

**THE EXPRESSION OF THE EUROPEAN SOCIAL MODEL THROUGH THE
MEDIUM OF LABOUR LAW : AN 'INSTITUTIONALIST' ACCOUNT.**

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'The expression of the european social model through the medium of labour law :

An 'institutionalist' account'

1. Introduction:

'Over and above our historical and cultural diversity, there are certain shared ways of organizing our societies¹.'

Over the course of the past decade, the term 'european social model' has entered into the lexicon of the European Community. It is appearing with increasing prevalence in policy documents emanating particularly, but by no means exclusively, from DG V of the European Commission. On one level, its use can be seen as an attempt to conceptualise and describe the common elements of a 'European approach' to the structuring of state-society relations. Beyond this, the 'European social model' can also be seen as a goal to be attained, as a normative vision of the 'sort of society' which European citizens 'want'². Either way, the model is portrayed as something distinctive, resting on an ideology which is not replicated anywhere else in the world. In particular, it is seen to stand in contrast to the US model, as far as that model embraces '(a) the deregulation of labour market guarantees, (b) low rates of real wages for less skilled workers and (c) lower levels of legal protection ensured by a welfare state policy model³,' and, it should be added, a limited role for collective bargaining. The US model has been rejected throughout the European Union, and as Veneziani argues, 'the reason for this rejection is deeply rooted in a difference in ideology which underlies the choices of the European Union....where the protection of workers and the elision of social differences have been historical pillars of the democratic consensus in each State

¹ J. Santer, Address by the President of the Commission, 1996.

² J. Shaw - chapter on citizenship in ***

³ B. Veneziani, 'The Changing Nature of the European Labour Market' 35 at p.36.

of the European Union⁴. The contours of this common approach by the Member States has been further elucidated by the European Commission, which has specified the core values underpinning the European social model as being: 'democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity⁵'.

However, analysts are increasingly challenging the coherence and continued viability of this common model⁶, and 'the point of view that the maintenance or the improvement of the European social model is contrary to the logic dictated by international economic competition has many supporters⁷'. In the face of such challenges, the Commission retains an attachment to the model, championing it and its perceived role in the process of integration : 'This social policy, from training to health and safety, from social protection to labour law is the foundation stone of the Union's successful political and economic progress. It forms the bedrock of company competitiveness, workforce productivity and people's ability- and willingness to create and contribute to active and stable society⁸'. Nevertheless, even within DG V, a shift within the model is seen as a necessary response to the changing economic reality, and Flynn has also stated that 'the European Model has to be adapted in order to be preserved'. At Community level, then, new strategies are perceived as necessary to support, defend and develop the European social model.

Of course, at any point during the course of the EC's history, it is possible to discern any number of alternative views about the way in which the Community should (or

⁴ *Ibid.*

⁵ *European social policy: A way forward for the Union* COM(94) 333 at para 3.

⁶ eg: J Grahl and P Teague *Is the European Social Model Fragmenting?* ; J. Vogel 'Declin du model social europeen' in M. Telo and C. Gobin (eds) *Quelle Union Social Europeenne?*

⁷ I. Nikolacopoulou-Stefanou 'The European Social Model: Challenges and Prospects' (1996) 49 *RHDI* 437 at p. 478.

⁸ P.Flynn, Social Affairs Commissioner, Warsaw, Poland, March 1999.

indeed should not) contribute to the delivery and development of the European social model. It is argued, however, that from amongst these different visions, three approaches in particular have stood out, and these are conceptualised as competing (and sometimes overlapping) 'policy frames', defined as 'central organizing ideas shaping an actor's policy positions⁹.' In accordance with the assumptions of institutionalist theory¹⁰, it is suggested that the more deeply institutionally entrenched a particular policy frame is within the Community system, the more influential it will be in shaping policy outcomes. This paper identifies the three frames as being in turn (1) *social policy as an adjunct of the internal market, contributing to the equalisation of market conditions* and the creation of a 'level playing field'; (2) a '*strong*' *social policy based on social rights and industrial citizenship*, and (3) *social policy in partnership with economic policy, promoting productivity and competitiveness* through its role in the formation of an adaptable and flexible workforce.¹¹ Section three of this paper will assess the extent to which each frame can be seen to have been 'institutionalized' within the Community system. The focus is on the institutionalization of the current dominant frame - one which arguably marks a shift in the social model and which conceives of social policy as an instrument for adaptability and flexibility. Section four will consider the policy implications of the ascendancy of this frame, and the way in which European social model is being now expressed at Community level. Before this, however, a brief introduction to the institutionalist approach will be provided.

