Social justice and labour rights: EU and ILO face palms in the governance web

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Introduction

1. This contribution is written in light of the Inaugural Social Justice Lecture held on 16 October 2017 at the University of Leiden. The Social Justice Lecture is dedicated to the work and career of professor Paul van der Heijden of the University of Leiden. In order to highlight this spirit and legacy, the present contribution aims to contribute to social justice, labour law and global governance debate.

2. The main focus of this contribution will be on the European Union (EU), without neglecting its relationship with the International Labour Organisation (ILO) and the broader global governance and social justice agenda. The European Union is multidimensional and must be regarded as a global governance actor, but also as a form of 'mini-globalisation' itself. Its ambition is to integrate states and their economies towards a transnational European market and an economic and monetary union. In this integration project, however, the EU also has broader, social aspirations. Furthermore, the EU is both a global and a regional actor. This makes its relationship with the International Labour Organisation (ILO) interesting, but also complex. Within this perspective, it will be the subject of discussion in this contribution.

3. There is a strong analogy in ambitions of both the European Union and the ILO. Both institutions promote social justice and labour rights. As ILO Director-General Guy Ryder explained, "the International Labour organization (ILO) and the European Union (EU) share the same foundational values."[1] But the EU's governance approach, including its legal mechanisms, has its own pathways and methods of reaching those objectives. The EU is indeed a specific construct. European integration is characterised by a tension between different policy goals of economic and social progress. In this light, the EU is facing difficulties in finding a proper and balanced approach, due to a wide set of reasons. At the same time, in this complex environment, broader evolutions due to globalisation and technological

evolutions emerge, creating new challenges. These have important implications for the world of work. They not only affect labour markets and the organisation of work, they also go together with (trade) liberalisation and agendas of economic competitiveness.

4. The purpose of this contribution is to discuss the EU's (joint) responsibility with regard to the promotion of social justice and labour rights in a global governance context. This will be done by highlighting the main challenges for labour law against the broader setting of globalisation. It will be shown how developments in the global economy impact the discussion about labour law, where the relationship between labour law and economics receives a new dimension. As these global challenges for labour law are also create effects in the European Union context, it will be shown that policy responses in the European Union generate various problems, not only in light of labour law's own values and social justice goals, but also in light of rights and principles recognised by the ILO. Against this background, it will be demonstrated that the EU remains somewhat caught between its global governance ambitions and its own regional integration dynamics. This contribution will argue that the EU and the ILO need to be partners in the promotion of social justice and labour rights and thus need to 'face palm' in the broader global governance web.

5. The focus, sources and expertise on which this contribution is based, is mainly drawn from sources in the field of labour law, European Union law and, broader, world of work and governance insights and literature.[2]

I. Setting the scene

6. The 21st Century has brought new challenges for labour law, or more generally, for labour rights both locally and globally. The world of work is changing. There are enormous challenges for our economies, labour markets, industrial relations actors and policy makers. Main factors of change include globalisation, the rise of new technologies, services and individual consumer oriented and capitalist driven markets.[3] We need to take into account new trends and developments, such as digitalisation, robotisation, demographic changes and multiculturalism, individualism and the changing meaning of work.

A. Globalisation

7. Globalisation is a key component of the new world of work, going along with high mobility and migration of businesses and, increasingly, of workers. Harry Arthurs has posed the intriguing question: "who is afraid of globalisation?" – and his answer is: "just about everyone, if they have any sense".[4] It translates the current concern: businesses receive increased, global, economic competition; countries deal with regulatory competition; workers are confronted with networks and chains of decision lines; unions suffer with attempts for global strategies and solidarity. Behind this, there are elements of uncertainty and concerns of control. We, indeed, lost the comfort of our traditional geographical boundaries.

8. Globalisation is a shifting and dynamic concept and, therefore, a definition is always problematic. According to the report of the World Commission on Fair Globalisation, the key characteristics of globalisation can be described as "the liberalization of international trade, the expansion of FDI, and the emergence of massive cross-border financial flows. This resulted in increased competition in global markets. It is also widely acknowledged that this has come about through the combined effect of two underlying factors: policy decisions to reduce national barriers to international economic transactions and the impact of new technology, especially in the sphere of information and communications." [5] In a narrow sense, globalisation can be seen as "a particularly advanced state of cross-border economic interdependence", while in a broader sense, it can be viewed as "a process of progressive interdependence driven by factors that bring societies and citizens closer together, and by policies, institutions and private initiatives that support the integration of economies and countries".[6]

9. For labour law, main challenges result from globalisation. Both the national state as a regulator as well as the autonomous actors of labour law (such as unions) are losing grip on cross-border trade, services and mobility. The question behind it was already seen by Albert Thomas, the first Director of the International Labour Office, writing in the first issue of the *International Labour Review*: "How far can international control be harmonized with national sovereignty?"[7]

10. There seems to be a positive and a negative side in this question. First, and positively speaking, the phenomenon of globalisation and the creation of the global workplace would require to address labour issues at a global level and would introduce the idea of transnationalism of labour law. For some scholars, "national labor law can at most be considered a local, and thus increasingly relative, if not insufficient, response to phenomena of global change".[8] There is, in other words, a growing relevance of legal intervention and action on a level above the state.

11. Second, and negatively speaking, it could be argued that globalisation creates imbalances between the economy, society and the polity. While the economy is becoming increasingly global,

social and political institutions remain largely local or national. In this context, nationally oriented legal and institutional pathways are not always providing suitable solutions for cross-border. This tension between national 'systematic behaviour' of labour law and cross-border mobility of economic forces is, for example, shown in the European integration process. A typical downside scenario in this context, is the phenomenon of social dumping or regulatory competition. Also unions may be driven into this logic and forced into 'bargaining competition', for example in the context of delocalisation of companies or transnational business reorganisation.

12. While national and international regulation of labour have become interlocked,[9] new modes of regulation,[10] mechanisms or institutions are to be addressed, complementary to, or in substitution of, traditional modes of labour law. This brings us to the new possibilities and challenges of labour law against the background of globalisation.

B. Future of work and labour law

13. Globalisation is not the only factor of change. Behind this goes a complex phenomenon of a changing world of work. New realities and dynamics have triggered a reflection and debate about labour law.

14. Many scholars have debated the 'modernisation of labour law',[11] the 'boundaries and frontiers of labour law[12]' or the 'future of labour law'[13]. Within the European union, the debate was illustrated by the European Commission's Green Paper on Modernising Labour Law (2006)[14] 'to meet the challenges of the 21st century'. The consultation was an important part of the EU's Social Agenda 2005-2010 and connected with several other Commission initiatives. The Green Paper embodies, implicitly, the academic labour law debate developed since some years throughout Europe and the world.[15] It also embodies the very intriguing debate on the identification of the 'European Social Model' and the role of the EU in labour law. In the ILO, the issue has been framed and discussed under the 'Future of Work' initiative, launched by ILO Director-General Guy Ryder.

