Chapter 3
Balancing fundamental social and economic rights in the EU: in search of a better method

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Introduction

Social rights are in fashion. In November 2017, the presidents of the European institutions solemnly proclaimed the European Pillar of Social Rights (EPSR). Several legislative acts, including a directive on predictable and fair working conditions and one on work-life balance, have already been adopted as part of the ongoing implementation of the EPSR (Garben 2019a, Sabato *et al.* 2018). Far from dissipating, the momentum behind a Europe of social rights continues to build. In her speech to the European Parliament, the new president of the European Commission Ursula von der Leyen announced her 'action plan to bring our Pillar of Social Rights to life', including a minimum wage, an unemployment benefit reinsurance scheme, a child guarantee and investment in education (von der Leyen 2019).

While social rights may be a current political buzzword in Brussels and beyond, they are of course not new in the EU legal order. Twenty years ago, at the time the first edition of *Social developments in the European Union* (Degryse and Pochet 2000) was published, the EU legal order featured a charter with by and large the same social rights as those recently restated in the EPSR, to which by that time all Member States had signed up: the Community Charter of the Fundamental Social Rights of Workers (hereafter referred to as 'Community Charter').[1] Similar to the EPSR, the Community Charter was not legally binding and thereby did not *per se* provide any actionable rights for individuals. Instead, it constituted an action plan that led to the adoption of a range of legislative measures giving workers concrete social rights. A large part of the current social *acquis* results from the Community Charter and its action programme: the directives on occupational health and safety, written statements, posted workers, working time, pregnant workers and younger workers. In many ways, the EPSR can be seen as repeating the successful formula of the Community Charter, with the aim of reinvigorating the social dimension of European integration.

One may question whether a further restatement of social rights was needed to reignite Social Europe, considering that, with the still relatively recent Lisbon Treaty, social rights had gained an even more prominent place in the European legal construct as part of the binding Charter of Fundamental Rights of the EU (hereafter referred to

1. The Community Charter was adopted in 1989, but initially without the UK, which signed up in 1997 following a change in government.

as the 'EU Charter'), which has the same legal status as the Treaties.[2] However, the period between the Lisbon Treaty and the EPSR was dominated by a grave economic and financial crisis, with harsh austerity measures deeply affecting the social situation of millions of European citizens. Coming out of the crisis, Europe needed to rebuild its social credentials, and the EPSR provides a suitable political platform to do so. But it is not just politics; through the ESPR's 'implementation measures' such as the aforementioned new social directives, it has concrete added value in legal terms (Garben 2019a; Clauwaert 2018).

Though the EU Charter is legally binding and has primary law status, it applies primarily to the EU institutions and only to the Member States when they act within the scope of EU law; i.e., the social rights contained therein in reality need EU legislative measures for them to be really useful to workers in their daily lives. The EPSR can be seen as a catalyst for the adoption of such measures 'implementing' the social rights contained in the EU Charter (and the EPSR itself).

Even if for the most part already contained in the Community Charter and the EU Charter (not to mention a range of international instruments; see further Garben 2018), I therefore consider the EPSR's restatement of social rights a useful addition to EU social law and policy. The EPSR does not, however, resolve one fundamental problem that has arisen in the EU legal order concerning social rights, namely the question of how to balance them against economic rights in cases where they clash. The tension between the internal market freedoms on the one hand and social rights on the other has become a major protagonist in the story of Social Europe of the past decade, with the *Viking* and *Laval* judgments enjoying a notoriety extending far beyond traditional EU law circles. More recently, the right to conduct a business as featured in the EU Charter has revealed itself as another challenger of social rights. Section 1 of this chapter considers the most important conflicts between social and economic rights in the case law of the Court of Justice of the EU (CJEU). While sympathetic to the argument that these judgments do not give sufficient protection to social rights and instead favour economic interests, the chapter ultimately proposes an alternative approach to conceptualizing and balancing economic and social interests in legal terms, with a greater focus on the democratic decision-making process at EU and Member State level (Section 2), rather than on imposing a more social outcome as such. The final section concludes and looks ahead.

