The UK Economic Constitution after Brexit:

Between Authoritarianism and Democracy

Abstract: Inspired from recent events, such as the resignation of the United Kingdom (UK) Prime Minister following a negative assessment of the autumn 2022 mini-budget, as well as the legislative intervention in the wave of trade disputes with the Strikes (Minimum Service Levels) Bill, this paper investigates the analytical value of the notion of the economic constitution. This notion can be used to examine the relationship between economic management and democratic processes but has not been adequately elaborated upon in the UK context. Nevertheless, constitutional theorists have used it to examine the European Union (EU) constitutional structure, which has been assessed as an example of authoritarian economic constitutionalism. Through a comparative juxtaposition to the EU economic constitution, this paper seeks to evaluate the authoritarian or otherwise characteristics of the UK economic constitution. It does so by focusing on two aspects of the UK economic constitution, namely fiscal monitoring and labour legislation. The paper concludes with a discussion of the potential for reforming the economic constitution in a more democratic direction in the post-Brexit UK.

Keywords: economic constitution, economic constitutionalism, depoliticisation, authoritarian liberalism, economic democracy, fiscal monitoring, right to strike

1. Introduction

The Brexit campaign was, to a large extent, carried out under the slogan of 'taking back control'. This naturally led to intense debates about the notion of sovereignty and the relationship between the European Union (EU) and the United Kingdom (UK) constitution.[1] Parallel to this, questions of economic management (touching upon issues like public investment, allocation of resources, market regulation, etc.) were quite prominent in the debates which informed the process of Brexit.[2] In this context, the relationship between economic sovereignty and political sovereignty (or the economy and the constitution) became key to the Brexit 'plot'. A crucial aspect of the demand to 'take back control' was the question of whether economic management is an area of decision-making that is better left to experts and technocratic institutions. A negative answer to this question could fit well with critiques of the EU's institutional structure, as well as its democratic deficit, and present an additional argument in favour of Brexit from a democratic standpoint.[3]

The above question had been at the centre of juridico-political and economic discussions since the Global Financial Crisis. The markets had already dictated the measures to deal with the crisis, which manifested itself as a sovereign debt crisis especially in the Eurozone context. In most cases,

[1] Indicatively see Graham Gee and Alison L. Young, 'Regaining Sovereignty? Brexit, the UK Parliament and the Common Law', 22(1) *European Public Law*, (2016), 131-147; Michael Gordon, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond …', 27(3) *King's Law Journal*, (2016), 333-343; Keith Ewing, 'Brexit and Parliamentary Sovereignty', 80(4) *Modern Law Review*, (2017), 711-726; Mark Elliott, 'Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?', in Mark Elliott, Jack Williams and Alison L. Young (eds.), *The UK Constitution after Miller: Brexit and Beyond*, (Hart Publishing 2018), 221-248.

[2] See for instance Ros Taylor, *Long read: Does the EU stop Britain from using state aid to help its economy?*, (21 May 2019), available at https://blogs.lse.ac.uk/brexit/2019/05/21/long-read-does-the-eu-stop-britain-from-using-state-aid-to-help-its-economy/, as well as Danny Nicol, *Nationalisation and the Fraud of "Remain and Reform"*, (10 July 2019), available at https://www.thefullbrexit.com/nationalisation/.

[3] See for instance Michael A. Wilkinson, *Prelude to a Lexit manifesto: decoding the new German ideology*, (4 December 2018), available at https://blogs.lse.ac.uk/brexit/2018/12/04/prelude-to-a-lexit-manifesto-decoding-the-new-german-ideology/.

such measures involved the restriction of various fundamental and constitutionally protected rights (such as the right to collective bargaining and the right to unionise).[4] In the context of crisis, the economy, governed by laws which are not man-made, seemed to determine the validity of constitutional norms. Additionally, the growing indignation of significant parts of the population with the solutions prescribed within the restrictive framework of the EU gave rise to several centrifugal tendencies. Two of these culminated in the form of 'existential' referendums: one on 'Grexit' in July 2015[5] and one on 'Brexit' in June 2016. Interestingly, in the only country that 'took back control' from the EU, the market still seems to dictate the main policy directions. The political crisis and the resignation of the Prime Minister in autumn 2022, following a negative assessment of the Government's mini-budget by an independent fiscal institution responsible for economic forecasts, is arguably an example of the markets' force and effect on constitutional affairs.[6]

In this paper I focus on the notion of the economic constitution,[7] understood as the institutional arrangement for managing economic affairs, as well as the rules that regulate the citizens' input in this process. I seek to examine how the relationship between citizens and the institutions responsible for the management of economic affairs is mediated by the UK constitution. In doing so, I intend to address a gap in the literature.

There are several analyses of the EU economic constitution, especially after the Maastricht Treaty and creation of the Eurozone.[8] During the financial crisis and the process that led to Brexit, critical approaches to the EU economic constitution multiplied.[9] These analyses emphasised the authoritarian character of the EU economic constitution; in other words, its hostility to democracy and citizens' input in economic management. Key to these critiques is the examination of the process of depoliticisation. Depoliticisation is here understood as a constituent element of the process of de-democratisation. If an issue is not political, but is rather technical, there is no need for democratic processes and citizens' input.[10] Brexit, to a certain extent, was informed by these critical discussions, as the narrative of 'taking back control built on the EU's structural democratic deficit.

Yet, there is a distinct lack of critical analyses of the UK economic constitution. If the EU economic constitution is characterised as authoritarian and hostile to democratic input, what would be the characteristics of the UK economic constitution? Can it be described too as authoritarian, i.e. as hostile to democratic input in the management of economic affairs? Even if so, is it perhaps

[4] Aristea Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece', 41(3) *Industrial Law Journal*, (2012), 276-304.

[5] See Dimitrios Kivotidis, 'The Pharmakon of Democracy: General Will and the People in the Context of the Greek Referendum', 27(6) *Social and Legal Studies*, (2018), 755-775.

[6] Ben Clift, 'Trussonomics and the OBR', *UK in a Changing Europe*, (29 September 2022) available at https://ukandeu.ac.uk/trussonomics-and-the-obr/.

[7] Indicatively see Guillaume Grégoire and Xavier Miny, *The Idea of Economic Constitution in Europe: Genealogy and Overview*, (Brill 2022), and Achilles Skordas, Gábor Halmai and Lisa Mardikian, *Economic Constitutionalism in a Turbulent World*, (Edward Elgar 2023).

[8] Indicatively see Julio Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, (Hart Publishing 2002) and Dagmar Schiek, Ulrike Liebert, Hildegard Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, (Cambridge University Press 2011).

[9] See for instance Agustín José Menéndez (ed.), 'Special Section: Herman Heller's Authoritarian Liberalism', 21(3) *European Law Journal*, (2015), 285-429; Danny Nicol, *The Constitutional Protection of Capitalism*, (Hart Publishing 2010); Wolfgang Streeck, 'The Crises of Democratic Capitalism', *New Left Review*, (2011); Werner Bonefeld, 'European Economic Constitution and the Transformation of Democracy: On Class and the State of Law', 21(4) *European Journal of International Relations*, (2015), 867-886.

[10] It is worth noting that depoliticisation is a political process. Denoting areas of policy-making as 'non-political' and insulating them from processes of political contestation is a political decision par excellence.

more amenable to reform? In other words, does Brexit provide an opportunity for reforming the economic constitution at domestic level?

To answer these questions the paper is structured as follows. The first section examines the notion of the economic constitution. It begins with the descriptive aspect of this notion and examines whether labour legislation can be considered part of it. It continues with the normative conception of economic constitutionalism and examines the dominant ordoliberal[11] (or authoritarian) variation, according to which management of the economy should be undertaken in accordance with predetermined norms overseen by independent apolitical institutions. The next section examines how this authoritarian version of economic constitutionalism is reflected in the EU's economic constitution. It focuses on two aspects, namely labour legislation and budgetary discipline, and their place in the EU economic constitution. As mentioned above, theory has already identified the EU economic constitution as an example of authoritarian economic constitutionalism. Examining aspects of it will, thus, allow us to engage in a critical comparative analysis with the UK economic constitution. Section three examines the UK economic constitution, focusing on the same two aspects, to answer the question of whether the UK economic constitution can also be characterised as authoritarian. In this context, the role of the Office of Budget Responsibility, as well as the recent legislation on industrial action, will be discussed. The final section will examine whether the UK constitution allows for the possibility of reforming the relationship between citizens and the economy to reflect a different normative conception of economic constitutionalism, i.e. one based on economic democracy.