15. The 'modernisation' or 'future' debate has pushed labour law in a sort of regulatory crisis. It is referred to as the crisis of the traditional socio-economic regulatory model, described by Supiot:[16] "Important national differences aside, that industrial model may be ideally or typically described as a regulatory framework which depends on a standardized form of subordination, the widespread nuclear family and the institutionalization of the parties who have an interest in collective bargaining, all within a national state."

16. Indeed, in its traditional formula, labour law worked well in an industrial setting. A classic approach of industrial relations – often labelled as 'Fordism' – bears elements such as a male full-time breadwinner, long-term service in the same firm, doing one or similar jobs, homogeneous and standardised working styles, clear-cut separation of working time from leisure or private time, relatively short terms of life expectancy, predominantly industrial unionism and collective bargaining.[17] Labour law has been traditionally built on the underlying assumption of employment relationships with lifetime or long-term security with the same employer. This has been fitting well with a right to long-term employment or legal job security.

17. This 'industrial' period of labour law has evolved and , in many areas or sectors of activity, has increasingly become something of the past. In 'post-industrial' globalised economies, with services and consumer oriented markets, businesses (often employers) have been looking for means to adjust and readjust work and the workplace. The result has been a quest for flexible work patterns and the rise of contingent employment, non-standard forms of work (fixed-term, part-time), outsourcing operations, and the growth of triangular employment relationships, such as temporary work. In such context, the traditional work place would seem to have become weakening. At the same time, the worker – and the concept of how work is done – has escaped a single model of understanding. The hierarchical and pyramidal enterprise structure, is losing out. Small scale units, teams and cooperation with individual expertise are becoming driving forces of business. Workers not only have to listen to their boss, they now have to take initiative themselves and create own authority based on creativity, responsivity and expertise.

18. Even in this post-industrial era, new challenges arise. In a further phase, by some called the 'second machine age',[18] digitalisation and robitisation determine new questions for the world of work and its regulation.

19. The so-called platform economy, also referred to as the collaborative economy or the gig economy, is creating forms of work which are much less capable of being recognised by more traditional modes or patterns of labour law. The European Commission has analysed the issue of the collaborative economy in its Communication of 2016 and described it as a number of "business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals".[19] Typical examples of this new economy are Uber, Airbnb or Deliveroo. The question is not only whether and how labour law is responding to the work performed via such platforms. The question is also whether this properly qualifies as work, since many tasks are irregular and sometimes referred to as 'micro-work'. The Uber-

litigation in the U.K. and the U.S. gives a good illustration on how employment law questions arise in light of technology based platform work.[20]

20. However, developments go much further than the collaborative economy. Further digitalisation and robotisation is causing new debate in labour law. The impact of robots and artificial intelligence on the world of work is subject of discussion and, still, cause a great deal of speculation as the future is quite uncertain.[21] Obviously, the influence of automation and digitalisation on jobs and the work environment is not new. We have had traffic lights, dish washer, computers and mobile phones in the past, all replacing jobs or changing the way we work. Technological evolution, however, goes at a much faster pace than ever before and it is clear that it takes jobs at a possible faster pace and bring other changes in our work environment.

21. Together with these developments, the collective element in labour relations has also come under debate. The organising capacity of workers and solidarity are under pressure. In a global context, union density is falling. As capital mobility increases globally, pressures on union bargaining increase. Super-capitalism may have a (negative) effect on systems of workplace democracy.[22] In a digitally mastered economy, collective organization is also become more challenging.

C. Social justice and labour law

22. The modernisation of labour law-debate should not be neglected, nor be feared. Labour law needs to be responsive and this requires a discussion of change and modernisation. In doing so, discussion about the future of labour law need to turn back to the basics and the foundational values of labour law.

23. A classical approach is to view labour law as addressing the inequality of bargaining power between the contracting parties in the employment relationship, or as serving as a *corrigendum* of the free market place. There is no doubt that this remains a prominent idea. Labour law as 'inequality compensation'[23] is perhaps increasingly relevant.

24. The ILO plays a big role in the search of foundations of labour law. To these foundational elements belong the idea of 'social justice' and the principle that 'labour is not a commodity'.[24]

25. The goal of 'social justice' was already referred to as a guiding principle in the wording of the 1919 Peace Treaty of Versailles, establishing the International Labour Organisation. The Peace Treaty expressed that universal peace "can be established only if it is based upon social justice". Social justice is a broad and open concept.[25] But as it belongs to the main mission of the ILO, the body of

international labour law can be seen as creating necessary guidance. In the "ILO Declaration on Social Justice for a Fair Globalization", adopted by the International Labour Conference on 10 June 2008, it is made clear that globalisation needs to be linked to fairness and fair outcomes.[26]

26. The Treaty of Versailles also provides "that labour should not be regarded merely as a commodity or article of commerce." This principle represents the idea that labour incorporates other values than mere market value. Thus labour (law) has to be evaluated in light of other norms and criteria than those who are proper to a (free) market. Put otherwise, the principle that "labour is not a commodity", seen as a reference to the foundation of labour law, allows to recognise the non-market dimension of labour and therefore the person, including human dignity, behind labour.

27. However, it is obviously a real challenge to reconcile the foundational discourse of labour law with an economic approach of labour law rising in light of globalisation.

II. Labour law and economics

28. Labour law not only faces the challenges of the world of work. It also faces the imperatives of economics. Economics, economic growth and competitiveness challenge the issue of regulating globalisation including the approach for labour law. It has made questions of labour law and economics increasingly difficult. This can be seen in two main ways: first by pointing at forces which trigger regulatory competition on the basis of economic interest, including social dumping, and, second, by looking at the competitiveness agenda of labour law itself.

A. Social dumping

29. One of the problems for labour law that increased by globalisation is called social dumping. Due to the growing transnational activities and relevance of economic competitiveness of both enterprises and countries, the roles of national or regional levels of regulation and government intervention are dramatically shifting.

30. A departing point of social dumping theory would be that not only businesses but also countries or governments would behave as market actors. The strategy for governments is then to stay attractive for business investment, implying an environment without a too complicated or expensive legal structure, with labour cost low and labour law flexible.[27] On a broader scale, it would imply that labour

law would be adapted to the growing and global mobility of capital.[28] Working conditions, and their level of regulation, may be used for purposes of competitiveness.

