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DIALOGUE AND DEBATE: SYMPOSIUM ON EMILIOS CHRISTODOULIDIS'S THE REDRESS OF LAW

Pushing the debate on Posted Workers beyond the EU's Status Quo

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Abstract

The debate on the posting of workers in the European Union (EU) shows no sign of resolution 15 years after the controversial *Laval* quartet of judgements by the ECJ. The majority view has it that the judgements gave social dumping the backing of EU law, thus undermining national achievements in the social sphere. From this perspective the 2018 Revised Posted Workers Directive is a step in the right direction. The critique from the periphery, on the other hand, alleges that what looks like social dumping from the centre amounts to equality of opportunity for workers of the periphery, thus seeing the judgements in a more ambiguous or even positive light. The Revised PWD is here seen as a reassertion of national dominance from the EU's centre. In this paper I engage with Christodoulidis's constitutional approach to this complex problem which he develops in *The Redress of Law*, arguing against his embrace of the majority position in Part 3 of his work while building on his radical democratic proposals from Part 4. From the latter's perspective, both the majority view as well as the critique from the periphery are to be rejected, since the very opposition between the two options is inimical to workers' rights in the EU. Radical democratic action is necessary to overcome this impasse, to open the space within which rights and interests of workers from across the Union can be properly protected and advanced.

Keywords: Posted Workers; centre/periphery; social union; radical democracy

1. Introduction

Much ink has been spilled over the *Laval* quartet of cases in which the ECJ inaugurated a new Gestalt in the relation between social and market forces of European integration. I read the *Laval*, *Viking, Ruffert*, and *Luxembourg v. Commission*[1] cases against the background of the 1996 Posted Workers Directive (PWD),[2] the 2018 Revised Posted Workers Directive,[3] and the intense discussions brought about by the prospect of 'social dumping'. What do the posted workers mean for the balance of power within the EU and to what extent are they undermining the social and welfare achievements of the Member States? About 15 years after the infamous judgements, this is still a live question for those of us concerned about the state of the Social Union.

[1]Case C-341/05, *Laval un Partneri Ltd* (2007) ECR I-11767; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (2007) ECR I-10779; Case C-446/06, *Rüffert v Land Niedersachsen* [2008] ECR I-1167; Case C-319/06, *Commission v Luxembourg* (2009) ECR I-4323.

[2]Directive 96/71/EC OJ L 18, 21.1.1997, 1–6.

[3]Directive 2018/957 OJ L 173, 9.7.2018, 16–24.

While there have been a number of high-quality commentaries in the wake of the judgements,[4] we have more recently seen the issues raised in the *Laval* quartet integrated into a broader theoretical understanding of the development of European integration. A great example of this is Emilios Christodoulidis's account in *The Redress of Law*,[5] where he treats these judgements and the logic which underpins them in the deepest registers of constitutional and political theory. This ambitious work will be my main interlocutor in attempting to move the debate forward, beyond the stalemate between the position of the centre and the critique from the periphery.

My main move will be to appeal to Christodoulidis from Part 4 of his work, where he reads authors such as Rancière to excavate a political way towards a more social Europe,[6] against the author's position in Part 3, where he adopts the perspective of the centre and defends national labour law against the ECJ's jurisprudence. In doing so, I will propose that we should reject both of the two alternatives offered to us by the ECJ in its framing of the issue, focusing political energies precisely on this refusal to choose sides on a terrain unfavourable to workers' rights and social concerns more broadly.

The paper develops this argument in three parts: in part 1 I briefly present the judgements and the mainstream commentary on them, in part 2 I lay out Kukovec's critique from the periphery and Christodoulidis's critique of Kukovec, which comes from his framing of the issue as a conflict between political and market constitutionalism, and finally in part 3 I critically engage with Christodoulidis's position, proposing a rejection of the two alternatives as a way forward.

