THE INCONVENIENCE (FOR LEFT-WING EU SUPPORTERS) OF THE EUROPEAN COURT OF JUSTICE

ITS STRANGULATION OF DEMOCRACY, VOIDING OF THE 'RULE OF LAW' AND CONSTRUCTION OF A SUPRANATIONAL NEO-LIBERAL POLITICAL ECONOMY

THE MISSING PART OF THE EU DEBATE

In the debate over EU membership, and in-particular-the undemocratic nature of the EU (often sophistically described as the EU's 'democratic deficit'), the discussion misses-out the most anti-democratic and objectionable aspect of the EU: the Court of Justice of the European Union (CJEU – although more often referred to as 'the Court', 'ECJ' or 'Court of Justice').[1] The sparse references to the Court and its role in the public debate about the EU among the public in general and the left in-particular is surprising, given the central importance (since its earliest days) of the Court of Justice to the EU. Scholar Danny Nicol noted the lack of interest and understanding of the Court from the very beginning of the UK's entry into the then European Economic Community (EEC). He points out that the political or legal establishment, largely:

> '*...disregarded...the fact that the adoption of our own 'written constitution', the Treaty, together with the establishment of a court charged with ensuring that 'the law' was observed, was likely to invest the ECJ with the status...of...Supreme Court*'.[2]

There were some references to its authority in the referendum campaign as part of the wider argument of the UK 'taking back control' of its laws. Nevertheless, in comparison to its fundamental importance to the EU and its path of development over 60 years (second only to the drafting and signing of the original Treaty of Rome in 1957) the Court of Justice remains a significantly under-discussed and poorly understood institution. Further, the dis-interest in the Court of Justice by those on the left is particularly notable and inexplicable because, of all the institutions of the EU, it is the one that offends against democratic socialist principles the most. Yet, the Labour Party and Trades Union in the UK appear more wedded than ever to keeping the UK under its jurisdiction, not least by disregarding the result of the referendum result in 2016 and supporting a second referendum to void the decision.

ANTITHETICAL TO DEMOCRATIC SOCIALISM

As R H Tawney summed up in his book *Equality*, a socialist society is a democratic society i.e. one embracing the fundamental moral and political equality of the people.[3] Democracy is, therefore, at its heart, a culture – a way of living – which requires the disbursement of privilege and power. In such a society, economic power in-particular needs to be dealt with i.e. eliminated where possible and controlled where necessary.

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[1]Key points often raised include: The unelected and largely unaccountable EU Commission and its power of initiative over new, or the reform of existing EU laws; the mysterious system of Comitology; the 'puppet' Parliament; the absence of transparency in the Council of Ministers; the un-democratic nature of Qualified Majority Voting (QMV) underpinned by secretive 'horse-trading' between Member State Permanent Representatives to the EU (and occasionally Member State Ministers) over policy issues; the secret process of 'Trilogue' and the associated secretive deal-making that goes on to agree new laws; the vague and open-ended nature of the Treaties giving extensive latitude to the EU, their self-amending nature (e.g. Article 48 of the Treaty on European Union - the Passarelle clause) and the near impossibility - for any Member State Parliament, Government or court – of changing the content of primary EU law and the extreme difficulty in changing or obviating secondary law, too; the extensive corruption and the power of lobbyists; the European Central Bank (ECB) and European Investment Bank (EIB) and their policies; the central supporting role the supra-national institutions have played in helping Member State Governments ignore referendum results (e.g. France and the Netherlands in 2005 and Greece 2014) and in-some cases to re-run plebiscites which 'went against' EU-integration (e.g. Ireland 2001 and 2008).

[2] Nicol. D. (2001). EC Membership and the Judicialization of British Politics. pg 252.

[3] Tawney, R H. (1931). Equality.

In order to realise the goal of a truly 'democratic society' - as elucidated by Tawney - there are a-number-of essential conditions that need to be in place. These are:

- Accountable government based-upon democratic processes, underpinned by a democratic (egalitarian) culture ensuring the ability for a society to organise itself cooperatively.
- The 'rule of law', which secures the basic elements of a free society, ensuring the material conditions for individual and collective endeavour.[4]
- The nurturing of solidarity, community and tackling privilege, vested interests and economic power and preventing the commodification of individuals and social life.

The Court of Justice has consistently attacked and undermined the essential conditions described above, by taking advantage of its largely untouchable position (in the EU's institutional make-up) as 'Master of the Treaties'[5] and playing the key role in constructing a supranational supreme legal order (the *Acquis Communitaire*) that is antithetical to democratic socialist principles. Specifically, it has spent six decades:

- Putting in place (largely unnoticed outside legal and academic circles) a supreme law to which all EU member states and many of their actions are subject and, as a result, supplanting debate, competitive politics and the authority of democratic institutions as the dominant methods for making key decisions about law and policy. This, consequently, negatively affects the ability of the people within the EU member states to be political and social actors, deciding their own fates.
- Pursuing political power over adherence to the fundamental tenets of the 'rule of law' and permanently weakening the latter.
- Imposing a neo-liberal political economic regime on the member states.

