

FACULTY OF LAW

‘Collective Labour Law in times of Economic Crisis: Theoretical and Comparative Perspectives’

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Abstract

The thesis explores the interaction of the economic phenomenon of 'economic crisis' with the legal phenomenon of Collective Labour Law (CLL). This interaction is the thesis' main *problematique*. Rather than undertaking an all-encompassing investigation, it seeks to modestly contribute some new theoretical and comparative perspectives on the *problematique.* These perspectives are of potential value both to the highly underdeveloped area of the theorisation on economic crises and CLL and to the comparative labour law literature.

On the *theoretical side*, the thesis puts forward a novel Marxist-critical theoretical framework for understanding the crisis' operation of CLL. Building successively on the Marxist-critical insights of a fundamental contradiction between the (capitalism) reproductive and (worker) protective function of CLL, the crisis theories' common assertion of economic rationalisation as the primary crisis response and a joint reading of Gramscian counter-hegemony and Habermas' theory of *legitimation crisis,* a theoretical framework is constructed around a proposed concept: *crisis (dis)equilibrium.* These (dis)equilibria, which arguably determine the course of CLL's crisis developments are composed of two fundamental opposing forces: the force of *economic rationalisation,* pushing for reforms dictated by the need for intense capitalist restructuring and the opposing *counter-legitimation* force, which reflects the level of socio-political threat of withdrawal of support to the prevailing economic system or at least to the reforms dictated by economic rationalisation.

The *comparative side* that serves also as a testing empirical ground for the theoretical framework, consists of an extensive interrogation of the recent crisis CLL trajectories in Greece and the UK. For Greece, the analysis observes and accounts for a dramatic collapse of the pre-crisis protective CLL edifice as a result of multiple and abrupt far-reaching CLL reforms bringing about the neo-liberal crisis movement. Subsequently, the thesis offers a response to why the protective constitutionalisation of CLL rights in Greece failed to prevent the de-construction by designating a de-constitutionalisation triangle of normative spheres. The triangle maps and explains how the neoliberal-oriented EU-IMF bailout conditionality prevailed over domestic-constitutional and transnational labour rights normative spheres through identifying a series of 'strong' and 'weak' legal and non-legal interactions. For the UK, the analysis dismisses a suggestion of a complete stasis during the crisis. Instead, it ascertains and accounts for a further -more gradual- neo-liberal *consolidating* crisis movement of UK's pre-crisis neo-liberal CLL paradigm. Hence the British crisis movement is described as *neo-liberal continuity by consolidation*. Very importantly, the thesis observes a significant crisis de-constitutionalisation process of CLL in the UK, which takes the shape of a constitutional attack on the political voice of unions by regulatory reforms.

Eventually, the thesis finds a comparative crisis pattern of a 'Great Neo-liberal Convergence' between the two previously diametrically opposite CLL systems, since they moved closer and toward the neo-liberal end during the crisis. The 'neo-liberal convergence' finding is situated as a supportive case for the convergence theorists within the convergence/non-convergence debate over whether the European CLL systems are to converge. Moreover, the analysis demonstrates the explanatory value of the Crisis Equilibrium theoretical framework for understanding the crisis trajectories in both countries and suggests that crisis developments confirm the *heteronomy* of CLL to the theoretically-identified dialectic between the capitalist force of economic rationalisation and the social force of counter-legitimation.

to all workers fighting injustice all

over the world….

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Table of Abbreviations

CLL	Collective Labour Law
CUP	Cambridge University Press
ECHR	European Convention on Human Rights
EU	European Union
HLR	Harvard Law Review
HUP	Harvard University Press
ILJ	Industrial Law Journal
ILO	International Labour Organisation
ILR	International Labour Review
IMF	International Monetary Fund
MLR	Modern Law Review
NLR	New Left Review
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PPERA 2000	Political Parties, Elections and Referendums Act 2000
TULRCA 1992	Trade Union and Labour Relations (Consolidation) Act 1992
YLS	Yale Law Journal

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European Court of Human Rights, *Bowman v the United Kingdom* [1998] ECHR 4...292

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Table of Other Sources

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European Commission, General Directorate for Economic and Financial Affairs, Occasional Papers 94, *'The Second Economic Adjustment Program of Greece'* (March 2012) ……116

European Financial Stability Facility, *Framework agreement concluded by the Eurozone Member States*……155

European Parliament resolution of 13 March 2014 on Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries 2014/2007(INI) ……192

European Parliament, Committee on Economic and Monetary Affairs, *Enquiry report on the role and operations of the Troika ECB, Commission and IMF) with regard to the euro area programme countries* 2013/2277 (INI) ……160

European Parliament's Committee on Constitutional Affairs, *Opinion* (11 February 2014) 2013/2277 (INI) ……193

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Memorandum of Understanding between the European Commission, acting on behalf of the euro area Member States, and the Hellenic Republic (3 May 2010)…….……155

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Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (5th edn, ILO 2006) ……...……183, 187, 276

International Labour Conference, *Collective Bargaining in the Public Service: A Way Forward, Report of the Committee of Experts on the Application of Conventions and Recommendations,* ILC.102/III/1B (International Labour Office 2013) …..……230

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Guidance on the Design and Implementation of IMF Conditionality: Preliminary Considerations (May 2002) ……..……..……156

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Cabinet Office, *Coalition: our programme for government* (May 2010) ……213, 279

Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service* (13 July 2012) …..…..……..……..……..……..……..……..……..……..……..231, 232

Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service: Government Response* (8 October 2012) …..……..……..……231

Central Arbitration Committee, *Annual Report 2014-2015*....…….…….……..240

Chief Secretary to the Treasury, *Trade Union Subscriptions: Check-Off Arrangements* (8 July 2014) …..……...…….235

Department for Business, Innovation and Skills, *Certification of trade unions' membership registers and investigatory powers for the Certification Officer: Impact Assessment* BIS LM001 (11 December 2014) …..……..…..223

Department for Business, Innovation and Skills, *Trade Union Membership 2014: Statistical Bulletin* (June 2015) ……..…228, 242

Department for Environment, Food and Rural Affairs, *Final Impact Assessment* (19 December 2012) …..…….216

Department of Employment, White Paper, *Building Business…not Barriers* Cmnd 9794 (1986) …..…….255

Her Majesty's Government, *Introducing a Statutory Register of Lobbyists*: *Consultation Paper* (January 2012) 280

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Her Majesty's Stationery Office, White Paper, *Lifting the Burden* Cmnd 9571 (1985)…… ……..…….255

Minister for the Cabinet Office Francis Maude, *Deduction of Trade Union Subscriptions at Source (''Check'Off') - Guidance* (20 December 2013) …..……...234

I

INTRODUCTION

1. Setting the *Problematique* of the Thesis: The Crisis Operation of CLL

What is the mode of interaction between the economic phenomenon of 'economic crisis' and the juridical field of 'Collective Labour Law' (CLL)?[1] Or, in other words, what is the Crisis Operation of CLL? These questions form this thesis' *problematique.* The principal purpose of the thesis is to enhance the understanding of labour law scholars on the way CLL works during economic crises by contributing new theoretical and comparative perspectives to existing literature.

Hugo Sinzheimer was perhaps the first labour law scholar to make a theoretical pronouncement on this problematique. Glancing at the capitalist darkness after the 1929 economic crisis, he observed the destructive impact of economic crises on labour law in Weimar Republic.[2] And he insightfully stated that:

> 'the storm fully sweeping the global order damages amongst all legal fields labour law with the most intensity. This is not at all puzzling, as soon as one looks beneath the provisions of labour law the fundamental base, on which it is founded. The fundamental base is the economy, part of which is labour law. The economic relations, attitudes and orders of things play a crucial role for dependent labour'.[3]

Along similar lines, the Greek labour law scholar Dimitris Travlos-Tzanetatos in 1970s advanced the seismograph thesis of labour law for capturing the mode of its crisis

[1] Collective Labour Law is used as a term for describing the legal regulation of the collective relationships of the workers and their organisations with their employers and the state through their collectivities, mainly unions. It covers the law in the areas of collective bargaining, strike, internal union organisation, political and industrial activities of unions broadly conceived and resolution of collective disputes (e.g arbitration).
[2] See Michel Coutu, 'With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labor Law' (2012-2013) 34 Comparative Labor Law and Policy Journal 605.
[3] Hugo Sinzheimer, *Arbeitsrecht und Rechtssoziologie* (Bd 1Gesammelte Reden und Aufatze 1976) 135 (in German).

operation. In the only systematic theoretical approach on the impact of economic crisis on labour law in general yet written in Greece and the UK, he maintained that labour law, 'insofar as it constitutes the fundamental legal field on which the highest socio-economic conflict is focused, is inevitably *functioning in times of crises as an over-sensitive seismograph*, able to detect with precision even the subtlest economic vibrations and political developments'.[4] Both quotes are of utmost significance. By arguing that the crisis operation of CLL is heteronomous to capitalism and class struggle, they offer a theoretical analytical thread to inspect. They suggest that crises are anticipated to act as transformative events for labour law due to the latter's material dependence on capitalism. Whether this is an accurate prediction is a theoretical and empirical question to be scrutinised within and by this thesis.

The recent economic crisis establishes an ideal new empirical ground for revising and advancing the old discourse on the crisis operation of CLL. In 2008, capitalism entered once again its dark side. The financial crisis subsequently muted into a global recession and into the 2010 public debt crisis for Eurozone countries. Commentators were quick to spot its enormous significance by evaluating the crisis as 'the most serious global financial crisis since the Great Depression'[5] and that it 'will be remembered as one of the most dramatic and extraordinary financial crashes in the history of capitalism'.[6] More importantly, in the real life-world struggle, it caused extensive damage on society,

[4] Dimitris Travlos-Tzanetatos, *Εργατικό Δίκαιο και Βιομηχανικη΄Κοινωνία* (Παπαζήσης 1977) 22 (in Greek); see also the collection of his writings *Οικονομική Κρίση και Εργατικό Δίκαιο* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2013).

[5] Carmen Reinhart and Kenneth Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press 2009) 208.

[6] Andrew Gamble, *The Spectre At the Feast: Capitalist Crisis and the Politics of Recession* (Palgrave Macmillan 2008) 5.

asymmetrically afflicting the lives of millions of ordinary workers, the true producers of society, and their families worldwide.

For the labour law scholars, the 2008 crisis is an unfortunate gift of history. This is because its study bears an immense analytical and epistemological value. Considering CLL's emergence in 20th century, with its maturity in most advanced countries not reached until after 1950s,[7] the 2008 economic crisis is only the second empirical instance -even the first- for interrogating the crisis operation of CLL.

However, along with the set of theoretical questions concerning the relation of economic crises with CLL and capitalism as raised by Sinzheimer and Travlos-Tzanetatos, there exists a second set of very important recent trajectory-specific questions concerning the evolution of the declining trajectory of CLL in the recent historical period. Indeed, up to the crisis, CLL was already in a well-documented prolonged state of crisis,[8] a terminal decline making scholars to pronounce its death in different jurisdictions[9] as -and because of- its enemy of neo-liberalisation evolving in full strength. So, what was the impact of the crisis on this neo-liberal trajectory? Did this process resume or came to a halt? Is the post-crisis CLL similar or different to the pre-crisis CLL?

In short, the problematique asks us to inspect the encounter of a *CLL already in crisis with a capitalism in crisis* in what is the next stage of the unfolding story of the relationship between neo-liberalism and labour law.

[7] See Antoine Jacobs, 'Collective Self-Regulation' in Bob Hepple (ed), *The Making of Labour Law in Europe* (Mansell 1986).
[8] See Gerald Lyon-Caen, 'La crise du droit du travail' in F Gamillsche and others, *In Memoriam Sir Otto Kahn-Freund* (Verlagsbuchhandlung 1980) (in French); See also for labour law's identity crisis Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011).
[9] See Keith Ewing, 'The Death of Labour Law' (1988) 8(2) OJLS 293 and Cynthia Estlund, 'The Death of Labor Law' (2006) 2 Annual Review of Law & Social Science 105.

2. Addressing the *Problematique*: Method and Structure

The previous part established the broader research questions and the broader research space wherein the thesis is to operate. This part clarifies the adopted method for addressing the crisis operation of CLL. The thesis uses a *joint* theoretical and comparative method for offering fresh perspectives to the problematique. As a result, the thesis contains two methodological and structural components.

The first component is the theoretical. Chapter II develops a new Marxist-critical theoretical framework for understanding and accounting for the crisis operation of CLL. This framework is termed as the 'Crisis Equilibrium Framework'. We should here clarify that the term 'equilibrium' is used to denote the opposing nature of the forces and should not necessary imply equality of the conflicting forces. It is thus a short-hand to cover both 'equilibrium' and 'disequilibrium', depending on context. The framework seeks to explain how capitalism and society determine the crisis trajectories of CLL. This theoretical venture aims to cover a notable deficit in British labour law scholarship where no theoretical engagement with the question of how economic crises affect CLL irrespective of specific jurisdictions exists. In addition, the framework operates also as an organising material for the comparative investigation wherein is tested. In the concluding parts of the last Chapter VIII, the theoretical implications of the comparative findings are also assessed.

The second component is the *comparative*. It takes the form a comprehensive and detailed examination of the specific CLL trajectories in Greece and the UK during the recent crisis, undertaken in Chapters III to VIII. More specifically, Chapter III which serves as a preface to the comparative analysis sets the comparative field, including the justification of the choice of comparator countries, and traces the opposite pre-crisis (neo-

liberal) British and (worker-protective) Greek CLL schemes Subsequently, Chapters IV and V on Greece and Chapters VI and VIII on the UK present the crisis developments concerning CLL. The thesis observes the common neo-liberalisation processes along with their nuances and different mediums in both countries.

More specifically, Chapter IV deals with the far-reaching and multi-front de-construction of the CLL protective edifice in Greece during the crisis and accounts for it by using the theoretical framework. Chapter V is devoted to constitutional considerations. It looks into why did the domestic constitutionalisation of CLL fail to prevent this de-construction by integrating the transnational and domestic constitutional dimensions within a 'de-constitutionalisation triangle'. The Chapter shows how the IMF-EU bailout conditionality normative sphere (conditions imposed to Greece for providing financial assistance) trumped the domestic constitutional and transnational normative labour spheres (International Labour Conventions, ECHR, EU Charter of Fundamental Rights) by examining the interactions and non-interactions between the spheres depicted as a *de-constitutionalisation process.*

Chapter VI interrogates the British CLL crisis trajectory. It argues for a 'neo-liberal continuity by consolidation' by demonstrating how the crisis developments gradually consolidated the pre-crisis neo-liberal paradigm and accounting for this pattern. Chapter VII observes a 'de-constitutionalisation process' within the UK by looking at the important attack on unions' political voice during the crisis.

Such comparative investigation is not only of value for each country individually as it assesses its recent trajectories, but it is significant inasmuch as there has been no comparative published work on Greece and UK as sole comparators with regards to CLL. In addition, Greece and UK were both protagonists in each phase of the crisis (financial

phase for the UK and public debt for Greece) and had different CLL systems (worker-friendly for Greece and neoliberal-friendly for the UK) when the crisis took off in 2008. So, a major comparative question relates to the assessment of whether these two different systems did converge, and if so toward which direction.

In the concluding Chapter VIII, based on the comparative material, the thesis argues for a 'neo-liberal convergence' between the two systems as a comparative pattern and look at its causes. As a result, the comparative analysis here can be also seen as granting also new perspectives on how neo-liberalisation proceeds within very different CLL systems. Both theoretical and comparative methods are also brought together in the ultimate concluding Chapter VIII where the comparative and theoretical findings of the thesis are advanced within an integrated framework.

To conclude, if Palomque Lopez is right to state that economic crises are labour law's 'travelling companion',[10] the ISSUE is to ascertain the nature of this companionship. Are they friends or foes? Responding to this question along with mapping the effect of economic crises on CLL through a theoretical and comparative investigation are the tasks to which the subsequent seven Chapters are devoted to.

[10] Palomeque López, M.C., 'Un compañero de viaje histórico del Derecho del Trabajo: la crísis económica' (1984) 143 Revista de política social 15 (in Spanish).

II

A Marxist-Critical Perspective on the Crisis Operation of CLL: Building the Crisis Equilibrium[1] Theoretical Framework

This Chapter intends to examine, by using the theoretical method, the thesis' main problematique (as set in the introduction): *the crisis operation of CLL*. It articulates a novel Marxist-critical theoretical framework termed as the 'Crisis Equilibrium Framework'. This articulation serves two major analytical goals. Firstly, it contributes a new theoretical perspective with a standalone explanatory value on the crisis operation of CLL. Secondly, it invests the subsequent comparative analysis with an organising framework. By doing so, it yields an appropriate grammar for enabling a deeper and sounder comprehension of the comparative materials presented in Chapters IV – VII.

The analysis is organised as follows. Following some preliminary scene-setting observations clarifying the type of the enquiry and the substantive presuppositions of the Marxist-critical theoretical framework (Part 1), the enquiry proceeds sequentially in two stages. Drawing on Marxist labour law scholars' accounts, Part 2 identifies the *general* operation of CLL as a fundamental contradiction between its (capitalism) reproductive and (worker) protective function and traces the origins and specific forms of each function. Subsequently, Part 3 develops the Crisis Equilibrium theoretical framework for the *crisis* operation of CLL. It suggests that the Crisis Equilibrium, a concept introduced by the Chapter, is the prime determinant of the crisis operation of CLL. These equilibria are composed of two fundamentally opposing forces: 'Economic Rationalisation'

[1] Just to repeat that the term 'equilibrium' is used here more to denote the opposing nature of the forces and should not necessary imply equality of the conflicting forces. It is thus a short-hand for both 'equilibrium' and 'disequilibrium', depending on the context.

expressing capital needs during crises, and 'counter-legitimation' expressing societal resistance. After identifying the forces, the analysis explains how the CLL is affected by these Crisis Equilibria, and ultimately the role of the state in the reflecting and manging these Crisis Equilibria is examined.

1. Setting the Enquiry: Preliminary Remarks

This initial part makes two preliminary tasks. It specifies the (i) type of the enquiry and the (ii) substantive propositions underpinning the adopted Marxist-critical theoretical framework.

Let us start from the former. The nature of the investigation calls for a type of enquiry with three characteristics. Firstly, it requires the adoption of the 'external viewpoint' of an observer of law and its crisis operation rather than the internal viewpoint of an internal legal participant.[2] The enquiry thus searches for an 'external theory' capable of 'identif[ying] the casual chains that shape or are shaped by legal practices'[3] and not for an 'internal theory' adjusted to the narrow outlook of a legal participant 'adopt[ing[the point of view of the judge or lawyer and try to theorise the process of argumentation and reasoning used in institutional discourse'.[4] This external perspective is in manifest contrast with normative approaches concerned with formulating propositions about what labour law *should* be or pursuing the idealistic enquiry of cognising the *Idea of Labour Law*.[5] Second, the enquiry is *universalist*. This means that it seeks to establish a theoretical framework universally valid for any CLL during economic crises as long as

[2] See H.L.A Hart, *The Concept of Law* (3rd edn, OUP 2012) 100-110.
[3] Costas Douzinas and Adam Gearey, *Critical jurisprudence: the political philosophy of justice* (Hart 2005) 5.
[4] ibid.
[5] For instance, see Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (OUP 2011).

they operate within a *capitalist society* (see below for elaboration). Therefore, it is not tailored to particular jurisdictions. Thirdly, it is *foundationalist or fundamentalist,* in that is orientated around the exposition of the very foundations of fundamentals of CLL. As a result, there is an admitted degree of a reductionist, abstract and at points quite elaborate analysis.

And finally, of course, it is theoretical. Theory could be defined as 'a deductive system in which observable consequences logically follow from the conjunction of observed facts with the set of fundamental hypotheses of the system'.[6] The distinct trait of theory, particularly when counterposed to empiricism, is its *deductive* nature. Theory consists of a systematic ordering of propositions. The theorist should proceed stepwise towards his goal of theorizing its analytical object by working out deductively her propositions (or hypotheses) within a logical chain.

After establishing the type of enquiry, let us now move to the substantive propositions of our analytical framework. The framework is labelled *Marxist-critical.* As its title indicates, it is rooted in the Marxist and critical intellectual traditions. Rather than a pure unrefined application, though, it emerges as a refined synthesis inspired from these two intellectual streams. To be more specific, the first source of inspiration is the Marxist *dialectical materialist* approach which generally argues for the centrality of the capitalist mode of production and class relationships between owners of means of production (capitalist class) and the dispossessed (working class)[7] for society. In addition, it stresses the law's superstructural dependence in social relations of production.[8] This approach is

[6] Richard Braithwaite, *Scientific explanation: a study of the function of theory, probability and law in science* (CUP 1953) 22.
[7] See Richard Hyman *Industrial Relations: A Marxist Introduction* (Macmillan 1975) Introduction and Chapter 1.
[8] See for the classic statement: '*the sum total of these relations of production [which correspond to a definite stage of development of their material productive forces] constitutes the economic structure of society, the*

combined with its important revisions by Gramsci contributing the concept of hegemony[9] and the Habermas' theory on the legitimation crises.[10] The second stream is that of the Critical Legal Scholarship. The latter mounted a critique to the traditional legal discourse as reproducing and legitimizing dominant class discourses and interests.[11] Critical Labor scholarship emerged as a key strand of this stream with its famous proponents Karl Klare and Katherine Stone.[12]

Throughout the Chapter, the theory builds upon and connects various threads from these intellectual traditions, but does so only selectively, strategically and synthetically*:* no intellectual stream is wholly adopted, but only those parts receiving an explicit mention *(selectively)*, the streams' use is carefully adapted to the purpose of examining the crisis operation of CLL questions *(strategically)* and occasionally the insights are combined with insights from other intellectual traditions *(synthetically).*

At this preliminary stage of the theoretical construction, there is need to be clear about the four presuppositions/propositions informing our adopted framework.

The first concerns the *epistemological cognition of capitalism as analytically and explanatory dominant.* This means that capitalism is analytically fundamental for explaining the patterns of CLL. As a result of this approach, we put forward a theoretical

real foundation, on which arises a legal and political superstructure'. Karl Marx, *Preface to a contribution to the Critique of Political Economy* in Robert Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978) 4 (emphasis added). For accounts of Marxism and Law see Alan Hunt, 'Marxism, Law, Legal Theory and Jurisprudence' in Peter Fitzpatrick (ed), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Pluto Press 1991); Evgenii Pashukanis, *Law and Marxism: A General Theory* (Pluto Press 1993) and Hugh Collins, *Marxism and Law* (OUP 1982).

[9] Antonio Gramsci, *Selections from the Prison Notebooks* (Lawrence & Wishart 1971) 210-276.

[10] Jurgen Habermas, *Legitimation Crisis* (Polity Press 1988).

[11] For an excellent introduction to Critical Legal Studies see Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6(1) OJLS 1.

[12] See the classical pieces of Karl Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941' (1978) 62 Minnesota Law Review 265 and Katherine Stone, 'The Post-War Paradigm in American Labor Law' (1981) 90 YLJ 1509.

perspective about the crisis operation of CLL and economic crises as fundamentally determined by the operation of CLL in a *capitalist society*.

More crucially, though, capitalism is the watchword. Capitalism describes the *class-based system of production distinguished by the state-sanctioned private ownership and by the fact that the majority of the population lacking the means of production need to gain their income by selling their labour power to the profit-seeking owners of the means of production (employers), under formally 'free' contractual exchanges, in return for a wage.* Since economic crises are crises of the capitalist mode of production and the CLL regulates the relationship which is the defining one for capitalism, that is the wage/labour relationship, then there emerges a link between CLL and economic crises as a result of their relation to capitalism.

In light of the Marxist contribution of viewing capitalist relations of production as analytically and explanatory dominant for the societal dynamic, placing capitalist society as the central unit of reference has four implications. Firstly, it leads to the recognition that CLL operates within 'capitalism' which exhibits a singular distinctiveness as a mode of production *('Capitalism matters for CLL')*, that is with a common logic, mechanisms and problems across all capitalist economies. Secondly, it leads to the recognition that CLL regulates the central capital-wage relationship so that its geography (along with contract and property law) is at the core of the inner constitutive workings of capitalism *('CLL matters for Capitalism')*. Thirdly, it entails the admission of the fact that capitalism is a dynamic ever-changing system of capital relations and not a static background context so that the capitalist society is in a constant motion thus affecting continuously the CLL trajectory. And, finally, for distancing the theoretical framework from a simple reductionist-structuralist economist account reflecting a pure base-superstructure

dialectic so that CLL is a pure by-product of the economy, the 'capitalist *society'* integrates the human agency and class as dynamic social processes into the picture.

Thus conceived, 'capitalism' and 'society', as *intrinsically inter-connected* categories (capitalism is after all a societal construct and society is affected by capitalism) are the areas wherein the crisis operation of CLL should be located, comprehended and interrogated. To put in more simple terms, it is by working the process of CLL operating in this capitalist society that we could arrive at what is its crisis operation. Evidently, treating *capitalist society* as a fundamental category – or referential domain- is of utmost significance for the possibility of theorisation. It enables a universal theorisation of the crisis operation of CLL across all capitalist economies in that they share the feature of operating in capitalist economies. Notwithstanding nation-specific particularities, *every* CLL exists within a *capitalist society*

This overall setting of the theoretical venture sides with a broader trend calling for *bringing capitalism back* in the analytical cognates, developed in disciplines as diverse as institutional political economy,[13] social theory,[14] industrial relations,[15] and more importantly for our purposes Labour Law. [16]

The second presupposition concerns the perception of the conflict between 'capital' and 'labour' as a *totalising class-based contestation.* This means that the conflict surpasses the narrow confines of the workplace to be reflexively registered within the structures of labour law. 'Capital' and 'labour' as classes continue their struggle outside

[13] Wolfgang Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (OUP 2009).
[14] Jennifer Lehmann, *Bringing capitalism back for critique by social theory* (JAI 2002).
[15] See Hyman, *Industrial Relations* (n 7); see also John Kelly, *Rethinking Industrial Relations: Mobilization, collectivism and long waves* (Routledge 1998).
[16] See Ruth Dukes, *The Labour Constitution* (OUP 2014) Chapter 1 and Eric Tucker, 'Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?' (2010) 39(2) ILJ 99, 130-137.

their workplaces and this struggle affects also the legislation. Hence it is totalising and reflexive. CLL does not *transcend*, but instead reflect the class conflict as well as being an instrument of it. As Sumner rightly notes, 'labour law is partly a state service to the economy … *but it is also a reflection of class struggles at the centres of production*'.[17] In virtue of this *totalising* characteristic of the class struggle, CLL –as part of the totality- cannot but be fundamentally affected, in its very nature and operation, by this fundamental contestation between capital and labour within the contradictory dynamics of capitalism. And CLL is even more important for capitalism given that it regulates the essential for capitalism wage-labour relation.

In this context, the herein theoretical framework integrates the principal Marxist and Critical Legal Scholars' insights of perceiving labour law and law in general as a contestation object reproducing power structures and dominant ideologies.[18] By doing so, the analysis fully adheres to the view of Julia López et al, suggesting that 'labour law as a scholarly field should not be contaminated with the invisibility and the denial of social conflict which often predominate in the larger society [and that] [c]onflict exists even if scholars minimize its significance'.[19]

Thirdly, and on a related note, the theoretical framework approaches CLL mainly as a *force,*[20] 'sufficiently malleable that can be shaped to the interests of a dominant class'[21]

[17] Colin Sumner, 'Jurgen Habermas' in David Sugarman (ed), *Legality, Ideology and the State* (Academic Press 1983) 148 (emphasis added).
[18] See Hunt, 'The Theory of Critical Legal Studies' (n 11) where he locates as a core insight of CLS the fact that law 'can achieve nothing other than a set of results which reflects the unequal distribution of power and resources' 5 and Karl Klare, 'Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law' (1981) 4(3) Berkeley Journal of Employment Law 450.
[19] Julia López, Consuelo Chacartegui and Julia Cantón 'From Conflict to Regulation: The Transformative Function of Labour Law' in *The Idea of Labour Law* (n 5) 361-362.
[20] See Jaques Derrida, 'Force of Law: The ''Mystical Foundation of Authority''' (1989-1990) (11) Cardozo Law Review 921.
[21] Raymond Hogler, 'Labor History and Critical Labor Law: An interdisciplinary approach to workers' control' (1989) 30 (2) Labour History 165, 168.

and not as a mere *discourse.* CLL is primarily posited law and hence force (or command). In this sense, the framework marries Derrida's critical conception of law as force with Marxist theories of law as consolidating power structures. This approach is conspicuously absent from British labour law epistemology. Labour law is usually and exclusively understood in *discursive* terms, either in the form of Government policy,[22] an idea,[23] a single purpose[24] or even as vocation.[25] Even though purposive discourse and legal reasoning are not at all insignificant, and of course very suitable for normative inquiries of what the law should be, these approaches when employed for descriptive-explanatory purposes tend to reify the position of Governments, legal scholars, legal practitioners or exaggerate the importance of a single purpose. In this manner, they give a false sense of coherence.

To illustrate it with an example, it is absolutely possible that a decision created in the consciousness of a judge or policy-maker as *protective* may indeed perform also the function of promoting capitalism. Whether it does so is what matters, and this can be captured only when the functions of CLL in relation to capitalism are taken into account. Indeed, the suggestion that 'CLL has a purpose A' remains elliptic and obscures rather than illuminates. The right form is the proposition that 'CLL has a purpose A that *in the context of B (e.g capitalism) functions towards X'*, the latter be C, or, importantly, anti-A. The result of treating CLL as mere discourse is that the scholar ignores the relationship of CLL to power structures, class conflicts and material reality. To discuss an other

[22] Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press 1993).
[23] See footnote 5; see also Dukes, *The Labour Constitution* (n 16) Chapter 1.
[24] For instance, by describing Government objectives, Davies and Freedland define British labour law in 1990s reference to the purpose of 'flexibility' [Paul Davies and Mark Freedland, *Towards a Flexible Labour Market* (OUP 2007)] whilst Hugh Collins to the purpose of competitiveness [Hugh Collins, 'Regulating the employment relation for Competitiveness' (2001) 30(1) ILJ 17].
[25] Hugh Collins 'Labour Law as a Vocation' (1989) 105 Law Quarterly Review 468.

example, approaching the political strike prohibition as a constitutional discourse issue may lead to neglecting its effect on suppressing workers' potential for challenging capitalism, the latter requiring an analysis of CLL as a force. A practical implication of looking CLL as a force is therefore the provision of a direct linkage with the power dynamics within the capitalist society.

Finally, based on the Hegelian and Marxist epistemological traditions, the enquiry adopts a *dialectical ontology* by defining its object in terms of contradictory dualities. It should be noted that dialectics in the Marxist and Hegelian conception, generally denote the perception of a thing or process, not as a coherent unity but as a contradictory internal duality,[26] consisting of opposite elements whose very opposition causes their evolution.[27] The object evolves through the contradiction. In this sense, it is this incoherence which produces an evolutionary thrust. To quote Hegel, dialectical thinking entails 'the comprehension of the unity of opposites, or of the Positive in the Negative'.[28]

So, to summarise, the four theoretical tenets of the framework are as follows:

(i) *capitalist society* as referential domain,

(ii) conflict as *totalising* in a capitalist society,

(iii) law as *force* and not only as discourse and

(iv) dialectical-contradictory epistemology.

[26] See Wal Suchting, 'Marx, Hegel and ''Contradiction''' (1985) 15(4) Philosophy of the Social Sciences 409.
[27] For contradiction as a process of development of all things see Mao Tse Tung, *On Contradiction* (August 1937) in Bruno Shaw (ed), *Selected Works of Mao Tse-Tung* (Harper & Row Publishers 1970) 89-100.
[28] Friedrich Hegel, *Science of Logic*, vol 1(Allen & Unwin 1929) 67.

2. The General Operation of CLL: The Fundamental Contradiction of Its (Capitalism) Reproductive and (Worker) Protective Functions

What is the *general* (not only crisis) operation CLL? Besides the apparent subject-matte, namely the collective regulation of the relationship between employers and workers and their organisations, this part, drawing on Marxist insights, elaborates a functional account of the general operation of CLL as premised upon a fundamental contradiction between two functions: (i) *protective* function, that is the function of protecting workers from capitalism, and (ii) *reproductive* function, that is the function of reproducing capitalism from which CLL is supposed to protect workers from.

Comprehending CLL's identity as contradictory owes its origins to the seminal Marxist account of the master of French labour law, *Gérald Lyon-Caen.* After detecting the 'ambivalence' of labour law towards capitalism, Lyon-Caen defined labour law as the *capitalist law of work* comprising 'the set of rules governing (1) the exploitation of human labour under capitalism, (2) the instruments for the working class struggle against this exploitation, and (3) the result of this struggle'.[29] Following Lyon Caen's approach exposing the dual contradictory identity of labour law, the Greek scholar Travlos-Tzanetatos refined this 'ambivalence' as a contradiction between the *(capitalism) reproductive* and *alternative-emancipatory* functions of labour law.[30] Therefore, we should emphasize that the analysis here builds on Travlos-Tzanetatos' view by making a more detailed functional breakdown of these two functions.

[29] Gérard Lyon-Caen, 'Les fondements historiques et rationnels du Droit du Travail' (original in 1950) reprinted in (2004) Droit Ouvrier 52, 56 (in French).
[30] Dimitris Travlos-Tzanetatos, *Οικονομική Κρίση και Εργατικό Δίκαιο* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2013) 6-21 (in Greek).

Interestingly, the presence of a fundamental contradiction, or an inescapable double bind for labour law, runs as an often implied and sometimes more explicit theme within literature. In slightly different formulations, it has been advanced mainly by Marxist and critical scholars. Karl Klare has observed that 'labour law evolved in response to *(although it also channelled and contained)* worker resistance to injuries and injustices visited upon them by industrial capitalism'.[31] Reflecting a similar spirit, Alain Supiot underlines that social law [part of which is labour law] protected 'the physical and economic health and security [of workers]' at the same time that 'it made the exploitation of labour as a commodity both economically and politically durable'.[32] Hunt puts forward a similar idea by arguing that the legal relation of employment 'constructs an apparent coherence within a framework which both *denies* and *confirms* the underlying inequality of the labour relation'.[33] But even Kahn-Freund's statement of the principal purpose of labour law as to 'regulate, to *support* and to *restrain* the power of management and the power of organised labour'[34] reveals a kind of double movement for labour law, which may be seen as expressing some form of contradiction unless one is willing to consider restraining trade unions' power as a protective outcome for the worker.

Therefore, if the *idea* of labour law is 'a combination of subject matter and purpose',[35] a proper descriptive examination on CLL we contend should rather be a combination of subject matter and *functions*. This was indeed one of the major contribution of Renner's account of the organic character of the legal order denoting the 'fact that the totality of

[31] Karl Klare, 'Introduction: The Horizons of Transformative Labour and Employment Law' in Joanne Conaghan, Richard Michael Fischl, Karl Klare (eds), *Labour Law in an Era of Globalization* (OUP 2002) 3 (emphasis added).
[32] Alain Supiot, 'Grandeur and Misery of the Social State' (2013) 82 NLR 99, 104.
[33] Hunt, 'Marxism, Law, Legal Theory and Jurisprudence' (n 8) 116.
[34] Otto Kahn-Freund, *Labour and the Law* (3rd edn, by Paul Davies and Mark Freedland, Stevens & Sons 1983) 15 (emphasis added).
[35] John Howe, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work' in *The Idea of Labour Law* (n 5) 295.

legal institutions existing at a given time must fulfill all general [societal] functions [which] means that the law is an organized whole determined by the needs of society'.[36] Hence, in our reading, in a capitalist society CLL cannot escape playing these capitalist functions.

Let us now also explain what is distinctive of the claim about a fundamental contradiction. In which sense it is fundamental? It is *fundamental* in the sense that this contradiction, built on the contradictory relation of CLL to capitalism, is not a trivial or ancillary matter but is *definite* for its development and historic evolution. This observation becomes clearer when the term contradiction is explained. Indeed, one could say that our analysis merely states that there may be two conflicting normative purposes in labour law and the use of the label 'contradiction' is a bit superfluous if not obscure. However, the usage of the term contradiction is not one made in analytical philosophy, or classical logics where indeed contradiction indicates a logical fallacy,[37] but one describing the *evolution* of the object as previously stated.[38] So, in our case, it entails that CLL evolves within the dynamic constraints of this contradiction and therefore partially within the evolution and development of capitalism.

In this context, the analysis now makes a *functional breakdown* of the two constituents of contradiction, fundamental for its operation, hopefully illuminating the hitherto abstract discussion in relation to CLL. It is this dialectical dynamic between these two functions which is the Fundamental Driving Force, the analytical key for the general CLL operation.

[36] Karl Renner, *Institutions of Private Law and their social functions* (Routledge & Kegan 1976) 76.
[37] Law of Non-Contradiction ('first principle') *a priori* treats *all* contradictions as logical errors.
[38] See footnotes 26-28 above.

(i) The (Worker) Protective Function: A Functional Breakdown

The *protective function* of CLL describes the distinct effect of CLL on protecting workers from capitalism. Dukes usefully summarises this function as meaning that 'labour laws were those laws which protected working people from unfair and unjust treatment at the hands of employers'.[39] Indeed, this function represents the traditional one,[40] aligning with the mission of labour law 'as the guardian of human beings in an age of almost unrestrained materialism'.[41] It could be divided in three more specific functions: *recognition, space-constituting and power altering.*

Recognition describes the expansion of narrow capitalist-based cognitive boundaries, or 'cognitive map'[42] of law, to accommodate inclusion of collective relationships and balance of forces between workers and employers as a permissible object of regulation. In short, to construe workers and unions, and not just individuals as contractual agents, as legal subjects and objects. As Supiot remarks:

> 'collective self-determination [is] distinct from both the horizontal dimension of civil law and the vertical one of public law [and] this collective dimension makes it possible for law to proceed from the right of free association of individuals, the clash of their opposing interests, and the compromises they reach'.[43]

Building on recognition as its operational precondition, the *space-constituting function* refers to the distinctive ability of CLL to generate a space between owners of capital and labour power at the heart of the highly privatised by property rules space of capitalist production. Such function appears in different guises in labour law literature. Sinzheimer's conception of 'economic democracy' labelled by Dukes as 'constitutional

[39] Dukes, *The Labour Constitution* (n 16) 1.
[40] ibid.
[41] Hugo Sinzheimer quote cited by Bob Hepple, 'The Future of Labour Law' (1995) 24(4) ILJ 303, 322.
[42] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (OUP 2005) 3.
[43] *Supiot* (n 32) 105.

function' of labour law,[44] Webbs' 'industrial democracy'[45] or Flanders' view that 'collective bargaining is not a truly bargain but rather a unique rule-making process of industrial relations which must be distinguished from the rest by the joint *authorship* of its rules, determined by representatives of employers and employees'[46], all essentially refer to this functional type. The main effect of this function of CLL is that it generates a collective space for the labour-capital interaction otherwise prohibited by traditional contract law rules.

Lastly, the *power-altering* function expresses the instrumental or empowerment 'inequality compensating'[47] function of CLL in redressing the inherent imbalance of power prevalent in labour relationship which tilts the space of formal contractual equality towards the employer side. As put by Otto Kahn-Freund, labour law deploys a 'countervailing force to counteract the inequality of bargaining power'.[48] The countervailing thesis is also shared by Hepple who states that 'the prime purpose of labour law is to establish countervailing power in the labour market which assures equality of position between employers and collective organisation of workers, while leaving room for the continuing effects of market forces'.[49] A similar approach is taken by the Webbs who stress the importance of equal bargaining strength as a justification for recognizing collective bargaining.[50]

[44] Ruth Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in *The Idea of Labour Law* (n 5) 62.
[45] Sidney and Beatrice Webb, *Industrial Democracy* (Longman 1897).
[46] Allan Flanders, *Management and Unions* (Faber and Faber 1970) 220-221.
[47] Paul van der Heijden 'Post-industrial Labour Law and Industrial Relations in the Netherlands' in Lord Wedderburn (ed), *Labour Law in the Post-Industrial Era* (Dartmouth 1994) 135-136.
[48] *Kahn-Freund* (n 34) 18.
[49] *Hepple* (n 41) 315.
[50] *Webbs* (n 45) 173.

(ii) The (Capitalism) Reproductive Function of CLL: A Functional Breakdown

The other side of CLL's contradictory duality is the *reproductive* function. It describes the function of CLL in reproducing capitalism. This function could take two forms: *(1) concessionary class trade-offs* and *(2) reproductive exploitation of the ideological features of law (formalisation, legalisation and legitimation).*

The first function ('concessionary class trade-offs') pertains to the historical accounting of CLL's identity as a *policy-making concession* by the ruling class to the gradually radicalized working class in exchange for the withdrawal of their anti-systemic demands. In short, workers were promised a protective CLL for not revolting against capitalism. As Massimo D' Antona remarks, the constitutionalisation of labour law in post-war conditions set 'the details of a compromise among social classes'[51] in an effort of 'political pacification supported by ruling classes who feared the looming menace of internal civil war, in a world divided into ideological and power blocs'.[52] As Gramsci put it in the context of Italian Soviets, industrial legality was on the one hand 'a great victory for the working class …[which] improved the working class's material living conditions', *but nonetheless a* 'compromise which has had to be made and which must be supported until the balance of forces favours the working class.'[53] This function could receive a more sophisticated theorization by perceiving the identity of CLL as a type of *class compromise,* that is an instance when 'people in each class makes ''concessions'' in favor of the interests of people in the opposing class'.[54]

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[51] Massimo D'Antona, *'Labour Law at the Century's End: An Identity Crisis?'* in *Labour Law in an Era of Globalization* (n 31) 31.
[52] ibid.
[53] Antonio Gramsci, 'Soviets in Italy' (1968) 51/1 NLR 28, 39.
[54] Eric Wright, 'Working-Class Power, Capitalist-Class Interests, and Class Compromise' (2000) 105(4) American Journal of Sociology 957, 964.

The second reproductive function constitutes a substler form of capitalist reproduction. Unlike trade-offs operating externally and visibly, the features of *formalization and legalisation* inherent to legal regulation establish a much subtler, albeit deeper and equally effective, reproduction mechanism by the medium of *legitimation*. In spite of the validity of these characteristics for every area of legal regulation, their application to the production of capital process, that is CLL, is of utmost significance for the preservation of the economic system. This is the case because relative order in the production of capital, itself presupposing workers' actual subordination to their exploitation, stands as an absolute prerequisite for systemic capitalist survival. At the very basis, CLL operates under the assumption of a capitalist wage relation to which workers are accustomed to treat it as a given.

In this direction, formalization restricts the diverse range of industrial struggle's potentialities to the narrow conceptual platforms of *formalism* typical in legal regulation. Coupled with the institutional bias in favor of upholding the economic status quo and respective liberal-dominated environment, *conceptual formalism* turns into a *repressing apparatus* for working class actions. For example, class struggle activities are only justified if related to the concept of an 'industrial dispute', or trade unions operations translated as expressions of the liberal understanding of 'freedom of association', thus blocking closed shop-agreements which strengthen trade unionism. Following this economic liberal translation, the legal concepts have the effect of depriving the working class of the capability of developing innovative and multiple strategies for advancing and realizing their radical claims. Indeed, as Tushnet puts it, the form of law 'serves as an

additional barrier to the organisation for the under-dog to upset existing social arrangements'.[55]

Legitimation capitalizes on *formalism* and *legalisation* for restricting working class actions through fragmenting the possibility of a concerted and powerful challenge to the economic system of subordination. This is not only because activities that do not survive the legalization scrutiny, such as the radical political strike, are sanctioned by the state who punishes the working class exercising them. It is also because it helps legitimating the containment of working class through endowing it with an illusion of rule-abiding neutrality, by exploiting the dominant perception of law in modern societies as a legitimate standard for conduct. An integral part of this function is the institutionalisation of trade unions within an overarching liberal context, for instance sourcing their legitimacy to the liberal freedom of association. Indeed, the ideological function of law[56] is assisted, even unconsciously, by the ideological narratives of labour law insofar used as they lay the underlying foundations for labour law doctrines. Klare refers to this function by stating that:

'the social function of significant legal ideas like the management prerogatives doctrine is to induce us to accept a certain view of the possibilities of and constraints upon human freedom, to induce us to believe in the justice, or at least the inevitability of existing institutional fore'.[57]

(iii) Summary

So, to summarize, this part argued that CLL consists of two sets of contradictory functions: (1) (worker) *protective*, in the specific functional forms of a recognition, space-

[55] Mark Tushnet, 'Perspectives on the Development of American Law: A Critical Review of Friedman's ''History of American Law'' (1977) Wisconsin Law Review 81, 102.
[56] Karl Klare, 'Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law' (1981) 4(3) Berkeley Journal of Employment Law 450.
[57] Karl Klare, 'Management prerogatives, plant closings and the NLRA: A response' (1982-1983) 11 Review of Law & Social Change 118, 120

constituting and power-altering function and a (2) (capitalism) *reproductive*, in the specific functional forms of class trade-offs and exploitation of the ideological features of law.

3. The Crisis Operation of CLL: The Crisis Equilibrium Framework

The antecedent part considered the general operation of CLL. It advanced a view thereof as a fundamental contradiction between two functions: (worker) *protective* and (capitalism) *reproductive* function. Now the enquiry undertakes the next crucial step. It looks how this fundamental contradiction manifests –or instantiates itself- in times when capitalism enters its 'dark side', namely *economic crises.* In response to the question of the crisis operation of CLL, the analysis develops the 'Crisis Equilibrium Framework'. The cornerstone of the theoretical edifice is the suggested concept of *Crisis Equilibrium* which is argued to be the determinant of the CLL during economic crises in ways that are to be explained in the subsequent parts. Crisis Equilibria are composed of two fundamentally opposing forces: (a) the Economic Rationalisation Force reflecting the capitalist logic in overcoming crises, and the (b) Counter-Legitimation Force reflecting the societal resistance or protest to capitalism in general or economic rationalisation in particular. In our framework, as 'equilibrium' is used as a generic term to cover also cases of disequilibrium, the forces may be equal or unequal in strength.

After this clarification, let us now identify first these two foundational forces along with their origins.

(i) The Two Constituents of the Crisis Equilibrium : Identifying the Economic Rationalisation and Counter-Legitimation Forces

(a) *Economic Rationalisation Force: The Crisis Capital Destruction*

The first force is termed as the 'Economic Rationalisation Force'. It describes the capitalist process through which capitalism tries to overcome economic crises. Prior to looking this process and identifying the solution of 'capital destruction', we should deal with two analytical tasks: (1) defining economic crises, and then (2) highlighting the fundamental instability of capitalism.

What is an economic crisis? For French sociologist Jean Clam, crisis is the 'climactic moment of chaotic mutation (overturning, tipping) or ''catastrophe'' (…) preceded by the regular process and followed either by restoration or by the modification of it, sometimes by the instauration of a new regular process'.[58] From this generic usage of the term, it follows that crises are inevitable transitional phases of any system that dynamically cause either its destruction and replacement, restoration or modification.

Let us now define economic crises. Within the economic realm, crises can be defined as recurring periods of the economic cycle characterised by the inability of the capitalist mode of production to adequately reproduce the fundamental parameters that are necessary for ensuring its sustainability, namely profitability and economic growth.

But the crucial question concerns the causes of these crises. Why do crises occur? This was perhaps the major contribution of Marx that revolutionized our thinking about economic crises. Whilst in the 18th and 19th century capitalism was considered to be a

[58]Jean Clam, 'What is a Crisis?*'* in Poul Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011) 192.

natural self-equilibrating model[59] and inherently stable, Marx pointed to the inherent crisis-prone unstable nature of capitalism. It was not human actions but the *system* that was the ultimate cause. So, he defined crises as the *'always but momentary and forcible solutions of the existing contradictions', 'violent eruptions which for a time restore the disturbed equilibrium*'[60]. But Marx was not alone in exposing capitalism as inherently unstable. For Keynes as well capitalism is characterized by an oscillation between upward and downward equilibrium tendencies. For him, the crisis is '*the fact that the substitution of a downward for an upward tendency often takes place suddenly and violently*'[61]. Even Schumpeter's conception of capitalism as a system of continuous 'creative destruction'[62] and the Minsky's financial instability hypothesis[63] build upon this exact dynamism and instability of capitalism.

Therefore, if capitalism is a dynamic and unstable system, the next issue is how capitalism seeks to solve its crises. What is its response? Marx and Engels give a clear answer. It is through *capital destruction.* As they say in the Communist Manifesto, 'in these crises a great part not only of the existing products, but also of the previously created productive forces, are periodically destroyed'.[64] And, in *Capital*, Marx suggests that the method for restoring the equilibrium in crises is 'the withdrawal or even the destruction

[59] See on Adam Smith's theory of natural equilibrium Bert Tieben, *The Concept of Equilibrium in different economic traditions: an historical investigation* (Edward Elgar 2012) Chapter 6.
[60]Karl Marx, *Capital: A Critique of Political Economy, Vol III* (Lawrence & Wishart 1960) 244 (emphasis added).
[61]John Maynard Keynes, *The General Theory of Employment Interest and Money* (Macmillan and Co. 1936), 314
[62]Joseph Schumpeter, *Capitalism, Socialism and Democracy* (G. Allen & Unwin, 1976) 81-86.
[63]Hyman Minsky, 'Financial Stability Hypothesis' (1992) The Jerome Levy Economics Institute Working Paper No. 74.
[64] Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin 1967) 226.

of more or less capital'[65], which may take the form of unused capital, depreciation of profits or replacement of old capital with new capital.[66]

Here capital destruction is a central term used throughout the thesis that should be clarified. *Capital destruction denotes loss of capital as value and not as a physical unit, in accordance with Marxist broader view of capital as value.*[67] To give some examples, capital destruction could include any of the following: dismissing a worker because the business is not profitable as a result of reduced demand, reduction of his/her wages, reduction of the price of certain goods, devaluation of loans or of property or of business assets. It is the total *reduction of value,* either as destruction or devaluation, that matters for the purposes of capital destruction.

Therefore, the *Economic Rationalisation Force* is essentially the force of capital destruction, universal in every capitalist crisis. And this very universality allows us to use it as a basis for a crisis theory of CLL. And this force is relevant for CLL, because this Economic Rationalisation Force is primarily exerted through the labour markets, which are the object of CLL. Labour markets are the places where the capital generates the profit by extracting the surplus value for workers. Therefore, as a result of the commodity treatment of labour, after all labour is treated as a common factor of production,[68] economic rationalisation inadvertently dictates *'capital destruction'* as an integral part of economic reconstruction,[69] the latter meaning the return of profitability.

[65]Marx, *Capital Vol. III* (n 60) 248.
[66]ibid.
[67] On crises and capital destruction See Marx, *Capital Vol 3* (n 59) 242-254.
[68] Hugh Collins, *Employment Law* (2nd edn, OUP 2010) 3.
[69] For a Marxist account on the current 2008 economic crisis as a 'delayed capital destruction moment' see Andrew Kliman, '''The Destruction of Capital'' and the Current Economic Crisis' (2009) 23(2) Socialism and Democracy 47; see also David Harvey, 'Neo-Liberalism as Creative Destruction' (2006) 88(2) Human Geography 145.

Confronted with this cessation of profitability, the principal if not exclusive motive for any capitalist activity, the economic system fails to incorporate workers' social needs, because such integration is manifestly foreign to its cognitive parameters that are programmed to employ human capital only to the extent that enhances such profitability. No distinction is made between other forms of capital and human labour capital insofar as, in the capitalist screen, 'labour power' amounts to nothing more than a surplus-value commodity-producing commodity. Therefore, when the instrumental 'labour/profitability nexus' breaks down, and human labour cannot generate sufficient profit, labour becomes a mere excessive burdensome unproductive capital that should disappear in the systemic altar of restarting the profitability and growth cycle.

In this sense, the Economic Rationalisation force is a primitive, systemic and instinctive urge springing from the very logic – or anarchy- of the capitalist system. Capitalism demands a large-scale capital destruction for restoring the broken equilibrium. It is crucial to clarify, though, that rationalisation as advanced here is conceived as a *process*, premised upon the drive for profitability, and does not necessarily entail beneficial systemic outcomes. Rationalisation could be indeed destructive for the system or irrational from the viewpoint of non-capitalist schemes of rationality, for instance from the perspective of morality or justice.

To sum up, the enquiry located the *Economic Rationalisation Force* calling for 'capital destruction' as the one constituent of the Crisis Equilibrium contradictory duality.

(b) *The 'Counter-Legitimation' Anti-Force*

So, the first force is capitalist logic in its purest. In this sense it is structural. However, there is an opposing force emanating from society which should be factored into and hence designating a Crisis Equilibrium along with economic rationalisation.

The counter-legitimation takes two forms: as a challenge to the prevailing capitalist system *('strong' counter-legitimation force)* in toto (e.g. threat of anti-capitalist revolution) or only to the particular reforms (e.g. flexibilisation of the employment relationships) dictated by economic rationalisation *('weak' counter-legitimation force).* An example of this kind is resistance to neo-liberal reforms within an alternative social democratic alternative. Sufficient emphasis should be put to the following: the terms 'weak' and 'strong' refer just to the *relative* strength of one to another, and in no way advancing the claim that the *actual* impact of the 'weak force' is *minimal.*

A reference to this force could be traced in the following statement from Massimo D' Antona where he wondered whether by:

> 'watching the wavering pillars of labour's identity is truly to ask oneself whether, with the fall of the Berlin Wall, an historic phase has definitely closed, and with it the conditions that pushed labour law from the periphery of liberal codes to the heart of contemporary institutions'.[70]

This statement is underlaid by a latent view of the genetics of labour law as, to a degree, linked with averting counter-legitimation threats to capitalism. The reason why the Soviet regime was relevant for CLL in non-communist countries was because the presence of the Soviet regime provided for a real alternative and therefore gave the possibility for workers to challenge capitalism. And, moreover, this counter-legitimation threat' offered a radical equilibrating function, with the result that the symbolic fall of Communism by

[70] *D' Antona* (n 51) 38.

the fall of Berlin War had a potential destructive impact for CLL. This counter-legitimating force is even more important during crises as it is the only one that can balance the force of economic rationalisation.

This force could acquire a firmer grounding if attached to a synthetic reading of Habermas' theory of legitimation crisis and the Gramscian perspective of 'counter-hegemony'. Prior to this, though, the basic foundation on which the entire legitimation edifice stands should be exposed. Why, the reader may ask, is legitimation relevant for the market order? The reason is that markets and capitalism are not pre-social natural orders[71] potentially gaining their status by a hypothetical consensus from a mythical social contract but are *constituted.*[72] As Renner argues, 'it is society that disposes of capital and prescribes the laws for its use'.[73] And, more crucially markets need the *continuous legitimation* from the social, political and the cultural system. Of course, the source of this legitimation may vary. It may be institutional structures, political models, ideologies, coercion or cultural narratives. However, capitalism cannot exist without legitimation of some sort.

Starting from this premise, Habermas perceives legitimation crisis in advanced capitalism as an 'input crisis' of the political system in which 'the legitimizing system does not succeed in maintaining the requisite level of mass loyalty while the steering taken over from the economic system are carried through'[74] For translating the sociological technical language of Habermas into our analysis, it entails that legitimation

[71] This view is inherent in the perception of classical liberal economists of the collective laisser-faire tradition. See Adam Smith, *An inquiry into the nature and causes of the wealth of nation Vol 1* (Cooke 1804).
[72] For a concrete articulation of this thesis see Karl Polanyi, *The Great Transformation* (Beacon Press 1957) 135-150 where he stresses that that even *'laisser-faire itself was enforced by the state'* 139.
[73] *Renner* (n 36) 297.
[74] *Habermas* (n 10) 46.

crises are a dramatic moment when, on the one side, the State *steers* the capitalist market but, on the other side, risks losing the *mass loyalty* of its citizens. Hence the crisis economic rationalisation in the form of regulatory measures could be a crisis manifestation of such 'steering' whilst 'process of loss of mass loyalty' could in fact correspond to a 'counter-legitimation' process. To illustrate it with an example, think about the case where a state should take urgent crisis measures to restore profitability by reforming he law for allowing mass dismissals and thus increasing unemployment but a looming anti-capitalist revolution is threatening which will be strengthened by the exasperated additional mass of unemployed persons.

Undoubtedly, Habermas' seminal account of legitimation crisis locates the systematic withdrawal of mass loyalty as a threat to the reproduction of the capitalist system channeled through the intermediary impact on the capacities of the political system to steer capitalism. Capitalists care about securing legitimation, as otherwise the whole system may be overthrown.

A limitation, though, emerges with regards to the potential static implications of the analytical construction of legitimation crises. Habermas' approach leads to the comprehension of legitimation as a yes/no binary question: either capitalism is legitimated or not. Either there is a full conformity or a potential revolution. We consider, though, that it is analytically more helpful to think of a *counter-legitimation force* always in operation. How strong it is, or what forms does it take, is varied and contingent on societal, economic and class circumstances different in various socio-historical contexts. Of course, when reaching a quantitative threshold, it may result in the dramatic status quo-breaking occurrence of *legitimation crises* (e.g. successful anti-capitalist revolution).

Yet its impact or dynamics do not entirely disappear when occupying an area below the revolutionary threshold.

Here Gramscian counter-hegemony[75] can refresh our perspective for making counter-legitimation force more operational for situations that are not revolutionary. This is because it can help us to understand the precise nature of this force. For examining 'counter-hegemony' we should first inspect its dialectical opposite: *hegemony.*

Hegemony is defined as the function 'which the dominant group exercises through society'[76] that extracts 'the ''spontaneous'' consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group'.[77] It constitutes the consent-acquiring (hence, in our reading, legitimating) mechanism and thereby supplements '''direct domination'' or command exercised through the State and ''juridical government'''.[78] In short, it secures consent from the subordinated classes. Rather than merely by means of physical domination, the supremacy of a social group manifests also as 'intellectual and moral leadership',[79] eventually permitting a limited accommodation of subordinate group interests as the extremely low price to be paid for the domination of hegemonic classes[80]. As Gramsci characteristically puts it:

> 'the fact of hegemony presupposes that account be taken of the interests and the tendencies of the groups over which hegemony is to be exercised, and that a certain compromise equilibrium should be formed- in other words, that the leading group should make sacrifices of an economic-corporate kind [b]ut there is also no doubt that such sacrifices and such a compromise cannot touch the essential; for though hegemony is ethical-political, it must also be economic, must necessarily be based on

[75] It should be noted that the term 'counter-hegemony' was not used by Gramsci as such. For one of the first usages of the term see Carl Boggs, *The Two Revolutions: Antonio Gramsci and the Dilemmas of Western Marxism* (South End Press 1984).
[76] Gramsci, *Prison Notebooks* (n 9) 12.
[77] ibid.
[78] ibid.
[79] ibid 57
[80] This remark correspond to the 'concessionary trade-offs' function of the reproductive function (see above Part 2)

> the decisive function exercised by the leading group in the decisive nucleus of economic activity'.[81]

Therefore, hegemony is exercised through the broader ideological, moral, cultural and intellectual fields and discourses. It is by this mechanism of hegemony that the dominant bourgeois (or capitalist) class 'poses itself as an organism in continuous movement, capable of absorbing the entire society, assimilating it to its own cultural and economic level'.[82] In this sense, hegemonic action amounts to *integration* of the subordinate group consciousness to the dominant group ideology, the latter portrayed as universal and natural. The capitalist ideology, for instance consider the example of increasing business competitiveness, is not seen as a sectional interest but is portrayed as a common goal the pursuit of which the subordinated working class should consider as commonsensical.

Institutionally, Gramsci argues that hegemony is exercised through the diffuse institutions of civil society consisting of 'the ensemble of organisms, commonly called ''private'' ',[83] such as trade unions, Church, family or other associations. Nonetheless, a complementary function of civil with political society arises, which together are claimed to be the State.[84] Such function is metaphorically depicted in Gramsci's statement that in the West 'the state was only an outer ditch, behind which there stood a powerful system of fortress and earthworks [civil society]'.[85] In this way, he presents a model on which hegemony and thereby legitimation is realised throughout a pluralistic framework in which State coercion and civil society groups harmonically coexist and mutually reinforce the supremacy of the dominant groups. As Buttigieg underlines 'through their

[81] *Gramsci, Prison Notebooks* (n 9) 161.
[82] ibid 260.
[83] ibid 12.
[84] ibid 263.
[85] ibid 238.

presence and participation in various institutions, cultural activities, and many other forms of social interaction, the dominant classes ‘‘lead’’ the society in certain directions’.[86] Thus, even a trade union could indeed function as a hegemonic entity and thereby be itself a site of hegemonic struggle if counter-legitimation tendencies exist. For instance, consider the case of a trade union split between those advancing an industrial strategy of moderation to employers’ demands over those supporting a political militant strategy or organised resistance to capitalism by political strikes, demonstrations e.t.c.

As the opposing side of hegemony, counter-hegemony signifies ‘the creation of an alternative hegemony on the terrain of civil society’,[87] ‘an alternative ethical view of society that poses a challenge to the dominant bourgeois-led view’[88] or, otherwise put, the process of *dis*organization of consent by disrupting of hegemonic discourses and practices through destabilization of the compliant identities and creation of new ways of thinking and identity’.[89] Inasmuch as *hegemony* legitimizes, counter-hegemony *counter-legitimizes.* The latter process evolves into a counter-legitimation force.

The concept of counter-hegemony enriches the understanding of counter-legitimation force in two significant ways. Firstly, it broadens the scope of the force, alleged determinant of crisis operation of CLL, to encompass the entire spectrum of civil society as a potential site for legitimation/counter-legitimation ideological dynamics, including trade unions or media. In turn, this extensive space of counter-legitimation force,

[86] Joseph Buttigieg, ‘The Contemporary Discourse on Civil Society: A Gramscian Critique’ (2005) 32(1) Boundary 2 33, 44.
[87] Nicola Pratt, ‘Bringing politics back in: examining the link between globalization and democratization’ (2004) 11(2) Review of International Political Economy 311, 332 (footnote 3).
[88] Theodore Kohn, *Global Political Economy* (Pearson and Longman 2005) 131.
[89] William Carroll and R.S. Ratner, ‘Between Leninism and Radical Pluralism: Gramscian Reflection on Counter-Hegemony and the Social Movements’ (1994) 20(3) Critical Sociology 3, 6.

structured and reinforced in multiple terrains, means that CLL crisis fate is indeed determined in all these areas- not just the political-regulatory one.

Secondly, a useful model for counter-legitimation is offered by the counter-hegemony dynamics but with the following qualifications. Diverging from counter-hegemony as a revolutionary pre-stage, our enquiry rather focuses on its counter-legitimation direction and includes what identified as 'weak force' that targets legitimation of economic rationalisation measures but not capitalism itself. Having said that, we should emphasise that *legitimation* does not merely constitute the aggregate of counter-legitimation predispositions of individuals but is also dependant on *coercive or material constraints*. For instance, violent repression of austerity crisis protests demanding reinstatement of CLL protections effectively reduces the force of counter-legitimation.

So, the counter-legitimation force operates as the countervailing force to the 'capital destruction' pressures of economic rationalisation. Together with economic rationalisation they form the Crisis Equilibrium. A quite simple formulation would posit this force as one of social protest but the joint reading of Habermas and Gramsci provides an analytically more solid and detailed view of its precise nature and direction as 'counter-hegemonic'.

(ii) The Crisis Equilibrium as a Crisis Theorem: The Heteronomous Determinant of CLL

The *Crisis Equilibria* are the heteronomous determinants of the crisis operation of CLL. The analysis has already located the two forces. These forces, however, should not be seen as abstract. They are exerted by real actors (businesses, trade unions, workers, the

state) and may involve visible levels of contestation.[90] Yet still we need to be more specific about *how* they affect CLL. One could say that capital destruction can proceed with non-legal measures, so that there is no relevance for CLL. For addressing this concern and making the Crisis Equilibrium dynamics more pristine, the analysis presents the *Crisis Theorem.* The Theorem is formulated as follows:

Crisis Equilibria => Regulatory Measures (RM) and Non-Regulatory Measures (NRM)

or (based on the fact that Crisis Equilibria are composed of the opposing Economic Rationalisation and Counter-Legitimation Forces)

Economic Rationalisation Force (ERF)- Counter-Legitimation Force (CLF)=> Regulatory Measures (RM)+ Non-Regulatory Measures (NRM)

The theorem consists of four variables, the two (ERF and CLF) already identified in the previous section. The principal finding, concisely presented in the theorem, is that the balance between the two forces, Economic Rationalisation and Counter-Legitimation which is the Crisis Equilibrium, is realised by and corresponds to two kinds of complementary measures: (i) non-regulatory and (ii) regulatory.

Non-Regulatory Measures are those measures realising the crisis' 'capital destruction' which do not require any alteration of the legal-regulatory framework (e.g lawful dismissals, lawful wage reduction) but still transform the labour market and fulfil the dictates of the ERF. They diminish labour costs for capitalists and are usually taken as immediate response by the owners of the means of production. Here no coordination by

[90] For an instance where this contestation is visible see Chapter IV, especially Part 4.

state or any other public authority is required. The most typical example is dismissal. Lawful dismissals effectuate capital destruction without demanding any alteration of the state regulation. The same applies to the lawful use of flexible forms of employment, lawful wage reductions e.t.c.

In contrast, *regulatory measures* are those crisis measures changing the regulatory rules of the game by promoting deregulation, which can be of two kinds. Either de-jure deregulation, that is through legislation or case-law, or *de facto deregulation* that is by change in the factum of the workplace (e.g weakening of CLL's enforcement effectiveness,[91] de-unionisation leading to the lack of collective regulations in a particular workplace, lack of effective inspectorates) in the direction of promoting *capitalism-reproductive* deregulation.[92] These measures represent the regulatory side of the 'capital destruction'. And they are important because CLL changes fall within this category.

This division between regulatory/non-regulatory measures is crucial. This is because the Crisis Equilibrium, if able to proceed only by non-regulatory measures, will not modify the CLL, which is a regulatory measure. This point could be better illustrated with two examples. Suppose that there exists a jurisdiction with a wholly deregulated environment where capitalists can dismiss workers without any cost, in legal terminology 'at will'. In an economic crisis, they can make their capital destruction *without any change of the legal framework.* On the contrary, think about a country with fully worker-protective laws where capitalists cannot reduce their wages because they are bound by

[91] For instance, see the de facto drift of the statutory recognition procedure in Britain See Chapter VI Part 4.

[92] For the distinction see Aris Kazakos, Η κατάσταση και οι λειτουργίες του δικαίου σε συνθήκες παγκοσμιοποίησης' in *Το δίκαιο μπροστά στην πρόκληση της παγκοσμιοποίησης* σε Aris Kazakos (ed), *Το δίκαιο μπροστά στην πρόκληση της παγκοσμιοποίησης* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2002) 47-58. (in Greek).

collective agreements favourable to workers due to a protective for workers and their power legal framework. Here the capitalists would not be able to make the capital destruction without legal reforms.

From these two examples, there are two principles derived from the Theorem that should be highlighted. The first is *the principle of complementarity.* For a given Crisis Equilibrium, the more non-regulatory measures that could be taken, the less regulatory measures are necessary and vice-versa. The second principle is the *principle of precedence.* This principle predicts that if a specific Crisis Equilibrium can be satisfied by non-regulatory measures then the system will opt for this solution. Only to the extent that this is not possible, regulatory measures are to be taken, including CLL reforms. Why is so? Because unlike the non-regulatory measures, the regulatory measures have typically to survive parliamentary-political processes in which the public nature of the discourse and their social thematization entail *higher* counter-legitimation threats. Whereas a *lawful* dismissal is usually (though not always) treated as a private, non-political and individual right of the capitalist, the change in the *laws* of collective dismissals could potentially attract more resistance and protest since typically involving a public-political deliberation and thereby more likely to be thematised as an issue of public contention. As a result, it is logical for a Crisis Equilibrium to attempt exhausting the more flexible and relatively counterlegitimation-free non-regulatory measures, and only if that is rendered impossible, to have recourse to the regulatory measures given that the latter could destabilize the equilibrium through increasing the CLF and disrupting the original ERF/CLF balance. If capitalists can exploit the existing framework for their capital destruction, why to risk involving the public parliamentary process that may raise

more awareness, particularly if the forces against capitalism or neo-liberalism in a given time and place are strong?

So, the crucial factors for the CLL crisis trajectory as explained in the theorem are two. The first and more important factor is the composition of the Crisis Equilibrium, or otherwise the relative balance between the two forces, ERF and CFF. However, since the Economic Rationalisation Force in crises is by definition quite high, as the system needs to engage in large-scale 'capital destruction' (otherwise there would be no crisis), it is the counter-legitimation force whose strength presents a crucial variable. If there is no social resistance or threat of withdrawing legitimation from capitalism, then the economic rationalisation is expected to successfully lead to various crisis measures for effecting the process of capital destruction. On the contrary, if there is social resistance or there is a danger of withdrawing legitimation (e.g anti-capitalist revolutionary threats), then there is a possibility that the rate of the crisis measures is to be reduced.

However, there is a second factor determining the CLL crisis operation. Pursuant to the principles of *complementarity* and *precedence*, this is the adequacy of non-regulatory measures for realising the Crisis Equilibrium (which is the specific balance of the ER and CL forces). To put it in rather simplistic terms, this factor refers to whether the pre-existing system is regulated or deregulated. The more regulated the previous system, the more likely is for regulatory measures to be taken for a definite Crisis Equilibrium. Evidently, these two factors (ERF-CLF balance and adequacy of non-regulatory measures) are expected to be unique in each country in accordance with broader political, class and historical forces which are to determine the counter-legitimation threats. Moreover, the pre-existing regulatory frameworks are naturally to be jurisdiction-specific. In this context, the theorem allows for a degree of diversification but ultimately

it is the relation between the Economic Rationalisation and Counter-Legitimation Force, that is the crucial determinant for the crisis operation of CLL.

(iii) State, Crisis Equilibria and Crisis Dilemmas: Tracing the State Tendency for Economic Rationalisation and Capitalist-Friendly State Intervention

The ultimate piece in the construction of the theoretical edifice is the consideration of the institutional expressions for the Crisis Theorem. Which institutions perform and reflect the contradictory dynamics of the Crisis Equilibrium, as well as taking the crisis measures? While the theorem dynamics could be played by various historically specific institutional forms, the theory here conforms to the Marxist-critical (revisionist) insight regarding the centrality of the state.[93] This insight runs counter to the familiar dramatic pronouncements in labour law of the 'de-nationalization' of labour law,[94] 'hollowing out'[95] and 'end of'[96] nation state', or otherwise put state's potential 'metaphoric death'[97]'

This is not only because the State, through which the democratic process of contestation operates in modern capitalist societies, constitutes the unique institutional class field in which the forces of Economic Rationalisation and Counter-Legitimation are conflicting. It is also in that the state is responsible for taking the regulatory crisis measures, the third factor in the theorem, for example CLL reforms. And in addition the State is central even for the non-regulatory reforms. The State ensures by maintaining the 'ensemble of private-law rules in place at a given historical juncture' which 'constitutes

[93] See Ralph Miliband, *The State in a Capitalist Society* (Quarter Book 1973) 3-8; see *Kelly* (n 15) 13.
[94] *D'Antona* (n 51) 40.
[95] R.A.W Rhodes, 'Hollowing out of the State: The Changing Nature of the Public Service in Britain' 65(2) (1994) Political Quarterly 138.
[96] Kenichi Ohmae, *The End of the Nation- State: the rise of regional economies* (Harper Collins 1975).
[97] Brian Bercusson and Cynthia Estlund, 'Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions' in Bercusson and Estlund (eds), *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions* (Hart 2008) 35.

a form of political intervention ('regulation') that may have dramatic impacts of capital/labour, gender, racial, and international outcomes'.[98] It is only because of this intervention, that the capitalists can take 'non-regulatory measures', for instance by dismissing workers or lowering their wages as a result of the state law and state protection. However, whilst recognising that the State is to be the principal terrain of the dialectic, this does not preclude other institutional formations reflecting these dialectics. For instance, consider the case of a trade union adopting the capitalist-friendly unitary strategy of competitiveness, and consequently lowering the counter-legitimation costs by transforming its militant to a docile stance.

But how does the State relate to these contradictory forces of the Crisis Equilibrium? This question is particularly pertinent in situations of *crisis dilemmas*, defined as a case where the State cannot accommodate economic rationalisation without risking the rise of counter-legitimation. Indeed, in stark contrast to periods of economic normality where CLL overcomes its contradiction by *protective* concessions to the working class in exchange for their *legitimation,* thus performing simultaneously both functions (albeit still imperfectly and contradictory), crises make more difficult this possibility: fulfilling the reproductive function, that is reproducing capitalism, through regulatory and non-regulatory measures entails abandoning protective aspirations and conversely, sticking to the *protective* function impedes capitalist reproduction. For example, the State may wish to pass laws abolishing the right to strike for restoring profitability of businesses, but this could trigger threatening counter-legitimation protests for capitalism in a particular historical context.

[98] Klare, 'Introduction' (n 31) 14.

Habermas puts this precise dilemma as one between 'rationality deficits', which 'are the unavoidable result of snare relations into which the advanced state fumbles and in which its contradictory activities become more and more mudded'[99] and 'legitimation crisis, the latter caused by the withdrawal of legitimation as a result of the government failure to satisfy the 'programmatic demands *that it has placed on itself'*.[100] Other authors express the same dilemma as between democracy and capitalism. To quote Laski:

> '[I]n a phase of contraction [t]he price of the concessions expected by democracy then appears too high. The assumptions of capitalism then contradict the implications of democracy. If the phase of contraction is prolonged, it becomes necessary either to abrogate the democratic process or to change the economic assumptions upon which the society rests'. [101]

Striking a similar tone, Wolfe states that 'the legitimacy crisis is produced by the inability of the late capitalist state to maintain its democratic rhetoric if it is to preserve the accumulation function, or the inability to spur further accumulation if it is to be true to its democratic ideology'.[102] Indeed, such *inability* becomes more debilitating during crises.

The dilemma is not at all abstract. Labour law scholars typically confront the actual dilemma's *discourse* manifestations, such as the one between the 'public interest' of ensuring competitiveness or efficiency (a.k.a economic rationalisation/reproductive function) and one of maintaining the social justice goals of labour law (a.k.a counter-legitimating protective forces) amidst fiscal crises or recession. Tucker has famously framed these dilemmas (but not just during crises) as between equity/efficiency and protection.[103] But here an important note of caution should be issued. Whether there would be *functional dilemmas* at all depends on whether the *counter-legitimation force*

[99] *Habermas* (n 10) 63.
[100] ibid 69.
[101] Harold Laski, *The State in Theory and Practice* (Unwin 1935) 130.
[102] Alan Wolfe, *The Limits of Legitimacy: Political Contradictions of contemporary capitalism* (Free Press 1977) 329.
[103] See *Tucker* (n 16).

will be relatively higher to the economic rationalisation force so that the system needs to choose one. If the Counter-Legitimation Force is weak in its strength, then there will be no crisis dilemmas.

The next question is how are States to resolve these dilemmas? At first, there can be a broader consensus regarding at least, a certain *material responsiveness* of the state to capitalism. In short, to establish the proposition that capitalism *matters* for the state. This observation underlies multiple statements from theorists as diverse as Miliband arguing that 'the existence of this major area of independent economic power [referring to business power] is a fact which no government, whatever its inclinations, can ignore in the determination of its policies',[104] Dahl who stresses that it would be irrational for a democracy not 'to insist that *our economic order be efficient*',[105] Levy pointing out that 'in a capitalist economy, where profitability is essential to investment and employment, most reforms must meet with at least the acquiescence of employers in order to sustainable and function effectively',[106] or Holloway and Piccioto in their description of State as 'playing a vital part in the maintenance and reproduction of capital as a relation of class domination'.[107]

The more specific answer, though, to the question of the modality of the State resolution of crisis dilemmas, besides acknowledging a certain material responsiveness of the State, is contingent on a fundamental disjuncture between pluralist and Marxist-critical insights. The former would advance a class-neutral and capitalist-neutral state thesis. This thesis either draws upon a 'too much state autonomy' thesis so that state

[104] *Miliband* (n 93) 132.
[105] Robert Dahl, *A Preface to Economic Democracy* (Polity Press 1986) 86.
[106] Jonah Levy, 'The State also Rises: The Roots of Contemporary State Activism' in Jonah Levy (ed), *The State after statism: new state activities in the age of liberalization* (HUP 2006) 24.
[107] John Holloway and Sol Piccioto, 'Capital, Crisis and the State'(1977) 1(2) Capital & Class 76.

action frequently diverge from those held by the political weightiest groups in civil society'[108] or a 'denial of state autonomy' *crucially associated* with a perception of a state 'fragmented into multiple power centres and check points'[109] where powerful groups are likely to be constrained by countervailing powers ',[110]so that 'no single group organized of political interest, party, class, region or ethnic groups would control all of these sites'.[111]

In contrast, Marxist-critical accounts commonly profess the biased character of State to be constitutive of its identity. And they argue that such bias is of materialist texture. Starting from the premise that the state cannot be neutral since it is the 'legal instrument for making the claims' of private owners of resources by upholding private ownership over those that lacking those resources and for 'so long as the instruments of production are not held in common on behalf of the society',[112] these accounts integrate the economic and political realm by correlating the exercise of political power with the continuation of economic subordination of the dominated working class by the dominant owners of means of production.

Of course, a simple *instrumentalisation* of the State grounded in a reductionist interpretation of Marx's and Engels' dictum portraying the executive of State as the 'committee for managing the common affairs of the whole bourgeoisie'[113] would challenge neutrality but instead reveal a mere undiluted state expression of class domination. In searching for a far more complex model required for explaining how in

[108] Eric Nordlinger, *On the Autonomy of the Democratic State* (HUP 1981) 203.
[109] Martin Smith, 'Pluralism' in Colin Hay, Michael Lister and David Marsh (eds), *The State: Theories and Issues* (Palgrave Macmillan 2006) 26.
[110] See Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Powe*r (Hamish Hamilton 1957).
[111] Robert Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (Rand McNally 1967) 325 (emphasis added).
[112] *Laski* (n 101) 167.
[113] *Marx and Engels* (n 64) 221.

capitalism 'the capitalist class reigns but does not govern'[114] built around the perception of State as 'also an arena in which conflicts over basic social and economic interests are fought out',[115] two major accounts could be discerned: Miliband's account of State bias, that could be termed 'organic', focuses on the social composition of the State elites that come predominantly, if not overwhelmingly, from upper and middle classes where businessmen belong[116] and Poulantzas'[117] more *structural class-based* account where the class basis emerges within the 'relative autonomy' of the State, the latter being 'the material condensation of such a relationship [of forces] among classes and class factions'.[118]

Alongside almost identical lines, Jessop recognises that 'structural biases built into the capitalist state make it more open to pressures for the restoration of conditions favourable to capital than to pressures for a transition to socialism'[119] but emphasizes that, but for this bias, 'the final outcome of state intervention depends on the complex interplay between institutional forms and the changing balance of forces mobilized in support of and resistance to the actions of the state'.[120]

Even without adhering to preceding accounts, *a functional dependency* of the State towards capital suffices to establish the bias. It is well-established that capitalism is the first economic mode of production in history that separated economic function from political authority so that 'State and accumulation are divorced' and the 'state has no

[114] Karl Kautsky, *The Social Revolution* (Charles H. Kerr & Company 1902) 29.
[115] Theda Skocpol, *States and Social Revolutions* (CUP 1979) 25.
[116] *Miliband* (n 93) 55.
[117] For the debate between Poulantzas and Miliband see further Nicos Poulantzas and Ralph Miliband, 'The Problem of the Capitalist State' in Robin Blackburn (ed), *Ideology in Social Science: Readings in Critical Social Theory* (Fontana 1972) 238-262.
[118] Nicos Poulantzas, *State, Power and Socialism* (Verso 2000) 128.
[119] Bob Jessop, *State Theory: Putting Capitalist States in their Place* (Polity Press 1990) 185.
[120] ibid 186.

authority to order production or control it'.[121] Precisely this structural feature of 'isolation' causally leads to increased *state dependency* on the reproduction of capitalist economy that in turn favors the interests of dominant class. At the very minimum, as Giddens observes, the State 'is dependent upon capitalist activities for its revenue',[122][123] Such *functional dependence* is even acknowledged by the pluralist Lindblom who emphasizes 'that public affairs in market-oriented systems are in the hands of two groups of leaders, government and business, who must collaborate and that to make the system work government leadership must often defer to business leadership' and that 'business simply needs inducement, hence a privileged position in government and politics, if it to do its job.[124]

By discerning the 'structural bias' of state towards capitalist interests and capital reproduction, a central tendency is revealed for dilemma's resolution: *The Tendency of State to Opt for Economic Rationalisation.* As Poulantzas highlights, the State 'has to take decisions that are absolutely crucial for the reproduction of capital, even when this creates problem with regard to hegemony'.[125] In our theorem terminology, it means that the Crisis Equilibrium *is systematically prone to favour the ERF,* but for exceptional countervailing circumstances where the CLF is so intense as to counter-balance the ERF. These circumstances could actually be characterised by an extremely high CLF resisting the measures (e.g anti-capitalist revolutionary threat) required by the ERF associated with comparative lower need for economic rationalisation. However, it is almost impossible in

[121] Claus Offe, 'The Theory of Capitalist State and the Problem of Policy Formation' in Leon Lindberg, Robert Alford, Colin Crouch and Claus Offe (eds), *Stress and Contradiction in Modern Capitalism* (Lexington Books 1975) 126.
[122] Anthony Giddens, *A Contemporary Critique of Historical Materialism,* vol 1 (Macmillan 1981) 211.
[123] *Fiscal dependence* is indeed a crucial constraint in the 2008 financial and the 2010 eurozone debt crisis, particularly in Greece. See Chapter IV.
[124]Charles Lindblom, *Politics and Markets: The World's Political-Economic Systems* (Harper Collins 1977) 175
[125] Poulantzas, *State, Power and Socialism* (n 118) 169.

economic crises for the ERF to be low. They are almost by definition characterised by high levels of the ERF. In turn, this *fundamental tendency* gives rise to a second tendency: *The Tendency of the State to Strengthen (Capitalism) Reproductive State Interventionism.*

By using the term 'reproductive' we intend for clarification of the distinct identity of that kind of interventionism as following economic rationality imperatives aimed at steering the disrupted capital accumulation process. It should be distinguished from *protective state interventionism* that purports to control pure market rationality through the incorporation of societal imperatives stemming from a non-commodity conceptualization of human labour. The reproductive state interventionist tendency could assume two forms: the first is strengthening the 'invisible' intervention through more non-regulatory measures. The second is to neutralize if previously *(worker) protective*, making more reproductive if previously neutral, the regulatory framework through reproductive regulatory state intervention. The emphasis here should be put on the reproductive movement anticipated to lead to changes in legislation or other regulatory instruments. Therefore, our model would predict that in Crises, since drastic reforms are required for capitalist reconstruction, there *will be a tendency for alterations in the direction of capitalist requisites.* Hence the CLL crisis equilibrium is more likely to be stabilized in a more *reproductive* form – that is more capitalist friendly- apart from cases where non-regulatory measures can do the trick of capital destruction.

