ECONOMIC COORDINATION AS FREEDOM OF ASSOCIATION

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I INTRODUCTION: ECONOMIC COORDINATION AS FREEDOM OF ASSOCIATION

In her brilliant deconstructive work exposing the normativity of antitrust law, Sanjukta Paul has explored antitrust's role as an allocative mechanism for economic coordination rights.[1] Despite the liberal promise of antitrust, based in the supposed neutrality of free competition as a public good, many systems of antitrust law prioritise and shield the market activities of powerful corporate actors while targeting the economic coordination of smaller firms and individuals. This promotes an ideology of political economy that is anything but neutral and value-free. Its effect is to entrench structures of concentrated corporate power, with all of the corrosive social, civic and democratic effects that such profound inequalities entail. At the same time, it has often stymied attempts by individual self-employed workers to seek empowerment through collective action. The central question of this chapter is whether freedom of association can be used to shield the economic coordination of self-employed workers from competition law. After all, economic coordination is, in essence, a form of freedom of association. And freedom of association is a basic constitutional liberty protected in national constitutions and international human rights law.

A core anti-competitive wrong is collusive coordination or concertation between undertakings on the market, with the object or effect of restricting competition between them. For example, a paradigm of this is set out in Article 101 (1) Treaty on the Functioning of the European Union (TFEU) which prohibits 'all agreements between undertakings…and concerted practices…which have as their object or effect the prevention, restriction or distortion of competition'. Let us call this the coordination wrong. The development of collective labour law depended upon an exclusion of this coordination wrong, given its conflict with the practices of collective bargaining and collective agreements. The coordination wrong is intrinsic to the very nature of collective agreements, because collective bargaining restricts competition by fixing the selling price of labour. This is because collective bargaining involves competitive restrictions both in relations between workers, and between groups of workers negotiating with employers.

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[1] Sanjukta Paul, 'The Enduring Ambiguities of Antitrust Liability for Worker Collective Action' (2016) 47 *Loyola University Chicago Law Journal* 101.

Historically, labour law systems developed an immunity or exclusion of the coordination wrong to create a permissive regulatory space for collective bargaining and collective agreements. To adopt the famous typology of norms from Otto Kahn-Freund's work, these measures were 'negative law', negating the operation of common law doctrines that would otherwise impede the collective activities of trade unions.[2] These exclusions could be introduced through legislation or judicial development, and legal systems display a rich variety of legal forms. The common thread running through all of them is a basic binary division between 'employees' (shielded from competition law) and business undertakings (regulated by competition law). This frontiers of labour law and competition law were usually demarcated along this boundary line.

The problem of competition law is as old as labour law itself. Legal systems provided different ameliorative responses long before the turn towards 'labour rights as human rights'.[3] In a characteristically prescient essay back in 1995, Lord Wedderburn examined the historic 'frontier' between labour law and competition law.[4] He predicted that European competition law, in which he included the laws on free movement and economic integration, would pose an increasing threat to autonomous trade unions and collective bargaining across Europe. He offered a devastating critique of the current state of European social law, developed with a sensitivity to historical and comparative examples. He noted that most labour law systems had developed an 'autonomy' from competition law early in their historical development, often through the legal technique of an immunity or exclusion for 'workmen' or other personal work category.[5]

This reflected 'the qualitative difference between a "contract of employment", or even a contract for services, and a commercial contract.'[6] The normative basis of this difference was rooted in the fundamental norm that 'the labor of a human being is not a commodity or article of commerce'.[7] Consequently, 'the sale of human labour power is not, therefore, to be treated as parallel to the substratum of the commercial combinations or transactions to which competition law is directed.'[8] Whereas products are commodities to be traded, human labour power is not. Note also the radical implication of this constitutional starting-point. For Wedderburn, this does not point to the binary divide between 'employees' and the 'self-employed'. Instead, he counterposes contracts of employment *and* contracts for services against 'commercial contracts'. This would locate the self-employed who sell their human labour power to make a living within the protective scope of 'labour law' and outside 'competition law'. The relevant binary divide is more radically conceived as set between labour markets and product markets.

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[2] Otto Kahn-Freund, 'Industrial Relations and the Law: Retrospect and Prospect' (1969) 7 *British Journal of Industrial Relations* 301.
[3] On 'labour rights as human rights', see Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.
[4] Lord Wedderburn, 'Freedom and Frontiers of Labour Law', in Lord Wedderburn, *Labour Law and Freedom* (London, Lawrence & Wishart, 1995) 350.
[5] Ibid. 370.
[6] Ibid.
[7] Ibid. 372.
[8] Ibid.

There is a value in remembering these older ways of thinking. Fundamental rights now occupy a central position in the architecture of our discipline.[9] Yet they do not exhaust the imaginative possibilities for achieving freedoms in the face of new forms of economic oppression. Some dazzling insights from Wedderburn's essay are worth reiterating. First, Wedderburn is emphatic that fundamental collective rights may not be *sufficient* to do the necessary normative work: 'The frontier, therefore, between labour law and "competition law" is one along which a fundamental aspect of the worker's freedom is defended, not merely to have the right to organise in combination for the sale of labour power but also not to be treated, combination or not, as a commodity to be traded.'[10] In other words, the right to collective bargaining is necessary but not sufficient. It needs to be supplemented by a non-commodification norm.

Secondly, he deprecated the scholarly hostility to 'immunities' as an unhelpful formalist distraction. What mattered was 'the content of the law and the enforceability of the rights afforded, not the form'.[11] Immunities were in fact indispensable in a scheme of statutory regulation, and the task of the conscientious legislator was to develop a coherent pattern of positive rights and immunities upon which autonomous collective bargaining could be based. Finally, it was vital to examine the realities of power in the workplace, in courts, in the economy, and in politics. This realist approach would expose the tendencies of a legal ideology that 'leans in favour of the status quo of power.'[12] A realistic account of power would repudiate attempts to treat the economic coordination of workers and the economic coordination of enterprises as equally amenable to a neutral and 'balanced' application of competition law restrictions. Even back then, Wedderburn could detect trends 'on the law of market competition' so that 'labour power is not adequately distinguished by the Court's judges from commodities. Competition law creeps forward, therefore, to occupy territory which labour law or "social law" is supposed to safeguard.'[13]

More than a quarter of a century later, these tendencies have accelerated. The binary divide between competition law and labour law has experienced tectonic pressures as a result of changing contracting practices in labour markets. There has been significant growth in forms of precarious self-employment, particularly in the platform economy, where work-providers may be categorised in law as self-employed or 'undertakings'.[14] This categorisation locates them within the domain of commercial and competition law, the effect of which is to treat the collective agreements of the self-employed as core instances of the coordination wrong under competition law. This is dysfunctional because these workers often display similar features of subordination, economic dependence, and contractual inequality, like employees in a standard employment relationship. Worse still, many self-employed workers often lead more precarious working lives than standard employees, given the intermittent and casual nature of their work, the lack of social insurance, and

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[9] See Alan Bogg, 'The Hero's Journey: Lord Wedderburn and the "Political Constitution" of Labour Law' (2015) 44 *Industrial Law Journal* 299.

[10] Wedderburn (above n 4) 372.

[11] Ibid. 409. This debate about 'rights' versus 'immunities' was a longstanding one in UK labour law, and it was focused on the issue of whether a positive right to strike would be a substantive improvement on the 'immunities' approach in UK labour law. See Bogg (above n 9) 337-346.

[12] Wedderburn, (above n 4) 405.

[13] Ibid. 379.

[14] For a recent overview, see Bernd Waas and Christina HieBl (eds), *Collective Bargaining for Self-Employed Workers in Europe* (Kluwer Law International B.V., Alpen aan den Rijn, 2021). On 'undertakings' in EU Competition Law, see Richard Whish and David Bailey, *Competition Law* (Oxford, OUP, 9th ed 2018) 84-92.

their legal exclusion from basic statutory employment rights. It is a form of 'legislative precariousness' that intersects with other patterns of racial and gender-based disadvantage.[15] The norms of competition law compound this disadvantage by impeding their collective empowerment in markets.

Does freedom of association provide an effective legal response to the coordination wrong of competition law? Freedom of association seems like an attractive candidate to reset the frontier between competition law and labour law. At its most basic level, freedom of association protects the concerted practices of individuals who coordinate their actions. It is the freedom to do collectively that which one is at liberty to do as an individual.[16] It is also a fundamental human right, protected under international and European human rights law and in many constitutions around the world.

This chapter will examine the role of freedom of association, and the fundamental right to bargain collectively, as a basis for excluding competition law from the territory of labour or 'social' law. It will do so by analysing the role of fundamental rights arguments in the European Convention on Human Rights (ECHR), the European Social Charter (ESC), and the European Union (EU). The European context is a fruitful area of study because the ECHR, the ESC and the EU each protects the fundamental right to bargain collectively. The ESC and EU have also engaged explicitly with the role of competition law in the context of fundamental labour rights.

As we will see, there is no single approach to 'personal scope' of the right to bargain collectively across these different legal orders. Sometimes it has been narrowly restricted to those in an 'employment relationship' as defined under ILO Recommendation 198 on Employment Relationship 2006, as with recent case law under the ECHR. The ESC has adopted a wider approach. The EU labour exclusion of competition law was extended beyond employees to the 'false self-employed' through case law development. None of them adopts a principle of universal scope for all persons.

More importantly, there are variations in judicial style across these different legal order. The judicial style in the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) case law has tended to be more formalistic, focused on the deductive application of general legal rules and doctrinal categories. By contrast, the European Committee on Social Rights (ECSR) has engaged in more 'contextualist' reasoning that is sensitive to the substantive disadvantages experienced by workers.[17] This has allowed it to look beyond the formal contractual dimensions of work relations, and to address the underlying substantive need for collective protections of different groups of workers. Where the right to freedom of association has been claimed successfully by the self-employed, as under the ECHR, this has often occurred in situations where *negative* freedom of association is being used to deregulate or challenge existing

[15] On 'legislative precariousness', see Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour' (2012-13) 34 *Comparative Labor Law and Policy Journal* 133.
[16] For a powerful elaboration of this liberal idea of freedom of association, see Sheldon Leader, *Freedom of Association* (Yale UP, New Haven, 1992).
[17] On 'contextualist' reasoning, see Martha C Nussbaum, 'Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism' (2007) 121 *Harvard Law Review* 4.

schemes of social protection. It is important to recognise that formal universality of rights, particularly those based upon individual autonomy and choice, can further empower economically advantaged groups. Human rights adjudication provides those groups with another way of entrenching their privileged position at the expense of the disadvantaged.

