

**On working and being:
The legal metaphysics of labour and the constitutional errors of Social Europe**

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1. Introduction: a legal metaphysics of work

This Chapter outlines the legal contradictions in the European ‘project’ with regard to work. In particular, it points to grave tensions between, on the one hand, the ‘existential’ social aspirations of the European Union, which place work at their centre, and, on the other hand, the ‘metaphysical’ realities of a legal framework which has singularly failed to constitute the very working relationships upon which the much vaunted ‘Social Europe’ is predicated. By constructing this ontological account of the role of law in *constituting* all social and economic identity and exchange, this Chapter argues 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 Chapter breaks with that vast, cacophonous body of literature to argue that it is precisely the efforts to rectify this ‘social deficit’ which cement this failure. The emergent ‘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. As the social values of the Union largely rest on an economic framework premised on stable working relationships, the failure of the constitutional settlement to ensure such relationships has the effect of negating the ontological status of the work in the European social model.

In this manner, this Chapter questions the coherence of the European employment and social policies through their failure to deliberately constitute stable employment relationships, while nonetheless being premised upon their existence. This failure is not simply a legal one however, but also one of ideology: much labour law thinking, including that which is critical of the relegation of social policy within the European project, shares this naïve vision of economic relationships and work. On the one hand, labour law emerged within an economico-historical, *materialist* heritage, rejecting the importance of law in the arranging of industrial affairs. On the other hand, more recent labour law scholarship and policy development have often fallen 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*. Such scholarship is based on, respectively, legitimate and laudable concerns regarding social power and the pervasiveness of constitutional principles. However, this Chapter argues 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, and social power will prove difficult to shape. While the passing of ambitious legislation such as the *European Pillar of Social Rights*, declared in late 2017, in many ways typifies and indeed magnifies these errors yet again, it might offer an opportunity for judicial and policy-focused reflection that forces greater focus on constituting working relationships within the shared European economic and social space.

2. The ontology of normativity and the deep constitutional role of law

Like all complex constitutional arrangements, the European Union (*EU* or *the Union*) is a project with no one single clear essence, instead being a pluralistic compromise seeking to balance various, sometimes inchoate, aims. 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. The *legally binding* goals of the EU, which have been progressively added to over the past six decades or so, 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. These Treaty provisions reveal that the Union has evolved significantly from its early stated goals of the establishment of the 'Common Market' (later rebranded the *internal market*), a customs union and joint competition policy in Articles 2 and 3 of the *Treaty of Rome* (1957), which has now evolved into the *Treaty on the Functioning of the European Union* (TFEU). 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 formal 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. 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.

Indeed, it is in relation to work and the regulation of working relationships where these constitutional changes can perhaps be seen most easily. At the Union's inception, there was a deliberate political decision, ratifying the conclusions of the *Spaak* and *Ohlin* Reports,¹ to exclude matters of employment protections and social standards 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 other factors of production meant that economic actors could choose the regime which struck the best balance in this regard.

Over the intervening sixty years or so, this original constitutional settlement has been 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 (Bercusson 2009). 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 force other Member States to seek to progressively undercut each other, in turn undercutting the social standards which the promise of increased aggregate wealth was supposed to ensure (Lee 1997). The competences of the European Union, and the aims of the Union itself, have therefore progressively expanded to include employment protections and labour rights, at least of certain types, although core matters such as pay and collective bargaining have remained matters for Member States. 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, 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 that the aim of the Union is a 'highly competitive social market', and that it will 'combat social exclusion and discrimination, and shall promote social justice and protection'. These developments have been accompanied by an increased focus more generally of fundamental rights within the European legal order, both in legislative form and through their progressive recognition by the Court of Justice of the European Union.

This sweeping genealogy of 'Social Europe' is crucial for a number of 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 locus 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' (Wilthagen and Tros 2004; Jeff Kenner 2009), 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 and the ultimate goal and continued basis of social policy. 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 (Mason 2014). There is, therefore, a deep continuity embedded in the emerging 'Social Europe'. Its success or failure will therefore depend on its ability to achieve these goals through the structures and frameworks which it establishes.

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 following section examines the legal and social theory which has led to this mismatch in aims and reality in the context of the broader intellectual and political crisis surrounding labour law and the legal regulation of work.