Therefore, two dominant tendencies can be discerned, the tendencies for the State to Opt for *(a) Economic Rationalisation and (b) (Capitalism) Reproductive State Intervention.*

4. Conclusion: Summary of Findings

The Chapter used the theoretical method for articulating a new Marxist-critical theoretical framework for understanding the *CLL-crisis* operation. It successively made the following claims: (i) CLL should be theorized vis-a-vis its operation in a *capitalist society;* (ii) CLL general crisis operation should be understood as a fundamental contradiction between its (capitalism) *reproductive* and (worker) *protective* functions, (iii) CLL crisis operation is determined by the specific *Crisis Equilibrium* reflecting the balance of two opposing forces: (1) economic rationalisation force dictating urgent 'capital destruction' and (2) counter-legitimation force threatening to withdraw legitimation from capitalism in general *(strong counter-legitimation force)* or from a particular form of economic rationalisation *(weak counter-legitimation force).* The Crisis Equilibrium dynamics were theorized in a *Crisis Theorem* linking the two forces with the regulatory and non-regulatory measures within an integrated paradigm with four variables. Finally, the Chapter located the central role of the State in managing the Crisis Equilibria and discerned the Tendency of the State to opt for Economic Rationalisation in cases of crisis dilemmas and thus a Tendency for Reproductive State Interventionism, that is transformation of CLL in a more reproductive-friendly or capitalist-friendly direction.

This framework is to be tested and applied in the comparative context of the 2008 crisis developments in Greece and the UK, a lengthy exercise to be undertaken in Chapters III-VII, that is to complement and enrich the herein theoretical findings.

III

A Preface to the Comparative Enquiry: Establishing the Comparative Field and Tracing the Pre-Crisis CLL Edifices in Greece and the UK

The thesis now alternates the method for addressing the *problematique* of the crisis operation of CLL: from the theoretical-universal to the comparative-empirical examination of the 2008 crisis developments in Greece and the UK. This Chapter serves as a preface of the next four Chapters containing the main comparative enquiry. It makes two kinds of necessary preparatory work: methodological and substantive. Regarding the former, it identifies the analytical functions of the comparative method *(Part 1)* and establishes the comparative field accordingly *(Part 2).* As for the substantive, it offers a comparative account of the pre-crisis CLL edifices in Greece and the UK *(Part 3)* before setting the 2008 economic crisis as the moment zero *(Part 4).*

1. The Comparative Method: Analytical Functions

The use of the comparative method, that is 'the *systematic* cross-analysis of phenomena displaying both similarities and differences',[1] for legal purposes dates perhaps as back as Aristotle's comparison of the Greek constitutions of ancient city-states.[2] In modern terminology, the Aristotelian exercise would have attracted the -slightly misleading to the

[1] Richard Hyman, 'Trade Union Research and Cross-national Comparison' (2001) 7 European Journal of Industrial Relations 203, 205 (emphasis in original).
[2] See Aristotle, *The Politics of Aristotle* (Clarendon Press 1946), *Book IV* ('Actual Constitutions and their Varieties') *and V* ('Causes of Revolution and Constitutional Change').

extent of implying a legal systematic unity- label 'comparative law', a term essentially 'denoting an intellectual activity with law as its object and comparison as its process'.[3]

What is the status of comparative law? The answer is that it is a method. In his seminal Lecture on *Comparative Law as an Academic Subject,* Otto Kahn-Freund famously espoused this view of comparative law not as a topic but as 'the common name for a variety of methods of looking at law,'[4] thus echoing Pound's[5] and Gutteridge's[6] method-centric exposition of comparative law's nature. More recently, Zweigert and Kötz, in their seminal textbook[7] and Adams and Griffiths have adopted similar viewpoints.[8]

However, it is more instructive to consider the analytical functions of the comparative method. The comparative method can pursue multiple aims. Danneman lists five purposes: unifying law, solving particular problems, applying foreign law, facilitating choice between law, and understanding law'.[9] Finkin identifies five *genres* of comparative labour law: descriptive; purposive; predictive; theoretical; profound.[10] Watering down the inflationary trens of categorisation, it suffices to distinguish two broad *species* of functions: an epistemological (knowledge) and a practical function, corresponding to Otto Kahn-Freund's distinction of comparative law as a tool of legal research/education and legal reform.[11]

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[3] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 2.
[4] Otto Kahn-Freund, *Comparative Law as an Academic Subject* (Clarendon Press 1965) 4.
[5] Roscoe Pound, 'Comparative Law in Space and time' (1955) 70(4) American Journal of Comparative Law 70.
[6] H.C Gutteridge, *Comparative Law: An Introduction to the Comparative Method by Legal Study & Research* (2nd edn, CUP 1971) 1-10.
[7] *Zweigert and Kötz* (n 3) 32-47.
[8] Maurice Adams and John Griffiths, 'Against ''Comparative Method'': explaining similarities and differences' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012) 279.
[9] Gerhard Danneman, 'Comparative Law: Study of Similarities or Differences' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 401-406.
[10] Matthew Finkin, 'Comparative Labour Law' in *The Oxford Handbook of Comparative Law* (ibid) 1139.
[11] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) MLR 1, 1.

Such a distinction helpfully leads us to clarify the exclusive epistemological analytical function of the comparative method within the herein enquiry. The comparative method is intended as a privileged modality, not for discovering or prescribing the better law, but for analytically contributing to the resolution of the main thesis' *problematique,* namely the interaction of the economic crises and CLL,[12] by furnishing empirical - and not as Chapter II theoretical- insights. This contribution proceeds in the context of three epistemological functions: (a) *scientific as non-instrumental observation, (b) scientific-experimental* and *(c) scientific-recoupment of the Crisis Equilibrium theoretical framework.*

The first function refers to the specific function of comparative law as a scientific non-instrumental enterprise. Comparative law can formulate comparative observations on legal developments, whose value is independent of their instrumental attachment to any theory, generalisation or specific hypothesis. Indeed for Valticos, the principal aim of comparative law is 'essentially *scientific* in nature, namely to gain a more extensive knowledge of the law of nations'.[13] Or as Otto Kahn-Freund eloquently put it, 'one of the virtues of legal comparison is that it allows a scholar to place himself outside the labyrinth of minutiae in which legal thinking so easily loses its way and to see the great contours of the law and its dominant characteristics'.[14] In this context, a comparative enquiry on the crisis CLL developments in Greece and UK exhibits an intrinsic usefulness for enhancing the legal knowledge on CLL in both countries.

On the contrary, the other two functions exhibit a more direct instrumental nature. The *scientific-experimental* function refers to the specific property of the comparative method

[12] See Chapter I.
[13] Nicolas Valticos, 'Comparative Law and the International Labour Organization' (1977) 2 Comparative Labor Law & Policy Journal 273, 274 (emphasis added).
[14] Kahn-Freund, *Comparative Law as an Academic Subject* (n 4) 3.

as a *functional substitute* to the use of experiment in natural sciences. This role is captured by the sociologists John Stuart Mill,[15] Comte[16] and Durkheim.[17] The reasoning here is that since for social phenomena the observer cannot simulate the experimental conditions by manipulating its object as in natural sciences so as to eliminate irrelevant variables, the comparative method constitutes an 'indirect experimentation',[18] or even if accepting Lijphart's reservations, at least, an 'imperfect substitute'[19] to experimentation for arriving at casual propositions when 'the production of facts is something beyond our power to command'.[20] This function applies *mutandis mutandis* to our *problematique*, that of the interaction between economic crises and CLL. Faced with the profound incapability of manufacturing economic crises and manipulating the variables in a controlled laboratory environment so as to separate *determining* variables or set of variables for CLL and *non-determining* ones, the approximate second best option is to utilise the comparison of CLL systems experiencing economic crises so as to examine the multiple interaction patterns as well as discerning relationships of causality or, at least, of interrelationship between different factors.

The other non-instrumental function corresponds to what Lepaulle terms *recoupement* function of the comparative law, referring to its status as a method for verifying a hypothesis by successive observations of the same phenomenon from different angles.[21] Adapted to our purposes, the *recoupment* consists in the utilisation of the comparative

[15] John Stuart Mill, *A System of logic, ratiocinative and inductive*, vol 1 (3rd edn, Parker 1851) 393-416.
[16] Auguste Comte, *The Positive Philosophy of Auguste Comte, vol 2* (Batoche Books 2000) 208-210.
[17] Émile Durkheim, *The Rules of Sociological Method: and selected texts on sociology and its method* (Macmillan Press 1982) 147-150.
[18] ibid 147.
[19] Arend Lijphart, 'Comparative Politics and the Comparative Method' (1971) 65(3) The American Political Science Review 682, 685.
[20] *Durkheim* (n 17) 147.
[21] Pierre Lepaulle, 'The Function of Comparative Law with a Critique of Sociological Jurisprudence' (1922) 35(7) HLR 838, 852.

investigation for controlling and refining the theoretical 'Crisis Equilibrium Framework' introduced in the previous Chapter by testing its applicability in the empirical comparative realm.

All three functions can be solely and distinctly performed by the comparative method thus rendering it analytically necessary. However, it is one thing to defend comparative enquiry by recognising its analytical necessity in abstract, and another to conduct a proper comparative enquiry. For the latter undertaking, and towards seeking to maximise the effectiveness of these functions, designating an appropriate comparative field emerges as a cardinal task.

2. Establishing the Comparative Field: Its Constitutive Properties

A comparative field should identify itself by reference to three constitutive properties: *(a) tertium comparationis* (*b) material scope of comparison (ratione materiae)* and *(c) choice of comparators.*

(i) Tertium Comparationis

The existence of a *tertium comparationis* is a precondition for any comparison. The latter becomes 'possible only among objects that are, simultaneously and without contradictions, uniform and plural'.[22] Schregle defines the *tertium comparationis* as the third factor to which the phenomena 'of the countries being compared can be related, a third element which provides the yardstick making international comparison possible'.[23] Both statements imply that the compared objects should have, at least, one uniform or

[22] Catherine Valcke, 'Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems' (2004) 52(3) American Journal of Comparative Law 713, 720.
[23] Johannes Schregle, 'Comparative Industrial Relations: pitfalls and potential' (1981) 120(1) ILR 15, 16.

common characteristic, granting them comparability: apples and oranges can be compared as *different* fruits only upon implicitly designating the *tertium comparationis* as *fruit.*

For the herein comparative field, the natural *tertium comparationis* is *Collective Labour Law.* In both countries (Greece and the UK), there exists a legal field comprising a set of rules regulating the collective relationships between employers and workers and their organisations (though in different legal forms among various jurisdictions). Hence CLL provides the 'vertical point of inter-connection' of the empirical materials of British and Greek CLL, which for Rose is a comparative prerequisite in as much as 'in order to connect empirical materials horizontally across national boundaries, they must also be connected vertically; that is, capable of being related to concepts that are sufficiently abstract to travel across national boundaries'.[24]

(ii) The Material Scope of Comparison as Movement within the Protective/Neo-Liberal Spectrum: Crisis Transformation Paths

Recognising CLL, though, as *tertium comparationis* is not enough. CLL systems may be compared and assessed by various yardsticks, e.g formal rules, doctrines or functions. More specificity is needed, to be achieved by a proper clarification of the *ratione materiae,* the *material scope of comparison.*

Pursuant to the intended epistemological functions of the comparative method in our enquiry, the optimal material scope of comparison is that of *Crisis CLL Trajectories.* The latter concept is devised for gauging the dynamic movement (or non-movement) of the

[24] Richard Rose, 'Comparing Forms of Comparative Analysis' (1991) 39(3) Political Studies 446, 447.

British and Greek CLL trajectories during the crisis within a spectrum defined by two ends: (i) worker-protective and (ii) market/neo-liberal.

Diagram 1: *The Comparative Spectrum*

Protective End *Neo-Liberal/Market End*

The two ends reflect diametrically opposite ideal-type juridical characters of a given CLL: (a) the *worker-protective* corresponds to an ideal-type CLL, which has constitutionalised the imperative of worker protection and thus oriented towards promoting effective, independent and free unionism as the sole rule-shaping objective, whilst the (b) *neo-liberal/market* end corresponds to an ideal-type CLL where capitalist functions are expressly constitutionalised within its juridical nature as the sole rule-shaping objective.

Theses ends should be treated as mere schematic ideal-types designating the spectrum. On the one hand, a fully worker-protective CLL is impossible under capitalism. Spector is right that full de-commodification, that is a truly protective CLL, would require the abolition of wage labour and contractual freedom, an impossibility under capitalism.[25] Hence partial commodification or 'incomplete commodification', to use Radin's label, presents the realistic optimal aim.[26] On the other hand, a fully capitalist CLL, integrating only market imperatives is also an impossibility, not because it is precluded by capitalism, but because it would amount to the eclipse of CLL.

[25] Horacio Spector, 'Philosophical Foundations of Labour law' (2006) 33 Florida State University Law Review 1119, 1139.
[26] Margaret Radin, 'Market-Inalienability' (1987) 100 (8) HLR 1849, 1917-1921.

A further critical reflection on the material scope of comparison reveals two principal qualities of the herein comparative field.

Firstly, by design, it is dynamic. Its observed object is a *dynamic movement.* The comparative exercise seeks to map, systematise and compare the *movements* of two CLL systems within a substantive spectrum during the economic crisis. It is not interested in merely taking a static a-historical snapshot photograph of the two systems and compiling an inventory of similarities and differences.

Both Schregle by expressing his preference for the integration of time-factor in comparative inquiries,[27] and Hepple by stating that 'much of comparative labour law remains in the age of still photographs and is only beginning to discover motion pictures'[28] have voiced concerns over the *static* nature of many comparative analyses.

Whilst acknowledging that a static enquiry may be helpful for some purposes, in our case the *dynamic* enquiry becomes compelling, by epistemological functional necessity rather than an optimal use of discretion. Since the broader thesis *problematique* is the crisis-CLL interaction, the *temporal* point of departure, *2008,* from which we compare the crisis movement in the spectrum is essentially not temporal but *facticious,* a capitalist economic crisis. Assuming the lack of knowledge on the determinants of the relationship between the economic crisis and CLL, our enquiry naturally directs its focus towards, at first instance, examining what was the curve of British and Greek CLL development when the economic crisis was inserted in the two countries' trajectories. The two objects, British and Greek CLL, share an economic crisis as stimuli. Of course, historical coincidence of any movement does not by itself prove causation.

[27] *Schregle* (n 23) 24.
[28] See Bob Hepple, 'Introduction' in Bob Hepple (ed), *The Making of Labour Law in Europe* (Mansell 1986) 1.

At the same time, though, the comparison includes the crisis determinants, as expounded in the Crisis Equilibriums framework and Crisis Theorem (Economic Rationalisation, Counter-Legitimation), in each country for questioning whether their specific configuration can account for their movement. Similar to an experiment, the purpose resides on whether we can *induct* from the particular movement of two objects certain universal *movement-determining* common factors. In turn these propositions may illuminate the nature of interaction between the economic crisis and CLL and the dominant variables, our main problematique, and in last instance, the nature of CLL itself. In this manner, the purpose is profoundly *nomothetic*, since 'seeking to generate generalizations of an abstract and law-like character'.[29]

The second quality relates to the lodging of the Comparative Field with the dominant functionalist comparative perspective.[30] Functionalism could be defined *vis-a-vis* its basic 'claim that legal ideas and practices should be compared not in terms of their forms but by reference to the tasks that they serve in a given context'.[31] To quote Peters and Schwenke, the novelty of the functional approach was that 'comparative analysis now set off from a concrete social problem' so the 'starting point is not considered the law, or the structures of legal institutions, but the facts'.[32] The functional approach is evident in Otto Kahn-Freund's depiction of comparatist lawyer as a 'comparative *physiologist* rather than as a comparative *anatomist',*[33] indicating a methodological victory of functionalism over structuralism. Similarly, Blanpain posits a prerequisite for comparative labour law,

[29] *Hyman* (n 1) 209.
[30] For the classic statement see *Zweigert and Kötz* (n 3) 34 where they argue that the 'basic methodological principle of all comparative law is functionality'.
[31] Roger Cotterrell, 'Comparative Sociology of Law' in David Scott Clark (ed), Comparative Law and Society (Edward Elgar 2014) 45.
[32] Anne Peters and Heiner Schwenke, 'Comparative Law beyond Post-Modernism' (2000) 49(4) International and Comparative Law Quarterly 800, 808.
[33] Kahn-Freund, 'Comparative Law as an Academic Subject' (n 4) 9.

namely that 'functions and not institutions are to be compared' as well as that extra-legal factors should be taken into account.[34]

Whilst a healthy note of caution should be issued regarding the diversity of the functionalist approaches,[35] the herein adopted Comparative Field shares certain core functionalist assumptions.

More specifically, the protective/neo-liberal spectrum measures the *effects* of the dynamic trajectory of CLL juridical norms, thereby essentially probing into their functional relationships with markets, capitalism and society as embedded in particular Crisis Equilibrium contexts. Hence the focus is turned away from formal doctrines, abstracted and sterilized from reality. In addition, the Crisis Equilibrium framework, as formulated in Chapter II, inherently rests upon a 'heteronomous embedding' of legal CLL elements within a holistic framework composed extra-legal and legal variables. Moreover, a socio-legal *problematique,* the CLL-crisis interaction, marks the departure point of the enquiry.

The herein analysis, though, should be sharply dissociated from any purpose of using functionality as an evaluative criterion, of treating the interaction of economic crisis and CLL as a form of a problem or pathology awaiting an objective technocratic answer from the various legal systems, or of postulating that societies have certain common organic needs to be evolutionarily fulfilled. In a sense, our functionalism amounts to an *epistemological functionalism* purporting to discover the functional relations of a CLL system in economic crises with capitalism and society. Having said this, though, proper

[34] Richard Blanpain, 'Comparativism in Labour Law and Industrial Relations' in Richard Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (10th edn, Kluwer Law International 2010) 3.
[35] See Ralf Michaels, 'The Functional Method of Comparative Law' in *Oxford Handbook of Comparative Law* (n 9) 343-360 where the author identifies six concepts of functionalism.

attention should be devoted to the fact that the adopted functionalist perspective possesses a profound 'dynamic-historical' dimension, in as much as functional relations can only be discovered by a historical exposition of the movement and the direction of CLL crisis developments.

(iii) Choosing Greece and UK as Comparators: Adopting a Binary 'Most Different' Countries Comparison

The third element in the construction of the Comparative Field involves the critical and difficult process of choosing comparators- here CLL jurisdictions. In light of the declared epistemological analytical functions, the selection pool is as large as those capitalist countries affected by the economic crises. The eventual choice of Greece and UK as comparators should be justified and explained along two dimensions: the preference for the *(a) binary* and *(b) 'most different countries'* comparison.

Depending on the number of comparators, the Comparative Field may be of two kinds: binary (involving two countries) and non-binary (involving more than two).[36] The binary comparison between Greece and UK is better-placed to fulfil the herein epistemological purposes. In particular, the importance of its distinct quality of enabling 'detailed confrontation -almost impossible when the analysis encompasses too many cases-'[37] as between two radically different systems cannot be overstated. Indeed, the historical-epistemological functionalist orientation and the Crisis Equilibrium framework require a holistic treatment encompassing an entire legal field related to a multi-factor and multi-variable contextual framework. A detailed analysis is thus necessary which, in

[36] See Mattei Dogan and Dominique Pelassy, *How to Compare Nations* (2nd edn, Chatham Publishers 1990) 126-131.
[37] ibid 127.

turn, can be better undertaken through a binary comparison. In addition, the adoption of a dynamic motion-centric approach may reduce the inherent danger 'of over-emphasising the contrast between the legal systems'.[38]

The process of picking comparators is not independent of the epistemological question one wishes to deal with. In his *System of Logic*, John Stuart Mill has articulated the following two logical canons of establishing causality in social phenomena, relevant for our analysis: 'the method of agreement' among two instances of the same phenomenon having one circumstance in common so that this is the cause (or the effect) of the phenomenon and the 'method of difference' where two instances where the phenomenon occurs and one that does not, have everything in common *but one* circumstance so that is the cause (or effect) of the phenomenon.[39] Mill's schemata correlate with two strategies: 'the most different nations design' and the 'most similar nations design',[40] each respectively based on a 'method of agreement' and a 'method of difference' principle.

Refined for our purpose, namely to understand the phenomenon of interaction between capitalist economic crises and CLL, Mill's scheme entails two comparative routes: either to compare a capitalist and a non-capitalist country with as many identical as possible other variables, or two capitalist countries with as many different as possible other variables. However, the first option is practically unavailable. Not only because of the contemporary lack of non-capitalist countries, but also to the extent that the CLL is related to capitalism.

So, the sole alternative is to opt for radically different countries in other respects *but for their common capitalist nature and in virtue of been severely affected by the economic*

[38] Mathias Siems, *Comparative Law* (CUP 2014) 15.
[39] *Mill* (n 15) 393-403.
[40] See Adam Przeworksi and Henry Teune, *The Logic of Comparative Social Inquiry* (Wiley-Interscience 1970) 31-39.

crises. Hence the 'method of agreement'. Once accepting the desirability of this method, Greece and Britain present an ideal inter-variety pairing. As demonstrate below, they had radically opposite pre-crisis positioning in the spectrum (protective end for Greece/neo-liberal end for UK). Moreover, they are fundamentally different in terms of political culture, economic development, heritage, legal origin (civil law for Greece/ common law for UK), constitutionalisation (for Greece)/non-constitutionalisation of CLL (for UK) whilst in the Varieties of Capitalism in comparative political economy they always belong to different varieties, for instance Liberal Market Economy (UK)/ Coordinated Market Economy (Greece) in Hall-Soskice varieties[41] or market-based economy (UK)/ Mediterranean capitalist model (Greece) in Amable's varieties.[42]

These contrasts designate an optimal comparative environment for testing whether the common injection of the 2008 capitalist economic crisis in their trajectory and the interplay between economic rationalisation and counter-legitimation forces, produced common movements and thus infer by the 'method of agreement' that these features play a more important role in general than the diverse features. Indeed, these considerations are to be critical in the last Chapter where we will situate the comparative findings in the context of the broader 'convergence/divergence' question of comparative labour law and political economy literature.[43]

[41] For the distinction see Peter Hall and David Soskice, 'An Introduction to Varieties of Capitalism' in Peter Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP 2011) 8.
[42] Bruno Amable, *The Diversity of Modern Capitalism* (OUP 2003) 13-23. Amable identifies other three models, 'social democratic', 'Continental European' and 'Asian model'.
[43] See Chapter VIII Part 1(iii).

(iv) The Comparative Field: A Summary

To sum up, this part established the comparative field with three properties: (a) Collective Labour Law as a *tertium comparationis*, (b) the movements to the protective/neo-liberal spectrum as material scope and comparison *(ratione materiae)* and (c) the adoption of a binary 'most different nations' comparison between Greece and UK (based on the Mill's canon of logic of 'method of agreement').

3. The Pre-Crisis Edifices in Greece and UK: Occupying the Antithetical Ends of the Spectrum

Let us now move to inspecte the pre-crisis CLL trajectories in Greece and the UK. Both pre-crisis CLL edifices share the 1980s decade as the critical period for their genesis. Driven by major transformative political and ideological re-alignments propelling the social-democratic PASOK party in 1981 and the Conservative Party in 1979 in power in Greece and the UK, the two countries synchronised the temporality of their *radical path departures* with the preceding CLL models, though in opposite directions. Both Governments steered their CLL edifices away from their *ancien regimes* towards eventually counter-positioning themselves within the 'protective (for Greece) and 'neo-liberal' (for the UK) ends of the spectrum respectively.

Breaking the extended 'lock-in' in what could be termed as 'prolonged infancy' of the Greek industrial relations[44] (previously held back by an entrenched pattern of *state authoritarianism* suppressing collectivism through the combined deployment of an

[44] See Nicos Kritsantonis, 'Greece: The Maturing of the System' in Anthony Ferner and Richard Hyman (eds), *Changing Industrial Relations in Europe* (Blackwell 1998); For a historical evolution of Greek labour see Theodore Koniaris, *Labour Law in Hellas* (Kluwer 2002).

extensive repressive juridification,[45] state paternalism,[46] repression of non-preferable communist union administrations[47] and statist-corporatist Government-initiated compulsory arbitration of collective disputes by the Minister of Labour[48]), the Greek model travelled swiftly towards occupying a *protective* position of the spectrum during what could be termed the Golden Decade (1982-1990) by adopting a *protective paradigm* where law was actively used to promote collectivist over market regulation.

Conversely, in 1980s, the British CLL model made the exact opposite movement. It abandoned the 'collective laissez-faire'[49] which previously:

> 'allow[ed] free play to the collective forces of society [and] limiting the intervention of law to those marginal areas where the disparity of forces of organized labour and management [was] so great as to prevent the successful operation of what is so very characteristically called ''voluntary negotiating machinery'''.[50]

Influenced by the liberal ideology of 'voluntarism'[51] and pluralism,[52] seeking to shield industrial relations from the law and state, the edifice exhibited in 1950s a comparatively singular *inverse correlation* between the limited role of law and its profound maturity.[53] Such correlation appeared to defy predictions of juridification as an evolutionary outcome

[45] *Kritsantonis* (ibid) 'since 1909 the law has defined in detail the relationships between employers, unions and the state, in ways which – according to the political context – have been sometimes progressive but more usually repressive' 520; see also *Koniaris*, 'the government plays a primary role in the shaping of labour relations' (ibid 65).

[46] For instance, the State used the state funding by the Workers' Hearth (Ergatiki Estia) to favour government-friendly trade unions.

[47] See *Kristantonis* (n 44) 513-514; For example, in 1929 the Government passed two laws permitting the abolition of trade unions which were communist, *Koniaris* (n 44) 43. Article 11 of the post-war GSEE Constitution openly called for the removal of trade unions organization that promoted anti-national or communist propaganda.

[48] Law 3239/1955. This law was only overturned in 1990 by Law 1876/1990.

[49] Otto Kahn-Freund, 'Labour Law' in Morris Ginsberg (ed), *Law and Opinion in England in the 20th century* (Stevens & Sons 1959) 224.

[50] ibid 224.

[51] See Alan Flanders, 'The Tradition of Voluntarism' (1974) 12(3) BJIR 352.

[52] For an excellent account elucidating the links of CLF with British and American Pluralism see Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009) 7-15.

[53] See Otto Kahn-Freund, 'Legal Framework' in Alan Flanders and Hugh Clegg (eds), *The System of Industrial Relations in Great Britain* (Blackwells 1954) 43.

of industrialisation,[54] collectivism[55] or of increased strength and political influence of unions.[56]

In rather simplistic terms, the *ancien* CLF edifice was characterised by three features: (i) a *relative* legal abstentionism in the process and outcomes of collective bargaining (no legal duty to bargain, no autonomous regulatory effect of collective agreements which were applicable to individual contracts by the doctrine of incorporation, no contractual effect of collective agreements which were generally binding in honour only unless the parties agreed otherwise, no statutory duty of recognition); (ii) the predominant 'negative' role of law, in the form of providing indirect support by performing what we earlier termed space-constituting function[57] through securing a free space for trade unions freedoms, collective action and industrial action by the juridical form of crafting statutory 'immunities' which blocked the operation of the hostile common law which 'knows nothing of a balance of collective forces'[58] (iii) and, as Ewing and Howell observe in their revisionist critique of CLF, there was an active 'state-interventionist' state supporting collectivism through various non-legal administrative and other practices[59] and institution-building.[60]

Although the initial departure from the CLF edifice was made in late 1960s/1970s by the move to regulated bargaining attempted by various income policies and the ill-fated

[54] Spiros Simitis, 'Juridification of Labor Relations' in Gunther Teubner (ed), *Juridification of social spheres: a comparative analysis in the areas of labor, corporate, antitrust, and social welfare law* (Gryter 1987) 113-161
[55] See Albert Dicey, *Lectures on the relation between law & public opinion in England during the nineteenth century* (2 edn, Macmillan 1914) 302.
[56] See Sidney and Beatrice Webb, *Industrial Democracy* (Longman 1897) 253.
[57] For this function as one of the three protective functions see Chapter II Part 2(i).
[58] Otto Kahn-Freund, *Labour and the Law* (3rd edn, by Paul Davies and Mark Freedland, Stevens & Sons 1983) 12.
[59] Keith Ewing, 'The State and Industrial Relations: "Collective-Laissez Faire" Revisited' (1998) 5 Historical Studies of Industrial Relations 1.
[60] Chris Howell, *Trade Unions and the State: The Construction of Industrial Relations in Britain, 1890-2000* (Princeton University Press 2005) 79-82.

Industrial Relations Act 1971,[61] it was the new post-1979 Thatcherite regime which effectively, through a series of legislative intervention ranging from 1979 to 1993, dealt the defining blow to the old regime and successfully 'replac[ed] collective *laissez-faire* with restrictive *laissez-faire*'.[62] This transition firmly anchored the British model on what could be termed as *neo-liberal paradigm.* This paradigm is distinguished by its its distrust of collectivism and its faith on market forces as an organising principle.

So, 1980s mark the period of *Great Divergence* for the two systems. Let us offer an overview of each edifice in some detail prior to arriving at certain comparative reflections.

(i) The 'Protective' Greek Edifice: The 'Protective' Alloy of the Ideological-Political, Constitutional and Statutory Materials

The Greek *protective* CLL edifice emerges from the synergic confluence – or alloy- of three materials: (i) social-democratic hegemony, (ii) the constitutionalisation of collective labour rights by the 1975 Constitution, and (iii) the legislative material of 1980s legislation resting upon the juridification of the *protective, partiality/asymmetry* and *pro-collectivist* principles. The analysis of these materials is followed by a brief exposition of the 'silent interregnum' between 1990 and the outburst of the crisis in 2008.

(a) The Political-Ideological Materials: 'Social-Democratic Hegemony'

The pre-crisis *protective* edifice construction in 1980s is underpinned by the formation of the hitherto unattained in Greek history *ideological-political* and *constitutional* positive supports.

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[61] See Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press 1993) 652-653 referring to IRA 1971 as 'regulated bargaining'. And, in general, about the collapse of the consensus on non-intervention prior to Thatcher see Chapters 6-8.

[62] Lord Wedderburn, *The Worker and the Law* (3rd edn, Penguin Books 1986) 95 (emphasis in the original).

This section analyses the former. In the period succeeding the fall of Greek dictatorship in 1974 (termed in Greek as '*Metapolitefsi'*) the anti-dictatorship mobilisation and radicalisation ushered in a broader political social-democratic restructuring of the Greek political and social institutions attached to a new 'social compromise'[63]. A *social-democratic hegemony* gained a stronghold. Its legitimation basis derived from the combination of 'an open democratic system (…) with the ideological culture of the so-called ''progressive-democratic'' culture bringing the blending of the left coherent social critique with populist beliefs'.[64] The new hegemony acquired a distinct political expression, in the rise of the left social-democratic PASOK party in power in 1981, a party which was to dominate the political sphere in the next two decades.[65] As Gunther et al observe, PASOK victory 'brought to an end almost forty-five years of uninterrupted dominance of Greek political life by the Greek right, whether in its parliamentary or authoritarian manifestations'.[66]

Within the party's effort to mix in its ideological *laboratorium* Keynesian policies of state planning, demand management, democratisation with integration of what the party called 'non-privileged' segments of society, a worker-protective CLL benefited from a *double* fertile legitimation basis: not only as a technical economic tool, but more importantly, as a normative instrument for the societal democratisation extended to the industrial realm.[67] In this way, it represented a key part of the overall promise of the

[63] Stathis Kouvelakis, 'The Greek Cauldron' (2011) 72 NLR 17, 20.
[64] Giannis Voulgaris, *Η Ιστορία της Μεταπολίτευσης (1974-1990)* (4η έκδοση, Θεμέλιο 2008) 31 (in Greek)
[65] PASOK ruled successively from 1981 to 2004 but from 1989-1993. On PASOK rise in power, and its first decade of Government see the excellent account of Michalis Spourdalakis, *The Rise of the Greek socialist Party* (Routledge 1988) and for an insightful critical account Euclid Tsakalotos, *Alternative economic strategies: the case of Greece* (Avebury 1991).
[66] Richard Gunther, Hans-Jürgen Puhle and Nikiforos Diamantouros, 'Introduction' in Richard Gunther, Nikiforos Diamantouros and Hans-Jurgen Pühle (eds), *The Politics of Democratic Consolidation: Southern Europe in Comparative Perspective* (Hopkins University Press 1995) 29.
[67] It is characteristic that the first law of the Edifice, 1264/1982 was entitled 'For the democratisation of trade union movements and the safeguarding of the workers' trade union freedoms'.

'gradual reform of the economy so that the basic economic choices are made the social whole'.[68] It goes beyond our aims to provide an account of PASOK's eventual failure to deliver its promises,[69] its populism[70] or the party's eventual movement towards the right after 1985. Fortunately, this becomes irrelevant for our enquiry since the protective CLL foundations were actually established during these formative years of the social-democratic experiment, in 1980s.

(b) Constitutionalising Social-Democracy: The Hospitable Constitutional Habitat of the 1975 Constitution for CLL

This social-democratic ethos registered itself in the constitutional sphere by the post-dictatorship 1975 Constitution. With this constitution, Greece, 'returned to its old tradition, according to which its constitutional texts were among the most progressive in Europe'.[71] Integrated into a progressive template essentially constitutionalising social-democracy, CLL reached a *novum constitutionalis.* The latter was attained by the explicit constitutionalisation of collective rights, namely the recognition of collective autonomy,[72] the protection of free and effective trade union activities,[73] and a broad 'organic' interest-based right to strike.[74] Very significantly, this constitutionalisation (labour constitution

[68] Greek Government Programme (General Secretariat for Press and Information 1981) 28.
[69] For the argument of economic failure see Euclid Tsakalotos, 'The Political Economy of Social Democratic Economic Policies: The PASOK experiment in Greece' (1998) 14(1) Oxford Review of Economic Policy 114; See also for PASOK as failure of social democracy Einar Berntzen, 'Democratic Socialism in Spain, Portugal and Greece' in Lauri Karvonen and Jan Sundberg (eds), *Social Democracy in Transition* (Dartmouth 1991) 234-238.
[70] See further Richard Clogg, *Greece, 1981-89: The Populist Decade* (Macmillan 1993).
[71] Academy of Athens, *Ιστορία του Ελληνικού Έθνους* Τόμος 16 (Ακαδημία Αθηνών 2000) 308.
[72] Article 22 paragraph 2 of the Constitution. The Article reads 'general working constitutions shall be determined by law, supplemented by collective agreements concluded through free negotiations and in case of the failure of such, by rules determined by arbitration'.
[73] Article 23 paragraph 1 of the Constitution.
[74] Article 23 paragraph 2 of the Constitution. 'The strike constitutes a right to be exercised by lawfully established trade unions in order to protect and promote the financial and the general labour interest of working people'.

stricto sensu) developed synergic dialectics with a broader constitutionally-prescribed 'socially-committed market economy', proscribing various social limitations on the right to property[75] *(labour constitution lato sensu).*

In turn, the constitutionalisation had radical teleological-epistemological implications for CLL. It firmly embedded it in the public law fabric, thereby rendering its preservation a public rather than private imperative. Indeed, inasmuch as the Constitution itself subjugates freedom of contract and private initiative to a socially-committed economy, it enables the cutting of the umbilical cord -and its relative autonomization from- a privileged contractual conceptualization. While in Britain the private law 'contract of employment' and the individual relationship is the cornerstone of the edifice,[76] in Greece this was the public law Constitution. Within this hospitable constitutional habitat, the presence of a worker-protective CLL becomes not an anomaly as in a private or common law regime where it struggles to be legitimised, but a requisite *instrument* for the fulfilling of the social mission of the market economy. Its absence would be a constitutional anomaly. As Karakatsanis characteristically remarks, collective negotiations in the Greek system are 'not a private affair of the bearers of collective autonomy that have the privilege of concluding collective agreements but a formalized constitutionally-mandated social function'.[77]

[75] These constitutional provisions are the ones (1) requiring that rights derived from property 'may not be exercised contrary to the public interest' (Article 17(1)), (2) dictating that 'private economic initiative shall not be permitted to develop at the expense of freedom and human dignity, or to the detriment of economy (106(2), (3) granting to the State the power to plan and coordinate national economic activity (Article 106) and (4) permitting nationalization of enterprises that 'are of the nature of a monopoly or are of vital importance to the developments of sources of national wealth or are primary intended to offer services to the community as a whole' (Article 106(3).

[76] Kahn-Freund, 'Legal Framework' (n 53) 45.

[77] Alexandros Karakatsanis, *Συλλογικό Εργατικό Δίκαιο* (Αντ.Ν. Σάκκουλας 1992) 106 (in Greek).

(c) The Legislative 'Layer' of the Edifice: Principles and Provisions

(1) Doctrine and Principles

Built on the favourable for CLL 'ideological-constitutional' materials, two landmark pieces of legislation in 1980s brought the long sought maturity of Greek CLL by strengthening the constitutional protection through depositing a protective legislative layer: Law 1264/1982 on the democratisation of trade union movement and safeguarding of trade union freedoms passed during PASOK's first term (1981-1985), and Law 1876/1990 on free collective negotiations and other provisions enacted with conservative-socialist-communist unanimity by the Greek Parliament (a rare occurrence in Greek political history) during the short-lived ecumenical Zolotas Government (November 1989-April 1990).

Regarding substance, the entire CLL edifice was firmly predicated upon a single constitutive foundation and 'organizing principle': the *protective principle.* The latter is derived from the basic thesis that 'labour law cannot exist but as a law for the protection of dependent labour'[78] and confronts that reality that 'the employer transforms freedom of contract into a tool of exploitation of the weaker party'.[79] Notably, the protective character of CLL was not an academic fiction or theoretical observation confined to theoretical discourse or a meta-principle but *permeated* as a *legal* principle (recognized also in case-law)[80] every corner of CLL. It eventually gave rise to a second principle: the principle of *asymmetry* or *partiality* of CLL towards protecting the worker as an imperative of substantive equality. Kazakos defends the principle of *partiality* toward the weaker party as 'not constituting legal contradiction but expression of a real legal

[78]Aris Kazakos, *Συλλογικό Εργατικό Δίκαιο* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2011) 50 (in Greek).
[79] ibid 49.
[80] For recent case-law recognition of *protective principle* see AP 1/2007 (in Greek).

culture'.[81] These two principles, *protective* and *partiality/asymmetry,* complemented (or expressed) by the legislative preference for collectivist regulation of terms and conditions of employment and maximum possible collective coverage *(pro-collectivist principle),* guided the specific legislative provisions in a distinctively protective shape.

(2) The Legal Framework: An Overview

This section presents a thematic exposition of the specific areas fleshing out these organizing principles in law.

Firstly, the most representative and fine-textured amalgam of *protective* and *partiality* principles is the juridification of the *favourability principle or inderogability*[82] as a principle of articulation between different levels of collective agreements and other regulatory sources. *Inderogability* organises the various regulatory collectivist and non-collectivist sources in a protective for worker pyramid under a simple rule: *in case of concurrent application, the more favourable for the worker prevails.* This organising norm applied to the concurrence of different types of collective agreements (enterprise, sectoral, national occupational, local occupational, National General Collective Agreement),[83] to law/collective agreements conflicts (except for pre-emptory laws of public order*)*[84] as well as to those between individual contracts/collective agreements.[85]

Secondly, as a juridical step for concretising the *pro-collectivist principle* and the state social-democratic preference for the two sides of the industry as co-legislators, collective

[81] Kazakos, *Συλλογικό Εργατικό Δίκαιο* (n 78) 3.
[82] On *inderogability* as a distinguishing feature between British and Continental labour law systems, see Lord Wedderburn, 'Inderogability, Collective Agreements, and Community Law' (1992) 21 ILJ 245.
[83] Article 10(1) of Law 1876/1990. The only exception was for occupational agreements that were always to give precedence to sectoral and enterprise ones. Article 10(2) of the same law.
[84] Article 7(3) of Law 1876/1990.
[85] Article 7(2) of Law 1876/1990.

agreements were vested with a legally binding automatic normative (to individual employment relationships) and contractual (as between the trade unions and employers or employer's organisations) effect.[86] In addition, Law 1876/1990 adopted a classical compulsory trade union recognition model for collective bargaining purposes. For determining trade union competence for negotiating collective agreements at a certain level, the law provided for the most representative in the bargaining unit as determined by the number of members voting in its last trade unions elections[87] whilst stipulating a special judicial procedure for potential challenges by other trade unions.[88] Penal sanctions for violations of collective agreements by the employer were expressly provided.[89] As for collective negotiations, the law imposed a duty on the employers and employees to negotiate in good faith with the view of resolving the collective disputes.[90]

Thirdly, the *principle of partiality* towards collective agreements as a preferred mode of resolution of disputes and the juridical aim for attainment of maximum collective coverage as an expression of the protective principle in the collective sphere, found expression in two legislative mechanisms: (i) after-effect (temporal extension) and (ii) personal extension of collective agreements. Both mechanisms derogate from a strict contractual conceptualisation of collective agreements in terms of temporality and persons covered.

Regarding 'after-effect', the regulatory terms and conditions of a collective agreement were automatically extended for six-months after its expiration or renunciation (unless renewed).[91] Even after this six-month extension period, they were still in force unless

[86] Article 7(1) of Law 1876/1990.
[87] Article 6(2) of Law 1876/1990.
[88] ibid.
[89] Article 21 of Law 1876/1990.
[90] Article 4(1) and 4 (3) of Law 1876/1990.
[91] Article 9(4) of Law 1876/1990.

modified by individual or collective agreements. This period after six-months was the so-called 'after-effect period'. Such a temporal extension served the rationale of facilitating the succession of collective agreements through preventing a sudden deterioration of terms and conditions of employees that would seriously undermine the efforts of their trade unions for concluding a new collective agreement.

On the other side, law instituted various mechanisms of *personal extension of the applicability of collective agreements* beyond the scope of those contractually bound *vis-à-vis* their membership to the respective employers' and employees' associations thus opting for a 'regulatory' rather than 'representational' collective bargaining.[92] More specifically, enterprise agreements and the NGCAs (National General Collective Agreements) benefited from automatic extension to all workers in the enterprise and employees in the country respective (thus setting national minimum wages).[93] The law also granted the power (following a request by either party) to the Minister of Labour to extend the personal scope of sectoral or occupational collective agreements to all the employees on the given sector or occupation when it is binding on employers' representing the majority of the employees in a given sector or occupation.

Fourthly, the Law 1876/1990 replaced the more authoritarian arbitration of 3239/1955 with a more voluntary and non-Governmental model of mediation and arbitration as an *ultimum remedium*. Its architecture enables the observer to pristinely detect the confluence of the protective, partiality/asymmetry and pro-collectivist principles motifs combined with more voluntarist arrangements. Regarding the recourse mechanism, the new legal framework brought a novelty whose historical importance in the Greek CLL

[92] For the distinction between 'representational' and 'regulatory' union functions and collective bargaining see Keith Ewing, 'The Function of Trade Unions' (2005) 34(1) ILJ 1, 4.
[93] Article 3(1) of Law 1876/1990.

history cannot be over-stated: it put the initiative at the behest of the parties and not as in the previous regime also unilaterally to the Government. Besides an agreed recourse, permitted at any stage, arbitration could also be initiated by the one party if the other party refused mediation, or unilaterally only by trade unions if the employers' side rejected the mediation's proposal which they accepted.[94] The latter possibility was not symmetrically provided to instances where the employees' side rejected the mediation proposal and employers' accepted them, hence exemplifying a clear case of *protective asymmetry for workers*.

Voluntariness, though, did not extend to the legal effect of the arbitration awards. The latter were binding for both parties. Their normative status, pursuant to their subsidiary status to collective autonomy, was fully equated with that of collective agreements.[95] Indeed, their scope coincided with the issues subject to regulation by collective agreement. They were the *ultimum remedium* ensuring that collective disputes would not remain unregulated.[96] So, the operation of arbitration as an ultimate collective safeguard perfectly embodied the *pro-collectivist* principle of the state enacting partial law privileging collective over market determination. It also enhanced the unions' power in the negotiating table. This is because they bargained in the shadow of arbitration and not of market forces. As for institutional machinery, the Law removed mediation and arbitration from Government hands and delegated it to the private law body OMED (Organization for Mediation and Arbitration). Appointed by an administrative board, consisting of academics, scientists, government officials and members appointed by

[94] Article 16 (1) of Law 1876/1990.
[95] Article 16(3) of Law 1876/1990.
[96] Giorgos Katrougalos, *Η Κρίση και η Διέξοδος* (Λιβάνης 2012) 236 (in Greek).

employers and workers' organizations,[97] arbitrators and mediators were independent and impartial from Government interference.

On trade union freedoms and right to strike, Law 1264/1982 sought to democratize the trade union operations and ensure their independence, a crucial imperative whose absence was previously holding back industrial relations. It also aimed at ensuring the effectiveness of union functions. This was done by permitting an extensive space for trade union freedoms and, in particular, the right to strike. This framework 'radically enhanced trade union rights'.[98] Under this overarching teleology, the law *inter alia* outlawed employers' 'actions or omissions that result in the hindering of trade union rights',[99] imposed an active State obligation 'to take the necessary measures for ensuring the unhindered exercises of the right to the creation and autonomous function of trade unions'[100] and guaranteed certain democratic trade union rights in the workplace (e.g right to have notice boards or maintain office in the workplace).[101] More importantly, it 'layered' on the constitutional right to strike by recognizing it as 'a medium of preserving and promoting the economic, labour, trade union and insurance workers' interests' and legalized the solidarity strikes.[102] The conditions for the declaration and notification of the employer for the strike were conducive to the effective exercise of the right to strike. A simple 24-hour notice to the employer is required.[103] Strikes should be declared by the General Assembly (and not by ballot) for first-levels unions, whereas for federations and confederations a decision by the Executive Board is sufficient unless their constitution

[97] Article 17.
[98] *Kritsantonis* (n 44) 521.
[99] Art. 14(2) of Law 1264/1982.
[100] Article 14(1) of Law 1264/1982.
[101] Article 16 of Law 1264/1982.
[102] Article 19 of Law 1264/1982.
[103] ibid.

provides otherwise.[104] This 'protective layering' was also negatively expressed by the prohibition of lockout and of hiring of strike-breakers.[105] These prohibitions directly reflect the principles of asymmetry and partiality towards the weaker worker side.

(d) 1990-Crisis: The Relatively Silent 'Interregnum'

During the 'interregnum period' between 1990 and the 2008 economic crisis, the overall protective orientation of the Edifice, infused with the protective, partiality and pro-collectivist principles, was maintained with only minor cracks. At a de-jure level, Law 2639/98 'severely wounded the idea of protective function of collective agreements',[106] by enabling Local Employment Pacts to provide for sub-minimum wages to those of other collective agreements with the only safety net being the National General Collective Agreement. In addition, the case-law deregulation of the right to strike through the frequent invocation of the civil law 'abuse of right' doctrine was resumed.[107] Despite cracks, though, the Greek CLL system entered the 2008 crisis as a relatively solid protective edifice.

(ii) The *Neoliberal* British CLL Edifice: The 'Neo-Liberal Alloy' of the Ideological-Political, Constitutional and Statutory Materials

The British 'neo-liberal' pre-crisis CLL edifice, built by the Conservative Party successive administrations of 1979-1997 (mainly in 1980s) owes its genealogy to the

[104] Article 20 of Law 1264/1982.
[105] Article 22 of Law 1264/1982.
[106] Aris Kazakos, Η κατάσταση και οι λειτουργίες του δικαίου σε συνθήκες παγκοσμιοποίησης' σε *Το δίκαιο μπροστά στην πρόκληση της παγκοσμιοποίησης* σε Aris Kazakos (ed), *Το δίκαιο μπροστά στην πρόκληση της παγκοσμιοποίησης* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2002) 48 (in Greek).
[107] In 2003, around 95% of judicial decisions on strikes held them unlawful under the abuse of rights civil law doctrine. See Dimitris Travlos-Tzanetatos, *Οικονομική Κρίση και Εργατικό Δίκαιο* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2013) 349-352 (in Greek).

synthetic confluence of three – in a marked contrast to Greece's pre-crisis model-materials comprising a 'neo-liberal alloy': (i) the political-ideological material of 'neo-liberal hegemony' (ii) the neo-liberal constitutional material of individualist common law and the (iii) the neo-liberal statutory 'restrictive' configuration for unions, collectivism and collective bargaining. Following their examination, the enquiry deals briefly with the British *silent interregnum* up to the crisis, namely the Blairite New Labour period (1997-2008).

(a) *The Political-Ideological Material: The 'Neo-Liberal Hegemony'*

In Britain, the post-1979 political-ideological material originates in a specific political process: the epoch-defining Thatcherite shift, bringing about a transformative re-alignment of politics, ideology and political economy. In broad terms, a 'neo-liberal consensus'[108] substituted the post-1945 'social-democratic consensus'.[109]

The resurgence of free unregulated markets and competitive individualism[110] as the organising principles of politics, political economy and society accompanied in a highly-dependent fashion the Conservative Party-led political turn within the critical 1980s. The Conservative Party's uninterrupted hegemonic presence in power between 1979 and 1997[111] permitted it to successfully construct and consolidate an electoral and ideological hegemony.[112] Such a multi-front hegemony operated as an effective springboard for the

[108] Colin Crouch, 'The Terms of the Neo-Liberal Consensus' (1997) 68(4) Political Quarterly 352.
[109] For the 'social-democratic consensus' and its collapse See David Marquand, *The Unprincipled Society* (Fontana Press 1988) Part 1.
[110] Niklas Bruun and Bob Hepple, 'Economic Policy and Labour Law' in Bob Hepple and Bruno Veneziani (eds), *The Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004* (Hart 2009) 46.
[111] The Conservative Party under Thatcher won three elections (1979, 1983, 1987) and one under John Major in 1992.
[112] See Andrew Gamble, *The free economy and the strong state: the politics of Thatcherism* (2nd edn, Macmillan 1994) 212-226.

successful pursuit of the Thatcherite aim 'to be the great liquidator of social-democratic Britain'[113] by the use of a *strong s*tate, based on the New Right imperatives,[114] for 'unwind[ing] the coils of social democracy and welfarism that had fastened around the free economy'.[115] The tenets of the British neo-liberal consensus are usefully summarised by Crouch as the following: the 'markets should rule under the guide of entrepreneurs, with minimal intervention from the government; taxes and public spending, and in particular the redistributive effect of direct taxation, should be kept down; and trade unions should have as marginal a role as possible'.[116]

The pervasive 'neo-liberal hegemony', reflecting more an elite policy and cross-party consensus and not necessarily a societal broader consent,[117] trapped the CLL in symmetrically *reverse dynamics* than Greece, thereby producing a hostile to CLL thrust. Whereas in Greece *a 'protective'* CLL was treated as an instrument for strengthening unions towards democratising Greek society, in Britain *a 'neo-liberal'* CLL was treated as an instrument for the democratisation of British society, ostensibly held in ransom by the undemocratic unions whose privileges have distorted the democratic process[118] and whose excessive power was to blame for the 1970s crisis of governability in Britain and the failures of British economy, not least by causing unemployment.[119] In addition, weakening the union power formed a strategic imperative for the successful restructuring

[113] ibid 256.
[114] For the influence of New Right on Thatcherism see Ruth Levitas (ed), *The Ideology of the New Rights* (Polity Press 1986); For the influence of Hayekian ideology on Thatcherite labour law reforms see Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18(1) ILJ 1.
[115] *Gamble* (n 112) 40.
[116] Crouch, 'The Terms of the Neo-Liberal Consensus' (n 108) 352.
[117] *Gamble* (n 112) 221.
[118] See Friedrich Hayek, *Law, Legislation and Liberty*, vol 3 (Routledge & Kegan Paul 1979) 99; for democracy as an argument for the labour law reforms during the Thatcher period see Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12(1) OJLS 24.
[119] Friedrich Hayek, *1980s Unemployment and the Unions: Essays on the impotent price structure of Britain and monopoly in the labour market* (Institute of Economic Affairs 1980).

of the free market economy along market dictates,[120] not least because, as Marquand rightly observes, trade unions 'are the carriers, not merely of distortion, but of an alternative ideology [as][t]hey reject the [neo-liberal] propositions that the labour market is a market like any other'.[121]

If the reader is to excuse an overstretching of historic analogy with Greece, in Britain the CLL seemingly fell victim of a neo-liberal narrative portraying its restrictive configuration as an instrument for liberating the country for the *unions' dictatorship* by weakening trade union power.[122] As Hayek put it, 'there can be no salvation for Britain until the special privileges granted to the trade unions three-quarters of a century ago are revoked'.[123] It is as an *instrument* within this anti-union campaign context, that the constitutional and statutory neoliberal materials of the pre-crisis CLL edifice should be understood.

(b) *Re-Discovering the Neo-Liberal Constitution: The Anti-Collectivist (Common Law) Rule of Law Hostile Habitat for CLL*

In 1959, Otto Kahn-Freund traced the constitutional basis of the collective laissez-faire edifice to 'the rapidly developing pluralistic character of the British Constitution',[124] considered the unions as part of the British constitution'.[125] He also grounded the framework of all labour in the UK 'in the triangular relationship between organised

[120] Davies and Freedland, *Labour Legislation and Public Policy* (n 61) 426.
[121] *Marquand* (n 109) 84.
[122] See Colin Hay, 'Narrating Crises: The Discursive Construction of the ''Winter of Discontent''' (1996) 30(2) Sociology 253. [Thatcherism as a state project, though conceived long before, was born in the context of the crisis during the winter of discontent]
[123] Hayek, *1980s Unemployment and the Unions* (n 119) 58.
[124] Kahn-Freund, 'Labour Law' (n 49) 223.
[125] ibid 225.

labour, organised management and government'[126] which 'obtained firm foundations after 1914'.[127]

Within this constitutional narrative, a major question was how to integrate the peculiar British historical feature of safeguarding the requisite space for trade union freedoms and industrial action not by entrenched positive rights but by *statutory immunities.* Otto Kahn-Freund understood this difference under the guise of less state interventionism. As he put it, 'all it means [to have freedom and not right to strike] is that the government does not intervene (on its legislative, administrative, or judicial side) so as to impede a certain type of human activity'. [128] From a different perspective, Wedderburn initially treated the question of immunities or rights as a 'semantic presentation' one,[129] a 'formalistic distraction' to invoke Bogg's comment on his work.[130]

However, in 1980s the immunities were not seen as formalistic distractions. They were trumpeted as unique union privileges, a deviation from the rule of law, in a clear revival of the Diceyan view[131] of the Trade Disputes Act 1906 as 'mak[ing] a trade union a *privileged body exempted from the ordinary law of the land'*.[132] As a result, Wedderburn muted an earlier scepticism[133] with a calculated and qualified advocacy for positive

[126] Kahn –Freund, 'Labour Law' (n 49) 218.
[127] ibid.
[128] Kahn-Freund, *Labour and the Law* (n 58) 205.
[129] Lord Wedderburn, 'Labour Law – From Here to Autonomy? A Franco-British Comparison' in Lord Wedderburn, *Employment Rights in Britain and Europe* (Lawrence & Wishart 1991) 91. Reprinting the original lecture delivered in 1983.
[130] Alan Bogg on Lord Wedderburn's analysis. Alan Bogg, 'The Hero's Journey: Lord Wedderburn and the ''Political Constitution'' of Labour Law' (2015) 44(3) ILJ 299, 343.
[131] See Keith Ewing, 'Trade Unions and the Constitution: The Impact of the New Conservatives' in Cosmo Graham, Tony Prosser (eds), *Waiving the Rules: the Constitution under Thatcherism* (Open University Press 1988) 145.
[132] *Dicey* (n 55) xivi (emphasis added).
[133] For instance, see the sceptical essay Lord Wedderburn, 'Freedom of association or right to organise?' (1987) 18(4) Industrial Relations Journal 244.

rights.[134] As he put it, 'those who think they can do without law of any kind err as greatly as those who think positive legal rights can do everything'.[135]

Indeed, what was relatively neglected from the pre-1979 literature was the proper apprehension of the constitutional significance and the power of language[136] in the constitutional discourse of immunities, compared to a rights discourse. The problem, as Collins rightly puts it, is that the language of immunities failed to 'rupture [labour law's] discourses from the traditional common law', and simply offered 'immunisation against the dysfunctional rules and process of common law'.[137] This failure was to prove critical in the post-1979 constitutional ordering.

It is in this constitutional terrain that the 'post-1979 constitutional retreat of unions' [138] should be understood. This retreat essentially threw into sharp relief the 'flexible and open-ended nature of the [British] constitution',[139] pursuant to which, 'the government could extend the freedom of the unions by bureaucratic or statutory means, so it can as easily limit that freedom by its unregulated control of the legislature'.[140]

Indeed, the notable absence of a constitutionalised collective labour rights regime facilitated the anti-union and anti-collectivist challenge on the trade union freedoms by enabling the *equation of the rule of law of with the common law* 'that knows nothing of a balance of collective forces'.[141] Legality could be defended and legitimised to the extent that it was a common law class-biased legality and not a social-democratic legality. Only in this framework, Hayek ideas of supporting *minimal (common law) constitution*

[134] For an account of Wedderburn's view See Bogg, 'The Hero's Journey' (n 130).
[135]Wedderburn, *Worker and the Law* (n 62) 276.
[136] See Keith Syrett, ''Immunity'', ''Privilege'', and ''Right '': British Trade Unions and the Language of Labour Law Reform' (1998) 25(3) Journal of Law and Society 388.
[137] Hugh Collins, 'The Productive Disintegration of Labour Law' (1997) 26 ILJ 295, 301.
[138] Ewing, 'Trade Unions and the Constitution' (n 131) 135.
[139] ibid
[140] ibid.
[141] Kahn-Freund, *Labour and the Law* (n 58) 12.

comprising only individualism,[142] free markets, rule of law, formal equality before the law and liberty[143] could be deployed as advancing, not an amendment but a genuine and authentic interpretation of the British constitution of liberty. Hence the neoliberals rested their case on defending a *nomocratic* state, based on rule of law over a *telocratic* state pursuing specific goals or ends.[144] However, their nomocratic grounding on rule of law, the latter forming 'a key principle of Conservatism'[145] and integral to the neo-liberal state[146] was plausible only because the common law was never jettisoned or, at least, adapted to *integrate* collective labour rights as an organic part of equal standing to private rights. The CLL freedoms' space had always operated like a forced sterile appendage upon a hostile juridical body, to be tolerated but never to be allowed to penetrate the inner capitalist individualistic workings of common law. Nowhere this deficiency is more manifest than in the easy framing of statutory immunities as privileges. This frame is impossible under a rights' regime. The terminology of 'privilege' is deliberately designed 'to create an impression of unwarranted legal status'.[147] Moreover, the lack of a positive CLL rights regime meant that the *effectiveness* of the exercise of collective rights or in the asymmetrical protection of the workers as a weaker party was outside of law's purview.

In this way, the 1980s are characterised by a re-assertion of an individualistic British constitution allegedly built on the rule of law, the latter effectively acting as a verbal

[142] See Friedrich Hayek, *The Road to Serfdom* (Routledge 1944) 33-58; As he put it in the Law, Legislation and Liberty' 'no principles of collective conduct which bind the individual can exist in a society of free men' Friedrich Hayek, *Law, Legislation and Liberty* Vol III (n 118) 151.
[143] See Friedrich Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul 1960).
[144] See Raymond Plant, *The Neo-Liberal State* (OUP 2010) Chapter 1.
[145] Peter Doorey, *The Conservative Party and the Trade Unions* (Routledge 1995) 4.
[146] *Plant* (n 144) Chapter 1.
[147] Fredman, 'The New Rights' (n 118) 26.

proxy for common law. And the latter is to be let by the law to careful bear the 'curse of its exaggerated continuity'[148] on the CLL statutory material as a destructive force.

(c) *The 'Neo-Liberal' Statutory Material: Doctrinal Disorientation and Provisions*

(1) Doctrine and Principles

The Thatcherite neo-liberal edifice of CLL was contrived incrementally and sequentially.[149] A 'step-by-step'[150] series of successive statutory interventions between 1980 and 1993 gradually consolidated the edifice, through returning to and extending previous themes.[151] Employed as a vital component of 'what is probably the most single-minded and sustained attack on the position of a major and previously legitimate social force to have taken place anywhere under modern democratic conditions',[152] in its cumulative effect the new CLL edifice constituted a juridification based upon a 'modulated rejection of collectivism.[153] The laws adopted 'an almost single-minded policy clearly intended to restrict the effectiveness of independent trade unions'.[154] Davies and Freedland usefully dissect two principal legislative motifs: 'reducing trade union power' and 'freeing the labour market' from non-market rigidities.[155] Similarly,

[148] Lord Wedderburn, 'Companies and Employees: Common Law or Social Legislation' (1993) 109 Law Quarterly Review 220, 253.
[149] William McCarthy, 'The Rise and Fall of Collective Laissez Faire' in William McCarthy (ed), *Legal Intervention in Industrial Relations: Gaines and Losses* (Blackwell 1992) 39.
[150] Linda Dickens and Mark Hall, 'The State: Labour Law and Industrial Relations' in Paul Edwards (ed), *Industrial Relations: Theory and Practice in Britain* (Blackwell 1995) 256.
[151] There were nine statutory interventions affecting collective labour law (Employment Act 1980, Employment Act 1982, Trade Union Act 1984, Wages Act 1986, Employment Act 1988, Employment Act 1989 and Employment Act 1990, Trade Union and Labour Relations (Consolidation) Act 1992, and Trade Union Reform and Employment Rights Act 1993).
[152]Colin Crouch, 'Atavism and Innovation: Labour Legislation and Public Policy since 1979 in Historical Perspective' (1996) 2 Historical Studies in Industrial Relations 111, 120.
[153] Wedderburn, *Worker and the Law* (n 62) 83.
[154] John Clark and Lord Wedderburn, 'Modern Labour Law: Problems, Functions and Policies' in Lord Wedderburn, Roy Lewis and Jon Clark (eds), *Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon Press 1983) 128.
[155] Davies and Freedland, *Labour Legislation and Public Policy* (n 61) 426.

Dickens and Hall identify the main thrust of Thatcherite legislation as directed towards 'weaken[ing] trade union power, assert[ing] individual rather than collective values and (…) reassert[ing] employer prerogative'.[156]

Marking a profound departure from the collective laissez-faire heritage of legal abstention, the law was deliberately[157] used by the Conservative administrations in a transformative-functional 'counter-revolutionary'[158] manner, as a malleable tool for attaining the neo-liberal aims of marketisation of industrial relations. The success of the undertaking evidences in the emergence, as Howell remarks, of a new industrial relations model characterised by the 'wholesale decollectivization of industrial relations'.[159] This re-structuring process spelled the 'end of institutional industrial relations',[160] a comment that should not be taken literally as total extinction of industrial relations but as emphasising its radical demise.

The new labour law edifice produced serious epistemological-teleological implications for British labour law. The Thatcherite 'counter-revolution' caused a 'fundamental change in the philosophical underpinnings of industrial relations policy and the direction of legislative change'.[161] As Wedderburn points out, for the first time in a century (writing in 1986) labour law 'does not accept the legitimacy of ''collective labour power'' in the labour market'.[162] The essence of new labour law was 'to restrict the social

[156] *Dickens and Hall* (n 150) 293.
[157] The Conservative Party Manifesto 1979 characteristically read: 'Labour claim that industrial relations in Britain cannot be improved by changing the law. We disagree. If the law can be used to confer privileges, it can and should also be used to establish obligations'.
[158] Henry Phelps Brown, 'The Counter-Revolution of Our times' (1990) 29(1) Industrial Relations: A Journal of Economy and Society 1; see also Simon Deakin and Frank Wilkinson, *The Law of the labour market* (OUP 2005) 264-271.
[159] *Howell* (n 60) 132.
[160] John Purcell, 'The end of Institutional Industrial Relations' (1993) 64(1) The Political Quarterly 6.
[161] *Deakin and Wilkinson* (n 158) 264.
[162] Wedderburn, *Worker and the Law* (n 62) 85.

power of trade unions through the (or threatened use) of legal sanctions'.[163] This teleology brought labour law in a diluted state of *doctrinal disorientation*, prompting Keith Ewing to announce the 'death of labour law',[164] for two principal reasons.

Firstly, it is not only that its actual configuration deviated from its traditional function as 'countervailing force to counteract the inequality of bargaining power'.[165] Labour law confronted a more fundamental *epistemological challenge.* The 'matching power' justification, premised upon the construction of the employment relationship as an unequal one, 'a relation between a bearer of power and one who is not a bearer of power'[166] vanished from public policy pronouncements. This automatically occasioned the deprivation of labour law from its necessary epistemological underpinnings and *raison d'etre*.[167] With the existential power foundations and traditional power-related justification of labour law melted in the neo-liberal thin air, labour law succumbed to its neo-liberal instrumentalisation: rather than redressing a power disequilibrium it was connected to market-friendly and employer-friendly objectives, such as 'competitiveness',[168] and 'flexibility'[169] all essentially disguising the reality that 'management has regained the freedom to manage, and the incentive'.[170] To put it in terms of the fundamental contradiction of labour law described in Chapter II, British labour law elevated its 'capitalism-reproductive' function, not explicitly articulated in other CLL systems, to an explicit purpose.

[163] Clark and Wedderburn, 'Modern Labour Law' (n 154) 130-131.
[164] Keith Ewing, 'The Death of Labour Law' (1988) 8(2) OJLS 293.
[165] Kahn-Freund, *Labour and the Law* (n 58) 18.
[166] ibid.
[167] For the eclipse of the 'matching-power' justification during the Conservative Party administration see *McCarthy* (n 149) 48-51.
[168] Hugh Collins, 'Regulating the employment relation for Competitiveness' (2001) 30(1) ILJ 17.
[169] See Paul Davies and Mark Freedland, *Towards a Flexible Labour Market* (OUP 2007).
[170] Department of Employment, *Employment for the 1990s* Cm 540 (1988) 16.

Inevitably, CLL struggled to hold onto justificatory ground in the adverse context of an individualised, market-fundamentalist discursive terrain inspired by what Wedderburn labelled as Hayekian 'alternative analysis of labour law'.[171] This analysis contains as chief components the treatment of the individual employment contract as having no special distinct character so as to be regulated by the common principles of 'freedom of contract' and general law and the imperative of stripping unions of their 'privileges'.[172]

Consequently, CLL muted its doctrinal-epistemological habitat. It was firmly attached to an explicit capitalist-friendly labour market perspective, not 'as a means of achieving distributive goals or embodying a notion of industrial justice, but as part of an economic policy designed to foster competitiveness'.[173] The inevitable casualty was the relative loss of its autonomy from the private law of contract and common law, its very act of genesis.[174] And loss of autonomy is a metonym for contractualisation. This loss did not appear as a total extinction but *as a death by assimilation*, in terms of first principles. To quote Dukes, the Thatcher legislation 'subsumed labour legislation and its associated body of social policy into a larger activity or pursuit of labour market regulation in the interests of a free and competitive market economy.'[175]

Secondly, the new neo-liberal strategy of legal intervention posed major translation problems for British scholarship. This is because the 'state [was] poised to take away the right it did not give',[176] a comment by Clark and Wedderburn referring to the Otto Kahn-Freund statement in favour of legal abstention that 'what the State has not given, it cannot

[171] See Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (n 114) 7-17.
[172] ibid 9-10.
[173] Simon Deakin and Gilliam Morris, *Labour Law* (5th edn, Hart 2009) 27.
[174] See Lord Wedderburn, 'Labour Law- From Here to Autonomy' (n 129) 1.
[175] Ruth Dukes, *The Labour Constitution* (OUP 2014) 101.
[176] Clark and Wedderburn, 'Modern Labour Law' (n 154) 199.

take away'.[177] Evidently, the new realities could not be accommodated within the old binary categories of juridification/non-juridification and the relevant discourses. Indeed, if approached from a juridifcation/non-juridification perspective, the Thatcherite legislation appears to furnish 'conflicting and contradictory evidence about the process and extent of juridification'[178] and hence is inexplicable.

The observer finds, as seen below, a combination of voluntarist and non-voluntarist aspects: retention of voluntarism for collective bargaining *(no law)* but with a policy of restrictions for unions *(more law)* and an institutional dismantling of collectivist structures. The blending acquires intelligibility and coherence only, as long as one, taking into account that 'the absence of one kind of law may help trade unions [whilst] the absence of another kind of law may handicap them',[179] focuses on the *quality and substance* rather than the volume of legislation. Then the overall neo-liberal market paradigm of the statutory provisions emerges in a revealing synthetic fashion as ordered by a simple 'organising' principle: *reduction of workers' collective power.* Restriction and voluntarism are configured so as to serve this overarching desideratum.

In turn, such an organising principle guided and gave substantive coherence to the diverse specific provisions whilst situating British pre-crisis edifice close to the neo-liberal side of the spectrum sketched above. Since the edifice was characterised by an anti-collectivist orientation, saved only by a voluntarist liberal hostility to a total repression of unions and unions' activities, *a fortiori* it caused no surprise that it exhibited a deficit of the following principles: the legal principle of asymmetry/partiality towards the weaker side and an *'effectiveness principle'* ensuring the effective exercise of unions'

[177] Kahn-Freund, 'Labour Law' (n 49) 244.
[178] John Clark and Lord Wedderburn, 'Juridification: A Universal Trend?' in Juridification of Social Spheres (n 54) 180.
[179] John Mcllroy, *Trade Unions in Britain Today* (2nd edn, Manchester University Press 1996) 236.

freedom to strike and collective bargaining. To summarise, the law rested upon two substantive principles: 'restriction' and 'anti-collectivism'.

(2) The Legal Framework: An Overview

These principles fleshed out in specific provisions. Like for Greece, the analysis examines them thematically.

The first theme concerns the imposition of a web of onerous conditions for industrial action. Since industrial action formed the main target of the legal changes, a more extended treatment is merited. In comparative terms, Britain stands out in European by its unique treatment of the legal effect of industrial action on the contract of employment. Maurice Kay LJ has famously opined that 'the right to strike has never been much more than a slogan or a legal metaphor.[180] Whereas doubts may exist about the accuracy of the statement, it perfectly alludes to the hostile common law terrain where strike operates in the UK. Formally, the striker *commits a repudiatory breach of contract*. The contract is not suspended, and the striker in theory offends common law legality. It is merely because of immunities preventing actionable damages, torts and dismissal against the striker that a relative freedom for industrial action is established. Starting from this broader weak status, the Thatcherite legislation enacted an *over-restrictive* legal framework for industrial action. Its configuration reflected the confluence of 'restrictive', 'anti-collectivist' and 'union ineffectiveness' principles.

More specifically, the law narrowed the scope of industrial action by restricting the trade dispute formula for the provision of immunities'.[181] It also imposed numerous procedural requirements, most notably 'extremely complex, technical, and, in parts,

[180] *Metrobus v UNITE* [2009] EWCA Civ 829, [2009] IRLR 851 at 868 (CA).
[181] Employment Act 1982 Section 18.

ambiguous'[182] (postal) ballot[183] and information and notice requirements.[184] A mandate based on a successful ballot is generally valid up to four weeks,[185] and a minimum seven-day notice to the employer applies.[186]

Very crucially, the legislator removed vital effectiveness-ensuring supports for industrial action, previously facilitating the union for drawing upon its solidarity resources in order to maximise the effectiveness of industrial action. It imposed a blanket prohibition on secondary action[187] and secondary (outside of striker's own place of work) picketing[188] and abolished unions' right to discipline their trade unions members for refusing to strike or crossing picket lines.[189] The restoration of common law torts of trade unions that made their funds subject to sequestration and damages in case of unofficial strikes[190] combined with the possibility of allowing non-selective dismissal of unofficial strikers,[191] provided an additional effective curtailment of the workers' ability to strike. Trade unions and strikers face the threat of financial destruction and dismissal if found on the wrong side of the law.

In line with the restrictive regulatory spirit, the law established a highly interventionist regime in the internal affairs of trade unions by introducing an obligation for the

[182] *Deakin and Morris* (n 173) 929.
[183] Trade Union Act 1984, Part 1 (extended by EA 1988 Section 1 and Trade Union Reform and Employment Rights Act 1993 Sections 17-20).
[184] The law requires multiple information before the ballot [TULRCA 1992, Section 226A)], a notice to the employer informing him of the result of the ballot [TULRCA 1992, Section 231A), and a third notice on the beginning of industrial action [TULRCA 1992, Section 234A as amended by Employment Relations Act 2004, Section 25].
[185] TULRCA 1992, Section 234(1). However, continuous action to the first industrial action made within the four-week period is permitted.
[186] TULRCA 1992 Section 234A (inserted by Trade Union Reform and Employment Rights Act 1993, Section 21).
[187] Employment Act 1990, Section 4. Now TULRCA 1992 Section 224.
[188] Employment Act 1980, Section 16. Now TULRCA 1992, Section 220.
[189] Employment Act 1988, Section 3. Now TULRCA 1992, Sections 64 & 65.
[190] Employment Act 1982, Section 15 (removal of blanket immunity of trade unions from tort liability).
[191] Employment Act 1990, Section 9. Now TULRCA 1992, Section 223.

maintenance of an accurate and up-to-date register of members[192] prescribing compulsory postal ballots for elections of senior trade union officials[193]as well as a 10-year period for ballots for the renewal of unions' political funds.[194]

In addition, there were various anti-collectivist measures, making what Wedderburn called 'disestablishment of collectivism'.[195] Multiple statutory props to unionization and collective bargaining were eliminated. The most significant changes were the following: prohibition of 'closed shop' arrangements, previously indirectly supporting unionization,[196] termination of the statutory union recognition scheme for collective bargaining (to be reintroduced by New Labour, see below),[197] abolition of the compulsory extension multi-employer mechanisms for terms and conditions of collective agreements as well as compulsory arbitration in certain cases,[198] elimination by John Major in 1993 of the tripartite Wage Councils previously setting sectoral minimum terms and conditions (thus constituting a functionally equivalent form of collective bargaining)[199] except for the Agricultural Wage Board,[200] and forbidding local authorities from setting Fair Wages clauses (clauses obliging government contractors to observe terms and conditions at least equal to those provided in collective agreements) by legally disabling them from taking into account 'non-commercial matters'.[201]

[192] TULRCA 1992, Section 24.
[193] TULRCA 1992, Section 51.
[194] Trade Union Act 1984, Section 12.
[195] *Wedderburn*, 'Freedom of Association and Philosophies of Labour Law' (n 114) 17-20.
[196] Employment Act 1988, Section 11 (now TULRCA Sections 146 and 152).
[197] Employment Act 1980, Section 19 (repealing Sections 11-16 of the Employment Protection Act 1975).
[198] Employment Act1980, Section 19 (repealing Section 98 and Schedule 11 of the Employment Protection 1975 Employment.
[199] Trade Union Reform and Employment Rights Act 1993, Section 35 (repealing Part II of Wages Act 1986).
[200] See Chapter VI Part 2(I) on the abolition of the Agricultural Wage Board by the Coalition Goverment.
[201] Local Government Act 1988, Section 17.

In this context, the retention of the 'legal abstentionist' regime towards the processes and effects of collective bargaining, the absence of an automatic legal effect of collective agreement and of a legal duty to bargain, all signal a voluntarism more nominal than real. This is for two reasons. Firstly, the restriction on the right to strike produces direct detrimental effects on collective bargaining. As Hendy and Ewing characteristically state, 'in the absence of a right to strike collective bargaining is no more than *collective begging* [as] [n[o employer will make concessions if the union cannot realistically threaten to withdraw labour if its demand is not met'.[202] Secondly, the anti-collectivist provisions deprived collective bargaining of its necessary supports, thus leading to a *de facto* weakening of the unions' capacity for collective bargaining which, in turn, recalibrated the power in the employer's favour.

(d) *New Labour: The Silent Interregnum*

The Blairite New Labour Government (1997-2007) left largely unscathed this neo-liberal restrictive CLL edifice[203] and enthusiastically accepted its epistemological premises. This was far from an unannounced choice. In 1997, the Labour Party Manifesto was unambiguously stating that:

> '[i]n industrial relations, we make it clear that there will be no return to flying pickets, secondary action, strikes with no ballots or the trade union law of the 1970s. There will instead be basic minimum rights for the individual at the workplace, *where our aim is partnership not conflict between employers and employees'*.[204]

The New Labour approach to industrial relations lived up to this statement. New Labour, under the guise of 'partnership'[205] and Third Way politics claiming to 'subscribe to

[202] Keith Ewing and John Hendy, *Trade Union Rights: The Short Story* (Institute of Employment Rights 2012) (emphasis added).
[203] Davies and Freedland, *Towards a Flexible Labour Market* (n 169) Chapter 3.
[204] Labour Party, *Manifesto for 1997 General Elections* (emphasis added).
[205] See Hugh Collins, 'Is There a Third Way in Labour Law?' in Anthony Giddens (ed), *The Global Third Way Debate* (Polity Press 2001).

neither unbridled individualism nor conformist egalitarianism',[206] adopted the unitary frame[207] of industrial relations. It faithfully rejected the 'power disequilibrium' thesis of the employment relationship,[208] substituting *partnership* for *conflict* in the workplace (*'where our aim is partnership not conflict').* As Smith and Morton rightly point out, the New Labour approach to industrial relations was a 'distinctive form of neoliberalism' in a subtler discourse.[209]

Although New Labour policies were embedded in a discursive terrain of pursuing both efficiency and fairness,[210] in reality the former was the trump card when they conflicted and it concerned individual rather than collective rights. Even for individual rights, fairness was downgraded from an end in itself, to a means to achieve efficiency', [211] thereby confined to a status of a junior partner always serving competitiveness,[212] the latter being the principal instrumental goal of labour regulation.[213] Of course, competitiveness and efficiency operated as *unitary* smokescreens for the respect of managerial prerogative, or managerial adaptability,[214] subtly equating the interests of the worker to those of the employer. Inevitably, the retention of the epistemological pre-suppositions of Thatcherism rendered its imagination, as Bogg observes 'moribund'.[215]

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[206] See Sandra Fredman, 'The Ideology of New Labour' in Catherine Barnard, Simon Deakin and Gillian Morris (eds), *The Future of Labour Law* (Hart 2004) 9; For an intellectual elaboration of third way politics see Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press 1998).
[207] For the 'Marxist, 'radical pluralist, 'traditional pluralist' and 'unitary' references see Bill Rees, 'Frames of Reference and Public Interest' in Lord Wedderburn (ed), *Labour Law and the Community: Perspectives for the 1980s* (Institute for Advanced Legal Studies 1982*)*.
[208] See Paul Smith and Gary Morton, 'Nine Years of New Labour: Neo-liberalism and Workers' Rights' (2006) 44(3) BJIR 401, 403.
[209] ibid 414.
[210] See Claire Kilpatrick, 'Has New Labour Reconfigured Employment Legislation?'(2003) 32(3) ILJ 135.
[211] Fredman, 'The Ideology of New Labour' (n 206) 21.
[212] *Howell* (n 60) 177.
[213] See Collins, 'Is There a Third Way in Labour Law? (n 206) 302; see also Collins, 'Regulating the Employment Relation for Competitiveness' (n 168).
[214] Davies and Freedland, *Towards a Flexible Labour Market* (n 169) Chapter 2.
[215] Alan Bogg, 'New Labour, Trade Unions and the Liberal State' (2009) 20(3) King's Law Journal 403, 434.

