

## DO WE NOT INTRODUCE TOO MUCH EMPLOYMENT LAW IN LABOUR LAW AND SOCIAL SECURITY LAW? PROBABLY YES!

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### Summary

In order to cope with the challenges of the globalisation of economy and the ageing of society, the European Union developed in March 2000 the Lisbon strategy. The objective is to become " *the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.*"

Originally this strategy aims to integrate economic policy, employment policy and social policy on a equilateral basis.

The new European concept of flexicurity however stresses the employability of workers.

In this way labour law and social security law lose their original social function of protecting people. Social law becomes employment law, the welfare state becomes a workfare state.

This article argues that the responses to the actual challenges should rather be sought in more extensive and binding social law on the level of the European Union and the World Trade Organisation. In this way multinational companies can compete on the same level playing field without the risk of social dumping by enterprises and of a race to the bottom by the national welfare states.

**Keywords:** Lisbon strategy, flexicurity, social dumping, race to the bottom

### Introduction

At the end of the nineteenth century the economy, driven by the Industrial Revolution, was globalising for the first time.

In his classic work of economic history "The Great Transformation", the British-Hungarian author Karl Polanyi describes the shift which has occurred over the past two centuries. At the stage of birth of industrial capitalism labour and life conditions were systematically and seriously 'commodified', i.e. submitted to the mechanisms of the 'free' market. Practices and institutions (guilds, traditional assistance) which stood in the way of this 'commodification' (because they offered the possibility to people to withdraw from the labour market, or they disconnected labour market position and standard of living) were at this stage dismantled.

However, as soon as this process was concluded, the reverse movement ('de-commodification') started, with the labour movement, the social<sup>1</sup> legislation and the modern social security provisions. A society in which labour market position and standard of living are linked linearly and exclusively with each other, appeared to be neither economically, nor politically, nor socially sustainable.

It seems that nowadays we are confronted again with the commodification of labour.

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<sup>1</sup> The qualification 'social' refers to the social problems of the workers during the nineteenth century.

## 1. Social Function of Labour Law and Social Security Law

In general the importance of the law for the protection of the weak people in society is obvious. The French Dominican Henri Lacordaire (1802-1861) wrote in 1848:

*"Between the strong and the weak, between the rich and the poor, between the master and the servant it is liberty that oppresses, it is the law that liberates".*

Civil law is based on the autonomy of the individual and the contractual freedom, so it offers only theoretical freedom and equality because it only regulates but does not correct the power relations in society.

On the contrary, the essential aim of labour law and of social security law is to protect the workers, the unemployed, the sick, the old, the poor, etc against the forces of power in the labour market.

As our society wants to realise not only economic but also social progress, we should not diminish this traditional market-correcting function of social law by making it a mere instrument of the employment and human resources policy. Social law should not be used as a market-making tool for economic policy, like 'a LEGO-brick manufactured in Denmark'.

The European Council of Lisbon of March 2000 laid down a new strategic objective aiming at making of the European Union "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion."

This Council also established the so-called Lisbon policy triangle combining economic policy, social policy and employment policy on an equilateral basis. But in practice these policies do not have equal value since the social policy of the European Union is less structured and less obligatory than the other European policies.

In European social policy (collective) agreements and soft law (declarations, guidelines) are very important. For instance the Open Method of Coordination (OMC) used to implement the Lisbon-strategy produces a lot of guidelines, recommendations, etc. These tools may have beneficial effects (such as the convergence of national policies) but they do not protect the rights of the weak people in the same way as hard law (European regulations, directives, ...) is able to do (Barnard, 2006).

One would need a social 'Montesquieu'<sup>2</sup> in order to balance the various policies and to promote real equality and real freedom for all citizens.

Thus: labour law and social security law should not become employment law<sup>3</sup>, but must preserve their autonomy and reinforce the rights of the weak citizens in society. Labour law must concentrate on the various interests of and the power between them.

