The Politics of European Labour Law

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Labour law – comprising individual employment laws and the collective regulation of work by trade unions and employers – is inherently political. It not only involves the legal regulation of the work relationship but also broader policy choices about the nature of society and the distribution of resources. As a result, any sophisticated study of the discipline mandates an understanding of both labour law's legislative content as well as the social, political and economic context within which it has evolved and within which its legislation plays out. 'European Labour Law' is no different in this regard. National understandings of twenty-eight labour law systems permeate the politics surrounding the development of a 'social' Europe and vice versa. This exchange between law and politics takes place on different levels with national ideas moving across borders, percolating to the EU level, and EU decisions filtering down to the national level. Notwithstanding the general recognition that law and politics go hand in hand in providing an understanding of the development of a social side to European integration, the extent to which scholars of 'European Labour Law' have regard to other disciplines is limited. This chapter discusses the shortcomings of this approach and suggests that insights from the EU studies literature on Europeanisation could help labour law scholars to better understand the impact of 'European Labour Law' on national labour law systems and, as a result, provide us with valuable future research agendas.

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Introduction

Labour law – comprising individual employment laws and the collective regulation of work by trade unions and employers – is inherently political. It not only involves the legal regulation of the work relationship but also broader policy choices about the nature of society and the distribution of resources. As a result, any sophisticated study of the discipline mandates an understanding of both labour law's legislative content as well as the social, political and

economic context within which it has evolved and within which its legislation plays out. 'European Labour Law' is no different in this regard. National understandings of twenty-eight labour law systems permeate the politics surrounding the development of a 'social' Europe and vice versa. This exchange between law and politics takes place on different levels with national ideas moving across borders, percolating to the EU level, and EU decisions filtering down to the national level.

Notwithstanding the general recognition that law and politics go hand in hand in providing an understanding of the development of a social side to European integration, the extent to which scholars of 'European Labour Law' have regard to other disciplines is limited. The starting point remains the EU's competence in the field, the resulting 'hard' and 'soft' law instruments, and the case law of the Court of Justice; which together comprise the category of 'European Labour Law' – a semi-autonomous discipline under the umbrella of the 'European Social Model'.[1] Scholars aim their criticism, which focusses predominantly on the EU's prioritisation of economic over social integration and its use of 'European Labour Law' to create a single market, at the EU institutions.[2] This has led to a sense of 'crisis' dominating in the literature.[3] The majority of labour law scholars are pessimistic about the future for labour law in Europe.[4] Reform proposals which aim to reinvigorate 'European Labour Law' as a category of laws that aim to protect workers as the weaker party concentrate on legal solutions while recognising that the proposals are unlikely to come to fruition.[5] There is limited discussion of the actual impact of 'European Labour Law' on the national system; the extent to which European labour laws have 'europeanised' national labour law systems. [6]

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[1] There are also overlaps with EU human rights law, EU internal market law and the law and governance of Economic and Monetary Union. See further P Syrpis, 'The EU's role in labour law: An overview of the rationales for EU involvement in the field' in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU labour law* (Routledge 2016).

[2] Cross reference to chapter in this handbook by Polomarkakis

[3] There are numerous works dedicated to the 'crisis' (broadly defined) of labour law. See C Barnard, S Deakin and G Morris (eds), *The Future of Labour Law. Liber Amicorum Sir Bob Hepple QC* (Hart 2004); G Davidov and B Langille (eds) *The Idea of Labour Law* (OUP 2011); A Bogg, C Costello, ACL Davies and J Prassl (eds), *The Autonomy of Labour Law*, (Hart 2015); S Sciarra, *Solidarity and Conflict. European Social Law in Crisis*, (CUP 2018).

[4] Syrpis (n 1) 21.

[5] For a summary of recent proposals and their evaluation see M Weiss, 'The need for more comprehensive EU social minimum standards' in R Singer and T Bazzani, *European Employment Policies: Current Challenges* (Berliner Wissenschafts-Verlag 2017).

[6] In line with the dominant approach in the literatures, this chapter will refer to 'europeanisation' in the legal literature with a small 'e' and 'Europeanisation' in the EU Studies literature with a capital 'E'.

In the legal literature, the discourse on europeanisation has distinguished between measures adopted at an EU level which aim at harmonisation or co-ordination through 'hard' or 'soft' law mechanisms.[7] The rationale and legal basis for pursuing europeanisation – whether through (minimum) harmonisation or co-ordination – in the sphere of social policy/labour law has varied over time, but overall it has served to legitimise the establishment of an internal market. Four different justifications have underpinned coordinating or harmonising measures at different times: (1) as a response to the effects of the common market; (2) to create industrial/social citizenship; (3) to enable capabilities and to facilitate labour market participation; (4) and, to correct or 'make' the market.[8] A focus on europeanisation in terms of co-ordination or harmonisation illuminates the aims embedded in particular measures and policies. However, it explains little about the processes and actors that influence these measures and their *actual* effect at a national level. It thus fails to answer questions on the scope of domestic change induced by European labour laws; to what extent has European Labour Law perceptibly altered the 'Rechtswirklichkeit', i.e. the law in practice rather than the law in the books in individual Member States? Has there been convergence or divergence across the Member States and, if so, to what extent and in which areas? To what extent has domestic change occurred as a result of 'vertical' Europeanisation (ie the domestic impact of European policies and rules) and to what extent has there been 'horizontal' Europeanisation where Member States influence each other?

The EU studies literature and its well-established understanding of and methodology for analysing Europeanisation – still relatively rarely used in legal scholarship – could be helpful in answering such questions and providing future research agendas. This broad literature offers different theoretical approaches which try to explain the effect of European integration on the domestic policies, politics and polities of the Member States.[9] Rather than looking at the aims

[7] See S Weatherill,'The Constitutional Context of (Ever-Wider) Policy-Making', in E Jones, A Menon and S Weatherill (eds), *Oxford Handbook of the European Union* (OUP 2012) 573; P Syrpis, 'Should the EU Be Attempting to Harmonise National Systems of Labour Law?', in M Andenas and C Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2012).