Smith and Morton illustrate this link between epistemology and the legal approach to CLL in their argument that the 'goal of social partnership embodies a particular view of the appropriate role of labour within the employment relationship, which requires the marginalization of trade unions as an autonomous forces.[216] In short, you cannot expect to have a protective CLL with a full-blown capitalist epistemology. The only major exception from the pattern of New Labour's inertia was the statutory recognition procedure.[217]

The Employment Relations Act 1999 introduced a statutory procedure for automatic recognition or recognition after balloting of unions demonstrating a majority of employees in a bargaining unit[218] combined with the utlawing of unfair practices during the balloting period by the Employment Relations Act 2004.[219] This scheme had the theoretical potential to counter individualism through establishing statutory paths for trade unions to actually force recognition. However, as Howell notes with regards to statutory recognition scheme the ' ''devil" is in the details'.[220] Besides the non-applicability of the procedure to enterprises employing twenty or fewer workers, as Bogg demonstrates even after Schedule A1 'the field of play still slopes decisively in the employer favour'[221] and that 'the lack of 'bite' by CAC's unfair practice jurisdiction is a combined result of poor legislative drafting and a cautious interpretive approach by the CAC'[222] which needs urgent reform if 'workers freedom to choose a bargaining

[216] Paul Smith and Gary Morton, 'New Labour's reform of Britain's employment law: the devil is not only in the detail but in the values and policy too' (2001) 39 BJIR 119, 120.
[217] For a comprehensive account on statutory union recognition see Bogg, *The Democratic Aspects of Trade Union Recognition* (n 58).
[218] ERA 1999, Schedule 1.
[219] TULRCA 1992, Schedule A1 para 27A (inserted by Employment Relations Act 2004 Section 10).
[220] *Howell* (n 60) 183.
[221] Bogg, *The Democratic Aspects of Trade Union Recognition* (n 52) 197.
[222] Alan Bogg, 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38(4) ILJ 390, 390.

representative is to be anything other than illusory'.[223] Therefore, this process seemed unable to offer a collectivist counterbalance to the wider process of de-regulation in contrast to its rhetorical appraisal by New Labour government, and its inherent defects led its statutory drift before and during the crisis.[224]

So, the New Labour consolidated *ab silentio* and failed to challenge the 'neo-liberal paradigm' of CLL. It was thus 'fundamentally convergent with the decollectivist thrust'[225] of Thatcherite system of industrial relations. The dog for a protective CLL did not bark, thereby turning the Thatcherite neo-liberal edifice into a consensual edifice, and 'mark[ing] a shift in the political consensus of the most significant kind'.[226] The 2008 economic crisis was to test British CLL after a prolonged *stasis.*

(iii) Comparative Reflections: The Symmetrically Reverse Greek and British Pre-Crisis CLL Edifices

The comparatist of the pre-crisis Greek and British edifices cannot but be struck by the almost ideal-type comparative pattern of their substantive characteristics: *inverse symmetry.* The 'social-democratic hegemony' for Greece from 1980s contrasts with 'neo-liberal hegemony' in UK from 1980s. The 'protective constitutionalisation' of CLL embedding the latter in a public law domain contrasts with the British 'neo-liberal constitutionalisation' of CLL embedding the latter in a private law contractual framework.

More importantly, the 'protective paradigm' of the Greek pre-crisis CLL edifice grounded in the protective function, a matching-power justification accompanying a

[223] ibid.
[224] See Chapter VI Part 4(1).
[225] *Howell* (n 60) 193.
[226] Davies and Freedland, *Towards a Flexible Labour Market* (n 169) 111.

'power-disequilibrium' epistemology and the imperative of maximising workers' collective power finds its symmetrically inverse counterpart in the British 'neo-liberal' paradigm of CLL built upon the 'labour market function', a power-agnostic unitary epistemology and the aim of reducing workers' collective power. Evidently, the dominant cleavage is not of juridification/non-juridification but of opposite intended functionalities of law: for Greece to protect and for UK to undermine collectivism. To add to the inverse symmetry pattern, both countries in 1990s and 2000s enjoyed a relative period of inertia, a 'silent interregnum' consolidating their edifices by relative inaction.

Projected into Antoine Jacobs' useful categorisation, the Greek model exemplifies a textbook combination of 'integration' and 'recognition' models. *Recognition* is defined by Jacobs as 'active encouragement of the system of collective self-regulation, through positive rights'[227] while *integration* 'involves the granting of public functions to trade unions and employers' representations'.[228] The regulatory function of collective bargaining in the Greek context and the *erga omnes* effect are indices of this integration function of unions in the Greek CLL pre-crisis system. By contrast, the British model constituted a combination of the 'toleration' and 'containment' models. The 'toleration' defined as the law 'go[ing[no further than to grant immunities against the prohibitions of criminal of criminal law or the liabilities of civil law,[229] was crucially accompanied with what Jacobs calls, in his revising statement *in Transformation of Labour Law* as 'containment' indicating the curtailment of the power of the trade unions in 1980s and 1990s.[230] Alternatively, following Raday's categorisation on policies regarding trade unions, the Greek and British CLL models could be depicted as adopting a 'supportive'

[227] Antoine Jacobs, 'Collective Self-Regulation' in *The Making of Labour Law* (n 28) 195.
[228] ibid.
[229] ibid.
[230] Antoine Jacobs, 'Collective Labour Relations' in *The Transformation of Labour Law* (n 110) 230.

and ‘deterrent’ policy respectively. The former is a policy under which ‘the political or legal systems provides incentives for union development or collective bargaining activities’ and the latter when the policy ‘limits or deters union formation, growth, or collective bargaining activity’. [231]

So, the two systems positioned in antithetical ends of the protective/market spectrum identified earlier in the Chapter. This was the departure point when the 2008 crisis movement erupted. The question to be examined in Chapters IV-VII is how these two antithetical systems behaved.

4. 2008 Economic Crisis: The Moment Zero

The enquiry sets the 2008 economic crisis as the natural moment zero for mapping the CLL movement of both CLL systems. The 2008 economic crisis caused an economic breakdown of historic and gigantic proportions leading the economies of developed countries (and to a lesser degree of developing ones) into a downward spiral of recession.

For our purposes, the most salient feature of this crisis was its *systemic* nature. It was produced by the *internal* workings of financial capitalism, ‘uncover[ing] fundamental flaws in the capitalist system’[232] and hence is structural and multi-dimensional.[233] Consequently, it gives us a great experimental material to test the connection of the economic crisis, in its pure capitalist fashion, with CLL.

[231] Frances Raday, ‘The Decline of Union Power’ in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalisation* (OUP 2004) 358.
[232] Joseph Stiglitz, *Freefall: free markets and the sinking of the global economy* (Allen Lane 2010) xxi.
[233] Manuel Castells, ‘The Crisis of Global Capitalism: Towards a New Economic Culture’ in Craig Calhoon and Georgi Derlguian (eds), *Business as Usual: The Roots of the Global Financial Meltdown* (New University Press 2011) 185.

Britain and Greece were implicated in each of the *two* crisis phases as protagonists. In the *financial* phase (2008-2010), Britain was one of the main casualties (after the USA). The credit crunch caused by the inability of US sub-prime housing mortgage borrowers to repay their loans eventually triggered the collapse of financial giants first in the US and then endangered the over-grown British financial sector prompting state bailouts.[234] Conversely, the second phase (2010-2015) marked a role reversal. As the crisis' nature transmuted from *financial* to *fiscal*, Greece took a centre stage to its inability to raise funds from private markets with reasonable interest rates.[235]

Without neglecting the different *types* of the crisis and their conjectural historical and policy-making particularities, after all a crisis is always a multi-factorial phenomenon, we adopt the view of the financial and Eurozone public debt crises as two mere manifestations of the evolution of a single process of capital destruction and restructuring starting the 2008 capitalist crisis and then dislocated. Although this approach is not uncontroversial, we consider public and private debt growth as inter-connected and mutually reinforcing so as to render the 2010 Eurozone debt crisis an intrinsic component of the 2008 financial crisis.[236]

5. Conclusion: Summary of Findings

To summarise, the Chapter reached the following preface findings, to be divided as *methodological* and *substantive.* Regarding methodology, two set of observations were

[234] See Chapter VI Part 1.
[235] See Chapter IV Part 1.
[236] For an integrated approach of the 2008 financial crisis and 2010 Eurozone crisis as part of the contradictory workings of democratic capitalisms as it transitions from 'tax state, 'debt state' to the 'consolidation state' see Wolfgang Streeck, *Buying time: the delayed crisis of democratic capitalism* (Verso 2014). See also Shelley Marshall, 'Shifting Responsibility: How the Burden of the European Financial Crisis shifted away from the financial sector onto labour' (2013-2014) 35 Comparative Labor Law & Policy Journal 449.

made. Firstly, the enquiry has ascertained the three epistemological analytical functions of the comparative method for our purposes: (a) *scientific as non-instrumental observation, (b) scientific-experimental* and *(c) scientific-recoupment of Crisis Equilibrium theoretical framework.* Secondly, it designated the Comparative field by elucidating and justifying its three properties: (a) CLL as *tertium comparationis*, (b) the 'dynamic' movement within a protective/ neo-liberal spectrum (termed as Crisis Trajectories) as *material scope of comparison,* a choice expressing a historical-epistemological variant of functionalism', and the (c) 'binary' 'most different countries' design as the best method for satisfying our epistemological purposes.

Regarding substance, the analysis exposes the *'inverse symmetry'* pattern of the pre-crisis CLL edifices, situated antithetically within the protective/neo-liberal spectrum: Greek model constituted a 'protective alloy' of social-democratic hegemony, protective constitutionalisation and protective legislative edifice based on 'integration-recognition' whilst British model constituted a 'neo-liberal alloy' of neo-liberal hegemony, 'neo-liberal constitutionalisation and 'neo-liberal' restrictive statutory edifice based on 'toleration-containment'. Finally, the 2008 economic crisis was set as the 'moment zero' for the tracing of the crisis movement.

The subsequent four Chapter trace the Crisis Movement of CLL in Greece (Chapter IV and V) and the UK (Chapter VI and VII). Chapter IV and VI offer a *general* exposition of the movement based on the Crisis Equilibrium Framework in Greece and the UK. Chapter V and VII examine a *thematic* development of constitutional nature in each country. For both countries there is a temporal end-date of the interrogated period coinciding with respective elections: December 2014 for Greece before the calling of

elections that brought Syriza in power and May 2015 for UK before the 2015 UK general election that returned a single-party Conservative Government.

IV

Not with a Whimper but with a Crisis Bang: The Dramatic Collapse of the Protective Collective Labour Law Edifice in Greece

For T.S Eliot the 'world ends not with a bang but with a whimper'.[1] However, for the Greek protective CLL edifice (*hereinafter Edifice)*, its collapse came with an astounding crisis bang rather than an infra-sound whimper. Located in the 'receiving end of the most punishing austerity programme ever implemented in post-war Europe'[2] imposed by IMF and EU through a *sui generis* regulatory and institutional geometry of bailout conditionality[3] (mainly Memoranda) from May 2010 onwards, Greece experienced a cataclysm of rapid and extensive de-constructive legislative alterations in its CLL system, particularly on collective bargaining, that 'are unprecedented in Greek and European political history'.[4] The crisis reform of CLL, or as Kazakos puts it, the 'institutionalized counter-reform of labour law',[5] realised a violent and forced derailment from its long-standing 'social-protective' tracks. Instead, CLL was thrown into the neo-liberal tracks of a competiveness-oriented individualized, decentralised and de-collectivized labour

[1] T.S Eliot, '*The Hollow Men'.*
[2] Stathis Kouvelakis, 'The Greek Cauldron' (2011) 72 NLR 17, 18.
[3] For a detailed account on bailout conditionality as a *sui generis* normative sphere see Chapter V Part 1 (i).
[4] Apostolos Dedoussopoulos, Valia Aranitou, Franciscos Koutentakis and Marina Maropoulou, *Assessing the impact of the memoranda on Greek labour market and labour relations*, Working Paper No. 43 (ILO 2013) 39.
[5] Aris Kazakos, *Συλλογικό Εργατικό* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2013) 6 (in Greek).

relations where 'for trade unions, strike and collective autonomy, there is a shadow, marginal and ostensible function'.[6]

In such an over-dynamic context, this Chapter offers a critical account of CLL's crisis trajectory (covering developments up to December 2014). The herein enquiry, though, does not address the constitutional and international dimensions of the trajectory. The latter deserve a separate examination, to be undertaken in the next Chapter.

The Chapter assumes the following structure, organised by the Crisis Equilibrium Framework factors presented in Chapter II. After identifying the economic rationalisation force as inhering in the *economised-fiscal* philosophy of reforms in Part 1, it develops a comprehensive account of the de-jure legislative attack on the Edifice in Part 2. Subsequently, it examines the de-facto deregulation of CLL and the non-regulatory measures taken in the labour market (Part 3) prior to detecting and assessing the 'counter-legitimation force'[7] (Part 4). The final Part (Part 5) undertakes the overall critical assessment of the trajectory. It suggests that the mode of the attack on the Edifice consists in the 'hollowing out' of its protective core by neo-liberal colonization, that is of strategically modifying crucial protective provisions so as to destabilise the edifice. It also finds CLL's 'Crisis Movement' as heteronomous to Crisis Equilibria and a big regressive leap towards the immature Heritage of Greek CLL.

[6] Dimitris Travlos-Tzanetatos, 'Η Διάλυση των συλλογικών σχέσεων εργασίας και το χρέος της αριστεράς *Εφημερίδα Αυγή* (Αθήνα, 12 Φεβρουαρίου 2012) (in Greek).
[7] For the terminology of economic rationalisation and counter-legitimation forces and regulatory and non-regulatory measures see Chapter II Part 3, especially the Crisis Theorem.

1. The Economic Rationalisation Force: The *Philosophy* of the Attack On Pre-Crisis CLL Edifice

For Harvey, 'capital does not solve the crisis tendencies but moves them around'.[8] Indeed, the CLL attack amounts to nothing more than an episode of this 'moving around'. CLL stood at the receiving end of a sequence of high-speed destructive reactions. A pattern of successive bangs emerged. The US-UK financial 2008 crisis 'bang' was refracted in the Eurozone and Greek debt crisis (2010-onwards) 'bang'.[9] The latter became then domesticated *qua* the CLL deconstructive conditionality 'bang' imposed by EU/IMF as a requisite for bailout assistance aimed at preventing a Greek default (and potentially Eurozone) 'bang'.

While subjected to multiple refractions, one should not lose sight of the *single* capitalist economic rationalisation force, urgently demanding capital destruction. By way of reminder, the Economic Rationalisation force expresses the capitalist restructuring process of destruction of capital. This process occurrs during economic crisis. The term destruction denotes the loss of economic value and not necessarily the loss of physical units.[10] In the Greek case, the economic rationalisation force reached extreme levels. This was so because the local Greek crisis economic rationalisation force inter-linked with the global and European economic rationalisation as a result of Greece's Eurozone member

[8] David Harvey, *The Enigma of Capital: and the crises of Capitalism* (Profile Books 2011) 262.
[9] For accounts of the Eurozone crisis see Shalendra Sharma, *Global Financial Contagion: Building a Resilient World Economy after the subprime crisis* (CUP 2014) Chapter 4 and Thomas Schoenbaum, *The Age of Austerity: The Global Financial Crisis and the Return to Economic Growth* (Edward Elgar 2012) 37-52.
[10] See Chapter II Part 3 i (a).

status. Truly, a sudden collapse of the Greek economy could have had wider economic implications far exceeding the national boundaries.[11]

The overarching philosophy of CLL crisis reforms, which Travlos-Tzanetatos labels 'neo-liberal pseudo-rational totalitarianism',[12] fully integrated and expressed this force in the field of LL. *Capital destruction* took on the technocratically-disguised metonym of 'internal economic devaluation'[13] required to restore competitiveness. *In effect* the latter was translated into 'reductions in unit labour costs and improvements in competitiveness, through a combination of upfront nominal wage cuts and *structural labour market reforms'*.[14] This aim was explicitly stated by the Government in its justification of labour market reforms for 'sending the message that the country has taken the firm decision to foster its competitiveness, to attract investment, and so promote employment and its development prospects to the benefit of weaker citizens'.[15] The reader should trace in this technical discourse a simple process: *capital destruction (loss of value) by an unprecedented reduction of peoples' income and living standards.*

CLL was trapped in this process by two attacks. Firstly, its labour market conceptualization as 'rigidit[y] that prevent[s] wages from adjusting to economic conditions'[16] detached its legitimacy from its social usefulness (which in Greece had also

[11] In June 2013, IMF recognized that in May 2010 'contagion from Greece was a major concern for euro area members given the considerable exposure of their banks to the sovereign debt of the euro' IMF, *Ex post Evaluation of Exceptional Access Under the 2010 Stand-By Arrangement* Country Report No. 13/156 (IMF June 2013) 12.

[12]Dimitris Travlos-Tzanetatos, 'Συλλογικές Συμβάσεις και Νεοφιλελεύθερος ψευδο-ορθολογικός ολοκληρωτισμός' *Εφημερίδα Αυγή* (Αθήνα, 06 Νοεμβρίου 2011) (in Greek).

[13]Since for Greece currency devaluation was unavailable *qua* its EMU membership, 'internal devaluation' was presented by neo-liberal orthodoxy as without alternative. See on this IMF, *Ex Post Evaluation* Report (n 11) paragraph 17 and, more generally, Klaus Armingeon and Lucio Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012) 41(3) ILJ 254.

[14] Greece, *Memorandum of Economic and Financial Polices* (9 March 2012) paragraph 2[*hereinafter* Memorandum 2012] (emphasis added).

[15] Government, Explanatory Note on Law 3845/2010 (in Greek).

[16] *Memorandum 2012* (n 14) paragraph 29.

an anti-authoritarian underpinnings')[17] thereby imprisoning it in the neo-liberal blind alley identified by Ewing which 'allow(s) the debate to be fought on the territory of the neo-liberals, and for justifications to be sought which are implausible, unsubstantiated, and unconvincing'.[18]

Then, the second attack came as a fatal necessity, in the form of the protective CLL marked for removal *qua* its rigidity status. This removal provided the springboard for the radical overhaul of the CLL system that 'entirely moves the equilibriums on which the edifice of industrial relations was founded for years, if not for decades'.[19] As Koukiadaki and Kretsos summarize, the reforms are not 'distributionally neutral, but aim to liberalise further and to deregulate key parts of the labour market and industrial relations system, and reduce the size and influence of the welfare state'.[20]

Therefore, CLL was forced violently into the confines of fiscal consolidation within a broader environment 'which confirms that the individual and social rights along with their bearers are treated as factors burdening production with unnecessary costs'.[21]

Having established CLL reforms as a manifestation of Economic Rationalisation Force, we should now focus on the multi-front 'de-jure attack' on the Edifice.

[17] See Chapter III Part 3 I (a).
[18] Keith D. Ewing, '"The Sense of Measure": Old Wine in New Bottles, or New Wine in Old Bottles, or New Wine in New Bottles?' (2010) 19(2) Social & Legal Studies 231, 231.
[19] Kostas Papadimitriou, Η απώλεια των σημείων ισορροπίας και η αποδόμηση στις συλλογικές εργασιακές Σχέσεις υπό το φως των ρυθμίσεων των ν. 4024/2011 και 4046/2012' (2012) 9 ΕΕργΔ 699, 699. (in Greek).
[20] Aristea Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41(3) ILJ 276, 276.
[21] Kazakos, *Συλλογικό Εργατικό Δίκαιο* (n 5) 7.

2. The De-Jure Attack on the CLL Edifice: A Multi-Front De-Construction

(i) The Decentralised Fall to the Bottom: Decentralisation without Favourability

In light of the declared need for building a new collective bargaining 'based on enterprise level bargaining and not just on national or sectoral agreements',[22] the most focal point of the entire attack has been the de-jure transformation of the collective bargaining scheme for enabling what we term as 'decentralised fall to the bottom'. The latter was brought by the joint effect of two related movements: (1) suspension of *favourability* for allowing the sub-minimum function of enterprise agreements to sectoral agreements, and (2) *decentralisation* by promoting enterprise-level workers' organizations and enterprise bargaining while simultaneously undermining sectoral bargaining and sectoral trade unions.

(a) The Prolonged Ending of Favourability: Enabling the Fall to the Bottom

Favourability, in its form of the implementation of the most favourable provision (in case of concurrence of collective agreements), was subjected to a series of legislative restrictions before its final suspension.

It was initially challenged by Law 3845/2010 (Law attaching Memorandum May 2010) which provided that:

> *'the terms of occupational and enterprise collective agreements may deviate from the respective terms of sectoral collective agreements and national general collective agreements and the terms of sectoral collective agreements may deviate from the*

[22] Greek Government reply included in ILO, *Report on the High Level Mission in Greece* (September 2011), paragraph 110.

respective national general collective agreements'.[23]

This proviso created all sorts of confusions, which perfectly reflect the improper hastiness under which Law 3845/2010 was quickly drafted for securing the first bailout agreement.[24] Not only did the legislator omit putting the provision as an amendment to the relevant Law 1876/1990, but even forgot adding the term 'downwards' after the word 'deviate'. Of course, the regulatory meaning of 'deviation' as 'downward deviation' based on the very existence of the provision and its systematic interpretation is not in question. This omission, however, soundly illustrates the overall rush of reforms.

Confusion, though, did not cease here. By mistake or deliberately, Greece 'sleepwalked' into *abolishing the constitutionally-prescribed minimum-wage* (without even the provision of statutory alternative!), the latter being the long-standing cornerstone of its social and welfare state. This was so because, despite the prime de-centralising purpose consisting in permitting the sub-minimum function of enterprise in relation to sectoral agreements, 3845/2010 enabled enterprise, sectoral and occupational agreements to derogate (obviously downwards) from the NGCA. In this fashion, Greece experienced an abrupt effective discarding of the minimum wage overnight without any special debate by the Parliament if not to say realization. Despite its formal validity, the entire provision was not implemented in practice because the required secondary legislation was not issued. Katrougalos attributed its de facto disappearance both to the fact that the undermining of minimum wage was profoundly contrary to the protective function of the constitution and impossible to be imposed politically.[25]

[23] Article 2(7) (emphasis added).
[24] Law 3845/2010 was introduced to the Parliament under the extraordinary *urgent procedure* (Article 76 (4) of the Greek Constitution) providing limited debate in only one session. The Government justified the *urgency* on the basis of the *urgent need* of securing default-preventing financial assistance which was to be approved on the Eurogroup sessions on the days after the voting.
[25] Giorgos Katrougalos, *Η Κρίση και η Διέξοδος* (Λιβάνης 2012) 234 (in Greek).

Law 3899/2010 attempted to strike a compromise by confining the suspension of favourability to the short-lived Special Enterprise Agreements (SEA) which could have derogated downwards from sectoral but, importantly, not from the NGCA.[26] For the conclusion of these agreements, which should have taken into account *inter alia* 'the need of the enterprise to adapt to market conditions and (…) to retain the competitiveness of the enterprises',[27] a compulsory non-binding opinion procedure was to be issued by the tripartite Council of Social Enforcement of Labour Inspectorate (Σ.K.E.E.E) reviewing the substance of the reasons outlined in the explanatory statement submitted by the enterprise.[28]

Pursuant, though, to the remarkable failure of the SEA (very few agreements were signed)[29] and in face of Troika's pressures,[30] Law 4024/2011 dealt the final blow to 'favourability' Favourability became eventually suspended as between (normal) enterprise and sectoral agreements for the period of 2012-2015 but was maintained for the relation between enterprise agreements and the NGCA hence preserving thereof minimum-standards function.[31] The same law also abolished the Special Enterprise Agreement.[32] Evidently, the attack on favourability effectuated the removal of the protective floor for workers previously blocking a 'fall to the bottom'. Hence it *enabled* a 'fall to the bottom'.

[26] Article 13.
[27] ibid.
[28]Article 13 (3).
[29] See European Commission, General Directorate for Economic and Financial Affairs, Occasional Papers 82, *'The Second Economic Adjustment Program of Greece' Fourth Review Spring 2011'* (July 2011) paragraph 49.
[30] See November 2011 Updated Memorandum which included the suspension of favourability as eventually legislated in the list of prior actions for disbursement. Updated Memorandum of Economic and Financial Policies (30 November 2011) Section 4 ([Structural Reforms] Part1 [To strengthen labour market institutions].
[31] Article 10 (2) as added by Article 37 (5) of 4024/2011.
[32] Article 37 (2).

(b) Downward Decentralisation: Ensuring the Fall to the Bottom

If the challenge to favourability enabled such fall, the decentralisation measures strived to ensure both that this fall is to occur and accelerate its pace. Such a downwards shifting from the *sector* to *enterprise* was principally made by three reforms.

Firstly, Law 4024/2011 facilitated the conclusion of enterprise agreements by regularising for all enterprise agreement the previous non-prescription of a minimal numerical requirement for employed workers in the enterprise by the ill-fated special Enterprises Agreements (previously 50 under the Law 1876/1990). [33] As a result, the vast majority of enterprises, barred from the previous 50-workers requirement, acquired eligibility for enterprise agreements.[34] In light of favourability's suspension, this eligibility was essentially a *licence* for a race to the bottom.

This effect of diminished protection for workers becomes more understandable when considering the second reform concerning the order of organisations competent to conclude enterprise agreements in the absence of an enterprise trade union. Whereas previously these were the primary sectoral unions that typically enjoyed greater negotiation strength, Law 4024/2011 (pursuant to the respective conditionality stipulation)[35] granted such power to the *atypical* 'association of persons' and only in the their absence, to primary sectoral unions. [36]

Interesting, the law used an existing structure, that of 'associations of persons' of 1264/1982,[37] but substantially reconfigured it. The new association of persons can be formed by 3/5 of workers regardless of total number employed and no legislative time-

[33] Article 6 (1b) of 1876/1990 as modified by Article 37(3) of 4024/2011.
[34] For the meteoric rise of enterprise agreements see Part 3 1 below.
[35] See November 2011 (Updated) Memorandum (n 30) Section 4 Part 1.
[36] Article 5(3) of 1876/1990 as replaced by Article 37(1) of 4024/2011.
[37] Article 3 A(cc) of 1264/1982.

limit is imposed (in contrast to the previous six-month limitation in 1264/1982).

In effect, the granting of collective bargaining capacity to these non-trade union formations generated a broad space for abuse in the form of employer-controlled associations formed for the sole aim of capitalizing on the sub-minimum function of enterprise agreements in relation to sectoral ones. Workers enjoy virtually inexistent bargaining powers in these *ad hoc* entities as a result of direct employer pressures, an asymmetry aggravated by their lack of a 'permanent mandate to represent workers on collective issues of work'.[38] In this context, their creation acted as a catalyst for *speeding* the fall to the bottom.

The third reform towards de-centralization effectively deconstructed sectoral bargaining. In particular, conforming to bailout conditionality,[39] 4024/2011 suspended for the duration of program of fiscal consolidation (2012-2015) the Minister of Labour's power to compulsory extend sectoral and occupational agreements binding on employers representing the majority of employees in the sector or occupation [40] (existing from 1955).[41] The suspension of this clause, itself having been a common method of regulation in many sectors, 'leads to a de facto abolition of these [sectoral] agreements as employers would no longer wish to be bound by them and would disaffiliate from the relevant employers' organizations'.[42] Hence the eradication of this mechanism of unifying terms and conditions across a whole sector removes another protective barrier for workers leaving them vulnerable to social dumping and asymmetrical enterprise negotiations.

[38]GSEE arguments in ILO Committee on Freedom of Association, *Conclusions* on Case No. 2820 (Greece) in 365th Report on Committee of Freedom Association (1-6 November 2012) 924. See next Chapter for detailed analysis 826.
[39] See November 2011 (Updated) Memorandum (n 30) Section 4 Part 1.
[40] Article 10(2) paragraph 2 as added by Article 37(5) of 4024/2011.
[41] Article 5(3) of 3239/1955.
[42] GSEVEE's (General Confederation of Craftsmen and Merchants) *reply* included in ILO, *High-Level Mission Report* (n 22) 186.

The undermining of sectoral agreements, in turn, should be considered in conjunction with the effective displacement of sectoral unions from enterprise bargaining. Cumulatively these provisions established the conditions for the marginalization of sectoral unionism. Since sectoral unions generally had greater power compared to enterprise unions, as well as ensuring the non-fragmented expression of workers' solidarity, the overall result of these changes was to push the workers' conditions even further to the bottom.

To summarise, the decentralisation measures represented a concerted holistic attack purported to alter the gravitational centre of Greek collective bargaining scheme towards the enterprise level. Yannakourou and Tsimpoukis talk about a 'widespread disordered decentralisation contesting the unity and cohesion of the entire collective bargaining machinery in Greece' and '[t]hus 'leaving space to the regulatory power of the individual contract of employment'.[43] This alteration is part of a broader one-way direction towards weakening workers' power and attacking workers' solidarity by a strategy which in the British context of 1980s Thatcherite legislation was called by Wedderburn as 'enterprise confinement'.[44] Similar to the UK, the aim in Greece was to imprison 'collective bargaining structures within the limits of the enterprise, where labour is weaker numerically and in terms of negotiating power'.[45] Such a weakening assumed its direct expression in the new legislative status of the vulnerable to employer's pressure association of persons. As Travlos-Tzanetatos points out, their new status had the 'aim of disguising through pseudo-collective negotiations the essential surrender of terms of

[43] Matina Yannakourou and Chronis Tsimpoukis, 'Flexiblility without Security and De-construction of collective bargaining: The New Paradigm of Labour Law in Greece' (2013-2014) 35 Comparative Labour and Policy Journal 331, 367.
[44] Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18(1) ILJ 1, 28.
[45] Eftychia Achtsioglou and Michael Doherty, 'There Must be Some Way out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm' (2014) 20(2) European Law Journal 219, 228.

conditions to the unilateral power of employer'.[46]

With the floor destructed by the suspension of favourable, the diminished labour power directly was directly translated into a *rapid descent to the bottom* for workers.

(ii) Erosion of the Protection of the Temporal Extension of Collective Agreements (after-Effect): A Step Towards De-Collectivization

In implementation of the provisions of the Memorandum,[47] The MCA 6/2012 reduced the protection offered by the temporal extension and 'after-effect' of collective agreements. In the pre-crisis scheme, all regulatory provisions of a collective agreement were automatically extended for a six-month period after its expiration or renunciation unless a new collective agreement was concluded in-between, while resuming their validity after this period until regulated by a new individual or collective agreement (after-effect).

The reforms curbed the 'after-effect' protection in two ways. Firstly, the extension period was shortened into three months. Secondly, after this three-month period, only provisions on basic wages and four benefits (seniority, child, education and hazardous professions benefits) were to be still in force until they are regulated by a new individual or collective agreement.[48] So, any other regulatory term ceased automatically after the three months without, this time, the consent of the worker required thereby forcing an immediate fall to her terms and conditions.

[46] Dimitris Travlos-Tzanetatos, *Οικονομική Κρίση και Εργατικό Δίκαιο* (Σάκκουλας Αθληνα-Θεσσαλονίκη 2013) 363 (in Greek).
[47] See Memorandum 2012 (n 14) paragraph 29.
[48]MCA 6/2012 Article 2(4).

In this context, albeit not formally abolishing the institution of extension/after-effect, the Law eroded its protective dynamic with strategic attacks. Given that the whole teleology of the institution was to ensure the undisrupted succession of collective regulation of terms and conditions employment, it was an additional step towards facilitating the de-collectivization of employment relations. Another safety net for workers was severely damaged.

(iii) State Intervention in Collective Agreements and Arbitration Awards: The Suspended Collective Autonomy

Collective autonomy was practically suspended during the crisis. There have been multiple regulatory interventions modifying or annulling the terms and conditions of collective agreements and arbitration awards. They can be divided into three areas.

Firstly, and perhaps most notably was the provision of the MCA 6/2012 modifying the minimum-wage (MW) effect of the 15.07.2010 agreed (in force until 31 December 2012) by reducing it by 32% for young workers (less than 25 years old) and 22% for the rest.[49] Evidently, the very conclusion of this agreement by social partners was made with their expectation of its minimum-wage effect until its expiry (December 2012). In addition, given that NGCA operates also as a benchmark reference for many collective agreements at lower levels, the downward effects were immediately diffused across the entire collective system of pay determination. [50]

[49] Article 1(1).
[50] See Institute of INE-GSEE, *Ετήσια Έκθεση: Η Ελληνική Οικονομία και η Απασχόληση* (Ινστιτούτο ΙΝΕ-ΓΣΕΕ 2013) 127 (in Greek).

If the MW intervention on NGCA consisted in the state regulation for reducing the *protective* effect of collective autonomy, the second type of interventions struck at its very core. Pursuant to the overarching and central 'internal devaluation' policy demanding an immediate and steep deflationary wage policy,[51] collective autonomy was sacrificed. The general philosophy of the multiple interventions was indeed very clear in its aim: *ensuring by direct legislative prohibition that collective autonomy in its two expressions (collective agreements and arbitration awards) did not break the 'internal devaluation' policy in a manner preventing the 'fall to the bottom'.*

In this context, the first interventions were brought for public servants and private law workers in the public sector by Laws 3833/2010 and 3845/2010. In particular, they stipulated general wage reductions (including all kinds of benefits) to those wages provided in arbitration awards or collective agreements[52] with few exceptions.[53] In parallel, by an express provision and as part of the overall restraining economic policy, there were a compulsory capping of increases that automatically abolished contrary provisions in arbitration awards/collective agreements[54] as well as a prohibition of the conclusion of new ones over the capping limit.[55] Along similar lines, 3899/2010 which implemented wage reductions up to 25% contained a stipulation of its provisions prevailing over collective agreements and arbitration awards.[56] A similar provision

[51] See footnote 13 above.
[52] See Article 1(5) of 3833/2010 (providing 7% reductions to wages and benefits and 30% reductions to Christmas and Easter Allowances) and Article 3(4) of 3845/2010 (providing 3% reductions and further Christmas and Easter allowance reductions)
[53] Article 1(4) of 3833/2010 and Article 3(4) of 3845/2010 provides exceptions for benefits related to family status and career progression and those related to dangerous and unhealthy occupations as well as to postgraduate studies.
[54] Article 2(5) of 3833/2010.
[55] Article 3(2) of 3833/2010.
[56] Article 2(21).

abolishing any contrary terms and conditions in collective agreements and arbitration awards was included in Article 31 of 4024/2011[57] which set a cap to public sector wages.

In this broader context of wage freeze, a direct form of intervention to arbitration awards (mainly targeting private law employment) was undertaken by Law 3871/2010. It stipulated the invalidation of the legal effect of arbitration awards in relation to their part prescribing any wage increases up to July 2011 or increases exceeding the NGCA rate until end-2012.[58] Evidently, the NGCA increase rate was turned from a minimum to a maximum standard. So much inclined was the legislator to enforce this intervention in arbitration that even created a special judicial procedure for parties and the Minister of Labour to appeal for arbitration awards conflicting with the newly imposed restraints (issued after the Law 3845/2010) in a three-panel session of OMED (Organization of Mediation and Arbitration).[59]

The third area of intervention concerns the *retroactive* application of new rules on duration of collective agreements that were to be compulsory fixed term and between one and three years so that their end was legislatively determined against their own terms. More specifically, a general fixed expiry date (14-2-2013) was set for collective agreements already in force for at least two years (since the enactment date of MCA 6/2012),[60] whilst Art 2(3) mandated for the rest their expiry after three years of their entry into force.[61]

Overall the extensive state intervention in collective autonomy has been the norm during the crisis. As Kazakos summarizes, the reforms amounted to ‘a prohibited

[57] Article 31(5).
[58] Article 51(1).
[59] Article 51(2).
[60] Article 2(2) of MCA 6/2012
[61] Article 2(3) of MCA 6/2012.

intervention in the substance of NGCA and in general the collective agreements/arbitration awards as well as in the decades-long established system of free negotiations for the regulation of minimum wages'.[62] The changes essentially demonstrated a profound distrust in the autonomous economic crisis management by social partners. The legislator communicated a strong message to workers not to anticipate a prevention of the rapid worsening of their terms and conditions of employment by collective negotiations. One could not find a better illustration of this mistrust than in Memorandum's very observation that 'the outcome of social dialogue to promote employment and competitiveness fell short of *expectations*'[63] which adopted a substantive review thesis for social dialogue outcomes as a rationale for the CLL reforms.

In short, another escape device from the 'fall to the bottom' of workers was blocked.

(iv) From a Collective-Determined to a State-Determined Minimum Wage: Another Blow to Collective Autonomy

Crisis reforms produced a casualty of major significance. They removed the long-standing feature (since 1955)[64] of the Greek social state, namely entrusting to collective autonomy, as expressed in the National General Collective Agreement (NGCA), the crucial function of minimum-wage (MW) determination upon.

[62] Aris Kazakos, 'Συλλογικές συμβάσεις εργασίας και διαιτησία μετά την Π.Υ.Σ. 6/28.2.2012- η καταστροφή του συστήματος παραγωγής συλλογικών ρυθμίσεων και η βίαιη επιστροφή στην ατομική σύμβαση εργασίας' 2012 9 ΕΕργΔ 593, 608 (in Greek).
[63] Memorandum 2012 (n 14) 4(1) (emphasis added).
[64] The determination of minimum-wage by a NGCA exists continuously since 1955 (Law 3239) but from a brief suspension during the dictatorship (Article 16 of the Legislative Degree 187/1969).

Pursuant to pressing demands by lenders,[65] Law 4172/2013 finally specified the special procedure of state determination of minimum wage outlined in Law 4093/2012[66] to be applicable not before 2017.[67] By way of reminder, during the crisis the minimum-wage was determined by the MCA 6/2012 which reduced the respective rates of NGCA (32% for young workers and 22% for the rest), and 4093/2012 which set the MW rates from 01.04.2013 (date when the three-month extension of the previous 15.07.2010 NGCA expired). So, the new MW method merely moved to *normalise* the crisis pattern.

According to the new mechanism, the MW is to be annually determined by a Ministerial Decision issued by the Minister of Labour after the required consent of the Ministerial Council with trade unions' role been relegated to a consultative one.[68]

Therefore, the crisis marked a critical juncture also for the Greek MW system. After almost 55 years and without proper consultation with social partners, collective autonomy lost its cardinal place for MW determination. The latter was transferred to the state. Interestingly, the very fact of lenders' pressure for designating a mechanism after the program of fiscal consolidation, soundly demonstrates that the CLL deconstructive measures are not of an exceptional character but aim to fundamentally alter the Greek CLL system.

It should be also noted that a principal argument for the statist determination of MW was its existence in 20 out of 27 European countries, thereby offering a real example of how convergence can act as a 'pulling force' for non-convergent systems.[69] Nonetheless,

[65] From May 2012, The Memorandum required from the Government the initiation of a consultation process with social partners under the (rather narrow-defined aim) of 'replacing the wage rates set in the NGCA with a statutory minimum wage rate legislated by the government in consultation with social partners' and 'to prepare a timetable for the overhaul of the national general collective agreement by end-2012' [Memorandum 2012 (n 14) paragraph 29].
[66] Article 1 (IA 11 paragraph1).
[67] Article 103 (2) of 4172/2013.
[68] Article 103 (4) and (5).
[69] Greek Government, Explanatory Note on Law 4173/2012 31 (in Greek).

Travlos-Tzanetatos is absolutely right to challenge this thesis that reasons only on the merits of comparative similarity, by counter-arguing that 'to the extent that [an institution less known to similar systems] reflects particularities and needs of the particular, historically defined legal and economic order, *this [difference] is an advantage'*.[70] Indeed, the problem of the transformation of the mechanism of MW mainly consisted in the violent and abrupt uprooting of an institution whose centrality for the identity of the modern Greek social state cannot be overstated. Such an uprooting exemplified ILO's broader comment on CLL reforms, namely that they were introduced 'in a manner which seems to be disconnected from Greek realities'.[71]

In reality, however, based on an *economised* assessment that 'the Greek minimum wage is also nominally higher than in the main competitors, notably neighboring countries and other Southern European economies',[72] the real function of the transformation was to offer decreased wage levels in long term than those that could have been achieved by the NGCA. Conceived likewise, the MW transformation should be treated as an intrinsic step in two strategies. The one was the *instrumental* 'fall to the bottom' movement for workers. Yet the symbolic dimension of a *state-based* MW determination is also important. The trade union function of *regulatory* collective bargaining (with effect extending beyond the parties so as to be distinguished from representative bargaining whose effect is only for the parties signing the agreement and their representative members)[73] was undermined. This development aligns with the overall direction of Memoranda, seeking to 'reduc[e] the scope for collectively bargaining

[70] Travlos-Tzanetatos, *Οικονομική Κρίση και Εργατικό Δίκαιο* (n 46) 345 (emphasis added).
[71] ILO, *High-Level Mission Report* (n 22) paragraph 302.
[72] European Commission, General Directorate for Economic and Financial Affairs, Occasional Papers 94, *'The Second Economic Adjustment Program of Greece'* (March 2012) paragraph 45.
[73] For the distinction between 'representational' and 'regulatory' collective bargaining see Keith Ewing, 'The Function of Trade Unions' (2005) 34(1) ILJ 1.

employment standards, in favour of legally binding minima'.[74] In short, another 'escape device' for workers was blocked.

(v) The Saga of De-Capacitating the Protective Function of Arbitration: The Fall of the Ultimum Remedium of Collective Regulation and Its Incomplete Restoration

During the crisis, the institution of arbitration was subject to a multitude of interventions, leading to a saga between the legislator and the Courts and to an *incomplete reversal* of the deconstructive effect of conditionality.

Initially, the law de-capacitated the protective function of arbitration by severely eroding the last protective vestige for the collective regulation of collective disputes.[75] The challenge strategically challenged two areas: (1) mechanism for recourse to arbitration and (2) scope of arbitration awards.

Regarding the former, the *protective* asymmetry, previously benefiting workers by reserving only for trade unions the right to recourse to compulsory arbitration in cases where they accepted the mediator's proposal and the employer rejected it, became the prime target of conditionality.[76] Conforming to the latter's stipulation, Law 3899/2010 extended the right of such recourse to both sides.[77] Yet workers retained the crucial right to unilaterally have recourse to arbitration but not for long.

Indeed, the MCA 6/2012 enacted a change that de-capacitated at once the arbitration's whole *ultimum remedium* function: *it mandated the consent of both parties for recourse to arbitration.*[78] Setting aside the fact that, as Papadimitriou rightly points out, this

[74] *Achtsioglou and Doherty* (n 45) 231.
[75] Katrougalos, *Η Κρίση και η Διέξοδος* (n 25) 236.
[76] *Memorandum 2012* (n 14) Structural Policies (c) paragraph 29.
[77] Article 16(1) of 1876/1990 as amended by Article 14 of 3899/2010. (amendment repealed by Article 3 of MCA 6/2012).
[78] Article 16(1) of 1876/1990 as amended by Article 3 of MCA 6/2012.

requirement makes ineffective and thereby conflicts with (the cardinal in the Greek system) duty for good faith negotiations[79] insofar as fully rewarding intransigence,[80] in times of crisis it essentially operates in favour of employers. This is so because the crisis-aggravated asymmetry between capital and labour power renders quite impossible the alternative collectivist resolution of collective disputes by an exercise of force (e.g industrial action) by workers. And, as Kazakos remarks, the unilateral recourse to arbitration was 'a guarantee that there would be a collective regulation and that the regulation of terms of employment would not be allowed to return to the individual employment contract'.[81]

This radical alteration should be considered in conjunction with the reduction of arbitration awards' scope, previously covering *all* aspects of a collective dispute.[82] Initially, Law 3899/2010 restricted the scope of arbitration awards only to the *basic wage*. Finally, MCA 6/2012 confined even more their scope by expressly prohibiting arbitration awards from containing the so-called 'preservation clauses'. These claused previously provided for the preservation of regulatory terms of previous collective agreements or arbitration awards.[83] A new set of macro-economic data to be considered by the arbitrator was also added. These include *inter alia* the 'economic conditions, progress in the reduction of competitiveness gap, reduction of labour costs per unit during the period of fiscal consolidation and the productive activity in the dispute-related sector'.[84]

However, pursuant to the STE case-law declaring the prohibition of unilateral

[79] Article 4 of 1876/1990.
[80] Papadimitriou, 'Η απώλεια των σημείων ισορροπίας' (n 19) 706.
[81] Kazakos, *Συλλογικό Εργατικό Δίκαιο* (n 5) 597.
[82] Article 16 of 1876/1990.
[83] Article 3(2).
[84] Article 3(3) of MCA 6/2012.

recourse as unconstitutional (see next Chapter for a detailed analysis of the decision),[85] the legislator complied by restoring the unilateral recourse mechanisms of arbitration and abolishing restrictions in the scope of arbitration awards.[86] Nonetheless, the devil hided in details. The effect of the restoration was restricted by two serious constraints.

Firstly, the new law established a very lengthy arbitration processes. The latter consisted of an arbitration of first instance, an arbitration appeal during which the first instance decision is suspended[87] as well as a judicial appeal to the ordinary courts. The time-consuming nature of the process is apparently inconsistent with the need for arbitration to promote rapid dispute resolutions so as to be effective and meaningful for unions. Secondly, the specified criteria to be taken into account by the arbitrators were maintained in a manifest labour market-friendly and thereby employer-friendly mode. More specifically, the criteria related to 'the developments and the economic situation of the weakest enterprises of the productive activity, which the collective agreements pertains to, progress in reduction of competitiveness deficit and reduction of labour unit costs during the period of the country's fiscal consolidation'.[88] At the same time, no explicit employee-friendly criteria or elements such as fair wages or indexing the level of wages in relation to the living standards were stipulated.

Hence arbitration stood as the sole case where a partial restoration of the edifice was achieved owing to a corrective judicial intervention (the only case in CLL so far). However, the restraints force us to talk about an 'incomplete restoration'. And, of course, this restoration came in force in October 2014 long after the institution was effectively annulled by the consensual recourse mechanism and the restrictions in the scope of

[85] STE (Council of State) Decision 2307/2014. See in more detail Chapter V Part 1 ii (b-2).
[86] Law 4303/2014.
[87] Article 4(3) of Law 4303/2014.
[88] Article 4(4) of Law 4303/2014.

awards thereby failing to prevent the rapid deterioration in terms and conditions of employment. Up to 2014, the overall effect in compliance with the lenders' dictates was the transformation of the *subsidiary* role of arbitration to collective negotiations to a *marginal* one.[89] The outcome was a direct undermining of collective negotiations since they are deprived of the vital for their existence and function subsidiary mechanism of arbitration.[90] It remains to be seen what would be the effect of this partial restoration.

In this context, the strategic de-capacitation of the protective function, even after its insurrection by the Courts from its previous 'functional disappearance',[91] undermined the CLL edifice by attacking the *ultimum remedium* for workers that stands firmly on the border between collective and individual negotiations. The new legislation only partially unsealed the escape door that was previously blocked pushing workers towards the asymmetrical individual negotiations.

3. The Dramatic De-Facto De-Regulation and the Non-regulatory Measures: An Overview

In line with the Crisis Equilibrium Model, the 'de-facto deregulatory measures' of CLL and the crisis' 'non-regulatory measures' of capital destruction (that is loss of the value of capital pursuant to the process of economic rationalisation) are here examined. We remind that 'de-facto deregulation' describes the process of de-construction of CLL in the actual factum of industrial relations, whereas 'non-regulatory measures' contain all

[89] Ioannis Koukiadis, *Συλλογικές Εργασιακές Σχέσεις Τομ..2* (Σάκκουλας Αθληνα-Θεσσαλονίκη 2011) 386 (in Greek).
[90] Kazakos, *Συλλογικό Εργατικό Δίκαιο* (n 5) 7.
[91] Giorgos Katrougalos, 'Το τέλος του εργατικού δικαίου; Συνταγματική αποτίμηση της ''αντιμεταρρύθμισης'' του Μνημονίου ΙΙ' 2012 (9) ΕΕργΔ 2012 637, 646 (in Greek).

those measures of capital destruction taken during a crisis for realizing the Crisis Equilibrium that are not related to CLL (though they affect it e.g dismissals).[92]

(i) De-Facto Regulation: Confirming the De-Centralized 'Fall to the Bottom'

Let us start with de facto developments. The available data (2010-2012)[93] demonstrated a perfect verification of the predicted *'decentralised fall to the bottom'* movement.

Firstly, in terms of decentralisation, there was a radical shift towards the enterprise level as *Tables 1a and 1b* show. Enterprise agreements experienced a 430% increase (from 227 in 2010 to 976 in 2012), whereas sectoral agreements (either by an agreement or by an arbitration award) fell by 60% (52 in 2010 to 20 in 2012) and occupational agreements (again either by an agreement or by an arbitration award) marked a decline by 72% (61 in 2010 to 17 in 2012). From the tables, the effective disappearance of arbitration awards in just two years is easily observable. From 26 and 13.1% of total collective agreements/arbitration awards (*joint total*) in 2010, there were only 8(!) (69% decrease) which amounted to only 0.8 of the joint total in 2012. It is remarkable that in 2012 from 976 enterprise agreements no one was referred to arbitration, thus showing the devastating impact of the *consensual* recourse to arbitration for the institution.

[92] See Chapter II Part 3(ii) on the Crisis Theorem.
[93] All data are taken (though some of them adjusted for presentation) from Christos Ioannou and Kostas Papadimitriou, *Συλλογικές Διαπραγματεύσεις 2011-2012* (ΟΜΕΔ 2013) (in Greek).

Table 1:

Table 1a Structure of Collective Negotiations – New Collective Agreements and Arbitration Awards (1990-2012)

Explanations: (1) CA: Collective Agreements (2) AA: Arbitration Awards (3) Total: Joint Total (CA+AA)

*Entry into Force of Law 1876/1990 **Entry into force of 3899/2010 ***Entry into force of 4046/2012

	OCCUPATIONAL			**SECTORAL**			**ENTERPRISE**		
	CA	AA	TOTAL	CA	AA	TOTAL	CA	AA	TOTAL
1990*	85	59	144	46	34	80	53	9	62
2000	76	19	95	98	17	115	122	6	128
2009	27	16	43	47	30	77	215	12	227
2010	47	14	61	31	21	52	227	11	238
2011**	22	6	28	23	12	35	170	9	179
2012***	10	7	17	19	1	20	976	-	976

Table 1b **Overall Number of CA and AA and their % composition**.

				%	
	CA	AA	TOTAL	CA	AA
1990	185	102	***287***	64.5	35.5
2000	297	42	***339***	87.6	12.4
2009	289	58	***347***	83.3	16.7
2010	306	46	***352***	86.9	13.1
2011	215	27	***242***	88.9	11.1
2012	1005	8	***1013***	99.2	0.8

From a person unfamiliar with Greek de-jure changes, Table 1a/1b could be perceived demonstrating a *'collectivist boom'* for Greek CLL,.There is a 288% in the *joint total* (352 in 2010 to 1013 in 2012) and a 328% increase in collective agreements (306 in 2010 to 1005 in 2012). Nonetheless, hiding behind the inflated numbers, is the *'fall to the bottom'* tendency, captured by Tables 2/3a/3b/3c.

In particular, Table 2 shows the rapid increase after 4024/2011 of the proportion of enterprise agreements (EA) concluded by association of persons. The latter gained a dominant presence as workers' collective bargaining entity for EA by representing 73% of the total number. In absolute terms, in 2012 there was a 23-fold increase of EA by association of persons from 30 in 2011 to 696 in 2012. Nonetheless, EA concluded by enterprise trade unions rose also in absolute terms by 72% (97 in 2011 to 167 in 2012) yet their share significantly declines (69% in 2011 to 17% in 2012). Conversely, primarily sectoral unions/federations concluded only 96 agreements in 2012 and their share in 2012 was only 10%. It is important to note that all these 96 agreements were concluded in the first semester of 2012. Therefore, there can be no doubt about the *prevailing* role in EA of *associations of persons,* an atypical trade union entity with virtually non-existent negotiation power.

Table 2 New Enterprise Agreements by Trade Union Entity (2011 and 2012)

Explanations: (1) EntUn: Enterprise Union **(2)** AssPer: Association of Persons **(3)** SectUn/Fed: Primary Sectoral Union and Federations

	NUMBER			***TOTAL***	%		
	EntUn	AssPer	SecUn/Fed		EntUN	AssPer	SecUn/Fed
2011	97	30	13	***140***	69	21	9
2012	167	696	96	***959***	17	73	10

The key to understand the *prima facie* 'collectivist boom' resides in the abolition of 'favourability' which enables enterprise agreements to derogate downwards from sectoral and occupational ones. 'Associations of persons' are nothing more than a pseudo-collective institutional carrier for realizing the 'fall to the bottom' and thereby de-facto deregulation. Table 3 on wages concluded by EA illustrates the downwards tendency. In overall (Table 3a), only 16.8% of EA stipulated no reductions while 13.9% making reductions up to 15% and 47.9% establishing the absolute minima, namely that of NGCA. Despite the general downward trend among all workers' entities, 'association of persons' EA tend to have by far the worse terms. If we were to use the sum of those providing more than 15% reduction or the NGCA level *(lower-level EA)*, then the 'lower-level EA' are 82% in 'associations of persons EA', 13.9 in enterprise unions EA and only 1% in sectoral unions EA (94.9% of them have stable wages) Therefore, the proposition that association of persons tend to facilitate EA with significantly inferior conditions finds a striking empirical confirmation.

Tables 3 Wages Concluded in New Enterprise Agreements (compared with previous agreements) in Total and by Trade Union Entity.

Explanation: (1) EA: Enterprise Agreements (2) % in Total EA: percentage of *total* number of enterprise agreements; (3) % in (AssPer, EntUn or SecUn): percentage in the number of EA concluded by the entity. (4) MW: Minimum Wage (5) National General Collective Agreement

Table 3a in Total

		NUMBER	% IN TOTAL EA
1	INCREASE	7	0.7
2	STABLE	157	16.1
3	UP TO 15% REDUCTION	50	5.1
4	MORE THAN 15% REDUCTION	136	13.9
5	NGCA LEVEL	467	47.9
6	STATUTORY MW LEVEL	12	1.2
7	OTHER	146	15

Tables 3b: Association of Persons

		NUMBER	% in TOTAL EA	% in AssPER
1	INCREASE	2	0.2	0.3
2	STABLE	7	0.7	1
3	UP TO 15% REDUCTION	28	2.9	4
4	MORE THAN 15% REDUCTION	117	12	16.6
5	NGCA LEVEL	461	47.2	65.4
6	STATUTORY MW LEVEL	8	0.8	1.1
7	OTHER	82	8.5	11.6

Table 3c: Sectoral Unions

		NUMBER	% in TOTAL EA	% in SecUN
1	INCREASE	1	0.1	1
2	STABLE	92	9.4	94.9
3	UP TO 15% REDUCTION	0	0	0
4	MORE THAN 15% REDUCTION	1	0.1	1
5	NGCA LEVEL	0	0	0
6	STATUTORY MW LEVEL	3	0.3	3.1
6	OTHER	0	0	0

Table 3d: Enterprise Unions

		NUMBER	% IN TOTAL EA	% IN EntUn
1	INCREASE	4	0.4	2.3
2	STABLE	58	5.9	33.5
3	UP TO 14% REDUCTIONS	22	2.3	12.7
4	MORE THAN 15%	18	1.8	10.4
5	NGCA LEVEL	6	0.6	3.5
6	OTHER	64	6.6	37
7	STATUTORY MW LEVEL	1		

So, the de-facto deregulation could be summarized as follows: '*a boom' of enterprise agreements concluded by association of persons which, if combined with the disappearance of arbitration (to be partially restored in 2014) and the suspension of favourability, amounted not to a collectivist but to a 'de-regulation boom' with a single effect: violent de-centralized fall to the bottom.*

(ii) Non-regulatory Measures: A Dramatic 'Capital Destruction'

During the crisis, there was a gigantic 'capital destruction' by which the capital (national and international) undertakes its requisite 'capital waste' through non-regulatory measures. This process was reflected in the six-year (2008-2013) recession of around 25%, average nominal wage reductions of 16.3 and average buying power reduction of

22.1, as well as falling domestic demand of 37.2% (in the period between 2009-2013). [94] More importantly, within the five year crisis period (2008-2013) 930.000 jobs were lost, a figure evaporating the entire job creation of 1992-2008(!).[95] As a result, official unemployment skyrocketed from 6.6% in May 2008 (and 12.0% in May 2010) to 23.1% in May 2012 and 27.2 in May 2014.[96] In particular, youth unemployment (15-24) reached from 19.6% in May 2008 (and 31.9 in May 2010) to the alarming 55.1% in May 2012 and 53.1 in May 2014.[97] So, if you are a young worker in Greece during the crisis the odds were that you are unemployed.

Beneath these figures which like seismographs detect the underlying 'capital destruction' of gigantic proportions lied a clear societal catastrophe. The latter was particularly manifest in the rising poverty levels which were the highest in EU (23.1 in 2012 from 19.7 in 2009),[98] the worsening health effect[99] and the increased suicide rates in a country previously having one of the lowest in the world.[100]

So, it was this spiral of destruction undertaken by the non-regulatory measures which CLL 'de-construction' eventually *complemented* and *enabled.*

[94]All Data from *INE-GSEE* (n 50).
[95] ibid.
[96] Data from the National Statistics Authority's (ELSTAT) press releases.
[97] ibid.
[98] This is the highest level in the European Union. Data from Eurostat.
[99] See Ilias Kondilis, Stathis Giannakopoulos, Magda Gavana, Ioanna Ierodiakonou, Howard Waitzkin and Alexis Benos 'Economic crisis, restrictive policies, and the population's health and health care: the Greek case' (2013) 103(6) American Journal of Public Health 973.
[100] See M Economou, M Madianos, LE Peppou, C Theleritis, A Patelakis, C Stefanis . 'Suicidal ideation and reported suicide attempts in Greece during the economy crisis' (2013) 12(1) World Psychiatry 53.

4. The Counter-Legitimation Force: A Contained Force for the Greek CLL

Chapter II argued that the counter-legitimation force is the countervailing force to the economic rationalisation.[101] It comes in two varieties or qualities: a *strong*, anti-capitalist one threatening to withdraw legitimation from capitalism *in toto* and a *weak* version resisting the particular reforms but not the capitalist system.

Given the ideological hegemony of the broader social-democratic culture in pre-crisis Greece,[102] the ideological, societal and political potentials for the weak force were largely (at least in comparative terms with Western Europe) non-depleted. For every additional shot of the attack on the social-democratic edifice by economic rationalisation, an intense 'weak'[103] counter-legitimation force was more galvanized, drawing more upon these reservoirs. Prior to looking into the 'Grand resolution' of the Crisis Equilibrium to which CLL fate is firmly attached, it is crucial to inspect its *two* highly interrelated manifestations at the (a) socio-cultural and (b) political-electoral terrains.

(i) The Socio-Cultural Form of Counter-Legitimation: The 'Protest Cycle'

Within the socio-cultural terrain, the counter-legitimation force (at least initially) drew on a vital resource offered in great supply, namely the effective converting of the 'private-individual' *dissatisfaction* with neo-liberal austerity into discrete 'active-collective' 'anti-austerity (or anti-Memorandum) *movement* or – better- *movements*'. This was translated as Kouvelakis observes (writing in end 2011) into 'a cycle of increasingly radicalized

[101] See Chapter II Part 3 (i-b).
[102] See Chapter III Part 3 (i-a).
[103] The 'weak' refers to the *type* of force while the 'intense' to its strength.

mass mobilization since May 2010, with huge demonstrations, general strikes and the occupation of Syntagma Square'.[104] Kouvelakis' comment fits Psimitis' (writing in 2011) characterization of 2010 protests as the potential start of a Tarrowan-type[105] 'protest cycle'.[106] Indeed, it was in this 'protest cycle' whose peak moments coincide with the austerity legislation enactment that the counter-legitimation's 'socio-cultural form' resides.[107] Since being unable to enter into detail, Sergi and Vogiatzoglou (covering the period up to May 2012) time-classification of the Greek anti-austerity movement in three periods is very useful. [108]

In the *first*, termed as 'traditional mobilization' (April 2010-April 2011), the movement had in its repertoire 'the usual general strikes, demonstrations, clashes with the police and protests in the majority of Greek cities'.[109] Within a succession of high-participation general strikes,[110] the movement peak was the 5 May 2010 strike demonstrations (coinciding with Memorandum I voting by the Greek Parliament) when 150,000 demonstrators protested in the National Parliament while strike participation reached 90% in most branches of the public sector, and 100% in many branches of the private sector.[111] It should be noted that, according to a poll, 68% of Greeks at that time

[104] *Kouvelakis* (n 2) 18.
[105] For the 'cycles of protest' as a 'phase of heightened conflict and contention across the social system' see Sidney Tarrow, *Power in Movement: Social movements, collective actions and Politics* (CUP 1994) 153 and Chapter 9 in total.
[106] Michalis Psimitis, 'The Protest Cycle of Spring 2010 in Greece' (2011) (10) 2 Social Movement Studies 191.
[107] For an excellent critical and philosophical account of the resistance and protests in Greece during the crisis see Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013).
[108] Vittorio Sergi and Markos Vogiatzoglou, 'Thing Globally, act locally: Symbolic memory and global repertoires in the Tunisian uprising and the Greek anti-austerity mobilization' in Cristina Flesher-Fominaya and Laurence Cox (eds), *Understanding European Movements: new social movements, global justice struggles, anti-austerity protest* (Routledge 2013) 224.
[109] ibid.
[110]For the strikes see *Psimitis* (n 106).
[111] *Newspaper Ethnos* (Athens, 6 May 2010).

'backed more strikes and protests against the measures' thus showing overwhelming societal support for the protests.[112]

The *second* period was (May-August 2011) effectively defined by the emergence of the non-party *Greek Indignados movement,* known as the 'occupy the squares' movement. The square movement attracted the overwhelming support of the Greek society[113] and 'managed to mobilize more than 25 percent of the country's population against the harsh austerity measures imposed by the Greek governments'[114] and used innovative tools of daily protests and meetings that made, though, a certain *routinization* of protest. The movement, however, quickly disappeared after the autumn of 2011, not least because of police repression. Yet, as Douzinas remarks, 'the experience and historical memory of the occupations had created a legacy which had changed the meaning of politics'.[115]

The third period [September 2011- May 2012] termed as *Labour Mobilization and Civil disobedience*:

> 'is characterized by the massive participation of workers' organizations, and by the widespread discontent among various social groups, mostly expressed through acts of civil disobedience inter alia refusal to pay newly-imposed taxes, verbal and physical attack on politicians in public space, protesting in previously non-politicized settings'.[116]

In this period, the 48-hour strike on 19-20 October 2011 during which around 300,000 demonstrated in Athens and at least 200,000 in the rest of the country (out of a population of 11 million) clearly reflected a wide mobilization.[117] Protests and strikes continued

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[112] Public Issue Poll for Kathimerini (May 2010) as referred in Reuters <http://www.reuters.com/article/2010/05/10/us-greece-poll-idUSTRE64718W20100510> accessed 6 February 2014.
[113] In June 2011, 86% of Greece had a favourable opinion of the 'occupy the squares movement' (Public Issue, June 2011).
[114] *Sergi and Vogiatzoglou* (n 108) 220.
[115] *Douzinas* (n 107) 150.
[116] ibid 224.
[117] Estimation from *Kouvelakis* (n 2) 18.

throughout the 2012, gaining significant traction in February 2012 (during the period of voting of the second Memorandum). However, there is a relative decline afterwards (up to January 2015), not least, because as we will see the 'protest cycle' entered an 'electoral cycle' in May and June 2012. Nonetheless, the decline of protests does not reflect a fading away of the underlying anti-austerity sentiment, but only concerns its protest expression. It could be attributed to a certain fatigue of the Greek society, the culture of *fatalism* about the inevitability of reforms as well as to the transfer of counter-legitimation to the political sphere in May-June 2012.

It is important to stress that the deployment of legal strategies, principally through litigation, has been an intrinsic part of this protest cycle. Regarding CLL, trade unions have pursued a strategy of litigation in different *fora*. Cases have been broughtin domestic courts, most notably for CLL in the Council of State[118] and to the ILO supervisory bodies.[119]

A reflection on the 'protest cycle*'* generates two broader conclusions. Firstly, the counter-legitimation force *qua* the ascending part of the protest cycle was electrified by the protecting confluence of two elements: the easiness of constructing an 'injustice frame'[120] about austerity measures enabled by the pre-crisis social-democratic hegemony combined *with* a master ''frame' articulated on the corruption of politics, symbolic localized of it in the parliament''[121]. The CLL, to the extent of its deconstruction made as part of austerity, entered conveniently and easily into the 'frame of justice'.

[118] Council of State Decisions 668/2012 and 2307/2014. See Chapter V Part 1 ii(b-2) for analysis.
[119] ILO, *High Level Mission Report* (n 22); ILO CFA, *Conclusions* (n 38). See Chapter V Part 2 i for detailed analysis.
[120] For the 'injustice frame' as a social movement's mode of discourse see William Gamson, *Talking Politics* (CUP 1992) Chapter 3; See also for the role of injustice as a factor *inter alia* for worker's mobilisation John Kelly, *Rethinking Industrial Relations: Mobilization, Collectivism and Long Waves* (Routledge 1998) Chapters 4 and 5.
[121] *Psimitis* (n 106) 196.

Consequently, it was positioned at the very sharp edge of the counter-legitimation force. As a result of this confluence, Greece experienced a mild 'organic crisis', the latter defined by Gramsci as when 'social classes become detached from their traditional political parties'.[122] These crises occur, according to Gramsci, when the masses 'have passed suddenly from a state of political passivity to a certain activity'.[123] Secondly, in this protest cycle, the trade union movement played a central role (though the latter should not be exaggerated). The strikes constituted a central pole for the mobilization of the anti-austerity movement. It seems that the moment of destruction of CLL pushed the trade unions into re-integrating with the social forces. Trade unions were also active in the legal strategies.

So, the 'protest cycle', which was relatively contained after starting from high levels, indicated a strong 'weak' counter-legitimation force which tried to draw on its social-democratic reservoirs for gaining intensity, yet as argued below, it suffered from strategic containment.

(ii) The Political-Electoral Form of Counter-Legitimation: The Electoral Cycle

The strong 'political-electoral manifestation' of the CF is *distinctive* of the Greek crisis case, since in other austerity-stricken countries (like Spain, Ireland or Portugal), the 'protest manifestation' has failed to re-structure the traditional political map in noticeable ways so far. Evidently, this manifestation acquires immense significance given its direct potential, at least theoretically, to have been reflected into a radically anti-austerity Government agenda annulling the reforms. This could be termed as the threat of having the *'counter-legitimation force in state power'*.

[122]Antonio Gramsci, *Selections from the Prison Notebooks* (Lawrence & Wishart 1971) 210.
[123] ibid.

More specifically in May and June 2012 parliamentary elections, the CLF (Counter-legitimation Force) erupted as a long-suppressed 'electoral volcano' over-sweeping a politically stable 34-year or so edifice dominated by the rivalry of PASOK and ND (usually gathered together more than 80% of the vote). Indeed, the elections were delayed as much as possible between May 2010 and May 2012, a period during which a technocratic Government (led by the ex-Vice President of the ECB Loukas Papademos) was established and supported by the traditional political rivals (PASOK and ND) who joined their forces for implementing the new round of austerity measures (most notably Memorandum March 2012) in the face of increasing public discontent.

The elections could be described as marking a cathartic collapse of the old two-party system which supported austerity. To be sure, June 2012 elections produced a *pro-bailout government* (despite an anti-bailout majority), assisted by the 50-seat premium that was granted (pursuant to the Greek electoral system) to ND (despite receding from 33.5 in 2009 to 29.7 in June 2012) as the first party (principally voted by older and non-productive forces of society fearing a eurozone exit)[124] and the fragmentation of anti-bailout parties.

However, the dramatic 72% fall of PASOK (from 43.9 in 2009 to 12.3 in June 2012) was an event of historical significance as was the party that has previously expressed and consolidated the 'social-democratic hegemony'. Indeed, its demise was a sign of the latter's politically autonomous persistence.

But the most important manifestation of this form of counter-legitimation was the 620% rise of the radical left-wing and anti-austerity minor party SYRIZA to the second place (from 4.5% in 2009 to 27.9 in June 2012) as well as the overall increasing share of

[124] See Tables in Yannis Mavris, 'Greece's Austerity Election' (2012) 76 NLR 95.

the left amounting to around 38% of the vote.[125] As Mavris notes, 'for the first time since the 1950s, the left is at the heart of political developments, rather than being consigned to the margins'.[126] This trend was confirmed in the 2014 European Elections. Syriza topped the polls with 26.60% of the votes with New Democracy being distant second with 22.71% and PASOK gathering a historically low of 8.02%. It was characteristic and symbolic that the first proposal (unsuccessful) of law introduced by SYRIZA was the restoration of the 'after-effect' of collective agreements and the suspension of the law reducing the NGCA-agreed minimum wage.

In essence, Greece's political system stood (in late 2014) in this Gramscian moment where the 'old is dying and the new cannot be born'.[127] The death of the 'old' was not natural but the *concrete* result of the counter-legitimation force as principally expressed by the rise of the anti-austerity party SYRIZA threatening to annul the reforms and the disappearance of the pro-austerity PASOK. However, one should be careful not to miss that the channelling of the counter-legitimation in the 'electoral cycle' associated with a concomitant reduction of the 'protest cycle' functioned also as a containing device. It put the counter-legitimation force into the capitalism's 'privileged arena' of economic rationalisation, namely *routine electoral politics*.

Yet the fact remains that the counter-legitimation force acquired a *distinct* political-electoral shape but, for reasons we now turn, failed to be *'a counter-legitimation force in state power*'.

[125] Sum of votes of SYRIZA (26.89), Democratic Left (6.25), KKE(4.5), ANTARSYA(0.33).
[126] *Mavris* (n 124) 96.
[127] *Gramsci* (n 122) 276.

(iii) The Counter-Legitimation Force within the 'Grand Resolution' of Greek Crisis Equilibria: Strong in Intensity, Weak in Quality and Weaker than the Economic Rationalisation Force

What is the dialectic between the economic rationalisation (ERF) and counter-legitimation forces (CLF) in the Greek case? At first, it is obvious that *both* ERF and CLF reached an extreme intensity, thus composing a 'high-tension' (strong by both sides) *Crisis Equilibrium.* For the latter's stabilisation *either* the ERF *or* CLF should have been contained. A pristine case of 'crisis dilemma'[128] arose.

The actual result had been a one-sided resolution in full conformity with the ERF dictates. The CLF suffered from serious 'strategic containment', which purported to prevent it from transforming into a '*counter-legitimation force in state power'.* Very briefly, three sources of containment could be identified: (1) manifestation containment, (2) ideological containment by attacking the 'reservoirs' and (3) the effort of disguising the ERF by discursive dislocation.

In virtue of the significant social-democratic reservoirs of Greek society and the intense pressures for economic rationalisation urgently demanding its destructive fast-pace realization, no time existed for a swift neo-liberal 'ideological-cultural transformation' of the Greek society. Consequently, containing, at least, the *manifestation*s of the counter-legitimation force presented the only alternative. In such strategic context, the containment took the initial form of election delaying so that the austerity measures implementing the ERF could be taken. Of course during the 'holding back' period of democracy[129] required for the *passage of the ERF*, the political system

[128] For the concept see Chapter II Part 3(iii).
[129] For crisis of democracy as a phase of the crisis see Catherine Barnard, 'The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective' (2012) 41(1) ILJ 98, 99.

was entirely shaken, discredited and often humiliated[130] and a major Greek political party (PASOK) disappeared. The old rival political elites were unified under the direct pressures of an overarching economic and European elite. Papademos' technocratic government established by the EU initiative which was supported by ND and PASOK perfectly exemplifies this unification. Eventually, the containment manifested in the formation of a '''Holy alliance against SYRIZA'' by international (mainly EU) and domestic media and elites[131] building on the fear factor of a threatened Eurozone exit.[132]

The second containment type consisted in attacking the ideological potential through using the familiar neo-liberal TINA (there is no alternative) narrative for making Greeks accepting austerity as a no-alternative route. This effort was intensified by various interventions by European governments, EU and IMF officials threatening Greece's exit from the Eurozone and the State's default. As a result, a containing culture of fatalism' was cultivated in Greek society, perceiving austerity as an irresistible fate 'imposed from outside'. Whereas economic rationalisation was *strengthened* by the international sources through the intensification of the TINA thesis, the counter-legitimation force received no such boost. In turn, such an *asymmetry* could not but directly harm the CLF.

The last containing strategy was to try to 'hide under the carpet' the ERF by the means of *discursive dislocation,* meaning the deliberate alteration of discourse so as to be harmless to capitalism. More specifically, the 'pro-austerity forces' were disguised as the 'European modernizing' front accusing the 'anti-austerity' proponents as 'the anti-

[130] The dismissal by the European leaders of the Prime Minister's proposal George Papandreou for a Greek referendum in November 2011 is an example of such humiliation.
[131] *Mavris* (n 124) 98.
[132] For fear in 2012 Greek Parliamentary Elections see Elias Dinas, Lamprini Rori, 'The 2012 Greek Parliamentary Elections: Fear and Loathing in the Polls' (2013) 36 (1) West European Politics 270.

European backwards one' or the 'lobby of drahma' (the previous Greek currency).[133] In addition, a narrative of austerity as the deserved fate for 'a nation leaving beyond its means'[134] which was often associated with stereotyping of Greeks as lazy, unproductive and free-riders,[135] aimed at dislocating the discourse from the *capitalist reconstruction* as reflected in the ERF.

In this context, the contrasting picture of Greek protesters gathered in Syntagma Square while a cracking political system was voting on austerity and the global (or, at least, the Eurozone) eye was centred on financial markets/credit rating agencies visualizes the following: *a moment where the conflict between economic rationalisation and counter-legitimation appeared naked in the open sky, a rare 'window' where social agency conflicts undistorted with the naked capitalist logic.*

Truly, the economic rationalisation Force operated as a fast-moving 'Damocles Sword' that sacrificed the political system, long-term societal values and traditions including democracy in the altar of its urgent realization by 'capital destruction'. The counter-legitimation force, despite its intensity, was still weak (not anti-capitalist) *in quality*. It seemed that only a *strong* anti-capitalist mobilization could have reached the counter-force *heights* proportionate to resist the gigantic magnitude of economic rationalisation.

[133] See 'Samaras says Tsipras [SYRIZA Leader] serves pro-drachma lobby' article in Ekathimerini 26 May 2012**.**

[134] See for instance Oli Rehn's (Vice President of the European Commission) Speech to the European Parliament, (12/378 22 May 2012) 5. 'After living beyond its means for too long, the journey Greece is undertaken is difficult and demanding'.

[135] For international media portrayal see the excellent account of George Tzogopoulos, *The Greek crisis in the media: stereotyping in the international press* (Ashgate 2013).

In short, we can say that the 'Grande Resolution' favouring economic rationalisation essentially constituted the result of the CF being *Strong in Intensity, Weak in Quality and Weaker than the Economic Rationalisation Force.*

And it was only in this '*Grande Resolution'* that CLL'S deconstruction could be adequately comprehended and contextualized. Hence the labour law scholar should not make the grave mistake of dismissing preceding enquiry as analytically irrelevant. On the contrary, it was the most pertinent for accounting for CLL's edifice attack.

5. Putting the Crisis Equilibrium Pieces Together: A Critical Assessment of Greek Collective Labour Law's Crisis Trajectory

After gathering the Crisis Equilibrium model pieces, the enquiry undertakes the critical synthetic exercise of assessing the CLL Crisis trajectory (up to 2013). This final part provides answers to the following questions: *(a) Which was the 'crisis movement' of Greek CLL (b) Which was the relation between the 'Grand Resolution' and 'CLL Resolution' and (c) How the 'crisis movement' is integrated within the macro-historic Greek CLL trajectory?*

(i) The Crisis Movement of CLL: Hollowing out its 'protective core' by 'neo-liberal colonization'

We here advance the characterisation of the crisis movement of Greek CLL as the '*hollowing out of its protective core by neo-liberal colonisation'*. This thesis contains two descriptive claims. The first is quite evident from preceding observations and concerns the neo-liberal direction of reforms. The second, however, deserves proper attention as not hitherto illuminated. It relates to the fact that the reforms, rather than formally re-

writing the constitution or the entire CLL legal structure, targeted key provisions (the 'core') previously granting and consolidating the protective character of the pre-crisis Greek CLL and shaped them into a neo-liberal direction (hence neo-liberal colonisation). In short, the *qualitative* effect of the reformed provisions far surpassed the *quantity* of reforms or their numerical proportion to the overall CLL provisions.

For justifying and clarifying this thesis, due emphasis should be put to the *locus* of the attack by the Memoranda legislation, before discerning this core which was subject to neo-liberal colonisation. In particular, the attack was directed towards the *legislative material* of the Edifice, predominantly on Law 1876/1990 on collective agreements and arbitration. In contrast, the constitutional material remains (at least formally) unaffected but, in virtue of losing its 'legislative protective layering', operated now defensively as shown in the next Chapter. No surprise here. The constitutional amendment is a lengthy and politically contentious process. Similarly, the 'ideological-cultural material', despite suffering under 'containment' by the TINA (there is no alternative) narratives, largely persists. Therefore, in schematic terms, the attack focused on the removal of the crucial protective 'legislative layering' from the Edifice thereby leading to its effective de-stabilization and collapse.

The interesting observation, though, relates to the mode for such removal. As Kazakos points out, 'the system of collective regulation (with collective agreements and arbitration awards) is challenged *with surgical attacks without the Law standing at the heart of the system of collective agreements and arbitration, namely 1876/1990 being abolished'.*[136]

Kazakos' observation hits the nail on the head. This is because the attack did not alter, in formal terms the entire pre-crisis legislative substratum or abolish the 1876/1990. It

[136] Aris Kazakos, 'Το Εργατικό Δίκαιο την Εποχή των Μνημονίων' (2012) 60(1) Νομικό Βήμα 2842, 2845 (in Greek).

rather assumed the shape of surgical modifications. *Surgical* here describes the replacement of those 'core or key provisions' necessary for diluting the law's protective effect. Indeed, Law 1876/1990 was carefully amended for withdrawing this protective core.

Which were those *core* legislative movements producing the 'neo-liberal colonisation' effect? Let us briefly summarise the analysis in Part 3. Suspension of favourability initially destroyed the protective floor and then de-centralization towards the enterprise level by the dominant associations of persons (as verified by data presented above) that lack strong negotiation power *ensures* this fall. At the same time, the de-capacitating of the protective function of arbitration as the *ultimum remedium* (and its effective disappearance as shown by the data) of collective regulation to be partially restored in 2014, the multiple interventions in collective autonomy and the erosion of the 'after-effect' sealed the escape doors for workers. On top of this, the transfer of MW from collective autonomy to the state (both during and for after the crisis) blocked an additional 'collectivist escape' for all workers.

And which were the other non-core provisions? These were the provisions like those on the content and levels of collective agreements, the automatic extension of enterprise agreements, the good faith obligation for collective bargaining, the institutions of mediation, conciliation and arbitration as well as the protective guarantees for the right to strike and trade union guarantee freedoms of 1264/1982. All these provisions remain formally intact yet operate within a radically different framework and cannot deploy their protective effect.

Therefore, whilst no doubt arises with regard to the CLL's movement 'from a quite protective system for the workers towards an over-flexible system'[137] the way that this movement is realised also merits attention. It proceeds by the replacement of a pre-crisis *protective* core with a *neo-liberal* core imported by bailout conditionality and secured by a submissive labour constitution.[138]. And this 'neo-liberal core' *formally cohabitates* in the same Law with pre-crisis provisions of 1876/1990 which, having been initially drafted under the 'protective core', now they have their protective functions undermined. The new core reflects the broader neo-liberal hostility towards trade unions and non-individualised contract collective regulation. Indeed, this hostility departed from subjecting CLL's legitimation to an *economized* competitiveness-oriented 'straitjacket' based on the overarching aims of protection of sanctity of contracts and of the individual right to freedom of action, expression and choice.[139]

The new 'neo-liberal core' was placed by the 'crisis legislation stealth' according to which 'the collective negotiation appears to have new functional aims, […] that is not to always to seek amelioration of social framework, but often to deconstruct it'.[140] As crisis changes feature just with one or two lines inserted into the respective parts of the law, we can talk about surgical neo-liberal colonisation. And as evident from previous analysis, CLL crisis alterations should be holistically treated as an organic whole purporting to jointly and cumulatively realize a rapid *'fall to the bottom'* for workers by 'overturning the static balance of collective negotiations [and] de-constructing the mechanism of production of collective regulation'.[141]

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[137] Panagiotis Kyriakoulias, 'Οι Εργασιακές Σχέσεις μετά το Μνημόνιο' (Εθνικό Ινστιτούτο Εργασίας και Ανθρωπίνου Δυναμικού Μάρτιος 2012) 5 (in Greek).
[138] See Chapter V Part 1(i).
[139]David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 64.
[140] Papadimitriou, Η απώλεια των σημείων ισορροπίας (n 19) 712.
[141] Kazakos, *Συλλογικό Εργατικό Δίκαιο* (n 5) 6.

