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Social Rights under the European Constitution: Comparing Ideal-typical Models of European Federalism

WP C.S.D.L.E. "Massimo D'Antona" N. 58/2005

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ISSN – 1594-817X
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Social Rights under the European Constitution: Comparing Ideal-typical Models of European Federalism

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* This paper has been presented at the annual Conference of the European Institute of Social Security, in Rome, 23-25 September 2004. A preliminary version of this paper has been published as URGE (Unità di Ricerca sulla Governance Europea) Working Paper."

1. Introduction: a theoretical comparison of ideal-typical models of the European multi-level constitution

The current discussion on fundamental social rights within the context of European constitutional reform is stimulating and rich. Fundamental social rights have been at the centre of a rich and imaginative academic and political debate since the end of the 1980s and particularly during the 1990s (see amongst others Däubler 1991; Lord Wedderburn 1995; A. Lyon-Caen and Simitis 1993; Rodríguez-Piñero, Casas 1996). Labour and social security lawyers have intensively participated and contributed to this debate, invoking and stimulating constitutional reform at European level (see especially Bercusson *et al*. 1996; Blanpain, Hepple, Sciarra, Weiss 1996, and the so called Simitis Report: Commission EC 1999).

More recently, the focus of attention on social rights in the European constitution has been on the Charter of Fundamental Rights of the European Union (EU) and its prospects for incorporation in Part II of the draft Treaty establishing a Constitution for Europe (see Kenner 2003b; Sciarra 2004). Much of the most recent debate on the constitutionalisation of fundamental social rights at the highest normative level of the European legal order has been about the legal relevance and normative weight of EU social rights *vis à vis* the fundamental market freedoms traditionally guaranteed by the Community economic constitution (Poiares Maduro 1998; Baquero Cruz 2002; Sciarra 2003). The issue of re-balancing negative and positive integration (Scharpf 1999) by protecting fundamental social rights on par with economic freedom and free competition principles has re-gained momentum with the Nice Charter and with its insertion within the new European constitutional Treaty approved by the 2004 Intergovernmental Conference.

In this context, the newly drafted Preamble of the Charter and Article II-112 of the draft Treaty establishing a Constitution for Europe have, for instance, attracted criticism by labour lawyers inasmuch as they might weaken the level of constitutional protection of social rights. The newly inserted distinction between (true) rights and (mere) principles (Article II-112.5) seems indeed to indicate a means of weakening certain rights - especially social rights - enshrined in the Nice Charter (see Bercusson 2003). Some worries appear again at the horizon as for the interpretation offered by

the Praesidium and now very oddly and unusually inserted in the Preamble of the Charter in Part II of the constitutional Treaty and in the newly drafted Article II-112.7. The risk is that such an improper distinction could threaten the central tenet of indivisibility of fundamental (civil, political, economic and social) rights firmly established in the Nice Charter. The auspices are that these amendments of the text of the Charter will not weaken the important interpretative potential of social rights and principles within the European Constitution (see Giubboni 2003b).

In my contribution I shall leave these issues aside to focus on the more abstract and theoretical question regarding the place and legitimacy of social rights under the European multi-level constitution. The main focus of this paper is the question of legitimacy of constitutional protection of fundamental social rights within the Community legal order. The constitutional dimension of the relationship between social rights and the market in the context of Community integration will be accordingly considered from a theoretical point of view, leaving aside questions concerning the "effective" and "positive" dimension of social rights in the EU legal order as it actually stands. The main aim of this paper is to compare different ideal-typical models of the European multi-level constitution (Pernice 2002), comparing the different positions and roles social rights might take in the different ideal-typical constitutional stylised frameworks. The recognition and protection of fundamental social rights at the EU level opens up the question of legitimacy of European law, which varies greatly according to the different ideal-typical models of European constitution under consideration.

The essential features of the different models will be illustrated, and their internal coherence examined, without, however, attempting to second guess future developments - whether likely or fanciful. The alternative models of federalism under consideration in this paper - "competitive", "solidaristic" and "co-operative" - should be considered as heuristic tools for normative analysis, liberally drawn from the theoretical debate on the present and future of the economic constitution, and of the European polity more generally. Even the very terminology used for this purpose - as also applies to similar examples - is chosen simply for convenience and identification (see *e. g.* Barnard 2000; Petroni and Caporale 2000). In particular, the word "federalism" - of which the meaning is quite broad, even vague - is used in a deliberately non-technical sense (see Pernice 1996), leaving aside its more familiar usage within the debate on the possible

federal (or otherwise) future of the Euro-polity (for a recent re-appraisal of this debate see Kelemen 2004). Similarly, wherever the qualifying adjectives used coincide with those sometimes used to describe the form or historical development of particular federal States (such as the German or North American ones), they should not be interpreted as referring to any particular aspect of the debate surrounding these issues.

