EUI SCHOOL OF TRANSNATIONAL GOVERNANCE

Le charme discret du droit bourgeois

Reflections on the treatment of collective labour rights in the jurisprudence of the Court of Justice of the European Union

Dylan Casey Marshall

Thesis submitted for assessment with a view to obtaining the degree of Master of Arts in Transnational Governance of the European University Institute

Florence, 22 May 2022

European University Institute
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ABSTRACT

This study critically maps and analyses the treatment of collective labour rights in the jurisprudence of the Court of Justice of the European Union since the controversial *Laval/Viking* quartet. In doing so, it also touches on the jurisprudence which has developed in parallel at the European Court of Human Rights. In doing so, it nestles these past 15 years of jurisprudential development within the wider context and the changing natures of both Europe's economic constitution and of labour law more generally.

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I. Introduction

> 'Expressed in terms of state and society, the EEC takes as its starting point the law of bourgeois society and its institutions as the first manifestation of the universal in the international realm.'
>
> – Ernst-Joachim Mestmäcker, 1973[1]

Luis Buñuel's 1972 surrealist classic *Le charme discret de la bourgeoisie* follows a dinner party, populated by up-standing members of bourgeois society, that is constantly interrupted by seemingly contradictory and unhinged occurrences. When looking at the jurisprudence of the Court of Justice of the European Union ('CJEU' or 'the Court') in the field of collective labour rights, one is reminded of Buñuel's film, with its disconnection from the outside world, its disjointed nature, and its general illogicality. Similar to the bourgeoisie's polite (if somewhat bland) presentation in Buñuel's film which starts to erode as the story progresses, the Court's façade of impartiality and moral infallibility starts to crack and expose the ideologies and ideological practices that permeate and uphold bourgeois law when exploring its jurisprudence in the field of collective labour rights.

The question that this thesis specifically seeks to answer is: how has the CJEU approached the protection of collective labour rights since the *Laval/Viking* quartet? This thesis will take this as a starting point and look at how the Court construed competing interests—be they economic or political, European or national, private or public—to time and again outweigh, and consequently diminish, collective labour rights in Europe.

The notion of collective labour rights encompasses a wide array of specific individual rights: freedom of association;[2] the right to collective bargaining;[3] the right to

[1] Quoted in: Christian Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation' (2014) 15(5) German Law Review 985, pp 989-990.

[2] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (adopted 09 July 1948, entered into force 04 July 1950) 68 UNTS 17 (ILO Convention No. 87); Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (CFR), art 12; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 5 May 1949, entered into force 3 August 1949) 213 UNTS 221 (ECHR), art 11; European Social Charter (adopted 11 October 1961, entered into force 26 February 1965) 529 UNTS 89 (ESC), art 5; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 23; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 03 January 1976) 993 UNTS 3 (ICESCR), art 8; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 22.

collective action;[4] information, consultation, and participation rights.[5] These rights are founded on the very notion of democratic input of workers in their own conditions and material circumstances, as well as empowering them vis-à-vis the superstructure. The choice of collective labour rights is a conscious choice. While other more individualised forms of labour rights are nonetheless important and merit research, they will not be extensively addressed over the course of this research. This is the case due to constraints imposed on this research project and in light of the several scholars who have identified a positive correlation between greater protection of collective labour rights and improvements in other aspects related to working life (e.g., health and safety in the workplace, opportunities for training and up-skilling, wages, working hours and work-life balance, etc.).[6] Further, outside the confines of the workplace, research has underlined that greater collective class-based organisation—as seen, for instance, through increased levels of trade unions density—influences resource and wealth distribution and, in doing so, reduces levels of socio-economic inequality in (post-)industrial democracies.[7]

The issue of the place of labour rights within the European integration process has been pertinent since the European Union's ('EU' or 'the Union') very inception. The topic of collective labour rights touches at the root of many debates facing the EU today: constitutional identities and traditions, democracy, liberalisation and the power of markets, national sovereignty, rising rates of precarity, socio-economic inequalities, socio-political legitimacy, and the underlying morals and values of our society. As such, this research is just one lacuna of what could be a wider investigation of the economic, legal, political, and social implications involved in the transition from a 'nation state' into a 'Member State' ('MS')—in this case, specifically with regards to the implications for collective labour rights.

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[3] Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (adopted 1 July 1949 entered into force 18 July 1951) 96 UNTS 257; CFR (n 2), art 28; ECHR (n 2), art 11; ESC (n 2), art 6.
[4] ILO Convention No. 87 (n 2), art 10; CFR (n 2), art 28; ECHR (n 2), art 11; ESC (n 2), art 6; ICESCR (n 2), art 8; ICCPR (n 2), art 21.
[5] CFR (n 2), art 27; ESC (n 2), art 21; ESC (n 2), art 22; ESC (n 2), art 29.
[6] Toke Aidt and Zafiris Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (World Bank 2002), pp 7-10; Layna Mosley and Saika Uno, 'Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights' (2007) 40(8) Comparative Political Studies 923, p 924.
[7] Aidt and Tzannatos (n 6), pp 7-10; Jasmine Kerrissey, 'Collective Labor Rights and Income Inequality' (2015) 80(3) American Sociological Review 626, p 626.

Moreover, the pertinence of Social Europe—and the place of labour rights within it—has become increasingly significant after the past 15 years of the back-to-back socio-economic crises: financial, debt, Covid-19, and the ongoing cost of living crisis. While Kilpatrick outlined that 'a fuller and broader definition of the social to encompass work-related rights and entitlements is necessary to capture the range of potential and actual constitutional challenges in response to sovereign debt loan conditionality',[8] one could posit that such an approach is needed in order to better comprehend the constitutional challenges and transformations brought about by the past 15 years as well as by the wider European integration project.

As neo-liberal capitalist globalisation expands, the 'dialectic opposition between collective relations and liberal individual laws' becomes more acute.[9] It is for this reason that labour and social rights—specifically those of a collective nature—are often pointed to as the casualties or collateral damage of contemporary globalisation.[10] This is felt in few places more than in Europe where class and societal fault lines have re-emerged, not just within nation-states but increasingly across the European continent.[11]

The choice to focus on the Court is also a conscious one. This research utilises the Court as a prism to better understand the wider Union's approach to and treatment of collective labour rights. The interpretation of the European Treaties by the CJEU can have profound effects on the material conditions of individuals and groups in Europe by recalibrating the balance between markets and social considerations. Through its jurisprudence, it has been argued that the Court has eroded the class compromise brought about in European states during the post-war *trente glorieuses*.[12] Not only this, specifically on the point of collective labour rights, the

[8] Claire Kilpatrick, 'Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry' (2015) EUI Working Paper Law 2015/34, p 3.
[9] Jérôme Porta and Tatiana Sachs, 'Conceptual issues on representation and solidarity' in Beryl ter Haar and Attila Kun (eds), *EU Collective Labour Law* (Edward Elgar Publishing 2021), p 56.
[10] For example, see: Zygmunt Bauman, *Collateral Damage: Social Inequalities in a Global Age* (Polity 2013).
[11] Stefan Schmalz, Brandon Sommer and Antonio Loffredo, 'Confronting crisis and precariousness in the European Union' in Stefan Schmalz and Brandon Sommer (eds), *Confronting crisis and precariousness: Organised labour and social unrest in the European Union* (Rowman & Littlefield International Ltd. 2019), pp 1-7.
[12] Stefano Guibbini, 'On the Vanishing Functional Autonomy of European Labour Law (And Some Dangerous Counter-Movements)' in Poul F. Kjaer (ed), *The Law of Political Economy Transformation in the Function of Law* (CUP 2020); Fritz W. Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'' (2010) 8(2) Socio-Economic Review 211.

CJEU has moulded EU law in such a way that it is questionable as to whether the EU and its MSs can comply both with obligations under the *acquis* of the EU and core conventions of the International Labour Organization ('ILO').[13]

Scholars, politicians, and trade union leaders have lambasted the CJEU for 'the barbarity of its *Laval/Viking* jurisprudence'.[14] Such criticisms of the Court's jurisprudence, based on abstract norms of justice and morals, are not enough.[15] To understand, and consequently tackle the problems posed by the *Laval/Viking* quartet and the cases that followed them, one must account for the economic, ideological, institutional, political, and structural factors at play behind the Courts decisions.

This thesis will be structured as follows: (i) an outline of the methodology employed in this research project; (ii) a theoretic analysis of the Court and the nature of the law; (iii) the historic development of the European economic constitution put in parallel with the changing nature of labour law up to 2007 in order to gain a holistic understanding of the wider legal and (political) economic context that collective labour rights found themselves in at the point of the *Laval/Viking* quartet; (iv) an analysis and mapping of collective labour rights in the jurisprudence of the Court; and finally (v) a discussion of the analysis of the previous chapter and resituating it in its wider context and current developments; and (vi) concluding words.

[13] *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – United Kingdom of Great Britain and Northern Ireland* (2009) Observation of the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations (99th session of the International Labour Conference Geneva 2-18 June 2010); *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Sweden* (2012) Observation of the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations (102nd session of the International Labour Conference Geneva 5-20 June 2013).

[14] Emilios Christodoulidis and Marco Goldoni, 'The political economy of European social rights' in Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2017), p 239.

[15] Zoe Adams, 'A structural approach to labour law' (2022) Cambridge Journal of Economics <https://doi.org/10.1093/cje/beac008> accessed 02 May 2022, p 2.

II. Methodology

This work rejects the doctrinal approach to legal research. In the opinion of the author, a doctrinal research methodology is unsuitable for a study on labour law. To capture the political and socio-economic considerations inherent to the development, implementation, and interpretation of collective labour rights, one must go beyond a narrow doctrinal reading of the so-called black letter of the law.[16]

As such, this research has adopted a law and political economy approach to the topic at hand. This is a critical approach which seeks to uncover 'how relations of power are legally and politically configured and reconfigured over time and in distinct periods, and how in turn this conditions the development of the economy.'[17]

To do so, a historical lens has been deployed on EU law and the development of institutions. For clarity, this has been done so in a diachronous manner.[18] That is, the development of the Union, its economic constitution, and labour law are ordered in epochal stages. Ryner and Cafruny's categorisation of periods of European integration has been adopted for this staged approach: the *trente glorieuse* covering approximately 1945-1975; the ascension of neo-liberalism spanning 1975-2007; and the consolidation of neo-liberalism from 2007 onwards.[19] This is mainly done so utilising legal materials and secondary literature from several academic disciplines.

As for primary legal documents and texts, this thesis draws primarily from landmark cases of the CJEU Specific focus is given to cases from the Court which deal with the topic of collective labour rights from the period 2007 to 2021. Naturally, EU Treaties, the Charter of Fundamental Rights of the European Union ('CFR'), and secondary law are also directly relied upon throughout the thesis. To a lesser extent, decisions emanating from the European Court of Human Rights ('ECtHR'), and bodies of the ILO are also utilised where appropriate.

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[16] Jan M. Smits, 'What Is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship A Transatlantic Dialogue* (CUP 2017), pp 209-213.

[17] Michael A. Wilkinson and Hjalte Lokdam, 'Law and Political Economy' (2018) LSE Law, Society and Economy Working Papers 7/2018, p 2.

[18] Bob Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011), p 31.

[19] J. Magnus Ryner and Alan W. Cafruny, *The European Union and Global Capitalism* (Bloomsbury 2016), ch 2.

Concerning secondary source material, this thesis predominantly relies on a mixture of scholarship from the critical legal studies movement as well as seminal texts emanating from the orthodox liberal legal academy in the fields of legal theory, EU law, and labour law. Further, literature from the fields of industrial relations, labour studies, philosophy, political economy, and political science also feature throughout.

Due to the constraints imposed on this research project, empirical research of the CJEU's jurisprudence utilising a network analysis could not be undertaken but, in the opinion of the author, would have fitted well into this study.[20] This approach could have further illuminated the extent of the influence of particular seminal cases of the Court, of both those dealing directly with collective labour rights and those which do not but provide transferable principles, in this field.

[20] For further reading, see: Urška Šadl and Fabien Tarissan, 'The Relevance of the Network Approach to European Case Law' in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (OUP 2020).