SQUEEZING OUT DEMOCRACY: A JUDICIAL *COUP D'ETAT*

The existence of a supreme court which stands atop a complex supranational legal order, with authority over the parliaments, assemblies, courts and the laws of all the member states of the EU, is an inherent afront to the principle of accountable power controlled through democratic processes. If the Court of Justice had been a limited institution of international arbitration facilitating cooperation between nations, democratic socialists would have little to object to. This, emphatically, is not what it is. Rather, what has taken place in the EU is a 'judicial *coup d'etat*'[6] of which the Court of Justice was the instigator and has remained in the driving seat of since the early 1960's.

Since the signing of the Treaty of Rome, the Court of Justice has been the institution that has single-handedly done the most to 'build' the EU. The Court has been able to instigate the coup because of its unassailable position in the EU's legal order, adjudicating on the meaning of EU law. Through its 'political' jurisprudence, it has

[4] Montague, E. (2014). The Christian Socialism of R H Tawney, pg 13.
[5] Alter, K (1996). 'The European Court's Political Power: the Emergence of an Authoritative International Court in the European Union' (1996) and Alter, K (1998). 'Who Are the Masters of the Treaty?: European Government and the European Court of Justice'. (1998). In Alter, K (2010). 'The European Court's Political Power: selected essays'. (2010).
[6] A 'judicial coup d'etat is '*...a fundamental transformation in the normative foundations of a legal system through the constitutional law making of a court*...[further]*...the constitutional law produced by the transformation would have been rejected by the founders had it been placed on the negotiating table*....[and]*...the outcome must alter – fundamentally – how the legal system operates...in ways...unintended by the founders*....[resulting in]*...systemic change, post-revolution...*[and]*...a specialized constitutional court*...[with a]*...radically expanded...scope of its own authority, and that of the constitutional law*'.Source: Stone Sweet, A. The Juridical Coup d'État and the Problem of Authority. Vol. 08 No. 10. (2007). Pg 915-916.

simultaneously bolstered its own position, expanded the EU's legal authority and subjugated the individual legal orders of the member states to a supreme law.[7] The two most important examples of the Court using legal cases to seize legal power from the member states, without authorisation from the Treaty framework, are the cases of *Costa v ENEL [1964] and van Gen den Loos [1963].* These:

> '*...judgments on supremacy and direct effect carry an indelibly activist mark, as the doctrines...not enshrined in the Treaties themselves, are products of judge-made law, created purely for the benefit of...European law'* [8]

The extract below from the judgment in the *Costa* case, shows very clearly the 'constitutionalisation' process in action as the judges in the Court of Justice articulate their reasons why EU law primacy over that of the member states:

> '*...the...Treaty has created its own legal system which on entry into force of the Treaty became an integral part of the legal systems of the member states and which their courts are bound to apply...the member states have limited their sovereign rights...and have thus created a body of law which binds both their nationals and themselves...it follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions...*'.[9]

Contained in the *Costa* and *van Gen den Loos* judgments is a constitutional revolution. Together they ensure that every member state is compelled to follow the obligations and abide by the prohibitions in the EU's legal order and that the laws directly impact individuals and organisations, by-passing any democratic check in each member country. What is more, once in-place, these two cases laid the groundwork for more revolutionary judicial activism, over the subsequent decades, as the Court became:

> *'...the architect of ever more numerous institutional innovations, transforming and constitutionalising the Treaty architecture, and amending both the horizontal (interinstitutional) and the vertical (EC Member States) division of powers in equal measure...'.*[10]

Examples of further flagrant 'constitutionalisation' by the Court, through teleological judicial activism, include early intrusions into issues of 'fundamental rights' in cases such as *Stauder v City of Ulm [1969]*[11] and the relegation of the constitutions of member states to subordinate status beneath the EU's own constitutional order e.g. *Internationale Handelsgesellschaft [1970].*[12] More recently the Court reiterated the EU legal order's supremacy over domestic constitutions in its *Melloni* ruling.[13] Other examples of the Court of Justice constructing and consolidating EU legal supremacy, over the decades include:

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[7] Stone Sweet, A. The Juridical Coup d'État and the Problem of Authority. Vol. 08 No. 10. (2007). Pg 924.
[8] de Waele, H. The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. Hanse Law Review, Vol 6, No 1. (2010). Pg 5.
[9] Case 6/64 Costa v ENEL [1964] ECR 585.
[10] de Waele, H. The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. Hanse Law Review. Vol 6. No 1. (2010). Pgs 5-7.
[11] Case C-29/69 Stauder v City of Ulm [1969] ECR 419.
[12] Case 11/70 Internationale Handelsgesellschaft v Einfur und Vorratstelle fur Getreide un Futtermittel [1970] ECR 1125.
[13] C-399/11 Melloni v. Ministerio Fiscal [2013] 2 CMLR 43.

> '...[the cases of]...*Les Verts (1986), Chernobyl (1990) and Francovich (1991)...*[where there was]...*little or no foothold...to be found in the Treaties for any of the decisions reached. In...Francovich...*[the Court of Justice created the doctrine of]...*liability of Member States for violations of EC law. All previous attempts at codifying such a rule having failed, the ECJ was happy to proclaim it a principle actually already 'inherent' in the Community legal order...*'.[14]

The process of 'constitutionalisation' has occurred in identifiable wave:

- The first between 1963 and 1979.[15]
- The second in the 80s and 90s.[16]
- The third wave in the 2000s and 2010s.[17]

Despite some initial reluctance among domestic courts in some member states about the supremacy of the EU legal order - it has now become accepted.[18] The Courts in the member states have effectively become 'EU Courts' routinely referring to the Court of Justice for the definitive interpretation of the law under dispute and subsequently enforcing the EU's laws and judgments.

