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Escaping Labour Law's Matrix: a review essay

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1999 was an auspicious year. It was the year that I began in earnest as a student of labour law in the neoliberal twilight years of the twentieth century, with my discipline in its seeming death throes. It was also the year that the critically acclaimed science fiction film *The Matrix* was released. The actor Keanu Reeves had been required to read Jean Baudrillard's famous work, *Simulacra and Simulation*, as a philosophical prelude to reading the film script.¹ *The Matrix* is a meditation on the nature of real human experience. The film is set in a dystopian future where intelligent machines have subjugated human beings who are encased in pods to harvest their bioelectric energies. The matrix is a simulated reality within which the conscious minds of the enslaved people are imprisoned. It is rather like a scaled-up version of Robert Nozick's 'experience machine'²: a computer-generated mirage that masks their real situation of enslavement. The heroic quest of this small band of liberated human beings was to smash through the simulation, and to live a real human life outside of the matrix. Emancipation meant that the human beings must reclaim the real territory of lived human experience.

Twenty years on, a reading of Professor Alain Supiot's *Governance by Numbers: The Making of a Legal Model of Allegiance* reveals a manifesto of profound importance.³ It is a stirring call for the emancipation of the human being, and the repositioning of the human being at the very centre of work and politics. It is underpinned by rigorous scholarship on a grand scale and it scintillates with brilliant insights. For Supiot, the fate of work and the fate of politics are intertwined. In the book, Supiot argues that freedom depends upon human beings reclaiming the territory and repudiating the map.⁴ What does this mean? The territory describes the situation where the human imagination can leave its imprint in the world, through meaningful agency in labour and democratic politics. The map is the matrix-like simulacrum of numbers, metrics, targets and statistics which provide the structure and content of new forms of governance in the public and private spheres. Supiot's fundamental claim is that human beings are becoming progressively more alienated from politics and work through the tyranny of numbers. This treatise stands in a long and distinguished line of works in French social theory on the interplay between domination and emancipation in modern society. The work of Michel Foucault is in point here who, like Supiot, was also a Professor of the prestigious College de France.

Governance by Numbers thus provides a grand theory of labour law's fate in the early decades of the 21st century. This sets it apart from more particularised engagements with specific sectors of work activity (for example, care work), the regulatory challenges of Gig work, the phenomenon of precarious work, or the stability and prevalence of the standard employment relationship. Supiot's distinctive contribution is to examine the multiple linkages between conceptualisations of the state,

¹ Jean Baudrillard, *Simulacra and Simulation* (Sheila Glaser tr, University of Michigan Press 1994).

² Robert Nozick, *Anarchy, State and Utopia* (Wiley-Blackwell 2001) 42-45.

³ Alain Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance* (Saskia Brown tr, Hart Publishing 2017).

⁴ *ibid* 169.

legal form, public and private governance, and the constitution of work. In this way, he is concerned to penetrate the deeper causes of work's degradation in the modern era. This degradation of work is linked umbilically to the degradation of legal form and of democratic politics. This degradation across different spheres of public life is being driven by the normativity of numbers and metrics.

The book is divided into two parts. The first part traces the decline of law as a cultural form that instantiates shared meanings between citizens of a political community. Its 'overthrow' has been facilitated by the rise of a 'cybernetic imaginary' where individuals are expected 'to react in real time to the multiple signals they receive, in order to meet the targets they are assigned.'⁵ This is the world of algorithms, metrics, instant feedback, indicators and benchmarking. The second part explores some of the consequences of 'governance by numbers' for the structuring of employment relations. Supiot suggests that the withering away of legal form and state sovereignty has led to the emergence of feudal forms of allegiance between networks of stronger and weaker actors. While many labour lawyers will be familiar with 'fissuring' discourse in the modern economy,⁶ Supiot's intriguing thesis attaches political significance to this phenomenon. Fissuring is not merely an economic process: it represents a new form of political organization based upon vassalage. Having identified these complex dynamics over centuries of legal and political development, and across a panoramic comparative sweep, *Governance by Numbers* then explores the possibilities for a reconstitution of labour law and the politics of work. This is a remarkable and ambitious work. Before evaluating Supiot's main claims, it is important first to clarify the structure of the argument.