31. It is important, in this context, to refer to one of the reasons of existence of the International Labour Organisation. Besides the social and political goals, there was the economic *ratio legis* of international labour standards. International standards provide for a level playing field for governments, businesses and workers in a global competitive environment, at least at a minimum standard level. This aims to avoid that labour standards would be going beyond a minimum floor for reasons of competitiveness.

32. For the purposes of discussion, certainly when referring to the EU context further below, it is useful to distinguish three different types of social dumping:[29]

- Dismantlement: In this understanding, the perspective of a regulator, government or system is taken. Dismantlement concerns the lowering of labour standards, such as the provision of inferior wages or a flexible labour market strategy, in order to attract foreign investment.

- Replacement: This can be understood from a consumer or user perspective. It may concern business to consumer, business to business, or business to government relations. Replacement concerns the creation of a competitive advantage through the replacement of high-cost producers by low-cost producers from countries or areas in which wages, social benefits, and direct and indirect costs entailed by protective legislation are lower.

- Delocalisation: This can be seen from a business or entrepreneurial perspective. It concerns effectively exercising the possibility of business relocation, or merely putting pressure on local levels of bargaining, given the fact that other countries might allow cheaper labour standards.

33. It is not surprising that social dumping has a negative connotation. It is also indicated as a 'race to the bottom'. "Regulatory competition leads non-labor groups to oppose labor regulation on the ground that business flight hurts them. Thus regulatory competition can trigger a downward spiral in which nations compete with each other for lower labor standards while labor, having lost its historic allies at the domestic level, is thus rendered powerless to resist."[30]

B. Competitiveness

34. In the context of globalisation, another trend puts pressure on labour law. With globalisation comes the idea of liberalisation. And with liberalization comes the idea of economic growth. This

combination is then supposed to bring overall well-being. As an 1996 UNCTAD report already stated, "liberalization of international trade, investment and capital movements can improve allocative efficiency and can bring about greater dynamism in an economy, thus providing faster economic growth".[31]

35. Liberalisation has promoted the diminishing of barriers to trade and has promoted the role of private and free enterprise. It has led to a trend towards de-regulation. This has also impacted the discussion on labour law. The competitiveness agenda has started to take on the labour law debate. It is logical that labour law and regulation forms part of an economic analysis and discourse. The economic relevance and impact of labour regulation is even a legitimate concern. In most developed market economies, economic or market freedom plays an important role. Businesses, including employers, need to take into account limitations and even the 'cost' of rules of labour law. Both disciplines, labour law and economics, thus have a mutual relationship and impact. However, due to globalisation and liberalisation, the economic impact of labour law has become more and more apparent in governance approaches. It has been used to (re-)assess rules on worker and employment protection in light of economic criteria.

36. This is well illustrated in the discussion on dismissal law. When rules on employment termination are protective for workers and are thus 'strict', they are seen as potential limitations for free enterprise and thus for economic growth. Since the beginning of the nineties, the OECD has been examining employment termination law and the use of fixed term employment contracts. This has been labelled as "employment protection legislation (EPL)" or "rules governing the hiring and firing of workers". In a 2013 OECD report, it is stated that this legislation "has been typically designed to protect jobs and increase job stability, by reducing job destruction, with the aim of preserving the individual worker and society from some of the above-mentioned costs. However, in some cases, constraints imposed to firms might be excessive, thereby discouraging job creation and needed reallocation. From both a research and policy perspective, it is important to accurately measure EPL in order to determine its labour market impacts, identify best practices and assess reform progress."[32] The enhancement of flexibility is thus seen as a strategy to serve the purposes of economic growth and development.

37. It is of course important to evaluate labour law provisions and regulation. For example, if job security law is becoming outdated it should be modernised and reformed in order to adapt to new realities and circumstances. In a labour law discourse, however, criteria and values are not necessarily similar to those of economics using criteria of economic competitiveness. This becomes clear when looking at the work of the World Economic Forum, who has defined economic competitiveness as "the set of institutions, policies and factors that determine the level of productivity of a country", assuming

that more competitive economies are productive ones and lead to growth which leads to income levels and improve well-being.[33] The approach is, seen from a labour law and policy point of view, may be one-sided. On the role of the labour market and its regulation, the Global Competitiveness Report (2017-2018) provides: "The efficiency and flexibility of the labor market are critical for ensuring that workers are allocated to their most effective use in the economy and provided with incentives to give their best effort in their jobs. Labor markets must therefore have the flexibility to shift workers from one economic activity to another rapidly and at low cost."[34] These findings are interesting in an economic discourse, but it is clearly not a labour law discourse.

III. Europe as (problematic) mini-globalisation

38. The European Union can be seen as form of mini-globalisation. It was originally designed as a project to intensify economic cooperation and market integration. A European economic integration project would imply the abolishment of barriers to transnational trade and mobility of capital, goods, services and persons. This obviously has also led to a discussion about the regulation of labour law, or broader, the world of work in light of social goals. Central in the European integration discussion, when dealing with issues of labour law, social policy or industrial relations, stands the well-known question of how the balance between economic and social integration – or is it a balance between economic freedom and social protection – should exactly be struck. That it is a complicated issue, would be an understatement. The complexity is increased, precisely due to the double face of the European Union: it is a global actor, but at the same time has to deal with its own (internal) European integration ambitions. The fact that the EU and its member states all face similar challenges of globalisation, competitiveness and social dumping, drives the governance of social justice and labour rights sometimes in a labyrinth.

A. On origins and purposes

39. An explanation of the difficult position of labour law in the European Union would require a long study. For the purposes of this contribution, it should however be noted that social policy and labour law became part of the legal and policy objectives through different stages.

40. With the original Treaties, including the Treaty of Rome of 1957, the main European project aimed at the creation of an economic community of states. Other policy areas would only come from the *spill-over* effect of economic integration. The early period of European integration delivered a limited

context of social rights and, for a long time, there remained a gap between ambitions and reality. Under the Commission Presidency of Jacques Delorsin the eighties,[35] European political leaders felt that a stronger emphasis on social policy was needed. But quite from the start, the issue of reconciling economic and social goals of the European integration project became apparent. The Single European Act of 1986 originated from the opinion that Europe needed to be more than what the predominantly economic dimension of the Communities had shown so far.[36] But it also confirmed member states' national sovereignty over 'rights and interests of employed persons', which required, at European level, unanimous voting in the Council. On 9 December 1989, at the Strasbourg Summit, the Heads of State of Government of 11 Member States (all except the U.K.) adopted, in the form of a declaration, the text of the Community Charter on Fundamental Rights of Workers. The Charter, although not seen as a legally binding instrument, paved the way for a renewed and social rights based view on European integration.