The consequence of the judicial *coup d'etat* i.e. the 'constitutionalisation' of the EU Treaties, has been the placing of inviolable constraints upon the political autonomy of the member states. In other words, the decision-making authority of the populations of the EU member states to decide (through debate, elections and referenda) the laws they live under and the policies pursued by their governments have been subjugated – in the final analysis - to the decisions of judges in Luxembourg. The Court's actions have displaced the key elements of democracy in the member states in at least three key practical ways:

- The fundamental social, legal and economic preferences on which member states base their politics and policies are no longer contested in elections or represented in domestic constitutional orders but are, in-the-end, what the Court of Justice decides.
- Swathes of specific public policies which impact the lives of the people in the member states have-to be accepted by national parliaments, assemblies and electorates and implemented no matter their suitability or desirability and cannot be reformed or repealed by domestic processes.
- The contours of the EU legal order are decided by the Court, with little recourse to the wishes of the people of the member states nor their elected representatives.

The result of the subjugation of legal and thus policy autonomy and the displacement of democratic political authority in the member states has been a hostile environment for the necessary conditions for a thriving democratic socialist society in the UK:

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[14] de Waele, H. The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. Hanse Law Review. Vol 6. No 1. (2010). Pgs 5-7.
[15] Stone Sweet, A. The Judicial Construction of Europe. (2004). Pg 68.
[16] Stone Sweet, A (2004). The Judicial Construction of Europe, pg 70.
[17] Joint Cases: C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351. In this judgment the Court of Justice declared that the autonomy of EU's legal order meant that international law could not have precedence over the Treaties. A principle not found in the Treaties.
[18] Stone Sweet, A. The Judicial Construction of Europe. (2004). Pgs 70-71. Citing: Slaughter, A M, Stone Sweet A and Weiler, J H H (eds). 'The European Court and the National Courts – Doctrine and Jurisprudence: Legal Change and its Social Context'. (1998).

- The accountable exercise of political authority has been severely curtailed by the Court's expansion of EU authority and its largely un-touchable position in-charge of the EU's legal order.
- The scope for cultivating and maintaining a flourishing 'democratic culture' - as described by Tawney - in the member states has been reduced significantly, with policy subject to EU legal processes rather than democratic decision making and thus many policy preferences are limited or outright ruled unlawful by judges.
- Removing from member states the autonomy to arrange their constitutional orders in the ways that best suit them and pursue a range of different political programmes based upon the freedom to take different directions with their laws and social and economic policy. With the ultimate result that member states are left with merely a 'residual' of autonomy, which is regularly reduced further through subsequent Court of Justice jurisprudence.

UNDERMINING THE 'RULE OF LAW'

Traditionally, many on the left have been sceptical about the law, its power and the judges that exercise it.[19] Further, there has been much historical evidence to commend this perspective. Nevertheless, a distrust of the judiciary and particular legal structures and actions does not mean that the 'rule of law' is not of vital importance to the material conditions of social existence. Rather, it means that the 'rule of law' has-to be defined correctly and implemented properly. In other words, the 'rule of law' as a principle, does sit at the heart of democratic socialist thinking and necessarily underpins democratic socialist practice, as the radical socialist historian E P Thompson explained:

> '*...the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims*...[is]...*an unqualified human good*'.[20]

Further, as Tawney recognised:

> '*...the primary, essential and fundamental liberties are...secured by law*'.[21]

The 'rule of law' for the democratic socialist has a-number-of key elements:

> '*The rule of law...concerns the conduct of social life, and the regulation of conflicts, according to rules...which are exactly defined and have palpable material evidences – which rules attain towards consensual assent and are subject to interrogation and reform*'.[22]

It is clear, however, that the history of the Court of Justice gives the traditional suspicion among many on the left of courts and the judiciary considerable credence. The Judges on the Court of Justice have used the autonomy it has and its oversight role to pursue a political agenda, which has been most evident in its accretion of more and more power to the legal order that it is the ultimate arbiter of. However, the Court of Justice's

[19] Bickerton, C. The Left's Journey from Politics to Law, in Judicial Power and the Left eds Ekins, R and Gee, G. (2018). Pg 57.
[20] Thompson, E P. Whigs and Hunters: The Origins of the Black Act. (1975). Pg 266. Cited by Cole, D H. An Unqualified Human Good: E P Thompson and the Rule of Law. Journal of Law and Society. Volume 28. No 2. (2001). Pg 182.
[21] Tawney, R H. Equality. (1931). Pg 227.
[22] Thompson, E P. The State of the Nation. In Writing by Candlelight. (1980). Pg 230-231. Cited in Cole, D H. An Unqualified Human Good: E P Thompson and the Rule of Law. Journal of Law and Society. Volume 28. No 2. (2001). Pg 188.