[8] C Barnard and S Deakin, 'Social Policy and Labour Market Regulation', in Jones et al (n 7) 546 onwards.

[9] There is a substantial literature looking at Europeanisation. See TA Börzel and T Risse, 'Europeanization: The Domestic Impact of European Union Politics' in KE Jørgensen, MA Pollack and B Rosamond, *The Handbook of European Union Politics* (Sage 2006); KH Goetz and S Hix, (eds) 'Europeanised politics? European integration and national political systems' [2000] 23(4) West European Politics 1; MG Cowles, J Caporaso and T Risse (eds) *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001); K Featherstone and C. Radaelli (eds), The Politics of Europeanization (OUP 2003); S Bulmer and C Lequesne (eds), *The Member States of the European Union* (OUP 2005). More recently the literature has examined Europeanisation of accession countries and non-Member States of the EU (B Lippert, G Umbach and W Wessels, 'Europeanization of CEE executives: EU membership negotiations as a shaping power' [2001] 8

underpinning individual measures, Europeanisation looks at how the EU has shaped institutions, processes and political outcomes in Member States. In this regard, it could help labour lawyers to understand the impact of EU-derived labour law norms on national systems and actors.

This chapter moves beyond the current state of the 'European Labour Law' literature by suggesting that insights from the EU studies literature would help us to better understand the impact of 'European Labour Law' and, as a result, provide us with valuable future research agendas. The chapter begins by defining what we mean when we talk about 'European Labour Law' and then explains how lawyers approach the study of the subject. The chapter moves on to discuss the shortcomings of a legal focus before providing an overview of the Europeanisation literature. The chapter concludes that lawyers would benefit from engaging with the Europeanisation literature and makes suggestions as to how such an engagement could occur.

Does European Labour Law exist?

The first complication which arises when writing about 'European Labour Law' is definitional in terms of how to 'label' social initiatives which have a European origin. The legal literature uses different umbrella terms, principally referring to either a broader European social policy/law or 'European Labour Law'. The latter encompasses narrow definitions of employment law within the EU's competence (and to an extent engages with the EU's rules on human rights, free movement of workers, social security co-ordination and equality laws where these relate to workers) while the former also encapsulates broader issues of social policy. If one focusses only on a narrow definition, then there is some scepticism in the literature as to the existence of a European Labour Law. Schmidt, for example, writes:

> In reality, there is not really such a thing as a set of 'European Labour Laws'. This is due to the absence, at a European level, of the usual division prevalent in … Member States between labour law as a form of private law and social security law as a form of

Journal of European Public Policy 902; F Schimmelfennig and U Sedelmeier, (eds) *The Europeanization of Central and Eastern Europe* (Cornell University Press 2005); J Dzankic, S Keil and M Kmezić, *The Europeanisation of the Western Balkans* (Springer 2019)), and the intersection with 'diffusion' (TA Börzel and T Risse, 'From Europeanisation to Diffusion: Introduction' [2012] 35 West European Politics 1).

> public law. At a European level both categories fall under the umbrella of 'European social policy'.[10]

Such a categorisation of labour law as a form of private law and social security law as a form of public law neglects the many facets of the former in particular. It has long been recognised in a number of Member States that labour law at a national level is an autonomous discipline which comprises elements of contract, tort, criminal and commercial law as well as constitutional law.[11] In particular, the collective aspect of the discipline whereby trade unions and employers can set their own norms without state interference overlaps into the public law divide. However, it is correct to say that hitherto it has been impossible to imagine the recreation of a national understanding of labour law at the European level. There is a general acceptance that some European labour laws are necessary yet the desired scope of a 'European Labour Law' is disputed; not because of legal barriers but due to political difficulties. Collins describes this paradox of the impossible necessity of 'European Labour Law':

> European labour law is impossible because of the diversity of European labour systems, which embrace divergent national political settlements and rest upon different models of social regulation of capitalist markets. These differences provide the principal explanation for the absence of the formal competence of the EU in many aspects of labour law under the Treaties.[12]

European Labour Law can therefore only be seen as the 'counterweight to national labour law. European Labour Law describes those labour law norms that originate at a European rather than a national level.'[13] This allows for a much broader interpretation of the term 'European Labour Law'. It permits the recognition of such a category of laws as long as one limits the ambit of the subject-matter to those norms – defined broadly to include any measures which affect national labour law systems – emanating from a European level. However, scholars of European Labour Law must also be scholars of national labour law. European Labour Law is

[10] G Haverkate, M Weiss, S Huster and M Schmidt (eds), *Casebook zum Arbeits- und Sozialrecht der EU* (Nomos 1999) 15.
[11] See Lord Wedderburn, 'Labour Law: From here to Autonomy' [1987] 16 Industrial Law Journal 1; Bogg et al (n 3).
[12] H Collins, 'The Impossible Necessity of a European Labour Law' in S Muller, S Zouridis, M Frishman and L Kistemaker (eds), *The Law of the Future and the Future of Law* (TOAEP 2011) 463.
[13] D Schiek, *Europäisches Arbeitsrecht*, 3rd edn (3rd edn, Nomos 2007), 17.

patchy in its coverage of rights[14] (see below) and although these laws originate from a common core of rules at a European level, they are generally implemented differently in individual legal systems (due to the laws often being in the form of Directives). It is therefore difficult to assess whether the different European labour law systems merely share common influences in the form of Directives originating from a European level or whether there is a common category of laws that has become a part of their legal system. Against this background, it is therefore suggested that there exists a sufficiently large body of labour law norms to justify considering the subject-matter as a *semi-autonomous* legal discipline (which can only be fully understood within the context of each individual national labour law system) which forms part of a 'European Social Model'.[15]

