

**Study Paper
No 03/18**

**The Classification of Digital Labour as a Constitutional
Problem: Mapping the Collaborative Economy for a Social
Europe**

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May 2018

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Please quote as follows:

Europa-Kolleg Hamburg, Institute for European Integration, Study Paper No 03/18,
<http://www.europa-kolleg-hamburg.de>

The Classification of Digital Labour as a Constitutional Problem: Mapping the Collaborative Economy for a Social Europe

Smarika Kumar*

Abstract

The completion of the European Digital Single Market is expected to develop the collaborative economy composed of actors like Uber and Amazon Mechanical Turk, and in the process, to create hundreds of thousands of new jobs in the EU. But the collaborative economy also presents a legal challenge because of its tendency to blur the boundaries between the legal category of an employee and that of a self-employed person. Additionally, the collaborative economy has also been noted to contribute to labour precariousness. Against this background, the present Thesis is an attempt to map and contextualise the seemingly technical question of the classification of a service provider as a “worker” or as a “self-employed” person in the collaborative economy against the broader political contest which emerges around the social protection of labour in Europe. This mapping is taken under the “law in context” approach, which aims to critically understand law as a dynamic phenomenon by studying it against social, political and economic contexts. Through the realisation of such a mapping, it is argued that the issue of classification as a worker versus as a service provider in the collaborative economy cannot and should not be addressed by the EU in isolation from the larger Social Europe versus Single Market tensions, and in fact, should be conceptualised as a constitutional issue. In doing this, the Thesis draws chiefly upon the work of the German labour law theorist Hugo Sinzheimer and his idea of the labour constitution, and concludes with discussing the modalities of a labour constitutional approach for addressing the problem of service provider classification in the collaborative economy.

Keywords: labour law, labour precariousness, labour constitution, European constitutionalism, multilevel constitutionalism, collaborative economy, labour classification, Hugo Sinzheimer, Social Europe, labour citizenship

* This paper was originally submitted by Smarika Kumar in September 2017 as a thesis for the degree “Master of Laws (LL.M.)” at the Europa-Kolleg Hamburg (Supervisor: Prof. Dr. Markus Kotzur). **Contact information:** smarika.kumar@gmail.com

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LIST OF ABBREVIATIONS

AMT	Amazon Mechanical Turk
CJEU	Court of Justice for the European Union
EU	European Union
HIT	Human Intelligence Task
ILO	International Labour Organisation
TEU	Treaty of the European Union
TFEU	Treaty on Functioning of the European Union

CHAPTER 1 INTRODUCTION

Digitisation has pervaded every aspect of life in the 21st century, and therefore, it is not without reason that the European Commission under the presidency of Jean-Claude Juncker has placed the Digital Single Market second in its list of priorities for the term.¹ The completion of the European Digital Single Market is estimated to contribute €415 billion per year to the European economy and “*create hundreds of thousands of new jobs.*”² A significant part of this job creating potential of the Digital Single Market is said to be held under what is termed the collaborative economy. The Commission defines collaborative economy as “*the business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals.*”³ Notable examples of such collaborative economy platforms include the car-sharing service Uber, the household services portal TaskRabbit, the online freelance services Amazon Mechanical Turk and Upwork, the short term apartment rental service AirBnB, and food delivery services like Deliveroo and Foodora. The Commission estimates that in 2015 alone gross revenue in EU from the collaborative economy was €28 billion, and that further growth could mean that the collaborative economy adds €160-572 billion to the EU economy in the coming years.⁴ The Commission underlines that if encouraged and developed in a responsible manner, the collaborative economy could “*make an important contribution to jobs and growth in the European Union.*”⁵ In light of these forecasts, the European Commission in 2016 has also drafted an agenda which aims to clarify certain law and policy issues to aid in the growth of the rising collaborative economy.⁶

Given this institutional will to aid the proliferation of the collaborative economy in the European Union, it becomes important to interrogate what the promise of employment in the collaborative economy really mean in terms of improvement of lives of its citizens? If at its core, work is a

1 Commission Communication on A Digital Single Market Strategy for Europe (2015), p.1.

2 European Commission, Digital Single Market (2014).

3 Commission Communication on A European Agenda for the Collaborative Economy (2016), p.3.

4 *Supra* n.3, p.2.

5 *Ibid.*

6 *Supra* n.3.

social relationship⁷, how is the nature of work – for example, working hours, quality of working conditions, security of work, and consequently, the balance of power between the employee and the employer – transformed in the collaborative economy, and how does such transformation affect those who contribute to it? Further, does such transformation of labour markets impact the ability of law to protect the interests of workers in this new economy? If so, how? And what can law do to respond to such changes?

One of the ways in which the collaborative economy presents a challenge to law is its tendency to blur the boundaries between the legal category of an employee and that of a self-employed person. In popular discourse, collaborative platforms are understood to play the role of a “broker” or that of a “mere intermediary” which connects the supply and demand of services through a facilitation of interaction between individuals providing the service and firms or individuals using that same service. In this sense, one may argue that participants on a collaborative platform should be understood as self-employed citizens who connect to potential clients through the use of said collaborative platform. However lately, a growing body of critique – outlined in Chapter 2 of this Thesis – has also pointed out that in many ways these collaborative platforms act as employers, playing a role which entails something more than being a mere intermediary between the service provider and the person or firm that makes use of those services. If this scenario holds, then the service provider must be classified as an employee or worker. Whether the service provider is classified as a worker or as a self-employed person, of course, has implications for the kind of social protection which she will receive in the labour market – workers typically have a wider net of social protection cast over them both under EU law and under various Member State jurisdictions than a self-employed person does. This question of legal classification thus has larger social implications for citizens of the European Union.

However, what is social is also political. The question of legal classification of collaborative economy service providers also acquires political charge since the extent of social protection of (collaborative) market participants has growing urgency in a world where the fractures caused by

⁷ Rubin, *Essays*, pp.13-19.

discontents of globalisation are increasingly visible⁸, and interestingly, are also becoming effective in initiating political upheavals – Brexit, social and labour unrest in southern Europe, fear of the East European migrant worker driving political debates, and the US presidential election outcome upon the promise of economic protectionism, being a few cases in point. Since the collaborative economy is not only a product of digitally-mediated globalisation but is also a driver of globalisation, any policy that blindly encourages the same without considering this larger context will only provide fuel to exacerbate the fires of discontent among European citizens. In this light, and as decades of tussles around the agenda of Social Europe have illustrated, social protection of labour in the transformative collaborative economy is no mean issue and needs to go hand-in-hand with market integration.

Against this background, the present Thesis is an attempt to map and contextualise the seemingly technical question of service provider classification in the collaborative economy against the broader political contest which emerges around the social protection of labour in Europe. This mapping is taken under the “law in context” approach, which aims to critically understand law as a dynamic phenomenon by studying it against social, political and economic contexts.⁹ Through the realisation of such a mapping, I argue that the issue of classification as a worker versus as a service provider in the collaborative economy cannot and *should not* be addressed by the EU in isolation from the larger Social Europe versus Single Market tensions, and in fact, should be conceptualised as a constitutional issue.

In order to undertake this, in Chapter 2, I outline the details of how the classification of a service provider in the collaborative economy as either a worker or a self-employed person poses a problem under EU law. To illustrate the details of this classification problem, I employ two examples as case studies – those of Amazon Mechanical Turk and Uber. Thereafter, in Chapter 3, I discuss how this issue of classification of the service provider in the collaborative economy is actually part of a larger trend of the increasing precariousness of labour. I argue that while such labour precarisation is hardly confined to the collaborative economy, what is novel about it is the processes through which it executes such precarisation, of which the abovementioned

⁸ Stiglitz, *Globalisation and Its Discontents*, pp. 4-10.

⁹ See *Twining, Law in Context*, which develops the law in context approach as essential to law’s ability to dispense justice.

classification dilemma forms an essential legal component. Having established this, in Chapter 4, I outline how the EU has dealt with the issue of social protection of labour since its foundation – discussing the implications of Social Europe and the division of EU and Member States competencies in the field of social protection as part of EU’s multilevel governance system—especially in light of EU’s objective of market integration. In doing so, I argue that there exists a tension between the legal principles of market integration and social protection of labour in the EU, and the limited legal response to precarisation of labour is a product of this tension. In Chapter 5, I discuss the implications of this limited legal response for the European integration project by framing the issue of social protection of labour as an issue of EU’s multilevel constitutionalism. In doing this, I draw chiefly upon the work of the German labour law theorist Hugo Sinzheimer and his idea of the labour constitution. In Chapter 6, I come back to the problem of service provider classification in the collaborative economy. Having established the social protection of labour as a constitutional issue, I argue that this classification problem, though seemingly technical in nature, actually has constitutional import for the EU, and needs to be addressed accordingly. In conjunction with this, I discuss what exactly a constitutional approach would mandate for addressing this classification problem, which a mere technical approach would not. Thereafter, Chapter 7 summarises the arguments presented in this Thesis, and concludes its mapping endeavour.

CHAPTER 2

WORKER V. SELF-EMPLOYED: THE PROBLEM OF LABOUR CLASSIFICATION IN THE COLLABORATIVE ECONOMY

The collaborative economy reformulates the working conditions of its participants in several ways, which in turn, poses new legal challenges for the protection of labour.¹⁰ Legal scholarship in this area has discussed several of these problems across various jurisdictions, including the problem of labour classification.¹¹ Arguments in this regard include the use of a functional approach of employer to recognise digital labour under the category of “worker,”¹² the creation of a new category of employee which is considerate of the unique characteristics of the collaborative economy¹³ and the limitations of such an approach.¹⁴ However in the present Chapter, my aim is not to offer the final legal solution to this problem of classification under any of the foregoing approaches, but rather to account for all these approaches to illustrate how the classification problem itself is a product of the peculiar format of the collaborative economy that changes legal and social relationships of labour. Consequently, in this Chapter I limit myself to discussing how exactly working conditions are transformed by the collaborative economy through two case studies: that of Amazon Mechanical Turk and Uber, and thereafter provide an overview of how EU law interacts with such transformation.

I have chosen the abovementioned case studies as they correspond to two distinct configurations of work in the collaborative economy: Amazon Mechanical Turk is an example of what has been called *crowdwork*, which usually refers to working activities that imply completing a series of tasks through collaborative platforms, which typically put an indefinite number of organisations and individuals into contact with each other through the internet, potentially allowing clients and workers to connect on a global basis.¹⁵ Uber, on the other hand, is an example of *work-on-demand via apps* which refers to a form of work in which the execution of traditional working

10 Cherry, CLLPJ 2016, pp.18-26.

11 See Waas *et al*, Crowdwork, in this regard for a comparative study of crowdwork in US, Germany and Japan.

12 Prassl *et al*, CLLPJ 2016.

13 See De Stefano, CLLPJ 2016, for elaboration on the argument concerning creation of a third novel category of labour for conditions specific to the collaborative economy.

14 *Ibid*.

15 Eurofund, *New Forms of Employment*, 2015; Bergvall Kåreborn *et al*, NTWE 2014, pp. 213-223; Felstiner, BJELL 2011, pp.143-204; Howe, Wired 2006; see also, *supra* n. 10 and 13.

activities such as transport, cleaning and running errands, but also forms of clerical work, is channeled through online apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce.¹⁶ The choice of these two examples as case studies for this Thesis is thus intended to provide insight into the diverse labour configurations facilitated by the collaborative economy.

My central contention in the present Chapter is that transformation of work under Amazon Mechanical Turk and Uber poses a legal challenge of classification between the categories of “worker” and “self-employed.” Classification under each of these categories has differing implications with regard to the social protection extended – under Article 153 of the TFEU, the EU sets minimum standards of working conditions, social protection and social security only for the category of “workers” and not the “self-employed.”¹⁷

2.1. The Transformation of Labour: Amazon Mechanical Turk

Amazon Mechanical Turk, or AMT, started in 2005, is a collaborative economy crowdwork platform, which purportedly provides “humans-as-a-service”¹⁸ and has upward of 500,000 workers worldwide.¹⁹ AMT facilitates the hiring of people for performance of so-called “Human Intelligence Tasks” or HITs, which are mostly tasks involving the use of a cognitive function, which are broken down into several smaller sub-tasks that are offered on the AMT platform, and are later consolidated. These tasks can range from the processing of raw data, sorting data spread sheets, copying or translating texts, identifying spelling errors to participating in some experiments, grouping items and labeling them, hunting for email addresses on the web, participating in online behavioral studies and online surveys.²⁰ AMT classifies its participants as a “Requester” or as a “Provider”, whereby the former refers to the category of entities which use the digital labour generated on AMT and the latter refers to the service providers which labour on AMT HITs. Both Requesters and Providers must necessarily agree to AMT’s Participation

16 Aloisi, CLLPJ 2015; *Greenhouse*, American Prospect 2015; *Rogers*, TULSRP 2015; see also *supra* n. 13, p.1.

17 Article 153, TFEU.

18 See, *Irani et al*, 2013, which notes that AMT has been said to provide “humans as a service” by Amazon CEO Jeff Bezos at MIT Emerging Technologies Conference 2006; see also, *Aloisi*, *supra* n. 16, p.666.

19 *Hitlin*, Pew 2016, p.3.

20 *Huws*, CEPS 2015.

Agreement, which is offered in a clickwrap format²¹, in order to use the AMT website to work or to request work.