So, we now arrived at the deep underlying essence of CLL crisis reforms. Their overall intention and effect was to redistribute 'the regulation of conditions of employment from the collective to individual level, in other words to the employer's hands'[142] which as Kouzis underlined 'dangerously extend the enclaves of ''labour medievalism'''.[143] Crouch made a similar observation in his statement that Greek workers 'faced with a choice between defending certain past social policy achievements that have ceased to have future utility and giving these up *in exchange for nothing other than full exposure to the insecurity of market forces*'.[144] In this context, Katrougalos perfectly summarizes the overall purpose as for new labour relations 'to be as de-centralized and de-regulated as possible, ideally at the level of individual employment contract or otherwise at the level of enterprise'.[145]

So, the *'hollowing out of the protective core of CLL by neo-liberal colonization'* firmly moved along the path of individualization and de-collectivization of employment relations. A paradigm shift took place, which as Yannakourou and Tsimpoukis captured, consists 'in the replacement of the after war humanitarian model with a neoliberal economic model of market supremacy and precedence of economic freedom over labour rights.[146] Along similar lines, Papadimitriou has spoken about a *new juridical nature* of deregulation,[147] echoing Achtsiouglou and Doherty observation regarding the infusion by the Memoranda of a 'competition principle' to the Greek CLL.[148]

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[142] ibid.
[143] Giannis Kouzis, 'Το Εργασιακό Τοπίο στην Ελλάδα μετά το Μνημόνιο' (2011) 6 Ενημέρωση 1 (in Greek).
[144] Colin Crouch, 'Entrenching neo-liberalism: the current agenda of European social policy' in Nicola Contouris and Mark Freedland (eds), *Resocialising Europe in a time of Crisis* (CUP 2013) 43-44.
[145] Katrougalos, *Η Κρίση και η Διέξοδος* (n 25) 223.
[146] *Yannakourou and Tsimpoukis* (n 43) 368-369.
[147] Costas Papadimitriou, 'The Greek Labour Law face to the crisis: A dangerous passage towards a new juridical nature' (2013) European Labour Law Network Working Paper Series No. 3 (December 2013).
[148] *Achtsioglou and Doherty* (n 45) 231-239.

To be sure, this neo-liberal movement expresses only a *dynamic* assessed by reference to the initial protective departure point. Hence it does not mean that, in absolute terms, the CLL system is now in the neo-liberal end (particularly compared to UK) but that *it is in on its way*. Nonetheless, it was the *high-speed* nature of the movement that stands out as a unique feature. As Kouzis underlines, the innovation is not necessarily the measures themselves which are to found already scattered in a number of countries 'but the fact that measures of such quantity and content are taken in the duration of few months, provoking with their brutality, social cruelty and the fury against the entire working class'.[149]

To sum up, our finding is the following: *the crisis trajectory of CLL effectuated a rapid drive towards the neo-liberal end by the method of a legislative replacement of its protective core ('core provisions') with a neo-liberal one so that the remaining other provisions and the formally intact constitutional layer could not produce their protective effect.*

(ii) The Heteronomy of 'CLL resolution' to the 'Grand Resolution': The Crisis Theorem in Full Action

In the previous part, we identified the 'Grand Resolution' of the Greek Crisis Equilibrium between economic rationalisation and counter-legitimation. How does, though, the *'Grand Resolution'* relate to the *'CLL resolution'* taking the form of the neo-liberal movement discerned above?

Our answer is clear and unequivocal. We find a *relationship of Heteronomy.* The CLL resolution is *fully dependent* on the 'Grand Resolution'. So much is its dependence, that

[149] *Kouzis* (n 143) 4-5.

the distinction between the two resolutions becomes wholly blurred. The economic rationalisation pro-austerity forces expressed the *'urge for death'* for CLL and the anti-austerity counter-legitimation forces the *'urge for life*' for CLL. It was as simple and clear-cut as this. Evidently, the life/death question is not determined in academic classrooms, by heritage or by the civil law origin of Greek CLL. It is merely linked to the 'Grand Resolution'. And since the 'Grand Resolution' opted for economic rationalisation due to its *relative* strength over counter-legitimation, CLL's demise was inescapable.

Let us now examine this life/death conflicting dynamic for Greek CLL through the lens of the *Crisis Theorem* introduced in Chapter II. The reader should be reminded that that the theorem read as follows:

Economic Rationalisation Force (ERF) - Counter-Legitimation Force (CLF) [Crisis Equilibrium] => Regulatory Measures (RM) + Non-Regulatory Measures (NRM)[150]

Now we put the Theorem in action for the Greek case. Indeed, it is a *sequence* game in which five stages could be identified.

The first corresponds to the 2008-2010 crisis period. In the latter, the Greek ERF was capable to be fullfiled 'non-regulatory measures' as evidenced by the pre-2010 recession and the rising unemployment. This was sufficient at the time.

In 2010, though due to the debt crisis and the threat of Greek default which could have unleashed domino effect in the global and Eurozone economy, the Greek ERF was intensified by being *fully tied* to the global economic rationalisation. *Hence the ERF part in the second phase started to dramatically increase.* Now, the 'non-regulatory measures' were not enough for the necessary capital destruction. So what happened?

[150] See further Chapter II Part 3(ii).

In the third stage (as predicted by our analysis of the Theorem in Chapter II) the *heightened* ERF, in the face of insufficient capital destruction by non-regulatory measures, demanded for its realization *regulatory* measures. A dominant part of these measures was the *de-jure* deregulation of CLL. Indeed, one could not find better verification of the theoretical findings than the de-construction of CLL based on its treatment as necessary for 'internal devaluation', the metonym for 'capital destruction'. However, now it was for the law of action-reaction to be tested by the counter-legitimation force.

This led to the fourth stage. Given the ideological, political and social reservoirs amassed by the hegemony of the social-democratic left, the CLF respectively gained intensity as testified by its 'protest' and 'electoral' cycles. Hence each additional layer of regulatory measures could lead to a further increase in Counter-Legitimation force. However, at the same time, because the CLF was *weak* (not anti-capitalist) in quality it could not check the rising ERF.

So, how the ERF reacted to the rise of CFF? Well, first of all, because the threat of radical change as derived from the ascending CLF, triggered immediate reactions to the finance markets, *there was an automatic increase* in the ERF. True, the more the protests in Greece gained in intensity, the more the bonds spreads skyrocketed thereby entailing that more economic rationalisation was needed. In parallel, though, there were strategies of 'containment' of CLF as described in the previous part that blocked it from being 'counter-legitimation in state power'. As predicted by our theoretical analysis, in the absence of an exceedingly high CLF, the system finally realized a one-sided ER-oriented resolution as the ERF was stronger than the CLF.

Of course, stages 3-5 were played repeatedly for every additional round of austerity measures. There was a clear cycle between higher ERF calling for regulatory deconstructive measures which increased the CLF and the ERF for restarting a new cycle.

So, we arrived at a definite conclusion for the Greek Crisis CLL trajectory: *it was heteronomous and fully subsumed under the interplay between economic rationalisation and counter-legitimation forces.*

(iii) Integrating the Crisis Movement into the Greek CLL Trajectory: A Regressive Leap Towards Its Pre-History

With extreme caution as soon as we are conscious that contemporary writing deprives us of the benefit of looking by time-distance the current path, a central macro-historic comment on the crisis movement is advanced: *it represented a regression towards the Heritage Age of immaturity or of CLL (pre-1955, or at least pre-1974) where the authoritarian construction of employment relationship was the norm.*

Indeed, as Travlos-Tzanetators underlines, 'the rational and teleological foundations and the doctrinal and principled identity of labour law, as formulated and formed in the past sixty years, are under attack'.[151] Metropoulos similarly observes, at a theoretical level, the Memoranda provisions 'dilute the value basis of the law of the weaker party in the employment contract' by realizing a 'radical conservative re-regulation' of the Greek system of employment relations[152] Koukiadis also comments about the destruction of

[151] Dimitris Travlos-Tzanetatos, 'Οι συλλογικές συμβάσεις εργασίας στη μνημονιοκρατούμενη Ελλάδα' (2012) 9 ΕΕργΔ 713, 717 (in Greek).
[152] Alexis Metropoulos, 'Από την 3η Σεπτεμβρίου στο Μνημόνιο' (Λιβάνης 2011) 496 (in Greek).

collective autonomy as meaning also that 'we come back to a *conflictual system* that was characterizing the pre-1990 industrial relations'.[153]

Therefore, if we were to adopt a 'bird's eye view' of the trajectory and with the benefit of hindsight, the following claims could be made.

Firstly, the 1974-2010 seemingly represented the adulthood period of CLL with 1990 as perhaps the *peak* of a cycle. From 2010, the 'Crisis Movement' brought this period to an abrupt end. Hence it was definitely a moment of 'path departure', the latter defined by Hepple and Veneziani as 'when a juncture is reached at which substantively different laws and policies begin to be followed'.[154]

Secondly, the Crisis Movement represented a regression step towards the immature Heritage of CLL in which authoritarian construction of employment relationship was the norm and collective autonomy was inexistent. Having said that, it is important to stress that the *novel crisis instrument of decentralisation* to enterprise level which continues a trend initiated by 1876/1990 (though previously favourability prevented the 'fall to the bottom' tendencies) represented only a new way to arrive at the same destination to which in the Heritage Years was reached through state paternalism: unilateral construction of employment relation.

Thirdly, and flowing from the first two, it could be said that the *Crisis Movement* effectuated a *gigantic leap* towards the pre-history, thereby marking the end of a confluence between stable democracy in the post-dictatorship era and the protective CLL edifice. The temptation of striking resemblance with the 'Crisis of Democracy'[155] context

[153] Ioannis Koukiadis, 'Δίκαιο της κρίσης, δίκαιο της μεταρρύθμισης ή κατάλυσης της προστασίας της εργασίας;' (2012) 9 ΕΕργΔ 647, 655 (in Greek).
[154] Bob Hepple and Bruno Veneziani, 'Introduction' in Bob Hepple, Bruno Veneziani (eds), *The Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004* (Hart 2009) 21.
[155] See fn 129 above.

in which the collapse of the edifice is undertaken could not be resisted. It seems that CLL fell along with democracy in Greece, just like it was constructed with democracy.

Of course, this *gigantic step* towards pre-history did not mean its disappearance insofar as starting from a protective departure point. History is to show whether the crisis is the first or the last step towards this direction. Nonetheless, as Papadimitriou powerfully states 'it seems that with the recent legislation there has been provided the tools for the tracing of path towards social regression'.[156]

6. Conclusion: Summary of Findings

The Greek pre-crisis edifice collapse came with a dramatic 'bang' - an abrupt and violent destruction. The Chapter elaborated an account of the crisis developments based on- and as a confirmation of- the Crisis Equilibrium theoretical framework. More specifically, it identified the *economised-fiscal* philosophy of reforms as an economic rationalisation demanding capital destruction. Then it mapped the legislative attack on the edifice occurring in multiple fronts. Subsequently, it traced the non-regulatory measures and the de-facto de-regulation. It assessed the *protest* and *electoral* cycles of the heightened counter-legitimation force giving rise to a high-visibility dynamic between high levels of economic rationalisation opposed by significant counter-legitimation forces of social protest. The outcome was the prevalence of the Economic Rationalisation force, due to the identified sources of containment of the counter-legitimation force. Ultimately, the Chapter concluded that the attack should be seen as realising the 'hollowing out' of the protective core of CLL by 'neo-liberal colonisation' as well as finding CLL's 'Crisis

[156] Papadimitriou, 'Η απώλεια των σημείων ισορροπίας' (n 19) 712.

Movement' as *heteronomous* to Crisis Equilibria and a major regressive leap towards the immature Heritage of Greek CLL.

A crucial analytical piece, though remains unexplored. Our enquiry immediately turns to inspecting the constitutional and international dimensions. These examinations are to further illuminate the origin of the 'bang'.

V

The 'Submissive' Labour Rights Sphere: How IMF-EU Bailout Conditionality 'Trumped' the Constitutional and Transnational Labour Rights

Constitutional entrenchment has been a central and distinctive (particularly when compared to the private law-oriented UK labour law) feature of the Greek CLL. The latter is firmly anchored in the public law domain.[1] After reading the previous Chapter, though, the reader may reasonably pose the following questions: why did the normatively supreme labour constitution fail to deter CLL de-jure deconstruction? Why was labour constitutionalisation ineffective? For answering these questions, there is need to chart the specific crisis process of *disembedding* the domestic labour constitution, a task undertaken by this Chapter.

Contiades and Achtsioglou usefully identify four types of constitutional reactions towards the crisis: adjustment, submission, breakdown and stamina.[2] Submission, which is relevant for our enquiry, is defined as an instance where 'exposed to informal change brought about by the crisis-induced rule production, *some constitutions pathetically witness the erosion of their functions'*[3] and the constitution 'seems to simply succumb to all deviations without authoritatively providing guidance and limits'.[4] As submission is

[1] See Chapter III Part 3 i(b).
[2] Xenophon Contiades and Alkmene Fotiadou, 'How Constitutions reacted to the Financial Crisis' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis* (Ashgate 2013) 46-52.
[3] ibid 49 (emphasis in the original).
[4] ibid.

not accompanied by formal constitutional amendment, it represents a type of 'functional disembeddedness'.

Building on Acthsioglou-Contiades analytical framework, the enquiry argues that the Greek domestic labour constitution experienced a crisis trajectory of '*functional disembeddedness* by submission'. Which, though, were the determinants of such a deconstructive path? The Chapter suggests that the latter was the *joint* outcome of a set of interactions (and non-interactions), both synergic and conflicting, between *three* normative spheres*: (a) IMF-EU bailout conditionality (hereinafter conditionality) (b) domestic labour rights sphere (hereinafter DLS)* and *(c) transnational labour rights sphere (herein TLS).*

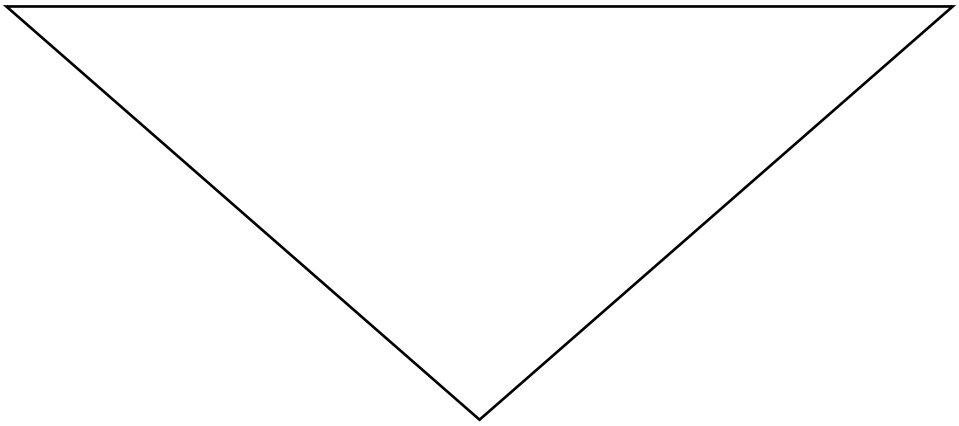
Conditionality (conditions imposed on Greece for financial assistance provision) emerged as the crisis-borne aggressive *disembedding* force. It advanced through a peculiar, *ad hoc* and *sui generis* normative sphere. In contrast, the other two spheres exhibited a *defensive* mode. The *DLS* comprises the domestic constitutional and legislative layer of labour rights. The *TLS* operates within three sites: (1) the International Labour Organisation system of protection of labour rights (2) ECHR protection of labour rights through Article 11[5] and the (3) EU labour rights scheme, mainly premised on the collective labour rights provisions of the EU Charter of Fundamental Rights (ECFR)

[5] For the ECHR, the labour sphere emerges only after Strasbourg Court's expansion of freedom of association to incorporate the right to collective bargaining {ECtHR, *Demir and Baykara v Turkey* [2008] ECHR 1345} and right of strike {Enerji Yapi-yol Sen v Turkey [2009] ECHR 2251} into Article 11 scope. Greece has not accepted Article 5 on the right to organise and 6 on the right to bargain collectively of the European Social Charter.

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The Normative Spheres Triangle

EU-IMF Conditionality Sphere (Conditionality) Transnational Labour Sphere (s) (TLS)



Domestic Labour Sphere (DLS)

The *triangular configuration* illustrates the pattern of inter-sphere possible interactions. Since each sphere may interact with *both* others, three set of potential inter-sphere interactions are interrogated.

In light of preceding remarks, the Chapter is organised as follows. Firstly, the enquiry examines the DLS submissive interaction with bailout conditionality resulting from latter's 'aggressive internalisation'. Secondly, the soft interaction of the TLS with the DLS is identified pursuant to the absence of internalisation of the TLS by the DLS. Thirdly, the Chapter underlines the non-existent interaction between the TLS and bailout conditionality within the EU sphere. The final section concludes by discerning the 'double submission' of labour spheres to bailout conditionality and offers Steven Gill's *New Constitutionalism* as an explanatory framework for the developments.

1. The 'Powerful' Conditionality- Domestic Labour Sphere Interaction: A Case of Domestic Submission

The interaction between EU-IMF conditionality and domestic labour normative spheres was by far the most active and pragmatically powerful in the triangle (to be contrasted to the other two interactions). Conditionality strived – remarkably successfully- to penetrate the *DLS* and re-shape the domestic normative CLL sphere in accordance with its dictates.

The analysis here proceeds in two stages. The first section develops a comprehensive examination of conditionality. It argues for the *dual* normativity of bailout conditionality, identifies *dominium* as the crucial gradient that solidifies a mix of hard and soft law, highlights its neo-liberal orientation and discerns the broader context in which it operates. The second section adopts an internal domestic viewpoint. It deals with the *'aggressive internalisation'* of conditionality by the domestic legal order and ascertains its mechanisms.

(i) The 'Disembedding' Force of IMF-EU Bailout Conditionality: Charting The Effective Yet Sui Generis Normative Sphere

Conditionality was a crisis product. Borne out of the *ad hoc* hybridisation of the IMF and EU layers in the context of the crisis measures for addressing the Eurozone debt crisis, it formed the most significant and novel, though overtly atypical normative sphere. Indeed, it defies fitting to any single traditional legal categorisation. As Contiades and Tassopoulos put it, the Memorandum is 'a novel and therefore unclassified creature in the legal universe'.[6]

[6] Xenophon Contiades and Ioannis Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution' *in Constitutions in the Global Financial Crisis* (n 2) 202.

In broad terms, conditionality mediated between the *material* and the *legislative.* That is between the material needs of the Greek State to refinance its public debts and its legislative sphere of norm-production. In a sense, it owed its birth to the inseparable confluence of a *fact* (economic crisis) with a specific *regulatory-economic response* to this fact. Unlike an instance where the material exerts its influence on the *legislator* through a pure material effect (e.g recession, unemployment), conditionality construed a *mediating normative structure* in the form of a peculiar *normative constellation* evolving by the specific *osmosis* of EU, Eurozone and IMF layers.

Conditionality consists of one-way asymmetric interactions directed towards altering the legislative layer of the domestic order and (indirectly) affecting the domestic labour constitution.[7] These interactions took the normative/instrumental shape of a variegated *normative constellation* of obligations. Besides obligations, *constellation* is the key term here. It denotes a *unity* of substance yet a *multiplicity* of sources of the obligation. Indeed, viewed from distance, the observer captures the *substantive unity* of the de-constructive for CLL force of bailout conditionality. Though the closer one inspects its source, the more pristine its multi-source, multi-form and legally unconventional nature becomes.

(a) *An Overview of Conditionality*

Prior to systematically mapping the normative constellation of conditionality, a general overview of its evolution in the Greek case seems appropriate. Based on the Eurozone decision to activate the financial assistance for Greece in response to the Greek request when the country was unable to borrow from the market with reasonable interest rates[8]

[7] See section ii of this part below.
[8] Eurogroup, *Statement* (2 May 2010).

and that of associating such financial assistance with 'strong' or 'strict' conditionality,[9] Greece concluded in May 2010 a MoU with the European Commission, acting on behalf of the Euro Member States.[10] This Memorandum expressed the policies upon which the support was conditional. In parallel, Greece requested a Stand-by arrangement from IMF accompanied with two Memoranda outlining the required reforms.[11] Subsequently, a Decision was adopted by the Council of the EU under the Treaty Articles 126(9) and 131 TFEU (Excessive Deficit Procedure) containing key aspects of policy conditionality.[12] The financial assistance (besides the IMF) took the form of bilateral loans from the individual Eurozone Members to Greece (pooled by the European Commission) under the inter-governmental Loan Facility Agreement[13] which explicitly set the observance of the Memoranda Conditions and the Council Decisions as a condition for the support.[14] For the second bailout programme, Greece concluded a Memorandum with the European Commission, again acting on behalf of Eurozone Member States[15] and a new Memorandum with the IMF.[16] This time, the funds came through the EFSF, a private law body established by an international agreement of the Eurozone Members.[17]

From this overview, the reader should notice the multi-source nature of conditionality became. Hence its characterisation as 'constellation'.

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[9] See Eurosummit, *Statement* (25 March 2010); Eurogroup, *Statement* (2 May 2010) for the original framing as strong conditionality. Subsequently, strict conditionality became the preferable term (indicating more intrusion), now finding explicit Treaty expression in Article 136(3) TFEU.

[10] *Memorandum of Understanding between the European Commission, acting on behalf of the euro area Member States, and the Hellenic Republic (3 May 2010).*

[11] Greece, *Letter of Intent, Technical Memorandum of Understanding and a Memorandum of Specific Economic and Fiscal Policies* (May 2010).

[12] Council Decision 2010/320/EU (10 May 2010).

[13] Loan Facility Agreement between Eurozone Member States, KFW and Greece.

[14] ibid. Preamble Recital 8.

[15] *Memorandum of Understanding between the European Commission, acting on behalf of the euro area Member States, and the Hellenic Republic* (1 March 2012).

[16] Greece*: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding* (9 March 2012).

[17] See EFSF Framework agreement concluded by the Eurozone Member States.

(b) *The Dual Normativity of Conditionality Obligations: An Effective Mixture of Soft and Hard Law with Dominium*

What is the normativity of conditionality? Does it give rise to state obligations? Are they soft or hard law? This section responds to these questions by advancing two theses. Firstly, it locates the existence of a *dual normativity* of conditionality obligations construing an *effective* combination of soft and hard law. Secondly, it highlights the pivotal role of *'dominium'* (a term referring to the use of wealth for achieving policy objectives) in rendering the combination 'effective'.

(1) Memoranda of Understanding: Soft Law with Dominium

Soft law…

The MoU constitute the principal instrumental embodiment of conditionality. In terms of normative quality, they lack any legal bindingness under international law. They are not as such legally binding[18] and they function more as 'political commitments'.[19] Such a view accords with Gold's[20] and IMF general official position against the nature of IMF fund arrangements as binding international treaties.[21] For the Greek Memorandum, it found affirmation in the Greek Council of State Decision (STE) which took the view that the Memorandum is a program of a government policy and not an international

[18] Malcolm Shaw, *International Law* (6th edn, CUP 2008) 906.
[19] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 28.
[20] Joseph.Gold, *The legal character of the Fund's stand-by arrangement and why it matters*, IMF Pamphlet Series no 35 (IMF 1980) 15.
[21] '*IMF Guidance on the Design and Implementation of IMF Conditionality: Preliminary Considerations* (31 May 2002) para 23 [Fund arrangements are not international agreements' and that 'language having a contractual connotation will be avoided'].

agreement.[22] Of course, Memoranda can give rise to political obligations to implement the conditions. If with Memoranda 'the parties wish to record their understanding about how they will conduct themselves',[23] it could be argued that sticking to these understandings, on the basis of which the other party has formed its opinion and its conduct, is consistent with good faith and political propriety.

So, how are Memoranda assessed against the Abbott and Snidal's hard/soft law yardstick consisting of the dimensions of obligations, precision and delegation?[24] Whereas the legally binding obligation element was missing, conditions benefited from a high degree of precision detailing the content of the proposed legislation. Regarding delegation, though, the assessment is more complex. Even if no formal delegation to a third party existed for their interpretation and implementation, the *sui generis* mechanism of supervision by the Troika *in effect* established such mechanism. Nonetheless, in formal terms, the Troika's role was confined to assisting the lenders, when forming their judgments about the disbursement of financial aid, regarding whether the conditions are observed by Greece.

In light with preceding observations, MoU should be held to have possessed a soft law nature thus constituting, at best, political obligations of the Greek state.

....But with Dominium

Notwithstanding their non-legal texture, the MoU ensure maximum effectiveness of their soft law obligations. How is this possible? We have just observed that they owe their 'soft

[22] STE (Council of State) Decision 668/2012 paragraph 28.
[23] *Aust* (n 19) 18.
[24] Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421, 423.

nature' to the absence of legal bindingness, and not to their precision. Impliedly, there also exists, from a legal point of view, a full discretion to observe or not the conditions. The latter's *formal* legal effect, though, diverge from their *actual* legal effect. The crucial factor for this divergence resides in the material dependence on the material resources to which these conditions are attached. Such dependence annuls in practice any discretion thereby ensuring compliance with the 'obligation to legislate X', the latter being precisely specified in the Memoranda. Therefore, the condition-receiver operated under the shadow of a probable sanction of a material and not legal nature. As Bruun frames it, MoU were 'clearly a result of negotiations, or even negotiations ''in the shadow of bankruptcy'', in which the borderline between negotiations and dictated becomes very blurred'.[25] Indeed, the very congruence of material dependence, in the extreme form of preventing debt default, with soft law yields an *actual normative* effect comparable, or even superior, to a 'hard law' obligation.

For invoking Daintith's distinction between *imperium* describing the 'government's use of the command of *law* in aid of its policy objectives' and *dominium* denoting the 'employment of the *wealth* of government for this purpose', [26] the MoU could be said to construct a powerful '*dominium over imperium'* insofar as the 'policy objectives', in our case, refer to the enactment of specific legislation *(imperium).*

The *dominium reading* of conditionality advances an understanding founded on the recognition of actual power asymmetries between the parties. These asymmetries reached an extreme level in the Greek case, due to the urgent need of Greek Government for

[25] Niklas Bruun, 'The Changing Normative Field of Labour Law' in Ann Numhauser-Henning and Mia Ronnmar (eds), *Normative Patterns and Legal Development in the Social Dimension of the EU* (Hart 2013) 93.
[26] T.C Daintith, 'The Techniques of Government' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (OUP 1994) 213.

financing its debts in order to prevent a catastrophic default coupled with the perceived danger of leaving the Eurozone and the non-existent alternative sources of funding. As Zachariadis notes, 'though nominally negotiating with its creditors, it is highly doubtful that the Greek government had any input into the bailout package given its dire economic condition [hence] it had to accept imposed measures from external creditors'.[27] Due to this presence of asymmetries, MoUs exemplified what Chorev and Babb call management of resource dependence that 'is a *latent* form of coercion- one that seems, at least on the surface, to be compatible with the modern notion of formal equality'.[28] Indeed, as Buira emphasizes, 'other things been equal, the greater the asymmetry in power between the country and the Fund, and the greater the country's need, the more likely it will need to accept fully Fund-prescribed conditionality'[29] so that the conditionality relationship is akin 'to a relationship of power'.[30] Under this approach, the conditionality relationship acquires more the *vertical* shape of an imposition than the *horizontal* shape of a contractual relationship.

The '*dominium over imperium'* firmly inter-linked the Greek material needs with the State's normative production by shaping the latter in conformity with the content of its conditions. In short, it established a '*normative quid'* for a *'material quo'.*

The *dominium* operation was ensured by a continuous supervision process undertaken by the so-called Troika, the *ad hoc* body consisting of representatives of the IMF, EU (European Commission) and ECB. While Troika as a body enjoyed no distinct legal

[27] Nikolaos Zahariadis, 'Complexity, coupling and policy effectiveness: the European response to the Greek sovereign debt crisis' (2012) 32(2) Journal of Public Policy 99, 112.
[28] Nitsan Chorev and Sarah Babb, 'The Crisis of the Neoliberalism and the future of international institutions: A Comparison of the IMF and the WTO' (2009) 38(5) Theory and Society 459, 480.
[29] Ariel Buira, 'An Analysis of IMF Conditionality' in Ariel Buira (ed), *Challenges to the World Bank and IMF: Developing Country Perspectives* (Anthem Press 2003) 59.
[30] ibid 60.

personality, it negotiated always as a consortium with the high-level government officials the Memoranda conditions. In addition, it conducted all the necessary inspections and reviews for ensuring that conditions are implemented. Hence Troika acted as an *effective* condition-setter and supervisor of conditionality. These functions took place within its overall mandate to deliver a report to the lenders, namely the IMF and the Eurogroup. The latter, comprising the Eurozone Finance Ministers) is the dominant political EMU institution. The Troika report was very influential since benefiting from Eurogroup's deferential treatment. As referred in a European Parliament's report, the President of Eurogroup has admitted 'that the Eurogroup endorsed the recommendations of the Troika without extensive consideration of their specific policy implications'.[31]

Therefore, the MoU soft obligations capitalized on a *powerful dominium* in order to galvanize their effectiveness

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(2) Council of EU Decisions: The 'Hard Cover'

The second type of normativity is 'hard'. It derived from the *inclusion* of Memoranda conditions into the Council of EU Decisions on specific deficit-reduction actions to be taken within a specific time-limit by a Country that 'persists in failing to put in practice the Recommendation of the Council'.[32] These Decisions fall within the 'hard law' forms of the Excessive Deficit Procedure mechanism. They are issued by the Ecofin formation of the Council acting upon a recommendation from the European Commission. By prescribing specific conditions and timetables for the enactment of legislation, usually

[31] European Parliament, Committee on Economic and Monetary Affairs, *Enquiry report on the role and operations of the Troika ECB, Commission and IMF) with regard to the euro area programme countries* 2013/2277 (INI), paragraph 52.
[32] Article 126 (9) of TFEU.

copying Memoranda provisions, they granted a *second* normativity to the same required collective labour law conditionality obligations.[33]

These decisions performed in essence the tasks of *formalisation* and *legalisation* of conditionality obligations by embedding them in the fiscal part of the formal EU architecture. This had major onormative consequences in legal terms. The duty to enact the specific laws was enclosed in an EU law obligation 'hard cover' pursuant to the binding nature of the Council Decisions.[34] And, based on the primacy of EU law over the domestic norms (at least over legislative ones) these obligations enjoyed a superior legal status within the domestic legal order while they also enable to be perceived as concretization of the fundamental primary law Treaty objectives to avoid excessive deficits.[35]

In light of preceding remarks, the following movement should not evade attention: there was an 'inward motion' of soft law obligations produced from the extra-EU structures *to* the hard law mechanisms of the EU Council Decisions rather than *from* the latter *to* the former.

(3) The Normativity Prism

The dual normativity of conditionality could be depicted with the metaphor of a prism: the same obligation, depending on the instrumental medium, comes out in dual *hard* and *soft* law colours.

[33] For instance, see Article 3(d) of the Council Decision of 10 May 2010 and Article 3(z) of Council Decision 2011/734/EU (recast) of 12 July 2011 L 296/38 OJEU.
[34] Article 126 (1) of TFEU.
[35] On this see Dimitris Nikiforos, 'Memorandum of …''Supremacy'': μία περίπτωση υπεροχής του ενωσιακού δικαίου έναντι του ελληνικού Συντάγματος' <http://constitutionalism.gr/site/wp-content/mgdata/pdf/ikiforos.pdf> accessed 13 October 2014.

The *soft law* aspect is *harder* than the hard. The reason lies in the combination of soft law with *dominium*. The latter is the distinct element differentiating conditionality's utmost effectiveness with that of the Open Method of Coordination in Employment policy.[36] In OMC, the discretion is not hindered by the extreme factual constraint of dependence on resources. Simultaneously, though, the hard law aspect ensures the legal visibility of the conditions which eventually ties collective labour law reforms to the formal EU Treaty law architecture.

In this manner, the multi-normativity of conditionality established an effective combination which forces the observer to abandon the traditional simplistic conceptualization of soft law as ineffective and hard law as effective, the latter being a standard preoccupation of labour law scholars. *Dominium* was the crucial effectiveness-guaranteeing gradient in the mix.

(c) *Procedural Features of Conditionality*

Before looking into the content of the conditionality of obligations, it is useful to locate five procedural features of conditionality.

The first is *informality*. Both Eurogroup[37] and Troika had an informal mode of decision-making operation. In turn, informality led to *non-transparency*. Key conditionality processes, namely Eurogroup and Troika meetings as well as Troika/Government negotiations took place in a secret and shadow background since conducted behind closed doors. The absence of written records rendered public access of

[36] On the OMC and 'hard' and soft 'law' see David Trubeck, and Louise Trubeck, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method Co-ordination' (2005) 11(3) European Law Journal 343.
[37] See Uwe Puetter, 'Governing informally: The role of the Eurogroup in EMU and the Stability and Growth Pact' (2004) 11(5) Journal of European Public Policy 854.

essential scrutiny-required information on deliberations, factual bases of condition-proposing, considered particular goals and policy objectives impossible. Characteristically, a European Parliament's Committee Report 'denounce[d] the lack of transparency in the MoU negotiations' while warning about 'the possible negative impact of such practices, which involve keeping information behind closed doors on citizens' rights, on the stability of political situation in the countries concerned and the trust of citizens in democracy and the European project'. [38]

Non-accountability unsurprisingly complemented informality and non-transparency. No special formal accountability mechanisms were built into the system with regards to Troika or Eurogroup conditionality functions that could potentially enable some sort of democratic or other social policy check. Fourthly, the *exclusion of social stakeholders* in respective conditionality domains gained particular relevance for labour law. Conditionality provided for no meaningful consultation the social partners. Evidently, this also entailed that CLL conditionality-driven regulatory changes derive from a technocratic-based input completely insulated from other sources. Finally, *time-continuity* was a central procedural feature. Condition-setting and condition-monitoring occured within a closely-monitored, regularly reviewed and updated with new conditions process. The process was repeated in frequent cycles of Eurogroup-Troika interactions that were fully synchronized with the periodic disbursements timetable for eventually allowing full deployment of the pressure of *dominium,* so that CLL deconstruction have to be exchanged for the securing of financial resources.

[38] *European's Parliament's Committee on Economic and Monetary Affairs Report* (n 31) para. 30

(d) *The Content of Obligation: A Neo-Liberal Normative Constellation*

In form, bailout conditionality resembled a normative constellation evolving within a pluralistic institutional architecture. In fact, though, this pluralism and the associated multi-normativity merely functioned towards embedding the *same obligation* in different institutional contexts and vest it within *multiple* normative qualities. If our attention moves to the content of conditions, the sense of pluralism immediately fades away and a sense of unity emerges. The conditionality obligations exhibited a single neo-liberal colour. There is no need to provide an analysis of the substantive content the conditionality obligations. As a testament to their effectiveness, all de-constructive CLL regulatory interventions examined in the preceding Chapter faithfully implemented the conditionality stipulations. The provisions could be summarized as giving rise to an obligation of the Greek state to de-construct its protective CLL system as a means for increasing competitiveness and ensure fiscal consolidation.

Starting from a fiscal-based conception of labour law, the conditions should be treated as integral part of what Colin Crouch calls 'entrenching of neo-liberalism' in the European Social Policy agenda.[39] As he observes for the Greek bailout 'the terms of its deal marked a full return to the simply-minded neo-liberalism of the 1990s'.[40] In marking the 'triumph of neoliberalism and of the economic over the social conception of labour law',[41] Memoranda exemplified an instance when to quote Countouris and Freedland 'social europe has once again worn its invisible cloak and the neo-monetarist ''medieval medicine'' prescribed by the EC/ECB/IMF, with the explicit or tacit support of a number

[39] Colin Crouch, 'Entrenching Neoliberalism: the current agenda of European Social Policy' in Nicola Countouris and Mark Freedland, *Resocialising Europe in a time of Crisis* (CUP 2013).
[40] ibid 41.
[41] Costas Papadimitriou, 'The Greek Labour Law face to the crisis: A dangerous passage towards a new juridical nature' (2013) European Labour Law Network Working Paper Series No. 3 4.

of key European Member States, is administered in massive doses to struggling Member States'.[42] Indeed, Memorandum policies 'attempt a violent reconstitution of the economic constitution of the country to a neoliberal direction, contrary to its fundamental provisions.[43]

(e) *The Context of Conditionality: The Intersection between the IMF Neo-Liberal Constitution and the EU/Eurozone Macro-Economic Constitution*

Let us broaden the enquiry and contextualize conditionality. Its genesis rested upon an overarching *path intersection.* The IMF evolutionary path encountered the European (or Eurozone) economic constitutionalisation. This internal synergy set the neo-liberal and de-regulatory substance of the transnational sphere of conditionality, which then unleashed its destructive dynamic by interacting with the domestic labour sphere.

For IMF, of course, claiming that it engages into a neo-liberal process (Tucker calls it as capital constitutionalisation)[44] is hardly controversial. The institution, at least from 1980s onwards, pursues radical de-regulatory labour law policies through its structural conditionality under a technocratic, monetarised and neo-liberal paradigm.[45]

The notable development arises in regards to the so-called European economic constitution, as is the term used for the EU rules on economy.[46] In an important

[42] Nicola Countouris and Mark Freedland, 'Introduction: The myths and realities of ''Social Europe''' in *Resocialising Europe* (n 39) 5-6.
[43] Giorgos Katrougalos, 'Το ''Παρασύνταγμα'' του Μνημονίου και ο Άλλος Δρόμος' (2011) 2 Νομικό Βήμα 231, 234 (in Greek).
[44] Eric Tucker, 'Labor's many Constitutions (and Capital's too)' (2011) 33 Comparative Labor Law and Policy Journal 355, 369.
[45] For accounts of IMF and neo-liberalism see Richard Peet, Unholy Trinity: The IMF, World Bank and the WTO (2nd edn, Zed 2009) and Julie Mueller, 'The IMF, Neoliberalism and Hegemony' 25 (3) 2011 Global Society 377 .
[46] For the European Economic Constitution see Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 27(4) Columbia Journal of European Law 27 and Armin Hatje, 'The Economic Constitution within the Internal Market' in Armin Von Bogdany and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2011).

intervention, Kaarlo and Klaus Tuori observe a crucial mutation within the always dominant EU economic constitution from the dominance of micro-economic layer (free market rules, free competition) to that of the macro-economic layer with thereof focus being directed towards attaining fiscal targets and objectives.[47] The authors argue that the 'Eurozone crisis has lifted the macroeconomic constitution into a pacemaker position among the many constitutions of Europe'.[48]

Indeed, the 'macro-economic constitution' was subjected to an intense constitutionalisation during the crisis. The constitutionalisation of budgetary constraints[49] through the introduction of golden rules (balanced budgets) to the domestic constitutional orders,[50] the tightening of the preventive and corrective arms of the Growth and Stability Pact mechanism for Eurozone Countries (Six-Plus Pact Regulation),[51] the European Semester introducing a close mechanism of economic coordination of budgets of the EU Countries with the involvement of the European Council and European Commission,[52] demonstrate the 'macro-economic constitutionalisation'. The most defining characteristic of this constitutionalisation concerned the prioritization of fiscal discipline and fiscal

[47] Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014) Part 2.
[48] ibid 205.
[49] On the topic see the collection of essays Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014).
[50] Article 3(2) of Treaty on Stability, Coordination and Governance.
[51] Regulation (EU) of the European Parliament and of the European Council No. 1175/2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (revising the *preventing* arm of the SGP); Council Regulation No. 1177/2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the EDP (revision of the corrective arm of GSP); Regulation of the European Parliament and of the Council No. 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area. Regulation (EU) of the European Parliament and of the Council No. 1174/2011 of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.
[52] Regulation (EU) of the European Parliament and of the Council No. 1175/2011 of 16 November 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

consolidation as overriding constitutional objectives, consequently framing the desired political and legal reforms.

Not only did conditionality operate under the *synergy* of these constitutionalisations, but it produced a more fundamenta shift for the CLL. In the presence of the IMF which has consistently put CLL structural reforms in its conditionality, the European Economic Constitution aggressively extended its material scope to introduce collective labour law de-construction as a concretisation of its fiscal and economic aims. We could detect a clear dynamic of an imperialism of the economic constitution towards CLL and the social policy field in general.[53] Indeed, one could easily discern an incorporation of the IMF monetarist/neo-liberal approach which is based on what Dahan calls 'economisation of social policy',[54] into the Memoranda and Council of EU Decisions where CLL issues are forced into a tight monetarist and fiscal crisis response straitjacket. Eurozone adopts the standard austerity prescription of liberalisation of IMF.[55] As Vivien Schmidt states:

> 'the economic policies, in particular in response to the Eurozone crisis are in reality highly conservative, following ordo-liberal (read German rules-based neo-liberal) principles focused on the need for ''sound money'' and ''stable finance'' in the macroeconomic sphere and neo-liberal programs focused on ''structural reform'' of national labour and welfare systems'.[56]

The imperialism of the macro-economic constitution, in so far as effectively capturing in its monetary frame the CLL, results in an effective intrusion of European economic

[53] For the impact of Six-Plus Pack on labour law see Catherine Barnard, 'The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective' (2012) 41(1) ILJ 98; On the impact of European stronger economic coordination on social policy see Francesco Costamagna 'The Impact of Stronger Economic Policy Co-ordination on the European Social Dimension: Issues of Legitimacy' *in The Constitutionalization of European Budgetary Constraints* (n 49).

[54] Samual Dahan, 'The EU/IMF Financial Stabilisation Process in Latvia and Its Implications for Labour Law Social Policy' (2012) 41(3) ILJ 305,321.

[55] See Costas Lapavitsas, Annina Kaltenbrunnera, Duncan Lindoa, J. Michella, Juan Pablo Painceiraa* Eugenia Piresa, Jeff Powella, Alexis Stenforsa and Nuno Telesa, 'Eurozone crisis: Beggar thyself and thy neigbour' (2010) 12(4) Journal of Balkan and Near Eastern Studies 321, 363-365.

[56] Vivien Schmidt, 'The Eurozone crisis: A Crisis of Politics, not just Economics' (2013) 48(3) The International Spectator: Italian Journal of International Affairs 1, 3.

constitutionalisation into the domestic CLL systems, the latter traditionally singled out as an area of exclusive Member States competence.[57] Hence the autonomous domestic CLL space from European governance is eroded. As Seifert puts it, 'labour and employment law is to a growing extent, under the custodianship of European economic law and is becoming a province of economic policy'.[58]

In this context, conditionality was the hyper-visible offspring of the *normative constellation* that sprang from the neo-liberal alignment of the process of European integration, Eurozone integration and IMF governance in the face of the crisis. The peculiar nature of conditionality inhereD in the very fact that its normative influence did not derive from its formal normative supremacy but from its ability to fully capitalize on the *dominium* in order to impose its rules.

Factum and *necessity* eventually transfigured into an extremely powerful neoliberal '*dominium over imperium'* imposed by a dynamic, aggressive and flexible device for CLL. This *'dominium over imperium'* enters the domestic labour sphere, a story that we immediately turn to.

(ii) The 'Aggressive' Internalisation of Bailout Conditionality in the Domestic Labour Sphere (DLS): 'Capturing' the Legislative and 'Functionally De-Capacitating' the Constitutional Labour Layers

Conditionality, especially the Memoranda, complicated the Greek legal-political structure. Crafted under the aforementioned complex process, a substantive, non-

[57] See Article 153(5) of the TFEU excluding EU's competence on issues of pay, freedom of association, strike and lockout.[57]
[58] Achim Seifert, 'European Economic Governance and the Labor Laws of the E.U Member States' (2013-2014) 35(3) Comparative Labor Law and Policy Journal 311, 312.

domestic and unconventional sediment was violently deposited in the Greek legal order. Its express purpose was to deconstruct the Greek CLL protective structures. In a sense, the conditionality-imposed legislative sediment appeared as a kind of 'transplant'. And for using Kahn-Freund's metaphor for organic transplantation of CLL norms,[59] the question relates to whether it would be accepted by the constitutional organism.

The reason why a *protective* domestic labour sphere eventually accepted a deregulatory transplant lies in the *'aggressive* internalisation' process of bailout conditionality within the domestic labour sphere. Bailout conditionality aggressively deconstructed the *DLS*. To put it in Kahn-Freund's metaphor, rather than the 'transplant' to be adjusted to the organism, the latter was adjusted to the former.

This 'aggressive internalisation' proceeded through a double parallel movement subjugating the legislature and judiciary respectively: (a) the capture of the legislative layer and (b) the de-capacitating of the *defensive* function of the labour constitution.

(a) The 'Capture' of the Legislative Layer: The Meta-Legal Function of Conditionality

The first 'aggressive internalisation' movement of bailout conditionality consisted in *capturing* the CLL's legislative layer. Indeed, the direct substantive object of conditionality is legislation. Conditions typically embodied an 'obligation to legislate', usually framed as a commitment by the Greek Government to enact a specific type of legislation within a specified time-frame. The *obligation* element stemmed from the conditionalization of financial assistance to these conditions.

[59] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) MLR 1, 21.

From a domestic and formal legal viewpoint, though, *conditionality* and *dominium*, albeit the pragmatic casual sources driving legislation, are hardly – if not at all- detectable. After all, it is a legislative act of *imperium*, that is a sovereign and free act of the Parliament, which formally brings conditionality into the legal universe. Memoranda *as such* evade legal recognition as, at best, they impose political and not self-executing obligations on the Greek State. In this sense, we talk about the *meta-legal* function of Memoranda establishing the framework for the laws to be enacted. Due to the *dominium*, this function attained utmost efficacy thereby realising the *capture* of legislation and giving rise to a kind of 'sham' legislation' with formal legislator submitted to bailout conditionality normative sphere not by a normative rule but by economic necessity. With regards to EDP (Excessive Deficit Procedure)-prescribed 'EU hard law' conditions, of course, there is a direct *legal* function of the conditions pursuant to the EU 'hard law' effect.

However, an important clarification should be issued. Memoranda have indeed been vested also with *imperium* as they have been legislated. More specifically, Memorandum I was attached as an annex to the Law 3845/2010 and thus as Pavlopoulos underlines, in a view coinciding with STE Decision,[60] they are a kind of 'leges imperfectae' whose future depends upon the initiative by the Greek legislator for enacting binding rules of law for their implementation.[61] In contrast, Memorandum II was legislated as such with an explicit provision rendering the provisions contained in the Memoranda as 'rules of

[60] Council of State 668/2012 paragraph 28. 'The Memorandum (…) does not enact other rules of law, but, for realizing its specified polices, there must be relevant acts by the competent, according to the Constitution, organs of the Greek State'.

[61] Prokopis Pavlopoulos, Παρατηρήσεις ως προς τη νομική φύση και τις έννομες συνέπειες του Μνημονίου' σε *Το Δημόσιο Δίκαιο Σε Εξέλιξη: Σύμμεικτα προς τιμην του Καθηγητή Πέτρου Ι. Παραρά'* (Αντ.Ν.Σάκκουλας 2012) footnote 15 (in Greek).

law with direct effect'.[62] Thus, all Memoranda II conditions were immediately incorporated in the Greek legal order, hence being *'leges perfectae'*. As a result, the *'duty to enact legislation A'* became a hard law duty. However, it is important to stress that their legal effect does not derive from the intrinsic legal effect of the Memoranda but from the intervention by the legislator.

Under these mechanisms, conditionality *captured* the domestic legislative layer thus *implanting* the transplant. For the transplantation to be successful, though, the labour constitution must be de-capacitated. This brings us to the *second movement.*

(b) Public Interest and Proportionality: The 'Transmission Belt' of Conditionality into the Domestic Constitutional Labour Layer

In its second movement, the 'aggressive internalisation' of conditionality targeted the constitutional layer. It aimed at the *functional de-capacitation* of the domestic labour constitution so that the latter cannot assert its hierarchical supremacy and free the *captured* legislative layer. Absent of a formal constitutional amendment, this de-capacitation was *functional:* it achieved the breakdown of the *protective* function of the labour constitution which then led to a 'functional disembeddedness' of the labour constitution. As shown below, *conditionality* employed public interest and proportionality as *transmission belts (or 'Trojan Horses')* for attaining this outcome.

This section is organised as follows. After locating the *prima facie* compatibility between the labour constitution and conditionality-imposed legislation, the enquiry expounds on the *thin fiscal/deferential* model of judicial review with the exception of the case of arbitration. Subsequently, the argument that public interest and proportionality

[62] Article 1(6) of 4046/2012.

operated as 'Trojan Horse' for conditionality and dominium is advanced by pinpointing its role in framing the proportionality review. Finally, we discuss the judicial stance on the nature of conditionality.

(1) The *Prima Facie* Conflict between Conditionality-Driven Legislation and Domestic Labour Constitution

There is little doubt that the conditionality-driven legislation *prima facie* conflicted with the protective labour constitution. Considering the breadth and far-reaching nature of the de-constructive CLL reforms, the proposition that the reforms imposed multi-faceted *prima facie* restrictions on collective autonomy and collective bargaining encounters a rather low justificatory hurdle. It is beyond our aim to offer an individual examination of each measure. It is sufficient to note that even the Council of State (STE), which, as shown below, declared all examined Memorandum II CLL measures as constitutional (with the exception of arbitration reforms), it conceded that they 'restrict the field of collective autonomy'[63] and that all the CLL provisions hitherto enacted 'amount to serious decline of the rights of workers and a corresponding weakness of their position in relation to their employer'.[64]

So, our attention should be re-focused on the critical instrument of proportionality.

(2) The 'Thin/Deferential' Construction of Public Interest/ Proportionality Review: The Standard Judicial Doctrine

Within the Greek constitutional order,[65] the principle of proportionality determines the constitutionality of restrictions on constitutional rights. While judicially recognised since

[63] Council of State (STE) 2307/2014 paragraph 23.
[64] ibid.
[65] According to the Greek system of diffuse constitutional review, every court has the power to examine the unconstitutionality of legislation. However, in practice, not least because such pronouncements are

1984 as an unwritten constitutional principle,[66] Article 25(1) of the Constitution (as revised in 2001) expressly provides that '[constitutional] restrictions of any kind…. should respect the principle of proportionality'. In broad terms, the principle requires for any measure to pursue a legitimate public aim or public interest, be suitable and necessary for the intended purpose, and not to violate the minimum core of the right.[67] It thus operates as the 'limitation of limitation of rights'.[68] By fixing the boundaries between legitimate and non-legitimate restrictions of constitutional rights, it performs a paramount 'constitutional litmus-test' function on which the whole constitutional edifice is predicated upon.

The Government and the STE case-law have adopted what is termed as 'thin' fiscal/deferential construction of proportionality review. The latter consists of two inter-related components: (a) a narrow 'fiscal/economic' conception of public interest and (b) judicial deference towards the Government.

Government's invocation of the *public interest* of economic survival is a mantra in legislation introducing the Memoranda-dictated CLL reforms. For Law 3845/2010 (Memorandum I) measures, after outlining the fiscal targets, the Government underlined that 'albeit being painful, the [measures] are necessary for the protection of the paramount public interst'.[69] In Law 4046/2012 (Memorandum II), the Government stated that

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appealed, the most important judgments come from the supreme Courts of the civil Law/criminal law (Areios Pagos) and of the public Law branches (*Council of State* [Simvoulio tis Epikrateias]).

[66] Council of State (STE), Decision 2112/1984; For the historical evolution of the principle see Stylianos-Ioannis Koutnatzis, 'The Proportionality Principle in Greek Judicial Practice' (2016) 16 *Diritto & Questioni Pubbliche* 205, 212-218.

[67] See in general, Koutnatzis (ibid), and Antonis Chanos, 'New Constitutionalism and the Principle of Proportionality: The Case of the Greek Constitution' (2016) 16 *Diritto & Questioni Pubbliche* 191.

[68] Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global economic crisis and constitutional litigation' 2012 10(3) International Journal of Constitutional Law 660, 672. The authors call this conception as traditional to be contrasted with proportionality as balancing technique.

[69] Government, Explanatory Note on Law 3845/2010 (in Greek).

reasons of paramount public interest render the measures necessary.[70] But what is the origin of this paramount public interest? Pursuant to Government's determination, it emanates from the fact that these measures are conditions for the disbursement of 'the necessary resources in the critical context of the most serious economic crisis that the country confronted in its recent history', while the survival of the country dictates the regaining of fiscal balance and fiscal surplus.[71] From these statements, the Government's exclusive fiscal colouring of public interest emerges as a visible motif.

Moving onto the judicial terrain, our focus is directed towards two landmark judicial decisions of the Council of State, namely 668/2012 pronouncing the 'fiscal/deferential' doctrine and 4093/2014 that upheld the constitutionality of all Memorandum II measures besides arbitration.

Decision 668/2012 of the Council of State -albeit not directly concerning the labour constitution- set the tone for the 'fiscal/deferential' construction of proportionality towards all the austerity-imposed measures. Replying to claimant's assertion that various cuts violated Article 1(1) of 1st Protocol of ECHR on right to property, the Court reasoned that they were justified due to them not existing in isolation but forming parts of a program aimed at 'covering the economic needs of the country and the improvement of its fiscal and economic state, that is to facilitate aims of serious public interest as well as of common interest of Eurozone members'.[72] The Court thus declared that it would apply a 'marginal review' of the contested measures, pursuant to which only measures 'profoundly unsuitable' for attaining the pursued aims would be declared unconstitutional.[73]

[70] Government, Explanatory Note on Law 4046/2012 (in Greek).
[71] ibid.
[72] STE 668/2012, paragraph 35.
[73] ibid.

In this fashion, the Court killed two birds with one stone thereby eventually clearing the path for a deferential attitude to the legislator: on the one hand, the marginal review, as Contiades and Tassopoulos rightly point out, 'employ[ed] a reversal of the burden, stating that it is up to the rights' claimants to show evidence that the legislator took into consideration the wrong elements and facts in drafting the measures under review' and hence 'freeing the legislator from the obligation to justify measures infringing fundamental rights'.[74] On the other hand, the 'en bloc' treatment of all measures as part of a program that is necessary for the realisation of the paramount public interest lowered the justificatory hurdle for the legislator for proving the 'necessity' part of proportionality. Rather than demonstrating the necessity of each measure, individually compared with other less intrusive alternatives that could achieve the same aim, the legislator suffices to show that the program to which all the measures are contained is necessary, with such determination being only subject to 'marginal review'.[75] So, a kind of a *'fiction of necessity'* was established for conditionality-required reforms. In turn, the necessity of the program was easily established as soon as fiscal aims are held to have an absolute priority.

The 4093/2014 Council of State ruling essentially applied this 'thin' construction on collective autonomy. In its overall assessment, the Court, albeit recognizing 'the restrictions in the field of collective autonomy,'[76] underlines that the measures form part of the broader set of regulations set in Memoranda.

Subsequently, it drew attention to four factors that render these conditions compliant with the marginal constitutional review. Firstly, the fiscal aims of the Memoranda,

[74] *Contiades and Tassopoulos* (n 6) 207.
[75] Council of State (STE) 668/2012, paragraph 35.
[76] Council of State (STE) 2307/2014 paragraph 23.

including reducing labour units and increasing competitiveness, are duly noted.[77] Secondly, it is observed that these measures are taken under the exceptional circumstances of a threatening debt default and a potential collapse of the national Greek economy with unpredictable economic and social consequences.[78] Thirdly, the question of the technical capacity of the Memoranda to achieve the stated aims is held to lie beyond the judicial review.[79] Finally, the restrictions are regarded as not violating the core of the right to collective autonomy 'since the basic institutions of collective autonomy are maintained, thus giving the chance to the employee to ameliorate their position and alleviate the consequences of the economic crisis and of the contested measures'.[80]

(3) The Exception to Judicial Deference: The Unconstitutionality of Arbitration

Deviating from the general deferential attitude, the Council of State held the elimination of the unilateral recourse to arbitration and the legislative restriction of its objects as unconstitutional. Two reasons drove its conclusions. The first, which may be regarded as evincing the merit in constitutionalising labour rights, is textual and builds on the explicit reference to arbitration in the constitutional text. The constitutional provision reads: 'general working conditions shall be determined by law, supplemented by collective labour agreements contracted through free negotiations and, in case of the failure of such, *by rules determined by arbitration'*.[81] For the Court, such a reference (the sentence in *italics)* would have no meaning if it was referring to a *consensual* recourse to arbitration that was to be permitted anyway.[82] In addition, the Court considers that the text leaves

[77] ibid.
[78] ibid.
[79] ibid.
[80] ibid.
[81] Article 22(2).
[82] Council of State (STE) 2307/2014 paragraph 2332.

absolutely no doubt that the elimination of an important part of the dispute for being arbitrated is not allowed.[83] The other reason cited by the Court is *functional*. Unilateral arbitration performs the crucial function of maintaining social peace by preventing both the non-resolution of disputes between social partners and the determination of terms and conditions by individual negotiations where the employer is the superior party.[84] It is worth noting that, for arbitration, the Court did not apply, and even consider at all, the '*necessity fiction'* of the reforms a justified vis-à-vis their inclusion in the Memoranda. Interestingly, the functional rationale invoked by the Council of State for justifying arbitration *clashes* with that of the International Labour Standards, as far as unilateral recourse to arbitration is concerned. A *conflicting* ILO-domestic constitution interaction, as seen below, is generated. ILO rules *prohibit* it but constitutional rules *require* it.[85]

Eventually, this judgment led to the new legislation, examined in the previous Chapter,[86] by the Government restoring the unilateral recourse to arbitration mechanism and eliminating restrictions on the scope of arbitration awards but with some serious restraints.

(4) Public Interest and Proportionality: The 'Trojan Horses' of Conditionality and Dominium

Public interest and proportionality operated as 'Trojan Horses', internalising bailout conditionality and *dominium*. They were the transmission belts through which conditionality becomes injected into the domestic constitutional layer. While formally independent from the bailout conditionality normative sphere, a careful reflection unravels their colonisation by the transnational sphere of conditionality. The following

[83] ibid 33.
[84] ibid 32 (for unilateral recourse) and 33 (restriction of permitted objects of arbitration).
[85] See Part 2 below.
[86] See Chapter IV Part 2 v.

interactions could be located that demonstrate the framing of proportionality under the influence of the transnational conditionality normative sphere.

Firstly, the transnational dimension enters the analytical fore as soon as the *derivative* dimension of the invoked public interest is highlighted. Indeed, public interest works in a secondary and derivative level. Rather than assessing each measure's ability to foster a particular economic aim, the determinative factor for the Court was their 'en bloc' attachment as conditionality to an external loan assistance program providing the requisite financial resources. In a sense, public interest *equates with a general interest to preserve the dominium.*

Secondly, repeated judicial references to the Eurozone and EU context of the obligation for fiscal consolidation enabled the 'hard law' light of the EU macro-economic constitution to penetrate through the public interest the domestic constitutional order. To quote the Council of State, national fiscal and economic consolidation purposes 'constitute, simultaneously, aims of common interest for European Member States, *taking into account the EU law obligation of fiscal discipline and maintenance of Eurozone stability in total'*.[87] Not only did the fiscal conception of public interest replicate the European macro-economic fiscal constitutional template, but the judicially-crafted deference to the capacity of each measure to realise the fiscal aims entailed that its controversial assumptions about de-regulation of labour law as an instrument to competitiveness remain unchecked. In this way, the *fiscal* constitution was vested with a kind of immunity. The latter was a result of the the essential transformation of the

[87] Council of STE 668/2012, paragraph 34 (emphasis added).

'necessity stage' dictates of the proportionality review: from one requiring *specific* justification for each measure to a *general* justification.[88]

The third level of interaction is a subtler one. CLL reforms reside within a macro-economic territory of achieving fiscal aims. They were intrinsically related to the emerging EU macro-economic constitution. Such habitat hardened the judicial review of proportionality. Indeed, how was the Court to make an assessment about whether CLL reforms contribute to the stated aims of competitiveness and fiscal reduction? Kaarlos and Klaus Tuori have very insightfully located that, within the EU, the macro-economic constitution renders control by judicial actors more difficult since premised on aggregate numerical fiscal targets and deficits. This is to be contrasted to the easier judicial reviewability and juridification of the micro-economic constitution (competition rules, four fundamental freedoms).[89] Indeed, this effect of the macro-economic orthodoxy was strikingly visible in the Court's approach to proportionality and may account for the 'necessity fiction' through which the Court may have tried to avoid this hurdle by deferring to the Government's and Memorandum determination for the existence of the necessity link between the measures and the fiscal aims. Indeed, when the Government was asked to justify the necessity of measures, it merely pointed to the Memoranda stating so.

Fourthly, as we will examine below, the rules of the transnational labour normative sphere (ECHR, ILO standards) played absolutely no part in framing the proportionality, albeit enjoying a supra-legislative according to the constitution. The *transnationalisation* of proportionality review concerned only conditionality.

[88] See Georgios Kassimatis, 'Τα αντισυνταγματικά μέτρα των δανειακών συμβάσεων. Οι βασικές θέσεις της απόφασης 668/2012 της Ολομέλειας του ΣτΕ' (2012) 60(1) Νομικό Βήμα 2648, 2672 (in Greek).
[89] *Tuori and Tuori* (n 47) 39.

(5) Domestic Courts and Proportionality Review: An Indirect Challenge to the Hierarchy of Norms

The judiciary, at least as expressed in the two aforementioned Council of State rulings, embraced a deferential stance to the legislator at the expense of the protection of the constitutional labour rights. Arbitration is the notable exception where the *textual* reading of the Constitution was seemingly far too clear to be ignored. In this way, the Courts have been complicit in the CLL crisis de-construction by moving to the same direction as the legislator and Government. As Douzinas eloquently points outs, with the Council of State Decision (referring to 668/2012) 'fundamental principles of constitutional law were set aside at the altar of ''saving'' the nation [and] judicial power became a fig leaf for governmental decision'.[90]

Judicial behaviour may be motivated by a pragmatic unwillingness to be involved in a highly-charged political and economic environment with economic survival at stake, not merely of Greece but even of the Eurozone. In other words, the fear that the Court would be scapegoated as derailing the reforms may have caused the judicial restraint. Another - more normative- motivation may have been that the 'thin' model of proportionality is complying with the separation of powers. Venizelos argues that public interest as all vague legal notions is in fact a 'rul [e] of separation of powers between the legislator and the judge, between the political and judicial power'.[91] Viewed from this angle, the entire discourse transforms into a comparative institutional analysis[92] question

[90] Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 47.
[91] Evangelos Venizelos, Εθνική Συνταγματική και Εθνική Κυριαρχία σε συνθήκες διεθνούς οικονομικής κρίσης' in Xenophon Contiades, Filippos Spiropoulos and Kostantinos Tsoukalas (eds), *Δημοκρατία, Σύνταγμα, Ευρώπη στην εποχή της κρίσης* (Σαβάλλας 2012) 35 (in Greek).
[92] For the concept of comparative institutional analysis see Nick Komesar, *Imperfect Alternatives* (University of Chicago Press 1994) Chapter 1.

of which institution is better equipped to deal with the complex financial questions emerging from the crisis. Since the government possesses *both* the superior technical administrative capacity to address these issues in a systematic way, particularly in light of their predominant fiscal nature, *and* also carried the responsibility to 'define and direct the general policy of the Country,[93] the 'thin' approach, under this view, stems both from the principle of separation of powers and from institutional competence considerations.

Whatever the reasons of the judicial stance, though, this deference to CLL reforms profoundly violates the spirit and purpose of the Constitution: the public interest, as many authors have claimed, is *intrinsic* to the Constitution and thus cannot be settled only on fiscal terms. Ir should integrate social considerations and conform to the constitutionally-guaranteed socially-committed market economy.[94] In addition, since limitations on rights should be the last resort and narrowly interpreted, there must be a 'thicker' proportionality review. To put it simply, the public interest cannot be restricted to 'what government says' which, to quote Crouch 'is merely a devaluation of the meaning of public interest'.[95] The practical consequence of a 'thick review' is the non-admissibility of the 'necessity fiction' of the 'en bloc treatment' of the legislative provisions as part of the Memoranda. Each measure needs to be individually justified as necessary for attaining the public interest.

By rejecting a 'thicker' approach, the Courts engineered a *de facto* modification of the hierarchy of norms within the domestic order. Normative hierarchy constitutes a

[93] Article 82 of the Greek Constitution.

[94] For this thesis see Travlos-Tzanetatos on the need to re-constitutionalise public interest Dimitris Travlos-Tzanetatos, *Εργατικό Δίκαιο και Πολιτική* (Αντ.Ν.Σάκκουλας 1986) 85 (in Greek). See also Georgios Leventis, *Συλλογική Αυτονομία και Κρατικός Παρεμβατισμός στο Εργατικό Δίκαιο* (Σάκκουλας Άθηνα-Κομοτηνή 1981) 62 (in Greek) [the general interest is not a notion located outside or beyond the constitution] and *Kassimatis* (n 86) 2661 [the criteria for the existence or not of public interest are constitutional'].

[95] Colin Crouch, 'Changing Perceptions of a Public Interest' in Lord Wedderburn (ed), *Labour Law and the Community: Perspectives from the 1980s* (Institute of Advanced Legal Studies 1982) 114.

central feature of rule of law and constitutionalism in Greece. This confirms the descriptive observation of a Greek constitutional scholar that economic crises cause a deregulation of the hierarchy of sources of law.[96] Following the de-capacitation of the protective functions of the labour Constitution as a result of a 'thin' proportionality review, a free rein is allowed on conditionality to resume capturing and de-constructing the CLL legislative layer. In this context, Katrougalos is right to point out (in striking historical resemblances with the post-WWII para-constitution consisting of anti-communist laws permitted to derogate from the 1952 Constitution) that Memoranda essentially function as a 'para-constitution whose implementation presupposes the sidestepping of the existing economic and social constitution'.[97]

In light of the above, one could be justified to talk about the 'submissive' or 'functionally disembedded' labour constitution.

2. The Transnational Labour Sphere- Domestic Labour Spheres Interaction: A 'Weak' Synergy and One Clash

Let us now re-focus the examination lens on the interaction between the transnational (TLS) and domestic labour spheres (DLS). Initially, the TLS was a *duet* comprising ILO and the European Social Charter. Recently, two new entrants have been added. The *duet* became *quartet.* The first additional member has been the European Charter of Fundamental Rights which protected several collective labour law rights. The ECHR is

[96] Giorgos Gerapetritis, 'Η οικονομική κρίση ως στοιχείο απορρύθμισης της ιεραρχίας των πηγών του δικαίου: Νομοτέλεια η άλλοθι;' (2012) 60(10) Νομικό Βήμα 2754 (in Greek).
[97] *Katrougalos* (n 43) 231.

the other member to join, following the adoption by the Strasbourg Court of an 'integrated jurisprudence'. This jurisprudence integrated, for the first time, the social right of collective bargaining as an essential element of the civil and political right to freedom of association.[98] Even more importantly, the Court extensively relied on ILO jurisprudence (ILO Digest of Decisions, Committee of Experts General Survey) for determining the inclusion of collective bargaining into the scope of Article 11.[99] Far from a determinate and integrated field, the quartet members preserve their distinctiveness and autonomy while the nature of their inter-relations is an evolving (and controversial) issue awaiting clarification.

Since Greece has ratified ILO Conventions 87 on Freedom of Association and 98 on Collective Bargaining and is a member of the ECHR, while failing to accept Article 5 (on the right to organise) and 6 (on the right to bargain collectively) of the European Social Charter, and insofar as the EU Charter does not apply to legislation not implementing European legislation,[100] ECHR and ILO are the only *active* layers of the TLS in relation to the domestic labour sphere. Whereas the European Convention on Human Rights is *normatively* applicable, the European Court of Human Rights has issued no pronouncement yet on the Greek CLL case. In contrast, ILO has developed a clear and extensive jurisprudence on Greek developments.

So, our enquiry adopts a two-step level of examination. Firstly, the ILO jurisprudence concerning the compatibility of the Greek CLL measures with international standards is

[98] *Demir and Baykara* (n 5) paragraph 154.
[99] See further Keith Ewing and John Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39(2) ILJ 2.
[100] Article 51(1); ECJ has clarified that a Member State's implementation of a Memorandum does not amount to implementation of EU law. Order in ECJ, Case C-128/12 Sindicato dos Bancarios do Norte v Banco Po Português de Negócios 8-12 (Lack of competence to consider a preliminary reference for the compatibility of Portuguese legislation implementing the Memorandum concluded with the Troika with the EU Charter).

provided. Subsequently, the analysis looks into the domestic penetration – or more accurately- non-penetration, of these norms into the domestic normative sphere. In particular, it presents the Council of State (STE) Decision 2307/2014, the only so far on collective labour rights coming from a superior Court.

(i) The International Labour Layer: ILO on Greek CLL Crisis Reforms

ILO has developed an extensive jurisprudence on the Greek crisis reforms, pronouncing a multi-faceted violation of ILO labour standards by crisis CLL reforms dictated by bailout conditionality. This jurisprudence is to be found in two *loci*: the annual observations of the Committee of Experts on the Application of Conventions and Recommendations' *(Committee of Experts)*,[101] and more importantly the ILO specialised Committee on Freedom of Association (CFA) conclusion on the complaint brought by the Greek trade unions regarding the violation by austerity measures of ILO jurisprudence on freedom of association.[102] There was also a High-Level Mission (HLM) report issued in September 2011.

(a) *An Overview of ILO Jurisprudence on Greek CLL Reforms: Setting the International Labour Standard*

(1) Crisis Measures falling below the ILO Standards

Whilst aware 'that the measures giving rise to this complaint have been taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis',[103] the CFA generally 'recommended that the Government promote and strengthen

[101] ILO, *Report on the High Level Mission in Greece* (September 2011).
[102] ILO Committee on Freedom of Association, Conclusions on Case No. 2820 (Greece) in 365th Report of Committee on Freedom of Association (1-6 November 2012).
[103] ibid 988.

the institutional framework for collective bargaining'.[104] Moving to the specifics, four principal areas were considered to be sub-standard.

- *The 'Full and Frank' Social Dialogue Standard*. ILO has made frequent pronouncements on the social dialogue deficits in the Greek case and appears to suggest a 'social dialogue standard' imposing a *procedural* obligation on Government to conduct a 'full and frank consultation with social partners' prior to the passage of the crisis measures. In 2010, the Committee of Experts emphasised 'the importance of holding *full and frank* consultations with the employers' and workers' organizations on the revision of collective bargaining machinery'.[105] One year later it expressed its deep regret that 'such far-reaching changes were made without full and thorough discussions with all the social partners'.[106] Along similar lines, the CFA urged that 'permanent and intensive social dialogue be held on all issues raised in the complaint with the aim of developing a comprehensive common vision for labour relations in the country in full conformity with the principles of freedom of association and the effective recognition of collective bargaining and the relevant ratified ILO Conventions'.[107] Such a 'permanent and intensive social dialogue' did not materialise.[108]

[104] ibid 989.
[105] Committee of Experts on Application of Conventions and Recommendations (Committee of Experts), *Observation on the Right to Organise and Collective Bargaining Convention 1949 (No. 98)* (adopted in 2010) (emphasis added).
[106] Committee of Experts, *Observation: Follow-up to the conclusions on the application of standards* (adopted in 2011).
[107] CFA, *Conclusions* (n 100) 989.
[108] For the first Memorandum (May 2010) there was no social dialogue. For the second (March 2012) there was dialogue but the Memorandum stated that it 'fell short of expectations' [Greece, *Memorandum of Economic and Financial Polices* 4(1) (9 March 2012)] and suggested unilateral state imposition. See further Elena Patra, 'Social Dialogue and Collective Bargaining in times of crisis: the case of Greece' Working Paper 38 (ILO 2012 See further Elena Patra, 'Social Dialogue and Collective Bargaining in times of crisis: the case of Greece' Working Paper 38 (ILO 2012)

- *Interventions in Collective Autonomy Standards.* The CFA has been very categorical that there are 'important and significant interventions in the voluntary nature of collective bargaining and in the principle of the inviolability of freely concluded collective agreements'.[109] These repeated statutory interventions 'could prove harmful and destabilize labour relations' by 'depriv[ing] workers of their fundamental right and means of furthering and defending their economic and social interests.[110]

- *The Primacy of Trade Unions Standard: The Case of Associations of Persons.* The granting to the atypical 'associations of powers' of the power to conclude enterprise agreements in the absence of an enterprise trade union was regarded by the *CFA* as a measure that it 'may seriously undermine the position of trade unions as the representative voice of the workers in the collective bargaining process'.[111] The CFA underlined that they are not trade unions with full functions and guarantees of independence.[112]

- *The State Neutrality of Bargaining Level Determination Standard: The Case of Favourability*. The CFA concluded that 'the elaboration of procedures systematically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of workers' and employers' organizations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98'.

(2) Crisis Measures in conformity with ILO Standards

Three crisis measures were judged to be in conformity with ILO standards:

[109] ibid 995.
[110] ibid.
[111] CFA, *Conclusions* (n 102) 998.
[112] ibid.

- *Elimination of the automatic extension of sector and occupational agreements*. As the CFA observed, 'there is no duty to extend agreements from the perspective of freedom of association'.[113]

- *Reduction of After-Effect Period.* The second measure concerns the reduction of the temporal extension and the partial elimination of the after-effect period of collective agreements. The CFA found no violation of the principles of collective bargaining but attempted to qualify this finding by recording its observation 'that it comes within an overall context where imposed decentralization and weakening of the broader framework for collective bargaining are likely to leave workers with no minimum safety net for their terms and conditions of work'.[114]

- *Unilateral Mechanism of Arbitration.* Finally, no violation arises in respect to the elimination of the unilateral resource mechanism to arbitration which is now permitted only on a *consensual* basis. Such elimination is not only *permitted* but *required* by ILO standards. Pursuant to the general rule that 'collective bargaining if it is to be effective must assume a voluntary character and not entail recourse to measure of compulsion which would alter the voluntary nature of such bargaining'[115] and that recourse to bodies appointed for settlement of dispute between parties to collective bargaining should be on voluntary basis,[116] the CFA in an earlier complaint in 2003 brought by employer's association has criticised the mechanism of unilateral recourse to arbitration as violating Convention 98[117] and asked for any mechanism of unilateral recourse to arbitration to be

[113] CFA, *Conclusions* (n 100) 996.
[114] ibid.
[115] ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, ILO 2006) paragraph 926.
[116] ibid 933.
[117] ILO Committee on Freedom of Association, *Conclusions* on Case No. 2261 (Greece) in 332nd Report on Committee of Freedom Association (November 2003) 665.

restricted to essential services.[118] So, now, the CFA just repeated its jurisprudence and concluded that 'the Committee recognizes that this measure was taken in an effort to align the law and practices with its principles to compulsory arbitration and does not consider this measure to be in violation of freedom of association principles'.[119]

(b) A Comment on ILO Position: The Soft Character of Obligations

The ILO jurisprudence gave rise to a 'conflict of obligations' for the Greek legislator. Multiple crisis CLL legislative reforms were held inconsistent with international legal standards. Whereas perceiving these violations from a *bilateral viewpoint* as a domestic legislation not complying with international labour norms, ILO in fact *indirectly* pronounced a clash with EU-IMF bailout conditionality. This is because the legislation pronounced to be in contravention to ILO standards was contained in the Memoranda and expressed in the respective Council of EU Decisions. With regard to unilateral recourse to arbitration, though, the clash follows the transnational/domestic lines. ILO rules, which prohibit unilateral recourse to arbitration as violating the voluntary nature of collective bargaining,[120] align with that of bailout conditionality and conflict with the domestic constitutional layer *requiring* unilateral arbitration as held by STE 2307/2014 ruling.

Nonetheless, the ILO obligations possess a soft nature. This is for two reasons. Firstly, there is the traditional 'enforcement problem' of international labour law. Eventually, as Ewing remarks, 'the supervision and enforcement of international labour law relies on the *goodwill* of governments to abide by obligations voluntarily entered into and

[118] ibid 667.
[119] CFA, *Conclusions* (n 100) 1000.
[120] On the critique of ILO compulsory arbitration position in the Australian context see Breen Creighton, 'International Labour Standards and Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia Fair Work's Act in International Perspective* (Routledge 2012) 52.

ultimately on *moral persuasion* by international community'.[121] Hence there might be *soft* obligations of international law on the Greek state to comply with international standards but no practical mechanism of enforcement exists. And, unlike the soft Memoranda, they lack the mechanism of *dominium* for being effective.

As a result, the enforcement of ILO norms and their ability to penetrate the domestic normative sphere depend upon the Member States legal system and their use by domestic judicial actors.

(ii) The Lack of Internalisation of the Transnational Labour Sphere in the Domestic Labour Sphere: The 'Curious' Council of State 2307/2014 Decision

Ratified Conventions are vested with a formal supra-legislative status within the Greek legal system.[122] However, the Council of State, in its 2307/2014 ruling, firmly sealed all doors of internalisation of the transnational labour sphere.

The Court divided allegations that CLL reforms conflict with TLS norms into two categories. In the first, the Court addressed allegations that the CLL reforms violate Article 11 of the ECHR and European Union freedoms of trade union rights, collective autonomy and right to strike. In the Court's view, these allegations are unfounded due to its ruling that the (Memorandum II) CLL provisions, 'considered in their entirety, neither violate the minimum core of the right to work and right to strike, collective autonomy, and trade union freedom in general, nor restrict those rights so as to lead to a violation of proportionality'.[123] The ambiguity of this pronouncement cannot be overstated. The Court

[121] Keith Ewing, *Britain and the ILO* (Institute of Employment Rights 1994) 14 (emphasis added). For the effectiveness of international standards see Bob Hepple, *Labour Laws and Global Trade* (Hart 2005) Chapter 2.
[122] Article 28(2) of the Greek Constitution.
[123] Council of State (STE) 2307/2014 paragraph 40.

seemingly suggests that the survival of the domestic constitutional review of proportionality suffices for the survival of the respective (EU, ECHR or both)[124] tests. Hence the subjugated to the bailout conditionality proportionality review kills two birds with one stone*:* not only internalises bailout conditionality, but also *prevents* the internalisation of the transnational (EU, ECHR or both) normative layers.

The second category contains claims of infringement of the ILO Conventions 87 and 98 and the European Social Charter. Here the Council of State not only ignored the CFA conclusions on the Greek case. It went further than that by relegating the Conventions' status to mere recommendations (repeating previous case-law[125]) to the countries having ratified them. And it even suggested that the content of the Conventions 87 and 98 and 154 as well as that of the European Social Charter were fully realized by the enactment of the constitutional provisions. In turn, this entailed that, since no constitutional violation (besides arbitration) was found in this case, automatically no conflict with these Conventions arose.[126] One could immediately discern the paradox here: while the protective labour constitution is 'functionally decapacitated' by proportionality, it is still used as a justification for 'decapacitating' the defensive potential of ILO norms. It seems a tails-I-lose, heads-you-win case for the labour normative spheres.

In this fashion, the Council of State blocked any interaction between the transnational and domestic labour spheres.

[124] The Court refers to EU and ECHR claims as only allegations. In the next sentence referring to why the allegations are inadmissible, the Court fails to specify which normative sphere(s) are *prima facie* applicable.
[125] Council of State (STE) 4569/1996 and A.P (Areios Pagos) 25/2004.
[126] Council of State (STE) 2307/2014 paragraph 40.

3. The Conditionality - Transnational Labour Spheres Interaction: The Notable Absentee

This part interrogates the *transnational interaction* between *bailout conditionality* and *transnational labour sphere (TLS).* Rendered possible by the EU participation in *both* spheres, this link carried immense potential. It offered an avenue for an effective 'trumping' of bailout conditionality *in its source* through preventing EU condition-setting institutions from prescribing CLL de-constructive reforms conflicting with TLS stipulations. Of course, the centre of reference for this interaction and crucially the necessary 'gateway' through which ILO and ECHR norms may penetrate the EU sphere, cannot be but the EU Charter of Fundamental Rights. The latter sought to 'constitutionalise the European Social Model'[127] by including freedom of association (Articles 12) collective bargaining and strike (Article 28) and was granted primary EU law status by the Lisbon Treaty. In promising, to quote Bercusson, a 'renewal of labour law',[128] its very function was to prevent the erosion of CLL rights by EU institutions. Greek crisis developments dismiss the 'renewal of labour law' expectations.

Our enquiry proceeds in two stages: firstly, we locate the missing interaction. Then, this observation is related to the crisis of legality and crisis of democracy.

(i) The Missing Interaction

No pattern of actual interaction between bailout conditionality and transnational normative spheres can be identified. As a result, bailout conditionality operated in a pragmatic environment of institutional immunity. Indeed, the shadow operation of Troika

[127] Anne Davies, *EU Labour Law* (Edward Elgar 2012) 20-24;
[128] Brian Bercusson, 'Preface' in Brian Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights* (Nomos 2006) 13.

and the crafting of bailout conditionality within extra-EU and informal channels were crucial for evading the control by the EU transnational labour sphere. Two levels of no-interaction can be traced: (a) formation of conditions, (b) review/oversight of conditions.