The first part of the book traces the deep historical roots of governing by law and its gradual eclipse by 'governance by numbers'. For Supiot, rule by law represents a particular aesthetic imaginary. The contours of this imaginary are painted in bold historical strokes, across different cultures, and through an examination of Greek and Roman legal traditions. There are of course important cultural variations in this ideal of government by law, and Supiot is sensitive to these differences. However, this symbolic ideal of law might today be understood as the 'Rule of Law'. It would reject the reductive thesis that law is simply an instrument, like a sharp knife, designed to achieve specified ends with ruthless efficiency. Instead, the Rule of Law represents an ideal of government where citizens are consecrated as citizens with dignity and autonomy and are governed by shared rules.⁷ The law addresses them as agents with dignity, and it does so in the normative terminology of obligations. The law is not simply coercive brute force like the threats of a gangster. Legal texts and political institutions provide a cultural structure of solidarity in the political community. Supiot's account of legal and historical development traces the slow degradation of these ideal of 'government', and its progressive substitution by 'governance':

Where 'government' relies on *subordinating* individuals, 'governance', in line with its cybernetic vision, relies on *programming* them...The subordinated worker obeys the rules he is given, whereas the programmed worker reacts to the information reaching him from his

⁵ *ibid* 10.

⁶ David Weil, *The Fissured Workplace* (Harvard University Press 2014).

⁷ See Lon Fuller, *The Morality of Law* (Yale University Press 1964); Kirsten Rundle, *Forms Liberate* (Hart Publishing 2012).

environment. The move from subordination to programme is absolutely central to our contemporary representation of human action.⁸

Supiot's careful tracing of this movement is legal scholarship in the genre of the *longue duree*, and this makes it a rather unusual work in the labour law canon. For example, chapter 4 exposes the latency of 'social harmony by numbers' in ancient political and legal practices. It is an excursus that takes us through Pythagoras, Plato and the Renaissance Neo-Platonists. Numbers represented secret truths of an immanent rational order in the world. This inspired the hope that esoteric knowledge of mathematical harmonies might provide models for the ordering of citizens in political communities. Given these roots in esoteric mystical practices, we are then led through the emergence of a normativity of numbers in early forms of legal practice in chapter 5. This is reflected in the legal obligation of accounting (whereby the account becomes the authoritative accreditation of a truth through the medium of a numerical image); the use of statistics and quantification as a technique of government, identifying regularities and patterns of social behaviour in order to manage populations; the rise of probabilistic reasoning in adjudication; and the use of quantification as a basis for designing legislative interventions. In this way, the law's encounter with quantification is a longstanding one. While the harnessing of scientific rationality and mathematical expertise is both inevitable and productive, it is an encounter that has also been fraught with risk. The Supiot narrative implies that the imagined superior objectivity of quantification has always threatened to undermine the authority of law as a symbolic medium.

Chapters 6 and 8 provide the most interesting contemporary insights into Supiot's thesis of the gradual entrenchment of 'government by numbers'. Chapter 6 explores the 'dethronement of law' in two seemingly different political situations, the Soviet-style 'planned economy' and the Anglo-American neoliberal paradigm. The modern era represents a 'hybridisation' of these models which have conspired to displace law in favour of quantification. In the planned economy, law is reduced to an instrument or tool to implement the detailed numerical planning determined by the central planning committee. According to Supiot, this was a form of '*government* by numbers'.⁹ It was not yet a form of *governance* because the individual was still subjected to coercive control implemented through legal directives. In neoliberal thinking, the law is also a mere technical tool which provides a minimal framework within which contracting parties maximise their self-interest through bargaining.

In both ideal-types, the conceptualisation of law as a coercive instrument 'most certainly represents a regression, and shows a lack of understanding of the law as a nodal point in the domestication of power. Law is most certainly a technique of power, but it is a technique which binds and limits power'.¹⁰ This 'dethronement of law' leads to its degradation as cultural form. Laws become a product, to be bought and sold in the political marketplace to the highest bidder; they also become simply another resource to be allocated in a contract, perhaps through the designation of a private arbitrator to 'resolve disputes' or choice of law clauses in a global marketplace of legal systems. Ultimately, calculation becomes the norm,

⁸ Supiot (n 3) 29.