⁹ A.Lenschow and A. Zito 'Blurring or Shifting of Policy Frames? Institutionalization of the Economic-Environmental Policy Linkage in the European Community' 1998 *Governance***.

¹⁰ See, in particular K.Armstrong and S.Bulmer (1998) *The Governance of the Single European Market*; P. Pierson, 'The Path to European Integration: An Historical Institutional Account' (1996) 29 *Comparative Politics* 123-163 ; A. Jordan, 'European Community Water Policy Standards: Locked in or Watered Down?' (1999) 37 *Journal Of Common Market Studies* 13; J. Hunt, 'The Court of Justice as a Policy Actor : The case of the Acquired Rights Directive' (1998) 18 *Legal Studies* 336.

¹¹ These conceptualisations are developments on those suggested by Wendon, 'The Commission and European Social Policy', in Sykes and Alcock (eds).

2. Institutional approaches to the study of the European Union.

An increasing number of analysts are turning away from attempting to fit the reality of European integration into the straight jacket of overarching predictive theories of this process. For some, the claim that there can be one 'grand theoretical narrative' which can offer an explanatory account of integration lacks validity. Instead of searching for alternative 'macro' theories to compete with neofunctionalism and intergovernmentalism, some analysts, as Armstrong has acknowledged, have retreated 'to a level of greater and greater description.' But a third strand of scholarship has appeared which lies between grand theory and atheoretical empirical case studies: 'it is in this sense that so-called middle range theories or approaches to European integration have emerged, and new institutionalist approaches can be said to seek to straddle the divide between story telling and theory building¹².'

Emerging from the disciplines of comparative politics, economics, and sociology, the 'new institutionalism' attempts to re-orientate existing modes of enquiry away from behavioural approaches and back towards an approach which places greater explanatory value to the role of institutions - both formal and informal - in decision-making.

One of the central pillars of the institutionalist approach is the adoption of a broader definition of the term 'institution.' This definition extends to include not only the formal institutional and organisational structures, but also the procedural rules and routines and the substantive norms which operate within these structures, and condition activities. The 'historical' variant of institutionalism, as Thelen and Steinmo show,

¹² K. Armstrong, 'Conceptualising the EU: The Contribution of New Institutionalism' Jean Monnet Working Papers, Harvard University, 1998.

'confronts issues of both historical contingency and path dependency.'¹³ Bulmer further elucidates this idea of 'path dependency': 'Historical institutionalism emphasises the cumulative nature of policy making...Thus initial policy choices may restrict subsequent evolution so that a kind of path-dependency influences a change of course in policy.'¹⁴ The policy decisions of today are inextricably linked with the decisions of the past, which set the contours and context of current and future action. Recognition of the potential significance of these background factors also leads to a more critical approach to the issue of the formation of actors' preferences.

As a methodology, historical institutionalism focuses attention both on the supranational institutional actors, and on institutions in the form of the rules, norms, and operating procedures, which 'shape the interaction between the institutional actors...and orientate institutional actors to their allotted functions.'¹⁵ The central theoretical premise is that 'institutions matter'. Institutional actors are seen as more than neutral arenas within which policy is formed, and institutions as having an important procedural and substantive impact on decision making. The institutional 'make-up' of a particular policy sector - the rules and procedures both formal and informal, and the beliefs and understandings carried by these institutions - is seen as an important conditioning factor in the determination of the outcomes of the policy process. An institutionalist perspective on the policy making process questions the assumptions of 'rational choice' theory which 'view decisions as the outcomes of

¹³ 'Historical Institutionalism in Comparative Politics' in Steinmo, Thelen and Longstreth (eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992) at p.2, citing Ikenberry 'Conclusion, An Institutional Approach to American Foreign Economic Policy' in Ikenberry et al (eds.), *The State and American Foreign Economic Policy* (Ithaca, Cornell U.P;1988) pp 222-223.

¹⁴ Bulmer 'New Institutionalism, The Single Market and EU Governance' Paper presented at the 5th Biennial ECSA Conference, Seattle, WA, 29 May-1 June 1997.