III. Theoretical analysis of the Court and the law

This research will predominantly focus on the CJEU and to do so, and to grasp why it is an essential actor in this field, one must first become acquainted with its nature as an institution and its operations. But one cannot fully comprehend this without first understanding the nature of what the Courts are charged with dealing with—the very law itself.

i. The law

While often derided today as antiquated or old-fashioned, legal positivism continues to have a strong influence on our understanding of law, particularly within Europe.[21] As Schmitt quite simply defined it, this is an approach which requires 'the rejection of everything "extra-legal"'.[22] Positivist conceptions of law view it as an autonomous and closed system that relies solely on itself—purged of ethical, historical, political, or socio-economic considerations.[23] To view the law in these terms leads to the potentiality of mischaracterising the law—in terms of its development, its implementation, and its functions.

Schmitt noted that positivism, by abstracting law from social contexts and realities, conceals the decisionist formation of law.[24] As such, such a positivist paradigm fails to recognise that it is the will of institutional actors—be it the CJEU, the Council, the European Commission, the European Parliament, or national institutions.

To better understand this decisionist nature of law, one can look to the theory of the material constitution as developed by Mortati. While this theory deals with the State but can be applied to other constitutional entities—such as the EU. Mortati's theory outlines that a polity is the outcome of economic, political, and social struggles in the pursuit of opposing visions for that polity.[25] This victorious faction of these struggles can thus wield the power to enforce compliance with their economic, political, and social ideals by creating coercive legal frameworks and mechanisms to undermine

[21] For further reading, see: Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002); Sabino Cassese, 'Legal Education Under Fire' (2017) 1 European Review of Private Law 143, pp 147-148.
[22] Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph W. Bendersky tr, first published 1934, Praeger Publishers 2004), p 64.
[23] Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L. Paulson trs, first published 1934, OUP 1997), p 1.
[24] Schmitt 1934 (n 22), p 67.
[25] Mortati (1998), pp 63-64; Andrea Salvatore and Mariano Croce, *The Legal Theory of Carl Schmitt* (Routledge 2014), pp 127-128.

internal counter-hegemonic groups. As such, the constitution polity that emerged from these struggles, as a whole, acts a reflection and tool for the reinforcement of the dominant social group's interests within that polity.[26] As such, law should not be solely understood as a framework for the restriction and punishment of certain actions but also as a multifunctional device for empowerment;[27] the promotion (and conversely, the exclusion) of actors, ideologies, and interests;[28] social engineering;[29] and subversion.[30]

When analysing the law, is important to not only consider the normative and substantive content, but also the legal form.[31] This theory was developed by Pashukanis and is based is a concept based on Marx's theory of the commodity form.[32] According to the theory of the legal form, law in capitalist societies turns a 'zoological individual into an abstract, impersonal legal subject'.[33] In this way, the legal form creates formally free and equal, yet exchangeable, legal subjects.[34] In doing so, 'social life disintegrates' and law abstracts the underlying power differentials and social contexts.[35] By creating law as a framework for neutral and unbiased dispute-settlement between different legal subjects with formal equality, it erases the material circumstances of the real world that dictate social relations.[36] As such, it has been pointed out that the legal form has an 'important consequence for the role that law can play in ignoring, facilitating, and reiterating material inequalities'.[37] Consequently, the legal form has an essential role in the

[26] Ibid, p 127.
[27] Dan Banik, 'Legal empowerment as a conceptual and operational tool in poverty eradication' (2009) 1(1) Hague Journal on the Rule of Law 117.
[28] A. Claire Cutler, 'Gramsci, Law, and the Culture of Global Capitalism' (2005) 8(4) Critical Review of International Social and Political Philosophy 527.
[29] Linus J. McManaman, 'Social engineering: The legal philosophy of Roscoe Pound' (1958) 33 John's Law Review 1.
[30] Honor Brabazon, 'Nomocratic social change: Reassessing the transformative potential of law' in neoliberal times' in Paul O'Connell and Umut Özsu (eds), Research Handbook on Marxism and Law (Edward Elgar 2021), pp 485-488.
[31] C.J. Arthur, 'Towards a Materialist Theory of Law' (1977) 7(1) Critique: Journal of Socialist Theory 31, p 31.
[32] Karl Marx, *Capital: A Critique of Political Economy, Vol I* (Friedrich Engels ed, first published 1867, Lawrence & Wishart 1977) ch 1; Evgeny B. Pashukanis *Law and Marxism* (Transaction Publishers 2002), pp 109-133.
[33] Pashukanis 2002 (n 32), p 115.
[34] Isaac D. Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' (1977) 11(3) Law & Society Review 571, pp 575-581.
[35] Pashukanis 2002 (n 32), p 113.
[36] Brabazon 2021 (n 30), pp 479-480.
[37] Jess Mant, 'Working Politically: Combining Socio-Legal Tools to Study Experiences of Law' (2020) 21 German Law Journal 1464, p 1467.

legitimisation, maintenance, and perpetuation of capitalist structures and social reproduction.[38]

This mystification of social relations is particularly important in the context of labour law.[39] The recognition that this formal legal equality is relatively hollow when translated to the real world of labour relations is the very thing that gave rise to collective labour organisations, and also subsequently the reason why they did not wither away after the adoption of labour and social rights into constitutions and international human rights treaties. Further, it has been noted that law which operates across several jurisdictions, such as EU law, makes the abstraction of the legal form even more acute than that operating within a State.[40]

ii. The Court

It has been well documented in the academic literature that the CJEU has played an essential role in driving forward the European integration project.[41] It is the highest judicial body within the constitutional polity that is the European Union. It is composed of two chambers: the Court of Justice, composed of 27 judges and 11 advocates-general, and the General Court, composed of 54 judges. The precise composition, role, and powers of the Court are outlined in Article 19 of the Treaty on European Union ('TEU'), Articles 251-281 of the Treaty on the Function of the European Union ('TFEU'), and the Statute of the CJEU.[42]

For the purposes of this study, the CJEU's most important role is that of providing the definitive interpretation of EU law, as empowered to do so under Articles 263 and 267 TFEU.[43] Article 263 TFEU provides for an action for annulment, whereby the

[38] Balbus 1977 (n 34), pp 581-582.
[39] Dimitrios Kivotidis, 'Principles for a dialectical-materialist analysis of law and the state' in Paul O'Connell and Umut Özsu (eds), Research Handbook on Marxism and Law (Edward Elgar 2021), p 548.
[40] Mant 2020 (n 37), p 1467.
[41] For example, see: Robert Lecourt, *L'Europe des Judges* (Bruylant 1976); J.H.H. Weiler, 'The Transformation of Europe' (1991) 100(8) Yale Law Journal 2403; R. Daniel Kelemen and Susanne K. Schmidt, 'The European Court of Justice and legal integration: a perpetual momentum?' in Susanne K. Schmidt and R. Daniel Kelemen (eds), *The Power of the European Court of Justice* (Routledge 2013); Anthony Arnull, 'The Many Ages of the Court of Justice of the European Union' in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (OUP 2020).
[42] Consolidated version of the Treaty on European Union [2012] OJ C 326/01 (TEU), art 19; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), arts 251-281; Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C 326/47.
[43] TFEU (n 42), art 263 and art 267.

Court assesses either Union or MS legislation for any conflicts with the Treaties. Article 267 TFEU outlines the preliminary ruling procedure, which has been referred to as the 'jewel in the crown' of the CJEU's jurisdiction.[44] This is a procedure where a national court or tribunal within a MS requests the CJEU to provide an interpretation of EU law in order to settle a case before it. In this procedure, the CJEU only provides the interpretation, and it is up to the national court to apply this interpretation to the facts of the case.

Due to the doctrine of the primacy of EU law, established by the CJEU in its early jurisprudence, this authoritative interpretation of EU law is binding on all MSs and is supreme over any conflicting national law—including provisions contained within national constitutions.[45] This evidently makes the CJEU an extremely important and powerful actor within the EU as 'the power to interpret—to paraphrase Marshall C.J.—is the power to destroy'.[46] This lies at the very centre of the Court's negative integrationist approach, a point which will be expanded upon in the next section.

An important point to note is that the jurisprudence of the CJEU is far more insulated from *ex post facto* political correction when compared to national constitutional courts. In national constitutional frameworks, judgements can usually be overturned by mechanisms within national parliaments.[47] On the other hand, there are only two ways for the interpretations and reasoning in the jurisprudence of the CJEU to be overturned—both of which are difficult and infrequent.

First, it can be done through a subsequent decision of the CJEU that overturns previous interpretations of EU law—something that only occurs in isolated and rare cases due to its system of *de facto* precedent within EU law and its goal of a coherent corpus of law.[48] Second, it can be achieved through revisions of the Treaties—something that has high barriers on account of the need for unanimous political support for such a move and subsequent ratification in the 27 MSs.[49] As

[44] Paul Craig and Gráinne de Búrca, 'EU – Law Text, Cases, and Materials' (OUP 2008), p 460.
[45] Case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114, para 3.
[46] Otto Kahn-Freund, 'The Impact of Constitutions on Labour Law' (1976) 35(2) The Cambridge Law Journal 240, p 244.
[47] Scharpf 2010 (n 12), p 217.
[48] Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004), pp 97-98.
[49] Scharpf 2010 (n 12), p 217.

such, not only do CJEU cases have strong doctrinal influences, but also pronounced and insulated temporal influences.

Further, it Is also interesting to note at this point that—on account of its special constitutional position and role within the EU's framework—the CJEU is the only EU institution whose actions are not regularly scrutinised for compliance with the CFR or the Treaties.[50]

Now that the institutional power and set-up of the Court have been outlined, we must turn to the role of courts in our constitutional politics. In the same manner that Joerges' characterised the *Bundesverfassungsgericht*, for the CJEU: '[t]he mere fact that it is exposed to political scrutiny from many quarters and that its pronouncements are assessed politically means that it is de facto performing a political role'.[51]

Rather than referees on the side-lines of the game of politics—intervening only to ensure the rules are followed—judges are a special kind of political actor who engages quite directly in their own form of constitutional politics. Understanding this role of courts and judges has taken particular importance since the rise of neo-liberalism has been characterised as the 'judicialisation of politics'[52] and as the 'judicialisation of economic governance'.[53]

Lenaerts noted that '[t]he very *raison d'être* of EU law thus pushes the ECJ to take its responsibility for "finding" the law'.[54] But it is in this very exercise of 'finding' the law that the Court can fill the *acquis'* gaps by translating principles into law in their own ideological, moral, philosophical, and social preferences It is relatively widely recognised that there is rarely if ever a case before the Court which has a single

[50] Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor* (CUP 2018), p 5.
[51] Christian Joergens (n 1), pp 1004-1005.
[52] Ran Hirschl, 'The judicialization of politics' in Robert E. Goodin (ed), *The Oxford Handbook of Political Science* (OUP 2011).
[53] Ntina Tzouvala, 'Neoliberalism as legalism International economic law and the rise of the judiciary' in Ben Golder and Daniel McLoughlin (eds), *The Politics of Legality in a Neoliberal Age* (Routledge 2019), p 116.
[54] Koen Lenaerts, 'Discovering the Law of the EU: The European Court of Justice and the Comparative Law Method' in Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing 2018), p 62.

possible interpretation or resolution.[55] The Court must inherently take a decision, in order to interpret a problem before it, on which Treaty provisions to account for and which to overlook, which common national constitutional norms and traditions to keep in mind and which to disregard, and what actions are proportionate and what are not.[56] Depending on the specific choices taken in these circumstances, specific interpretations will be arrived at.