2.1.1. Contractual Classification by AMT Participation Agreement

EU law and the domestic law of nearly all EU Member States follow the primacy of fact principle (*Rechtsformverfehlung* under German law²²), according to which it is substance of the working relationship, as opposed to the form of contract or formal criteria that determines the legal nature of a labour contract.²³ This would mean that in order to determine classification as worker or self-employed, how a labour contract classifies a service provider would ultimately be less important than the real conditions under which the work takes place. Nevertheless, the formal contractual relationship provides a starting point in assessment of the classification question.

The AMT Participation Agreement characterises service providers as self-employed persons or independent contractors and not as employees or workers. An analysis of the Participation Agreement shows that it constitutes a tripartite agreement.²⁴ First, between AMT and the Providers, the Participation Agreement excludes an employment relationship by stating that AMT only “*provides a venue for third-party Requesters and third-party providers to enter into and complete transactions*” and therefore, it is “*not involved in the transactions between Requesters and Providers.*”²⁵ Second, between the Providers and Requesters, the Participation Agreement additionally excludes an employment relationship by specifying that “*as a Provider you are performing Services for a Requester in your personal capacity as an independent contractor and not as an employee of the Requester.*”²⁶ This bidirectional exclusion of the AMT service provider from the category of worker is then reaffirmed through the following contractual clause: “*This Agreement does not create an association, joint venture, partnership or franchise,*

21 See *Preston et al*, BYUJPL 2012, p. 17, for a discussion on consent formats in online agreements. In this regard, “clickwrap agreements” refer to those which require users to click a link before proceeding to the offered services or before placing an order. Originally, clickwraps typically required the user to knowingly move a cursor and click a link clearly labeled to indicate that a click would constitute acceptance of terms that were shown.

22 *Supra n. 11*, p.149

23 ILO, *Regulating the Employment Relationship in Europe* (2013), p.33.

24 See *supra n. 12* for an in-depth analysis of the tripartite/triangular agreements in context of online collaborative platforms.

25 §2, AMT Participation Agreement (2014).

26 §3b., AMT Participation Agreement (2014).

*employer/employee relationship between Providers and Requesters, or Providers and Amazon Mechanical Turk.*²⁷ At the same time, the Participation Agreement seems to be aware of the primacy of fact principle and requires Requesters to acknowledge that, “*while Providers are agreeing to perform Services for you as independent contractors and not employees, repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification of that employment status.*”²⁸

Classifying service providers as independent contractors is actually a very frequent contemporary business practice, even outside of the collaborative economy.²⁹ What is then different or transformative about these terms of work? It is that they do not only exclude the existence of an employment relationship between AMT and the service provider but also exclude that the service provider and the client may enter into an employment relationship, even when the terms and conditions of the service specify that these actors are “third parties” to the collaborative platform. It is for this reason that such clauses have been termed as “enhanced independent contractor clauses.”³⁰ Read together, such bidirectional exclusion from the category of employee or worker, seems to create a paradox, since while on the one hand, the Participation Agreement claims that AMT is not involved in Requester-Provider transactions, on the other, it also lays down the terms of the relationship between the Requesters and the Providers. And it is in this very paradox that the novelty of collaborative economy labour contracts lies, as opposed to traditional labour contracts. The collaborative platform lays down the terms of a tripartite relationship³¹, while simultaneously also claiming to have no involvement in said relationship between the other two parties. This form of labour contractualisation is not just different but also transformative, because while it seemingly frees two transactional parties – the Provider and the Requester – to engage on their own terms by pushing them to the foreground as “active” parties, in reality, the relationship between the two is not so “free.” The third party – AMT – plays a crucial role in shaping the relationship between the two parties by blending into the background as a “passive” party, or a “mere venue.” However, the fact that it is this venue which lays down

27 §3b.(v), AMT Participation Agreement (2014).

28 §3a., AMT Participation Agreement (2014).

29 See Chapter 3 of the Thesis for a more in-depth discussion of how classification as independent contractors/self-employment is a practice which plagues the economy generally, and leads to increasing labour precariousness.

30 *Supra n.* 13, p. 13.

31 *Supra n.* 11, p. 142.

through its contractual architecture the forms in which the other so-called “active” parties can engage, is downplayed. It is through this perception of the “passivity” of the AMT that the power relationship between the collaborative platform, and the Providers and Requesters is rendered invisible. And it is this very form of invisibilisation of power relationships³² to which (digital) labour is subjected that is transformative about the AMT in particular and about the collaborative economy in general.

2.1.2. The Organisation of Labour Relationships on AMT

The ways in which labour is transformed in the digital space is, of course, not merely contractual, but also manifests itself in the organisation of labour relationships of the collaborative economy. The architecture of AMT is such that Requesters can set hiring conditions and also refuse to “approve” accomplished work from the Provider for any reason or for no reason.³³ Even when the Requesters refuse to “approve” the Providers’ work, they may still retain it without any payment to the Provider. Moreover, the “non-approval” of a Provider’s work, irrespective of its retention by the Requester, adversely affects the former’s AMT reputation or ratings, which in turn, impacts her likelihood of getting further assignments for more remunerable pay on AMT.³⁴ All these factors create a highly skewed balance of power in favour of the Requester, which transform the digital labour markets into highly disadvantageous environments for the service providers.

It is often claimed that the collaborative economy is advantageous for its service providers because of the flexibility it provides to service providers in terms of duration of working hours, work timings, and venue of work.³⁵ However, it has been argued that such flexibility is only a chimera because service providers are after all, controlled by allotting a fixed amount of time for finishing a specified task or set of tasks, and by monitoring systems that are peculiar to virtual work, such as taking screenshots of workers’ monitors.³⁶ Providers on AMT are additionally

32 See *Flyverbom*, Internet Policy Review 2016, for a discussion on the crucial role of ‘visibility’ and its management in ordering and governing digital infrastructure.

33 *Aloisi*, *supra* n. 16, p. 667

34 *Marvit*, The Nation 2014.

35 *Gajendran et al*, JAP, 2007; *Mulcahy*, HBR, 2017.

36 See *Risak et al*, 2015, where it has been argued that such practices “often result in determination of work that is so pronounced that it equals “classical” personal dependency necessary for an employment relationship”; See also *supra* n. 13, p. 17, where a similar argument is made.

disadvantaged since Amazon can also unilaterally suspend or terminate a Provider's account without providing a reason,³⁷ and without assuming liability for the same.³⁸ Further, AMT aims at binding Requesters to “*only accept work product from Providers that has been submitted through the Site,*”³⁹ thus diminishing possibility of its Providers to work outside of AMT. That the AMT ratings/reputation score cannot be transferred to other collaborative economy platforms also serves as a barrier for Providers to work for other collaborative platforms, while also posing an interesting problem for competition law. What this analysis ultimately reveals is that as AMT exhibits more involvement in the transactions between Requesters and Providers through its platform architecture than it claims to. Such invisibilisation of power through realisation of particular configurations of labour relationships via collaborative platform architecture constitutes the second transformative dimension of crowdwork in the collaborative economy.⁴⁰

2.2. The Transformation of Labour: Uber

Founded in 2009, Uber is a transportation-hailing service which also serves as an example of work-on-demand via apps in the collaborative economy. Uber works as a platform connecting drivers and passengers in a given area and time through its internet-based app, which can be used on smartphones. The app recognises the location of the passenger and finds available drivers who are nearby. When a driver accepts a trip, the app notifies the passenger and displays the driver's profile together with an estimated fare to the destination indicated by the passenger. Once the trip is completed, the fare is automatically charged to the bank card which the passenger is required to enter when signing up for Uber. Prior to all this, in order to access the app as a passenger or to be a Uber driver, one must accept the terms and conditions laid down by Uber through a clickwrap agreement.⁴¹ Like AMT, Uber also constitutes a tripartite or triangular contractual relationship: First, the contractual relationship between Uber and the passenger, which is covered under the Terms and Conditions Agreement⁴² and second, the contractual relationship between

37 §4d. & §11, AMT Participation Agreement (2014).

38 §4e., AMT Participation Agreement (2014).

39 §3a., AMT Participation Agreement (2014).

40 See *Srnicek*, Platform Capitalism, for a detailed discussion on exactly how power is negotiated through the configuration of labour relationships by collaborative platforms.

41 *Supra n. 21*

42 Uber T&C Agreement (2017).

Uber and its drivers, which is covered under the Driver Services Agreement.⁴³ Notably, unlike AMT, these two contractual relationships form the contents of separate agreements.

2.2.1. Contractual Classification by Uber Agreements

Uber operates through a number of subsidiaries across the world under the parent company Uber Technologies Inc. with its principle seat of business in San Fransisco, USA. The contractual terms of service of Uber accordingly vary for different jurisdictions depending on the local laws and the kind of vehicular services Uber offers in each.⁴⁴ In the EU, the Uber platform is managed by the subsidiary, Uber BV, which is governed by Netherlands law.⁴⁵ The Terms and Conditions Agreement under Uber BV requires the passenger to accept that Uber does not provide transportation or logistics services and that all such services on Uber’s platform are provided by independent third party contractors who are not employed by Uber or its affiliates.⁴⁶ Accordingly, the Agreement stipulates the Uber driver as a self-employed person and not a worker. This is similar to the clause under the Driver Services Agreement, which lays down that the relationship between Uber and the drivers is solely that of an independent contractor⁴⁷, and that the drivers must not hold themselves out as an employee, agent or authorised representative of Uber.⁴⁸ Additionally, the Driver Services Agreement lays down that the provision of transportation services to passengers “creates a legal and direct business relationship” between the driver and the user to which neither Uber or any of its affiliates is a party.⁴⁹ In this manner, the Agreement defines the relationship not just between Uber and the driver, but also between the driver and the passenger, which as argued before, is a novel feature of contractual relationships in the collaborative economy. The collaborative platform dictates the terms of the relationship between the service consumer and servicer provider, while at the same time, contractually classifies the service provider as an independent contractor, thus excluding itself of responsibility towards the same. Such form of contracts raise new legal challenges regarding determining the actual status of the service provider in the collaborative economy.

43 Uber Driver Services Agreement (2015).

44 Opinion of Advocate General Szpunar in *Uber Systems*, Case C-434/15, ECLI:EU:C:2017:364, para.14.

45 *Supra n. 44*, para.12.

46 §2, Uber T&C Agreement (2017).

47 §13.1, Uber Driver Services Agreement (2015).

48 §13.2, Uber Driver Services Agreement (2015).

49 §2.3., Uber Driver Services Agreement (2015).

2.2.2. The Organisation of Labour Relationships on Uber

It should be noted that in order to become an Uber driver, a person needs to complete Uber's application process, providing driver license information and evidence to the vehicle's registration and insurance.⁵⁰ They also might be required to pass a city knowledge test and have an interview with an Uber employee, and but do not necessarily need a commercial driving insurance.⁵¹ Uber additionally employs a ratings system, whereby each passenger evaluates the driver's performance after every ride out of 5 stars. The driver's behaviour and quality of service provided has direct impact on this rating. If the rating falls below a certain threshold (4.6 out of 5), the driver could simply lose access to the Uber application, without an opportunity to respond or explain the situation.⁵² Additionally, Uber sets the price for each ride depending on the distance to be covered and the supply and demand of drivers. However, Uber's surge pricing system, which supposedly adjusts the demand and supply of drivers in real-time, is run by an algorithm which lacks transparency or the participation of drivers or passengers. This means that Uber can slash or increase the prices of rides without warning, while also taking a sizeable bite of the ride fare as commission which can be up to 20-30% depending on the service.⁵³ However, Uber does not pay for drivers' gasoline, insurance, maintenance costs and potential vehicle leasing costs.⁵⁴

The use of ratings system, surge pricing, and algorithmic price fixing all illustrate the novel formats in which the relationship between the passenger, driver, and Uber is organised under the collaborative economy. While on the face of it, it would seem that Uber exercises little control over the driver, for example, by letting the driver decide whether she accepts the ride requests or not, the ratings system ensures that such acceptance or rejection has an implication on the ratings system which eventually determines whether the driver stays or is kicked out of Uber's platform. Control is thus still exercised over the driver, though in more invisible ways, because rather than acting as the active party in the relationship between the driver and the passenger, Uber mediates said relationship through a technological interface, which *prima facie* seems passive. But this seeming passivity, which simultaneously lays down the terms of the very environment in which the driver and passenger are allowed to constitute their working relationship, is exactly the novel

50 *Aloisi, supra n. 16*, p. 674

51 *Aloisi, supra n. 16*, p. 674-75

52 *Sachs, On Labor 2015*.

53 *Aloisi, supra n. 16*, p. 673

54 *Ibid.*

feature of the collaborative platform which makes it difficult to classify as an employer or hirer of independent contractors or self-employed persons.

2.3. The Scope of “Worker” under EU Law: Assessing the Status of AMT and Uber Service Providers

So far, I have outlined the key features of AMT and Uber as part of the collaborative economy, and how they transform working and labour relationships through novel formats that differ from traditional labour configurations. In order to understand how these novel formats pose a classification challenge in terms of “worker” or “self-employed” for European law, one needs to first clarify what is actually meant by a “worker” under the European legal order.