41. The Charter seemed to be an important step in the search for a more legitimate and socially driven Europe. It gained momentum for political will in favour of European social policy which led to a major revision of the Treaty framework in various stages. It has brought us to the current social policy provisions laid down in articles 151-161 of the Treaty on the Functioning of the European Union (TFEU). However, the EU's difficult position towards the economic and social dimension, is already found back in article 151 TFEU which confirms the need for positive regulation, but also that European measures shall "take account of the diverse forms of national practices" and "the need to maintain the competitiveness of the Union's economy". The globalisation, liberalisation and economic forces in discussing labour law and social policy are thus never far away. This becomes clear when looking at similar challenges as those driven by globalisation, but now posed in the European Union context.

B. EU labour law and economics

42. Over the years, the European Union institutions have taken the lead in discussing labour law and its relationship vis-à-vis broader realities and policy ambitions. On 22 November 2006, the European Commission published a Green Paper "Modernising labour law to meet the challenges of the 21st century".[37] The Commission raised the question what role labour law might play in Europe. It suggested that existing member states' concepts on labour law needed revision. According to its own terms, the purpose of the Green Paper was to launch a public debate in the EU on how labour law could evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs. It is well-known that the Green Paper produced a lot of criticism and debate. Not the least because of the starting point that the modernisation of labour law should contribute to the proposition that

"increasing the responsiveness of European labour markets is crucial to promoting economic activity and high productivity".[38] For many observers, it made this European initiative, which used flexicurity as a framework of evaluation, difficult to accept.

43. It is important to turn back to history and to see how the discourse of labour law has evolved. Over time, the labour law and economics issue has become quite dominant in the European debate.

44. The initiatives of the seventies and eighties, and their results, created a firm basis for furthering the development of the social dimension of Europe. During times in which the need was felt to address the tension between economic and social integration in Europe, and a social rights declaration or a charter seemed a strategy to ease the pathway to Treaty amendments and secondary hard law initiatives. The fit with a logic of labour law seemed also present. The aspirations were directing towards a political view in favour of a more balanced project, with 'socially acceptable economic integration'. Furthermore, Commission President Jacques Delors' views on the involvement of management and labour in social policy making confirmed a European "tradition of inclusion of unions and workers' interests in the shaping of industrial relations and political regulations in general".[39] Likewise, the Delors strategy accommodated a tradition of government activity and social policy intervention in the (integrating) economy in Europe.

45. The adoption of the 1989 Charter of Fundamental Rights and the introduction of the Maastricht Protocol on Social Policy in 1991, marked a major development for European labour law and social policy. However, three sets of policy papers would mark a new era, in which views on economic and social progress can be seen to start moving forward in a slightly, or is it a significantly, different manner. It concerns the adoption of the "Green Paper on European Social Policy – Options for the Future",[40] presented by Commissioner Flynn on 17 November 1993; the White Paper on Growth, competitiveness, and employment, adopted on 5 December 1993;[41] and the White Paper on European Social Policy, adopted on 27 July 1994.[42]

C. Papers white and green

46. According to the 1993 "Green Paper on European Social Policy", European social policy entered into a 'critical phase'. The existing social action programme was reaching its natural end; the entry into force of the Treaty on European Union opened up new possibilities for European action in the social field, and the changing socio-economic situation, reflected notably in the serious levels of unemployment, required, as the Green Paper explained, a new look at the link between economic and

social policies, both at national and at European level. The Commission considered that this situation required the launching of a wide-ranging debate about the future direction of social policy (and that would include labour law).

47. The 1993 Green Paper was not only important for the development of European social policy in general. The reflection that it stimulated debate about the future direction of labour law also displayed a concern for the reconciliation of labour laws and labour markets with economic objectives. In particular, the Green Paper stated that "this process will be taking place at a moment when the attention of the Community is focused on the whole issue of how to reconcile economic and social objectives in the face of rising unemployment and growing concern about Europe's ability to remain competitive into the 21st century."

48. With the "White Paper on Growth, Competitiveness and Employment" (1993), the economy came back on centre stage. The Copenhagen European Council (June 1993) invited the European Commission to present a white paper on a medium-term strategy for growth, competitiveness and employment. That decision followed an in-depth discussion between the Heads of State or Government based on an analysis by the President of the Commission of the weaknesses of the European economies.

49. The White Paper, as its title suggests, was clear on the priority in European policy at the time: the issue of employment. Also the White Paper's primary angle was made clear: "It is the economy which can provide the necessary pointers to a reappraisal of principles inherited from an age in which manpower resources were scarce, technological innovation was made possible through imitation, and natural resources could be exploited at will. We are thus setting out a number of broad guidelines which have a predominantly economic basis".[43] Interesting is the fact that the 1993 White Paper also refers to labour law. The paper suggested that labour law as well as labour markets needed modernisation, and mentioned issues such as flexibility of enterprises, training and modernised social protection systems.[44] The White Paper clearly suggested that the economic problems and the high unemployment figures throughout Europe could be explained by the inflexibility of the labour market and specific institutional, legal (labour law and social security law) circumstances in each country.[45]

50. The wide-ranging debate, initiated by the 1993 Green Paper on Social Policy, was followed by the "White Paper on European Social Policy" of 27 July 1994,[46] setting out the Commission's approach to the next phase of social policy development and, in fact, a strategy for consolidating and developing the Union's action on social policy for the future. It was clear from the outset of the social policy White Paper, that the social policy thoughts needed to be brought in line with the economically oriented

analysis presented in the 1993 White Paper on Growth, Competitiveness and Employment. Therefore, the 1994 White Paper went back into the core debate of economic and social policy balancing. It also referred back to the issue of labour law and the pressure on labour standards from the viewpoint of economic competitiveness. The 1994 White Paper did not conceal the real issue: "A substantial base of labour standards has been consolidated in European law. The question of where to go from there is complex and controversial because the issue of labour standards is at the heart of the debate about the relationship between competitiveness, growth and job creation. (…) On the one hand, there are those who argue that excessively high labour standards result in costs which blunt the competitive edge of companies in one country or region as compared with others. On the other hand, many believe that productivity is the key to competitiveness and that high labour standards have always been an integral part of the competitive formula. (…) It must be said that there is no clear consensus on this point and that Member States and others remain divided in their opinions about the need for further legislative action on labour standards at European level."[47]

D. Economically acceptable labour law

51. The issue of the role of labour law in light of an economic performance agenda was also reflected in the exercise by the Union of its hard European social policy competences. Under the rubric of "economic issues", the conclusions of the Essen European Council (9-10 December 1994) emphasised the need to take steps to improve the employment situation, and called for measures aimed at "increasing the employment-intensiveness of growth, in particular by more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition". A hard law approach for flexible work followed, with the involvement of the European social partners.[48] The European initiatives were explained as accommodating the need for flexibility (of employers) and security (of workers).[49] Steps towards the development of a policy concept of flexicurity would later be elaborated the European employment strategy around the millennium change.