Employment policy (i.e. active labour market policy) on the other hand should try to bridge the gap between well protected workers and workers in the margin.<sup>4</sup>

The goal of government policy should be to create a welfare state and not a state of 'low paid workfare'. The world should not become a large 'workhouse'<sup>5</sup> controlled by cameras.

Of course, social policy is also a productive factor (economic function) but the primary goal of labour law and social security law is not so much to create work, but especially to protect and reinforce the position of the weak people in society.

Employment policy on the other hand must ensure the productive and freely chosen full employment.

Today this social function of labour law is of primary importance, considering the harmful effects of a dehumanized economic globalisation.

The pressure on the workers and the benefits of the companies increase dramatically.

It is thus necessary to reinforce social protection, especially at the European level. One could think of a social clause in the European Treaties, social drawing rights for the citizens,<sup>6</sup> a European

<sup>2</sup> In 1748 Montesquieu published "De l'esprit des lois". In the chapter "De la constitution d'Angleterre" he concluded that one could increase freedom and prevent tyranny by dividing the powers. In the theory of trias politica there is the legislative power, the executive power and the judicial power. These three independent powers should be controlled mutually and prevent that one power takes the top. In this way they could guarantee freedom and equality.

<sup>3</sup> In her excellent book 'EC Employment law', Catherine Barnard treats not only employment policy, but also labour law and social security law. Nevertheless in the title only 'Employment Law' is mentioned.

<sup>4</sup> In a labour market at two speeds the 'insiders' profit from a high degree of protection and safety, and the others, the 'outsiders', face a very precarious situation.

<sup>5</sup> The practice of the "workhouses" in the nineteenth century is described in an excellent way by Charles Dickens in his books (for example Oliver Twist). Recently Professor Marc De Vos of Ghent University published an article in a Flemish newspaper with the title "The demographic ageing of the slave state" (De Standaard, 15 January 2004). Others speak of the penitentiary state.

<sup>6</sup> The concept of social drawing rights connected to work in general and not only paid, subordinate work refers to a pre-established "account" from which a person may draw in order to achieve certain social objectives. It emerged from work done for the European Commission by a group of experts led by Professor Alain Supiot of the University of Nantes.

definition of the salaried worker,<sup>7</sup> a reinforced protection for the migrant worker,<sup>8</sup> European minimum levels for social benefits, etc ....

## 2. The Concept of Flexicurity

Does this mean that the national welfare states should not adapt their social law?

On the contrary, it is certainly necessary to coordinate labour law and social security law with economic and employment policy in order to create a 'level playing field' for the companies and the citizens. A system of 'checks and balances', of 'trade offs' is obvious.

Referring to the Danish model the European Commission<sup>9</sup> suggests that a solution may be found in the concept of flexicurity. In its communication the Commission identifies four components of flexicurity:

- flexible and reliable contractual arrangements
- comprehensive lifelong learning (LLL) strategies
- effective active labour market policies (ALMP)
- modern social security systems.

But this solution of flexicurity seems to be a tool which would make it possible to put the workers more at the profit of the companies. The main objective is to introduce quite flexible working conditions. To remedy the negative social consequences the European Commission would like to 'modernise' social security. But is flexicurity not a form of externalisation (outsourcing): the employers pay an invoice (taxes) in order to mitigate and repair social damage which they cause by the exaggerated flexibility in employment?

One could also wonder whether social security must in the first place stimulate and subsidize employment policy, for example by incentives for employment, exemptions of contributions (opting out), or by compensations for underemployment?

Article 22 of the Universal Declaration of Human Rights (UDHR, 10 December 1948) states that: *"Everyone, as a member of society, has the **right to social security** and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."* (emphasis added)

So the right to the social security is a human right and thus has a right to certain autonomy. Also, the government is not supposed to solve all problems. On the contrary, it is necessary to make employers responsible in a sufficient way. The task of social security is not to subsidize precariousness on the labour market.

The economic system increases the pressure on workers by making their status precarious. The pauses on the work place and the salaries decrease and the stress increases.

But do people really want more flexibility on the labour market?