A. The clash of market and social dimensions in the EU

The controversy around the posting of workers in the EU plays out against a much broader background which can be understood as the uncoupling of the social and economic spheres.[7] Schematically, while the economic objective of building the Internal Market is pursued at the transnational level, the social dimension remains primarily a Member State competence. This division of labour may have existed in a certain equilibrium in the early decades of the European Economic Community (EEC), but at least from the second Delors Commission (1988-1992) onwards, there has arguably been an ascendancy of the economic logic. This leads commentators to talk of the economic constitution,[8] neo-liberalisation, and negative integration[9] of the European project. An assessment shared by many is that the European project post-Maastricht has become a decidedly economic affair, which has been detrimental to the social achievements of the welfare state as well as to the republican achievements of democratic participation.[10]

Within this overall picture the issue of posted workers appears rather local, so we may surmise that its visibility and significance largely stem from the fact that it so well encapsulates the systemic changes in a fashion which is immediately comprehensible and viscerally problematic. After all, in

[4]C Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' 37 (2) (2012) European Law Review 117–35; St Reynolds, 'Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' 53 (3) (2016) Common Market Law Review 643–77; S Picard, 'Collective Action vs Free Movement The Laval and the Viking Cases' 14 (1) (2008) Transfer 160–65.

[5]E Christodoulidis, *The Redress of Law* (Cambridge University Press 2021).

[6]J Rancière, *Disagreement: Politics and Philosophy* (trans. J Rose) (University of Minnesota Press 1999).

[7]See Christodoulidis, 'The Redress of Law' (n 5); FW Scharpf, 'Monetary Union, Fiscal Crisis and the Pre-Emption of Democracy' 9 (2) (2011) Zeitschrift Für Staats- Und Europawissenschaften (ZSE)/Journal for Comparative Government and European Policy 163–98; and C Joerges and F Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' 15 (1) (2009) European Law Journal 1–19.

[8]W Sauter, 'The Economic Constitution of the European Union' 4 (1) (1998) Columbia Journal of European Law 27–68.

[9]See Scharpf, 'Monetary Union, Fiscal Crisis and the Pre-Emption of Democracy' (n 7).

[10]See, inter alia, A Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford University Press 2008); JGA Pocock, *The Discovery of Islands: Essays in British History* (Cambridge University Press 2005); P Manent, *A World beyond Politics?: A Defense of the Nation-State* (Princeton University Press 2006).

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2017 there were only 2.8 million posted workers in the EU, even though this is an increase of 83 per cent since 2010.[11] Within the entire EU labour market in 2018, this amounted to only 0.8 per cent of the workforce.[12] Out of those, only about one third were moving from the countries of the periphery to the countries of the centre, the movement where the possibility of social dumping is most salient. Despite its overall low significance there are specific sectors in specific countries which are at certain points in time heavily affected, such as, for example, the Belgian construction sector around 2014.[13] The questions about normative justification of the posted workers scheme arise either from these local acute phenomena or as representations of the much broader unease about the asymmetry between the market and social aspects of the Union.

B. Laval quartet and reactions

What brought tensions between the social and market dimension in the EU to the fore was a quartet of judgements which the Court of Justice of the European Union (CJEU) delivered in 2007 and 2008. They were *Viking (Line), Laval, Rüffert,* and *Commission v Luxembourg*. Since the last two follow closely the reasoning and content of *Laval*, and since these three cases touch upon the PWD directly, we can refer to the cluster of cases as the *Laval* quartet. For the purposes of this Article, a brief outline of *Laval* is enough to set up the discussion.

In *Laval*, the CJEU adjudicated on the clash between the (new)[14] fundamental right to strike and the fundamental freedom to provide services as laid out in Article 56 TFEU. Laval, a Latvian company wanted to pay its workers which were posted in Sweden a Swedish minimum wage. A Swedish trade union, however, blocked Laval's construction site in protest over this undercutting of the collective pay agreement which it had secured. The union action was in conformity with Swedish labour law, but it in the CJEU's interpretation fell afoul of EU law since the collective agreements were ad hoc and case-by-case, whereas Article 3, paragraph 1 of the PWD stipulates that exceptions to the minimum wage can only be made in the form of universally applicable collective agreements. The Court thus found the union's action to constitute a breach of Laval's fundamental economic freedom to provide services. Swedish labour law gave way to EU's Internal Market rules.