3. The Crisis of Labour Law and the mistakes of the *Good European*

It has become customary to think of labour law as being 'in crisis' (Countouris and Freedland 2013; Coutu 2007; D'Antona 1998; Hepple 1987; Davidov and Langille 2011). Broadly understood, labour law is the body of legislation, other legal sources, and industrial practices which regulate the terms of work and their generation which emerged, and the participation of workers and their representatives within negotiations or company procedures. Labour law emerged in the Twentieth Century in all industrialised legal systems as a response to political and intellectual pressures which perceived that the formal legal status of the individual, benefitting from the formal equality of civil law, did not adequately reflect the shared located realities of the worker, and the specificities of the employment relationship, which might justify their own autonomous body of law and legal principles (Sinzheimer 1976a). 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 (Hepple 1986). Throughout this period, there existed a curious paradox within labour law's regulation of the employment relationship, indeed one which has failed to garner sufficient attention. On the one hand, and as is well-known by labour lawyers, 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, but unfortunately less widely recognised, labour law was crucially premised on the deliberate reinforcing of that relationship, and indeed its legal *construction*, through the constitution 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 which employment regulation is supposed to serve continue to expand (Collins, Lester, and Mantouvalou 2018; Deakin and Wilkinson 1994). Such goals might include the generation of income and wealth distribution, equality more broadly, the collection of taxes, the source of training, industrial democracy, economic efficiency or social inclusion. As a consequence, the employment relation, in this stable form, came to be a key demarcator for both personal and collective identity, in both the modern usage in terms of ‘sense of self’ and 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 ‘domesticated’ by social pressure and legislation. The emergence of unfair dismissal legislation in particular underlines this point, with stable forms of employment relationship seen as paramount, at least in the absence of other good competing reasons which were legally regulated and proceduralised.

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 most easily understood as linked the progressive erosion of the very locus of regulation, that is the employment relation, which was delineated in the previous sections (Prassl 2015; Freedland and Kountouris 2011). 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 the stable forms of relationship which bring with them both risk and the opportunity to guard against that risk through progressive regulation to achieve the aims of social policy. As working practices become more flexible and the contractual nexus between those who work and those who direct or pay for that work becomes more diverse, the less uniform the nature of work becomes and the harder to maintain the guise of ‘unity’ and ‘autonomy’ of labour law through the shared social location of those people who find themselves within 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 a brake on productivity, employment levels, and broader social inclusion (Esping-Andersen and Regini 2000). The resulting policy changes have seen what might be called the ‘normalisation’ of atypical work, 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 re-attach them to participation in the labour market (Deakin and Wilkinson 2005). 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. This vision builds loosely on the influential work of economist Amartya Sen, in particular on *capabilities* (Sen 1993; Deakin and Browne 2003; Deakin and Rogowski 2011), and the influential *Supiot Report*, which sought to understand social policy and labour law in Europe *au dela de l'emploi* (Supiot 1999). Most significantly, these changes were expressed in the Green Paper on 2006 (Commission of the European Communities 2006), 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 (Coutu, Le Friant, and Murray 2012; Heyes 2013). This has often been achieved around the distribution of so-called bail-outs, with labour market reform being a condition of receipt of funds (Koukiadaki and Kretsos 2012).

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 (Prassl 2018). 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. With these challenges facing the prevalence of the employment relationship or its increasing transience come a number of connected issues, largely located around the lack of an identifiable legally classifiable relationship which can be properly understood as one of employment. 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 work which seek to extend certain social protections to such workers (De Stefano 2015–2016). In other contexts, there have been attempts to argue that such relationships are already captured by existing legal tests for employment status when properly understood (McGaughey 2019). 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.

4. 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. 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 (Alston 2005; Mantouvalou 2012). However, certain thinkers have sought to take this re-examination further, seeking to revisit the seminal works from labour law's genealogy and genesis, to better understand the fundamental place or role of labour law as a separate area of law (Dukes 2008; Rödl 2009). 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 (Davies and Freedland 2007).

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. 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, both at work and more broadly. 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, requires 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, who developed the complex, multi-layered conception of *labour constitution* (*Arbeitsverfassung*) (Sinzheimer 1927; Sinzheimer 1976b). Sinzheimer was writing at a time during which the very notion of labour law as a separate field was emerging, partly under his influence. This took place within a European intellectual environment where his peers were developing a sociological vision of law which sought to understand law within a broader range of social sources of regulation, for instance in the realm of the workplace, which had its own rules and sources of normativity (Gurvitch 1934; Ehrlich 1936). 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, 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 (Fudge 2011; Mason 2014; Mason 2018). In many cases, what this 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 (Lecomte 2010–2011). These are of course interesting and necessary debates, relating the standards of employment regulation with the core values of a legal system, a constitution and a polity. 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 asserting 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 (Dukes 2014; Rödl 2006). authors make a deliberate attempt to delve into recent use of '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. 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. 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. Social relations such as in the labour context are, argues Rödl, *constituted* by law. 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. This is well summarised by Arthurs in his attempt to understand Dukes' position as a description of how labour law can construct the 'new normal' (Arthurs 2010), that is the basic normative ordering which is the starting point for labour and employment relations.

Sinzheimer's concepts of the labour constitution, and, by extension, his broader concept of the *Wirtschaftsverfassung*, the 'economic 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. These are the *ordoliberal*s, 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 (Eucken 1989; Böhm 1933; Vanberg 2004).

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, in particular in discussions of various aspects of EU integration and the internal market, as well as more generally (Kaupa 2016; Nörr 1996; Streit and Mussler 1995). However, the core constitutional claim in ordoliberal thought is often lost, confused with a prescriptive approach to the organisation of the economy according to the principle of an entrenched *Ordnungspolitik*, that is a private 'transactional' economy guaranteed by the legal entrenchment of certain economic rights.