2. The Economic Constitution

2.1. Descriptive aspect

Despite its importance in EU constitutional literature, there is a lack of authoritative analyses of the 'economic constitution' in the UK context. Tony Prosser, one of the few thinkers engaging with the notion with reference to the UK constitution, defines the economic constitution as the 'key constitutional principles and institutional arrangements which may be relevant to management of the economy'.[12] For Prosser, key provisions of economic management appear in various forms of law: constitutional law, ordinary legislation, as well as 'soft' law.[13] There are, therefore, various sources of the economic constitution. In his study, Prosser proceeds with an institutional map of the main institutions of the United Kingdom's economic constitution and includes institutions like the Treasury, the Bank of England, the Cabinet Office, and the Office for Budget Responsibility (OBR), as well as relevant Acts of Parliament (such as the Banking Act 2009, the Financial Services Act 2021, the Budget Responsibility and National Audit Act 2011, etc.). A key distinction between political institutions (such as the Treasury and the Cabinet Office), whose source of authority lies in democratic representation and accountability, and non-political institutions (such as the Bank

[11] It is quite common to speak of neoliberalism when discussing the mainstream approaches to economic policy of the last few decades. Here I use the term ordoliberalism which puts more emphasis on the authoritarian elements of the economic constitution. The relationship between ordoliberalism and neoliberalism is interesting and quite complex. Yet, it has been argued that 'in directing the constitutional dynamic of European integration and postwar reconstruction, ordo- and neoliberalism represent a single movement: a conjunction of political authoritarianism and economic liberalism in opposition to democracy and especially in opposition to democratic constituent power' (Michael Wilkinson, 'Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism', 45 (7-8) *Critical Sociology*, (2019), 1023-1034, 1023).

[12] Tony Prosser, *The Economic Constitution*, (Oxford University Press 2014), 8.

[13] ibid.

of England and the OBR), whose source of authority lies in their technocratic expertise and insulation from popular pressure, is already evident here. This distinction is crucial for understanding the role of the economic constitution; especially its normative aspect.

If the notion of the economic constitution relates to economic management, listing the key areas of economic management is key to understanding what it stands for. Prosser refers to areas like: 'taxation and borrowing; public expenditure; monetary policy; regulation of financial services (including the banks); government shareholdings and industrial policy; and public procurement'.[14] He fails to mention market regulation, which in post-Brexit environment is governed by statute such as the United Kingdom Internal Market Act 2020, but this is understandable as his work was written while the UK was still a member of the EU and this aspect of economic management was covered by EU legislation. Nevertheless, this point brings us to the significance of labour market regulation for the economic constitution. Are industrial relations a key area of economic management? Differently put, can labour legislation be considered as part of the economic constitution? Or would that amount to unacceptably enlarging the notion to the point of meaninglessness?

I argue that labour law should be considered part of the economic constitution. As long as a particular legal area's significance for the public management of the economy is shown, then it can be considered part of the economic constitution. Management of labour relations is a central aspect of economic management. During the crisis, labour market reform was considered key to economic recovery and for good reason. According to mainstream politico-economic views, economic growth is linked to the regulation of the labour market, since it relies on investment of capital and the conditions of profitability which in turn depend on labour market regulation. The aims of 'growth' and 'competitiveness' of the economy are explicitly connected to the principle of 'labour-market flexibility' in EU policy. The EU Commission's 1993 White Paper on 'Growth, Competitiveness, and Employment'[15] asserts that sustained economic growth can only be achieved through 'changes in economic and social policies and changes in the employment environment as expressed in the structure of labour market, taxation and social security incentives'.[16] Lack of flexibility in labour-regulation is identified in the White Paper as the root cause of 'what are relatively high labour costs, which have risen at a much greater rate in the Community than among our principal trading partners'.[17] Additionally, high labour costs are cited as a contributory factor to the loss of the competitive angle of EU economies.[18] No enterprise will invest unless it is reassured that an 'agreeable investing environment' is created and sustained, as well as that production costs are reduced. Therefore, the growth and competitiveness of EU economies relies on the principle of flexibility being introduced in domestic regulation of the labour market and labour relations.

It follows from the above that regulation of the labour market - in other words, labour legislation - can and should be considered part of the economic constitution. The economic value of labour legislation was clearly evident in the recent speeches delivered by the Secretary of State for Business, Energy and Industrial Strategy and the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy in support of the Strikes (Minimum Service Levels) Bill, in its second reading in the House of Commons. They both emphasised the importance of

[14] ibid., 2.
[15] European Council, *Commission White Paper on Growth, competitiveness, and employment*, (COM (93) 700), (1993).
[16] ibid.
[17] ibid., 123.
[18] ibid., 124.

regulating industrial action as the most cost-effective solution to the ongoing trade disputes in the context of a 'cost of living' crisis.[19] Imposing additional conditions for a strike to be lawful, thereby potentially restricting the exercise of industrial action, was based on the government's reluctance to proceed with wage increase or intervene in a manner favourable to employees in the 2022-2023 trade disputes for fear of entering a spiral of inflation, as well as on its intention to minimise the disruptive effect of industrial action on the economy.

2.2. Normative aspect

Let us now move to the normative aspect of the economic constitution. How *should* the relationship between citizens and the economy be regulated? The normative aspect of the 'economic constitution' is predominantly associated with the ordoliberal view which requires 'that government in undertaking economic management should act only to implement the general norms derived from the economic constitution, rather than using discretionary powers'.[20] The normative dimension of the economic constitution, thus, gives rise to a notion of economic constitutionalism; a distinct current of the liberal and constitutionalist tradition. If 'liberalism' stands for government limited by law and 'constitutionalism' for government limited by a fundamental law, 'economic constitutionalism' arguably stands for the limitation of democratic economic governance through a specific set of fundamental rules, principles and institutional design.[21] From a more critical standpoint, it has been argued that, according to this ordoliberal economic constitutionalism, Keynesian policies of social-democratic governments should be monitored and, if necessary, restricted or prohibited by an institutional design supporting different principles of economic management.[22]

This normative conception is reflected in specific institutional designs, as well as concrete principles of policy-making. Economic management relying on general norms, rather than government discretion, requires an institutional design where non-political and unaccountable institutions (such as central banks or independent monitoring agencies) undertake the task of economic management free from political pressures and democratic mandates. Such institutional arrangements promote the depoliticisation of the economy and de-democratisation of economic decision-making, as well as the insulation of the latter from popular demands and social forces advocating government discretion over markets and government spending. What is more, this ordoliberal conception of economic constitutionalism translates into concrete principles which this institutional design promotes, such as: fiscal discipline; balanced budgets; competitiveness; growth; labour-market flexibility, etc. From a critical perspective, such principles seem to reflect

[19] See HC Deb 16 January 2023, vol 726, col 55 and HC Deb 30 January 2023, vol 727, col 80.

[20] Prosser, *The Economic Constitution*, 9.

[21] George Gerapetritis proposes a different conceptualisation of the relationship between constitutionalism and economic constitutionalism. He sees the former as an element of modernity which lasted until the inter-war crisis, according to which the Constitution was deemed as a privileged means of community organisation and was largely indifferent to economic matters. Under economic constitutionalism, which dominated the period until the global financial crisis, constitutions embraced the economy as a standard feature of interpretation but did not actively give priority to economic provisions. Gerapetritis argues that since the latest crisis a new economic constitutionalism has emerged where 'the Constitution subsumes the economy and the economic constitutional clause as key instruments for drafting and interpreting the Constitution overall'. See George Gerapetritis, *New Economic Constitutionalism in Europe*, (Hart Publishing 2021), 1-24.

[22] Christian Joerges, 'Economic Constitutionalism and "The Political" of "The Economic"', in Guillaume Grégoire and Xavier Miny, *The Idea of Economic Constitution in Europe: Genealogy and Overview*, (Brill 2022), 789-820, and Michael A. Wilkinson, 'Authoritarian Liberalism as Authoritarian Constitutionalism', in Helena Alviar García and Günter Frankenberg, *Authoritarian Constitutionalism*, (Edward Elgar 2019), 317-337.

the fundamental requirements for the profitability of capitalist enterprises, hence a distinct politico-economic view of how economic affairs should be managed.