A stable and decent work is on the other hand the best integrator in society. One needs at least **flexisecurity**, security organized in a flexible way. The accent must thus be on a reinforcement of the protection on the work place and in the society, taking into account obviously the inevitable and necessary changes in the labour market. Labour law and social security law have to be adapted constantly but may not become mere employment law, with the accent on the employability and the adaptability of the workers, the unemployed, etc.

## 3. The Need for European and International Social Minimum Standards

In 1957 the founding Member States of the European Economic Community (EEC) choose to focus exclusively on European economic integration, believing that the working of the common market

<sup>7</sup> In Belgium a law of December 2006 defined criteria which make it possible to appreciate the existence or the absence of authority in a work relationship. In case of doubt a Commission can determine in a binding way whether there is a contract of employment or on the contrary a service contract. By this mechanism of social ruling government hopes to limit the phenomenon of false independency.

<sup>8</sup> Belgium introduced in April 2007 an electronic site, called LIMOSA, as a reference to the name of a migratory bird ([www.limosabe.be](http://www.limosabe.be)). It is a single desk where migrant workers (employees or self-employed) must be declared. Government hopes in this way to limit black work of illegal workers without papers. Maybe this system could be promoted on the European level.

<sup>9</sup> Communication of the European Commission of June 27, 2007: "Towards common principles of flexicurity: more and better jobs through flexibility and security".

would automatically engender better living and working conditions for all. Contrary to the United States (US), the EEC chose to leave the field of social policy to the national welfare states. This decision was based on the Ohlin report written on behalf of the ILO. It concluded that social policy differences between countries were sustainable, so that harmonisation of national social policies was not deemed necessary (Cantillon and Marx, 2005). This model worked quite well in the past.

Nowadays, however, the causes of employment and social problems are especially to be found in the increased global competition. Both countries and citizens undergo enormous pressure of economic globalisation, because there is no social globalisation.<sup>10</sup> This causes social dumping by enterprises and a race to the bottom by the states.

For example, on 18 December 2007 the European Court of Justice (ECJ) ruled in the judgment *Laval un Partneri Ltd* (C-341/05) that “ *the right of trade unions in a Member state to take collective action by which undertakings established in other Member States may be forced into negotiations in order to ascertain minimum wage rates and to sign a collective agreement – the terms of which go beyond the minimum protection guaranteed by Directive 96/71 – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services.* “

The European Trade Union Confederation (ETUC) was very disappointed by this judgment because this ruling about the Posting Directive 96/71 amounts to a licence for social dumping by enterprises, and key features of national industrial relations systems face being superseded by the economic free movement provisions. Therefore the ETUC is demanding a “Social Progress Protocol” to be linked to the Lisbon Treaty.

Article 9 of the Treaty on the Functioning of the European Union (TFEU) might, when the Treaty of Lisbon of 13 December 2007 will enter into force, provide already some horizontal social guarantee: “*In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*“

So it seems that nowadays we need more European and international minimal<sup>11</sup> standards and especially more mechanisms of control on this level. Of course, in our market economy we need economic competition, but it needs to be above a certain social (and ecological) threshold. To make a comparison: in the sport of boxing, it is strictly prohibited to hit below the belt, behind the head or on the back.

Too much tax and social competition limits the possibilities of welfare states to collect enough money for employment policy, social policy, education, research, etc.... Indeed the companies and the rich can establish themselves in countries where they can pay lower taxes. So a fragmentation (Balkanization) of legislation favours the strong in the society.

Therefore the need for a reinforced and imperative social policy on the level of the European Union (EU) is obvious.

Maybe the provisions in the European Treaties on enhanced cooperation between at least nine Member States can constitute a basis for an appropriate social policy (Lenaerts Koen and Van Nuffel Piet, 2005),

In order to avoid destructive competition and a degradation of social protection on the international level one could think of a role for the World Trade Organization (WTO).

I wonder whether the WTO could not integrate within his framework more social standards and more constraining mechanisms of control.

In every case these standards must go further than the four Fundamental Principles and Rights at Work, adopted by an ILO Declaration of June 1998 (Servais, 2005):

- the freedom of association and the effective recognition of the right to collective bargaining
- the elimination of all forms of forced or compulsory labour
- the effective abolition of child labour
- and the elimination of discrimination in respect of employment and occupation.

