

**BREXIT, THE END OF HISTORY AND THE CONSTITUTION OF  
SOCIAL EUROPE: CRITICAL REFLECTIONS ON THE  
EUROPEAN PILLAR OF SOCIAL RIGHTS AND ITS LIMITS**

***LE BREXIT, LA FIN DE L'HISTOIRE ET LA CONSTITUTION DE  
L'EUROPE SOCIALE : REFLEXIONS CRITIQUES SUR LE SOCLE  
SOCIAL DES DROITS SOCIAUX ET SES LIMITES***

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**ABSTRACT**

This article analyses Brexit and the declaration of the European Pillar of Social Rights from the perspective of constitutional and economic theory of labour law. It concludes that both events are constitutional moments, in that they are examples of political choices in which values of a political community are expressed in some symbolic form. However, it is argued that the Social Pillar is merely the latest example of a serious failing in European social policy, in which existential constitutional statements of values are prioritised ahead of ontological constitutional frameworks which create the necessary economic and social actors and institutions to achieve those very social goals. The success of the internal market was built on the clear legal establishment of economic actors and rights, based on the influential constitutional ideas of ordoliberal economic thought and its innate legal theory. In contrast, the European Social Model is based on the assumption of the existence of stable employment relationships, however European

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Union law does not make any serious attempt to construct or guarantee such relationships. In part, this is due to methodological errors within labour law scholarship. To succeed, Social Europe should focus on the creation of a European Employment Contract.

**KEY WORDS:** Brexit, European Pillar of Social Rights, European Union, Economic Constitution, Social Constitution, Labour Law

## **RESUME**

Cet article analyse le Brexit et la proclamation du Socle européen des droits sociaux du point de vue de la théorie constitutionnelle et économique du droit social. Il conclut que ces deux événements sont des « moments constitutionnels », en ce sens que ce sont des exemples de choix politiques où les valeurs d'une collectivité politique sont exprimées sous forme symbolique. Cependant, l'auteur du présent article soutient que le Socle des droits sociaux n'est que l'exemple le plus récent d'une défaillance sérieuse de la politique sociale européenne, dans laquelle les énoncés existentiels constitutionnels de valeurs sont prioritaires par rapport aux cadres constitutionnels ontologiques qui créent les acteurs économiques et sociaux nécessaires pour atteindre ces mêmes objectifs sociaux.

Le succès du marché intérieur s'est fondé sur l'établissement juridique clair d'acteurs et de droits économiques, une structure fondée sur les idées constitutionnelles influentes de la pensée économique ordolibérale et de sa théorie juridique innée. En revanche, le modèle social européen se fonde sur l'hypothèse de l'existence de rapports d'emploi stables, mais le droit de l'Union européenne ne fait aucune tentative sérieuse, ni pour construire ni pour garantir de tels rapports. Cela est dû en partie à des erreurs méthodologiques dans le droit social. Pour atteindre ses buts, l'Europe sociale devrait se concentrer sur la création d'un contrat de travail européen.

**MOTS-CLES:** Brexit, Socle Européen des Droits Sociaux, Union Européenne, Constitution Économique, Constitution Sociale, Droit Social

## *SUMMARY*

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## 1. Introduction

This article explores the repeated failure of 'Social Europe'<sup>2</sup> to achieve its stated goals. These goals were recently reiterated in the European Pillar of Social Rights, the so-called Social Pillar, solemnly declared in Gothenburg November 2017.<sup>3</sup> The Social Pillar constituted the remaining 27 Member States' reaction to the United Kingdom's notification of its intention to leave the European Union,<sup>4</sup> in the form of a unanimous and formal articulation of core principles and values. It is argued in this article that while the European Union's attempt to revisit its constitutional values and goals in the face of such a constitutional crisis is coherent and sensible, its attempt to do this through a catalogue of values merely repeats the errors of the past, in which social goals have been stated in 'existential' constitutional statements of intent, in stark contrast to the 'ontological' constitutive function of the founding Treaties of the European Union. The latter have positively created the social and economic actors and frameworks necessary for the attainment of the internal market. There exists, on this view, a deep tension between, on the one hand, the social aspirations of the European Union and, on the other, the realities of a missing legal framework which has thereby failed to construct the very working relationships upon which the much vaunted 'Social Europe' is predicated.

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<sup>2</sup> In this article the terms Social Europe and European Social Model are used relatively interchangeably, as appropriate. These are of course contested notions, which are not always applied to the European Union itself, but rather to shared social policy and labour law heritages of particularly Western European policy models during the post-war era. In this article, the terms refer to the policy aspirations and legislative structures of the European Union itself, as these have emerged, taken shape and grown in importance in recent decades. It is hoped that adopting an ecumenical meaning for these terms will allow the main thesis of this article to be more clearly stated.

<sup>3</sup> European Pillar of Social Rights [2017].

<sup>4</sup> Following the procedure laid down by Art 50 TEU, the United Kingdom served notice of intention to leave the European Union on 29 June 2017. Theresa May, 'Notification of Intention to Withdraw from the European Union' (29 March 2017)

<[http://www.consilium.europa.eu/media/24079/070329\\_uk\\_letter\\_tusk\\_art50.pdf](http://www.consilium.europa.eu/media/24079/070329_uk_letter_tusk_art50.pdf)>.

By constructing an ontological account of the role of law in *constituting* social and economic identity and exchange, it is argued that the legal and constitutional theory which formed the basis of the 'economic' phase of European integration has not been followed during the 'social' phase of integration which has followed. In this manner, the 'social' within Europe has been relegated to an inferior status, precisely due to the failure to construct the working relationships which this social vision is based upon. While the idea that the 'social' gives way to the 'economic' is one which emerges from much writing on the European Union and international economic integration more generally, this article breaks with that vast cacophonous body of literature to argue that it has been precisely the efforts to rectify this 'social deficit' which have cemented this failure. The emergence of a 'social' *acquis* of European Union law at constitutional level has often come to adopt the 'existential' trappings of constitutional language, by expressing the identity of its polity through its values and social aims. However, in so doing, it has failed to capture the ontological essence of constitutionalism, whereby social or economic actors are literally constituted by the law. It is this ontological role of the law which allows us to talk of the European Union as a genuinely constitutional project, at least in the economic sphere.

It is argued that while the Court of Justice of the European Union has become increasingly aware of this problem, its attempts to construct an 'autonomous' meaning of 'worker' in EU law have been rather anaemic and, in any case, are not of the scale necessary to create the stable employment relationships which the European Social Model is predicated upon. However, labour law scholarship and ideology has also shared in these category errors, having emerged within a form of naïve historical materialism, rejecting the constitutive function of law, and, more recently, sometimes falling into a form of jurisprudential naivety, in which it has been thought sufficient to engage in a form of juridical virtue signalling through the use of the rhetoric of social values and human rights. It is argued that without the necessary legal constitution of the economic relationships, in particular working relationships, upon which these values and rights are predicated, such goals will remain illusory. While the passing of ambitious legislation such as the Social Pillar does not do this directly, it might offer an opportunity for judicial and policy-focused reflection, which forces greater focus on constituting working relationships within the shared European economic and social space. It is argued that a fundamental right to a stable employment relationship should be included within the canon of Social Europe, or at least understood as implicit within the current rights and principles. In more concrete terms, the European Union should, it is concluded, pass secondary legislation creating the framework for a European Employment Contract.

## **2. Brexit and the End of (European) History**

When Francis Fukuyama famously wrote, in 1989, that the collapse of Eastern

European Communism constituted the ‘end of history’, the subsequent geo-political developments, in particular in the context of the European Union (EU or Union), seemed to prove his rather ambitious thesis broadly correct. Just as Fukuyama had suggested, the Fall of the Berlin Wall seemed to mark a departure from the previous decades and centuries of ideological dialectics and struggles, and the final hegemony of ‘Western liberal democracy’.<sup>5</sup> The progressive enlargements of the EU to include many of the former Eastern Bloc countries, and most of the remaining Western European Nation States who, until that time, had remained outside the EU, saw the Union grow from 12 Member States to 28, with several more countries seemingly on a conveyor belt towards membership. The expansion of the Union in this manner seemed to prove Fukuyama right for various reasons. Firstly, the EU adopted its current name upon the implementation of the Maastricht Treaty,<sup>6</sup> reflecting a deeper political form of integration and a deeper focus on those shared values of so-called ‘Western Democracy’. Secondly, and more importantly perhaps, the Union’s apparent triumph was significant, because it placed at supra-constitutional level, and therefore outside of ordinary political debate within Member States and within the Union, the core ‘economic freedoms’ and broader economic logic of the Union’s Treaties. Thirdly, these developments seemed to mirror a deeper international process of market-based reforms, often encapsulated as the ‘Washington Consensus’<sup>7</sup> which appeared irrepressible notwithstanding unease from various quarters.

The subsequent reforming Treaties added various layers of nuance, underlying the pluralist nature of the goals of the Treaty, but were largely a continuation of this process, shifting to Union-level the internal compromises of the modern liberal democracy while seeking to respond to modern challenges thought to require coordinated responses.<sup>8</sup> As the Court of Justice of the European Union’s progressively implemented the EU’s ‘economic constitution’,<sup>9</sup> the process appeared irreversible.<sup>8</sup> Brexit is, however, a stark demonstration of the slight ridiculousness of such teleological accounts of history, or at least any attempt to point to any particular moment in history as its end point. Regardless of the economic models or ideologies we wish to see within the European Union’s

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<sup>5</sup> ‘What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government’ in Francis Fukuyama, ‘The End of History?’ [1989] *The National Interest* 3. Fukuyama developed these skeleton ideas into a more extensive monograph in Francis Fukuyama, *The End of History and the Last Man* (Simon and Schuster 2006).