The ruling was followed by an outpouring of critical assessments from EU law commentators, as well as the political class and the public at large. It was claimed that by thus limiting the permissible scope of union action 'the very autonomy of Member States' labour and social constitutions is undermined'[15] by the CJEU in these rulings. Such sentiments are widely shared.[16] According to this mainstream view, these cases are so corrosive because they express a 'supremacy of the economic freedoms of the internal market above fundamental social rights'.[17] On the one hand we have a social fundamental right, namely the right to strike, while on the other there is the fundamental economic freedom to provide services. The Court puts the two conflicting rights into a breach-justification type proportionality analysis and what comes out, in all four cases, is a

[11]R Konle-Seidl, 'Fact Sheets on the European Union – 2021. Posting of Workers', <www.europarl.europa.eu/factsheets/en>.

[12]F De Wispelaere, L De Smedt and J Pacolet, Posting of Workers – Report on A1 Portable Documents Issued in 2018 (HIVA-KU 2018); Luxembourg: Publications Office of the European Union 2020).

[13]F De Wispelaere and J Pacolet, 'An Ad Hoc Statistical Analysis on Short Term Mobility – Economic Value of Posting of Workers. The Impact of Intra-EU Cross-Border Services, with Special Attention to the Construction Sector' (European Commission – DG EMPL; Brussels, 2016) 20.

[14]Established in *Viking* only days prior to *Laval*.

[15]Joerges and Rodl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration' (n 7), 13.

[16]See Picard, 'Collective Action vs Free Movement: The Viking and Laval Cases' (n 4); C Barnard, 'Social Dumping or Dumping Socialism?' 67 (2) (2008) Cambridge Law Journal 262–4; Reynolds, 'Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (n 4).

[17]P Pecinovsky, 'Evolutions in the Social Case Law of the Court of Justice: The Follow-up Cases of the Laval Quartet: ESA and Regiopost' 7 (2) (2016) European Labour Law Journal 295.

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limitation of the social fundamental rights in favour of the economic freedoms.[18] Simply put, market union and not social union carries the day.

At the core of the worry is the issue of 'social dumping', which is also acknowledged in *Laval* by the Court.[19] Because posted workers are not considered 'workers' but instead 'service providers', the non-discrimination clauses which are at the core of the free movement of workers[20] as well as of EU citizenship itself,[21] do not apply. This can and does lead to situations where two workers are doing the same work in the same place but operate under different regimes. For example, one construction worker moved from the Netherlands to Belgium under the free movement of workers regulation and thus has to be treated like other Belgian workers on the site in terms of pay and all other benefits, while her fellow construction worker is posted from Poland and hence technically a service provider, not entitled to the full scope of renumeration owed to construction workers in Belgium. Here Article 3, paragraph 1 of the 1996 PWD is crucial since it enumerates the so-called 'hard core' of the work conditions which include, inter alia, things like minimum wages, minimum number of paid annual holidays, maximum work periods, etc, but not things like allowances for working Sundays or public holidays, working at night, and overtime rates in general, among others. This of course meant that hiring the posted worker allowed companies to reduce their overall labour costs.

This is indeed the main aspect which has been updated in the Revised Posted Workers Directive of 2018. Here the concept of minimum wages in Article 3, paragraph 1 is replaced by that of 'renumeration' which includes the said overtime rates and extra allowances for working at night or on Sundays, etc. Reimbursement of travel and lodging costs is also included on the same basis as for the domestic workers. The hard core of the provisions for posting has thus greatly expanded, closing the gap between the domestic worker and the posted worker.[22]

The revision of the PWD has on the mainstream view achieved a victory for social Europe, introducing equality and fairness into the workplace and taming the market mechanism which has through social dumping threatened to undercut workers' wages and in the long term erode the very foundations of the social welfare state. The Reviewed PWD ensures 'equal pay for equal work at the workplace'.[23] It aims to 'strike the right balance' between the freedom to provide services and the rights of posted workers.[24] But while this development is hailed as a strengthening of social Europe by most, a trenchant critique has been developed by Kukovec which attempts to show the parochiality and bias in the way terms such as 'social' or 'equal' are used in this context. It is his critique I turn to next.

