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THE COURT OF JUSTICE AS A POLICY ACTOR IN THE
DEVELOPMENT OF THE EC LABOUR LAW REGIME: THE CASE
OF THE ACQUIRED RIGHTS DIRECTIVE.

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Introduction:

Increasingly, and beyond the realm of legal scholarship, the important contribution of the European Court of Justice to the process of European integration is being recognised. In such analyses the Court takes its position alongside the other political institutions involved in the processes of policy making which occur within the structural environment of the European Community. Through its activities, the Court may be seen as having had a significant influence both on substantive characteristics of policy, and also upon this structural environment within which policy is made, as with those decisions which have endorsed a Community competence over matters previously regulated at the national level, and those which have concerned the structuring of the Community-level inter-institutional balance in the law and policy making process.

Whilst the policy role of the Court is increasingly being brought into focus, some controversy exists over the degree to which the Court can, by itself create direct policy effects. Alter and Meunier-Aitsahalia¹ have challenged the Court's ability so to do, arguing, in the context of the development of the 'new approach' to harmonisation, that judicial policy innovations needed to be received into the political arena, taken up and developed there - the Court's role in the policy making process being one of inter alia 'provoking political responses' and 'launching ideas.'²

¹(1994) 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision.' 26 *Comparative Political Studies* 535 - 561.

²Ibid, at p.535 et seq.

Standing in partial contradiction to this view is that propounded by de Burca³. De Burca takes issue with the implicit notion in Alter and Meunier-Aitsahalia's argument that whilst the Court cannot directly create policy, the political institutions can. It is argued that any limitations on the Court's role in this regard are not as a result of its inherent judicial nature, rather, de Burca challenges the view that we should assess any individual institution on its ability to create direct policy effects. The approach to the policy making process advanced by de Burca is one which recognises that 'a Community policy is created by a complex interaction between the different institutional actors at Community, national and subnational level.'⁴ This understanding of the policy process is one which is central to the development of the approach adopted in this paper. It is one which views the different stages of the policy process as intimately linked, that regards policy making as a dynamic, iterative process, consisting of feedback loops and interchanges between multiple actors in the substantive definition of policy. The study also accords with the view that approaches which concentrate on the 'history making' moments of the integration process should be supplemented by analysis of 'everyday' policy making within the EC, so as to lead us to a fuller understanding of how the EC operates.

As Alter and Meunier-Aitsahalia have suggested, with little known about how the ECJ affects policy making, there is the need for 'further research ... to better understand how the Court interacts with the Commission and the Member States.'⁵ The current enquiry seeks to reveal instances of such interaction within the field of the EC's employment policy, which has, in recent years, emerged in a more coherent form than has previously existed, focusing on one particular piece of substantive employment law, that of the 1977 Acquired Rights Directive. Recent policy statements from the Commission on the future direction of employment law have revealed a 'renewed emphasis on the need for labour flexibility.'⁶ Following de Burca it is

³(1997) 'Subsidiarity, Proportionality and the Court of Justice as an Institutional Actor' - paper presented to the Conference 'Integrating Law: Legal Perspectives on European Integration'.

⁴Ibid.

⁵op cit.

⁶Barnard and Deakin (1996) 'Social Policy in Search of a Role : Integration, Cohesion and Citizenship' in Caiger and Floudas (eds) at p.177.

legitimate to question to what extent these policy commitments by the Commission *by themselves* create direct policy effects. Such policy objectives require articulation and transformation into policy outputs, be it through legislative, judicial or some other means. It is through this process of operationalisation that the content of this policy develops, through 'negotiation and mutual adjustment'.⁷

This paper takes as its main task an account of the construction of a Community response to the regulation of contracting out practices occurring within the Member States, in the context of this developing employment policy. The Court has been central to this task, and the way in which it functions within a web of interactions between a range of actors at multiple levels will be revealed. Certain aspects of the Acquired Rights Directive, as implemented by the Member States, applied by their national courts, and especially as interpreted by the Court of Justice could be seen as conflicting with the thrust of the employment policy developing within the political organs of the Community. Following an abortive attempt by the Community to legislate in mitigation of the more politically uncomfortable aspects of the Court's jurisprudence, recent judgments by the Court issued in the context of the 177 procedure have witnessed a subtle shift in the Court's approach to contracting out situations, to one more in accord with the goals of the emerging employment policy. The history of the development of the law relating to the Acquired Rights Directive shows not only how the Court can, through its judgments, provoke political responses, but also how it, in turn, can be responsive to, and involved in attaining the policy goals set in the political sphere. Thus, of particular significance is the Court's interaction with the political institutions - especially the Commission. Whilst this perspective does to some extent move outside the traditional paradigm of legal analyses of the Court's role, room should also be made for recognition that the Court is a legal institution, operating within the legal sphere. Thus, without signalling a retreat into legal formalism, one should be sensitive to pressures coming from within this sphere, not only such pressures as are directed towards the Court of Justice by national courts, but also those which emanate from

⁷Wincott (1996), 'The Court of Justice and the European Policy Process' in Richardson (ed) at p. 170.

within the Court itself, which as the hierarchically supreme judicial institution of a multi-tiered polity founded on the basis of a liberal democracy and respect of the rule of law, must (at least appear to) retain the attributes of an autonomous, independent body, so as to assure the legitimacy of its standing. In its role of interpreting the law the Court is therefore confronted with a host of preferences, norms and understandings of the policy implications of its activities, emanating from multiple sectors of the EC polity. In drawing attention to this interrelationship of different institutions involved in policy development, the following account is broadly inspired by the orientations of the historical institutionalist school⁸. Such themes and perspectives will be outlined below, following a review of the various approaches which can be found in the literature on the role of the Court of Justice in the policy process.