¹⁵ Armstrong 'Regulating the Free Movement of Goods: Institutions and Institutional Change' in Shaw and More (eds.) *New Legal Dynamics of European Union*, at p167.

choices made by individuals on the basis of their preferences.¹⁶ Historical institutionalists are concerned with identifying the way in which these preferences are conditioned by institutional factors; and policy solutions are shaped by the decisions of the past, and may follow a course of 'path dependency.'

Over the past 5 years or so, studies of the EC policy system from an historical institutionalist perspective have become increasingly prevalent.¹⁷ They can be seen as attempts to fill the gaps left by grand theory. For example, historical institutionalism has been shown to provide a means of explaining how and why gaps in Member State control over the development of the EC integration and policy processes occur, affording recognition to some degree of autonomous action on the part of the EC institutional actors. Once such gaps have occurred, and the position adopted at the supranational level no longer accords with Member State preferences, an historical institutionalist perspective may be employed¹⁸ to explain how institutional constraints ensure that closure of these gaps by the Member State governments is difficult. This involves a focus on what could be termed the 'historical depth' of the issue, as well as the institutional configuration within the particular policy sector, and on the norms and principles which may be seen to influence activities undertaken in that area. Historical Institutionalism also appeals to those wishing to forge interdisciplinary approaches to the study of the EC, as the role of the law and of legal processes can be firmly embedded in the historical institutionalist approach. The involvement of the Court as a policy actor may be brought into focus, with a recognition of the law's contribution to the shaping of institutional conditions.

¹⁶ *Ibid.*, at p.168.

¹⁷ *Supra* note 10.

¹⁸ See for example the work of Pierson, 'The Path to European Integration: A Historical Institutional Analysis' (1996) 29 *Comparative Political Studies* 123.

Historical institutionalism has been shown to be particularly well attuned to explaining policy stability, for showing why and how a policy trajectory may be continued, in the face of competing policy demands.¹⁹ It is, however, irrefutable that policy *does* change direction, that new visions of what policy should achieve, and which interests it should satisfy, become dominant. As many of its proponents have been at pains to demonstrate, historical institutionalism is not insensitive to such dynamism. It is however posited that policy change is most often evolutionary and incremental in nature, rather than revolutionary; and that the prevailing institutional configuration *matters* to the way in which change is brought about. Lenschow and Zito have examined policy change through an institutionalist lens in the EC context with their work on the shifting relationship between the interests of the environment and the economy. Their starting point is one of acceptance of the institutionalists central claim that in the generation of policy outcomes, institutions matter. They then define the competing visions of what the environment-economy relationship should be and how it should be articulated as a number of alternative 'policy frames', and show how each policy frame may implicate, or indeed necessitate, a different institutional configuration if its objectives are to be met. The full articulation of a particular policy frame will be facilitated through the entrenchment of a particular set of organizational, procedural and normative arrangements. The extent to which a particular frame is institutionalized has an important impact on policy outputs of a system, and deep insitutionalization may result in policy lock in, or at least, policy stability. For a new frame to gain ascendancy, and the ideas within it to be coherently and consistently expressed through policy instruments, an institutional reconfiguration may be required. Given the 'stickiness' of institutions, however, there may be some lag between the shift in actor expectations and this institutional reconfiguration. In the following sections of this paper, the three policy frames which have been identified as existing in the social policy sphere are presented, and an examination is made of the extent to which they have

¹⁹ See particularly the work of Jordan, *Supra* n.10, and Pierson, *Ibid*.

been institutionalized within the Community system. The implications of these processes of institutionalization are assessed through a consideration of policy outputs. It is argued that recent policy outputs evidence a shift in the way in which the European social model is being delivered, and the ascendancy of a new policy frame. The institutionalization of this frame will have set the contours for policy development for the foreseeable future.

3. Delivering the 'European social model' : three policy frames.

The social policy sphere is depicted as an area of 'shared' or 'concurrent' competence of the Member States and the Community. In reality, this has resulted in conflict and controversy surrounding the allocation of tasks, in profound disagreement over the role that the Community should play in the provision of social policies, and in the delivery and development of the European social model. It is asserted that three dominant views can be discerned of what the Community's role in social policy 'should' be. These views are conceptualised in terms of the following three competing policy frames; (1) *social policy as an adjunct of the internal market, contributing to the equalisation of market conditions and the creation of a 'level playing field'*; (2) a *'strong' social policy based on the promotion of social rights and industrial citizenship*, and (3) *social policy in partnership with economic policy, promoting productivity and competitiveness* through its role in the formation of an adaptable and flexible workforce.