52. Although the idea was reflected that it cannot be so that "social progress must go into retreat in order for economic competitiveness to recover" and that "the Community is fully committed to ensuring that economic and social progress go hand in hand" (see the Green Paper), it nevertheless left a different impression. The new developments, through the Green and White Papers, gave all the signs that the phrase that economic and social progress goes hand in hand, first seen as "socially acceptable economic integration", could now be explained as "economically acceptable social

integration". It seemed to enshrine the European Commission's, later the whole European Union's new blue print view.

53. It would of course turn labour law into a new policy dilemma and to a new test. While in principle labour law is conceived as a *corrigendum* to the market forces or a counterforce to the economy, now labour law was (also) viewed as a competitiveness factor. This certainly changed the approach towards labour law and created a dilemma of making a compromise, or even a choice, between protection versus economic competitiveness.

E. Valentine and Bolkestein

54. On 14 February 2006, when the European Parliament held its plenary session, demonstrators in the streets of Strasbourg shouted "No Valentine for Bolkestein", referring to the European Commissioner who initiated the initiative for European free services legislation. Evelyne Gebhardt, rapporteur of the European Parliament's Internal Market Commission, added: "*We are dealing with the most important piece of EU legislation apart from the Constitution*".[50] Under discussion was the draft of the European Services Directive[51] and it triggered high controversy.

55. The discussion on the freedom of services, a cornerstone in EU law, shows how the labour law discourse in Europe was not only influenced by general economic logics, but also determined by the specific context of (free) market creation in the European Union. With the draft Service Directive, the possible clash between the promotion of the internal market's freedoms with nationally rooted social and labour policy became clear.

56. In a 2002 report concerning the state of the internal market for services, on which the first proposal of the Services Directive broadly relied,[52] the European Commission gave an analysis of the problems occurring in the context of cross-border service provision. Using a broad interpretation of the notion of 'barriers to free services', the Commission concluded that obstacles may not only derive from practical or administrative constraints, but also from legislation, such as, in the case of posting of workers, national provisions of labour law. In order to deal with these obstacles, and to secure the free movement of services, the Commission proposed[53] to apply the 'country of origin principle', according to which a service provider would be subject only to the law of the country in which he is established. The country of origin principle would imply that a service provider in one member state would not need to adapt himself repeatedly to the local rules and regulations in another member state where the services are delivered.

57. It triggered a 'social dumping alarm'. The idea suggested that service providers entering high-cost-high-protective labour countries could continue to rely on low-cost-low-protective labour law rules from their country of origin. It was called a radical change in labour law.[54] The Services Directive, in its final version, ultimately underlines that its provisions do "not affect labour law",[55] but the social dumping alarm did not disappear. Also the European Union area itself thus strongly suffers from (internal) social dumping concerns.

F. Social dumping

58. Social dumping has been traditionally associated with delocalisations of companies to countries or regions outside Europe. But it becomes clear that the game of regulatory competition is also present on the European scene. Where the existence of social-regulatory competition between member states of the European Union is perhaps to be assessed rather cautiously,[56] it becomes clear that Europe cannot easily escape from this phenomenon.[57]

59. Firstly, it can be argued that a form of regulatory competition exists between the member states of the European Union.[58] This may be translated into tax measures or incentive schemes, or through specific labour cost instruments. In other words, member states are able to compete with each other on the basis of labour costs or labour protection. This debate not only become clear in the discussion on the European Services Directive 2006/123.[59] It is also well expressed in the *Viking*[60] case where the issue of delocalisation was raised in an intra-European Union setting. A Finnish company, Viking, sought to reflag its ship, the *Rosella*, by registering it either in Estonia or Norway, in order to be able to enter into a new collective agreement with a trade union established in one of those countries the point being to stay economically viable due to lower labour costs. The unions who wanted to avoid the reflagging were found to be in violation with Viking's freedom of establishment.

60. Secondly, the mechanism of replacement was playing in the case of in *Laval.*[61] In this case, posted workers from Latvia went to work on building sites in Sweden in order to build school premises. The Swedish industry trade union engaged in industrial action including blockades in order to push Laval into negotiations with a view to establish (Swedish) rates of pay for the Latvian workers and in order to include Laval in the collective agreement of the building sector. The Court found an infringement of European Union law on free movement of services, protecting Laval's interests. In sum, a balance was made between the freedom to provide services and the exercise of the right to take collective action.

61. Finally, European businesses have not stopped to move to the East (either Easter Europe or Asian), which would allow them to produce on the basis of lower labour costs (producing items we consume in Europe by the way). Furthermore, the negotiations with the unions in the Italian carmaker Fiat, where local investment and production was promised in return for more labour flexibility, is seen as a form of concession bargaining.[62]

G. EU economic governance

62. The economic challenges for labour law were also triggered in the EU's employment policy agenda. The Employment Title, adopted in the 1997 Amsterdam Treaty, gave the EU employment policy competences through an 'open method of coordination'. In general, the European employment strategy was perceived as a soft law mechanism. However, not only became the blurring of social and economic policies more and more apparent, the logics and dynamics of economic policy seemed to strongly dominate social objectives. The tensions between labour law and economic policies became stronger when employment policies and labour law debate became part of the new 'EU economic governance'.

63. The EU economic governance mechanism is connected with the EU's strategic objectives, currently defined under the heading of 'Europe 2020', which succeeded the Lisbon agenda (2000-2010). The ultimate goal of 'Europe 2020' is to go for *"a smart, sustainable and inclusive economy"* with *"high levels of employment, productivity and social cohesion".*[63] To attain this goal, targets for 2020 were set out regarding employment, research and development, climate, education and social inclusion, accompanied by ten integrated guidelines for the economic and employment policies of the Member States.[64] Against this progression of EU Member States towards the targets of Europe 2020 various policy measures, including economic and employment policies, have come into existence, one of which is 'economic governance'.

64. The central aspect of economic governance concerns economic and budgetary coordination as well as growth and job creation. In order to reach this, the EU economic governance is since 2010 installed in a system generally called 'the European Semester'.[65] This European semester functions as an integrated tool to control (monitor) and coordinate the economic policies of the member states. It is a rather complicated system, but it can be seen as a monitoring calendar, which exists of many different mechanisms and processes.