2. The neo-liberal model of "competitive federalism"

In the neo-liberal constitutional model of "competitive federalism", European law tends to be assigned the role of simply promoting the negative integration of national markets. Within this model, Community law has as its prime function the constitutional unification of the common market, conceived of as an economic space without internal borders. It achieves its task through the elimination of all normative barriers which interfere with the free circulation of factors of production (i.e., capital, labour, goods and services) and the free play of competitive forces. Following in the German tradition of Ordo-liberalism, which had a strong (but not exclusive) influence on the Community's conception of an economic constitution, supranational law, properly conceived of as "economic constitutional law", has the exclusive task of constructing and maintaining an open and competitive common market (for an account of Ordo-liberalism from the point of view of the European economic constitution see Joerges 1994; Everson 1999; for a theoretical re-construction see Gerber 1994; Miccù 1996; Cantaro 1999a).

According to this conception, the open and free market has been put in place and enacted by Community law, and its efficient functioning is constitutionally guaranteed. The system finds expression both in the conferral of fundamental economic freedoms on market actors, and in the firm regulation of the competitive process. The latter regulation is simultaneously aimed at preventing the distorting interference of the state and the abuse of concentrating power in the form of private monopoly.

One might emphasise the significant difference between the ordo-liberal conception of the Freiburg school and the liberal constitutionalism of Hayek (see Irti 1998; Cassetti 2002): indeed the latter approach tends to conceive the market as a spontaneous order - which precedes (and is not constituted by) any decisions about the institutionalisation of the market order taken by the law of the economy - and therefore to consider economic rights as natural and pre-political liberties, which exist to a certain extent independently of their constitutional recognition. Thus the law, including the

Community legal order, is assigned a less significant role, or rather, a role which is not exactly at the foundation of the common market. This divergence in approaches has important repercussions for any attempt to characterise "economic constitutional law" as the basis for the legitimacy of Community law. From the ordo-liberal point of view, the market does not constitute a spontaneous order, which precedes public regulatory intervention, but rather represents an entity which is politically-instituted and socially-regulated through law.

The characteristic element of this model is therefore a clear separation between the common market and the nation state, the constitutional construction of a transnational market taking place without the parallel development of coterminous mechanisms of control and imperative political correction of the market process. The result is the absence of a state-like (federal) body at the supranational level. This model is characterised, in other words, by the coexistence of a single European market and a multitude of rules of individual States applied to their own territories, without a level of political control equivalent to that in place for economic integration.

Within this model, the governance mechanism *par excellence* is the market, and the main mechanism for bringing its virtues to bear is the generalised application of the principle of mutual recognition. This principle lies at the heart of "competitive federalism", in the sense that it ensures regulatory competition between the different national political-legal systems which together form this integrated economic space. The full mobility of the factors of production, and the circulation of the information necessary to make a comparison between different national political and institutional systems, allows economic actors to make an informed and free choice between these different systems on the basis of their needs and rational preferences. The role of institutions and of the European constitutional law of the economy is precisely that of making regulatory competition possible, in the first instance by guaranteeing the freedom of movement of factors of production.

The natural convergence of the preferences of rational actors (enterprises, workers and consumers) towards the most efficient and suitable system is the ideal mechanism for the production, according to supporters of this model, of a process of bottom-up harmonisation. This process is guided by the market and is intended to select and disseminate through by imitation the best regulatory model. The likely uniformisation which is set in motion by this bottom-up, ex post form of harmonisation is,

according to its advocates, different and better than that produced ex ante and top-down by heteronomous political intervention. The reason for the superiority of rules produced by this mechanism are twofold: not only is the ex post method an example of a "spontaneous" and "natural" process based on competition (and therefore, by definition, efficient), but also, its reliance on decentralised decisional mechanisms means that this method guarantees conformity with the principle of subsidiarity.

The Hayekian virtues of competition as a "process of discovery" (Hayek 1998) are achieved in this way. The allocative efficiency function of the integrated market is maximised, and interventions by Member States, both corrective and (especially) re-distributive, are limited by the effects of fiscal competition.