It should be underlined that the scope of worker has historically developed in the EU in the context of freedom of movement of workers under Article 45 of the TFEU which has been a core principle of the European single market. Nevertheless, who constitutes a “worker” is not laid down in the EU Treaties, but rather, has been shaped by the CJEU. Importantly, such understanding of “worker” is not limited merely to issues concerning the free movement of workers, but also extends to determine who is to be considered as a worker when applying EU laws in the social protection of labour more generally.⁵⁵ In this regard, one must also note the case of *Asociación Profesional Elite Taxi v. Uber Systems Spain* SL56 pending before the CJEU at the time of writing, which asks whether Uber is a mere intermediary in the role of an “information society service: under Directive 98/34/EC, which exempts it from liability or whether it actually constitutes a provider of transportation services under EU law? Though according Advocate General Szpunar’s opinion, the case excludes the exact question of whether an Uber driver qualifies as a worker or self-employed contractor⁵⁷, it nevertheless offers an interesting and relevant discussion which can provide some guidance. However, according to the overall jurisprudence of CJEU, there are two main criteria which need to be satisfied in order for

55 Some examples of CJEU judgments which apply the EU definition of “worker” to EU social protection legislation include: Judgment in *Isère*, Case C-428/09, ECLI:EU:C:2010:612 (for the Directive on Working Time), Judgment in *Balkaya*, Case C-229/14, ECLI:EU:C:2015:455 (for the Directive on Collective Redundancies) and Judgment in *O*, Case C-432/14, ECLI:EU:C:2015:643 (for directives concerning employment equality).

56 Case C-434/15.

57 *Supra n. 44*, footnote 19.

a citizen to constitute a “worker” under EU law. Nevertheless, these criteria raise challenges for the legal classification of service providers in the collaborative economy,⁵⁸ and are discussed in detail as follows.

2.3.1. Existence of subordination link

The CJEU has laid down that a subordination link between a person who provides their labour and the person/entity which uses this labour must exist in order for the former to qualify as a “worker.” What this means has been explained in *Deborah Lawrie-Blum v. Land Baden-Württemberg*⁵⁹, where the CJEU held that the essential feature of an employment relationship is that for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration.⁶⁰ In this case, the question which the Court answered in the affirmative was whether a person who works as a trainee teacher as part of teachers’ preparatory service under German law should be regarded as a worker. That such trainee teachers give lessons for only a few hours a week and are paid remuneration below the starting salary of a qualified teacher did not prevent the Court from conferring the status of “worker” on trainee teachers. This position was affirmed in *Jany and Others v. Staatsecretaris van Justitie*,⁶¹ which also further clarified that “any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in self-employed capacity.”⁶² The crucial issue to determine then is what is exactly meant by an activity outside the relationship of subordination, viz. “performing services for and under the direction of another person.” The *Danosa* judgment sheds some light on this question, laying down that subordination does not altogether erase the margin of discretion in the performance of a task, but does involve reporting on one’s duties.⁶³

Applying this criterion to both AMT and Uber, one can argue that there exists a large margin of discretion for the service provider under both platforms, since she is not obliged to accept any particular task at all. Additionally, the completion or performance of tasks under both these

58 *Supra* n. 3, pp.11-13.

59 Judgment in *Deborah Lawrie-Blum*, Case 66/85, ECLI:EU:C:1986:284.

60 *Supra* n. 59, para.17.

61 Judgment in *Jany and Others*, Case 268/99, ECLI:EU:C:2001:616.

62 *Supra* n. 61, para.43.

63 Judgment in *Danosa*, Case C-232/09, ECLI:EU:C:2010:674, para.48.

platforms does not *per se* involve reporting on his duties to the collaborative platform. All these features point to the absence of a subordination link between the service provider and the collaborative platform. On the other hand, it can and has also been argued that AMT and Uber merely change the format of exercise of control, while still exercising control over the service provider through their ratings and price setting mechanisms and their final authority on making their platform inaccessible to the service provider in certain cases.⁶⁴ Advocate General Szpunar in the Uber Spain case has pointed out that Uber does not merely match supply to demand, but also *creates* the supply of drivers itself.⁶⁵ In this sense, it can be argued that the service providers on these platforms are hardly independent of the collaborative itself, and fulfill the requirement of the subordination link. The novel format of collaborative platforms thus poses a legal challenge as far as the determination of the subordination link under EU law is concerned.

2.3.2. Genuine and effective employment

The second criterion to qualify as a “worker” under EU law is that it must constitute genuine and effective employment, which means that the work in question must constitute a genuine economic activity. In *Levin v. Staatssecretaris van Justitie*⁶⁶, the CJEU accordingly upheld part-time employment activities as being genuine and effective, but excluded such activities from its scope which are undertaken on such a small scale as to be regarded purely marginal and ancillary.⁶⁷ Additionally, in its *Kempf* judgment, the Court ruled that the criterion of genuine and effective employment is not precluded from fulfillment when the employee’s income is below the minimum means of subsistence in the concerned Member State.⁶⁸

In the case of service providers on AMT, Uber and other similar collaborative platforms, it can be challenging to identify what constitutes small scale or purely marginal and ancillary work. Labour performed through Uber and AMT can both be of extremely short duration – from the length of a taxi ride to the time it takes to complete a HIT, which can be as short as 1 minute.⁶⁹ Remuneration to service providers on both these platforms can be notoriously low and

64 *Aloisi*, *supra* n. 16, pp.674-77; *supra* n. 13, pp.20-21; *supra* n. 10, pp.21-23.

65 *Supra* n. 44, para.43.

66 Judgment in *Levin*, Case 53-81, ECLI:EU:C:1982:105.

67 *Supra* n. 66, para.17.

68 Judgment in *Kempf*, Case 139-85, ECLI:EU:C:1986:223, para.14.

69 *Wilson*, Daily Dot 2013.

variable⁷⁰: On AMT, remuneration for each HIT completed can be as low as 0.01 USD.⁷¹ Additionally, the work of the service providers can be discontinuous, even as it results in sliding of corresponding provider's ratings.⁷² Does this mean that labour performed by AMT or Uber service providers is marginal and ancillary to the business of these collaborative platforms, which always contractually claim to be a mere intermediary or just a meeting place for the platform's Providers/drivers and Requesters/passengers?

In his opinion in the *Uber Spain* case, Advocate General Szpunar argues that Uber is not a mere information society intermediary but rather, a transportation company⁷³ because the component of its business provided through electronic means - viz. booking of vehicles and drivers by passengers - is neither economically independent from the component provided through non-economic means, nor constitutes the main component of the two.⁷⁴ Corollarily, it could be argued that the drivers' activity on Uber does not constitute an activity which is marginal or ancillary to Uber's business. On the other hand, in its judgment in *Ker-Optika*, the CJEU has held that the online sale of goods constitutes an information society intermediary because the essential component of the transaction, viz. making offer, acceptance, and payment are performed by online means, and that delivery of goods is simply the performance of the contractual obligation and is ancillary to the main activity of the business.⁷⁵ Based on this analogy, one might also argue that the essential component of an Uber transaction is making offer, acceptance, and payment for the ride, which are all done electronically – in which sense, the trip is “purchased” entirely online - and therefore the actual performance of the trip by the driver is merely ancillary to the main activity of Uber's business.

Because of these reasons, it becomes difficult to decide whether the criterion of genuine and effective employment is fulfilled by the service providers in the collaborative economy. The difficulties are complicated in the case of AMT, where both the purchase and performance of the

70 *Ibid.*

71 Turkernation, *The Myth of Low Cost, High Quality on Amazon's Mechanical Turk*, 2014.

72 *Supra n. 3*, p.13.

73 *Supra n. 44*, para.88.

74 *Supra n. 44*, para.71.

75 Judgment in *Ker-Optika*, Case C-108/09, EU:C:2010:725, para.22, 28; see also *supra n. 44*, para.36 for an elaboration on this point.

service are done online. Would this imply that AMT Providers are marginal and ancillary to the business of AMT or constitute a core part of its operations? The answer is not evident.

In this way, the fulfillment of both major criteria for qualifying as a worker under EU law – existence of subordination link, and genuine and effective employment – is brought into question by the contractual, labour, and technological formats developed under the collaborative economy. This creates a glaring legal uncertainty concerning the categorisation of collaborative economy labour as a worker or self-employed person, and consequently affects the extent of social protection received by the service providers.

CHAPTER 3

LABOUR PRECARIOUSNESS IN THE COLLABORATIVE ECONOMY

In the last Chapter, I explained how the collaborative economy is characterised by changing contractual and technical formats of labour relationships, and how such novelties present a legal challenge in terms of labour classification for EU law. In the present Chapter, I argue that collaborative platform labour formats, while they might be novel, actually trace their lineage to the broader trend of global precarisation of labour, and thus provide a technologically-mediated continuity to the challenges which globalisation raises for labour protection. Accordingly, I first briefly discuss what the precarisation of labour means both generally, and within the collaborative economy. Next, I employ the concept of “virtualisation of workspace” propounded by labour and globalisation theorist, Ursula Huws, to illustrate how collaborative platform labour precarisation is part of a larger trend of global labour precarisation. The underlying idea of this Chapter is to thus underscore the prominent role which legal classification plays in labour precarisation processes generally, and in the collaborative economy in particular.

3.1. Understanding(s) of precarious labour

The concept of precarious labour is closely connected with the loss of dignity of labour.⁷⁶ A basic understanding of precarious labour includes little or no job security owing to the non-permanent nature of the work or non-specific contractual terms or the absence of a written contract - for example, in the case of involuntary part-time or temporary work or employment with unclear working hours and duties which vary with the employer’s wishes.⁷⁷ All these conditions lead to what has been termed as “demutualisation of risk,”⁷⁸ whereby employers shift the risks and responsibilities of their undertakings on to their employees and workers. Such demutualisation of risk also contributes to an assault upon one’s dignity at work.⁷⁹

⁷⁶ See in this context, European Parliament Committee Report on Working Conditions and Precarious Employment, 2016, p.8, which defines decent work as “*full and productive employment, ensuring dignity, fair remuneration, a safe workplace, freedom of expression of opinion, freedom to organise and participate in decisions that affect workers’ lives, equal opportunities, equal treatment for all and gender equality.*”

⁷⁷ *Supra n. 76*, p.7.

⁷⁸ See generally, *Freedland et al*, The Legal Construction of Personal Work Relations for development of the concept of “demutualisation of risk.”

⁷⁹ See *Mantouvalou*, UCLLRI 2012, pp.20-23, for a detailed discussion on the link between human dignity and labour precariousness.

Labour precariousness is hardly a 21st century problem. It was a concern in the sense of casualisation and discontinuity of labour for a large part of the workforce even in the heyday of Fordist industrialisation and the “golden age” of employment protection legislation⁸⁰ – both of which have been identified as major factors in the de-casualisation of work relations.⁸¹ In the early 1960s, Italian economist Sylos Labini offered a basic definition of precarious labour as the type of employment performed by workers with “no guarantee of stability either of their job or of their income and hence....no definite prospects of improvement.”⁸² However, the scope of precarious labour is larger, and today, three distinct, though not mutually exclusive, approaches to understanding precarious labour may be identified.

As per the first approach, precarious labour may be understood to refer to work in certain specific sectors of the labour market which had been left at the margins of the de-casualisation push of the early 20th century. This approach was dominant in the 1950s-60s, which was also the era of Fordism. The focus here is on the *sector* of labour. Otto Kahn-Freund’s seminal analysis of the inherently casual work relations of dockworkers is an excellent example of this approach.⁸³ The second approach evolved in the 1970s and 80s, whereby precarious labour began to refer to what came to be known as “atypical” or “nonstandard” work.⁸⁴ According to this approach, precarious labour refers to “work that departs from the normative model of the standard employment relationship (which is a full-time and year-round employment relationship for an indefinite duration with a single employer) and is poorly paid and incapable of sustaining a household.”⁸⁵ The focus here then is on the *form* of labour relationship - “atypical” or “non-standard” forms of labour relationships, often engaged in by women, begin to constitute precarious labour.

The third approach however, shifts the focus from both the sector and form of employment to instead identify particular *factors* that may contribute to rendering any form of labour in any

80 Kountouris, CLLPJ 2012, p.22.

81 Coase, Ronald H., *Economica* 1937; Deakin, Simon, ESRC 2000.

82 Labini, P.Sylos, *Int’l Lab. Rev.* 2008.

83 Kahn-Freund, Otto, *MLR* 1967, pp. 635. 642.

84 *Supra* n. 80, p.23.

85 Fudge and Owens (eds.), *Precarious Work, Women and New Economy*, p.3.

sector precarious. According to this approach, therefore, the concept of precarious work is constituted by a range of factors that contribute to whether a particular form of employment exposes the worker to employment instability, a lack of legal and union protection, and social and economic vulnerability.⁸⁶ A 2016 European Parliament Study on Precarious Employment also employs this approach by considering the possibility of precarious labour in all kinds of employment relationships, from all sectors, including “standard, open-ended, full-time contracts.”⁸⁷

3.2. Legal Determinants of Precariousness in the Collaborative Economy

The third approach to labour precariousness discussed in the last subsection has been used to develop a taxonomy of the “legal determinants of precariousness.”⁸⁸ These determinants refer to factors that, from a legal regulatory point of view, can contribute to rendering a personal work or labour relation of any kind or form, inherently precarious.⁸⁹ These legal determinants are often interlinked and though they are not the only determinants of labour precariousness (which could include, for instance, the personal, psychological, or existential aspects of the work), they do provide a useful compass to gauge its presence from a legal perspective.

3.2.1. Employment status precariousness

Employment status precariousness refers to the labour precariousness characterised by the classification or uncertainty of classification of one’s work relation. As we have seen, in the EU among other things, a work relation can be categorised as a “worker” or “self-employed” or independent contractor. Employment status may further be characterised as “part-time worker”, “seasonal worker”, “on-call worker”, “voluntary worker” or “informal worker” in various jurisdictions.⁹⁰ In its extreme manifestations, classification under these different employment categories can have the effect of totally disenfranchising workers from any protection afforded by labour law or even subject labour to exclusive regulation by commercial or contract law provisions. It is the stripping of such legal protection of labour which creates employment status precariousness. Examples of such precariousness include Article 153 of the TFEU which extends

86 *Rodgers*, *Precarious Work in Western Europe*, 1989, p.1.