1. 'Social sore spots': where social and economic rights clash

1.1 The internal market and social rights

As is well-known, over the course of the European integration process – and thereby significantly furthering it – the CJEU has given a very broad interpretation to the internal market freedoms, defining as a restriction basically any national rule that hinders,

2. The EU Charter was originally adopted in Nice in December 2000 but was devoid of legal effect until the Lisbon Treaty.

whether actually or potentially, cross-border economic activity. Such restrictions may be upheld when they are considered justified by the pursuit of a legitimate public interest, but only when they are limited to what is necessary to achieve that objective. Within this framework, economic freedom is posited as the rule and any other public interest, including fundamental social rights, as the exception. The wider the reach of the internal market freedoms, the more extensive the conflict becomes, as they potentially 'catch' any national rule protecting workers. Such conflicts are, of course, not always resolved in favour of these very broadly construed economic rights. Many national measures pursuing social goals were, and still are, upheld as justified. But the game-changing CJEU judgments in *Viking*, *Laval* and *Rüffert*[3] fundamentally altered the balance, to the detriment of social rights.

Laval concerned a Latvian construction firm that won a government contract to renovate a school in Sweden, where it posted some of its Latvian workers. The Swedish construction union started negotiations with Laval's Swedish subsidiary to extend the sectoral collective agreement to the posted workers and to negotiate their wages. When Laval refused to agree, the union blockaded Laval's building sites, leading to the subsidiary's bankruptcy. The CJEU held that the Posted Workers Directive 96/71/EC did not authorize the imposition on a foreign service provider of the obligation to conduct on-site negotiations with the trade unions to determine rates of pay, nor did it allow trade unions to force a foreign service provider to accept better conditions than the bare minimum standard allowed by the Directive and regulated by the State. It basically considered that the freedom to provide services (Article 56 TFEU) applied to the actions of the trade unions. While the CJEU, citing the EU Charter (which was non-binding at the time), held that the right to strike was a general principle of EU law, it also considered that its exercise could be subject to restrictions. As Hinarejos (2008: 717) stated:

> This led the Court to reaffirm its previous position on fundamental rights and EC fundamental freedoms: the protection of fundamental rights is a legitimate interest that can justify a restriction of the obligations imposed by Community law. The exercise of the fundamental right at issue must however 'be reconciled with requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality'. The right to collective action does, therefore, have a place in EC law and it may provide for an exception to it, but it needs to be properly justified.

The Court, however, went on to state that the union's attempt to make Laval accept working conditions (other than pay) of a standard exceeding the minimum set out in the Posted Workers Directive could not be justified with regard to the objective of protecting workers, since the Directive already served this purpose sufficiently. As regarded the negotiations on pay, the Court reasoned that if a Member State wanted to protect workers, all it had to do was impose a minimum rate of pay through legislation

3. Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809 ; C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772 ; Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, ECLI:EU:C:2008:189.

or a universal collective agreement. The strike action was thus unlawful, exposing the trade union to punitive damages.

In *Viking*, the case concerned the ferry ship *Rosella* operating between Finland and Estonia under Finnish flag. Viking owned the *Rosella*, which was operating at a loss. This was ostensibly due to the fact that Viking had to pay Finnish wages, while competing Estonian ferries had lower wage costs. Viking wanted to re-flag the ferry to Estonia in order to be able to pay lower wages. The Finnish Seamen′s Union, of which the *Rosella's* crew were members, joined forces with the International Transport Workers′ Federation, which, in an action against flags of convenience, issued a circular ordering all its affiliates not to negotiate with Viking, thus preventing the company from acquiring an Estonian crew. In its ruling, the CJEU confirmed its position in *Laval* that the internal market provisions (this time on freedom of establishment) could be invoked directly against a private party, such as a trade union. While in contrast to *Laval* it left it up to the national courts to decide whether the objectives pursued by the unions by means of the collective action 'concerned the protection of workers′, it also indicated that such action could no longer be considered as coming under the objective of protecting workers if it could be shown that the jobs or conditions of employment at issue were not under serious threat (such as when the employer gave a binding undertaking that the current crew would keep their jobs and terms of employment). Furthermore, the national courts would have to check whether the union had no means at its disposal other than restricting freedom of establishment, and whether the union had exhausted those means beforehand. As regarded the International Transport Workers′ Federation's policy against flags of convenience, the CJEU held it could not be justified, since the restriction on freedom of establishment was blanket, in that it would apply even if the ferry were to be re-flagged in a Member State that offered better employment standards to its workers.

