

## **On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the “Social Deficit” of the European Integration Project**

*Reflections after the Judgments of the ECJ in Viking and Laval*<sup>1</sup>

*Christian Joerges\* and Florian Rödl\*\**

### **Introductory Remarks**

“Social Europe” has become an intensively discussed topic. The Maastricht Treaty, the Amsterdam Treaty, the Lisbon Council of 2000, together with the European Convention, have constituted the basis of vital turning points within relevant debates. Today, however, with the Lisbon Reform Treaty awaiting ratification, public attention has shifted from treaty amendments and constitutional deliberations to the European Court of Justice. With the two landmark decisions in *Viking* and *Laval*, most recently joined and complemented by *Rüffert*, the Court has reminded us that the hard law of negative integration can still be brought to bear where political processes have proven to be slow and cumbersome and the benefits of soft law mechanisms remain obscure.

“Social Europe”, *i.e.* the ensemble of European social and labour law and policy and social rights has become a wide and opaque field of such complexity that generalists in European law, let alone students of other sub-disciplines, tend to shy away from intervening in the dominating discourses. In our view, this is unfortunate because the formation of the “social” and the “economic” are contemporaneous and the outcome of this dual process is of vital significance for the state of the European Constitution. Our essay will address these interdependencies. We will therefore start by developing a theoretical framework within which the project of “social Europe” can be observed and assessed. In Section I, we will submit a reconstruction of what we call the “social deficit” in the original design of the European Economic Community, arguing that a credible response to this deficit would be a pre-condition for the democratic legitimacy of the intensified integration project; alternatively, we will underline the need to link the rule of law with democracy and social justice. Our second step will focus on the constitutional forms through which such linkages can be institutionalized. As we will argue in Section II, their realisation requires a re-conceptualisation of European law as a new type of supranational conflict of laws. This vision is contrasted in Section III, first with the steps towards Social Europe envisaged in

---

<sup>1</sup> An earlier version of this paper was presented on 10 and 11 February by Christian Joerges in Seminars at Stockholm and Örebro University organized by Antonina Bakardjieva-Engelbrekt. The present elaboration responds to the seminar discussions and in particular to extensive, critical and constructive written comments by Brian Bercusson, London. The usual disclaimer, however, remains fully applicable.

\* Christian Joerges is Research Professor at the University of Bremen, Faculty of Law.

\*\* Florian Rödl, PhD (Florence), M.A. (Berlin) is Research Fellow at the Centre for European Law and Politics (ZERP) at Bremen University.

the Draft Constitutional Treaty, and then with the principles established in *Viking* and *Laval*.

### **Section I: European integration and democracy: a legacy of unresolved tensions**

The project of European integration was launched not as an experiment in supranational democracy, but in the aftermath of the Second World War and its devastating effects on the European economies. It was intended to serve as a means whereby lasting peace among former enemies could be ensured, and had as its design, an integration strategy which would mitigate the significant differences between objectives and concerns/anxieties of Germany on the one hand, and those of the allied victors on the other.<sup>1</sup> This was accomplished through a primarily economic and technocratic integration strategy. That choice certainly did not come as a surprise. In/with (both correct, “with” preferable) hindsight, however, the implications of this choice, which were hardly foreseeable and certainly not a salient issue half a century ago, become apparent. This is true for both the queries on which our analysis will focus.

The first may be referred to as a “normative fact”, namely, the exclusion of “the social” sphere from the integrationist objectives which Fritz W. Scharpf famously characterised as the decoupling of the social sphere from the economic sphere.<sup>2</sup> But why should this decoupling be problematical? This question is of constitutional significance. The exclusion of “the social” sphere from the integration project is a potential failure of constitutional significance for those who assume that the citizens of constitutional democracies are entitled to vote in favour of welfare policies. This is by no means a trivial premise, not even at national level.<sup>3</sup> The second premise concerns the integration process. Only in the course of its intensifying and growing impact on the “economy and society”, will a response to the “social deficit” become a political necessity.<sup>4</sup>

---

<sup>1</sup> Students of European law tend overly to focus their analyses upon the history of “institutionalised Europe” rather than on the diverse histories of the Member States, their complex relations, and the legacies of inherited conflicts, as well as the generation of new ones.