This model therefore prescribes the generalised application of the principle of mutual recognition. This implies its extension to the spheres of market regulation and labour relationships, the primary goal being to stimulate convergence on a model which is more flexible and favourable to employment growth. Thus regulatory competition on the European or international levels in the field of action of the welfare state serve to realise a process of discovery directed to identify which system of welfare - for whatever purpose - manages to demonstrate itself economically more efficient and sustainable in practice.

Given that the supranational legal order places legal systems and national social policies in competition with each other, it does not - and cannot - deliberately set itself corrective or re-distributive tasks aimed at compensating for this decrease in the autonomy of Member States to intervene. The competitive federalism model considers Community law to be legitimate only in so far as it limits itself to ensuring the negative integration of national markets and to guaranteeing free competition in the common market. Its aim - and therefore the foundation of its legitimacy - consists simply in the creation and maintenance of an open and competitive European market.

This limitation means that Community law - understood as the constitutional law of the European market (see Joerges 1994) - cannot legitimately turn its attention to the positive integration of national welfare systems. The foundations of the legitimacy of European law are essentially found in the guarantee of individual rights (civil and economic) against interference by national public authorities (Mestmäcker 1994). This normative and functional legitimacy is based on the recognition of the

fundamental freedoms of movement and the consequent guarantee of the effective functioning of the common market. The legitimacy of Community law rests on efficiency and freedom, assured by (and in) the European common market. For this reason, it does not require or presuppose the extension of the scope of supranational governance by analogy to the forms of representative or majoritarian democratic legitimacy. These forms have relevance only in the national political process.

Social rights cannot be recognised at the European level, but should remain restricted to the level of competence of the Member States, together with political rights. The reason for this is that they go beyond what may legitimately be done by Community law: they are based on value choices which are only legitimate within national democratic political processes. Since the peoples of the EU do not see themselves as one people (as a *demos*), the supranational level of governance cannot be entrusted with re-distributive functions. The EU legal order should be used to remove national barriers to access to free trade, without performing re-distributive functions. Social rights and re-distributive policies presuppose a sense of common belonging to a *demos*, which is totally lacking at the EU level.

This model suggests that the Community/Union does not suffer from a democratic deficit only to the extent that it is based on a paradigm of the formal rationality of economic constitutional law. Community action also faces the problem of the lack of democratic legitimacy wherein the EU breaks out of the functional internal limits of the paradigm of formal law of the market in order to appropriate for itself the tasks that can be carried out democratically only by national welfare states. In particular, the tasks of reallocating social power in the area of labour relationships and/or of redistributing wealth, issues currently dealt with by national social rights, are examples of those functions for which the Community does not have the necessary resources of democratic legitimacy.

3. The neo-socialdemocratic model of "solidaristic federalism"

In the neo-liberal model of competitive federalism, the social sovereignty of the Member States, even if formally preserved, is reduced to an empty vessel, deprived of substance. This model suggests that the effects of negative integration, which stem jointly from the exercise of economic freedoms of movement and from regulatory competition between the

Member States, have the clear and calculated potential to dismantle national welfare systems. Indeed, it constitutes an explicit assumption of the neo-liberal model that regulatory competition between national jurisdictions - supported by full mobility of the factors of production - produces a spontaneous convergence towards the system which is considered most efficient by the market.

The progressive coalescence towards the "lightest" or "lowest" (national) social standard is seen as the natural and favoured outcome of the competitive process placed at the heart of this constitutional model. The truly liberal virtues of the model are visible in the restriction of public expenditure (including social spending) to a minimal level, which results from the "Leviathan-taming" effects, which are inherent in fiscal competition.

The model of "solidaristic federalism" arises from preoccupation regarding the progressive decline in the social sovereignty of the Member States, which is one of the indispensable sources of their democratic legitimacy. This model advances a radically different alternative to the simple negative integration of markets. It asserts the need to rebuild at the supranational level those very capacities of political control of the economy which have been lost (or at least diminished) at the national level.

This model emphasises the aim of the full positive integration of national welfare systems with the objectives of creating a European sphere of social protection policies, as well as "an Europe-wide sphere of entitlements to a decent livelihood" (Leibfried and Pierson 1994, p. 20) through the construction of an authentic political and democratic government of the common market. This institution would have substantial capacity to modify the distribution of life chances at the only level which now appears functionally adequate, that is, the supranational level.