'constitutionalisation' of the EU's legal order is not a manifestation of the 'rule of law' in-action. It is the converse: a clear example of what happens when the 'rule of law' is not respected. Indeed, when the very concept is treated by disdain by a court. It is clear, the Court as an institution and its jurisprudence fail to meet any of the requirements that Thompson identified as essential to the operation of the 'rule of law':

- The Court of Justice's tendency to invent novel legal principles to further political objectives rather than maintain adherence to the letter of law, is the exact opposite of '*...rules...which are exactly defined and have palpable material evidences*...'.[23] For example, the invention of legal primacy and direct effect (among other legal inventions) of EU law had no basis in the Treaty of Rome nor were either of these principles evident in the intentions of the original parties. when they agreed to create the (then) European Economic Community.[24] As is illustrated earlier in the article, this 'invention' of legal principle has been a recurring theme in the life of the Court.
- The rulings of the Court do not place effective restraints on power, which Thompson notes any 'rule of law' – that deigns to be worthy of the phrase - must do. Again, the Court of Justice does the very opposite of what the 'rule of law' requires. It takes decisions which accrete more power to the EU's legal order over which it is the 'master' thus furthering its ability to make more arbitrary extensions of EU legal authority at the expense of the member states and their domestic legal orders. Compounding this clear undermining of the 'rule of law' is the irreversibility of the flow of power under the Court of Justice from member states to the EU legal order. One of the most egregious recent examples of the Court's blatant disregard for effective restraints on power was its decision in *Gauwiler*. In this case the politics of the Euro and 'propping up' the Eurozone economy took precedence over explicit prohibitions in the Treaties against 'monetary financing'.[25] In other words, clear limitations on the competences of the institutions in the Treaties of the EU were thrown aside for politics and its own benefit. Another example is Opinion in which the Court opined on a draft accession treaty to the European Convention on Human Rights in which it ruled it incompatible with the coherence and autonomy of the EU's legal order, despite it being a Treaty requirement (TEU Article 6(2)).[26] The latter opinion reiterated – in broad terms – similar themes to those the Court had outlined previously in *Kadi [2008]*, where it was ruled that international treaties cannot have primacy over the EU Treaties and their constitutional principles.[27]
- There is no 'consensual assent' from those subject to EU law, nor any interrogation of the law it makes by those under its jurisdiction or any likelihood of reforming the 'supreme' law that it decides upon. Despite the political nature of much Court of Justice jurisprudence, there are no referenda or elections about its frequent highly significant decisions. There is no opportunity for elected representatives in the member states to reject or reverse important rulings e.g. decisions that extend the EU's legal order, declaring a member state law or regulation - decided upon by the democratic assembly of a member state – unlawful. The only participants in such 'decisions' are lawyers and judges, with the contest taking place in abstruse

[23] Thompson, E P. The State of the Nation. In Writing by Candlelight. (1980). Pg 230. Cited in Cole, D H. An Unqualified Human Good: E P Thompson and the Rule of Law. Journal of Law and Society. Volume 28. No 2. (2001). Pg 188.
[24] As scholar Alec Stone Sweet consistently highlights: '*It cannot be stressed enough that the Court initiated and sustained this process* [constitutionalisation] *in the absence of express authorisation of the Treaty, and despite the declared opposition of Member State Governments'*. Source: Stone Sweet, A. The Judicial Construction of Europe. (2004). Pg 66.
[25] C-26/ 14 Peter Gauweiler and Others v Deutscher Bundestag [2015].
[26] Opinion 2/13 [2014].
[27] Case C–402/05 P and C–415/05,Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351.

language in remote buildings in Luxembourg. The position that the Court of Justice occupies in the EU's institutional make-up, places it beyond the influence of the electorates of the member states.[28] Its judgements are - similarly - beyond the control of the domestic courts in the member states, too. They are merely required to refer relevant cases to the Court of Justice and implement decisions. Whether the process is democratic processes or judicial, neither has any meaningful ability to interrogate or reform the Court and the law that it (frequently) creates.

Thompson added a further contextual factor to the criterion he elucidated as necessary for there to be the 'rule of law'. He pointed out that the 'rule of law' is only meaningful when embodied in a material context, i.e. it:

'*...must always be historically, culturally, and, in general, nationally specific*'.[29]

Patently a court making a single law for 28 different countries is not a body of law that is 'culturally' or 'nationally' specific. This is particularly true for England and Wales where the Common Law system that prevailed, until the UK joined the then European Community in the early 70s, was of a distinctive nature to the Civil Law systems that prevail in most of the other member states.[30] As a result of this historical and cultural difference a number of the distinct advantages of the Common Law system, such as its flexibility and its focus on material instances of social conflict as the source of its jurisprudence [31] (which made it a pragmatic medium for dispute resolution) have been diluted by the supremacy and subsequent expansion and of the EU's legal order.