<sup>6</sup> The Treaty on the European Union [1992].

<sup>7</sup> John Williamson, ‘A Short History of the Washington Consensus’ (2009) 15 *Law & Bus Rev Am* 7. <sup>8</sup> Successively, Treaty of Amsterdam (1999); Treaty of Nice (2003) and Treaty of Lisbon (2009). <sup>9</sup> Luis Miguel Poiaras Pessoa Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Bloomsbury Publishing 1998).

<sup>8</sup> See the interesting discussion in this respect in Christian Joerges, ‘What is Left of the European Economic Constitution? A Melancholic Eulogy’ (2005) 30 *European Law Review* 461.

complex and internally contested Treaty structures, and notwithstanding the rather inchoate rationality which might have motivated the vote in favour of leaving the European Union by the British electorate in 2016, the political earthquake which such a popular vote has unleashed, and its constitutional and legal consequences, are a demonstration of the fragility of any apparent ideological hegemony. The rejection of the *Treaty establishing a Constitution for Europe* around a decade earlier in similar national plebiscites in France and the Netherlands was a similar warning about over-confidence in the inevitability of the realisation of political projects.

In fact, this article will seek to demonstrate that, in the context of the European Union at least, Fukuyama's thesis, as perhaps with all teleological theories of history,<sup>9</sup> is in fact simultaneously both too modest and too ambitious. It is too ambitious because it prioritises certain perceived developments towards an apparently final social ordering, usually meet with the approval of the author, and mistakes this for a historical inevitability rather than something based on a combination of numerous factors at a given point in history viewed from a certain standpoint. However, it is too modest because theories such as Fukuyama's do not contain an account of how such perceived historical *teloi* or 'end points' can, in fact, become 'sticky', thereby becoming resistant to change, even in the face of ideological evolution. It is the contention of this paper, and its discussion of the European Union, that it is the European Union's *legal* structures, when conceived of in their function as constitutive of social and economic reality, which represent the grain of truth within teleological visions of history such as Fukuyama's, in that where law can effectively recreate social ontology, that is the deep structuring of social and economic life, these become more resistant to change.

Brexit itself can be straightforwardly, if somewhat reductively, understood as a political *choice* to reject a certain legal or constitutional order, namely that of the EU. What Brexit creates therefore is an area of 'autonomy' for the British polis to reorder its legal and political priorities, potentially in ways which are not permitted within the framework of the European Union. EU law has, thereby been 'de-constitutionalised' within the British political and legal context.<sup>10</sup> This underlines the fact, which is perhaps obvious when stated so starkly, but underappreciated in particular contexts, that questions of social and

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<sup>9</sup> A variety of such accounts can be located within influential work. See generally: Georg Wilhelm Friedrich Hegel, *Phenomenology of Spirit* (Motilal Banarsidass Publ 1998); Karl Marx and Friedrich Engels, *The Economic and Philosophic Manuscripts of 1844 and the Communist Manifesto* (Prometheus Books 2009); Kojève, *Introduction to the Reading of Hegel: Lectures on the Phenomenology of Spirit* (1 edition, Cornell University Press 1980); Gerald Allan Cohen, *Karl Marx's Theory of History: A Defence* (Oxford University Press 1978).

<sup>10</sup> This is not a statement of the likelihood that any such goal might be more likely to be achieved or that there is any greater degree of legitimacy in such a course of action. It is simply a statement of the 'legality' of legislative and policy choices outside of the European Union.

economic ordering are based, to a great extent, on the translation into legal forms of political *choices*.

However, upon reflection, what is striking is the minimal impact which Brexit will have upon the ‘British Social Model’, that is the legally constructed framework within which working relationships are formed and regulated. While some core Directives, in particular in the fields of Health and Safety,<sup>11</sup> working time,<sup>12</sup> atypical work,<sup>13</sup> equal treatment,<sup>14</sup> and information and consultation<sup>15</sup> will cease to be binding upon the British legislator upon departure from the EU, the basic structures and frameworks of employment and labour law have remained *largely* untouched by over four decades of membership of the Union. This is particularly significant due to the progressive emergence of the so-called European Social Model and the increasing rhetorical importance of ‘Social Europe’ within political and scholarly discussion of the Union.<sup>18</sup> Indeed, a renewed focus on Social Europe among the remaining 27 Member States was the immediate reaction to the Brexit vote, in the form of the new *Social Pillar*, as described above.

In fact while an increased political focus on ‘Social Europe’ within the Union has resulted in numerous significant Treaty changes over the past few decades, and indeed new forms of legislative process, political integration, competences and entire Treaty sections, the impact upon national social models has been relatively modest. This paper seeks to explain and indeed dissolve this apparent paradox. It attempts to draw the distinction between, on the one hand, those constitutional choices within the EU which have (re-)constituted social and economic actors on the one hand, which have longlasting and constitutive status and, on the other hand, those constitutional choices which are merely symbolic or communicative. As the European Union deals with the constitutional questions which Brexit poses, it becomes aware, yet again, that the European Union is a political project which is legally constructed, rather than vice versa. However, if the Union is genuinely committed to developing Social Europe and achieving its goals it must take account of the fact that the law must be used to reconstitute social and economy reality within the Union, recreating employment and labour relations in the necessary manner to achieve the social goals which have become the mantra of recent political rhetoric surrounding the European Union.

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<sup>11</sup> European Framework Directive on Safety and Health at Work [1989]

<sup>12</sup> Directive 2003/88/EC, Working Time Directive [2003]

<sup>13</sup> Council Directive 1999/70/EC, Fixed Term Work Directive [1993]; Council Directive 97/81/EC, Part-Time Work Directive [1997]; Directive 2008/104/EC, Temporary Agency Work Directive [2008]

<sup>14</sup> Council Directive 2000/43/EC, Race Directive [2000]; Council Directive 2000/78/EC, Equality Framework Directive [2000], and the extensive primary and secondary legislation concerning equal pay between men and women, stemming from Art 157 TFEU and related competences.

<sup>15</sup> For instance, see Directive 2002/14/EC, Information and Consultation of Employees Directive [2002]. There exists a larger body of secondary legislation concerning the social impact of the movement and merging of firms and the protection of certain substantive and procedural rights of employees affected. <sup>18</sup> Brian Bercusson, ‘The European Social Model Comes to Britain’ (2002) 31 Ind Law J 209.

In less abstract terms, the paper argues that the European Union has a social model based on a plethora of catalogues of rights and values, all of which are premised on their achievement through the exploitation of stable employment relationships. However, Union law does almost nothing to legally construct and maintain such relationships, assuming that these will either emerge naturally or be constituted automatically at national level. This is a grave category error on the part of EU law, reflecting deeper ambiguities within labour law scholarship and ideology, which has tended to underestimate the importance of the constitutive function of law and overestimate its regulatory capacities. The legal and constitutional history of the Union shows, in fact, that the historical success of the EU has in fact been predicated on the deep legal constitution of the economic structures which its dominant economic ideology favours. It is this *legal* constitution of reality which has created some semblance of irreversibility of history, rather than Fukuyama's pseudo-Hegelian thesis of ideological teleology. As the European Union faces its current political choices about the kind of Union it wants to be, it must ensure that its existential responses, whatever these are, be translated into ontologically stable social forms and structures rather than rhetorical devices and laudable aspirations.

### **3. The Existential European Social Model and the Social Pillar**

The previous section sought to provide a superficial account of the attractiveness of Fukuyama's teleological understanding of history in the context of the European Union, understanding the EU as the expression of the hegemony of a clear and final political and social ideology. In reality of course, even if the EU's current state were the ideological end point of history, it would of course be churlish to think of it as the result of one single identifiable ideology, unpolluted by others. On the contrary, like all complex constitutional arrangements, the European Union is a project with no one single clear essence, instead being a pluralistic compromise seeking to balance various, aims, some of which may be explicit, some more unstated or even inchoate. Tensions between these various goals, and between those of Member States and the Union, come to the fore at moments of crisis from time to time, although such tensions bubble under the surface all the time. In the context of the Union, this balancing act is more complex still because of the additional complexity of the matter of national sovereignty and constitutional identity of Member States,<sup>16</sup> meaning that certain questions were traditionally reserved for Member States due to their symbolic or historical significance, or the perception that such matters would be better or more legitimately achieved at national level.<sup>17</sup>

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<sup>16</sup> Indeed, this tension is now reflected in the Treaties: Article 4(2) TEU provides that '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities. See academic discussion of the meaning of this provision in Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) 13 Cambridge Yearbook of European Legal Studies 195.

<sup>17</sup> This careful balancing act, in the context of social policy and labour law at least, was originally achieved through the placing of social matters at national level, implementing the recommendations of the



The legally binding goals of the EU, which have been progressively added to over the past six decades or so as the Union has grown in remit, can be found primarily in the opening Articles of the Treaty on the European Union (TEU), some of which possess a certain literary merit due to their verve and lyricism, in keeping with the ambitious mission statements of other modern Constitutional documents.<sup>21</sup> These Treaty provisions reveal that the Union has evolved significantly from its early stated goals of the establishment of the ‘Common Market’ (later renamed internal market), a customs union and joint competition policy in Arts 2 and 3 of the Treaty of Rome 1957. Aside from some subsidiary or indirect aims, this was the extent of the legally stated goals of the EU at its inception. In contrast, the TEU’s goals now include a prodigious list of aims and values for the Union, which reflect an expanded set of ambitions for the EU, a changing global economy and a generally diminished role for the Nation State, but also a perception of the failure of the Union’s original constitutional settlement to guarantee and promote social standards and other aims.<sup>22</sup>

Progressively, therefore, goals such as equality, environmental protection and labour rights have been included in both the legally binding goals of the EU, and, to some extent, the competences which the Union is able to exercise to achieve these goals. As this article seeks to underline, while some such goals were left out of the Union’s original aims due to their emergence as political priorities only later, such as environmental protection, this was not the case for all such exclusions. The so-called social-deficit of the original European Economic Community, its apparent lack of concern for social matters such as employment protections, was not due to a perception that these matters lacked importance, but rather was a constitutional choice to place such matters firmly within the hands of Member States, who were in the process of constructing national social models of different shades of post-war era welfarism.