Approaches to the Policy Role of the Court:

As an increasing number of schools begin to engage with the Court, attempting to make sense of its role in the EC policy (and integration) process within their respective theoretical and methodological structures, a range of distinct approaches to the policy role of the Court are emerging. These views of the Court may be seen to differ in respect of matters such as the degree of influence over the policy process that the Court may have and the level of autonomy under which the Court acts. These points of divergence are referable to the way in which the different schools construct the '[r]elationships between the legal sphere - legal structures, institutions and norms - and the integration process at the economic and political level.⁹ Under a traditional legalist view, the activities undertaken within the legal sphere appear central, perhaps determinative to the integration process. As regards the Court's possible contribution to substantive policy development, the centrality of the Court and its perceived dominance in the emerging polity leads legalism to 'implicitly assume that legal decisions have policy

⁸On historical institutionalism see *inter alia* Steinmo, Thelen and Longstreth, (1992) 'Structuring Politics: Historical Institutionalism in Comparative Analysis', and for its application to EU studies, see Bulmer, and Armstrong, below.

⁹Dehousse and Weiler (1996) 'The Legal Dimension' in Wallace (ed) at p. 242.

consequences.¹⁰ This understanding of a policy role for the Court is however, one that denies the 'political' quality of its decisions, as the Court is regarded as operating in accordance with some internal, self-referential legal dynamic. The central focus on the developments within the legal sphere also results in a view of the Court as operating almost in isolation from the other, political institutions. This isolationism (and centrality) is broken down on an initial level through the range of 'contextual' approaches offered, and taken further by the various political science accounts which have emerged.

At its furthest point, the centrality of the law and of legal institutions is replaced wholesale with the centrality and dominance of the political sphere. Between these two points lies a body of scholarship which whilst perceiving the processes of integration and policy making as overwhelmingly contingent on the actions of political institutions, nevertheless opens up a space for the law to be incorporated as a contributing factor in these processes. Thus, Alter and Meunier-Aitsahalia portray the Court as a policy actor, involved in the policy process but only to the extent that it throws up ideas which are then taken up in the political domain. This recognition of the importance of the interchanges which take place between the legal and political domains, is, I feel a significant step forward in the breaking down of the barriers between law and politics as separate and enclosed spheres, leading to wards a more coherent, yet complex understanding of the influences on policy development. Nevertheless, it would appear that having 'discovered' the Court, political science analysis (perhaps understandably) wants to see what law can offer politics, with action in the political domain remaining determinative, the place where policy is 'made'. The challenge I make to this understanding is that policy making may be a more fluid, protracted process than may be portrayed in certain of the political science accounts, with policy solutions emerging, and being redefined through a series of interchanges between legal and political institutions. Understanding the policy process in this way leads us to enquire not only how the legal impacts on the political, but also how

¹⁰Alter and Meunier - Aitsahalia (1994) *op cit.*, at p 547.

policy considerations developed in the political sphere impact within that of the law, locating these cumulative interchanges within a broader view of how policy is made.

The dynamics of the potential impact of political considerations upon the exercise of the Court's adjudicatory and interpretative role is an issue which is not inquired into in much of the recent political science work on the Court. Perhaps it is one which is taken for granted, although as Burley and Mattli¹¹ have shown, to recognise such possibilities is potentially damaging to the legitimacy and authority of the law, which needs to maintain appearance of independence - the 'law [functioning] as a mask for politics.'¹² Clearly, these authors do recognise that 'countervailing political forces'¹³ may impact upon the Court in the exercise of its functions, but their thesis does not require them to elaborate further on this, such as suggesting where these impulses are coming from, how they are transferred into the legal domain, and how the Court makes sense of these perhaps divergent 'countervailing political forces', and incorporates them. When these considerations are engaged with in the political science literature, we are confronted with either the realist, 'technical servant' view which sees the Court as merely giving effect to policy created within the political organs, or the neorationalist view propounded by scholars such as Garrett¹⁴, that the Court, in framing its decisions, will reflect the wishes of the dominant member states. Arguably¹⁵, neither of these views reflect the complexity of the situation, and are open to serious empirical refutation.

The view of the Court's policy role incorporated in this paper is one located somewhere between legalism and realism. It ties the Court into policy making, which is viewed as a

¹¹(1993) 'Europe Before the Court: A Political Theory of Legal Integration' 47 *International Organization* 41-76.

¹²Burley and Mattli, *Ibid*, at p44.

¹³*Ibid* at p.76.

¹⁴See eg, Garrett (1992) 'International Co-operation and Institutional Choice: The European Community's Internal Market.' 46 *International Organization* ..