THE EUROPEAN COURT OF IN-JUSTICE

The 'constitutionalising' of the treaties and the abrogation of the principle of the 'rule of law' – by the Court of Justice - has resulted in the Court playing a leading role in the development of the EU as a neo-liberal system of political economy. The centrality of the latter is manifest in the EU Treaties and the Court of Justice's case law, which embody neo-liberal presuppositions, such as:

- Decisions by economic actors, often ones with extensive economic power, are the primary determinate of the 'justness' of the distribution of resources between individuals and organisations and within and between groups. Distributive justice organised along alternative lines (e.g. by democratically determined need) is strictly constrained by EU law and the Court's interpretations of it.
- Businesses have rights as well as individuals. Further, the rights of the former are at least equal to and often override those of the latter when they are in tension. Notably these rights do not vary depending on the circumstances i.e. the disparities in the wealth and power, of those entitled to them. Privileging commercial freedom and corporate power both reflects and reinforces the neo-liberal approach to

[28] '*The Court's...status...served to shield the process...*[constitutionalisation]*...from direct interference on the part of the Member States. At the same time constitutionalisation strengthened the Court's position...expanding the zone of discretion of...the Court...*'. Source: Stone Sweet, A. The Judicial Construction of Europe. (2004). Pg 66.
[29] Thompson, E P. The State of the Nation. In Writing by Candlelight. (1980). Pg 267. Cited in Cole, D H. An Unqualified Human Good: E P Thompson and the Rule of Law. Journal of Law and Society. Volume 28. No 2. (2001). Pg 188.
[3030] Ireland had a Common Law system before it joined the European Community. As with England and Wales, Ireland now has a hybrid system as a result of the dominance of the Civil Law system of the EU encroaching where once a Common Law system predominated. Scandinavian countries, it is often argued, have systems of law that are substantively different in nature to those of most of the EU member states who are more clearly in the Civil Law tradition.
[31] Thompson, E P. Whigs and Hunters: The Origins of the Black Act. (1975). Pg 267. Cited by Cole, D H. An Unqualified Human Good: E P Thompson and the Rule of Law. Journal of Law and Society. Volume 28. No 2. (2001). Pg 186.

distributional justice embedded in the EU's legal order. As one scholar has succinctly put it:

> '*...the ECJ has asserted the equivalence of fundamental market freedoms and fundamental rights...As has so often been the case in the EU, the Internal Market lies at the centre of things, and proportionality functions to ensure that market integration is not...diminished*'.[32]

If anything, the above quote from Douglas-Scott understates the position because the Court of Justice's case law has placed 'economic freedoms' in a position of superiority over the interests of labour and principles such as community. These presuppositions mean that EU laws (and in particular the judgments of the Court of Justice) should, and indeed do '*...structure the...field of action' of states, firms and individuals in the internal market in a way that furthers...neoliberal governmentality*'.[33] This has resulted in a position where '*Corporate rights*...[are]...*essentially...enshrined in constitutional law*' in each member state[34] whether the populations of those states wanted that to be the case, or not. The 'constitutionalisation' of EU law in-general and of neo-liberalism specifically in that body of law, has necessarily:

> '*...greatly reduced the range of autonomous policy choices in the member states*...[by]...*expand*[ing] *the reach of European competences*...[and ultimately having]...*a liberalizing and deregulatory impact on the socio-economic regimes of European Union member states*'[35]

The neo-liberalism – and the form of 'justice' that inevitably emerges out of that - is clear in Court of Justice case law, which has consistently expanded '*...the domain of...market values and mechanisms*...'[36] and '*...restrain*[ed] *the use of political power for other purposes*'[37] through favouring the dis-embedding of capital and economic processes from national constraints and for capital over labour and for economic freedom over solidarity and community. In the final analysis, swathes of the jurisprudence of the Court imposes on each member state a body of rules which is incontestable and embodies one particular-idea of 'justice'. Further, it is a kind of 'justice' antithetical to any conceivable understanding of 'justice' from a democratic socialist perspective.

in a genuine political community, contests over what 'justice' means and should mean in the future, are the very lifeblood of politics.[38] With different concepts vying with each other for primacy decided through debate, elections and referendums.[39] Some societies may prefer one version of 'justice' over another. Others may find a balance where they mix different aspects of different conceptions of 'justice'. Either way, preferences for

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[32] Douglas-Scott, S. Justice, Injustice and the Rule of Law in the EU, in Europe's Justice Deficit?. In Kochenov, D., de Burca, G and Williams, A.(eds). (2017). Pg 56
[33] Brannstrom, L. Law, Objectives of Government, and Regimes of Truth: Foucault's Understanding of Law and the Transformation of the Law of the EU Internal Market, Foucault Studies, No 18. (2014). Pg 175.
[34] Nicol, D. Nicol, D (2010). 'The Constitutional Protection of Capitalism'. Pg 98.
[35] Scharpf, F W. The asymmetry of European integration, or why the EU cannot be a 'social market economy'. Socio-Economic Review. Vol 8. (2010). Pg 211.
[36] Brannstrom, L. Law, Objectives of Government, and Regimes of Truth: Foucault's Understanding of Law and the Transformation of the Law of the EU Internal Market, Foucault Studies, No 18. (2014). Pg 175.
[37] Brannstrom, L. Law, Objectives of Government, and Regimes of Truth: Foucault's Understanding of Law and the Transformation of the Law of the EU Internal Market, Foucault Studies, No 18. (2014). Pg 187.
[38] Nicol, D. Swabian Housewives, Suffering Southerners: The Contestability of Justice as Exemplified by the Eurozone Crisis. Pg 175
[39] Nicol. D. Swabian Housewives, Suffering Southerners: The Contestability of Justice as Exemplified by the Eurozone Crisis. (2017). Pg 166.

the most appropriate mode of 'justice' for a society will depend on the material conditions present in the society i.e. the balance of the political and economic forces and interests at play in each society, history, culture and political structures. Member states of the EU no longer have the capability for meaningful debate because the powers to implement what is decided is taken away from politics by the EU and in large measure ultimately put in the hands of the judges of the Court of Justice.