Indeed, it is in relation to work and the regulation of working relationships where subsequent constitutional changes can be seen most easily. At the Union’s inception, there was a deliberate political decision, ratifying the conclusions of the *Spaak* and *Ohlin* Reports,<sup>23</sup> to exclude matters of employment protections and social standards

*Spaak* Rport, published by the secretariat of the Intergovernmental Committee in preparation for the Treaty of Rome 1957, and of the *Ohlin* Report, International Labour Organisation, ‘Social Aspects of European Economic Co-Operation: Report by a Group of Experts (Summary)’ (1956) 74 *International Labour Review* 99. As the EU has taken on more competences and this division has become more confused, the fraught principle of subsidiarity has sought to mediate this tension, see Article 5(3) TEU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

<sup>21</sup> Art 2 TEU is particularly striking: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. <sup>22</sup> Art 3 TEU contains a prodigious list of sometimes competing aims, as stretches to several paragraphs, incorporating social, environmental, cultural and economic aims. The second paragraph focuses in

particular on core social goals: 'It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'.

<sup>23</sup> (n. 20)

more generally from the integration process at European level. The justification for this was several-fold, but was largely based on a combination of two mutually reinforcing considerations. On the one hand, the creation of an internal market, in which the factors of production were fully mobile, was seen as sufficient to create the economic conditions to ensure raising living standards among Europeans; increased social standards would follow from this economic progress and increased aggregate wealth. On the other hand, these matters were considered to be better left to Member States, with welfare and labour models being sensitive matters attached on various levels to the nation state. A combination of these two factors resulted in a model of 'regulatory competition', in which Member States were free to experiment with social models which suited their circumstances, while the free movement of workers and the other factors of production, guaranteed by the Treaties, meant that economic actors could choose the regime which struck the best balance in this regard.<sup>18</sup>

Over the intervening sixty years or so, this original constitutional settlement was revisited on several occasions, with an increasing consensus around the need to harmonise certain social standards, in particular employment rights, at European level, at least in certain areas. The reasons for this have been complex, and have responded to particular political exigencies at different times. However, it is possible to sketch a broad genealogy of the current constitutional arrangements in this regard. The progressive attainment of the internal market, and, in particular, the growth in the mobility of capital and goods, created an apprehension, both in regard to the European economic space and in the global economy, that a lack of concerted harmonisation of employment standards, at least in certain areas, would lead to a so-called 'race-to-the-bottom' in which Member States would respond to a threat of capital flight, or alternatively seek to attract additional inward investment, by lowering labour standards, and this would, in turn, force other Member States to seek to progressively undercut each other. The upshot of this process would be the progressive undercutting the social standards which the promise of increased aggregate wealth was supposed to ensure, with consequent impacts on equality and the perceived legitimacy of the entire European project. The competences of the European Union, and the aims of the Union itself, have therefore progressively expanded to include

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<sup>18</sup> For a discussion of these constitutional choices, see generally Luke Mason, 'Labour Law, the Industrial Constitution and the EU's Accession to the ECHR' in Kanstantsin Dzehtsiarou and others (eds), *Human rights law in Europe: the influence, overlaps and contradictions of the EU and the ECHR* (Routledge 2014).

<sup>25</sup> Such competences are found throughout the TFEU, but are mostly found within Title X on 'Social Policy'. The major shift in focus in the Treaty can be seen in the Social Protocol to the Maastricht Treaty [1991], which was eventually incorporated into the main body of the Treaty following the UK's ratification in the late nineties.

employment protections and labour rights, at least of certain types,<sup>25</sup> although core matters such as pay and collective bargaining have remained matters for Member States.<sup>19</sup>

However, these developments have also periodically taken a more symbolic form, with the passing of ‘existential’ constitution-like documents, which proclaim the importance of such aims or rights, seeking to locate ‘Europe’ as a protector of these rights, rather than a threat to the national model of social protections. Such existential proclamations have sometimes come in the form of Bill of Rights-type documents, which enumerate social rights or principles, such as the *European Social Charter* of 1989 or the *European Pillar of Social Rights* of 2017. At other times, they have been included in the language of the legally binding goals of the Union, such as the current Article 3 of the TEU, which states while that the aim of the Union is a ‘highly competitive social market’, it will also ‘combat social exclusion and discrimination, and shall promote social justice and protection’. These developments have been accompanied by an increased focus more generally on fundamental rights within the European legal order, including those relating to labour law and social policy, both in legislative form and through their progressive recognition by the Court of Justice of the European Union.<sup>20</sup>

This sweeping genealogy of ‘Social Europe’ is crucial for several reasons. Importantly, it shows the continued significance of ‘work’ and ‘workers’ within the predominant models of social justice even as we move into a post-national and fully post-industrial phase of European history. The social goals of the Union are inextricably linked to the maintenance of the crucial nexus of social justice within the post-war model of the welfare state: the employment relationship. While recent European employment policy has shifted to a broader focus on ‘employment security’ and ‘flexicurity’, which seek to combine labour market inclusion and flexibility with social rights connected to participation in the labour market rather than any particular single job, this policy agenda has remained largely focused on the desirability and importance of long-term stable employment relationships as the ultimate goal and continued basis of social policy.<sup>21</sup> The increased focus on social rights connected to employment over the past decades does not, in this way, demonstrate an innovation in a fundamental sense, but rather a shift to the transnational level of certain social goals which were previously understood as the competence of the Nation State. There is, therefore, a deep continuity embedded in the emerging ‘Social Europe’. Its

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<sup>19</sup> Art 153(5) explicitly states ‘The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs’.

<sup>20</sup> For instance those rights and principles contained in Title IV ‘Solidarity’ in the Charter of Fundamental Rights of the European Union, or the recognition in cases such as Case C-438/05, *Finnish Seamen's Union v Viking Line APB* [2007] ECR I 10779, in which a right to strike was recognised in EU law for the first time in Court of Justice jurisprudence.

<sup>21</sup> See in particular, how, even in the Green Paper which firmly established the EU’s flexibilisation policy agenda, the ultimate goal was the establishment of stable working relationships: Commission, ‘Modernising labour law to meet the challenges of the 21st century’. COM (2006) 798 final.

success or failure will therefore depend on its ability to achieve these goals through the structures and frameworks which it establishes.

It is the contention of this author that an examination of the overarching legal framework within the economic and social sphere reveals a deep flaw in this vision of Social Europe. By revisiting the constitutional theory which was the basis of the legal foundations of the internal market, we can see that these same deliberate ‘constitutive’ legal steps have not been taken in relation to employment relationships. In this way, European law has failed to legally constitute the very relationships upon which its social model, and by extension its political legitimacy, are based. The constitutional and economic history of the European Union reveals that economic relationships are legally *constituted*: they come to exist because they are made by norms. The focus on the existential elements of the European constitutional project, of ‘who we are’ in an identitarian sense, has been at the expense of the ontological aspects of the European social constitution. By failing to constitute, at European level, working relationships, the existence of work in the form that it is presumed to exist within our current social and political models, is placed in peril.

So, while Brexit gives the European Union and the United Kingdom an opportunity to consider their ‘constitutional’ priorities, it is crucial that the lessons of the history of the European Union be borne in mind. Most centrally, it is important to understand that while ‘existential’ constitutional statements of values, social rights and social models are important for all manner of political and symbolic reasons, such documents do not, in themselves, create the legally constituted relationships upon which they are predicated. The social reality, or ontology, of the employment relationships necessary to achieve many of the social goals which are central to such documents as the Social Pillar are analytically prior to the values or goals which social models seek to achieve. The following section places this discussion within the current crisis of labour law and the employment relationship more generally.

#### **4. The nature labour law and its latest ‘crisis’**

It has become customary to think of labour law as being ‘in crisis’.<sup>22</sup> Broadly understood, labour law is the body of legislation, other legal sources, and industrial practices which regulate the terms of work and their generation. Labour law emerged in the Twentieth Century in all industrialised legal systems as a response to political and intellectual

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<sup>22</sup> Michel Coutu, ‘Crise Du Droit Du Travail, Pluralisme Juridique et Souveraineté’ (2007) 12 Lex Electronica; Nicola Countouris and Mark Freedland, *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013); Michel Coutu and others, ‘Broken Paradigms: Labor Law in the Wake of Globalization and the Economic Crisis’ (2012) 34 Comp Lab L & Pol’y J 565; Bob Hepple, ‘The Crisis in EEC Labour Law’ (1987) 16 Indus LJ 77; Massimo D’Antona, ‘Diritto Del Lavoro Di Fine Secolo: Una Crisi Di Identità’ [1998] *Revista Giuridica del Lavoro e della Previdenza Sociale* 322.

pressures which perceived that the formal legal status of the individual benefitting from formal equality did not adequately reflect the shared located realities of the worker, and the specificities of their working relationships. It was thought that these shared socially located aspects of work might justify an autonomous body of law and legal principles.<sup>23</sup> While each national legal experience differed markedly in this respect, some broad trends can be identified within the emergence of this body of law, in particular the development of minimum employment standards, standardised patterns of work, representative mechanisms or collective forms of establishing certain core labour terms, and protections against various risks inherent in the employment relationship, in particular that of losing one's job, and all manner of more specific risks, such as threats to health and safety or the more general threat of mistreatment.<sup>24</sup> Throughout this period, there existed a curious paradox within labour law's regulation of the employment relationship. On the one hand, the relation between the employee and the employer was seen as a locus of risk to be regulated, not amenable to the ordinary principles of freedom of contract and private law more generally. On the other hand, labour law was premised on the deliberate *reinforcing* of that relationship, and indeed its legal constitution, through the construction of the stable employment relation or contract of employment, as both a source of value in itself, and as a locus of regulation for all manner of other goals which labour law encapsulated. In this manner, labour law, predicated on the risks and shared locatedness which characterised the social reality of the subordination and domination of the employment relationship, came to see the maintenance and stability of such relationships as crucial to the achievement of multifarious social goals. These goals evolved and expanded as time went by, and indeed the goals to which employment regulation is supposed to serve continue to expand. Such goals might include the generation of income and wealth distribution, equality more broadly, the collection of taxes, the source of training, or industrial democracy. In more recent times, the employment relation has been utilised to also serve broader goals such as anti-discrimination, social inclusion, productivity, familyfriendly policies, or the 'work-life balance'.