Each frame, it is suggested, carries with it a particular view of what the Community's involvement should be and how that involvement should take place. Flowing from each frame there are therefore 'a number of regulatory features, including institutional arrangements, state-society relations and policy design',²⁰ which would be considered the most satisfactory for the attainment of the objectives of the particular frame.

²⁰ Lenschow and Zito, *Supra*.

Whilst it is of course recognised that at any one time the constellation of actors involved in the development of social policy may associate themselves with any one of these frames (or some variation on them), it is nevertheless asserted that, in the course of the Community's evolution, there has been a chronological succession from frame one, through frame two, to the current situation, in which frame three is dominant. It should be recognised that there has been difference in the degree and depth of the institutionalization of each frame, resulting in the objectives of certain frames being better met than others.

Frame One: Social Policy as an Adjunct of the Internal Market

The first frame to gain dominance in the social policy sphere was one which conceived of legislative activity by the Community as legitimate to the extent that the measures it introduced contributed to the establishment of the common market, through the equalisation of costs borne by employers. It may be challenged whether this normative principle inspired the initial design of the framework for social policy making. As many commentators have recognised, the Treaty of Rome left much unsaid on the issue of social policy, as it was assumed that 'economic integration...would in time ensure the optimum allocation of resources throughout the Community, the optimum rate of economic growth, and thus an optimum social system'.²¹ Nevertheless, and whatever the inspiration which lay behind it, the approach adopted in the EEC Treaty lent itself to the consecration and institutionalization of the 'social policy as an adjunct of the market' frame.

Procedurally, of course, the Treaty had set out no specific legal base for the introduction of social policy measures. Recourse would therefore have to be made to one of the general legal bases - either art. 100 on the harmonisation of national

²¹ C.Barnard, 'EC 'Social' Policy' in Craig and de Burca (eds) *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), 479.

measures, or art. 235, the broader basis, which would allow for measures to be introduced which further the objectives of the Community. Whilst the Heads of State or Government meeting at Paris Summit of 1972, (which instructed the Commission to draw up the first Social Action Programme) recommended the use of art. 235 where necessary, the overwhelming majority of the measures introduced to give effect to the Social Action Programme were introduced under art. 100. The selection of this base is significant. It both reflected a view, and contributed to the entrenchment of that view, that social policy intervention was legitimate to the extent that it served the market dimension.

Organizationally, a dedicated Directorate General for social affairs, DG V, had been a feature of the Community's institutional architecture since the establishment of the European Economic Community. Whilst it had long been involved in network building and the development of policy ideas, it was not automatically accepted that measures incorporating a social policy dimension should necessarily emanate from DG V. For example, significant work in the area of employee protection in the event of company mergers and concentrations had been undertaken by the company law Directorate in the late 1960s and early 1970s. Such contestation lessened somewhat following the adoption of the Social Action Programme, and when the first wave of social policy legislation was placed on the agenda it was assumed that DG V would hold the responsibility for policy initiation. It is perhaps surprising that at this time that DG V did not do more to impose a particular and differentiated approach to policy making, distinguishing itself and the measures it proposed from those of other DGs which may have had a stake in the area under consideration. For example, it could have done this through wider recourse to art. 235, which would have enabled it to emphasise the 'social' characteristics of legislation over and above the conditional, qualified view of social policy available under art. 100, which necessarily submits social considerations to the economic interests of the market. Certainly, reports of the negotiations which would lead to the adoption of the 1975 Collective Redundancies Directive indicate that certain Member States would have supported the use of art. 235 as a legal base. DG

V, however favoured art. 100, perhaps having simply accepted the political reality of what was possible. This approach was then adopted in respect of the Collective Redundancies 'sister' Directives, on Acquired Rights and Insolvency, without further debate on the issue of legal base. The 'automatic' recourse to art. 100 had become institutionally entrenched, and reflected the fact the primary policy orientation remained the creation of the common market.