<sup>2</sup> Scharpf, Fritz W., “The European Social Model: Coping with the Challenges of Diversity”, [2002] 40 *Journal of Common Market Studies*, 645 ff.

<sup>3</sup> Friedrich August von Hayek was the most outspoken critic of this theory; the turn to welfare policies means taking *The Road to Serfdom*, (London, Routledge, 1944). A legendary debate in the young German Federal Republic between Wolfgang Abendroth and Ernst Forsthoff concerned precisely that *problématique* (see Fischer-Lescano, Andreas and Eberl, Oliver, “Der Kampf um ein soziales und demokratisches Recht. Zum 100. Geburtstag von Wolfgang Abendroth”, [2006] 51 *Blätter für deutsche und internationale Politik*, 577 ff.) and these debates are going on until today (see the Special Issue on „Social Democracy“ of the [2004] 17 *Canadian Journal of Law and Jurisprudence on Social Democracy* (Guest Editor: Colin Harvey)).

<sup>4</sup> For a brilliant recent analysis of this interdependence cf. McCormick, John P., *Weber, Habermas, and Transformations of the European State. Constitutional, Social, and Supranational Democracy*, (Cambridge, Cambridge UP, 2007).

### I.1 Europe's equilibrium in the formative period of the integration process

Theories of legal integration can be regarded as efforts to provide a contextually (historically, socially and politically) “adequate” legal conceptualisation of the state of the European Community (now Union). Two such efforts aimed at capturing the “nature of the beast” in its formative period stand out and remain important: Germany’s ordo-liberalism and Joseph Weiler’s theory of supranationalism.

Ordo-liberalism is not only an important theoretical tradition in Germany, but also a powerful contributor to German ideational politics. The ordo-liberal school<sup>5</sup> reconstructed the legal essence of the European project as an “economic constitution” which was not in need of an ideal like 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 which also conformed with the ordo-liberal conceptions of the framework conditions for a market economic system. The fact that Europe had started out on its integrationist path as a mere economic community lent plausibility to ordo-liberal arguments – and even required them: in the 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 by supranational institutions. This legitimacy was independent of the State’s democratic constitutional institutions. By the same token, it imposed limits upon the Community: thus, discretionary economic policies seemed illegitimate and unlawful.<sup>6</sup> The ordo-liberal European polity consists of a twofold structure: at supranational level, it is committed to economic rationality and a system of undistorted competition, while, at national level, re-distributive (social) policies may be pursued and developed further.<sup>7</sup>

“Integration through law” is the legal paradigm commonly associated with the formative era of the European Community outside the German borders.<sup>8</sup> It is not by chance that generations of scholars have built upon it or tried to decipher its sociological basis.<sup>9</sup> 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 the *Wahlverwandtschaft* with German ordo-liberalism, in that only the European market-

---

<sup>5</sup> European integration was, in its early years, by no means, an uncontested project among the protagonists of ordo-liberalism (see Wegmann, Milene, *Früher Neoliberalismus und europäische Integration: Interdependenz der nationalen, supranationalen und internationalen Ordnung von Wirtschaft und Gesellschaft (1932-1965)*, (Baden-Baden, Nomos, 2002), 297 ff., 351 ff.). Her analyses fit well the enquiry into the politics of competition policy by Karagiannis, Yannis, *Preference Heterogeneity and Equilibrium Institutions: The Case of European Competition Policy*, PhD Thesis EUI Florence 2007, ch. 7.

<sup>6</sup> Significant, here, is Müller-Armack, Alfred, “Die Wirtschaftsordnung des Gemeinsamen Marktes”, in: Müller-Armack, Alfred (ed.) *Wirtschaftsordnung und Wirtschaftspolitik*, (Freiburg i.Br, Rombach, 1966), 401 ff.

<sup>7</sup> Ordo-liberalism has not attracted too much attention outside Germany. All the more important is the notable exception of Foucault, Michel, *Naissance de la biopolitique. Cours au Collège de France*, (Paris, Seuil-Gallimard, 2004), in particular the lectures of 7 February (at 105 ff) and of 14 February 1979 (at 135 ff).

<sup>8</sup> See, path breaking, Weiler, Joseph H.H., “The Community System: the Dual Character of Supranationalism”, [1981] 1 *Yearbook of European Law*, 257 ff.