⁹ Supiot (n 3) 115.

¹⁰ *ibid* 118.

akin to a biological norm or a computer programme, it results from the interaction of individual calculations and it operates *from within*. The interiorisation, or eradication of heteronomy, is precisely what governance means: whereas *government* implies a commanding position above those governed...*governance* starts out from individual freedoms, not to limit but rather to programme them.¹¹

The fact that there has been a confluence between capitalism and communism appears to give this process an irresistible momentum. Chapter 8 provides a powerful overview of the displacement of law by 'governance by numbers' at multiple levels of normative activity. In each normative domain, there is a 'system of self-adjusting interacting units automatically responding to signal inputs and feedback, as programmed by computer algorithms.'¹² Parallel regulatory phenomena are identified at the levels of individual governance, corporate governance, public sector governance, European governance, and global governance. Quantification, benchmarking, and indicators pervade each of these levels of governance. This has corroded democratic principles across multiple regulatory levels.

The second part examines the specific consequences of 'governance by numbers' in the field of social law and the organization of work. This is more familiar intellectual territory for labour lawyers, though Supiot analyses that territory in new and interesting ways. In chapter 9, Supiot examines the phenomenon of 'governance by numbers' and the friction that it generates at the interface with 'government by laws'. In the employment context, the book offers important insights into the reconfiguration of Taylorism by modes of quantification. Under Taylorism, workers 'were reduced to the status of cogs obeying mechanically the rules of the workshop and the rhythms of the machines.'¹³ Despite the promise of liberation through technological advancement, 'governance by numbers' 'ensnares managers and workers alike in feedback loops governed by numerical representations of the world increasingly disconnected from experience.'¹⁴ Or again, 'Taylorism was based on the total *subordination* of workers to a rationalised system imposed from outside, whereas today the organization of work is predicated on *programming*.'¹⁵

Supiot then traces the complex dynamics *within* protective labour law generated by this new figure of the 'programmed worker'. For example, there is an interesting discussion of sites of resistance from French health and safety law to the mental degradations wrought by dehumanised work.¹⁶ These legal challenges to objectives-led management techniques provide opportunities for democratic empowerment, and Supiot accordingly rejects crude technological determinism. This chapter also gestures tantalisingly to another possibility, which is that labour law developments can also be a Trojan Horse for the deeper penetration of 'governance by numbers' into working life. Nearly twenty years ago, in the heyday of 'third way' labour law in the UK, proposals emerged for new contractual paradigms based upon high-discretion contractual performance.¹⁷ On the face of it, this shift might be interpreted as an emancipatory development marking a transition from coercive subordination to cooperation and autonomy. Supiot's powerful arguments provide a stark reminder that legal

¹¹ *ibid* 116.

¹² *ibid* 145.

¹³ *ibid* 169.

¹⁴ *ibid*.

¹⁵ *ibid* 177.

¹⁶ *ibid* 186.

¹⁷ Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *ILJ* 17.

developments must always be assessed within the broader social, economic and technological context. Just as formal subordination is eclipsed, new and more insidious forms of structural domination emerge. Autonomy must be assessed in its totality. Good faith and ideals of contractual cooperation may facilitate a state of self-enslavement through the internalisation of metrics. Self-enslavement is a pernicious form of domination precisely because its chains are not so tangible.

