

***Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process**

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Abstract

Will the welfare state survive European Integration? The paper seeks to put this currently intense debate into constitutional perspectives. It starts with a reconstruction of the *débat fondateur* in post-war Germany on the new Basic Law, which was focused on alleged or real tensions of welfarism with *Rechtsstaatlichkeit*, the commitment to rule of law. This is the background for the discussion in Section II on legal categories, which Fritz Scharpf has characterised as a de-coupling of economic integration from the various welfare traditions of Member States. The third section analyses the ECJ's recent labour law jurisprudence with its interpretation of the supremacy of European freedoms and its rigid interpretation of pertinent secondary legislation. These controversial moves are bound to provoke fierce opposition on the part of the protagonists of "Social Europe."

Keywords

Sozialer Rechtsstaat, Social Market Economy, European Economic Constitution, Social Europe, European Court of Justice

Is the idea of rule of law compatible with a commitment to social justice? This query was at the core of the first great constitutional debate in the newly constituted Federal Republic of Germany. The famous antagonists were Ernst Forsthoff, one of the most respected disciples of Carl Schmitt, and Wolfgang Abendroth, defending the legacy of Hermann Ignaz Heller.

The former had a Lehrstuhl in the prestigious Heidelberg Faculty of Law, the latter, although a lawyer by education, was a Professor in the political science department of Marburg. As if the differences in these affiliations were not telling enough: The text of Forsthoff's seminal analyses was published in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (Forsthoff 1954), the prestigious organ of Germany's public law professors, where Abendroth was present only as a discussant (Fischer-Lescano and Eberl 2006). He published the elaborated version of his argument in the Festschrift for political scientist Ludwig Bergsträsser (Abendroth 1954).

The Sozialstaats Controversy

The argument was about Article 20 (2) of the German Basic Law, which states: "The Federal Republic of Germany is a democratic and social federal state." According to Forsthoff's interpretation, this social state clause was to be understood as a commitment outside constitutional law, because any striving for social justice would have to resort to techniques that were incompatible with the formal structure of rule of law. Abendroth, in his counter-argument, re-stated what Herman Heller had argued in his reading of Germany's first democratic constitution, the Weimar *Reichsverfassung*. The promise of social justice is inherent in the very idea of democratic rule (Dyzenhaus 1997; Maus 1984; Schluchter 1983; Stolleis 1999). Social justice and rule of law were, to borrow a Habermasian category, co-original concepts, social justice being a truly constitutional commitment.

The legendary *Sozialstaats* controversy of the early 1950s with its roots in the laboratory of Weimar was to persist not only in all major constitutional controversies, but also to surface at more abstract theoretical levels, in particular, in Niklas Luhmann's distinction between "conditional" and "purposive" programming (Luhmann 1968, 1972), Jürgen Habermas' proceduralisation of the category of law (Habermas 1996; Wiethölter 1982, 1989) and Gunther Teubner's early efforts to mediate between the two master thinkers through "reflexive law" (Teubner 1983). These debates are clearly not just *querelles allemandes*. Instead, given their often-noted (Caldwell 2000; Harvey 2004) paradigmatic importance, it would be surprising if they did not re-surface in the European integration process.

This re-appearance was to be expected but is still, nevertheless, disquieting. This is because the topicality of the classical *Sozialstaats* controversy in the European arena is due to the unruly dimension of “the social.” No one other than Max Weber had underlined this when he observed that the quest for social justice was an agenda of populist movements which threatened the achievement of modern law and occidental rationalism, namely, its formal qualities (Weber 1978, 1994). It is precisely this threat which motivated Friedrich Hayek’s warnings against “The Road to Serfdom” (Hayek 1944), and which was invoked in important analyses of the perversion of anti-formalism in the era of national socialism (Kennedy 2004).¹

History can teach us a lesson. European integration was an explicit reaction to the disaster which, in particular, Germany’s National Socialism had caused in Europe. One element of constitutive importance in this response was the commitment of the integration project to the rule of law. This answer was necessary, but was it meant to be comprehensive? Was Europe to listen to Hayek, or was its integration project bound to be complemented by the establishing of a European *Sozialstaatlichkeit*, some kind of European social model?