In doing so, the CJEU has come under accusations of enacting judicial legislation—making rather than finding the law.[57] This is a process where the Court interprets provisions in such a way that a case can effectively create new substantive law far beyond the text it was interpreting or the intentions of the drafters of that text.[58] Further, several scholars have noted that due to the Court's jurisprudence being binding on Union institutions as well as on those of the MSs, the CJEU effectively has the power to act as a policy guide for other Union institutions.[59] It has been noted that this is particularly the case in the fields of employment policy and social policy.[60]

On a more general level, Ciocchini and Khoury have characterised judges as playing 'a dual role in our societies as both "technicians of repression"—actors of the bureaucratic machinery of the state—and "moral and intellectual leaders"—actors who produce and legitimate the values of the dominant social order'.[61]

In relation to the former, judges as 'technicians of repression', we can look to Kalyvas' theory of 'liberal authoritarian legalism'.[62] He utilises this term for the ongoing transfer of political power and decision-making capacities from the executive

[55] Tamara Ćapeta, 'Ideology and Legal Reasoning at the European Court of Justice' in Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing 2018), p 93
[56] Ibid, p 93.
[57] Joseph William Singer, 'Legal Realism Now' (1988) 76 California Law Review 465, p 474.
[58] For further reading, see: Horsley 2018 (n 50) pp 156-165.
[59] Horsley 2018 (n 50), pp 166-167; Michael Blauberger and Susanne K. Schmidt, 'The European Court of Justice and its political impact' (2017) 40(4) West European Politics 907, p 908; Dorte Sindbjerg Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union' (2015) 48(12) Comparative Political Studies 1622, p 1624.
[60] For further reading, see: Dorte Sindbjerg Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* (OUP 2015).
[61] Pablo Ciocchini and Stefanie Khoury, 'A Gramscian Approach to Studying the Judicial Decision-Making Process' (2018) 28 Critical Criminology 75, p 76.
[62] Andreas Kalyvas, 'The Stateless Theory' in Stanley Aronowitz and Peter Bratsis (eds), *Paradigm Lost: State Theory Reconsidered* (University of Minnesota Press 2002), pp 123-136.

and legislature to judicial bodies.[63] Building off this, Gill highlights how economic and political decision-making—including those which are highly contentious and salient, such as those related to bailouts (and the social fall-outs) during the crisis years—to the courtroom has the effect of depoliticising and isolating such issues from democratic input or mass mobilisations.[64]

This latter point, of judges as 'moral and intellectual leaders', judges have a strong role in the creation and maintenance of hegemony.[65] When connecting this with a Poulantzasian categorisation of judges as state actors with a class position, one can see how this gap-filling by the CJEU can serve to maintain the hegemonic ideological orthodoxy favourable to certain social actors and classes.[66] Ciocchini and Khoury further underlined that those judges who operate in international contexts and at high levels within a constitutional polity have different class affiliations—that is, aligned with the bourgeois and capitalist classes—when compared with judges in lower courts. Thus, judges at these high levels are less affected by inter-class alliances or contradictions.[67] Gill and Cutler outlined that in adjudicating on politically-salient matters, in their position as 'moral and intellectual leaders', courts create a sort-of economic, political, and social 'common sense' favourable to dominant classes with a veneer of legal and moral justice through its jurisprudence. As Althusser outlined, with reference to the abstraction inherent to the legal form in capitalist societies:

> 'the illusion that since all subjects are declared equal and free before the law, and since the law is the law of freedom and equality, magistrates and jurists are the servants of freedom and equality, not of the capitalist state.'[68]

[63] Ibid, pp 125-127.
[64] Stephen Gill and A. Claire Cutler, *New constitutionalism and world order* (CUP 2014), p 9; See also: Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21(4) European Law Journal 460.
[65] For further reading, see: Gill and Cutler 2014 (n 54); Cutler 2005 (n 28).
[66] Ciocchini and Khoury 2018 (n 61), p 78.
[67] Ibid, p 78.
[68] Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (G. M. Goshgrian tr, Verso 2014), pp 166-167.

Further, those operating in the sphere of the CJEU (e.g., academics and 'eurolawyers') also aid with promoting and sustaining EU law, and in doing so re-enforce the hegemony of its ideological underpinnings.[69]

[69] R. Daniel Kelemen and Tommaso Pavone, 'Mapping European law' (2016) 23(8) Journal of European Public Policy 1118, p 1123; Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (CUP 2015); Lukas Oberndorfer 'A New Economic Governance Convergence through Secondary Legislation' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart Publishing 2014) p 26.

IV. The changing nature of Europe's economic constitution and labour law

The economic constitution, originating from the German concept of *Wirtschaftsverfassung*, is a term that first appeared in the writings of German legal theorist, Hugo Sinzheimer, in 1919.[70] It is a concept that encompasses 'all legal rules which constrain the conduct of economic agents'.[71] In the context of the EU, the economic constitution seeks to organise economic and social actors with rules (e.g., the Treaties, Decisions, Directives, Regulations, the jurisprudence of the CJEU, etc.) that permeate and underpin the supranational economy. The fundamental goal of the European economic constitution is, above all else, to create and protect the functioning and integrity of the internal market—'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.[72]

All markets within an economic system are a result of or at least facilitated by the legal regime which governs them.[73] Contractual rights, juridical privileges, property rights, and the structures which facilitate economic interaction do not appear out of thin air—they are all creations of legal frameworks.[74] The internal market is no exception.

i. Les trente glorieuses

The early post-war period, the so-called *trente glorieuses*, has been characterised as the triumph of politics over the economy—as the 'age of the political constitution'.[75] The class compromise of the post-war period—with the creation of expansive welfare states and the deployment of *dirigiste* and Keynesian economic policies in

[70] Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014), p 13.
[71] Manfred E. Streit and Werner Mussler, 'The Economic Constitution of the European Community: From 'Rome' to 'Maastricht' (1995) 1(1) European Law Journal 5, p 5.
[72] Ioannis Kampourakis, 'Bound by the Economic Constitution: Notes ; for Law and Political Economy in Europe' (2021) 1(2) Journal of Law and Political Economy 301, p 303; Joined Cases C-403/08 and C-429/08 *FA Premier League et al. v. QC Leisure et al., Karen Murphy v. Media Protection Services Ltd* ECLI:EU:C:2011:631, para 115; TFEU (n 42), art 26(2).
[73] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press 2001).
[74] Tamar Frankel, 'The legal infrastructure of markets: The role of contract and property law' (1993) 73 Boston University Law Review 389.
[75] Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (CUP 2006), p 10.

the industrial democracies of Western Europe—prescribed economic constitutions with a 'pre-eminence of politics'.[76]

During this post-war period, many novel constitutions were enacted by new or reorganised nation-states. The majority of these national constitutions, to different extents,[77] recognised citizens as *personnes situées*—individuals navigating social relations and operating within their material circumstances.[78] As such, these constitutions embodied class compromise by containing a range of economic and social rights.[79] These constitutions, with their array of economic and social rights, provided the legal framework for strengthening labour's position vis-à-vis capital.

This inclusion of economic and social rights for the under-privileged classes was the embodiment of Polyanion embedded liberalism[80] and also arguably a reflection of Smend's pre-war constitutional theories. Smend held that the very *raison d'être* of constitutional orders is the promotion of social integration towards homogeneity—in this case, of socio-economic classes.[81] In doing so, and achieving a certain level of class convergence, the State avoids the need to deploy force or violence to control unruly masses.[82] This was particularly important in the context of many European states—specifically Belgium, France, and Italy—facing the perceived threat of communism.

This period is widely regarded as the heyday of collective labour in Europe, with many countries having high collective bargaining coverage and trade union densities.[83] It was then that the nations of the world declared that 'labour is not a commodity'.[84] Labour law—and the labour movement as a whole—in this period was

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[76] Ibid, p 10.
[77] Florian Rödl, 'Constitutional integration of labour constitutions' in Erik Oddvar Eriksen, Christian Joerges and Florian Rödl (eds), *Law and Democracy in the Post-National Union ARENA Report No 1/2006* (ARENA 2006), p 294
[78] Vincenzo Bavaro and Vincenzo Pietrogiovanni, 'A hypothesis on the economic nature of labour law: The collective labour freedoms' (2018) 9(3) European Labour Law Journal 263, p 269.
[79] Giubboni 2006 (n 75), pp 9-11.
[80] For further reading, see: John Gerald Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36(2) International Organization 379; Polanyi 2001 (n 73).
[81] Marco Goldoni, 'Introduction to the material study of global constitutional law' (2019) 8(1) Global Constitutionalism 71, p 75
[82] Ibid, p 75.
[83] For further reading, see: Alain Touraine, Michel Wieviorka, and François Dubet, *The Workers' Movement* (CUP 1987).
[84] Declaration concerning the aims and purposes of the International Labour Organisation (26th session of the International Labour Conference Philadelphia 10 May 1944), art 1(a).

seen to have a dual function. Firstly, and most fundamentally, it served to protect workers from the worst excesses of capitalist domination and exploitation in the production process.[85] Secondly, it served as a tool for the economic and social emancipation of workers—as a tool for the spread of democratic participation from beyond the political sphere to the economic sphere and for changing the patterns of capitalist production.[86] Thus, it encompasses both a defensive and offensive nature.[87]

It was against this background that the European Economic Community (EEC) was founded with the Treaty of Rome. The approach adopted in this period has been characterised as embodying ordo-liberalism.[88] It is well known that the founders of the EEC agreed on a track of European integration whereby economic policy moved to the transnational level and was 'decoupled' from social policy which remained, for the most part, at the MS level.[89]

Those political and social considerations, which inevitably require value judgements, were to be taken at the MS level. Economic integration was not to interfere with or undermine the social systems of MSs—rather an upward harmonisation would be facilitated while protecting the autonomy of each specific system.[90] Kampourakis has highlighted that, based on the Union's subsequent development, this approach 'laid the groundwork for the emergence of a fundamental constitutional asymmetry'.[91]

The ordo-liberal model that has characterised European (legal) integration largely cloistered the economy from political and social considerations—making market freedoms, monetary stability, and undistorted competition at the centre of the European economic constitution.[92] On a European level, economic governance was (and still is) 'conceptualised as a non-political *epistemic* task. This task is delegated to a supranational bureaucracy which enjoys practically unlimited discretionary

[85] Dukes 2014 (n 70), p 1; Gérard Lyon-Caen, 'Permanence et renouvellement du Droit du travail dans une économie globalisée' (2004) Le Droit Ouvrier 49, p 49.
[86] Dukes 2014 (n 70), pp 4-5; Lyon-Caen 2004 (n 85), p 49.
[87] Touraine (n 83), p 23
[88] Kampourakis 2021 (n 72); Joergens 2014 (n 1).
[89] Fritz Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40(4) Journal of Common Market Studies 645, p 646.
[90] Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14(10 European Constitutional Law Review 172, p 173.
[91] Kampourakis 2021 (n 72), p 306.
[92] Ibid, p 302.

powers.'[93] Accordingly, any overtly ideological economic decisions taken at the European level were seen as being illegitimate. This model of economic governance is the very antithesis of the basis of collective labour rights, that the emancipatory goal of collective labour rights which aims for the democratic input of labour and workers into the functioning of the labour market and the wider economy.[94]

As Röpke, a prominent ordo-liberal economist, underlined: 'the free market requires an active, an extremely vigilant policy'.[95] The same logic can be applied to the common, and later internal, market. The CJEU, throughout its history, has been extremely wary of any and all policies that could adversely affect the unity of the single market and its four freedoms—including those geared towards the protection or promotion of (collective) labour rights.