Chapters 10 and 11 set out the core analytical theses of the second part of the book. Chapter 10 explores the contours of the ‘withering away of the state’. For Supiot, this is reflected most strongly in the erosion of the public sphere and of the sovereignty of state law. State law and the sovereignty of the state has been displaced by the narrowing of mandatory *ius cogens* norms in favour of *ius dispositivum* norms that can be modified or excluded through private ordering. It is also reflected in the expanding legal universe of proliferating norm-systems which can be opted into through employment contracts. Legal norms are becoming an object of consumer choice like shoes or sofas. Imagine being a platform driver in Barcelona, contracting with a platform provider in New York, with your employment disputes governed by employment laws in Amsterdam. In the most extreme versions of this phenomenon, employment contracts provide for compulsory and individualised private arbitration so that employment disputes are channelled out of the system of public courts entirely.¹⁸ In the US, the public courts have themselves been complicit in this privatisation of public justice.¹⁹ According to Supiot, ‘such legal forum shopping is of course incompatible with a system based on *the rule of law*, but it has its place in one based on *rule by laws*.’²⁰ This is no doubt facilitated by the emergence of *leximetrics*, using numerical values and coding techniques to rank legal systems by business-friendly indicators, under the guidance of the World Bank.²¹

According to Supiot, the vacuum created by the ‘withering of the state’ and the ‘dethronement of law’ explains the emergence of a new feudalism based upon ‘ties of allegiance’. This represents a situation where ‘the key idea is not that all should be subject to the same abstract law, but that each person should behave according to his or her place in the network. Each must serve the interests of those on whom he depends, and be able to count on the loyalty of those who depend on him.’²² On an initial encounter, these ideas of serfdom, loyalty and vassalage seemed rather odd and obscure within the context of the current predicaments of labour law.²³ I now incline to the view that there is considerable analytical power in this way of framing things. In particular, we start to see familiar phenomena from different angles. In a brilliant analysis of the ‘de-constitutionalisation’ of collective labour rights in Greece, Ioannis Katsaroumpas has critiqued the dismantling of Greek social law through the use of economic conditionality tools by the Troika.²⁴ While this narrative has been rather shocking to labour lawyers, witnessing constitutional norms dissolve like mist in an encounter with

¹⁸ Matthew Finkin, *American Labor and the Law: Dormant, Resurgent, and Emergent Problems* (Wolters Kluwer 2019) 54-62.

¹⁹ *Epic Sys. Corp. v Lewis* 138 S. Ct. 1612 (2018), a majority of the U.S Supreme Court upheld the preclusion of group claims by mandatory arbitration clauses in employment contracts.

²⁰ Supiot (n 3) 197.

²¹ For a recent exploration of the nature of leximetric research in labour, which exposes some difficulties with the World Bank methodology, see Simon Deakin, ‘The Use of Quantitative Methods in Labour Law Research: An Assessment and Reformulation’ (2018) 27 *Social and Legal Studies* 456.

²² Supiot (n 3) 212.

²³ Though see Andre Gorz, *Reclaiming Work: Beyond the Wage-Based Society* (Polity, 1999)

²⁴ Ioannis Katsaroumpas, ‘De-Constitutionalising Collective Labour Rights: The Case of Greece’ (2018) 47 *ILJ* 465.

commercial debt arrangements, Supiot's thesis of a new feudalism enables us to see how this might be a predictable and normal occurrence at the current political juncture.

It also provides a new perspective on the ubiquitous discourse of 'the fissured workplace'.²⁵ In fissuring, there is a proliferating network of contracts parcelling out productive activities to different contracting parties. So far, this has been conceptualised as an economic process that creates regulatory challenges for enforcement, namely, how to affix liability for employment standards to the 'lead companies' in supply chains. Supiot's feudalism thesis exposes fissuring as a political process that is subverting the sovereignty of law. This is a valuable corrective to underestimating the significance of fissuring, and its connections to a wider crisis of democratic governance. It also implies that the regulatory responses to fissuring must be more than technical fixes to existing enforcement paradigms, such as the introduction of 'joint employer' or 'joint and several liability' into the regulatory armoury.

The book concludes with 'ways forward'. This depends upon a reconstitution of labour law that recognises "the anthropological dimension of work, understood in its broadest and most concrete sense of human beings' need to inscribe into their everyday living environment the mental images which guide their action and collaboration."²⁶ Above all, this book is an elegy for the tragic loss of meaning in work and in law.²⁷ In turn, the 'anthropological dimension of work' depends upon the reconstitution of meaningful work. This invites a search for new forms of solidarity and the creation of new functions for the nation state in fostering solidarities: 'the state's role should be to guarantee the articulation between national solidarity and solidarity organizations within civil society and internationally, which are woven through these networks of allegiance.'²⁸ This envisages a radical democratisation of the political and economic spheres, so that human agency can overcome the tyranny of numbers. This is the way out of the matrix.