87 European Parliament Committee Report on Precarious Employment in Europe: Part 1, 2016, p.22.

88 *Supra n.* 80, p.26.

89 *Ibid.*

90 *Supra n.* 80, p.28.

various kinds of social protection only to “workers” under EU law.⁹¹ Another example is the Part Time Work Directive⁹², which establishes a general principle of non-discrimination against part-time workers but allows Member States to exclude “part-time workers who work on a casual basis” from its protection, albeit “for objective reasons” and after appropriate consultation with social partners.⁹³

In general, work relations that strongly deviate from the classic binary, personal, full-time, wage/salary remunerated, standard employment relationship, are always at risk of falling outside of the scope of labour law.⁹⁴ As discussed in detail in Chapter 2, work relations in the collaborative economy are characterised by tripartite or triangular contracts and irregular working hours and wages, and thus strongly exhibit such deviation. More often than not, collaborative platforms contractually characterise the employment status of their service providers as that of a “self-employed” person or “independent contractor.” This is certainly true in the cases of AMT and Uber. But even if one looks beyond contractual terms to follow the primacy of fact principle, one encounters a vast amount of uncertainty in the nature of the employment status of a service provider. In this manner, labour precariousness is created in the collaborative economy both by contractual classification as an independent contractor, and by the vast legal uncertainty concerning the service provider’s real employment status.

3.2.2. Temporal Precariousness

Temporal precariousness refers to the type of precariousness that derives due to temporal uncertainty or time limitation of one’s work relation. Such precariousness can manifest in four legally distinct varieties: First, a work relation can be inherently temporary - for instance, because it is associated with a fixed-term contract, a seasonal contract, a temporary agency work contract, or a contract for the performance of a specific task. Second, some work relations may require the provision of services for such a short period of time that they are seen as either marginal or ancillary to the main business (thus linking temporal precariousness to employment status precariousness), or as to fall below a particular threshold of weekly working hours

91 Article 153, TFEU.

92 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

93 *Supra n. 92*, Clause 2.2.

94 *Supra n. 80*, p.29.

necessary to trigger the application of labour protection laws. Third, some work relations while being full-time and of indefinite duration, still allow the employer to terminate it unrestrained by the legal framework either contractual, statutory or collectively agreed.⁹⁵ Precariousness in this situation is triggered due to the fact that the legal possibility of unfair termination constantly threatens job security. Fourth, temporal precariousness might derive from the inability to have some control over one's working hours, which is a typical feature of on-call and part-time work.⁹⁶ In the EU, an example of temporal precariousness may be found in Directive 91/533/EEC, which obliges the employer to inform employees in writing of some essential aspects of the employment. Member States are, however, allowed to exclude workers in "employment with a total duration not exceeding one month, and/or with a working week not exceeding eight hours"⁹⁷ or "of a casual and/or specific nature, provided, in these cases, that its non-application is justified by objective considerations."⁹⁸

In the collaborative economy, temporal precariousness of the first, second and fourth variety are especially dominant. As discussed in the last Chapter, work on both AMT and Uber is characterised by being inherently temporary, and of short duration. Work on Uber can last the duration of only one ride and the completion of each HIT on AMT can take as little as 1 minute.⁹⁹ These conditions create temporal precariousness in the collaborative economy by the work being understood as "marginal or ancillary" and exclude the service provider from the protection afforded by law. Further, collaborative platform work offers very little control over one's working hours, since often service providers have to work on an "on-demand" basis or risk losing their ratings on the respective platforms, thus creating additional temporal precariousness.

3.2.3. Income Precariousness

In the simplest terms, income precariousness refers to the unavailability of a steady and decent income that allows the person indulging in labour to live a fulfilling and dignified existence.¹⁰⁰ Such precariousness can manifest in three forms: First, in the absence of institutional

95 *Supra n.* 80, p.30.

96 *Supra n.* 80, p.32.

97 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, Article 1.2.(a).

98 *Supra n.* 97, Article 1.2.(b).

99 *Supra n.* 69.

100 *Supra n.* 80, p.32.

arrangements- either statutory or collectively agreed- which fix minimum wages. Second, in the absence of sufficiently strong legal and procedural guarantees for the protection of wages and income in general, for example, protection from unlawful deduction of wages, or in the case of employer bankruptcy. Third, when the totality or a share of one's income is determined by reference to the output and/or performance of the individual or by the output/performance of its employing entity, insofar as such variations in income prevent the labouring person from earning enough to live a dignified life.¹⁰¹ Income precariousness has a strong link with all other legal determinants of precariousness, and can very often emerge as a direct consequence of temporal or employment status precariousness. According to the EU multilevel governance system, the competency of most issues concerning income precariousness lie with the Member States.¹⁰²

The collaborative economy exhibits many signs of income precariousness as well. For instance, minimum wage standards do not seem to be followed in the workings of AMT and Uber.¹⁰³ Surge pricing on Uber and random increases in Uber's commission from its drivers, as well as price fixing of each HIT by AMT would imply that service providers have little protection against deduction of wages by both these platforms. Finally, income on both Uber and AMT, and on collaborative platforms in general, is highly output-oriented: On Uber, drivers are specifically excluded as employees, and paid only for each ride, the earnings of which can be highly variable due to surge pricing. On AMT, each task is broken down into micro-tasks (HITs), and thus remunerated on a very low basis. All these factors contribute to a heightened income precariousness on both these platforms.

3.2.4. Organisational control precariousness

Organisational control precariousness refers to the inability of the labour provider to have a full and effective control over the modalities of performance of her work.¹⁰⁴ This seemingly broad category however does not refer to the more normal exercise of managerial discretion that is typical of subordinate or dependent work, but rather tries to capture the precariousness that arises when a particular legal regime tends to lean towards flexibility in employment contracts,

101 *Ibid.*

102 *Infra*, Section 5.1. of this Thesis.

103 *Butler*, Guardian 2017; *Lawrence*, Guardian 2016.

104 *Supra* n. 80, p.34.

whereby employers and related social partners are allowed to unilaterally modify the terms of employment for better or for worse, or to interpret existing terms and conditions in ways that are detrimental to the workers' stability.¹⁰⁵ In this context, flexibility of and in employment should not *per se* be understood to constitute organisational control precariousness. But employment flexibility which prevents labour providers from exercising some degree of control over their flexible working lives, and their lives in general, and instead subjects them to the employer's whim, does contribute to this form of precariousness.¹⁰⁶ Zero-hour and on-call employment contracts are typical examples of this phenomenon.

In the collaborative economy, organisational control precariousness manifests itself in the combination of seemingly flexible working hours on the one hand, and the control exercised through the ratings system and through the unilateral power of the collaborative platform to kick out service providers, on the other: The availability of flexible work duration, and flexible frequency of work for the service provider is revealed as a chimera when one takes into consideration that to maintain their ratings, both AMT Providers and Uber drivers have to engage in enough work of acceptable quality over a consistent period of time. Gaps in output quality or frequency can lead to low ratings or deactivation of accounts in both cases.¹⁰⁷ The ratings system is not vetted, and a AMT Provider or an Uber driver can be unilaterally – for reasons good or bad – be rated in a binding way by the AMT Requester or Uber passenger. Furthermore, the working of both the AMT and Uber algorithms which collate different ratings/reviews by Requesters and passengers, along with other factors to make up a single service provider's rating on their platform is highly non-transparent.¹⁰⁸ Additionally, on AMT, Providers' output may be rejected without pay by Requesters for no defined reason, even as the latter retains the former's work. All such unilateral powers exercised by the collaborative platforms take the service provider's agency away from her, subjecting her to the whims of the former as well as that of the recipient of the service to a high degree¹⁰⁹, thereby heightening her organisational control precariousness.

105 *Ibid.*

106 *Ibid.*

107 *Supra n. 37.*

108 European Parliament Policy Analysis, *The Situation of Workers in the Collaborative Economy*, 2016, p.14.

109 *Supra n. 69*, see also, *Shontell*, *Busn. Insider* 2011.

I have described four different forms of labour precariousness here. However, it should be underlined that the classification of collaborative economy labour as self-employed can amplify all the abovementioned forms of precariousness, and not just employment status precariousness. This is because a person's employment status is dependent on several other factors like duration of work, and control over working conditions¹¹⁰, and therefore employment status precariousness is *not* mutually exclusive of temporal, income or organisational control precariousness. In this manner, the classification question in the collaborative economy has a direct impact on the precariousness of labour.

3.3. Collaborative Economy Precariousness as an Acute form of Global Labour Precariousness

So far I have illustrated how the structure of the collaborative economy in conjunction with relevant public and private (contractual) legal regimes increases labour precariousness, including (employment status) precariousness caused by possible (mis)classification. In this sense, one might be tempted to think that the perpetuation of labour insecurity and indignity in the collaborative economy is a novel problem created by digitisation and related technological advancement. However, this premise has been questioned by characterising the collaborative economy as “the continuation of traditional outsourcing by other means,”¹¹¹ thus bringing in an assumption of continuity from old forms of labour.

Such continuities are especially traced in reference to the collaborative economy's extreme flexibility, shifting of risks to workers and income instability, which have long become the reality for a large portion of the workforce in contemporary labour markets generally. It indicates that such continuities are part of a much vaster trend towards the casualisation of labour,¹¹² which implies that labour precariousness in the collaborative economy is not really a novel problem, but just a continuation of the same old class struggles. But if so, then one must ask how far such struggles formulated differently in the collaborative economy?

110 See discussion in Section 2.3 of this Thesis, *supra*.

111 Morozov, Fin. Times 2015.

112 Bowles & MacPhail, Social Indicators Research 2008; Campbell, Lab. & Indus. J. 2004, pp.85-101; see also, *supra* n. 108, p.20, *supra* n. 13, p.6

It is to answer this question that the concept of “*virtualisation of work organisation*” was formulated by labour theorist, Ursula Huws. She has argued that the precarisation of labour through collaborative platforms, while using novel digitisation-enabled forms, is really part of a global trend of labour precarisation that extends far beyond the collaborative economy.¹¹³ For her, the virtualisation of work organisation is the trend of management of work and labour relationships through collaborative platforms and apps but which more often than not, involves not just “virtual work” (viz. labour carried out using a combination of digital and telecommunications technologies and/or produces content for digital media)¹¹⁴, but also the production of material goods or the delivery of real services in real time and space to actual customers physically and in person.¹¹⁵ This corresponds to the general understanding of the collaborative economy today. But Huws sees such virtualisation as part of a longer historical trend which can be traced to a series of developments in management and labour organisation since at least the 1970s, including the rise freelance labour markets, teleworking, and standardisation and performance monitoring, which allows for quantified imaginations of labour.¹¹⁶ This history has played a major role in the increasing precarisation of global labour over time, of which the current precarisation by collaborative platforms is only the next natural link. In this manner, Huws distinguishes between the technologies which the collaborative economy employs (eg., the internet and smartphone-based apps) and those employed by traditional teleworkers or freelancers (eg. telephones or fax), but sees a common ground concerning the structures through which labour is/was managed, exploited and rendered precarious in both these spheres.

Drawing on this historical understanding of labour precarisation, one realises that the collaborative economy has not introduced the serpent of casual labour into the garden of full employment. Rather, it is exploiting an already casualised workforce in ways that might ameliorate some problems even as it exaggerates others.¹¹⁷ In other words, precarisation of labour is not a problem caused *per se* by the collaborative economy – it is a trend that has existed

113 Huws, *Where Did Online Platforms Come From?*, 2017, p.31.

114 *Supra n.* 113, p.30.

115 *Supra n.* 113.

116 *Supra n.* 113, p.39.

117 Aloisi, *supra n.*16, p.662.

longer, and the collaborative economy only renders such precarisation a new shade, and by corollary, also accentuates it.

What is the significance of this realisation that the collaborative economy is a product of this larger history of global labour precarisation? Making the link between labour conditions in the collaborative economy and traditional labour precarisation explicit allows one to contextualise the collaborative economy, rather than viewing it as an isolated, one-off problem. Such a shift in perspective forces us to address the disease of unfair flexibilisation of employment relationships, rather than limiting our focus to just one of its symptoms viz., precariousness in the *collaborative economy*. This is crucial because merely making the symptoms disappear does not vanquish the disease. Focus on the symptoms leads only to piecemeal and decontextualised solutions which miss the forest for the trees. The goal of good mapping - which is what this Thesis attempts to do - then should be to prevent such short-sightedness. Collaborative economy represents only a piece in the global puzzle of the precarisation trend of labour relationships.¹¹⁸ An important piece yes, but only a piece nonetheless. To understand its problems better and to offer corresponding sustainable solutions, one needs to see where it stems from, how it connects to its history, and address the puzzle as a whole. How exactly this puzzle should then be approached in the EU context is the subject of the chapters that follow.

118 Stone, Osgoode Hall L.J. 2006, p.77.

CHAPTER 4

SOCIAL EUROPE v. SINGLE MARKET IN EU: LEGAL RESPONSE TO LABOUR PRECARISATION

So far, I have attempted to illustrate how the uncertainty over employment status classification contributes to labour precariousness in the collaborative economy. Building on this, I have mapped precariousness in the collaborative economy as a piece in the larger puzzle of global labour precariousness across different sectors. Hereforth, I intend to interrogate how EU law has sought to address this general issue of labour precariousness so far, and what one may learn about the social protection of labour in the EU from these attempts.