<sup>9</sup> Most recently, Vauchet, Antoine, “‘Integration-through-Law’. Contribution to a Socio-history of EU Political Common sense”, EUI Working Paper RSCAS 2008/10.

building project was juridified through supranational law, whereas social policy at European level could, at best, be said to have been handled through intergovernmental bargaining processes.

Fritz Scharpf's decoupling theory is, at least on the surface, not intended to be a contribution to the debates on the constitutionalisation of Europe. However, it does build upon sociological assumptions with constitutional implications. This holds true in particular for the argument that the social integration of capitalist societies will require a balance between social and economic rationality. This is, of course, again a primarily empirical issue, but it is one with obvious implications for the legitimacy of the polity under scrutiny.<sup>10</sup> Since we can assume that "welfarism" – notwithstanding its very diverse modes – is a common European heritage,<sup>11</sup> it will become imperative for European politics to address the social dimensions and implications of the integration project. Interestingly enough, German *ordo-liberalism* was well accustomed to this *problématique*. Its early proponents conceptualised it as the interdependence<sup>12</sup> of societal and economic "orders" (*Ordnungen/Verfassungen*<sup>13</sup>).

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. The social embeddedness of the market could, and, indeed, should, be accomplished by the Member States in various ways – and, for a decade and a half, the balance appears to have been stable.<sup>14</sup>

---

<sup>10</sup> See the classical studies by Habermas, Jürgen, *Legitimation Crisis*, (Boston, Beacon Press, 1979); "Towards a Reconstruction of Historical Materialism", in Seidman, S. (ed.), *Jürgen Habermas on Society and Politics*, (Boston, Beacon Press, 1989), 114 ff and J.P. McCormick (note 4), 176 ff.

<sup>11</sup> See Judt, Tony, *Postwar. A History of Europe Since 1945*, (New York, Penguin, 2005), e.g., at 777 ff.

<sup>12</sup> See, most famously, Eucken, Walter, *Grundzüge der Wirtschaftspolitik*, (Tübingen, Mohr/Siebeck, 1952), 6th ed. 1990, 180.); out of the rich literature on the interdependence theorem, see Wegmann, M. (note 5), in particular at 369 ff.

<sup>13</sup> *Verfassung* in German has a double meaning. It can imply a legal constitution and a social structure or pattern. The notion of *Ordnung* (order), too, comprises this twofold meaning. This clarification is necessary to convey our idea of a constitutionalisation of the economy, of other societal spheres or parts of the legal system. Such constitutionalisation can either claim the dignity of constitutional law (e.g., supremacy within the legal system) or be an integral part of the constitutional order (in this sense, Jürgen Habermas talks of the co-originality of private and public law; see Habermas, Jürgen, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, (Cambridge, MA: MIT Press, 1998), 84 ff.

<sup>14</sup> Reference is made here to J.H.H. Weiler who qualifies the years from "1958 to the middle of the 1970s" as Europe's foundational period (see Weiler, Joseph H.H., *The Constitution of Europe: "Do the New Cloths Have an Emperor?" and other essays on European integration*, (Cambridge: Cambridge UP, 1999), 16 ff. His reconstruction is compatible with the analysis of Leibfried, Stephan and Zürn, Michael "The National Configuration of the State in the Golden Age"; Leibfried, Stephan and Zürn, Michael, "Reconfiguring the National Constellation", in St. Leibfried and Michael Zürn (eds.), *Transformation of the State*, (Cambridge, Cambridge UP, 2005), 93-117. [= *European Review*, Volume 13, Supplement S1, available at: <http://0journals.cambridge.org>] and Ruggie, John, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order," [1982] 36 *International Organization*, 379 ff.

## **I.2 The completion of the Internal Market, the erosion of the Economic Constitution and the advent of Social Europe**

The original 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*<sup>15</sup> is widely perceived not only as a turning point, but also 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, from now on, to be understood as Europe's orienting maxim, its first commitment and its 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, rather than by political rule.

This characterisation, however, soon proved to be too simplistic.<sup>16</sup> 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 in view of Europe's "social deficit", in terms of the new efforts to strengthen Europe's presence in the spheres of labour and social policy.