As a consequence, the employment relation, in this stable form, came to be a key marker for both personal and collective identity, in both the modern usage in terms of 'sense of self' or worth, and the more classical usage in terms of 'sameness' within a social framework. It is crucial to note therefore that the employment relationships which emerged to form this bedrock of labour law, and by extension of social policy and organisation of late industrial Western democracies, was one which was largely legally constructed, rather than being something which only emerged organically and was later 'tamed' by social pressure and legislation. The emergence of unfair dismissal legislation

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<sup>23</sup> Hugo Sinzheimer, 'Über Den Grundgedanken Und Die Möglichkeit Eines Einheitlichen Arbeitsrechts Für Deutschland (1914)' in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (Europäische Verlagsanstalt 1976).

<sup>24</sup> Bob Hepple (ed), *The Making of Labour Law in Europe* (Mansell 1986).

in particular underlines this point, with stable forms of employment relationship seen as paramount, at least in the absence of other good competing reasons, competing reasons which were legally regulated and proceduralised, creating ‘legitimate’ reasons for the termination of employment relationships.

Now, this model of labour law has been increasingly seen as being ‘in crisis’ over recent decades. This crisis has many forms, but these can be expressed succinctly through the progressive erosion of the very locus of regulation, that is the employment relation, which was delineated in the previous sections. A combination of technological, industrial, economic and political changes and trends have emerged over the past three decades or so which have encouraged the fragmentation of working practices, meaning that they do not fit easily into those stable relationships which bring with them both risk and the opportunity to guard against that risk through progressive regulation to achieve the aims of social policy.<sup>25</sup> This crisis has taken slightly different forms in different contexts, and, in reality, has various causes. However, as working practices become more flexible and the contractual nexi between those who work and those who direct or pay for that work become more diverse, the less uniform the nature of work becomes and the harder it is to maintain the guise of ‘unity’ and ‘autonomy’ of labour law through the shared social locatedness of stable employment relationships. In some respects, this change has been the result of deliberate steps within employment policy at national and European level, whereby rigid employment practices are seen as both a brake on productivity, employment levels and broader social inclusion. The resulting policy changes have seen what has been called the ‘normalisation’ of atypical work,<sup>26</sup> whereby the legal system and State policies encourage the use of new models of employment by reducing resistance to their usage, both by employers and employees. More broadly, such policies, have built upon intellectual developments in labour law thinking over the past two decades or so which have sought to detach the social protections which labour law has traditionally sought to provide from employment relationships themselves, and to re-attach them to participation in the labour market.<sup>27</sup>

This policy direction moves away from a model of job security and towards a model of ‘employment security’ in which people are given the tools to thrive within a more flexible labour market, in which their specific job is not guaranteed.<sup>35</sup> This vision builds loosely on the influential work of economist Amartya Sen, in particular on capabilities, and the

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<sup>25</sup> There is a vast literature on these matters. The recent work of Prassl captures much of the nuance:

Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press 2018); Jeremias Prassl, *The Concept of the Employer* (Oxford monographs on labour law, Oxford University Press 2015).

<sup>26</sup> Nicola Kountouris, ‘EU Law and the Regulation of “Atypical” Work’ (Edward Elgar Publishing 2016).

<sup>27</sup> For a scholarly version of this form of perspective see, Simon Deakin and Frank Wilkinson, *The Law Of The Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, Incorporated 2005). <sup>35</sup> Nuna Zekic, ‘Job Security or Employment Security: What’s in a Name?’ (2016) 7 European Labour Law Journal 548.

influential *Supiot Report*,<sup>28</sup> which sought to understand social policy and labour law in Europe *au delà de l'emploi*. Most significantly, these changes were expressed in the Green Paper on 2006,<sup>29</sup> which officially adopted the language of flexicurity within EU institutions, and the coordinated policy mechanisms in the intervening period have sought, at least at a rhetorical level, to encourage the implementation of such policies. In many ways, the realities of the implementation of these policies, coming as they have during a period of deep financial and debt crisis within Europe, have been characterised by the progressive *deregulation* of employment law, and the deconstruction of the employment relationship, without the commensurate reconstruction of social protections and guarantees around labour market participation. This has often been achieved around the distribution of so-called bail-outs, with labour market reform being a condition of receipt of funds.<sup>30</sup>

This process has of course been accompanied, and indeed partly motivated, by a series of technological and industrial changes which have progressively changed the nature of working practices within post-industrial economies. While so-called 'atypical' working practices, such as 'work on demand' have always existed, and indeed sometimes dominated within certain industries at certain times, the proliferation of such practices of fixed-term, temporary, flexible, part-time, agency and other non-standard forms of work has accelerated in recent years, at times with the tacit or explicit support of legislators, at times creating a deep divide between standard employees and those in non-standard employment arrangements. This process has been accelerated by the rapid emergence of the connected phenomena of 'platform capitalism' and the 'gig economy', in which working relationships are mediated by technology which creates an environment of trust in the platform while putting end-users and workers in direct contact, removing some of the salient elements of the classical employment nexus, such as control or the obligation to accept work.<sup>31</sup> With these challenges facing the prevalence and stability of the traditional employment relationship come a number of connected issues, largely located around the lack of an identifiable legally classifiable relationship which can be properly legally classifiable as one of employment.<sup>32</sup> Instead, such workers tend to exist within the hinterland of employment law, and within relationships which possess at least some of the components of ordinary commercial relationships. In various legal contexts, there have been efforts to overcome this problem by creating new intermediate categories of

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<sup>28</sup> Alain Supiot, *Au-Delà de l'emploi : Transformations Du Travail et Devenir Du Droit Du Travail En Europe* (Flammarion 1999); Amartya Sen, 'Capability and Well-Being' (Oxford University Press 1993).

<sup>29</sup> (n. 28)

<sup>30</sup> For a general discussion of the confrontation of the aspirations of flexicurity and the realities of the financial crisis, see Jason Heyes, 'Flexicurity in Crisis: European Labour Market Policies in a Time of Austerity' (2013) 19 *European Journal of Industrial Relations* 71.

<sup>31</sup> Valerio De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdfund, and Labor Protection in the Gig-Economy' (2015–16) 37 *Comp Lab L & Pol'y J* 471.

<sup>32</sup> Prassl, *The concept of the employer* (n 32).

work which seek to extend certain social protections to such workers.<sup>33</sup> In other contexts, there have been attempts to argue that such relationships are already captured by existing legal tests for employment status.<sup>42</sup> The issue which emerges however is a significant one: employment law and practice has become characterised by working relationships which are either unclassifiable (or not easily classifiable) as employment relationships, or which have become so varied and unstable that there remains little unity. The upshot of this ‘crisis’ is significant: the European Social Model remains largely based around the existence of stable employment relationships, even in the context of the promotion of ‘flexicurity’, where stable employment and quality work remains the ultimate aspiration. Without this stable nexus, the goals of Social Europe will be illusory. Yet European law has been naïve about its own contribution to the progressive (legal) deconstruction of these economic relationships. This will be explored further in the following section, which seeks to understand the deep assumptions (and errors) in the economic constitutionalism and social constitutionalism of the European Union.

## 5. Constituting Economic Reality and the forgotten influence of Ordoliberal Constitutional Theory

This crisis of labour law has caused many labour lawyers to seek to reconsider the fundamental nature and assumptions of their field.<sup>34</sup> At times, this has been in line with current changes, seeking to relocate labour law within a broader understanding of new relationships, or the labour market more generally. In other cases, labour law thinkers have sought to underline the moral or legal importance of their field, in the face of political and industrial change, by reconceptualising labour rights as human rights, seeking to link their thinking to a growing focus on both fundamental rights discourse in law in general and in private law in particular.<sup>3536</sup> However, certain thinkers have sought to take this re-examination further, seeking to revisit the seminal works from labour law’s genealogy

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<sup>33</sup> Guy Davidov, ‘Who is a Worker?’ (2005) 34 *Industrial Law Journal* 57; Guy Davidov, ‘Setting Labour Law’s Coverage: Between Universalism and Selectivity’ [2014] *Oxford J Legal Studies* 543. <sup>42</sup> Prassl, *The concept of the employer* (n 32).

<sup>34</sup> See the wide-ranging discussions in the contributions to Guy Davidov and Brian Langille, *The Idea of Labour Law* (Oxford University Press 2011).