Europe’s Social Deficit

Ever since the French referendum of 2005, “Social Europe” has become a nightmare for proponents of a European Constitution, not a noble complement of their project. The perceived dismantling of welfare state accomplishments was of decisive importance in France, and remained important in the later campaigns, even in Ireland. This importance was by no means a comforting experience for the proponents of a European social model. They found themselves in very irritating alliances with populist movements, which presented precisely the kind of irrationalism which had concerned Weber and von Hayek.

¹) Von Hayek’s work is the response of a great intellectual to totalitarian barbarism. Two other Jews from Vienna who published around the same year deserve equal admiration: Karl R. Popper (1945) and Karl Polanyi (1944) – and the diversity of their orientations is a lasting reason for the defence of pluralism.

The century-old tensions between rule of law and *Sozialstaat* have apparently again come to the fore – and they seem to exhibit the same kind of destructive potential that characterised their history. History, however, does not repeat itself. It is important to understand the impact of Europe's post-national constellation on the patterns of the controversies which all European societies have experienced – particularly because Europe is in such troubled waters.

We start our analysis with a brief historical account. However, this analysis will not attempt to explain "what really happened in the past", but will, instead, reconstruct the institutional locus of "the social" in the various stages of the integration project.

"De-coupling" "the Social" from the Economic Constitution in the Formative Period

The project of European integration was launched not as an experiment in supranational democracy. This observation by no means downplays its historical importance or dignity. The apparent political modesty of the economic objective documented a break with the previous nationalist striving for power. After the "bitter experiences" of the Second World War and its devastating effects, the prospect of economic integration was intended as a means of ensuring lasting peace and economic well-being. The primarily economic and technocratic design of the project appeared, to its architects, to be a precautionary shield in a political constellation which was still unsettled. It was a choice of what seemed possible and reasonable.

With hindsight, however, the implications of this choice, which were hardly foreseeable and certainly not a salient issue half a century ago, become apparent. The choice for "economic Europe" implied a renunciation of a "European social model", which would have addressed the tensions between rule of law and social justice. This choice has been coined by Fritz Scharpf as a de-coupling of the social sphere from the economic sphere (Scharpf 2002). This is an analytical observation, not a normative statement on the *finalité* of the European project.

The normative evaluation is, of course, controversial. The exclusion of the social sphere from the integration project has the potential for failure, which is of constitutional significance for those who assume that the citizens of constitutional democracies are entitled to determine in what kind of social order they prefer to live. This is a political right of fundamental

constitutional significance. This is supported by the fact that, in the course of the negotiations, France had tried to consolidate the competences of the Community in the field of social policy (Milward 1999; Scharpf 2002).

Are we to interpret its failure and the neglect of “the social” in the formative era as a definite decision on a constitutional issue of the utmost political sensitivity and practical importance? “Social Europe” was not yet on the agenda, and there was simply no need to engage in pertinent debates (Leibfried and Zürn 2005; Ruggie 1982). Only in the course of the intensifying impact of the Europeanisation process was Europe’s “social deficit” to become apparent.

Contemporary theories of legal integration, however, have to conceptualise the European Community as it was institutionalised. Two such efforts stand out and remain of lasting importance: Germany’s *ordo-liberalism*, and Joseph Weiler’s theory of *supranationalism* (Weiler 1981, 1991).

Ordo-liberalism is not only an important theoretical tradition in Germany, but also a powerful contributor to German ideational politics.² The *ordo-liberal* school reconstructed the legal essence of the European project as an “economic constitution” which was not in need of democratic legitimacy. The freedoms guaranteed in the EEC Treaty, the opening up of national economies and anti-discrimination rules, and the commitment to a system of undistorted competition were interpreted as a quasi-Schmittian “decision” that supported an economic constitution and also conformed with *ordo-liberal* conceptions of framework conditions for a market economy.