2. In the name of the periphery

We've seen the very critical responses from the commentators in light of the *Laval* quartet of CJEU judgements, who interpret these rulings as giving priority to economic freedoms over social rights. Kukovec finds this mainstream framing of the situation very misleading, because it fails to take into account a structural split in the EU between the 'centre' and the 'periphery', instead opposing 'economic' freedoms to 'social' rights in the abstract, believing interests of workers will always be advanced by the latter and those of capital by the former.

[18]See M Lasser, 'Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms' 15 (1) (2014) Theoretical Inquiries in Law 229–60 for a critique of the breach/justification version of proportionality.

[19]*Laval*, para 103.

[20]Art 45 TFEU.

[21]Art 18 TEU.

[22]The other big change in the Revised PWD is the introduction of a hard limit on the duration of posting to prevent long term or repeat posting of the same worker or different workers for the same position.

[23]H Verschueren, 'The CJEU Endorses the Revision of the Posting of Workers Directive' 22 (3) (2021) ERA-Forum 559.

[24]Preamble to Revised PWD, para. 4.

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Kukovec begins by elaborating the hierarchies one finds between the centre and the periphery of the EU, between say Germany and Poland.[25] There is a difference between them in GDP per capita, education levels, direct foreign investment, strength of industry and efficiency of agriculture, size and prestige of companies, and so on.[26] Because the EU legal discourse remains universalist – discussing concepts such as efficiency and equity in general terms – these hierarchies and the privileges of some to cause harm to others, remain hidden and are not addressed. This universalist discourse proceeds from the standpoint of the centre, which leads Kukovec to claim that the 'EU center's views concerning free movement and social considerations are strong, and are conceived of as natural or less problematic, whereas the periphery's claims are often perceived as harmful.'[27] What is perceived from the centre as social dumping which needs to be remediated by having a more social Europe, looks different from the perspective of the periphery. The ability to offer cheaper labour is a comparative advantage with which companies and workers of the periphery can better compete against those of the centre. This in turn provides workers of the periphery higher wages than they would receive at home. Cases like *Laval* embody, from this perspective, a victory for the workers of the periphery. We should not forget that the periphery has received the *Laval* quartet and the subsequent Revised PWD in a diametrically opposed manner from the mainstream view discussed above. Poland and Hungary's challenge to the Revised PWD was only recently rejected by the CJEU.[28]

Kukovec's approach, however, goes beyond merely highlighting differential distributional consequences of the CJEU rulings on the centre and periphery. His boldest argument is that 'what is a social claim and what is an economic (or "free movement" or "autonomy") claim is a matter of perspective.'[29] This means that the standard reading of *Laval*, one in which the social rights of (all) workers are opposed to economic freedoms of (all) businesses, can easily be reframed as 'a conflict between Latvian workers' social rights and Swedish businesses' interpretation of freedom of movement provisions which would impede the realization of these rights.'[30] What counts as social and what as market is thus no longer universal but becomes attached to proper names, such as Latvian workers and Swedish companies, which means that by changing ones perspective the nature of the conflict changes.

By paying attention to this structural divide between the centre and periphery we see that there is not only social dumping happening when Polish workers are posted to Germany, but that there is also a practice of goods dumping by German companies to the periphery.[31] In the mainstream universalist thinking the latter is not even noticed or conceptualised as an issue. When it comes to questions of the tension between the social and market dimensions in the EU we thus need to always ask 'for whom?' is a certain Directive or judgement beneficial and whom it harms. In Kukovec's view, only by seeing 'who wins and who loses in a particular case'[32] can we make up our mind about the (in)justice of a particular situation. At the very least this makes *Laval* much more ambiguous, since Latvian workers did plausibly win by this judgement. Conversely, the Revised PWD has done much to erode the competitive advantage of Latvian posted workers in Sweden, so it may be seen as a negative development from their perspective.

[25]More precisely between different regions, or even between metropolitan centres and the countryside.

[26]D Kukovec, 'Economic Law, Inequality, and Hidden Hierarchies on the EU Internal Market' 38 (1) (2016) Michigan Journal of International Law 15.

[27]Ibid., 16.

[28]Case C-620/18 *Hungary v European Parliament and Council*, EU:C:2020:1001; Case C-626/18, *Poland v European Parliament and Council*, EU:C:2020:1000. See also Verschueren, 'The CJEU Endorses the Revision of the Posting of Workers Directive' (n 23).