Indeed, membership of Troika, the latter being the prime condition-setting body, carefully excluded ILO, Council of Europe or any other more socially-minded institution. In light of Troika's composition as containing a monetarist (ECB) and a neo-liberal institution (IMF) along with the European Commission, it was hardly surprising that CLL questions were approached as 'macro-economic rigidity' issues and not from a 'rights-based' or 'labour is not a commodity'[129] perspective. But not only did Troika lack any socially-oriented institution. There existed no 'screening process' examining the compatibility of conditions with the TLS, or at least a consultation with ILO and other social policy bodies.[130] Moving to the oversight level, no political oversight by the European Parliament or special judicial oversight has been crafted. *And the ECJ has so far blocked the route of challenges to conditionality-imposed legislation based on the Charter by finding the references inadmissible.*[131]

So, in the face of the absence of no *actual* transnational link between bailout conditionality and transnational labour spheres exists, bailout conditionality is left to proceed unhindered with the 'aggressive internalisation' in the domestic labour sphere.

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[129] ILO, *Declaration of Philadelphia* 1(1).

[130] See European Parliament resolution of 13 March 2014 on Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries 2014/2007(INI) (The Committee] regrets (…) the fact that the ILO was not consulted [when the austerity programmes were designed] and that, despite the important social implications, the consultative bodies established by Treaty, in particular the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR), were not consulted) Preamble 3.

[131] See e.g Case C-434/11 *Corpul National al Politistilor v Mnisterul Administratiei si Internelor (MAI) and Others* [2011] ECR I-000; Case C134/12 *Ministerul Administratiei si Internelor (MAI), Inspectoratul General al Politiei Romane (IGPR) and Inspectoratul de Politie al Judetului Tulcea (IPJ) v Corpul National al Politistilor- Bbiroul Executiv Central* [2012] ECR I-000

(ii) The Missing Interaction: The Crisis of Legality and Crisis of Democracy

This lack of transnational link should not be seen as a merely a matter of an institutional design failure. It bears significant normative consequences. In essence, the absent interaction amounts to what Keith Ewing calls a 'crisis of legality'[132] resulting from EU institutions' failure to observe the spirit of the labour rights enshrined in the Charter. Echoing Ewing's comment, Yannakourou and Tsimpoukis stress that it is noteworthy that the European Commission, as member of the Troika 'forces Greece to adopt acts that are manifestly in breach of the EU law'.[133] Indeed, the Charter should be seen as being applicable to EU condition-setting institutions, even when acting outside of formal EU framework (e.g European Commission as a member of Troika). As Fischer-Lescano points out, Article 51 of the Charter 'provides that the institutions are bound by the CFR irrespective of the specific context'.[134] The *ultra vires* thesis finds support in ECJ's judgment in *Pringle* where the Court stressed that the European Commission by its involvement in the ESM Treaty should 'promote the general interest of the Union'[135] and 'ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law'.[136][137]

In turn, by using *Demir and Baykara* incorporation route of ILO standards into Article 11 of the ECHR[138] and then channel them to Article 12 of the Charter through Article 52

[132] Keith Ewing, The Death of Social Europe' (2015) 26(1) King's Law Journal 76;
[133] Matina Yannakourou and Chronis Tsimpoukis, 'Flexiblility without Security and De-construction of collective bargaining: The New Paradigm of Labour Law in Greece' (2013-2014) 35 Comparative Labour and Policy Journal 331, 369.
[134] Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the conclusion of Memoranda of Understanding,* (Centre of European Law and Politics 2014) 9.
[135] ECJ, Case C-370/12 *Thomas Pringle v Government of Ireland and the Attorney General* (27 November 2012) 163.
[136] ibid 164.
[137] For the *ultra vires thesis* see also European Parliament's Committee on Constitutional Affairs, Opinion (11 February 2014) 2013/2277 (INI), paragraph 11.
[138] *Demir and Beykara* (n 5) see *para* 147, 154 and 166.

of the Charter, it is reasonable to argue for the violation of the Charter by the EU institutions in light of ILO CFA pronouncements on the Greek case. Bogg and Ewing invoke this precise route as a basis for concluding that 'following the report of the ILO HLM in 2011 and the ILO Committee of Experts in 2012, it is thus strongly arguable the austerity plan for Greece is utterly illegal for its failure to respect the requirements of Art 12 of the EU Charter'.[139] *A fortiori* the same conclusion would apply for the CFA conclusions. However, as we have already stated in the previous section the Courts have treated the few cases based on Memoranda as inadmissible thus blocking the potential application of the EU Charter of Fundamental Rights. This has been the *de lege lata* EU official position and all other opinions are academic commentaries.

So, the EU rule of law appears to emerge as a serious crisis casualty. In turn, as a European Parliament's study pointed out, there is a co-constitutive triangular relation between fundamental rights, rule of law and democracy. The latter are 'inherently and indivisibly interconnected, and interdependent on each of the others, and they cannot be separated without inflicting profound damage to the whole and changing its essential shape and configuration'.[140] In line with this co-constitutive evolution, the serious deficits in upholding fundamental rights should be intimately connected with the 'crisis of democracy' at both European and national levels. Within the European sphere, the sidestepping of the European Parliament, supposed to represent the European *demos* or

[139] Alan Bogg and Keith Ewing, 'Freedom of Association' in Guy Mundlak and Matthew Finkin (eds), *Comparative Labor Law* (Edward Elgar 2015) 326.

[140] Sergio Carrera, Elspeth Guild, Nicholas Hernanz and Jeffrey Jowell, *The triangular relationship between fundamental rights, democracy and the rule of law in the EU: Towards an EU Copenhagen Mechanism*, Study Commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (European Parliament 2013) 4.

demoi, and the ECJ for 'checking' the various condition-setting institutions creates an apparent lack of democratic control,[141] transparency and accountability.

So, bailout conditionality, by resting upon 'soft law' and 'extra-EU' structures, strived to immunize itself from an institutional control assessing its compatibility with fundamental social rights. The lack of transnational interaction casually contributed to this immunization. Eventually, legality, democracy and fundamental rights were sacrificed on the altar of the fiscal retrenchment caused by the austerity policies.

4. A Critical Assessment: Making Sense of the Interactions

Each preceding part offered a *single* piece of inter-sphere interactions. Only when pieced together, though, the entire picture gains clear visibility. This task is undertaken here. Two claims are advanced. The first is *descriptive*: a 'double submission' of labour rights to bailout conditionality is found and its implications worked out. The second is *explanatory*. It accounts for this double submission by integrating it into the broader explanatory framework of New Constitutionalism.[142]

(i) The 'Double Submission' of Labour Spheres by Bailout Conditionality: Losing Both 'Conflicts of Obligation'

All interactions could be conveniently illustrated within a framework of 'conflict of obligations' between bailout conditionality and labour spheres. A disclaimer is required here to avoid misunderstandings. The term 'conflict' is employed to encompass conflicts which, depending on the normative space they occur, may be subject to clear superior 'rules of conflict' (e.g constitutional primacy over legislation') so that the conflict may

[141] For an account of the tension between EMU financial assistance policies and democracy see Ben Crum, 'Saving the Euro at the Cost of Democracy' (2013) 51(4) Journal of Common Market Studies 614.
[142] Stephen Gill, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' (1998) 3(1) New Political Economy 5.

be *non-genuine.* The reader should pay proper attention to the 'rules of conflict' which, as shown below, are *de facto* subverted.

The interactions cause conflicts of obligations in two *loci:* (a) domestic space as obligations to the legislator, (b) European Union as obligations to condition-setting EU institutions. Labour spheres lose both battles.

(a) The Conflict of Obligations for the Domestic Legislator: An Initial Strong Labour Sphere Position Yet ….A Losing Outcome

For domestic legislator, the three normative spheres establish a typical (*prima facie)* conflict of obligations. Besides the constitution, bailout conditionality and the transnational labour sphere generate their own stream of obligations. In general, TLS/DLS configurations are synergic, except for unilateral recourse to arbitration where the TLS *conflicts* with DLS and is *synergic* to bailout conditionality.

The interaction of both transnational labour spheres with the domestic sphere could be comprehended as a *dual* 'globalized Europeanisation'. The latter term combines the concept of Europeanisation denoting 'the process whereby EU institutions and policies influence national institutions and policies within the various Member states'[143] with the presence of global institutions, IMF for bailout conditionality and ILO for the transnational labour sphere. It is important to point out that bailout conditionality represents an unconventional source of Europeanisation operating within unique structures and not within the traditional formal channels (Directives, Regulations e.t.c). Radaelli conveniently distinguishes four types of national response to Europeanisation: (a) inertia denoting lack of change (b) absorption referring to change as adaptation, (c)

[143] Marc Pollack, 'Theorizing EU Policy-Making' in Helen Wallace, Mark Pollack and Alasdair Young, *Policy-Making in the European Union* (6th edn, OUP 2010) 37.

transformation describing paradigmatic change and (d) retrenchment implying national policy becoming less European than it was.[144] In the Greek case, domestic labour sphere responds with its 'transformation' to bailout conditionality *(aggressive internalisation)* while for transnational labour sphere, it responds with 'inertia' *(no internalisation)* as no change is effectuated.

So, what mode does the resolution of this conflict of obligation partake? At first, there is a clear 'rule of conflict' based on the constitutional ordering of sources from which the obligations stem from. Pursuant to such ordering, the labour constitution vis-à-vis its quality *qua* constitution *trumps* bailout conditionality, the latter having an inferior legislative status and (due to the *dual normativity* of conditionality) certain (still inferior to the constitution) *supra-legislative* elements *qua* EU hard law. In addition, the TLS obligations as entrenched to Conventions ratified by the Greek State, possess a supra-legislative status thus formally trumping conditionality-imposed legislation. Indeed, the labour rights entered with a strong initial position and an upper hand in this conflict.

However, eventually the bailout conditionality emerged as a winner and the labour constitution is loser while the transnational labour sphere is invisible. How should we account for this *prima facie* paradox?

The answer should be located in the *de facto* subversion of the traditional *conflict of obligations rule*. Such subversion was the cumulative effect of multiple normative and institutional interactions (and non-interactions). Firstly, the *non-legal* means of *dominium* ensured the capture of the legislative layer by bailout conditionality through a *sui generis* normative constellation. Yet bailout conditionality should also subvert the supreme labour constitution. The latter subversion proceeded via the instrument of proportionality

[144] Claudio Radaelli 'Whither Europeanization? Concept Stretching and Substantive Change' (2000) 4(8) European Integration online Papers (EIoP).

as devised by the Council of State Decision which grants with a kind of constitutional immunity the conditionality-captured legislative layer. Obviously, Courts plaed a critical role by authoring a *de facto* alteration of the conflict of obligations rule. At the same time, transnational labour norms (ILO, ECHR) failed to make an impact owing to the judicial undermining of their *supra-legislative* quality.

In this manner, a new *conflict of obligations rule* resurfaced within the Greek domestic order that endows bailout conditionality with a *de facto supremacy.* And in light of these new rules, the labour (both constitutional and TLS) spheres *lost* the battle, despite battling from an initially superior normative position.

(b) The Conflict of Obligations in the European Sphere: An Initial Weak Labour Sphere Position and a …Losing Outcome

The EU hosted the second conflict of obligations between bailout conditionality and transnational labour sphere. Its resolution bore an intrinsic and casual relation to the emergence of the first conflict. Only due to the incapacity of the transnational labour sphere to 'trump' bailout conditionality, the latter can penetrate the domestic legal sphere.

Let us now introduce the two sides. The anti-labour side challenges labour scholars' presuppositions traditionally accustomed to direct their analytical focus on obligations arising between the fundamental freedoms and labour rights.[145] Here the *aggressive villain* takes on the unusual crisis-induced form of *bailout conditionality.* The latter grows organically in connection with the emerging macro-economic European constitution, the status thereof being upgraded during result of the crisis. At the opposite side stands the

[145] For an excellent account of conflict of obligations within the Viking/Laval Context see Alan Bogg, 'Viking and Laval: The International Labour Law Perspective' in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart 2014).

EU labour rights' normative sphere consisting of a patch of different rules, potentially incorporating ECHR and ILO rules, but with the EU Charter as a 'gateway'.

The traditional *pragmatic* position of labour and social rights in EU is weak. The dominance of economic constitution over the social constitution, the latter called by Tuori as the 'underdog, capable of asserting itself merely in the limits and on the terms of the more robust aspects of constitutionalization, chiefly the economic one',[146] is a well-documented feature in literature. As Barnard put it, 'social policy has long been viewed as the poor relation in the integration process'.[147] Bruun insightfully underlines the contrast between the 'EU's labour is a market commodity on the internal market approach' with ILO's 'labour is not a commodity' approach.[148] No matter the pragmatic weakness, in formal terms labour rights enjoy an equal status to the economic freedoms due to the Treaty status of the Charter of Fundamental Rights. In turn, this entails that a *formal* 'conflict of obligations' rule may suggest the dominance of the Charter over bailout conditionality norms that, in large, are not *legally posited* (besides the Council of EU Decisions under the Excessive Deficit Procedure) and lack a direct treaty Status.

So, let us inspect the mode of resolution of this conflict. Is the *pragmatic* weakness or the *formal* conflict of obligations rule granting a 'constitutionalisation role' to labour rights for 'trumping' other EU obligations to prevail? To put it otherwise, which face of what Seirfert calls Janus-face nature of the European economic governance is dominant, that of the 'traditional social policy of harmonization of national legal order [or the one]

[146] Karlo Tuori, 'The Many Constitutions of Europe' in Karlo Tuori and Suvi Sankar (eds), *The many constitutions of Europe* (Ashgate 2010) 25.
[147] Catherine Barnard, *EU Labour Law* (4th edn, OUP 2012) 3.
[148] *Bruun* (n 25) 93.

that legitimizes but also imposes legal interventions on the level of the Member States that cut the existing statutory or collective protection of employees'?[149]

As preceding analysis demonstrated, bailout conditionality remained unchecked by the invisible transnational labour sphere. No interactive pattern arose, and bailout conditionality benefited from a degree of institutional subversion since exploiting its operation within new extra-EU structures (e.g Troika) for growing in the shadow of EU legality. At the same time, whilst ECHR had the theoretical capacity to as a 'transmission belt'[150] of ILO soft law obligations and projecting them with an enhanced EU law status to the EU institutions, in practice this function never materialized. Indeed, the EU Charter, rather than becoming a 'vehicle for th[e] constitutionalisation of labour law',[151] was as an ineffective *paper tiger* tragically incapable of arresting the de-construction of collective labour law imposed by bailout conditionality that capitalises on novel multi-normativity structures operating outside the strict confines of EU law in order to escape the balancing application of the EU social constitution.

Thus the labour sphere again emerged as the *loser* in a second conflict of obligations, albeit starting from a *strong* formal position. The losing outcome, though, is fully consistent with its *pragmatic* weak position within the EU institutional environment.

In turn, this resolution *confirms* an established trajectory and *adds* a new twist. On the one hand, bailout conditionality may be perceived as carrying the 'old wine' of supremacy of economic orthodoxy to the 'new bottles' of macro-economic coordination. As Achtsiouglou and Doherty rightly argue, Memoranda 'demonstrate the existence a hierarchical relationship in which fundamental labour rights are subordinated to

[149] *Seifert* (n 58) 329.
[150] *Bogg* (n 145) 66-68.
[151] Brian Bercusson, *European Labour Law* (CUP 2009) 12.

fundamental economic freedoms'.[152] At the same time, though, a significant *new* development should not evade attention. This is the expansion of the macro-economic EU constitution over the territory of collective labour law which disrupts the original positioning of CLL outside of the confines of EU intervention. If Viking and Laval broke CLL immunity by subjecting it to the micro-economic constitution forces, bailout conditionality breaks this immunity for CLL *in toto* by fully subjecting the CLL domestic layer to the hostile forces of condition-setting institutions. Indeed, the European layer 'captures' CLL not by simply crafting general restraints but by imposing specific legislation which, in practice, have the effect of *positive harmonization* for the country-member concerned. Thus there is a full *Europeanisation* of the collective labour law of a Member State.

(ii) The 'Double Submission' and Eric Tucker's Thesis on Multi-Level Capital and Labour Constitutions

The double submission of labour spheres to bailout conditionality thesis fits well with Eric Tucker's sceptical position on the constitutionalisation debate regarding the desirability of constitutionalising labour rights for protecting them.[153] Tucker's view could be summarised as consisting of two methodological and two descriptive theses. The former comprises the theses calling for the (a) transformation of the one-dimension field

[152] Eftychia Achtsioglou and Michael Doherty, 'There Must be Some Way out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm' (2014) 20(2) European Law Journal 219, 220.
[153] *Tucker* (n 44) ; For the *defence* of constitutionalisation building on Sinzheimer's conception of labour or economic constitution see Ruth Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour law* (OUP 2011); Dukes, 'A Global Labour Constitution' (2014) 65(3) Northern Ireland Legal Quarterly 283; For sceptical accounts see Harry Arthurs, 'Labour and the Real Constitution' (2007) 48(2) Les Cahiers de droit (2007)) 43 ; Judy Fudge, 'Constitutionalizing Labour Rights in Europe in Tom Campbell, Keith Ewing and Adam Tomkins, *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

of enquiry preoccupied only with labour constitutionalisation to a two-dimensional field comparing capital and labour constitutionalisations[154] and (b) a joint investigation of the different geographical scales (national, European, international) where these constitutionalisations take place.[155] Regarding the descriptive assertions, Tucker locates (a) a supremacy of capital over labour constitutionalisations, (b) with the former enjoying a 'thicker' and 'harder' constitutionalisation[156] than the latter at every level. [157]

The Greek case offers a new - continental European- ground confirming Tucker's findings but contributes some new insights. To begin with, Tucker's methodological observations cannot be more spot-on. An adequate comprehension of Greek developments requires the joint examination of all geographical levels. In addition, the double trump of labour spheres by bailout conditionality disguises a conflict between capital and labour constitutionalisation. This conflict is thrown into relief, as soon as bailout conditionality is treated as the distilled joint product of IMF capital constitutionalisation and EU's neo-liberal constitutionalisation.

In respect to Tucker's descriptive positions, the Greek example fully accords with its thesis positing the *supremacy* of capital over labour constitutionalisations. This argument echoes Harry Arthurs one regarding the prevalence of the real constitution (that is the structure of the economy) over the juridical constitution.[158] Yet the herein enquiry makes a contribution by illuminating *how* the supremacy comes forward in instrumental terms. This necessitates the adoption of a *dynamic* approach to Tucker's framework. The levels

[154] *Tucker*, ibid 355-356.
[155] ibid 356.
[156] In Tucker's framework, 'thickness' refers to the substantive content of labour rights and 'hardness' to their enforceability. *ibid* 355.
[157] ibid 374. With the exception of *Charter* (Canadian Charter of Human Rights) rights that provides for thicker rights than the capital rights.
[158] *Arthurs* (n 153) 43.

and types of constitutionalisation should not be perceived as static categories but as processes. To put it simply, capital labour constitutionalisation, or as put by Bogg and Ewing economic and labour orthodoxy,[159] are not two ships simply passing each other during the night. The same applies for each level. They conflict, fuse or strengthen each other in legal and non-legal interactions. Indeed, the Greek case sheds light into the crucial interactive side. And for understanding how they conflict, the herein enquiry may invite a revisiting of hard law/soft law distinction to one of effectiveness/non-effectiveness.

Let us now explore the Greek case through a *dynamic* application of Tucker's framework. International (IMF) and regional (EU, Eurozone) capital levels are *fused.* The normative constellation of bailout conditionality was the by-product of this effective fusion. Instrumentally, the powerful gradient of *dominium* solidifies a soft law basis with a 'hard law cover'. In stark contrast, the international (ILO) and regional (EU, Council of Europe) layers are remarkably impotent to achieve such an effective fusion and keep themselves distinct from each other. Next to a coherent, integrated, powerful transnational/European TLS stands an incoherent, fragmented and weak TLS. Indeed, ILO pronouncements have, at best, a nature of soft law obligations on the Greek state, while transnational norms labours are incapable of penetrating the domestic labour sphere, not least because of the judicial construction of proportionality. At the regional level, the asymmetry of capital and labour constitutionalisation grows not because of the 'hard law' quality of bailout conditionality but in that the latter is unchecked by the EU labour rights norms. At the domestic level, though, the capital and labour constitutions have an *equal* relationship due to the overarching Greek socially-committed market

[159] *Bogg and Ewing* (n 139) 321-327.

economy as prescribed by the Greek constitution. Nonetheless, the 'hard law' status of labour constitution was undermined by the constitutional instrument of proportionality/public interest. This instrument effectively functions as a tool for the capital constitution to re-establish the domestic equilibrium in favour of capital rights. Weakening of labour rights automatically strengthens capital rights since unburdening freedom of property and business from labour law restraints.

Following preceding observations, it is hard to explain the asymmetry between the *capital* and *labour* constitutions along the hard law/soft law divide. The asymmetry finds more fertile justificatory ground along the effectiveness/ineffectiveness divide. Effectiveness-enhancing factors may, of course, include the 'hard law' status but effectiveness could be also achieved by a combination of factual and normative conditions as is actually the case with bailout conditionality where soft law by capitalising on the *factual* 'dominium' attains maximum effectiveness.

In this context, a critical examination of Greek developments seems to support the sceptical camp in the constitutionalisation debate which points to its limitations. A constitutional cover for labour rights, as the Greek case shows, does not *per se* render the protective labour edifice bullet-proof from the capital constitution. In the end, the constitution as Travlos-Tzanetatos observes '*is a field of struggle and hence a truce pact of the competing social classes*'.[160] The constitution does not *transcend* class conflict but operate *under* the class conflict. The practical implications of perceiving constitution *qua* conflictual discursive class terrain is that it means that there will be always legal instruments at the disposal of the capital for undermining labour rights if the balance of class forces permits it and/or the economic circumstances require it. For this, it is

[160] Dimitris Travlos-Tzanetatos, *Εργατικό Δίκαιο και Βιομηχανική Κοινωνία* (Παπαζήσης 1977) 48 (in Greek).

sufficient for the observer to consider the Trojan Horse of proportionality/public interest which de-capacitated the labour constitution and de-constructed the hierarchy of norms thus promoting capital interests. In addition, the Greek case highlights the institutional limitation of the Courts to whose decisions the constitutional labour edifice rests upon. To be sure, this in no way means that constitutionalisation projects, as Dukes has successfully advocated for,[161] lack any merit. To be fair, for instance, textual constitutionalisation saved the arbitration clause as well as facilitating socio-political mobilisation as long as it increased the legitimacy of demands for those resisting the reforms.

While paying due regard to these constitutionalisation benefits, the Greek case supports the following proposition: *the effectiveness of a constitutional labour edifice is not an issue of formulating the proper norms or related to their superior normative quality but ultimately rests upon the operation of complex actual class, economic and social forces.*

(iii) The Double Submission: Normative Implications (Crisis of Legality, Crisis of Constitutionalism)

The *double submission* of labour sphere to bailout conditionality is not an outcome with mere *technical-legal* significance. In amounts essentially to a crucial *twin* movement of the economic crisis whose importance cannot be overstated: the first movement concerns the violation of constitutional legality as CLL rights fail to realise their protective potential and the domestic rule of law is violated due to the *de facto* transformation of the constitutionally-prescribed hierarchy of rules. The *submissive constitution* to bailout conditionality dictates represents the effective subordination of long-held societal and

[161] See Ruth Dukes 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in *The Idea of Labour law* (n 153) and by the same author 'A Global Labour Constitution' (n 153).

political choices to a new orthodoxy whose rules emerge in a shadowy, non-transparent, informal and hence illegitimate setting. The same applies for the second movement, with the EU sidestepping of labour rights prescribed by the EU Charter - as well as the European Parliament's oversight- that led to the above identified crisis of legality.

(iv) Accounting for the Double Submission: An Episode of New Constitutionalism

This final part accounts for the *double submission* by putting it in its proper political-legal context. A central assertion is that this submission does not arise randomly or as an inevitable natural consequence of the economic crisis. It forms an organic *part* of the broader *long duree* process of the institutionalisation of neo-liberalism termed by Stephen Gill as 'New Constitutionalism'. *New Constitutionalism* 'is the political/juridical form specific to neoliberal processes of accumulation and to market civilisation',[162] and is conceived as a global hegemonic strategic project on behalf of capital for entrenching neo-liberalism. The aim of New Constitutionalism consists in assisting a global neo-liberal economy by redefining the political 'on a world scale involving restructuring of political constraints and opportunities and reshaping of long-term framework designed, constitutionally, to lock in commitments to a neoliberal path of development'.[163] When viewed from this perspective, submission of the labour spheres acquires a firmer explanatory basis. Indeed, the observer of Greek developments witnesses an *episode* of, what Brodie calls for social policy as a *double movement* of 'rolling back the old and a

[162] Stephen Gill, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' (1998) 3(1) New Political Economy 5, 28.
[163] ibid.

rolling of the new'.[164] The *old* that vanishes is the Greek social-democratic CLL protective model. The latter was the political-juridical expression of one of the latest rounds of the social-democratic 'labour is not a commodity' spirit, at least in Europe. The *new* emerges gradually, but steadily, as the fine by-product of the *perfect synchronisation* of the Bretton Woods with the European layers that ultimately erodes the social-democratic 'old'. The *neo-liberal* and *monetarist* IMF-EU paradigms fuse perfectly into the Eurozone monetarist laboratory, which advances an *instrumentalisation* of labour law, focusing on labour law's macro-economic utility.

Eventually, bailout conditionality undertakes a kind of what Brenner et al term 'inter-jurisdictional policy transfer', termed as the circulation of neo-liberal policy prototypes which 'exten[d] their availability as reading accessible, all purpose 'solutions' to contextualize specific regulatory process'. [165] A crucial insight generated by New Constitutionalism is that the *double loss* of the labour spheres and the curious operation of legal instruments do not defy consistent explanation: they are part of the need to entrench neo-liberalism within hostile normative environment by 'disembedding' social-democratic remnants, whatever their normative (in the Greek case constitutional) quality.

To sum up, the Greek case is essentially a 'frame' in the broader movement towards neo-liberalisation that re-adjusts the equilibrium between capital and labour normative spheres in favour of the former by employing a multitude of instruments cutting across the legal and non-legal divides.

[164] Janine Brodie, 'New Constitutionalism, neo-liberalism and social policy' *in* Stephen Gill and Claire Cutler (eds), *New Constitutionalism and World Order* (CUP 2014) 251.
[165] Neil Brenner, Jamie Peck and Nik Theodore, 'New constitutionalism and variegated neo-liberalization' in *New Constitutionalism and World Order* (ibid) 133.

5. Conclusion: Summary of Findings

So, the Chapter has shown why the constitutional and transnational labour rights were impotent to prevent CLL's conditionality-imposed de-construction. By designating a triangle of labour spheres comprising EU-IMF conditionality, the transnational labour sphere (TLS) and the domestic labour sphere (DLS), it examines each potential interaction or non-interaction with the triangle.

It first examined *DLS submissive* interaction with the 'powerful' mix of hard and soft law which is IMF-EU bailout conditionality resulting from the latter's 'aggressive internalisation' effectuated by a *thin-deferential* conceptualisation of proportionality. Then it illuminated the very 'soft' interaction of the TLS with the DLS asymmetrically weaker than the interaction between the EU-IMF conditionality and the DLS as well as underlining the inexistent interaction between the TLS and bailout conditionality within the EU institutional sphere. Finally, *New Constitutionalism* was offered as an explanatory framework for the developments. Understood in this context, the Greek constitutional developments examined in this Chapter should be treated as a photograph of the broader unfolding motion picture of neo-liberalisation.

VI

Not with a Crisis Bang but 'Death by a Thousand Cuts': The 'Never-Ending' Neoliberal Travel of British Collective Labour Law

When the 2008 economic crisis erupted, the British CLL model stood close to the least protective (for the worker) end of the protective/market (neo-liberal) continuum. It occupied an antipodal pre-crisis position to Greece's.[1] This Chapter interrogates the CLL's crisis trajectory. While Hepple rightly remarked (in 2013) that 'Britain has so far nothing to match the drastic ''emergency'' reforms which are deconstructing labour law in some parts of the Eurozone',[2] this statement should be treted as a *comparative* observation. The herein enquiry categorically rejects any claim postulating a total crisis stasis for British CLL or dismissing this historical period as unimportant for its evolution. On the contrary, it argues that the crisis trajectory marks a '*neoliberal continuity by consolidation'*. This consolidation realised a critical additional step in the seemingly 'never-ending' neoliberal travel of British CLL.[3]

For facilitating comparative synthesis, a symmetrical structure with Chapter IV on Greek developments is adopted, shaped by the Crisis Equilibrium theoretical framework

[1] See Chapter III Part 3.
[2] Bob Hepple, 'Back to the Future? Employment Law under the Coalition Government' (2013) 42(3) ILJ 203, 204.
[3] Indeed, the anticipated enactment of the Trade Union Bill 2015 (awaiting House of Lords approval in January 2016) by the Conservative Government which 'seeks to place significant restrictions on UK trade union activity' (Michael Ford and Tonia Novitz, 'An Absense of Fairness…Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2015) 44(4) ILJ 522, 522) confirms this never-ending neo-liberal trajectory. However, the Trade Union Bill falls outside of the time cut-off (May 2015) of the thesis' examination.

construed in Chapter II. However, the Chapter's coverage is *partial.* The central issue of the constitutional attack on unions' political voice is judged as worthy of a special consideration in the next Chapter.

The enquiry proceeds as follows. Firstly, it traces the economic rationalisation force in the concrete form of a 'pre-emptive austerity frame' which set the dominant regulatory policy-making theme during the Coalition Government period *(Part 1)*. Subsequently, it critically assesses the *de jure* developments (abolition of Agricultural Wage Board and new statutory union duties in relation to their membership lists) *(Part 2)*. The next part considers the administrative attack on public sector unionism through the removal of check-off facilities and the imposition of new restraints on facility-time for union representatives *(Part 3)*.

The analysis of *de jure* and *administrative* reforms as further restraining the 'organisational' and 'functional' space of unions is confirmed, and complemented, by the *de facto* developments: the 'institutional drift' of the statutory union recognition procedure and the crisis' accelerated de-collectivisation and de-unionisation (*Part 4*). After inspecting the 'capital destruction' forms (*non-regulatory measures) (Part 5)* and ascertaining the weak level of the 'counter-legitimation force' in the British Governmental and public discourse (*Part 6), Part 7* puts forward a synthetic view of the trajectory as *'neo-liberal continuity by consolidation'*. Ultimately, *Part 8* accounts for the movement by coding it in the *Crisis Theorem* and adopting a class-based narrative of neo-liberalism as an explanatory causal framework for the crisis movement of CLL.

1. The Age of 'Pre-Emptive Austerity': The Second Movement of Economic Rationalisation in the British Context

As Chapter II argued, capitalist economic crises lead inexorably to a process of 'economic rationalisation' or 'capital destruction' (this is reduction of capital as value rather than as a physical unit),[4] whose intensity and nature vary according to the specific national circumstances and pre-existing regulatory structures.

The 2008 economic crisis was essentially a 'crisis of financialisation',[5] provoked by the mass systemic failure of the financial system to perform its basic functions of proper resource allocation and risk management.[6] Due to the high international inter-dependence of financial institutions (mainly through the so-called derivatives) and the unbalanced nature of British post-Thatcherite post-Fordist capitalism resting heavily upon City-driven lightly-regulated financial markets, it is hardly inexplicable that UK was one of the first crisis' casualties.

Subsequently, the economic rationalisation force made two movements. The first movement took the public policy form of a short-lived 'twelve-month Keynesianism'[7] in 2008 at a global level (among developed countries). Britain played a leading role in this period. As banks had to engage in capital destruction (e.g devaluations of derivative products and write-off of non-performing loans) of an endangering magnitude for the

[4] It is worth reminding here that 'rationalisation' is a term referring to the economic adjustment pursuant to the often contradictory and self-destructive rationality of the capitalist system.
[5] Costas Lapavitsas, 'Introduction' in Costas Lapavitsas (ed), *Financialisation in Crisis* (Brill 2012).
[6] Jozeph Stiglitz, 'The Financial Crisis of 2007–8 and its Macroeconomic Consequences 1' in Stephany Griffith-Jones, José Antonio Ocampo and Joseph Stiglitz (eds), *Time for a visible hand: lessons from the 2008 world financial crisis* (OUP 2010).
[7] Marc Blyth, *The History of a Dangerous Idea* (OUP 2013) 54-56; see also Colin Hay, *The Failure of Anglo-liberal Capitalism* (Palgrave Macmillan 2013) 39-40.

entire banking system stability, the state abandoned its traditional laissez-faire attitude and intervened[8] in a Keynesian manner by nationalizing and supporting parts of the ailing banking sector. Whilst necessary for capitalist preservation, rescuing the banks by pumping fresh capital entailed a moderate increase in public debt (from 43.6% in 2007 to 51.8% of GDP in 2008 and 65.8% in 2009 and 76.4% in 2010) and deficits (3.0% of GDP in 2007 to 10.8 of GDP in 2009),[9] thereby starting a process of state assumption of financial banking liabilities. This process switched the economic rationalisation force from the private banking-financial circuits to the state-public ones.

Unlike Keynesianism which proved a short-lived policy employed as a one-use palliative for the benefit of the banks, a kind of 'foul weather Keynesianism', 'a dipping into the repertoire of Keynesian techniques in recession only to be abandoned as and when growth resumed',[10] the second movement, that is the 'austerity movement', precipitated a major policy and long-lasting shift.

With the benefit of hindsight, David Cameron's speech (at the time Leader of opposition) in April 2009 pronouncing that the 'age of irresponsibility is giving way to the age of austerity'[11] heralded a new policy-making paradigm. It acted as the symbolic pre-figuration of a paradigmatic change, pursuant to which a dominant 'austerity narrative' is to pervade British public discourse and policy-making. Austerity could be defined as 'a form of voluntary deflation in which the economy adjusts through the

[8] For an insider autobiographical account of the decision for intervention in the banking sector see Gordon Brown, *Beyond the crash : overcoming the first crisis of globalisation* (Simon & Schuster 2011) Part II.
[9] Data from Office for National Statistics, 'Government Deficit and Debt Return' (June 2015).
[10] Hay, *The Failure of Anglo-Liberal Capitalism* (n 7) 39.
[11] David Cameron, 'The Age of Austerity' speech (*Conservative Party Speeches*, 26 April 2009) <http://conservative-speeches.sayit.mysociety.org/speech/601367> accessed 13 June 2015.

reduction of wages, prices, and public spending to restore competitiveness, which is (supposedly) best achieved by cutting the state's budget, debts, and deficits'.[12]

Eventually, the formation of the Coalition Government between the Conservative and Liberal Democrats in the aftermath of 2010 general elections, elevated this narrative to a Governmental public policy frame. Austerity and macro-economic discipline gained the status of pre-eminent government and regulatory objectives, as the Coalition 'recognise[d] that deficit reduction, and continuing to ensure economic recovery, is the most urgent issue facing Britain'.[13]

The British adoption of austerity as a crisis management technique draws apparent similarities with Greece. Yet it is dissimilar to Greece in many respects. In Greece, austerity was *externally imposed* as an emergency measure (ostensibly) addressing a public debt crisis of debt re- financing. By contrast, the UK deliberately realised a '*pre-emptive* austerity', in that it was not associated with a direct and imminent material risk, external pressures aggravated by power asymmetries and the lack of monetary inflexibility faced by Greece vis-à-vis its Eurozone membership.

From a public policy and regulatory perspective, however, the most salient aspect of the Coalition Government's attitude to austerity resides in its intended *permanence.* Indeed, austerity aspires to standardise the 'politics of fiscal squeeze'.[14] Rather than a temporary emergency expedient arrangement, austerity is seen as setting a 'new normal' rational approach to economic policy to be incorporated as a durable irreducible element into State's macro-economic policy. As David Cameron stated, deficit reduction and

[12] *Blyth* (n 7) 2.
[13] Cabinet Office, *Coalition: our programme for government* (May 2010) 15.
[14] See David Health and Christopher Hood, 'The Politics of Fiscal Squeeze' in Christopher Hood, David Health and Rozana Himaz (eds), *When the Party's Over: The Politics of Fiscal Squeeze in Perspective* (British Academy 2014).

public spending cuts aim at building 'a leaner, more efficient state….[n]ot just now, but *permanently*'.[15]

The new 'austerity frame' seeks a permanent reduction of public expenditure and welfare. This shrinkage is nothing more than a metonym for a *permanent* economic rationalisation transferring the burdens of adjustment, initially caused by the financial sector, onto the more vulnerable segments of society relying on various form of state support,[16] as well as 'a cover for a very different agenda, namely an attempt to reduce the overall size of government and especially spending on social insurance'.[17]

Hence 'pre-emptive austerity' and permanent macro-economic fiscal discipline have been crystallised into the new overarching regulatory objectives in the UK.

2. Destroying the Ruined Fortress of CLL: De-Jure Developments in the UK

The reader of the Coalition Agreement in 2010 would have been perfectly excused to have anticipated that the forthcoming crisis period (2010-2015) would have been a static period for CLL. The newly-imposed overarching austerity rationale and the associated pre-eminent imperative of fiscal prudence were not considered in the agreement as dictating any CLL reforms. This conclusion is hardly surprising from a pure economic

[15] David Cameron, 'Lord Mayor's Banquet 2013: Prime Minister's speech' (*Cabinet Office*, 11 November 2013) < https://www.gov.uk/government/speeches/lord-mayors-banquet-2013-prime-ministers-speech> accessed on 13 June 2015 (emphasis added).

[16] For the impact of austerity policy on welfare and gender see the excellent analysis by Julie MacLeavy, 'A ''new politics'' of austerity, workfare and gender? The UK coalition government's welfare reform proposals' (2011) 4(3) Cambridge Journal of Regions, Economy and Society 355; For the shift in general see Shelley Marshall, 'Shifting Responsibility: How the Burden of the European Financial Crisis shifted away from the financial sector onto labour' (2013-2014) 35 Comparative Labor Law & Policy Journal 449.

[17] Paul Krugman, 'The Austerity Delusion' (*Guardian,* 29 April 2015) <http://www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion> accessed 12 June 2015.

standpoint. Tony Blair's boasting in 1997 that 'even after the changes we do propose, British laws on trade unions will remain the most restrictive in the western world'[18] maintained its full validity in 2010. To put it in the language of the neo-liberal monetary policy-makers, the British CLL regulation established no 'economic rigidities' (as in Greece), distorting the free operation of market forces supposedly striving to restore the disrupted crisis equilibrium.

In spite of the Coalition Agreement's silence regarding CLL, however, this period saw significant *de jure* alterations, in the form of new legislative and administrative practices. Even though these changes did not form an organic and coherent by-product emanating from a single and comprehensive 'master plan' of CLL overhaul or animated by a single normative justification, which would have been very difficult given the Coalition nature of the government, a common overall direction is nonetheless discernible in terms of their overall effect: the further *de jure* constraining of the 'functional' and 'organisational' space of workers' representation through unions.

(i) The Abolition of the Agricultural Wage Board: Dismantling the Last Vestige of Centralised Collective Bargaining

(a) *The Changes*

Under the overarching goal of cutting business red tape in agriculture,[19] the Coalition Government abolished the *tripartite* Agricultural Wage Board of England and Wales

[18] Tony Blair, 'We Don't Look Back to the 1970s' quoted in Chris Howell, *Trade Unions and the State: The Construction of Industrial Relations in Britain, 1890-2000* (Princeton University Press 2005) 176.
[19] DEFRA, *Consultation on the Future of the Agricultural Wages Board for England and Wales, and Agricultural Wage Board for England and Wales, and Agricultural Wages Committees and Agricultural Dwelling House Advisory Committees in England* (October 2012) 9.

(AWB), [20] the sole survivor of the ultimate obliteration of Wage Councils[21] by the Conservative Major Government in 1993.[22] Existing since 1917[23] and in its abolished consolidated form since 1948,[24] the AWB issued a legally binding annual Agricultural Wage Order (AWO) setting down minimum rates for all agricultural workers (permitted to be set only at a higher level than the National Minimum Wage). It also enjoyed the discretionary power to incorporate into the AWO any other employment terms and conditions. In practice, AWOs had traditionally set a comprehensive range of terms and conditions of employment extending far beyond the minimum rates. Its coverage included issues such as graded pay structure, on-call payment, night allowances, annual leave entitlements, bereavement leaves and sick pay.[25] Following abolition, the National Minimum Wage scope was extended to cover agricultural workers but all other entitlements were eliminated, thereby overall reducing the protection for agricultural workers.[26]

The distinctive feature of this statutory body, rendering its abolition pertinent toCLL, was its tripartite composition. The body comprised an equal number of employers' and employees' representatives and 'independent members' appointed by the Government. Decisions were usually reached by an agreement between the employers' and employees' representatives in the Board. Recourse to voting was reserved only for breaking any

[20] Enterprise and Regulatory Reform Act 2013, Section 72.
[21] In its design, operation and effect the Agricultural Wage Board, despite its different name as 'Board', was identical with the Wage Councils.
[22] Trade Union Reform and Employment Rights Act 1993, Section 35 (repealing Part II of Wages Act 1986).
[23] Corn Production Act 1917.
[24] Agricultural Wages Act 1948.
[25] Agricultural Wages Board, The Agricultural Wages (England and Wales) Order 2012.
[26] Based on the impact assessment estimation, the abolition will lead to a transfer of resources from the employee to employers of up to £ 259 million within the next ten years. DEFRA, *Final Impact Assessment* (19 December 2012) 13.

impasse between the two sides, in which cases the independent members held the decisive bloc of votes.

(b) *The Government's 'Regulatory Burden Frame'*

Depending on whether the stress is placed on the *tripartite decision-making (process)* or the *statutory form* of the regulation, AWB abolition may be perceived as a collective self-regulation/collective bargaining or a 'regulatory burden' matter.

By wholly ignoring its specific tripartite decision-making and focusing exclusively on the *statutory form* of the regulations, the Government framed the AWB as a 'regulatory burden' produced by Government intervention. Such conceptualisation of AWOs likened to any non-tripartite Government intervention is far from innocent. It directly brought them to the wrong side of the malign Government intervention/ benign market divide artificially created by the dominant neo-liberal narrative distrusting any Government intervention in the market. In this way, it eventually legitimised their abolition within the standard overarching pro-business policy context of 'removing unnecessary red tape and administrative burden'[27] for businesses so as to 'to give employers the flexibility to run their business effectively'.[28]

Delving into the specifics, the abolition was defended on four principal grounds. Restating the traditional neo-classical labour market argument, the Government considered AWB *qua* Government intervention in the market by *default* as distorting the efficient market operation and potentially 'rais[ing] wages above market clearing levels for some types of work and reducing employment'.[29] Secondly, in a quote implicitly

[27] DEFRA, *Consultation on the Future of the Agricultural Wages Board* (n 19) 9.
[28] ibid.
[29] DEFRA, *Impact Assessment* (n 26) 1.

conceding the acceptability of state intervention but only for redressing market failures, the Government claimed for the *absence of market failure* in the agricultural sector. This absence makes the retention of the AWB unwarranted. Previous market failures were supposedly solved by the existence of protective minimum wage legislation to be extended to agricultural workers, and of other statutory entitlements for all workers.[30]

Evidently, the introduction of protective minimum wage and of individual statutory legislation was regarded as a 'downward harmonisation ceiling' with the effect of automatically de-legitimising any more protective non-contractual regulatory mechanisms for workers. The real purpose was, as Anne Davies rightly pointed out, ''that 'normal'' employment law will take on an increasingly important role as the main source of protection for agricultural workers'.[31]

Thirdly, the Government presented the abolition as necessary for ending what is portrayed as unnecessary preferential treatment of agriculture compared to other sectors, by noting that 'no other sector of the economy is subject to the same intervention'. [32] Of course, the 'exceptional' treatment of agriculture, previously also justified in terms of the exceptional and distinctive vulnerabilities of workers in the agricultural sector, emerged as a product of the *deliberate* act of obliterating the rest of Wage Councils in 1993, which now exerted a 'pull-down force' for de-legitimising the remaining one, in a typical case of a 'race to the bottom'.

The fourth justification invoked the alleged 'rigidity' of the AWOs 'which are prescriptive and constrain flexibility between workers and employers to reach their own

[30] See ibid 3.
[31] A.C.L Davies, 'Migrant Workers in Agriculture' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 82.
[32] DEFRA, *Impact Assessment* (n 26) 10-11.

agreements'[33] with the result that they provide no 'flexibility for parties to reach their own agreements which suit their particular circumstances'.[34] Obviously, the Government did not perceive the employment relationship in agriculture as exhibiting severe power disequilibria, transforming flexibility of individual negotiations into a mere regulatory licence for the unilateral construction of the employment relation by the employer.

(c) *The 'Collective Bargaining Frame'*

A closer *functional* inspection of the process unravels a radically different story. It exposes the misleading nature of this Governmental frame in so far as it failed to take into account the AWB's *tripartite* distinctiveness. In essence, the abolition constituted a disguised attack on centralised collective bargaining in agriculture.

In his submission to the British Parliament, John Hendy QC powerfully demonstrates that AWB is in fact a collective bargaining body.[35] Following a detailed examination of the actual process revealing an extreme degree of resemblance to a classic collective bargaining process,[36] Hendy concludes that 'the process is one of collective bargaining with an in-built facility (through the independent members) of conciliation, mediation, and finally, arbitration'.[37]

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[33] DEFRA, *Consultation on the Future of the Agricultural Wages Board* (n 19) 12.
[34] ibid.
[35] John Hendy, Thompson Solicitors (Submission by Unite on International Law Aspects before the Joint Committee on Human Rights), In the Matter of the proposal to abolish the Agricultural Wages Board, Bills (12-13) 141A, paragraph 6.
[36] UNITE (employees' representative) submitted an offer regarding minimum wage and other terms and conditions every February. Then the NFU (employers' representative) provided a written response. Subsequently, a two-day meeting was held in June with multiple adjournments wherein the two sides worked towards reaching an agreement, and only in the failure thereof, the independent members were acting as mediators assisting the parties to conclude an agreement. And only if such mediation proved fruitless, the body had to decide by majority voting, which in effect meant that the independent members operated as quasi-arbitrators (quasi because they had to side with the proposal by the one party and thus not capable of submitting their own as is the case for typical arbitrators).
[37] *Hendy* (n 35) 36.

An evolutionary-historical account of the institution of Wage Councils [38] supports Hendy's thesis. Wage Councils were perhaps the most significant regulatory novelty in the history of British collective bargaining. The Liberal Lloyd George Government created the 1909 tripartite Wage Councils (identical in operation and composition with the abolished AWB) in industries with 'exceptionally low wages',[39] thereby breaking the hitherto capitalist taboo of direct statutory intervention in the market wage regulation. Their function, however, particularly after 1948 Atlee Government's overhaul of the institution, was expanded and transformed into that of a full-scale collective bargaining prop. They became institutional manifestations of a promotional state towards collective bargaining for industries where 'voluntary machinery is not and cannot be made adequate or does not exist or is likely to cease to exist or be adequate'.[40] To quote Bayliss, '[t]his conception of the function of Wages Councils [espoused by Wages Councils Act 1945) amounted to the use of State power to keep collective bargaining going when economic circumstances tended to destroy it, and was quite different from the simpler, ameliorative purpose of abolishing sweating'.[41]

Their principal function was to generate to industries which were not well-organised 'the habit of collective regulation, so that ultimately voluntary collective bargaining would be universal'.[42] Regarding their legal nature, Wages Council Orders posed serious theoretical challenges to the purity of the traditional theory of voluntary collective bargaining. This is because they were statutory bodies producing *legally binding* and *erga omnes* rules backed by state sanctions. In reality, though, they were not that dissimilar to

[38] For a detailed classical account see the F.J Bayliss, *British Wage Councils* (Blackwell 1962).
[39] Trade Boards Act 1909.
[40] Wages Councils Act 1945, Section 2 (1).
[41] *Bayliss* (n 38) 56.
[42] Hugh Clegg, *The Changing System of Industrial Relations in Great Britain* (Blackwell 1979) 296.

voluntary collective bargaining. Even Otto Kahn-Freund, who reconciled their existence with his 'voluntarist' theoretical framework by considering them as a 'substitute for collective bargaining, a footnote ….to the settlement of collective terms by trade unions and employers or their associations outside the law'[43] regarded Wage Councils to some extent as 'a statutory replica of a voluntary negotiation board'.[44] He also stated that:

'when the sides agree, as they often do in wages councils, but even if the independent members have the decisive say, the order made by a wage council is in fact an *emanation of the autonomous forces of the two sides of industry, and in substance not all that different from a collective agreement, though in law it is of course something miles apart from it'*.[45]

Viewed through the lens of a *functional perspective,* Wage Councils and the AWB instantiated an actual form of collective bargaining when the two sides agreed. But when negotiations were inconclusive, instead of relying on social sanctions, it was the independent members who, by representing the community, provided conciliation and, in the failure thereof, effectively an arbitration (in the form of casting the decisive vote). In this respect, Wage Councils are the British-made *functionally equivalent* model to the Continental European *erga omnes* and *legally binding* sectoral collective bargaining.

(d) *A (Preliminary) Critical Assessment*

Assessed in the latter frame, AWB abolition erodes the *functional space of unions* and hence of workers to co-determine their terms and conditions of employment with

[43] Otto Kahn-Freund, 'Collective Bargaining and Agreements in Great Britain' in Otto Kahn-Freund (ed), *Labour Relations and the Law: A Comparative Study* (Stevens & Sons 1965) 34-35.
[44] Otto Kahn-Freund, *Labour and the Law* (3rd edn, by Paul Davies and Mark Freedland, Stevens & Sons 1983) 185.
[45] ibid (emphasis added).

employers by dismantling a *sui generis* form of statutory sectoral collective bargaining. Moreover, as soon as one factors in the analysis the specific particularities of the agricultural employment relationship (characterised by remoteness, isolation, high degree of dependence of the worker to her employer as in most cases they need to share accommodation or live in accommodation provided by the employer, seasonal nature) posing severe hindrances for collective organisation at an enterprise level associated with the non-applicability of the statutory union recognition procedure in most agricultural undertakings as they typically have fewer than the statutory minimum of 21 workers,[46] it becomes evident that the dismantling of sectoral bargaining, without the provision of any collective regulation alternative, effects the *de-collectivisation* and individualisation of the agricultural employment relationship.

Put in macro-historic perspective, the abolition of AWB marks the end of a whole era in the British CLL history, that of the 1909 'Wage Council Revolution'. This law was described by Tawney as marking 'in reality, the silent abandonment of the doctrine, held for three generations with an almost religious intensity, that wages should be settled, as it was said, by free competition, and free competition alone'.[47] The institution now has disappeared at a national level by the elimination of the ultimate vestige. So, it completed a 'counter-revolution' cycle, *a contrario* confirming the return of the doctrine of free and unhampered competition.

At this point, the reader should pay attention to the *trade-off* intrinsic in the Government's analysis between what has been elsewhere termed as 'protective individualisation',[48] namely affording individual protective rights such as the minimum

[46] Employment Relations Act 1999, Schedule A1, 1(7).
[47] Richard Tawney, *Towards Industrial Peace* (King 1927) 19.
[48] For the term see Deirdre McCann, 'Temporal Autonomy and the Protective Individualisation of Working-Time Law: The Case of Overtime Work' (2007) 17(3) Labour & Industry 29.

wage, with collective regulation and collectivisation. This trade-off reflects a broader trend in the post-1997 landscape of British Labour Law.[49] The minimum wage and protective statutory individual regulation are deployed as justifications in order to take away a form of collective regulation of terms and conditions of employment.

To summarise, the AWB abolition constitutes a direct affront to collective bargaining and industrial democracy in agriculture, which without the provision of any collective bargaining alternative, leads to a double outcome: the narrowing of the *functional* space of unions and the de-collectivisation of agricultural employment relations.

(ii) The Lobbying Act: The De Jure Legislative Attack on Unions' Organisational Space by Increasing the Red Tape

(a) *The Changes*

Moving to diametrically opposite tracks to the red tape reduction for businesses, Part III of the 'Lobbying Act' (Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014) increased the already excessive unions' red tape. It piled a new bureaucratic organizational layer for unions in respect to their pre-existing duty under section 24 of TULRCA 'to compile and maintain a register of the names and addresses of its members' and 'secure, so far as is reasonable practicable, that the entries in the register are accurate and are kept up-to-date.[50] Starting from the goal of providing '*greater* assurance that unions comply' with this duty, the Government considered necessary the 'introduction of an *effective reporting and enforcement regime'*.[51]

[49] For the turn from collective procedures to individual rights in the British labour law see William Brown, Simon Deakin, David Nash and Sarah Oxenbridge, 'The Employment Contract: From Collective Procedures to Individual Rights' (2000) 38(4) BJIR 611, 627.
[50] Trade Union and Labour Relations (Consolidation) Act, Section 24 1.
[51] BIS Department, *Certification of trade unions' membership registers and investigatory powers for the Certification Officer: Impact Assessment* BIS LM001 (11 December 2014) 1 (emphasis added).

The new legal regime is complementing and strengthening, rather than substituting, s 24 duty. It obliges all unions to submit a 'Membership Audit Certificate' to the Certification Officer (CO), certifying that they are in compliance with s 24 duties, along with their annual return.[52] For small unions (less than 10.000 members), the certificate could be self-certified by an authorised union officer. Larger unions, however should appoint an 'independent assurer', entrusted with issuing a certificate declaring whether 'the trade union's system for compiling and maintaining the register of the names and addresses of its members was satisfactory'.[53] In addition, the CO is given new enforcement powers. If he 'is satisfied that a union has failed to comply with any of the duties' of s 24, he has the power to issue an enforcement order which could lead to fines.[54]

Compared to the previous legal framework, the Lobbying Act effects five changes. Firstly, whilst the previous model was exclusively *member-proactive* so that the CO could act only upon a complaint submitted from a union member whose access to the register was confined to checking the accuracy of his own entry,[55] the Lobbying Act designates a comprehensive *union-pro-active pre-emptive* model. Unions need to *demonstrate* their compliance irrespective of any suspicion or specific complaint. Secondly, the Act asks for unions to allow full access and disclosure of their membership to third parties. This access raises serious issues of compatibility with the privacy of membership for union members, who may be reasonably concerned that they can be blacklisted or discriminated against.[56] To alleviate these fears, the Act stipulates a confidentiality duty for the

[52] Trade Union and Labour Relations (Consolidation) Act [TULRCA], Section 24ZA (inserted by Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 Act, Section 40 (2)) ['Lobbying Act'].
[53] TULRCA 1992, Section 24Z3 (inserted by Lobbying Act, Section 41).
[54] TULRCA 1992, Section 24B (inserted by Lobbying Act, Section 43).
[55] TULRCA 1992, Section 24(3).
[56] On this point and the compatibility of the access to sensitive data with Article 8 of the European Convention of Human Rights (right to private life) and Article 11 (Freedom of association) see Keith

assurers[57] but remains to be seen whether this will be an effective barrier. Thirdly, and more generally, the Act enacts a new mode of intervention in the internal union affairs, with new external persons (assurer and potentially inspector) intruding and supervising their affairs. Fourthly, this new process burdens unions with new bureaucratic and monetary costs as they need to deploy additional resources and time. Fifthly, and very significantly, the framework operates under the hard law shadow of enforcement orders and fines by the Certification Officer.

(b) *A (Preliminary) Critical Assessment*

The Act is characterised by two stark contradictions. The first derives from its origin. The trade union administration amendments emerged as an irrelevant addition to a piece of legislation with an entirely alien theme, initially crafted as a responsive legislation to Lobbying scandals and corruption involving Ministers and Members of Parliament. Evidently, Part III does not fall within the natural legislative scope delineated by the declared objective of regulating the effect of third parties and their undue influence on politics.[58] Part III regulates internal trade union and not political activity.

The second contradiction relates to the (Government's) contradictory and incoherent argument, in relation to the antithetical treatment of the impact of bureaucratic 'red tape' on business and unions. On the one hand, the Government rejected, or better ignored, a *principled* stance contending that industrial democracy could account for 'red tape' on businesses on the basis that this impedes the efficient operation of the labour market, as for instance the AWB abolition exemplifies. For businesses, expediency trumps principle.

Ewing, 'Transparency of Lobbying Bill etc.- A Note on Potential Human Rights Implications' (Institute of Employment Rights 2013) paragraphs 17-20.

[57] TULRCA, Section 24ZG (inserted by Section 41 of the Lobbying Act).

[58] See Chapter VII Part 3 for the background and the purpose of the Act.

On the other hand, when unions substitute businesses as the regulatory object, the Government is comfortable to reverse its argument and present the 'principle of democracy' as a justification for imposing 'red tape' on unions whilst ignoring their impact on their efficient operation. Hence for unions democratic principle always trumps expediency.

Indeed, the Act's main policy rationale draws upon the instrumental effect of the new enforcement and reporting provisions on securing unions' 'democratic accountability'. The Government argues that 'unions should be able to *visibly demonstrate* that they know who their members are and can communicate with them'.[59] The reader should single out the term 'visibly demonstrate' which heightens the obligation from one of simple compliance. But why do unions carry a duty not just to comply but to 'visibly demonstrate' their compliance even though they are voluntary bodies? According to the Government, this duty emanates from their nature as *membership organisations* rendering 'important that trade unions decisions reflect the will of all their members [and] [k]nowing who their members are being able to engage them is intrinsic to union's *democratic accountability'*. [60] This reason, however, alone is not sufficient. Its consistent application would entail that every membership organization needs similar intrusion. So, this rationale is coupled by the Government with the typical 'impact-based rationale' of trade union activity 'hav[ing[the potential to affect the daily lives of members and *non-members'*[61] to finally deduce that:

[59] Department BIS, *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014: Consultation on Trade Union Assured Register of Members* (September 2014), Foreword by the Minister for Employment Relations and Consumer Affairs 3.
[60] ibid (emphasis added).
[61] BIS, Impact Assessment (n 26) 6 (emphasis added).

'[t]he general public should be confident that voting papers and other communications are reaching union members so that they have the opportunity to participate, even if they choose not to exercise it [and] [a]s a result, unions also have a responsibility to give public assurance that they are keeping up-to-date registers'. [62]

On closer inspection, the Government's reasoning continues the 1980s Thatcherite regulation justification on intervention in trade union affairs under the cloak of an individual concern with democracy and rights of trade individual union members.[63] It was then that the 'anti-autonomy' rubicon of state interference in internal union affairs was crossed. Although the balance of democracy and autonomy in internal union affairs gives rise to a difficult equation, [64] the unions as Otto Kahn-Freud has said, 'must have power in order to play the role in society without which there can be no industrial relations'.[65] And in order to have power, we can add, they must be able to exercise their functions efficiently and promptly unencumbered by onerous and unnecessary organizational requirements.

Part III of the Lobbying Act produces the opposite effect. It is an unnecessary intervention in their industrial affairs and adds more red tape to the unions. The latter are 'beset with an endless bureaucracy'[66] for an existing duty and no pragmatic evidence is submitted that the unions had failed to comply with s 24 duty. In short, the Act purports to solve a non-inexistent problem.

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[62] Department BIS, *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill: Certification of trade union membership details: discussion paper* (July 2013) 4.
[63] See Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12(1) OJLS 24.
[64] See Kahn-Freund, *Labour and the Law* (n 44) 270-290.
[65] ibid 270.
[66] Bill Hayes, 'The Gagging bill looks designed to undermine trade unions' (*Guardian*, 29 January 2014) <http://www.theguardian.com/commentisfree/2014/jan/29/lobbying-bill-trade-unions-law> accessed 23 July 2015.

In light of the above, one should reasonably assume that Part III provisions are driven by an anti-union ideology and not evidence, a charge that Hepple levels against the Coalition Government legislation in general.[67] They are also seemingly part of a broader effort to maintain and strengthen the hegemonic popular discourse perception of unions as mere Lobbying and bureaucratic organisations whose affairs should be always treated with suspicion.

Overall, the new provisions generate more organizational burdens for unions, which cumulatively with pre-existing onerous requirements, constrain even further their organizational space.

3. Attacking Public Sector Unionism: The Coalition Government's De Jure Administrative Restrictions on Facility Time and Check-Off Arrangements

(i) Background

In post-industrial societies, the gravitational centre of trade union strength has shifted from manufacturing to the public sector. Public sector increasingly 'constitute the bedrock of union movement'.[68] Britain exemplifies this trend. Public sector unionisation rates overwhelmingly exceed those of the private sector (in 2014 54.3% in the public sector to 14.2% in the private sector).[69]

[67] *Hepple* (n 2) 213-220.
[68] Steven Bach and Gregor Gall, 'Public Service Voice under strain in an Era of Restructuring and Austerity' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 324.
[69] BIS Department, *Trade Union Membership 2014: Statistical Bulletin* (*June 2015)* 6.

The Thatcherite seismic shift has brought about, after 1979, a 'fundamental restructuring of the public sector of the labour economy',[70] a central tenet of which is the radical transformation of the role of the State as an employer towards industrial relations: from the traditional 'role-employer' model where the State envisaged itself and acted as 'pace-setter' setting the collectivist example for the private sector (by centralised determination of wages, promotion of collectivism, collective bargaining and public sector trade unionism, 'fair wage clauses' in public contracts) to a 'market model' where the State aims to emulate the private market rules 'and apply private-sector, free-market ideas to its own employment practices'[71] (through privatisation, contracting-out, de-centralisation of bargaining units and withdrawal of the promotional attitude towards unions and collective bargaining).

Interestingly, the new 'market-model' whilst placing indirect contextual constraints upon the mechanisms of collective determination of employment terms and conditions, did not alter the two absolutely minimum and vital prerequisites of the unions' functional and organizational space: facility time-off arrangements, granting union representatives paid or unpaid time off for performing their functions (*functional prerequisite*) and 'check-off arrangements' allowing the deduction of union subscriptions directly from their source (pay) *(organisational prerequisite*). Surviving Thatcherism, these prerequisites came under a sustained attack by the Coalition Government. Instead of modifying the statutory framework, the Government opted for the administrative method within the existing law.

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[70] Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press 1993) 615-635; see also *Howell* (n 18) 153-156.

[71] Sandra Fredman and Gillian Morris, *The State as employer: labour law in the public services* (Mansell 1989) 1; in general, from the move to the 'market-based' model see also Sandra Fredman and Gillian Morris, 'The State as Employer: Is it Unique?' (1990) 19(3) ILJ 142.

(ii) Facility Time Changes: The 'Functional' Administrative Attack

The provision of facilities to union representatives, notably paid and unpaid time-off from their work, is a 'logically corollary of the trade union functions',[72] in that it constitutes a material condition for union representatives to adequately perform their representational, collective bargaining and other trade union functions. As Collins et al remark, 'collective bargaining can only be effective if workers' representatives have adequate time to discharging their duties and are fully trained'.[73] Very significantly, it also enables unions to be able to effectively resist the bureaucratic tendency of 'outside' professional full-time officials by appointing 'inside' laymen with localised knowledge and experience of the work conditions of the particular workplace.

Recognising the status of facility time as an instrumental necessity for unions' functional effectiveness, the British law, since 1975,[74] has imposed a statutory duty on employers to grant union officials of *recognised* independent trade unions reasonable amount of *paid* time off during work hours for trade union duties, including negotiation of terms and conditions of employment for collective bargaining matters and consultation for collective redundancy purposes, [75] and reasonable time off (which need not be paid) for trade union activities and activities in relation to which the employee is acting as a representative of the union.[76]

[72] International Labour Conference, *Collective Bargaining in the Public Service: A Way Forward, Report of the Committee of Experts on the Application of Conventions and Recommendations,* ILC. 102/III/1B (International Labour Office 2013) 37.
[73] Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law* (CUP 2012) 577.
[74] Employment Protection Act 1975, Sections 57-58.
[75] TULCRA 1992, Section 168.
[76] ibid. Section 170.

Profoundly echoing (or influenced by) ultra-conservative Groups concerned that 'the taxpayer should not be ''forced'' to pay for trade union campaigns' by paid time-off arrangements (Trade Union Reform Campaign composed of Tory backbenchers)[77] and framing paid facility time as taxpayer 'subsidy' conflicting with the imperative that trade unions as voluntary bodies 'should look to their members for financial support, not taxpayers' (Taxpayer Alliance),[78] the Government launched a Consultation for reforming time-off arrangements in the Civil Service in July 2012.[79] Eventually the Government proposed three major modifications of administrative practices: (a) the capping of paid facility time to 0.1% of the total pay bill per department (to be exceeded only by the agreement of the Secretary of State or Chief Executive) (b) maximum limit of 50% of time spent by a union representatives to trade union activities (unless there are exceptional circumstances approved by the Secretary of State or the Chief Executive in which case a maximum three-year limit for the office applies) and (c) rendering unpaid time-off the *default position* for trade union activities[80] (contrary to the previous practice in many Departments of agreed *paid* time off for trade union activities).

These proposals were quickly extended beyond civil service to Local Government,[81] with the relevant report stipulating even a reduced benchmark of 0.04% in order to align

[77] From the website, *Trade Union Reform Campaign* <http://turc.org.uk/> accessed 26 July 2015.
[78] See, for instance, blog entry Taxpayers' Alliance, 'The Spending Plan policy 34: scrap trade unions' subsidies of facility time, grants and office space' (*Taxpayers' Alliance*, 1 June 2015) <http://www.taxpayersalliance.com/the_spending_plan_policy_34_scrap_trade_unions_subsidies_of_facility_time_grants_and_office_space> accessed 26 July 2015; for paid time off as subsidies see The Taxpayers' Alliance, *Taxpayer funding of trade unions 2012-13* (2014) Research Note 140, 1.
[79] Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service* (13 July 2012) and Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service: Government Response* (8 October 2012).
[80] ibid.
[81] Department for Communities and Local Government, *Taxpayer funding of trade unions: Delivering sensible savings in local government* (March 2013).

with the average facility time costs in proportion to the annual pay bill in the private sector.[82]

The Government case for reform is predicated upon the 'austerity rationale' harnessed to a taxpayer-oriented perspective over-sensitive to the costs borne by the 'subsidy' of paid time-off. Such rationale evidences in the following quote from the Consultation stating:

> 'at a time when departmental budgets are under great pressure we need to ensure the current provisions for trade union facility time represent the best value for money. With annual estimated expenditure of £36 million we need to ensure that these arrangements align with the significant Civil Service wide workforce and business restructuring'.[83]

Dancing to the same tune, the Department for Communities and Local Government justifies the default position for unpaid facility time for trade union activities on the need 'to provide reassurances to local taxpayers that, in the context of reduced budgets, staff resources are being focused appropriately'[84] The austerity objective is manifest in Francis Maude's ministerial statement in 2015 that the new arrangements 'have saved taxpayers £25 million in the last rolling year to date, and have reduced the number of taxpayer-funded full-time union officials in central Government from 200 in May 2010 to fewer than 10 now'.[85] Reduced trade union representation parades as a fiscal success.

In reality, however, the Government's assertion regarding the putative costs of paid time-off arrangements is of disputable validity. Multiple reports have demonstrated the overall benefits for the economy of time-off arrangements, springing from the positive contribution of effective trade union representation to meaningful consultation

[82] ibid paragraph 11.
[83] Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service* (13 July 2012).
[84] *Department for Communities and Local Government* (n 81) para. 9
[85] The Minister for the Cabinet Office and Paymaster General Mr Francis Maude, House of Commons Debate (7 January 2015) Column 257.

representation, partnership facilitation that improves employer reputation, early intervention in disputes saving potential staff time and legal costs and better communication minimising negative impacts and reducing potential costs from industrial action.[86]

So, the 'austerity rationale' couched in the guise of 'good value for money' for the taxpayer represents the dominant theme behind the proposed reform. Yet on closer inspection, when considering the benefits of facility time, it could be reasonably argued that the austerity rationale is a fig-leaf for an ideological attack against the unions.

(iii) Withdrawal of Check-Off Facilities: The Administrative 'Organisational' Attack

Trade union funding is almost exclusively sourced from union subscriptions. The collection of union subscriptions is an exercise as necessary and existential for unions as potentially administrative burdensome, draining time and resources. To facilitate the process, the 'check-off' system was a common provision offered by employers, at a minimal cost, to unions. It allowed administrative convenience by collecting union dues from salary deductions and subsequently transfer them to the unions. The practice benefits both union members, as they do not have to provide their own arrangements for each month or set a direct debit or standing order that should be changed or replaced according to their altered personal circumstances , and the union by providing an 'organisational' time-saving and cost-saving efficient method of collecting payments

[86] See Martin Mitchell, Steven Coutinho and Gareth Morell (prepared on behalf of NatCen Social Research for Unison), *The Value of Trade Union Facility Time: Insights, Challenges and Solutions* (Natcen Social Research, 2012) 9-16 and ACAS, *Code of Practice 3: Time off for trade union duties and activities* (January 2010) 6.

compared to collecting them for each individual member.[87] In spite of the voluntary nature of the practice (though under certain conditions it may be treated as incorporated in the individual contract of employment)[88] since the statute merely regulates the conditions of the union members' request and termination of check-off arrangements and does not impose any duty on the employer to provide it,[89] check-off was a widespread practice in the public sector.[90]

Reversing a long-standing policy of promotion or, at least neutrality, to check-off arrangements, the Government actively supported their withdrawal. In a guidance letter circulated to the Departments, the (Conservative) Cabinet Office Minister called for a review of the existing Departmental arrangements. While the decision was a matter for the individual departments, the *preferred* Government's view was clearly that of withdrawing them, easily discernible in its statement that 'it is the view of the Cabinet Office that any review *should include serious consideration to withdrawing* from providing this service'.[91]

The outlined reasoning, as for facility-time, touches upon the 'austerity rationale'. After judging check-off arrangements as 'unnecessary', it is underlined that 'at a time of fiscal consolidation, Departments should no longer provide unnecessary services on behalf of Trade Unions that can cause additional costs and constraints on payroll process

[87] See *Hickey and Hughes v Secretary of State for Communities and Local Government* [2013] EWHC QB) 3163, paragraph 24.
[88] ibid. The case arose by the dispute with the unions provoked by the decision of withdrawal of check-off facilities by the Department for Communities and Local Government. The Court relied on Staff Handbook for holding that check-off provision is a contractual obligation of the Department.
[89] TULCRA, Section 68.
[90] Fredman and Morris, *The State as employer* (n 71) 111. In 1984, check-off practice was almost universal in the public sector.
[91] Minister for the Cabinet Office Francis Maude, *Deduction of Trade Union Subscriptions at Source (''Check'Off')- Guidance* (20 December 2013) paragraph 4 (emphasis added). Available at http://www.theguardian.com/politics/interactive/2014/oct/03/liberal-conservative-coalition-francismaude>

and services'.[92] The 'fiscal cost' thesis has been challenged even within the Government. The (Liberal Democrat) Chief Secretary to the Treasury Minister himself counter-argued in a response letter that 'there is no fiscal case for doing this [withdrawing check-off arrangements] as the unions have offered to pay any costs associated with check-off, which in any case are minimal'.[93]

(iv) A (Preliminary) Critical Assessment

An assessment of facility time and check-off reforms must proceed in four levels: (a) effect, (b) doctrine/rationales, (c) technique and (d) macro-historic.

Regarding their effect, the new administrative landscape *restrains* the functional and organizational space of public unions. Whereas not as eye-catching as a formal de-recognition or a restrictive statutory reform, it is a functionally equivalent state intervention. Indeed, facility time modifications diminish the capacity of public sector unions for effective discharging of their duties and effective campaigning by undermining their material conditions. This, in turn, has a direct knock-on effect both on collective negotiation capacities and on the workers' perceptions regarding their union, a crucial factor for continued membership and membership participation. As TUC observes, 'for many union members the existence and effectiveness of a workplace union representative is a key determinant of whether or not they think the union is effective where they work',[94] and granting of facility time is a material condition for effectiveness. In addition, and in a complementary manner, the check-off abolition forces public sector unions to devote extra resources and time for collection and union subscriptions, thus redeploying them

[92] ibid paragraph 3.
[93] Chief Secretary to the Treasury, *Trade Union Subscriptions: Check-Off Arrangements* (*Gurdian*, 8 July 2014).
[94] Trade Union Congress, *The Facts about Facility Time for Union Reps* (TUC October 2011) 4.

from ‘functional’ to ‘organisational’ needs. As a result, the cumulative outcome of the reforms is to erode the *strategic* autonomy of unions to devise the, according to their view, best methods for deploying their representatives and adopting the funding methods appropriate for maximising unions’ effectiveness.

More fundamentally, a careful scrutiny of the Government rationales exposes the contours of a new visible doctrine of state abstentionism in public sector industrial relations, which could be termed as ‘austerity abstentionism’. Since State cannot of course abstain as an employer in the public sector industrial relations, ‘abstentionism’ relates to its role as ‘regulator’.

More specifically, the following doctrinal chain is established: (i) austerity and the concomitant public spending restraint set the overarching constitutive goals serving as legitimation benchmarks of policies, (ii) austerity requires heightened sensitivity to taxpayer-interests, (iii) heightened sensitivity is translated as removing ‘unnecessary’ costs and providing ‘value for money’, (iv) paid time-off and facility time represent such costs.

The ultimate outcome of this chain of reasoning is that the utilitarian *cost-oriented* assessment of unions’ effectiveness prerequisites is used as a de-legitimising device pushing towards ‘abstentionism’ because the promotional attitude is portrayed as a costly and unaffordable burden to the taxpayer. The practice of benchmarking of permissible facility-time to a fixed numerical target cost of the overall departmental pay perfectly exemplifies the austerity-driven logic infusing trade union rights and underpinning the new abstentionism. This logic *fiscalises* the discourse on union effectiveness while the insistence on abolishing check-off, even against union assurances for covering the cost, proves that the discourse is ideologically entrenched.

This doctrinal 'utilitarian-austerity' conception exhibits a foundationally contradictory orientation to the alternative 'effectiveness-based' conception, espoused by the ILO. In the context of securing 'effective recognition of the right to collective bargaining'',[95] the ILO Convention 151 demands that facilities must be granted to union representatives as appropriate 'in order to enable them to carry out their functions *promptly and efficiently*'.[96] Such conception could be easily accommodated within what Stuart White terms as 'power-adjusted liberal neutrality'[97] sensitive to the need of rectifying power imbalances in order to reclaim Government-proposed 'neutrality'. For instance, Bogg and Ewing rightly account for facility time for union representatives on the basis of power asymmetries. This is because union representatives are:

'being pitted against what may be the extensive capacity of the human resources department of the employer [whilst] [u]nlike the workers' representative, the human resources manager is unlikely to be distracted by the fact that he or she too is expected to perform his or her role in addition to another job performed by the employer'.[98]

Thirdly, the *technique* of reforms deserves proper attention. Changes in administrative practices are preferred over statutory legislation, mainly to bypass potential opposition of Liberal Democrats in Parliament which could have led to the defeat of legislative initiatives. Far from exceeding statutory legislation, administrative practices are now scaled down to the absolute statutory minimum, even at the risk of violating the statutory requirements, such as the 'reasonable' standard for time-off that is hard to be satisfied by a blanket one-size-fits-all approach for all undertakings.[99] These reforms, though, may

[95] ILO, *Declaration of Philadelphia,* III (e).
[96] ILO, *Workers' Representative Convention 135,* Article 2(1) (emphasis added).
[97] Stuart White, 'Trade Unionism in a Liberal State' in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 337; see also Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009) 93-96
[98] Alan Bogg and Keith Ewing, *The Political Attack on Workplace Representation* (Institute of Employment Rights 2013) 12.
[99] For this argument see ibid, 15.

provide a testing experimental ground, within a gradual strategy, for future statutory regulation.

Finally, in macro-historic terms, the measures should be conceived as an isomorphic realignment of the remnants of the previous 'role-employer' model with the dominant 'market' post-1979 model of public sector regulation, the latter premised upon the perception of unions 'as unjustifiable impediments to the operation of the market, obstacles to efficiency and incompatible with individual freedom'.[100] In this context, the destructive reforms on facility time and check-off arrangements represent the 'consolidating' aggressive march of the 'market model', colonising the alien elements and expanding its assault at the bones of unionism, namely its very prerequisites for effective functioning. In what is essentially a Catch-22 situation, these measures *justified* by the austerity rationale perform a de-capacitating function for the 'counterlegitimation force' by undermining the capacity of public sector workers to resist austerity measures and spending cuts imposed on them.

To sum up the analysis discerned four features of the reforms: (a) restraining effect on unions' organisational and functional space, (b) doctrinal adherence to 'austerity abstentionism' (c) preference for the administrative practice technique, and (d) macro-historic isomorphic realignment with the dominant 'market-based' model of public sector regulation

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[100] Fredman and Morris, 'The State as Employer: Is it Unique?' (n 71) 146.

4. De Facto Crisis Developments: The 'Accelerated' De-Regulation

During the economic crisis, there is strong evidence revealing that long-standing pre-existing patterns of de-facto deregulation,[101] experienced an 'acceleration' thus undermining *in practice* collective labour law protections. Such acceleration manifests in two areas: (1) 'institutional drift' of the statutory union recognition process, and (2) acceleration of the decline of unionisation, de-collectivisation and trade union presence in the workplaces.

(i) Legislative De Facto Deregulation: The 'Institutional Drift' of the Statutory Union Recognition Procedure

The ERA 1999 statutory union recognition procedure,[102] the 'single most important undertaking which the union movement secured from the Labour Party in the area of collective labour law [up to the 1997 election]',[103] drew essentially the major dividing line separating Thatcherite and Blairite collective labour law. The Act adapted the North American Model of statutory recognition organised around the majority principle in bargaining units to the particularities of the British traditional voluntary system and heritage. The eventual process paved a statutory route, but with 'a series of rigorous tests that establish a highly circumscribed right to trade union representation'.[104]

During the crisis, this institution experienced a rapid demise or, to put in in Streeck and Thelen's terms, 'institutional drift', defined as an instance where an institution may

[101] For the terminology see Chapter II Part 3(ii).
[102] Employment Relations Act 1999, Schedule 1.
[103] Paul Davies and Mark Freedland, *Towards a Flexible Labour Market* (OUP 2007) 118.
[104] Paul Smith and Gary Morton, 'New Labour's reform of Britain's employment law: the devil is not only in the detail but in the values and policy too' (2001) 39 BJIR 119, 124.

retain their formal integrity even as it increasingly loses its grip on social reality.[105] Describing the *de facto* weakening of the CAC procedure upon which trade unions can statutory rely for gaining recognition, the two most prominent scholars in this area Alan Bogg and Gregor Gall talk about the quiet death of the statutory union recognition with barely a whimper[106] and the end of 'legally-induced' voluntarism'.[107] Considering the regressive pattern of accepted applications (from 72 in 2001-2002, to 65 in 2003-2004, 32 in 2005-2006, 41 in 2007-2008, to as low as 22 in 2009-2010, 24 in 2011-2012, [108] and 19 in 2014-2015[109]) no dispute arises about the validity of these pronouncements. In spite of its formal survival, the institution has seemingly lost its social and industrial relations relevance.

While the demise of CAC's applications could be attributed to other factors like the existence of non-unionisation as a default option which creates a tendency for 'stickiness',[110] the 'low hanging fruit' causing the initial surge in the number of applications,[111] the exhaustion of the 'shadow' and 'demonstration effects' of the Act '''as the shock of the new'' declined as Schedule A1 became part of the accepted industrial relations ''furniture'',[112] and the semi-voluntary nature of the process oriented to facilitating voluntary settlement of recognition claims rather than establishing union recognition',[113] the *economic crisis* shall be as well considered an *accelerating* factor.

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[105] See Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity* (OUP 2005) 29.
[106] Alan Bogg, 'The Death of Statutory Union Recognition in the United Kingdom' (2012) 54(3) Journal of Industrial Relations 409, 423.
[107] Gregor Gall, 'Union Recognition in Britain: The End of Legally Induced Voluntarism?' (2012) 41(4) ILJ 407.
[108] Statistics from Sian Moore, Sonia McKay and Sarah Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Palgrave 2013) 72.
[109] Central Arbitration Committee, *Annual Report 2014-2015* 10.
[110] See Bogg, 'The Death of Statutory Union Recognition' (n 106) 412-417.
[111] *Gall* (n 107) 422.
[112] ibid 423.
[113] See Ruth Dukes, 'The Statutory Union Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37(3) ILJ 236, 264-267.

In reality, the crisis acted as the midwife of exposing the major design flaw of the statutory union recognition regime: 'voluntarism'. For the latter to be effective, it must be underpinned by a relative equilibrium of balance of forces between capital and labour. The *contextual* crisis environment aggravated the already pre-existing imbalances in favour of capital. The weakening of the material support for voluntariness caused the 'drift' of the process which was rendered *de facto* inoperable.