Briefly described below are a-number-of examples of Court of Justice case law which betray the deep embeddedness in the EU and consequently member states of neo-liberal perspectives on the nature of 'justice'. Each one on its own might be dismissed as a small infringement on the ability of a Government to pursue socialist policies or individuals or groups to take on economic power and pursue egalitarian agendas. However, taken together they are clearly a significant corpus of law which puts in-place substantial constraints on the economic policy of Democratic socialist inclined member state Governments and the choices available to member state electorates. And further, the examples are by no means exhaustive, e.g. they do not touch upon the case law around corporate governance, procurement or state aid, among other issues nor the extensive body of Directives, Regulations and administrative measures which also form part of the Acquis, which similarly embody neo-liberalism. Therefore, the examples below must not be confused with the totality of the legal and organisational embedment of neo-liberalism in the EU and consequently the member states and their economies and societies.

Attacking collective bargaining and workers terms and conditions

In a series of court judgments (*Viking*[40], *Laval*[41], *Ruffert*[42] and *Commission v Luxembourg*[43]) the Court of Justice asserted the superiority of the freedoms of business to establish in another Member state (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU) above the rights of workers to take industrial action and defend collectively agreed standards and conditions.

Prior to this string of cases, there had been a degree of ambiguity over whose rights took precedence in cases of conflict – capital or labour – and therefore the extent to which the EU legal order was neo-liberal. The Court of Justice settled this issue emphatically in the judgments in these cases. Capital was the favoured constituency as the Internal Market won out over social solidarity.

Enabling tax avoidance

As a result of the Court's jurisprudence tax avoidance by business (and big business in-particular) is not only easier but has been *de facto* encouraged. Key cases such as *Marks & Spencer v Halsey*,[44] *Cadbury Schweppes*, [45] *Thin Cap Group*[46], *Deutschland*

[40] Case C-438/05 International Transport Workers Federation v Viking Line ABP [2007] ECR I-10779.
[41] C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet [2007] ECR I-11767.
[42] Case C-324/ 98 Ruffert v Land Niedersachsen [2008] 2 CMLR 39.
[43] Case C-319/ 06 Commission of the European Union v Grand Duchy of Luxembourg [2008] ECR I-6097.
[44] Case C-446/03 Marks and Spencer PLC v David Halsey (Inspector of Taxes) [2005] ECR I – 10837.
[45] Case C-277/09 The Commissioners for Her Majesty's Revenue & Customs v RBS Deutschland Holdings GmbH (RBS Deutschland) [2010] ECR I-0000, cited in: O'Shea, T. CFC Reforms in the UK – Some EU Law Comments. Paper for the 7th Annual Avoir Fiscal EU Tax Conference. Institute of Advanced Legal Studies. (2012).
[46] Case C-196/04 Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue [2006] ECR I7995. Cited in: O'Shea, T. CFC Reforms in the UK – Some EU Law Comments. Paper for the 7th Annual Avoir Fiscal EU Tax Conference. Institute of Advanced Legal Studies. (2012).

Holdings GmBH[47] and *A/S Bevola v Skatteministeriet*[48] Provide examples of the Internal Market in operation i.e. facilitating capitalistic practices such as the circulation of capital. Utilising the principles of the freedom of establishment and movement of capital (Articles 49 TFEU and 63 TFEU) the Court has enabled financiers and large corporations specifically, to avoid their tax obligations in EU member states. The Court has allowed firms to write off losses in one member state against profits made in another, decided not to stand-in-the-way of intra-company loans (which reduce tax liability), 'green-lighted' corporate structuring designed to minimise tax liability and the setting-up of corporate structures in different member state to avoid taxes. More recently, judgments about member state anti-avoidance measures have seen the Court deny member states the ability to utilise a general presumption of abuse in anti-avoidance measures and define any tax planning or 'tax efficient' structuring as abuse.[49]

In taxation cases, the Court has been consistent in its efforts to build the Internal Market and prioritise the rights of capital (whether that be financial or corporate capital) over those of the member state and their respective tax authorities carrying out the taxation policy of elected Governments. In these cases, the Court has effectively made political judgments about the desirability of a neo-liberal inspired sense of distributional 'justice' (over more collectivist alternatives) in every member state by imposing limitations on the taxing power of those states.