As previously stated, the Court has regularly been pointed to as keeping the march of integration on a forward track. While this period is often characterised as the Court solely pushing the whole integration project forward—it must be noted that the Commission was not a passive onlooker of the Court's constitutionalisation of European law. The Commission, realising that the Court was an alternative route when legislative harmonisation was politically infeasible, was responsible for approximately 80 per cent of applications to the Court in this period.[96]

The liberalising shift of market integration brought on by *Dassonville*[97] and *Cassis de Dijon*[98] has been well noted by scholars. These, in effect, cast an extremely wide net for the Court to examine national measures, regardless of policy objectives, for compliance with the *acquis*. These cases maximise CJEU discretion through the introduction of a proportionality test, the reversal of the burden of proof onto MSs to

[93] Christian Joerges and Christian Kreuder-Sonnen, 'European Studies and the European Crisis: Legal and Political Science between Critique and Complacency' 23 European Law Journal 118, p 137.
[94] Dukes 2014 (n 70), ch 1; Fotis Vergis, 'Collective Labour Rights As An Element Of The Substantive Constitutionalisation Of EU Law After The Treaty Of Lisbon' (PhD thesis, University of Cambridge 2020) p 65.
[95] Quoted in: Tzouvala 2019 (n 53), p 124.
[96] Perry Anderson, 'Ever Closer Union?' *London Review of Books* (London,7 January 2021) <https://www.lrb.co.uk/the-paper/v43/n01/perry-anderson/ever-closer-union> accessed 03 April 2022.
[97] C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* ECLI:EU:C:1974:82, para 5.
[98] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

justify national policies, and the creation of a *Begriffsjurisprudenz*-esque pyramid of concepts with economic priorities related to free movement at the top.[99]

The tail end of the *trente glorieuse* was arguably the peak of organised labour's power.[100] This came after the major upsurge of mobilisation and reinvigoration of the labour movement that took place in large swathes of the continent during the unrest of the late 1960s and early 1970s. Although, as this was institutionalised, the labour movement saw a transition from a mass social movement with strong class consciousness to one pursuing 'trade union politics'.[101] Although, it must be noted that even in this period, labour power was largely for the benefit of just male salaried workers. Further, this relatively favourable position of labour and levels of social protection (for some) within the nation-states of Western Europe was predicated on global environmental destruction, imperialist exploitation abroad and subjugation of subalterns at home.

ii. The accension of neo-liberalism

After Nixon's gold shock and the 1973 Oil Crisis, the *trente glorieuse* began wrapping up, capitalism entered a crisis, and stagflation raised its head across European economies. The result of the crisis of capitalism saw d*irigisme* and Keynesianism within the nation states and ordo-liberalism on the European level transformed into neo-liberalism on both. While not to the same degree as the Anglo-Saxon sphere under Reaganomics or Thatcherism, the EU and its MSs experienced exponentially increasing levels of liberalisation and marketisation.

Labour law, and particularly that which relates to the collective nature of labour, became increasingly problematic in the view of many who walked the halls of power as the *trente glorieuse* wound up and the economy progressed towards the expansion of unbridled global capitalism in the 1980s.[102] This idea that collective labour institutions were in themselves, let alone the results of their actions, negative 'externalities' that need to be reduced is widespread within the discourse and

[99] Hans-Peter Haferkamp, 'Jurisprudence of Concepts' in Stanley Katz (ed), *The Oxford Encyclopedia of Legal History, Vol 3* (OUP 2009) p 432.
[100] Touraine (n 83), pp 140-145.
[101] Touraine (n 83), pp 254-277.
[102] ACL Davis, Perspectives on Labour Law (2nd edn, CUP 2009), p 20.

policies of political leaders.[103] Many viewed collectively bargained wage increases as a driver of inflation; labour militancy and strikes as a threat to productivity; and the protection of insiders via collective organisations as a contributor to increasing levels of unemployment.[104]

This was reflected in the way that labour law and policy were subsumed by labour market regulation—an important change in terminology.[105] This saw the policies of protecting vulnerabilities, of redistribution, and of rebalancing power dynamics be replaced by regulation of the labour market with a goal of increasing competition and flexibility.[106] The fragmented labour and social protections between MSs became competitive advantages to exploit.[107] Labour regulation did begin to be adopted on a European level and the CJEU did advance protections in this era, particularly concerning non-discrimination and occupational health and safety.[108]

The integration process increased with the Single European Act in 1986, starting the process towards the creation of a single, internal market. This did not appear out of the blue, the CJEU was the first to use the term internal market in 1982.[109] The pivot, albeit a nuanced one, from the pursuit of a common market to that of an internal market with the Single European Act and subsequent treaty revisions brought a change in jurisprudential, legislative, and regulatory practice.[110] The focus of the Union, and its institutions, was thus aimed at the further removal of barriers to free movement rather than common policymaking.[111] Although this was the first point where collective labour rights were explicitly recognised in European law, albeit in a

[103] Fotis Vergis, 'Back to the Future: Rediscovering the Non-Economic Role, Value and Scope of Labour Law and Collective Labour Institutions in a Changing World' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Hart Publishing 2019), p 82.
[104] Davis 2009 (n 102), p 20.
[105] Wolfgang Streeck, 'Competitive Solidarity: Rethinking the "European Social Model"' (1999) MPIfG Working Paper 99/8, p 4; Giandomenico Majone, 'The European Community between social policy and social regulation' (1993) 31 Journal of Common Market Studies 153.
[106] Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011), p 124.
[107] Stefanie Hürtgen, 'The Competitive Architecture of European Integration: European Labour Division, Locational Competition and the Precarization of Work and Life' in Stefan Schmalz and Brandon Sommer (eds), *Confronting crisis and precariousness: Organised labour and social unrest in the European Union* (Rowman & Littlefield International Ltd. 2019), pp 35-36.
[108] For further reading, see: Ruby Gropas, 'Gender, Anti-discrimination and Diversity: The EU's Role in Promoting Equality' in François Levrau and Noel Clycq (eds), *Equality* (Palgrave Macmillan 2021).
[109] Case 15/81 *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* ECLI:EU:C:1982:135, para 33.
[110] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017), p 18.
[111] Ibid, p 18.

non-binding instrument. The Community Charter of the Fundamental Social Rights of Workers was adopted in 1989, containing references to several collective labour rights.[112]

The Maastricht Treaty, adopted in 1992, enshrined the EU's constitutional commitment to an economy 'the principle of an open market and free competition'. While this commitment remains enshrined today,[113] the Lisbon Treaty later introduced the some-what conflicting goal of 'a highly competitive social market economy'.[114] The reform brought increased competences to the European level and, most importantly, set the scene for the European Monetary Union (EMU), and for the later creation of the European Central Bank (ECB). Needless to say, this had extremely important and far-reaching consequences for labour and social rights in the Union. The economic governance structures in the reformed Treaties, which remains largely unchanged by subsequent revisions,[115] have been characterised as stereotypical neo-liberal construction,[116] with strong restraining powers over MSs intervening in the economy.

In an attempt to balance the perceived social deficit of the EC, the Agreement on Social Policy was attached to the Maastricht Treaty, which is now incorporated into the TFEU.[117] The most important aspect of this innovation was the introduction of social dialogue on a European level. While a step forward, no doubt, this embryotic structure had a number of issues related to its neo-voluntaristic nature[118] and the social partners' autonomy,[119] a point that will be further expanded upon later in the discussion of the *EPSU* case. The European social partners, it is said, reached the peak of their influence during the Delors Commission.[120] During this period, several new labour and social regulations were enacted.[121] Some of the most notable

[112] Community Charter of the Fundamental Social Rights of Workers (COM(89) 471 final).
[113] TFEU (n 42), art 120.
[114] TEU (n 42), art 3.3.
[115] Oberndorfer 2014 (n 69), pp 29-30
[116] Ibid, pp 29-30.
[117] TFEU (n 42), ch X.
[118] Wolfgang Streeck, 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 1(1) European Law Journal 31.
[119] Alan Bogg and Ruth Dukes, 'The European social dialogue: from autonomy to here' in (CUP 2013), pp 470-471.
[120] Daiva Petrylaité, 'Overview of common issues and evolution of EU Collective Labour Law' in Beryl ter Haar and Attila Kun (eds), *EU Collective Labour Law* (Edward Elgar Publishing 2021), p 437.
[121] Ibid, p 437.

achievements of this era were the creation of European Works Councils ('EWCs'),[122] and the enactment of the Information and Consultation Direction.[123]

It was also then that the first Posted Workers Directive ('PWD') was adopted by the Union.[124] In this period, the CJEU took a rather open approach to collective labour rights. In the *Rush Portuguesa* case,[125] and restated in *Vander Elst*,[126] the Court held that endorsed the notion that MSs could extend national collective agreements to the posted workers in their territory. Further, in the *Albany* case, the Court outlined conditions where collective agreements would be considered to be excluded from EU competition rules.[127] These were substantively the first cases the CJEU dealt with concerning labour rights. Further, the CFR was adopted in 2000 which saw the expansion of (collective) labour rights into the EU's *acquis*.[128] Although, this document has quite substantial built-in limitations and was, at the time, a non-binding document—a fact not rectified until the adoption of the Lisbon Treaty.[129]

Although after the adoption of the CFR, the influence of social partners in EU policymaking decreased significantly and labour faced a number of challenges. The adoption of the Lisbon Agenda in 2000 saw the EU's goal being set on becoming the world's most competitive economy by 2010.[130] This new goal saw EU labour and social regulations being measured against tests of 'economic efficiency'.[131] In effect, this resulted in the volume of legislative initiatives pertaining to labour-related matters being decreased and the new focus of creating a Social Europe was shifted to enhancing consumer protection and non-discrimination.[132] Further, the expansion eastward in 2004 posed new challenges related to increased chances of social

[122] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [1994] OJ L 254.
[123] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80.
[124] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L 18.
[125] Case C-113/89 *Rush Portuguesa Ldª v Office national d'immigration* ECLI:EU:C:1990:142.
[126] Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* ECLI:EU:C:1994:310.
[127] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430.
[128] CFR (n 2), ch IV.
[129] TEU (n 42), Art 6
[130] Hans-W. Micklitz, 'The Transformative Politics of European Private Law' in Poul F. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (CUP 2020), p 213
[131] Ibid, p 213.
[132] Ibid, p 213.

dumping on account of the vast differentiated levels of economic development between the old and new MSs, increasing the possibility of social dumping.

V. Mapping collective labour rights in the jurisprudence of the Court

Collective labour rights in Europe are of a 'polycentric' nature—being protected to various degrees in domestic, European, and international law.[133]

The early development of the *acquis* in this area of labour law and labour rights, as previously stated, was largely in the spheres of individualised approaches to equality, non-discrimination, and certain social rights of workers who exercised their freedom of movement and their families. Although, it has been noted that even this advancement of individual labour rights by the Court has slowed due to competing interests and (perceived) economic exigency.[134]

To better understand and map out the jurisprudence since the seminal the *Laval/Viking* quartet of cases, the analysis will be grouped by the specific rights addressed by the Court's case-law which fall under the wider umbrella of collective labour rights.

i. The Laval/Viking quartet

The *Laval/Viking* quartet of cases were extremely controversial cases of the CJEU that came in quick succession in 2007-2008: *Laval, Viking*, *Luxembourg*, and *Rüffert*.[135] These cases stirred academic debate and the literature produced is extremely expansive.[136] Thus, it is a somewhat futile exercise to go so deeply into the specificities of cases and as such, only an extremely short review of the outcome will be outlined.

[133] Claire Kilpatrick, 'Has Polycentric Strike Law Arrived in the UK: After Laval, after Viking, after Demir' (2014) 30 International Journal of Comparative Labour Law and Industrial Relations 293.
[134] A.C.L. Davies, Alan Bogg and Cathryn Costello, 'The role of the Court of Justice in labour law' in Alan Bogg, Cathryn Costello and A.C.L. Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016), p 114.
[135] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007:809; Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* ECLI:EU:C:2007:772; Case C-319/06 *Commission v Luxembourg* ECLI:EU:C:2008:350; Case C-346-06 *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* ECLI:EU:C:2008:189.
[136] For further reading, see: Andreas Bücker and Wiebke Warneck (eds.), *Reconciling fundamental social rights and economic freedoms after Viking, Laval and Rüffert* (Nomos 2011); Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2014); Catherine Barnard, 'Viking and Laval: an introduction' (2008) 10 Cambridge Yearbook of European Legal Studies 463.

In *Laval* and *Viking*, the CJEU affirmed that there is indeed a positive right to collective action, and specifically to strike, protected in EU law.[137] Although, the Court went on to outline that this right is not absolute. When it came into conflict with the free movement of services (*Laval*) and establishment (*Viking*) the Court found the industrial actions to be disproportionate and unjustified breaches of the Treaties.[138]

In Commission v Luxembourg, Luxembourgish protections that required wages be adjusted to changes in the cost of living and also that collective agreements be respected were held not to be permissible on account of them restricting the free movement of services.[139] Similarly, in *Rüffert*, the requirement to pay workers a minimum wage as set out in a collective agreement as a condition for the award of a public procurement contract was not a justified restriction to the free movement of services.[140]

ii. Freedom of association and the right to collective bargaining

Freedom of association is, in effect, the right to freely join collective organisations. This is a freedom that is considered a basic aspect of European democracy. Collective bargaining is a process of negotiations by social partners on behalf of their members with a view of concluding a collective agreement. An essential aspect of collective bargaining is the autonomy of social partners from political institutions and the State itself. This notion of autonomy is based on the notion that social partners themselves are in the best position to recognise and define their own interests, and those of their members. In terms of numerical volume, the Court has dealt with more cases concerning collective bargaining and collective agreements than any other individual collective right since the *Laval/Viking* quartet.