If we are to interrogate further the causes of this drift, it should be stressed that, since its inception, the scheme suffered from a cognitive and interpretative misjudgment: the question of recognition was framed exclusively as a *deliberative* one to be resolved with the 'majority principle' rather than a *power* one to be resolved by a range of measures for redressing the substantial power imbalances preventing unionization and effective collective bargaining. As Davies and Freedland remark on the 'majority principle', the Government's case for recognition 'was because the workers wanted collective bargaining in a particular case, not because the government wanted it as the general or paradigm case, that it should be imposed on employers'.[114]

In light of the above, one could account for the acceleration pace of reduction rates during the crisis which appears *prima facie* to be contradictory. In the face of deregulation, de-unionisation, reduction of collective bargaining coverage (see below) and hostile market conditions for trade unions, one would expect more applications since employers will easier exploit the situation for refusing to enter into recognition negotiations forcing workers to make use of CAC procedure as *ultimum refugium.* So, does that mean as Bogg wonders that 'workers do not want collective bargaining'?[115]

[114] Davies and Freedland, *Towards a Flexible Labour Market* (n 103) 120-121.
[115] Bogg, 'The Death of Statutory Union Recognition' (n 106) 412.

Considering the economic conditions and new wage restraints presenting multiple grievances, this seems not to be a very likely scenario. The problem resides in the *imbalance* of class forces enabling employers to 'suppress any nascent signs or stirrings [of trade unions], preempting the possibility of CAC applications',[116] a possibility that becomes much easier for employer during economic crises. In short, trade unionism is strangled at its birth and the statutory union recognition regime's role is limited to that of a passive witness. The problem is *disempowerment,* not unwillingness, and the statutory union regime lacks any in-built mechanism to address the former. In turn, such failure gives rise to what Gall identifies as a Catch-22 situation: union need recognition to access multiple statutory rights such as information, consultation, facility-time and gain organizational legitimacy, but in order to gain them they need to have these resources either to gain 'voluntary recognition' or mobilize resources and membership to attain a statutory union recognition.[117]

This *de-facto* deregulation of the statutory union recognition process by 'institutional drift' blurs the only major dividing line between Thatcherite and Blairite CLL, and attacks unions at their very entry point to industrial relations with negative implications for collective bargaining: *recognition.*

(ii) The 'Accelerated Decline' of Collectivism

The pace of reduction (reduction rate) [118] of trade unions in workplaces, trade union density and coverage of collective agreements has been dramatically increased in the crisis. The choice of 'reduction rate' is made in virtue of its capacity to at least partially

[116] *Gall* (n 107) 424.
[117] ibid.
[118]Reduction and 'acceleration' rates are estimated from original BIS, *Statistical Bulletin* (n 69).

address counterfactual concerns. Towards gauging 'acceleration', we use as an indicator the 'acceleration (of reduction) rate'. The latter measures the *rate* of the crisis period reduction rates (2008-2014) to pre-crisis period reduction rates (2002-2008). Acceleration rate of 1.0 denotes no change in the reduction rates, whilst >1 denotes an accelerated reduction whilst <1 a decelerating reduction. To put it more simply, we measure how faster or slower was the reduction in the six-year crisis period compared to the pre-crisis period. Hence acceleration rates refer to accelerated reduction rates. Let us first see the data before calculating the rates.

	Trade Union Density (%)	Collective Bargaining Coverage (%)	Trade Unions in the Workplace (%)
2002	28.8	35.2	48.0
2008	27.5	33.7	46.8
2014	25.0	27.5	43.3

The acceleration rate for trade union density was *1.9*. More specifically, in the crisis period, the reduction rate was 2.5 (from 27.5% to 25.0%) compared to the 1.3 in the pre-crisis period (from 28.8 to 27.5). The decline assumes an even steeper shape for collective bargaining coverage. The acceleration rate is as high as *4.1*. The 2008-2014 reduction rate of 6.2 (from 33.7% to 27.5%) has been almost quadrupled from the pre-crisis period of 1.5 (from 35.2% to 33.7%). Echoing a similar direction, trade union presence in workplaces experienced an 'acceleration' of *2.9.* The crisis period (2008-2014) reduction 3.5 rate of trade unions in workplaces (from 46.8 to 43.3) was almost triple to the 1.2 pre-

crisis period rate (from 48.0 to 46.8).

So, the data confirm an overall 'acceleration' of the pre-crisis *de facto* deregulation (1.9 for trade union density, 4.1 for collective bargaining coverage, 2.9 for trade union presence in workplaces). Hence trade union power and the collective regulation of employment conditions fell during (or because of) the crisis in a growing rate.

5. 'Non-regulatory Measures': The British Crisis' Capital Destruction

Capitalism responds to crises by undertaking the requisite 'capital destruction' for the restoration of profitability without, at first instance, taking into account its social or non-economic consequences.[119] British capitalism was not an exception to this rule. Even though the better state of the economy in conjunction with the option of currency devaluation enabled less severe capital destruction than Greece, in absolute terms it was far from negligible. During 2008-2009, the destruction visible in the recession of 0.9% (2008) and 4.3% (2009)[120] caused the 2.3% rise of unemployment from 6.1% (October 2008) to 8.4% in 2011.[121] Nonetheless, growth rates picked up after 2010 with economy sustaining mild economic growth rates of 1.9% (2010), 1.6% (2011), 0.7% (2012) and 1.7% (2013) before jumping upwards to 2.6% in 2014. Unemployment rate also diminished from its 2011 peak of 8.4% to 7.1% in 2013 and 5.8% in 2014.

[119] See Chapter II Part 3 i(a).
[120] All statistics on UK growth rates are taken from World Bank <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?page=1> accessed on 28 July 2015.
[121] All unemployment rates are from Eurostat as compiled in the Google Public Data Directory Section. https://www.google.co.uk/publicdata/directory?hl=en&dl=en#!dp=Eurostat

Does this recovery starting from 2010/2011 (growth rates, decline of unemployment) indicate the end of crisis-required capital destruction? The answer seems rather negative. It is just that 'capital destruction' has assumed forms unable to be captured by the growth/unemployment radars. More significantly, austerity operates as a 'delayed capital destruction capsule': it delays (by taxpayer-funded bank bailouts) the capital destruction resulting from the financial and banking practices so that this can be offloaded to the wage-earners, taxpayers and more vulnerable segments of society who ultimately bear the brunt of capitalist crisis restructuring. In the UK, the 'offloading' proceeds within what Green and Lavery term as 'regressive recovery' grounded in a 'recovery through regressive distribution'. The latter is characterised by a rising asset wealth for the few, and falling living standards alongside increasing economic insecurity for wage earners.[122] Data showing that the net job creation concentrated in low-pay jobs,[123] the rise of 'in-work' poverty,[124] proliferation of non-standard forms of employment (zero-hour contracts is the most prominent example)[125] and declining real wages (8.5% from 2010 to 2013)[126] confirm the 'regressive distribution' thesis. This process intrinsically derives from capitalist rationality, since the remarkable lag in productivity (stagnated since 2007)[127] forces inevitably employers to suppress the human-worker costs in order to maintain profitability.

[122] Jeremy Green and Scott Lavery, 'The Regressive Recovery: Distribution, Inequality and State Power in Britain's Post-Crisis Political Economy' (2015) New Political Economy 1, 2.
[123] According to a 2013 TUC Report , 77% of net job creation (from June 2010 to 2013) was in 'low-pay sectors'. Trade Union Congress, *The UK's Low Pay Recovery* (TUC 2013) 4.
[124] See Living Wage Commission, *Working for Poverty: The Scale of the Problem of Low Pay and Working Poverty in the UK* (Living Wage Commission 2014).
[125] see, in general, Zoe Adams and Simon Deakin, *Re-regulating Zero Hours Contracts* (Institute of Employment Rights 2014) and Abi Adams, Mark Freedland and Jeremias Prassl, 'The ''Zero-Hours Contracts'': Regulating Casual Work or Legitimating Precarity?' University of Oxford Legal Research Paper Series No. 11/2015 (February 2015).
[126] Office for National Statistics, 'Real Wages down by 8.5 since 2009' (05 April 2013).
[127] House of Commons Library, 'Productivity in the UK' (2015) Briefing Paper 06492, 1.

The austerity policy of 'delayed capital destruction' disguised as austerity, in-work poverty and benefit reductions has led to negative social consequences, such as the meteoric rise on food poverty[128] and people relying on food banks in 2014-2015 (almost 700% from 2008 and 176% from 2010).[129]

6. Assessing the Counter-Legitimation Force: The 'Weak' 'Counter-Legitimation Force and the Neo-Liberal Colonisation of the 'Pre-Figurative' Discursive Policy Space

The *Crisis Equilibrium* theoretical framework assigned the 'counter-legitimation force' *(CLF)*, in its dialectic interaction with the economic rationalisation with which it forms a contradictory totality, a *determining* status for the ultimate crisis CLL motion. *CLF* comes in two *varieties or qualities*: a 'strong' anti-capitalist one threatening to withdraw legitimation from capitalism *in toto* and a 'weak' version resisting the particular reforms but not the capitalist system. [130]

Within the concrete British crisis-historical field, the *CLF* exhibited a great weakness in its intensity, and in its (non-capitalist) nature. No major political or social unrest generating credible legitimation threats took place. This absence is as much the outcome of the lack of substantial CF-generating 'spark-firing' and 'eye-catching' CLL reforms to act as catalysts of mobilisation as of the consolidation of the 'neo-liberal consensus'

[128] On the politics and food poverty see Nicola Livingstone, 'The Hunger Games: Food Poverty and politics in the UK' (2015) 39(2) Capital & Class 188.
[129] Food bank users (given 3-day emergency food) skyrocketed from 25,899 in 2008-2009 and 61,468 when the Coalition Power to 1, 084, 604 in 2014-2015. Statistics from Trussel Trust http://www.trusselltrust.org/stats. On the uses and causes see Emma Downing and Steven Kennedy, *Food Banks and Food Poverty Standard Note SN 06657* (House of Commons Library 2014).
[130] See Chapter II Part 3 i(b).

succeeding in rendering incontestable any suggestion for the reconstruction of the ruined pre-crisis CLL edifice. Hence the overall impression from 2015 is one of a counter-legitimation stasis and resumption of the de-politicisation pattern of CLL so that the latter remains in complete obscurity, uncontested and outside of the mainstream political debate.

Let us interrogate in more detail the *CF* manifestations or rather the lack thereof in two relevant spheres: (a) the 'Governmental sphere', (b) the broader 'public discourse sphere'.

(i) The Governmental Sphere

The CLL crisis trajectory encountered a rare conjuncture in British political history. A Labour Government was succeeded in 2010 by a *Coalition Government* formed by the Conservative Party, traditionally inclined against unions as a senior partner and the Liberal Democrats traditionally showing a liberal defence of unions seemingly sufficient for resisting further CLL reforms as a junior partner.[131] Hepple traces the two-directional face of the Coalition Employment legislation, since grounded in an 'ideological duality' and tension between 'market fundamentalism' and 'social justice liberalism' whose genealogy is roughly traced to the Coalition's composition.[132] Pursuant to the 'Coalition Effect' naturally setting 'the mood for concession, compromise and, above all ideological innovation',[133] it is reasonable to assume that Liberal Democrats exerted a *certain 'intra-Government non-regressive counter-legitimation force'* resisting and tempering the

[131] This was the first Coalition Government since the Second World War National Unity Coalition Government.
[132] *Hepple* (n 2) 208.
[133] Matthew Lakin and Marius Ostrowski, 'Ideology in the Age of Coalition: the strange rebirth of British Capitalism' (2014) 19(1) Journal of Political Ideologies 15, 16.

further Conservative Party instinct for further restrictive trade union reforms, unrelated to fiscal consolidation, which, in turn, resulted in the *relative* crisis *inertia* observed within British CLL. The dispute over the check-off arrangements along with the non-enactment of the various anti-union legal reforms (see below) suggested within the public discourse in this period seem to evidence this 'counter-legitimation function' of Liberal Democrats.

As a result, there arises a strong case, albeit subject to standard counter-factual caveats, for concluding that the Liberal Democrat presence in the Government safeguarded a relative non-regression for CLL. particularly as soon as it became clearer that Conservative Party's supposed modernisation, at least in relation to unions, was more apparent than real and thus vindicating Hayton's thesis in 2010 that '[Conservative Party modernisation] never meant that Thatcherism must be vanquished, but rather it be reconstituted and repackaged in an electorally palatable manner'.[134] However, the Liberal Democrat consensus on the passage of Lobbying Act and the abolition of AWB counsels against an over-estimation of the strength and impact of this force as 'safety valve', besides preventing a full reigniting of the anti-union legislation animated by the Thatcherite market fundamentalism. In short, the Liberal Democrats presence in the Coalition was, at best, a *light* 'counter-legitimation counter-weight'.

(ii) The Public Discourse Sphere

In the broader political and public discourse sphere, a closer inspection underneath the formal juridical/administrative sphere exposes crucial dynamics of seismic potential*: the ever-increasing neo-liberal colonisation of the 'pre-figurative discursive space', the*

[134] Richard Hayton, 'The path to (sharing) power: The Conservative Party' In Gianfranco Baldini and Jonathan Hopkin (eds), *Coalition Britain: The UK election of 2010* (Manchester United Press 2012) 68.

latter referring to the space where policies for future laws are discussed and developed, demanding further de jure restrictions on unions' functional and organisational space. This process should be understood in the context of four elements/(non)-motions: (a) Labour Party's 'silence', (b) Conservative Party anti-union discursive space for further restrictive reforms and, in the opposite direction, (c) societal anti-austerity mobilisation and (d) litigation mobilisation.

The first *non-motion* is a familiar carry-over from the New Labour period whose electoral strategists, as Davies and Freedland pointed out, saw 'unions as a potential liability, not an advantage'.[135] The absence of any *CLF* (counter-legitimation force) pressure for the restoration of the ruined CLL edifice by the Labour Party (LP), now the Party of Opposition, under Ed Miliband carries this view forward. Despite 'acknowledging that inequality is the biggest issues we face',[136] and the existence of objective connections between the decline of unions and union power and the rise of inequality[137] recognised even by IMF,[138] the *LP* reproduced the silent pattern of implicitly consenting that a social-democratic CLL edifice is outside of the parameters of acceptable discourse and contestability. This discursive strategy of de-politicisation towards CLL starkly contrasts with the intense politicisation of individual employment rights under Ed Miliband's leadership. Exhibiting apparent continuities with New Labour, the Labour Party confined its radicalism to the re-travelling of the 'individual rights route' by contending that the improvement of the security and reward of working life would happen

[135] Davies and Freedland, *Towards a Flexible Labour Market* (n 103) 107.
[136] Mark Ferguson, 'Ed Miliband interview: the biggest issue we face is inequality' (*LabourList*, 6 May 2014) <http://labourlist.org/2014/05/ed-miliband-interview-the-biggest-issue-we-face-is-inequality/> accessed 7 August 2015.
[137] On this see Lydia Hayes and Tonia Novitz, *Trade Unions and Economic Inequality* (Institute of Employment Rights 2014).
[138] See Florence Jaumotte and Carolina Osorio Buitron, *Inequality and Labour Market Institutions*, IMF Staff Discussion Note SDN 15/14 (July 2015) 27.

through the raise of minimum wage, ban of exploitative zero-hour contracts and promotion of the living wage.[139] The LP Manifesto included only a vague recognition on the value of trade unions 'as an essential force for a decent society and as guarantors of skills and fair wages' preceded by the pro-business praise of businesses as only 'wealth creators', [140] thereby dissociating from any narrative of workers as principal wealth creators. There was also no mention of collective bargaining in the Manifesto.

While proposals for strengthening CLL institutions remained politically incontestable by the Labour Party, neo-liberal policy proposals for a further reform of industrial relations law were progressively formulated and intensified. In a sign confirming the harmonic operation of what Bach and Gall call *'de facto'* bipartism between Government and businesses,[141] the Government essentially integrated most (though not all) of the proposals contained in a Confederation of Business of Industry publication termed *Keeping the Wheels turning*[142] as well as similar ones derived from right-wing think-tanks and Conservative politicians[143] in its 2015 Electoral Manifesto.

In what is essentially the Thatcherite unfinished business, the Conservative Party pledged radical tightening of the industrial action law conditions by enacting the following reforms : 50% minimum turnout for strike ballots so that they are a 'result of a clear, positive choice' *plus* 40% positive support of all union members in essential services 'to tackle the disproportionate impact' of these strikes, repeal of the 'nonsensical'

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[139] The Labour Party Manifesto, General Elections 2015, 23.
[140] ibid.
[141] *Bach and Gall* (n 68) 333.
[142] Jim Bligh, *Keeping the Wheels turning: Modernising the Legal Framework of Industrial Relations* Brief (September 2010, Confederation of Business and Industry).
[143] See, for instance, Ed Holmes, Andrew Lilico and Tom Flanaghan, 'Modernising Industrial Relations' (2010) Policy Exchange Research Note; Hélène Mulholland and Adam Gabbatt, 'Boris Johnson Calls for new laws to curb strikes' (*Guardian*, 4 October 2010) <http://www.theguardian.com/politics/2010/oct/04/boris-johnson-cbi-strike-ballots> accessed 7 August 2015; 'Cameron would reform union strike rules, Cameron confirms' (*BBC*, 9 May 2014) <http://www.bbc.co.uk/news/uk-politics-27339147> accessed on 7 August 2015.

ban on hiring agency staff to provide coverage during strikes, ensure that strikes are called on the basis of fresh ballots (a.k.a shorter period during which a ballot is valid), tackle intimidation of non-striking workers (a.k.a tougher rules on picketing).[144] Besides industrial action, the Conservative Party called for altering the opt-out process for union subscriptions to opt-in as well as restricting the rules for the 'facility time' for union representatives.[145] As it is beyond our scope to offer a detailed analysis of these proposes reforms, it suffices to stress for our purposes that they reflect a further neo-liberalisation of the public discourse space for CLL at the same time that the opposite movement is not championed by the Labour Party.

However, it would be erroneous to ignore the opposite winds of a third, protest anti-austerity counter-movement. Drawing on the direct democracy legacy of the Occupy London Movement (comprising activists that put the inequality agenda and the ills of financial-led capitalism at the core of the popular discourse through the powerfully simple inequality slogan of 1% versus 99%) which acted as a symbolic form of resistance by 'doing'[146] to the neo-liberal subjectivity imposed by neo-liberalism, there has been a non-negligible anti-austerity grassroots mobilisation mainly expressed in the anti-austerity demonstrations.[147] In his analysis, David Bailey observes the rise in 'extra-parliamentary' activity during the crisis (urban riots, Occupy movement, 'UK uncut' protests) sparking a wave of popular unrest not seen since 1980s,[148] an activity taking more the instrumental form of demonstrations rather than strikes.[149] Bailey also documents the emergence of

[144] Conservative Party, *The Conservative Party Manifesto* (General Election 2015) 18-19.
[145] ibid 19.
[146] Emma Dowling, Anna Feigenbaum, Susan Pell and Katherine Staley, 'Occupy London' (2012) 111(3) *South Atlantic Quarterly* 608, 614; see further Noam Chomsky, *Occupy* (Penguin Books 2012).
[147] For an institutional form See People's Assembly against Austerity http://www.thepeoplesassembly.org.uk/
[148] David Bailey, 'Contending the Crisis: what role for extra-parliamentary British politics' (2014) 9(1) British Politics 68, 69.
[149] ibid 85.

two new extra parliamentary actors: anti-cuts campaigners and radical activists.[150] These developments show a progressively growing discontent for spending cuts and austerity to which a protective CLL edifice could conveniently fit as a modality for redistribution, reduction of inequality and democracy. But this discontent was not overwhelming enough to trigger credible legitimation concerns.

Under this anti-austerity mobilization, there should also be included strategies of legal mobilization in the form of using human right litigation, as for instance the unsuccessful challenge of the ban on secondary action for its incompatibility with Article 11 of the European Convention on Human Rights in the *RMT v UK* case.[151] Whilst limited in its practical effect, one should not ignore the potential of a human rights justification on collective labour rights[152] to add political legitimacy, particularly given the absence of a positive system of constitutionalized protection of CLL rights. Arguing that the restrictions on the right to strike violate human rights is a more legitimate claim than that they are merely undesirable, however the Strasbourg Court in *RMT v UK* did not hold such a view by finding restrictions justifiable.

So, the *CLF* in the crisis period, though visible to a degree in social anti-austerity mobilisations, was characterized by a failure to penetrate the 'mainstream political party sphere' and influence Governmental and public policy where state power is exercised.

[150] ibid 89.
[151] European Court of Human Rights *National Union of Rail, Maritime and Transport Workers v United Kingdom* (Application No. 31045/10), 8 April 2014. See the excellent commentary of Alan Bogg and Keith Ewing, 'The Implications of the *RMT case*' (2014) 43(3) ILJ 221.
[152] See the seminal article by Virginia Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3(2) European Labour Law Journal 151.

7. 'Neo-Liberal Continuity by Consolidation': The Crisis De-Rigidification

An overall assessment of the CLL crisis trajectory should respond to the following question: what is the *mode of relation* of the crisis trajectory to the pre-crisis dominant neo-liberal paradigm of de-collectivisation and de-institutionalisation for CLL, introduced by Thatcher and accepted (if not consolidated)[153], in its essence, by New Labour so that it transfigured into a 'neo-liberal consensus'?[154] Did the crisis period mark a *stasis, rupture or consolidation* of the dominant paradigm in terms of its material application?

The herein provided answer is that of *consolidation,* termed as *'neo-liberal continuity by consolidation'.* In their seminal work on institutional change in advanced economies, Thelen and Streeck have insightfully suggested how transformation could emanate from *gradualism* and continuity rather than violent ruptures and discontinuity.[155] This framework, though for Britain not as transformation but as consolidation, finds a concretisation in the British CLL crisis trajectory. To be sure, a kind of gradualism in CLL could be discerned as early as 1980s, in the form of the tortuous, 'step-by-step' destruction of the doctrinal foundations of British CLL,[156] or as Hepple eloquently puts it 'death by a thousand cuts'.[157] Within this broad evolution of 'destructive gradualism' for collectivism and CLL institutions, the crisis period represents a fine-textured neo-liberal evolutionary piece. The 'neo-liberal paradigm's material field of application becomes strengthened and expanded to the previously few 'alien-paradigm' areas.

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[153] Susan Watkins, 'A Weightless Hegemony: New Labour's Role in the Neoliberal Order (2004) 25 NLR 5, 10; See also *Howell* (n 17) 134.
[154] See Colin Crouch, 'The Terms of the Neo-Liberal Consensus' (1997) 68(4) Political Quarterly 352.
[155] See *Streeck and Thelen* (n 105).
[156] See Chapter III Part 2 (c-i).
[157] *Hepple* (n 2) 204.

In rather schematic terms, the crisis developments amount to a neo-liberal exercise of maximising the *coherence* of the neo-liberal paradigm, built on the 'first principles' of competitiveness and flexibility, with industrial relation reality, purporting to bring the latter closer to the text-book liberal market economy paradigm.[158] Enhancing coherence is attained by the elimination or erosion of the blind spots of institutional remnants of the *social-democratic anti-paradigm.* By ending the tripartite AWB, a remnant of the state's promotional stance toward collective bargaining and sectoral bargaining, by restraining the check-off and facility-time, remnants of the promotional 'role-employer' state towards public sector unionism while adding new layers of bureaucracy on unions, the crisis reforms' approach seeks to consolidate the dominance of the neo-liberal over the social-democratic settlement. In reality, the crisis observer witnesses the extension of the application field of 'first principles' rather than the replacement thereof, hence 'consolidation'.

Indeed, when one scratches the surface 'austerity rationale' or 'austerity frame', which seems to be nothing more than a convenient short route to the neo-liberal preferences for a reduced state, a 'fig-leaf' from masking the Coalition's real concern which is that '*the more entrenched problem is the practice of perpetuating an embedded social democratic state',*[159] the observer discovers familiar themes juxtaposing old Thatcherite mantras and rationalities with a blend of New Labour: the *utilitarian* idea of de-legitimising collectivist and state intervention in the market by presenting it as red-tape impeding

[158] On this thesis as for the crisis trajectory of social model in general see Damian Grimshaw, Jill Rubery, 'The end of the UK's liberal collectivist social model? The implications of the coalition government's policy during the austerity crisis' (2012) (36) Cambridge Journal of Economics 105, 107.
[159] Matt Beech, 'A Tale of Two Liberalisms' in Matt Beech and Simon Lee (eds), *The Cameron-Clegg Government: Coalition Politics in an Age of Austerity* (Palgrave 2011) 276 (emphasis added).

flexibility and markets *(AWB),*[160] the *principled* stance supporting *de jure* bureaucratisation of unions by adding new statutory organisations layers as a means to enhance their accountability and democracy *(Lobbying Act Part 3),* the subtle liberal idea of voluntarism as neutrality[161] which now applies to the public sector in order to justify restrictions on check-off and facility-time on the basis of taxpayer rather than business interests, the *unitarist* frame of employment relations dismissing power equilibria[162] and the New Labour mantra of trading collective for individual rights which is used by the Coalition Government to account for the AWB abolition on the basis of the existence of the minimum wage.[163]

Propelled by the neo-liberal thrust, the reforms, in their cumulative effect, generate a *transformative impact.* In what is a new process of 'de-rigidification', the latter term used by Davies and Freedland to describe 'the reduction of all sorts of socially-generated structural constraints upon the labour market and the employment relationship'[164] as in 1980s, the law and the state administrative levers were recalibrated towards reducing union power, by undermining their functional and organisational capacities, and simultaneously freeing and re-structuring the labour market.[165] Curbs on check-off and facility-time in the public sector and the further bureaucratisation of union internal affairs

[160] See e.g DTI, *Burdens on Business: Report of a Scrutiny of Administrative and Legislative Requirements* (HMSO 1985); Her Majesty's Stationery Office, White Paper, *Lifting the Burden* Cmnd 9571 (1985) and Department of Employment, White Paper, *Building Business…not Barriers* Cmnd 9794 (1986).
[161] See Bogg, *The Democratic Aspects of Trade Union Recognition* (n 97) 93-96; In 1980s, Earl Gowrie has characteristically said that the intention of 1980s reforms was 'to get back to the voluntary system'. Earl Gowrie, Parl.Deb.H.L., May 20, 1980, col. 902.
[162] As Hepple notes, 'the Coalition, like the Blair and Brown governments, espouses a vision of ''industrial partnership'' and cooperation between management and labour, not an adversarial relationship in which the ''rights'' of collective action by workers are protected' *Hepple* (n 2) 209.
[163] See Labour Party, Manifesto for the 1997 General Election: 'In industrial relations, we make it clear that there will be no return to flying pickets, secondary action, strikes with no ballots or the trade union law of the 1970s. There will instead be basic minimum rights for the individual at the workplace, *where our aim is partnership not conflict between employers and employees*' (emphasis added).
[164] Davies and Freedland, *Labour Legislation and Public Policy* (n 70) 529.
[165] On Thatcherite labour law aims as reduction of trade union power and restructuring of the labour market see ibid Chapter 9.

by Part III of the Lobbying Act fall within the former, while the abolition of the AWB supposedly freeing the market from statutory (in practice collectivist) intervention within the latter. These two groups could perfectly fit onto each of the sides expounded by Andrew Gamble as components of neo-liberalism, namely strong state and free markets.[166]

Scott and Williams liken the British structure of employment relations to 'the simile of a colander [in so far as] a structure is present, but it is beset with holes, through which much of the meaningful content of employment rights is gradually draining out',[167] thereby concluding that Coalition reforms 'hollow out' employment relations.[168] Indeed, the *de jure* and *de facto developments*, rather than covering pre-existing holes, engineer *new holes.* Hence, whilst *formally* the freedom of association in trade unions is maintained, it is dried up from its vital meaning and functions. The *de jure* alterations strategically deprive unions of the requisite functional space (as for AWB) while carefully tightening the very basic material organisational conditions for effectiveness, as for facility-time and check-off arrangements.

These features develop destructive complementarities with de facto developments, namely the 'institutional drift' of statutory union procedure, acceleration of de-collectivisation and de-unionisation so as to bring about the actual 'de-institutionalisation' of CLL by eroding the effectiveness of trade unions aiming at 'remov[ing] the little protection for workers that remains' and disempowerment.[169] More

[166] Andrew Gamble, *The free economy and the strong state: the politics of Thatcherism* (2nd edn, Macmillan 1994).
[167] Peter Scott and Steve Williams, 'The Coalition Government and the employment relations: accelerated neo-liberalism and the rise of employer-dominated voluntarism' (2014) 15 Observatoire de la société britannique, text quoted here from the online version <https://osb.revues.org/1636#text> para 2.
[168] ibid paragraph 33.
[169] Bogg and Ewing, *The Political Attack on Workplace Representation* (n 98) 5.

fundamentally, the crisis' de-rigidification produces also a *constitutional (or entrenchment) effect* for the radical state retrenchment (more notably in welfare and public spending cuts) [170] realised by the coalition Government: restraining unions' space, particularly in the public sector, *enables* the permanence of the institutional arrangements in that it de-capacitates the traditionally strong union capacity to act as civil society resistance counter-legitimation institutions.

At this point, there should be also a note on the *technique* of this neo-liberal movement. Initially, the Coalition Agreement appeared to evince a pragmatic Coalition attitude based on a maxim *'Quieta Non Movere'* ('not to disturb quiet things'). [171] As the de-regulated CLL, unable to perform its protective function, posed no serious impediment to the economic measures, it was better to render it untouched as to avoid any unnecessary union weakening. However, in the subsequent period, the Conservative Party within a process of gradual internal differentiation changed course. It acted in a gradual, opportunistic, confident and strategic way exploiting all available situations for pushing its resurgent Thatcherite anti-union agenda. The Lobbying Act is the most characteristic case. A responsive act to political lobbying in Parliament was used as an opportunity for burdening unions with more bureaucracy. Similarly, the modification of public sector administrative practices constraining public sector unionism testify to the instrumental flexibility of the Conservative Party in achieving the maximum possible 'de-rigidification' within the natural political restraints of a Coalition with a party (Liberal Democrats) not sharing the strength of its anti-union predilections.

[170] See Peter Taylor-Gooby, *The Double Crisis of the Welfare State and What we can do about it* (Palgrave 2013) particularly Chapter 1.
[171] This famous phrase comes from one of Lord Wordpole letters.

Therefore, the crisis led to a path-reinforcement and *consolidation* of the pre-crisis CLL patterns: further state intervention for unions in the form of more bureaucracy ('restrictive laissez-faire'), elimination of the collectivist social-democratic vestiges (AWB), and rolling back the state when establishing minimal devices for facilitating the operation of unions (check-off, facility-time restrictions). Undeniably, a *moribund equilibrium* seems to settle within the British CLL, where a Labour Government does not alter, in its essence, the neo-liberal paradigm and a non-Labour Government pushes it more towards an ideal-type market-form where, 'freedom of contract [is treated] as if it were a social fact rather than a conceptual apparatus of the law'.[172] No mistake here. This push is towards its pre-history, namely non-existence. As Wedderburn usefully reminds us, 'market labour law is master and servant writ large'.[173]

8. The Crisis Equilibrium and the Crisis Trajectory: Putting the Neo-Liberal Continuity by Consolidation in Class Context

In Chapter II, the theoretical enquiry arrived at the following theorem for the CLL crisis movement:

Economic Rationalisation Force (ERF) - Counter-Legitimation Force (CLF)=> Regulatory Measures (RM) + Non-regulatory Measures (NRM) [174]

[172] Referring to Conservative Governments approach to labour law and industrial relations between 1979-1997, Linda Dickens and Mark Hall, 'Labour Law and Industrial Relations' in Paul Edwards (eds), *Industrial Relations: Theory and Practice* (2nd edn, Blackwell 2003) 130.
[173] Lord Wedderburn, 'Changes, Struggle and Ideology in British Labour Law' in Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (Lawrence & Wishart 1995) 2.
[174] See further Chapter II Part 3(ii).

Indeed, the observed pattern in Britain nicely coheres with theoretical expectations. Unlike Greece where there were multiple stages in the theorem pursuant to the repetition of vicious circles of high economic rationalisation competing with high counter-legitimation forces whilst (or since) demanding non-regulatory measures for its realisation, thereby comprising a 'fragile equilibrium', the British crisis equilibrium exhibits enduring stability, not fragility. The economic rationalisation force of capital destruction was capable to realise itself predominantly and quietly through regulatory measures (e.g low pay, see *capital destruction* above), fully exploiting the pre-crisis unregulated environment. This explains why the CLL movement was not over-dynamic as in Grrece. In addition, the *de facto* deregulation (accelerating decollectivisation and deunionisation of workplaces, demise of statutory union recognition process) rendered radical *de jure* interventions unnecessary as there was no impediment to the requisite capitalist restructuring. Moreover, the weakness of the resisting counter-legitimation forces, underpinned by the neo-liberal political consensus, was a crucial factor stabilising and safeguarding the equilibrium.

In this pattern of 'neo-liberal continuity by consolidation', however, there are two features which, in closer inspection, may appear puzzling for different reasons: (a) the lack of counter-paradigm movement and (b) lack of inertia. Proper reflection gives us access to the underlying causes of the movement.

The first puzzle becomes clear when proper emphasis is accorded to the status of the period as a *crisis* trajectory. It relates to the very fact that the crisis period was a 'business as usual' for CLL and the dog of worker-protective CLL did not bark. This seems to defy a historical pattern. Indeed, a keen observer of British industrial relations history would take notice of an interesting pattern: crises tend to cause, or at least correlate, with an anti-

paradigm post-crisis 'rupture' with the pre-existing paradigms, a 'discontinuous transformation' This insight that could be termed as the *crisis genealogy of new patterns*, perhaps based on the British attraction to empiricism rather doctrine[175] which may have forced them to change attitudes only and when they seem to fail, evidently underlies Howell's historical analysis of British industrial relations. After distinguishing between three industrial relations systems, the collective laissez-faire (1890-1940), the decentralisation (1940-1979) de-collectivisation (1979-1997) one he concludes that 'each one emerged out of a crisis of the last'.[176] The most recent one is the rupture with the pre-Thatcherite developed in response to the perceived crisis produced by the Winter of Discontent.[177] If history was to repeat, then the first serious crisis of *neo-liberalism* should have precipitated a rupture, not consolidation. .

Why this did not occur? Part of the answer lies in how the *dominant discourse* was framed or re-framed. As Colin Hay rightly points out, 'whether a crisis proves paradigm-challenging or paradigm-reinforcing depends on how it is perceived- specifically whether it is seen to signal exhaustion of the paradigm or as here [in this crisis] to emerge from a violation of its core precepts'.[178] Vindicating the thesis that capitalism is an over-flexible system, there has been a *discursive secondary (counter-) narration* of the crisis: an objective crisis *of* neoliberalism in Britain, 'has led not to a questioning of neo-liberalism', but its reassertion through the redefinition of the consequences of the crisis (high levels of public borrowing and state deficit) as its cause'.[179] The crisis was transformed from an obstacle to the neo-liberal capitalist evolution to an opportunity, by

[175] David Marquand, *The Unprincipled Society* (Fontana Press 1988), Introduction.
[176] *Howell* (n 18) 190.
[177] ibid 130-145; see also Colin Hay, 'Narrating Crises: The Discursive Construction of the ''Winter of Discontent''' (1996) 30 (2) Sociology 253.
[178] Hay, *The Failure of Anglo-liberal capitalism* (n 7) 42-43.
[179] *Scott and Williams* (n 167) paragraph 21.

being re-configured as a crisis of the ruined social-democratic state. Such dominant discourse, following the path of the two movements of the economic rationalisation force ending up at the 'permanent austerity' discourse[180] accounts for why the 'dog did not bark' for a worker-protective CLL, as the latter can emerge only when the ideological chains of neo-liberalism are shattered. As Mirowski eloquently puts it, this is 'the crisis that didn't change very much of anything'.[181]

In this fashion, an *ideological reflexively-reinforcing property* of neo-liberalism could be discerned, which enables it to re-claim path-obstructing as path-accelerating narratives. But an analysis confined to ideology as a free-standing device may be misleading. While recognising that the ideological/discursive dimension is absolutely essential, as Wedderburn has done in relation to the neo-liberal influence on labour law[182] it is also essential to make the next crucial step. This step is to contextualise ideology by perceiving it as in intrinsic modality attached to, expressing and shaped by, a hegemonic field of class domination.[183] Admittedly, British labour law scholarship has traditionally not constructed Marxist *class domination* and class struggle as a pertinent determination.[184] Yet, only by such an undertaking, the *effectiveness* of the neo-liberal discourse can be adequately explained unless one wills to succumb to the temptation of viewing societal workings as ones reaching a class-free consensus outside of circuits of power.

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[180] See Part 1 above.
[181] Philip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Verso 2013) Chapter 1.
[182] Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18(1) ILJ 1.
[183] For a class domination state analysis of the British State see Alexander Gallas' The silent treatment of class domination: ''critical'' comparative capitalism scholarship and the British State' (2014) 38(1) Capital & Class 225.
[184] On the point that British labour law scholarship was infused by English empiricism characterised with 'an uncertainty about the processes of a class socierty' see Lord Wedderburn, 'Changes, Struggle and Ideology in British Labour Law' (n 173) 27.

If one starts from the premise that neo-liberalism is a class[185] and political[186] project, a form of class war[187] and treating Thatcherism as class domination[188] then the discursive and ideological dimensions of the crisis trajectory may be viewed as part of a consolidating Gramscian 'hegemony', by which the ruling class seek to reproduce their domination by consent rather than coercion.[189] Illuminated by this perspective, the fact that the 'first-principles' of labour law - competitiveness, flexibility and market utilitarianism- are outside of political challenge and thus *appear* to operate on a seemingly supa-ideological plane merely hints their 'naturalisation' as a weapon of class domination. Their persistence is not a result of their intrinsic rational superiority or of their neutrally-ideological character, as mere public policy instruments infiltrating public policy makers, but instead there are signs of an effective ideology, which is so effective as to disguise its ideological character. As Fairclough underlines, 'ideology is most effective when its working are least visible'.[190] Conceived along these lines, the de-constestation and de-politicisation of the neo-liberal labour law, resumed in the crisis, functions as a hegemonic tool developed by the dominant class for preventing the strengthening of counter-legitimation forces. The political consensus is, as Crouch rightly points out, politics framed by class.[191] Hence the ideology analysis must be associated

[185] For neo-liberalism as class narrative see David Harvey, *A Brief History of Neoliberalism* (OUP 2005);
[186] *Gamble* (n 166) 4-11.
[187] In the words of Ralph Miliband class war conservatism', see Ralph Miliband, 'Class War Conservatism' in Ralph Miliband, *Class War Conservatism and Other Essays* (Verso 2015) 279-285.
[188] *Gallas* (n 183).
[189] Antonio Gramsci, *Selections from the Prison notebooks* (Lawrence & Wishart 1971) 210-276.
[190]Norman Fairclough, *Language and Power* (2nd edn, Pearson 2001) 71.
[191] *Crouch* (n 154) 352.

with an analysis of the relation of ideology as an *intrinsic* dimension of class domination, a central theme in the writings of Marx and Engels,[192] and Poulantzas'.[193]

For understanding the crisis' trajectory it is useful to refer to Foucauldian work on neo-liberalism and truth regimes which is an appropriate framework for explaining the British case. Indeed, the crisis trajectory shows that, in order to use the Foucauldian view, a 'truth regime' has been established as an undisputed hegemonic narrative so that the state rationalises itself, by using the markets as benchmark indicator for policy and regulatory legitimacy.[194] Foucault has perceived the transition of the role of the market from pre-capitalist to capitalist societies in 18th cerntury, as one from 'juris-diction' (pre-capitalist markets functioning as a site of justice)[195] to 'veri-diction' (markets constituted as agents of truth for the governmental practice)[196], and in his analysis the 'truth regimes' have a circular relation with power exchanges (though conceived as broader than class domination) in society. Foucault's observations gain analytical instantiation in the British crisis trajectory. A manifestation of this trend of markets as 'truth regimes' could be detected in the *commodification* or the *liquidation* of the trade union rights discourses by the Coalition. Check-off/facility-time are de-legitimated as a burden on the taxpayer and the AWB abolition as impediment to competitiveness. Even though for the former is the taxpayer and not market which is the focus, in reality an identical market *market-*

[192] See Karl Marx and Friedrich Engels, *The German Ideology* (Lawrence & Wishart 1965) 60 'The ruling ideas are nothing more than the ideal expression of the dominant material relationships grasped as ideas; hence of the relationships which make the one class the ruling one, therefore, the ideas of its dominance'.
[193] On Poulantzas idea of dominant ideology as 'regional instance within the unity of the structure (…) which has the dominant of a given class as its effect in the field of the class struggle' see Nicos Poulantzas, *Political Power and Social Classes* (New Left Books & Sheed & Ward 1973) 209.
[194] See Michel Foucault, Lecture of 17 January 1979 in Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-79* (Palgrave Macmillan 2008).
[195] ibid 31.
[196] ibid 33.

monetary logic is deployed for preventing the application of a rights' discourse, or in Foucauldian terms 'jurisdiction'.

In this context, the market rule (in labour law recent slang parading as 'market efficiency') becomes essentially a metaphysical claim[197] automatically denoting the inappropriateness of collectivist interventions in the market and of the need for intervention for unions which proceeds, without supporting empirical evidence.[198] And this is perhaps the most significant form of the *consolidation pattern* of the neo-liberal paradigm in the crisis trajectory: the consolidation of a destructive consensus for CLL, a form of hegemony. And as Wedderburn notes, 'history shows how hard it is to reintroduce shared assumptions once they are driven off the agenda'.[199] CLL is thus pushed more and more beyond the collective memory so that its market-like nature is increasingly perceived as a natural state.

Let us now move to the second puzzle. Here the observer is faced with the opposite question: why there was any movement at all? A theorist could reasonable wonder why, in the face of no economic rationalisation force that could not be accommodated by non-regulatory measures alone, there was to be any crisis movement at all towards neo-liberalisation. The response here is once again linked with the nature of neo-liberalism as a *totalitarian commodifying philosophy* espousing a world-view of markets as an absolute organising principle of society. As put by Marquand, 'at the centre of the neo-liberals' moral universe lies the *Idealised Market* of the rising manufacturers of the first Industrial

[197] Ruth Levitas, 'Ideology and the New Right' in Ruth Levitas (ed), *The Ideology of the New Right* (Polity Press 1986) 2.
[198] See footnote 67.
[199] Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (n 182) 33.

Revolution', [200] while Supiot relates neo-liberalism with the total Market.[201] Indeed, the British crisis trajectory exemplifies this totalitarian tendency, according to which, neo-liberalism seeks to expand its reach as an inherent default tendency, even without an urgent economic necessity. In essence, this totalitarian neoliberalism signals an emerging 'totalitarian capitalism'.[202] But the latter can proceed undisrupted only in the face of low counter-legitimation pressures.

To sum up, this part looked, with the assistance of the crisis equilibrium, into some deeper causes of the trajectory. We concluded that a class narrative of 'hegemonic consolidation' linking the ideology of neoliberalism with class domination may be the most fertile for making sense of the British crisis trajectory.

9. Conclusion: Summary of Findings

The Chapter interrogated the British CLL crisis trajectory. After having traced the economic rationalisation within the austerity discourse, it exposed the CLL de-jure legislative and administrative reforms whilst ascertaining the non-regulatory measures realising the capital destruction and the weak manifestations of the 'counter-legitimation' forces. Subsequent to the account of developments through the Crisis Equilibrium model, the enquiry found a pattern of a 'neo-liberal continuity by consolidation' during the neo-liberal period which could be justified by a class-based neo-liberal narrative of ideology. For a full understanding of the trajectory, though, the reader should turn to the next Chapter mapping the muting of unions' political voice by the constitutional attack on

[200] *Marquand* (n 175) 3 (emphasis added).
[201] On the total market as related to neo-liberalism see Alain Supiot, *The Spirit of Philadelphia: Social Justice vs. the Total Market*, (Saskia Brown (tr), Verso 2012).
[202] See Colin Leys, *Total Capitalism: Market Politics, Market State* (Merlin Press 2008) and George Liodakis, *Totalitarian Capitalism and Beyond* (Ashgate 2010).

unions during the crisis, which puts an additional descriptive puzzle in the seemingly never-ending neo-liberal travel of CLL.

VII

Muting the Political Voice of Workers: The Constitutional Attack on Trade Unions

Labour law is not the product of any 'invisible hand'. Its very existence bears the mark of the 'hyper-visible hand' of the struggle of workers against capital. Indeed, 'the birth of trade unionism was a political struggle, the winning of recognition was a political struggle'.[1] In his introduction to the *Making of Labour Law in Europe,* Bob Hepple famously perceived labour law in *agency-centric* terms, as the outcome of a process of struggle between different social groups and 'competing ideologies'.[2]

How does this agency translate into labour law? This could be called as the 'input question' of labour regulation, an often neglected subject in labour law literature habituated to treat rules as given. An integral piece in this translation cannot but be the 'political voice'[3] of workers. In the British constitutional order, political voice performs also a necessary *constitutional amendment* function, untypical for jurisdictions with constitutionalised labour rights. This function could be understood in the context of the following features of the British system. Firstly, collective labour law is hostile to the common law constitution[4] that 'knows nothing of a balance of collective forces'[5] and

[1] Andrew Taylor, *Trade unions and politics: a comparative introduction* (Macmillan 1989) 177.
[2] Bob Hepple, 'Introduction' in Bob Hepple (ed*), The Making of Labour Law in Europe* (Mansell 1986) 4.
[3] For the application of the 'voice' framework in the context of labour law see Alan Bogg and Tonia Novitz, 'The purposes and techniques of voice: Prospects for continuity and change' in Alan Bogg and Tonia Novitz (eds) *Voices at work: continuity and change in the common law world* (OUP 2014); for the original articulation see Albert Hirschman, *Exit, voice, and loyalty: responses to decline in firms, organizations, and states* (HUP 2014).
[4] Keith Ewing, 'The Importance of Trade Union Political Voice: Labour Law Meets Constitutional Law' in *Voices at work* (n 3) 278-282.
[5] Otto Kahn-Freund, *Labour and the Law* (3rd edn, by Paul Davies and Mark Freedland, Stevens & Sons 1983) 12.

'operates between individuals and not otherwise'.[6] Secondly, it is the absence of a codified written constitution. As a result, it is ordinary statutes, produced by the normal political process, that are the the only *functional equivalents* to constitutional rights in other jurisdications such as Greece. These statutes sustain the necessary constitutional space for the existence of labour law in the UK. In this sense, Britain has a highly *politicised* constitutional basis of labour law. Without political action, the default common law constitution applies. As Ewing rightly remarks, in common law jurisdictions: 'it is necessary to overcome a hostile legal framework by legislation, which in turn requires a measure of political power to which politicians feel constrained to respond [hence] [a] political voice is necessary for industrial freedom'.[7]

So, political voice forms an intrinsic part of the political '*constitutional* cornerstone' of labour law. Did crisis developments re-configure this constitutional basis? For answering this question, the Chapter interrogates the crisis trajectory in the *regulatory dimension* of the translation in Britain. It deals with the most significant crisis CLL development in UK, albeit of constitutional law origin: the multi-faceted attack on workers' political voice as exercised through trade unions. Our analysis is norm-oriented: we look into the norms with an impact on the political voice of workers. Of course, this is a part of the translation. Nonetheless, it is a crucial part. Although admittedly norms cannot activate workers' agency alone, they can still severely restrict it, because the normative substratum is associated with the powerful sanction of state coercion and repression.

The Chapter examines the crisis developments in the UK in the field of *regulation of workers' political voice.* The latter consists –principally though not exclusively- of those norms directly regulating trade unions' activity in the political sphere (see Part 2 below).

[6] ibid.
[7] Ewing, 'The Importance of Trade Union Political Voice' (n 4) 277.

This is so due to the role of unions as the principal *institutionalised*[8] carriers of workers' political voice, at least for the present historical period.

Prior to embarking on the main enquiry, it is useful to clarify the meaning of 'politics' herein adopted. Beyond any doubt, defining 'politics' belongs to one of the most contested exercises in political philosophy. Broadly conceived, every human action with a public expression is political. For Marx, every 'class struggle [including industrial disputes] is a political struggle'[9] whilst Richter defines unions' political actions 'not necessarily or merely in the narrow sense of party politics, but in the deep sense of participation in the larger public politic'.[10]

Whereas sharing the broad conception of politics as descriptively accurate, the Chapter deploys the term 'political' in a qualified narrower sense. Political activities are distinguished from 'industrial' activities of unions. This distinction is expressed in the British legislation. In this conception, political refers to unions' involvement in party politics and actions as pressure groups, aiming at bringing 'their power and influence to bear on parties or Government' and not on employers of labour through industrial methods.[11] In short, the 'political' designates activities directed towards the State, Government, political parties and public policy. It thus corresponds to the 'representation', 'Government' and 'policy-making functions identified by Ewing.[12] Needless to say that, as Winston Churchill himself noticed more than one century ago, 'the sphere of industrial and political activity is often indistinguishable, always

[8] Institutionalisation necessarily means that capitalism filters out and integrates workers' voice. For the capitalist integration of unions see Richard Hyman, *Industrial Relations: A Marxist Introduction* (Macmillan 1975) Chapter 7 (Conflict and Accommodation) and *Taylor* (n 1) Chapter 7.
[9] Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin 1967) 230.
[10] Irvin Richter, *Political purpose in trade unions* (Allen and Unwin 1973) 16.
[11] Alan Flanders, 'Trade Unions and Politics' (essay published in 1961) in *Management and Unions* (Faber and Faber 1970) 26.
[12] Keith Ewing, 'The Function of Trade Unions' (2005) 34(1) ILJ 1, 2-5;

overlaps'[13] with the result that, to quote Hayward, 'it is not possible to separate what is happening in the labour market from what happens within the political system'.[14]

Hence the herein enquiry draws upon the qualified narrow version of the 'political' but retains a critical eye on the very possibility of such distinction. The examination proceeds in four stages. *Part 1* offers an initial mapping of the regulatory space for the regulation of political voice in the UK. Part 2 and 3 deal respectively with two crisis developments: the enactment of the *Lobbying Act (Part 2)* and the Labour Party constitutional reforms altering the unions' constitutional role in the Labour Party *(Part 3).* The final part puts the trajectory in context and locates the 'constitutional counterrevolution' that proceeds as the 'isomorphic counterpart' of the previous Thatcherite counter-revolution in the industrial arena.

1. Mapping the 'Regulatory Space' of Political Voice in the UK: The Pre-Crisis Position

For gauging the extent and the dynamic of the crisis trajectory, there is a need to map the *regulatory space* of unions' political voice in the UK. At the outset, it should be admitted that in virtue of the dynamic nature of the political phenomenon there can be no exhaustive and complete list. However, this space could be said as being primarily constituted by the following five regulatory sub-domains.

The first sub-domain could be termed as *corporatist.* Corresponding to the 'government function of unions',[15] it encompasses the set of rules determining unions'

[13] Winston Churchill, House of Commons (30 May 1910) excerpt in *Martin Gilbert* (ed), *Churchill: The power of words: his remarkable life recounted through his writings and speeches* (Bantam 2012).
[14] Colin Hayward, 'Trade Union Movements and their Politico-Economic Environments: A Preliminary Framework' (1980) 3(1) West European Politics 1, 5.
[15] Ewing, 'The Function of Trade Unions' (n 12) 4-5.

participation in Government bodies and policy-making institutions. These rules may emanate from legislation, administrative practice or mere custom. This domain is of utmost significance for unions. It establishes a convenient channel for them to *directly* influence Government policy-making regardless of the political party or parties in Government at a given time. In British history, the period between the Second World War until 1979 has been generally characterised by a 'corporate climax'[16] as unions 'cross[ed] the political threshold and became part of the extended state'[17] through participating in numerous Governmental committees formulating public policy. As Taylor observes, there was an 'established quasi-constitutional norms of consultation',[18] so that no major piece of legislation affecting unions can be passed without them consulted. Yet his was a *voluntary* 'weak corporatism'.[19] There was no binding legislation coming out from these bodies and their membership was purely voluntary. Indeed, government-union relations were 'based on independent voluntary cooperation, not compulsion' with their relationship being flexible and uncodified.[20] The symbolic heyday of corporatism is often regarded to be the 'Social Contract' between the TUC and the Harold Wilson Labour Government in the early 1970s.[21] Indeed, this non-juridified corporatism was a central characteristic of the British relations., setting it apart from other continental European countries. The Thatcherite administration brought this corporatism to an abrupt halt by adopting administrative practices that effectively excluded unions from any privileged

[16] See Keith Ewing, 'Trade Unions and the Constitution: The Impact of the New Conservatives' in Cosmo Graham and Tony Prosser (eds), *Waiving the Rules: the Constitution under Thatcherism* (Open University Press 1988) 139-143.
[17] Keith Middlemas, *Politics in industrial society: the experience of the British system since 1911* (Deutch 1979) 373.
[18] *Taylor* (n 1) 123.
[19] ibid 111.
[20] ibid.
[21] See Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press 1993) Chapter 8.

policy-making position in the administration.[22] New Labour administration under Tony Blair and Gordon Brown did not alter the situation. As Ken Mayhew and Mark Wickham-Jones put it, 'Gordon Brown's hostility toward tripartism and consensus-building structures was as implacable as that of Blair'[23] with institutions, such as Acas, retained but with marginal roles and budget cuts.[24] However, there was a minor improvement in the unions' involvement in the Government structures, characterised by Ewing as a 'reemergence of the public administration function'.[25] This participation took the form of unions' representation in 'skills and learning' Government bodies, bipartite groups created for implementing specific legislation and the Treasury-sponsored bipartite CBI/TUC body on productivity.[26] Yet these mechanisms were informal, non-institutionalised and far from substantial. As Ewing himself points out for the New Labour period, tripartism 'was very discrete' and 'did not appear seriously to address macro-economic questions'.[27]

The second sub-domain refers to the *ad hoc* statutory regulation of trade union affairs in respect of the pursuit of political objectives. This interventionist *special regulatory regime* enacted by the Trade Union Act 1913[28] came after a brief period of 'associational laissez-faire', during which there were no additional norms in place to regulate unions' political activities (following their legalisation by the Trade Union Act 1871 and Trade

[22] ibid 438-441. See also David Marsh, *The New Politics of British Trade Unionism* (Macmillan 1992) 110-138.
[23] Ken Mayhew and Mark Wickham-Jones 'The United Kingdom's Social Model: From Labour's New Deal to the Economic Crisis and the Coalition' in Jon E. Dolvik and Andrew Martin (eds), *European Social Models from Crisis to Crisis: Employment and Inequality in the Era of Monetary Integration* (OUP 2015) 152.
[24] ibid.
[25] Ewing, 'The Function of Trade Unions' (n 12) 17.
[26] ibid 17-19.
[27] Ewing, 'The Importance of Trade Union Political Voice' (n 4) 290.
[28] For an excellent account on this act see Keith Ewing, *Trade Unions, the Labour Party and the Law: A Study of the Trade Union Act 1913* (Edinburgh University Press 1982).

Union Amendment Act 1876. This non-interventionist period was ended by the House of Lords *Osborne* Judgment.[29] *Osborne* held that the compulsory political levy raised for funding and sponsoring Labour MPs and union political activities in general, are unlawful on the ground that they are *ultra vires* in relation to the statutory prescribed union objectives that contained no express reference to political representation.[30] In addition, besides the *ultra vires* doctrine, Lord Shaw of Dunfermline invoked a constitutional argument. He treating unions' political activities as an affront to 'the spirit of our parliamentary constitution or [to] that independence and freedom which have been hitherto been held to lie at the basis of the representative government in the United Kingdom'.[31] His remark was in reference to Labour Party MP's commitment to follow the trade union demands as a condition of sponsorship. In essence, the practical consequence of the decision 'was effectively to find the Labour Party unlawful'[32] since its funding originated exclusively from the unions. Positioned in the middle of associational laissez-faire and *Osborne*, the Trade Union Act 1913 –which at the time was seen as a temporary compromise-[33] proved to be extremely resilient. Its architecture survived relatively intact up to day. Its basic premise was that the traditional principles of associational freedom based on constitutional self-government of the associations and majoritarian decision-making are not applicable to unions. Thus *laissez-faire* was quickly abandoned. The legislation is imbued with the *separation principle* of industrial and political objectives. Political objectives should be pursued by a *separate political fund,*

[29] *Amalgamated Society of Railways Servants v Osborne* [1910] AC 87; for a full analysis see Michael Klarman, 'A Judgment Gone too Far' (1988) 103(46) English Historical Review 21.
[30] ibid Lord Machnagen 'There is nothing in any of the Trade Union Acts from which it can be reasonably inferred that trade unions, as defined by Parliament, were ever meant to have the power of collecting and administering funds for political purposes' 97.
[31] ibid Lord Shaw of Dunfermline 111.
[32] Ewing, 'The Importance of Trade Union Political Voice' (n 4) 282.
[33] For the historical background of the Trade Union Act 1913 as a compromise see Ken Coates and Tony Topham, *Trade Unions and Politics* (Blackwell 1986) 118-123.

authorised by a special ballot and funded by a special political levy from which trade unions members can contract-out.[34] In this edifice, there has been only one major alteration still in force today, namely the Thatcher-introduced requirement of periodic ballots (up to every ten years) for renewing the authorisation for political funds.[35]

Regarding this regulation domain, five remarks could be made. Firstly, since affiliation fees to Labour Party are funded by this political levy, a direct link between this regulation and political party funding arises. Secondly, in comparative terms, this sort of regulation is truly exceptional. As Minkin points out, unions' political activities in Britain in the twentieth century 'were demarcated and constrained to a degree unknown by most Labour Movements in Western industrial countries'.[36] Thirdly, it should be stressed that the *separation principle* adopted by law between the industrial and political sphere also contributed towards 'an internalisation of the distinctiveness of these spheres'[37] by the unions. Fourthly, emphasis should be put to the fact that unions are subject to an *asymmetrical* treatment when compared to the respective rules applicable to businesses for their political activities.[38] Up to 2000 there was no requirement of a shareholders' approval for political donations and expenditures.[39] And even currently there is no option for shareholders to contract-out if they object to the use of their funds for political

[34] These provisions are today in the Trade Union and Labour Relations (Consolidation) Act 1992 ch 6, s 82-85.
[35] Part 3 Section 12 of Trade Union Act 1984; Currently it is Section 73 of Trade Union and Labour Relations (Consolidation) Act 1992.
[36] Lewis Minkin, *The contentious alliance: trade unions and the Labour Party* (Edinburgh University Press 1992) 8.
[37] ibid.
[38] For this asymmetry see *Coates and Topham* (n 33) 64; Ewing, 'Trade Unions, the Labour Party and the Law' (n 28) 166-167; Keith Ewing, *The Cost of Democracy* (Hart 2007) 101-102;
[39] Section 139 of the Political Parties, Elections and Referendums Act 2000 amending Section 347 of Companies Act 1985; Currently, the special authorisation requirement for companies is provided in Section 366 of Companies Act 2006.

purposes.[40] Finally, after the outlawing of enforcement of the closed shop,[41] the argument defending separation on the basis of the lack of an 'exit option' for union members that previously had the effect of 'coercing' them in funding political objectives they do not consent to, is no longer relevant and valid.

The third regulatory sub-domain consists of those norms regulating *third party* campaign expenditure limits in the context of imposing spending limits on political parties. This layer is by far the most active in recent years. Under the aim of enacting a more interventionist regime, the *Political Parties, Elections and Referendums Act of 2000* (PPERA 2000) introduced for the first time in British history expenditure limits to national party spending,[42] including spending limits on what was termed as 'controlled expenditure' of third parties.[43] A third party is defined as any body or person other than a registered party.[44] This definition capturies unions. Controlled expenses that are capped for third parties, covered any expenditure 'incurred by or on behalf of the third party in the connection with the production of publication of election material which is made available to the public at large or any section of the public (in whatever form and by whatever means)'.[45] While the regulation of this sub-domain is motivated by paramount public and democratic objectives such as prevention of corruption and undue influence, promotion transparency and ensuring equality of political competition, its indirect effect on the principal functional manifestation of political voice, namely the unions' electoral campaign, should be properly taken into account. In a representative democracy, elections

[40] For an excellent normative analysis of this asymmetry in the US context but with observations easily transposable to the British Context see Benjamin Sachs, 'Unions, Corporations and Political Opt-Out Rights After *Citizens United*' (2012) 112 Columbia Law Review 800.
[41] Employment Act 1990 Section 1.
[42] Part V and Schedule 9.
[43] Section 85 and Schedule 10.
[44] Section 85(8).
[45] Section 85 (2).

constitute the primary means through which unions can seek to translate their demands into Government policies and statutes, as well having their input channelled into their electoral public sphere.

The third sub-domain concerns the total prohibition of non-industrial, or as they are often called in the UK, 'political strikes'. Such a prohibition results from the trade dispute formula permitting 'strikes only in contemplation or furtherance of trade disputes between employers and employees'.[46] The last General Strike in 1926 was held illegal by the courts[47] and was generally argued to be unconstitutional. As Sir John Simon MP put it at that time, workers participating in a general strike inflict:

'a most serious blow on the whole constitution of the country [since] they abuse that undoubted right [right to strike] with totally different effects, so that the result of what you do (…) must be that you are putting pressure upon the community, the Government, the people as a whole'.[48]

However, the narrow trade dispute formula places a serious restraint on unions' political voice. It deprives them of the ability to deploy the strike method for intervening in the public sphere or pursue demands not confined to the workplace but in relation to Government activities or statutes affecting employment legislation even indirectly (such as economic policy, government cuts, taxation e.t.c). This blanket prohibition runs counter to ILO jurisprudence that distinguishes between permitted 'socio-economic strikes' 'made to support their position in the search for solutions posed by major social and economic trends which have a direct impact on their members and workers in general' and purely political strikes.[49] Outlawing non-industrial strikes does not only result in the

[46] Trade Union and Labour Relations (Consolidation) Act 1992 Part V.
[47] High Court, *National Sailors' and Firemen's Union of Great Britain and Ireland* [1926] (Ch) 536 (per justice Astbury).
[48] Sir John Simon MP, *Speech delivered in the House of Commons on May 11*th *26)* in Sir John Simon, *Three Speeches on the General Strike* (Macmillan 1926) 20; See also *Coates and Topham* (n 33) Chapter 7 (Class Politics and the General Strike that did not come).
[49]ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, ILO 2006) paragraphs 527-528.

political *disempowerment* of unions. It also leads to a *de jure* separation between the industrial and political spheres, pursuant to a 'thin' 'single-channel' view of democracy, according to which, Parliamentary representative democracy is the sole vehicle of politics.

The fourth sub-domain consists of the regulation by the Labour Party of the so-called 'union-party link'. *Prima facie* this appears to be an *interna corporis* issue concerning a political party. The Labour Party, though, has been *created by* the unions and 'became the agency […] of the protection of their industrial rights and the means by which unions pursued industrial objectives which could not be achieved solely or easily by action within the industrial sphere'.[50] As Ewing puts it, 'trade union blood flows through every vein and artery of its (Labour Party) body'.[51] In the context of this union-party relationship of 'interdependence and symbiosis',[52] the unions, besides generating the main source of the Party's funding, play a prominent role in its constitutional government. This role has been under a dynamic and constant redefinition throughout the life of the Labour Party. Prior to 1918, the party was a pure 'indirect party'. Only unions and societies were admitted as members. After 1918, individual members were accepted so the party became a 'mixed' one with two classes of members: the unions/societies and individual members. Union members paying the political levy of affiliated unions had the 'affiliated members' of the Labour Party. Within the Labour Party decision-making structures, unions played a major role in various institutional bodies and processes. For instance, they held a large share of the votes in the National Conference (reduced in 1993 to 50%)[53] and they appointed 12

[50] *Minkin* (n 36) 42.
[51] Keith Ewing, *Trade Unions, the Labour Party and Political Funding: The Next Step: Reform with restraint* (Catalyst Forum 2002) 10.
[52] *Hayward* (n 14) 5.
[53] Chapter 3, Clause 3 (3A-iv) of the Labour Party Rule-Book.

out of the 33 members of the National Executive Committee.[54] In 1980s, they were vested with a new role in the election of the Leader and Deputy Leader of the Labour Party pursuant to the change in their selection procedure from that of an internal vote in the Parliamentary Party to an Electoral College. In this college, unions had 40% of the votes, later reduced to 33% in 1993. Despite New Labour's more reluctant approach to unions, however, in the period 1997-2010, there has not been an institutional delinkage of unions from the party.[55]

To summarise, the five regulatory subdomains of political voice are: (i) the corporatist involvement of unions in Government policy-making, (ii) the regulation of trade union activities in respect to political objectives, (iii) the regulation of third party campaign expenditure, (iv) the prohibition of the non-industrial strike and the (v) the constitutional rules of Labour Party on the union-party link.

2. The *Lobbying Act*

(i) Background

The *Transparency of Lobbying, Non-Campaigning and Trade Union Administration Act* ('Lobbying Act') constitutes a landmark intervention in the regulatory sub-domain of third party campaigning. The Act is a type of *responsive regulation*,[56] in the sense that it was envisaged as a Governmental regulatory reaction to an external series of timely events. These events were not wholly related to the trade unions. The Act was crafted as

[54] ibid Chapter IV Clause III A(i).
[55] Thomas Quinn, 'New Labour and the Trade Unions in Britain' (2010) 20(3) Journal of Elections, Public Opinion and Parties 357.
[56] The use here should not be confused with the 'responsive regulation' terminology by John Braithwaite, *Restorative Justice & responsive regulation* (OUP 2002).

a response to a series of improprieties by politicians that have undermined the public trust in politics in the UK. Indeed, since mid-1990s, there has been an 'unfolding drama'[57] in British politics consisting of multiple misconducts. These misconducts involved MP's receiving money for asking questions (the so-called 'cash-for-questions affair'),[58] foreign donations to both Labour and Conservative Parties, [59] suspicions of donations to Labour Party used for influencing legislation, [60] exchanging political donations for public offices (the cash-for-honours affairs), [61] as well as House of Lords Members offering to be paid in order to work for Lobbying Firms.[62]

In this environment, David Cameron warned in 2010 (at the time Leader of Opposition) that the political lobbying 'is the next big scandal waiting to happen'.[63] Pointing to the need of regulation, the Coalition Government Agreement (between Conservatives and Liberal Democrats) committed in May 2010 to 'regulate lobbying through introducing a statutory register of lobbying and ensuring greater transparency'.[64]

[57] Ewing, *The Cost of Democracy* (n 38) 1-21.
[58] 'Tory MPs were paid to plant questions say Harrods Chief Thursday' (*Guardian*, 20 October 1994) <http://www.theguardian.com/politics/1994/oct/20/conservatives.uk> accessed 15 June 2015; 'Cash-for-questions MPs suspended by Commons' (*Independent*, 21 April 1995).
[59] See Ewing, *The Cost of Democracy* (n 38) 3-5.
[60] This is the so-called Ecclestone Affair where there was suspicion that a large donation by Ecclestone, the President of the Formula One was used to influence Tony Blair's position on requesting an exemption of Formula 1 from the EU Directive on the ban of tobacco advertising, see Ewing ibid 13-16.
[61] 'Timeline: Cash-for Honours' (BBC, 23 October 2007) <http://news.bbc.co.uk/1/hi/uk_politics/5174108.stm> accessed 15 March 2015.
[62] 'Revealed: Labour Laws change laws for cash' (Sunday Times, 25 January 2009); and House of Lords Privilege Committee, 'The Conduct of Lord Moonie, Lord Snape, Lord Truscott and Lord Taylor of Blackburn' (*Parliament*, 11 May 2009) <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldprivi/88/8803.htm#a16> accessed 16 March 2015.
[63] David Cameron, 'Rebuilding trust in politics (8 February 2010) excerpts from 'David Cameron warns lobbying is next political scandal' (The Telegraph, 8 February 2010) <http://www.telegraph.co.uk/news/election-2010/7189466/David-Cameron-warns-lobbying-is-next-political-scandal.html> accessed 15 March 2015.
[64] Cabinet Office, *The Coalition: our programme for government* (May 2010) 21.

Pursuant to this agreement, a consultation paper was soon published in January of 2012 covering *only* the question of introducing a register of lobbyists.[65]

In the period after the publication of the consultation paper, though, the Government suddenly decided to broaden the ambit of the regulation so as to include third party campaigning. This move was made without any prior consultation or any explicit reference to the Coalition agreement. As Keith Ewing observes, 'the proposal is all the more remarkable for the fact that it has never formed part of the discussions or the recommendations of any of the recent party funding inquiries'.[66]

In June 2013, the Deputy Prime Minister Nick Clegg said in the Parliament that we 'want to make sure that this increasingly important type of campaigning [third-party] is fully transparent and is not allowed to distort the political process'.[67] One month later, Clegg confirmed the revamped scope of the intended statute by stating that:

> 'What the Bill on lobbying should do is introduce a register for lobbyists, which has been promised and should be delivered. What the bill on Lobbying *will also do is make sure that we look at the impact of all third parties, including trade unions, on our politics*'.[68]

For accounting for its decision to include third party campaigning in the scope of the *Lobbying Act*, the Government identified the problem as a 'lack of transparency in the way that third parties campaign in elections including a view that not all expenditure is captured, undermining public confidence in the democratic system'[69] and noted that 'without stronger reporting and spending regulations, the behaviours underlying this

[65] HM Government, *Introducing a Statutory Register of Lobbyists*: *Consultation Paper* (January 2012), Cm 8233.
[66] Keith Ewing, 'Another Political Attack on Free Speech' (*UK Constitutional Law Blog*, 8 July 2013) <http://ukconstitutionallaw.org> accessed 17 March 2015.
[67] HC Deb June 2013 c13713.
[68] HC Deb 5 Jul 2013 c1513 (emphasis added).
[69] HM Government, Third Party Campaigning in Elections (as part of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill): Impact Assessment (15 July 2013).

perceptions will continue to damage the legitimacy of the system of government'.[70] So, the introduction of spending controls to third parties is 'intended to curb perceptions of undue influence'.[71]

Evidently, the Government reasoning behind the legislation adopts the following rational chain:

(1) Lobbying is the next scandal to happen and is a problem.

(2) Lobbying in the Parliament is a *type* of undue influence.

(3) Government should provide appropriate regulatory responses to any type of undue influence in politics.

(4) Third Party Campaigning has created a perception as, in certain circumstances, giving rise to undue influence.

(5) Government should curb third party campaigning.

In this manner, the Government reframed the problem by having recourse to the method of generalisation as 'undue influence' with the result that, what originated as an MPs problem affecting the legislative activity was re-casted as a general problem of 'undue influence' of third parties influencing the electoral campaigns. This extension, in turn, realised a direct 'regulatory capture' of trade unions in two of the three Parts of the Act. Besides Part 1 that introduced the statutory Lobbying Register and Part III (as examined in the previous Chapter) that stipulated new trade unions' duties on keeping registers of their members, Part 2 made a radical revision of the PPERA 2000 on third-party campaigning.

Let us examine these changes before advancing an overall assessment.

[70] ibid.
[71] ibid.

(ii) The *Restrictive* Configuration of the Lobbying Act: An Overview of the Changes

The restrictive teleology of the *Lobbying Act*, seeking to reduce non-party electoral campaigning is perfectly reflected in its specific provisions. The following restrictive alterations could be identified.

The first is perhaps the most notable. It is the expansion of the *material scope* of the 'controlled expenditures', as a consequence of the new broad statutory definition. Such a definition had two elements under the *PPERA 2000*: (i) *the scope of regulated activities* determined as covering those third party expenses incurred 'in connection with the production or publication of election material which is made available to the public at large or any section of the public',[72] and (ii) the *test* for determining whether the publication of the material is a 'controlled expenditure', that is whether the material 'can be reasonably be regarded to promote or procure electoral success' for a party or an individual.[73] The *Lobbying Act* widened the scope by encompassing a range of previously non-covered regulated activities such as market research, unsolicited election material, conferences, transportation, events, rallies and public meetings[74] and, in general, any expenditure that 'can be reasonably be regarded as intended to promote or procure electoral success' for a party or an individual.[75] The Government essentially applied to the third-parties the definition of 'campaign expenditure' for political parties. [76]

On the one hand, this harmonisation follows the suggestion by the Electoral Commission that the PPERA third-party campaigning rules 'should more closely reflect

[72] PPERA 2000 Section 85(2).
[73] ibid 85 3(a).
[74] Section 26(2) of *Lobbying Act* (amending 85(2) of PPERA 2000) that made applicable Schedule 8A (previously applicable to candidates and parties) for third party campaigning.
[75] Section 26(2) b of *Lobbying Act* (amending 85(2)).
[76] Schedule 8A of PPERA 2000.

the scope of rules for political parties by covering events, media work and polling, as well as election material'.[77] Yet, on the other hand, it ignores the other part of the Commission's Recommendation urging for an upward review of the limits if the definition is expanded.[78]

The restrictive environment for unions is as much the product of the broad definition as of its ambiguity. Which activities are to be covered by the new definition? Which activities can 'reasonably be regarded to promote or procure electoral success' for a party of an individual?[79] To be sure, this test existed in the previous definition. But insofar as was related only to the election material along with higher spending limits, its uncertain formulation gave rise to fewer practical concerns.

The Electoral Commission published its guidance on the definition which seems to confirm the unions' worries. For an activity to be regulated, according to the Electoral Commission, it must satisfy both the 'public' and 'purpose' tests. The 'public test' is met by activities 'also aimed at, seen or heard by, or involve the public'.[80] For the 'purpose test', the determination is exceedingly complex. An activity of the following three types is said to satisfy 'in almost all cases'[81] the purpose test: an activity which (i) 'identifies political parties or candidates who support or do not support [third party's] campaigning aims',[82] or (ii) 'sets out or compares the position of political parties or candidates on a policy the [third party is] promoting in a way that can reasonably be regarded as intended to influence voters to vote for or against particular parties or candidates'[83] or (iii)

[77] Electoral Commission, *A Regulatory review of the UK's party and election finance laws: recommendation change*, June 2013, paragraphs 4.43.
[78] ibid 4.48.
[79] Section 26 (2) of *Lobbying Act* (amending 85(2) of PPERA 2000)
[80] Electoral Commission, *Overview of regulated non-party campaigning* 4 (emphasis removed from the original).
[81] ibid 6.
[82] ibid.
[83] ibid

'promotes or oppose policies which *are so closely and publicly associated* with a party or parties or with categories of candidates that it is reasonable to regard [the third party's campaign activity] as intended to influence voters to vote for or again political parties or candidates'. [84]

For decising whether an activity meets the purpose test, the Electoral Commission cites a multi-factorial test to be considered as a *whole:* the existence of a negative or a positive tone in the third party campaign regarding a political party or candidates *('tone'),* the temporal coincidence of campaigning on an issue that is prominent in the public debate or one that represents an area of difference between political parties *('context and timing'),* the existence of an explicit or implied call for voting for a political party or candidate *('call to action'),* and the perception of a reasonable person as to whether the activity is intended to influence people's voting choices *('how a reasonable person would see your activity').*

Therefore, it is evident that the new definition captures a wider range of activities. For instance, take the example of a public union-led anti-austerity rally against the Government policies of austerity. This rally will definitely meet the 'purpose test'. This is because it identifies the Government party as not supporting the anti-austerity aims of the unions, or even if there is no reference to the Government, by austerity constituting a policy 'closely and publicly' associated with the Government. In addition, it is sufficient for a union event to be televised and hence '*heard* by the public' in order to be covered. Even though annual conferences are unregulated, the new definition may capture other national, local sector-specific or occupation-specific union conferences.[85] It is indicative

[84] ibid (emphasis added).
[85] ibid 15.

that social media activities could fall into the 'regulated activities' as soon as they satisfy the 'purpose test' as well as transportation costs related to the 'regulated activities'.[86]

Although a rational approach to regulation would have entailed that an upward adjustment of the limits comes as a string attached to a definitional expansion, the law opted otherwise. It lowered the national campaign limits for third parties thus effectively placing a 'double reduction'. From £988,500(£793,500 in England, £108, 000 in Scotland, £60,000 in Wales and £27,000), the national limit was lowered approximately by 55% to £450,000 (£319,800 in England, £55,400 in Scotland, £44,000 in Wales and £30,800 in Northern Ireland). Based on data from previous elections, the limit is far below the expenditure by the major – and bigger third-party spender- union *Unison* (£671,900 in the UK, 671,200 in England in 2010).[87] One should also take into account that the *Unison's* shortfall in the hypothetical case of willing to launch an identical electoral campaign in 2015 than 2010 is exacerbated by the broader definition of the controlled expenditures. Hence *Unison* should significantly restrain its activities, at least in relation to the 2010 levels.

Thirdly, the law innovated by prescribing '*constituency* expenditure limits' set at £9,750.[88] Given the nature of the first-past-the-post British electoral system that renders decisive the outcome in particular constituencies, this limit adds a further strain on the capacity of unions to strategically deploy their resources to key constituencies for maximizing the chances of a successful electoral outcome.

[86] ibid 10.
[87] Data from the Table *Third Party Spending at the 2010 General Election* included in the House of Commons Library, *Transparency of Lobbying, Non-Campaigning and Trade Union Administration Bill* Research Paper 13/51 (27 August 2013) 41.
[88] Section 29.

In addition, the *Lobbying Act* placed a fourth limitation in respect of the 'targeted spending'[89] category. The latter is a controlled expenditure of a third party 'targeted at a particular registered party', further specified by the statute as the expenditure that 'it can be reasonably be regarded as intended to benefit (or not)'[90] a political party or its candidates. Such a type of expenditure is capped at £40,000. Any amount exceeding this limit should be authorised by the political party and will crucially count towards the party's spending limits.[91] Since it is very hard to detect the difference between the 'controlled expenditure' and the 'targeted expenditure',[92] it is very likely that many unions are to exceed this limit so that they either will have to receive the authorisation by the Labour Party or scale down their planned activities.

On top of these restraints, a stringent reporting system of donations for third parties is introduced. The pre-existing obligation of post-electoral submission of donations[93] is replaced by a stricter duty of submission of quarterly reports in the election year and weekly reports in the period after the dissolution of parliament.[94]

To summarise the Lobbying Act brings the following restrictive changes: (1) expands the material scope of the definition of controlled expenditure, (2) reduces the spending limits, (3) creates constituency spending limits, (4) caps the 'controlled expenditure' unless authorised by the (beneficiary) political party towards spending limits and (5) tightens the reporting requirements.

[89] Section 30(8) of Lobbying Act (inserting 94(D) at the PPERA 2000).
[90] Section 30(8) of Lobbying Act (inserting 94(D) at the PPERA 2000)
[91] Section 30(8) of Lobbying Act (inserting 94(F) at the PPERA 2000)
[92] See Keith Ewing, 'The Gagging Act: What can be done' (*The Institute of Employment Rights*, 3 March 2015) <http://www.ier.org.uk/blog/gagging-act-what-can-be-done> accessed 25 March 2015.
[93] PPERA 2000 Section 95.
[94] Section 33 (inserted to Section 95 of the PPERA 2000 Act) and Schedule 4 amending the respective PPERA 2000 Act Schedule 11.

(iii) Evaluating the Paradoxical Act: The Regulatory Minefield for the Political Voice of Unions

From preceding observations, it becomes manifest that the *Lobbying Act* has the effect of tightening the regulatory grip on workers' political voice through the indirect medium of altering the rules of the game regarding third party's campaign activity.

This piece of union regulation has a peculiar and alien origin: it is the 'paradoxical' product of a *discursively dislocated* responsive regulation triggered by events not wholly related to unions. From an actual problem concerning undue *corporate* influence in Parliamentary legislation through lobbying, the regulation was refashioned to address another problem of *undue influence* of third parties by their electoral voice supposedly to be addressed by capturing unions, charities and other civil society actors. The Government deliberately *externalised* the frame of the problem by a recourse to the general category of 'undue influence' so that, in essence, 'turn[ed] a crisis of [its] own into a crisis for their enemies'. [95] The legislative outcome is paradoxical and ironical. For *lobbying*, the real problem according to the Government, a 'narrow definition' is adopted[96] (excluding in-house Lobbying[97] and lobbying that is incidental to the main business,[98] as well as covering communications only targeted to Government and permanent secretaries[99] but not to MPs) so that only a small fraction of Lobbying is

[95] Owen Jones, 'Under the disguise of fixing lobbying, this Bill will crush democratic protest' (*Independent*, 1 September 2013) <http://www.independent.co.uk/voices/comment/owen-jones-under-the-disguise-of-fixing-lobbying-this-bill-will-crush-democratic-protest-8793224.html> accessed 20 March 2015.
[96] *Lobbying Act* Section 2(1); A person carrying on the business of consultant lobbying is defined as the one who 'in the course of a business and in return for payment, [he] makes communications [with Government officials and senior civil servants] on behalf of another person or persons'.
[97] In-House Lobbying is defined 'as those who lobbying on behalf of their own organisation', Office of the Registrar of Consultant Lobbyists, *Guidance on the requirement to join the Register of Consultant Lobbyists* (Office of the Registrar 2015) 11.
[98] ibid 11-12.
[99] *Lobbying Act*, Section 2(3).

captured.[100] And even for this small fraction covered, only a 'soft' transparency requirement obligation of registration of lobbyists to a special register is imposed. [101] On the contrary, for third party campaigning, the regulation is 'hard' and its teeth extend far beyond imposing a mere transparency obligation. It puts in place multiple restrictions backed by severe criminal and civil sanctions.