The different variations of this model of economic constitutionalism have been critically assessed under the notion of authoritarian liberalism. This term has been used to describe the authoritarian tendencies inherent in liberal forms and ideals, whereby the main task of ensuring the constitution of economic freedom is assigned to a strong state.[23] The term 'authoritarian liberalism' was introduced by Herman Heller in 1932[24] to critique the authoritarian reforms debated towards the end of the Weimar Republic, such as the one advocated by Carl Schmitt.[25] Schmitt had set out a political programme which involved the strengthening of the state for the purpose of efficiently crushing the 'internal enemy', while leaving the planning of the economy to private initiative, so as to ensure conditions for enhanced profitability of capital, through intensified exploitation of labour and extraction of absolute surplus value.[26]

Extensive research has already been carried out and published on authoritarian liberalism as a distinct variation of authoritarian constitutionalism - characterised by hostility towards democratic processes and the strategy of depoliticisation - which can be used to describe contemporary institutional arrangements in Europe.[27] As we shall see in the analysis of the UK economic constitution, the strategy of depoliticisation combines ideological and institutional elements. Key to the former is legal ideology which tends to abstract disputes from their socio-economic context, thus depoliticising them and removing them from political contestation.[28] As far as the institutional aspect is concerned, it has been argued that post-WWII Europe was reconstructed on the basis of a fear of democracy, specifically of its tendency to economic instability or irrationality'.[29] According to this view, the EU's opposition to democracy is not contingent or exceptional, but an essential and conscious characteristic of its institutional design.[30] Additionally, the EU economic constitution, reflecting an authoritarian economic rationality, was arguably designed to contain democracy's inherent 'instability and irrationality'. Let us elaborate on this point before we turn to examine the UK economic constitution.

3. The EU Economic Constitution

It is argued that the normative ideal of authoritarian economic constitutionalism is reflected to a large extent in the EU economic constitution. The juridical nature of the EU, its institutional design, as well as its fundamental principles, render it a paradigm of authoritarian economic

[23] Werner Bonefeld, 'European Economic Constitution and the Transformation of Democracy', 869.
[24] Herman Heller, 'Authoritarian Liberalism?', 21(3) European Law Journal, (2015), 295-301.
[25] See Schmitt, 'Starker Staat und gesunde Wirtschaft: Ein Vortrag vor Wirtschaftsführern', *Volk und Reich,* no. 2 (1933): 89-90; Schmitt, 'Machtpositionen des modernen Staates' (1933), in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954,* (Duncker & Humblot 1958) 371. A translation is found in Renato Cristi, *Carl Schmitt and Authoritarian Liberalism,* (University of Wales Press 1998), 212.
[26] Alfred Sohn-Rethel, *Economy and Class Structure of German Fascism*, (Process Press 1987), 8.
[27] Indicatively see Agustín José Menéndez (ed.), 'Special Section: Herman Heller's Authoritarian Liberalism', 21(3) *European Law Journal*, (2015), 285-429; Eva Nanopoulos and Fotis Vergis, *The Crisis behind the Euro-Crisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU*, (Cambridge University Press 2019); Helena Alviar García and Günter Frankenberg, *Authoritarian Constitutionalism: Comparative Analysis and Critique*, (Edward Elgar 2019).
[28] Robert J. Knox, 'Against Law-Sterity', 6 *Salvage*, (2018), 49-68.
[29] Michael Wilkinson, 'Authoritarian Liberalism as Authoritarian Constitutionalism'.
[30] Guglielmo Carchedi, *For Another Europe: A Class Analysis of European Economic Integration*, (Verso 2010), 29.

constitutionalism.[31] To begin with, the EU is a deeply juridical organisation. The legal avenue has been the predominant way of furthering the process of integration and establishing an internal market, to the point that the *acquis communautaire*, the rulebook that the Commission and the European Court of Justice (ECJ) wield as an instrument of power, now runs to 90,000 pages.[32] This has been described as 'the longest and most formidable written monument of bureaucratic expansion in human history […], impenetrable to its citizens, but inescapable for its states'.[33] The EU is thus able to realise the ordoliberal idea of economic management based on general norms, rather than political discretion.

Crucial to this process has been the ECJ's role in developing the constitutional principles of the EU economic constitution. The declaration of a 'new legal order of international law' in *Van Gend En Loos*[34] implied that this could now be forcefully imposed and prevail over domestic legal orders and democratic decision-making processes.[35] Direct effect and supremacy are the cornerstones of the EU economic constitution. These principles seem to give rights to individuals ('nationals'), but this is a misleading term as it embraces 'not only natural persons but also legal persons such as corporations'.[36] More accurately put, economic freedoms are conceptualised as basic rights which 'market citizens' can invoke against nation states.[37] As a result, capitalist enterprises can now promote their interests and enforce the dictates of the market against domestic legislation that seeks to restrict or mitigate their effect on popular strata.

The ECJ's pioneering role in establishing the constitutional framework that facilitated the creation of the internal market is well documented.[38] The ECJ was not an arbiter but the driving force of integration. Its role in this process was facilitated by an attribute that is not encountered in other Union institutions: it is the only Union institution 'whose activities are not routinely scrutinised (by itself or by others) for compliance with the EU treaties'.[39] This attribute makes the ECJ unique within supreme or constitutional courts around the world. The decisions of every other constitutional court are subject to alteration or abrogation by elected legislatures and are, thus, reversible. This is not the case with the ECJ's decisions which are irreversible, short of an amendment of the treaties which requires the unanimous agreement of all member states.[40]

This proves that the EU economic constitution provides for a heightened degree of entrenchment. The substantive principles and ideas of economic management it reflects are depoliticised and far

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[31] There is ongoing debate on the EU's politico-economic paradigm. See, for instance, Matthias Matthijs and Craig Parsons, *Polanyian Means to Hayekian Ends? The 'Ordo-liberalism on Steroids' Economic Governance Philosophy of the EU*, presented at European Union Studies Association (EUSA) in Miami, 19-21 May 2022, where the authors argue that it features a blend of Hayekian normative goals with Polanyian 'muscles', resulting in some sort of 'ordoliberalism on steroids'. See also Stavros Mavroudeas, *The Coronavirus Pandemic and the Health and Economic Crisis*, (25 March 2020), available at https://stavrosmavroudeas.wordpress.com/, where he argus that the New Macroeconomic Consensus, combining New Keynesianism (which recognizes the possibility of short-term imbalances due to rigidities in some markets) with elements of Neoliberalism (rational expectations, long-term market equilibrium), has gradually succeeded at the end of the twentieth century Neoliberalism as the dominant politico-economic paradigm in Europe.

[32] Perry Anderson, 'Ever Closer Union?', 43 *London Review of Books 1*, (2021).

[33] ibid.

[34] *Van Gend en Loos v Nederlandse Tariefcommissie* (Case 26/62).

[35] Danny Nicol, *The Constitutional Protection of Capitalism*, (Hart Publishing 2010), 97.

[36] ibid., 91.

[37] Joerges, 'Economic Constitutionalism and 'The Political' of 'The Economic'', 798.

[38] See Anderson, 'Ever Closer Union?'.

[39] Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits*, (Cambridge University Press 2018).

[40] Dieter Grimm, *The Constitution of European Democracy*, (Oxford University Press 2017).

removed from political contestation. Cases like *Van Gend en Loos* or *Cassis de Dijon*[41] seem to simply promote European integration but the way in which they do is by no means ideologically neutral. In reality, the EU economic constitution entrenches certain substantive policies, thereby elevating them to a 'constitutional plane above the contestation of everyday politics and sheltering those who enforce them from accountability'.[42] Indeed, it has been argued that the EU economic constitution entrenches 'a predominantly neoliberal programme' in that it seriously compromises 'the ability of governments to favour competing considerations over those of free trade'.[43]

This is a crucial characteristic of the EU economic constitution, which depoliticises by entrenchment. Several cases decided by the ECJ manifest the entrenchment of market values by the EU economic constitution: the four freedoms, reflecting the dictates of the market, will prevail over contradicting principles. It is useful to focus here on the place of labour rights in the EU constitutional architecture. The two leading cases are *Laval*[44] and *Viking.*[45] In both cases the ECJ held that the right to take industrial action is recognised in EU law and constitutes an integral part of its general principles. Yet, this effectively meant that it can only be exercised in a manner that is compatible with this law. In other words, the exercise of this right is conditional upon satisfying the proportionality test and will be fettered as long as it unjustifiably restricts the four fundamental freedoms of the market.