Like Sinzheimer, Böhm and Eucken, the jurist 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. 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. 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 important 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, which asserts that the structure of the norms and institutions which frame economic interaction are seen as fundamental in ordering economic activity and relationships.

This is a controversial claim in labour law in particular because of its ‘pluralistic’ history on the fringes of State law in many countries, and, indeed in influential scholarship about the European Social Model (Lo Faro 2000). However, the force of the 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 (Kelsen 1945). 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.

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’ (the economic rights at the heart of the original Common Market), combined with the proactive stance of the Court of Justice regarding their direct effectiveness, had the effect of creating economic actors within the legal space of the EU.² 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 the values which 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.

5. The European Union's constitution of the worker: between mobility and nowhere

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. While certain areas of social harmonisation have been successful during this time, there has now emerged a pattern of 'existential posturing' within the recent history of the Union, as discussed earlier in this Chapter, 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 (Commission of the European Communities 2006). 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 of Fundamental Rights*, or those principles mentioned in Article 3 TEU, these are clearly based on the continued, or even increased, importance of the employment relationship for their attainment. What is striking 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, or to such a legal framing to be the default for relationships akin to work. 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.

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.

There are at least four reasons for this, and these 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 (Countouris 2009; Countouris and Freedland 2013; Syrpis and Novitz 2008; Jeff Kenner 2003). 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. On the contrary, and as the Court of Justice recognised in its celebrated *Defrenne* jurisprudence,³ 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 (Rödl 2006). 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 European Social Model is predicated on the continued centrality of such relationships, this would appear to be a rather imprudent 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 (Nieuwenhuis 2005). 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 Chapter: they are dependent on the stable relationships akin to an employment contract. However, there is a danger, when coupled 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’ and that ‘the law is not the principal source of social power’ (Kahn-Freund 1983, chap. 1). Bob Hepple (Hepple 1980) has described Kahn-Freund’s assertion of law as a secondary force as ‘a belief written in gold letters.’ 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 (Kahn-Freund 1954). Such perspectives have of course been one of the core strengths of labour law scholarship in Europe, 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 (Cohen 2000; Marx and Engels 1970), but also many modern variants of neoliberal economics (Posner 1987). 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, including at European level (Lo Faro 2000).

A combination of these enumerated 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 establishing that basic pillar of the internal market.⁴ The relatively explicit treatment of this matter in *Danmols Inventar*⁵ has become the *locus classicus* for the Court’s treatment of such questions (Kountouris 2018). In that case, decided in 1984, the Court held the 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.’

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*⁶ 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],’ thus 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, 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. The problematic nature of this approach was cleverly linked by Advocate General Kokott in *Wippel*⁷ 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.’ Kokott is alive to the fact that labour law, as has been discussed in this Chapter, 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*,⁸ 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.’

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 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, that is regarding who benefits

from the freedom movement rights guaranteed to workers. 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.

Superficially, it would seem appear that the recent subtle change in approach is a positive development, in the light of the arguments made in the present Chapter. 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.

6. Small developments in the legal constitution of the worker and the (limited) potential of the Social Pillar

This Chapter has engaged in wide-ranging discussion, but has at its core a relatively simple contention: the European Social Model is based upon a vision of work which is, in turn, based on an analytically prior model of economic relationships: stable contracts of employment. In contrast to the 'four freedoms' of the internal market, European Union law has failed, for various historical reasons and continued political and intellectual blindspots, 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 perhaps necessarily 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 only 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, and indeed a structure to control imbalances of power and dangers of abuse and injustice. 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 of Fundamental Rights and the Social Pillar, 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. The impending exit of the United Kingdom from the Union was the initial motivation for the promulgation of the Social Pillar, whose failures have been mapped in this Chapter. The opportunity that Brexit provides for the EU to revisit its own constitutional precepts must not rest simply on the 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.

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¹ Report of the Heads of Delegation to the Foreign Ministers ("Spaak Committee") ["Spaak Report"] 1956; International Labour Organisation, *Social Aspects of European Economic Co-operation: Report by a Group of Experts* (summary) ["Ohlin Report"] (1956) 74 *International Labour Review* 99

² Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

³ Case 43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455

⁴ See Case 66/85, *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121 and subsequent case law.

⁵ Case 105/84 *Danmols Inventar* [1985] ECR 2639

⁶ C-256/01, *Allonby v Accrington and Rossendale College* [2004] ECR I-00873 para 71, but see also the following cases, where the Court of Justice has, similarly held that there exists a European definition of worker, rejecting the possibility of a purely national definition: 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.

⁷ C-313/02 *Wippel v Peek & Cloppenburg GmbH & Co KG* [2004] ECR I-9483

⁸ Case C-393/10 *O'Brien v Ministry of Justice* [2012] 2 CMLR 25