¹⁵As Armstrong has argued, in, inter alia 'New Institutionalism and EU Legal Studies' (1996) (unpublished mimeo).

process which unfolds over time, carried forward through a series of interactions between a range of institutions. The paper does not seek to explore whether the Court can, or cannot create direct policy effects, or whether any other institution can, rather it aims to reveal the Court's involvement in policy making as one amongst a range of actors involved in this task. It aims to show how the Court both launches and receives ideas, which has consequences for the development of policy. Whilst this approach attempts to deconstruct the divide which may be seen to exist between the political and legal spheres, it nevertheless retains space for the recognition of the specificity of the Court's position as a legal institution. It is submitted that these concerns can be brought together and explored through an approach inspired by an historical institutionalist perspective.

Historical Institutional themes:

The turn to historical institutionalism as a research strategy in the field of EU studies has been advocated and operationalised by a body of scholars located in a range of disciplines. Approaching from the direction of comparative public policy, Simon Bulmer¹⁶ has advanced this methodological approach to the study of the governance of the EU (at both the macro level, and in the context of sector-specific studies) grounding its suitability on four assumptions. The first is that the EU is acquiring increasingly state-like qualities, and this leads to the second assumption, that this emerging 'multitiered system of government' is more fitted to an analysis grounded in comparative social sciences than in international relations. The EC pillar of the EU at least is arguably more 'state-like' than 'international organisation like.' Bulmer's third assumption provides the opening for legal scholars to engage with historical institutionalism, being that 'a rapprochement between political science and legal analyses of integration is necessary.' Bulmer's fourth assumption is simply that historical institutionalism as a research strategy can accommodate these first three stated assumptions.¹⁷ The development and

¹⁶(1995) *Four Faces of EU Governance: A New Institutional Research Agenda*.

¹⁷Ibid, pp2-6.

application of historical institutionalism in the analysis of the governance of the EU marks an important contribution to the establishment of an interdisciplinary research agenda in the field of EU studies. The significance of this approach to the current debate on the role of the Court in particular, and the legal sphere in general in the integration and policy making process is suggested through Armstrong's submission that through an historical institutionalist perspective, the '[l]egal dimension can be brought into view without either retreating into narrow legal formalism, or reducing the role of legal institutions to that of an agent of some other more significant exogenous force.¹⁸

As a methodology, historical institutionalism focuses attention on the supranational institutional actors and on institutions in the form of rules, norms, and operating procedures, and the symbols, ideas and 'norms of appropriateness' embedded in them. 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. As Kenneth Armstrong has illustrated, these institutions 'shape the interaction between institutional actors...and orientate institutional actors to their allotted functions.¹⁹ Diverging from 'rational choice' institutionalist approaches, the historical variant of new institutionalism rejects the assumption that policy making outcomes must be rational. Institutional conditions, shaped by the decisions of the past ensure that the solutions offered to policy problems are often sub-optimal, and may follow a course of 'path dependency'. Historical institutionalism sensitises us to the fact that the institutional actors are themselves capable to some extent of 'shaping their own institutional context²⁰, whereby they consolidate and expand their own powers further. The possibility of rational action by these actors is in turn problematised, and factors such as the existence of inter-institutional dialogue, (or 'organisational linkage'); the impact of path dependency; the inequalities in access to interest

¹⁸Armstrong, *supra* note 15, at p. 17.

¹⁹(1995) 'Regulating the Free Movement of Goods: Institutions and Institutional Change' in Shaw and More (eds) at p167.

²⁰*Ibid.*

representation ; and instances of regulatory imitation are all cited by Armstrong as instances of 'bounded innovation' necessarily practised by the institutional actors. Importantly the role of the law and of legal processes is firmly embedded in the historical institutionalist approach. The involvement of the Court as a policy actor is brought into focus, and there is recognition of the law's contribution to the shaping of institutional conditions. Importantly, as Armstrong especially has shown, these processes of institutionalisation, of the establishment of routinised responses and the development of guiding 'norms of appropriateness' may take place within distinct organisational settings - leading to potential dissonance between legal and political conceptions of the same issue. Rather than according to one particular theoretical view which *a priori* assumes the subordination of one system to the other, an institutionalist enquiry is more concerned with exploring 'the extent to which organisational linkages and entrepreneurial activity by the Community actors resolve, or indeed exploit such tensions.'²¹

Finally, the experience of implementing supranationally-created policy at the national level is drawn into the frame, as the inter-institutional dialogues which ensue between (in particular) the national courts and the Court of Justice may contribute to the evolution of institutional norms.

In the following account of the construction of a Community response to the practice of contracting out in the context of the Community's employment policy, a number of insights which an historical institutionalist perspective can provide are particularly stressed. An overarching theme is one which appears to have motivated Paul Pierson to embrace historical institutionalism²², which he sees as providing a means to explain how gaps in Member State control over the development of the EC integration and policy processes can occur, affording recognition to some degree of autonomous action on the part of the EC institutional actors. In this respect, the role of the Court is particularly emphasised.

²¹Armstrong, *supra* note 15 at p.11.

²²Pierson, (1996) 'The Path to European Integration: A Historical Institutional Analysis' 29 *Comparative Political Studies* 123-163.

Once such gaps have occurred, and the position adopted at the supranational level no longer accords with Member State preferences, Pierson employs an historical institutionalist perspective to explain how institutional constraints ensure that closure of these gaps by the Member State governments is difficult. This involves a focus on 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.