Before analysing the legal developments, section II will begin by considering labour law's sceptical tradition towards human rights. While the sceptical tradition has now receded in influence, no doubt as a result of progressive jurisprudence on labour rights, I propose a pragmatic assessment of the pros and cons of a fundamental rights approach to competition law. An approach to fundamental rights developed with a sensitivity to power and inequality holds the greatest promise in reconstructing the boundaries of labour law and competition law in the new economy.

II THE TURN TO FUNDAMENTAL RIGHTS AND THE SCEPTICAL TRADITION

Scholars and activists have recently turned to fundamental rights to challenge the conventional boundary between labour law and competition law. The argument usually goes something like this. Freedom of association, which includes the right to bargain collectively, is a fundamental human right. As a fundamental human right, it should have a universal personal scope. This is reflected in the text of many relevant international instruments, which refer to 'everyone' or 'every worker' or 'workers without distinction whatsoever'.

There are textual variations across these different instruments, but they all point towards a wide formulation of the right to collective bargaining which would include many self-employed workers within its scope. The fundamental rights approach is aligned with a purposive and inclusive approach to entitlement. This has been coupled with a practical strategy of constitutional litigation, challenging competition law restrictions using human rights treaties in human rights courts and committees. There is a recent successful example of this under the ESC, used by trade unions to challenge the restrictive impact of competition laws on the collective bargaining rights of the self-employed in Ireland.[18]

In considering the prospects for this human rights approach, we should first consider the historically critical orientation of labour law scholarship. For example, Lord Wedderburn was often critical of Article 11 of the ECHR, which he described as 'a sham formula', based upon an 'attenuated interpretation', and hence providing a 'false prospectus' for trade unions and workers.[19] This was based upon three main criticisms. First, the right under Article 11 was based upon an 'individualistic' interpretation antithetical to collective interests. This was reflected in strong protection accorded to the individual's negative right to disassociate from the trade union. This prioritization of individual autonomy provided 'yet another avenue for individuals to litigate

[18] For discussion, see Michael Doherty and Valentina Franca, 'Solving the "Gig-Saw"? Collective Rights and Platform Work' (2020) 49 *Industrial Law Journal* 352.
[19] Lord Wedderburn, 'Freedom of Association or Right to Organise? The Common Law and International Sources', in Lord Wedderburn, *Employment Rights in Britain and Europe* (London, Lawrence & Wishart, 1991) 138, 150.

against trade unions',[20] and it was antithetical to collective goods. Secondly, this individualism was entrenched by a non-integrated judicial approach to the development of Article 11.[21] The norms of the ESC and the ILO, more attuned to collective interests, exercised a weak influence on the reasoning of the ECtHR. The effect of this was to demote collective conceptions of freedom of association in the development of Article 11.

Finally, Wedderburn highlighted the vagueness and open texture of the language used in Article 11. This uncertainty was heightened under Article 11 because of the permitted restrictions under Article 11(2), the effect of which was to transfer political decisions on controversial matters of policy to judicial determination. The translation of this Convention right into a common law context 'would be dangerous in the hands of a British judiciary willing to give as great a latitude to the state as the Strasbourg court, if not more'.[22] Indeed, this might be thought endemic to proportionality-style reasoning, which has been described as central to the 'received approach' to human rights adjudication in contexts such as the ECHR.[23]

These sceptical concerns registered across Wedderburn's general scholarship on labour rights. For Wedderburn, it was the *substance* of the collective freedom that mattered, not the juridical form of protection. What was important was that trade unions enjoyed a wide latitude to take effective collective action, whether based upon statutory 'immunities' or positive constitutional rights. For this reason, legislation had a special position in Wedderburn's legal theory, as a democratic form of law-making that constrained the role of courts and judicial development of legal standards.[24] Where a legislated 'immunity' from competition law constraints provide a wider substantive freedom for trade unions than a rights-based approach calibrated through proportionality and balancing, the immunity-based approach should be preferred.

Are these criticisms still valid? Wedderburn's critical engagements were developed at a time before the radical shifts in the ECtHR's interpretive approach, which has now recognised a fundamental right to bargain collectively and a protected right to strike under Article 11.[25] There has also been a more 'integrated' approach to adjudication, with the ECtHR developing its jurisprudence in the light of other international instruments such as ILO Conventions, the ESC, and the EU Charter.

These important jurisprudential developments have led to a greater openness among scholars and activists to formulating labour rights as human rights. This is reflected in recent scholarship on competition law and collective bargaining rights for the self-employed. Let us consider the main arguments underpinning the 'fundamental rights' approach, taking the influential work of Nicola

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[20] Ibid.

[21] On the 'integrated' approach to human rights adjudication, see Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' [2013] *Human Rights Law Review* 1.

[22] Wedderburn (above n 19) 150.

[23] Gregoire C. N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, CUP, 2009) chapter 2.

[24] Wedderburn (above n 19) 309-312.

[25] See *Demir v Turkey* [2008] ECHR 1345 on the right to collective bargaining. See *Enerji Yapi- Yol Sen v Turkey*, Application No 68959/01, 21 April 2009 on the right to strike. For a discussion of the significance of these cases, see K. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

Countouris and Valerio De Stefano.[26] This literature identifies three positive normative consequences of a fundamental rights approach. First, a right 'can be subject to exceptions as long as the latter is justified and proportionate and does not affect the essential content of the right itself.'[27] In contrast to Wedderburn's reservations about proportionality reasoning as an illegitimate expansion of the judicial role into political decision-making, this treats the proportionality enquiry as a positive dimension of rights-based reasoning. Secondly, the fundamental character of a right signals its normative weight and importance, particularly when it is balanced against competing goals and interests. This reflects the normative priority of rights as legal claims possessing special weight in legal systems. Finally, the designation of rights as fundamental 'usually point to their personal scope being interpreted broadly.'[28] Other scholars have also drawn attention to the 'inclusive' character of freedom of association as a political or constitutional right, in contrast to a narrower 'labour law' approach focused on an employment contract.[29]

This more universalist approach to entitlement makes it easier for the self-employed to claim a fundamental right to bargain collectively. Where this fundamental right clashes with the goals of competition law, such as protecting consumers from harm or maintaining the public good of a competitive market, its strong normative weight tilts the legal reasoning in favour of optimizing the right.[30] In turn, proportionality reasoning ensures that the right is impaired as minimally as possible. Where the right is accorded constitutional protection, litigation in the courts also provides an institutional opportunity for precarious workers to challenge the restrictions of competition law. Such workers might otherwise be politically marginalized in the general democratic process, because of their social and economic disadvantage.

Is the sceptical tradition still relevant today? Before answering that, let's start with some basic clarifications. The formula 'everyone has the right to bargain collectively' is framed at a very high level of abstraction. It is an incomplete specification of a 'right' because its 'two-term structure does not describe any particular relationship between persons.'[31] It is two-term because it refers only to right-holders (everyone) and to an activity (collective bargaining). It is incomplete because it does not yet specify who are the duty-bearers, the content of those duties, the circumstances in which the right can be exercised, whether the class of right-holders is restricted, and so forth.

Though 'two-term' rights are incomplete, they are not devoid of normative guidance either. They function as directive goals, indicating that a certain kind of valuable activity (i.e. collective bargaining) is of such importance that it is something that (some) citizens have by right. These 'broad goal-oriented' norms require further specification and limitation into three-term rights (a right-holder, the subject-matter of the right, and the duty-bearer), and this is usually implemented

[26] Nicola Countouris and Valerio De Stefano, 'The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively', in Waas and HieBl (above n 14) 1.
[27] Ibid. 5
[28] Ibid.
[29] Mark Freedland and Nicola Kountouris, 'Some Reflections on the "Personal Scope" of Collective Labour Law' (2017) 46 *Industrial Law Journal* 52.
[30] For a discussion of 'optimization' in proportionality balancing, and a critical discussion of Robert Alexy's work, see Webber (above n 23) 68-69.
[31] G. Webber, P. Yowell, R. Ekins, M Kopcke, B. W. Miller and F. J. Urbina, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: CUP, 2018) 127.

through legislation.[32] This process of legislative determination is an exercise in creative construction, and it requires that 'a series of acts and arrangements – a combination of Hohfeldian relationships – must be selected from among more or less reasonable alternatives and authoritatively established.'[33]

Different legal systems will adopt incompatible yet reasonable specifications of the right to collective bargaining: is it sectoral or enterprise- based? Is the duty-bearer a single employer or an association of employers? Are collective agreements legally binding? How are norms incorporated into individual contracts of employment? What are the legal methods for extending the normative effects of collective agreements *erga omnes*? What is the juridical status of peace obligations and the permissible role of members-only bargaining? Usually, there is no single right answer to these regulatory choices. They represent reasonable (and incommensurable) options for legislative choice.[34] There is no single shape to the 'right to collective bargaining' that is dictated by the logic of fundamental rights. The right to collective bargaining must be democratically constituted through the creative formulation of limitations in legislation.[35] As Webber puts it, 'rights are never reasons in determining what constitutes a right; one argues *towards* and not *from* rights.'[36] The concrete specification of the right represents a determinate conclusion to the public process of deliberative reasoning.

This account of the concept of rights, and the critical role of legislation in constituting rights in political communities, provides a cautionary perspective on the fundamental rights argument now being considered. First, the extension of the right to collective bargaining *to every person* is not necessitated by the fundamental right characterization. In every legal system, the specification of rights depends upon legislated circumscription. Not every adult has a right to vote. Friends cannot generally bring legal claims for unlawful discrimination when a friendship is ended. So too for trade union rights. As soon as we identify the relevant duty-bearer in the *right* to bargaining collectively, for example an 'employer', this also requires the legislator to specify intelligible limits to the class of right-holders. Given the nature of collective bargaining, as a process focused on terms and conditions of employment, the right-holder must stand in some kind of relationship with an employer. Otherwise, if 'any person' could assert the right to bargain collectively, such as a group of consumers negotiating prices with a supermarket, it would be difficult to determine the nature of the correlative duty, how that would be enforced, against whom, what the remedies would be, and so forth. It requires legislation to specify these choices, so that right-holders and duty-bearers know in advance how the law will address the situation. Yet this determination is not dictated by the fundamental right as a matter of logic.

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[32] Ibid. 21.
[33] Ibid. 42. The conceptual scheme of Hohfeld provides a lucid map of these different jural relations. See W.N. Hohfeld and W.W. Cook. *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New York: Praeger, 1964).
[34] This is best captured in the idea of *determinatio*, based on the work of Aquinas and developed by scholars working the Thomist tradition of natural law theory such as John Finnis. This highlights how legislation has a central role in selecting a scheme of public coordination where there are reasonable and incommensurable alternatives for specification. On *determinatio*, see R. P. George, 'Natural Law and Positive Law' in R. P. George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: OUP, 1996).
[35] Webber (above n 23) chapter 5.
[36] Ibid. 132.