These tendencies became mainstream during the preparation of the Maastricht Treaty, which was adopted in 1992. This is why this Amendment of the Treaty, officially presented as both an intensification and a consolidation of the integration project, met with fierce criticism. The most outspoken critique came not from the political left, but from the proponents of the new economic philosophy, and, in particular, from Germany's ordoliberalists.<sup>17</sup> And, indeed, the Maastricht Treaty of 1992 can be interpreted as a break from the

---

<sup>15</sup> Commission of the European Communities, "Commission White Paper to the European Council on Completion of the Internal Market", COM(85) 310 final of 14 June 1985.

<sup>16</sup> See, on the following, in more detail, Joerges, Christian, "Economic Law, the Nation-State and the Maastricht Treaty", in Dehousse, R. (ed.), *Europe after Maastricht: an Ever Closer Union?* (Munich, C.H. Beck, 1994), 29 ff, and the reconstruction in Nörr, Knut W., *Die Republik der Wirtschaft. Teil II. Vom der sozial-liberalen Koalition bis zur Wiedervereinigung* (Tübingen, Mohr/Siebeck, 2007), 44 ff. On spill over-effects of market regulation even in the area of collective labour law see: Bercusson, Brian, "The Collective Labour Law of the European Union", [1995] 1 *European Law Journal*, 157 ff.

<sup>17</sup> See Streit, Manfred E. and Mussler Werner, "The Economic Constitution of the European Community. From 'Rome' to 'Maastricht'", [1995] 1 *European Law Journal*, 5 ff.

ordo-liberal economic constitution. 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 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 distinct/clear lines between Europe’s (apolitical) economic constitution and the political responsibility assumed by Member States in relation to social and labour policies.

Up till now, a consensus on the interpretation of this new constellation has not emerged. Is this a result of contingent events and decisions? Has a deeper “logic” been at work? Back in 1944, Karl Polanyi, in his seminal *Great Transformation*, had argued that markets will always be “socially embedded”.<sup>18</sup> In Polanyian terms, both the initial decoupling of the economic from the social economic constitution in the design of the integration project and the later strive for competitiveness through the “completion” of the internal market programme can be interpreted as disembedding moves. Such moves, he had insisted, will provoke countermoves directed at a re-embedding of the market. The European experience seems, in principle, reconcilable with his message.<sup>19</sup> It is important to underline, however, that Polanyi had refrained from predicting the intensity and direction of such countermoves. The message one can safely infer from his writings is that markets could not be understood simply as mechanisms that functioned perfectly and automatically to adjust supply and demand. This message, its indeterminacy notwithstanding, is important enough. As Fred Block, one of Polanyi’s most important contemporary readers suggests:

*[t]he critical question is no longer the quantitative issue of how much state or how much market, but rather the qualitative issue of how and for what ends markets and states should be combined and the structures and practices that should exist in a civil society that will sustain a productive synergy of states and markets.*<sup>20</sup>

It is exactly in this sense that we invoke the “social embeddedness” theory. What happened in the implementation of the internal market programme, namely the establishment of an ever greater sophisticated regulatory machinery entrusted with the management of the internal market, was simply not dictated by some functional necessity. This development can be better understood as having been facilitated and shaped by political countermoves which then also addressed Europe’s social deficit more comprehensively until it became a prominent part of the European agenda.

---

<sup>18</sup> Polanyi, Karl, *The Great Transformation: The Political and Economic Origins of Our Time*, (1944), (Boston, Bacon Press, 1992), 45 ff, and 71ff.

<sup>19</sup> Cf., Caporaso, James and Tarrow, Sidney, “Polanyi in Brussels. European Institutions and the Embedding of Markets in Society”, RECON Online Working Paper 2008/01, available at [www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html](http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html).

<sup>20</sup> See Block, Fred, “Towards a New Understanding of Economic Modernity”, in Joerges, Ch., Str ath, B. and Wagner, P. (eds.), *The economy as a polity. The political construction of modern capitalism – an interdisciplinary perspective* (London, UCL Press, 2005), 3 and recently Beckert, Jens, “The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology”, MPIfG Discussion Paper 07/1.

## Section II: Conflict of laws as constitutional form

As stated in our introductory remarks, this section will outline an alternative to the prevailing understanding of Europe's constitutional perspectives. We will start with a clarification of our intentions. We do not believe that lawyers are well equipped to decipher the historical, political and sociological determinants of the developments of law. Their vocation is in our view, a more modest one, namely, to offer legal conceptualisations which are compatible with what we know about the law's context – and at the same time, seek to explain whether, or under what conditions, a deliberate adaptation to these contexts would be “worthy of recognition”. Our conflict-of-laws approach is not intended to “solve” the problematic of social Europe. What we seek to develop is a legal framework which adequately reflects Europe's post-national constellation and through which it seems possible to strive for a survival of Europe's social legacy.