[137] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007:809; Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* ECLI:EU:C:2007:772, para 44.
[138] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007:809 para ; Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* ECLI:EU:C:2007:772, para
[139] Case C-319/06 *Commission v Luxembourg* ECLI:EU:C:2008:350.
[140] Case C-346-06 *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* ECLI:EU:C:2008:189.

In *Commission v. Germany*, the Court addressed the issue of collectively bargained pensions contra freedom of movement of services and freedom of establishment.[141] In the case, the Court once again recognise the fundamental right to collective bargaining with reference to Article 28 CFR.[142] In the case, the Court listened numerous sources where the right is protected, referencing sources from the Germany Basic Law,[143] general international law, the ECHR system, and EU law.[144] Regardless of these considerations, the Court took up the balancing act once again. They considered the 'good' would offset the 'bad'.[145] Due to the fact that the local authorities did not public tender on an EU level, Germany was found to be in violation of the relevant provisions of EU law. In the subsequent *Prigge* case, the Court in effect restated the findings—stating that while collective negotiations are protected by the CFR, these collective negotiations and the outcomes of them must be in conformity and compliant with the wide body of EU law.[146]

The *FNV KIEM* case concerned a collective agreement that was concluded and covered both employees (e.g., workers operating under the auspices of an employment contract) and self-employed musicians.[147] As, *de iure*, self-employed musicians were not employees, the Court took the view of each individual self-employed musician as an individual undertaking.[148] Following this logic, when negotiating the collective agreement, the CJEU took the view that the trade union was not operating as a representative collective of workers (e.g., as a trade union) but rather an 'association of undertakings'.[149] Consequently, this meant that the trade union operating in this way fell outside the meaning of social partners and thus, beyond the scope of *Albany* exceptions to competition rules.[150] As such, the collective agreement in question was found to be contrary to EU law.

[141] Case C-271/08 *Commission v. Germany* ECLI:EU:C:2010:183.
[142] Ibid, para 38.
[143] Ibid, para 43.
[144] Ibid, para 37.
[145] Ibid. para 57.
[146] Case C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* ECLI:EU:C:2011:573, para 47.
[147] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411.
[148] Ibid, para 27-28.
[149] Ibid, para 28.
[150] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430, paras 62-64.

This case has the effect of limiting protection to only certain workers in a formal employment relationship, something that is of concern when one considers the changing forms of labour market participation and the work-poor concept. On this point, the Advocate-General in the case raised the issue that the interpretation that the Court subsequently took could result in social dumping through the replacement of contract employees with self-employed individuals.[151]

The *Alemo-Herron* case[152] became almost as infamous in European legal scholarship as the *Laval/Viking* quartet.[153] The case concerned the protection of workers, who were covered by a collective agreement, in the case of the privatisation of their workplace. The new owner refused to comply with 'dynamic clauses' of the workers' employment contracts which required the continuation of observance of the previously concluded collective agreement.[154] The new owner brought the case to a British court, claiming this was an infringement of their right to do business. The Court clearly outlined, in the process of balancing interests, that the new owner must be in a position to make the adjustments and changes necessary to carry on its operations'.[155] In doing so, based on Article 16 CFR and the connecting rights of free contract.[156] This effectively deprived the workers of protections and certainties, allowing the new owner to *post-facto* change the terms of their employment contracts. What is also interesting to note is the lack of consideration afforded to the workers' right to contract, in terms of their employment contract.

Following *Alemo-Herron* was the case of *Österreichischer Gewerkschaftsbund*, where the Court adopted a relatively more open position to labour.[157] Building off *Alemo-Herron*, in the context of a trasnfer of an undertaking, the Court held that the previously-negotiated collective agreement must be respected, if incorporated into the employee's contract of employment, until a new collective agreement is signed.

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[151] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2215, Opinion of Advocate-General Wahl, paras 74-79.
[152] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521.
[153] See, for example: Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law (Case C-426/11 Alemo-Herron v Parkwood Leisure)' (2013) 42 Industrial Law Journal 434' Giubboni 2018 (n 90).
[154] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521, paras 15-18.
[155] Ibid, para 25.
[156] Ibid, para 31.
[157] Case C-328/13 *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* ECLI:EU:C:2014:2197.

This was effectively echoed by the Court once more in *Asklepios*[158] Although in this case, the Court does recognise the employees' right to contract as well as that of the transferee's.

The *EPSU and Goudriaan v Commission* case delivered in 2019 was perhaps one of the most important cases in this area in the past years.[159] This case after the Commission's non-implementation of a collective agreement that was negotiated by the European social partners under Article 155(1) TFEU.[160] The notification of non-implementation was only delivered to the social partners after two years after the conclusion of negotiations and was on account of the negotiated agreement being counter to the general interest of the Union as defined by the Commission.[161] The Commission only has the power to conduct such a review of the collective agreement when it is autonomy initiated by the social partners themselves. The Court highlighted that the Commission has full discretion in to independently define and defend the general interest as it sees fit.[162] But in doing so, it must follow the general principles of social policy.[163] While the social partners argued that they are best placed to craft such policies, the Court wholly rejected this on account.[164] While this naturally stems from the social partners' autonomy, EPSU argued that the social partners were impowered to do so on account of horizontal subsidiarity, which the CJEU rejected.[165] Further, the Court outlined that if the social partners were in the position to force the Commission to implement the negotiated agreement, this would effectively give them greater legislative powers than either of the Parliament and Council.[166] In effect, the Court rejected all of EPSU's claims and on appeal, the Court of Justice upheld the General Court's findings, dismissing EPSU's arguments.[167]

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[158] Joined Cases C-680/15 and C-680/11 *C-680/15 and C-681/15 Asklepios Kliniken Langen-Seligenstadt GmbH v Ivan Felja and Asklepios Dienstleistungsgesellschaft mbH v Vittoria Graf* ECLI:EU:C:2017:317.
[159] Case T-310/18 *European Federation of Public Service Unions (EPSU) and Goudriaan v Commission* ECLI:EU:T:2019:757.
[160] TFEU (n 42), art 155.1.
[161] TEU (n 42), art 17.1.
[162] Case T-310/18 *European Federation of Public Service Unions (EPSU) and Goudriaan v Commission* ECLI:EU:T:2019:757, para 65.
[163] Ibid, para 75.
[164] Ibid, para 98.
[165] Ibid, para 97-98.
[166] Ibid, para 82.
[167] Case C-928/19 P *European Federation of Public Service Unions (EPSU) v European Commission* ECLI:EU:C:2021:656.

This case was problematic for a number of reasons. While the institutions of the EU, including the CJEU and the Commission, are required to facilitate and support the social dialogue,[168] the *EPSU* decision does anything but. Even before this ruling, European social dialogue had its issues.

Firstly, from the union side, there is somewhat of a low buy-in due to exclusion of salient issues (particularly wages) from European social dialogue.[169] From the employer side, as Streek noted, there was little benefit in entering into social dialogue or collective agreements as the lack of transnational regulation was in their interest.[170] Now, due to the Court's decision in *EPSU*, trade unions have been further de-incentivised in entering into social dialogue or collective agreements as it has become clear that, even in cases where an agreement has been successfully negotiated, there is no guarantee of implementation by the Union's political institutions. The resources needed to conclude a collective agreement no longer match the potential output—particularly when one considers that salient issues of are excluded from European social dialogue under Article 155 TFEU.[171]

This also leads to a second problematic aspect of the *EPSU* case, its effects on the autonomy of social partners vis-à-vis public bodies, particularly the Commission. This issue of autonomy had already been raised by scholars prior to the *EPSU* judgement. Bogg and Dukes outlined that employers enter only when threatened with formal legislation emanating from the Commission while the European Trade Union Confederation ('ETUC') is substantially financially reliant on EU funds.[172] Now, to ensure implementation, social partners will be required to regularly check in with the Commission during negotiations in order to ensure that potential agreements do not go against the nebulous general interest of the Union. This clearly reduces the ability to pursue the interests of employers and workers in an autonomously self-directed manner.[173]

[168] TEFU (n 42), art 152
[169] Thomas Prosser, 'Is the "new phase" of the European Social Dialogue the development of an autonomous and effective form of social dialogue?' (2006) Warwick Papers in Industrial Relations 82/2006, p 8.
[170] Streeck 1995 (n 118), p 37.
[171] TFEU (n 42), art 155.3
[172] Bogg and Dukes 2013 (n 119), pp 470-471.
[173] Vergis 2019 (n 98), p 142.

iii. The right to collective action

The collective action of labour is the most basic and fundamental avenue for workers to resist unilateral decisions taken by employers. Collective action can crystallise in several forms, such as absenteeism, sabotage, slowdowns, strikes, work stoppages, and picketing. This right, specifically when it is manifested through strike action, is at the forefront of class confrontation.[174] Under neo-liberalism, employers and labour are seen as having a 'common interest to work together in order to improve market functioning, achieve rationalisation of social processes, and improve international competitiveness'.[175] Accordingly, in the view of the EU institutions, social partners are not meant to resort to forceful measures of dispute resolution and the right to strike is not seen as a necessary component of European labour and social policy.[176]

The CJEU has not dealt with the cases on the topic of workers' right to collective action since the *Laval/Viking* quartet, but the topic has been addressed several times in the jurisprudence of the ECtHR, which has shown considerably more openness to labour than its Luxembourgish counterpart. While it may seem somewhat off-topic to examine the jurisprudence of another Court, there is a logic in doing so.

The ECtHR has recognised that the CJEU provides the same human rights protection as that provided for under the European Convention on Human Rights ('ECHR').[177] Conversely, the CJEU has stated that the ECtHR's case-law acts as an interpretive tool for its own adjudication.[178] Further, it has been argued that the wording of Article 52(2) CFR *de facto* cannot provide lower protection for fundamental rights than that is afforded under the ECHR system.[179]

Demir[180] and *Enerji*[181] both came on the heels of the *Laval/Viking* saga and radically departed from the jurisprudence of the CJEU. In the *RMT* case, [182] the ECtHR once

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[174] Ntina Tzouvala, 'Continuity and rupture in restraining the right to strike' in Honor Brabazon (ed), *Neoliberal Legality* (Routledge 2016), p 119.
[175] Marija Bartl, 'Socio-economic imaginaries and European private law' in in Poul F. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (CUP 2020), p 232.
[176] Piotr Grzebyk, 'The right to strike as a fundamental right' in in Beryl ter Haar and Attila Kun (eds), *EU Collective Labour Law* (Edward Elgar Publishing 2021), p 90
[177] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland App no 45036/98 (ECtHR, 30 June 2005), para 155.
[178] Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* ECLI:EU:C:2009:94, paras 27-28.
[179] Vilija Vekyvyte, 'Right to Strike in the EU after Accession to the ECtHR' in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2014) , p 85; CFR (n 2), art 52.3.
[180] *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008).

again outlined that the right to strike was an 'essential element' of freedom of assembly protected by Article 11 ECHR.[183] Although, it did somewhat retrain itself via-à-vis *Demir* and *Enerji*, allowing for the complete ban of unions' political strikes, as it considered it a 'secondary action' of a trade union, thus allowing the UK government a wider margin of appreciation.[184]

The recent *Holship* case from the ECtHR is also a particularly interesting case for the topic at hand as it dealt directly with the question of economic freedoms versus collective labour rights. The case resulted from a Danish shipping company, Holship, exercising its right under the European Economic Area (EEA) Agreement to the free movement of services in Norway, In doing so, it refused to observe a collective agreement which resulted in the Norwegian dockers' union organising a boycott of Holship which, it was argued, limited the exercise of its free movement rights.[185] The Court stated that 'the degree to which a collective action risks having economic consequences cannot […] in and of itself be a decisive consideration in the analysis of proportionality under Article 11 [ECHR]'.[186] Here is the subtle distinguishing element from the CJEU's approach. While industrial strike action for matters related to the workplace is allowed to be balanced, with a small margin of appreciation, the ECtHR is not of the opinion that it can be done solely against economic considerations. While not perfect, it is somewhat of a positive step forward in the repudiation of the *Laval/Viking* quartet. Although, one must wait to see how the CJEU shall react.

iv. Information, consultation, and participation rights

Information, consultation and participation rights effectively give workers, through their representatives in trade unions or works councils, a voice and input into the affairs and operations of the corporation they work within. These are somewhat lower than the level of rights given in many MSs, which provide for co-determination. Nonetheless, these rights are particularly important in cases of bankruptcy or

[181] *Enerji Yapı-Yol Sen v Turkey* App no 68959/01 (ECtHR, 21 April 2009).
[182] *National Union of Rail, Maritime and Transport Workers v United Kingdom* App no 31045/10 (ECtHR, 08 April 2014).
[183] Ibid, para 84.
[184] Ibid, para 87-88.
[185] *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway* App no 45487/17 (10 June 2021).
[186] Ibid, para 117.

insolvency, collective redundancies, and the transfer of ownership. The Court has addressed information, consultation and participation rights in several cases since the *Laval/Viking* quartet.