The European Union should - in this perspective - assume all the characteristics of a federal welfare state, equipped with a political constitution which is capable of bringing together the diverse traditions which already today come together to form the substantially unitary "European social model". The single market must be accompanied by corresponding full federalisation of the foundations of social citizenship. Their regeneration at the European level will put a halt to the erosion of the legitimacy of individual European welfare states. European law should be able to draw its own legitimacy from a political constitution, which expresses the democratic will of the peoples of Europe and gives form to their pact of solidarity.

According to this model, economic-functional and technocratic rationality, which the neo-liberal model uses to demonstrate the legitimacy of Community law, fails on two grounds. First, it does not succeed in explaining the full extent to which European integration has already taken place. Second, it is not able to justify the increasingly strong pressure which is being placed on national democratic political processes, especially concerning questions of social justice. It is based on a "normatively-reduced concept of the person" (Habermas 1999, p. 77), which only considers the instrumental rationality of the subject as an economic actor and is absolutely incapable of aspiring to the idea of equal respect for the human dignity of everyone, the notion which the recognition of fundamental social rights depends upon.

According to the neo-socialdemocratic model of solidaristic federalism, therefore, re-imposing political control over the Community's process of economic integration requires the creation of a European welfare state. This supranational state must be democratically legitimated in order to carry out those solidarity and social cohesion functions which today fall to the individual Member States. The transfer of this role may be justified by reference to the ever greater difficulty which the individual Member States have in effectively discharging their social functions.

The achievement of European political union – necessary for the governance of a market which has reached full integration with the advent of the single currency – would find its most characteristic expression in the construction of a supranational welfare state structure, aimed at offering the citizens of Europe a high level of social protection.

The solidaristic federalism model implies, according to neo-Keynesian logic, the restoration of a centralised management capable of regulating overall demand. To this end, the Union would need to be equipped with an adequate budget and its own fiscal resources to the degree necessary for its goals.

Its most ambitious version calls for the development of a system of industrial relations and collective bargaining ("Euro-corporatism") on a pan-European scale. This system would lead to the federalisation of the principal programmes of social protection (*e. g.*, minimum wage, unemployment insurance and pension protection) and to the harmonisation of the highest standards which currently exist to govern the employment relationship. The European constitution – which would be hierarchically superimposed on those of the Member States – should contain an extended catalogue of social

rights which are fundamentally *common* (that is, uniformly applicable across the entire territory of the Union) and immediately justiciable.

A Europe which might be considered the "Scandinavia of the world" could put itself forward as the only global subject which is really capable of taking part in the political governance of economic globalisation. It would then offer social security and social protection to all Europeans against the most destabilising effects of globalisation, taking as its reference point the historic gains made by the democratic welfare state.

Europe needs to be aware of its possibilities, to regain its former solidaristic identity and to pursue its vocation of civilising the capitalist economy through social intervention. A rediscovery of its "social self" (Poiares Maduro 2000), taking full advantage of the potential set out in its "foundational moment" (*ibid.*, p. 149), would assist the aim of creating a post-national democratic constitution based on the principles of liberty, substantial equality and solidarity. The constitutional moment of the EU draws its *raison d'être* from the exhaustion of the functionalist model and its incapacity to legitimate the actual political and institutional developments at the heart of the Community.

Re-distributive and social cohesion functions have for some time been carried out to a significant degree at Community level. This demonstrates that the Community is already perfectly capable of bringing about that abstract solidarity "among strangers" (Habermas 1999, p. 151) which is the foundation of the democratic welfare state.

The preconditions for the legitimate transfer of welfare functions from their present, predominantly national level to the European level already exists today. Those preconditions could be mutually reinforcing in a virtuous circle, nourished by the forces of legitimacy unleashed by the effective implementation of solidarity functions by EU institutions.

The transformation of the EU's political institutions into democratic and majoritarian forms of governance should rest on an underlying social contract, based on a criterion of distributive justice capable of guaranteeing full legitimacy to the decisions taken by the majority. The discursive elaboration of the contents of this new social contract, and of the link between civic solidarity and solidarity "between strangers", in which it has its roots, must be central to this building process. A building process which is undertaken in order to redefine the shape of the crucial question of the European social identity, of the European "social self" (Poiares Maduro 2000).