Our idea of a new type of conflict of laws as Europe's proper constitutional form is less idiosyncratic in substance than its terminology may suggest. The core argument upon which it rests is in fact quite simple. Back in 1997, Jürgen Neyer and Christian Joerges submitted it under the heading of “deliberative” (as opposed to “orthodox”) supranationalism:<sup>21</sup>

*The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms [through which] to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes.*<sup>22</sup>

If the legitimacy of supranational institutions can be designed to cure these deficiencies – as a correction of “nation-state failures”, as it were – they may then derive their legitimacy from this compensatory function. To quote a recent restatement:

*We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy, but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires.*<sup>23</sup>

This, of course, is not the way in which the supranational validity of European law was originally understood and justified. Fortunately enough, however, the methodologically and theoretically bold and practically successful ECJ decision in favour of a European legal constitution<sup>24</sup> can be rationalised in this way. The European “federation” thus established a legal constitution that did not have to aim at Europe's becoming a state, but was able to derive its legitimacy from the fact that it compensates for the democratic deficits of the nation states. This is precisely the point of deliberative supranationalism. Existing European law had, according to the argument, validated principles and rules that meet with and deserve supranational recognition because they constitute a palpable community project:

<sup>21</sup> Joerges, Christian and Neyer, Jürgen, “From Intergovernmental Bargaining to Deliberative Political Processes”, [1997] 3 *European Law Journal*, 273 ff.

<sup>22</sup> *Ibid.*, at 293.

<sup>23</sup> Joerges, Christian, “Deliberative Political Processes’ Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making?”, [2006] 44 *Journal of Common Market Studies*, 790.

<sup>24</sup> Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] E.C.R. I.

Community members cannot implement their interests or laws without restraint, but are obliged to respect the European freedoms; they are not allowed to discriminate and can pursue only legitimate regulatory policies which have been approved by the Community; they must, in relation to the objectives that they wish to pursue through regulation, harmonise with each other, and they must reform their national systems in the most community-friendly way possible.

Why should this type of law be referred to as a new type of conflict of laws? This notion reminds us on the one hand of Europe's internal diversity, the fact that diversity is a cause of conflict of interests both, horizontally, among Member States and societal actors, and, vertically, between the different levels of governance and the institutional actors representing them.<sup>25</sup> It represents the effort to live with diversity rather than to strive for uniformity. European conflict of laws is "new", even revolutionary, because conflict of laws has traditionally – in all its sub-disciplines: private international law, international administrative law, international labour law, *etc.*, – refused to acknowledge claims under foreign „public“ law; according to such tradition, each State not only determined the international scope of its own public law unilaterally, but was also solely responsible for its enforcement. Traditional conflict of laws is, therefore, a paradigm example of what Michael Zürn characterises as "methodological nationalism".<sup>26</sup> The "New" European conflict of laws has, of course, to overcome this hostility. And the principles just cited do exactly that: they guide the search for responses to conflicting claims where no higher substantive law is readily available. To give voice to "foreign" concerns means, in the EU, first of all, that Member States mutually "recognise" their laws (that they are prepared to "apply" foreign law), that they tolerate legal differences and refrain from insisting ruthlessly on their own *lex fori* and domestic interests. This European law of conflict of laws is "deliberative" in that it does not content itself with appealing to the supremacy of European law; it is "European" because it seeks to identify principles and rules that make different laws within the EU compatible with one another.<sup>27</sup> The conflict of laws approach envisages a horizontal constitutionalism for the EU. It distances itself from both the orthodoxy of conflict of laws and orthodox supranationalism which promote top-down solutions to Europe's diversity. It seeks to accomplish what the Draft Constitutional Treaty had called the "motto of the Union",<sup>28</sup> namely, the vision of "unity in diversity".

<sup>25</sup> Mayntz, Renate, "The Architecture of Multi-level Governance of Economic Sectors", MPIfG Discussion Paper 07/13, at 22 ff.

<sup>26</sup> Zürn, Michael, "The State in the Post-national Constellation – Societal Denationalization and Multi-Level Governance", Oslo: ARENA Working Paper No. 35/1999.