In the context of the Acquired Rights Directive and its application to contracting out, despite the failure of legislative change (referable to such institutional constraints), the Court has nevertheless been seen to be shifting ground. A neorationalist view would explain this shift in terms of Court responding to political pressure exerted by the Member States. Whilst this explanation is perhaps sustainable, its neorationalist assumptions 'tend to underestimate the potential complexity of both the observation of the world and its processing by actors.'²³ It is arguably too simplistic an account, and whilst these political preferences should in no way be underplayed, they are but one aspect to consider. The approach adopted here incorporates these political pressures, but attempts to show how the Court's response to them are structured by institutional considerations. The following account thus stresses the importance of the interplay between the supranational institutional actors. It identifies the emergence of different conceptualisations of the same issue within the Court and Commission, and seeks to show how attempts are made to resolve these tensions, and show how the Court responds to changed 'norms of appropriateness' existing in the political sphere (though their emergence is not referable solely to action in this sphere). It highlights the existence and impact of organisational linkages between the institutional actors on different levels, as between the Court and the national courts, and particularly the Court and the Commission. In the recent decisions in this area, the Court has appeared particularly responsive to the Commission's representations before it. Clearly the Court is aware of the political controversy its earlier decisions have

²³Armstrong, *supra* note 15.

generated, and of course the Member States governments do have a right to intervene in actions before the Court as well, but the Court has here preferred to incorporate the views of the Commission, views which reflect the institutional norms which guide the Commission's own comprehension of the matter. In short, this case study attempts to provide an account in which 'explanatory value is attached to organisational structures, procedural routines, and substantive norms.²⁴

The Acquired Rights Directive:

In its 1994 proposal for the replacement of the then 17 year old Council Directive 77/187, on 'the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business, or parts of businesses', the Commission recognised the invaluable contribution the Directive, had had in 'ensuring peaceful and consensual economic and technological restructuring and [in] promoting fair competition with respect to such changes.²⁵ As identified by the Commission, the 'main purpose' of the Directive is 'to ensure that restructuring of undertakings within the Common Market does not adversely affect the employees in the undertaking concerned.²⁶ Whilst one commentator has declared that the Acquired Rights Directive numbers among the (few) pieces of Community legislation which 'deal unashamedly with social matters²⁷', the Directive was also designed to achieve a particular economic objective, as is implicit in the Commission's assessment. This economic objective, as Barnard has identified, was to 'assist in the process of restructuring, allowing more competitive and efficient undertakings to emerge. Consequently, the managerial right to restructure was and to dismiss employees was never questioned.²⁸ The operation of

²⁴Armstrong, *Ibid.*

²⁵COM (94) 300 final, p1.

²⁶*Ibid.*

²⁷Benson (1993) 'The Employment Protection Directive' in Gold (ed) *The Social Dimension : Employment Policy in the European Community.*

²⁸Barnard (1996) *EC Employment Law* p 353.

this 'managerial right' is nevertheless constrained under the Directive. The protection afforded to employees under the Directive includes the automatic transfer from the transferor to the transferee employer of the rights and obligations arising under an employment relationship²⁹ and extends to protecting affected employees against dismissal in the event of the transfer of the undertaking to which they are attached.³⁰ This protection is not absolute, however, as the Directive provides that dismissals may legitimately take place for 'economic, technical or organisational reasons.'³¹ In the context of business restructuring therefore, the Directive aims to balance employment protectionism with commercial realism. Through the many 177 references which have come before it from the national courts, the Court of Justice has ensured that this balance is weighted in favour of the protection of employee's rights.

For the protection offered by the Directive to be available to employees, Article 1(1) requires for there to be a 'transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.' The determination of whether a particular set of circumstances fit within this construct is a task jointly shared by the Court of Justice and the national courts. Whilst the Court of Justice retains for itself the right to determine what constitutes a 'legal transfer', it is for the national courts to determine whether, on the facts before them, a transfer of an undertaking has been effectuated. The Court has applied an expansive approach to determining those transactions which may amount to a 'legal transfer', the determining factor being whether 'there is a change in the legal or natural person who is responsible for carrying on the business, and by virtue of that fact incurs the obligation of employer vis-à-vis the employees of the undertaking.'³² A wide variety of transactions have been held to amount to 'legal transfers' for the purposes of the Directive's application, ranging from *inter alia* contracts of sale, leasing agreements, to contracting out arrangements. No direct legal relationship need exist between the transferee and transferor employers, nor does

²⁹Article 3(1).

³⁰Article 4.

³¹Article 4(1).

³²Case 287/86 *Ny Molle Kro* [1987] ECR 5465, para 13.

the fact that the transfer was effected in two stages necessarily remove it from the scope of the Directive.