4.1. Legal response to labour precarisation in EU

EU has had ambitions of regulating precarious labour since at least the 1970s.¹¹⁹ But concrete legal manifestations of EU's attempts to address labour precariousness first emerged in only the early 1990s, a period that also saw the introduction of a new 'Social Chapter' by the Treaty of Maastricht. This Social Chapter extended the power of the European Community to adopt directives in the field of social policy by empowering the Council to act by qualified majority voting in relation to a wider variety of subject matter.¹²⁰ Consequently after the introduction of the Social Chapter, several directives were adopted with the aim to improve the social protection of labour: For example, this period saw the enactment of the Directive on employer's obligation to inform employees of conditions applicable to employment relationship.¹²¹ This was followed by the adoption of Directives on the regulation of working time,¹²² part-time work,¹²³ fixed-term work,¹²⁴ and temporary agency work.¹²⁵ Thereafter, the 2002 Framework Agreement of Telework was adopted as a voluntary agreement by the European Social Dialogue under the European

119 Council Resolution of Jan 21, 1974 concerning a social action programme.

120 *Dukes*, *The Constitutional Function of Labour Law*, 2011, p. 349.

121 Council Directive, *supra n. 97*.

122 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

123 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

124 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

125 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

Commission, for the protection of workers who use information technology to organise and perform work on a regular basis.

However, the level of labour protection provided by each of these legal instruments varies, and does not necessarily address the different forms of labour precariousness noted in Chapter 3. As discussed previously, the 1991 Directive, for example only applies to “paid employees” (workers) having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State,¹²⁶ and even then provides the possibility to exclude certain kinds of employees based on the duration of their employment and the number of working hours.¹²⁷ In this manner, it fails to comprehensively address employment status precariousness, as well as temporal and organisational control precariousness. Similarly, labour protection under the part-time work¹²⁸, fixed-term work,¹²⁹ temporary agency work¹³⁰ and working time¹³¹ directives as well as the Framework Agreement on Telework¹³² are all contingent on the existence of an employment relationship between the service provider and the recipient of that service, which again exacerbates the precariousness borne out of employment status, both generally and in the the collaborative economy specifically.

It has been argued¹³³ that the reason the abovementioned legal instruments fail to address the various kinds of labour precariousness effectively is because they focus on the form of work, rather than seeking to address the legal determinants which make work precarious.¹³⁴ Thus, as a result, these directives are centred upon regulating atypical work through the objective of achieving equal treatment between atypical workers with irregular forms of employment relationships and comparable “standard” workers with bilateral, full-time, and open-ended

126 *Supra n.* 97.

127 *Supra n.* 98.

128 *Supra n.* 123, Clause 3.1.

129 *Supra n.* 124, Clause 2.1.

130 *Supra n.* 125, Article 3.1.(a).

131 *Supra n.* 122, Article 2.

132 Framework Agreement on Telework, 2002, Article 2.

133 *Supra n.* 80, pp. 35-41.

134 Refer *supra*, Section 3.1 of this Thesis, for the discussion on different approaches to precarious labour, and why addressing precariousness through legal determinants over form of labour agreement is crucial.

contracts of employment.¹³⁵ However, as outlined in Chapter 3, with an economy tending to increasing precarisation of labour, merely addressing irregular forms of employment is not enough.¹³⁶ This is especially true of the collaborative economy, where uncertainties about labour classification contribute to several legal factors that perpetuate labour precariousness. In this manner, EU law has fallen short of responding to the problem of labour precariousness, because of its inability to move beyond addressing merely atypical or irregular forms of labour.¹³⁷ The question which then becomes pertinent to ask is why that is so?

4.2. Social Europe v. Single Market: Allocation of competencies in the EU multilevel governance system and its effect on labour protection

Why has the EU been unable to move beyond the atypical work framework with respect to its labour law formulations? To answer this question, one needs to first understand the background in which EU law and policy concerning the social protection of labour has developed, viz. the system of multilevel governance.¹³⁸

Since its beginnings in the European (Economic) Community, the EU has had a split-level distribution of legal powers between the supranational institution and the Member States, which EU scholarship broadly refers to as a multilevel governance system.¹³⁹ In the context of the common market which the Treaties of Rome sought to establish, the European supranational institutions were assigned the task of ensuring economic rationality and a system of undistorted competition, and national institutions of Member States the task of pursuing redistributive social policies including labour protection.¹⁴⁰ The Ohlin and Spaak committees of the early 1950s, which were constituted to envisage the role of labour and trade unions in the European Community, were of the opinion that such a division of competencies between the supranational institutions and the Member States would be adequate for labour interests to be represented at

135 See for example, directives listed under *supra n.* 124, Preamble, para.6; and *supra n.* 125, Preamble, para.15, which clearly recognise that contracts of an indefinite duration are, and will continue to be, “*the general form of employment relationship*” between employers and workers.

136 *Supra n.* 133.

137 See also, *supra n.* 80, pp 38-39, whereby an analysis of EU policy, as opposed to EU legislation, in the field of social protection of labour leads to the same conclusion.

138 *Infra n.* 139.

139 *Marks et al*, JCMS 1996, pp. 341-378.

140 *Joerges*, What is Left of the European Economic Constitution?, 2004, pp.14-17.

the Community level.¹⁴¹ The rationale was that if decision-making in matters of social policy was to remain in the hands of the Member States, then it was primarily at the national level that trade unions would be able to pursue their interests. Furthermore, it was thought that in the case of Community decisions affecting labour interests, these unions and related interest groups would also be able to exert their influence on decision from within the Member States because Community decisions were conditional on the agreement of an intergovernmental Council.¹⁴²

However, this configuration of strict division between the regulation of a common market at the community level and the regulation of social policy at the Member State level was soon found to fall short of its expectations, as labour unrest across Europe increased in the late 1960s and the 70s.¹⁴³ Following the Luxembourg Compromise and the events of Paris in 1968, which saw massive civil and student protests against economic class discrimination among other things¹⁴⁴, arguments were increasingly made in order to expand Community involvement in social matters as a means of legitimising the economic policies brought about by the creation of the common market.¹⁴⁵ This marks the beginning of what can be seen today as the tension between the European single market and the idea of Social Europe. *This tension stems directly from the legal allocation of competencies under the multilevel governance approach.* With the allocation of competencies of social policy formulation to the Member States and of economic policies concerning the single market to the European institutions, the legal structure of the EU in effect, de-linked these two issues. Such de-linking prevented the assessment of labour law and policies at the EU level, even though legislation and policy framing at the supranational level in the context of the common market did affect the ability of Member States to address the problem of labour precariousness.¹⁴⁶

It was this tension which also gave birth to the Social Action Programme of 1974, under which a variety of social legislation aimed at the harmonisation of labour standards among the Member

141 *Supra n.* 120, p.345.

142 *Ibid.*; see also, *Ohlin*, Int'l Labour Review 1956, p. 112; *Spaak*, PEP 1956, p.235.

143 *Silver*, Forces of Labour, p.45.

144 See *Salvati*, May 1968, 1981, pp.331-366, for a detailed discussion on the impact of the May 1968 events of Paris on labour and class struggles.

145 *Shanks*, Com. Mar. LR 1977, pp. 373,378.

146 *Scharpf*, The Asymmetry of European Integration, 2009, pp. 7, 22-24; see also, *supra n.* 120, p.346.

States of the erstwhile European Community was adopted.¹⁴⁷ Further democratisation of supranational spaces and strengthening the involvement of management and labour in Community decision-making were the two proclaimed goals of the Programme.¹⁴⁸ Accordingly, with the creation of employee rights to information and consultation, the initial steps towards Community regulation of worker participation in decision-making were undertaken in directives dealing with the transfer of business within the Community.¹⁴⁹

The underlying recognition visible in these developments, viz., that the promotion of competition and removal of barriers to trade would not automatically result in the enhancement of social conditions in the Member States, was a significant shift from the ordoliberal rationale of the Rome Treaty.¹⁵⁰ However in legal terms, it still did not result in the reconciliation or erasure of the tension between the common market and social policies. The Social Action Programme did not amend the Rome Treaty nor extended the legislative competence of the Community to cover social and labour issues. Neither did it relax the requirement of unanimity in the Council of Ministers for the adoption of Community legislation.¹⁵¹ All this meant that in an attempt to be politically acceptable, the 1970s directives and amendments towards the social protection of labour limited themselves to a subject matters like health and safety and gender discrimination.

The landmark jurisprudence of the CJEU in the 1970s enabling the doctrines of direct effect and supremacy in the cases of *Van Gend en Loos*¹⁵² and *Costa*¹⁵³ further exacerbated the tension between the ideas of the European single market and Social Europe.¹⁵⁴ The doctrine of direct effect led to the possibility that in their efforts to expand social protection, Member States would be hindered rather than facilitated through the direct application of community law.¹⁵⁵ And because the European Community was still an *economic* community, whose competencies and

147 *Supra* n. 120, p.346.

148 *Ibid.*

149 European Commission Green Paper, Employee Participation and Company Structure, 1975, pp. 9-10; see also, Council Directive 75/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of businesses.

150 See generally, *Peacock et al (eds.)*, German Neo-Liberal and the Social Market Economy, for a translation of key works of ordoliberalism and their early impact in influencing the shaping of the common market in Europe.

151 *Supra* n. 120, p. 347.

152 Judgment in *Van Gend en Loos*, Case C-26/62, ECLI:EU:C:1963:1.

153 Judgment in *Costa v. ENEL*, Case 6-64, ECLI:EU:C:1964:66.

154 *Supra* n. 120, p. 347.

155 *Weiler*, Com. Pol. S. 1994, p. 510.

laws were directed towards the creation of a common market, the possibility emerged that the doctrine of supremacy would ultimately be used for the prioritisation of common markets aims over other aims falling in Member State competencies, like that of social protection of labour.¹⁵⁶ Such possibilities further amplified the tension between the aims of common market at the supranational level and the aims labour protection aims at the national level. Simultaneously, because of the division of competencies, the ability to guarantee equivalent standards at the Community level remained limited.¹⁵⁷

This tension became especially explicit in the Sunday Trading cases that emerged across various Member States in the late 1980s and early 1990s, and were concerned with the question if the national restrictions on trading and opening hours were compatible with the Community principle of freedom of movement of goods.¹⁵⁸ Similarly, this tension was also evident when the CJEU struck down a national law which permitted the monopolisation of the provision of dock-work services to safeguard the right to work for Italian citizens, as being in conflict with Community legislation preventing the abuse of dominant market position.¹⁵⁹

Because of such a landscape, at the time of negotiations for the Single European Act of 1986, the fear that the completion of European single market might entail the usurpation of a whole range of social and labour protection regulations at the national levels, was stark (and also justified). As a response to this fear, the Single European Act relaxed the rule requiring unanimity in the Council with respect of measures intended to improve health and safety at work, with the hope that this would allow for creation of social protection of labour at the European level. At the

156 *Scharpf*, Negative Integration and Positive Integration, pp. 15-17, 36-39.

157 *Supra* n. 120, p. 348.

158 See *Maduro*, The European Court of Justice and the European Economic Constitution, pp. 29, 63; *Davies*, *Indus. LJ* 1995, p.49, for a detailed discussion of this tension with respect to the Sunday Trading Cases. See also, in this regard, Judgment in *Torfaen Borough Council*, Case C-145/88, ECLI:EU:C:1989:593; Judgment in *Rochdale Borough Council*, Case C-306/88, ECLI:EU:C:1992:510; Judgment in *Reading Borough Council*, Case C-304/90, ECLI:EU:C:1992:512; Judgment in *Union of the City of Stoke-on-Trent e Norwich City Council*, Case C-169/91, ECLI:EU:C:1992:519; Judgment in *Union départementale des syndicats CGT de l'Aisne*, Case C-312/89, ECLI:EU:C:1991:93; Judgment in *André Marchandise et al*, Case C-332/89, ECLI:EU:C:1991:94; Judgment in *Punto Casa SpA*, Joined Cases C-69/93 and 258/93, ECLI:EU:C:1994:226; Judgment in *Semeraro Casa Uno Srl et al*, Joined Cases C-418-421/93, C-460-464/93, C-9-11/94, C-14-15/94, C-23-24/94 and C-332/94, ECLI:EU:C:1996:242.

159 Judgment in *Merci convenzionali porto di Genova Spa v. Siderugica*, Case C-179/90, ECLI:EU:C:1991:464.

same time, the Commission encouraged bipartite discussions between management and labour¹⁶⁰ under the umbrella of what ultimately came to be formalised as the European Social Dialogue.¹⁶¹ This was done with the hope that such discussions would ultimately result in substantial contractual collective agreements through the process of collective bargaining at the European level, which in turn, would also help bypass the difficulties associated with fostering Council unanimity with regard to European labour protection laws.¹⁶² 1989 also saw the adoption of a European Charter of Fundamental Social Rights, which though not legally-binding because of the opposition of United Kingdom, still had symbolic value as it proclaimed a variety of labour and social rights including the freedom of association, collective bargaining and collective association.¹⁶³ However, in an effort to implement some provisions of the Charter, the Second Action Programme of legislative proposals and directives for the social protection of labour, dealing *inter alia* with the issue of worker health and safety, pregnant workers, working time, and posted workers, was passed.¹⁶⁴ Finally, as mentioned before, in 1993, the Treaty of Maastricht also introduced a new Social Chapter which allowed the Council to act by qualified majority voting rather than unanimity in the adoption of EU legislation in the field of social policy for a wider variety of subject matter.¹⁶⁵

These developments aimed at strengthening the pursuit of social aims at the European level certainly helped ease the tension between the newly-formed single market and the idea of Social Europe. But at the same time, they *did not erase* this tension, but rather directed it away from the policies of harmonisation of social and labour protection laws across Member States and from the related pursuit of expansion of EU competencies in the social arena.¹⁶⁶

160 Northrup *et al*, Int'l Lab. Rev. 1988, p. 525.

161 See *supra* n. 120, pp.352-357, for an in-depth historical analysis of the European Social Dialogue. See also, Article 152, TFEU, which provides the legal basis for the foundation of the Dialogue.