In *Association de médiation sociale v Union locale des syndicats CGT and Others* (‘*AMS*’), the Court directly addressed the status of information and consultation rights under the CFR.[187] The company in question, *Association de médiation sociale* had only several permanent staff but over a hundred part-time staff. The Court effectively held that Article 27 CFR cannot be interpreted to confer a judiciable free-standing right, due to its lack of individual nature.[188] It is somewhat more of a principle rather than a fundamental right. Further, the Court outlined that Article 27 CFR lacks horizontal effect, severely limiting its scope.[189] Similar to *FNV KIEM*, the case excluded flexible or non-regular workers from information and consultation rights. As noted above, this is an unwelcome development in Europe where such working relations are becoming increasingly common.

v. Labour rights in the context of collective redundancies

In the crisis years when several MSs had unemployment rates upward of 25 per cent, the Court was required to address the issue of labour rights in the context of collective redundancies.

AGET iraklis concerned mass layoffs at a factory during the height of the economic and financial crisis in Greece—something that, under Greek law, needed the governmental authorisation.[190] In the position that the country found itself in at the time, the Greek authorities refused the company’s request, who challenged the legal basis of the decision’s compatibility the *acquis.* In this case, the Court largely restated the reasoning in *Alemo Herron*, prioritising the company’s freedom to conduct business under Article 16 CFR and derivative rights, as well as an obstacle to exercising one’s right to the freedom of establishment.[191]

[187] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2; CFR (n 2), art 27.
[188] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2, para 47.
[189] Ibid, para 49.
[190] Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:972.
[191] Ibid, paras 104-106.

Even though the CJEU did uphold the reasoning of *Alemo Herron*, it did make reference to the wide array of labour protections as legitimate public policy objectives,[192] the social market economy goal of the Union,[193] and social provisions of the TFEU.[194] The Court, when looking at its reasoning, effectively decided to wilfully ignore all these considerations when trading them off in favour of the employer's interest.

[192] Ibid, para 73-75.
[193] Ibid, para 76.
[194] Ibid, paras 77-78.

V. Discussion

In the early 2000s, the Court held that fundamental rights and fundamental freedoms have equal weight in the EU *acquis*.[195] In the EU of 2022, it does not necessarily seem as such. There is an issue with the wider set-up of the CFR. The restrictions contained in Article 52 effectively subsume any substantive social rights below provisions of existing EU law, which is overwhelmingly of a liberalising approach. It has been noted that organised labour's distrust of the courts is traditionally seen as a uniquely Anglo-Saxon proclivity, founded out of 'a judicial system steeped in a common-law ideology based upon contract and property'.[196] It is very maybe true that this is becoming a feature throughout the EU, with the CJEU's *de facto* precedent steeped in advancing economic freedoms, enhancing marketisation, and entrenching liberalisation. The jurisprudence of the Court effective rationalises the economic system that makes it:

> 'possible [for capital] to swiftly relocate and adapt should anything—rebellious proletarians, foot-dragging governments, unruly nature—get in the way of profitability. […] It enhances the power of capital over workers by increasing the capacity of individual capitals to relocate production or change subcontractors.'[197]

The continued reliance on proportionality and the balancing of interests are exceedingly problematic in the Court's jurisprudence on collective labour rights. Contra an orthodox formalist conception of proportionality, one can argue that there is little reason nor rationality in the balancing approach adopted by the CJEU. A proportionality test comes down to a value judgement, one that presupposes the potentiality of limiting fundamental rights. Through the Court's balancing acts, the judges have effectively created a false moral equivalence between the normative foundations of EU economic freedoms and fundamental labour rights.[198]

[195] *Schmidberger*, para 74; *Omega Spielhallen*, para 35
[196] Bogg and Dukes (n 119), p 490.
[197] Søren Mau, ''The Mute Compulsion of Economic Relations': Towards a Marxist Theory of the Abstract and Impersonal Power of Capital' (2021) 29 (3) Historical Materialism 3, p 18.
[198] Emilios Christodoulidis, 'The European Court of Justice and "Total Market" Thinking' (2013) 14(10) German Law Journal 2005, p 2010.

As Giubboni pointed out so lucidly, the extreme jurisprudence of the CJEU has effectively inverted the original normative premise of Europe labour law.[199] While formally, Article 153 TFEU does 'not prevent any MS from maintaining or introducing more stringent protective measures',[200] this is restricted by the caveat that these supplementary measures must be 'compatible with the Treaties' (as interpreted by the CJEU).[201] This inversion, or rather perversion, of this original normative premise, has meant that European rights and standards of protection for labour are now *de facto* a ceiling rather than a floor.[202] This conclusion has been echoed by Cremers, who outlined that 'EU MSs no longer had the unilateral right to decide on the mandatory rules applicable within their territory, even if these mandatory rules would guarantee better provisions [than those provided for by EU law] for the workers concerned'.[203]

Moreover, the labour governance regime currently in place in the EU is arguably a potential threat to the harmony and integrity of the internal market itself. As Kahn-Freund pointed out already in 1976, that inter-MS competition and trade could be adversely affected by the chasm vis-à-vis wages and other conditions of employment between MSs.[204] The current regime has arguably led to 'face to face social dumping'.[205] While some have pointed to migrant workers' willingness to do work in less favourable conditions, this is little more than a tacit acceptance of a situation where atomised workers in a foreign land must accept the less favourable material and working conditions on account of their low levels of collective organisation to demand an amelioration of their dismal situation. In realty, workers are not bottles of Cassis de Dijon and they should not be treated as such.

One of the Union's flagship projects in recent years in this area has been the European Pillar of Social Rights ('EPSR'), proclaimed in 2017. Although this is a non-binding document of principles, Garben has suggested that the EPSR could provide a benchmark for upgrading the existing employment and social *acquis* to

[199] Giubboni 2020 (n 12), pp 283-284.
[200] TFEU (n 42), art 153.4.
[201] Ibid, art 153.4.
[202] Giubboni 2020 (n 12), p 284.
[203] Jan Cremers, 'Economic freedoms and labour standards in the European Union' (2016) 22(2) Transfer: European Review of Labour and Research 149, p 153.
[204] Kahn-Freund 1976 (n 46), p 250.
[205] Kalypso Nicolaïdis, 'The Cassis Legacy: Kir, Banks, Plumbers, Drugs, Criminals and Refugees' in Fernanda Nicola and Bill Davies (eds), EU Law Stories: Contextual and Critical Histories of European Jurisprudence (CUP 2017), p 291.

adequate standards.[206] While this is possible (and desirable), the neo-liberal paradigm of competition and flexibility persists and runs throughout the employment and welfare-related principles.[207]

Due to the embeddedness of EU law within the legal frameworks of the MSs, it is wholly inadequate for national governments to attempt to solely re-construct what has been lost or re-enforce what remains of social systems. Although judicial and legal avenues may not seem promising, it would be foolish to completely abandon them on account of the judicialisation of political issues in our neo-liberal world. The constitutional value of these collective labour rights remains hotly contested and there is a need for the Court to further define their substantive, free-standing, content. Labour rights, and social rights in a more general sense, have been noted as essential for the nurturing of solidarity and challenging the individualism of ever-expanding marketisation[208]. If they do indeed have constitutional value, they should not be traded against others in such a free-wheeling test of proportionality by the CJEU that reduces and loses the very essence of their constitutional value.

Outside the confines of the juridical field, collective labour organisations face a number of daunting challenges in the world of work that the XXI century is ushering in.

The erosion of collective organisations, undermining of class solidarity, and expansion of markets into increasing numbers of aspects of life also saw a move towards individualism. This is most evident in the rise of the dogma of 'individual responsibility' for many society's problems—be that employment, poverty, or welfare.[209] Somewhat less discussed is that this also came with the rise of an individualist approach to human rights. Human rights, since this normative shift, have

[206] Sacha Garben, 'The European Pillar of Social Rights as a Revival of Social Europe' in Maurizio Ferrera (ed), *Towards a European Social Union The European Pillar of Social Rights and the Roadmap for a fully-fledged Social Union: A Forum Debate* (Centro Einaudi 2019), pp 77-78.
[207] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' COM(2017) 250 final; *European Pillar of Social Rights* (European Commission 2017), participle 5(b), 13, and 14.
[208] Kampourakis 2021 (n 72) pp 317-318.
[209] For further reading, see: Yascha Mounnk, *The Age of Responsibility: Luck, Choice, and the Welfare State* (HUP 2015); Michael Morris, 'From the Culture of Poverty to the Underclass: An Analysis of a Shift in Public Language' (1989) 20(2) The American Sociologist 123.

been used as a tool to depoliticise civil society and placate demands for economic change, distribution, or justice.[210]

This individualist approach is also reflected in changing approaches to the governance of wage regimes. During this period, a move away from collectively bargained wages toward statutory minimum wages has occurred in many EU MSs. While admittedly protecting workers on an individual level, this also has the effect of atomising them and disincentivising trade union membership and participation. Consequently, this individualisation of wage regimes in Europe and the fall in trade union density have, in some cases, resulted in models of collective bargaining being undermined. This has been explicitly reinforced by EU institutions, particularly during the crisis years. In an annual report, the Commission's Directorate-General for Economic and Financial Affairs listed several priorities for reform amongst which were the 'decrease the bargaining coverage or (automatic) extension of collective agreements' and 'an overall reduction in the wage-setting power of trade unions'.[211] According to the Organization for Economic Cooperation and Development (OECD), all of the statutory minimum wages in EU MSs fall under their classification of 'low wages' and many, even further, are characterised as 'poverty wages'.[212] On the other hand, collectively bargained wage regimes have been shown to improve the overall wage structure, narrow wage inequality, and reduce the low-pay sector.[213]

The deregulation of markets has led to the financialisation of the economy—the dominance of finance capital with an abstraction and centralisation of the control of capital.[214] This advance of financialised economic operations has led to increasing instances of institutional ownership (e.g., in the form of commercial or investment banks, hedge funds, pension schemes, etc.) of corporations, something which has effects on the organisation of corporations and thus the position of labour.[215] Marx, in

[210] For further reading, see: Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019).
[211] Marco Buti, Servaas Deroose and Anne Bucher (eds), *Labour Market Developments in Europe, 2012* (European Commission 2012), p 104
[212] Thorsten Schulten, *Minimum Wage Regimes in Europe* (Friedrich Ebert Stiftung 2014) p 9.
[213] Torsten Müller, Kurt Vandaele and Wouter Zwysen, 'Wages and collective bargaining: is social Europe really back on the agenda?' (ETUC 2021), p 97.
[214] Samir Amin, 'The New Imperialist Structure' (*Monthly Review*, 01 July 2019) <https://monthlyreview.org/2019/07/01/the-new-imperialist-structure/> accessed 05 May 2022.
[215] Costas Lapavitsas, 'The financialization of capitalism: "Profiting without producing"' (2013) 17(6) City 792, pp 794 and 797.