These cases prove that organisational principles of the EU economic constitution reflect a distinct political view of the economy and how it should run. This is even more evident in the case of *AGET Iraklis*.[46] The case concerned the compatibility of domestic legislation which restricted private companies' discretion to proceed with collective redundancies with articles 49 TFEU (freedom of establishment) and 63 TFEU (free movement of capital). The Advocate General's opinion in this case is instructive of how labour rights must submit to the dictates of the market as these are expressed in the EU's fundamental freedoms. According to him, domestic legislation restricting collective dismissals 'is not appropriate for the purpose of protecting workers and, in any event, it goes beyond what is necessary to achieve that purpose'.[47] The rule at issue merely gives the impression of being protective of workers. In reality, workers are best protected by an economic environment which fosters stable employment and the only way to achieve this is by undertaking 'rigorous reviews and modernisation of collective bargaining, industrial action and, in line with the relevant EU directive and *best practice*, collective dismissals'.[48] Consequently, according to the Advocate General, in order for the workers to be protected against unemployment, any protection against collective dismissals has to be forfeited. This opinion reflects the aforementioned distinct political conception that links economic growth to a deregulated labour-market.

Another substantive principle of the EU economic constitution that reveals its political and ideological bias is 'fiscal discipline'. Reference can be made here to the Fiscal Compact of 2012;[49] an example of depoliticisation through constitutionalisation. The Fiscal Compact is an

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[41] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* (Case 120/78).
[42] Danny Nicol, *The Constitutional Protection of Capitalism*, 83.
[43] ibid., 97.
[44] *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet & ors* (C-341/05).
[45] *International Transport Workers' Federation & anor v Viking Line ABP & anor* (C-438/05).
[46] *AGET Iraklis v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* (C-201/15).
[47] Opinion of Advocate General Wahl delivered on 9 June 2016 on *AGET Iraklis v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* (C-201/15), paragraph 76.
[48] ibid., paragraph 73.
[49] Treaty on Coordination, Stability and Governance in the Economic and Monetary Union (2012).

intergovernmental treaty signed by all EU Member States with the exception of the United Kingdom and the Czech Republic. Article 1 of the Treaty requires states to adopt a set of rules that foster budgetary discipline to support 'the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion'. Article 3(2) requires that these rules take effect in national law 'through provisions of binding force and permanent character, preferably constitutional'. The process of implementation of the Fiscal Compact has been interpreted as a post-democratic phenomenon, where an increasing number of core political decisions is made 'behind closed doors', mainly justified as economic inherent necessities.[50] In any case, it is an obvious example of depoliticisation through constitutional entrenchment and quite telling of the forceful impact which EU principles aspire to have on national legal orders, even on policy areas which do not form constitutive parts of the EU legislative framework and its array of competences.

The strategy of depoliticisation and de-democratisation regarding fiscal policies is now also reflected in the EU's institutional design. The experience of the Euro crisis led national fiscal policy to be monitored by a 'dense web of European surveillance'.[51] The Eurogroup, the informal meeting of the euro area's finance ministers, which began as a consensus-building organ without the authority to take decisions but played a central role in the Euro crisis drama, setting the conditions attached to European financial assistance to Cyprus, Greece, Ireland, Portugal and Spain, has assumed a crucial role in this surveillance web.[52] With the changes introduced to the European Commission's annual monitoring and coordinating of national economic policies, known as the 'European Semester', the Eurogroup continues to make important decisions on national economic policies, including potential fines of up to 0.5% of GDP under the excessive deficit procedure.[53] The Eurogroup, acting as a 'supra-government' of sorts that monitors and coordinates economic and fiscal policy, while enforcing fiscal discipline, can thus be assessed as another institutional instantiation of authoritarian economic constitutionalism. Its institutional position in the EU's architecture raises serious concerns for its democratic accountability and, therefore, enhances the EU's democratic deficit, which as we saw above constitutes an essential characteristic of the EU economic constitution.[54]

4. The UK Economic Constitution

4.1. The Office for Budget Responsibility

Does the above analysis imply that the process of breaking up the Union is the only possible route for enhancing democratic processes in Europe? In other words, does Brexit provide an

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[50] Stephan Puehringer, *The implementation of the European Fiscal Compact in Austria as a post-democratic phenomenon*, ICAE Working Papers 15, Johannes Kepler University, Institute for Comprehensive Analysis of the Economy (2013). See also, Eckhard Hein and Achim Truger, 'Fiscal Policy and Rebalancing in the Euro Area: A Critique of the German Debt Brake from a Post-Keynesian Perspective', 61(1) *Panoeconomicus*, (2014), 21–38; Jan Priewe, *Why 60 and 3 percent? European debt and deficit rules - critique and alternatives*, IMK Studies 66-2020, IMK at the Hans Boeckler Foundation, Macroeconomic Policy Institute, (2020).

[51] Ben Crum, Parliamentary accountability in multilevel governance: what role for parliaments in post-crisis EU economic governance?, 25(2) Journal of European Public Policy, (2018), 268-286, 281.

[52] Benjamin Braun and Marina Hübner, "Vanishing Act: the Eurogroup's accountability", *Transparency International EU*, (2019), available at https://transparency.eu/wp-content/uploads/2019/02/TI-EU-Eurogroup-report.pdf.

[53] ibid., 5, 18.

[54] 'There is no *such thing as a European democratic deficit* simply because *the economic constitution does not require the credentials of democratic constitutionalism* as enshrined in the constitutional democracies of the Member States of the EU'. Joerges, "Economic Constitutionalism and "The Political" of "The Economic", 799, my emphasis.

opportunity for reforming the economic constitution at domestic level in a more democratic direction? Possibly, but not necessarily. The answer to the above questions can only be negative if the solutions proposed reproduce authoritarianism at national level. In post-Brexit UK, where independent fiscal institutions like the OBR have the power to influence governmental policy to the point of a Prime Minister's resignation,[55] where democratic rights and civil liberties are restricted with waves of controversial legislation,[56] and where the economic constitution is largely driven by market imperatives,[57] this is arguably the case.

Let us elaborate by focusing on two aspects of the UK economic constitution. We shall begin with fiscal monitoring and the case of the OBR and then turn to the place of labour legislation in the UK economic constitution. The analysis will mirror the preceding analysis of the EU economic constitution in an attempt to assess the authoritarian -or otherwise- nature of the UK economic constitution. We saw above that the UK did not sign the Fiscal Compact of 2012 and therefore was under no obligation to constitutionalise the rule of balanced budgets. It, nevertheless, 'constitutionalised' the principle of monitoring budgets by an independent fiscal institution. Section 2 of the Budget Responsibility and National Audit Act 2011 established the OBR and section 3 conferred to it the duty to examine and report on the sustainability of the public finances. In the context of the global financial crisis this was an important institutional innovation towards reassuring the markets, as it rests on a preconceived notion of a sound economy insulated from democratic ('populist') demands. Indeed, the OBR, unusually amongst independent fiscal institutions, has sole responsibility for producing the official economic forecast, leaving the Treasury reliant upon it.[58] The reason behind this was to address the abuse of power by the Treasury which in the past 'exploited their informational advantage over outsiders to justify over-optimistic forecasts and to move the goalposts of their fiscal rules'.[59]

In the first instance, the goal of introducing transparency in fiscal policy-making may not seem controversial. Yet, this institutional reform has to be assessed in the wider context of depoliticisation of economic policy-making. Indeed, the monitoring of fiscal sustainability by the OBR has been characterised as an example of 'technocratic economic governance'.[60] This term has been used to describe the outsourcing of macroeconomic management to depoliticised expert institutions. It has been argued that despite the appearance of 'permanence and fixity of fiscal doctrine, and mechanistic administration of technocratically assured guiding policy principles', in reality there is deep 'contestation over conceptions of the economy, and of 'sound' policy'.[61] In other words, technocratic, apolitical institutions operate within a framework whose design and parameters depend on political and, therefore, contestable decisions.