Breaking with this view somewhat is the Community's role in the area of sex equality. Whilst art. 100 was used for the introduction of the Equal Pay Directive of 1975, later Directives were introduced under 235. This can be seen as reflected the normatively different approach which the Community advanced (and was supported by the Member States) in respect of rights to equal treatment. Such rights were seen as being of a different order to the 'employment protection' rights. The former are conceived of as being more in the nature of fundamental rights, less apt to being conditional on the fulfilment of other (economic) objectives.

To sum up, up until the mid 1980s a particular view of the Community's role in social policy had been procedurally, organizationally and normatively institutionalised. A specific policy frame, which conceived of social policy as playing a supporting role to the process of economic integration, had become dominant, and this was reflected in policy outcomes. Whilst certain actors may have held different views about what Community social policy 'should' be, and of how the Community should be delivering the European social model, the institutional environment mitigated against different objectives being met.

Frame Two: A 'Strong' Social Policy

As Lenschow and Zito have shown, 'in order to move from one policy frame to the next and change policy accordingly, policy makers need to 'embed' those...values and ideas in the institutional apparatus in such a way that they frame actor perceptions and

choices in the future.' It is submitted that such an attempt to depart from the first frame was instigated following the arrival of Jacques Delors to the Commission Presidency in 1985. Delors, with his dynamic approach to leadership, and firm belief in the need for a strong Community social policy led the endeavour to shift the dominant social policy frame to one premised on support for social rights and industrial citizenship.

The reorientation began with a shift in the normative discourse surrounding the policy area, with Delors calling for the consecration of une 'espace sociale europeene', and for a social dimension to the internal market. Whilst the 1986 SEA incorporated only minimal legal and procedural changes in the field of social policy, the attempts at reorienting the Community's approach to social policy became more visible in the post SEA era, during which time, according to Cram, the Commission led a 'high profile relaunch of the social dimension'.²² At the forefront of this relaunch was Delors' commitment to the drawing up of a Charter guarantying minimum social rights. This Charter, of course was to be adopted by only 11 of the 12 Member States, and took the form of a non-binding political declaration. Nevertheless, that the Community was talking in terms of social rights marked a break from the previous frame. In addition to the moves being made in the area of the promotion of individual social rights, the Community was also focusing on the collective dimension, and the idea of industrial citizenship. Procedurally, steps had been taken to institutionalize the social dialogue firstly informally, through the convocation of the Val Duchesse talks, and then formally, through the introduction of art.118b in the SEA.

Throughout this period, it is possible to discern that attempts were being made inside the Commission to disassociate social policy from its supporting, incidental role to economic integration, and to bring it more centre stage. This vision of a less

²² L. Cram *Policy Making in the EU: Conceptual Lenses and the Integration Process* (London; Routledge, 1997) 42.

'compromised' social policy was also supported by the Court in its 1993 Opinion, in which it recognised the Community's 'internal legislative competence in the area of social policy'.²³ However, it is submitted that this 'strong social policy' frame was, at best, only partly institutionalized within the Community structure. The institutional conditions which would have favoured the delivery of this frame through policy outputs were lacking. Whilst a majority of the Member States, and the Commission may have adopted the same normative position to social policy, the existing institutionally framework made it impossible to fully articulate this view. With the extreme opposition of the UK government to the strong social policy approach, the use of article 235 as a means to consecrate a broad social policy dimension through law was out of the question, as the requisite unanimity in Council would not have been possible. This frame was able to find legal expression through the opportunities provided by art. 118a, which allowed for qualified majority voting in the area of health and safety in the working environment. However, the attainment of the objectives contained within the strong social policy frame was necessarily only partial. Most dramatically, the UK ensured that this frame would not be further institutionalized at the Community level through its opt out from the revised, strengthened, social policy provisions agreed upon at Maastricht.²⁴

Frame Three: Social Policy in Partnership with Economic Policy.

It is submitted that one can track, over the course of the past five years, the emergence of a new social policy frame; a frame which normatively enjoys widespread support, and which is increasingly procedurally and organisationally institutionalized. This new vision can be described as one in which *social policy is in partnership with economic policy, promoting productivity and competitiveness* through its role in the formation of

²³ Opinion 2/91 of 19 March 1993 [1993] ECR I-1061.