[29]D Kukovec, 'Hierarchies as Law' 21 (2014) Columbia Journal of European Law 144.

[30]Ibid., 143–4.

[31]See Kukovec, 'Economic Law, Inequality, and Hidden Hierarchies on the EU Internal Market' (n 26).

[32]D Kukovec, 'Whose Social Europe? – The Laval/Viking Judgments and the Prosperity Gap' SSRN Scholarly Paper (Rochester, NY, 16 April 2010) 4.

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I am very sympathetic to Kukovec's project, but have a worry about how this approach plays out systematically or over the long run. While the competitive advantage of cheaper labour may work in favour of the periphery locally (in particular cases such as *Laval*), it still seems to undermine the interests of workers – both those of the periphery as well as those of the centre – systemically. What is a better paid employment opportunity for workers of the periphery or a lucrative contract for companies of the periphery, is usually a source of labour cost savings for big and powerful companies of the centre. This is especially the case with posted workers, who can provide wonderful cost saving to companies of the centre, while at the same time allowing them to weaken their domestic labour organisation, such as effected by the Laval and Viking rulings. Saving on labour costs helps cement the dominant position of these companies of the centre over those of the periphery and thus helps perpetuate the very hierarchy which the competitive advantage undermines in a local way.

A. Political vs market constitutionalism

Kukovec advances a persuasive argument about the need to recognise the structural split between the centre and periphery in the EU which results in a perspectival assessment of the distributional effects of European labour law. But there is a major worry with this approach, articulated by Christodoulidis and Somek, concerning the argument that what counts as a social and what as an economic claim can be inverted. Swedish social rights and Latvian economic freedoms can be re-described as Latvian social rights and Swedish economic freedoms, on Kukovec's account. This, however, equates the operation of a politically negotiated distributive settlement, of collective bargaining in Sweden, and the operation of a transnational market with its economic imperatives, lower price of Latvian posted workers, on the other. In Somek's assessment, this echoes Hayek's analysis in which 'transnational contexts are devices for replacing political choice and common commitment with non-cooperative strategic actions among constituents'.[33] Christodoulidis points to the strange conclusion of such substitution, in which social dumping becomes the realisation of the Social Union.[34]

What is lost in Kukovec's equation is the political space within which a social settlement can be reached. It is another step in the dis-embedding of the market from the other spheres, or perhaps a further re-embedding of the social within the market sphere as the economic constitutionalists have argued.[35] This means that while Kukovec is correct to say that in a case like *Laval* Latvian workers have won relatively speaking, what they have won cannot be reasonably described as a social right, nor does it mean that the judgement has not continued down the path of economic liberalisation and negative integration, as argued by the mainstream position.

Furthermore, while Latvian workers have won and the Swedish lost in *Laval*, they were not the only or perhaps even primary parties with an interest in the case. Somek maintains it is 'managers, shareholders and consumers at large',[36] who have probably benefitted most. The working class as a whole can be said to have lost in this and related judgements, at the expense of these other stakeholders. This would sadly be a rather expected and unremarkable way in which a free liberal market economy works. Pitting two groups of workers against each other to reduce labour costs and increase profits is a tried and tested strategy.

Christodoulidis has a further worry about Kukovec's approach which has to do with what he calls the 'deep commodification of labour' and 'total market thinking'.[37] He contends that collapsing the distinction between social rights and economic freedoms, by making them

[33]A Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' 18 (5) (2012) European Law Journal 713.

[34]Christodoulidis, 'The Redress of Law' (n 7), 422.

[35]See Sauter, 'The Economic Constitution of the European Union' (n 8).

[36]Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion' (n 33), 715.

[37]Christodoulidis, 'The Redress of Law' (n 7), 422.

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discursively interchangeable, an entire language of labour law and even of constitutionalism is lost. For Christodoulidis, one of the major achievements of political constitutionalism[38] is political and legal articulation of certain values, such as solidarity and dignity, which get entrenched in a dogmatic fashion. This means they are taken out of circulation of both ordinary politics as well as market imperatives. The social right to strike or to proper working conditions, such as those at stake in *Laval* et al, belongs to a different normative sphere and language game than the economic freedoms whose aim is free circulation in the economic sphere.