In this context, there is evidence to argue that the Government motives behind the legislation were deeply ideological and political, insofar as the Tory-led Coalition Government funding mainly originated from wealthy donors and the Labour Party opposition from unions. This case for arguing that the Lobbying Act 'has nothing to do with cleaning up lobbying' or getting big money out of politics [but] instead it is a crude and politically partisan attack on trade unions, particularly those who affiliate to the Labour Party'[102] is strengthened by taking sufficient notice of two grave procedural irregularities. Firstly, as Ewing rightly remarks, the non-consensual passing of the law blatantly conflicts with a settled custom of a cross-party consensus on issues of electoral regulation, so (in citing Churchill in 1948) that 'matters affecting the interests of a rival parties should not be settled by the imposition of the will one side over the other.[103] And second, the rush for passing the law was remarkable. There was no special special comprehensive consultation. In addition, even though the law's application could have been held up so as not to apply to the 2015 Parliamentary Elections in order for its content to be clarified, the Government chose otherwise.

[100] According to the Association of Professional Political Consultants (APPC) only 1% of Lobbying is covered by the Government's definition (Association of Professional Political Consultants, Response to the Committee on Standards in Public Life 'Lobbying: Issues and Questions Paper' (APPC, 31 July 2013) <http://www.appc.org.uk/appc-submission-to-lobbying-issues-and-questions/> accessed 10 May 2015).
[101] *Lobbying Act*, Section 1(1).
[102] Interview with Frances O'Grady, Trade Union Congress General Secretary (*BBC*, 19 August 2013) <http://www.bbc.co.uk/news/uk-politics-23750845> accessed 10 May 2015.
[103] Ewing, 'Another Political Attack on Free Speech' (n 66).

The final result is that under the sound-bite smokescreen of eliminating centres of 'undue influence' to politics, corporations survive without even a scratch while unions become heavily regulated in what appears as 'legislative overkilling'. In short, unions fall victim of lobbying activities in a deliberate *narrative alteration*. Ewing is absolute right to regard the Act as 'devious political stunt designed at the time to deflect attention from the government own failure on Lobbying'.[104] This Act seems to perfectly exemplify what Hepple has identified as a feature of the Coalition's approach to legislation, namely that is driven by ideology and not by evidence.[105]

Regarding its content, the Act produces a 'chilling effect' on the freedoms of third party actors, including unions. The chief problem of the Bill is the undemocratic conflation of two distinct forms of speech: (i) the *electoral speech* designed to directly influence elections with the (ii) *public sphere speech*, the latter operating in the sphere identified by Habermas as 'a realm of our social life in which something approaching public opinion can be formed'.[106] For Habermas, public opinion refers 'to the tasks of criticism and control which a public body of citizens informally- and, in periodic elections, formally as well – practices *vis-à-vis* the ruling structure organised in the form of a state'.[107] Instead of confining regulation to the electoral speech narrowly conceived, the law over-stretches itself by regulating this vital public sphere for a year coinciding with the election year. By doing this, it covers speech which is not designed to be related to the party campaign but merely to formulate a critique to Government policies or even raising awareness about certain policies or facts that may happen to be issues of electoral

[104] Ewing, 'Another Political Attack on Free Speech' (n 66)
[105] Bob Hepple, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42(3) ILJ 213-231.
[106] Jurgen Habermas, 'The Public Sphere: An Encyclopedia Article' (1974) 3 New German Critique 49.
[107] ibid.

debate. For instance, a simple 'poverty tweet' by Oxfam highlighting 'zero-hour contracts, high prices, benefit cuts, unemployment and childcare costs' as sources of poverty attracted investigation by the Charity Commission on the suspicion that it may be a regulated third party political campaign activity, the latter not available to charities which should maintain their political neutrality. The Commission concluded that the 'charity should have done more to avoid any misperception of political bias by providing greater clarity'[108] and that 'consideration must always be given as to how they [tweets] might be perceived when received in isolation'.[109] Here the reasoning implies that a Charity cannot raise the issue of a zero-hour contract as linked with poverty, because this may be negatively associated with the Government. This is because it is also used in the public discourse by the Opposition of the day.

This line of reasoning inevitably directly applies to unions whose regulatory space for participating not only in campaigning but also in the broader 'public sphere' through rallies, protests or other public sphere events is seriously curtailed for the election year. As the TUC resolution underlines, the provisions of the Bill 'attack democracy, freedom of speech and are designed to silence coalition critics'.[110] The *restrictive impact* on unions does not arise only from the more restrictive environment that produces the chilling effect of 'shut[ting] down dissent for the year before an election [as] no organisation that criticises a government policy will be able to overdraw their limited ration of dissent without fearing a visit from the police',[111] but also from the uncertainty of its provisions.

[108] Charity Commission, *Operational Case Report Oxfam (202918)* 2.
[109] ibid.
[110] TUC, 'Congress 2013 Emergency Motion 05: Lobbying Bill' (*Trade Union Congress*, 10 September 2013) https://www.tuc.org.uk/about-tuc/congress/congress-2013/congress-2013-emergency-motion-05-lobbying-bill accessed 15 April 2015.
[111] TUC Briefing, 'A gag by any other name…' (Trade Union Congress, 9 September 2013) <https://www.tuc.org.uk/union-issues/gag-any-other-name> accessed 21 April 2015.

Indeed, this uncertainty associated with the fear of reputational damage and criminal sanctions has acted as a serious deterrent, as a report demonstrated, in relation to charities for pursuing speech in relation to their objectives.[112] To quote Helen Mountfield QC:

> '[t]he lack of clarity as to the extent of the controls, coupled with the criminal sanctions for non-compliance with them, mean that the provisions of Part II of the Bill are likely to have a chilling effect on the expression of views on matters of public interest by third sector organisations'.[113]

The same observation is valid for unions. The unions need to be more careful and reluctant and have to report every single piece of funding so as not to find themselves on the wrong side of the law. Yet a speech anxious of whether it borders on illegality cannot be a genuinely free speech. Paradoxically, a Government which placed the cutting of red tape in the actual marketplace for businesses as a key objective,[114] generates additional red tape for the political marketplace of ideas for everyone except corporations and media. The benefits of deregulation apparently cease outside of the capitalist market.

Both Keith Ewing[115] and Helen Mountfield QC[116] have persuasively made the case of the Bill violating Article 10 of the European Convention on Human Rights on freedom of expression applicable in Britain through the Human Rights Act 1998. Although restrictions in freedom of speech are permissible under the Convention, these should be 'necessary in a democratic society' and 'prescribed by law'. [117] Mountfield cites two problematic issues. Firstly, the law 'lacks clarity to give it the quality of law'[118] and,

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[112] Karen Barker and Tim Harrison, *The Lobbying Act: A Waste of Time and Resources* (nfpSynergy, February 2015); See Chapter 4 for 'Concerns over breaking the law 'and chapter 5 on 'Increasing Reputational Risk'.
[113] Helen Mountfield QC, *Opinion: In the Matter of Part II of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill and the Voluntary Sector* paragraph 5.
[114] See further on the red tape challenge Hepple, 'Back to the Future' (n 105) 203-208.
[115] Keith Ewing, 'Transparency of Lobbying Bill etc. - A Note on Potential Human Rights Implications' (Institute of Employment Rights 2013).
[116] *Mountfield* (n 113) 86-100.
[117] Article 10(2).
[118] *Mountfield* (n 113) paragraph 96.

secondly, 'the restrictions and restraints are so wide and so burdensome as arguably to amount to a disproportionate restraint on freedom of expression'.[119] This disproportionate effect becomes even more profound in the face of the lack of any similar restraints on the freedom of press. In *Bowman v UK*, the Eurpean Court of Human Rights invoked freedom of expression as a basis for the *disproportionality* of the statutory restrictions imposed on the applicant's freedom of expression by the electoral legislation.[120]

A deeper analysis of the Bill, though, unravels a normative foundational misjudgement in the treatment of the influence of unions in politics. Unions are *qualitatively distinct* from corporations or even charities, hence meriting an *asymmetrically favourable treatment* in relation to other third party organisations. Indeed, as the Shadow House Leader Angela Eagle points out, the law is a 'hurried, badly drafted and an agglomeration of the inadequate, the sinister and the partisan'.[121] This principle of hostile regulatory intervention for unions pursuant to a general and indiscriminate legal rule is deeply flawed and indefensible from a normative democratic and participatory perspective. Unions are carriers of integration of a large number of individuals in the political sphere. They perform a legitimate democratic function. Their funds come from millions of ordinary workers. In a sense, they act as resource pools for making the political voices of workers heard in the electoral arena. In contrast, corporations are not humans no matter the fictional legal construction of corporate personhood. Corporations *cannot* vote. So, it emerges as a democratic imperative for union rules to be more relaxed in relation to corporate lobbying. However, paradoxically, the law is doing exactly the opposite by 'crack[ing] down on the very institutions –charities, campaign groups and

[119] ibid 99.
[120] ECtHR *Bowman v the United Kingdom* [1998] ECHR 4.
[121] Angela Eagle, HC Deb 3 September 2013 c186.

trade unions- that provide a voice for those who aren't heard often'.[122] Corporations enjoy a free rein in influencing the Parliamentarian and policy-making process through lobbying, at the same time that workers have a restricted field to influence elections. And the latter in any case is an *indirect* medium of legislative influence unlike the lobbying medium which directly influences legislation.

In light of the above considerations, it is clear that the Lobbying Act establishes a regulatory minefield for unions, that they have to navigate for expressing their political voice at the same time that the market field for corporations and media is cleared of obstacles. The real effect of the new law is as, Brian Abbot and Steven Williams rightly locate, to 'exacerbate the representation gap' in the workplace[123] by deterring a whole range of other civil society organisations 'from engaging in coalition working and from operating at the level of the state, both of which are important channels they use to exert pressure and secure policy changes supportive of working people'.[124]

The parallels with 1980s Thatcherite regulation of union activities cannot be more profound. In 1980s, the smokescreen of freedom and democracy was employed for justifying union restrictions.[125] Similarly, the Lobbying Act invokes the language of transparency and prevention of union influence in order to curb their political voice. This assessment does not deny that these objectives may be paramount. The problem is that the Lobbying Act by restricting those organisations, mainly the unions, from expressing the voices of people, it achieves the exact opposite of its declared intentions.

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[122] Lisa Nandy, 'The Lobbying Act does nothing to stop vested interests' (*NewStatesman*, 4 April 2011) <http://www.newstatesman.com/politics/2014/04/lobbying-act-does-nothing-stop-vested-interests-s-why-labour-will-repeal-it/> accessed 14 June 2015.

[123] Brian Abbott and Steve Williams, 'Widening the ''representation gap''? The implications of the ''lobbying act'' for worker representation in the UK' (2014) 45(6) Industrial Relations Journal 507, 520.

[124] ibid.

[125] See Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12(1) OJLS 24.

To summarise, the Lobbying Act operates as Trojan Horse for unions 'by attacking the capacity of trade unions to mount an effective electoral campaign, alongside the attacks on their capacity to mount effective legislative or governmentally focused activities'.[126]

3. The 2014 Labour Party Constitutional Reform: A De-Constitutionalisation Step for Unions?

(i) Background

Besides the *Lobbying Act,* the other regulatory sub-domain experiencing a drastic re-configuration during the crisis has been that related to the Labour Party rules on the so-called 'union-party' link. On 1 March 2014, a specially-convened Labour Conference approved what amounts to one of the most important and far-reaching transformation of the constitutional status of unions and union members in the Labour Party from its inception.

The origin of the reform could be traced back to the Leader's Ed Miliband's *One Nation Politics Speech* delivered on 9th July 2013.[127] Under the the over-arching objectives of 'shaping a Party appropriate for the twenty-first century'[128], 'do[ing] more, not less, to make individuals trade union members part of our party'[129], doing more 'to involve members of the public in our decision-making'[130] and 'building a Party that is truly rooted in every community and every walk of life', [131] Miliband put forward a set

[126] Ewing, 'The Importance of Trade Union Political Voice' (n 4) 294.
[127] Miliband E, 'One Nation Politics: Speech to the St Bride Foundation' (*Labour*, 9 July 2013) <http://archive.labour.org.uk/one-nation-politics-speech> accessed 20 April 2015.
[128] ibid.
[129] ibid.
[130] ibid.
[131] ibid.

of changes that aimed at restructuring the union-Party link and commissioned a review by Ray Collins towards this purpose. The eventual report implemented and detailed all reforms proposed by Miliband in his speech.[132]

Let us outline the main reforms relevant to unions before offering an assessment of their implications for unions' political voice.

(ii) An Overview of the Changes

The Labour Party constitutional reform has re-shaped the regulatory framework governing the trade union involvement in the party funding and operation in significant ways. The focus is herein placed on the rules with a direct impact on unions' political voice.

The most notable change concerns the unions' funding to the Labour Party and the membership status of union members. Under the pre-existing regime, these two issues were linked as part of the single process of *automatic affiliation* of union members to the party through their affiliation fees. Since affiliation was associated with the payment of political levy, it entailed that the union paid to the party the political levies from those union members they have not exercised their statutory right to contract-out of their political fund. Those affiliated members had the right to participate through their collective membership in the affiliated unions to the party decision-making. Evidently, the relationship between the union members and the Party was intermediated by the unions.

The reforms (whose application in terms of affiliation fees will be applicable after a 5-year transitional period) brought an end to the practice of automatic affiliation. Funding

[132] Ray Collins, *The Collins Review into Labour Party Reform* (February 2014).

and membership were disentangled from any automatic connection. Unions *should* now affiliate only those members *positively expressing* their intention for their political levy to be contributed to the Labour Party. Hence an *opt-in* process is instituted. However, levy-paying members having *opted-in* are not automatically *affiliated members* of the Labour Party. Instead, they should make a second *opt-in* for acquiring this status. A new category of 'affiliated members' is thereby created with limited rights. Despite having the right to vote in the Leadership Contests, 'affiliated members' are ineligible for the election of party representatives as well as ballots for the selection of parliamentary and council candidates (except for Leadership ballots and primaries).

In addition, the rules have made a full overhaul of the method for Leadership Elections. The Electoral College, in which unions held the 1/3 of the overall vote, was abolished in favour of a one-member-one-vote system. Finally, proper emphasis should be put to the fact that the 50% of unions in the National Party Conference and the unions' quota in the National Executive Committee remained unchanged.

(iii) Evaluating the New Regulatory Landscape: The Declining Constitutional Role of Unions

An evaluation of reforms' implications for unions' political voice must take due notice of two important facts. Firstly, the reforms were approved by an overwhelming majority of trade union members[133] in the special conference. It is an open question whether such level of support reflected a genuine approval or it was merely due to an unwillingness by

[133] Unions backed by 96% the constitutional reforms while the overall percentage in all sections of the conference was 86%. See Miliband wins vote on Labour party reforms with overwhelming majority: Politics live blog (*Guardian*, 3 June 2014) <http://www.theguardian.com/politics/blog/2014/mar/01/labour-votes-on-membershipunion-reforms-at-special-conference-politics-live-blog> accessed 28 March 2015.

unions to bring a politically embarrassing defeat for Ed Miliband in the run-up to the 2015 elections. Secondly, there was a declared principled commitment for the retention of the federal structure of the party comprising unions and individual members. Lord Collins put as the starting point of his report that the federal structure 'should remain the bedrock of Labour organisation'[134] whilst Miliband stressed that he did not 'want to break the link with working people'.[135]

On closer inspection, though, the reforms move towards the opposite direction than these statements may indicate. The commitment is more apparent than real. In practical terms, the unions' role in the Labour Party government is weakened. This is quite straightforward. The change of the affiliation system so that political levy-payers need to opt-in would entail a massive reduction of union funding to the party.[136] And, in turn, this brings great consequences for the internal balance of power between unions' and businesses' influence in the party. Union funding comes from millions of small contributions of working people. As Ewing remarks, this collective representation of individually powerless individuals performs a balancing function of political influence which 'creat[es] a still imperfect balance in the political process' [137] Although this shortfall may be plugged by individual contributions, there is a real danger that it would lead to an increased corporate funding in the Labour Party with the concomitant negative

[134] *Collins Review* (n 132) 20.
[135] Miliband E, 'Speech to the Special Labour Conference' (*NewStatesman*, 1 March 2014) <http://www.newstatesman.com/politics/2014/03/ed-milibands-speech-labours-special-conference-full-text> accessed 14 April 2015.
[136] According to union estimates, only 10% of the members would opt-in thus resulting in a 9-fold decrease of union funding to the Labour Party. See George Eaton, 'Miliband's gamble on union funding could cost Labour millions - but it is one he had to take' (*NewStatesman*, 9 July 2013) <http://www.newstatesman.com/politics/2013/07/milibands-gamble-union-funding-could-cost-labourmillions-it-one-he-had-take> accessed 15 June 2014 and 'GMB slashes Labour Party affiliation fees from £1.2 million to £150,000' (LabourList, 4 September 2013) <http://labourlist.org/2013/09/gmb-socislashes-labour-party-affiliation-fees-from-1-2-million-to-150000/> accessed 15 June 2014.
[137] Ewing, *The Cost of Democracy* (n 38) 37.

outcome for the representation of labour interests which are, in most cases, at odds with the corporate ones. Thus a new equilibrium wherein unions enter in inferior terms may be established. In addition, unions lost their constitutionally-enhanced role of constituting one of the three classes voting in the Leadership Elections as the latter's method turned into a one-member-one-vote system. Of course, this link in terms of efficacy should not be overestimated since it was the unions who held the decisive sway for the election of Ed Miliband in the leadership contest who then decided to reduce their constitutional role. So, albeit the retention of the federal structure in nominal terms, the unions seem to have suffered from a retreat of their role in two critical functions: for party funding, their dominant position is under threat while the process of leadership election was, in institutional terms, fully de-unionised.

By delving deeper into the rationale of reforms, we can expose the deep-seated underlying philosophy. This philosophy is suffused by the doctrine of *individualism* associated with a rejection of unions as *organic collective entities* with collective interests transcending a mere agglomeration of their members' interests. The method of affiliation provides a good example for this. Undoubtedly, the practice of affiliation of union members to Labour Party through their unions may be an affront to classic individualism liberalism as it uses a collectivity as an 'intermediary' unit of membership. As Stewards notes, changing the affiliation system 'challenges the final binding element of the party-union alliance'.[138] Indeed, collective affiliation operated as the historical expression of collectivism in the party. It functioned as a 'valuable counterweight to the growing influence of business in the political process'.[139] Miliband challenged this practice by

[138] Stewart D, 'The end of Labour? The Collins Report and the Labour Party-Trade Union Alliance' (*Brit Politics*, 19 June 2014) <http://www.britpolitics.co.uk/academic-articles-all/the-end-of-labour-the-collins-report-and-the-labour-party-trade-union-alliance-by-dr-david-stewart> accessed 3 May 2015.
[139] Ewing, *Trade Unions, the Labour Party and Political Funding* (n 51) 22.

noting its anti-voluntarist or coercive nature for union members participating in the Labour Party despite not having actively expressed their intention to do so. He stated that 'in the twenty-first century, it just does make sense for anyone to be affiliated to a political party unless they have chosen to do so',[140] and went on stressing that it would enable union members 'to make a more active, individual choice on whether they become part of our Party [and] [t] hat would be better for these *individuals* and better for our *Party'.*[141] The reader can detect that only *individuals* and the *Party* are now matters of concern, not the unions. What, though, Miliband misses is the proper apprehension of the *organic needs* of unions, dependant on their ability to be effective. Unions are not 'simply by-standers, caught up in the political battle [but [t]hey are combatants'.[142] The new reforms essentially enacted the 'contract-in' that was vehemently opposed by the Labour Party when proposed or legislated by the Conservatives[143] by an internal party rather than statutory fiat.

Viewed *in tandem* with the statutory provisions, it means that union political funding to the Labour Party requires *four* additional processes beyond the constitutional government and majoritarian decision-making rules applicable for every association: an initial ballot to set up the political fund (renewable every ten years),[144] possibility of contracting-out of union members for the political fund[145] (statutory), opt-in to the Labour Party (Labour Party Rules) and an additional opt-in to be an affiliated member so as to get limited rights, including voting in Leadership Elections (Labour Party Rules). So,

[140] Miliband, *One Nation Politics Speech* (n 127).
[140]ibid.
[141] ibid.
[142] Martin Harrison, *Trade Unions and the Labour Party since 1945* (George Allen & Unwin 1960) 14.
[143] The 1946 Labour Government repealed the contract-out introduced from 1927-146 and Thatcher, although contemplated introducing the 'contract-in', did not do it. See Cmmd 8778 (1983) 37.
[144] Section 73 of Trade Union and Labour Relations (Consolidation) Act 1992.
[145] Trade Union and Labour Relations (Consolidation) Act 1992 Chapter 6, Sections 82-85.

there can theoretically be five types of union members in the same union: (1) union members that are not political levy-payers, (2) union members that pay their levy but do not contribute it to the Labour Party, (3) union members that consent for their levy to be paid to the Labour Party but are not affiliated, (4) affiliated union members and (5) full Party Members with full rights.

Evidently, this extreme fragmentation and 'slicing and dicing' of the union membership that makes union political activities perhaps the most regulated ones amongst associations in the UK, reduces their capacity to promote and defend their interests as they wish. Similar 'slicing and dicing' does not apply for corporations which could decide how to advance the whole range of resources merely by a simple majoritarian decision-making process among the shareholders.[146] Paradoxically, a process of fragmentation of political voice viewed in 1913 by the labour movement 'as an unfair and discriminatory piece of law',[147] it was now expanded by the Labour Party itself. And the answer that *inertia* should be interpreted as rejection of the majoritarian decision of the union to affiliate to the Labour Party is not plausible: within a collective institution, there is a presumption that members accept the decisions taken by its majority in such a fundamental issue as to which party they will contribute their funding. Evidently, these considerations deriving from unions perceived as *organic entities* with their effectiveness being a main condition of their success, falls outside of the considerations of Collins Review. Echoing a similar spirit, the transformation of the method for Leadership Elections from the electoral college where unions had 1/3 of the vote into an one-member-one-vote system eliminates another area previously reflecting a

[146] Even after the enactment of the Section 366 of Companies Act 2006 prescribing a special resolution for using corporate funds for political objectives, only a majoritarian decision-making is required for corporations.
[147] *Coates and Topham* (n 33) 118.

mixed collectivist/individual approach thus encouraging the identification of party members as isolated individuals and not through their union membership.

Coloured by an individualist rhetoric premised upon the need to protect individual rights reminiscent of the Thatcherite arguments for regulating unions, Miliband rested his case of reform upon an implicit modernisation imperative. Evidently, collectivist practices as affiliation are treated as 20th century material while an individualist reading of the union-party link is portrayed as a 21st century material reflecting a natural evolutionary path. The problem is, however, that this argument of 'modernisation' does not consider whether the fact that individualisation seems so natural is not because of its evolutionary optimality but because of the post-Thatcherite counter-revolution[148] against the unions and the individualist hegemony then established in the British political and cultural sphere. Furthermore, there is no compelling evidence of why the need to build a mass membership party cannot be attained without the elimination of the last collectivist vestiges.

In this context, the reforms make a historical re-adjustment of the balance between the individual and the collective towards the former, at an institutional level, through **'**a process of internal party reform in which the position of the individual trade unionist will be enhanced at the expense of the collective voice of the union'.[149] To be sure, the party is still federal in its constitution but the dynamic as reflected in these institutional changes is towards individualism and a reduced role for the unions. Hence there is a de-constitutionalisation of unions in the Labour Party no matter whether one views it as a desirable or undesirable development. But caution is required as there is a need to

[148] Henry Phelps Brown, 'The Counter-Revolution of Our times' (1990) 29(1) Industrial Relations: A Journal of Economy and Society 1.
[149] Ewing, 'The Importance of Trade Union Political Voice' (n 4) 293.

anticipate future developments for seeing whether the current crisis represents the start of the end of British exceptionalism in terms of the collectivist nature of the Labour Party.

4. Muting Unions' Political Voice during the Crisis: The 'Constitutional Counter-Revolution'?

The picture of the crisis trajectory on unions' political voice should be seen in its evolving historical-political context. It adds a *new* frame on the *long duree* of the post-1979 'counter-revolution' [150] in industrial relations as the challenge on unions is transferred onto the constitutional sphere. In a sense, the crisis reforms amount to a 'constitutional counter-revolution' driving further the de-constitutionalisation of unions within the British constitution. This revolution proceeds as the perfect 'isomorphic counterpart' of the 1980s Thatcherite attack which 'had put the emphasis on industrial and not political measures'[151] seeking to de-legitimate unions as market participants.

Within the template of an over-elastic constitution that 'expands as easily it limits',[152] the *Lobbying Act* and *Labour Party reforms* made a *restrictive reconfiguration* of the 'constitutional basis' of labour law by further circumscribing unions' regulatory space for political voice. Two regulatory sub-domains assumed a more restrictive character for unions: more specifically, unions' space for third party campaigning became more strictly regulated with hitherto unregulated forms of protest or anti-Government non-electoral activities falling under the regulatory hand. In addition, the unions' constitutional role in the Labour Party experienced a diminishing trajectory. Regarding the other three subdomains, they preserved their restrictive shape. Unions were still excluded from any

[150] *Brown* (n 148).
[151] Davies and Freedland, *Labour Legislation and Public Policy* (n 21) 440-441.
[152] Ewing, 'Trade Unions and the Constitution' (n 19) 135.

meaningful corporatist involvement in Government policy-making, the blanket prohibition on action that is not industrial was preserved and the regulation of internal union affairs in full deviation from 'associational laissez-faire' perfectly matched with a Labour Party internal regulation on union funding thus enhancing the 'slicing and dicing' of unions' political voice. The novelty of this period concerns the introduction of new regulation with chilling effect on the political voice of 'civil society actors' that captures also the voice of workers as channelled through non-union carriers.[153] Taking into account that the rules on political voice exhibit a higher historical resilience, not least because their effect on the electoral competition dictates cross-party consensus, the extent of the changes over a six-year period is even more remarkable.

This de-constitutionalisation process, in turn, expresses and instrumentally consolidates three historical movements. The first relates to the downgrading of unions from special groups that realise the integration of the mass working class into the political process to mere interest groups. The *Lobbying Act* is a perfect embodiment of this downward slope. Unions are indiscriminately regulated as *any* other interest groups in the electoral arena with the implicit suspicion of corrupting the political process by exerting undue influence. In turn, such movement echoes an international tendency of the perception towards unions. As Streeck and Addison remark, unions' claim for a 'political status above that of a mere lobbying groups, […] mainly reflects the memory of the class society of the past'[154] and that in national politics 'the opportunities for unions to exercise political influence seem to be becoming similar to those of any other interest groups, from farmers to environmentalists'.[155] This loss of status is intimately associated with the

[153] See *Abbott and Williams* (n 123).
[154] Wolfgang Streeck and Anke Hassel, 'Trade unions as political actors' in John Addison and Claus Schnabel, *International handbook of trade unions* (Elgar 2003) 19.
[155] ibid.

second movement, namely the adoption of an *institutionalist* conception of unions as mere institutional entities sterilised from considerations of the nature of their membership. The institutionalist conception evidently is evident in the *Lobbying, Act* wherein unions are approached as any other institution, notwithstanding their composition of myriads of individual workers.

The third movement is perhaps the most significant. It concerns the imprint and consolidation of an *individualist ethos* in the quality of regulation of unions' political voice. The value and the efficiency needs of collectivism are wholly neglected. This philosophy does not appear only in the Lobbying Act that adds further regulatory restrictions on unions' political activities. Labour Party reforms may also be seen through this prism. To be fair, it is true that the constitutional reforms may be normatively justified by a reference to an ideal of *active* rather than passive citizenship seeking to empower individual union members. As Miliband stated, the individual union members 'should be able to make a more active, individual choice on whether they become part of our Party'.[156] Even though this proposition is not without merit, it is still an individualistic approach. It is only the *individual citizenship* that matters, not the *collective citizenship* expressed by the organic interests of unions acting as collectivities. The fact that a union member exercised its *collective citizenship* by registering to a trade union whose interests are facilitated by affiliating to the Labour Party does not matter.

In essence, the last regulatory vestiges of collectivism inhering in the various processes of Labour Party such as automatic collective affiliation or the Electoral College for Leadership Elections are eliminated with the Labour Party putting the *individual* union member as an exclusive unit of concern. The very fact that the reforms were seen as

[156] Miliband, *One Nation Politics Speech* (n 127).

natural or electorally expedient for the Labour Party and were even supported by trade unions seem to be a proof of the hegemonic attitudes of the individualist attitudes diffused across the British society. The individual, not the collectivity, forms the exclusive unit of reference. Even a country as Britain with a tradition of channelling the *collectivist* integration of trade unions in the political sphere through the Labour Party seemingly falls prey to the international tendency of the 'weakening of the historical alliance between the labour movement and social democratic parties',[157] not least because the election strategists have seen 'the close link between the party and the union movement [as] a potential liability, not an advantage'.[158] The tide of what Beck terms institutionalised individualisation denoting when 'people are invited to constitute themselves as individuals [so as] to plan, understand, design themselves as individuals'[159] deploys its destructive impact across the regulatory spectrum both in statutory and Labour Party rules.

Zoomed out in the macro-historic trajectory of unions' role in the British political system, the crisis regulation on unions' political voice amounts to a further step in the post-1979 transition from *inclusion* 'where unions achieve a representational status, are consulted frequently by government but are excluded from effective decision-making'[160] to *marginalisation* 'where unions achieve representational status but are confined to the periphery of the political process'.[161] Starting from 1979 with the end of the public policy custom of consulting unions as privileged institutions for major policy-making decisions,

[157] G.P Cella and Tizianno Treu 'National Trade Union Movements' in Richard Blanpain and Jim Baker (Eds) *Comparative labour law and industrial relations in industrialized market economies* (10th edn, Kluwer Law International 2010) 508.
[158] Paul Davies and Mark Freedland, *Towards a Flexible Labour Market* (OUP 2007) 107.
[159] Ulrich Beck, *World risk society* (Polity Press 1999) 9.
[160] *Taylor* (n 1) 97.
[161] ibid.

the new crisis regulatory landscape perfectly resumes this marginalisation trajectory by pushing unions further in the periphery of the political process through over-regulating and restricting their *functional spaces*, namely the (i) electoral (Lobbying Act) and the (ii) Labour Party ones. Hence there is a 'counter-revolution'.

In constitutional terms, there can hardly be any doubt that the constitutional basis of labour law is not the same as it was when Otto Kahn-Freund diagnosed the 'rapidly developing pluralistic constitution'[162] as the basis for collective laissez-faire. A process of de-constitutionalisation of labour law is unfolding. Or otherwise put, there is an underlying constitutional process of re-configuration of the British constitution against unions, the basic institutional pillars of labour law. Ewing attributes the spirit of the crisis development on the unions' political voice to the revival of the *liberal* over the *social-democratic* constitutionalism. For Ewing 'liberal democracy is blind to the imbalance of economic resources and insists on the political representation of *individuals in an individual capacity, emphasizing the personal autonomy of the individual atomization of collective power'* while 'social democracy is based on the collective representation of individuals through organizations, and on the *acceptance of the legitimacy of their collective power'*. [163]

Nonetheless, an important qualification must be made on the 'liberal democracy' label. As Alan Bogg has shown, there are considerable varieties of liberalism. Bogg makes a cardinal distinction between egalitarian liberalism and neo-liberalism. The former admits economic freedoms but subordinates them to autonomy and accepts

[162]Otto Kahn-Freund, 'Labour Law' in Morris Ginsberg (ed), *Law and Opinion in England in the 20th century* (Stevens & Sons 1959) 223.
[163] Ewing, 'The Importance of Trade Union Political Voice' (n 4) 289.

egalitarian institutions,[164] while in the latter 'economic liberties and market institutions play a critical role in the realisation of the individual freedom'.[165] In practice, the qualification may not be so important. This is because it seems that what Bogg calls egalitarian liberalism falls easily within the 'social democratic constitutionalism', to the extent that the latter treats the *collectivist* action of unions as an egalitarian measure promoting workers' autonomy. The crucial aspect of this constitutional movement is the de-collectivisation of the constitution consistent with Hayekian constitutional ideals.[166]

Indeed, this pendulum swinging once again towards the *individual* as the sole legitimate site of public power can be pristinely detected both in the Lobbying Act which seeks to liberate the political process for the alleged excessive influence of third party collective actors and the Labour Party reforms that profoundly neglect the participatory need for unions *qua* representing workers to have a uniform and effective collective functional expression. It is crucial, however, not to exaggerate the presence of the social-democratic constitutionalism in British constitutional history. Given the peculiar nature of the British constitution consisting of the individualist-oriented common law and the Parliamentary statutes, even in the heyday of British 'weak corporatism' it has always been an unintegrated *two-tiered constitution*. As Deakin and Wilkinson note 'common law and legislation can co-exist, or operate alongside each other, within the relevant ''contextual area''; but by their nature, they cannot be effectively integrated into a single, coherent body of doctrine'.[167] Here one cannot but notice the lack of a constitutional

[164] Alan Bogg, 'New Labour, Trade Unions and the Liberal State' (2009) 20(3) King's Law Journal 403, 406-408.
[165] ibid 407.
[166] See Friedrich Hayek, The Road to Serfdom (Routledge 1944) 33-58; As he put it in the Law, Legislation and Liberty' 'no principles of collective conduct which bind the individual can exist in a society of free me Friedrich Hayek, Law, Legislation and Liberty, vol III (Routledge & Kegan Paul 1979) 151.
[167] Simon Deakin and Frank Wilkinson, *The Law of the labour market* (OUP 2005) 298.

entrenchment of the role of unions so as to be superimposed on the common law that could have prevented Hayek from expounding the minimal British libertarian constitution comprising only individualism,[168] free markets, rule of law, formal equality before the law and liberty,[169] as a *fact* rather than as a prescription.

This *political individualism* arises out of a liberal theory of representative government premised upon the faith on a 'single-channel' participation of citizens in the individual process *as individual Parliamentary electors*[170] reinforced by a class-free and idealised view of a *unitary* State whose wish is expressed by the Parliament. In this manner, the crisis period brought the 'constitutional isomorphism' of the Thatcherite de-legitimation of unions: in 1980s, unions suffered de-legitimation as market participants by the re-emergence of common law and economic individualism doctrines and now they suffer de-legitimation as participants of the political marketplace by the re-emergence of the classical doctrines of political liberalism and 'single-channel' representation. Unions' space becomes eroded by a concerted public and private law attack. The hostility to collectivism and non-individual actors, though, is only *partial* as 'collectivities of capital' (a.k.a corporations) are left essentially unregulated to influence and corrupt the political process.

This constitutional change of the two-tiered constitution turning into an explicit watered-down single-tier constitution, in turn, results in the severe mutation of unions' political voice. The regulatory space is dramatically reduced. And such development is of paramount significance for labour law. The latter acquires a hostile constitutional basis

[168] See Friedrich Hayek, *The Road to Serfdom* (Routledge 1944) 33-58; As he put it in the Law, Legislation and Liberty' 'no principles of collective conduct which bind the individual can exist in a society of free men' Friedrich Hayek, *Law, Legislation and Liberty*, vol III (Routledge & Kegan Paul 1979) 151.
[169] Friedrich Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul 1960).
[170] For the faith of the British labour party on the Parliamentary system see Ralph Miliband, *Parliamentary socialism: a study in the politics of labour* (Allen & Unwin 1961).

that attacks the *institutional* pre-conditions for the restoration of worker-protective labour law, namely politically and industrial active unions. Because, as Coates and Topham observed, disconnecting unions from political objectives is a *Catch-22 situation*: 'without political objectives, none of the other iniquities can be redressed: it will not be possible to organize the secure repeal of adverse laws, or enactment of beneficial ones'.[171] So the attack on unions' political voice should be perceived as an organic component of the entrenchment of the Thatcherite de-regulation of labour law so as to ensure its permanence. Because once the political process is structured in such a way as to impede the scope for political action by organized labour, the potential for significant structural reform of labour markets based on worker protective norms is thereby curtailed. Or, to put it in our theoretical framework terms developed in Chapter II, the 'constitutional counter-revolution' impedes the operation of the counter-legitimation force for fully expressing itself and hence resisting the capitalist economic rationalisation force.

In analytical terms, this 'constitutional counter-revolution' reveals in visible form the mode of the inter-relationship between constitutional and labour law: the *'reflexive equilibrium'* between political and industrial voice as mediated by the constitutional space consisting of the various regulatory sub-domains. To quote Ewing, 'it is thus unfortunate- but perhaps *inevitable*- that trade union political action should now be vulnerable, at the time of greatest needs'.[172] The reason for this *inevitability* is that the constitution is not *external to,* but *contingent* on political and class forces and hence the constitutional status of unions is the result of their political influence. The latter, as Taylor points out 'is neither a commodity possessed by nor an inevitable feature of, organisation;

[171] *Coates and Topham* (n 33) 107.
[172] Ewing, 'The Importance of Trade Union Political Voice' (n 4) 278.

it is the product of relationships and is therefore relative and changeable as the balance of economic and political forces changes in a political system'.[173]

In this framework, the new class balance in the British politics and the hegemonic domination of individualism could not but lead to an attack on unions' constitutional status, particularly *vis-à-vis* both its full statutory basis subject to the government of the day as well as its precarious evolution as an addendum to the common law constitution that could be easily be cut off. As a result, the crisis developments on unions' political voice in the UK realise a 'constitutional isomorphic equilibrium' adapted to the new level of class and political struggle that liquidates the superior position of capital in the post-1979 Britain. Hence the Webbs' comment that Trade Unionism is not merely an incident of the present phase of capitalist industry, but has a *permanent function* to fulfil in the democratic state'[174] may have fatally ignored the dynamism of this 'reflexive equilibrium' from which unions' role depended upon. Unions' role was not *permanent*, it was and is *contingent* and *heteronomous.*

In searching for more elaborate explanatory accounts, this de-constitutionalisation serves as an episode of what Stephen Gill has termed new constitutionalism, that is the political/juridical form specific to neoliberal processes of accumulation and to market civilisation'.[175] The observer witnesses a process of re-definition of the British Constitution made according to the peculiarities and the intricacies of the British Constitution that leads to the same neo-liberal outcome of exclusion of unions and de-collectivisation.

[173] *Taylor* (n 1) 46.
[174] Sidney Webb and Beatrice Webb, *Industrial Democracy* (Longman 1897) 823.
[175] Stephen Gill, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' (1998) 3(1) New Political Economy 5, 28.

In a nutshell, the crisis developments constitute a British-grown New Constitutionalism proceeding not with a 'bang' but with significant whimpers that, albeit occurring in what was for many labour law scholars an unfamiliar territory, perfectly reflect, complement, deepen and sustain the neo-liberal trajectory of labour law examined in the previous Chapter. And even more fundamentally, it renders less probable the re-construction of the 'dwounded' collective labour law edifice.

5. Conclusion: Summary of Findings

This Chapter investigated the constitutional attack on unions' political voice during the crisis as a central development that continues the process of the neo-liberal restructuring of the constitutional basis of labour law. It considered the *Lobbying Act provisions* on third party funding impacting on unions and Labour Party reforms as integral parts within a process of weakening the constitutional role of unions whilst underlining the Catch-22 nature of these reforms as seeking to preclude any challenges to the hostile for unions' current constitutional status quo in the future. Finally, the enquiry exposed the broad contours of the 'constitutional counter-revolution' proceeding as the delayed isomorphic counterpart of the 'industrial counter-revolution' initiated by the Thatcherite 1980s reforms. This de-constitutionalisation is an integral part of the neo-liberal trajectory identified in the previous chapter.

VIII

Conclusions: The Comparative and Theoretical Findings

This final Chapter presents the concluding comparative and theoretical findings. Responding to the thesis' *problematique* of the crisis operation of CLL, three major conclusions are advanced. Firstly, in specifying the nature of the comparative movement, Part 1 posits and accounts for a *'Great Neo-Liberal Convergence'* between the two CLL's crisis trajectories. The second part exposes the causal dynamics (the *why*) of the movement by offering two readings: a 'surface reading' and a 'Crisis Equilibrium reading'. The latter demonstrates the explanatory priority of the Economic Rationalisation Force (ERF)-Counter-Legitimation Force (CLF) dialectic along with ideology. Part 3 assesses the theoretical implications of the comparative observations. The ultimate part is devoted to a short note on the future of CLL.

1. The 'Great Neo-Liberal Convergence': A Comparative Dynamic Assessment of the Greek and British CLL Crisis Trajectories

In comparative studies with a dynamic (temporal) component, the staple exercise is to state whether the compared systems converge or not. We are not to deviate from this custom. For systematically addressing this question, there is need to trace *what* was the comparative movement of the Greek and British CLL crisis trajectories within the observing time-frame (2008- December 2014 for Greece and May 2015 for the UK).

Using the defined comparative scope of the movement within the *protective/market (neo-liberal) spectrum* introduced in Chapter III as an evaluative axis,[1] the analytical desideratum could be better illustrated in the following terms: if we are to think of an observer glancing simultaneously the pictures of the countries in 2008 and then fast-forwarding in 2015, what would be his overall impression of the *comparative diachronous movement*? Did the countries maintain their radical opposite pre-crisis positioning (protective for Greece, market/neo-liberal for UK), did they look more similar, and if yes towards which end?

In response, the enquiry finds that the comparative movement evidences the clear simile of a 'Great Neo-liberal convergence' between the two CLL systems. The 'neo-liberal convergence' thesis consists of two analytic observations regarding the nature of the crisis motion picture that our observer would see: (1) firstly, the countries are more similar, or otherwise put less different, in 2015 than 2008 as far as the spectrum movement is concerned: (2) and, more crucially, their similitude was towards the neo-liberal end, to which the British CLL also made more, albeit gradual, steps by further neo-liberalisation.

Prior to explicating this thesis, two clarifications are necessary. Firstly, our analysis draws upon Baccaro and Howell's useful concise definition of neo-liberalisation as a process of 'expand[ing] employer discretion'.[2] We re-formulate it, as 'expanding employer discretion by reducing collective constraints', as to fit the purpose of a comparative examination for CLL. Secondly, due emphasis should be accorded to the fact that convergence *does not entail assimilation*. Instead, it means that 'legal phenomena become *more* similar [and] it does not imply that they will become identical'.[3]

[1] See Chapter III Part 2(ii).
[2] Luis Baccaro and Chris Howell, 'A Common Neoliberal Trajectory: The Transformation of Industrial Relations in Advanced Capitalism' (2011) 39(4) Politics & Society 521, 527.
[3] Mathias Siems, *Comparative Law* (CUP 2014) 233 (emphasis added).

After these clarifications, the examination proceeds in three stages. Firstly, the main 'neo-liberal convergence' thesis is justified by ascertaining its multi-level manifestations. Subsequently, the movement is evaluated from its macro-historic significance for the compared countries. The last stage widens the analytical ambit by situating the herein comparative finding as a *supportive* case-study of the 'convergence theorists' camp within the convergence/non-convergence debate.

(i) The Four Levels of Convergence: Legislative, Constitutional, Doctrinal-Teleological and Transformative Use of Law

The 'neo-liberal convergence' movement manifests at four levels *(i) legislative, (ii) constitutional, (iii) doctrinal-teleological and (iv)transformative use of law.* These levels, far from external or mutually independent, should be treated as diverse regional expressions of a *single 'global' underlying process of 'neo-liberal convergence'* of the two CLL systems.

(a) The Legislative Level: Convergence to a De-Collectivised and De-Centralised Model

Regarding the legislative level, an abrupt process of *convergence* on the British neo-liberal *de-collectivised* and *de-centralised* model could be pristinely detected during the crisis period. The convergence does not originate in a symmetrical similar-pace movement of both countries towards a middle-distance point. It rather emerges asymmetrically from the *over-dynamic gigantic leap* of the Greek CLL towards the market/neo-liberal end. This leap made with a 'neo-liberal bang'[4] generates a process of

[4] See Chapter IV.

'catching up' with the fundamentally unaltered British model. The latter, however was far from stationary. It resumed its travel towards the neo-liberal end in a process termed as a 'never-ending' 'neo-liberal continuity by consolidation'[5].

This neo-liberal realignment between the two countries encompasses a repertoire of three strategies, not all of them to found in each country. The first strategy could be called as *direct de-collectivisation.* It refers to the distinct use of law for eliminating the functional collective restraints, or otherwise put the reach, of collective autonomy *(e.g suspension of the erga omnes of collective agreements).* The second strategy of *indirect decollectivisation* involves the legal restructuring of the 'production centre' of collective restraints, so as to be in a more favourable for the employers' power terrain. The most characteristic example is the de-centralisation to the enterprise level, combined with the granting of power to atypical workers' organizations with minimal bargaining power to conclude enterprise agreements. The de-collectivisation is *indirect* in that, while formally a collective space between the parties is maintained, in reality the power dynamics where the legal reforms direct collective negotiations to and/or the parties empowered to make their agreements, ensure that collective regulation is made in a terrain so unfriendly for workers as in practice to make collectivisation illusory. The third strategy involves attacking unions as institutions by reducing their *organizational capacities and their ability to exercise political voice.* This could be termed as *de-collectivisation by de-institutionalisation,* since this strategy uses law for attacking the trade unions' institutional capacities.

Let us now move to see how these strategies were deployed in both countries. The two areas where the two systems attained a near-perfect assimilation during the crisis

[5] See Chapter VI.

period are: *(i) de-centralised system of enterprise-level collective standard-setting* and *(ii) state determination of national minimum wage.*

In a typical exemplification of *indirect de-collectivisation,* that is transferring the negotiations to the more employer-friendly enterprise with conditions so as for collective constraints to be more employer-friendly, the Greek CLL was strategically recast towards *promoting* - and not as previously *discouraging*- disorganised decentralisation (without coordinated by sectoral or other high-level levels)[6] from sectoral to the enterprise level. This rapid de-centralisation was utilised as a *regressive instrument* for workers. The regressive purpose becomes manifest in the following joint reforms: the *simultaneous* abolition of the favourability principle between enterprise and sectoral agreements which removed the protective floor for workers *with* the break of unions' collective bargaining monopoly by granting of collective bargaining powers to the enterprise-level atypical 'associations of persons' having very weak negotiation power.[7] The cumulative effect of these two reforms was for associations of persons to negotiate enterprise agreements derogating *in peius* from sectoral agremements, thereby approximating the de-centralised British CLL model. At the same time, the latter's decentralisation nature resilience gained *totalised* presence during the crisis after the abolition of the Agricultural Wage Board, the ultimate vestige of the *sui generis erga omnes* sectoral wage bargaining.[8]

The *state minimum-wage determination systems* constitute the second assimilation area. Once again it was the over-dynamic motion of the Greek CLL model which changed towards the British model of state determination of the minimum wage. The Greek

[6] For the distinction between 'disorganised'/'organised' de-centralisation see Franz Traxler, 'Farewell to Labour Market Associations? Organized versus Disorganized Decentralizaztion as a Map for Industrial Relations' in Colin Crouch and Franz Traxler (eds), *Organised industrial relations in Europe: What future?* (Avebury 1995).
[7] See Chapter IV Part 2 Part i(b).
[8] See Chapter VI Part 2 Part I.

reforms transferred the minimum-wage determination from the space of collective autonomy (in the form of a National General Collective Agreement concluded by confederations of employers and employee) to the State reach within a *direct de-collectivisation* legal strategy process. Here it should be also mentioned that in the UK a similar, though far more limited in scope, trajectory was effectuated by the transfer of minimum wage-setting power for agricultural workers from collective determination (as part of the Agricultural Wage Board) to the reach of the statutory national minimum wage. Both developments lead *in effect* to *direct de-collectivisation.* This is because the collective autonomy loses vital regulatory capacities, consequently shrinking the functional space of unions.

Moreover, there has been a striking and intense 'fading' of the pre-crisis major dividing lines between the two CLL systems. These lines previously set apart the 'protective' social-democratic Greek CLL, *de jure* privileging collectivism, collectivist resolution of employment disputes and effective and independent trade unionism, from the 'neo-liberal' British CLL model. Such fading is caused by the withdrawal or serious undermining of various statutory props previously designating a comprehensive scheme of pro-collectivist checks and balances and eventually safeguarding a relative equilibrium between capital and labour.

Four legal reforms of pre-crisis statutory props are relevant here. The first was the suspension of the *favourability or inderogability* principle as a principle of articulation of concurrent collective agreements so that the most protective for worker applies. This principle has been rightly expounded by Freedland and Kountouris as a key separating principle between the Continental and Anglo-Saxon CLL systems.[9] The second was the

[9] Mark Freedland and Nicola Kountouris, *The legal construction of personal work relations* (OUP 2011) 60.

elimination of the 'erga omnes' effect of sectoral agreements by the suspension of the *erga omnes* sectoral extension mechanism (though *erga omnes* is applicable for enterprise agreements). The third was the legislative attack on the institution of arbitration (which performed the crucial *ultimum remedium* role for offering a collective over market determination of terms and conditions of employment in cases of disputes) by restricting the scope of arbitration and abolishing the unilateral resource which in effect annulled the institution. This restrictive outcome was not fully reversed even after the judicial intervention declaring it unconstitutional due to a restrictive law enacted in response.[10] And finally there was the reduction of the *after-effect* of collective agreements previously guaranteeing a successive collective determination of terms and conditions of employment.

Rather than focusing on the complex details, a work done in previous Chapters, it suffices to elucidate the fading of the protective colouring of the Greek model which renders its post-crisis shape less different from the British one.

Whilst capturing the dynamic, it is also vital not to miss the *instrumental variation* in respect to the neo-liberal trajectory in the two countries. In Greece, legal intervention has been directed toward the annulment, or at least restriction, of the *regulatory effect of collective autonomy* either directly by multiple state interventions in modifying/suspending the effects of collective autonomy (collective agreements and arbitration awards) *(direct de-collectivisation)* or indirectly by the 'regressive decentralisation' bringing the *regulatory significant* negotiations to the more favourable dynamics for the employer (enterprise level) (*indirect decollectivisation)*. In Britain, the

[10] See Chapter IV Part 2(v).

crisis legislative instruments producing the neo-liberal thrust exhibited a different strategy, that of *de-jure de-institutionalisation.*

In light of the British peculiarity concerning the non-binding nature of the collective agreements in the sense of lacking automatic normative legal effect, the de-collectivised and de-centralised departure point and the de-facto weakening of the statutory union recognition procedure, the British CLL reforms naturally sought not to restrain collective autonomy *directly* (here the only exception is the AWB abolition) but to diminish the unions' institutional power by limiting their functional and organizational capacity. This was made, for instance, by the imposition of new bureaucratic requirements for maintaining an accurate register of members, the administrative abolition of check-off arrangements and reduction of facility time for union representatives for public sector unions. Very crucially, besides attacking the unions' organizational capacity, a series of measures was enacted with the effect of impeding unions' ability to exercise their voice in the political arena. It is under the latter objective that two sets of reforms should be considered. These are the Lobbying Act curbs on unions' political voice and the aforementioned administrative reforms related to public sector unions. So, the purpose in the UK is seemingly to create a Catch-22 situation: not only to liberate employers from any restraints by strategically de-capacitating institutional power but also immunising the neo-liberal CLL framework from *transformative* political challenges. Hence there is a notable attempted *political de-institutionalisation.*

So, it arises a crucial divergence in terms of the focus of the legislative attack: regulatory effect of collective autonomy for Greece by *de-collectivisation* either direct or de facto and for Greece de-institutionalisation by undermining of institutional power of unions.

Overall, there has been a major legislative convergence between the two countries towards a neo-liberal, marketised CLL. Despite exhibiting *formal* convergence elements, the *functional* neo-liberal outcome should receive more attention. The broad trajectory of the legislative changes in both countries enhanced employer's unilateral discretion and diminished the functional space for collective actors thus having a *neo-liberal* effect of allowing freeer rein to the market forces. In Greece, measures effected a rapid direct and indirect de-collectivisation and de-centralisation whilst in the UK they moved towards the direction of *de-institutionalisation* by attacking unions' power, a natural aim given the voluntarist framework of British collective agreements having no legal binding force. Again, though, we should be careful to dissociate convergence from full assimilation. There are persistent significant marked divergences between the two CLL systems, for instance in relation to strike law, union recognition or bargaining in good faith. What our enquiry demonstrated *vis-à-vis* its pre-defined dynamic comparative assessment is merely that the crisis brought about *a 'convergent' common neo-liberal dynamic.*

(b) The Constitutional Level: The Common Neo-Liberal De-Constitutionalisation Trajectory

The second manifestation level of the *'neoliberal convergence'* is *the constitutional.* At first sight, this may appear puzzling. It is common to expound CLL's *constitutional embeddedness* as the most fundamental pre-crisis demarcating dissimilitude of the two systems. This embeddedness existed in Greece under the social-democratic constitution entrenching a positive and protective scheme of CLL rights and was absent from the UK. To be sure, there has been no *formal convergence* during the crisis. There have been no textual amendments to the Greek labour constitution and, conversely, no constitutional

entrenchment of CLL in the UK. Yet the *constitutional convergence* expresses itself in a *neo-liberal de-constitutionalisation trajectory* developed in the fundamentally diverse constitutional mediums in both countries. The effect of this convergence is the reduction of the practical significance of the formally superior constitutional protection of CLL rights in Greece. For grasping this dynamic, it is necessary to dismiss a static and misleading *binary* view of constitutionalisation as admitting a yes/no answer, starting and finishing with an act of constitutional codification. Instead constitutionalisation should be seen as a *dynamic constitutional process,* a product of continuous contestation between the capital and labour constitutions inevitably occurring in every capitalist constitution.

Chapters V and VII devoted to constitutional considerations in Greece and the UK have already mapped this dynamic in each country. No effort to restate the analysis is made here. It is sufficient to remind that for Greece, the apparent constitutional properties of hierarchical superiority of the constitution over legislation were de facto subverted by the adopted *constitutional interpretation of proportionality* affording a deferential 'thin review' attitude towards the legislator in the context of a complex geometry described as a de-constitutionalisation triangle.[11] Indeed, a deferential proportionality review was used as a submissive instrument for achieving the effect of internalising the Transnational Capital Constitution of EU-IMF bailout conditionality and immunising it from the constitutional protective restraints of the labour constitution. In general, the transnational capital constitution trumped the submissive domestic labour constitution, to which effect the transnational labour constitution (ECHR, ILO Conventions) was lacking the 'teeth' for preventing its submission either at the domestic or at the European level, the latter

[11] See Chapter V.

being the centre of the conditionality production setting the destructive conditions for CLL to be implemented by the Greek legislator.

In Britain, respectively, the analysis ascertained the *constitutional attack on unions' political voice* where no *external* impact was visible. Here CLL operated within a more hostile 'individualistic', political constitutional environment along with the hostile to collectivisation common law presenting the default option. It is under this rubric of de-constitutionalisation that the Lobbying Act should be comprehended. Unions' political voice was tightly regulated, in an asymmetrically stringent fashion compared to corporations, because unions were supposedly designated as mere interest groups to be treated with suspicion as distorting the neoliberal-constitutional process. Moreover, the changes to the Labour Party affecting the union-party link also reflect a unions' de-institutionalisation process along the lines of an anti-collectivist restructuring. As a result, the British de-constitutionalisation amounts more to a *pre-emptive constitutional neo-liberal safeguard* impeding unions' future attempts to re-configure the malleable constitution through political action.

In spite of the admittedly diverse constitutional mediums, in both countries the constitutional position of unions and CLL experienced a weakening during the crisis, though of course such effect was more acute and visible in Greece. Stephen Gill's 'New Constitutionalism' framework[12] could be helpful for evaluating the *neo-liberal direction* of constitutional developments, so as to capture a process of constitutional juridification of neo-liberalism proceeding in re-structuring domestic protective constraints. The outcome was that there was a *convergence* in as much as the *actual* constitutional

[12] Stephen Gill, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' (1998) 3(1) New Political Economy 5, 28. For analysis of the framework in Greece and UK, See Chapter V Part 5 III and Chapter VII Part 5.

protection in Greece was not *in effect* so different as if there was no such protection as in the UK, whilst the British *de-constitutionalisation* of unions' political role proceeded even further to the neo-liberal end.

(c) Doctrinal-Teleological Level: 'Neo-Liberal Convergence' to a Diluted form of CLL

The comparatist of the two crisis trajectories, potentially lost in the micro-analysis of the minutiae and intricacies of specific legislative comparisons, hazards ignoring a major macro-expression of the neo-liberal convergence regarding the *doctrinal-teleological* level of CLL. The latter level reflects the *articulated*[13] functions, objectives and justifications for the very existence of CLL. This foundational convergence between the two systems inevitably follows the course of the legislative convergence, which complements and legitimates. It arises out of a 'paradigm shift movement' of the Greek CLL counter-posed to a 'paradigm continuity (and consolidation)' movement of the British CLL.

Indeed, up to the crisis, the two systems were firmly predicated upon opposite and mutually exclusive positions.[14] On the one hand, the 'protective' Greek CLL system was legally cognisant of the imbalance of power between the capital and labour. It rested upon the imperative of *protecting* workers, an aim concretised *inter alia* by assigning an *ameliorative* regulatory function to collective bargaining (both in relation to individual negotiations and to inferior for workers' collective agreements through the favourability principle) and prioritizing collective regulations taking place under regulatory-supporting

[13] We refer here to *articulated* functions since CLL always performs the latent function of reproducing capitalism vis-à-vis its resting upon a fundamental contradiction. See Chapter II Part 2.
[14] Chapter III Part 3.

conditions of mitigated power imbalance between capital and labour as a preferred state objective over individual negotiations. On the other hand, the British system assumed a doctrinal-teleological position exhibiting the following characteristics: (i) configuration determined by a neo-liberal economised assessment of its instrumental optimality for capital-related objectives such as flexibility and competitiveness[15]; (ii) distrust of collective agreements as sub-optimally interfering with the optimal labour market flexibility ; (iii) position of *neutrality* with regard to collective negotiations and individual contracts as methods for determining terms and conditions; (iv) lack of integration of power asymmetries in the calculus and (v) a re-assertion of an individualistic common law constitution treating unions as interest groups enjoying unique privileges to be curbed.

In short, to term with the terminology of the current labour law fashionable discourse, the Greek model reflected a 'protective' normative-teleological conceptualisation whilst the British CLL model a 'labour market' conceptualisation.[16]

During the crisis, the British conceptualisation experienced a 'paradigm continuity'. The dominant 'labour market conceptualisation' was fully resilient, yet crucially extended its reach by co-opting remaining other-paradigm areas (e.g abolition of the Agricultural Wage Board) as well as permitting the individualist constitution to attack by a new regulatory framework the unions' political voice. The austerity rationale seemingly provided a new legitimation for this paradigm, for instance by justifying restrictions on check-off arrangements based on taxpayer interests or for facility time in the public

[15] Paul Davies and Mark Freedland, *Towards a Flexible Labour Market* (OUP 2007) and Hugh Collins, 'Regulating the employment relation for Competitiveness' (2001) 30(1) ILJ 17.

[16] For the classical account see Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (OUP 2005) and for a critique see Ruth Dukes, *The Labour Constitution* (OUP 2014) Chapter 5 & 8.

sector. Yet in reality austerity gave just a new cover for consolidating the labour market paradigm. On the contrary, the Greek doctrinal-teleological CLL foundations sustained a cardinal reconfiguration, so radical as to merit the characterisation of a 'path departure, defined by Hepple and Veneziani as 'when a juncture *is reached at which substantively different laws and policies begin to be followed'*,[17] or to use Kuhn's terminology 'paradigm shift'.[18] This is because alien labour market objectives (competitiveness and flexibility) were rapidly integrated into the Greek CLL system, under the discursive and actual pressure of austerity. Such objectives diverge from its traditional protective inclinations. Moreover, a neo-liberal technocratic economised language of unit labour costs and efficiency was injected by the Memoranda legislation as legitimation schemata alongside the traditional language of redressing the power equilibrium between capital and labour. This resulted in the 'normative weakening' of CLL[19] pursuant to the dilution of its protective function. It led Greek CLL to a kind of *hybridisation* in that the *protective* doctrinal-teleological foundations have been seriously diluted by a new alien labour market epistemology, thus giving rise to a serious problem of coherence. As Papadimitriou rightly notes, the Greek CLL made a dangerous passage towards a de-regulated 'new juridical nature'.[20] The distinctive feature of this juridical nature is that CLL's legitimation is to be found not just in the power-compensating mission of labour law but in its new function towards the labour market, assessed and evaluated by neo-liberal assumptions and presuppositions.

[17] Bob Hepple and Bruno Veneziani, 'Introduction' in Bob Hepple and Bruno Veneziani (eds), *Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004* (Hart 2009) 21.
[18] Thomas Kuhn, *The Structure of Scientific Revolutions* (4th edn, University of Chicago Press 2012) especially Chapters VII-X.
[19] Adrián Goldin, 'Labour Subordination and the Subjective Weakening of Labour Law' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006) 109.
[20] Costas Papadimitriou, 'The Greek Labour Law face to the crisis: A dangerous passage towards a new juridical nature' (2013) European Labour Law Network Working Paper Series No. 3.

Hence there has been a *convergence towards a diluted (labour market) function for CLL oriented away from its protective function as the sole objective.* Although still not identical, the Greek model approached rapidly the British 'labour market' conceptualisation of CLL.

(d) Transformative Use of Law Level: Resuming the Pre-Crisis Convergence

The last convergence manifestation concerns the *transformative use of law* as a technique by both systems, an issue which historically has attracted a lot of attention in the UK vis-à-vis its collective laissez-faire tradition up to 1970s.[21] The utilisation of law as a primary instrument for neo-liberal transformation during the crisis appears inconsistent with Otto Kahn-Freund's pronouncement that 'law is a secondary force in human affairs, and especially in industrial relations'.[22] On the contrary, in both countries, law has been employed, without any principled hesitation, as a pivotal transformative instrument for engineering the neo-liberal transformation of industrial relations in Greece and consolidating the neo-liberal paradigm in the UK.

This use has been particularly evident in Greek case. The eradication of protective aspects of Greek law (e.g favourability clause, special privileges for collective agreements) has to be understood in the context of a comprehensive attempt to alter what Dunlop considers to be a central element of an industrial relations system, its *ideology.* The latter is a 'body of common ideas that defines the role and place of each actor and that defines the ideas which each actor holds towards the place and function of the others in the system'.[23] The new laws are instrumental in this process of ideological

[21] See Chapter III Part 3(i)
[22] Otto Kahn-Freund, *Labour and the Law* (3rd edn, by Paul Davies and Mark Freedland, Stevens & Sons 1983) 13.
[23]John Dunlop, *Industrial Relations Systems* (Henry Holt Company 1985) 16-17.

reconfiguration that involves the unseating of pre-crisis understandings and the infusion of a new, liberal-oriented ideology in CLL. Against the background of the deep-rooted logic of the pre-existing system that was founded on the fundamental aim of protecting workers and had achieved a wide social consensus, the crisis laws exhibit a salient *expressive* dimension. The reforms seemingly purport to instill to all participants the new conceptualization of CLL so that in long-term an alteration of societal perceptions for CLL's role and justification could be achieved.

Similarly, in Britain the law, despite the persistence of the voluntarist castle regarding the legal effect of collective agreements, has been actively deployed towards tweaking the remaining non-neoliberal peripheral elements. Attacking unions' political power and reducing of unions' functional and organisational space are such acts seeking to transform the industrial landscape into a more perfect neo-liberal terrain.

Therefore, both countries deployed law as a transformative tool. The feature of using the law for achieving changes is the only one to *resume* a convergence of the two systems achieved already in 1980s. But the crucially difference relates to the transformative goals towards which the law is used. For Greece, the purpose of the use of law was reversed from social-democratic transformative tool in the form of a protective CLL to an explicit capitalism-reproductive tool in the form of a neo-liberal CLL.

(ii) Putting the 'Neo-Liberal Convergence' in its Macro-Historic Context

Prior analysis detected the 'neo-liberal convergence' movement by locating its four-level manifestations. It identified a *singular uniformity of the direction* of CLL crisis transformations in both systemssince legal changes were exclusively oriented towards the

neo-liberal, market-friendly terrain wherein collective restraints for employers were eliminated or reduced. To put it simply, in both systems there has been a total absence of a regulatory change towards the protective end. The pre-crisis pattern of near-perfect *inverse symmetry* between the two countries[24] has been severely disturbed, thereby losing its appropriateness after the crisis.

Profoundly, the 'neo-liberal convergence' thesis is *dynamic*, by reference to the movement within the spectrum. It should not be misconstrued as articulating a *static* claim that the two systems are now identical. In virtue of the opposed starting points and the different pace of reforms, *gradual* for UK and *abrupt* for Greece, the convergence logically does not produce a blanket perfect assimilation effect. However, the systems have been in dramatically closer proximity as a result of the legislative, doctrinal-teleological and transformative use of law levels of convergence whilst the common de-constitutionalisation dynamic renders the formal CLL's constitutionalisation divide of less practical significance.

Projected onto he macro-historic comparative context of both countries, the comparatist of the CLL British and Greek trajectories is in front of a historically unprecedented phenomenon: a re-alignment, or a historic encounter, of two countries whose CLL histories have been hitherto opposed. Hence we term it as *'Great* Neo-Liberal Convergence'. This terms reflects the violent reversal of the Great divergence observed in 1980s where the Greek and British pre-crisis opposed edifices were built by the social-democratic and neo-liberal hegemonies respectively. *Now, for the first time in their history, the two systems appear to have synchronised their direction, as a result of the Greek CLL moving towards the British by a rapid loss of its protective distinctiveness.*

[24] See Chapter III Part 3(ii and iii).

(iii) Situating the 'Neo-Liberal Convergence' Finding in the Convergence Debate: A 'Convergence Turn' Theorisation

Let us situate the neo-liberal convergence finding beyond its local significance for the Greek and British CLL jurisdictions. We maintain that it should be considered as a *supporting case-study* for the neo-liberal convergence thesis, articulated recently with renewed intensity within the long-standing convergence/non-convergence debate questioning the potential convergence trajectory of labour law and industrial relations. A brief restatement of the debate at this point is necessary.

Historically, the debate has received various formulations depending on the *putative* convergent-producing common process shared across national systems *or* the nation-centric convergence-resistance materials identified in response. Initially, the contentious source was industrialisation. Claims by Kerr[25] and Simitis[26] positing industrialisation as a convergent force for industrial relations systems and for the juridification of labour law respectively were implicitly refuted by Otto Kahn-Freund's famous exposition of the relatively static nature of CLL as resting upon nation-contingent power relations resisting transplantion[27] and Clark and Wedderburn's respective challenge to juridification drawing on 1980s British legislation.[28]

[25] Clark Kerr, *Industrial and industrial man: the problems of labour and economic growth* (Heinemann 1962).
[26] Spiros Simitis, 'Juridification of Labour Relations' in Gunther Teubner (ed), *Juridification of social spheres: a comparative analysis in the areas of labor, corporate, antitrust, and social welfare law* (Gryter 1987).
[27] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) MLR 1, 21.
[28] John Clark and Lord Wedderburn, 'Juridification: A Universal Trend?' in *Juridification of Social Spheres* (n 25).

Yet from 1990s, the debate changed terrain. It focused on the convergent properties of neoliberalism. In light of the undisputed observed (neo-) liberalisation[29] trajectory associated with the closer European integration for EU Member States, the principal question has naturally revolved around whether neo-liberalism and EU integration are to unleash a sweeping convergence impact among the diverse European labour law systems. With a degree of oversimplification, there have been two responses with a third in-between.

Non-convergence theorists came up with sophisticated discourses on *resistance materials* effectively preventing a neoliberalism-induced convergence. Varieties of Capitalism literature offered the leading account. It divided capitalist countries into Liberal Market Economies (LME) (where economic coordination takes place solely via market mechanisms including de-regulated labour law regimes) and Coordinated Market Economies (CME) (where firms depend on non-market relationships to coordinate their endeavours and have more stringent labour law regimes), and suggested *institutional complementarities* producing multiple combinations of comparative advantage as a resistance material for each variety. [30] Other theorists pointed to the legal origin (civil law or common law)[31] or nation-bound legal cultures[32] as convergence-resistant materials.

[29] See Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity* (OUP 2005) 2-4.
[30]Peter Hall, David Soskice, 'An Introduction to Varieties of Capitaism' in Peter Hall, David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP 2011) 8.
[31] See Juan Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez de Silanes and Andrei Shleifer, 'The Regulation of Labor' (2004) 119(4) The Quarterly Journal of Economics 1339; For a comprehensive collection of essays see Simon Deakin and Katharina Pistor (eds), *Legal Origin Theory* (Edward Elgar 2012).
[32] Pierre Legrand, 'European Legal Systems are not converging' (1996) 45(1) International and Comparative Law Quarterly 52.

On the contrary, the *convergence proponents* illuminated the neo-liberal dynamic. Perhaps the first neo-liberal convergence statement was authored by Lord Wedderburn in 1994, when writing prophetically that:

> 'there is perhaps a need respectfully to warn colleagues elsewhere in Europe who still enjoy *consensus*-based labour law, not to write off these [Thatcherite] developments as some short term Anglo-Saxon deviation from the natural course of history in ''post-industrial societies''. Those who have subscribed to the new individualism believe that they have seen the future and that it works. It is a proselytising faith which is not dependant on any particular political party or leader'.[33]

Eight years later, Claus Offe professed the 'asymmetrical law of entropy' according to which, 'it is much more likely that a European-style capitalism transforms itself into a liberal model than that the Anglo-Saxon model becomes ''Europeanized'''.[34] But it was Baccaro and Howell who explicitly and persuasively argued for neo-liberal convergence. In a seminal piece, they defended a *functional convergence* thesis in the form of a common liberalization trajectory of labour law changes based on evidence from fifteen modern advanced economies during the 1974-2005 period. While acknowledging the diversity, their main contention was that this is *more formal than functional*. Liberalization proceeds not only by 'institutional deregulation', but also through institutional convergence, as the functions associated with existing institutional forms change in a convergent direction'.[35] Along imilar lines, Alan Bogg and Keith Ewing in a major intervention have very recently adopted, by taking into account crisis developments, a neo-liberal convergence thesis for labour law.[36] Warning 'that the fetish with difference in the modern world is a *deviant activity that causes us to lose sight of*

[33] Lord Wedderburn 'Labour law and the Individual in Post-Industrial Societies' in Lord Wedderburn (ed), *Labour law in the post-industrial era: essays in honour of Hugo Sinzheimer* (Dartmouth 1994) 15.
[34] Claus Offe, 'The European Model of ''Social Capitalism'': Can It Survive European Integration?' (2003) 11(3) The Journal of Political Philosophy 437, 446.
[35] *Baccaro and Howell* (n 2).
[36] Alan Bogg and Keith Ewing, 'Freedom of Association' in Guy Mundlak and Matthew Finkin (eds), *Comparative Labor Law* (Edward Elgar 2015).

major developments of convergence that threatens the very existence of labour law as traditionally understood',[37] Bogg and Ewing conclude that there is a neo-liberal convergence under way or, as explicitly formulated by them, that questions are raised 'over the veracity of scholarly claims denying that there is a process of comparative neo-liberal convergence underway'.[38]

Other accounts occupy a middle-ground. Thelen admits the direction of liberalization but identifies 'varieties of liberalisation' to qualify the trajectory and resist the idea of a uniform slide toward Anglo-Saxon-style liberalization.[39] Similarly, Schmidt observes that 'although globalization and Europeanization (…) have indeed restricted national policy choices, this has not produced convergence in policies since governments continue to exercise choice within a narrower range'.[40]

Within the debate, the neo-liberal convergence finding of the Greek and British CLL operates as a *supportive* case-study for the 'convergence theorists'. This is because it describes two systems, which despite their location on opposite varieties, legal origin and constitutionalisation sides, both moved dramatically closer towards the neo-liberal end. Whilst fitting with the neo-liberal convergence theorists, our thesis is also compatible with the middle-accounts of Thelen and Schmidt as indeed there has been in the two countries an instrumental variation: in Britain reforms focused on unions' power (both political and industrial) whilst in Greece on the regulatory effect of collective agreements and collective autonomy. However, such variation is confined to the instruments rather than to the *neo-liberal effect.* For instance, both Greece and the UK have now more de-centralised systems. In Britain this is because of the abolition of the Agricultural Wage

[37] ibid 299.
[38] ibid 321.
[39] Kathleen Thelen, *Varieties of liberalization and the politics of social solidarity* (CUP 2014) 1.
[40] Vivien Schmidt, *The Futures of European Capitalism* (OUP 2002) 3 and see further Chapter 1.

Board while in Greece because of the suspension of the favourability clause and the de-capacitation of the constitutional protection.

Contextualising the comparative trajectory within a broader convergence dynamic benefits the analysis with a deeper theorisation of comparative developments. If we are to hark back to our initial observer, the pictures of two countries he observed may not be seen as isolated instances, but as two pieces in a *common* big motion picture of an aggressive neo-liberalisation. Understood in this light, the transformation of the Greek CLL system merely indicates the defeat of the '*deviant* social-democratic case' in a clash between two opposed CLL civilisations as the 'new' neo-liberal sweeps over the old social-democratic. Hence one could re-conceptualise the whole enquiry as a conflict of *CLL genetic-temporalities,* where the 1980s *descending* social-democratic steam is exhausted, evidenced by the bowing of Greek CLL to the *ascending* dominant neo-liberal ideology.

Indeed, there is an ongoing process of individualization of collective relations, accelerated but not initiated by the crisis. In turn, this process could be reckoned as part of a wider historical trend being termed as 'individualisation of the social'[41] or 'counterrevolution',[42] that pushes the CLL back to its pre-history, to its non-existence. Even efforts of re-norming labour law along market objectives amount to its *substantial* eclipse as long as 'a merely market-oriented labour law means in the end: no labour law'.[43] Indeed, the demise of labour law seems to signal a phase of *new* rise of *freedom*

[41]Zsuzsa Ferge, 'The Individualisation of the Social: The Changed Welfare Paradigm' (1997) 31(1) Social Policy & Administration 20.
[42] Henry Phelps Brown, 'The Counter-Revolution of Our times' (1990) 29(1) Industrial Relations: A Journal of Economy and Society 1.
[43] Detlev Joost, 'Deregulation and Labour Law in Germany' in Richard Blanpain(ed), *Deregulation and Labour Law: In search of a labour concept for the 21st century (*Kluwer Law International 2000) 67.

of contract thereof shown by Atiyah to decline during 1870-1970.[44]

In this context, taking into account that the liberal re-orientation of the Greek CLL through *decentralization* is a pattern followed also in other Southern European Countries with social-democratic models (Portugal, Spain, Italy), with commentators talking about 'the death of social Europe'[45] there is ample evidence to suggest that the crisis operates as a catalyst for an overwhelming liberalization of distinct social-democratic models of Europe and for effectuating a wider neo-liberal convergence.

2. Identifying the Causal Dynamics of the Movement: A 'Surface' and a 'Crisis Equilibrium' Reading

After ascertaining the neo-liberal convergence movement, the enquiry now interrogates its *causal dynamics* or determinants. Since separate chapters IV-VII provided more detailed and nuanced causal accounts, here the analysis is confined to a more systematic, concise and to an extent reductionist comparative exposition. Qualified by a proper acknowledgment that CLL crisis trajectories constitute in fact multi-causal phenomena over-determined by political, economic and social factors in various combinations, so that the comparatist should proceed with utmost caution in isolating individual factor(s), the analysis advances two readings: the 'surface' and the 'Crisis Equilibrium' reading.

[44] Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979) 681-715.
[45] Keith Ewing, 'The Death of Social Europe' (2015) 26(1) King's Law Journal 76.

(i) A Surface Reading: Two Opposed Causal Chains

At a surface level, the causal dynamics driving the two CLL Crisis neo-liberal trajectories exhibit contrasting compositions. For Greece, they were *exogenous, emergency-justified* and *abrupt* whilst the economic crisis acted as a *'visible'* cause and justification. Conversely, for the UK, the dynamics were more *endogenously-induced, normal and gradual* with economic crises acting – in comparative terms- as a more 'background' operation and justification.

Indeed, for Greece, it is impossible to sustain any explanation of the direction and pace of the over-dynamic CLL crisis trajectory that is devoid of a consideration of the following elements. The first relates to the *exogenously-induced* nature of legal change. CLL reforms faithfully implemented the *sui generis* externally-created hard law/soft law normative constellation of EU-IMF bailout conditionality.[46] The latter consisted of conditions in a series of sequential 'quid pro quo' arrangements where the international lenders exploited the *dominium* (provision of material resources for influencing state behaviour)[47] of providing the default-preventing financial assistance necessary for Greece's repayment of debts. Dominium effectiveness was maximised by the non-availability to the Greek Government of any other crucial economic crisis-addressing levers besides internal devaluation (e.g currency devaluation) as a result of Eurozone's Membership.

This very strong element of *externality,* when combined with the extensive power asymmetries against Greece, led to the successful injection of conditionality in the Greek legal order. Hence the framework of 'transplant' may be appropriate for the Greek case, since conditionality is both violently integrated into the Greek CLL system and its neo-

[46] See Chapter V Part 1(i).
[47] ibid.

liberal orientation is foreign to its previous worker-protective nature. And the successful of the 'transplantation' provides empirical evidence 'that the degree of (non-) transplantability depends largely on the relationship to the distribution of power in society',[48] which is tilted towards the employers' and capital's side' during crises.

Secondly, the dominant justification for Greek CLL reforms has been almost invariably an *emergency* one. Greek CLL reforms were dictated as part of a broader program of fiscal adjustment and promotion of competitiveness, *presented* as necessary for overcoming the crisis. This rationale was used by the Courts to explain their deferential to the legislator proportionality test and was invoked by the legislator to bypass labour law's traditional protections on the ground that a de-construction of CLL was requested by the lenders. The *emergency* justification is causally interwined with the *abrupt* shape of the crisis trajectory. This is because the passage of CLL reforms was treated as necessary for realizing a violent fiscal adjustment and, crucially, was considered as a precondition of the receipt of bailout funds necessary for covering immediate Greek financing needs and therefore for avoiding an expulsion from the Eurozone.

These causes should be complemented by an additional one. From a normative-regulatory perspective, there is a *negative* cause related to the failure of the constitutional protection and international labour law instruments to prevent the CLL's de-construction So, in light of previous considerations, it becomes obvious that the *crisis* operates as an 'over-visible' causative event. Indeed, if developments are subjected to a counter-factual scrutiny by eliminating the stimulus of the 2008 and Eurozone debt economic crisis

[48] Richard Blanpain, 'Comparativism in Labour Law and Industrial Relations' in Richard Blanpain (ed), *Comparative Labour and Industrial Relations in industrialized Market Economies* (10th edn, Kluwer Law International 2010) 19.

developments, it is hard to envisage the same trajectory as nearly all reforms were imposed in the framework of conditionality and were crisis-justified.

When moving from Greece to Britain, the most reliable route for the inspector is to reverse its compass pointer. Contrary to Greece's exogenously-induced legal change, in Britain the reforms were exclusively *endogenously-generated.* They were driven by a totalizing tendency of the neo-liberal paradigm naturally maximizing its coherence by colonizing the remaining other-paradigm areas. Moreover, although the austerity discourse and rationale pervaded the Coalition Government rationalisation of legal changes, with regards to CLL this has been of less significance (unlike welfare reforms), not least because of the already de-regulatory CLL framework having exhausted its de-regulatory potential before the crisis. Therefore, whereas an austerity discursive plane establishing the springboard for reducing taxpayer burdens and supposed taxpayer justice drove certain changes (e.g check-off arrangements and facility time), more traditional crisis-independent justifications were invoked for other measures. These justifications ranged from efficient labour markets (Agricultural Wage Board Abolition), to the democratic rationale (Lobbying Act rules for third party campaigning and Labour Party reforms) along with transparency justifications (Lobbying Act provisions imposing new conditions for maintaining the register of union members). Moreover, unlike Greece, the political nature of the Government as a Coalition led by Conservative Party is seemingly a more salient explanatory factor for the developments. The Coalition nature may have prevented more radically de-constructive reforms, but at the same time the absence of the Labour Party may have facilitated the pursuit of the neo-liberal trajectory. Very crucially, the British case represent a 'gradual' case of neo-liberal continuity by consolidation[49] in

[49] See Chapter VI.

line with Crouch's insight that 'major change can happen through an accumulation of little changes, that is, incremental change with transformative potential'.[50]

Evidently, in the British case the crisis played a less visible 'background' role for CLL change so as theoretically, if the trajectory is subjected to counter-factual test eliminating the 2008 crisis stimuli, it is easier to envisage a similar trajectory as most reforms bear little relation to the economic crisis.