Maybe the legal ground for the integration of social minimal standards in the WTO practice could be found in the WTO agreements themselves.

For this inspiration can be sought in what President Franklin Delano Roosevelt (FDR) realised in the United States (US) with the federal social laws of the New Deal.

<sup>10</sup> The need of social globalisation was understood by the German chancellor Otto von Bismarck (1815-1898) when he introduced obligatory social insurance in the unified Germany which already existed earlier in Prussia. One of the aims was of course to avoid competitive disadvantages for the Prussian economy.

<sup>11</sup> These minimal standards can be relative or proportional, taking account of the economic resources and wage levels of each country. See art 22 of the Universal Declaration of Humans Rights.

For example, the Social Security Act of 1935 established an old-age insurance system which was organized on the federal level. The goal of this social federalism was to avoid a race to the bottom by the states. This law was based on Article I, section 8 of the American Constitution: "*The Congress shall have **power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.***" The Supreme Court confirmed in 1937 the constitutionality of this law (Cantillon and Marx, 2005).

## Conclusion

"The welfare states were constructed during the thirty golden years after the Second World War" (Esping-Andersen, 1990).

The International Labour Organization adopted in May 1944 the Declaration of Philadelphia stating that "*labour is not a commodity*" and that "*lasting peace can be established only if it is based on social justice*". Because of the pressure of the Soviet model and the public support for communism western countries had to invest in social values. However, since the fall of the Berlin Wall in 1989 the world is ruled by a neoliberal capitalist ideology.<sup>12</sup>

The economy is globalising very fast and we are witnessing a historically unprecedented transformation of work. As there is no extensive and binding social level playing field within the European Union, we see more and more the signs of a race to the bottom by the states and of social dumping by the enterprises. The new European concept of flexicurity is fully in line with this evolution. It aims at making the employees more employable and adaptable for economy, but it forgets to protect the weak people in society against the market forces.

So the message carved on Karl Marx's tombstone and the final line of the Communist Manifesto (1948) "*Workers of all lands unite*" becomes again very relevant. Hopefully the formation on 1 November 2006 of the International Trade Union Confederation (ITUC)<sup>13</sup> as the world's largest trade union federation can be a step towards more social justice.

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<sup>12</sup> The Russian logician, sociologist and author Alexander Aleksandrovich Zinovyev (1922-2006) speaks about the "Global Suprasociety" (сверхобщество), that divested the Russians of their pioneer right as discoverers of the new, Communist course of the social evolution of mankind. [www.zinoviev.ru](http://www.zinoviev.ru)

<sup>13</sup> It was formed on 1 November 2006 out of the merger of the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL). [www.ituc-csi.org](http://www.ituc-csi.org)

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## AR NE PER DAUG UŽIMTUMO TEISĖS DARBO BEI SOCIALINĖS APSAUGOS TEISĖJE? KO GERO, TAIP!

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### **Santrauka**

Europos Sąjunga siekdama įveikti ekonomikos globalizacijos bei visuomenės senėjimo iššūkius 2000 m. kovo mėn. priėmė Lisabonos strategiją, kurios svarbiausias tikslas buvo užtikrinti ekonominės, socialinės ir užimtumo politikos jungtį. Naujoji europinė „flexicurity“ koncepcija vis dėlto pabrėžia gyventojų užimtumą. Šiuo atveju darbo bei socialinės apsaugos teisė praranda savo pirminę socialinę žmonių apsaugos funkciją. Socialinė teisė tampa užimtumo teise, o gerovės valstybė – „workfare“ valstybe. Šiame straipsnyje konstatuojama, kad atsako į dabartinius iššūkius turėtų būti ieškoma, vis dėlto siejant socialinę teisę Europos Sąjungos bei Pasaulinės prekybos organizacijos lygiu.

**Pagrindinės sąvokos:** Lisabonos strategija, „flexicurity“, socialinis dempingas.