The fact that Europe had initiated the path toward integration as a mere economic community lent plausibility to such *ordo-liberal* arguments – and even required them: in an *ordo-liberal* account, the Community acquired a legitimacy of its own by interpreting its pertinent provisions as prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition at a supranational level. This legitimacy was independent of the democratic constitutional institutions of the state. By the same token, it imposed limits upon the Community: thus, discretionary economic policies seemed illegitimate and unlawful. The

² *Ordo-liberalism* has not attracted too much attention outside Germany. Publications in English are rare and mostly by German authors. All the more important is the notable exception of Foucault 2004:105–134 (lecture of 7 February 1979); 135–164 (lecture of 14 February 1979).

ordo-liberal European polity consists of a twofold structure: at a supranational level, a commitment to economic rationales and a system of undistorted competition, while, at a national level, re-distributive (social) policies may be pursued and developed further (Joerges 2005; Joerges and Rödl 2005).³

“Integration through law” is the legal paradigm commonly associated with the formative era of the European Community outside German borders (Weiler 1981). It is not by chance that generations of scholars have built upon it or tried to decipher its sociological basis (Vauchez 2008). The strength of the paradigm may well rest (in part) on assumptions that become apparent only when social and economic policies are viewed through its lenses.

Then, we become aware of a *Wahlverwandtschaft* with German ordo-liberalism in that only the European market-building project was juridified through supranational law, whereas social policy at a European level could, at best, be said to have been handled through intergovernmental bargaining processes. This affinity has its limits, however. It was not intended that Joseph Weiler’s legal supranationalism would overrule and outlaw “the political” in the same way as ordo-liberalism. It is nevertheless true that in Weiler’s analysis “social Europe” was an unlikely option, simply because its advent was dependent on unanimous intergovernmental voting.

To summarise: Europe was conceived according to principles of a dual polity. Its “economic constitution” was non-political in the sense that it was not subject to political interventions. This was its constitutional-supranational *raison d’être*. Social policy was treated as a categorically-distinct subject. It belonged to the domain of political legislation, and, as such, had to remain national.

Fritz Scharpf’s de-coupling thesis captures this constellation well without, however, providing a basis for a definite normative theory regarding the constitutionalisation of Europe. It is, nevertheless, possible to interpret his thesis as a theory with normative implications. Scharpf’s analysis rests upon the assumption that the social integration of capitalist societies will require a balance between social and economic rationality. This is not only a sociological theory (Habermas 1979, 1989), but also an assumption

³ European integration was, in its early years, by no means, an uncontested project among the protagonists of ordo-liberalism (Wegmann 2002:297 et seq., 351 et seq.)

that summarises a political preference rooted in the histories of European societies (Judt 2005).

Hence, it seems unsurprising that it should become imperative for European politics to address the social dimensions and implications of the integration project (Eucken 1952; Wegmann 2002). It seems adequate to interpret the “de-coupling” of the social sphere from the economic order not as a kind of Schmittian decision against a European social model, but as a temporary compromise, which was to pass the debate on the institutional design of Europe’s social dimension on to future generations.

Completion of the Internal Market, Erosion of the Economic Constitution, and Advent of Social Europe

What seemed originally like a sustainable equilibrium was not, however, to remain stable. One important reason for its instability was the progress of the integration project.

The Delors Commission’s 1985 White Paper on Completion of the Internal Market is widely perceived not only as a turning point, but also as a breakthrough in the integration process. Jacques Delors’ initiative provided the hope of overcoming a long phase of stagnation; the means to this end was the strengthening of Europe’s competitiveness. Economic rationality, rather than “law”, was to be understood from now on as Europe’s orienting maxim, its first commitment and regulative idea.