4. The mixed model of "co-operative federalism"

Critics of the solidaristic model of the Community's economic constitution, and in particular of its assumptions of legitimacy, are not only found among those who argue this type of change is precluded by the lack of a European *demos,* and the substantial impossibility of one arising (at least in a time period shorter than a "geological era": Mancini 1999, p. 34). In fact, this objection is based on an assumption that does not pay adequate regard to the current normative and political reality of the European Union. In particular, it does not take account of the fact that the (conservative) notion of a sovereign people, forming an ethnically, linguistically, culturally and spiritually homogeneous entity, necessarily preceding the establishment of a democratic political state, is today in deep crisis.

The model of solidaristic federalism also encounters objections from those who argue that a post-national democracy – embracing pluralistically the "multiple *demoi*" (Weiler 1996) of Europe – is not only possible (and desirable), but to a certain extent already visible within the constitutional developments of Community integration.

It is argued that, since "even in a politically constituted European Union there will continue to exist an element of pragmatic agreement [...] between the Member States, and the European federal state will have to assume a form which is different from national federal states of the classic kind and will not be able to simply imitate their methods of self-legitimation" (Habermas 1999, p. 121). While refuting the hypothesis which states that only a nation (understood as a "prepolitical community with a common destiny") could develop that "anticipatory trust" (*ibid.*, p. 84) and that feeling of solidarity which underlie the democratic re-distributive policies of the nation state, they argue that in fact it would be neither possible nor desirable to level the national identities of the Member States, merging them together in a single nation of Europe.

The European Union would, in any event, have great difficulty reproducing the same forms of democratic majoritarian legitimacy, upon which to base re-distributive policies analogous to those of the nation state, and it should not try.

Through this lens, the deep institutional diversity of national welfare states - rooted in their varying historical, political, economic and social contexts - lies at the root of two objections. There is an empirical and functional objection to the hypothesis that there should be unification of

these systems within a common supranational structure. There is also a truly normative objection, based on the attribution to the different national identities of a positive value, which should be preserved as such. Whatever difficulties it might face, any harmonisation project aimed at rendering national social policies and rights uniform, and in particular the construction of a truly "shared" European social law, would produce significant destructive or disintegrative effects within the different national welfare State constellations. These effects would be of no less impact than those which follow the process of negative integration. And it is difficult to imagine how such outcomes could ever be legitimated on the basis of democratically made majority decisions on a European scale. A complete federalisation of questions of distributive justice would clash with the need to preserve the diverse national democratic and social identities (see Ferrera 2004).

The constitutional model of "co-operative federalism" aims to take account of the demand to respect these different identities, while at the same time preserving the social autonomy of the Member States in the face of the destructive effects arising from a competitive game which is politically unregulated at EU level. In this sense it proposes itself as a hybrid model or a solution which lies in between the two poles of "competitive federalism" and "solidaristic federalism".

In the "co-operative federalism" model the functions of market correction and of redistribution of opportunities in life remain for the most part within the prerogative of the Member States of the Union. Labour and social security rights, as well as general welfare policies, will remain mainly nation-specific, relying on those resources of democratic material "input-oriented" legitimacy (Scharpf 1999) which, in the absence of a fully developed European public sphere, only the nation-State can guarantee.

The level of Community governance is essentially assigned a co-ordinating role which consists in producing guidelines and undertaking monitoring functions. The aim of this is twofold. On the one hand, it aims at encouraging processes of mutual learning among the Member States, and, on the other, at stimulating attempts to find effective responses to common problems through the adoption of the best solution for the local situation. At the same time, this should prevent recourse to destructive forms of regulatory competition of the "beggar my neighbour" type.

The European Union limits its direct regulatory activity to the social sphere, in each case giving preference to more flexible forms which are likely to have the effect of encouraging differentiation at the national and sub-

national level. Harmonisation aimed at uniformity or at approximation around a common model is replaced by "reflexive harmonisation" (Deakin 1999; Barnard and Deakin 2003). This occurs through the elaboration of general principles, which are initially translated into the various systems by active support of the social partners for the self-regulatory process and through autonomous processes of adaptation at the national or sub-national level. This is an intermediate form between pure centralisation and pure decentralisation, between heteronomous positive integration and anomic regulatory competition.