Kukovec's approach thus becomes symptomatic of this broader move in which structures and semantics of political constitutionalism – entrenchment of values, hierarchy of norms, etc – get replaced by those of market constitutionalism – the world of indicators, learning, optimisation, and so on. This results in a double injury in *Laval*: not only is the substance of labour protection eroded at the national level through the market liberalising logic of the CJEU's fundamental freedoms jurisprudence, but the manner in which the proportionality presents the clash between competing values robs us of the language in which we could articulate and resists such incursion of the market. In Christodoulidis's view, the manner in which the Court employs proportionality, placing social rights and economic freedoms into the same register and then trying to 'optimise' their realisation,[39] collapses the semantic distance between labour law and market forces. In this respect, Kukovec follows the semantic lead of the CJEU.

3. Recovering the political dimension

I find Christodoloudis's critique of the CJEU and Kukovec persuasive, insofar as he diagnoses in them a loss of political constitutional language which threatens the achievements in the social sphere accomplished during the post-World War II period. But I contend that his focus on the cleavage between political and market constitutionalism takes him too far, which means he at times misses the critical import of Kukovec's distinction between centre and periphery. I first present what I take to be Christodoulidis's shortcoming in this respect in Part 3 of his work – in which he discusses matters related to the EU – before drawing on Somek and Christodoulidis from Part 4 of his book to argue against this mistake.

The *Laval* case, simply put, presented a choice between advancing the reach of the four economic freedoms and the logic of the Internal Market on the one hand, and the protection of national labour standards on the other. In the tradition of political constitutionalism, as interpreted by Christodoulidis, the right to strike exercised by Swedish workers expresses the constitutionally protected value of solidarity which makes its exercise immune from the demands of market logic. National labour law provides a kind of immunity for workers to take action which may be damaging to the smooth operation of the capitalist market. From the perspective of market constitutionalism, which Christodoulidis detects in the development of the EU generally and reasoning of the Court specifically, such labour protections amount to unjustified protectionism. Indeed, as the CJEU holds, the disproportionate exercise of the right to strike is cast as an *obstacle* to the freedom to provide services, as such running afoul of the Treaties.[40]

When the issue is cast in this way, it is not too surprising that Christodoulidis sides with the mainstream view which wants to protect national labour law against the incursion of EU's market constitutionalism. He positions himself with the likes of Wolfgang Streeck and Christian Joerges, arguing for a type of militant formalism which claims we should 'uphold democratically enacted law'.[41] Adopting this view, the Court would have ruled otherwise in the *Laval* quartet, finding that the exercise of labour rights which are legal under respective national law, is to be upheld from the

[38]Not related to the legal/political constitutionalism debate.
[39]Christodoulidis, 'The Redress of Law' (n 7), 409.
[40]*Laval* (n 1), para. 108.
[41]Christodoulidis, 'The Redress of Law' (n 7), 423.

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perspective of EU law, even when it hampers the smooth functioning of the Internal Market by placing obstacles in the freedoms to provide services by posting workers. Christodoulidis recognises the need to include all EU workers in the protections of national labour law, and maintains this is achieved by the principle of non-discrimination. Taking Germany as an example, he argues we should respect democratically taken decisions which have resulted in a social constitution that protects labour, and has been expanded to include all EU workers in its protections.[42] In short, non-discrimination is the right way to find an equitable balance in the EU labour market, not the market access principle championed by the Court.

A. Why non-discrimination is not enough

If we accept Christodoulidis's critique of Kukovec for his total market thinking where language of political constitutionalism is lost and all that remains is the logic of the market, coupled with his defence of the principle of non-discrimination which extends national labour law protections to all EU workers, what is the remaining problem with Christodoulidis's position? I argue that Kukovec's insistence on the structural difference between the workers of the centre and those of periphery cuts deeper than what non-discrimination can ameliorate.