In this sense, it seems justified to characterise Delors’ programme as a deliberate move towards an institutionalisation of economic rationality. This seems even more plausible when we consider two complementary institutional innovations accomplished through, and subsequent to, the Maastricht Treaty, namely, the Monetary Union and the Stability Pact. Europe resembled a market-embedded polity governed by an economic constitution, not by political rule.

This characterisation, however, soon proved to be too simplistic (Bercusson 1995; Joerges 1994; Nörr 2007). What had started out as an effort to strengthen Europe’s competitiveness and to accomplish this objective through new (de-regulatory) strategies soon led to the entanglement of the EU in ever-increasing policy fields and the development of sophisticated regulatory machinery. It was, in particular, the concern of European legislation and the Commission with “social regulation” (the health and safety of consumers and workers, and environmental protection) which served as irrefutable proof of this. The weight and dynamics of these policy fields

had been thoroughly under-estimated by the proponents of the “economic constitution”.

Equally important and equally unsurprising was the fact that the integration process intensified with the completion of the Internal Market and affected ever-increasing policy fields. This was significant not so much in terms of its factual weight, but rather in view of Europe’s “social deficit”, in terms of new efforts to strengthen Europe’s presence in the spheres of labour and social policy.

These tendencies became truly significant during the bargaining over the Maastricht Treaty, which was adopted in 1992. This is why this Amendment of the Treaty, officially presented as both an intensification and consolidation of the integration project, met with fierce criticism. The most outspoken critique came not from the political left, but from proponents of the new “economic turn” in powerful political quarters, and, in particular, from Germany’s second generation *ordo-liberals* (Streit 1998; Streit and Mussler 1995). Following the explicit recognition and strengthening of new policy competences, which was accomplished in Maastricht, it seemed simply no longer plausible to assign a constitutive function and normative dominance to the “system of undistorted competition” because this competition policy had now been downgraded to one among many commitments. In addition, the expansion of competences in labour law by the Social Protocol and Agreement on Social Policy of the Treaty blurred the formerly clear lines between Europe’s (apolitical) economic constitution and the political responsibility assumed by its Member States in relation to social and labour policies.

Three Pillars of Social Europe and their Fragility

The quest for “Social Europe” has gained ever-increasing momentum since the Maastricht Treaty of 1992 (Bercusson et al. 1997). Three recent events nurtured the hope that progress, albeit slow, would be a matter of course. One was to have its birth with the promotion of the Open Method of Co-ordination at the Lisbon Council of 2000. This Council had been dedicated primarily to knowledge society issues and to setting very ambitious goals for Europe in pertinent industries. However, the Council felt that the agenda of “Social Europe” should simultaneously be renewed.

This was a daring exercise and promise. What until then had been perceived as an obstacle to strengthening Europe’s social dimension, namely,

the lack of genuine European competences and the unavailability of the traditional “Community method,” was now presented as having both virtue and potential. The OMC was presented by its proponents as an appraising non-coercive form of policy co-ordination which emphasised mutual learning and exchange of good practices, which could be applied to politically-sensitive fields, such of social protection, where harmonisation was considered by many to be neither practicable nor desirable (Sabel and Zeitlin 2008).

The second event was the inclusion of “Social Europe” in the proceedings of the European Convention. This was not envisaged at the outset of the proceedings. “Social Europe” was not part of the original Convention agenda. With hindsight, this proved to be an untenable, even incomprehensible, design in a project aiming at a “Constitution for Europe”. The Working Group on “Economic Governance” was hence complemented by an additional Working Group on “Social Europe”.

“Social Europe” is once again, and without any significant changes, present in the Treaty on the Functioning of the European Union, signed at Lisbon on 13 December 2007. Hence, we can observe a remarkable continuity in the discussion on the three constitutive elements of “Social Europe”. All three elements can be understood as resulting from long-term developments. Their validity and impact would be strengthened by an adoption of the Lisbon Treaty (LT), but would not be dependent on what is now (in October 2008) a rather unlikely event.