²⁴ And, of course, the UK moved close down the route offered by article 118a through its legal challenge to the Council's adoption of the Working Time Directive on this basis.

an adaptable and flexible workforce. Rather than casting the relationship between social policy and economic policy as essentially one of conflict - according to which the attainment of goals in one sector requires the compromising of the goals of the other - the new frame encapsulates the view that a strong economy and increased employment require a supporting social policy. Economic and social policy need to be developed in partnership with one another. Dynamic, responsive labour markets require labour forces with these same qualities. The transition from the previous frame to the productivity, partnership frame can be seen to have begun with the Commission's 1993 White Paper on Growth, Competitiveness and Employment, which has been interpreted as an attempt to 'shift the emphasis away from employment rights to job creation'.²⁵ Subsequent policy documents have revealed that the previous frame's attempts to consecrate a strong social policy based on the harmonisation of social rights is regarded as ill suited to the creation of an adaptable, flexible workforce. For example, in the Commission's 'Employment Agenda for the Year 2000' the Commission presents its vision of a 'new world of work...in which the concept of security of workers has been reformulated, focusing more on security based on employability in the labour market than the security in a specific job'.

In broad terms, the Commission's commitment to 'flexibility' does not lead it to the unfettered pursuit of labour market flexibility through deregulation of the employment relationship. Instead it has favoured an approach which continues to recognise the desirability of employment protection measures (from both a social and economic perspective), recognising nonetheless 'the need for a thoroughgoing reform of the labour market, with the introduction of greater flexibility in the organisation of work...[and] reduced labour costs...'²⁶ as a basis for the Community's emergent

²⁵ Wendon, 'The Commission and European Social Policy' at p.65.

²⁶ CEC, *White Paper on Growth, Competitiveness and Employment*, op cit., *Supra* n.16 at p. 140. This 'balancing act' is returned to in both the 1995-97 Medium Term Social Action Programme *Social Europe 1/95*; and in the Report produced by DGV of Commission Progress Report on the Implementation of the Medium Term Social Action Programme,

employment policy. This employment policy has, over the last few years, been placed high on the European Union agenda. The advances made at Amsterdam, with the incorporation of a new Employment Title were taken further at the Extraordinary European Council Meeting on Employment, which met in Luxembourg in November 1997. The 1998 Employment Guidelines which were agreed on at this meeting, are grouped around four themes: improving employability, developing entrepreneurship, encouraging adaptability in businesses and their employees, and strengthening equal opportunities policies.²⁷ A critical feature of 'adaptability' is ensuring that, in promoting a positive response to economic change, the right balance is struck between the flexibility required by businesses, and the security which employees need. As the Commission recognises in its Social Action Programme for 1998-2000, the 'social dialogue has a key role in achieving the right balance'.²⁸

This recognition of the potentially significant role that the social partners can play leads us on to a consideration of the procedural and organizational institutions which are central to the new frame. Of key importance is of course the social dialogue introduced under the Maastricht Social Policy Agreement and Protocol, and now firmly secured in the main body the EC Treaty following the ratification of the Amsterdam Treaty. The possibility now exists for the social partners to be centrally involved in the creation of social policy measures, and indeed to regulate issues themselves. And the social partners are making steady use of this route. Some commentators²⁹ have noted that the Commission DG V supports this alternative law making forum as it presents a means of overcoming the procedural deadlock which bedevils the (previously standard) legislative route to Community social law making. It should however be recognised

Social Europe Supplement 4/96 at p.27; Commission Green Paper: A New Partnership on Work Organisation COM(97) 127.

²⁷ Presidency Conclusions from the 1997 Employment Summit; at
<<http://europa.eu.int/en/comm/dg05/elm/summit/en/papers/concl.htm>>

²⁸ Commission Communication on the Social Action Programme 1998-2000, COM(98) 259
at para. III.2.

²⁹ Wendon, *supra*.

that this procedure also presents perhaps the optimum structure through which the normative goals of the new frame can be realised, as the increased role for the involvement of the social partners generally, and for labour in particular in the representative organs of the enterprise³⁰ represents a move towards creating the necessary decision making structure within which (mutually acceptable) flexible work practices can be established.³¹

In conclusion, it is submitted that with the institutionalization of this new frame, what we are witnessing is perhaps less a radical overhaul of the European social model, and more a shift in emphasis in the way in which this model is being delivered at the Community level, or perhaps a reassessment of the aspects of the European social model that the Community level is best placed to take the lead on. No longer (if it ever actually was) is it the Community's role to set individual social rights, instead, the Community's primary task is to provide a framework for the social dialogue and collective bargaining - both crucial aspects of the European social model.