162 Ross, Delors and European Integration, p. 45.

163 Community Charter of Fundamental Social Rights of Workers of 09 December 1989. The Community Charter was later influential in shaping Article 151 of the TFEU, and may still be used by the CJEU as an interpretative guide in litigation concerned with social and labour rights. Some rights outlined in the Community Charter are further developed in the Charter for Fundamental Rights of the European Union of 12 December 2007, which has legally binding value. See also, *Tooze*, Social Security and Social Assistance, 2003, pp.166-168, for a detailed discussion of the history of the Community Charter.

164 Commission Communication concerning its Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers, 1989.

165 *Supra* n. 120, p. 349.

166 *Streeck*, Eur. LJ 1995, p.31.

Since Maastricht, harmonisation of labour protection across Member States has been off the EU agenda because of the fear of social dumping from Eastern Enlargement that could follow in its wake.¹⁶⁷ As a result, it has given new form to the tension between the European single market and Social Europe. The consequent disparities in the level of social protection and labour rights across different Member States have resulted in an erosion of labour rights, especially in the older Member States. This is particularly visible in the landmark CJEU judgments of *Laval*¹⁶⁸, *Viking*¹⁶⁹, *Rüffert*¹⁷⁰, and *Luxembourg*¹⁷¹ between 2007 and 2008.¹⁷² In all these cases, the CJEU answered the question of whether fundamental freedoms of the single market should be prioritised over national protections concerning the rights of labour with an emphatic yes. Such developments have resulted in the minimum standards of social and labour protection as becoming the acceptable standards at the European level.

The tension between the European Single Market and Social Europe, borne originally out of the legal division of competencies under the multilevel governance system thus still survives in EU. And this tension has often prevented and still prevents the linkage of labour precariousness and the fundamental freedoms of the single market. By obstructing the legal mapping of labour precariousness against the effects of the single market, the multilevel division of competencies in the EU hinders a comprehensive view of the problem of social protection of labour and inhibits an integrated response. It is also the reason why EU has not moved beyond regulating merely atypical or irregular forms of labour to address more intrinsic forms of labour precariousness, which arise from the legal form which labour is assigned, and which among others issues, includes the classification of service providers in the collaborative economy.

167 *Supra n.* 120, pp. 349-51.

168 Judgment in *Laval*, Case C-341/05, ECLI:EU:C:2007:809.

169 Judgment in *Viking*, Case C-438/05, ECLI:EU:C:2007:772.

170 Judgment in *Rüffert*, Case C-346/06, ECLI:EU:C:2008:189.

171 Judgment in *Luxembourg*, Case C-319/06, ECLI:EU:C:2008:350.

172 See generally, European Parliament Directorate General on Employment and Social Affairs, *The Impact of the ECJ Judgments on Viking, Laval, Rüffert, and Luxembourg*, 2010, for an in-depth analysis of these judgments and their implications. See also, *Ashiagbor*, Eur. LJ 2013, pp. 315-324, for a discussion on how these judgments impact labour protection in EU.

CHAPTER 5

‘LABOUR CONSTITUTION’ AND ITS SIGNIFICANCE FOR EU MULTILEVEL CONSTITUTIONALISM

In the last Chapter, I argued that the tension between the ideas of European single market and Social Europe, which emerges through the legal allocation of competencies in the EU multilevel governance system, hinders a comprehensive addressal of the issue of precarious labour. In the present Chapter, I intend to illustrate how this tension is actually a constitutional problem by outlining its specific constitutional aspects. Thereafter, I discuss the idea of labour constitution, propagated by early 20th century labour theorist Hugo Sinzheimer, and make a case for why his ideas are relevant to address the constitutional tension between the European Single Market and Social Europe.

5.1. Solidarity as a feature of EU multilevel constitutionalism: Negotiating between the principles of conferral and subsidiarity

Legal scholarship since the turn of the century has argued for the need to understand the EU legal order as not just multilevel governance, but as a multilevel *constitutional* system.¹⁷³ Such a concept of multilevel constitutionalism refers to a constitutional configuration with five distinct elements¹⁷⁴: First, it embodies an idea of the constitution which is rooted in post-nationalism. Second, it is constitutionalism driven by European citizens and not the Member States. Third, multilevel constitutionalism involves a governance configuration whereby the constitutional aspects of EU and the Constitutions of Member States are both intertwined and impacted by developments in the other. Fourth, such constitutionalism is based on idea of multiple identities of its citizens at the local, regional, national and European levels. Finally and importantly, multilevel constitutionalism refers to a *dynamic* rather than static constitutionalism.¹⁷⁵, whereby the allocation of powers shared by the national and European levels of government is

173 See among others, *Pernice*, Col. J. of Eur. Law 2009; *Pernice*, Walter Hallstein-Institut 2002; *Walker*, LEQS 2009; *Dellavale*, Jean Monnet Working Paper Series 2009; *Stone Sweet*, The Judicial Construction of Europe.

174 See, *Pernice*, Walter Hallstein-Institut 2002, pp. 4-6, for an outline and discussion of the elements of multilevel constitutionalism.

175 *Pernice*, 2002, *supra* n. 173.

continuously reorganised and reshifted, while all public authority- national or European- draws its legitimacy from a stable source, viz. the citizens.¹⁷⁶

As seen through the third and fourth elements, core to such multilevel constitutionalism are its organisational dimensions, which in the EU are negotiated through the principle of conferral and the principle of subsidiarity.¹⁷⁷ The principle of conferral refers to the competencies of EU deriving from its explicit and differing allocation in various areas by the Member States. In this regard, TFEU defines: The areas of exclusive competence of the EU,¹⁷⁸ the areas of competence which EU shares with the Member States,¹⁷⁹ and the areas where EU does not have the competence to legislate *per se* but can lay down legal frameworks short of harmonisation of laws to support, coordinate and supplement the actions of Member States.¹⁸⁰ Legal measures with respect to social policy fall under the second category, viz. that of shared competence, but is limited to the areas laid down under Article 153 of the TFEU.

Next, the principle of subsidiarity was laid down under the Maastricht Treaty and has a close relationship with this scheme of allocation of competencies. This principle is enshrined under Article 5(3) of the TEU, which lays down that with respect to areas which do not fall under its exclusive competence, which would include the social protection of labour, EU shall act only if and insofar as the proposed action cannot be sufficiently achieved by the Member States, either at central, regional or local level, but rather because of the scale or effects of the proposed action, is better achieved at the Union level.¹⁸¹ In effect, the principle of subsidiarity then seeks to balance the actions at EU and national states level in the areas of non-exclusive competencies.¹⁸²

Since these features of multilevel constitutionalism affect the shared competence regarding the social protection of labour, they also obviously have implications for the tension between European single market and Social Europe as described in the last Chapter. In case there is a

176 *D. Th. Tsatsos*, *The European Symptom: New Democratic Discourses*, 2008; *Chrysochoou, D.N.*, *Europe as a Synarchy: A Study in Organized Co-Sovereignty*, EJPL 2007, p. 407.

177 *Kotzur*, *Europe's Unfinished Community*, p.5.

178 Article 3, TFEU.

179 Article 4, TFEU.

180 Article 5, TFEU.

181 See also, TEU Protocol (no.) 2 on the application of the principles of subsidiarity and proportionality, 2007.

182 See generally, *Fabbrini*, *The Principle of Subsidiarity*, 2016; *Portuese*, CJEL 2011.

dispute concerning the competence of a EU level legislation or the violation of the principle of subsidiarity, it is the CJEU which decides the case at the Union level.¹⁸³ In this manner, the CJEU occupies a special role in formulating the structure of EU's multilevel constitutionalism.

However, the legitimacy of CJEU judgments in this regard do not stem from a hierarchical supremacy as in a traditional federal system, but is rather dependent on the wider network of national, regional and local courts spread throughout the Member States of the EU.¹⁸⁴ It is true that at the Union level, EU primary law is understood to be the "higher law," against which the validity of not just EU secondary law and decisions, but also the validity of all national legal rules and decisions within its scope are tested. Effectively, this means that national laws within the scope of EU competence will have to comply with EU primary law to be valid, and the decisions of CJEU verify the final legitimacy of both EU and national laws. However, the perspective endorsed within the national legal orders of Member States is quite different, since there it is the national constitutions, and not the EU primary law, which remain supreme. Thus, within Member States, EU law derives legitimacy from these *national* constitutional orders, since it is the latter which hold the final "*kompetenz/kompetenz*,"¹⁸⁵ or the competence to decide their own competencies, which owing to the principle of conferral, is something the CJEU or EU in general cannot delineate for itself. This power of national legal orders can, therefore, undercut the CJEU's decisions on both the allocation of competencies and the principle of subsidiarity. This perspective is made apparent in the reasoning behind the German Constitutional Court decision on Maastricht¹⁸⁶ and Lisbon Treaties¹⁸⁷ and is shared by many other constitutional courts and national constitutional doctrines within the EU. In this manner, EU multilevel constitutionalism actually requires a conception of law which is not dependent on a hierarchical construction, but rather allows for the CJEU and national courts to engage in a constitutional discourse which is based on the awareness that neither of them has absolute power or supremacy over the other.¹⁸⁸

183 Article 19, TEU; Article 251-281, TFEU.

184 *Maduro, supra n. 158*, pp. 9-11.

185 *Beck*, Eur. LJ 2011, pp. 471-80.

186 *Maduro, supra n. 158*, p. 31.

187 *Supra n. 184*, pp.473-76.

188 *Maduro, supra n. 158*, pp. 30-31.

It is this precise feature which is said to be embedded to create the idea of solidarity within EU multilevel constitutionalism.¹⁸⁹ The principle of subsidiarity in the context of shared competencies has been conceptualised as a process of mutual assistance, not necessarily by a superior body but by association and mutual action leading.¹⁹⁰ One instance of this feature might be requests by national courts (and not compulsions or imposed orders) for preliminary rulings to the CJEU.¹⁹¹ In this manner, the principle of subsidiarity does not merely facilitate the reasonable division of competencies *but also expresses the idea of common action and partnership as a matter of factual and political necessity.*¹⁹² This results in an enmeshed constitutional structure in the EU, which is based on the idea of solidarity, rather than of hierarchy.

5.2. The limits of judicial solidarity: European single market v. Social Europe as a constitutional problem

While solidarity remains a feature and an aspiration of EU constitutionalism, much of it is realised through judicial co-operation as described above, rather than politically.¹⁹³ My argument is that this political vacuum concerning solidarity plays a central role in rendering constitutional import to the seeming contradictory positions of the European single market and Social Europe.

Judicial solidarity essentially enables a process of legitimation of the EU constitutional order, which manifests itself in what has been termed as “integration through law”.¹⁹⁴ However, such integration also inheres a very particular *form*, since the judgments of CJEU derive and have derived their legitimacy from a particular form of legal reasoning, viz. formal reasoning. Formal reasoning, or *legal formalism* is the traditional understanding of judicial reasoning, which bases the authority and legitimacy of court decisions on the *recognition or discovery*, as opposed to the *creation* of law. Under legal formalism, courts are presented as merely the discoverers and agents of application of pre-existing law based upon deductive reasoning.¹⁹⁵ Such formulation of the

189 See, *Calliess, Subsidiaritätsß und Solidaritätsprinzip*, p. 167, for a detailed discussion on the relationship between the principles of subsidiarity and solidarity.

190 *Pernice*, CJEL 1996, p.407-8.

191 Article 267, TFEU.

192 *Supra n. 190*, p. 408.

193 *Maduro, supra n. 158*, p.2; *supra n. 156*; *supra n. 177*, p.54; *Everson et al*, ELJ 2012, p. 644.

194 *Cappelletti et al (eds.)*, *Integration through Law*.

195 *Prakken et al*, *A Logical Analysis of Burdens of Proof*, pp.5-7.

work of judges denies the use of discretion and conveys the impression of neutrality of the court, thus conceptualising judicial decisions as a *technical process* of application of law.¹⁹⁶ Such technicalisation which seemingly concretises the impartiality of judgments ultimately helps in the establishment of the court's authority.¹⁹⁷ The impression of neutrality as embedded in formal reasoning is also often essential in granting legitimacy to the decisions of courts.

However, as has been well-established by legal philosophy, formal reasoning builds its apparent neutrality only by masking the contestation(s) of values which underlie the apparent obviousness of the results arrived at by the "technical" application of the law.¹⁹⁸ It has been argued that it is the application of such formal reasoning by the CJEU which has prevented the Court from seeing itself as an actor in the conflicts of values arising from the application of free movement rules to a large area of national economic, social and cultural policies.¹⁹⁹ In other words, the legal formalism employed by the CJEU also facilitates masking of the tension between the European single market which relates primarily to the four freedoms of movement and competition, and Social Europe, which relates to areas of national economic and social policies, including the social protection of labour.