<sup>35</sup> Judy Fudge, ‘The New Discourse of Labor Rights: From Social to Fundamental Rights’ (2007–08) 29 *Comp Lab L & Pol’y J* 29; Hugh Collins, ‘Theories of Rights as Justifications for Labour Law’ in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (Oxford University Press 2011); Virginia Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3 *European Labour Law Journal* 151. <sup>45</sup> See for instance: Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford monographs on labour law, Oxford University Press 2014); Michel Coutu, ‘With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labor Law’ (2012) 34 *Comp Lab L & Pol’y J* 605. <sup>46</sup> Hugo Sinzheimer, ‘Über Soziologische Und Dogmatische Methoden in Der Arbeitsrechtswissenschaft (1922)’ in *Arbeitsrecht und Rechtssoziologie : gesammelte Aufsätze und Reden* (Europäische Verlagsanstalt <sup>36</sup>) vol 2; Hugo Sinzheimer, ‘Die Soziologische Methode in Der Privatrechtswissenschaft (1909)’ in



and genesis, to better understand the fundamental place or role of labour law as a separate area of law.<sup>45</sup> This section seeks to engage in a similar exercise in legal theory, seeking to underline the fundamental importance of the law in constituting employment relationships as a political choice. In particular, this section will analyse the constitutive nature of law in economic relationships, and to sketch how the success of the European Union has been premised on precisely this understanding of law's constitutional role. A failure to appreciate this function, in particular on the part of labour lawyers, but also others including many who wish to re-assert the values and goals of labour law, has had the effect of deconstructing the very working relationships which much social policy and meaning currently rest upon, even in the midst of the shift to a 'flexible' labour market.

Labour law has always found itself, at least in its more intellectually ambitious forms, at the complex intersection of private and constitutional law on the one hand, and of sociology and legal theory on the other.<sup>46</sup> An attempt to explain and justify an area of law which combines private law relationships with the broader collective policy aims of constitutional law inevitably finds itself engaged with a discussion of the social realities of power and economics at work.<sup>47</sup> Moreover, the complex relationship between social pressure and political and economic forces, on the one hand, and the aspirations of the legal system to regulate and shape these forces, on the other, necessitates deep reflection on the relationship between law and social reality. One of the very earliest attempts to capture this complex nexus came in the hugely influential work of Hugo Sinzheimer, sometimes known as the father of labour law, who developed the complex, multilayered conception of labour constitution (*Arbeitsverfassung*).<sup>48</sup> Sinzheimer was writing at a time during which the very notion of labour law as a separate field was emerging, partly under his influence.<sup>49</sup> This took place within a European intellectual environment where his peers were developing a sociological vision of law which sought to understand law itself within a broader range of social sources of regulation, for instance in the realm of the workplace, which had their own rules and sources of normativity.<sup>50</sup> This forced early labour lawyers to reflect on the role of law, and its potential limits, in ensuring justice and other goals in the working environment. It is to be argued here that the key insights of Sinzheimer in relation to the constitutional function of law have been lost to labour law to some extent, and that a proper reflection on the deeper meanings of Sinzheimer's work on labour law and constitutions can help to frame the inconsistencies of the current legal and constitutional framework in relation to work in Europe.

Now, it has become modish to analyse labour law through a 'constitutional' lens, and indeed there is a longstanding tradition of seeing labour law as somehow fundamentally related to the 'constitution' of a national legal system.<sup>51</sup> In many cases, what this

<sup>47</sup> Otto Kahn-Freund, *Kahn-Freund's Labour and the Law* (Edited by Paul Davies and Mark Freedland) (3rd edn, Stevens 1983).

<sup>48</sup> Hugo Sinzheimer, *Grundzüge Des Arbeitsrechts* (2nd edn, Gustav Fischer 1927); Hugo Sinzheimer, 'Das Wesen Des Arbeitsrechts (1927)' in *Arbeitsrecht und Rechtssoziologie : gesammelte Aufsätze und Reden* (Europäische Verlagsanstalt 1976). <sup>49</sup> Hugo Sinzheimer, 'Eine Theorie Des Sozialen Rechts (1936)' in *Arbeitsrecht und Rechtssoziologie : gesammelte Aufsätze und Reden* (Europäische Verlagsanstalt 1976) vol 2; Sinzheimer, 'Über den Grundgedanken und die Möglichkeit eines einheitlichen Arbeitsrechts für Deutschland (1914)' (n 30); Hugo Sinzheimer, 'Das Problem Des Menschen Im Recht (1933)' in *Arbeitsrecht und Rechtssoziologie : gesammelte Aufsätze und Reden* (Europäische Verlagsanstalt 1976) vol 2.

<sup>50</sup> Georges Gurvitch, 'Théorie Pluraliste Des Sources Du Droit Positif' in *Annuaire de l'Institut International de Philosophie du Droit et de Sociologie Juridique* (Recueil Sirey 1934) vol 1; Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction 1936); Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion* (G Fischer 1929); Sinzheimer, 'Die Soziologische Methode in der Privatrechtswissenschaft (1909)' (n 46).

<sup>51</sup> Harry Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 19 Social & Legal Studies 403; Luciana Santos Trinidad Capelari, 'Constitucionalização Dos Direitos Trabalhistas: O Princípio Da Proteção Ao Trabalhador' (2009) 12 Âmbito Jurídico; Salvador Del Rey Guanter, 'Notas Sobre Los Derechos Fundamentales Inespecíficos y El Contrato de Trabajo En La Más Reciente Doctrina Del Tribunal Constitucional' [1998] Trabajo: Revista andaluza de relaciones laborales 9; Carin A Clauss and Paul M Secunda, 'Introduction: Symposium on the Constitutionalization of Labor and Employment Law' (2012) 27 Wis J L Gender, &

involves is the analysis of the employment relation through the lens of fundamental human rights, often seeking to defend the notion that certain labour standards should be respected because they find their moral root within constitutional principles, such as equality or dignity. These are important and creative forms of legal and constitutional reasoning and provide important frameworks for judicial and critical interpretation of employment law provisions. Other 'constitutional' perspectives on labour law seek to analyse the place of labour law provisions, standards or principles themselves within the constitutionally entrenched level of a legal system. These are of course fascinating and necessary debates, relating the standards of employment regulation to the core values of a legal system, a constitution and a political community. They are also important in the modern global legal system, because they allow a critical dialogue with international or transnational fundamental rights discourses and legal frameworks. However, while there are many virtues to such perspectives on labour law, they tend to fall into a particularly grave form of category error which can overlook the insights of Sinzheimer's labour constitution. The recent advent of the Social Pillar is the latest example of such muddled thinking. These assertions require some explanation and location within both the broader intellectual history of labour law and the constitutional and legal history of the European Union.

The upshot of Sinzheimer's work is, it is argued, that the law, whether deliberately or more latently, necessarily (*re-*)constitutes the actors in the industrial sphere and enables and limits their ability to generate norms in the employment context. This is a complex and in some ways controversial claim which appears to conflict with certain assumptions within much labour law scholarship. Upon examination, it is less contentious than it might first appear, simply stating that *any* normative ordering (such as that of the workplace) has its latent constitutional norms, which, to whatever extent, must *by definition* constitute

the actors who act within that normative ordering to generate sub-constitutional norms (such as the terms and conditions of employment). If this is true, one key task for the labour lawyer is therefore to identify the actors as defined by law in any given legal system.

Other scholars of European labour law have also recently made similar observations about the relevance of Sinzheimer's work, in particular Ruth Dukes<sup>52</sup> and Florian Rödl.<sup>53</sup> Both authors make a deliberate attempt to delve into recent use of

Society 93; Judy Fudge, 'Constitutionalizing Labour Rights in Europe' in Tom Campbell and others (eds), *The legal protection of human rights : sceptical essays* (Oxford University Press 2011).

<sup>52</sup> Ruth Dukes, 'The Constitutional Function of Labour Law in the European Union' in Neil Walker and others (eds), *Europe's Constitutional Mosaic* (Hart 2011); Ruth Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (Oxford University Press 2011); Dukes, *The labour constitution* (n 45).

<sup>53</sup> Florian Rödl, 'Arbeitsverfassung' in Armin Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht* (Springer-Lehrbuch, Springer Berlin Heidelberg 2009); Florian Rödl, 'The Labour Constitution of the European Union' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2009); Florian Rödl, 'Constitutional Integration of Labour Constitutions' in Erik Oddvar Eriksen and others (eds), *Law, Democracy and Solidarity in a Postnational Union* (Routledge 2006).

'constitutional' language in labour law, and both identify seek to develop Sinzheimer's account of a labour or economic constitution, discussed above. They assert, furthermore, that the core meaning of this idea is the assertion that labour law possess a '*constitutional function*'. Dukes, for instance, focuses on the ability of (and indeed moral necessity for) labour law to be *built* according to the principles of justice which inform the constitution in general.<sup>37</sup> This, according to Dukes, is possible precisely because the market is constructed as a matter of political choices, which can be illuminatingly termed 'constitutional'. Equally, Rödl underlines his belief that Sinzheimer's basic concept of the labour constitution helps us to understand the interdependence of legal norms and social power in a systematic and precise way.<sup>38</sup>

That is to say, that the 'constitutional' status of labour law is a reflection of the fact that labour norms, actors and goals are the result of deliberate political choices which are, in turn, reflected in laws. As such, he argues, labour law is not merely a negligible superstructure built upon the material reality of society, but rather constitutive of that social reality.<sup>56</sup> Social relations such as in the labour context are, says Rödl, 'constituted' by law. Therefore, he notes, '[t]he individual and collective rights of social actors constitute the foundation of the labour constitution. Logically prior are those individual rights that define social actors in their social roles.'<sup>57</sup>

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<sup>37</sup> Dukes, 'Hugo Sinzheimer and the constitutional function of labour law' (n 52).

<sup>38</sup> See Rödl in E Christodoulidis and R Dukes, 'Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot' (2010) 19 Social & Legal Studies 217. <sup>56</sup> *ibid* 224 <sup>57</sup> Rödl, 'The labour constitution of the European Union' (n 53).