In discussing the content and scope of the European Social Model, lawyers tend to rely on writings in other disciplines. It differs from the narrower category of European Labour Law in that it is characterised by values and commitments rather than binding norms. Thus, Jepsen and Serrano Pascual regard the European Social Model as 'a political project of highly normative ambiguity' which is a 'key factor in legitimising European institutions.'[16] It is a tool which enables the EU to create minimum standards in those areas that fall within its competence. As Giddens points out, the European Social Model is 'a mix of values, achievements and hopes which differ in their form and in the extent of their development in the individual Member States.'[17] It seeks to act as a counterweight to the economic dimension of European integration. However, it is marked by a 'constitutional asymmetry between policies promoting market efficiencies and policies promoting social protection and equality.'[18]

For those critical of the European Social Model, it legitimizes a neoliberal (European) integration process which demands far-reaching restrictions and reforms of national welfare states under the pretence of modernization.[19] The reasons for the vague nature and limited development of the European Social Model vary. The political science literature accepts that significant obstacles at the European level have hindered the development of the European

[14] As evidenced, for example, if one looks at the subjects covered in a textbook on 'European Labour Law'. See C Barnard, *EU Employment Law* (4th edn, OUP 2012).
[15] See Commission Communication, White Paper on Social Policy, COM(94) 333.
[16] A Serrano Pascual and M Jepsen (eds), *Unwrapping the European Social Model* (Policy Press 2006) 19, 25.
[17] A Giddens, *Die Zukunft des europäischen Sozialmodells* (Friedrich-Ebert-Stiftung Politikanalyse 2006) 1.
[18] FW Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' [2002] 40 JCMS 645, 645.
[19] C Hermann and I Hofbauer, 'The European Social Model: Between Competitive Modernisation and Neoliberal Resistance' [2007] 93 Capital and Class 125.

Social Model.[20] There is, however, little agreement on the content and scope of these obstacles. Political economists have used the 'varieties of capitalism' literature to explain the difficulties underpinning the creation of a European Social Model.[21] Thus at European level, not only are different types of welfare state in competition but also different types of capitalism and different types of industrial relations.[22] Other obstacles to the development of the European Social Model include the decision-making process at EU level[23], the predominance of (national) identity politics and the corresponding absence of a European identity,[24] the non-participatory nature of EU decision-making,[25] and the dominance of capital over labour within the European project.[26] [27]

For most of the twentieth century, national labour law systems were not affected by the European integration process which focussed mainly on product market integration.[28] During the first decade of the twenty-first century, a coalition of countries, with the UK at its centre, pushed for the EU to take the same 'market-making' approach to social policy development and promoted the modernisation of European economies along the lines of the 'Anglo-Saxon' model.[29] As labour lawyers would argue, the European Commission and the Court of Justice have been responsive to this approach and have mirrored, and at times reinforced, the deregulatory approach to labour law increasingly dominant in a majority of Member States; hence labour lawyers' pessimistic outlook on the future of EU labour law.[30] There have been

[20] See, in particular, FW Scharpf, 'Die Politikverflechtungsfalle, Europäische Integration und Deutscher Föderalismus im Vergleich' [1985] 26 Politische Vierteljahresschrift 323.
[21] PA Hall and D Soskice, 'An Introduction to Varieties of Capitalism' in PA Hall and D Soskice (eds), *Varieties of Capitalism* (OUP 2001).
[22] B Ebbinghaus, 'Does a European Social Model Exist and Can It Survive?' in G Huemer, M Mesch and F Traxler (eds), *The Role of Employer Associations and Labour Unions in the EMU* (Ashgate 1999).
[23] S Leibfried and P Pierson, 'Semisovereign Welfare States: Social Policy in a Multitiered Europe', in S Leibfried and P Pierson, *European Social Policy: Between Fragmentation and Integration* (Brookings Publications 1995); FW Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).
[24] M Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (OUP 2005); W Streeck, 'International Competition, Supra-National Integration, National Solidarity: The Emerging Constitution of "Social Europe"' in M Kohli and M Novak (eds), *Will Europe Work? Integration, Employment and the Social Order* (Routledge 2001).
[25] A Warleigh, *Democracy in the European Union: Theory, Practice and Reform* (Sage 2003).
[26] G Carchedi, *For Another Europe: A Class Analysis of European Economic Integration* (Verso 2001).
[27] Cross references to add to other chaters throughout this paragraph
[28] M Höpner and A Schäfer, 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe' [2010] 33 *West European Politics* 344.
[29] The other countries are Ireland, the Netherlands, and the Scandinavian countries. See also Scharpf (n 18); Leibfried, 'Social Policy: Left to the Judges and Markets?' in H Wallace, W Wallace, and MA Pollack (eds), *Policy-making in the European Union* (5th edn, OUP 2005). For an overview of the mutual influences characterising the relationship between the UK and the European Social Model see R Zahn, 'The "European Social Model" and the UK: From Europeanization to Anglicization' [2018] 39 HSIR 169.
[30] For an overview of the literature, see Syrpis (n 1).

limited legislative developments since 2002.[31] Existing legislation has been interpreted in 'creative ways – often against the interests of workers – by the Court of Justice' and the demands of 'Eurozone (and crisis) management are resulting in sharp downward pressures on social standards in all Member States, in particular in those relying on EU and IMF for financial support.'[32] This has affected the place given to social rights in the EU's legal order (second to economic rights and market freedoms) and has brought national labour law systems within the regulatory sphere of the EU institutions despite their formal exclusion from the treaties.[33]

How do lawyers approach the study of European Labour Law?

For lawyers, the starting point for any discussion and critique of the social aspects of European integration (whether narrowly understood as European Labour Law or more broadly as European social policy) is the competence in the EU Treaties and its interpretation by the EU institutions. The analysis focuses on two channels: legislative and judicial. In relation to the former, the narrative traces the EU's initial preference for social legislation ('hard law') and subsequent shift to 'soft law'/new governance methods. For the latter, the focus is on the Court of Justice's case law. This section summarises these narratives in order to highlight the main sites of interaction between law and politics, and to illustrate how the EU Studies literature may contribute to a better understanding of this area.