In the model of co-operative federalism, the Community is built through the development of institutional mechanisms which allow the reconciliation of the defence of common European values and the heterogeneity of national models through which those values take form. In this way, the preservation of heterogeneity of the national systems allows forms of competition between those systems, while anchoring them to accepting common fundamental principles and - with the establishment of inderogable thresholds and non-regression clauses - pushes them to seek the "best rules". The differentiation, which may be marked, between standards of social protection among the various territorial communities, is not, however, left to the logic of the market, but is checked and guided by supranational governance. This defining of the rights and fundamental guarantees of the Community order in some sense defines even "the elements of justifiable diversity" between national legal orders (D'Antona 1992).

Along with the solidaristic federalism model, the co-operative federalism model also assigns a key role to the constitutionalisation of a strong catalogue of fundamental social rights directly at the level of the Union. There is also, however, an important difference between them. In the solidaristic model, the rights take the form of truly *common* social rights, which means that they are designed to entrench the functions of redistribution and reallocation of social power directly at the level of the Union. By contrast, in the co-operative federalism model the European "social" constitution serves essentially as a guarantee and a measure of protection of social rights at the national level. It does not, in other words, aspire to substitute national forms of social protection, but rather to safeguard them, through exposing them, in a dialectical confrontation with the constitutional traditions of the other Member States, to a process of co-operative elaboration of new meanings in the context of common

fundamental values. The constitutional recognition of European fundamental social rights will operate to preserve core common values in a dynamic and pluralist way without any pretence of achieving a uniform protective content, built either as a medium or average standard artificially extracted from the rules in force in the various countries.

The relationship between Community sources and national sources of fundamental social rights is not structured in hierarchical terms, as in the case of solidaristic federalism, but rather is configured as a dynamic relationship of reciprocal subsidiarity, aimed at achieving the greatest achievement protection possible - in the prevailing conditions - of the social values which underlie the norm in question. The basic idea is that of a system in which many decisional levels coexist, which involves many institutional actors, each one bearing its own regulatory mission, and which are all linked with each other through a social model and common constitutional traditions.

The predominant European governance mechanism is that of the network: the link between the different levels of government in the system is neither entrusted to the market - as in competitive federalism - nor to the hierarchical relationship between juridical rules and public bodies, as in the case of solidaristic federalism. Instead it is entrusted to open and diffuse mechanisms of decentralised and poli-centric co-ordination, and to the reciprocal and reflexive interdependence between the different levels of decision making and the different actors (public, quasi-public, social, private) who are involved. The elective regulatory technique is soft law open co-ordination of national systems based on a floor of fundamental rights and principles, rather than mutual recognition (as in the competitive model) or hard law harmonisation (as in the solidaristic model) (see Della Cananea 2003).

Supranational intervention, while resting on a foundation of common values, is predominantly procedural, and relies on its deliberative character, as well as the open and participatory nature of its "polyarchic" (Choen and Sabel 1997) co-ordinating processes activated by it, for its legitimacy. The discussion of the conditions required for "deliberative supranationalism" constitutes a promising theoretical ground from which to gather the implications of the discursive and process-orientated legitimisation of the model (see Joerges 2002). The idea of the EU as a "deliberative polyarchy" (Cohen and Sabel 2003) adds insight towards a similar conceptualisation of the legitimacy foundations of this model. "In deliberative polyarchy,

problem-solving depends not on harmony and spontaneous coordination, but on permanent disequilibrium of incentives and interests imperfectly aligned, and on the disciplined, collaborative exploration of the resulting differences" (*ibid.*, p. 366). Thus, in this perspective, reflexive harmonisation and the open method of co-ordination are seen as "a highly promising mechanism for promoting crossnational deliberation and experimental learning across the European Union" (Zeitlin 2003, p. 5).

5. Conclusions

It was stated in the introduction that none of the models – stylised and ideal-typical – of Community economic constitution described above had the intention of hegemonically enshrining the actual course of European integration. These models, however, have influenced the theoretical debate in numerous ways and have even influenced the concrete modelling of the Community's institutions.

The echoes of the ordo-liberal concept are clearly discernable, for example, in the configuration of common competition law as the central propulsor of juridical unification within the unified market. The idea of Article 28 of the Rome Treaty as a European "economic due process clause", which is embraced by the European Courts of Justice at least until recently, is evidently very influenced by it (see Poiares Maduro 1998; Egan 2001). The "infiltration" (G. Lyon-Caen 1992) of European competition law and market law in national labour and social security laws draws strong arguments for its legitimacy from this very model.