Secondly, the detailed specification of the right to bargain collectively will often be provided by the existing legislative schemes and the detailed norms already developed by specialist bodies. In most legal systems, the field of collective labour relations has already been long occupied by legislated rights. These existed before constitutional courts began to develop freedom of association jurisprudence. In developing the constitutionalized right to bargain collectively, courts often develop those constitutional standards reflexively using existing legislative models.[37] This priority is inevitable. The right to collective bargaining depends upon legislation to acquire a determinate shape. For this reason, it is not unusual for courts to integrate existing 'labour law' understandings into constitutional norms. As we will see, the ECtHR has recently emphasized the need for an 'employment relationship' in the Article 11 right to bargain collectively. We should moderate our expectations as to how radically disruptive the fundamental rights approach can be to existing legislative models. This is because it often treats those statutory models as a basic normative reference point.

Thirdly, we must be sensitive to the ideological nuance and complexity in the constitution of fundamental rights. While the ECtHR has recognized the fundamental right to collective bargaining, it has also entrenched the negative right to disassociate to protect individual autonomy and choice. The significance of these configurations for national labour law systems require careful scrutiny. For example, what if an employer (if it is a right for 'everyone') used Article 11 to challenge the extension of a collective agreement through the negative right not to bargain collectively? This illustrates the difficulties when rights are conceptualized as autonomy claims for everyone, to be mediated through judicial balancing. The disruptive effects on public schemes of social protection may be very difficult to predict, and this also expands the 'political' role of courts straining their competence and institutional legitimacy. This extension could also undermine strategies to use competition law to challenge the concentrated market power and abusive coordination of platform employers, where those employers can invoke their right to bargain collectively as a shield against competition law scrutiny.[38]

Fourthly, the expanding remit of rights might have the effect of diluting their normative importance as special legal entitlements. For example, Webber has criticized what he describes as the 'received view' of fundamental rights for precisely this reason.[39] The threshold for identifying an interference with a right is set very modestly, which then invites an assessment of whether the interference was necessary and proportionate. This dilution effect may have occurred under Article 11 itself, where an expanding suite of rights under Article 11 (1) is increasingly coupled with a very deferential assessment of interference under Article 11 (2). By treating this as a right of everyone in all circumstances to engage in collective action, Article 11 (1) is in danger of becoming a formal

[37] The gravitational force of labour relations statutes has shaped the development of norms in the Canadian constitutional jurisprudence on freedom of association. For discussion, see Alan Bogg, 'The Constitution of Capabilities: The Case of Freedom of Association', in Brian Langille (ed), *The Capability Approach to Labour Law* (Oxford, OUP, 2019) 241.

[38] There have been powerful proposals for using competition law to challenge the concentrated economic power of platform employers. See, e.g., Ioannis Lianos, Nicola Countouris, and Valerio De Stefano, 'Rethinking the competition law/labour law interaction: Promoting a fairer labour market' (2019) 10 *European Labour Law Journal* 291, 324-331.

[39] Webber (above n 23) 66-69.

threshold, with the substantial legal analysis shifted to the proportionality enquiry under Article 11 (2).

Finally, it is important to consider different 'styles' of judicial reasoning in human rights adjudication. For example, Martha Nussbaum has identified 'contextualism' as a style, which she describes as 'realistic, historically and imaginatively informed type of practical reasoning that focuses on the actual abilities of people to choose and act in their concrete social settings.'[40] She contrasts this with 'lofty formalism', which is a more distanced and mechanistic approach based upon the application of abstract and general rules.[41] This contextual approach allows for a discriminating attention to the material situations and lived experiences of claimants. This enables an appreciation of the hidden exclusionary barriers and genuine obstacles faced by claimants such as gig workers who are notionally self-employed, but who may experience significant precariousness in their working lives. This contextualist approach supports a dynamic and emancipatory human rights law that looks to the reality of power relations in economy and society.

These considerations do not support the sceptical tradition, but they reinforce the need for pragmatic assessment of the pros and cons of a fundamental rights strategy. In the following sections, the ECHR, ESC and EU will each be considered. While the ECHR has adopted the widest approach to personal scope, this has often been within the context of negative freedom of association claims that could undermine collective institutions and public regulation. By contrast, the ESC has developed a more contextualist style of reasoning sensitive to the particular disadvantages experienced by self-employed workers. The EU has yet to be influenced by the fundamental rights approach, despite the formal recognition of fundamental rights in the EU Charter. The next phase of legal development in the EU should favour the contextualist approach of the ESC rather than the more formalistic approach of the ECHR. This disadvantage-sensitive approach is the most powerful way in which a human rights strategy could reshape the frontier between competition and labour. It also enriches the standard labour law approach, which has tended to focus on contractual form rather than economic substance.

III THE ECHR AND THE FUNDAMENTAL RIGHT TO BARGAIN COLLECTIVELY

Let us begin with Article 11 of the ECHR. This has often been taken as an example of the broad and inclusive approach to entitlement, with the potential to protect collective bargaining practices of the self-employed from national competition laws.[42] This strategic choice appears to be supported by the text of Article 11 (1), which treats trade union rights as 'included' within the general right to freedom of association for 'everyone'. The ECtHR has emphasised that trade union freedom is a specific aspect of general freedom of association, rather than an independent

[40] Nussbaum (above n 17) 8.
[41] Ibid. 26.
[42] Joe Atkinson and Hitesh Dhorajiwala, 'IWGB v RooFoods: Status, Rights and Substitution' (2019) 48 *Industrial Law Journal* 278.

right.[43] This envisages continuity between the general right to freedom of association and the 'labour' right to freedom of association.

The jurisprudence of the ECtHR on personal scope of Article 11 is in fact rather more complex than this simple textual argument implies. There are two distinct patterns in the case law. First, there is an 'inclusive' line of case law treating self-employed applicants as within the personal scope of Article 11.[44] This is based upon the continuity argument, that trade union rights are specific aspects of the general right to freedom of association. The leading cases in this 'inclusive' line each involve self-employed applicants asserting *negative* freedom of association to *disassociate* from trade union membership or to avoid collective regulation. As such, fundamental rights are being used in these cases as tools of deregulation.[45]

By contrast, there is an 'exclusive' line of case law restricting trade union rights to those in an 'employment relationship'. This 'exclusive' approach received a strong endorsement in the Grand Chamber decision of *Sindicatul 'Pastoral Cel Bun v Romania* (*Pastoral Cel Bun*).[46] According to the Grand Chamber, the 'only question' relevant to whether the clergy in this case qualified for Article 11 protection was 'whether such duties, notwithstanding any special features they may entail, amount to an employment relationship rendering applicable the right to form a trade union within the meaning of Article 11.'[47] The Court based its assessment of the employment situation on relevant international instruments, in particular using the indicative criteria in ILO Recommendation No 198 on Employment Relationship. It also referred to the core ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise 1948, albeit without acknowledging that the ILO committees have taken a wider approach to freedom of association that is not restricted to an 'employment relationship'.[48] The Grand Chamber concluded that the clergy performed their duties 'in the context of an employment relationship falling within the scope of Article 11 of the Convention.'[49] Accordingly, the indicative criteria in the ILO's concept of 'employment relationship' set the boundaries of the right to form a trade union in Article 11. In *Demir* the Grand Chamber supported its conclusion that civil servants were within the scope of the fundamental right to bargain collectively by drawing upon relevant ILO instruments, including ILO Conventions No. 98 and 151. In *Demir*, the Court took a wider approach to personal scope using the ILO material, reflecting the formula in Article 2 of ILO Convention No 87 that 'Workers and employers, *without distinction whatsoever*, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation'. It may nevertheless be taken as an example of an

[43] See, e.g. *Demir* (above n 25) [109].
[44] The distinction between 'inclusive' and 'exclusive' approaches is adopted from Freedland and Kountouris (above n 29).
[45] There are interesting parallels here with the employers' use of free speech in US constitutional law as a strategy for deregulation. See Charlotte Garden, 'The Deregulatory First Amendment at Work' (2016) 51 *HARV. C.R.-C.L. L. REV.* 323.

[46] *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10

[47] Ibid. [141].
[48] Ibid. [142].
[49] Ibid. [148].

'exclusive' approach, because 'workers' is not 'everyone'. Yet it is wider and more inclusive than the 'employment relationship' approach in *Pastoral Cel Bun*.

The 'exclusive' approach of *Pastoral Cel Bun* presents a significant obstacle for self-employed workers, many of whom may not have an 'employment relationship'. It has received a critical reception from many labour rights advocates. However, the 'inclusive' cases, recognising freedom of association rights for the self-employed, reveal that there are also deregulatory risks with the inclusive approach. This is because many of the leading 'inclusive' cases involve the use of Article 11 by the self-employed to pursue deregulatory agendas and promote notions of free over fair competition. In its most extreme versions, the trade union itself is treated as a corporate entity engaged in 'abuse of dominant position' against workers and small employers. The difficulty has arisen from the coupling of a wide personal scope with the protection of negative freedom of association. As a result, the 'inclusive' approach has fuelled a deregulatory agenda pursued through the courts using fundamental rights as a Trojan Horse. Paradoxically, then, the 'inclusive' approach may have supported economic policies that have led to the growth in exploitative work arrangements for the self-employed.

The first decision to consider in the Article 11 self-employment cases is *Vordur Olafsson v Iceland* (*Vordur Olafsson*).[50] This involved an Article 11 challenge to a compulsory levy (the 'Industry Charge') imposed on certain private sector enterprises, collected by the State Treasury in the manner of a special tax, and then distributed to the Federation of Icelandic Industries (FII). The FII was a private law organisation and its objective was to promote Icelandic industry and a competitive working environment for Icelandic businesses. It did so through influencing governmental economic policies, commenting on draft legislation, and publicising the activities of Icelandic industry. These policy activities included advocating publically for accession to the European Union, a political position which the applicant objected to. The applicant was a member of the Master Builders' Association which was not affiliated to the FII. While it was possible for him to be a member of the FII, the applicant did not join it. In fact, more than 10,000 persons were subject to the mandatory Industry Charge, whereas the FII only had approximately 1100-1200 members. There were special benefits for members of the FII, although its policy work was undertaken on behalf of Icelandic businesses more generally. The claimant alleged that this compulsory levy violated his Article 11 right, specifically the negative right to freedom of association. The Court concluded that there had been a violation of Article 11.