The decisions of CJEU in *Viking* and *Laval* are good illustrations of such masking. In these judgments, the reasoning of CJEU is structured such that it frames the issue centrally as a problem of freedom of movement of workers at the EU level (a single market concern), rather than as a conflict between social protection of labour gained through collective bargaining at national level and the freedom of movement of workers at the EU level (single market v. social protection conflict).²⁰⁰ Blindness to the question of social protection leads to a lack of acknowledgement of the tension between the two. This lack of acknowledgment of this tension means that the CJEU never goes into questions of competency of EU and adherence to principle of subsidiarity, which would be essential to decide cases of conflict between objectives of single market and that of social protection under a multilevel constitutional structure. Consequently, the

196 *Weiler, J.H.H.*, *JCMS*, 1982, pp. 39-40.

197 *Maduro, supra n. 158*, p. 11.

198 *Supra n. 195*, see also, *Hart*, *The Concept of Law*, p. 125; *Alexy*, *A Theory of Legal Argumentation*, p.1; *Perelman*, *Le Champ de l'argumentation*, p. 143; *MacCormick*, *Legal Reasoning and Legal Theory*, p.168; *Unger*, *The Critical Legal Studies Movement*, p.10.

199 *Maduro, supra n. 158*, pp. 21, 24.

200 *Beck*, *The Legal Reasoning of the Court*, pp. 301-305.

tension sees no resolution, even as the scales tip in matters of real-world consequences, viz. in this case, an undermining of the right to collective bargaining.

Therefore through the judicial denial of discretion, it is this entire tension rather than merely one position or the other, which assimilates itself into the fabric of EU multilevel constitutionalism, and much like an individual pattern of weave in a tapestry, renders itself invisible. Such invisibility, nevertheless, does not mean that the tension ceases to exist or to be relevant - it still operates in the backstage of EU constitutionalism as populist politics, which often constitutes the faulty footlighting that ruin the mainstage aspirations of European integration altogether. But such invisibility does mean a denial of contestation of values on the European mainstage - an exclusion of certain actors like labour from EU constitutionalism altogether.

In this manner, because of its heavy reliance on legal formalism, mere judicial solidarity is unable to address the problem of labour precariousness, but rather results in an institutional asymmetry which plagues the governance system at a structural level.²⁰¹ Consequently, it has been argued that multilevel constitutionalism in EU should mean more than mere solidarity in judicial relations: It also embodies an idea of *political* solidarity since “*the allocation of powers is primarily the result of the political process- what the Member States or their people feel is appropriately addresses in common or separately – rather than legal deduction.*”²⁰² The failure of developing a European political discourse to address solidarity is also seen as contributing to the de-legalisation within the European legal order, which ultimately undermines solidarity via judicial co-operation and the legitimacy of CJEU’s decisions viz. legal legitimacy of the EU. Additionally, it leads to de-socialisation within the European polities, which results in the political disenfranchisement of European citizens, thus undermining the political legitimacy of the EU.²⁰³ And it is because of its implications for questions of legitimacy in the absence of political solidarity that the tension between European single market and Social Europe poses itself as a constitutional problem.²⁰⁴

201 *Supra* n. 146.

202 *Supra* n. 190, p. 408.

203 *Supra* n. 177; *Everson et al, Supra* n. 192, p. 644.

204 *Pernice, 2002, supra* n. 173.

The contention that the invisibility of the European single market v. Social Europe dynamic in EU constitutionalism has implications for both legal and political legitimacy might seem paradoxical because the presence and acknowledgment of a tension or contestation can appear contradictory to the idea of solidarity. It is in order to address this apparent paradox in the context of labour precariousness that I invoke Sinzheimer's idea of the labour constitution in the next subsection.

5.3. Sinzheimer and Labour Constitution: Reconstituting Labour Within Economy

The term "labour constitution" is first made familiar in the work of Hugo Sinzheimer, who was active as a legal theorist under the umbrella of social democratic politics in Germany in the early 20th century, and who was also an influential figure in the drafting of the section concerning governance of labour relationships in the Weimar Constitution of 1919.²⁰⁵ In its substantive aspect, the term referred to the entire body of labour law of the Weimar Republic, including the law regulating trade unions, works councils, collective bargaining and co-determination. But in constitutional terms, it implied a distinct and radical shift in ways of thinking about labour.

Sinzheimer's first major contribution was a recognition that law plays a central role in constituting the economy. It does so by configuring the institution of property, and thereby formulating the legal status of economic actors, viz. capitalists as the owners of property and labour and workers, who depend upon such property for their subsistence.²⁰⁶ Second, such a recognition allowed the understanding - unlike classical liberal and neoliberal ideas which understood the market as a "natural" phenomenon²⁰⁷ - that the economy was publicly constituted, as a function, among other things, of law.²⁰⁸ Third, such a conception of the economy as a public construction allowed for Sinzheimer to argue that the economy should be used for the pursuit of public and not private interests. Accordingly, he argued that the mere transferral of ownership of property from capitalists to workers (a private transaction), in the absence of legal transformation (a public activity), would not solve the problems associated with

205 *Dukes, J.L.&Soc'y* 2008, p.345.

206 *Sinzheimer, H.*, Die Demokratiesierung des Arbeitsverhältnisses; see also, *Dukes, N. Ir. Legal Q* 2014, p. 283-4.

207 *Dukes, supra n.* 206, p. 298.

208 *Supra n.* 206.

the private ownership of the means of production.²⁰⁹ In this way, and fourthly, Sinzheimer recognised the *legal imbalance* of power inherent in the capitalist mode of production – While the body of property and contract law protected the capitalists, there was no equivalent protection for workers. It was to address this vacuum that he formulated the term “labour constitution”, which mapped labour law as a *democratising* legal instrument for the capitalist economy.²¹⁰

In this manner, Sinzheimer conceptualised the labour constitution upon the following: premise: Since the economy is part of the *public* sphere and should be governed in the public interest, the purpose of law should be to configure different economic actors (like capitalists and workers) in a manner so as to reduce legally-birthed imbalances of power between them. Such a body of law was consequently concerned with not just the technical implementation of employment regulation, but rather with upholding the *human dignity inherent to labour* by empowering the latter under democracy.²¹¹ By drawing on the idea of dignity of labour, Sinzheimer thus breathed soul into the stiff body of labour law, and moved beyond the mere objectives of distributive justice.²¹² And because the labour constitution concerned itself with the ordering of the economy in a democratic manner, it should be understood as having transformative and not just mechanical implications.²¹³

Why are these ideas from a hundred years ago relevant for the present time? The short answer is that whatever other changes may have occurred, the fundamental nature of the economy, including that of the collaborative economy has not changed since Sinzheimer’s time – it is still capitalist.²¹⁴ This means that any imagination of labour appropriate to the 21st century which seeks to address labour precariousness must articulate its scope in a way which is consistent with

209 Sinzheimer, H., *Das Rätssystem*, p.334; see also, *supra* n. 206, p.348, which distinguishes Sinzheimer’s ideas from Marx, since the latter deemed a socio-political revolution to be adequate to restore the balance of power between labour and capital, and did not necessarily see the need for legal reform, unlike the former.

210 *Supra* n. 205.

211 Here, one should also recall that it is the stripping of human dignity from labour which also leads to its precariousness, see in this context, *supra* n. 76 and 79.

212 See also, *Rodgers, Labour Law*, pp.11-14, which discusses the impact of Immanuel Kant’s philosophy of human dignity on Sinzheimer’s theorisation of labour law.

213 *Supra* n. 206.

214 *Supra* n. 40.

the realities of work relationships in a capitalist society.²¹⁵ Furthermore, in articulating these realities, the inherent conflict between labour and capital is central. This includes the conflict between social classes over the distribution of economic benefits; in other words, the contestation “*over the extent to which social life should be controlled by competitive markets and by imperatives of economic efficiency.*”²¹⁶

It is essential to formulate these economic relationships as a contestation also to facilitate the recognition of power relationships inherent in employment relationships. Such a contestation model also underlines its nature as an essentially *social* conflict, and prevents the conflation of economic and social rights as potentially mutually enforcing: An analysis of the economy as a set of abstract and neutral rules resulting in a lack of appreciation for this contestation allows one to exclude social relationships like labour from the very framework of the economy. Labour is then no longer seen as an issue inherent to the economic configuration. Such a formulation further enables the conclusion that the interests of labour (social rights) should *only* be protected when to do so would have the potential to also protect the interests of property owners (economic rights).²¹⁷

Such a narrow conception of economy then deflects focus from the contestations *within* the whole of the economic sphere, and formulates the conflict between capital and labour as arising *between* subsystems, while simultaneously shutting out actors who have the most to benefit from the formalisation of such a contestation.²¹⁸ This is often the case today.²¹⁹ Sinzheimer’s conception of the economy as a public phenomenon, where different economic actors are essentially in conflict and where law has a responsibility to empower and limit the powers of both capital and labour, facilitates movement away from such narrow conceptions.²²⁰ The role of the law here is not necessarily to erase the conflict, but rather to empower each party to the conflict in order to engage with the other in effective ways, and from a place of comparable

215 *Supra n.* 206. p.286.

216 *Streeck*, *Reforming Capitalism*, pp. 232-33.

217 *Supra n.* 206. p.286.

218 *Supra n.* 206. p.295.

219 *Supra n.* 206, pp. 293-297.

220 *Supra n.* 206. p.298.

power. In other words, the labour constitution facilitates the reconstitution of labour and its issues as an essential component *of* economic governance, rather than outside of it.

In the EU context, the contestation between capital and labour - between economic and social rights - maps neatly onto the contestation between European Single Market and Social Europe. I have discussed before how the tension between the single market and social protection is assimilated rather than made explicit by the current model of multilevel constitutionalism in the EU, which results in effect in the denial of contestations at the European level. I have further discussed how this undermines the legitimacy of the EU legal and political order through an exclusion of certain actors like labour from EU's constitutional structure altogether.²²¹ As mentioned before, there have been several calls to develop a political discourse and political solidarity to address this crisis of legitimacy.²²² But what would the development of such solidarity which is not limited merely to judicial relations look like? How should it be designed, especially in the area of labour relationships? Answering this question is crucial to addressing the problem of labour precariousness which faced today by EU generally, and in the case of the collaborative economy in particular.

Drawing upon Sinzheimer's conflict-based model of the labour constitution, I propose that a legal design for European solidarity in this context must include an endeavour to make the contestation between the single market and social protection, between economic rights and social rights explicit *within* the framework of EU constitutionalism.

This proposal is rooted in *a dynamic idea* of the Constitution²²³ as well as in the idea of the Constitution as a *forum for contestation*, whereby the Constitution acts as an instrument for facilitating contestations among different interests in the polity, which is a necessary process to allow for the polity to realise its values and to evolve.²²⁴ In this sense, contestations and conflicts are generative moments, rather than harkers of death.²²⁵

221 *Supra*, Section 5.2 of this Thesis.

222 *Supra* n. 146.

223 *Supra* n. 177, 175; see also, *supra* n. 174, for discussion on the dynamic idea of the Constitution.

224 *Wiener*, A Theory of Contestation; see also, *supra* n. 177.

225 *Ackermann*, YLJ 1989.

Sinzheimer's labour constitution adds further to this by postulating that in the context of the economy which includes labour relationships, law's role is constitutional (positive postulate) and *should be* democratic (normative postulate).²²⁶ For the EU, this would mean developing a multilevel constitutionalism which *facilitates in a democratic manner*, without necessarily resolving, the tension, conflict, and contestation between the ideas of the European Single Market and Social Europe. It would mean empowering the vision of Social Europe in EU substantive law and institutional framework in the same way as the single market vision is currently empowered. Drawing from Sinzheimer, it is additionally crucial to recall here that "democratic" does not just mean existence of representation and electoral processes, but also narrowing the imbalances of power between property owners and workers, and working towards *similarly empowered* representations.²²⁷ It is the only way that a fair contestation for the present and future directions of the EU economy can be facilitated.

With this proposal of constitutionalising contestation within the EU multilevel order, it becomes apparent that the notion of solidarity is not eroded, but rather strengthened by contestation, as long as such contestation is democratically enabled. Especially for a diverse community like EU, solidarity should not be about uniformity of values, but rather about a democratic design which facilitates the contestation of values. The role of constitutionalism should be a fair and well-balanced facilitation of contestations, rather than establishing the *status quo*. This is the only conception of constitutionalism which can stand the test of time, and as far as the economic framework of the EU is concerned, the pertinence of this perspective must not be forgotten either.

226 *Supra* n. 206.

227 *Ibid.*

CHAPTER 6

LABOUR CONSTITUTION FOR THE (COLLABORATIVE) ECONOMY

So far, I explained the relevance of Sinzheimer's idea of labour constitution for the constitutional tension between the single market and Social Europe in EU, and for European solidarity. I argued that constitutionalising the contestation between the European Single Market and Social Europe at the EU level is essential for addressing the issue of labour precariousness. But what might the details of such constitutionalism look like? And specifically, what would be its implications for the question of classification in the collaborative economy?