Despite their neutral, technocratic appearance, independent fiscal institutions, like the OBR, operate within deeply historically contingent frameworks and are, thus, 'inextricably imbricated in this politics of economic ideas through their adjudication upon fiscal rules'.[62] The institutionalisation of fiscal watchdogs is a crucial aspect of the strategy of depoliticisation, since their apolitical function relies on political assumptions and evaluations, especially considering the

[55] Clift, 'Trussonomics and the OBR', *UK in a Changing Europe*, (29 September 2022), available at https://ukandeu.ac.uk/trussonomics-and-the-obr/.
[56] See Police, Crime, Sentencing and Courts Act 2022 and Public Order Bill currently in Parliament.
[57] See Trade Union Act 2016 and Strike (Minimum Service Levels) Bill currently in Parliament.
[58] Ben Clift, 'Technocratic Economic Governance and the Politics of UK Fiscal Rules', *British Politics*, (2022).
[59] ibid.
[60] ibid.
[61] ibid.
[62] ibid.

scale of uncertainty surrounding economic trajectories.[63] As OBR members put it, judgment cannot be taken out of the forecasting process; it certainly applies at the start of it in the choice of models that use specific parameters.[64] It can thus be argued that the OBR is an essential aspect of an economic constitution which decouples economic management from democratic politics,[65] based on the rationale that a 'depoliticised (rules-based) approach' reassures markets more than the 'politicised (discretion-based) system' that we normally encounter in parliamentary democracies.[66]

This approach identifies the motivation behind fiscal rules and the establishment of independent fiscal watchdogs as preventing the demos from threatening fiscal probity and economic stability. Under this prism the OBR is seen as an essential element of a depoliticisation strategy that enhances the authoritarian elements of the UK economic constitution. Which brings us to the case of the 2022 mini-budget and the role of the OBR in the downfall of the Truss government. It has been argued that the events which transpired in autumn 2022 reveal a tension between organisations such as the OBR 'and the more 'populist' style of politics that has been prominent in the UK in recent years, which often rejects such expertise as the product of an establishment elite'.[67] Technocratic economic governance supposedly renders economic policy a realm of dispassionate administration by posing limits on government discretion, yet the multifaceted politics inherent in the operations of independent and 'apolitical' bodies reveal the political content and authoritarian tendencies of this institutional arrangement.[68]

4.2. Labour legislation

Let us now turn to another aspect of the UK economic constitution, namely the regulation of the labour market. We need to note at the outset that there are two main ways of approaching labour law. The first emphasises the special character of employment rights, as well as their democratic dimension and constitutional significance. It approaches the employment relation as a manifestation of a fundamental conflict, intrinsic to capitalist societies, between the owners of capital, who invest in productive activities, and the workers, who supply the necessary labour.[69] Employers seek to maximise the return of their investments, by reducing the cost of labour and/or extending the working day, whereas workers seek the highest price available for their labour. This conflict necessarily leads to an 'antinomy, of right against right, both equally bearing the seal of the law of exchange'.[70] The point is also revealing of the economic significance of labour legislation, as the regulation of the labour market directly affects the rate of profit and, therefore, the economic indicators of investment and growth.

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[63] Jacqueline Best, 'Varieties of ignorance in neoliberal policy: or the possibilities and perils of wishful economic thinking', 29(4) *Review of International Political Economy*, 1159-1182.
[64] Clift, 'Technocratic Economic Governance and the Politics of UK Fiscal Rules'.
[65] Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*, (Verso 2014).
[66] Peter Burnham, 'The Politics of Economic Management in the 1990s', 4(1) *New Political Economy* (1999), 37-53, 42, 45, 47 and Peter Burnham, 'New Labour and the Politics of Depoliticisation', 3(2) *The British Journal of Politics and International Relations*, (2001), 127-149.
[67] Clift, 'Trussonomics and the OBR'.
[68] Ben Clift, 'OBR commentary on Sunak's spring statement: the inevitable politics of technocratic economic governance/, UK in a Changing Europe, (05 April 2022), available at https://ukandeu.ac.uk/obr-commentary-on-sunaks-spring-statement/.
[69] Hugh Collins, Keith Ewing, and Aileen McColgan, *Labour Law (2nd edition)*, (Cambridge University Press 2019), 108-110.
[70] Karl Marx, *Capital: Volume 1*, (Penguin 1990), 344.

The special nature of the employment relation is also reflected in the employment contract, which, due to its long-term and dynamic nature, is likely to 'be less specific than other types of contract about the details of the performance required from the worker'.[71] As a result, the contract of employment creates a relation of power in which the employer has the discretion, within limits, to direct labour and the employee has the duty to obey lawful instructions.[72] This, together with the ever-present threat of dismissal which functions to coerce employees to comply with the orders of the employer, creates the need for special regulation beyond the ordinary rules of the law of contract.[73] This special field of legislation shifts the focus from the individual to the system of social and production relations. Based on this approach, labour rights, such as the right to unionise or the right to take industrial action, assume a special social significance owing to the recognition of their participatory-democratic dimension.[74] These rights promote the unilateral protection of employees and aim to create at the constitutional level a rival authority against that of the employer-entrepreneur, which emanates from the right of ownership of the means of production. The goal of this collectively organised counterforce of employees is to limit the monopoly power of their social competitor to unilaterally determine the employment status.[75]

Nevertheless, the UK law on employment relations follows the exact opposite approach. Through a combination of common law, statute and human rights law, it has the effect of depoliticising the deeply political employment relation, approaching it in an individualistic manner. The role and nature of labour legislation in the UK has gone through several historical phases, yet it is safe to argue that since the 1980s and once labour regulation intended to protect employees was perceived as a barrier to profit and, thus, normatively abhorrent, it has been replaced by economic regulation intended to attract investment.[76] Indeed, the abysmal state of labour legislation in the UK legal system led several theorists to argue against Brexit because of the detrimental effect this would have on workers' rights.[77]

In the UK, the individual contract of employment is the primary legal form of regulating industrial relations, as opposed to other jurisdictions which support systems of collective bargaining and collective labour agreements that recognise the distinct democratic value and political context of the labour legislation. The focus on the individual contract of employment reflects the view that the hire of workers to perform work is and should be treated like any other market transaction.[78] This approach perceives and presents the contract of employment as a bargain between equals in the marketplace. This individualistic approach abstracts from the reality of material, power relations and thus depoliticises the relation of employment. The presentation of this relation as a contract freely entered into after a bargain between equals belies the fact that the two parties are not equal, and the contract is hardly ever the result of a bargain. Indeed, the principal weakness of a job seeker lies in the importance of employment for securing an income.[79] Any worker will accept

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[71] Collins, Ewing, McColgan, *Labour Law (2nd edition)*, 110.
[72] ibid., 111.
[73] ibid., 112.
[74] Dimitrios Travlos-Tzanetatos, *Industrial Action in the Enterprise and the Constitution (in Greek)*, (Sakkoulas 1984), 16.
[75] ibid., 17.
[76] Ruth Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law', 35(3) *Journal of Law and Society*, (2008), 341-363.
[77] Michael Ford, 'The Impact of Brexit on UK Labour Law', 32(4) *International Journal of Comparative Labour Law and Industrial Relations*, (2016), 473-495; Michael Ford, 'The Effect of Brexit on Workers' Rights', 27(3) *King's Law Journal*, (2016), 398-415; Rebecca Gumbrell-McCormick and Richard Hyman, 'What about the workers? The implications of Brexit for British and European labour', 21(3) Competition & Change, (2017), 169-184.
[78] Collins, Ewing, McColgan, *Labour Law (2nd edition)*, 218.
[79] Hugh Collins, Keith Ewing, and Aileen McColgan, *Labour Law (1st edition)*, (Cambridge University Press 2012), 98-100.

the first job that appears more or less satisfactory or will be reluctant to quit a poorly paying job, for fear of unemployment and poverty.

The limitations of the contractual and individualist approach could be addressed through the adoption of legislation that promotes collective bargaining and collective agreements, i.e. bargains reached between a trade union and an employer (or sometimes a group of employers). Such an approach would recognise the structural imbalance between the parties to an employment relation, as well as the democratic significance of its regulation. Yet, in the UK a collective agreement is unlikely to be a legally enforceable contract itself. This absence of legal sanctions for collective agreements is due in part to the Trade Union and Labour Relations (Consolidation) Act (TULRA) 1992. Section 179(1) includes a conclusive presumption that a collective agreement is not intended by the parties to be a legally enforceable contract unless certain conditions are met. This provision leaves open the possibility that a legally enforceable agreement might be reached, but in practice the parties to a collective agreement are unlikely to use legal remedies in order to enforce the agreement.[80] Instead, trade unions and employers tend to seek to enforce collective agreements in other ways.