Constraining State Control of Industry

The Court of Justice has restricted the ability of Governments to determine the distribution of property ownership. On the face of it, the treaties 'carve out' the issue of property ownership from EU jurisdiction (Article 345 TFEU) and leave this issue to the member states to decide. However, as has been illustrated earlier in this article, seeming limitations on the extent of EU law does not stop the Court of Justice from interfering in a topic, extending its jurisdiction over issues. The:

> '*...case law at the EU level...is clear that Article 345 TFEU cannot be relied on to escape the prohibitions against competition*...[and that]...*in the ECJ's considerations, Article 345 TFEU does not obviously affect the reasoning on applicability of EU competition law*...[consequently]...*Considering Member States or their derivatives acting on markets, the space left for them by Article 345 TFEU seems rather insignificant from the point of view of EU regulation of economic activity*'.[50]

This erosion of the barriers that Article 345 supposedly put around ownership structures, by the Court of Justice, is evident in the *Essent and others [2013]* where the Court made clear that the socialised ownership of utilities is limited by EU law because such measures are subject to the strictures of EU competition rules and proportionality

[47] Case C-524/04 Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue [2007] ECR I-2107. Cited in: O'Shea, T. CFC Reforms in the UK – Some EU Law Comments. Paper for the 7th Annual Avoir Fiscal EU Tax Conference. Institute of Advanced Legal Studies. (2012).
[48] Case C-650/16 A/S Bevola & Jens W Trock ApS v Skatteministeriet (Ministry of Finance, Denmark) [2018].
[49] Case C-6/16 Eqiom SAS, formerly Holcim France SAS and Enka SA v Ministre des Finances et des Comptes publics [2017].
[50] Fraga, F L., Juutilainen, T Havu, K and Vesala, J. Property and European Integration: Dimensions of Article 345 TFEU. Legal Studies Research Paper Series No 17. (2012). Pgs 16 – 17.

tests.[51] In other words, there are market-based limits (monitored by judges) on the scope of nationalisation as a policy tool for organising and running industry and the delivery of services.

The Court of Justice has also imposed limitations on other (alternatives to nationalisation) interventions by Governments in corporate affairs. In *Volkswagon*[52] for example the Court ruled unlawful a-number-of interventions by a regional Government in Germany in the governance of a major employer within their area: Volkswagon. Specifically, a combination of interventions (restrictions on share ownership, minimum voting thresholds and the power to appoint company directors to represent the Lander) that enabled the elected state authorities to ensure Volkswagon pursued plans which benefited the prosperity of Lower Saxony and protected it from predatory takeovers were ruled to be infringements of EU law.[53]

Not only has the EU's legal order – through the Court - placed limitations on nationalisation but it has limited the tools available to Governments to intervene in ways that aren't nationalising firms, but that aim to ensure they are acting in a socially beneficial way. These are constraints that no democratic socialist run Government aiming to deliver a more egalitarian society could or should countenance. However, because they are Court of Justice rulings, they are effectively un-changeable and form part of a supreme constitutional framework within which the UK for example, now sits.

Marketising Public Services

The Court has also undermined publicly run healthcare provision as it has forced market-based provision upon member states. In judgments such as *Luisi and Carbone [1984]* the Court established that health care could be subject to the EU's 'four freedoms'.[54] Despite not being in the Treaties. Subsequently, in *Kohll [1998]* the CJEU established that 'freedom of movement' applied to healthcare services.[55] Finally, in a series of more recent cases in the 2000s (*Vanbraekel [2001]*, *Smit and Peerboom [2001]*, *Muller-Faure [2003]* and *Watts [2006]*) the Court of Justice established that *a-priori*, healthcare services fall with the rules of the Single Market and therefore, for example, competition rules apply to provision of health services.[56]

In areas as sensitive as healthcare, the Court is placing the rights of private providers above the 'distributional' and 'rights' preferences of the people of the member states as expressed through their Government's and institutions, which in the UK for example, is for a single tax-payer funded national health system, where principles like 'competition' have no place. As a result of the Court's jurisprudence, not only is the UK unable to prevent private healthcare from competing with the NHS, but it is difficult to see how the

[51] Joint cases: C-105/12 Staat der Nederlanden v Essent NV [2013]; C-105/12 Staat der Nederlanden v Essent Nederland BV [2013]; C-106/12 Staat der Nederlanden v Eneco Holding NV [2013] and C-107/12 Staat der Nederlanden v Delta NV [2013].
[52] C-112/05 Commission v Germany [2007] ECR I-8995.
[53] Blauberger, M. National Responses to European Court Jurisprudence. West European Politics. Vol 37. No 3. (2013). Pg 463.
[54] Joint cases: 286/82 and 26/83 Luisi and Carbone v Ministerio del Tesoro [1984] ECR 377.
[55] C-158/96 Kohll v Union des Caisses de Maladie [1998] ECR I-1931.
[56] C-157/99 Geraets-Smits v Stichting Ziekenfonds and Peerbooms v Stichting CZ Groep Zorgverzekeringen [2001] ECR I-5473.
C-368/98 Vanbraekel v Alliance Nationale des Mutualites Chretiennes (ANMC) [2001] ECR I-5363.
C-385/99 Muller-Faure v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA [2003] ECR I-4509.
C-372/04 Watts v Bedford Primary Care Trust [2006] ECR 3961.

NHS could maximally leverage its 'market power' to drive down the prices of the drugs that it buys, without coming up against EU competition law requirements.