In legislative terms, labour law was excluded from the founding Treaty of the EEC and social policy competence was limited to the free movement of workers, equal pay and cooperation in the area of social security.[34] Social policy was in essence to remain within the regulatory domain of the nation state which would off-set any negative effects of market integration at the national level. A change in the EEC's abstentionist approach can be traced to the Declaration of Heads of State or Government after the Paris Summit of October 1972 which proclaimed the attachment of 'as much importance to vigorous action in the social field as to the

[31] Even though Directives were issued on social matters prior to 1993 (see, for example, Directive 75/117/EEC of 10 February 1975 on equal pay for men and women, OJ 1975 No. L45, 19 February 1975), the Maastricht Treaty marked the start of an active 8-year legislative period in the social sphere involving the European Commission and the social partners. Even though Directives on social policy are still sporadically negotiated, soft law mechanisms have, since 2002, taken over as the preferred method for achieving an approximation of labour standards across the EU.
[32] Syrpis (n 1) 21.
[33] See also the contribution by Polomarkakis in this volume.
[34] ILO, *Social Aspects of European Collaboration (Ohlin Report)* (ILO Studies and Reports 1956) 40-41.

achievement of economic union.'[35] The result was the adoption of an ambitious Social Action Programme.[36] Yet lack of political will among the Member States meant that the Social Action Programme's aims failed largely to materialise.[37] The subsequent introduction of a limited amount of legislative competence in the field of labour law beginning with the Single European Act, and expanded by the Treaties of Maastricht and Amsterdam, has enabled the European institutions to play key roles in trying to advance a catalogue of rights. However, the adoption of initiatives in the social policy sphere has always been dependent on political preferences.[38]

Current legislative competences in the area of social policy include not only the provisions contained in the EU Treaties on the free movement of workers, but also Article 153 of the Treaty on the Functioning of the European Union (TFEU) which allows for the introduction of directives on working conditions, information and consultation of workers and equality at work between men and women. Pay, the right of association and the right to strike are excluded and the EU may not legislate to affect the right of Member States to define the fundamental principles of their social security systems. There is also the option to make rules on matters related to employment law through the social dialogue. Article 151 TFEU consolidates and clarifies the role of the social partners in the making of social policy through the social dialogue. In doing so, it recognises the diversity of national systems and emphasizes the autonomy of the social partners. Contained in article 153(3) TFEU, the social dialogue consists of representatives of the two sides of industry: management and labour. The agreements concluded between the two sides may be given force of law through a Council decision under article 155 TFEU, thereby turning the agreements into a Directive.

Particularly following the entry into force of the Maastricht Treaty, the European Commission together with the social partners through social dialogue, took advantage of the Treaty provisions in actively pursuing a social policy. Academic commentaries at the time were

[35] *Statement from the Paris Summit*, Bulletin of the European Communities, October 1972, No. 10. The reasons for this shift are unclear but it seems to have been felt necessary to develop a 'social side' to the economic policy of the EEC and to 'humanise' market integration. See M Shanks, 'The Social Policy of the European Communities' [1977] 14 CMLR 375.
[36] Council Resolution of 21 January 1974 concerning a social action programme, OJ C 13, 12.2.1974.
[37] Only three specific legislative measures were adopted: Directive 75/129/EEC on collective redundancies, Directive 77/187/EEC protecting the acquired rights of workers on the transfer of an undertaking, and Directive 80/987/EEC protecting workers in an insolvency situation.
[38] See W Streeck, 'From Market-Making to State Building? Reflection on the Political Economy of European Social Policy' in Leibfried and Pierson (n 23); G de Búrca, 'Towards European Welfare' in G de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (OUP 2005).

optimistic about the future development of labour law at EC level and considered the introduction of the social dialogue in particular as laying the constitutional foundation for a collective labour law of the EC.[39] However, a period of legislative stagnation which characterised the end of the 20th Century resulted in a change of approach by the Commission which, keen to avoid a return to the political stalemate that had occurred during the recession of the 1980s, turned to a new *modus operandi* for social integration: since the turn of the century, the emphasis has been on soft law mechanisms in order to achieve some sort of harmonisation in the sphere of social policy.[40] This shift to new forms of governance[41] was accompanied by the launch of the EU's Lisbon Strategy in 2000 which aimed to turn the EU into 'the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'[42] by 2010. The main policy instrument, introduced to achieve this, was the Open Method of Coordination (OMC).[43] Its characteristics are flexibility, adaptability and pervasiveness.[44] Giubonni argues that 'in embracing open co-ordination the Union represents, more than ever before, a "polycentric legal system" in which europeanisation (of the employment policies and labour law of the member-states) respects "national peculiarities".'[45] In this the OMC is a normative tool which can be used to enshrine a series of common values within the national policies of member-states so that the goals are identical with methods adapted to suit domestic frameworks.

Opponents of the OMC challenged its effectiveness, arguing that it only 'impacts on domestic policy-making, when the European objectives coincide with the national policy objectives.'[46] Hatzopoulos argues the OMC may:

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[39] See B Bercusson, *European Labour Law* (CUP 2009) part IX.
[40] See chapter in this volume by Cardwell
[41] KA Armstrong, *Governing Social Inclusion – Europeanization Through Policy Coordination* (OUP 2010); C Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010); and, M Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (CUP 2011).
[42] European Council, *Presidency Conclusions – Lisbon European Council* Brussels: European Council, 2000.
[43] COM (2002) 629.
[44] M-J Rodrigues and M Telo (eds), *Vers une société européenne de la connaissance : La stratégie de Lisbonne 2000–2010* (Éditions de l'Université de Bruxelles 2004).
[45] S Giubboni, *Social Rights and Market Freedom in the European Constitution* (CUP 2009) 247, citing S Sciarra, 'Global or Re-Nationalised? Past and Future of European Labour Law' in F Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart 2000) 288.
[46] C De la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' [2002] 8 *European Law Journal* 38, 50.