In view of its generality and status in both the Draft Constitutional Treaty (DCT) and the Lisbon Treaty, the commitment to a “competitive social market economy” is the first element to be mentioned here. The formula owes its quasi-constitutional dignity to an initiative by then Foreign Ministers Joschka Fischer and Dominique de Villepin in the deliberations of the European Convention. It was then understood as a political signal and has retained this status (Mayer 2008). The positive connotations of this signal certainly stem from its historical origin (Ebner 2006; Joerges and Rödl 2005; Manow 2001).

The notion of a “social market economy” was coined in the early Federal Republic. It represented a social model distinct from Hermann Heller’s “social *Rechtsstaat*,” but nevertheless symbolised a “third way” between *laissez-faire* capitalism and socialism. This third way was quite a well-defined agenda which Alfred Müller-Armack had developed in numerous publications (Müller-Armack 1956, 1998). This agenda envisaged re-distributive

policies through taxation and subsidies, minimum wages, welfare aid, tenant subsidies, investments in higher education, and the objective of a high rate of employment. “The social” was hence relying upon a host of competences which are not available at the European level.

For this simple reason, “the competitive social market economy” cannot be equated with its historical model. As a former judge of the German Constitutional Court, Ernst-Wolfgang Böckenförde commented more than a decade ago: “European law cannot but realize a pure market economy because it does not have the means of establishing a social market economy.” Böckenförde referred to the law as it stood in 1979 and which still stands today.

The recognition of “social rights” (138 DCT; 151 LT) encounters similar problems. Here one has to differentiate. Collective rights, such as the right to strike, do not have a fixed prescriptive content. They are instead an empowerment to promote social objectives. As the judgment in *Viking* uniquely demonstrates, the recognition of such a collective right at the European level does not imply that European law should respect its transnational exercise.

With regard to this position, which is by no means in line with the opinion prevailing among European labour lawyers (Orlandini 2007), social rights which grant entitlements have to cope with a twofold difficulty. Such rights need to be substantiated by special legislation and supported by financial means (Böckenförde 1991). This is in many cases a serious obstacle to their recognition at the European level. This is not to suggest that social rights do not “deserve recognition” at European level. However, as Jürgen Habermas underlines (1996), for example, it is the political quality of social rights which requires an engagement of the various branches of the political system. At the European level, however, the judiciary will have to assume all of these functions.

The Third Pillar of “Social Europe”, namely, the new “soft law” mechanisms for co-ordinating social and labour market policies, is the most delicate of all three. Many proponents of this mode of governance suggest that its legitimacy may result from its potentially beneficial effects. Others underline and seek to promote its procedural qualities. However, this complex debate cannot be taken up in the present context in any detail. Suffice it to note that, in my own view, both defences of the “Open Method of Co-ordination” fail to take the very idea of constitutionalism, namely,

the idea of law-mediated and rule-of-law bound governance sufficiently seriously (Joerges 2008).

Can “Social Europe” be established on those three Pillars? While debates on each pillar continue intensively, we observe the European Court of Justice passing a series of judgments in the light of which these debates seem purely academic. According to these judgments, the EU is committed not to a social, but to a strictly neo-liberal, market economy; the exercise of “social rights” in such an economy has to respect the economic freedoms guaranteed by the Treaty. Thus, the soft law method of co-ordination needs to operate in the shadow of the hard law of negative integration. This is why we do not pursue our queries with stability or fragility of the three Pillars any further here, and turn, instead, to the jurisprudence of the ECJ.

“Authoritarian Liberalism”⁴ in Recent Jurisprudence of the ECJ⁵

In a series of four judgments handed down since December 2007 (2007a; 2007b; 2008a; 2008b), the ECJ has dealt with the impact of European law on national labour law in a way which amounts to a re-chartering of the European Union. This characterisation may seem all too dramatic in view of the doctrinal continuity of these judgments with firmly established principles and rules. Whether there is continuity or change, however, depends on the conceptual framework through which one observes and evaluates these judgments.