In this respect, a difference in respect to the use of the discourse of austerity common in both countries should be highlighted. In Greece, the austerity is justified more as having a temporary emergency quality whilst in the British political discourse is used as reflecting a permanent 'new normal' state of affairs related to prudent state management.

So, this is a notable causative divergence between the two systems: for Greece, the crisis has a *visible* strong causative connection as it unleashes its thrust to CLL reforms whilst for UK this connection is more indirect. The Crisis Equilibrium reading is to give a more illuminating and elaborate response on why this is the case.

(ii) The Crisis Equilibrium Unitary Reading

A major intended thesis' contribution is the articulation of the *Crisis Equilibrium* framework. The latter's function is not confined to be a mere organizing framework. Its analytical ambit encompasses *causal* claims. The framework specified in Chapter II offered a *unitary* set of fundamental determinants of CLL crisis trajectory universally applicable in capitalist countries experiencing economic crises. In Chapters IV and VI, we have demonstrated how the empirical insights in Greece and Britain could be

[50] Colin Crouch, *Capitalist Diversity and Change: Recombinant Governance and Institutional Enterpreuners* (OUP 2005) 75.

adequately explained by the framework.[51] To issue a brief reminder, the Crisis Equilibrium insights were coded in the following theorem.

Economic Rationalisation Force (ERF)-Counter-Legitimation Force (CLF) [Crisis Equilibrium] => Regulatory Measures (RM) + Non-Regulatory Measures (NRM)

Based on the theorem, the crucial determinants of the CLL crisis trajectory were set as follows: *(1) the ERF-CLF dialectic*, comprising the opposed dialectic between the economic rationalisation force of capital destruction requisite in every capitalist crisis and the counter-legitimation force of societal resistance to the reforms (weak force) or to capitalism (strong force*); (2)* however, this determinant was qualified by the additional principles of *complementarity* of regulatory and non-regulatory measures and the principle of *precedence* of non-regulatory over regulatory measures meaning that a state is more likely to take regulatory measures *only when the regulatory measures (e.g lawful dismissals)* are not adequate for capital destruction.

When applying this theorem to the two comparators, the two countries have evidently *different* types of Crisis Equilibria: *fragile* for Greece compared to the *stable* British one.

Indeed, for Greece the crisis equilibrium was burdened by a heightened level of economic rationalisation (a.k.a need of capital destruction) intensified by the inter-linkage of the Greek capitalism with international capitalism vis-à-vis Greece's Eurozone status and resisted by a considerable level of counter-legitimation forces. And as the *ERF-CLF* [Crisis Equilibrium] could not be satisfied by non-regulatory measures, in a manner fully conforming to our model prediction, the system introduces multiple *regulatory measures* in the form of a far-reaching alteration of CLL to permit this capital destruction. To give an example, as the collective agreements due to the favourability principle were not able

[51] See Chapters IV Part 5(ii) for Greece and Chapter VI Part 8 for the UK.

to implement the required internal devaluation, the only solution for the capitalists was to adopt regulatory measures by eliminating the principle of favourability. Very exceptionally, the so-called crisis of legality or the bypassing of constitutional protection should be seen as *radical regulatory measures* of functional equivalence with the *regulatory alteration of the CLL provisions* dictated by the urge of satisfying the needs of economic rationalisation quickly. The Greek system was thus caught in a dramatic highly-charged sequence of economic rationalisation necessarily demanding regulatory measures that, in turn, raised counter-legitimation forces. Hence it was a *fragile equilibrium* which could be termed as 'High Economic Rationalisation- High Counter-Legitimation' combined with the inadequacy of non-regulatory measures to perform the capitalism-required capital destruction.

The equilibrium strived for reducing its fragility by various state mechanisms for reducing the counter-legitimation forces. The outcome was a *pure capitalism-reproductive interventionism,* in that the change was according to the dictates of capitalist reproduction. This interventionism eventually shaped into the visible effect of the de-construction of the pre-crisis protective edifice. In doing so, it completely ignored the high levels of the CLF, thus exemplifying a classical instance of a *crisis dilemma* where the state had to choose between *economic rationalisation* and *counter-legitimation* and opted for the former.

As opposed to Greece, the British crisis equilibrium exhibited *stability*. As we argued in Chapter VI, this is not because the economic rationalisation process did not occur in Britain, which was the first casualty of the financial crisis. It was merely the result that, given the already deregulated environment, the *non-regulatory measures* (most characteristically low pay) could realise the need for capital destruction that was also

facilitated by de-facto deregulation (e.g institutional drift of the statutory union recognition process). This verifies our thesis about the precedence of the non-regulatory over regulatory measures. As a result, this did not lead to an over-dynamic trajectory of CLL measures since capital destruction operated in the silent background of legality. However, the British case presented us with a great puzzle as there were more neo-liberal reforms even in the face of the adequacy of non-regulatory measures to make the 'capital destruction'. To resolve this puzzle, in Chapter VI we adopted an account a class struggle account of ideology as effectively generating an automatic neo-liberalisation succeeding only *because of* the very low counter-legitimation pressures detected in the British system. Hence the UK Crisis Equilibrium could be termed as '*Medium-to-Low Economic Rationalisation (compared to Greece), Very Low Counter-Legitimation' associated with the adequacy of non-regulatory measures to realise the ERF-CLF dialectic.*

So, which insights could the previous reading generate regarding the causal dynamics? Firstly, it offers an *actor-centred* account of analysis integrating capitalist rationality and societal actions as expressed in a particular Crisis Equilibrium. The Economic Rationalisation Force represents capitalist rationality and Counter-Legitimation Force represents societal action. Indeed, the Crisis Equilibrium framework, within the confines of the specific comparative enquiry, is a more adequate guide for comprehending developments than pointing to the legal culture, constitution, legal origin or the long-standing societal ideology as for Greece all of these factors were apparently impotent. Secondly, the analysis demonstrates the crucial significance of the *ERF-CLF* dialectic as a *relative* balance of forces. What matters is not whether the counter-legitimation is high or low but whether in relative terms the counter-legitimation force is able to match the Economic Rationalisation Force intensity.

But here we need to admit that the British case contributes a novel insight to the equation, namely that of *ideology.* A major question posed was how it was possible to conceptualise the attack on unions' power in the British context when, in light of the de-regulated environment, unions do not impede the market operations and the process of economic rationalisation? Indeed, for both countries there is an easily cognisable ideological commonality as a *labour market conceptualisation* of CLL prevails. This conceptualisation establishes a truth regime of CLL legitimation based on its apparent contribution to the capitalist goals of profitability and competitiveness. Whilst recognising the force of ideology, we pointed to the fact that ideology does not have an *independent force,* but it matters to the extent that it can act upon the counter-legitimation force in order to supress its capitalist-threatening potential. It would be erroneous to think of ideology as an independent variable, because it may give the false impression that the effectiveness of the new reforms lies in the struggle of ideas. On the contrary, and the Greek case clearly demonstrates this, it was not ideology alone but also repression, crisis of legality, authoritarian constitutionalism[52] and the bypassing of political procedures that made the imposition of the measures effective. Therefore, while ideology matters, it should be treated only as *one* of the ways to impact on the counter-legitimation force, a hegemonic tool in the broader context of a class struggle. As soon as one perceives the Crisis Equilibrium dialectic between the ERF and CLF as one reflecting a class struggle where ideology is one tool to be used, the British case becomes immediately comprehensible as confirming that the capitalist class is to continuously attempt to try to totalise its dominance even in the absence of objective economic needs deriving from

[52] See Lukas Oberndorfer, 'A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism' in in Niklas Bruun, Klaus Lörcher and Isabelle. Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart 2014).

capitalist rationality. Finally, the last insight already hinted upon, is that the Crisis Equilibrium reading has the ability to expose the independent variables whilst stressing that other variables, such as legality, constitutionalism, legal origin, industrial relations ideology could be indeed *instrumentalised* and bypassed as soon as the ERF-CLF requires it. The Greek example perfectly affirms this view.

So, to summarise, the *Crisis Equilibrium* reading generates the following causal insights: (1) an *actor-centred* analytical frame integrating capitalism and society within a specified Crisis Theorem context, (2) the *relative* significance of the ERF-CLF dialectic, (3) integrates the value of ideology within a class struggle context, and (4) specifies the independent variables which matter for the CLL Crisis trajectories.

3. The Theoretical Contribution of the Comparative Enquiry: The Heteronomy of CLL

In the introductory Chapter, it was mentioned that the 2008 global economic crisis is essentially the second one of CLL. In the last one in 1929, Hugo Sinzheimer was insightfully spotting the destructive effect of economic crises for CLL. Therefore, in using a precious material existing in dramatic rarity, what insights could we get about the very nature of CLL? Admittedly any theoretical abstraction should be qualified by the fact the herein comparison contained two countries. But these countries were unique in the following sense. Their CLL systems were radically different in all respects *except for* for the fact that the crisis stimuli injected into their trajectories. This could generate some theoretical conclusions based on Mill's method of agreement, according to which if the same phenomenon occurs in two instances having only one circumstance in common then

this circumstance is the cause (or the effect) of the phenomenon.[53] This should be taken also schematically, but in our case capitalism is the common factor uniting developments in both countries.

Evidently, the Travlos-Tzanetatos' *seismograph thesis* of labour law in crises[54] found remarkable confirmation within the thesis. The observer of CLL trajectories in both countries accesses in a condensed form a richer picture about phenomena ranging from capitalist contradictions, systems' attempt to return to profitability, class struggle involving attacking unions' power, undermining rule of law for ensuring neo-liberal colonisation of the domestic regulatory sphere and the societal resistance in the form of counter-legitimation. Why is this case? Why does labour law operate as a seismograph? The answer resides in a clear finding of the herein thesis, regarding the 'strong material responsiveness' of CLL in the context of crisis, particularly relevant for the Greek case. When capitalism cannot undertake its adjustments required by its rationalisation, then CLL is more likely to transform so as to ensure the preservation of capitalism. This is natural, since CLL regulates the capitalist mode of production.

In turn, this operation cannot but linked by the *fundamental contradiction of CLL,* an observation developed in Chapter II.[55] Armed with this ontological thesis, the developments from a theoretical perspective gain better intelligibility. It is not that CLL suddenly changed its function or orientation, but merely that its *capitalism-reproductive* function gained an *articulated expression.* Now capitalists can confidently elevate the capitalism-reproductive function into an articulated objective, more commonly through

[53] John Stuart Mill, *A System of logic, ratiocinative and inductive,* vol. 1 (3rd edn, Parker 1851) 393-403. See discussion in Chapter III Part 2(iii).
[54] Dimitris Travlos-Tzanetatos, *Εργατικό Δίκαιο και Βιομηχανική Κοινωνία* (Παπαζήσης 1977) 22 (in Greek).
[55] See Chapter II Part II.

the labour market or competitiveness aims. This development signals a new evolutionary stage of capitalism which has diminished the zone of attainability of the protective function and protective outcomes for CLL.[56] This result, in our analysis, is to be attributed not just to the capitalist needs but on the apparent weakness of the of counter-legitimation force, particularly of the 'strong variety' resisting capitalism. This weakness unavoidably created the conditions for a CLL de-construction by the dilution of its protective function.

Let us associate these findings with two classic Marxist theses: *base-superstructure* operation of CLL and state bias. As for the former, a strong connection could be traced between, *on the one hand*, the economic forces or relations of production developed in the context of economic rationalisation, and *on the other hand*, with CLL reforms for the Greek case. The pure economist conception of public interest promoting delegitimation and separation of labour law from its social foundations, constitutes a principal manifestation of CLL's subordination to the economic factors. A similar interconnection could be identified in the British case where the regulatory environment is directly adapted to the imperatives of a liberal, increasingly globalised and financialized economy.

The same applies for the thesis about *state dependence* on capitalist relations. The finding, suggesting a *Tendency for the State to Opt for Economic Rationalisation* in cases of crisis dilemmas, is confirmed by the Greek case. The crisis has provoked a pattern of a sudden conversion, turning swiftly a social-democratic state with protective CLL to a de-regulatory state that sidestepped constitutionally-entrenched and socio-politically dominant collective labour rights. The rapid change of the nature of state intervention

[56] For this concept as denoting the existential possibilities of CLL derived from the associational power of unions and the interests of capitalists see Eric Wright, 'Working-Class Power, Capitalist-Class Interests, and Class Compromise' (2000) 105(4) American Journal of Sociology 957.

from *protective* to *hostile* forms is another manifestation of labour law's subordination. Whereas these processes that make the function of CLL parochial and pretentious *prima facie* indicate the dominance of economic base, the influence of *ideology*, in our case neo-liberalism, should not be underestimated. Ideology cements the particular form and narratives of economic rationalisation that then determine CLL's developments. However, ideology seems to be more an expression of dominant class interests of capital, whivh having been internationalized capitalize on the *instrumental* value of the ascending neoliberalism for curbing legitimacy considerations and preserving social coherence, rather than an autonomous force In this context, neoliberalism embraced by state-led deregulation should be better viewed as 'the response of capital and state, *the latter expressing the full and long-term interests of capital,* against the great power that labour classes, their trade unions and political organizations and the other social movements have acquired during the period 1960-1975'.[57]

In this scheme, the superstructural elements (state, law) are subordinated to the principal economic imperatives, thus dismissing the factual currency of relevant *idealising* accounts of law or state. Projecting this observation into the terrain of constitutionalisation of labour rights' debate, the economic subjugation of law as well as of the constitution to the economic system powerfully illustrates the existence of inherent capitalist-imposed limits that restrain the *protective* effects of *constitutionalisation* for workers.

Therefore, the comparison in a 30-year time reference clearly illustrated that the transformation of wider economic models taking place since 1980s has determined patterns of deregulation that are now becoming convergent in both countries. This offers

[57] Dimitris Katsoridas, 'Κρίση του συστήματος ή κρίση της εργασίας;' (2009) 55 ΕΕργΔ 41, 42-43 (in Greek) (emphasis added).

strong evidence about an ultimate concordance between the legal superstructure of these countries and their economic transformation. While Hepple's statement that 'there is no mechanical connection between an economic ''base' and a ''superstructure'' of labour law'[58] may retain validity only as an ultimate rejection of a fully automatic version of superstructure, it appears that having reached an *economic novum*, the economic base place more constraints to the permissible actions of regulation of collective labour relations, thus dramatically reducing any relative autonomy of labour law. Whether such a process continues unhindered and 'mark the entry of a society in a different stage' and 'the emergence of a free, unregulated labour market of the sort that predated the birth of collective bargaining 100 years ago'[59] as Purcell predicts for Britain or a historical reversal reviving *collectivism* will take place, as Kelly's application of 'long wave'[60] theory in collective mobilization seem to suggest,[61] is an open question. But the herein enquiry of crisis transformations soundly confirmed the extreme *heteronomy* of CLL whose fate is inescapably tied to capitalism and society resisting its totalizing commodifying tendencies as well as offering new perspectives for explaining this heteronomy.

4. From Here to Where? A Post-Enquiry Note

The thesis narrated a story of decline and destructive transformation for CLL. It

[58] Bob Hepple, 'Introduction' in Bob Hepple (ed), *The Making of Labour Law in Europe* (Mansell 1986) 14.
[59] John Purcell, 'The end of Institutional Industrial Relations' (1993) 64(1) The Political Quarterly 6, 23.
[60] 'Long-waves are now commonly defined as regular patterns of fluctuation in one or more economic indicators (usually prices, output and profit rates) synchronized across countries, with a total span of approximately fifty years, consisting of a twenty-five year 'upswing'(or sustained growth), and twenty-five years of downswing' (sporadic growth and recession)' John Kelly, *Rethinking Industrial Relations: Mobilization, Collectivism and Long-waves* (Routledge 1998) 83.
[61] For the applications of long-wave theory to mobilization see Kelly (ibid); For original conception of long-waves in economic cycles see Nikolai Kondratieff, 'The long waves in economic life' (1935) 17(6) The Review of Economics and Statistics 105.

documented the astounding collapse of the Greek protective edifice as it moved closer with a spectacular neo-liberal bang to the neo-liberal CLL itself moving further towards the neo-liberal spectrum. The new status quo is one of convergence of two systems in a diluted form. CLL becomes increasingly a poor 'guardian of human being in an age of almost unrestrained materialism'.[62] At the moment of writing, neo-liberalism emerges triumphant, not least because of a Greek left-wing Syriza Government elected initially on an anti-austerity platform has humilated itself by embarrassingly implementing harsh austerity reforms and betraying the popular mandate.

CLL transformations described by the thesis constitute the capitalism's outstanding trophy, pursuant to a remarkable process of capitalist re-defining of its own failures into a thrust for undermining not just the traditional foundations of CLL as resting *in part* upon providing some collective protections of workers against the dull capitalist forces but the very structures of societal solidarity, justice and democracy. Whilst a regrettable outcome, it could not have been otherwise. It would have been a paradox for CLL to thrive when neo-liberalism moves humanity to a dark alley where once against powerless employees are to face individually the powerful employers, and the biased capitalist state pushes CLL toward its pre-history, namely toward its non-existence.

Escaping this regression is not and will never be an issue of juridical norms or juridical constructions. Law has inescapable limits. CLL is -as Lyon-Caen warned us- after all a *law of capitalism.*[63] Consequently, to quote Karl Klare, the 'struggle to emancipate labor must also be a struggle to emancipate law itself'.[64] Society needs to exercise a historical

[62] Hugo Sinzheimer quote cited by B. Hepple, 'The Future of Labour Law' (1995) 24(4) ILJ 303, 322.
[63] Gérard Lyon-Caen, 'Les fondements historiques et rationnels du Droit du Travail' (original in 1950) reprinted in (2004) Droit Ouvrier 52, 56 (in French).
[64] Karl Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941' (1978) 62 Minnesota Law Review 265, 339.

form of autonomy based on what the Greek Marxist philosopher Castoriades calls radical social imaginary and social dimension of autonomy defined as societies moving beyond the instituted, breaking the boundaries of the established and critically unchain itself from the repressive societal structures.[65] In our terminology, to activate the *latent* counter-legitimation force.

Let us hope that the darkest hour for society and labour law may be just before the dawn and that the death whimpers of CLL and the suffering muted crisis' voices of millions of workers and their families in the UK, Greece and across the globe are to be the fertilizing seeds for a new creative process of collective re-imagination, radical transformation and re-invention. As in a Sisyphean task, humanity confronts once again the dystopian forces of commodifying total markets.[66]

Let us hope…and (re)act…

[65] Cornelius Castoriades, *The Imaginary Institution of Society* (Polity Press 1987) 369-372.
[66] Alain Supiot, *The Spirit of Philadelphia: Social Justice vs. the Total Marke*t (Verso 2012)

BIBLIOGRAPHY

Abbott B and Williams S, 'Widening the ''representation gap''? The implications of the ''lobbying act'' for worker representation in the UK' (2014) 45(6) Industrial Relations Journal 507.

Abbott K and Snidal D, 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421.

Academy of Athens, *Ιστορία του Ελληνικού Έθνους* Τόμος 16 (Ακαδημία Αθηνών 2000). (in Greek).

Achtsioglou E and Doherty M, 'There Must be Some Way out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm' (2014) 20(2) European Law Journal 219.

Adams A, Freedland M and Prassl J, 'The ''Zero-Hours Contracts''': Regulating Casual Work or Legitimating Precarity?' (2015) University of Oxford Legal Research Paper Series No. 11/2015.

Adams M and Griffiths J, 'Against ''Comparative Method'': explaining similarities and differences' in M Adams and J Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press 2012).

Adams M, Fabbrini F and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014).

Adams Z and Deakin S, *Re-regulating Zero Hours Contracts* (Institute of Employment Rights 2014).

Amable B, *The Diversity of Modern Capitalism* (Oxford University Press 2003).

Aristotle, *The Politics of Aristotle* (Clarendon Press 1946).

Armingeon K and Baccaro L, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012) 41(3) Industrial Law Journal 254.

Arthurs H, 'Labour and the Real Constitution' (2007) 48(2) Les Cahiers de droit 3.

Association of Professional Political Consultants, Response to the Committee on Standards in Public Life 'Lobbying: Issues and Questions Paper' (*APPC*, 31 July 2013) http://www.appc.org.uk/appc-submission-to-lobbying-issues-and-questions/ accessed 10 May 2015.

Atiyah P, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979).

Aust a, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007).

Baccaro L and Howell C, 'A Common Neoliberal Trajectory: The Transformation of Industrial Relations in Advanced Capitalism' (2011) 39(4) Politics & Society 521.

Bach S and Gall G, 'Public Service Voice under strain in an Era of Restructuring and Austerity' in A Bogg and T Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press 2014).

Bailey D, ‘Contending the Crisis: what role for extra-parliamentary British politics’ (2014) 9(1) British Politics 68.

Barker K and Harrison T, *The Lobbying Act: A Waste of Time and Resources* (nfpSynergy, February 2015).

Barnard C, ‘The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective’ (2012) 41(1) Industrial Law Journal 98.

Barnard C, *EU Labour Law* (4 th edn, Oxford University Press 2012).

Bayliss F J, *British Wage Councils* (Blackwell 1962).

Beck U, *World risk society* (Polity Press 1999).

Beech M, ‘A Tale of Two Liberalisms’ in Matt Beech and Simon Lee (eds), *The Cameron-Clegg Government: Coalition Politics in an Age of Austerity* (Palgrave 2011).

Bercusson B and Estlund C, ‘Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions’ in B Bercusson and C Estlund (eds), *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions* (Hart 2008).

Bercusson B, ‘Preface’ in B Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights* (Nomos 2006).

Bercusson B, *European Labour Law* (Cambridge University Press 2009).

Berntzen E, ‘Democratic Socialism in Spain, Portugal and Greece’ in L Karvonen and J Sundberg (eds), *Social Democracy in Transition* (Dartmouth 1991).

Blair T, ‘We Don’t Look Back to the 1970s’ quoted in Chris Howell, *Trade Unions and the State: The Construction of Industrial Relations in Britain, 1890-2000* (Princeton University Press 2005).

Blanpain R, ‘Comparativism in Labour Law and Industrial Relations’ in R Blanpain (ed), *Comparative Labour and Industrial Relations in industrialized Market Economies* (10th edn, Kluwer Law International 2010).

Bligh J, *Keeping the Wheels turning: Modernising the Legal Framework of Industrial Relations* Brief (September 2010, Confederation of Business and Industry).

Blyth M, *The History of a Dangerous Idea* (Oxford University Press 2013).

Bogg A and Ewing K, ‘Freedom of Association’ in G Mundlak and M Finkin (eds), *Comparative Labor Law* (Edward Elgar 2015).

– – ‘The Implications of the *RMT case*’ (2014) 43(3) Industrial Law Journal 221.

– – *The Political Attack on Workplace Representation* (Institute of Employment Rights 2013).

Bogg A and Novitz T, ‘The purposes and techniques of voice: Prospects for continuity and change’ in A Bogg and T Novitz (eds), *Voices at work: continuity and change in the common law world* (Oxford University Press 2014).

Bogg A, ‘New Labour, Trade Unions and the Liberal State’ (2009) 20(3) King’s Law Journal 403.

– – ‘The Death of Statutory Union Recognition in the United Kingdom’ (2012) 54(3) Journal of Industrial Relations 409.

– – ‘The Hero’s Journey: Lord Wedderburn and the ‘‘Political Constitution’’ of Labour Law’ (2015) 44(3) Industrial Law Journal 299.

– – ‘The Mouse that Never Roared: Unfair Practices and Union Recognition’ (2009) 38(4) Industrial Law Journal 390.

– – ‘Viking and Laval: The International Labour Law Perspective’ in M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart 2014).

– – *The Democratic Aspects of Trade Union Recognition* (Hart 2009).

Boggs C, *The Two Revolutions: Antonio Gramsci and the Dilemmas of Western Marxism* (South End Press 1984).

Botero J, Djankov S, La Porta R, Lopez de Silanes F and Shleifer A, ‘The Regulation of Labor’ (2004) 119(4) The Quarterly Journal of Economics 1339.

Braithwaite J, *Restorative Justice & responsive regulation* (Oxford University Press 2002).

Braithwaite R, *Scientific explanation: a study of the function of theory, probability and law in science* (Cambridge University Press 1953).

Brenner N, Peck J and Theodore N, ‘New constitutionalism and variegated neo-liberalization’ in S Gill and C Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press 2014).

Brodie J, ‘New Constitutionalism, neo-liberalism and social policy’ in S Gill and Cl Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press 2014).

Brown G, *Beyond the crash: overcoming the first crisis of globalisation* (Simon & Schuster 2011).

Brown H P, ‘The Counter-Revolution of Our times’ (1990) 29(1) Industrial Relations: A Journal of Economy and Society 1.

Brown W, Deakin S, Nash D and Oxenbridge S, ‘The Employment Contract: From Collective Procedures to Individual Rights’ (2000) 38(4) British Journal of Industrial Relations 611.

Bruun N and Hepple B, ‘Economic Policy and Labour Law’ in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004* (Hart 2009).

Bruun N, ‘The Changing Normative Field of Labour Law’ in A Numhauser-Henning and M Ronnmar (eds), *Normative Patterns and Legal Development in the Social Dimension of the EU* (Hart 2013).

Buira A, ‘An Analysis of IMF Conditionality’ in A Buira (ed), *Challenges to the World Bank and IMF: Developing Country Perspectives* (Anthem Press 2003).

Buttigieg J, ‘The Contemporary Discourse on Civil Society: A Gramscian Critique’ (2005) 32(1) Boundary 2 33.

Cameron D, 'Rebuilding trust in politics (8 February 2010) excerpts from 'David Cameron warns lobbying is next political scandal' (*Telegraph*, 8 February 2010) <http://www.telegraph.co.uk/news/election-2010/7189466/David-Cameron-warns-lobbying-is-next-political-scandal.html> accessed 15 March 2015.

– –, 'The Age of Austerity' speech (*Conservative Party Speeches*, 26 April 2009) <http://conservative-speeches.sayit.mysociety.org/speech/601367> accessed 13 June 2015.

Carrera S, Guild E, Hernanz N and Jowell J, *The triangular relationship between fundamental rights, democracy and the rule of law in the EU: Towards an EU Copenhagen Mechanism*, Study Commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (European Parliament 2013) 4.

Carroll W and Ratner R S, 'Between Leninism and Radical Pluralism: Gramscian Reflection on Counter-Hegemony and the Social Movements' (1994) 20(3) Critical Sociology 3.

Castells M, 'The Crisis of Global Capitalism: Towards a New Economic Culture' in C Calhoon and G Derlguian (eds), *Business as Usual: The Roots of the Global Financial Meltdown* (New University Press 2011).

Castoriades C, *The Imaginary Institution of Society* (Polity Press 1987) 369.

Cella G P and Treu T, 'National Trade Union Movements' in R Blanpain and J Baker (eds), *Comparative labour law and industrial relations in industrialized market economies* (Kluwer 2010).

Chanos A, 'New Constitutionalism and the Principle of Proportionality: The Case of the Greek Constitution' (2016) 16 *Diritto & Questioni Pubbliche* 191

Charity Commission, *Operational Case Report Oxfam (202918)* 2.

Chomsky N, *Occupy* (Penguin Books 2012).

Chorev N and Babb S, 'The Crisis of the Neoliberalism and the future of international institutions: A Comparison of the IMF and the WTO' (2009) 38(5) Theory and Society 459.

Churchill W, House of Commons (30 May 1910) excerpt in M Gilbert (ed), *Churchill: The power of words: his remarkable life recounted through his writings and speeches* (Bantam 2012).

Clam J, 'What is a Crisis?' in P Kjaer, G Teubner and A Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011).

Clark J and Wedderburn L, 'Juridification: A Universal Trend?' in G Teubner (ed), *Juridification of social spheres: a comparative analysis in the areas of labor, corporate, antitrust, and social welfare law* (Gryter 1987).

– – 'Modern Labour Law: Problems, Functions and Policies' in L Wedderburn, R Lewis and J Clark (eds), *Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon Press 1983).

Clegg H, *The Changing System of Industrial Relations in Great Britain* (Blackwell 1979).

Clogg R, *Greece, 1981-89: The Populist Decade* (Macmillan 1993).

Coates K and Topham T, *Trade Unions and Politics* (Blackwell 1986).

Collins H, 'Is There a Third Way in Labour Law?' in A Giddens (ed), *The Global Third Way Debate* (Polity Press 2001).

– – 'Labour Law as a Vocation' (1989) 105 Law Quarterly Review 468.

– – 'Regulating the employment relation for Competitiveness' (2001) 30(1) Industrial Law Joutnal 17.

– – 'The Productive Disintegration of Labour Law' (1997) 26 Industrial Law Journal 295.

– – *Employment Law* (2nd edn, Oxford University Press 2010).

Collins H, Ewing K and McColgan A, *Labour Law* (Cambridge University Press 2012).

– – *Marxism and Law* (Oxford University Press 1982).

Collins R, *The Collins Review into Labour Party Reform* (February 2014).

Comte A, *The Positive Philosophy of Auguste Comte*, vol 2 (Batoche Books 2000).

Conservative Party, *The Conservative Party Manifesto (General Election 2015).*

Contiades X and Fotiadou A, 'How Constitutions reacted to the Financial Crisis' in X Contiades (ed), *Constitutions in the Global Financial Crisis* (Ashgate 2013).

– – 'Social Rights in the Age of Proportionality: Global economic crisis and constitutional litigation' 2012 10(3) International Journal of Constitutional Law 660.

Contiades X and Tassopoulos I, 'The Impact of the Financial Crisis on the Greek Constitution' in X Contiades (ed), *Constitutions in the Global Financial Crisis* (Ashgate 2013).

Costamagna F, 'The Impact of Stronger Economic Policy Co-ordination on the European Social Dimension: Issues of Legitimacy' M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014).

Cotterrell R, 'Comparative Sociology of Law' in D S Clark (ed), Comparative Law and Society (Edward Elgar 2014).

Countouris N and Freedland M, 'Introduction: The myths and realities of ''Social Europe''' in N Countouris and M Freedland, *Resocialising Europe in a time of Crisis* (Cambridge University Press 2013).

Coutu M, 'With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labor Law' (2012-2013) 34 Comparative Labor Law and Policy Journal 605.

Creighton B, 'International Labour Standards and Collective Bargaining' in B Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia Fair Work's Act in International Perspective* (Routledge 2012).

Crouch C, 'Atavism and Innovation: Labour Legislation and Public Policy since 1979 in Historical Perspective' (1996) 2 Historical Studies in Industrial Relations 111.

– – 'Changing Perceptions of a Public Interest' in L Wedderburn (ed), *Labour Law and the Community: Perspectives from the 1980s* (Institute of Advanced Legal Studies 1982).

– – ‘Entrenching neo-liberalism: the current agenda of European social policy’ *in* N Contouris and M Freedland (eds), *Resocialising Europe in a time of Crisis* (Cambridge University Press 2013).

– – ‘Entrenching Neoliberalism: the current agenda of European Social Policy’ in N Countouris and M Freedland, *Resocialising Europe in a time of Crisis* (Cambridge University Press 2013).

– – ‘The Terms of the Neo-Liberal Consensus’ (1997) 68(4) Political Quarterly 352.

– – *Capitalist Diversity and Change: Recombinant Governance and Institutional Enterpreuners* (Oxford University Press 2005).

Crum B, ‘Saving the Euro at the Cost of Democracy’ (2013) 51(4) Journal of Common Market Studies 614.

D’Antona M, *‘Labour Law at the Century’s End: An Identity Crisis?’* in J Conaghan, R M Fischl, K Klare (eds), *Labour Law in an Era of Globalization* (Oxford University Press 2002).

Dahan S, ‘The EU/IMF Financial Stabilisation Process in Latvia and Its Implications for Labour Law Social Policy’ (2012) 41(3) Industrial Law Journal 305.

Dahl R, *A Preface to Economic Democracy* (Polity Press 1986).

– – *Pluralist Democracy in the United States: Conflict and Consent* (Rand McNally 1967).

Daintith T C, ‘The Techniques of Government’ in J Jowell and D Oliver (eds), *The Changing Constitution* (Oxford University Press 1994).

Danneman G, ‘Comparative Law: Study of Similarities or Differences’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

Davies A C L, ‘Migrant Workers in Agriculture’ in C Costello and M Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014).

– – *EU Labour Law* (Edward Elgar 2012).

Davies P and Freedland M, *Labour Legislation and Public Policy* (Clarendon Press 1993).

– – *Towards a Flexible Labour Market* (Oxford University Press 2007).

Deakin S and Morris G, *Labour Law* (5th edn, Hart 2009) .

Deakin S and Pistor K (eds), *Legal Origin Theory* (Edward Elgar 2012).

Deakin S and Wilkinson F, *The Law of the Labour Market* (Oxford University Press 2005).

Dedoussopoulos A, Aranitou V, Koutentakis F and Maropoulou M, ‘Assessing the impact of the memoranda on Greek labour market and labour relations’ (2013) ILO Working Paper No. 43 39.

Department for Business, Innovation and Skills, *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014: Consultation on Trade Union Assured Register of Members* (September 2014).

Department for Business, Innovation and Skills, *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill: Certification of trade union membership details: discussion paper* (July 2013).

Department for Communities and Local Government, *Taxpayer funding of trade unions: Delivering sensible savings in local government* (March 2013).

Department for Environment, Food and Rural Affairs, *Consultation on the Future of the Agricultural Wages Board for England and Wales, and Agricultural Wage Board for England and Wales, and Agricultural Wages Committees and Agricultural Dwelling House Advisory Committees in England* (October 2012).

Department of Employment, *Employment for the 1990s* Cm 540 (1988).

Department of Trade and Industry, *Burdens on Business: Report of a Scrutiny of Administrative and Legislative Requirements* (Her Majesty's Stationery Office 1985).

Derrida J, 'Force of Law: The ''Mystical Foundation of Authority''' (1989-1990) 11 Cardozo Law Review 921.

Dicey A, *Lectures on the relation between law & public opinion in England during the nineteenth century* (2nd edn, Macmillan 1914).

Dickens L and Hall M, 'Labour Law and Industrial Relations' in P Edwards (eds), *Industrial Relations: Theory and Practice* (2nd edn, Blackwell 2003).

– – 'The State: Labour Law and Industrial Relations' in P Edwards (ed), *Industrial Relations: Theory and Practice in Britain* (Blackwell 1995).

Dinas E, Rori L, 'The 2012 Greek Parliamentary Elections: Fear and Loathing in the Polls' (2013) 36 (1) West European Politics 270.

Dogan M and Pelassy D, *How to Compare Nations* (2nd edn, Chatham Publishers 1990).

Doorey P, *The Conservative Party and the Trade Unions* (Routledge 1995).

Douzinas C and Gearey A, *Critical jurisprudence: the political philosophy of justice* (Hart 2005).

Douzinas C, *Philosophy and Resistance in the Crisis* (Polity Press 2013).

Dowling E, Feigenbaum A, Pell S and Staley K, 'Occupy London' (2012) 111(3) *South Atlantic Quarterly* 608.

Downing E and Kennedy S, *Food Banks and Food Poverty Standard Note SN 06657* (House of Commons Library 2014).

Dukes R, 'A Global Labour Constitution' (2014) 65(3) Northern Ireland Legal Quarterly 283.

– – 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011).

– – 'The Statutory Union Recognition Procedure 1999: No Bias in Favour of Recognition? (2008) 37(3) Industrial Law Journal 236.

– – *The Labour Constitution* (Oxford University Press 2014).

Dunlop J, *Industrial Relations Systems* (Henry Holt Company 1985).

Durkheim E, *The Rules of Sociological Method: and selected texts on sociology and its method* (Macmillan Press 1982).

Eaton G, 'Miliband's gamble on union funding could cost Labour millions - but it is one he had to take' (*NewStatesman*, 9 July 2013) <http://www.newstatesman.com/politics/2013/07/milibands-gamble-union-funding-could-cost-labourmillions-it-one-he-had-take> accessed 15 June 2014.

Economou M, Madianos M, Peppou L E, Theleritis C, Patelakis A, Stefanis C, 'Suicidal ideation and reported suicide attempts in Greece during the economy crisis' (2013) 12(1) World Psychiatry 53.

Electoral Commission, *A Regulatory review of the UK's party and election finance laws: recommendation change,* June 2013.

Eliot T S, '*The Hollow Men'.*

Estlund C, 'The Death of Labor Law' (2006) 2 Annual Review of Law & Social Science 105.

Ewing K and Hendy J, 'The Dramatic Implications of Demir and Baykara' (2010) 39(2) Industrial Law Journal 2.

– – *Trade Union Rights: The Short Story* (Institute of Employment Rights 2012).

Ewing K, '"The Sense of Measure": Old Wine in New Bottles, or New Wine in Old Bottles, or New Wine in New Bottles?' (2010) 19(2) Social & Legal Studies 231.

– – 'Another Political Attack on Free Speech' (*UK Constitutional Law Blog*, 8 July 2013) <http://ukconstitutionallaw.org> accessed 17 March 2015.

– – 'The Function of Trade Unions' (2005) 34(1) Industrial Law Journal 1.

– – 'The Death of Labour Law' (1988) 8(2) Oxford Journal of Legal Studies 293.

– – The Death of Social Europe' (2015) 26(1) King's Law Journal 76.

– – 'The Function of Trade Unions' (2005) 34(1) Industrial Law Journal 1.

– – 'The Gagging Act: What can be done' (*Institute of Employment Rights*, 3 March 2015) <http://www.ier.org.uk/blog/gagging-act-what-can-be-done> accessed 25 March 2015.

– – 'The Importance of Trade Union Political Voice: Labour Law Meets Constitutional Law' in A Bogg and T Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press 2014).

– – 'The State and Industrial Relations: "Collective-Laissez Faire" Revisited' (1998) 5 Historical Studies of Industrial Relations 1.

– – 'Trade Unions and the Constitution: The Impact of the New Conservatives' in C Graham, T Prosser (eds), *Waiving the Rules: the Constitution under Thatcherism* (Open University Press 1988).

– – ‘Transparency of Lobbying Bill etc. - A Note on Potential Human Rights Implications’ (Institute of Employment Rights 2013).

– – *Britain and the ILO* (Institute of Employment Rights 1994).

– – *The Cost of Democracy* (Hart 2007).

– –The Death of Social Europe’ (2015) 26(1) King’s Law Journal 76.

– – *Trade Unions, the Labour Party and Political Funding: The Next Step: Reform with restraint* (Catalyst Forum 2002).

– – *Trade Unions, the Labour Party and the Law: A Study of the Trade Union Act 1913* (Edinburgh University Press 1982).

Fairclough N, *Language and Power* (2nd edn, Pearson 2001).

Ferge Z, ‘The Individualisation of the Social: The Changed Welfare Paradigm’ (1997) 31(1) Social Policy & Administration 20.

Ferguson M, ‘Ed Miliband interview: the biggest issue we face is inequality’ (*LabourList*, 6 May 2014) <http://labourlist.org/2014/05/ed-miliband-interview-the-biggest-issue-we-face-is-inequality/> accessed 7 August 2015.

Finkin M, ‘Comparative Labour Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

Fischer-Lescano A, *Human Rights in Times of Austerity Policy: The EU Institutions and the conclusion of Memoranda of Understanding* (Centre of European Law and Politics 2014).

Flanders A, ‘The Tradition of Voluntarism’ (1974) 12(3) British Journal of Industrial Relations 352.

– – ‘Trade Unions and Politics’ (essay published in 1961) in *Management and Unions* (Faber and Faber 1970).

– – *Management and Unions: The Theory and Reform of Industrial Relation* (Faber and Faber 1970).

Ford M and Novitz T, ‘An Absense of Fairness…Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44(4) Industrial Law Journal 522.

Foucault M, Lecture of 17 January 1979 in Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-79* (Palgrave Macmillan 2008).

Fredman S and Morris G, ‘The State as Employer: Is it Unique?’ (1990) 19(3) Industrial Law Journal 142.

– – *The state as employer: labour law in the public services* (Mansell 1989).

Fredman S, ‘The Ideology of New Labour’ in C Barnard, S Deakin and G Morris (eds), *The Future of Labour Law* (Hart 2004).

– – ‘The New Rights: Labour Law and Ideology in the Thatcher Years’ (1992) 12(1) Oxford Journal of Legal Studies 24.

Freedland M and Kountouris N, *The legal construction of personal work relations* (Oxford University Press 2011).

Fudge J, 'Constitutionalizing Labour Rights in Europe in T Campbell, K Ewing and A Tomkins, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011).

Galbraith K, *American Capitalism: The Concept of Countervailing Powe*r (Hamish Hamilton 1957).

Gall G, 'Union Recognition in Britain: The End of Legally Induced Voluntarism? (2012) 41(4) Industrial Law Journal 407.

Gallas A, 'The silent treatment of class domination: ''critical'' comparative capitalism scholarship and the British State' (2014) 38(1) Capital & Class 225.

Gamble A, *The free economy and the strong state: the politics of Thatcherism* (2nd edn, Macmillan 1994).

Gamble A, *The Spectre At the Feast: Capitalist Crisis and the Politics of Recession* (Palgrave Macmillan 2008).

Gamson W, *Talking Politics* (Cambridge University Press 1992).

Gerapetritis G, 'Η οικονομική κρίση ως στοιχείο απορρύθμισης της ιεραρχίας των πηγών του δικαίου: Νομοτέλεια η άλλοθι;' (2012) 60(10) Νομικό Βήμα 2754 (in Greek).

Giddens A, *A Contemporary Critique of Historical Materialism,* vol 1 (Macmillan 1981).

– – *The Third Way: The Renewal of Social Democracy* (Polity Press 1998).

Gill S, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' (1998) 3(1) New Political Economy 5.

'GMB slashes Labour Party affiliation fees from £1.2 million to £150,000' (*LabourList*, 4 September 2013) <http://labourlist.org/2013/09/gmb-socislashes-labour-party-affiliation-fees-from-1-2-million-to-150000/> accessed 15 June 2014.

Gold J, *The legal character of the Fund's stand-by arrangement and why it matters* IMF Pamphlet Series no 35 (International Monetary Fund 1980).

Goldin A, 'Labour Subordination and the Subjective Weakening of Labour Law' in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006).

Gramsci A, 'Soviets in Italy' (1968) 51/1 New Left Review 28.

– – *Prison Notebooks,* vol 3 (Columbia University Press 2007).

– – *Selection from Prison Notebooks* (Lawrence & Wishart 1971).

Greek Government Programme (General Secretariat for Press and Information 1981).

Green J and Lavery S, 'The Regressive Recovery: Distribution, Inequality and State Power in Britain's Post-Crisis Political Economy' (2015) New Political Economy 1.

Grimshaw D, Rubery J, 'The end of the UK's liberal collectivist social model? The implications of the coalition government's policy during the austerity crisis' (2012) (36) Cambridge Journal of Economics 105.

Gunther R, Pühle H-J and Diamantouros N, 'Introduction' in R Gunther, N Diamantouros and H-J Pühle (eds), *The Politics of Democratic Consolidation: Southern Europe in Comparative Perspective* (Hopkins University Press 1995).

Gutteridge H C, *Comparative Law: An Introduction to the Comparative Method by Legal Study & Research* (2nd edn, Cambridge University Press 1971).

Habermas J, 'The Public Sphere: An Encyclopedia Article' (1974) 3 New German Critique 49.

– – *Legitimation Crisis* (Polity Press 1988).

Hall P and Soskice D, 'An Introduction to Varieties of Capitalism' in P Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2011).

Harrison M, *Trade Unions and the Labour Party since 1945* (George Allen & Unwin 1960).

Hart H L A, *The Concept of Law* (3rd edn, Oxford University Press 2012).

Harvey D, 'Neo-Liberalism as Creative Destruction' (2006) 88(2) Human Geography 145.

– – *A Brief History of Neoliberalism* (Oxford University Press 2005).

– – *The Enigma of Capital: and the crises of Capitalism* (Profile Books 2011).

Hatje A, 'The Economic Constitution within the Internal Market' in A Bogdany and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2011).

Hay C, 'Narrating Crises: The Discursive Construction of the ''Winter of Discontent''' (1996) 30 (2) Sociology 253.

– – *The Failure of Anglo-liberal Capitalism* (Palgrave Macmillan 2013).

Hayek F, *Law, Legislation and Liberty*, vol 3 (Routledge & Kegan Paul 1979).

– – *1980s Unemployment and the Unions: Essays on the impotent price structure of Britain and monopoly in the labour market* (Institute of Economic Affairs 1980).

– – *Law, Legislation and Liberty,* vol 3 (Routledge & Kegan Paul 1979).

– – *The Constitution of Liberty* (Routledge & Kegan Paul 1960).

– – *The Road to Serfdom* (Routledge 1944).

Hayes B, 'The Gagging bill looks designed to undermine trade unions' (*Guardian*, 29 January 2014) <http://www.theguardian.com/commentisfree/2014/jan/29/lobbying-bill-trade-unions-law> accessed 23 July 2015.

Hayes L and Novitz T, *Trade Unions and Economic Inequality* (Institute of Employment Rights 2014).

Hayton R, 'The path to (sharing) power: The Conservative Party' in G Baldini and J Hopkin (eds), *Coalition Britain: The UK election of 2010* (Manchester United Press 2012).

Hayward C, 'Trade Union Movements and their Politico-Economic Environments: A Preliminary Framework' (1980) 3(1) West European Politics 1.

Health D and Hood C, 'The Politics of Fiscal Squeeze' in C Hood, D Health and R Himaz (eds), *When the Party's Over: The Politics of Fiscal Squeeze in Perspective* (British Academy 2014).

Hegel F, *Science of Logic*, vol 1(Allen & Unwin 1929).

Heijden P, 'Post-industrial Labour Law and Industrial Relations in the Netherlands' in L Wedderburn (ed), *Labour Law in the Post-Industrial Era* (Dartmouth 1994).

Hendy J, Thompson Solicitors (Submission by Unite on International Law Aspects before the Joint Committee on Human Rights), In the Matter of the proposal to abolish the Agricultural Wages Board, Bills (12-13).

Hepple B and Veneziani B, 'Introduction' in B Hepple and B Veneziani (eds), *Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004* (Hart 2009).

Hepple B, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42(3) Industrial Law Journal 213.

– – 'Introduction' in B Hepple (ed), *The Making of Labour Law in Europe* (Mansell 1986).

– – 'The Future of Labour Law' (1995) 24(4) Industrial Law Journal 303.

– – *Labour Laws and Global Trade* (Hart 2005).

Hirschman A, *Exit, voice, and loyalty: responses to decline in firms, organizations, and states* (HUP 2014).

Hogler R, 'Labor History and Critical Labor Law: An interdisciplinary approach to workers' control' (1989) 30 (2) Labour History 165.

Holloway J and Piccioto S, 'Capital, Crisis and the Stat' (1977) 1(2) Capital & Class 76.

Holmes E, Lilico A and Flanaghan T, 'Modernising Industrial Relations' (2010) Policy Exchange Research Note.

House of Commons Library, 'Productivity in the UK' (2015) Briefing Paper 06492.

House of Commons Library, *Transparency of Lobbying, Non-Campaigning and Trade Union Administration Bill* Research Paper 13/51 (27 August 2013).

House of Lords Privilege Committee, 'The Conduct of Lord Moonie, Lord Snape, Lord Truscott and Lord Taylor of Blackburn' (*Parliament*, 11 May 2009) <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldprivi/88/8803.htm#a16> accessed 16 March 2015.

Howe J, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011).

Howell C, *Trade Unions and the State: The Construction of Industrial Relations in Britain, 1890-2000* (Princeton University Press 2005).

Hunt A, 'Marxism, Law, Legal Theory and Jurisprudence' in P Fitzpatrick (ed), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Pluto Press 1991).

Hunt A, 'The Theory of Critical Legal Studies' (1986) 6(1) Oxford Journal of Legal Studies 1.

Hyman R, 'Trade Union Research and Cross-national Comparison' (2001) 7 European Journal of Industrial Relations 203.

– – *Industrial Relations: A Marxist Introduction* (Macmillan 1975).

Institute of INE-GSEE, *Ετήσια Έκθεση: Η Ελληνική Οικονομία και η Απασχόληση* (Ινστιτούτο ΙΝΕ-ΓΣΕΕ 2013) (in Greek).

Interview with Frances O'Grady, Trade Union Congress General Secretary (*BBC*, 19 August 2013) <http://www.bbc.co.uk/news/uk-politics-23750845> accessed 10 May 2015.

Ioannou C and Papadimitriou K, *Συλλογικές Διαπραγματεύσεις 2011-2012* (ΟΜΕΔ 2013) (in Greek).

Jacobs A, 'Collective Labour Relations' in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004* (Hart 2009).

– – 'Collective Self-Regulation' in B Hepple (ed), *The Making of Labour Law in Europe* (Mansell 1986).

Jaumotte F and Buitron C O, *Inequality and Labour Market Institutions,* IMF Staff Discussion Note SDN 15/14 (July 2015).

Jessop B, *State Theory: Putting Capitalist States in their Place* (Polity Press 1990).

Jones O, 'Under the disguise of fixing lobbying, this Bill will crush democratic protest' (*Independent*, 1 September 2013) http://www.independent.co.uk/voices/comment/owen-jones-under-the-disguise-of-fixing-lobbying-this-bill-will-crush-democratic-protest-8793224.html accessed 20 March 2015.

Joost D, 'Deregulation and Labour Law in Germany' in R Blanpain (ed), *Deregulation and Labour Law: In search of a labour concept for the 21st century (*Kluwer Law International 2000).

Kahn-Freund O, 'Collective Bargaining and Agreements in Great Britain' in O Kahn-Freund (ed), *Labour Relations and the Law: A Comparative Study* (Stevens & Sons 1965).

– – 'Labour Law' in M Ginsberg (ed), *Law and Opinion in England in the 20th century* (Stevens & Sons 1959).

– – 'Legal Framework' in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Blackwells 1954).

– – 'On Uses and Misuses of Comparative Law' (1974) 37(1) Modern Law Review 1.

– – *Comparative Law as an Academic Subject* (Clarendon Press 1965).

– – *Labour and the Law* (3rd edn, by P Davies and M Freedland, Stevens & Sons 1983).

Karakatsanis A, *Συλλογικό Εργατικό Δίκαιο* (Αντ.Ν.Σάκκουλας 1992) (in Greek).

Kassimatis G, 'Τα αντισυνταγματικά μέτρα των δανειακών συμβάσεων. Οι βασικές θέσεις τηε απόφασης 668/2012 της Ολομέλειας του ΣτΕ' (2012) 60(1) Νομικό Βήμα 2648 (in Greek).

Katrougalos G, 'Το ''Παρασύνταγμα'' του Μνημονίου και ο Άλλος Δρόμος' (2011) 2 Νομικό Βήμα 231 (in Greek).

– – 'Το τέλος του εργατικού δικαίου; Συνταγματική αποτίμηση της ''αντιμεταρρύθμισης'' του Μνημονίου ΙΙ' 2012 (9) Επιθεώρηση Εργατικού Δικαιού 2012 637 (in Greek).

– – *Η Κρίση και η Διέξοδος*(Λιβάνης 2012) (in Greek).

Katsoridas D, 'Κρίση του συστήματος ή κρίση της εργασίας;' (2009) 55 Επιθεώρηση Εργατικού Δίκαιου 41.

Kautsky K, *The Social Revolution* (Charles H. Kerr & Company 1902).

Kazakos A, 'Το Εργατικό Δίκαιο την Εποχή των Μνημονίων' (2012) 60(1) Νομικό Βήμα 2842 (in Greek).

– – 'Συλλογικές συμβάσεις εργασίας και διαιτησία μετά την Π.Υ.Σ. 6/28.2.2012- η καταστροφή του συστήματος παραγωγής συλλογικών ρυθμίσεων και η βίαιη επιστροφή στην ατομική σύμβαση εργασίας' 2012 9 Επιθεώρηση Εργατικού Δικαίου 593 (in Greek).

– – 'Η κατάσταση και οι λειτουργίες του δικαίου σε συνθήκες παγκοσμιοποίησης' σε Aris Kazakos (ed), *Το δίκαιο μπροστά στην πρόκληση της παγκοσμιοποίησης* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2002) (in Greek).

– – *Συλλογικό Εργατικό Δίκαιο* (2η έκδοση, Σάκκουλας Αθήνα-Θεσσαλονίκη 2011) (in Greek).

– – *Συλλογικό Εργατικό Δίκαιο* (3η έκδοση, Σάκκουλας Αθήνα-Θεσσαλονίκη 2013) (in Greek).

Kelly J, *Rethinking Industrial Relations: Mobilization, collectivism and long waves* (Routledge 1998).

Kerr C, *Industrial and industrial man: the problems of labour and economic growth* (Heinemann 1962).

Keynes J M, *The General Theory of Employment Interest and Money* (Macmillan and Co. 1936).

Kilpatrick C, 'Has New Labour Reconfigured Employment Legislation?'(2003) 32(3) Industrial Law Journal 135.

Klare K, 'Introduction: The Horizons of Transformative Labour and Employment Law' in J Conaghan, R M Fischl, K Klare (eds), *Labour Law in an Era of Globalization* (Oxford University Press 2002).

– – 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941' (1978) 62 Minnesota Law Review 265.

– – ‘Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law’ (1981) 4(3) Berkeley Journal of Employment Law 450.

– – ‘Management prerogatives, plant closings and the NLRA: A response’ (1982-1983) 11 Review of Law & Social Change 118.

Klarman M, ‘A Judgment Gone too Far’ (1988) 103(46) English Historical Review 21.

Kliman A, ‘‘‘The Destruction of Capital’’ and the Current Economic Crisis’ (2009) 23(2) Socialism and Democracy 47.

Kohn T, *Global Political Economy* (Pearson and Longman 2005).

Komesar N, *Imperfect Alternatives* (University of Chicago Press 1994).

Kondilis I, Giannakopoulos S, Gavana M, Ierodiakonou I, Waitzkin H and Benos A, ‘Economic crisis, restrictive policies, and the population’s health and health care: the Greek case’ (2013) 103(6) American Journal of Public Health 973.

Kondratieff N, ‘The long waves in economic life’ (1935) 17(6) The Review of Economics and Statistics 105.

Koniaris T, *Labour Law in Hellas* (Kluwer 2002).

Koukiadaki A and Kretsos L, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece’ (2012) 41(3) Industrial Law Journal 276.

Koukiadis I, ‘Δίκαιο της κρίσης, δίκαιο της μεταρρύθμισης ή κατάλυσης της προστασίας της εργασίας;’ (2012) 9 Επιθεώρηση Εργατικού Δίκαιου 647 (in Greek).

– – *Συλλογικές Εργασιακές Σχέσεις* τόμος 2 (Σάκκουλας Αθήνα-Θεσσαλονίκη 2011) (in Greek).

Koutnatzis I, ‘The Proportionality Principle in Greek Judicial Practice’ (2016) 16 *Diritto & Questioni Pubbliche* 205.

Kouvelakis S, ‘The Greek Cauldron’ (2011) 72 New Left Review 17.

Kouzis G, ‘Το Εργασιακό Τοπίο στην Ελλάδα μετά το Μνημόνιο’ (2011) 6 Ενημέρωση 1 (in Greek).

Kritsantonis N, ‘Greece: The Maturing of the System’ in A Ferner and R Hyman (eds), *Changing Industrial Relations in Europe* (Blackwell 1998).

Krugman P, ‘The Austerity Delusion’ (*Guardian,* 29 April 2015) <http://www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion> accessed 12 June 2015.

Kuhn T, *The Structure of Scientific Revolutions* (4th edn, University of Chicago Press 2012).

Kyriakoulias P, ‘Οι Εργασιακές Σχέσεις μετά το Μνημόνιο’ (Εθνικό Ινστιτούτο Εργασίας και Ανθρωπίνου Δυναμικού Μάρτιος 2012) (in Greek).

Labour Party, *Manifesto for 1997 General Elections*.

Lakin M and Ostrowski M, ‘Ideology in the Age of Coalition: the strange rebirth of British Capitalism’ (2014) 19(1) Journal of Political Ideologies 15.

Langille B and Davidov G (eds), *The Idea of Labour Law* (OUP 2011).

Langille B, 'Labour Law's Theory of Justice' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011).

Lapavitsas C, 'Introduction' in C Lapavitsas (ed), *Financialisation in Crisis* (Brill 2012).

Lapavitsas C, Kaltenbrunnera A, Lindoa D, Michella J, Painceiraa J P, Piresa E, Powella J, Stenforsa A and Telesa N, 'Eurozone crisis: Beggar thyself and thy neigbour' (2010) 12(4) Journal of Balkan and Near Eastern Studies 321.

Laski H, *The State in Theory and Practice* (Unwin 1935).

Legrand P, 'European Legal Systems are not converging' (1996) 45(1) International and Comparative Law Quarterly 52.

Lehmann J, *Bringing capitalism back for critique by social theory* (JAI 2002).

Lepaulle P, 'The Function of Comparative Law with a Critique of Sociological Jurisprudence' (1922) 35(7) Harvard Law Review 838.

Leventis G, *Συλλογική Αυτονομία και Κρατικός Παρεμβατισμός στο Εργατικό Δίκαιο* (Σάκκουλας Αθήνα-Κομοτηνή 1981) (in Greek).

Levitas R (ed), *The Ideology of the New Rights* (Polity Press 1986).

Levitas R, 'Ideology and the New Right' in R Levitas (ed), *The Ideology of the New Right* (Polity Press 1986).

Levy J, 'The State also Rises: The Roots of Contemporary State Activism' in J Levy (ed), *The State after statism: new state activities in the age of liberalization* (HUP 2006).

Leys C, *Total Capitalism: Market Politics, Market State* (Merlin Press 2008).

Lijphart A, 'Comparative Politics and the Comparative Method' (1971) 65(3) The American Political Science Review 682.

Lindblom C, *Politics and Markets: The World's Political-Economic Systems* (Harper Collins 1977).

Liodakis G, *Totalitarian Capitalism and Beyond* (Ashgate 2010).

Living Wage Commission, *Working for Poverty: The Scale of the Problem of Low Pay and Working Poverty in the UK* (Living Wage Commission 2014).

Livingstone N, 'The Hunger Games: Food Poverty and politics in the UK' (2015) 39(2) Capital & Class 188.

López J, Consuelo Chacartegui and Cantón J, 'From Conflict to Regulation: The Transformative Function of Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011).

López P, 'Un compañero de viaje histórico del Derecho del Trabajo: la crísis económica' (1984) 143 Revista de política social 15 (in Spanish).

Lyon-Caen G, 'La crise du droit du travail' in F Gamillsche and others, *In Memoriam Sir Otto Kahn-Freund* (Verlagsbuchhandlung 1980) (in French).

– – 'Les fondements historiques et rationnels du Droit du Travail' (original in 1950) reprinted in (2004) Droit Ouvrier 52.

MacLeavy J, ‘A ‘‘new politics’’ of austerity, workfare and gender? The UK coalition government’s welfare reform proposals’ (2011) 4(3) Cambridge Journal of Regions, Economy and Society 355.

Mantouvalou V, ‘Are Labour Rights Human Rights’ (2012) 3(2) European Labour Law Journal 151.

Marquand D, *The Unprincipled Society* (Fontana Press 1988).

Marsh D, *The New Politics of British Trade Unionism* (Macmillan 1992).

Marshall S, ‘Shifting Responsibility: How the Burden of the European Financial Crisis shifted away from the financial sector onto labour’ (2013-2014) 35 Comparative Labor Law & Policy Journal 449.

Marx K and Engels F, *The Communist Manifesto* (Penguin 1967).

– – *The German Ideology* (Lawrence & Wishart 1965).

Marx K, *Capital: A Critique of Political Economy*, vol III (Lawrence & Wishart 1960).

– – *Preface to a contribution to the Critique of Political Economy* in R Tucker (ed), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978).

Mavris Y, ‘Greece’s Austerity Election’ (2012) 76 New Left Review 95.

Mayhew K and Wickham-Jones M, ‘The United Kingdom’s Social Model: From Labour’s New Deal to the Economic Crisis and the Coalition’ in J E Dolvik and A Martin (eds), *European Social Models from Crisis to Crisis: Employment and Inequality in the Era of Monetary Integration* (Oxford University Press 2015).

McCann D, ‘Temporal Autonomy and the Protective Individualisation of Working-Time Law: The Case of Overtime Work’ (2007) 17(3) Labour & Industry 29.

McCarthy W, ‘The Rise and Fall of Collective Laissez Faire’ in W McCarthy (ed), *Legal Intervention in Industrial Relations: Gaines and Losses* (Blackwell 1992).

Mcllroy J, *Trade Unions in Britain Today* (2nd edn, Manchester University Press 1996).

Metropoulos A, *Από την 3η Σεπτεμβρίου στο Μνημόνιο* (Λιβάνης 2011).

Michaels R, ‘The Functional Method of Comparative Law’ in M Reimann and R Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press 2006).

Middlemas K, *Politics in industrial society: the experience of the British system since 1911* (Deutch 1979).

Miliband E, ‘One Nation Politics: Speech to the St Bride Foundation’ (*Labour*, 9 July 2013) <http://archive.labour.org.uk/one-nation-politics-speech> accessed 20 April 2015.

– – ‘Speech to the Special Labour Conference’ (*NewStatesman*, 1 March 2014) <http://www.newstatesman.com/politics/2014/03/ed-milibands-speech-labours-special-conference-full-text> accessed 14 April 2015.

Miliband R, ‘Class War Conservatism’ in R Miliband, *Class War Conservatism and Other Essays* (Verso 2015).

– – *Parliamentary socialism: a study in the politics of labour* (Allen & Unwin 1961).

Miliband R, *The State in a Capitalist Society* (Quarter Book 1973).

Miliband wins vote on Labour party reforms with overwhelming majority: Politics live blog (*Guardian*, 3 June 2014) <http://www.theguardian.com/politics/blog/2014/mar/01/labour-votes-on-membershipunion-reforms-at-special-conference-politics-live-blog> accessed 28 March 2015.

Mill J, *A System of logic, ratiocinative and inductive*, vol. 1 (3rd edn, Parker 1851).

Minkin L, *The contentious alliance: trade unions and the Labour Party* (Edinburgh University Press 1992).

Minsky H, 'Financial Stability Hypothesis' (1992) The Jerome Levy Economics Institute Working Paper No. 74.

Mirowski P, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Verso 2013).

Mitchell M, Coutinho S and Morell G (prepared on behalf of NatCen Social Research for Unison), *The Value of Trade Union Facility Time: Insights, Challenges and Solutions* (Natcen Social Research 2012).

Moore S, McKay S and Veale S, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Palgrave 2013).

Mountfield H, *Opinion: In the Matter of Part II of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill and the Voluntary Sector*.

Mueller J, 'The IMF, Neoliberalism and Hegemony' 25 (3) 2011 Global Society 377.

Mulholland H and Gabbatt A, 'Boris Johnson Calls for new laws to curb strikes' (*Guardian*, 4 October 2010) <http://www.theguardian.com/politics/2010/oct/04/boris-johnson-cbi-strike-ballots> accessed 7 August 2015.

Nandy L, 'The Lobbying Act does nothing to stop vested interests' (*NewStatesman*, 4 April 2011) <http://www.newstatesman.com/politics/2014/04/lobbying-act-does-nothing-stop-vested-interests-s-why-labour-will-repeal-it/> accessed 14 June 2015.

Newspaper Ethnos (Athens, 6 May 2010).

Nikiforos D, 'Memorandum of …''Supremacy'': μία περίπτωση υπεροχής του ενωσιακού δικαίου έναντι του ελληνικού Συντάγματος' <http://constitutionalism.gr/site/wp-content/mgdata/pdf/ikiforos.pdf> accessed 13 October 2014 (in Greek).

Nordlinger E, *On the Autonomy of the Democratic State* (HUP 1981).

Oberndorfer L, 'A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism' in N Bruun, K Lörcher and I Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart 2014).

Offe C, 'The European Model of ''Social Capitalism'': Can It Survive European Integration? (2003) 11(3) *The Journal of Political Philosophy* 437.

– – 'The Theory of Capitalist State and the Problem of Policy Formation' in L Lindberg, R Alford, C Crouch and C Offe (eds), *Stress and Contradiction in Modern Capitalism* (Lexington Books 1975).

Office for National Statistics, 'Government Deficit and Debt Return' (June 2015).

Office for National Statistics, 'Real Wages down by 8.5 since 2009' (5 April 2013).

Office of the Registrar of Consultant Lobbyists, *Guidance on the requirement to join the Register of Consultant Lobbyists* (Office of the Registrar 2015).

Ohmae K, *The End of the Nation- State: the rise of regional economies* (Harper Collins 1975).

Oli Rehn's (Vice President of the European Commission) Speech to the European Parliament, (12/378 22 May 2012).

Papadimitriou C, 'The Greek Labour Law face to the crisis: A dangerous passage towards a new juridical nature' (2013) European Labour Law Network Working Paper Series No. 3.

Papadimitriou K, 'Η απώλεια των σημείων ισορροπίας και η αποδόμηση στις συλλογικές εργασιακές Σχέσεις υπό το φως των ρυθμίσεων των ν. 4024/2011 και 4046/2012' (2012) 9 Επιθεώρηση Εργατικού Δίκαιου 699 (in Greek).

Pashukanis E, *Law and Marxism: A General Theory* (Pluto Press 1993).

Patra E, 'Social Dialogue and Collective Bargaining in times of crisis: the case of Greece' Working Paper 38 (ILO 2012)

Pavlopoulos P, 'Παρατηρήσεις ως προς τη νομική φύση και τις έννομες συνέπειες του Μνημονίου' σε *Το Δημόσιο Δίκαιο Σε Εξέλιξη: Σύμμεικτα προς τιμην του Καθηγητή Πέτρου Ι. Παραρά* (Αντ.Ν.Σάκκουλας 2012) (in Greek).

Peet R, Trinity U: The IMF, World Bank and the WTO (2nd edn, Zed 2009).

Peters A and Schwenke H, 'Comparative Law beyond Post-Modernism' (2000) 49(4) International and Comparative Law Quarterly 800.

Plant R, *The Neo-Liberal State* (Oxford University Press 2010).

Polanyi K, *The Great Transformation* (Beacon Press 1957).

Pollack M, 'Theorizing EU Policy-Making' in H Wallace, M Pollack and A Young, *Policy-Making in the European Union* (6th ed, Oxford University Press 2010).

Poulantzas N and Miliband R, 'The Problem of the Capitalist State' in R Blackburn (ed), *Ideology in Social Science: Readings in Critical Social Theory* (Fontana 1972).

Poulantzas N, *Political Power and Social Classe*s (New Left Books & Sheed & Ward 1973).

Poulantzas N, *State, Power and Socialism* (Verso 2000).

Pound R, 'Comparative Law in Space and time' (1955) 70(4) American Journal of Comparative Law 70.

Pratt N, 'Bringing politics back in: examining the link between globalization and democratization' (2004) 11 (2) Review of International Political Economy 311.

Przeworksi A and Teune H, *The Logic of Comparative Social Enquiry* (Wiley-Interscience 1970).

Psimitis M, 'The Protest Cycle of Spring 2010 in Greece' (2011) (10) 2 Social Movement Studies 191.

Puetter U, 'Governing informally: The role of the Eurogroup in EMU and the Stability and Growth Pact' (2004) 11(5) Journal of European Public Policy 854.

Purcell J, 'The end of Institutional Industrial Relations' (1993) 64(1) The Political Quarterly 6.

Quinn T, 'New Labour and the Trade Unions in Britain' (2010) 20(3) Journal of Elections, Public Opinion and Parties 357.

Radaelli C, 'Whither Europeanization? Concept Stretching and Substantive Change' (2000) 4(8) European Integration online Papers (EIoP).

Raday F, 'The Decline of Union Power' in J Conaghan, R M Fischl and K Klare (eds), *Labour Law in an Era of Globalisation* (Oxford University Press 2004).

Radin M, 'Market-Inalienability' (1987) 100 (8) Harvard Law Review 1849.

Rees B, 'Frames of Reference and Public Interest' in L Wedderburn, *Labour Law and the Community: Perspectives for the 1980s* (Institute for Advanced Legal Studies 1982*)*.

Reinhart C and Rogoff K, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press 2009).

Renner K, *Institutions of Private Law and their social functions* (Routledge & Kegan 1976).

Rhodes R.A.W, 'Hollowing out of the State: The Changing Nature of the Public Service in Britain' (1994) 65(2) Political Quarterly 138.

Richter I, *Political purpose in trade unions* (Allen and Unwin 1973).

Rose R, 'Comparing Forms of Comparative Analysis' (1991) 39(3) Political Studies 446, 47.

Sachs B, 'Unions, Corporations and Political Opt-Out Rights After *Citizens United*' (2012) 112 Columbia Law Review 800.

Sauter W, 'The Economic Constitution of the European Union' (1998) 27(4) Columbia Journal of European Law 27.

Schmidt V, 'The Eurozone crisis: A Crisis of Politics, not just Economics' (2013) 48(3) The International Spectator: Italian Journal of International Affairs 1.

Schmidt V, *The Futures of European Capitalism* (Oxford University Press 2002).

Schoenbaum T, *The Age of Austerity: The Global Financial Crisis and the Return to Economic Growth* (Edward Elgar 2012).

Schregle J, 'Comparative Industrial Relations: pitfalls and potential' (1981) 120(1) Industrial Law Journal 15.

Schumpeter J, *Capitalism, Socialism and Democracy* (G. Allen & Unwin 1976).

Scott P and Williams S, 'The Coalition Government and the employment relations: accelerated neo-liberalism and the rise of employer-dominated voluntarism' (2014) 15 Observatoire de la société britannique 145.

Seifert A, 'European Economic Governance and the Labor Laws of the E.U Member States' (2013-2014) 35(3) Comparative Labor Law and Policy Journal 311.

Sergi V and Vogiatzoglou M, 'Thing Globally, act locally: Symbolic memory and global repertoires in the Tunisian uprising and the Greek anti-austerity mobilization' in C Flesher-Fominaya and L Cox (eds), *Understanding European Movements: new social movements, global justice struggles, anti-austerity protest* (Routledge 2013).

Sharma S, *Global Financial Contagion: Building a Resilient World Economy after the Subprime Crisis* (Cambridge University Press 2014).

Shaw M, *International Law* (6th ed, Cambridge University Press 2008).

Siems M, *Comparative Law* (Cambridge University Press 2014).

Simitis S, 'Juridification of Labor Relations' in G Teubner (ed), *Juridification of social spheres: a comparative analysis in the areas of labor, corporate, antitrust, and social welfare law* (Gryter 1987).

Simon J, *Three Speeches on the General Strike* (Macmillan 1926).

Sinzheimer H, *Arbeitsrecht und Rechtssoziologie* (Bd 1Gesammelte Reden und Aufatze 1976) (in German).

Skocpol T, *States and Social Revolutions* (Cambridge University Press 1979).

Smith A, *An enquiry into the nature and causes of the wealth of nation,* vol 1 (Cooke 1804).

Smith M, 'Pluralism' in C Hay, M Lister and D Marsh (eds), *The State: Theories and Issues* (Palgrave Macmillan 2006).

Smith P and Morton G, 'New Labour's reform of Britain's employment law: the devil is not only in the detail but in the values and policy too' (2001) 39 British Journal of Industrial Relations 119.

– – 'Nine Years of New Labour: Neo-liberalism and Workers' Rights' (2006) 44(3) British Journal of Industrial Relations 401.

Spector H, 'Philosophical Foundations of Labour law' (2006) 33 Florida State University Law Review 1119.

Spourdalakis M, *The Rise of the Greek socialist Party* (Routledge 1988).

Stewart D, 'The end of Labour? The Collins Report and the Labour Party-Trade Union Alliance' (*Brit Politics*, 19 June 2014) <http://www.britpolitics.co.uk/academic-articles-all/the-end-of-labour-the-collins-report-and-the-labour-party-trade-union-alliance-by-dr-david-stewart> accessed 3 May 2015.

Stiglitz J, 'The Financial Crisis of 2007–8 and its Macroeconomic Consequences 1' in S Griffith-Jones, J A Ocampo and J Stiglitz (eds), *Time for a visible hand: lessons from the 2008 world financial crisis* (Oxford University Press 2010).

– – *Freefall: free markets and the sinking of the global economy* (Allen Lane 2010).

Stone K, 'The Post-War Paradigm in American Labor Law' (1981) 90 Yale Law Journal 1509.

Streeck W and Hassel A, 'Trade unions as political actors' in J Addison and C Schnabel, *International handbook of trade unions* (Elgar 2003).

Streeck W and Thelen K, 'Introduction: Institutional Change in Advanced Political Economies' in W Streeck and K Thelen (eds), *Beyond Continuity* (Oxford University Press 2005).

Streeck W, *Buying time: the delayed crisis of democratic capitalism* (Verso 2014).

– – *Re-Forming Capitalism: Institutional Change in the German Political Economy* (Oxford University Press 2009).

Suchting W A, 'Marx, Hegel and ''Contradiction''' (1985) 15(4) Philosophy of the Social Sciences 409.

Sumner C, 'Jurgen Habermas' in D Sugarman (ed), *Legality, Ideology and the State* (Academic Press 1983).

Supiot A, 'Grandeur and Misery of the Social State' (2013) 82 New Left Review 99.

– – *The Spirit of Philadelphia: Social Justice vs. the Total Market*, (Saskia Brown (tr), Verso 2012).

Syrett K, '''Immunity'', ''Privilege'', and ''Right '': British Trade Unions and the Language of Labour Law Reform' (1998) 25(3) Journal of Law and Society 388.

Tarrow S, *Power in Movement: Social movements, collective actions and Politics* (Cambridge University Press 1994).

Tawney R, *Towards Industrial Peace* (King 1927).

Taxpayers' Alliance, 'The Spending Plan policy 34: scrap trade unions' subsidies of facility time, grants and office space' (*Taxpayers' Alliance*, 1 June 2015) <http://www.taxpayersalliance.com/the_spending_plan_policy_34_scrap_trade_unions_subsidies_of_facility_time_grants_and_office_space> accessed 26 July 2015.

Taxpayers' Alliance, Taxpayer funding of trade unions 2012-13 (2014) Research Note 140.

Taylor A, *Trade unions and politics: a comparative introduction* (Macmillan 1989).

Taylor-Gooby P, *The Double Crisis of the Welfare State and What we can do about it* (Palgrave 2013).

Thelen K, *Varieties of liberalization and the politics of social solidarity* (Cambridge University Press 2014).

‘Tory MPs were paid to plant questions say Harrods Chief Thursday’ (*Guardian*, 20 October 1994) <http://www.theguardian.com/politics/1994/oct/20/conservatives.uk> accessed 15 June 2015.

Tieben B, The Concept of Equilibrium in different economic traditions: an historical investigation (Edward Elgar 2012).

‘Timeline: Cash-for Honours’ (*BBC*, 23 October 2007) <http://news.bbc.co.uk/1/hi/uk_politics/5174108.stm> accessed 15 March 2015.

Trade Union Congress Briefing, ‘A gag by any other name…’ (*Trade Union Congress*, 9 September 2013) <https://www.tuc.org.uk/union-issues/gag-any-other-name> accessed 21 April 2015.

Trade Union Congress, ‘Congress 2013 Emergency Motion 05: Lobbying Bill’ (*Trade Union Congress*, 10 September 2013) https://www.tuc.org.uk/about-tuc/congress/congress-2013/congress-2013-emergency-motion-05-lobbying-bill accessed 15 April 2015.

Trade Union Congress, *The Facts about Facility Time for Union Reps* (TUC October 2011) 4.

Trade Union Congress, *The UK’s Low Pay Recovery* (TUC 2013) 4.

Trade Union Reform Campaigh <http://turc.org.uk/> accessed 26 July 2015.

Travlos-Tzanetatos D, ‘Η Διάλυση των συλλογικών σχέσεων εργασίας και το χρέος της αριστεράς *Εφημερίδα Αυγή* (Αθήνα, 12 Φεβρουαρίου 2012) (in Greek).

– – ‘Οι συλλογικές συμβάσεις εργασίας στη μνημονιοκρατούμενη Ελλάδα’ (2012) 9 Επιθεώρηση Εργατικού Δίκαιου 713 (in Greek).

– – *Εργατικό Δίκαιο και Βιομηχανική Κοινωνία* (Παπαζήσης 1977) (in Greek).

– – *Εργατικό Δίκαιο και Πολιτική* (Αντ.Ν.Σάκκουλας 1986) (in Greek).

– – *Οικονομική Κρίση και Εργατικό Δίκαιο* (Σάκκουλας Αθήνα-Θεσσαλονίκη 2013) (in Greek).

– – Συλλογικές Συμβάσεις και Νεοφιλελεύθερος ψευδο-ορθολογικός ολοκληρωτισμός’ *Εφημερίδα Αυγή* (Αθήνα, 6 Νοεμβρίου 2011) (in Greek).

Traxler F, ‘Farewell to Labour Market Associations? Organized versus Disorganized Decentralizaztion as a Map for Industrial Relations’ in C Crouch and F Traxler (eds), *Organised industrial relations in Europe: What future?* (Avebury 1995).

Trubeck D and Trubeck L, ‘Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method Co-ordination’ (2005) 11(3) European Law Journal 343.

Tsakalotos E, ‘The Political Economy of Social Democratic Economic Policies: The PASOK experiment in Greece’ (1998) 14(1) Oxford Review of Economic Policy 114.

– –*Alternative economic strategies: the case of Greece* (Avebury 1991).

Tse Tung M, *On Contradiction* (August 1937) in B Shaw (ed), *Selected Works of Mao Tse-Tung* (Harper & Row Publishers 1970).

Tucker E, ‘Labor’s many Constitutions (and Capital’s too)’ (2011) 33 Comparative Labor Law and Policy Journal 355.

– – ‘Renorming Labour Law: Can We Escape Labour Law’s Recurring Regulatory Dilemmas?’ (2010) 39(2) Industrial Law Journal 99.

Tuori K and Tuori K, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014).

Tuori K, ‘The Many Constitutions of Europe’ in K Tuori and S Sankar (eds), *The many constitutions of Europe* (Ashgate 2010).

Tushnet M, ‘Perspectives on the Development of American Law: A Critical Review of Friedman’s ‘‘History of American Law’’’ 1977 Wisconsin Law Review 81.

Tzogopoulos G, *The Greek crisis in the media: stereotyping in the international press* (Ashgate 2013).

Valcke C, ‘Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems’ (2004) 52(3) American Journal of Comparative Law 713.

Valticos N, ‘Comparative Law and the International Labour Organization’ (1977) 2 Comparative Labor Law & Policy Journal 273.

Venizelos E, ‘Εθνική Συνταγματική και Εθνική Κυριαρχία σε συνθήκες διεθνούς οικονομικής κρίσης’ in X Contiades, F Spiropoulos and K Tsoukalas (eds), *Δημοκρατία, Σύνταγμα, Ευρώπη στην εποχή της κρίσης* (Σαβάλλας 2012) (in Greek).

Voulgaris G, *Η Ιστορία της Μεταπολίτευσης (1974-1990)* (4η έκδοση, Θεμέλιο 2008) (in Greek).

Watkins S, ‘A Weightless Hegemony: New Labour’s Role in the Neoliberal Order (2004) 25 New Left Review 5.

Webb S and Webb B, *Industrial Democracy* (Longman 1897).

Wedderburn L, ‘Changes, Struggle and Ideology in British Labour Law’ in L Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (Lawrewnce & Wishart 1995).

– – ‘Companies and Employees: Common Law or Social Legislation’ (1993) 109 Law Quarterly Review 220, 253.

– – ‘Freedom of Association and Philosophies of Labour Law’ (1989) 18(1) Industrial Law Journal 1.

– – ‘Freedom of association or right to organise?’ (1987) 18(4) Industrial Relations Journal 244.

– – ‘Inderogability, Collective Agreements, and Community Law’ (1992) 21 Industrial Law Journal 245.

– – ‘Labour Law – From Here to Autonomy? A Franco-British Comparison’ in L Wedderburn, *Employment Rights in Britain and Europe* (Lawrence & Wishart 1991).

– – ‘Labour law and the Individual in Post-Industrial Societies’ in L Wedderburn (ed), *Labour law in the post-industrial era: essays in honour of Hugo Sinzheimer* (Dartmouth 1994).

– –*The Worker and the Law* (3rd edn, Penguin Books 1986).

White S, ‘Trade Unionism in a Liberal State’ in A Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 337.

Wolfe A, *The Limits of Legitimacy: Political Contradictions of contemporary capitalism* (Free Press 1977).

Wright E, ‘Working-Class Power, Capitalist-Class Interests, and Class Compromise’ (2000) 105(4) American Journal of Sociology 957.

Yannakourou M and Tsimpoukis C, ‘Flexiblility without Security and De-construction of collective bargaining: The New Paradigm of Labour Law in Greece’ (2013-2014) 35 Comparative Labour and Policy Journal 331.

Yannakourou M, *The Evolution of Labour Law in the European Union* 1992-2003, Country Study on Greece (Final Report) Study undertaken for the European Commission, DG for Employment and Social Affairs VT 2002/45 60.

Zahariadis N, ‘Complexity, coupling and policy effectiveness: the European response to the Greek sovereign debt crisis’ (2012) 32(2) Journal of Public Policy 99.

Zweigert K and Kötz H, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998).