The *Laval* and *Viking* rulings were followed, and their effects strengthened, by a third landmark case. In *Rüffert*, the Court held that EU law precluded Member States from requiring that, in public procurement, contractors pay their employees the remuneration prescribed by the collective agreement in force at the place where those services are performed. The Court's reasoning was especially striking as regards the possible justification on grounds of worker protection: to require a level of remuneration exceeding the minimum rate of pay applicable pursuant to national legislation cannot be necessary for the protection of workers. Otherwise, the same rate of pay would be required nationally or for the whole sector. These three judgments thereby simultaneously widened the already broad definition of potential restrictions on the free movement provisions, seemingly embracing a full 'market without rules' approach that qualifies all national legislation applicable to foreign companies (as well as collective agreements and collective action by workers aimed at procuring such agreements) as *prima facie* restrictions, while also narrowing the scope for justification on social grounds (Barnard 2009).

Libraries have been filled with critical commentaries on the judgments (Joerges and Rodl 2009; De Schutter 2011; Bücker and Warneck 2011; Davies 2008). Pointing to the horizontal application of internal market provisions to organized labour, the wide

definition of restrictions to economic freedom and the priority accorded to this freedom over the right to take collective action and to strike, the majority of commentators agree that in these judgments the CJEU gave precedence to market freedoms over social objectives. Before these judgments, the CJEU had already held that social standards, such as certain labour rules, could imply a restriction on companies' free movement rights. However, the CJEU had previously conducted a relatively relaxed proportionality review, upholding most measures as justified. Similarly, where it held that the freedom of assembly could constrain the internal market, it held the national authorities and not the individual protesters responsible, while according a margin of appreciation to those national authorities.[4] This changed with the *Laval*, *Viking* and *Rüffert* rulings, with the CJEU fundamentally shifting the balance between economic and social rights – with real and non-negligible consequences.

These cases were game-changers. The judgments influenced the Commission's subsequent infringement actions not only against the country to which the judgment related, but also against other Member States, as well as influencing national courts and authorities which adapted their actions accordingly in the affected areas and beyond. This means that these few judgments have become the hard norm on all pay standards in public procurement across Europe, on all labour standards imposed in (potential) temporary cross-border service provision, and on all collective actions undertaken against companies' market freedoms. At European level, these judgments have changed the terms of the argument about the market-social balance, providing one side of the argument with significant leverage over the other within and between the EU institutions and *vis-à-vis* national players. Economic players have sought to exploit this new legal landscape to the fullest by bringing new claims to national courts, inviting the further market-favouring expansion of these doctrines (Scharpf 2010).

Perhaps in response to the criticism levelled at its hardened stance towards labour standards,[5] the CJEU has readjusted its position to the benefit of national social regulatory autonomy in two more recent rulings. In *Elektrobudowa*,[6] it was again asked to interpret the Posting of Workers Directive. The case concerned 186 Polish workers posted to Finland who considered that they had not received sufficient wages. They assigned their claims to a Finnish trade union, which seized a national court, which in turn asked the CJEU for guidance on what the employer could be obliged to pay the workers under host State rules. The Court sided with the trade union, giving a broad interpretation of what host States could consider as constituting the mandatory 'minimum rates of pay' under Article 3(1) of the Directive. Contrary to the Advocate General, the Court held that the minimum wage could be calculated by categorising workers into pay groups based on criteria such as qualifications, training, experience and type of work (if this is done transparently), and that it could include a posting-specific, flat-rate daily allowance applicable for the entire duration of the posting and

4. C-112/00, *Eugen Schmidberger v Austria* [2003] ECR I-5659.

5. Another factor may have been that, in *Elektrobudowa*, the posted workers themselves brought the claim, in contrast to *Laval* where the protection of workers was invoked generally but not necessarily with the agreement or in the interest of the posted workers. In *Elektrobudowa*, the Finnish and Polish workers stood together in solidarity, possibly making the CJEU more receptive to the trade union's arguments.

6. Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, ECLI:EU:C:2015:86.

a reimbursement for daily travelling time. The Court also considered that the cost of accommodation provided by the employer and meal vouchers could not be deducted from the minimum rates of pay payable to the workers. This important shift was followed up in the *Regiopost* ruling.[7] Contrary to the position of the Commission, the Court held that the award of public contracts may be made subject, by law, to a minimum wage. As could also be seen from the different stances taken by the Advocate General and the European Commission, full application of the *Laval* and *Rüffert* doctrines would have suggested a harsher outcome than that reached by the CJEU. But while these later judgments resolve some important social concerns concerning public procurement and posted workers, they do not alter the point of principle in *Viking* and *Laval* that collective action undertaken by workers has to respect the free movement rights of companies in the internal market.

1.2 The freedom to conduct a business vs. the social protection of workers

Article 16 of the EU Charter recognizes '[t]he freedom to conduct a business in accordance with Union law and national laws and practices'. The wording indicates that this freedom is inherently relative and can be limited by both regulations and practices, suggesting it is one of the weaker rights in the EU Charter (Groussot *et al.* 2017) and could be considered a principle rather than a right (Veneziani 2019; Deakin 2019). The EU Fundamental Rights Agency (2015: 3) considers it 'one of the less traditional rights', not generally protected in international human rights instruments and not traditionally universally present in the national constitutional law of the Member States, many of which have only recognized versions of this right very recently and some not as an (enforceable) constitutional right at all.[8] Where the freedom to conduct a business is recognized in national constitutional law, it tends to allow a relatively wide scope of limitation in the public interest and is generally conceived of as a right of individuals to set up an economic activity or join a profession rather than concerning the general exercise of economic activity.

The EU Fundamental Rights Agency (2015: 7) considers that the 'freedom to conduct a business is about enabling individual aspirations and expression to flourish, about encouraging entrepreneurship and innovation, and about social and economic development', thus linking it to the EU's current political growth agenda. Under general constitutional democratic theory (Tully 2002), it could be said that the constitutional dimension of human rights is to ensure the necessary pre-conditions and well-functioning of a robust democracy (Gearty 2004), and to correct majoritarian outcomes in exceptional cases where these outcomes unjustly harm the essence of human dignity, equality and liberty. This means that the (protected) content of human rights should be interpreted for these purposes. The freedom to conduct a business has a role in ensuring a robust democracy, to the extent that it helps to empower individuals – especially

7. Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau*, ECLI:EU:C:2015:760.

8. In Belgium, Greece, Latvia and the Netherlands, the constitutions contain only general or vague references. In Malta, freedom to conduct a business is not a right enforceable by courts. The UK, which does not have a written constitution does not feature this constitutional right: For an overview, see European Union Agency for Fundamental Rights, 2015: 27.

those who are disadvantaged – through economic activity, to prevent concentrations of (economic) power and equalize social inequalities. This would suggest a reading where the right is about fostering the possibility of individual entrepreneurship, in the sense of enabling citizens to set up an economic activity or join a profession, within a broader picture of creating more socioeconomic progress and equality in society. This human right would not, in such a constitutional democratic reading, provide a 'sword' for companies in the operation of their business against workers, citizens and general public interest standards.

Over time, however, the CJEU seems to be developing a much stronger interpretation of the freedom to conduct a business. As the EU's Fundamental Rights Agency (2015: 9) notes:

> With the Charter becoming legally binding in 2009, the right has come to occupy a more prominent role. It is being used more forcefully to balance other rights and underpin proportionality tests of various intrusive measures. [...] The CJEU has even used Article 16 to balance workers' rights.

The CJEU's judgments in *Alemo-Herron*[9] and *AGET*[10] are crucial developments in this regard. In *Alemo-Herron*, the CJEU was asked to interpret Article 3 of Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, which provides that the transferor's rights and obligations arising from an employment relationship existing on the date of a transfer shall be transferred to the transferee. The Directive constitutes a minimum harmonization in the sense that it does not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees (Article 8). The case concerned the question whether dynamic clauses referring to collective agreements negotiated and agreed after the date of transfer are enforceable against the transferee. The Court acknowledged that such clauses are more favourable to employees (para. 24) but that the Directive did not aim solely to safeguard the interests of employees, but rather to ensure a fair balance between the interests of employees and employers (para. 25). The dynamic clauses were not considered a fair balance, as they 'limit considerably the room for manoeuvre necessary for a private transferee to make ... adjustments and changes' after the transfer. The Court then extensively interpreted and forcefully applied the freedom to conduct a business as laid down in Article 16 EU Charter, stating that it covers, *inter alia*, the freedom of contract, a freedom that it considered to be seriously reduced by the dynamic clauses 'to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business' (para. 35). The upshot is that under this minimum harmonization directive, Article 16 of the Charter cancelled Member States' right to take measures more favourable to employees.