4.3. Industrial action regulation

This is where the significance of industrial action lies, as the predominant mechanism through which employees can collectively reach, enforce or amend the conditions of a collective agreement. I now wish to focus on the regulation of industrial action, as part of the UK economic constitution. It needs to be stressed at the outset that common law does not recognise the existence of a right to strike. Quite the opposite, the default position in common law is that industrial action constitutes a breach of contract on part of the strikers and gives rise to 'economic torts … [for] the organisers and their union'.[81] What is more, following a House of Lords decision that the same act could give rise to liability under more than one tort,[82] the power of employers to hold trade unions liable has greatly increased.

Common law approaches industrial action in an individualistic manner, as breach of contract which requires statutory justification. It can thus be argued that the default approach to industrial action in the UK economic constitution depoliticises this social phenomenon. On the contrary, the statutory regulation of industrial action varied throughout the twentieth century, owing to the different levels of development of class conflict. For instance, the Trade Disputes Act 1906, passed as one of the first measures of the newly elected landslide Liberal Government, and only six years after the foundation of the Labour Party, created immunities against existing torts in the context of trade disputes, providing workers who until then 'stood naked and unprotected at the altar of the common law' with some statutory protection.[83] In the same spirit, the Trades Disputes and Trade Unions Act 1947, lifted the ban on secondary action, while the Trade Union and Labour Relations Act 1974 afforded substantially broader protection to industrial action than is the case at present. In this statutory context the judiciary had followed suit, as evidenced in the *MacShane* case which had held that the test to be applied to determine whether an action is taken 'in furtherance of a trade dispute' was a subjective one, that is to say it was sufficient that the person

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[80] ibid., 123.

[81] *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173 [118].

[82] *OBG Ltd v Allan* [2007] UKHL 21.

[83] Collins, Ewing, McColgan, *Labour Law (1st edition)*, 665.

honestly believed that the act in question might further the cause of those taking part in the dispute.[84]

The situation is now different. It has been argued that since the 1980s statutory regulation of industrial action has constructed an authoritarian legislative framework, through the conscious pursuit of a strategy of marginalising the political voice of organised labour and depoliticising industrial action.[85] The ways to achieve this included the strict regulation of the political fund of trade unions, the banning of secondary action, and the statutory restriction of lawful industrial action to action 'in furtherance of a trade dispute' between employers and their workers concerning wages, working conditions, etc.[86] This strategy of depoliticisation of labour relations and industrial action was a dominant element in the Conservative Government's wider strategy of restructuring the labour market and providing the foundations for an economic constitution that would promote economic growth 'by preventing trade unions from deploying their political power to secure legislation that would otherwise interfere with the spontaneous order of a free labour market'.[87]

The economic significance of industrial relations regulation is key to understanding the process of development of the UK economic constitution from 1979 to 1997. The UK economic constitution is based on the politico-economic conception that growth can only be achieved through the free market and the government's job is to create the conditions for the flourishing of the free market.[88] In that sense, its ideological roots are not that different from those of the EU economic constitution. The Conservative Government during the 1980s undertook the political project of re-establishing the conditions for capital accumulation and restoring the power of economic elites, inspired from ordoliberal ideas which had been percolating since the 1930s and shaped the thought of neoliberal thinkers such as Friedrich Hayek and Milton Freedman.[89] Yet, in order to restore profit rates more broadly, it was necessary to curtail heavily the power of organised labour and re-establish the power of employers. This point proves that UK labour legislation is a result and manifestation of a concrete crystallisation of class conflict and holds central place in the UK economic constitution.

Did protection of industrial action increase with the enactment of the Human Rights Act 1998? This Act could have potentially led to the indirect constitutionalisation of a right to take industrial action, through Article 11 of the European Convention on Human Rights (ECHR) and Strasbourg jurisprudence. It certainly appeared so to members of the Union of Rail, Maritime and Transport Workers (RMT) who brought a case against the UK government to contest the compatibility of the absolute ban of secondary action in UK law with the ECHR.[90] Their optimism was not unfounded. In *Ognevenko v Russia*, the European Court of Human Rights (ECtHR) had confirmed that Article 11 protects the right to strike,[91] while in *Demir and Baykara v Turkey*, the Court had gone further, stating that a State would have only a limited margin of appreciation in such matters.[92] Nevertheless, the ECtHR rejected the RMT's application by emphasising that the margin of

[84] *Express Newspapers Ltd. v. MacShane and another* [1980] AC 672.
[85] Paul Davies and Mark Freedland, *Labour Legislation and Public Policy: A Contemporary History*, (Clarendon Press, 1993), Chapters 9-10.
[86] ss. 219 and 244 of the Trade Union and Labour Relations (Consolidation) Act 1992.
[87] Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State', 45(3) *Industrial Law Journal*, (2016), 299-336, 307.
[88] Robert Knox, 'A Marxist Reading of RMT v UK', in Damian Gonzalez-Salzberg and Loveday Hodson (eds.), *Research Methods for International Human Rights Law*, (Routledge 2019), 13-41, 33.
[89] ibid.
[90] *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366.
[91] *Ognevenko v Russia* [2012] ECHR 1266.
[92] *Demir and Baykara v Turkey* [2008] ECHR 1345, paragraph 119.

appreciation was indeed wide in the context of industrial and economic policies of the state, especially regarding secondary action which could not be conceptualised as 'core' to Article 11, according to the Court.

The decision has been described as 'doctrinally odd' and possibly 'explicable as a 'political' rather than a 'legal' decision, given the stated preference of some Government Ministers to withdraw from the ECHR'.[93] It is certainly quite revealing of the ECtHR's individualistic conception of trade union activity, which has a depoliticising effect and thus fits perfectly with the model of authoritarian economic constitutionalism promoted in the UK. Strasbourg can only conceive of a 'right' to form a trade union and take industrial action as rooted in an individual's right to free association. Yet, under Article 11 there is nothing distinctive or special about trade unions; there is no sense of the special role that trade unions might be called upon to play in a capitalist society.[94] This approach abstracts from the political nature of the employment relation and presents it as a clash of rights.

What is more, it allows for a distortion of the fundamental conflict in the dispute and a reversal of the democratic credentials of trade union activity and labour legislation. We saw earlier that labour legislation protective of the employees recognises the democratic dimension and structural imbalance of the employment relationship and seeks to create a democratic counter-power to the employers' minoritarian monopoly of power. By re-framing industrial action as a 'clash of rights', the ECtHR manages to depoliticise the employment relation and render the democratic aspect of industrial relation into its opposite. In the ECtHR's conception, the RMT's right to take secondary industrial action is in conflict not only with the rights of employers not party to the dispute, but also with the wider rights of the public to receive essential services.[95] In other words, conceived as an individual right, industrial action is exercised by a minority of the population but greatly affects the rights of a vast majority since it will 'disrupt the economy' and impact on the delivery of public services. In this depoliticised context, industrial action can only be a bad thing, i.e. a disruption and prima facie violation of rights, rather than an exercise of democratic rights.[96]

4.4. New authoritarianism in labour law.

The place of labour legislation is quite revealing of the normative content of the UK economic constitution as it reflects a hostile predisposition towards workers' empowerment and economic democracy, opting for a depoliticised and authoritarian process of approaching this key economic relation. It is not surprising that this individualistic and depoliticised conception of the employment relation has greatly influenced the Conservative Government's latest legislative intervention in the field of labour legislation. Indeed, it has been argued that the Government in 2015 took the ECtHR's ruling as a green light for further restrictive legislation on industrial action and thus placed it at the forefront of its claims that the restrictions in the Trade Union Bill were proportionate and hence justifiable for the purpose of Article 11.[97]

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[93] Bogg, 'Beyond Neo-Liberalism', 328. See also Keith Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights', 45(3) *Industrial Law Journal*, (2016), 391-422.
[94] Knox, *A Marxist Reading of RMT v UK*, 28.
[95] ibid., 30.
[96] ibid., 31.
[97] Michael Ford and Tonia Novitz, 'Legislating For Control: The Trade Union Act 2016', 45(3) *Industrial Law Journal*, (2016), 277-298, 282.

The Trade Union Act (TUA) 2016 has been characterised as a 'ragbag of different measures, united only by a common theme of placing more controls on trade unions'.[98] It includes measures such as the restriction of union-supported industrial action and picketing, the increase of the Certification Officer's powers of intervention and enforcement, and placing additional constraints on unions' political funds.[99] It was enacted in the wake of a budgetary deficit created by prior attempts to mitigate the effects the global financial crisis, as part of the Conservative Government's strategy to raise the 'productive potential of the economy'.[100] Trade union reform and restriction of the statutory protection of workers taking industrial action were seen as necessary means to that goal.