Capital Volume III, already recognised that this abstraction brought by financialisation leads to a situation where the relationship of capital is 'not as directly counterposed to labour, but rather as unrelated to labour, and simply as a relationship of one capitalist to another'.[216] The real-world effects of this market financialisation manifest themselves in examples such as that of the workers at the GKN factory in Florence, Italy.[217]

Further, possibly the greatest challenge faced by collective labour is establishing its role in the green transition. This will undoubtedly bring major changes to production and society. These effects will be inequitably distributed and likely fall on already vulnerable communities. The neutralisation, through the jurisprudence of the Court, of avenues for action has limited the scope that trade unions can play in the defence and representation of these vulnerable communities in the process of transition. If trade unions and other forms of collective labour institutions cannot adequately protect workers from the worst by-products of this, it will be a damning indictment of their fitness for purpose in today's world. The empowerment and inclusion of social partners in policymaking, as well as collective class-based organisations operating within the wider society, are essential for embedding labour and social rights (as well as wider labour and social policies) into the transition.

Further, the rise of digitalisation and platform work challenges the very assumptions of traditional organisation theory. These factors, together with the financialisation of company ownership (and the wider economy in general), have led to new forms of worker organisation across Europe, particularly in the periphery, beyond traditional forms of trade unionism and mass class-based political parties.[218]

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[216] Karl Marx, *Capital: A Critique of Political Economy, Volume III* (Friedrich Engels ed, first published 1894, Lawrence & Wishart 1977), p.382.

[217] For further reading, see: Collettivo di fabbrica Gkn, *Insorgiamo Diario collettivo di una lotta operaia (e non solo)* (Alegre 2022).

[218] For further reading, see: Verity Burgmann, *Globalization and Labour in the Twenty-First Century* (Routledge 2016), pp 230-231; Loris Caruso, Riccardo Emilio Chesta and Lorenzo Cini, 'Le nuove mobilitazioni dei lavoratori nel capitalismo digitale:una comparazione tra i ciclo-fattorini della consegna di ciboe i corrieri di Amazon nel caso italiano' (2019) 1 Economia e società regionale 61; Arianna Tassinari and Vincenzo Maccarrone, 'Riders on the Storm: Workplace Solidarity among Gig Economy Couriers in Italy and the UK' (2020) 34(1) Work, Employment and Society 35; Maurizio Atzeni , 'Workers' organizations and the fetishism of the trade union form: toward new pathways for research on the labour movement?' (2021) 18(8) Globalisations 1349; Lorenzo Cini, (Re)mobilizing labour. A lesson from recent labour struggles in Italy (2021) Social Movement Studies <https://doi.org/10.1080/14742837.2021.2010532> accessed 09 April 2022.

The normative underpinnings of the insulation of political decisions from mass participation must be challenged. MSs have been required to delegate significant power over important economic and political policymaking to counter-majoritarian institutions with little to no democratic input. Even without the transfer of competence, MSs' economic and social policies are increasingly subject to review and surveillance by the same institutions.[219]

This has resulted in a denial of democratic norm formation and popular sovereignty. This has been termed 'neoliberal path dependency'.[220] This is particularly the case with debtor states in the periphery that received bailouts and are subject to strict supervision mechanisms. As needs no reminding, this resulted in deep austerity. This was, unsurprisingly, largely unpopular.

This picture of authoritarian legality and 'law-sterity'[221] cannot be disentangled from political developments that have occurred in Europe in the past 15 years. Mainstream social-democratic parties entering government on the back of anti-austerity electoral campaigns—such as François Hollande and the Parti Socialiste in France, the Labour Party in Ireland, and Partij van de Arbeid in the Netherlands—during the crisis years were largely unable to stop the austerity train once it had left the station. This apparent inescapability of austerity through democratic channels was arguably one of the contributing factors to the dramatic rise of populism across the continent.[222] The situation has resulted in MSs finding 'themselves increasingly enmeshed in a highly toxic mixture of market-oriented technocracy and extreme populism'.[223]

The analysis above is somewhat only a partial snapshot of a wider picture. A more nuanced picture of collective labour rights in the European Union today would require a more in-depth examination of the practice of the other EU institutions as

[219] Oberndorfer 2014 (n 69), pp 29-54.
[220] For further reading, see: Stephen Gill, *Power and Resistance in the New World Order* (Plagrave 2008), ch 3.3.
[221] Robert Knox, 'Against Lawsterity' (*Salvage,* 13 December 2018) <https://salvage.zone/against-law-sterity/> accessed 13 May 2022.
[222] Natalia Mamonova and Jaume Franquesa, 'Populism, Neoliberalism and Agrarian Movements in Europe: Understanding Rural Support for Right-Wing Politics and Looking for Progressive Solutions' (2019) 60(4) Sociologia Ruralis 710, pp 714-715; Hanspeter Kriesi and Takis S. Pappas (eds), *European populism in the shadow of the great recession* (ECPR Press 2015).
[223] John Erik Fossum, 'The crisis, a challenge to representative democracy in the European Union?' in John Erik Fossum and Agustín José Menéndez (eds), *The European Union in crises or the European Union as crises ?* (Arena Centre for European Studies 2014), p 653.

well as those at a national level. Further, reforms undertaken in the legal frameworks of different policy areas (for example, company law, competition law, contract law, intellectual property law, trade law, etc.) are also important to understanding socio-economic rights, social reproduction, and the balance between capital and labour and should be analysed further.

Moreover, this study focused solely on the EU, but as neo-liberal capitalism—and its associated culture of individualism—has expanded across the globe, similar or comparative studies may be fruitful in ascertaining the status of collective labour rights in other jurisdictions. In this vein; comparing, linking, and analysing collective labour rights in domestic and regional spheres influenced by the practice of international financial institutions may yield interesting results.

VI. Conclusion

The issue of collective labour rights in the European Union has far-reaching implications for the wider integration project. As stated in the introduction, collective labour rights have implications for and touch on an array of the discourses that dominate the European public sphere (if one is to accept that such a public sphere exists).

The jurisprudence of the CJEU is as such that collective labour law has effectively been curtailed in hard law, relegated to soft law, non-binding declarations, and governance systems. Without these fundamental collective rights, trade unions are reduced to simple lobbying groups or social movements. Further, it deprives workers of any relative control of their socio-economic conditions, leaving them at the mercy of the dominant classes. In a Europe of inequality, precarity, un- and under-employment, working poor, and zero-hour contracts—collective labour rights are simply too important to be left to judges to trade off as they wish.[224] Bold political decisions, taken with democratic input, are needed—orthodoxy under which 'principles associated with democracy and social rights are subsumed by a mode of governing that operates in accordance with capital accumulation, marketisation and economic rationality' needs to be challenged at its normative core and

[224] Alan Bogg '*Viking and Laval:* International Labour Law Perspective' in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2014), p 72.

foundations.[225] A Social Europe is simply not possible when workers are *de facto* deprived of several fundamental labour rights—no amount of non-binding declarations or pillars can fix that.

While this thesis dealt overwhelmingly with jurisprudential and legal analysis of the topic at hand, it would be remiss not to point out that inter-class domination and socio-economic inequalities are not the results of juridical privileges., Rather bourgeois law governing capitalist society is a tool utilised to exacerbate these conditions. As students at Université Paris Nanterre so eloquently put it in May 1968, 'le droit bourgeois est la vaseline des enculeurs du peuple'.[226] At the core of these issues is the atomisation of the individual, austerity, the commodification of everyday life, wage slavery, etc. These are, at their root, not solely the result of juridical machinations but rather the economic and social relations of our society. Although, even if one accepts this, the bourgeois foundations of European law must (continue to) be combatted from both within the institutions and outside the established frameworks in order to reconquer the law and unlock its emancipatory and transformative potential. To quote Herbert Marcuse:

> 'Working according to the rules and methods of democratic legality appears as surrender to the prevailing power structure. And yet, it would be fatal to abandon the defences of civil rights and liberties within the established framework.'[227]

It is difficult to be hopeful. The overture window in policymaking has narrowed, and we are living through a period of capitalist realism—famously, 'there is no alternative' to the dog eat dog, ever-expanding, individualised, selfish world of neo-liberal capitalism. Whatever constituted the European social model in the first place was so eroded by crisis management that Mario Draghi, at the time President of the ECB, declared that the 'European Social Model has already gone!'[228]

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[225] Michael A. Wilkinson, 'Authoritarian liberalism in Europe: a common critique of neoliberalism and ordoliberalism' (2019) 45(7-8) Critical Sociology 1023, p 1024.
[226] Sophie Wahnich, 'Reconquérir la loi contre le droit bourgeois' (2016) 3 Vacarme 128, p 128.
[227] Herbert Marcuse, *An Essay on Liberation* (Beacon Press 1969), p 65.
[228] Quoted in: Brian Blackstone, Matthew Karnitschnig, and Robert Thomson, 'Europe's Banker Talks Tough' *The Wall Street Journal* (New York, 24 February 2012) <https://www.wsj.com/articles/SB10001424052970203960804577241221244896782> accessed 06 January 2022.

We cannot accept 'actually existing Europeanisation',[229] or whatever passes for solidarity in today's Europe. After the Conference on the Future of Europe, Treaty change now seems more likely now than it has in the past 15 years. An amelioration of the situation may come with Treaty change but true transformative change will likely not. For this, a wider societal change is also needed.

In the wake of the past 15 years of repeated crisis and facing stagflation, not to mention total climate collapse, we need to collectively find the courage to rethink everything. We must reject the axioms that form the basis of today's Frankenstein Europe and rekindle alternative visions for continental integration based on emancipation, substantive democracy, and true solidarity—that of Mandel, of Spinelli. We must recognise both our commonalities and differences so we can construct authentic solidaristic bonds. We must remember the struggles that came before us and recapture the spirit of the civilians of the Carnation Revolution in Portugal; of the partisans in Italy; of the workers of the LIP factory in Besançon, France.

We have to dream in order to escape the nightmare. There *is* an alternative—another world is possible. Let us meet our masters and demand together '*¡lo queremos todo!*', '*nous voulons tout!*', '*vogliamo tutto!*', and '*wir wollen alles!*', reminding them that 'for our demands most moderate are, we only want the earth!'[230]

[229] Richard Hyman, 'Trade unions, Lisbon, and Europe 2020: From dream to nightmare' (2012) 28(1) International Journal of Comparative Labour Law and Industrial Relations 5, pp 25-28.
[230] James Collonny, 'We Only Want the Earth' (*Marxist Internet Archive*) <https://www.marxists.org/archive/connolly/1907/xx/wewnerth.htm> accessed 29 April 2022.

BIBLIOGRAPHY

Zoe Adams, ‘A structural approach to labour law’ (2022) Cambridge Journal of Economics <https://doi.org/10.1093/cje/beac008> accessed 02 May 2022

Toke Aidt and Zafiris Tzannatos, ‘Unions and Collective Bargaining: Economic Effects in a Global Environment (World Bank 2002).

Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (G. M. Goshgrian tr, Verso 2014).

Perry Anderson, ‘Ever Closer Union?’ *London Review of Books* (London,7 January 2021) https://www.lrb.co.uk/the-paper/v43/n01/perry-anderson/ever-closer-union.

Anthony Arnull, ‘The Many Ages of the Court of Justice of the European Union’ in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (OUP 2020).

C.J. Arthur, ‘Towards a Materialist Theory of Law’ (1977) 7(1) Critique: Journal of Socialist Theory 31.

Maurizio Atzeni, ‘Workers’ organizations and the fetishism of the trade union form: toward new pathways for research on the labour movement?’ (2021) 18(8) Globalisations 1349.

Rémi Bachand, ‘Taking political economy seriously: Grundriss for a Marxist analysis of international law’, in Paul O’Connell and Umut Özsu (eds), *Research Handbook on Marxism and Law* (Edward Elgar 2021).

