course, fundamental social rights need a supervision mechanism. One may think about monitoring along the lines of the European Social Charter or the ILO’s institutions and bodies, rather than a court. A committee supervising the EPSR within the EU and by EU institutions may be an interesting role player in EU policy.

As suggested before, there may still be a long way to go. But any progress in overcoming the paradoxes of European labour law needs a coherent narrative and some degree of determination.

[1] COM(2020) 14 final.

[2] See my earlier blog: http://regulatingforglobalization.com/2017/11/29/the-european-social-pillar-labour-law-not-only-needs-rights/

[3] Cf. www.etui.org

[4] Cf. T. Treu & M. Biagi, “The role of a European social policy” in *Labour law and industrial relations in the European Union*, *Bulletin of Comparative Labour Relations* 1998, vol. 32, 217.

[5] F. Hendrickx, “Completing economic and social integration: towards labour law for the United States of Europe”, in Countouris & Freedland, Resocialising Europe in a Time of Crisis, Cambridge University Press (2013).

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