6.1. The Role (and Limitations) of a Fundamental Rights Framework in Strengthening Labour Protection

In order to answer the above questions, a turn to the discourse of fundamental rights in the area of social protection of labour can be enlightening: It has been argued that a recognition of social rights of labour as fundamental rights will go a long way in restoring the balance between the vision of the European single market and that of Social Europe.²²⁸ There is optimism that ECtHR's engagement with the 'general principles of law recognised by civilised nations' and its integration of all international and European labour laws including the norms of the ILO and the Charter of Fundamental Rights of the EU might provide the starting point for the recognition of labour and social rights²²⁹ as fundamental rights by the EU legal order.²³⁰ This would mean using law to elevate the claim of Social Europe to that of the European single market, which already stands elevated by the protection of the four freedoms of movement under the EU Treaties.²³¹ Providing equivalent legal teeth to both these claims under constitutional law would allow for the much-needed contestations of constitutional visions and enable a healthy functioning of democracy in the EU. It is suggested that such empowerment of social rights would also ultimately help demolish labour precariousness.²³²

228 *Supiot*, A Sense of Measure, p. 223.

229 *Ibid.*; *supra* n. 80 , pp.42-45.

230 Article 6(2), TEU.

231 Articles 30, Article 45, Article 49, Article 56, TFEU.

232 *Supra* n. 228.

However, how far has the fundamental rights framework been really effective for eliminating labour precariousness in EU? As mentioned before, a Community Charter for the Fundamental Social of Workers was already suggested as far back as the 1980s.²³³ Though it never had legal enforceability, it did influence the inclusion of certain social rights in the legally enforceable Charter of Fundamental Rights of the EU in 2007.²³⁴ The Charter today recognises and protects a few important socio-labour rights like the right to be protected in the case of an unjustified dismissal²³⁵, and the right to fair and just working conditions.²³⁶

Nevertheless, one important critique of this fundamental rights framework has been that many important socio-labour rights, like the right to collective bargaining or to strike, are either excluded or deeply undermined.²³⁷ Moreover, two other crucial problems still plague this fundamental rights framework: First, all these provisions have limited application to the category of “workers,” which brings the dilemma of labour classification to the fore once more. In her opinion in *Wippel*, Advocate General Kokott has noted that the concept of “worker” in the Charter is to be considered a Community concept and that the definition of “worker” developed by the CJEU in the context of freedom of movement of workers should be taken as a guideline for interpreting the meaning of “worker” under the Charter.²³⁸ However, as already discussed in Chapters 2 and 3, such a definition of worker does not really help to address the problem of labour precariousness, also in the context of the collaborative economy. Consequently, it does not help impart equitable legal backing to the claims of the European single market and that of Social Europe in the realm of contestation. The various kinds of precariousness brought about by labour classification still persist²³⁹.

Second, in spite of a (limited) fundamental rights framework protecting labour rights, whenever the four freedoms of movement have come into conflict with socio-labour rights, thanks to the

233 *Supra* n. 163.

234 *Supra* n. 164.

235 Charter of the Fundamental Rights of the European Union, 2012/C 326/02, 2007, Article 30.

236 Charter of the Fundamental Rights of the European Union, 2012/C 326/02, 2007, Article 31.

237 *Supra* n. 80, p. 44; *supra* n. 228, pp. 222-23.

238 Opinion of Attorney General Kokott, in *Nicole Wippel v. Peek & Cloppenberg GmbH*, Case C-313/02, ECLI:EU:C:2004:308.

239 See Section 3.2 of this Thesis, *supra*, for a discussion on how labour (mis)classification can accentuate various kinds of labour precariousness.

multilevel governance system limiting the competency of EU in the sphere of labour governance,²⁴⁰ the CJEU has turned a blind eye to the socio-labour aspect of the conflict and has decided in favour of the former.²⁴¹ A choice between social rights and what is understood as individual “economic” rights, has so far seen a win for the latter.²⁴² In this sense, elevating certain social rights to the level of fundamental rights under the EU Charter does not seem to have helped in advancing their claim.

It is precisely in context of this second problem that Sinzheimer’s conception of the labour constitution becomes directly useful because of its insistence on understanding socio-labour rights as an essential part of the “economic.” The labour constitution contextualises the tension between the single market and social protection of labour *not* as a tension between two different subsystems but rather as a tension *within* the same system, viz. the economy.²⁴³ Accordingly, under such perspective, the tension between the single market and social protection then translates as a contestation between *fundamental economic rights*²⁴⁴, rather than a contestation between individual, civil rights and socio-labour rights.²⁴⁵ And if labour rights are understood as economic rights, then it is harder for the Court to ignore the socio-labour aspect when adjudicating cases where conflicts between the four freedoms and labour rights do arise. This is because the labour constitution perspective allows one to *re-link* labour issues to the single market, where the Court does have competency.²⁴⁶

6.2. Formulation of Labour Citizenship: The Need for Political Solidarity

However, mere *judicial* reconfiguration of socio-labour rights as fundamental economic rights to impart them the same status as the four freedoms of movement is a dicey game since it can develop into judicial overreach²⁴⁷ and thereby undermine the legitimacy of CJEU.²⁴⁸ Additionally, the classification problem within the fundamental rights framework cannot be

240 Article 4, TFEU.

241 See, for example, *supra* n. 158, 168, 169, 170, 171.

242 *Ibid.*

243 *Supra* n. 218.

244 *Rödl*, Re-thinking Employment Relations, p.244.

245 *Ibid.*, see also, *Supra* n. 228, pp.224-226.

246 See, Section 4.2 of this Thesis, *supra*, which discusses how socio-labour issues have been historically de-linked from the European single market.

247 *Supra* n.195.

248 *Ibid.*

resolved by mere judicial intervention, since it would require an amendment to the text of the Charter. Briefly, to be addressed effectively, these problems require more than an interpretive act.²⁴⁹ In this context, it has been rightly remarked that this is not a battle between individual civil rights and social rights and principles, to be arbitrated by neutral courts, but rather, a battle between individual, civil rights and the democratic legislator's prerogative.²⁵⁰

It is here that the shortcomings of the EU legislative framework are laid bare: Contrary to the single market freedoms which are inherently negative in nature, socio-labour rights often need positive content, which can only be legislated and not devised by neutral courts.²⁵¹ This is where EU needs to urgently needs to embrace its multilevel constitutional form in its entirety: This entails a development of solidarity not just through judicial co-operation, but also political solidarity.²⁵² Such political solidarity needs to emerge from the development of a European political discourse which recognises the constitutional import of the single market v. Social Europe tension, and looks to set high standards for socio-labour rights in order to elevate them to the status of the four freedoms.

Furthermore, such political solidarity needs to be informed by the labour constitutional perspective, which recognises equal economic citizenship of both labour and capital.²⁵³ This means constituting EU citizenship not just through the exercise of the four freedoms and other single market rights, but also through the exercise of socio-labour rights. In other words, it means recognising *labour citizenship* within EU.

But if a fundamental rights framework falls short of achieving such labour citizenship, then what should its modalities be? In this regard, it has been argued that, "*a broad or even all-including social state principle is not only sufficient but even more effective than a catalogue of single rights and principles.*"²⁵⁴ Such an approach would protect the democratic legislator's prerogative to legislate for a labour citizenship, even in conflict with individual rights under the single

249 *Supra* n.146.

250 *Abendroth*, Zum Begriff des demokratischen und sozialen Rechtsstaates, 131.

251 *Supra* n. 120, p. 360.

252 Section 5.2 of this Thesis, *supra*.

253 *Supra* n. 206.

254 *Supra* n. 244, p.246.

market, while also underlining the interdependence of civil rights, social rights and democratic legislation, which is inherent to the concept of the labour constitution.²⁵⁵

When viewed from the perspective of labour citizenship, the classification problem must necessarily evaporate because here, the basis for the protection of labour is human dignity²⁵⁶, and not the legal form (“worker” or “self-employed”) which labour takes.²⁵⁷ In such a scenario, the dichotomy between a “worker” and a “self-employed” person, and corresponding (in)ability to claim social protection and invoke labour rights is made redundant. What matters, irrespective of whether a person is a “worker” or “self-employed” person, is that in her work relationships, her dignity as a human is maintained.²⁵⁸ This may entail, among other things, protection of the right to work, limitation of the number of hours of work, minimum standards of decent pay, the right to unionise and the right and possibility to bargain *effectively* and in an empowered manner, *for everyone*.²⁵⁹ However as highlighted before, to ensure the dignity of labour, legislating a comprehensive catalogue of socio-labour rights is less important than ensuring that law is created and interpreted according to the principles of democracy which sees the economy as a enterprise geared for public interest.²⁶⁰ And when the dignity of labour is preserved, labour precariousness automatically recedes.²⁶¹

Therefore, in order to address the problem of collaborative economy service provider classification as part of the larger problem of labour precariousness²⁶², EU needs to cultivate political solidarity to come up with a democratic, legislative design for a labour citizenship. Given the diversity of political stakes in European integration project²⁶³, and the current institutional configurations²⁶⁴, this is not and has never been a mean task. But this realisation

255 Rödl, Labour Constitution, p.619.

256 See, Charter of the Fundamental Rights of the European Union, 2012/C 326/02, 2007, Article 1, which protects human dignity. However, interestingly, the CJEU has ruled that even human dignity needs to be reconciled with the four freedoms protected under the TFEU, see in this regard, *supra n.* 168, para.46, *supra n.* 169, para.94; see also, *supra n.* 120, p. 359.

257 *Supra n.* 80, pp. 35-36; *supra n.* 206.

258 *Supra n.* 206.

259 *Supra n.* 80.

260 *Supra n.* 206.

261 *Supra n.* 80.

262 Section 3.3 of this Thesis, *supra*.

263 Crouch, Social Change in Western Europe, pp.7-16.

264 Sadurski, PYIL 2012, pp. 36-40.

also underlines that the problem at hand, even as it has implications for legal legitimacy, is essentially a political one. This perspective that can no longer be cast aside in support of neo-functional approaches.²⁶⁵ It is time for EU legislation to take a truly democratic turn, and to recognise and address the imbalance in power relationships between capital and labour in its legal structures. If this opportunity is ignored, EU risks losing both its political and legal legitimacy.

²⁶⁵ *Schmitter*, Neo-functionalism, pp. 50-57

CHAPTER 7

SUMMARY AND CONCLUSION

My aim in this Thesis has been to map. Maps supposedly tell us how to get from Point A to Point B. But they do much more: They also enable or hinder us from drawing connections between Point A and Point B, between things, places, people, reasons. Maps define and erase relationships between different ideas. In this sense, they are political. To map is to then narrate or erase a story of struggle and oppression.²⁶⁶

In popular imagination, digitisation and the collaborative economy has been a story of success. It is only recently that some scholars have started redrawing that success map to illustrate the looming bogs and threatening valleys of labour precarisation that pepper it.²⁶⁷ Even so, that new map has also been limited. We tend to talk about collaborative economy as a completely novel form, its challenges as unheard of before. We tend to be blind to connections between the exciting, futuristic technological upheavals and the age-old, seemingly banal(?) constitutional questions. In doing so, we risk obliterating a whole range of experience and knowledge, both from the past, and from a future which allows us to make new connections.

It is with this intention that I began my mapping journey – With the aim to draw connections between distant, seemingly unrelated debates around the legal classification of service providers in the collaborative economy and EU multilevel constitutionalism. My hope was that such mapping might allow us to trace the connections between the so-called technical issues of legal interpretation and the heavyweight questions of legal philosophy, and that in doing so, it would allow us to reframe the issue and address it more effectively within its larger context.

To summarise, I first illustrated the challenges posed by the apparently technical problem of labour classification in the collaborative economy²⁶⁸, and mapped how this classification problem results in labour precariousness.²⁶⁹ Thereafter, I mapped the labour precariousness borne

266 *Harley et al*, The History of Cartography, p.1.

267 Chapter 2 of this Thesis, *supra*.

268 *Ibid*.

269 Sections 3.1 & 3.2 of this Thesis, *supra*.

in the collaborative economy as a larger trend of labour precariousness across all sectors globally.²⁷⁰ Having mapped our present location thus in a quagmire of precariousness, I tried to set a course to crawl out of it, whereupon I encountered the imposing yet tortured edifices of the European supranational structures. As I traced their history, I found that said torture had been ravaged by the contesting forces of European single market and Social Europe.²⁷¹ I eventually managed to map this contestation as a constitutional *feature*, rather than as a constitutional glitch,²⁷² which led me to trace it to an much older concept of constitutional contestation, viz., Sinzheimer's labour constitution.²⁷³ I then attempted draw the edges of the map, trying to figure how Sinzheimer's time-worn imagination of a formalised contestation between labour and capital could help us address the classification challenge in the collaborative economy.²⁷⁴

In taking this journey, I have come to realise that nothing is as small or insignificant as it seems – even a technical legal question which apparently requires little more than a mechanical application of law,²⁷⁵ has the potential to shake up the presumptions of law, and open up new horizons for exploration. One such horizon which this Thesis has tried to reveal is the idea that the fundamental aim of the protection of human dignity over distributive justice should drive labour law.²⁷⁶ Another is that labour, like capital, is an essential part of the economy and economic rights constitution, and needs to be treated as such by law.²⁷⁷ I have suggested that classification challenge posed by the collaborative economy could be tackled effectively if one worked with this new map.²⁷⁸ But what course the European Union actually charts for itself against these horizons remains to be seen.

270 Section 3.3 of this Thesis, *supra*.

271 Section 4.2 of this Thesis, *supra*.

272 Section 5.2 of this Thesis, *supra*.

273 Section 5.3 of this Thesis, *supra*.

274 Chapter 6 of this Thesis, *supra*.

275 *Supra n.* 196, 198.

276 Section 5.3 of this Thesis, *supra*.

277 *Ibid.*

278 Section 6.2 of this Thesis, *supra*.

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