When non-discrimination is applied to democratically adopted labour protections in Germany to workers from, let's say Poland, the latter are included in the democratic process through a type of virtual representation. They do not take part in the democratic process directly but their interests are represented virtually by German workers. Insofar as German and Polish workers share the same interests, we can say that Polish workers are meaningfully represented in the German domestic political process. The problem is, however, that in certain crucial respects substantial interests of the two groups of workers do not align. Following Kukovec's structural distinction between the centre and the periphery, we can surmise that workers of the centre have higher levels of education, skills more relevant to the fast-changing economy, and so on. We can even simplify the difference by looking at their respective income levels. Virtual representation of Polish workers by German workers within their domestic political process would work if the two groups of workers would meaningfully form a class. But while the majority of income inequality in the EU15 was attributable to class, in the EU27 it is location, or Member State of origin, which accounts for the greater share of inequality.[43] At its most extreme, the gap between minimum wages in Bulgaria and Luxembourg is no less than sixfold, adjusted for purchasing parity![44] Those working for minimum wages in the two respective countries can hardly be ascribed the same substantial interests. In other words, transnational class position such as between workers of the centre and the periphery, tells us less about the level of income than the country of origin. This discrepancy puts in question any attribution of virtual representation.

For this reason, Christodoulidis's formula of national democratic process plus non-discrimination does not meet the centre/periphery challenge raised by Kukovec. In the case of *Laval*, it is clear that it is in the interests of the workers of the centre that the higher levels of labour protection as enshrined in national law are protected against incursion by the four economic freedoms under the market access formula. But for the workers of the periphery, the ECJ's piercing of the national labour protections in a certain sense advances their interests. They do not have to subscribe to total market thinking for this. The workers of the periphery may well recognise labour protections in the countries of the centre as a laudable social–democratic achievement, but insofar as they are excluded from their reach, they do not have a stake in

[42] Ibid., 422.

[43] B Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press 2016) 126–7.

[44] <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef21015en.pdf> accessed 2 March 2023.

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protecting them. In a sense, this flows logically from the architecture of European integration in which the market is progressively transnationalised, while the social sphere remains largely rooted at the national level. Insofar as the workers of the periphery do not have a meaningful social protection, they have little to lose and new job opportunities to gain by the erosion of national social protections by the advances of the four economic freedoms.

When Christodoulidis sides with national labour law in cases like *Laval* he fails to take seriously this perspective from the periphery. Perhaps this is partly due to the fact that the objection from the periphery as formulated by Kukovec comes couched in market language. While I join Christodoulidis in decrying the loss of political constitutional language and like him refuse to accept that social right and economic freedoms are interchangeable, the workers of the periphery need to be given a better shake than non-discrimination.

B. Towards a transnational working class or withdrawal of labour

For those of us who don't want to give up on the achievements of political constitutionalism, especially in relation to labour protections and other social rights, but who also want to take seriously the interests of the workers of the periphery, a new way forward is necessary. The choice presented by the *Laval* quartet has to be rejected. The rulings undermined national labour law, but the defence of that national labour would perpetuate the exclusion of the workers of the periphery. We need to look for resources to get us beyond this unappealing choice.

I first turn to Somek's appeal for a transnational working-class solidarity and increase of social competences at Union level. This normative project is as necessary as it is utopian in the current conjuncture of European integration. Then I consider a more radical approach developed by Christodoulidis in part 4 of his work, which amounts to an outline of a political strategy for redressing the march of market constitutionalism.

Somek proposes that instead of fighting within an economic landscape in which they are bound to lose, workers of the centre and periphery 'would be better off if they were to join forces to overcome such an insufficiently politicised social space'.[45] What this means in effect is a radical increase in the competence of the EU over the social sphere so that the distributive effects of jobs transfers could be negotiated in one political space.[46] This implies no less than 'a centralised authority with the ability to levy taxes and to effect transfers'.[47] Such an arrangement would re-embed the market and tame its anti-labour effects, by for example, using a tax and transfer system which would compensate the 'losing' workers from the gains made by the said managers, shareholders, and consumers.