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9. Case C-426/11, *Mark Alemo-Herron and Others v. Parkwood Leisure Ltd*, ECLI:EU:C:2013:521.

10. Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972.

The judgment has been the subject of criticism (Prassl 2013; Groussout *et al.* 2017). On the socioeconomic balancing itself, the Court 'failed seriously, in this case, to view fundamental rights "in relation to their social function"' (Prassl 2013). The Court accords a very high level of protection to the non-traditional, supposedly weak, freedom to conduct a business, while failing to properly weigh the social interest of high levels of worker protection (Groussout *et al.* 2017). Furthermore, on the scope of application of Article 16 EU Charter, it could be argued that, as the rules in question were not covered by the Directive (they were national rules setting higher levels of worker protection than laid down in the EU minimum harmonization), they were not in the scope of EU law and thus the Charter would not apply. If the scope of EU law in question was considered to be the internal market, a *prima facie* restriction of one of the internal market rights should have been established, which the Court did not do. This raises profound constitutional problems concerning the nature of minimum harmonization in relation to the scope of EU law and applicability of the Charter, especially in light of the principle of conferral that entails that the EU has to act within the powers attributed to it.

Similarly controversial is the *AGET* judgment concerning Greece's legislation on collective redundancies. This held that the Greek protections concerning collective redundancies, which entailed that prior authorisation had to be obtained from a Greek authority before executing such redundancies, were contrary to the freedom of establishment laid down in Article 49 TFEU, interpreted in light of Article 16 of the Charter. After having established a *prima facie* restriction on the freedom of establishment, the Court considered the possibility of an objective justification of the national rules on grounds of worker protection and the protection of employment – which was in principle possible '[s]ince the European Union … has not only an economic but also a social purpose' (para. 77). It saw an interference with Article 16 of the Charter. While recognizing that Article 16 could be limited and noting that 'the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities that may limit the exercise of economic activity in the public interest' (paras. 85 and 86), the Court held that the details of the Greek arrangement infringed proportionality and thus both Article 49 TFEU and Article 16 of the Charter. The national authority charged with considering the planned collective redundancy had too much discretion to interpret the 'situation of the undertaking' and the 'conditions in the labour market' as reasons for opposing the redundancies.

This judgment again may be considered as favouring economic over social interests. While the Court's tone in *AGET* is more conciliatory than in *Viking*, *Laval, Rüffert* and even *Alemo–Herron* (Markakis 2017), the fact remains that once again precedence is given to the economic freedom of companies over a system protecting workers from collective redundancies. This can be considered politically controversial considering a) Greece's overall crisis context; and b) the fact that these rules applied without distinction to domestic and EU companies. While it is true that the Court gives directions as to how a national system reviewing planned collective redundancies could comply with EU law,[11] it is difficult to see how a system compliant with the criteria of the Court can

11. The Court considers that the grounds for refusing a collective redundancy cannot include 'interests of the national economy', and that while such grounds may be the 'situation of the undertaking' and the 'conditions in

be as protective as the Greek system that was condemned. While that outcome could arguably be considered a necessary compromise between social and economic rights – the result of a balancing – the legal basis for the application of these economic rights to this situation is legally contestable in the first place. Applied without discrimination, the rules do not in any way place any additional burden on foreign companies and do not even disadvantage 'new' operators over established ones. It is thus uncertain whether the freedom of establishment as laid down in Article 49 TFEU should apply. Secondly, as regards Article 16 EU Charter, while the Court may be using softer language, it is nevertheless applying a hard-core interpretation to a traditionally weak right. The very text of Article 16 EU Charter states that this freedom (not right) is conditional on compliance with Union law and national laws and practices: it is thus not a right that can be limited by Union law and national laws and practices but is only recognized as a freedom to the extent that it is in accordance with Union law and national laws and practices. It is thus highly questionable whether it is an actionable right in the first place, and secondly, it suggests a much wider scope for public interest mitigation than the CJEU allows.