> Damage the future legitimacy of the EU and its institutions […] as it does not confer any new competencies on them but specifically limits their reach on national policies in the fields concerned. More importantly still, there is a risk that the OMC replaces the classic Community method in fields where the latter currently prevails.[47]

Although the Lisbon Strategy and the OMC can be criticized for a lack of effective time constraints on implementation, or enforcement mechanisms to ensure compliance, there is a general consensus that the Lisbon Strategy 'enlarged the EU employment and social agenda on matters of national priority'.[48]

The introduction of the Charter of Fundamental Rights by the Treaty of Nice in 2000 – albeit as a non-legally binding document – contributed to this consensus. On the one hand, the introduction of the Charter functioned 'as a limit to the exercise of the powers of the EU institutions and the Member-states acting as decentralized European administration'.[49] On the other, the placement of the full range of rights within a single document signified a process of deconstruction of the traditional hierarchy of rights within EU law which had prioritized economic over social rights; a hierarchy which had tempered the EU's social ambitions since the 1970s.[50] The Charter could have signified a sea change in this regard. Placing the OMC against this backdrop of fundamental rights protection suggested 'possibilities for stimulating governmental actors to reflect upon and to develop the protection of fundamental rights in policy-making while also holding states to account for their performance through systematic and periodic analysis and review.'[51] The viability of using the OMC to stem the rights agenda has however been questioned. As Armstrong points out, the 'OMC, while it may provide EU institutions with information, is not primarily intended as a tool to stimulate those institutions to act: rather it is intended to promote policy reflection by the member-states.'[52] The Lisbon

[47] V Hatzopoulos, 'Why the Open Method of Coordination is Bad For You: A letter to the EU' [2007] 13 European Law Journal 309, 318-9.
[48] J Goetschy, 'The Lisbon Strategy and Social Europe: Two Closely Linked Destinies' in MJ Rodrigues (ed.), *Europe, Globalization and the Lisbon Agenda* (Edward Elgar 2009) 222.
[49] O de Schutter, 'The Implementation of Fundamental Rights Through the Open Method of Co-ordination', in O de Schutter and S Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant 2005).
[50] This was recognized in 1995 by Lord Wedderburn: 'Although some lip service has been paid to the "equal" place of the "social dimension" with economic ambitions, it is impossible to recognise this in the real world of the Community.' Lord Wedderburn, *Labour Law and Freedom* (Lawrence and Wishart 1995) 387.
[51] KA Armstrong, 'The Open Method of Co-ordination and Fundamental Rights: A Critical Appraisal', Draft Paper for Discussion at the 'Fundamental Rights and Reflexive Governance' Seminar (Columbia Law School, 4 November 2005) 2.
[52] Ibid. 4.

Strategy marked therefore a permanent shift in approach to social policy by the Commission: social policies are to provide a market-making/market-correcting function by co-ordinating national social policies.[53]

At a legislative level, the Lisbon Strategy was replaced in 2010 by the Europe2020 Strategy whose aim is to 'turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion'[54] The strategy combines five EU headline targets, which are to be translated into national targets, a number of flagship initiatives, and integrated guidelines for employment and economic policies.[55] Thus, as with Lisbon 2010, the coexistence of soft law mechanisms alongside policy goals under the Europe2020 Strategy leaves little room for the development of new legislative initiatives and the focus has shifted to structural change of the economies of the member-states. This is evident in the wake of the 2008 financial and economic crisis.[56] At a national level, spending cuts to reduce public deficits have entailed a reduction in social, welfare, and public services. At a European level the response has focused on recovery plans and rescue packages targeted at the financial sector, although the financial assistance packages for Ireland, Portugal and particularly Greece have also, directly or indirectly, been the source of major initiatives to amend employment protection regulation, and to deregulate collective bargaining and wage-setting systems in these countries.[57] In parallel, the European Commission has also, under the umbrella of economic policy co-ordination as part of its Europe2020 Strategy, criticized a number of countries' labour law and collective-bargaining systems as being too inflexible to respond effectively to the crisis by protecting workers' pay and conditions.[58] Both of these forms of intervention in national labour law systems have taken place outside the social policy provisions found in the TFEU; the former through bilateral measures addressed directly to member-states; and, the latter through Commission-driven administrative measures based on articles 121 (on economic policy) and 148 (on employment policy) TFEU. Challenges to the measures based on the Charter of Fundamental Rights have been unsuccessful before the CJEU.[59]

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[53] See C Barnard, 'EU "Social" Policy: From Employment Law to Labour Market Reform' in P Craig and G de Búrca (eds), *Evolution of EU Law* (2nd edn, OUP 2011).
[54] COM(2010) 2020.
[55] COM(2012) 173.
[56] See D Vaughan-Whitehead (ed.), *The European Social Model in Crisis: Is Europe Losing Its Soul*? (Edward Elgar and ILO 2015).
[57] See KD Ewing, 'The Death of Social Europe' [2015] 26 King's Law Journal 76.
[58] Ibid. 87-90.
[59] See Case C-128/12 *Sindicato dos Bancarios do Norte* v. *BPN* ECLI:EU:C:2013:149.

In recognition of the ongoing tensions between the economic and the social, the Juncker Commission, in 2016, launched the European Pillar of Social Rights[60] which sets out twenty principles that should renew and guide convergence towards better working and living conditions among participating member-states. Unlike other recent initiatives, its aim is to support rather than deregulate systems of national labour law.[61] To that end, it is centred on three themes: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. To date, there have been few legislative initiatives and no proposals have been put forward for strengthening the social dialogue; the Pillar has therefore been criticised for focussing on ensuring the adaptability of workers to flexible labour markets.[62]

Finally, labour law scholars are, of course, interested in the case law of the Court of Justice. The Court has often played a successful role in advancing the idea of the existence of European Labour Law and its importance vis-à-vis the common market although its decisions have not gone without criticism especially when they have threatened the integrity of national systems of labour and social protection.[63] This came to a head following the decisions in *Viking* and *Laval*, both handed down within a week of each other in December 2007.[64] The judgments, considered to be among the most high-profile judicial decisions in EU law during the last decade, have created a difficult interface between EU free-movement law and national labour regulation.