This is a book of significance and magnitude. Its intellectual power lies in its ability to jolt and disrupt the familiar ways of framing legal developments. Here are two examples, both of which originate in the domain of 'protective' labour law. As labour lawyers, we have been accustomed to defending the citadel of social law from encroachment by the neoliberal barbarians at the gate. 'Governance by numbers' demonstrates how the deepening of quantified domination is being secreted into ostensibly protective measures.

The first example is in the context of working time regulation under the Working Time Directive. In *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* the question arose whether it was mandatory for an employer to maintain records of the actual duration of daily and weekly time worked by workers, in order to facilitate the effective enforcement of working time rights.²⁹ The case arose out of a legal claim brought by a Spanish trade union. Advocate General Pitruzzella's Opinion was that monitoring and precise measurement of working time was a mandatory obligation, which flowed from the need to ensure effective enforcement of working time limits. My

²⁵ Weil (n 6).

²⁶ Supiot (n 3) 288.

²⁷ More than once, Supiot indicates the value of a psychoanalytic approach. The deeper themes in Supiot's book reminded me very much of Carl Jung, *Modern Man in Search of a Soul* (Routledge 2001).

²⁸ Supiot (n 3) 289.

²⁹ Case C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* EU:C:2019:87.

first reaction to this case was that it represented a solidification of worker protective principles in the scheme of working time principles. Supiot's arguments might lead us towards a more cautious assessment. The intensification of monitoring, particularly through technologies and discrete forms of surveillance, may have dehumanizing effects on workers. Would protective labour laws legitimate the use of patented wristbands to track the physical movements of workers?³⁰ Should this be calibrated to measure the intensity of activities so that working time limits might be fine-tuned even further? What about technology that pinpoints cognitive activities such as thinking time? It is often forgotten that the Working Time Directive is based upon a normative principle of the humanization of work.³¹ It is vital that this shadow-side of worker-protective labour laws is given fuller recognition, and Supiot's thesis provides a novel conceptual grammar for doing this.

The second example is drawn from some recent developments in UK labour law. In July 2017 the 'Good Work: The Taylor Review of Modern Working Practices' was published.³² This report had been commissioned by the Government to examine working practices in the UK labour market, prompted by public concerns about exploitation, under-enforcement of labour standards, and the proliferation of classificatory problems of 'false self-employment' in the 'gig economy'. It was a remarkable opportunity for a meaningful public conversation about the constitution of work. Alas, the Taylor Review did not have a Supiot.

There have been critical engagements with some of the detail of the review's regulatory proposals.³³ However, Supiot's arguments point the way to a deeper critique of the review's intellectual and political framework. First, there is a startling faith in technology to deliver 'clarity' on the issue of employment status, with the review recommending the development of 'online tools' to assist individuals in discovering the legal identity of the working arrangements.³⁴ This presents the employment status characterization as a technical exercise. Where next from here? We might develop numerical values to attach to specific features of the work arrangements, and an overall score for the employment status threshold. This, of course, is precisely the lie of 'governance by numbers'. Its effect is to depoliticize the question of the employment status enquiry, which must be understood as a creative political act in determining which of us has employment rights (and which of us does not). Dressing this up as a technical enquiry, to be assisted by new technology, obscures the politics of employment status.

Secondly, the review proposes a new statutory definition for an intermediate category of employment status based upon 'control'.³⁵ Building upon Supiot's important distinction between the 'subordinated worker' and the 'programmed worker', to inscribe 'control' into a new statutory definition would be

³⁰ Olivia Solon, 'Amazon patents wristband that tracks warehouse workers' movements' (The Guardian, 1 February 2018) <www.theguardian.com/technology/2018/jan/31/amazon-warehouse-wristband-tracking> accessed 9 May 2019.