The model of solidalistic federalism has never been fully appreciated, probably not even during its peak years of "social democratic consensus". This did, however, create a vision of Europe that – no matter how politically minoritarian - maintains an undoubtfully attractive force, and it is certainly not absent from the debate on the constitutionalisation of fundamental social rights in the EU legal order (see for instance the proposal for an "*Euro-stipendium* by Schmitter and Bauer 2001).

The model of co-operative federalism owes its ability to open the more significant perspectives of the prevailing tendencies – which are all but definite and linear – that appear today in paving the way to European integration to its position as a middle-ground. Its *medietas*, however, also makes it the least defined model, as well as full of incognitos, especially when it overlaps the concrete dynamics of Community integration.

It has been suggested that the decentralised and not hierarchical mechanisms of open co-ordination, grounded as they are on the defense of specific national identities, do not have the intention of preserving the particularities of each welfare system, but rather the very opposite intention of the Member States of using their own sovreignity in social issues as an alternative mechanism for adjusting their own competitiveness compensating for the loss of sovreignty on currency and exchange rates (Cantaro 1999b).

The eminently procedural orientation of the model risks creating no more than merely symbolic limits to the weight of the self-regulating mechanisms of the integrated market (see Deakin and Reed 2000). While the strength of market integration is able to explain the most powerful effects of complete monetary unification, the mechanisms of deliberative governance have not yet reached full maturity and risk being used simply for responding to – re-legitmizing ex post – decisions actually made by the market.

The risks involved in de-structuring national traditions of fundamental social rights in an approach that should orient itself accentuatedly in a post-regulatory and merely procedural direction, can only be compensated for through the decisive re-affirmation of the cogent force of the founding and common values of the European social model at Community constitutional level. Such an approach, which is solely procedural, is insuffucient: the States, as well as the European Union when involved, cannot limit themselves to organising rules of procedure that allow the participation of individuals and intermediary groups in the definition and realisation of the interests normally under their responsibility. They also have to lay down the principles that are the very basis of this definition, so as to guarantee individuals and groups their fundamental social rights (see Supiot 2001).

The full affirmation of fundamental social rights within the Community legal order represents an essential step in this critical phase of European integration. The constitutionalisation of these rights at the heart of the EU legal order also constitutes – as previously mentionned – a supporting axis of the co-operative federalism model. In the absence of a substantial common foundation of values guaranteed by the affirmation of principles and Community fundamental social rights, it is difficult to imagine that the pluralsim of national welfare state traditions can be preserved and adapted to the new socio-economic needs without simply giving into the levelling pressure of market integration.

The drive towards Community constitutionalisation of fundamental social rights does not derive only from the need to protect essential principles of social justice and solidarity from (and against the) logic of the market. It derives from considerations of economic efficiency. Fundamental social rights are actually a determining component for the dynamic efficiency and the long-term competitivity of open and complex market economies: far from being adverse to market relations, they should be considered central to a European labour market which is becoming ever-more flexible and individualised (see Deakin and Wilkinson 1994).

The awareness of this essential economic function of social rights was no stranger to the compromise of post-war embedded liberalism, whose founding fathers inspired the construction of the Community (Giubboni 2003a, especially Chapter 1). Today, more than ever, it should guide the indispensable re-definition of the contours of the European social model.

The values of freedom and solidarity embodied to differing degrees by the national traditions of labour and social security law constitute a fundamental patrimony of the European democracies. Re-declined and dutifully up-dated, these must remain central to the construction of the Community (see Kenner 2003a; Giubboni 2003c). Strengthening the constitutional roots of European social rights and strengthening the institutional capabilities of the social parties – which have always been the main actors in the dynamics of labour law and its extraordinary adaptability to the changing needs of the market – make up, today more than ever, the crucial groundwork for democratic legitimacy of any advancement in the process of European integration.

The draft Treaty establishing a Constitution for Europe might realise a significant re-definition of the fundamental values and objectives inspiring the EU mission in the globalised world. The insertion of the European Charter of fundamental rights in Part II of the constitutional Treaty might imply a full constitutionalisation of social rights within the EU legal order on par with economic freedoms, according to the principle of indivisibility of fundamental values and rights. The draft constitutional Treaty, notwithstanding its limits and shortcomings, represents therefore a fundamental step in the process of building solid constitutional roots for the European social model (Giubboni 2004). Its ratification by the Member States would be a decisive move in pursuing what Joseph Weiler has called the "European *Sonderweg*" (Weiler 2000).

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