What Somek's position amounts to is a declaration that within the current parameters of EU law the conflict between the workers of the centre and those of the periphery cannot be resolved. Neither a judgement like *Laval*, securing a momentary victory for workers of the periphery, nor the Revised PWD, bringing in the 'equality' as conceived from the perspective of the centre, offers an appealing conception of justice. One follows the logic of transnational economic imperatives, while the other attempts to retrench the statist conceptions of social justice implicitly excluding workers of the periphery. While such a bold proposal to reform the structure of the EU may indeed be necessary, and I agree that it is if the EU is to become a 'social union' in any real sense, it is rather utopian. It is the type of argument which has been offered as a response to many of the EU's deep problems over the decades: to deal with the democracy deficit we need a constitution and accountability,[48] to deal with the social effects of the internal market we need broader fiscal

[45]Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion' (33), 726.
[46]Ibid., 717.
[47]Ibid.
[48]JHH Weiler, 'The Authority of European Law: Do We Still Believe in It?' in W Heusel and JP Rageade (eds), *The Authority of EU Law* (Springer 2019) 3–20.

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competence at the transnational level, etc. In the face of the development of the EU since Maastricht and various setbacks and crises over the past decade and a half, the proposal to deal with this labour problem through a grand political project seems too optimistic.

If a radical increase in social competences of the EU is currently unrealistic and a basis for transnational working-class solidarity hard to find, Christodoulidis offers a more negative programme which could have teeth. By turning to Rancière, Christodoulidis talks about the political engagement of those who have 'no part' in the current order,[49] which of course includes workers of the periphery. By resisting the current articulation of power relations, political praxis of those without a part then results in a new subject position.[50] It is their insistence on the principle of *equality*, 'whose claim can never be fully discharged',[51] which brings about this transformation. A new subject, one which is no longer a worker of the centre or of the periphery but a European worker, will not accept the choice presented in *Laval*, a choice which belongs to the order of the 'police' in Rancière's language, but instead insist that the 'solution has to be transcendent to the system that harboured it'.[52]

Such a transcendent solution might well mean the creation of a proper Social Union, one with powers of taxation and redistribution, setting of common labour standards, and so on. But what is crucial is to recognise that such a transformation is unlikely to come through current EU electoral processes, or the many sophisticated normative proposals as to the proper shape of the Social Union.[53] A full Social Union has failed to emerge not because we are lacking in good normative proposals, such as Somek's above, but due to a complex constellation of political and economic power, institutional setup, historical convergences, and so on. In light of the limitations of normative and practical proposals for institutional tweaking, the negative approach instead outlines the contours of what a political movement that 'transcends' the current constellation may look like.

The process that Christodoulidis appeals to, a kind of 'radical withdrawal' of labour,[54] is a 'persistent negativity' which simply refuses continued participation in the current order.[55] Coming into being of such a development is inherently contingent and unpredictable, but there may be hints of its inception in the recent trends such as the Great Resignation, 'quiet quitting', and more generally a downward pressure on labour participation rates resulting from health reasons (mainly Covid and mental health related) and early retirements. At a certain point a drop in labour participation changes the relative bargaining position between workers of the centre and the periphery in their relation to capital. These are of course merely preconditions for political action which need to be seized and developed into a movement. Such a development might create openings for a reframing of the problem present in the *Laval* quartet. This is, however, highly contingent and a matter of political praxis.

4. Conclusion

What we can do as theorists is to reject the choice as presented in *Laval*, thus pushing against both Christodoulidis's and Kukovec's position, against defending national labour laws or celebrating the incursions of the four market freedoms. A dual commitment to the most advanced national welfare states as well as to the rights and welfare of those workers excluded from them, brings to light one of the fundamental tensions or contradictions in the development of European

[49]Rancière, 'Disagreement', 8–9, in Christodoulidis, 'The Redress of Law' (n 7), 492.
[50]Ibid., 493.
[51]Ibid.
[52]Ibid., 511.
[53]See, inter alia, A Sangiovanni, 'Solidarity in the European Union' 33 (2) (2013) Oxford Journal of Legal Studies 213–41; F Vandenbroucke, C Barnard and G De Baere, *A European Social Union after the Crisis* (Cambridge University Press 2017).
[54]Christodoulidis, 'The Redress of Law' (n 7), 507.
[55]Ibid., 513.

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integration, namely the growing asymmetry between social and market dimensions. This is a contradiction which needs to be continuously addressed by theory, but which can only be properly forced towards a more equitable settlement through political means.

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