There is continuity if one restricts their analysis to invoking the direct effect of economic freedoms in conjunction with the supremacy doctrine, a tandem, which is widely and for good reasons understood as the core of the European charter ever since the ECJ’s early judgments in *Van Gend & Loos* (1963) and *Costa v. ENEL* (1964). Continuity is much less apparent when one considers the subtlety of the ECJ’s delineation of economic freedoms and regulatory concerns in such numerous cases. These cases have established the reputation of a jurisprudence which combined its insistence on

⁴ The term was coined by Hermann Heller in a commentary on early ordo-liberalism (Heller 1933).

⁵ The following section draws on Ch. Joerges & F. Rödl 2009. The phrase in quotations is from Heller 1933.

Community concerns and objectives with acceptance of the political autonomy of Member States (Scharpf 1994). Continuity seems even more questionable when one considers the new jurisprudence in the light of Europe's "unfinished agenda", namely, the tensions arising from its "social deficit" and its socio-economic diversity, which has deepened since 2004.

Three Background Problems

It is submitted here that both mechanical applications of inherited doctrines fail to resolve the threefold *problématique* noted above. This reservation is not meant to indicate a generalising disrespect of these doctrines. It is, instead, a plea to consider their legitimate scope in light of equally fundamental constitutional principles, in particular, the principle of enumerated competences, the commitment of the EU to democratic values, and their importance for the functions of the European Court.

The importance of the order of competences has been addressed implicitly in the section on the decoupling of the social from the economic constitution (pages 68–71 above). The limitation of European competences in the areas of social policy and labour law cannot be interpreted as an empowerment of European institutions to subject these fields to the discipline of Community principles and to overrule conflicting national legal traditions. As Antoine Lyon-Caen has recently put it (2008:2)

Dans les sociétés d'Europe de l'Ouest, le droit du travail s'est constitué par émancipation du droit du marché, dénommé moyennant les variations terminologiques qu'il importe de ne pas oublier: liberté du commerce ici, freedom of trade ailleurs... Ce n'est pas que des règles sur le travail n'existaient pas avant cette émancipation, mais elles relevaient d'avantage d'une police du travail, partie plus ou moins autonome d'une police du ou des marchés.⁶

The uniqueness of labour law, the social and economic constitution, is an indispensable dimension of democratic orders, a feature Heller's social

⁶ "In West European societies labour law constituted itself as an alternative to the law of the market. It developed terminological distinctions which one must not forget: *liberté de commerce* here, freedom of trade there. . . . To be sure, labour had been a concern for law before that emancipation occurred, but the rules concerning labour operated in the framework of a law which was meant to police the market or the markets."

Rechtsstaat shares with a social market economy and the ensemble of Europe's democratic tradition.

Interventions in constitutional accomplishments of such dimensions cannot be based upon the supremacy which European law grants to economic freedoms. The very same objection militates against an invocation of these freedoms as the arbiter over distributional conflicts in the enlarged EU. The commitment to equal living conditions is constitutional principle in federations such as Germany. The implementation of this principle is certainly far from perfect. It is also true that the means at the disposal the EU are by no means equivalent to those of the nation states. It remains, nevertheless, problematical to interpret economic freedoms and market processes as *per se* legitimate alternatives to political decisions over distributional issues.

Last, but not least, one has to consider the proper function of the ECJ in the handling of these issues. The ECJ is not a constitutional court with comprehensive competences. Thus, we may ask: Is this Court authorised to re-organize the interdependence of Europe's social and economic constitutions? Is its proper task to "weigh" the values of *Sozialstaatlichkeit* against the value of free market access, of the values of political democracy against the rationality of socially disembedded economies?