While the interface between competition law and fundamental rights may not be immediately obvious in this case, *Vordur Olafsson* can be understood as a challenge to industrial policy in order to promote free competition.[51] The coordination of firms through umbrella organisations, to promote collaboration and economies of scale, can sometimes be in tension with the requirements of competition law. In *Vordur Olafsson*, the claimant was using Article 11 to challenge a scheme for coordinated industrial policy in Iceland. In this way, negative freedom of association was an instrument of deregulation to promote a free market ideology

[50] Application no. 20161/06, *Vordur Olafsson v Iceland*, judgment of 27th April 2010.
[51] On the tensions between 'industrial policy' and free competition, see Whish and Bailey (above n 14) 15.

It is surprising that the Court treated this as engaging trade union freedoms under Article 11. Most obviously, the FII was not a 'trade union' engaged in the activities associated with such an association, such as collective bargaining. It was an industry organisation acting on behalf of businesses and entrepreneurs in the development of industrial policy. Yet the Court's legal analysis is located within the principles of trade union freedom of association in international law. In terms of 'relevant international law and practice', the Court engaged with the decisions of committees under Article 5 ESC and the ILO's approach to union security arrangements. On that basis, the Court reasoned that the differential allocation of benefits to trade unions undermined the 'right to organise' by interfering with workers' freedom of choice. Workers might be directed toward favoured associations. These ILO principles favoured trade union pluralism, competition between unions for members, and a neutral framework of laws facilitating that pluralism.[52] These principles also the highlighted risk that trade union independence could be compromised where the state was involved in the collection and distribution of financial contributions. Those principles, concerned with trade union freedoms, were not obviously germane in considering the treatment of the FII as an industry body under Article 11.

Despite the fact that the self-employed claimant was not required to join the FII, and despite the fact that the levy corresponded to a modest statutory rate of only 0.08% of annual turnover, the Court concluded that the arrangement interfered with his negative freedom of association. The Master Builders' Association was disadvantaged in connection with membership fees, and relevant international law principles on the 'right to organise' supported the conclusion that this was an interference with the claimant's right to join an organisation of his own choosing.[53] Perhaps the most striking thing about *Vordur Olafsson* was the problematic translation of trade union principles into a different associational context. The underlying policy considerations are very different as between trade union associations and industrial policy associations like the FII. For example, trade union independence is a fundamental norm of trade union freedoms, given the historical context of trade union autonomy as a bulwark against state totalitarianism. It does not have the same salience in the state's relationship with representative industry bodies. This elision of distinctive associational contexts,[54] and the application of trade union principles to non-trade union associations, allowed Article 11 to be used as a deregulatory instrument in this case. *Vordur Olafsson* indicates a need for caution in the uncritical extension of trade union freedoms to the self-employed, particularly for genuinely independent entrepreneurs. This extension is a particular risk where negative freedom is given robust protection as under Article 11.

The next self-employed Article 11 decision is *Gustafsson v Sweden (Gustafsson)*.[55] The applicant was owner of a hostel business which employed a number of seasonal employees. Hence, he did not

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[52] These principles have also been very effectively critiqued in Teri Caraway, 'Freedom of association: Battering ram or Trojan horse?' (2006) 13 *Review of International Political Economy* 210.

[53] *Vordur Olafsson* (above n 50) [53]. The Court went on to conclude that the interference was not justified under Art 11 (2), so that there was a violation of Art 11.

[54] Given the important differences between different types of association, we might do better to think in terms of particularised norms that respond to those normative differences. For an interesting exploration of different associational contexts, see Mark E. Warren, *Democracy and Association* (Princeton UP, Princeton, 2000).

[55] *Gustafsson v Sweden* (1996) 22 EHRR 409.

fall into the category of 'solo self-employed' with no workers of his own. The claimant in *Gustafsson* objected on principle to the system of collective bargaining in Sweden, and he refused to accede to collective agreements that had been negotiated between the relevant employers' associations and trade unions. Furthermore, he refused to enter into a substitute collective agreement negotiated at the enterprise-level. As a result of his refusal to apply or negotiate collective agreements, the hostel was subjected to a blockade through sympathy strike action. This prevented deliveries to the restaurant. He was unable to secure remedies under domestic law either to restrain the blockade or compensate him for his losses. The Commission declared his application admissible, and expressed the opinion that his negative freedom of association had been violated by the lack of state protection.

The Grand Chamber did not find a violation of Article 11. However, its route to that conclusion was a delicate one. The first issue was whether Article 11 was applicable at all. As in *Vordur Olafsson*, the applicant had not been compelled to join an association. He had refused to enter into or negotiate a collective agreement. It was possible to apply the collective agreement without thereby joining the employers' association. Nevertheless, the Court reasoned that it would be artificial to deny that his negative freedom of association had been affected. This required drawing a formalistic distinction between membership *per se* and the incidents of membership, which the Court was not prepared to do. Since his Article 11 rights were engaged, this necessitated an examination of positive state duties under Article 11. The Grand Chamber concluded that there was no interference because Article 11 did 'not as such guarantee a right not to enter into a collective agreement'.[56] This was the logical flipside of the proposition that Article 11 did not guarantee a positive right to enter into a collective agreement. The economic pressures on the employer did not amount to compulsion to be a member of the association, and so the state's positive obligations were not engaged.

Once again, it is important to recognise that competition law considerations were relevant to the strategic use of negative freedom of association in *Gustafsson*. The case can be understood as a conflict between notions of *fair* competition and *free* competition. The Swedish Government invoked the ideas of fair competition to justify the Swedish model of collective bargaining and industrial relations. In particular, maintaining the systemic integrity of sectoral collective agreements was important because employers 'should not be able to gain a competitive advantage over their competitors by offering less favourable working conditions than those provided for by collective agreements.'[57] Some of the dissenting opinions in *Gustafsson* reflected a competing vision of free competition. In particular, Judge Jambrek took the view that there was an interference with Article 11 that was not justified under Art 11 (2). This was formulated in terms more recognisable to competition lawyers than to labour lawyers. The state was under a positive duty 'to prevent *abuse of a dominant position* by a trade union aimed at compelling anyone to join an association or to adhere to a system of collective bargaining.'[58] This was particularly so where the abuse of dominant position occurred through 'important corporate actors enjoying broad economic, financial and political support.'[59] Similarly, Judge Martens considered that states had a positive obligation under

[56] Ibid. [52].
[57] Ibid. [49].
[58] Ibid. [1] (*emphasis added*).
[59] Ibid. [8].

Article 11 'to protect that freedom against abuse or disproportionate use of collective action by trade unions.'[60] These dissenting opinions reveal the umbilical connection between negative freedom of association as a deregulatory tool and ideologies of free competition. The competition law terminology of 'abuse of dominant position', and of negative freedom of association as a restraint on market abuse by trade unions, is particularly striking. Once again, it exemplifies the difficulty when an inclusive approach to personal scope is coupled with strong protection of negative freedom of association.

The final Article 11 decision to consider is *Sigurjonsson v Iceland (Sigurjonsson)*,[61] which is of particular interest given current debates on Gig work and precarious self-employment in the taxi industry. The litigation arose out of a challenge to the regulation of taxi services in the Reykjavik area in Iceland. Under the 1989 Law on Motor Vehicle for Public Hire and Regulation no 208/1989, taxi services in the Reykjavik area were subject to restrictions placed on the number of vehicles available for private hire. A Committee for Taxicab Supervision exercised regulatory supervision and control of taxi services in the area subject to these restrictions. The Committee had three members, one of which was nominated by the relevant trade union. In the Reykjavík area, the relevant trade union was 'Frami', an organisation which existed to protect and represent the professional interests of drivers. While Frami did not undertake collective bargaining on behalf of its members, it was concerned with the fixing of rates for services, monitored the suitability of vehicles and the observance of licence conditions, and other regulatory tasks. The 1989 Law provided for compulsory union membership within an area where restrictions on taxicabs were in force. This meant that the holding of an operating licence was dependent upon membership of Frami in the Reykjavík area. In *Sigurjonsson* a self-employed driver used negative freedom of association under Article 11 to challenge these restrictions on competition. This was because the restrictions were based in compulsory membership of a professional association. The Court upheld the Article 11 challenge to the 1989 Law.

The threshold issue was whether Frami was an 'association' at all under Article 11. According to the Government, the regulatory activities of Frami meant that it was an administrative body of a public law character. The Court disagreed with this analysis, because Frami was an autonomous organisation with the freedom to set its own internal rules and objectives. On that basis, it was a private law association. The Court did not decide whether Frami was a 'trade union' because it was not necessary to do so 'since the right to form and join trade unions in that provision is an aspect of the wider right to freedom of association, rather than a separate right'.[62] Yet the Court also referred to relevant international material on trade unions and the right to organize, including the Committee of Independent Experts under the ESC. This supported its conclusion that there had been an interference with his negative freedom of association.[63] The interference was not justified

[60] Ibid. [10].
[61] *Sigurdur Sigurjónsson v Iceland* (1993) 16 EHRR 462

[62] Ibid. [32].
[63] Ibid. [35].

because the Government had not demonstrated that compulsory membership was necessary to the performance of Frami's supervisory functions.[64]

The Court's formulation of the legal issue in *Sigurjonsson* obscured the political economy of private taxi hire. Fundamentally, it was crystallised as a matter of individual conscientious objection: '[he] objected to being a member of the association in question partly because he disagreed with its policy in favour of limiting the number of taxicabs and, thus, access to the occupation; in his opinion the interests of the country were better served by extensive personal freedoms, including freedom of occupation, than State regulation.'[65] The characterisation of negative freedom of association by analogy with a 'religious' model of individual dissent has often distorted analysis of the right not to be a trade union member. There are important and relevant differences between trade unions and religious organisations which should lead to different approaches to compulsory membership and the scope for conscientious objection.[66]

Sigurjonsson, however, represents a deeper problem. As Veena Dubal has demonstrated in her brilliant work on the rise of precarity in the San Francisco taxi economy, the growth of precarious work through platforms was enabled by a breakdown in the model of municipal regulation.[67] In what she describes as a 'political bargain' in the San Francisco context, 'the Chauffeurs' Union shaped business models, set prices, and effected public policy, establishing strong municipal regulation of a once unregulated industry.'[68] The restriction of labour supply through operating licences under this model was essential to the maintenance of high labour standards. The erosion of the 'political bargain' left a regulatory vacuum that was then filled by platform-based entities like Uber.