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[60] COM(2016) 127 final.
[61] I Schömann, *Labour Law Reforms in Europe: Adjusting Employment Protection Legislation for the worse?* Working Paper 2014.02 (ETUI 2014) 7.
[62] To date, the Council has adopted Directive 2019/1152 on transparent and predictable working conditions in the EU and Regulation 2019/1149 establishing a European Labour Authority. However, the European Labour Authority's remit is limited to assisting the Member States and the Commission in their effective application and enforcement of EU law related to labour mobility across the EU and the coordination of social security systems. It will not have enforcement powers in labour matters. For a critique see A Bogg and KD Ewing, 'The Continuing Evolution of European Labor Law and the Changing Context for Trade Union Organizing' [2017] 38 Comparative Labor Law and Policy Journal 211.
[63] See further P Syrpis, *EU Intervention in Domestic Labour Law*, (OUP 2007).
[64] Case C-438/05, *Viking* [2007] ECR I-10779; Case C-341/05, *Laval* [2007] ECR I-11767. The cases have been discussed at length: see the website of the European Trade Union Institute (http://www.etui.org/Topics/Social-dialogue-collective-bargaining/Social-legislation/The-interpretation-by-the-European-Court-of-Justice/Reaction-to-the-judgements/Articles-in-academic-literature-on-the-judgements). The cases are often referred to as part of the 'Laval Quartett' which also includes Case C-346/06, *Rüffert* [2008] ECR I-01989 and Case C-319/06, *Commission of the European Communities* v. *Grand Duchy of Luxemburg* [2008] ECR I-04323.

In *Viking* and *Laval*, the Court was asked to decide whether collective action by trade unions which impeded enterprises' rights, respectively, to freedom of establishment and free movement of services was permitted. In its reasoning, the CJEU frequently relied on the case law of the internal market rather than that in the social policy sphere to find that the collective action constituted a restriction in free movement which could only be justified if it pursued a legitimate interest and was proportionate.[65] Both judgments thus set limits to the type of collective action available to trade unions. By requiring trade unions to justify the proportionality of collective action if it is to be lawful in cases where it restricts the free movement provisions, the court introduced a judicial dimension to labour relations. By choosing to balance the right to strike with the economic freedoms at issue and thereby creating a conflict of norms, the court, in effect, revealed its expectation that national courts should be willing be involved in the autonomous bargaining structures of collective relations. It thereby brought collective labour law within the regulatory sphere of the EU institutions despite its explicit exclusion from the Treaty.

The introduction of the concept of 'proportionality' in balancing the opposing rights in both cases is a difficult concept to reconcile with the process of collective relations. Although the concept may be sufficiently broad and flexible to satisfy both employers and trade unions in some situations, it also leaves much room for interpretation by national courts and influence by national political sentiments. This may potentially create wide disparities in the protection of collective action across the member-states. The CJEU's willingness to adjudicate on the right to strike marked a departure from earlier case law which had exempted national labour laws from the free movement of goods.[66] The judgments in *Viking* and *Laval* thus stand out for the CJEU's willingness to prioritize EU economic integration over the preservation of national autonomy in the social sphere. The cases also re-established the traditional hierarchy that subordinates the EU's social dimension to economic concerns but a time when many had expected the CJEU to follow a different approach.

[65] See A Hinarejos, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms' [2008] 8 Human Rights Law Review 714.
[66] See Case C-265/95 *Commission v France* [1997] ECR I-6961 and Regulation 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L337/8, Article 2.

The CJEU's decisions in *Viking* and *Laval* prompted increased calls for the adoption of a Social Progress Protocol to be attached to the EU treaties.[67] The proposed Protocol clarified the relationship between fundamental rights and economic freedoms. In cases where these conflict, fundamental social rights are to take precedence. Economic freedoms are to be interpreted in a way that does not violate the exercise of fundamental social rights, including the right to negotiate, conclude, and enforce collective agreements. In addition, the Protocol mandated the EU institutions to take legislative action to ensure social progress. However, although the Lisbon Treaty made a number of changes to the EU and its treaties, only few concern the chapters on employment and social policy.[68] In addition, article 6(1) TEU elevated the status of the Charter to that of a legally-binding document. Academic commentaries at the time hoped that the CJEU would use the Charter's provisions, particularly those contained in the 'Solidarity Chapter' to develop a unifying ideology and normalization of social standards, particularly against the backdrop of the OMC's potentially deregulatory guidelines and the decisions in *Viking* and *Laval*.[69] The early signs regarding the CJEU's willingness to apply the Charter's provisions were promising.[70] However, this hope was not long lived. Thus, in *Alemo-Herron* v. *Parkwood Leisure Ltd*[71] decided in 2011, the CJEU found that collective agreements applicable to public-sector workers would not apply after the transfer of an undertaking to the private sector unless the future employer agreed to be bound by the collective agreement. In doing so, the CJEU overturned long-standing British acceptance of the practice. The court found support for its conclusion in relying on Article 16 of the Charter which enshrines the freedom to conduct a business.[72] The judgment fortifies the view that, while previous case law focused on the need for the protection of workers' rights and recognized the EU's limited competence in the social policy sphere, the CJEU is now following the Commission in prioritizing market priorities over social rights. Subsequent cases concretise the CJEU's reluctance to endow collective labour rights with a constitutional nature despite their inclusion in the Charter.[73] The Charter therefore does little to disturb the status quo which has developed

[67] The idea of a Social Progress Protocol is not new: A Bücker, 'A Comprehensive Social Progress Protocol Is Needed More Than Ever' [2013] 4 European Labour Law Journal 4.
[68] See Article 151 TFEU.
[69] See Bercusson (n 39) chapter 7.
[70] See C-236/09 *Association Belge des Consommateurs Test-Achats* v. *Conseil des Ministres* [2011] 2 CMLR 38; joined cases C-159/10 and C-160/10, *Fuchs and Köhler* v. *Land Hessen* [2011] ECR I-06919*;* and C-78/11 *Asociación Nacional de Grandes Empresas de Distribución (ANGED)* v. *Federación de Asociaciones Sindicales (FASGA) and others* ECLI:EU:C:2012:372.
[71] Case C-426/11, ECLI:EU:C:2013:521.
[72] Ibid. para 33.
[73] See, for example, Case C-176/12 *AMS* v. *CGT* ECLI:EU:C:2014:2.

over the EU's life time as regards the subordination of social policy to single-market integration. Rather than relying on the Charter's Solidarity provisions to give social rights the same constitutional status as economic rights, the CJEU has used the Charter to entrench the primary nature of economic rights. In doing so, it has required the adjustment of the labour law systems of member-states whenever these conflict with EU economic rights, despite the EU's limited competence in the social policy field.