<sup>27</sup> We refrain here from explaining two further implications. One is methodological: European conflict of laws requires a proceduralisation of the category of law. It has to be understood as a „law of law-making“ [Michelman, Frank I., *Brennan and Democracy*, (Princeton (NJ), Princeton UP, 1999), 34], a *Rechtfertigungs-Recht* [Wiethölter, Rudolf, "Just-ifications of a Law of Society", in Perez, O. and Teubner, G. (eds.), *Paradoxes and Inconsistencies in the Law*, (Oxford, Hart, 2005), 65 ff!]. The second concerns the need for a „second order of conflict of laws“. This need stems from the „turn to governance“ which we witness not just at the European level but also with nation states. Just as nation states have long had to learn to deal with complex conflict situations, to integrate expertise in legal decision-making and to co-operate with non-governmental actors, the EU had to build up governance arrangements which complement its primary and secondary law. „second order conflict of laws“ seeks to constitutionalise this sphere primarily through a proceduralisation of law; see, in more detail, Joerges, Christian, "Integration through De-legalisation?", forthcoming in [2008] 33 *European Law Review*.

<sup>28</sup> Article I-8 of the Draft Treaty on a Constitution for Europe (DCT), OJ C310/1, 16/12/2004.

Should this provide us with a new perspective for the cure of Europe's social deficit? This question will now be considered.

### Section III: Soft and hard responses to the quest for Social Europe

In a recent essay dealing with the state of the European Union following the signing of the reform treaty, Jürgen Habermas criticised the tendency of Germany's Social Democrats to respond to risks of economic globalisation through the means of the national welfare state. Would it not be preferable, he asked, to search for co-ordinated responses within the entire European economic space?<sup>29</sup> His question implicitly acknowledges the importance of Europe's social deficit. What answers are available? We are currently witnessing two seemingly contradictory, but in fact, complementary responses namely, the resort to soft modes of governance on the one hand, and the turn to orthodox supranationalism on the other.

#### III.1 "Social market economy", social rights and soft co-ordination

The first-mentioned alternative which was the option pursued by the Draft Constitutional Treaty,<sup>30</sup> was supported by a great number of its proponents and can be found largely unchanged in the so-called reform treaty of Lisbon. "Social Europe" was to be founded, in particular, on three corner stones: the commitment to a "competitive social market economy",<sup>31</sup> the recognition of "social rights"<sup>32</sup> and new "soft law" mechanisms for the co-ordination of social and labour market policies.<sup>33</sup> Joschka Fischer and Dominique de Villepin, to whom the assignment of constitutional significance to the concept of the "social market economy" is owed, thereby provided a political signal. However, they were hardly aware of the interdependence between the economic and the social constitution as illustrated in the theory of the "social market economy". The latter's legacy would have required what was not yet an imperative in the formative era of the European Economic Community, namely, a compensation for the decoupling of both spheres in the European Treaties.<sup>34</sup> Thus, all hope for a cure rested on new social rights and new co-ordination competences.<sup>35</sup> However, these expectations were never substantially justified.<sup>36</sup> This is why the reform treaty signed by the European governments in Lisbon will not markedly

<sup>29</sup> „Erste Hilfe für Europa“, DIE ZEIT no. 49/2007.

<sup>30</sup> Unsurprisingly, the Lisbon Treaty, as signed on 13 December 2007, is moving along the same lines.

<sup>31</sup> Article 3 (3), DCT.

<sup>32</sup> See Title IV (Solidarity) in Part II (The Charter of Fundamental Rights of the Union) DCT.

<sup>33</sup> See, especially, Article I-14 (4) DCT. For an instructive recent state of the art report on the Open method see. Laffan, Brigid and Shaw, Collin, "Classifying and Mapping OMCs in Different Policy Areas", *NewGov Paper*, 02/D09, 2005, available at

[http://www.eu-newgov.org/database/DELIV/D02D09\\_Classifying\\_and\\_Mapping\\_OMC.pdf](http://www.eu-newgov.org/database/DELIV/D02D09_Classifying_and_Mapping_OMC.pdf).

<sup>34</sup> See, in more detail, Joerges, Christian and Rödl, Florian, "The 'Social Market Economy' as Europe's Social Model?", in Magnusson, L. and Stråth, B. (eds.), *A European Social Citizenship? Pre-conditions for Future Policies in Historical Light*, (Brussels, Lang, 2005), 125 ff.