The point which both writers seem to be underlining is the ability of the law to radically alter the constellation of economic power within the context of labour law and, therefore, the non socially *a priori* status of current economic rights or actors.<sup>39</sup> This is well summarised by Arthurs<sup>59</sup> in his attempt to understand Dukes' position as a description of how labour law can construct the 'new normal', that is the *basic normative ordering* which is the starting point for labour and employment relations. Dukes and Rödl are right therefore to intuit this socio-legal functional aspect in

Sinzheimer's concepts of the labour constitution, and, by extension, his broader concept of the *Wirtschaftsverfassung*, the *economic* or *industrial* constitution. While these ideas, when used by Sinzheimer, primarily drew upon the *values* and *moral* connotations of the idea of 'constitution', they *also* implied this functional element. Here, we are concerned exclusively with this second aspect. To understand it more fully, and to relate it to the European Union, we can draw upon the work of another group of scholars, near-contemporaries of Sinzheimer, who also worked on the idea of the *Wirtschaftsverfassung* or economic constitution.<sup>40</sup> These are the *ordoliberals*, whose work, upon analysis, was equally fraught with competing 'constitutional' claims. The work of the ordoliberals is particularly important, because it provided the basic framework for the so-called 'economic constitution' of the European Union, and can, in large part, explain the continued success of the Union's original core goals.<sup>41</sup>

Just as Sinzheimer's ideas of the *labour* and *economic* constitution elide a series of overlapping 'constitutional' ideas, ordoliberal thinkers developed a similarly complex and multifaceted idea of the *economic constitution*. This notion, and terminology has become highly influential in current discussions of both law and economics,<sup>42</sup> in particular in discussions of various aspects of EU integration and the internal market, as well as more generally.<sup>43</sup> However, the core *constitutional* claim in ordoliberal thought is often *lost*,

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<sup>39</sup> Similar arguments can be found in Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) 15 European Law Journal 1; C Joerges and F Rödl, "'Social Market Economy" as Europe's Social Model?' [2004] Available at SSRN 635362; Emiliios Christodoulidis, 'A Default Constitutionalism: A Disquieting Note on Europe's Many Constitutions' (Ashgate, Farnham 2010). <sup>59</sup> Arthurs (n 51). In particular, Arthurs points out that In particular Arthurs says that what this allows us to do is 'to "re-engineer" the deep structures of society'.

<sup>40</sup> VJ Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism' [2004].

<sup>41</sup> Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 4 Colum J Eur L 27; Manfred E Streit and Werner Mussler, 'The Economic Constitution of the European Community: From "Rome" to "Maastricht"' (1995) 1 European Law Journal 5.

<sup>42</sup> Streit and Mussler (n 61); Sauter (n 61); David J Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 American Journal of Comparative Law 25; Maduro (n 9).

<sup>43</sup> Knut W Nörr, 'On the Concept of the "Economic Constitution" and the Importance of Franz Böhm from the Viewpoint of Legal History' (1996) 3 European Journal of Law and Economics 345; Knut W Nörr, 'Economic Constitution: On the Roots of a Legal Concept' (1996) 11 JL & Religion 343. <sup>64</sup> Vanberg (n 60).

confused with a prescriptive approach to the organisation of the economy according to the principle of an entrenched *Ordnungspolitik*,<sup>64</sup> that is a private ‘transactional’ economy guaranteed by the legal *entrenchment* of certain economic rights.

Like Sinzheimer, Böhm<sup>44</sup> and Eucken,<sup>45</sup> the lawyer and economist respectively at the centre of the ordoliberal movement, were concerned about the inadequacies of materialist or historicist accounts of the economy which did not perceive the crucial role of *rules* in building and framing economic interaction. They proposed an iconoclastic idea in economics at the time that the law was foundational in economic interaction, and that the application of economic theory to reality required its translation into legal techniques.<sup>46</sup> While Böhm advocated a form of entrenchment of economic rights, entrenchment was not the core meaning of ‘constitution’ in ordoliberal thought. Böhm’s ‘constitutional’ perspective is related to the claim that the law *constitutes the economic sphere*.<sup>47</sup> He argued that the economy was *constructed* as a result of *political choices* which had, to be effective, to be entrenched in *law*, although not necessarily formal Constitutional law. For Böhm it was *private law* more generally which actually possessed this *constitutional function*. In this respect, therefore, Böhm shares Dukes’ insight, that the organisation of the economy is a matter of *political choice* because such choices can change the identity and the potential scope for action of the actors involved.

The point here is that such claims must, if they are true, be entirely separable from the normative claims of economic and social justice with which they are used in conjunction. They are conceptual *social* claims about the *function* of the law, with this function being meaningfully characterised as ‘constitutional’. The idea of *Ordnung* – order – in *ordoliberalism* should not therefore be linked to the normative arguments of political economy but rather been seen as a form of *institutional economics*,<sup>48</sup> which asserts that the structure of the norms and institutions which frame economic interaction are seen as fundamental in ordering economic activity and relationships.<sup>49</sup>

This is a controversial claim in *labour law* in particular because of its (labour law’s) ‘pluralistic’ history on the fringes of *State* law in many countries, and, indeed in influential scholarship about the European Social Model.<sup>50</sup> However, the force of the

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<sup>44</sup> Franz Böhm, *Wettbewerb Und Monopolkampf* (Heymann 1933).

<sup>45</sup> Walter Eucken, *Die Grundlagen Der Nationalökonomie* (Springer 1989).

<sup>46</sup> Heinz Grosseckttler, ‘Franz Böhm as a Pioneering Champion of an Economic Theory of Legislative Science’ (1996) 3 *European Journal of Law and Economics* 309.

<sup>47</sup> Böhm (n 65); Nörr, ‘On the concept of the “economic constitution” and the importance of Franz Böhm from the viewpoint of legal history’ (n 63).

<sup>48</sup> James M Buchanan, *Freedom in Constitutional Contract : Perspectives of a Political Economist* (1st. ed., Texas A & M University Press 1977) 4–8.

<sup>49</sup> Vanberg (n 60) 4–5.

<sup>50</sup> Antonio Lo Faro, *Regulating Social Europe* (Hart 2000). See in particular, Lo Faro’s extensive critical usage of the key concept of autonomy.

argument presented here suggested that, in fact, legal rules also necessarily constitute market, and therefore social, *actors*, just as, for instance, the norms of the political constitution necessarily constitute the institutions which generate the laws within a legal system. While this makes intuitive sense with regard to the legal creation of legislative institutions for instance, this sounds an improbable claim in the context of the private economy, where most actors are in fact *natural persons* (or groups of persons) who cannot be metaphysically ‘constituted’ nor granted agency by a constitutional ‘moment’ or its legal iteration. However, this would be to misunderstand the social function of the ‘material constitution’, to adopt a Kelsenian term, where law holds sway in a particular social sphere. One is only able to act within such a framework for norm generation by following the paths provided by that framework. In a very important sense, therefore, all material constitutions create new social actors, in that they create potential avenues for agency and cut off others. At least where the legal system is effective, all laws possess their latent material constitutional underpinnings which create actors.<sup>51</sup>

This is significant in the economic or social sphere generally because it underlines that, regardless of whether there is any form of transcendental economic or social actor is worthy of moral respect or economic priority, such an actor can only act within a system of economic or social interaction if that actor finds agency within, ie is *constituted* by, the rules of that system. In the labour law context, this means that, regardless of political, economic or social pressure, norms of interaction are necessarily present which latently or deliberately constitute individual or collective actors in the industrial sphere who then create the norms which govern employment. Just as constitutional law ‘constitutes’ the citizen (as well as many other institutional actors), labour law constitutes the actors in its own sphere. This is the social constitution in a material sense.

Taking a step back from this rather theoretical discussion, we can apply these general considerations to the specifics of the development of the European Union. The ordoliberal influence in the Union is well documented, however this work generally focuses on the underlying economic rather than legal or constitutional theory implicit therein. In fact, the European Union’s central legal tenets are a perfect case study for the application of ordoliberal economic constitutionalism, explaining the success of the original goals of the creation of a particular form of market economy within the EU. Firstly, the four freedoms,<sup>52</sup> combined with the proactive stance of the Court of Justice regarding their

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<sup>51</sup> For an exploration of similar questions from different viewpoints, see the contributions to Simon Deakin and Alain Supiot (eds), *Capacitas: Contract Law and the Institutional Preconditions of a Market Economy* (Hart 2009).

<sup>52</sup> See, principally, Arts 30, 34, 110, 63, 49, 45 and 56 TFEU, which transform into clear economic rights, and by extension actors, the aspirational norms within Art 3(3), ‘The Union shall establish an internal market’, and Art 26(2) TFEU, ‘The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’.

direct effectiveness,<sup>53</sup> had the effect of creating economic actors within the legal space of the EU. This shifted the Treaties from being a series of binding agreements between States, under the general principle of *pacta sunt servanda*, to a framework for a new economic and social ordering. Through the creation of these actors and their potential pathways for cross-border economic activity, the law served an ontological social purpose. This method has been successful precisely because it removes the direct requirement for each Member State to translate broader free trade goals into national frameworks, which leaves such aspirations vulnerable for all manner of reasons. As the EU has grown in complexity and ambition in the subsequent decades, this firm basis of economic actors and rights has meant that attempts to positively or negatively harmonise EU law have been far more effective than they would otherwise have been, because they have built directly upon an enforceable legally constructed core. This is to be contrasted with the European Social Model, whose genesis and development was discussed above. Since the 1970s, there has been a growing perception that some of the social aspects which were originally reserved for national competence within the EU should be shifted to Union-level in order to allow harmonised and coordinated action. In the intervening decades, the Treaties and other important Declarations and instruments have increasingly underlined the centrality of social goals, rights and principles within the European project. Now, while these changes can be understood as being a constitutionalisation of social priorities and labour law in a symbolic sense, their significance is limited because of their general existential rather than ontological nature, that is to say they have not created a material social constitution. They have a tendency to be a statement of what values the Union represents, rather than an economic reconfiguration of the relationship between actors in the manner described in the preceding paragraphs regarding the constitution of the internal market. The following section seeks to describe the legal construction of working relationships and the anaemic social model of the European Union due to its merely existential nature, and the Court of Justice's limited attempts to remedy this problem.