What are the limits of the legal approach?

From the foregoing, it is clear that European Labour Law has undergone considerable change in terms of its content and aims. However, it is not clear to what extent the existence of European Labour Law as a category of laws has actually led to a process of change across national labour law systems; to what extent has European Labour Law perceptibly altered the 'Rechtswirklichkeit', i.e. the law in practice rather than the law in the books in individual Member States? When it comes to assessing the impact of European Labour Law, much of the literature either restricts itself to providing an EU-level perspective[74]; to providing comparative accounts of national labour law systems[75]; or to considering the (legal) implementation of individual measures in, and effect of case law on, a particular legal system.[76] In this regard, scholars of European Labour Law tend to either be EU law generalists or subject specialists at the national (and by extension EU) level. Within their respective frameworks, these scholars focus on the coherence of the overall legal system which is the focus of their analysis, rather than concentrating on European Labour Law's societal impact. Yet, an understanding of the extent to which European labour norms actually 'arrive' in national legal systems and which actors shape those norms is crucial if one is to shape the future trajectory of the discipline.

A number of cross-national projects have therefore attempted to better understand the impact of EU laws within national labour law systems using a comparative law approach.[77] Nonetheless, there has been a chronic lack of systematic evidence and theoretical analysis as

[74] For example, by critiquing case law of the Court of Justice in light of previous decisions or by assessing the success of a legislative measure in light of its aims.
[75] B Hepple (ed.), *The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945* (Hart 1945) and its successor B Hepple and B Veneziani, *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004* (Hart 2009).
[76] See, for example, M Rönnmar, *EU Industrial Relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Kluwer 2008).
[77] See in particular MR Freedland and J Prassl, *Viking, Laval and Beyond* (Hart 2016).

to how EU rules operate in different countries and why their impact differs across systems. Freedland and Prassl in their book on the *Viking* and *Laval* cases attempted to isolate the effects of the judgments on national labour law systems by exploring the relationship between EU law and the legal systems of different Member States as well as the sustained impact of internal market law on Member State law. In doing so, they sought to break down 'the compartmentalisation in EU law scholarship which goes hand-in-hand with compartmentalisation (and specialisation) in each of the legal systems themselves' with a view to 'offering both a deeper understanding of each substantive area under discussion and insights into the operation of EU law more broadly.'[78] The book indeed provides helpful insights into the relationship between EU law and different countries' legal and industrial relations systems. For example, it illustrates the dichotomy between academic debate and legal reality. The *Viking* and *Laval* cases triggered a substantial debate amongst labour law academics across all Member States; most of whom broadly agreed in their criticism of the decisions. However, with the exception of Sweden where the Laval case had a substantial impact on the labour law system, the judgments had little or no direct impact on primary legislation or judicial decisions across other Member States analysed in the book. The logical next step would be to consider *why* this dichotomy exists and what it teaches scholars about the nature of European Labour Law.

The legal literature therefore leaves a number of questions unanswered. How and why are certain EU labour law rules implemented (or not) and how do they operate across the Member States? To what extent do Member States share a common category of laws that has become an integral part of their legal system? Can one speak of convergence when it comes to domestic institutions, policies and processes in the sphere of Member States' labour law systems? What is the 'net effect' of the European institutions (which are the primary focus of criticism) and to what extent do they drive or reinforce other sources of domestic change (either at a national level or through other forces such as globalisation)? To what extent has domestic change occurred as a result of 'horizontal' influences between Member States?

Theoretical and methodological insights from other disciplines may be able to fill the gaps in order to help us to better understand European Labour Law and, on that basis, to develop future research agendas. The EU studies literature, in particular, has developed a thriving research

[78] Ibid 3.

agenda on Europeanisation which looks at how the EU has shaped institutions, processes and political outcomes in Member States. This literature is still relatively rarely used in legal scholarship and could help to provide conceptually and methodologically grounded answers to the questions listed above.

How could the 'Europeanisation' literature help?

While the legal literature looks at 'europeanisation' in terms of the aims of particular European measures, the EU Studies literature understands 'Europeanisation' to encapsulate the domestic impact of Europe; how effective are European-level policies at the domestic level and how does European integration affect or constrain the domestic policies, politics and polities of the Member States?[79] Europeanisation as such is not a theory but a phenomenon which different theoretical approaches have sought to explain.[80] One of the earliest conceptualisations of 'Europeanisation' was given by Ladrech who considered it to be 'an incremental process of re-orienting the direction and shape of politics to the extent that EC political and economic dynamics become part of the organisational logic of national politics and policy making.'[81] A number of authors[82] have since elaborated upon Ladrech's definition thereby widening it to include the development of political networks at a European level as well as 'transnational influences that affect national systems'[83] within the concept of Europeanisation. In *Europeanization and National Politics*, Ladrech developed his earlier definition of Europeanisation. He explicitly situates his approach to Europeanisation in 'the 'top-down' perspective in which domestic change is traced back to EU sources.'[84] In doing so, he follows the recommendation of Börzel and Risse[85] to 'use the term Europeanisation as focusing on the dimensions, mechanisms, and outcomes by which European processes and institutions affect domestic-level processes and institutions.'[86] Following on from these definitions, 'EC political