Undermining State regulation of product markets

In order to construct the Internal Market, the Court of Justice has played a central role in stripping the authority from member state parliaments and assemblies to regulate (in the ways they deemed best) the goods, and more recently services, produced provided and sold in their respective jurisdictions. There is a lengthy line of (often messy) case law which dismantled member state product market regulation, which has been consolidated and built upon by EU secondary law. Two of the most significant judgments are those in the *Dassonville*[57] and *Cassis de Dijon* cases:[58]

> '...*once the requirement of discrimination had been replaced by the prohibition of potential impediments in Dassonville and by the proportionality test and mutual recognition in Cassis, the tool set of*...'*negative integration through law' was complete—and with it the ratcheting mechanism that secured the front line established by judicial liberalization*...'.[59]

Once consequence of the *Dassonville* and *Cassis de Dijon* 'line' of case law was the abolition of the veto that member states had over the EU's role in making important aspects of regulatory policy.[60] With member states effectively side-lined by the ECJ's judicial activism it became less of a significant step, in the Single Market Act in 1986, to accept the anti-democratic system of qualified majority voting in the Council of Ministers over Internal Market issues (and subsequently over many others). The Court neutered the autonomy of member states to regulate product markets and decide on the optimal balance between economic liberality on the one hand and the protection of domestic interests – whether they be industrial, cultural or health related, etc on the other – in line with the preferences of their peoples'.[61] The Court was able to impose – as a result of its unassailable position as 'master of the Treaties' - on the countries of the EU a policy framework based squarely on neo-liberal presuppositions, leading to the de-regulation of markets. In other words, more freedom for corporations to operate and the furtherance of the commodification of life under the EU's capitalistic constitutional order, no matter what the preferences of the populations of the member states. For democratic socialists, the existence and exercise of extra territorial legal power to undo the regulation of commercial activity in general and the exercise of corporate power in-particular should be anathema. An entity that undertook such an activity cannot be anything other than opposed by anyone claiming to be democratic socialist.

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[57] Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837.
[58] C-120/78 Rewe Zentrale v Bundesmonopolverwaltung fur Branntwein [1979] ECR 649.
[59] Scharpf, F W. The asymmetry of European integration, or why the EU cannot be a 'social market economy'. Socio-Economic Review. Vol 8. (2010). Pg 23.
[60] The liberal approach of *Dassonville* and *Cassis de Dijon* was somewhat qualified in *Keck [1994]* with the introduction of the concept of 'selling arrangements' and their exclusion from the purview of Article 34 of the TFEU (movement of goods), Nevertheless, the Court has subsequently moved away from the *Keck* limitations in a more liberal direction again with a 'Market Access Test', in cases such as: *Commission* v. *Italy (trailers)* and *Mickelsson and Roos*. Source: Joint cases: C-267/91 and C-268/91 Criminal Proceedings against Bernard Keck and Daniel Mitouard, [1993] ECR I-6097; C-110/05, *Commission* v. *Italy (trailers)*, [2009] ECR I-00519; C-142/05, *Mickelsson and Roos*, [2009] ECR I-04273.
[61] A good example of the Court of Justice overriding domestic (health) policy measures with market liberal dogmatism is *Scotch Whiskey Association [2015]*. In the case a policy with the democratic backing of the people of Scotland, to introduce minimum alcohol pricing to reduce alcohol consumption, was ruled unlawful by the Court on the basis that other less market distorting measures could achieve the same objectives. In other words, the Court of Justice was dictating to the Scottish Government what policies it could and could not pursue. Source: Case C-333/14, *The Scotch Whisky Association and Others*, *[2015]*. Cited in: Correta, J. Counting every sip of my whiskey?' The CJEU rules on minimum alcohol price. LSLR EU Law Blog. (2016).

CONCLUSION

An institution or individual that undermines or is antagonistic to the key principles underpinning Democratic Socialism, cannot be considered Democratic Socialist in its make-up nor sympathetic to Democratic Socialism as an idea. As this article has shown, the EU's Court of Justice is actively hostile towards Democratic Socialist principles.

The Court of Justice has shown its contempt for democracy. Over decades, enabled by its activist approach to law, it has implemented a judicial *coup d'etat* and built a comprehensive framework of superior law, which has removed from member states their autonomy to make political choices and implement policies based upon democratic processes. The link between the preference of electors and their governments and the public policy regime that impacts them is severed. Government, across swathes of policy areas, is now beyond the control of democratic accountability in the 28 member states of the EU.

The Court has regularly eschewed adherence to the 'rule of law', another key tenet of Democratic Socialism, in favour of pursuing political goals. It has frequently acted as a policy-making Star Chamber rather than a court led-by fealty to the principle of the 'rule of law'. The Court has not delivered predictability in its judgments and has often increased uncertainty not lessened it through its jurisprudence. The Court arbitrates over the extent of its own powers. Its actions contain the hallmarks of a despotic institution. A 'soft' despotism, but a despot-ism nevertheless.

The Court has used the authority it has given itself to build up, through its case law, a supranational neo-liberal system of political economy in which the member states are embedded and which the electorates of a member state cannot change. An extensive body of case law highlights the Court's support for the interests of 'big' capital (i.e. finance and large corporations) over those of labour, member state taxpayers and the socialistic political choices of member state Governments and electorates. The result is the dis-embedding of capitalism from its national, regional and local context which is anti-thetical to tackling economic power and reducing material inequality that Democratic Socialist policies aim to achieve.

Ultimately, the only conclusion for Democratic Socialists is that it is necessary to leave the jurisdiction of the Court of Justice if they want to create a society based upon Democratic Socialist principles. And the only way to do that is by leaving the EU.