³¹ Alan Bogg, 'Of Holidays, Work, and Humanisation: A Missed Opportunity?' (2009) 34 *European Law Review* 738.

³² Matthew Taylor and others, 'Good Work: The Taylor Review of Modern Working Practices' (July 2017) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf> accessed 9 May 2019.

³³ Katie Bales, Alan Bogg and Tonia Novitz, "'Voice' and 'Choice' in Modern Working Practices: Problems with the Taylor Review' (2018) 47 *ILJ* 46.

³⁴ Supiot (n 3) 39.

³⁵ *ibid* 36.

to track a set of preoccupations with the ‘subordinated worker’. As the numbers of ‘programmed workers’ expand in the economy, legal tests need to be supple enough to track those constitutive features of ‘programmed work’. The forms and techniques of domination are less overt for the ‘programmed worker’ than for the ‘subordinated worker’, precisely because they are internalized forms of cognitive subjugation. A statutory test of control, focused on external indicia, risks deflecting the enquiry away from these elements in new forms of work arrangement.

Thirdly, the review embodies a particular aesthetic style of discourse. For a review concerned with the future of work and its regulation, it is rather short in running to 115 pages. It contains lots of quantitative data in chapter 4, setting out the current composition of the UK labour market in a variety of colorful graphs and charts. The text is interspersed with trendy line drawings of people in a variety of work poses. Yet these people are faceless. Supiot’s arguments have finally helped me to pin down what I have found so irritating about this report. The faceless figures signify a glossy and superficial piece of work that is devoid of cultural and intellectual substance at the symbolic level. The report ignores a rich corpus of case law stretching back over more than a century, where courts have grappled with and refined different approaches to employment status. Undoubtedly, this case law has formulated legal tests with manifold limitations at the technical level. It has displayed folly more than wisdom. Yet this body of jurisprudence is a rich repository of cultural meanings that provide the foundations of a common life and for a law that we have in common. Supiot’s thesis provides a powerful argument to the effect that the reconstitution of meaning in work is bound up with the reconstitution of meaning in our shared legal practices. This suggests that a reductive approach to legal reform, based upon a slim statutory definition that takes its year of enactment as Year Zero, is unlikely to be the best way forward.³⁶

Finally, the Government’s main response to date to the Taylor Review has been the implementation of a ‘Good Work Plan’.³⁷ One plank in this strategy is dedicated to the promotion of ‘quality of work’.³⁸ On its face, this might seem to invoke Supiot’s ‘anthropological dimension of work’. However, the proposal is for the ‘Industrial Strategy Council’ to develop and refine ‘effective evaluation metrics’ to measure the progress of quality work.³⁹ Supiot’s thesis identifies the ways in which ‘evaluation metrics’ are utterly destructive of the ‘quality of work’. For this reason, the Good Work Plan’s formula for achieving ‘quality work’ will in fact be its undoing. What is needed is an approach focused on solidaristic democratic empowerment of workers, through representative organizations, so that these metrics are contested, shaped and implemented through democratic engagement. Unfortunately, the entire corpus of restrictive trade union laws was outside the Taylor Review’s terms of reference, so there were very few concrete legal proposals on collective worker voice.

³⁶ A leading trade unionist described the Taylor Review as ‘wishy-washy’ and ‘full of fluff’: Jason Moyer-Lee, ‘Wishy-washy and full of fluff – the Taylor review offers little’ (The Guardian, 18 July 2017) <www.theguardian.com/commentisfree/2017/jul/18/taylor-review-gig-economy-workers> accessed 9 May 2019. While this was addressed to the specific content of the proposals, I think that this language also reveals frustration with the cultural and intellectual gravity of the document.

³⁷ Department for Business, Energy & Industrial Strategy, *Good Work Plan* (Cm 9755, December 2018).

³⁸ *ibid* 17.

³⁹ *ibid*.