Viewed through this political economy lens, *Sigurjonsson* is an example of negative freedom of association being used as a battering ram to disrupt the 'political bargain' in Reykjavik's taxi economy. Article 11 was deployed by a self-employed driver to undermine a scheme of collective regulation based in democratically enacted legislation. The applicant's conscientious attachment to free competition and deregulation should not have been permitted to undermine a democratic scheme of collective regulation in the guise of fundamental rights. The conviction that markets should be free and unregulated should not attract the same degree of protection as fundamental convictions about religious matters and the good life. *Sigurjonsson* is a case about economic deregulation. It is also a case study in the legitimate scope for elected representatives to shape the parameters of fair competition in labour markets, and the need for judicial deference in matters of economic regulation. We are now seeing the damaging effects of this type of deregulation across the world, reflected in the deteriorating labour standards brought about through precarious self-employment in private hire. It is a significant irony that *Sigurjonsson* is now being invoked in the

[64] Ibid. [41].
[65] Ibid. [37].
[66] See Stuart White, 'Trade Unionism in a Liberal State', in Amy Gutmann (ed), *Freedom of Association* (Princeton UP, Princeton, 1998) chapter 12.
[67] Veena Dubal, 'The Drive to Precarity: A Political History of Work, Regulation, and Labor Advocacy in San Francisco's Taxi and Uber Economies' (2017) 38 *Berkeley Journal of Employment and Labor Law* 73.
[68] Ibid. 79.

legal countermovement against the Uber-isation of work and the growth of precarious self-employment.

This 'inclusive' jurisprudence exemplifies some of the risks of an extension of freedom of association rights to the self-employed. The problems have arisen where the court has not been sensitive to the material and regulatory context of its decision-making. A number of points should be emphasized. First, the cases are a microcosm of the variety of different kinds of self-employment. The applicant in *Gustafsson* was effectively a small business owner, and employed others, whereas the applicant in *Sigurjonsson* appeared to be solo self-employed'. These differences are important in assessing the power dynamics in the contexts of litigation. For Mr Gustafsson, the freedom not to associate was effectively a freedom to exploit his workforce by opting out of the regulatory standards in the applicable collective agreement. Linguistic arguments (rights for 'everyone') or arguments of conceptual necessity (human rights are rights inherent in personhood) circumvent consideration of these important contextual factors. Secondly, these cases all involved attempts to deregulate public standards and/or economic coordination, pursued by self-employed parties, in circumstances where the political community had settled upon a scheme of fair competition. Freedom of association has become a proxy for free competition, with well-resourced parties using the judicial process to undermine public regulatory frameworks.

Thirdly, it is important to consider the regulatory consequences when different elements in the constitution of a right interact. While the ECtHR has developed a fundamental right to bargain collectively in its jurisprudence, it has continued to give strong protection to negative freedom of association. The problems have arisen in these cases where self-employed parties have used negative freedom of association in ways that are antithetical to collective interests. This is particularly important given recent proposals to use competition law to challenge the market power of platform companies. A universal right to freedom of association might be used by companies to challenge cartel prohibitions. While these restrictions are very likely to be justified under Article 11 (2), it might be better to say that business entities cannot claim freedom of association in the first place. This would avoid the uncertainties of judicial balancing, and the politicization of the judicial role.

Finally, the formulation of normative principles in freedom of association should be sensitive to associational types. At least some normative considerations are likely to vary depending upon whether we are dealing with churches, political parties, social clubs, business associations, civic organisations, or trade unions. In *Vordur Olafsson,* for example, the Court applied principles of trade union pluralism and trade union independence to a body coordinating industrial policy amongst Icelandic businesses. These contextually specific principles were less pertinent to a context where the state favoured a more centralized arrangement for coordinating economic policies for businesses. For example, trade union independence from the state is rooted in a liberal concern to promote an independent civil society as a bulwark against state authoritarianism. In *Sigurjonsson*, conscientious objection was applied to trade unions when this consideration has much more salience in the context of religious associations and confessional convictions. In shifting towards a more general 'constitutional' or 'political' understanding of freedom of association, it is important to be sensitive to the distinctive needs of specific associations. This envisages a more

compartmentalized approach to freedom of association principles, one that retains normative space for a particularized body of trade union principles.

The *Pastoral Cel Bun* approach reveals how the bifurcation between a 'human rights' and a 'labour rights' approach to fundamental trade union rights is not conceptually clear-cut. When the ECtHR has developed labour rights like the right to bargain collectively, it has done so by drawing upon existing norms produced by specialist bodies with contextual expertise in the labour field. There are advantages to this judicial openness to specialized norms, and there are parallels in the practices of national constitutional courts deferring to the legislated parameters of collective bargaining in adjudicating the constitutional right to bargain collectively. It ensures that constitutional norms are sensitive to the realities of power and its unequal distribution in labour markets. The formalistic appeal to universality of fundamental rights obscures this material dimension to human rights norms. The Article 11 self-employment cases examined here demonstrate the potential of what Nussbaum has described as 'lofty formalism' to unleash deregulatory effects in labour markets.[69]

The defect of the *Pastoral Cel Bun* approach is that its narrow focus on the 'employment relationship' category is more restrictive than the ILO's own approach to freedom of association. The ECtHR has reintroduced its own brand of formalism into the jurisprudence by focusing on the requirements of an 'employment relationship'. The ILO approach is 'not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.'[70] This recognizes the fact that there are many people who earn their living through their own labour, and who are also in need of collective bargaining protection. Indeed, the lack of an 'employment relationship' is often itself a source of inequality and disadvantage. These disadvantages justify the need for collective empowerment through trade union action.

What are the prospects for an approach that is more contextually sensitive to disadvantage outside the formal 'employment relationship'? While the Grand Chamber decision in *Pastoral Cel Bun* represents a significant obstacle, *Demir* is a reminder that the ECtHR is prepared to develop its jurisprudence progressively as a 'living' instrument.[71] There are signs of a more contextual approach in *Manole and 'Romanian Farmers Direct' v Romania* (*Manole*) which could provide the basis for a different approach.[72] In *Manole*, self-employed farmers formed a trade union to defend their social and economic interests. They attempted to register the trade union, and this was refused on the basis that legal registration was restricted to associations representing employees. The self-employed could join existing trade unions, but they could not register (and therefore 'form') a trade union for the self-employed. Drawing upon ILO instruments and committee decisions on the position of agricultural workers, which placed particular emphasis on the importance of freedom of association for those who were marginalized or disadvantaged by poverty,[73] the Court

[69] Nussbaum (above n 17).
[70] ILO, Freedom of Association Compilation of decisions of the Committee on Freedom of Association (2018, 6th ed, Geneva) para 387, cited in Lianos et al (above n 38) 297.
[71] Demir (above n 25) [68].
[72] Application no. 46551/06 *Manole and 'Romanian Farmers Direct' v Romania*, judgment of 16th June 2015.
[73] Ibid. [25].

concluded that the exclusion of the self-employed from the scheme of legal registration was an interference under Article 11. This Court nevertheless regarded this interference as 'necessary in a democratic society', in light of the wide margin of appreciation for states. This was because the self-employed could set up 'trade associations' which could defend the social and economic interests of members without the need to register as a 'trade union'. There are undoubtedly limitations in *Manole*, for example in failing to examine the possibility that 'trade unions' might have access to legal rights and enhanced legal support for essential bargaining activities that 'trade associations' do not enjoy. It does nevertheless offer a contextually sensitive alternative to the narrow approach in *Pastoral Cel Bun*, and one that is more attuned to the multiple disadvantages and legislative exclusions experience by some self-employed groups such as agricultural workers.

IV THE FUNDAMENTAL RIGHT TO COLLECTIVE BARGAINING UNDER THE EUROPEAN SOCIAL CHARTER: CONTEXTUALISING HUMAN RIGHTS?

Unlike the ECHR, the specific issue of competition law and its relationship to the fundamental right to bargain collectively has been considered by the ECSR under Article 6 (2) ESC. Article 6 (2) requires states 'to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements'. In *Irish Congress of Trade Unions (ICTU) v Ireland* (*ICTU*), [74] the Committee examined the prohibition of collective bargaining of certain categories of self-employed worker due to competition law constraints in Ireland. The original complaint was presented in August 2016 by ICTU under the collective complaints Protocol. The facts are complex and they extended over a long period of time. The complaint originated a decision of the Irish Competition Authority in 2004, the effect of which was to treat self-employed voice over actors as 'undertakings' and thereby subject to the application of the Competition Act 2002. This decision had a chilling effect on other self-employed worker collective agreements, including those for freelance journalists and self-employed musicians.

Following tripartite negotiations in Ireland, it appeared that there might be an amendment to the Competition Act 2002 which would exclude these self-employed workers from the scope of the relevant competition law provisions. However, as a result of conditionality requirements imposed on Ireland by the EU following the financial crisis, the TROIKA (the European Commission, the European Central Bank and the International Monetary Fund) stated that it would not support the proposed changes. This highlights the ambivalent role of EU institutions in supporting a fundamental right to bargain collectively, in situations where that right is in tension with the legal

[74] European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v Ireland* (Complaint No. 123/2016).

norms constituting the free market. Indeed, it is precisely this kind of destructive interaction that Wedderburn had warned of in his 1995 essay on the 'frontier' between labour law and EU competition law.