Whilst it is for the national courts to decide whether a transfer of undertaking has in fact occurred, the Court of Justice has not only supplied them with guidance in the form of a set of criteria to be considered, but has on occasion effectively taken this task out of the national court's hands and decided the matter for them. In the final analysis, the national courts must be satisfied that the 'business in question retains its identity in as much as it is transferred as a going concern, which may be indicated particularly by the fact that its operation is actually continued or resumed by the new employer with the same or similar activities.³³ With its focus on the mechanics and result of the transfer process, the Court has arguably obfuscated the issue of what should be considered an 'undertaking, business or part of a business' for the purposes of the Directive. Whilst the Court in its decisions up to and including the controversial Schmidt³⁴ case had made repeated reference to the concept of an 'economic unit' it had not engaged in any exclusionary definition of its content nor stipulated in any detail the essential characteristics of such units. Successive Advocates General developed their own constructs, often incorporating the notion of organisation independence, signalling perhaps to the Court that a more rigorous definition was warranted. The Court's refusal to determine with more clarity the essential organisational characteristics of the 'unit' being transferred is of course equally explicable on the grounds that the Court wished to ensure that the Directive had the widest possible application. Thus, much to the consternation of many Member State governments and contractor organisations, the Court in the Schmidt judgment appeared to rule that the transfer of little more than a contract for services could fall within the scope of the Directive.

³³ *ibid*, at para 18, subsequently approved in Cases 24185, *Spijkers* Case 29191 *Dr Sophie Redmond*, and Case C-392192 *Schmidt*.

³⁴ Case C-392/192 [1994] ECR I- 1311

The expansive, protectionist approach pursued by the Court of Justice, and importantly, applied by the national courts, whereby employees rights seem to be protected at any cost has effectively resulted in a situation whereby 'a Directive designed in part to facilitate the transfer of business is now acting as a deterrent to such transfers.³⁵ Politically, the main battleground over the Court's interpretation has been with regard to the constraints the Directive places on the business efficacy of the practice of contracting out. The regulation of this practice by EC law has impacted most significantly within the UK, where it conflicts with the government's cost cutting privatisation policy of market testing of central government services and the compulsory competitive tendering of local government services. Clearly, the Court's case law is unwelcome to the UK government, and does not accord with its policy preferences. Motivated more perhaps by fears of potential Francovich³⁶ liability state actions than an acceptance of the legal logic of the Court's reasoning, the UK government abandoned its view that the Directive in the form of the transposing TUPE Regulations of 1981 did not apply to contracting out -type situations, instructing local government departments involved in submitting and receiving tenders to proceed on the basis that the Directive applies³⁷. Whilst reluctantly submitting to the Court's authority within the domestic context, the UK government, as with several other Member States, became involved in an attempt to bring the Court under control through the channel of legislative revision at the Community level.

The Attempt at Legislative Revision:

Whilst the Commission's decision to instigate of the process of legislative revision predated the more controversial of the Court's decisions, and is not therefore wholly referable to the Court's activities, it soon became clear that this process would be the forum for certain interests to

³⁵Barnard (1996) op cit. p 363.

³⁶*Francovich v Italian State Cases C-6,9/90 [1991] ECR I-5357.*

³⁷For a detailed account of the UK Government's response to the ARD and its interpretation by the Court - see Radford and Kerr (1997) 'Acquiring Rights -Losing Power: A Case Study in Ministerial Resistance to the Impact of European Community Law' 60 *Modern Law Review* 23 -44.

attempt to close off certain avenues in the Court's ever expanding interpretation of the Directive's scope. Coming after the decisions in the contracting out cases of Rask³⁸, and Schmidt³⁹ and under intensive lobbying from contractors' groups and certain Member State governments, the Commission's 1994 proposal for a replacement Directive introduced a reformulated Article 1(1), which was designed to take into account the 'dynamic interpretation activities'⁴⁰ of the Court, and introduce 'certain clarifying and other elements to held in interpreting and implementing the Directive, more particularly where only one business activity is transferred.'⁴¹ The new paragraph aimed to distinguish 'two fundamentally different situations; the transfer of an activity as such, and the transfer of an economic entity which retains its identity'⁴² and provided, *inter alia* that '[t]he transfer of only an activity of an undertaking, business, or part of a business, whether or not it was previously carried out directly, does not, in itself, constitute a transfer within the meaning of the Directive.'⁴³

Whilst this 'clarification' has been roundly condemned as bringing nothing but increased complexity and confusion to this area, the Economic and Social Committee for one were of the opinion that the new construct 'undermines employees' rights in respect of the Directive's declared aims'⁴⁴ and the Small Business Category of the Committee went further and stated that its 'members think that it must be quite clear that the Commission seeks to ensure that the Directive does not apply to the contracting out of services.'⁴⁵ Similar views were propounded by ETUC, and various national employee representative bodies, and the European Parliament proved particularly trenchant in its opposition to the proposed changes. At the other extreme, UNICE was opposed to the proposed changes on the basis that they did not go far enough,

³⁸Case C-209/91 [1993] IRLR 133.

³⁹op cit.

⁴⁰COM (94) 300 final, p 7.

⁴¹Ibid.

⁴²Supra., at p. 8.

⁴³Ibid.

⁴⁴ECS Opinion adopted 9 March 1995, CES 317/95.