In sum, Supiot's work has provided us with a highly original and analytically powerful framework for theorizing labour law in the 21st century. Inevitably, for a major work in the *longue duree* genre, there are some important points of disagreement. For this reader, two of them are fundamental. First, Supiot is forthright in criticizing the EU institutions, and particularly the Court of Justice, for its 'neoliberal deconstruction of labour law'.⁴⁰ As evidence of this turn, which has 'proved irreversible', he cites the *Viking* and *Laval* cases⁴¹ and the *Association de médiation sociale* case.⁴² The facts in *Viking* and *Laval* hardly need repetition in a labour law journal. In *Association de médiation sociale*, the Court concluded that Article 27 of the EU Charter, conferring a right to information and consultation, did not have horizontal effect. These cases are described by Supiot as exemplars of 'the *Law and Economics* doctrine, according to which every legal rule must be judged in terms of its economic effects.'⁴³

In contrast to Supiot, I think this economistic reading is too reductive. These decisions are – rightly – unsettling to many labour lawyers. In substance, *Viking* and *Laval* involved the sacrifice of fundamental social rights where they conflicted with the employer's free movement rights under EU law. Yet it is possible to read *Viking* and *Laval* as also involving a difficult constitutional navigation of competing solidarities in an enlarging European Union. It is as much a conflict between the competing social and economic interests of workers from different member states, as it is a conflict between the 'social' and the 'economic' or between capital and labour.⁴⁴ Furthermore, the *Association de médiation sociale* case was a disappointing failure in the use of the Charter by atypical workers seeking to maintain solidarity and enforce their collective rights. Yet there is now a litany of working time cases where Article 31 of the EU Charter has had powerful normative effects on the interpretation of the Working Time Directive.⁴⁵ There have also been important worker-protective developments under Article 47 of the EU Charter, and the effective enforcement of EU social law.⁴⁶

Admittedly, the Court's encounter with collective forms of solidaristic empowerment has been more fraught. Still, the *longue duree* perspective obscures the complex strands that make up our contemporary legal and political practices. European labour and social law represents a contested normative site. Any attempt to impose a Procrustean uniformity on this field is highly problematic, and certainly so when it is filtered through selected landmark judgments like *Viking* and *Laval*. Like other forms of law, the cultural symbolism of European social law is rich and multi-layered. Perhaps UK labour lawyers are more sensitive to the worker-protective elements in that unfolding narrative, given our brutal experience of many decades of neoliberal deregulation. And there is a strong hermeneutic tradition in Anglo-American jurisprudence that treats law as an argumentative practice,

⁴⁰ Supiot (n 3) 237.

⁴¹ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* EU:C:2007:772; Case C-341/05, *Laval v Svenska Byggnadsarbetareförbundet* EU:C:2007:809.

⁴² C-176/12, *Association de Médiation Sociale v Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)* EU:C:2014:2.

⁴³ Supiot (n 3) 238.

⁴⁴ ACL Davies, 'Identifying 'Exploitative Compromises': The Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 *Current Legal Problems* 269.

⁴⁵ Case C-173/99, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* EU:C:2001:356; Case C-155/10, *Williams and Others v British Airways plc* EU:C:2011:588; C-569/16, *Stadt Wuppertal v Maria Elisabeth Bauer* EU:C:2018:871.

⁴⁶ Jeremias Prassl, 'Article 47 CFR and the Effective Enforcement of EU Labour Law: Teeth for Paper Tigers?' Working Paper for Directorate General for Employment, Social Affairs and Inclusion (April 2019).

with legal interpretation as constructive interpretation, interpreting the material in its morally best light.⁴⁷ At the current time, constructive interpretation of EU social law strikes me as a moral imperative. In an era of resurgent nationalism, it would be a profound mistake to give up on the very idea of European social law in totality.