It has been argued that the TUA 2016 represents a more authoritarian style of Conservative ideology and statecraft in the sphere of trade union regulation, as reflected in: (i) the repressive strategy of de-democratisation it promotes, undermining political resistance and stifling dissent in the democratic process; (ii) the heavier reliance on direct State coercion, criminalisation, as well as the empowerment of employers to use civil law remedies against trade unions and workers in industrial action situations; and (iii) the elevation of unity and social order over agonistic expressions of industrial and political dissent.[101] According to Alan Bogg, these characteristics take UK labour law 'beyond neo-liberalism', as they seem to reflect a highly authoritarian strand of Conservative ideology which is anti-liberal, rather than neo-liberal, in its orientation.[102]

Regardless of whether one agrees with this argument -since neoliberalism is itself arguably a form of authoritarian liberalism[103]- it seems to confirm that the dominant authoritarian characteristics UK labour law, an essential aspect of the UK economic constitution, are strengthened even more with this new wave of authoritarian legislation. Bogg puts emphasis on this point by focusing on policy proposals which did not make it into the Bill but give a flavour of an ambitious programme of reform, of which the TUA was just the first step. These proposals included: the reduction of unfair dismissal protection for strikers; the banning of strike action in contexts of 'essential' goods and services; a requirement that a union meets a minimum membership threshold of 10% before a strike ballot can be called; use of competition law to challenge the 'monopoly' position of trade unions in the provision of union services.[104] According to Bogg, the TUA 2016 reflects what was politically achievable rather than what was politically desired by the Government.[105]

The Strikes (Minimum Service Levels) Bill confirms this point, as it arguably constitutes the next step in this ambitious programme of authoritarian reform. The Bill which, as these lines are written, is being discussed in Parliament, has been characterised as 'another legislative episode in the never-ending 'death by a thousand cuts' of trade unions' ability to mount an effective lawful industrial

[98] ibid., 277
[99] ibid.
[100] ibid., 293-294.
[101] Bogg, 'Beyond Neo-Liberalism', 299-300.
[102] ibid., 300.
[103] Bogg's argument rests on a reading of Hayek, as main exponent of neoliberal thought, which fails to take into account the authoritarian elements already present in his thought. Hayek seems to prima facie condemn Schmitt's authoritarianism. Yet, a more careful reading reveals that Hayek's defense of the constitution of liberty shares a lot with Schmitt's critique of liberalism, which in reality is a critique of the 'weak' positivist legal state which is unable to safeguard the substantive values of liberalism (namely rule of law, private property, and individuality) against democracy. See the relevant discussion in Cristi, *Carl Schmitt and Authoritarian Liberalism,* 149.
[104] Bogg, 'Beyond Neo-Liberalism', 302.
[105] ibid., 303.

action',[106] as well as 'the latest salvo in the relentless attack to which this Government have subjected our democracy',[107] and has been criticised by more than fifty civil liberties and human rights organisations as a draconian measure with the potential to cause 'significant damage to fair and effective industrial relations'.[108]

The Bill applies to workers in the following sectors: health services; fire and rescue services; education services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; border security. Inserting new sections to the TULRA 1992 it seeks to impose an additional condition for a strike to be lawfully conducted and participating employees to be protected, namely that the union takes reasonable steps to ensure compliance by its members with a work notice in relation to minimum service levels. Unless a union takes reasonable steps to comply with this notice, it loses statutory protection against liability, while any employees participating in such action lose protection from unfair dismissal.

The key problems with the Act, from a human rights perspective, have already been noted by the Joint Committee on Human Rights in their Report.[109] In their view, 'the requirement that trade unions take "reasonable steps" to ensure their members comply with a work notice issued by an employer does not provide the clarity needed to ensure trade unions and employees will know when this duty has been met and when it has not'.[110] Additionally, the lack of any limits on the level of service that the Secretary of State may impose by regulations 'allows for potentially arbitrary interferences with the right to strike'.[111] In the Bill's second reading in the House of Lords a similar question was posed to the Minister on whether the Bill ultimately gives the Secretary of State powers 'to set so-called minimum service levels for strikes at 80%, 90% or, indeed, 100%' - in which case it would have been more accurately entitled the 'ban strikes' Bill.[112] Last but not least, the government has not made an adequate case that there is a 'pressing social need' for imposing minimum service levels across the breadth of categories currently set out in the Bill.[113]

Aside from these valid criticisms and concerns, what interests us even more is the adoption of the depoliticised conception of the employment relation by the Government in the Bill's justification. In its attempt to justify this legislative intervention to the class conflict currently taking place in British society, with a view to breaking the spiral of inflation, the Government adopts the individualist conception of industrial action as a clash of rights. In doing so it reverses the majority-minority relation. The political struggle between workers and employers is presented as a legal battle between the rights of employers and the rights of the employees, and further as a clash between the rights of a social minority of employees and the rights of the vast majority of the population, or, in other words, the public interest. The right of employees to take industrial action is pitted against the right of millions of people 'to life and limb'. In the words of the Minister, the

[106] Ioannis Katsaroumpas, 'The Strikes (Minimum Service Levels) Bill: A Blatant Violation of International Labour Standards', *UK Labour Law Blog*, (18 January 2023), available at https://uklabourlawblog.com/2023/01/18/the-strikes-minimum-service-bill-a-blatant-violation-of-international-labour-standards-by-ioannis-katsaroumpas/.
[107] See HL Deb 21 February 2023, vol 827, col 1573.
[108] Joint Letter to Business, Energy and Industrial Strategy Secretary on the Strikes Minimum Service Levels Bill, (27 January 2023), available at https://www.libertyhumanrights.org.uk/wp-content/uploads/2023/01/Joint-letter-to-BEIS-Secretary-on-the-Strikes-Minimum-Service-Levels-Bill-January-2023.pdf.
[109] Joint Committee on Human Rights, *Legislative Scrutiny: Strikes (Minimum Service Levels) Bill 2022-2023*, Tenth Report of Session 2022-23, available at https://committees.parliament.uk/work/7232/legislative-scrutiny-strikes-minimum-service-levels-bill-20222023/.
[110] ibid.
[111] ibid.
[112] HL Deb 21 February 2023, vol 827, col 1564.
[113] Joint Committee on Human Rights, *Legislative Scrutiny: Strikes (Minimum Service Levels) Bill 2022-2023*.

Bill intends to ensure that the public is protected from disproportionate disruption to their daily lives.[114]

Therefore, the government's approach to the right to strike seems to demand proof from the employees that the exercise of the right does not disproportionately affect the rights of the public, instead of the government itself proving that statutory limitations to it do not affect the core of the right. This distortion of the logic and purpose of labour legislation is not so dissimilar from the one we encounter in the analysis of the EU economic constitution. The point can thus be made, based on the preceding analysis, that the UK economic constitution, as it now stands, has significant authoritarian elements. We can also identify a tendency to increase these elements in the post-Brexit socio-political environment.

5. Reforming the UK Economic Constitution?

The authoritarian Strikes Bill, which allows for unilateral change in the contracts of employment of thousands of people to be made by a piece of secondary legislation,[115] is evidence of a tendency to enhance the authoritarian characteristics of the UK economic constitution, as well as its hostility to any form of economic democracy, post-Brexit. Yet, Brexit also provides an opportunity, as it signifies a transition from an economic constitution with a high degree of entrenchment to one where entrenchment is almost absent. The UK economic constitution, contrary to the EU economic constitution, does not -and due to its nature cannot- entrench a certain set of values and principles on how citizens should relate to the economy. We saw earlier that the ECJ's decisions, which established the EU economic constitution, are irreversible short of a treaty revision. This rigid constitutional structure, superimposed on national constitutional arrangements, is designed to frustrate popular majorities seeking to alter the coordinates of national economies. Contrariwise, the UK constitution has a low degree of entrenchment. Constitutional rules can change via and Act of Parliament. Therefore, Brexit opens the possibility of amending the economic constitution as it simplifies the process of its amendment.