Dan Banik, 'Legal empowerment as a conceptual and operational tool in poverty eradication' (2009) 1(1) Hague Journal on the Rule of Law 117.

Isaac D. Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' (1977) 11(3) Law & Society Review 571, pp 575-581.

Catherine Barnard, ‘Viking and Laval: an introduction’ (2008) 10 Cambridge Yearbook of European Legal Studies 463.

Marija Bartl, ‘Socio-economic imaginaries and European private law’ in in Poul F. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (CUP 2020).

Zygmunt Bauman, *Collateral Damage: Social Inequalities in a Global Age* (Polity 2013).

Vincenzo Bavaro and Vincenzo Pietrogiovanni, 'A hypothesis on the economic nature of labour law: The collective labour freedoms’ (2018) 9(3) European Labour Law Journal 263

Michael Blauberger and Susanne K. Schmidt, 'The European Court of Justice and its political impact' (2017) 40(4) West European Politics 907

Honor Brabazon, 'Nomocratic social change: Reassessing the transformative potential of law’ in neoliberal times' in Paul O’Connell and Umut Özsu (eds), Research Handbook on Marxism and Law (Edward Elgar 2021).

Andreas Bücker and Wiebke Warneck (eds), *Reconciling fundamental social rights and economic freedoms after Viking, Laval and Rüffert* (Nomos 2011).

Verity Burgmann, *Globalization and Labour in the Twenty-First Century* (Routledge 2016).

Tamara Ćapeta, ‘Ideology and Legal Reasoning at the European Court of Justice’ in Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing 2018).

Loris Caruso, Riccardo Emilio Chesta and Lorenzo Cini, ‘Le nuove mobilitazioni dei lavoratori nel capitalismo digitale:una comparazione tra i ciclo-fattorini della consegna di ciboe i corrieri di Amazon nel caso italiano’ (2019) 1 Economia e società regionale 61.

Sabino Cassese, ‘Legal Education Under Fire’ (2017) 1 European Review of Private Law 143.

Emilios Christodoulidis and Marco Goldoni, ‘The political economy of European social rights’ in Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2017).

Lorenzo Cini, ‘(Re)mobilizing labour. A lesson from recent labour struggles in Italy’ (2021) Social Movement Studies <https://doi.org/10.1080/14742837.2021.2010532> accessed 09 April 2022.

Pablo Ciocchini and Stefanie Khoury, ‘A Gramscian Approach to Studying the Judicial Decision-Making Process’ (2018) 28 Critical Criminology 75.

Paul Craig and Gráinne de Búrca, ‘EU – Law Text, Cases, and Materials’ (OUP 2008).

Jan Cremers, 'Economic freedoms and labour standards in the European Union' (2016) 22(2) Transfer: European Review of Labour and Research 149.

A. Claire Cutler, 'Gramsci, Law, and the Culture of Global Capitalism' (2005) 8(4) Critical Review of International Social and Political Philosophy 527.

ACL Davis, *Perspectives on Labour Law* (2nd edn, CUP 2009).

Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014).

Albert S. Foulkes, ‘On the German Free Law School (Freirechtsschule)’ (1969) 55(3) Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 367.

Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2014).

Sacha Garben, ‘The European Pillar of Social Rights as a Revival of Social Europe’ in Maurizio Ferrera (ed), *Towards a European Social Union The European Pillar of Social Rights and the Roadmap for a fully-fledged Social Union: A Forum Debate* (Centro Einaudi 2019).

Stephen Gill and A. Claire Cutler, *New constitutionalism and world order* (CUP 2014)

Marco Goldoni, ‘Introduction to the material study of global constitutional law’ (2019) 8(1) Global Constitutionalism 71.

Dieter Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21(4) European Law Journal 460.

Piotr Grzebyk, ‘The right to strike as a fundamental right’ in in Beryl ter Haar and Attila Kun (eds), *EU Collective Labour Law* (Edward Elgar Publishing 2021).

Stefano Guibbini, ‘On the Vanishing Functional Autonomy of European Labour Law (And Some Dangerous Counter-Movements)’ in Poul F. Kjaer (ed), *The Law of Political Economy Transformation in the Function of Law* (CUP 2020).

Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14(10 European Constitutional Law Review 172.

Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (CUP 2006).

Hans-Peter Haferkamp, ‘Jurisprudence of Concepts’ in Stanley N Katz (ed), *Oxford International Encyclopaedia of Legal History, Volume 3* (OUP 2009).

Bob Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011).

Ran Hirschl, 'The judicialization of politics' in Robert E. Goodin (ed), *The Oxford Handbook of Political Science* (OUP 2011).

Thomas Horsley, The Court of Justice of the European Union as an Institutional Actor (CUP 2018).

Stefanie Hürtgen, 'The Competitive Architecture of European Integration: European Labour Division, Locational Competition and the Precarization of Work and Life' in Stefan Schmalz and Brandon Sommer (eds), *Confronting crisis and precariousness: Organised labour and social unrest in the European Union* (Rowman & Littlefield International Ltd. 2019).

Christian Joerges, ‘Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation’ (2014) 15(5) German Law Review 985.

Christian Joerges and Christian Kreuder-Sonnen, ‘European Studies and the European Crisis: Legal and Political Science between Critique and Complacency’ (2017) 23 European Law Journal 118.

Otto Kahn-Freund, ‘The Impact of Constitutions on Labour Law’ (1976) 35(2) The Cambridge Law Journal 240.

Andreas Kalyvas, ‘The Stateless Theory’ in Stanley Aronowitz and Peter Bratsis (eds), *Paradigm Lost: State Theory Reconsidered* (University of Minnesota Press 2002), pp 123-136.

Ionnais Kampourakis, ‘Bound by the Economic Constitution: Notes for Law and Political Economy in Europe’ (2021) 1(2) Journal of Law and Political Economy 301.

Hermann Kantorowicz, *Der Kampf um die Rechtswissenschaft* (Carl Winter's Universitätsbuchhandlung 1906).

R. Daniel Kelemen and Susanne K. Schmidt, ‘The European Court of Justice and legal integration: a perpetual momentum?’ in Susanne K. Schmidt and R. Daniel Kelemen (eds), *The Power of the European Court of Justice* (Routledge 2013).

Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L. Paulson trs, first published 1934, OUP 1997).

Duncan Kennedy, ‘The Distinction Between Adjudication and Legislation’ in Larry May and Jeff Brown (eds), *Philosophy of Law: Classic and Contemporary Readings* (Blackwell Publishing Ltd. 2010).

Jasmine Kerrissey, ‘Collective Labor Rights and Income Inequality’ (2015) 80(3) American Sociological Review 626.

Claire Kilpatrick, ‘Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry’ (2015) EUI Working Paper Law 2015/34.

Robert Lecourt, *L’Europe des Judges* (Bruylant 1976).

Koen Lenaerts, ‘Discovering the Law of the EU’ in Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing 2018).

Gérard Lyon-Caen, ‘Permanence et renouvellement du Droit du travail dans une économie globalisée’ (2004) Le Droit Ouvrier 49

J. Magnus Ryner and Alan W. Cafruny, *The European Union and Global Capitalism* (Bloomsbury 2016).

Jess Mant, ‘Working Politically: Combining Socio-Legal Tools to Study Experiences of Law’ (2020) 21 German Law Journal 1464.

Herbert Marcuse, *An Essay on Liberation* (Beacon Press 1969).

Karl Marx, *Capital: A Critique of Political Economy, Vol I* (Friedrich Engels ed, first published 1867, Lawrence & Wishart 1977)

Karl Marx, *Capital: A Critique of Political Economy, Volume III* (Friedrich Engels ed, first published 1894, Lawrence & Wishart 1977).

Søren Mau, ‘‘The Mute Compulsion of Economic Relations’: Towards a Marxist Theory of the Abstract and Impersonal Power of Capital’ (2021) 29 (3) Historical Materialism 3.

Linus J. McManaman, 'Social engineering: The legal philosophy of Roscoe Pound' (1958) 33 John's Law Review 1.

Hans-W. Micklitz, ‘The Transformative Politics of European Private Law’ in Poul F. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (CUP 2020).

Layna Mosley and Saika Uno, ‘Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights’ (2007) 40(8) Comparative Political Studies 923.

Lukas Oberndorfer ‘A New Economic Governance Convergence through Secondary Legislation’ in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart Publishing 2014).

Evgeny B. Pashukanis *Law and Marxism* (Transaction Publishers 2002).

Daiva Petrylaité, ‘Overview of common issues and evolution of EU Collective Labour Law’ in Beryl ter Haar and Attila Kun (eds), *EU Collective Labour Law* (Edward Elgar Publishing 2021).

Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press 2001).

Jérôme Porta and Tatiana Sachs, 'Conceptual issues on representation and solidarity' in Beryl ter Haar and Attila Kun (eds), *EU Collective Labour Law* (Edward Elgar Publishing 2021).

Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law (Case C-426/11 Alemo-Herron v Parkwood Leisure)' (2013) 42 Industrial Law Journal 434.

Thomas Prosser, 'Is the "new phase" of the European Social Dialogue the development of an autonomous and effective form of social dialogue?' (2006) Warwick Papers in Industrial Relations 82/2006.

Urška Šadl and Fabien Tarissan, 'The Relevance of the Network Approach to European Case Law' in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (OUP 2020).

Andrea Salvatore and Mariano Croce, *The Legal Theory of Carl Schmitt* (Routledge 2014).

Fritz W. Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'' (2010) 8(2) Socio-Economic Review 211.

Fritz W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40(4) Journal of Common Market Studies 645.

Stefan Schmalz, Brandon Sommer and Antonio Loffredo, 'Confronting crisis and precariousness in the European Union' in Stefan Schmalz and Brandon Sommer (eds), *Confronting crisis and precariousness: Organised labour and social unrest in the European Union* (Rowman & Littlefield International Ltd. 2019).

Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph W. Bendersky tr, first published 1934, Praeger Publishers 2004).

Dorte Sindbjerg Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* (OUP 2015).

Dorte Sindbjerg Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union' (2015) 48(12) Comparative Political Studies 1622

Joseph William Singer, 'Legal Realism Now' (1988) 76 California Law Review 465.

Jan M. Smits, 'What Is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship A Transatlantic Dialogue* (CUP 2017).

Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004).

Wolfgang Streeck, 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 1(1) European Law Journal 31.

Manfred E. Streit and Werner Mussler, 'The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'' (1995) 1(1) European Law Journal 5.

Arianna Tassinari and Vincenzo Maccarrone, 'Riders on the Storm: Workplace Solidarity among Gig Economy Couriers in Italy and the UK' (2020) 34(1) Work, Employment and Society 35.

Alain Touraine, Michel Wieviorka, and François Dubet, *The Workers' Movement* (CUP 1987).

Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002).

Ntina Tzouvala, 'Neoliberalism as legalism International economic law and the rise of the judiciary' in Ben Golder and Daniel McLoughlin (eds), *The Politics of Legality in a Neoliberal Age* (Routledge 2019).

Ntina Tzouvala, 'Continuity and rupture in restraining the right to strike' in Honor Brabazon (ed), *Neoliberal Legality* (Routledge 2016).

Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (CUP 2015).

Vilija Vekyvyte, ‘Right to Strike in the EU after Accession to the ECtHR’ in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2014).

Fotis Vergis, ‘Collective Labour Rights As An Element Of The Substantive Constitutionalisation Of EU Law After The Treaty Of Lisbon’ (PhD thesis, University of Cambridge 2020).

Fotis Vergis, ‘Back to the Future: Rediscovering the Non-Economic Role, Value and Scope of Labour Law and Collective Labour Institutions in a Changing World’ in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Hart Publishing 2019).

Sophie Wahnich, ’Reconquérir la loi contre le droit bourgeois’ (2016) 3 Vacarme 128.

Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017).

J.H.H. Weiler, ‘The Transformation of Europe’ (1991) 100(8) Yale Law Journal 2403.

Michael A. Wilkinson and Hjalte Lokdam, ‘Law and Political Economy’ (2018) LSE Law, Society and Economy Working Papers 7/2018.

Erik Olin Wright, ‘Working-Class Power, Capitalist-Class Interests, and Class Compromise’ (2000) 105(4) American Journal of Sociology 957.