[79] See (n 9) for an overview of the literature.
[80] See Featherstone and Radaelli (n 9) 340.
[81] R Ladrech, 'Europeanization of Domestic Politics and Institutions: The Case of France' [1994] 32 JCMS 69, 69.
82 See TA Börzel and T Risse, 'When Europe hits home: Europeanization and Domestic Change' [2000] European Integration Online Papers 4:15; JP Olsen, 'The Many Faces of Europeanization' [2002] 40 JCMS 921; and, the contributions in K Featherstone and CM Radaelli (eds), *The Politics of Europeanization* (OUP 2003).
[83] B Kohler-Koch, 'Europäisierung: Plädoyer für eine Horizonterweiterung' in M Knodt and B Kohler-Koch (eds), *Deutschland zwischen Europäisierung und Selbstbehauptung* (Campus 2000).
[84] R Ladrech, *Europeanization and National Politics* (Palgrave 2010), 15.
[85] TA Börzel and T Risse, 'Europeanization: The Domestic Impact of European Union Politics' in KE Jørgensen, MA Pollack and B Rosamond (eds) *Handbook of European Union Politics* (Sage 2007).
[86] Ladrech (n 84) 22.

and economic dynamics' can thus be integrated into a member state's organisational structure through either a 'top-down' or a 'bottom-up' approach. The 'top-down' dimension considers the EU's domestic impact. It typically starts by identifying the 'goodness of fit' between the domestic and EU levels. Where there is 'misfit' – in terms of policy or institutions – one would expect domestic change to occur, the extent of which depends on adaptational pressures.[87] These pressures can arise from the EU level or within the domestic system. For example, domestic actors may invoke the EU level to justify and legitimate domestic reforms.[88] However, there is also a recognition that EU governance, in particular, does not fit neatly into this explanation as it encourages – through the OMC – mutual learning across the Member States.[89] The 'bottom-up' approach looks at the construction of the EU system of governance and is aware of the fact that individual Member States may seek to upload their policy model to the EU level in order to minimise subsequent adjustment costs.[90]

In light of these conceptual understandings, Graziano and Vink identify five points which researchers should consider when assessing the scope of Europeanisation: (1) it is not necessarily top-down; (2) Europeanisation can occur directly or indirectly; (3) there is not necessarily a uniform impact (harmonisation or convergence) – European integration can also have a differential impact; (4) Europeanisation can affect wider polity and politics dimensions than just the targeted policy domain; and, (5) regional integration processes as a whole can play a part.[91] This leads us to the final theoretical discussion point: how should the outcomes of Europeanisation be classified? The literature broadly distinguishes between different outcomes regarding the degree of change ranging broadly from absence of change (inertia) via absorption and accommodation to substantial transformation.[92] Overall, the evidence seems to suggest that the degree of domestic change induced by European integration appears to be limited. There has also been limited evidence of convergence across the Member States when it comes to

[87] See Börzel and Risse in Jørgensen et al (n 9) 8-9.
[88] M Haverland, 'National adaptation to European integration: the importance of institutional veto points' [2000] 20 Journal of Public Policy 83.
[89] S Bulmer and CM Radaelli, 'The Europeanization of national policy' in S Bulmer and CM Radaelli (eds), *The Member States of the European Union* (OUP 2005).
[90] TA Börzel, *States and Regions in Europe. Institutional Adaptation in Germany and Spain* (CUP 2002) and TA Börzel, 'Europeanization: how the European Union interacts with its member states' in Bulmer and Lequesne (n 9).
[91] MP Vink and P Graziano, 'Challenges of a New Research Agenda' in P Graziano and MP Vink, *Europeanization. New Research Agendas* (Palgrave Macmillan 2008) 8-9.
[92] Cowles et al (n 9); A Héritier, D Kerwer, C Knill, D Lehmkuhl and M Teutsch, (2001) *Differential Europe – New Opportunities and Restrictions for Policy Making in Member States* (Rowman and Littlefield 2001); Featherstone and Radaelli (n 9); TA Börzel, and T Risse, 'Conceptualizing the domestic impact of Europe', in Featherstone and Radaelli (n 9).

institutions, policies and processes. Convergence that does occur does not necessarily originate at the European level and it is often difficult to disentangle the effect of European integration from other influences at the domestic and global level. There are still substantial gaps in the Europeanisation literature, for example, in how to theorise horizontal influences, however in its approach to theorising European influences on the national level, it could provide some useful insights for European labour lawyers in how to approach their discipline. Indeed, the Europeanisation of social policy has been studied much less deeply than other disciplines.[93] Conversely, Europeanisation researchers would benefit from legal scholars' understanding of their discipline who, in their analyses of the impact of European norms focus on the extent to which these contribute to the construction of a coherent legal system which minimises uncertainties.

Conclusion

European Labour Law has undergone considerable change in terms of its content and aims since the adoption of the EEC Treaty. It has become a patchwork floor of social rights which limits Member States' legislative capabilities, constrains judicial decision-making at a national level, but has also opened up new avenues for social partner and civil society involvement. However, it is not clear to what extent European Labour Law has perceptibly altered the 'Rechtswirklichkeit', i.e. the law in practice rather than the law in the books in individual Member States. This chapter has argued that legal scholars could usefully look to the Europeanisation literature in order to develop causal explanations of the effects (or lack thereof) of European integration on national labour law systems. Methodologically, it would support the design of research projects which engage in quantitative or qualitative studies of the effects of European labour laws on the national level; thereby enriching our understanding of the discipline, the hurdles it faces in Europeanising national systems, and discovering new research questions for further exploration. At the same time, the Europeanisation literature could benefit from European labour lawyers' understanding of the place and function of EU-derived norms within, and contribution to, a coherent (national and European) legal framework.

[93] See G Falkner, O Treib, M Hartlapp and S Leiber, *Complying with Europe. EU Harmonisation and Soft Law in the Member States* (CUP 2005). For an analysis of the impact of the Social OMC see H Schönheinz, 'The Social OMC in the UK: Beyond Cheap Talk?' in E Barcevicius, T Weishaupt, J Zeitlin (eds), *Assessing the Open Method of Co-ordination* (Palgrave 2014). For an example of where a multi-country labour law case study was designed in reliance on the Europeanisation literature to assess the effects of EU enlargement on national labour law systems see R Zahn, *New Labour Laws in Old Member States* (CUP 2017).