65. As the economic governance system is connected with the EU's employment objectives, guidelines for member states lead to labour market reforms, going deep into labour law protection mechanisms of member states. Critics of economic governance claim that the EU demands its member states to dismantle acquired social rights in a one-sided crusade for austerity and economic growth.[66] It has created difficulties in legal terms in the relationship between the EU and the ILO, as will be shown below.

IV. From EU and ILO 'facepalms'

66. While it is clear that the EU and the ILO differ strongly in their respective mandates, structures and objectives,[67] they do work together closely and present themselves both as cooperative global governance actors aiming to promote shared values.

67. In light of this, it would be legitimate to expect that EU policy initiatives or outcomes would not go against the ILO's main principles and rights, or would at least be consistent with them. However, it seems that the problems which the European Union is facing, given its special position as both a global and a regional actor, lead to serious concerns and even contradictions in light of widely recognised labour rights and principles. Hereafter, two subjects are highlighted about which the respective EU and ILO approaches are leading to rather conflicting outcomes. If they do not produce a legal conflict in the technical sense, they at least generate a lot of questions, or to put it metaphorically, a respective 'facepalm'.[68]

A. Balpa

68. In the so-called *BALPA* case, the ILO's Committee of Experts explicitly addressed the *Viking* and *Laval* case law.[69] The British Airline Pilots' Association (BALPA) wished to undertake strike action after British Airways (BA) decided to establish a subsidiary company in another EU country and after unsuccessful attempts to start up negotiations on the impact of this on the terms and conditions of employment in the group. BA, however, requested an injunction against the strike action before a UK Court, as it believed that a strike would violate the fundamental freedom of establishment under EU law, as established in the *Viking* and *Laval* case law. BA asked damages of £100 million per day of work stoppage. Fearing enormous damages, BALPA did not proceed with strike action, yet it expressed its deep concern about the UK court's adoption of the *Viking* and *Laval* approach.[70] The ILO Committee of Experts, subsequently examining the case, was of the opinion that it is not competent to assess the

correctness of the *Viking* and *Laval* cases to the extent that they give an interpretation of European Union law. However, it examined whether the consequences of these cases on national level would violate the rights following from ILO Convention no. 87. First, the ILO Committee rejected the CJEU's proportionality test, based on the view that itself never felt the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. Second, the ILO Committee held that the threat of damages that could bankrupt the trade union, renders the exercise of the rights under Convention no. 87 impossible. The ILO Committee was of the opinion that *"*that the doctrine that is being articulated in these ECJ judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention".

69. It is thus clear that various international legal orders come into play when a strike issue is dealt with under EU law. It is also apparent this may lead, as the *Viking* and *Laval* experience shows, to incompatibility and contradiction.

B. Austerity

70. Similar relational difficulties arise between the EU and the ILO when their respective (legal) approaches to austerity measures are concerned. As described above, the EU has a power through its economic governance mechanisms to force member states to adopt national reform policies, including austerity measures, in view of the economic and budgetary criteria of the EU. The most severe austerity programmes in countries like Portugal, Spain, Cyprus, Ireland and Greece have caused social unrest and despair.[71] Although set up under EU initiative and mainly to settle EU problems, both the Council of Europe and the ILO have addressed austerity measures and identified legal problems. Before these institutions, a number of Greek austerity measures have been under debate.

71. One case concerned the ILO instruments on the basis of which Greek and international trade unions filed a complaint, against Greece, before the Committee of Freedom of Association (CFA). The complaint mainly referred to numerous violations of trade union and collective bargaining rights within the framework of austerity measures, implemented in the context of the international loan mechanism of the Greek economy.[72] The unions referred to the abolition of the 'favourability principle' that ensured the prevalence of terms in collective agreements which are more favourable for workers, the nullification and banning of any future extension of collective agreements, the reduction of the negotiated national minimum wage by 22 per cent and its further freeze until the end of the programme period, the suspension of clauses providing for wage increases or relating to seniority, the enforcement of a maximum duration for collective agreements of three years and the mandatory

expiration of collective agreements in place for 24 months or more or with a residual duration of one year. The ILO Committee observed "that the long list of issues raised by the complainants demonstrate important and significant interventions in the voluntary nature of collective bargaining and in the principle of the inviolability of freely concluded collective agreements."[73] Although the exceptional circumstances – the Greek financial crisis – were recognised, the Committee considered that "such repeated and extensive intervention in collective bargaining can destabilize the overall framework for labour relations in the country if the measures are not consistent with the principles of freedom of association and collective bargaining". It continued by stating that repeatedly resorting to statutory limitations on collective bargaining would, in the long run, "only prove harmful and destabilize labour relations, as it deprived workers of a fundamental right and means of furthering and defending their economic and social interests."[74]

72. The conclusions of the CFA clearly make that Greek austerity measures, in furtherance of the recommendations of the Troika's Economic Adjustment Programme, problematic in light of the fundamental right to collective bargaining, enshrined in ILO Convention no. 98.

V. Towards EU and ILO facing palm

73. A general outlook of the EU and the ILO shows high ambitions for the promotion of labour rights in the world and an outreach to the goal of social justice. A closer look at EU policies, when viewed in light of the normative framework of the ILO, as shown above, gives a field where conflict and incoherence arises. This is an undesirable situation. To use the words of Janice Bellace: "For a global governance network in the area of human rights at work to be effective, the parts must be aligned". **[75]**

74. Hereafter, we undertake some normative discovery in our the discussion and in shaping future steps. First of all, it will be pointed out that the EU's social goals need to be taken seriously when dealing with labour rights and social justice questions. The European 'Social Pillar' may be seen as a positive development. Secondly, the EU and the ILO should foster interinstitutional dialogue and cooperation, and work together in the global governance web.

A. EU social goals and the 'Social Pillar'

75. The EU has a social rights framework. The EU has social goals. But the EU itself still brings various fundamental social rights obligations, both of itself as of member states in difficulties.**[76]** These

difficulties can, at least partly, be explained by the unique project that makes the European Union. The EU is confronted with ambitions of reconciling the goals of economic and social integration. The economic and monetary policy forces of the European Union have imposed increasingly severe constraints on national welfare state systems, including pressures on labour law. As EU – and thus transnational – action remains highly relevant is a globalising world, new symmetries need to be created in light of social justice aspirations. New action is, therefore, needed at EU level.