4. The implications of the ascendancy of the new frame:

The new institutional context has undoubtedly left its imprint on the type of measures which are now coming out of DG V. A change of direction is observable both in terms of the type of policy instruments being selected as well as the substantive characteristics of these instruments. In operationalising its current social policy agenda, the Commission is stressing the use of a 'balanced mix of policy instruments',³² with legislation playing something of a supporting role to the development of 'partnerships'

³⁰ As contained in Directive 94/45/EC on European Works Councils, and the proposals for a measure relating to national level works councils.

³¹ See further the discussion in the Commission's Green Paper *Partnership for a New Organization of Work* COM(97) 127 final.

³² Commission Communication on the Social Action Programme 1998-2000, COM(98) 259 of April 29, 1998, at para III.

between the social partners. The content of such legislation as is still being adopted well reflects the normative shift in social policy. In contrast with the legislation of the 1970s, which was perhaps rather unsophisticatedly designed to eliminate competition distortions provide the worker with security within the enterprise, a different view now prevails under which concerns with 'employability' and 'flexibility' are paramount.

Examples can be provided of directives which, whilst premised on the protection of workers' rights, recognise and validate the flexible work practices they address. Early manifestations are Working Time directive³³, and Atypical Workers directive.³⁴ This policy trajectory has been continued, and can be seen in most recent Framework Agreement made between the social partners, that on Fixed Term Contracts, which has been welcomed as a 'fitting response to the Commission's call for greater flexibility and security'.³⁵ The social partners are increasingly being granted responsibility not only in the formation of policy, but also in decisions relating to the implementation of policy measures. For example, the recently revised Acquired Rights Directive contains a new article which provides the social partners with the opportunity to agree to derogations from the directive, in the economic interests of the undertaking concerned. Article 4a(2)(b) declares that 'the transferee, transferor, or person(s) exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree to alterations...to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking'. Commenting on the text of the amended Directive, Ian McCartney, Minister of State at the Department of Trade and Industry, asserted that by '[p]romoting this co-operative partnership approach to business restructuring [the Acquired Rights Directive] will help competitiveness and employment flexibility, by

³³ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (OJ 1993 L307/18).

³⁴ Council Directive 91/383/EEC (OJ 1991L206/19)

³⁵ Padraig Flynn IP/99/187 (18/3/1999).

helping the labour market to adapt to structural change in the economy without walking over the rights of employees'.³⁶ In general terms, it can be submitted that Community social policy and labour law has recognised that discontinuity in the employment relationship is, increasingly, the norm, and is responding with attempts to provide worker with the means to accept and work around this discontinuity in the employment relationship.

Conclusion:

This paper has sought to illustrate the significance of institutional context on policy outcomes. It has argued that, over the course of the Community's history, it is possible to discern three overarching policy frames - three different broad approaches to understanding what social policy should be and how it should be done - being the *social policy as an adjunct of the internal market frame; the 'strong' social rights and industrial citizenship frame, and the social policy in partnership with economic policy, promoting productivity and competitiveness frame*. Rather than each being a radical root and branch overhaul of the underpinnings of the European social model, each can instead be interpreted as being a restatement of those aspects of the European social model which are considered most apposite to be dealt with at the Community level. Each frame, in turn has dominated the social policy debate at Community level, and has been 'institutionalized' procedurally, organizationally and normatively - though the degree and depth of institutionalization of each frame has differed. Consistent with historical institutionalist thinking, it is suggested that policy actors are influenced by the institutional environment within which they operate - they come to recognize what is considered 'appropriate' under that frame and tailor their policy positions accordingly. In accounting for shifts from one frame to another, significant factors would appear to be societal and political pressures, as well as learning by those

³⁶ Speech reported in DTI Press Release P/98/430 of June 4, 1998. On file with author.

involved in the policy process - with actors becoming aware of the boundaries imposed by the particular frame in place, leading them to search for alternatives within which their particular policy objectives can best be met - though the transition from one frame to the next in by no means a smooth, automatic process.

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