These three issues can only be outlined here. It is important, however, to remain aware of this background in evaluating the Court's recent jurisprudence. We restrict our analysis to the first two of the four cases mentioned. In the first, *Viking*, we focus on the Court's interpretation of the impact of primary law whereas in the second, *Laval*, we pay particular attention to the Courts' interpretation of European secondary law (Joerges and Rödl 2008, 2009).

Economic Liberties versus Social Rights: The Viking Case

It seems nothing but economically sound, at least in the short run, for a Finnish shipping company (Viking) to try to replace its predominantly Finnish seafarers with cheaper labour from Estonia. It seems equally understandable for the Finnish crew to seek protection against unemployment. This provided the background to the Finnish (Seamen) Union's threats to go on strike. Viking argued, *inter alia*, that the threat of collective action by the Finnish Union is incompatible with Viking's right of free establishment as guaranteed by Article 43 EC.

The ECJ quite solemnly recognised the “right to take collective action, including the right to strike... as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures [...]” (Case C-438/05, *Viking* 2007:§ 44). With the following argumentative step, however, the Court fundamentally reconfigures the traditional balance between economic freedoms at European level, and social rights at national level. This reconfiguration is hardly visible at first sight.

All the Court requires is that when exercising their competence in the field of collective labour law, the Member States must comply with Community law (Case C-438/05, *Viking* 2007:§ 40). The delicate nature of this request stems from the fact that the Community has no competence to regulate national industrial relations. The fundamental rights concerned are not within the competence of the Community, as Article 137 (5) EC explicitly provides that “pay, the right of association, the right to strike or the right to impose lock-outs” are matters to be regulated by Member States.

The Court, nevertheless, feels authorised to insist upon a “proportionate” exercise of the right to strike (Case C-438/05, *Viking* 2007:§ 46). With this asymmetrical (diagonal) interlinking of the fundamental rights of the European economic constitution with the fundamental rights of national labour constitutions, the very autonomy of Member State labour and social constitutions is *de facto* eroded. This move is all the more remarkable as it also directly concerns the unions even though their threat to strike cannot be equated with one-sided regulations via state legislation (Case C-438/05, *Viking* 2007:§ 57).

The separation of powers in the field of economic and social spheres is not clear-cut and/or rigid. The ECJ accordingly underlines that, under Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an “internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital”. They are also to include “a policy in the social sphere”, and Article 2 EC states that the Community is to have as its task, *inter alia*, the promotion of “a harmonious, balanced and sustainable development of economic activities” and “a high level of employment and of social protection”.

What conclusion can be drawn from all this? In principle, the “social purpose” of national labour law would legitimise collective action that is aimed at “protecting the jobs and conditions of employment”. The pre-conditions, however, are that the “jobs or conditions of employment at issue... are, in fact, jeopardised or under serious threat”, and that any actions taken “do not go beyond what is necessary to attain that objective” (Case C-438/05, *Viking* 2007:§ 81, 84). The Court leaves such evaluations to the national courts which have jurisdiction – in *Viking*, ironically, an English court, and indicates only vaguely what yardstick is available to be used in assessing the “necessity” of union actions (Case C-438/05, *Viking* 2007:§ 81–83).

The incompatibility of the Court’s requirements with the very nature of collective labour law is nevertheless striking:

[T]he Court expects trade unions to espouse stated objectives and to pursue them in a suitable and non-excessive way. Remarkably, the Court even suggested that “less restrictive” means need to be exhausted first. This is an incredible expectation, for it seeks to submit collective acts that are part of a struggle to a normative precept that has been developed for a context where those wielding sovereign rights are supposed to attain objectives in an unruffled and instrumentally fine-tuned way. Trade union action needs to be far cruder than bureaucratic rationality. In fact, necessarily it has to be excessive in order to attain its objective. It may well need to threaten to bring bankruptcy on an undertaking. Confronting trade union action with proportionality requirements makes it destined, from the outset, to lose out against business interests. (Somek forthcoming 2009)