76. Distributive social justice can be delivered at the EU's supranational level. Most likely, it also *should* be dealt with at this EU level, in order for the Union to keep its social and democratic legitimacy. There are positive references in the Treaty. The EU's social objectives are written down in the European treaties, including the social market economy (article 3, 3 of the EU Treaty). The introductory article of the Treaty's social policy title (article 151 TFEU), provides, that in making social policy, the Union and the member states 'will have in mind' fundamental social rights. This is designed to align social policy intervention with the fundamentals of labour law. The Treaty also supposes active steps at EU level. Article 151 TFEU expresses the believe that social development requires positive regulation as it "will ensue not only from the functioning of the internal market". Even in a system, such as the EU, where member states remain relatively important social policy actors, positive regulatory steps are supported.

77. Social policy rebalancing should be strengthened through the values and rights of the Charter of fundamental rights of the European Union (Article 6, paragraph 1, TEU). The EU Charter has the same legal value as the Treaties. The inherent limits of the Charter may not give it the full potential it would deserve, but this binding Charter assures that it is applied throughout the Union by the institutions themselves and the EU member states.

78. Another interesting and positive development is the official proclamation on 17 November 2017 of the 'European Pillar of Social Rights'.[77] The initiative for a European Pillar of Social Rights was announced by President Jean-Claude Juncker during his first State of the Union before the European Parliament on 9 September 2015. In his speech, Juncker argued for "a fair and truly pan-European labour market" and the development of "a European Pillar of Social rights, which takes account of the changing realities of Europe's societies and the world of work." [78]

79. The Pillar reads like a rights charter. It contains 20 rubrics under which various social rights are formulated. The fact that the Pillar formulates rights seems logical, since it is entitled Pillar of Social Rights. The Pillar departs from existing EU competences, although it goes quite deep into crucial areas of labour law. But the legal nature of the Social Pillar will certainly be subject of further debate. While

the Pillar gives the impression to create new rights, nothing is pointing in the direction of a legally enforceable instrument. On the contrary, the Pillar is expressly referred to as being "designed as a compass" and "to serve as a guide" (Preamble 12). The Pillar's 14th Preamble mentions "for them to be legally enforceable, the principles and rights first require dedicated measures or legislation to be adopted at the appropriate level." As the Pillar's legal profile is rather low, scepticism on its impact may become high. However, the Pillar obviously has the potential of bringing about a new policy dynamic. And political will is in this area perhaps more crucial than the legal basis.

B. EU and ILO in the global governance web

80. From the above it should clear that not everything is conflict. The EU has set for itself high social goals. There is room for improvement but also for optimism. The European Union is a strong global player, working towards the 2030 Sustainable Development Goals .[79] The EU may even act as a model for a global governance strategy. Also at world level, the reconciliation of economic and social justice goals remains crucial.

81. The European Union and the ILO may use each other as a mirror in order to reflect about their respective approaches. Globalisation cannot be avoided, and it should not be avoided. Recognition of market systems, economic freedoms and liberalisation are part of this process. One may recognise, in this light, the concept of economic justice. Globalisation needs to go together with social justice. This means that economic justice should be aligned with it, or even part of it. "The customary distinction between economic justice and social justice is intellectually unsatisfactory, as it serves to legitimize the dichotomization of the economic and social spheres."[80]

82. The European Union and the ILO also need each other. Global actors need strong reciprocal regional actors with global ambitions. Their relationship should thus be conceived in terms of partnership. A 'network' governance approach may deliver a useful theoretical perspective to see both the EU and the ILO (and also other institutions such as the Council of Europe) as part of a global governance network, or a global governance web. The institutions may still remain relatively autonomous actors, but with shared goals and coherent policy outcomes. In this 'web', diversity might be unavoidable. But conflicts should perhaps be defined as "power struggles".[81] Dialogue may be more useful than opposition, and interaction can deliver mutually agreeable outcomes.[82] There is, of course, only one actor who is per definition global and who has social justice as its core competence: the ILO is the world's leading organisation in global governance and social justice.[83] But the (global

governance) web may have different 'spiders', as long as their relative moves rest on coherence and alignment.

Final remarks

83. In a recent Dutch publication, Paul van der Heijden reflects about the evolution of the International Labour Organisation, looking critically at the ILO's 100th anniversary in 2019.[84] The ILO is a great institution. But not everything is great. We share the concerns about the difficulties of making hard-binding international labour standards and about the ILO's internal conflict concerning the right to strike. We can add recent concerns about European Union policy developments, including – there too – difficulties of reaching hard law consensus over labour rights, or including political developments such as the Brexit. European Commission President Jean-Claude Juncker announced in his 2017 State of the Union that "the wind is in Europe's sails",[85] but we have strong doubts.

84. We share Paul van der Heijden's view that social justice needs to go together with international, or transnational, regulation and that this is needed more than ever. The question how this needs to be done is a difficult one and will be subject of further discussion and research. We hope that this contribution has contributed to the analysis. We aimed to show that the European Union and the ILO share the same challenges. They must reach out to each other and take up their share of responsibility over social justice in a global governance context. It is also clear that legal strategies remain very important, but they are not the only ones. Policy and global consensus over economic and social justice remains crucial. Contributing to this is an interdisciplinary endeavour. What is promising for the social justice agenda is the World Economic Forum's new analysis about worker protection, found in its approach in 2017: "So much conventional wisdom is given over to the idea that unemployment can be solved by making it easier to hire and fire people and put them on insecure, short-term contracts. However, while such "labour market flexibility", as economists call it, is certainly important in kick-starting a jobs market, it can also act as a barrier to workers being able to land sustainable, secure work. According to our Index, economies that have been able to combine labour market flexibility with robust protection of workers' rights have been more successful at achieving higher levels of competitiveness, higher employment and lower inequality."[86] This foms a good building block for the modernisation agenda of labour law and the future of work discussion. So let us express the hope that the ILO's centenary delivers a unique occasion to build a new narrative for labour law in reconciling globalisation with social justice.

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[2] This contribution relies on former authored contributions such as: F. Hendrickx & P. Pecinovsky, "EU economic governance and labour rights: diversity and coherence in the EU, the Council of Europe and ILO instruments" in A. Marx, J. Wouters, G. Rayp & L. Beke (eds.)*, Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives*, Cheltenham, Edward Elgar Publishing, 2015, 118-149; F. Hendrickx, "Completing economic and social integration: towards labour law for the United States of Europe" in N. Countouris N. & M. Freedland (eds.), *Resocialising Europe in a time of crisis*, Cambridge, Cambridge University Press, 2013, 61-80; F. Hendrickx, "Foundations and functions of contemporary labour law", *European Labour Law Journal 2012, Vol. 3* (2), 108-129, F. Hendrickx, "The future of collective labour law in Europe", *European Labour Law Journal* 2010, Vol. 1 (1), 59-79; F. Hendrickx, "Beyond Viking and Laval: the evolving European context", *Comparative Labor Law and Policy Journal* 2011, Vol. *32* (4), 1055-1078; F. Hendrickx, "Regulating flexicurity and responsive labour law", in F. Hendrickx (ed.), *Flexicurity and the Lisbon Agenda. A Cross-Disciplinary Reflection*, Antwerp-Oxford-Portland, Intersentia, 2008, 123-161.