In 2017, legislation was passed in the Competition (Amendment) Act 2017. This provided for exemptions from competition law for certain self-employed workers. The exemption in Schedule 4 was targeted specifically at self-employed voice-over actors, session musicians, and freelance journalists. It applied automatically to workers falling within these narrow categories. Additionally, the legislation created two general categories of exemption which could be granted by the relevant Minister following an application by a trade union. These categories were 'false self-employed' and 'fully dependent' self-employed workers, and s. 15D provided the following definitions of the general categories:

> "'false self-employed worker' means an individual who—
>
> (a) performs for a person ('other person'), under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person,
>
> (b) has a relationship of subordination in relation to the other person for the duration of the contractual relationship,
>
> (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work,
>
> (d) does not share in the other person's commercial risk,
>
> (e) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her, and
>
> (f) for the duration of the contractual relationship, forms an integral part of the other person's undertaking;
>
> 'fully dependent self-employed worker' means an individual—
>
> (a) who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing), and
>
> (b) whose main income in respect of the performance of such services under contract is derived from not more than 2 persons;"

The ICTU complaint related to the situation both before and after the entry into force of the 2017 statutory amendments, and these situations were considered separately by the Committee. In approaching this assessment, the Committee identified a range of relevant preliminary considerations which supported a broad and inclusive approach to the right to bargain collectively under Art 6(2). The Committee commenced its analysis on the generally inclusive basis that all employment-related provisions in the ESC applied to the self-employed except where the context

required a limitation to employed persons.[75] The context did not indicate that any such limitation was required under Article 6 (2). This broad approach was supported by the position under ILO instruments as interpreted by the ILO Committees, which viewed the right to bargain collectively as a right for all workers without distinction, which included self-employed workers.[76] Since there was no such limiting context to Article 6, it followed that any restriction of the right of self-employed persons to bargain collectively was subject to Article G. This general limitation clause requires that any restriction of the right to bargain collectively, which would include competition law constraints, pursues a legitimate aim and is necessary in a democratic society. The Committee recognised that competition law goals could constitute a legitimate aim, in that 'effective and undistorted competition in trade' could protect the rights and freedoms of others.[77]

Before considering the specific conclusions, three features of the Committee's reasoning should be emphasised. Its methodology may be described as *integrated*, *contextual* and *substantive*. The *integrated* method is reflected in the Committee's interpretive engagement with other legal orders, such as the ILO, the ECHR, and the EU. This provided normative support to its own legal reasoning, and in particular its inclusive approach to the self-employed under Art (6) (2). It reflects a more general tendency for supranational courts and committees to use the integrated approach. More significantly, its *contextual* method emerges very strongly in the Committee's observation that 'the world of work is changing rapidly and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, of shifting risk from the labour engager to the labour provider. This has resulted in an increasing number of workers falling outside the definition of a dependent employee'.[78] This recognises that the development of labour rights must be open to the real context of contracting practices in changing labour markets. [79]This is particularly important where those contracting practices reveal structural imbalances of power and hidden forms of disadvantage in labour markets, as with the growth in new forms of self-employment. This can be contrasted with the limitations of the more formalistic approach under Article 11, which has focused on the identification of an 'employment relationship'. The Committee's approach is an exemplar of the contextualist style of human rights reasoning elaborated and defended by Nussbaum.

This contextual method is aligned with a *substantive* approach to determining the legitimate scope of the right to bargain collectively. This substantive approach is reflected in the following observation: 'In establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.'[80] The underlying approach is based on an idea of substantive equality. Given the

[75] Ibid. [35].
[76] Ibid. [39].
[77] Ibid. [98].
[78] Ibid. [38].
[79] For an example of this judicial emphasis on 'real world' labour market practices, see the 'tribunal fees' judgment in *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[80] *ICTU* (above n 74) [38]

existing substantive justification for collective bargaining for workers in a standard employment relationship, based upon inequality of power, the right to bargain collectively should also extend to those self-employed workers who display similar relevant features of subordination and dependence. This avoids weak linguistic arguments about the universalist logic of 'everyone' or 'every person', which often obscure the power dynamics of real work relations. It is the 'comparably weak position of the individual supplier of labour' that would justify the exclusion of competition law constraints and so permit cartelisation through collective bargaining.[81] This is substantive in that it is focused on the relative lack of market power experienced by the individual labour provider, rather than the contractual form through which labour is supplied. It can again be contrasted with the approach of the ECtHR, which has tended to fall back either on weak textual arguments (in its wide jurisprudence including the self-employed) or on the adoption of formal criteria of 'employment relationship' (in its narrower jurisprudence represented by *Pastoral Cel Bun*).

The Committee's substantive analysis supported an inclusive approach so that 'an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of this provision.'[82] In relation to the pre-2017 position, where the Competition Authority treated the voice-over actors as subject to the competition law regime, the Committee concluded that this was a denial of the right to bargain collectively. The approach was 'over-inclusive', and therefore 'excessive' and not 'necessary' in a democratic society, because it failed to discriminate between the substantive position of different self-employed labour providers.[83] In particular, the ban on collective bargaining encompassed those who were not 'genuine independent self-employed': 'having several clients, having the authority to hire staff, and having the authority to make important strategic decisions about how to run the business. The self-employed workers concerned here are obviously not in a position to influence their conditions of pay once they have been denied the right to bargain collectively.'[84] These considerations track the characteristic features of independent self-employment by identifying indicative facts that support a finding of market power.

In legal terms, it appears to establish a default of inclusion within the scope of the right, unless there is a positive finding of genuine market independence on the basis of the criteria set out in paragraph [99]. Given the relevant substantive similarities between 'non-independent' self-employed persons and standard employees, collective bargaining was unlikely to have any greater anti-competitive effects than 'regular' collective bargaining. This supported the Committee's conclusion that the Irish competition law ban on voice-over actors, journalists and musicians was excessive and had breached Article 6(2).[85]

The analysis of the legal position after the 2017 statutory amendments is more complex, given the new statutory categories of 'false self-employed' and 'fully dependent self-employed' worker. These categories, defined in the legislation, could form the basis of an application by a trade union

[81] Ibid.
[82] Ibid. [40].
[83] Ibid. [98].
[84] Ibid. [99].
[85] Ibid. [100].

to the relevant Minister to be exempted from the competition provisions and so enable it to engage in collective bargaining. The ICTU argued that these definitions were too narrow and so in breach of Article 6 (2). The Committee found no breach of Article 6(2) because the ICTU's complaint was premature and 'speculative': compliance depended upon how the categories were interpreted and applied in practice by the relevant authorities.[86] If the categories were interpreted purposively, so as to identify those self-employed workers who could exercise 'no substantial influence' over their contractual conditions, there would be no breach of the ESC.

It remains to be seen whether these statutory exemptions will be interpreted by the Minister in line with the contextual and substantive approach of the Committee. Even then, the statutory definition of 'false self-employed worker' in the 2017 amendment appears to be restrictive when set against the substantive reasoning in the Committee's decision. The statutory definition requires a 'relationship of subordination' as a necessary condition. It also requires that the party have 'no independence as regards the determination of the time schedule'. This would appear to exclude many casual workers where there is an absence of 'mutuality of obligation', so that the worker is free to accept or refuse offers of work at her discretion. It is not uncommon for casual workers to have a degree of control over scheduling, while lacking any influence at all over the content of the contract. A recent example would be the situation of delivery riders in the recent *Deliveroo* case in the UK, where the individual was under no obligation to switch on the App and was free to designate substitutes to undertake deliveries.[87] The written contracts were presented to Riders on a take-it-or-leave-it basis, and did not display the features of entrepreneurial independence elaborated by the Committee. Applying the statutory definition in the Irish legislation, the Rider would not meet the definition of 'false self-employed' yet is undoubtedly in a situation of significant contractual weakness vis-à-vis the employer. The wider statutory category of 'fully dependent self-employed' worker will not address the problem of under-inclusiveness in all cases. It is restricted to situations where the party's main income 'is derived from not more than 2 persons.' As has been pointed out in a recent Australian decision of the Fair Work Commission, so-called 'multi-Apping' where workers are earning their living through multiple platforms is a growing feature of precarious self-employed working.[88] The Irish definition is insufficiently flexible and may have exclusionary effects here, given the real possibility that a worker may be dependent on income from more than 2 persons and yet still have limited market power. This may also describe the situation of many UK Riders who would fail to meet the Irish definition of 'fully dependent' self-employment.

A final observation concerns the conceptualisation of a 'right' in the Committee's reasoning. The Committee examined national law in light of the general limitation clause in Article G of the ESC. It did not follow from this that the national authorities were themselves required to treat the 'right to bargain collectively' as a broad principle, with interferences to be 'balanced' against the requirements of competition law using a proportionality analysis on a case-by-case basis.[89] The Irish legislator had adopted a set of exclusions (i.e. specified occupations, 'false self-employed', 'fully dependent self-employed') that operated as exemptions to competition law. In Gregoire

[86] Ibid. [110].
[87] *R (The IWGB) v Central Arbitration Committee* [2018] EWHC 3342 (Admin).
[88] *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818, [117]-[118]
[89] Webber (above n 23) chapter 2.

Webber's terms, the 2017 Act was a 'limitation' of the right, specifying its boundaries using the legal technique of immunities or exclusions from liabilities. Once that perimeter was specified through legislation, there was little residual scope for 'balancing' the right to bargain collectively against competing values and interests. The ESC limitation clause represents an approach that gives focal position to legislation in the specification of the right to bargain collectively in national legal orders. The Committee was not distracted by the *form* of that specification in terms of 'immunities' or exemptions from competition law liabilities. This was consistent with its more general adherence to substantive reasoning, focusing on the substance of the legal protection rather than its form.

The *ICTU* decision thus represents an important advance on the current approach under the ECHR. The reasoning in the *ICTU* decision is both contextual and substantive. It is contextually attuned to the labour market realities of contracting practices, and the rise of self-employment in Europe. The Committee correctly identified that market inequalities are often pervasive in many new forms of self-employment, so that the self-employed may have a similar need as standard employees for collective bargaining. The reasoning is substantive in that it avoids formalistic enquiries into legal types of contractual engagement. The issue is not whether there is an 'employment relationship', however inclusively defined. The Committee directed its attention instead to the underlying substantive issue: is there a lack of individual market power so that this person is unable to exercise substantial influence over her contractual terms? If so, this justifies her inclusion within the right to collective bargaining, by comparison with standard employees, and the exclusion of competition law constraints. This would be so regardless of the formal legal classification of the work relation.

The background issue that loomed in *ICTU* was the position under EU competition law. The Irish competition legislation was based upon the competition law provisions in the EU Treaties. Nevertheless, it was beyond the remit of the Committee to assess the compliance of EU law with the ESC directly. As the Committee observed, it 'cannot assess the potential risk of EU law being applied, but only its actual execution through domestic law.'[90] For EU member states, the position under EU competition law is of central importance for the right to collective bargaining in national legal orders. Indeed, the delay in implementing legislative changes in Ireland was attributable to the regressive intervention of EU institutions during the period of European austerity politics. In the following section, we consider the role of fundamental rights in shaping the 'frontier' between labour law and competition law in the EU legal order. We can then reflect back on Wedderburn's pessimistic assessment of the prospects for a European social order encountering the laws of the market hardwired into the EU treaties.

IV EU COMPETITION LAW AND FUNDAMENTAL RIGHTS

The EU legal order is an important case study in examining the role of fundamental rights. The European Court of Justice developed an 'immunity' from competition law for collective agreements negotiated between representatives of employers and labour. The scope of this

[90] *ICTU* (above n 74) [115].

immunity is based upon the legal boundary between 'employees' and 'undertakings', `and this distinction underpins the 'binary divide' between labour law and competition law. This immunity has now been judicially extended to the 'false self-employed', which responds to shifts in contracting practices in European labour markets and the growth of the self-employed in many member states. The European Commission is currently consulting on the collective bargaining rights of the self-employed. This will necessitate reconsideration of the scope of the immunity, and whether it is sufficiently inclusive in the circumstances of new forms of work particularly in the Gig economy.