<sup>35</sup> See the contributions to de Búrca, G. and de Witte, B. (eds.), *Social Rights in Europe*, (Oxford, Hart, 2005), Búrca, G. and Scott, J. (eds.), *Law and Governance in the EU and the US*, (Oxford, Hart, 2006).

<sup>36</sup> See Joerges, Ch. and Rödl, F. (note 34) above.

advance the agenda of social Europe.<sup>37</sup> In the present context, however, we cannot and indeed need not examine the intrinsic merits and failures of these options, specifically because the recent jurisprudence of the ECJ has re-configured the agenda substantially. Following the ECJ judgments in *Viking* and *Laval*, one will have to ask what accomplishments could be achieved through the soft mechanisms of co-ordination in their confrontation with the “hard law” of negative integration.

### III.2 The ECJ judgments in *Viking* and *Laval*

These two cases have attracted wide attention over the last years. The conflicts that were addressed were directly related to the new socio-economic diversity in the Union following enlargement. In both cases, “old” (high wage-) Member States defended the principle that their wage level must not be eroded by low wage offers from new Member States. Furthermore, the latter States in both cases, invoked the economic freedoms guaranteed by the Treaty and strategically used not least by companies in the old Member States, which seek to operate at home at the wage levels of their eastern neighbours. “It is a bracing reminder to EU lawyers of the power of political and economic context to influence legal doctrine”, as observed by Brian Bercusson.<sup>38</sup> He also notes “that the new Member States making submissions were unanimous on one side of the arguments on issues of fundamental legal doctrine (horizontal direct effect, discrimination, proportionality) and the old Member States virtually unanimous on the other”.

#### III.2.a *Viking*: Freedoms in primary law and Member State labour constitutions

The plaintiffs in the *Viking* case<sup>39</sup> were a Finnish shipping company (*Viking*) and its Estonian subsidiary. *Viking* was a large ferry operator, running among others, the ferry *Rosella* registered in Finland. Its crew was predominantly Finnish. A labour agreement negotiated by the Finnish Seamen’s Union provided that the wages and conditions of employment were to accord with Finnish standards. But as the *Rosella* was not making sufficient profit at the time, *Viking* decided to re-flag the ferry in Estonia. The Finnish crew was replaced by Estonian seamen, as under Estonian labour law they were far less expensive.<sup>40</sup> This resulted in the Finnish Seamen’s union threatening to go on strike. Both the Finnish and the Estonian unions were affiliates of the International Transport Workers’ Federation (ITF). One of the ITF’s prime policy targets included “flags of convenience”. It

---

<sup>37</sup> For a detailed analysis focusing on the lack of dynamically exercisable European competences to articulate the new social aims and rights at European level, see Rödl, Florian, “Labour Constitution”, in von Bogdandy, A. and Bast, J. (eds.), *Principles of European Constitutional Law*, (Oxford, Hart, forthcoming).

<sup>38</sup> Bercusson, Brian, “The Trade Union Movement and the European Union: Judgment Day”, [2007] 13 *European Law Journal*, 279 ff.

<sup>39</sup> Case C-438/05 *International Transport Workers’ Federation et al. v Viking Line et al.* [2007] ECR 000... For a detailed analysis, see Bercusson, B. (previous note) and *Collective Action and Economic Freedoms: Assessment of the Opinions of the Advocates General in Laval and Viking and Six Alternative Solutions*, European Trade Union Institute (ETUI-REHS), Brussels, 2007, available at [www.etui-rehs.org/research/publications](http://www.etui-rehs.org/research/publications).

<sup>40</sup> This implication of *Viking* was addressed, not by the ECJ (see Case C-438/05, para. 9), but in the findings of The Queen’s Bench Division Commercial Court ([2005] EWHC 1222 (Comm), para. 3) and repeated by the Court of Appeal ([2005] EWCA Civ. 1299, para. 1).

was the ITF's aim to achieve collective agreements under the law in force at the very place where the ownership and control of a vessel was situated. In this way, it attempted to defend seafarers against low wage strategies from employers such as Viking, who replaced their seamen with labour from low wage countries. In the case of Viking, ownership and control were situated in Finland; this meant that, according to the internal rules of the ITF, only Finnish unions were authorised to agree to wage settlements with Viking. As a result, the ITF had sent written correspondence to its member unions, advising them not to enter into collective negotiations with Viking, a suggestion that was also complied with by the Estonian union.