[3] R. Blanpain, "The world of work in the XXI Century. From globalisation to flexicurity" in F. Hendrickx (ed.), *Flexicurity and the Lisbon Agenda*, Antwerp, Intersentia, 2008, 1-19.

[4] H. Arthurs, "Who's afraid of globalization? Reflections on the future of labour law" in J.D.R. Craig & S.M. Lynk, *Globalization and the future of labour law*, Cambridge, Cambridge University Press, 2006, 51.

[5] World Commission on the Social Dimension of Globalization, *A Fair Globalization. Creating Opportunities for All*, Geneva, International Labour Office, 2004, 24 (ISBN 92-2-115426-2, available on www.ilo.org).

[6] V. Marleau, "Globalization, decentralization and subsidiarity" in J.D.R. Craig & S.M. Lynk, *Globalization and the future of labour law*, Cambridge, Cambridge University Press, 2006, 110-111.

[7] A. Thomas, "The International Labour Organisation. Its origins, development and future", *International Labour Review* 1921, Vol. 1, No.1, 6.

[8] B. Caruso, "Changes in the workplace and the dialogue of labor scholars in the 'global village'", *Comparative Labor Law & Policy Journal*, 2007, Vol. 28, 507.

[9] E. Gravel & Q. Delpech, "Notes, debates and communications. International labour standards: recent developments in complementarity between the international and national supervisory systems", *International Labour Review* 2008, Vol. 147, No. 4, 403.

[10] Including hard and soft law, labelling, public and private codes of conduct, international framework agreements; J.-M. Servais, "International labour standards and corporate social responsibility", *Bulletin of Comparative Labour Relations* 2005, Vol. 55, 21-35.

[11] European Commission, *Green Paper on Modernising Labour Law* (2006), COM(2006)708 final, 22 November 2006.

[12] Cf. G. Davidov & B. Langille (eds.), *Boundaries and frontiers of labour law*, Oxford, Hart, 2006, 413 p.

[13] Cf. C. Barnard, S. Deakin & G. Morris (eds.), *The future of labour law. Liber Amicorum Sir Bob Hepple QC*, Oxford, Hart Publishing, 2004, 320p; J. J.D.R. Craig & S.M. Lynk (eds.), *Globalization and the Future of Labour Law*, Cambridge, Cambridge University Press, 2006, 498 p.

[14] COM(2006)708 final, 22 November 2006.

[15] "The reader of the Green Paper, however, could be amazed most of all not to find in it specific traces of the analysis carried on in academic research", S. Sciarra, "EU Commission Green Paper 'Modernizing labour law to meet the challenges of the 21st Century'", *Industrial Law Journal* 2007, Vol. 36, No. 3, 378.

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[17] T. Iwagami, "The end of the classic model of labor law and Post-Fordism", *Comparative Labor Law Journal*, 1999, 691-692.

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[19] COM(2016)356 final, 3.

[20] Cf. E. Sanders & P. Pattison, "Worker characterization in a gig economy viewed through an Uber centric lens" *Southern Law Journal* 2016, Vol. 26, No. 2, 297-320.

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[22] Cf. R. Reich, *Supercapitalism, The Transformation of Business, Democracy, and Everyday Life*, New York, Knopf, 2007, 272 p.

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[24] Cf. F. Hendrickx, "Foundations and functions of contemporary labour law", *European LabourLaw Journal* 2012, Vol. 3, No. 2, 108-129.

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[26] Cf. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf (consulted 9.12.17).

[27] Cf. R. McCallum, "In defense of labour law", *Legal Studies Research Paper*, No. 07/20, 2007, 1-2.

[28] Cf. B. Langille, "Labour law is not a commodity", *Industrial Law Journal* 1998, 1011: "The alternative conception is to see the new world order we have just described as offering a market in labour laws".

[29] Cf. also H. Mosely, "The social dimension of European integration", *International Labour Review* 1990, vol. 129, n° 2, 160.

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[32] *OECD Employment Outlook* 2013, p. 66.

[33] Source: https://www.weforum.org/agenda/2017/09/what-is-economic-competitiveness (consulted 16/10/17).

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[36] Single European Act, 17 February 1986.

[37] *Green Paper Mondernising labour law to meet the challenges of the 21st century*, 22 November 2006, COM(2006)708 final, 15 p.

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[43] COM(93)700 final, 11.

[44] COM(93)700 final, 11: "Our employment systems have aged: by this term we mean the whole complex of issues made up nowadays by the labour market, labour legislation, employment policy, the possibilities of flexibility within or outside enterprises, the opportunities provided or not provided by the education and training systems, and social protection."

[45] COM(93)700 final, 16: "The educational system, labour laws, work contracts, contractual negotiation systems, the social security system, and business management (including internal work management) form the pillars of the "employment environment" in each Member State and combine to give each of them a distinctive appearance. In each case, the entire environment must be mobilized to improve the functioning of the labour market."

[46] Commission of the European Communities, *European Social Policy – A way forward for the Union*, 27 July 1994, COM(1994)333 final.

[47] COM(1994)333 final, 23.

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[55] Cf. article 1, 6 Services Directive.

[56] Cf. C. Barnard, "Social dumping and the race to the bottom: some lessons for the European Union from Delaware", *European Law Review* 2000, 64-65.

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[58] Cf. C. Barnard, "Social dumping and the race to the bottom: some lessons for the European Union from Delaware", *European Law Review* 2000, 64-65.

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[60] C-438/05, ECJ 11 December 2007, *E.C.R.* 2007, I-10779.

[61] C-341/05, ECJ 18 December 2007, *E.C.R.* 2007, I-11767.

[62] Cf. *Financial Times*, on *FT.com*, 29 September 2010.

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[65] Cf. article 2bis Regulation 1466/07, modified by Regulation 1175/11; EUROPEAN COMMISSION, *The European Union explained: Europe 2020: Europe's growth strategy, growing to a job-rich and sustainable future*, 2013, 6, http://ec.europa.eu/europe2020/pdf/europe_2020_explained.pdf.

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