⁴⁵Ibid. Appendix ii.

fearing that 'the wording proposed by the Commission [would be] unlikely to cause the Court to reverse its jurisprudence.⁴⁶ In support of their argument that contracting out should be removed from the Directive's scope, and this should be more explicitly done, UNICE drew from one of the surveys which had been requested by the Commission in the pre-proposal stage, in which it was declared that 'the inclusion of services based on contracting out by the principal to other undertakings must be rejected as economically harmful and legally unjustifiable.⁴⁷

As the Directive was to be introduced on the basis of Article 100 EC, the unanimous approval of all Member States would be required for its adoption. Whether the necessary agreement over Article 1 (1) would have been attained is at best dubious, but in the event this was not tested, as the Commission, at the request of the European Parliament withdrew the controversial paragraph. In a speech delivered to the Parliament in February 1996, Padraig Flynn announced that Article 1(1) would be left untouched, whilst stressing that the Commission had not sought to 'change the law, only bring it into line with the judgments of the Court,⁴⁸ the Commission's insistence that the proposed Article was concerned only with a codification of the law and not with a change in its substance having been maintained throughout the legislative process.

What was made clear by the abortive legislative attempt was the intense political conflict which surrounds the Court's extension of the Directive's protection to contracting out. The Court would inevitably be called upon to return to its previous interpretations in subsequent 177 references, and would be faced with inevitable 'policy' choices. In determining which line it was to pursue, it is submitted that the Court has been influenced most strongly by the

⁴⁶UNICE position in the proposal for a Directive amending Directive 77/187/EEC -23 December 1994.

⁴⁷Birk, (1993).

⁴⁸Transcript of speech delivered by Commissioner Flynn to the European Parliament (supplied by the European Parliament).

Commission, which was not as neutral towards the Court's judgments as Commissioner Flynn's pronouncement would have believed. Through their interactions, the Court and the Commission are both responding to, and contributing to the development of 'norms of appropriateness conditioning institutional activity in the employment policy field.

The EU's Employment Policy:

The challenge may be made that the Community's involvement in social matters generally, and in the field of employment policy in particular has developed without any coherent, unifying underlying rationale. Teague has commented that 'virtually absent [within the Community structure] is any ideological outlook which should set the parameters of the interactions between the various parties and set standards of behaviour⁴⁹.' The character of the EC's social/employment policy is of a somewhat fragmented, disparate body of measures, effected by actors who have lacked any sustained, coherent strategy. A focus on the institutional characteristics of this policy area suggest certain reasons behind this outcome. Of particular significance is of course the paucity of provisions in the Treaty under which 'social' measures could be introduced for the Community, the first dedicated legislative base for social measures (and then only in the field of health and safety at work) only appeared in the 1986 Single European Act. The requirement for proposed social policy measures to be framed in such a way as to enable them to be introduced under the Treaty led to a certain amount of compromise, and shift from the original objectives that the measures were designed to fulfill. Under the main body of the Treaty, unanimity in the Council remains the general requirement for the adoption of all but health and safety type social measures. In the face of these institutional obstacles, the Community nevertheless was able to establish a presence in the social field, thanks in great part to the Commission's pragmatic and 'purposeful

⁴⁹Teague (1992) 'Human Resource Management, Labour Market Institutions and European Integration' 2 *Human Resource Management Journal* 1, at p.17.

opportunism,⁵⁰ and the intervention and the support of the Court of Justice. However, the necessity of opportunistic engineering of the situation on the part of the Commission ensured that a clear, consistent long-term strategy in the social field was unlikely to emerge.

Adopting a 'policy community' analysis to the EC social policy framework, Teague has outlined the characteristics that an 'ideal' policy community would possess. The participants in a model policy community would share 'idealised policy norms', being the 'deep rooted and widely shared aspirations which shape and guide [the participants] outlook and actions.⁵¹ In addition, 'idealised behavioural norms' in the sense of 'ideological foundations of the structured relationships between the policy actors' should also be ingrained.⁵² Teague explains that together, 'these separate policy aspirations create the institutional and normative structures, the value systems, the established patterns and standards of behaviour within a policy community ... [which are] indicative and prescriptive in nature.⁵³ To this extent a clear link is forged with new institutionalist perspectives, although whilst Teague states that these 'institutions' are 'somewhat removed from the more mundane routine of formulating and implementing policies', a new institutionalist view would stress that far from being 'removed' from policy making, they are intrinsically involved in structuring this process. Teague's assessment denies the existence of a policy community in the social policy field, as '[o]verall, with no idealised policy and behavioural norms, the institutional structure lacks direction, a sense of purpose and important normative institutions and mechanisms.⁵⁴

It is submitted however, in contradiction to Teague's assessment, that there are institutional norms, akin to the 'idealised policy objectives', emerging which guide the institutional actors' participation in policy making in the employment policy sphere. These 'norms of appropriateness' are only recently becoming more institutionalised, but they represent a more

⁵⁰Cram (1993) 'Calling the Tune Without Paying the Piper? Social Policy Regulation : The Role of the Commission in European Community Social Policy.' 21 *Policy and Politics* 135 -146.

⁵¹Teague, op cit, p. 14.

⁵²Ibid.

⁵³Ibid.