The second fundamental disagreement is on the ‘withering of the state’ and the ‘dethronement of law’. Supiot presents these developments as very highly developed at the current time. His presentation of these processes is too categorical. Take the ‘withering of the state’. This fails to account for the resurgence of authoritarian populism and resurgent nationalism, that has led to a dramatic reassertion of the coercive power of the nation-state. We can see these developments in Hungary, Poland, Italy and the ‘Brexit’ debacle in the UK. This re-forging of nationalistic community is often implemented through coercive primary legislation. In the UK, for example, the Immigration Act 2016 and the Trade Union Act 2016 both represent legal interventions constructed around the cultural symbolism of organic national unity.⁴⁸ It could be read as the legislative assertion of a Schmittian politics of ‘friend’ and ‘enemy’, with the ‘enemy’ in the guise of the ‘illegal migrant’ or the disruptive ‘cultural Marxist’ trade unionist.⁴⁹ This development represents not the ‘withering’ of the nationalistic state, but its recrudescence. The rise of nationalistic communitarianism, centered on the nation state, is the reaction against rampant marketization. An urgent task for our time is to salvage the social and inclusive nation-state, based upon decent migration regimes and respect for fundamental rights. At the very least, then, the ‘withering’ thesis should be understood as a single strand in a rather complex set of vectors shaping the development of the modern state. I would regard the resurgence of the populist nation-state as one of the most important developments of our time, and it is difficult to locate it within Supiot’s intellectual mapping. It also means that it is particularly important to be precise in portraying the contours of Social Europe, at a time when the EU might have a vital role to play in stabilizing decent work and decent politics across Europe.

Now take the ‘dethronement of law’. This obscures the persistence and value of the general law to provide solutions to some of the problems being thrown up by the degradation of work. For example, a recent case in Ontario was concerned with the enforceability of a private arbitration clause that compelled the individual to arbitrate in the Netherlands under Dutch law.⁵⁰ The arbitration clause was treated as invalid by the appeal court, in part because of the doctrine of unconscionability. This is an important development in resisting the encroachment of ‘governance by numbers’ and law as marketized product. In the UK, the UKSC recently used the common law fundamental right of access to a court to strike down the tribunal fees regime which had effectively priced out the most vulnerable workers from enforcing their basic employment rights in a public court.⁵¹ This was based upon a constitutional principle of the Rule of Law, which was formulated as a public good in the political community. These decisions are only possible because the law has not been ‘dethroned’, even though it may be experiencing tectonic pressures in a globalized world. National legal systems continue to

⁴⁷ Ronald Dworkin, *Law’s Empire* (Hart, 1998).

⁴⁸ Alan Bogg and Mark Freedland, ‘Labour Law in the Age of Populism’ in [Julia López López](#) (eds), *Collective Bargaining and Collective Action* (Hart Publishing 2019).

⁴⁹ Supiot discusses Schmitt’s political thought (204-211), but this is within the context of a set of claims based upon the ‘withering of the state’ rather than its authoritarian resurgence.

⁵⁰ *Heller v Uber Technologies Inc.*, 2019 ONCA 1.

⁵¹ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409; Michael Ford, ‘Employment Tribunal Fees and the Rule of Law: *R (Unison) v Lord Chancellor* in the Supreme Court’ (2018) 47 ILJ 1.

provide workers with a law in common, some of it of ancient lineage and carrying deep symbolic meaning, and we do the law (and the workers) a disservice if we exaggerate its demise.

In sum, Supiot's work on 'governance by numbers' should be read as the beginning of a research project, rather than its culmination. It reminds me of the literature around the 'standard employment relationship'. Scholarship had been rather quick to declare the death, extinction, disappearance, or otherwise mortal condition of the standard employment relationship. More recent work has taken a more measured view of its position in labour markets.⁵² In a similar vein, we now need to examine some of the core claims of 'governance by numbers' in the real world of work and social law. It is likely that the 'withering of the state', or the 'dethronement of law', or the rise of algorithmic control, represent important strands in a wider, complex and dynamic picture.

In 1907, Mahler apparently said to Sibelius that 'the symphony is like the world, it must encompass everything.'⁵³ Supiot's work is labour law on a Mahlerian scale. There are few labour law treatises that lead one through (amongst many others) Gödel, Livy, Cicero, Schmitt, Simone de Beauvoir and St. Paul. This is a book that demands much of its reader, but the rewards are rich indeed.

⁵² Zoe Adams and Simon Deakin, 'Institutional Solutions to Precariousness and Inequality in Labour Markets' (2014) 52 BJIR 779.

⁵³ Quoted in Norman Lebrecht, *Why Mahler?* (Faber 2010) 9.