2. Towards a better balancing of fundamental social and economic rights

The focus of the foregoing assessment, as well as of the CJEU itself and of commentators generally, has been on the balance between social and economic rights and the interests of workers and employers as such. Thus, the assessment of whether the balance has been struck correctly uses the yardstick of whether the outcomes are sufficiently 'social' or whether the balance between workers and employers is sufficiently 'fair'. I argue that this focus needs to be shifted in two important ways.

Firstly, it needs to be more clearly recognized that the substantive question of the appropriate balance between social and economic values is inherently political and subjective, contestable and controversial. As such, it should not primarily fall to the judiciary to strike this balance substantively, but instead to the legislator. Indeed, it could be argued that the fundamental problem with *Viking* and *Laval*, and the CJEU's case law on the internal market more generally, is not the outcome as such or whether it is sufficiently social, but that the problem lies in the democratic deficit that it entails (Garben 2017). This case law makes highly sensitive political choices on socioeconomic issues that should be the bread and butter of European, as well as national, politics and thus be decided through the legislative process. While arguably in any system of constitutional democracy majoritarian decision-making should be circumscribed by certain constitutional values, such as *par excellence* fundamental rights, to be upheld by the judiciary through judicial review, such review should be as deferential as possible and only circumscribe democracy – not replace it with judicial legislation. Over the past decades, both economic and social concerns have perhaps become too firmly entrenched in European constitutionalism. Instead of the core political-ideological battlefields that

the labour market', there need to be clearer rules indicating to companies how these criteria will be applied by the authority in question. See paras. 96 – 102 of the judgment.

they once were, they have become 'fundamental rights' that are not within the purview of democratic decision-making but instead are the basis for judicial review. While these social and economic rights are also protected in the constitutional law of many Member States, within domestic legal orders the judiciary tends to leave more room for the legislative process to limit these rights in the public interest, especially where they need to be balanced against other fundamental rights.

Secondly, and relatedly, in the highly sensitive process of judicial review, the judiciary should be guided not only by an approach of deference but also by a clear normative framework within which the fundamental values that it is mandated to uphold are to be accommodated and, importantly, which states how these fundamental values relate to one another, especially in cases of conflict. This would make the adjudication of these values and rights more predictable (a cornerstone of the rule of law) and would provide a more legitimate framework for balancing than one guided by what can never be anything but a subjective view of socioeconomic justice. In other words, an ideological meta-framework is needed for constitutional adjudication in the EU legal order, but it should not be an ideology of political economy but of constitutional democracy. Ideally, the CJEU, as the EU's constitutional court, would develop such a theory, even if only implicitly, as for instance done by the German Constitutional Court. EU primary law contains sufficient meta-values to anchor such an approach (see further Garben 2019b).

On the basis of constitutional democratic theory, we could design some principles to guide us in the question of how the judiciary should interpret the minimum standards of the economic and social rights in question when reviewing national and European legislation. The core idea is that fundamental rights are there primarily to guarantee the necessary conditions of a robust and long-term democracy, thus ensuring equality (through social mobility, inclusion and emancipation, as well as non-discrimination and the correction of power asymmetries), and to correct grave cases of majoritarian injustice, thus ensuring individual dignity and liberty. Using such a framework, we can develop more concretely how each fundamental right should be interpreted, how it relates to other fundamental rights and to what extent it should be enforced by the judiciary.

The following four points are a first, tentative attempt in this regard, intended to stimulate further debate along these lines of thinking (see further Garben 2019b).

(a) As stated above, the freedom to conduct a business has a role to play in ensuring a robust democracy, to the extent that it helps to empower individuals – especially those who are disadvantaged – through economic activity, to prevent concentrations of (economic) power and equalize societal asymmetries. As a human right it should not, under such a constitutional democratic reading, provide a 'sword' for companies in the operation of their business against workers, citizens and general public interest standards; that would be counterproductive.

(b) The internal market rights serve the purpose, within this constitutional democratic perspective, of compensating for the failures of national democracies to take due account of the impact of their decisions across borders, or of their deliberate decision

to negatively impact other jurisdictions to the benefit of their own, and should thus be interpreted as focused specifically on reviewing direct and clear indirect discrimination – and not on the general economic freedom of companies. In this review, a clash between the internal market's 'transnational equality rights' on the one hand and fundamental social rights on the other needs to be considered with deference to the democratic process either at national or EU level.