⁵⁴Teague, at p. 19.

structured, coherent view of the role for the Community in employment policy. It may be submitted that a shift in the Commission's approach to the role of legislative intervention in this field, based on a reduced reliance on such measures in favour of 'soft law' techniques has given it increased scope and freedom to develop this more coherent approach to employment policy. The main thrust of this new view is one which places centre stage the goal of employment creation, calling for more active labour market policies in which measures promoting labour market flexibility play a key role. The Community approach however does not call for the concomitant deregulation of employment protection rights, but instead requires a balancing of interests. To some extent the Commission has been required to compromise, and rationalise 'its traditional emphasis on improving worker protection.'⁵⁵ This reorientation can be seen as a necessary response to the impact of the internal market programme, which, it was predicted, would lead 'in the relatively short term, to an increased spatial concentration of activities as regards industrial production, a concentration in the services sector with serious consequences for employment...'⁵⁶ To the extent that this prediction has been fulfilled, the exacerbation of the European unemployment crisis led to numerous Member States to embark on 'radical labour market reforms to reduce labour costs, improve competition and boost employment.'⁵⁷ At Community level, the 1986 Council Action Programme for Employment Growth concentrated on the need to reduce labour market rigidities, and placed as its first priority the 'promotion of flexible employment patterns and conditions of work.' The Commission, meanwhile, had initiated investigations into the social aspects of the internal market programme, which were conducted both 'in-house' by the inter-services group, and by external bodies of experts, such as the 'non-institutional debate' conducted by Frere Consultants in 1987⁵⁸. Common ground was found on the need to design and implement policies to combat

⁵⁵Rhodes (1995) 'A Regulatory Conundrum: Industrial Relations and the Social Dimension' in Leibfried and Pierson (eds) at p 210.

⁵⁶CEC (1988) Social Aspects of the Internal Market, *Social Europe* 88/7 p. 14.

⁵⁷Rhodes, op cit, at p.120.

⁵⁸A resume of the findings from this investigation are contained in *Social Europe* 88/7.

unemployment, and to ensure that in future policy making in the social sphere, the 'economic efficiency of social policies must be given priority.⁵⁹

Despite the preferences of certain Member States, the Commission has rejected an unfettered pursuit of labour market flexibility, favouring 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...⁶⁰ In determining this general approach, the Commission has had to take into account the pre-existing body of rules and commitments which have been established in this sphere, rules which have been fashioned through an interaction of the institutions, including, of course, the Court. Thus the Court's long standing commitment to the protection and promotion of employees' rights was a factor which the Commission has to incorporate in the determination of the basis of the emergent employment policy. The 'flexibilisation' of the labour market is a central Community policy objective, but the context within which the flexibilisation debate is conducted at the Community level ensures that it is inspired by a commitment to the maintenance of the level of employee protection which has been achieved in the past. Thus the approach is one that endorses labour market flexibility, but which desires a minimum level of employment protection to be guaranteed.

A number of examples can be provided of measures which appear to have been inspired by the new norms of appropriateness operating with regard to Community activity in the employment policy sphere. Amongst the (few) legislative measures there are the Working Time Directive and the Atypical Workers Directive. Both Directives are premised on the protection of workers rights (as regards their health and safety) but recognise and validate the flexible work practices which they address. A second Atypical Workers measure, on the flexibility in working time and security for workers has been introduced under the Social Policy Agreement, and the

⁵⁹Ibid, pp14-15.

⁶⁰CEC (1994) White Paper on Growth, Competitiveness and Employment, p. 140.

Social Partners are currently negotiating an agreement. This proposal had previously been introduced under Article 100 but the necessary unanimity in Council was not forthcoming. It is clear that as far as the UK at least is concerned, 'business flexibility' is equated with labour market deregulation. This is not representative of the Commission's approach, which could perhaps better be described as a rationalisation of employment rights in the face of the demands of business flexibility. This can be evidenced for example, by the substantive content of the Working Time Directive, which incorporates many possible derogations and exemptions from the standards set out therein. The Commission appears to be motivated by the idea that whilst business flexibility should not be unfettered, it also must not be overly constrained. Thus, returning to the Acquired Rights Directive and the issue of contracting out, itself an example of a widely used flexible employment form⁶¹, it is submitted that whilst it is questionable that the Commission has been attempting to fully remove contracting out from the Directive's scope, it has been seeking to rationalise its application. A tension is apparent between the Court and the Commission over the proper balancing of the interests of business in the creating of a more flexible market, with those of employees. It is submitted that the Commission, through the organisational linkages it has with the Court has sought to transfer the norms of appropriateness conditioning the actions of actors in the political sphere across to the legal sphere.

The Court's Response:

In the post Schmidt era, the Court has been called upon by the national courts to interpret the Directive on several occasions. Two cases explicitly concerned to the Directive's application to contracting out, being the Rygaard⁶² action, and the Suzen⁶³ judgment of March 1997. The

⁶¹See further More (1995) 'The Acquired Rights Directive: Frustrating or Facilitating Labour Market Flexibility' in Shaw and More (eds).

⁶²Case C-48/94 *Ledernes Hovedorganisation, acting for Rygaard v Dansk Arbejdsgivellorening, acting for Stro Molle Akustik*. Not yet reported - See [1996] IRLR 51.