There has been longstanding recognition of the right to collective bargaining as a fundamental social right in Europe. Point 12 of the Community Charter of Fundamental Social Rights of Workers 1989 recognised that 'Employers or employers' organizations, on the one hand, and workers' organizations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.' The EU Charter of Fundamental Rights became part of the Treaty architecture of the EU as a result of the Treaty of Lisbon in 2009. Article 12 states that 'Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies *the right of everyone* to form and to join trade unions for the protection of his or her interests'. This is formulated differently to Article 11 ECHR in that the right to form and join trade unions is stated explicitly to be 'the right of everyone'. This appears to be wider than the *Pastoral Cel Bun* restriction of trade union rights to those in an 'employment relationship'. Article 52 (3) of the EU Charter provides that the ECHR is a 'floor' rather than a 'ceiling': 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.' Article 28 of the EU Charter also provides that 'Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels'. This accords explicit protection to the right to bargain collectively although this must be 'in accordance with Union law' which includes EU competition law. The Explanation to Article 28 makes specific reference to Article 6 ESC. This is important because it aligns Article 28 of the EU Charter with the inclusive approach under Article 6 ESC, and the contextual and substantive reasoning of the ECSR in *ICTU*.

The seminal European case on competition law and collective bargaining is still *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*.[91] It concerned a supplementary pension scheme negotiated in a sectoral collective agreement. At the request of the social partners, the Minister for Social Affairs and Employment decreed that the scheme required compulsory affiliation for all relevant workers in the textile industry. Albany sought an exemption from the compulsory scheme because it had entered into a supplementary pension scheme with an insurance company at a time when the sectoral scheme provided for less generous benefits. The exemption was refused. Albany challenged this on the basis that the social partners' request to make the fund compulsory constituted an agreement between undertakings that was contrary to Article 85 (1) of the Treaty.

[91] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 (*Albany*).

The *Albany* decision was a landmark in the developing social law of the EU because collective agreements are by their very nature anti-competitive. The frontier between collective agreements and competition law was fundamental to the future direction of EU social law. In what now stands as a canonical statement of EU social law, the Court stated that 'agreements concluded in the context of collective negotiations between management and labour'[92] directed at the improvement of 'conditions of work and employment'[93] were outside the scope of Article 85 (1). The agreement in *Albany* was in the form of a collective agreement concluded by organisations representing employers and workers, and it contributed directly to the improvement of the working condition of remuneration. It followed from this that the specific agreement did not fall within the scope of Article 85 (1) in view of its nature and purpose.[94]

The Opinion of Advocate General (AG) Jacobs in *Albany* is as famous as the judgment itself, and the Opinion provided an extensive comparative examination of competition law and collective agreements. He considered two possible bases for the exclusion of competition law scrutiny of collective agreements: (i) the fundamental right to bargain collectively; (ii) the need to shield collective agreements from competition law scrutiny in view of the Treaty provisions encouraging the negotiation and conclusion of agreements between the social partners. AG Jacobs rejected the first approach and endorsed the second approach. It is interesting to consider his reasoning, because the judicial development of the *Albany* line of cases appears to have been largely impervious to the influence of fundamental rights.

According to AG Jacobs, whether there was a fundamental right to bargain collectively in the Community legal order was 'a seminal question' in the case.[95] He concluded that there was not a fundamental right to bargain collectively. The recognition of 'the right to negotiate and conclude collective agreements' in Article 12 of the Community Charter of the Fundamental Social Rights of Workers was described as merely a political declaration. This was because Member States were unwilling to treat the Community Charter as a legally binding instrument with concrete legal effects. Moreover, there was no textual reference to this right in Article 11 ECHR, and the ECtHR had at this stage declined to treat the right to bargain collectively as an essential element of 'the right to form and join trade unions for the protection of his interests.' He also considered that the explicit recognition of collective bargaining in fundamental ILO instruments such as ILO Convention 98 was not formulated in terms of it being a subjective 'right', with a right-holder and correlative duties imposed on duty-bearers. Rather, Article 4 of ILO C98 was formulated in terms of a state's positive obligation to 'encourage and promote' voluntary collective bargaining. Where collective bargaining was specified as a 'right', as in Article 6 ESC, this was better understood as positing 'policy goals rather than enforceable rights'.[96] Taken together, these observations supported the view that there was not 'sufficient convergence of national legal orders and international legal instruments on the recognition of a specific fundamental right to bargain collectively.'[97]

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[92] Ibid. [60].
[93] Ibid. [59].
[94] Ibid. [64].
[95] Ibid. [133].
[96] Ibid. [146].
[97] Ibid. [160].

Some of these considerations reflect the state of jurisprudential development at the time of the Opinion. The 'fundamental' right to bargain collectively has now been recognised as an essential element in Article 11 of the ECHR in *Demir*. The right to bargain collectively is also recognised by Article 28 of the EU Charter, a provision which (as the Explanation to Article 18 makes clear) is itself based upon Article 6 ESC and the relevant points of the Community Charter of Fundamental Social Rights of Workers. The EU Charter has the same legal value as the EU Treaties. Reflecting these developments, the right to collective bargaining has now been recognised as a fundamental right by the CJEU in *Commission v Germany (Occupational Pensions)*.[98]

There are, however, two deeper features of AG Jacobs' reasoning which reflect what Webber has described as the 'received approach' to the conceptualisation of fundamental rights.[99] The first feature is a 'balancing' concept of rights, where proportionality is central to the nature of rights-based reasoning. AG Jacobs explained that the case law on equal pay and collective agreements 'could be seen as an application of the general rule that the exercise of a fundamental right may be restricted, provided that the restriction in fact corresponds to objectives of general interest pursued by the Community and does not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.'[100] According to Webber, a problematic consequence of this 'received approach' is the normative dilution of the right. At the first stage of proportionality reasoning, the right is broadly construed. At the second stage, its interference is then readily amenable to being overridden by considerations of policy. This is reflected in AG Jacobs' view that 'the mere recognition of a fundamental right to bargain collectively would therefore not suffice to shelter collective bargaining from the applicability of competition rules.'[101] The better view is that the fundamental right to bargain collectively is *constituted* by limitations in legislation, which would include 'immunities' or exclusions of competition law liabilities. This immunity-based approach is more likely to do justice to its status as a fundamental entitlement, because it removes the right to bargain collectively from the give-and-take of judicial balancing. The dilution that this often causes has been amply demonstrated by the CJEU's recognition of the right to strike, which exposed it to proportionality-style 'balancing' against free movement provisions in the Treaties.[102] The effect of this has been a substantive dilution of the right to strike's protection in the EU legal order, which is in line with Webber's broader critique of the 'received approach' to rights.[103]

The second feature of his reasoning reveals a narrow view of what can constitutes 'rights' in international instruments. So, according to AG Jacobs, Article 4 of ILO C98 does not guarantee a

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[98] Case C-271/08 *Commission v Germany (Occupational Pensions)* [2010] ECR I-7091. See also Case C-699/17 *Allianz Vorsorgekasse AG* v. *Bundestheater-Holding GmbH*, EU:C:2019:290

[99] Webber (above n 23).
[100] *Albany* (above n 91) [162].
[101] Ibid. [163].

[102] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* (Judgement 11 December 2007).

[103] A.C.L. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 *Industrial Law Journal* 126.

fundamental *right* to collective bargaining because there is no specified right-holder and there are no duty-bearers. It is certainly true that the Hohfeldian approach regards 'rights' as based upon a three-term structure. That is to say, a person X enjoys a right in relation to a subject-matter Y where the right correlates to duties owed to X by a duty-bearer Z. It is characteristic of international instruments and many constitutional provisions that they are incomplete and based upon a two-term structure. They identify an important subject-matter (say, collective bargaining) that certain persons have *by right* but without specifying the relevant duties, duty-bearers, or delimiting the class of right-holders. The translation of these two-term formulae into three-term jural relations between persons depends upon concrete specification in national legal orders. Ordinarily, this will usually occur through labour legislation specifying the complex details of collective bargaining schemes. Nor do these schemes ordinarily settle upon a simple 'right' to bargain collectively correlative to a duty to bargain. The 'right to collective bargaining' will usually display a more complex 'molecular' structure, consisting in a legislative pattern of rights, liberties, powers, and immunities.[104] This right varies significantly across different legal systems, reflecting the fact that it can be concretised in reasonable but incommensurable ways. In this way, it is a mistake conclude that collective bargaining is not a fundamental right in the international legal order. It is an incomplete specification, for sure, given its two-term structure. This is necessary to allow legislators creative latitude to make selections so that the legislated right to bargain collectively coheres with the wider elements of a legal system, its constitution and values, the history and structure of its trade union movement, and so forth.

In *Albany*, the Court of Justice favoured an 'immunity' approach, and it did so on the basis of the Treaty provisions supporting social dialogue between management and labour. It noted that this architecture provided that 'the Commission is to promote close cooperation between Member States in the social field, particularly in matters relating *to the right of association and collective bargaining* between employers and workers.'[105] However, the overriding emphasis was on the Treaty's promotion of social dialogue, rather than the status of collective bargaining as a fundamental right. *Albany* was affirmed and extended by the CJEU in *FNV Kunsten Informatie en Media v Staat der Nederlanden* (*FNV Kunsten*) in 2014.[106] *FNV Kunsten* was concerned with the scope of the *Albany* immunity, and whether it extended to collective agreements regulating the minimum fees of both employed and self-employed substitute musicians who were substituting for members of orchestras. *FNV Kunsten* was a golden opportunity for inclusionary arguments based upon the fundamental right to bargain collectively, particularly in light of the legal developments recognizing that right post-*Albany*. The Court reaffirmed the limits of the *Albany* exclusion, and its restriction to collective agreements negotiated between management and labour on behalf of employees. There were no provisions in the Treaties facilitating or encouraging social dialogue on behalf of self-employed service providers, who were to be regarded as 'undertakings' within the scope of

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[104] On the 'molecular' nature of freedom of association, see A. Bogg and K. Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2012) 33 *Comparative Labor Law and Policy Journal* 379.

[105] *Albany* (above n 91) [55] (*emphasis added*).
[106] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] EUECJ C-413/13 (*FNV Kunsten*).

EU competition law.[107] Consequently, there was no equivalent Treaty-based arguments to extend the reach of the *Albany* principle to encompass self-employed service-providers.