## **6. The European Union's failed constitution of the worker**

The previous section's thrust was based on an account of labour law which posited that it is the law which actively constructs social and economic actors, a realisation which explains the success of the internal market project within the Union, and EU law's more general success in regulating that market, whether through regulation or deregulation, due to a firm legal basis as an object for regulation. Now, as European labour law and social priorities have seemingly gained in prominence and importance within the EU legal order, one might have expected a similar success in that field also. In certain areas this is probably the case, and it is not the goal of this paper to cast doubt on the modest successes

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<sup>53</sup> This is the line of cases famously funding their genesis in Case 26/62, *van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

of the Union in certain social fields. However, there has now emerged a pattern of 'existential posturing' within the recent history of the Union, with the successive promulgation of ambitious statements regarding, and catalogues of, central social principles and rights, seeking to place these at the heart of the EU legal order. The social model of the European Union is expressly based on many social goals and questions of social justice being attained, in part at least, through the utilisation of the employment relationship. There is a pre-supposition that such structures will form the basis of the necessary transformations which promote fairness and equity, allowing people to share in the prosperity of the Union's market economy and to be treated fairly while so doing. There is a continuation, in this regard, of the Twentieth Century paradigm whereby the power and exchange nexus of the employment relationship is seen as both a source of risk and a source of potential for social justice and social meaning.

Although recent policy documents have sought to encourage more 'atypical' forms of working, these are seen as either examples of, or stepping stones towards, employment relationships. While there are numerous other social models imaginable which are not based on the employment relationship as the core motor for social meaning, stability and justice, none of these are currently seemingly on the agenda within the European Social Model. The veracity of the preceding paragraphs is not difficult to demonstrate. If one takes the social rights contained in the Social Pillar, or in the Charter, or those principles mentioned in Art 3 TEU, these are clearly based on the continued, or even increased, importance of the employment relationship for their attainment. What is interesting in this regard is that these are not simply labour law instruments, but rather are more general statements of social goals and aspirations, and indeed rights, which see the central nexus of employment as their basis. The central problem with this model is the absence of that relationship from the Union's legal paradigm. From a very basic standpoint, there is no general right, within these existential constitutional instruments, to a stable and clearly defined employment relationship. This is alarming, it should be self-evident, because the other rights are parasitic upon that very relationship, just in the manner in which the regulation of the internal market is parasitic on a stable and clear legal framework of actors and rights which constitute that internal market.

There exists therefore an infelicitous heritage of the original European constitutional settlement, which separated economic and social questions and attributed competence for the latter to the Member States. Member State labour law is replete with complex legal constructions of individual and collective actors and relationships, reflecting the importance of these so-called 'gateway' questions within labour law, defining its scope and separating it from other areas, such as commercial and consumer law. As concern for the 'social' has been shifted, at least in part, to the European level, EU law has failed to learn the lesson of its success in the economic sphere, taking for granted the existence of the very relationships upon which its social policy is predicated, rather than understanding that employment relationships are legally constituted frameworks.



The reasons for this are several-fold, and can be linked directly to errors in labour law scholarship and ideology which have meant that such errors have been largely ignored within the vast literature on Social Europe and its failings. The first such error is the dogged intellectual separation between so-called ‘social’ and ‘economic’ aspects of the Union, which is promoted by both those who would like to see the ‘social’ prioritised as well as those who would prefer to see it take a back seat to the economic aspects of integration for whatever reason.<sup>54</sup> In understanding that ‘social’ aspects of European policy rely on the construction of economic relationships, such as employment relationships, one is forced to recognise the non-separability of the social and the economic. The European project was founded on this false dichotomy at the outset, and its continued influence leads to unnecessary and flawed legal wrangling, such as the ‘balancing’ of social and economic rights.<sup>55</sup> On the contrary, and as the Court of Justice recognised in its celebrated Defrenne jurisprudence,<sup>56</sup> it is unwise to seek to separate social and economic aspects of European, and indeed other, policy and law. By seeing employment relationships as questions of social policy, their constitution or creation is neglected, because the crucial role of the law in constructing economic relationships is not apprehended.

This leads on to the second factor which has led commentary on the European social model to neglect the importance of the construction of employment relationships at EU level, namely a continued belief that such matters should remain questions of national law for national social models.<sup>57</sup> This of course is a viewpoint which reflects the original constitutional compromises, discussed above, of the European Union and its original implementation of the Spaak and Ohlin reports, discussed above. This is a problematic precisely because of the inseparability of the economic and social elements of integration, discussed in the preceding paragraph, and because economic integration has immediate ramifications for national social models if these are not somehow protected through European-level harmonisation. While one could favour a model in which national competence for ‘social’ matters, such as the construction of employment contracts, were reserved and could not be impacted upon by EU law, this would not resolve the issue of the progressive fragmentation of such models and the pressure to deregulate at national level in the absence of a harmonised response. Such a position therefore assumes that national law will continue to seek to maintain and, more importantly, be capable of maintaining the centrality of such economic relationships. Given that the success of the

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<sup>54</sup> Countouris and Freedland (n 29); Nicola Countouris, ‘European Social Law as an Autonomous Legal Discipline’ (2009) 28 Yearbook of European Law 95; Streit and Mussler (n 61). See the contrasting perspectives in these works based around the same basic *separation thesis* of the social and the economic.

<sup>55</sup> For instance, Case C-438/05 Viking (n. 27).

<sup>56</sup> Case 43/75, Defrenne v Sabena (No 2) [1976] ECR 455.

<sup>57</sup> This argument is found very strongly, for instance, in Rödl, ‘Constitutional integration of labour constitutions’ (n 53).

European Social Model is predicated on the continued centrality of such relationships, this would appear to be a rather foolhardy strategy.

Thirdly, labour law scholarship has undergone an interesting shift in rhetoric and focus in recent years, discussed in part above, which has led to a diminished focus on the institutional frameworks which characterise its normative core. This has largely been in the form of a rights-based rhetoric, building in interesting ways upon the focus on fundamental and constitutional rights-focused scholarship within many areas of legal study.<sup>58</sup> While this has created various interesting avenues of legal thought, and indeed heavily influenced jurisprudential practice and reasoning, it runs the risk of seeing labour law and social policy as simply the application of abstract rights to existing social structures and their operation, rather than the more or less deliberate restructuring of those social frameworks. This criticism should not be taken too far: rights-based models of labour law scholarship and ideology are capable of generating hugely transformative results, precisely because, to be fully enjoyed, many rights require certain background considerations to be fulfilled. This is precisely the case with the type of rights which have come to characterise the European Social Model, as has been argued in this article: they are dependent on the stable relationships akin to an employment contract. However, there is a danger, when couple with the moralistic vim and virtuousness which accompanies rights discourse, that labour law scholarship itself can fall into the same trap as has characterised EU social policy's existential rather than ontological tendencies.

This is linked to the fourth tendency within labour law, which may further exacerbate labour law scholarship's blind spot towards EU law's deficiencies in its social constitution, particularly within certain national traditions. This is labour law's *historical materialist* heritage, most famously encapsulated by Otto Kahn-Freund's celebrated formulations that 'law is a secondary force in human affairs [...] especially in labour relations'<sup>59</sup> and that 'the law is not the principal source of social power'.<sup>81</sup> Bob Hepple has described Kahn-Freund's assertion of law as a secondary force as 'a belief written in gold letters.'<sup>60</sup> It is an assertion which is made, in various ways, in writings of Kahn-Freund which were directed at both lawyers and non-lawyers, warning them both of a temptation to believe in the law's ability to achieve certain goals, at least where other social practices or forces were not conducive to their achievement.<sup>61</sup> Such perspectives have of course been one of the core strengths of labour law scholarship in Europe,

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<sup>58</sup> For a general discussion of this trend within private law, see Hans Nieuwenhuis, 'Fundamental Rights Talk, An Enrichment of Legal Discourse in Private Law?' [2005] *Constitutionalisation of private Law*, (Martinus Nijhoff Publishers, 2006) 3. In the context of labour law itself, see Fudge (n 44).

<sup>59</sup> Kahn-Freund (n 47) 2.

<sup>81</sup> *ibid* 15.

<sup>60</sup> Bob Hepple, 'Introduction' in Franz Gamillscheg (ed), *In memoriam, Sir Otto Kahn-Freund* (Beck 1980).

<sup>61</sup> Otto Kahn-Freund, 'Intergroup Conflicts and Their Settlement' (1954) 5 *British Journal of Sociology* 193.

allowing a dual focus on both legal norms on the one hand and industrial relations and work-based practice on the other, placing labour law scholarship at the vanguard of legal academia and transcending the over-idealised, naïve and socially detached doctrinal focus of much legal scholarship. However, this same wealth also creates a curious paradox within much labour law scholarship, namely that it appears to be authored by community of lawyers who do not ‘believe’ in law. In this manner, labour law scholarship has a tendency to reflect the economic materialism which is found within both Marxist accounts of history, but also many modern variants of neoliberal economics. It is here that we find labour law’s version of the hubris of Fukuyama discussed in the opening sections of this article. By neglecting the law’s role in constructing and (re-)constituting social reality, teleological accounts of history, whether materialist or ideological, fail to understand the crucial normative ordering role of law in creating stable economic and social relations. The upshot of such a perspective is to easily fall into the trap of thinking of social relationships as somehow pre-legal and requiring regulation rather than creation. If one conceives of economic relationships, such as the employment relationship, as being matter of brute social fact, it is only natural to think of it as unnecessary, or even incoherent, for the law to construct these relationships.<sup>62</sup>

A combination of these four elements, it is suggested therefore, has led to a blind spot within labour law scholarship whereby the employment relationship is presumed within paradigms of ‘Social Europe’ but where there is no need, legitimacy or coherence in it being EU law itself which constructs such relationships.