Rygaard decision marks the first occasion that the Court decided that on the basis of the information presented to it and the questions asked, there was no transfer of an undertaking, disagreeing with the findings of the Advocate General. Whilst the judgment did not remove contracting out from the Directive's scope, it did provide a clarification, and a qualification of the situations in which it would apply, through a more stringent definition of an economic entity. As the Advocate General highlighted, the previous decisions of the Court indicate that 'that concept must be deemed to have a very broad meaning.' The Court however was of the opinion that the transfer from one undertaking to another of 'one of its building works with the view to the completion of that work' fell outside the scope of this concept as it lacked the necessary characteristic of a 'stable economic entity' The fact that the works contract being transferred was limited in duration, and was not accompanied by a transfer of assets was conclusive for the Court that no transfer under the terms of the Directive had occurred. Significantly, it was these factors that the Commission had emphasised in its observations to the Court. The influence of the Commission is yet more evident in the Suzen case. The Court declared that the transfer as between contractors of a cleaning contract lay outside the scope of the Directive as there was no 'concomitant transfer from one undertaking to the other of significant tangible or intangible assets, or taking over by the new employer of a major part of the workforce in terms of their numbers and skills, assigned by his predecessor.'⁶⁴ Significantly, in reaching its decision, the Court directly addressed the activity/economic entity point it has obfuscated in Schmidt , declaring that an 'entity cannot be reduced to the activity entrusted to it...The term entity refers to an organised grouping of persons and assets facilitating the exercise of an economic activity.'⁶⁵ This approach accords closely with that originally proposed by the Commission as the revised Article 1(1) paragraph. Furthermore, whilst the Court maintains that the 'decisive criterion for establishing whether there is a transfer

⁶³Case C-13/95 *Suzen V Zehnacker Gebäudereinigung GmbH Krankenhausservice* Not yet reported, see [1997] IRLR 255.

⁶⁴*Ibid* at para 23.

⁶⁵*Ibid*, at para 15.

within the meaning of the Directive is whether the entity in question retains its identity⁶⁶ the determination of this point may now be coloured by a distinction the Court has drawn between labour market sectors. Whilst the guidelines have always included a consideration of the 'type of undertaking or business' in determining whether a transfer has occurred, this case further expands on when, and how this factor may be relevant. In its observations before the Court, the Commission distinguished between three types of transfer situations in the area of contracting out - firstly where the means of production - tangible assets - are transferred; secondly, where knowledge and expertise are transferred; and thirdly where no special knowledge or expertise is required to carry out the work, as is often the case in the labour-intensive services sector, in which the practice of contracting out is particularly prevalent. As Rubenstein has noted, in Suzen, 'this construct seems to have been accepted by the Court.'⁶⁷ Without the concomitant transfer of assets, tangible or intangible, the Court has now declared that for more than simply an activity to be transferred and thus for the protection of the Directive to be activated, the transferee would have to have taken on 'the major part ... of the employees specially assigned by his predecessor to that task.'⁶⁸ On this construct, the Schmidt decision is perhaps justifiable, as although only a single worker was taken over, that worker constituted the entirety of the workforce assigned by the transferor to the activity. However, it is perhaps somewhat difficult to conceive of Frau Schmidt as 'an organised grouping of persons and assets facilitating the exercise of an economic entity which pursues a specific objective.'⁶⁹

What is apparent is that having made the application of the Directive and the rights it provides for the workforce affected, potentially conditional on the transferee's taking over of a major part of the workforce, the Court, incorporating the Commission's construct, has opened a loophole through which transferee employers can avoid the financial impact of having to take such workers on.

⁶⁶Ibid, reiterated at para 10.

⁶⁷Rubenstein (1997) Case Note on *Suzen*, 27 *IRLR* 197.

⁶⁸Case C-13/95 *Suzen*, at para 21.

⁶⁹Ibid at para 13.

It remains to be seen how the Court's decisions are incorporated into national business practice, although both sides of industry in the UK have already expressed their concern over the Suzen ruling, trade unions on the grounds that workers rights are open to abuse, and contractors on the basis that current contracting bodies may have to bear the cost of redundancy payments should they lose on the next round of contracting out⁷⁰.

Conclusion:

The case study presented above of the Acquired Rights Directive and its application to contracting out reveals the significant role the Court may play in the EC policy process, where it is enmeshed in a network of relationships with legal and political actors alike. The Court's jurisprudence clearly provoked a political response leading to an attempt to reorientate the Court through legislative intervention. Whilst this reorientation proved impossible through the Community's legislative channels, the Court has to some extent effected such change itself. It could of course be argued that the two spheres - legal and political - remain insulated from one another, that the Court was very much aware of that some degree of rationalisation or at least clarification was necessary, and this was made apparent through interchanges in the legal sphere, through the number and nature of the 177 references coming before it from the national courts. It is however indisputable that faced with a range of conflicting opinions, from the parties to the cases before the national courts, from the Advocates General, from Member State governments presenting observations, and from the Commission, the Court has invariably followed the line of the Commission. It can therefore be submitted that the Court has looked to the 'Community' approach presented by the Commission to assist it in making decisions in a legally complex, and politically sensitive area. Through its willingness to take on board the views of the Commission, the Court has been introduced to the norms of appropriateness which operate at the intersection of employment policy and labour market policy, and which formerly structured the roles of the political actors alone.

⁷⁰See the report in 279 *European Industrial Relations Review* 18 (April 1997).

This case study definitely does not necessitate an acceptance the triumph of politics over law thesis, nor does it necessarily support the technical servant view of the Court, it is simply designed to reveal the possible contours of the interrelationships between the different institutional actors who together create and develop EC policies.

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