(c) Workers' rights or interests, such as the right to be protected against collective dismissal and the negative repercussions of restructuring, are primarily for the democratic process to flesh out, and it would seem that here there is scope for significant counterbalancing with other rights and interests such as those of the employer or the economy. Strong protection would need to be provided against unjust dismissal generally, as the lack of such protection would undermine the enforcement of any other right in an employment context and would entrench an unacceptable power asymmetry between the employer and the worker which cannot be justified in a democratic society. But the scope for (collective) dismissal for economic reasons is not something that should *a priori* be determined by the judiciary or the constitution, but instead is a main battleground for the political process.

(d) The rights to strike and bargain collectively have an important role to play in creating and maintaining the conditions for a robust democracy. They are procedural rights rather than rights establishing certain socio-economic outcomes. As the UN Special Rapporteur put it:

> protecting the right to strike is not simply about States fulfilling their legal obligations. It is also about them creating democratic and equitable societies that are sustainable in the long run. The concentration of power in one sector – whether in the hands of government or business – inevitably leads to the erosion of democracy, and an increase in inequalities and marginalization with all their attendant consequences. The right to strike is a check on this concentration of power (Kiai 2017).

This right should therefore, in principle, be forcefully protected by the judiciary.

It should be clear that the current approach under EU law does not correspond to this proposed way of interpreting, balancing and enforcing fundamental rights. Coming back to the four cases discussed in this chapter, many will agree that in *Viking* and *Laval*, fundamental economic rights were taken too far. The above principles would support that criticism, pointing out that the right to strike should receive a forceful interpretation while the internal market provisions should be about combating unjustified (indirect) discrimination, which does not seem to have been the case in *Viking* and *Laval*. While the social interest at stake in *Alemo-Herron* and *AGET* should, following the above interpretation principles, be open to significant (economic) counterbalancing, it is the political process that should have decided on the balance in this case, because the counter-interest of 'conducting a business' should equally be a weaker right open to significant (social) counterbalancing. The EU legislator had not, in the Directives at stake, decided on that balance as regards the cases at hand – they fell outside the scope of the Directives. Thus, it should have been left to the national

democratic process: the UK and Greek rules in question should have been upheld until the European legislator had acted to establish a different balance at EU level on these specific questions. Instead, the EU judiciary gave an overly forceful interpretation to the freedom to conduct a business, thereby constitutionalizing a certain view on the right socioeconomic balance that it was not necessary to establish for a democratic society.

Conclusion and outlook

Over the past 20 years, the balance between 'the market' and 'the social' in the EU legal and political order has become an increasingly controversial question in both political and legal terms. This chapter has argued that the way the judiciary balances fundamental social and economic rights in the EU legal order is a key element in determining that balance. However, the chapter has also argued that we need to move beyond a narrow focus that analyses the EU on the basis of whether it is sufficiently in balance, appropriately or overly 'social' or 'economic' in its policy output and constitutional configuration: the answer inevitably lies in the eyes of the beholder and is therefore too political and subjective to be meaningful in analytical terms. Instead, the European legal community should start a deeper reflection process, moving beyond the current battle of fundamental rights to consider critically what the position of rights and the judiciary should be more generally – especially in relation to democracy. Importantly, this could provide the CJEU with a more legitimate framework to adjudicate the inevitably thorny situations where fundamental social and economic rights seem at odds, prioritizing neither the economic nor the social over the democratic.

While it may be tempting for both scholars and practitioners of EU social law to now devote their time and thought to the exciting new developments concerning social rights in the wake of the EPSR, there is some important groundwork to be done as well. The new legal measures fleshing out social rights adopted as implementation of the Pillar will inevitably have to be interpreted by the CJEU at some point, and new situations of conflict between social and economic rights and interests will certainly arise. Going forward, we need a better compass and roadmap to guide us. This should be defined, as a first step, through scholarly and public thinking and debate. *What is the role of social rights in the EU? What is the role of economic rights? How fundamental are they and should they be, and, relatedly, what are the respective roles of the judiciary and the legislator in determining their content, their enforcement and their interaction?* While we may never find conclusive answers to these constitutional questions that are also subject to perennial debate at national level, it is important to at least define the terms of the argument.

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