Secondary Law in New Territories: The Laval Case

The conflict constellation in the Laval case (Case C-341/05, *Laval* 2007) again related to wage differences in Old and New Europe. Laval, a company incorporated under Latvian law whose registered office is in Riga, had won the tender for construction of a school building on the outskirts of Stockholm. In obtaining the tender, it took advantage of its ability to post workers to Sweden with considerably lower wages from Latvia. In May 2004, when work was to commence, and after Laval had posted several dozens of its workers to work on the Swedish building sites, Swedish

trade unions resorted to hostile actions against Laval with determination and intensity. Particularly effective was the blockade of the building sites, causing Laval to cede.

In the Court's judgment, secondary law is of decisive importance, namely, that of Directive 96/71/EC concerning the posting of workers within the framework of the provision of services. According to Recital 22 of this Directive, the Community legislator did not aim at a harmonisation of the substantial-legal provisions concerning the employment of posted workers. The Member States were, instead, asked to ensure that the working conditions of those workers posted to their territory were, in a number of essential working conditions (Article 3 (1)), in compliance with their own legal provisions and minimum wage requirements (Rödl 2008).

Sweden adopted the Posted Workers Directive in 1999. Its implementing legislation included some legally-prescribed minimum working conditions, in particular, working hours, but it failed to provide for a specific level in relation to wage minimums or any system which ensured universal applicability. "Universal applicability" is, however, required by Article 3 (1) of the Directive. Sweden, instead, intended to make use of the special ruling in Article 3 (8) (2) of the Directive, which accepts, as an alternative, wage standards which are *de facto* generally binding. Moreover, Sweden left the determination of these minimum standards to employers and employees, and there were no requirements for authoritative approval, *i.e.*, it empowered its unions to defend the wage levels for which they had bargained.

The ECJ, however, declared all the activities of the Swedish unions which aimed at this objective to be illegal. According to its interpretation, the objective of the Directive was not merely the restriction of wage cost competition, but the determination of the legality of collective actions. The Court found that the Directive prohibited all union activities beyond those essential to working conditions enumerated in Article 3 (1), and prohibited, in particular, union activities for essential working conditions that are better than those already provided for legally (Case C-341/05, *Laval* 2007:§ 99), as well as union activities for all wages with the exception of the lowest wage group (Case C-341/05, *Laval* 2007:§ 70).

We are faced again with an extremely extensive interpretation of the impact of European law. Directive 96/71, adopted after lengthy discussions and bargaining processes, is concerned only with a conflict situation within the Internal Market. In the Court's daring interpretation, this

Directive is transformed into a cornerstone of a European labour and social constitution, which outlaws important elements of the Swedish social model (Case C-341/05, *Laval* 2007:§ 10, 92). The Court is, again, going a step too far.

Concluding Remarks

The Court's recent jurisprudence has met with harsh critique from many quarters across Europe, in particular, the Union movement. "The only way is not to follow the Court," to exercise principled disobedience, was the answer of Fritz Scharpf, Germany's most respected political scientist, in an interview with a union periodical (Scharpf 2008). This type of critique indicates that the ECJ risks being perceived as a partisan body. Critics such as Fritz Scharpf are certainly aware of the constraint under which the Court operates. After the failure of the Draft Constitutional Treaty, the uncertainty about the future of the Lisbon Treaty, the Court may be the one and only institution which can keep the integration project alive.

This, however, is a delicate task. There is, in view of the indeterminacies of European law, considerable room for judicial manoeuvre. A more moderate and restrained interpretation suggesting procedural, rather than substantive, answers to politically highly-sensitive conflicts would be conceivable. Such a restraint seems all the more appropriate since even the parties to these proceedings from Eastern Europe, who were all insisting on economic freedoms, should not be so sure that the dismantling of Western welfarism is in their own long-term interests.

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