This tendency can be witnessed within the classical model for employment regulation at EU level. Directives in this field generally delegate questions of ‘personal scope’ to national law, presupposing their existence, but also reflecting a subsidiarity-based conception of competences, whereby such matters are left to the national legal system to deal with, in line with the division of social and economic competences envisaged by original Treaty settlement. This approach has been largely endorsed by the Court of Justice, with some exceptions in the field of free movement of workers and the meaning of worker under what is now Art 45 TFEU.<sup>63</sup> As Kountouris has recently explored, the relatively explicit treatment of this matter in *Danmols Inventar*<sup>64</sup> has become the locus classicus for the Court’s treatment of such questions. In that case the Court held the

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<sup>62</sup> For a similar warning against taking the socially located insights of labour law too far, see Hugh Collins, *Marxism and Law* (Clarendon 1982); Hugh Collins, ‘Against Abstentionism in Labour Law’ in *Oxford essays in jurisprudence: Third series* (OUP 1987).

<sup>63</sup> The definition for freedom of movement questions is generally seen as stemming from Case 66/85, Lawrie-Blum [1986] ECR 2121.

<sup>64</sup> Case 105/84 *Danmols Inventar* [1985] ECR 2639.

relevant employment protections could ‘be relied upon only by persons who are, in one way or another, protected as employees under the law of the member state concerned.’<sup>65</sup>

However, in the intervening period, the Court has sought to claw back some of the autonomy left to national legal systems and, sometimes, economic actors in defining their relationships for the purpose of EU law. The Court held in the celebrated case of *Allonby* that ‘[t]he formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of [EU employment law provisions],’<sup>66</sup> opening the way for the Court to develop its own definition of ‘worker’ within the context of EU law employment rights. In a series of cases concerning different Directives, the Court has perceived the need to develop an EU law meaning of the notion of worker, in order to ensure the existence of the necessary employment structures upon which the Directives may rest,<sup>67</sup> meaning that, in relation to some Directives at least, EU law does possess a definition of

‘worker’, although the Court generally appears rather deferential to national definitions.<sup>68</sup> The problematic nature of this approach was cleverly linked by AG Kokott in *Wippel* to the more general duty of sincere cooperation, now found within Art 4(3) TEU, whereby Member States would be in breach of that duty if it ‘were to define the term “worker” so narrowly under its national law that the [Directive] were deprived of any validity in practice.’<sup>91</sup> She is alive to the fact that labour law, as has been discussed in this article, is parasitic on a particular form of stable relationship, which the law must also guarantee if the law is to have any meaning. Although the Court in *Wippel* declined to heed this warning, the spirit of her advice has seemingly been followed in other cases. Indeed, the Court itself adopted similar language regarding the scope of other Directives, holding in *O’Brien*, for instance, that Member States ‘may not apply rules [regarding someone’s employment status] which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.’<sup>69</sup>

The upshot of this brief survey of a rather chaotic body of caselaw is that there currently exists a rather contradictory approach to employment status within EU law, with the Court seeking to draw a fine line between leaving such matters to national law classifications

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<sup>65</sup> *Ibid*, para 27.

<sup>66</sup> C-256/01, *Allonby v Accrington and Rossendale College* [2004] ECR I-00873 para 71.

<sup>67</sup> Cases where the Court of Justice has insisted that there is a EU law notion of worker for the purposes of the personal scope of EU employment protections stemming from Directives include: C-428/09 *Union syndicale Solidaires Isère* [2010] ECR I-9961; Case C-32/02, *Commission v Italy* [2003] ECR I-12063; Case C-596/12, *Commission v Italy* ECLI:EU:C:2017:77; C-229/14, *Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* [2015] ICR 1110. All of these cases are significant because the Court rejected the national classification of the individual and/or their working relationship, making use of an ‘autonomous’ EU law definition instead.

<sup>68</sup> C-313/02 *Wippel* [2004] ECR I-9483, para 40.

<sup>91</sup> *Ibid*, para 45 of AG’s Opinion.

<sup>69</sup> Case C-393/10, *O’Brien v Ministry of Justice* [2012] 2 CMLR 25, para 34.

and developing an autonomous EU definition, with the curious result that there are several different approaches to this question, with no purposive justification for the difference in approach. There exist Directives for which an ‘autonomous’ EU law definition of worker applies, largely taken from Art 45 TFEU jurisprudence. There exist those intermediate areas, where the matter is one for national law, but the Court will seek to ascertain whether the definition is so narrow as to avoid the effect of the legislation. And finally there are those areas which follow the ‘Danmols orthodoxy’ where such matters are seemingly left entirely to the judgment of the national legal system. However, broadly speaking, there would seem to be a general shift towards the application of the free movement definition of worker to most EU employment law matters.<sup>70</sup>

Superficially, it would seem appear that this is a positive development, in the light of the arguments made in the present article. It is certainly to be applauded that the Court has perceived that parasitic nature of employment rights on certain forms of economic relationship or status and has sought to act upon this to the extent that it feels legitimated in so-doing. However, at present, this is, at best, a fragmented and piecemeal approach, which does not provide the basic framework for the full realisation of the European Social Model, as was advocated above. Indeed, the application of a definition of worker which stems from the purposive and expansive application of free movement-related rights would, in many ways appear to be entirely inappropriate given the assumptions and prerequisites for the European Social Model based on stable employment relationships. The definition of worker within EU law which has primarily developed in relation to freedom of movement-related rights has been admirably broad, and has sought to incorporate as wide a category of people engaged in work-like activities as possible. Indeed, one could also link the success of this expansive definition to the creation, within the economic ordoliberal constitution, of the worker as economic actor, with directly effective claim rights. However, the starting point for such cases was generally the distinction between economically active and economically inactive people, rather than the rather more complex scenario facing labour law now, which is the fragmentation of economic relationships in various ways due to a plethora of legal, technological industrial, cultural and economic changes. These have led to the increasing marginalisation of the employment contract as the basis for working arrangements. Given that the European Social Model is still based on the desirability and necessity of such relationships, a more concerted and robust form of employment status is required to ensure the attainment of the laudable goals in documents such as the Social Pillar.

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<sup>70</sup> This is a position that has been broadly advocated within scholarly literature also: Georges Cavalier and Robert Upex, ‘The Concept of Employment Contract in European Union Private Law’ (2006) 55 *The International and Comparative Law Quarterly* 587.

## **7. Reconstituting Social Europe and the construction of a stable European ‘Pillar of Employment’: some concluding remarks**

This article has engaged in wide-ranging discussion, but has at its core a relatively simple contention: the European Social Model is based upon an analytically prior model of economic relationships, that is stable employment. In contrast to the four freedoms of the internal market, European Union law has failed, for various historical reasons, to attempt to construct these relationships. One reason for the continued failure of the Union to achieve the laudable goals of such documents as the recent Social Pillar is the continued assumption that such relationships will somehow exist in a manner which precedes their regulation and instrumentalisation to achieve the various goals of EU law. It has been argued here that this is based on fundamental misunderstanding of the role of law within the construction of employment relationships, reflecting various misconceptions within the intellectual heritage of labour law itself. While the Court of Justice has come to recognise this danger, its muted response is far from sufficient to even begin to put in place the framework of stable economic relationships necessary for the attainment of the European Social Model. Member States are under increasing pressure to turn a blind eye to the progressive deregulation of working relationships, creating a more fragmented and more transitory system of work. One must not underestimate the extent to which far more than the attainment of the goals of sometimes rather esoteric employment law Directives rests on the creation of stable employment relationships. The structures of training, taxation, social inclusion, meaning, identity, income policy, pensions and all manner of other social concerns in EU Member States are based on the existence of more or less stable employment relationships. The employment nexus here is not something to be seen as a source of danger, due to its inherent power imbalance, but rather a necessary and desirable social and economic framework to achieve manifold other social and economic goals. How can European Union law achieve this goal? A first step should be the recognition that the right to a stable employment relationship is a fundamental right, alongside those rights and principles which rest upon such relationships. This can be captured either by an express creation of a distinct claim right, or through a rather modest judicial interpretation of other substantive rights as presupposing at least the assumption of such rights. This would necessitate the assumption that an employment relationship exists in cases where this is in doubt.

However, given the aspirational nature of documents such as the Charter and the Social Pillar in many respects, and their lack of direct applicability in many circumstances, something more than this is required. The European Union should seek to reconstruct Social Europe starting from its basic economic building blocks, creating an archetypal regulatory norm in the form of a *European Employment Contract* which should form the personal or relational scope for all existing EU employment protections, and as the basis for future employment protections. The precise nature, form and flexibility of such a contract are of course important matters to be discussed and debated in detail, and

questions of space preclude such discussions here. However, current changes in working practices and new technologies which have placed the employment relationship in 'crisis' in national legal orders make such a development more rather than less necessary: the EU can build economic relationships which positively shape the development of work in a socially and economically appropriate way. The alternative is that the EU continues to engage in existential grandstanding without engaging in the necessary accompanying social ontological engineering to achieve its stated goals. Brexit has demonstrated that teleological visions of history are always vulnerable to the vicissitudes of political events, yet the opportunity that Brexit provides for the EU to revisit its own constitutional precepts must not rest on similarly naïve assumptions about the role of law in regulating the world of work. If the EU wishes to develop a genuinely Social Europe, this must be based on the necessary economic relationships which allow the achievement of those social aspirations.