The Court introduced a modest extension to *Albany* so that it also encompassed the 'false self-employed'. A service provider would cease to be an 'undertaking' where he 'does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking.'[108] The court should scrutinize the economic substance of the work arrangement regardless of its legal classification in national law, to determine whether the service provider 'acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (see judgment in *Allonby*, EU:C:2004:18, paragraph 72), does not share in the employer's commercial risks (judgment in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (see judgment in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 26).'[109] The most striking feature of *FNV Kunsten* is that this extension to the 'false self-employed' was developed without reference to the fundamental right to bargain collectively, even despite *Demir* and Article 11 ECHR, and Article 28 of the EU Charter.

The Commission is currently engaged in consultation on collective bargaining for the self-employed, which involves a consideration of the current scope of *Albany* and *FNV Kunsten*. The Commission's 'Inception Impact Assessment' takes as its point of departure that there are growing numbers of 'solo self-employed' workers (i.e. those who rely on their own personal labour and do not employ others) who are unable to exercise effective influence over the negotiation of their terms and conditions of employment.[110] In this respect, it reflects the contextual understanding of the Committee in *ICTU*. It then canvasses a range of possible options for including the self-employed within the scope of collective bargaining by extending the exclusion of competition law. The narrowest option is restricted to the solo self-employed providing work through platform intermediaries. The widest option would include all solo self-employed workers who supply labour to professional customers of any size. An academic proposal which may be influential in these deliberations has been offered by Lianos, Countouris, and De Stefano, who provide the following definition for a reconfigured approach to the competition law frontier:

> 'A worker is a person that for a certain period of time is engaged by another to perform mainly personal work or services in return for which he receives remuneration. Such work or services may be performed under the direct control, indirect control, or decisive

[107] See Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 (*Pavlov*).
[108] *FNV Kunsten* (above n 106) [33].
[109] Ibid. [36].
[110] European Commission, *Collective bargaining agreements for self-employed – scope of application of EU competition rules* (2021), available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules_en

influence of the employer or involve a duty to cooperate with the employer's direct or indirect instructions.'[111]

This is aligned with an earlier proposal in favour of the 'personal work relation' approach, which defined a worker as someone who 'mainly provides personal labour and is not genuinely operating a business on her own account.'[112] Elsewhere, Countouris and De Stefano have formulated this in terms of work or services provided in a 'predominantly personal' capacity and is not genuinely operating a business undertaking.[113] In what ways, if any, does the fundamental right to bargain collectively provide support for the 'personal work relation' concept?

The fundamental right to bargain collectively is not aligned with a single right answer to the matter of personal scope. There is variation across different instruments, and even some divergence within the case law of the ECtHR. It might be better to focus on how a fundamental rights paradigm could influence the application of a 'predominantly' or 'mainly' personal work concept. A starting point is Article 6 ESC, identified as a source for Article 28 of the EU Charter in the Explanations. The Committee in *ICTU* adopted a substantive and contextual approach to interpretation, and this should inform the judicial application of a personal work relation concept if this is adopted in the EU legal order. The importance of this will be demonstrated using an example from UK law on the 'personal work' requirement for personal work contracts.

The leading case to consider 'personal work' is the Supreme Court judgment in *Pimlico Plumbers*, which was concerned with 'substitution clauses' in the contract (where a worker has a contractual right in certain circumstances to designate a substitution to perform the work).[114] Lord Wilson accepted that Mr Smith had the right to substitute another Pimlico operative in a wide range of circumstances, not limited to when he was unable to do the work but including when he found more lucrative work elsewhere. Lord Wilson suggested the following approach: 'But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.'[115] In light of the other provisions of the contract which were addressed to Mr Smith personally, and the restriction of the substitution clause to other Pimlico operatives, Lord Wilson concluded the tribunal was entitled to find Mr Smith was a 'worker'.

A focus on whether the 'dominant feature' of the contract is personal performance by the individual probably reduces the potential for substitution clauses to negate employment protection. Despite this, the *Pimlico Plumbers* approach appears to have had a limited impact. Most notoriously, where Deliveroo riders sought union recognition, the company introduced new contracts with a wide substitution clause. The Central Arbitration Committee (CAC) held that a

[111] Lianos, Countouris and De Stefano (above n 38) 321.
[112] Nicola Countouris and Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment* (ETUC, Brussels, 2019) 65.
[113] Countouris and De Stefano, (above n 26) 9.
[114] *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 (*Pimlico Plumbers*).

[115] Ibid. [32].

wide substitution clause defeated worker status under s. 296 of the Trade Union and Labour Relations (Consolidation) Act 1992[116] and, to date, the ruling of the CAC has survived a challenge in the High Court, though an appeal to the Court of Appeal has yet to be decided. This was because the Rider was free to designate a substitute even once a delivery job had been accepted through the App, and there were few restrictions either on the identity of the substitute or the permitted reasons for substitution (for example, the Rider could send a substitute where she was simply unwilling to do the work).

There is a risk that a personal work relation concept might founder on the rock of substitution clauses, given that the 'dominant feature' approach has had the effect of excluding highly precarious workers from the scope of basic statutory protections. The personal work enquiry must be undertaken substantively and contextually, in line with Article 6 ESC. On this approach, the court examines the broader normative issue of whether an individual is a genuinely independent entrepreneur operating his or her own business, and hence not vulnerable to contractual exploitation. In answering this question, personal work must be assessed realistically against the wider backdrop of the economic realities. It is no more than an element in a much bigger picture, assessing the individual's vulnerability to exploitation and whether an entitlement to collective bargaining is justified in the circumstances. The riders in *Deliveroo* had no influence over the written contractual terms and delivery fees were fixed by the company and presented on a take-it-or-leave-it basis.[117] This context should inform the determination that they were not independent entrepreneurs but instead in a relationship of personal dependence and so within the intended scope of the right to bargain collectively. The existence of written substitution clauses may sometimes be a factor pointing towards autonomy and independence. Applying the contextual and substantive approach in *Deliveroo*, however, the clause should be accorded little weight given the wider context of contractual inequality.

V CONCLUSION

Let us return to our opening question. To what extent does freedom of association provide an effective answer to the competition law barriers for self-employed workers? The coordination wrong of concerted price fixing is simultaneously an exercise of freedom of association, a fundamental freedom. Freedom of association has also been treated as encompassing a fundamental right to bargain collectively in many legal instruments and constitutional guarantees. This chapter has demonstrated that the fundamental right to bargain collectively is not reducible to a single pattern. There are reasonable and incommensurable specifications of the right that vary in terms of the right-holders, those whom are subject to correlative duties, and the content of those duties. The fundamental right cannot be invoked like a magic spell so as to automatically derive an easy answer to the difficult questions. The full specification of that right represents the

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[116] *IWGB v Deliveroo T/A Deliveroo*, TUR1/985 (2016), available at www.gov.uk/government/publications/cac-outcome-iwgb-union-roofoods-limited-ta-deliveroo

[117] Ibid. [34]-[35].

conclusion to a normative argument, not its premiss. There are, however, some important consequences that flow from using fundamental rights as an argumentative practice.

The first is that an 'immunity' or 'exclusion' of competition wrongs from labour law is not an alternative approach to rights-based protections. The 'right to collective bargaining' is a complex right that consists of a legal pattern of rights, liberties, powers, and immunities. Furthermore, this pattern will be constituted across different bodies of law: contract, tort, labour statutes, competition law, constitutional law. This reflects the argument of Webber *et al* that there is no single autonomous compartment in a legal system called 'human rights law', because in a sense *all* legal ordering is directed at the realization of human rights and the common good.[118] For this reason, the 'rights' versus 'immunities' debate is a red herring. Most fundamental rights will depend upon the full range of jural relations and this will include immunities. In *Van der Woude v Stichting Beatrixoord* AG Fennelly observed that the *Albany* exclusion was 'an exception to the general field of application…of the EC Treaty' and hence its scope 'should be narrowly construed.'[119] This principle of strict or narrow construction of immunities represents a basic failure to understand that immunities are simply fragments in a larger legal picture whereby a fundamental right is being constituted by limitation in the legal order. As such, there is no warrant for a principle of narrow construction.

The second point is that the recognition of a fundamental right does not necessitate a balancing and proportionality model of rights. The recognition of a fundamental right to strike in cases like *Viking*, and its consequent exposure to a proportionality-style balancing exercise, has led to a normative dilution of the right. It would be a serious mistake to extend the *Viking* proportionality approach to the sphere of competition law and collective bargaining. The exclusionary approach of *Albany* effectively removes the right to bargain collectively from a balancing exercise undertaken on a case-by-case basis by courts. The adoption of a proportionality approach would be a retrograde step. While the legal form of *Albany* is an 'immunity', the substantive legal protection is more robust than in *Viking*'s proportionality model. The legal delimitation of the immunity has the effect of treating the right to bargain collectively as a strong and absolute entitlement, rather than one that is easily overridden through judicial balancing.

Finally, does the analytical approach of 'legislated rights' mean that the right to bargain collectively is simply an empty constitutional vessel, the content of which is filled by the detailed statutes that specify the right concretely in labour law? If this is so, does this not mean that the fundamental right is superfluous to our analysis? Not so. There is a vital critical space between the abstract fundamental right and its concrete specification in labour relations statutes and instruments. Recently, the Supreme Court of Canada identified specific instances of freedom of association that warranted strong constitutional recognition and protection, which included 'the right to join with others to meet on more equal terms the power and strength of other groups or entities.'[120] This recognition that freedom of association occupies a space in the flux of social and economic power, between domination and empowerment, is important. It helps to explain the attractiveness of the

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[118] Webber and others (above n 31) 53.
[119] Case C-222/98 *Van der Woude v Stichting Beatrixoord* para [26]
[120] *Mounted Police Association of Ontario v Canada*, 2015 SCC1, 1 SCR 3, [66].

contextual and substantive approach of the ECSR in the *ICTU* decision. On the one hand, it enabled the ECSR to dispense with the standard doctrinal apparatus of labour law, looking beyond formal contractual classifications to scrutinize the economic substance of the work arrangement and the need for collective empowerment. On the other hand, it also enables us to be sensitive to the use (abuse?) of freedom of association by powerful economic actors which attempt to shield their own concerted practices from competition law scrutiny. In this way, the fundamental rights paradigm is an important corrective to the narrow construction of inequality and disadvantage in labour law's foundational approach, and its limiting preoccupation with contractual forms. This will ensure that the frontiers of social law extend to protect those who stand in need of its protections, while leaving competition law free to challenge the abuse of economic power by employing entities in the platform economy.