In that sense, it might be worth exploring the possibility of reforming it in a more democratic direction by focusing on theoretical elaborations and practical proposals on the idea of economic democracy.There have recently been various theoretical elaborations and proposals for alternatives to authoritarian (ordoliberal or neoliberal) economic constitutionalism.[116] These proposals focus on the original notion of the economic constitution, which had meant democratic control of the economy.[117] Despite the notable differentiations, these views approach the constitution as an instrument that enables, rather than restricts, economic democracy.[118] They understand the latter as the substitution of workplace democracy for workplace despotism.[119] The common characteristic is the search for a formal, permanent and dynamic institutional framework of economic democracy. This ranges from proposals that draw inspiration from the Weimar Republic and seek to 'put an end to the subordination of labour to capital',[120] to more ambitious proposals for an Economic Council as a first step towards socialisation of the process of economic

[114] HC Deb 16 January 2023, vol 726, col 57.
[115] See Lord Judge's view of the Bill in HL Deb 21 February 2023, vol 827, col 1568.
[116] See for instance the Symposium on 'Socialist Constitutionalism' organised by the *Law and Political Economy Project* in June 2020, available at https://lpeproject.org/symposia/socialist-constitutionalism/.
[117] Wilkinson, 'Authoritarian Liberalism as Authoritarian Constitutionalism'.
[118] Keith Ewing, 'Socialism and the Constitution', 73(1) *Current Legal Problems*, (2020), 27-58, 33.
[119] Ruth Dukes, 'Constitutionalizing Employment Relations', 346.
[120] ibid., 341.

governance or an alternative legislative process made without reference to Parliament based on collective labour agreements.[121]

For instance, there are thinkers who draw inspiration explicitly from the Weimar Constitution,[122] article 165 of which called workers, 'to participate, in community with the employers and with equal rights, in the regulation of wages and conditions of employment as well as in the overall economic development of the productive forces'.[123] A system of councils, consisting of industrial councils and workers' councils would be established to undertake the task of regulation. The institutional formation of industrial councils, organised according to industry and geographical district, and responsible for the regulation of production, was intended to put an end to the unilateral decision-making power of management in production matters.[124] This is an example of an alternative economic constitution; one intended to address the imbalance of power between capital and labour, so that employees might participate in managerial decision-making on a parity basis with employers.[125]

A more recent example of alternative economic constitutionalism can be found in the Bolivarian constitution and the principle of 'people's protagonism', institutionally manifested in the form of communal councils. These were instituted with Act 5806/2006, which provided for the establishment of communal councils in every community.[126] Article 6 set out the main responsibilities of these councils, which include the approval of community development plans, the taking of substantive decisions on community life, and the overseeing of the implementation of government decisions and programs concerning the community.[127] Articles 1 and 2 of the Act identify these councils as part of state power and as mechanism not only for the implementation of state policies and related decisions but also for their elaboration. Yet, despite the dynamic nature and important responsibilities allocated to this institution, communal councils never became part of a hierarchy of power, partly owing to the rejection in 2007 of a Bill on 'Socialist Workers' Councils', which would have further integrated councils into the management of national economy by allowing them to participate in the planning, implementation and evaluation of the economic plans of specific companies as well as in nationwide planning. [128]

In the UK context, an alternative economic constitution would involve the extension of democratic standards and liberal values in the economy, as well as in politics. As Keith Ewing puts it, if individuals are permitted to elect their representatives for Parliament, they should also be entitled to be heard through their representative institutions in industry; and if obedience to the rule of law is demanded of governments, it ought just as legitimately to be demanded of employers.[129] Furthermore, if the constitution is to be seen as an instrument that enables economic democracy, then sovereignty of Parliament can be seen as 'the legal principle which enables the

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[121] Ewing, 'Socialism and the Constitution', 39-47.
[122] See for instance William A. Forbath, 'Socialism Past and Future', *LPE Project*, (22 June 2020), available at https://lpeproject.org/blog/socialism-past-and-future-part-i-of-ii/, Samuel Moyn, 'The Relevance of Weimar', *LPE Project*, (22 June 2020), available at https://lpeproject.org/blog/the-relevance-of-weimar/, and Ruth Dukes and Wolfgang Streeck, *Democracy at Work Contract, Status and Post-Industrial Justice*, (Polity Press 2023).
[123] Dukes, 'Constitutionalizing Employment Relations', 349.
[124] ibid.
[125] ibid., 343.
[126] These are defines in article 4 as ensembles of families and citizens living in a specific area, connected with each other through common history and interests, use of the same services, sharing common economic, social, urban needs. A communal council constitutes of 200 to 400 families in urban areas and 20 families in rural areas.
[127] Dimitris Kaltsonis, *The Dilemma of Bolivarian Democracy* (in Greek), (Ksifaras 2009), 136.
[128] ibid., 146.
[129] Keith Ewing, Socialism and the Constitution, 38-39.

wishes of the people to be implemented through their representatives in a disciplined system of party government'.[130] Such an approach supports the possibility of reforming the UK economic constitution in a more democratic direction. Ewing, inspired by early twentieth century debates, discusses two examples of institutional arrangements that would promote equal representation of workers and employers in the management of the economy. These arrangements would provide workers with the right to be engaged with all questions of interest, and to initiate and make legislation within the economic sphere delegated or devolved to them.[131]

The first of these institutional proposals involves the establishment of an Economic Council, as a step towards the democratisation and socialisation of the process of economic governance. This council would initially be a tripartite executive body responsible for developing and proposing policies that would lead to the progressive socialisation of the economy.[132] With the gradual socialisation of the economy under way, the powers of this Economic Council would grow to the point of transitioning from an executive to a legislative body. In that case, were the economy to become socialised, a functional devolution of power could take place, alongside the territorial devolution of political power, through the creation of an Economic Parliament.[133] The second proposal discussed by Ewing would involve a greater regulatory role for trade unions, through an enhancement of collective bargaining and collective labour agreements. Modelled after social-democratic constitutions of southern Europe (Italy, Spain and Greece), which provided for collective labour agreements with mandatory effect, Ewing advocates for a nation-wide regulatory system of industrial councils as an 'alternative legislative process made without reference to Parliament, creating norms that would take priority over any less favourable parliamentary legislation to the contrary'.[134]

It is worth noting that Ewing's proposals seem to recognise the historically contingent character of such institutional arrangements. He argues that economic democracy, understood as genuine management of the economy by the producers themselves, is not possible within the confines of liberal economic conditions; it can only be made possible in a society which struggles for the socialisation of the means of production, distribution and exchange.[135] Alternative models of economic constitutionalism are always under the Damoclean sword of an economic crisis, whose inevitability might eventually lead - as it has in several historical instances, like the case of the Weimar Republic or the constitutions of the European South in the recent crisis - to the abolition of legal guarantees to decent working and living conditions. Still, this does not reduce the analytical and critical value of such proposals and their potential role in ameliorating even the most extreme effects of an authoritarian economic constitution.

6. Conclusion

This paper examined aspects of the UK economic constitution and assessed it as increasingly authoritarian.The characterisation of crucial aspects of the UK economic constitution as authoritarian and hostile to the idea of economic democracy is further enhanced by a new wave of trade union legislation. The TUA 2016 and the Strikes Bill currently in Parliament are part of a

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[130] ibid., 33.
[131] ibid., 42.
[132] ibid., 42-43.
[133] ibid., 43.
[134] ibid., 46.
[135] Ewing, 'Socialism and the Constitution', 31.

new wave of authoritarianism which sees collective action of employees as a threat to the economy. Laws such as this indicate that the UK economic constitution has grown more authoritarian since Brexit. But this not necessarily be so. One major constitutional implication of Brexit is the lessening of the degree of entrenchment of economic constitutional principles. The UK economic constitution, still governed by the principle of parliamentary sovereignty, leaves open the possibility of reform.

Of course, the actualisation of this possibility depends on the existence of a political will, and it is true that 'even the most solid constitutional norms can melt into air when confronted with capital interests'.[136] Yet, Brexit constitutes the first opportunity to test whether an EU Member State can escape the dominant economic constitutionalism, as institutionalised in the EU, if it exits the Union. Taking back control is unfinished business unless it extends to the enhancement of democratic processes and institutions. This includes democratisation of the economy, a process which can draw inspiration from other parts of the world and past attempts at socialising and democratising the economy

[136] Ioannis Katsaroumpas, 'De-Constitutionalising Collective Labour Rights: The Case of Greece', 47(4) *Industrial Law Journal*, (2018), 465.