This was the reason for Viking's legal action against union activities, first in Helsinki and then, with reference to the ITF having its headquarters in London, at the Court of Justice for England and Wales, Queen's Bench Division (Commercial Court) – this was a strategic practice known as *forum shopping*, which allowed the rules for European civil jurisdiction to take effect (Art. 6 no. 1, Art. 2 (1), 60 (1)(a) Brussels I-Regulation)<sup>41</sup>. Viking argued *inter alia* that the threat of collective action by the Finnish union and the co-ordinating activities of the ITF were incompatible with Viking's right of establishment as guaranteed by Article 43 EC.

Two of the ECJ's arguments are of particular interest here. Pompously, it states: "the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures [...]".<sup>42</sup> This benevolent confirmation of the right to strike explains the favourable reaction the judgment received, not least on part of the European trade unions.<sup>43</sup> The following argumentative step by the ECJ, however, is hardly worthy of any commendation, as here the Court fundamentally reconfigures the traditional balance between economic freedoms at the European level and social rights at the national level:

*It is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law.*<sup>44</sup>

At first glance, the Court here proposes a marginal step. All the ECJ does is to bring to bear the framework which Community law has already developed in assessing the legitimacy of restrictions imposed by national law. However, in the present case, this move concerns a social autonomy, protected by fundamental rights, whose articulation lies not within the

<sup>41</sup> According to English international civil procedure, the case fell under the Finnish rather than English jurisdiction. However, the doctrine of *forum non conveniens*-doctrine cannot be invoked under Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (as amended), Article 2 and Article 6(1); see ECJ, Case C-281/02 *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' et al.*, [2005] E.C.R. I-1383.

<sup>42</sup> Case C-438/05 (*Viking*), para. 44.

<sup>43</sup> Press statement by the European Trade Union Confederation, 11 December 2007, available <http://www.etuc.org/a/4376> (4 February 2008). Whether an outright denial of a European fundamental right to strike was indeed a realistic menace can be doubted given the loss of public acceptance and political legitimacy that would have resulted from such a "finding" of the Court.

<sup>44</sup> Case C-438/05 (*Viking*), para. 40.

competence of the Community, as it can be derived not least from Article 137 (5) EC which explicitly indicates that questions of „pay, the right of association, the right to strike or the right to impose lock-outs“ should continue to be regulated by the Member States.<sup>45</sup>

The second argument brought forward by the ECJ concerns limits imposed by community law on those fundamental rights guaranteed by national law in the area of their domestic labour and social constitutions. The remarkable scope of Article 43 EC, which has just been highlighted, appears to be qualified. The Court refers to a formula, well-known from the cases *Schmidberger*<sup>46</sup> and *Omega*<sup>47</sup> according to which

*the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty.*<sup>48</sup>

But the text continues:

*However, in Schmidberger and Omega, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.*<sup>49</sup>

With this asymmetrical (diagonal) interlinking of the freedoms of the European economic constitution with the fundamental rights of national labour constitutions, the very autonomy of Member States' labour and social constitutions is undermined, although it should have been protected by the principle of enumerated competences. This remarkable move is accorded even greater effect by subjecting not only national labour legislation to European restraints but also directly the unions as actors entitled by such laws<sup>50</sup> — although their threat to go on strike cannot be equated with one sided regulations which were indeed comparable to state legislation.<sup>51</sup>

<sup>45</sup> We are aware of the fact that Art. 137 (5) ECT does not prevent the Union from regulating on matters relating to pay, strike and lock-outs on a treaty-base beyond Art. 137 (2) ECT. However, as has been underlined by AG Mengozzi, Art. 137 (5) must not be derogated by formalistic resort to some legal bases other than Art. 137 (2). Cf. AG Mengozzi, Opinion delivered on 23.May 2007 – Case. C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] E.C.R. para. 57 ff.

<sup>46</sup> ECJ, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Oesterreich* [2003] E.C.R. I-5659.

<sup>47</sup> ECJ, Case C 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] E.C.R. I-9609.

<sup>48</sup> Case C-438/05 (*Viking*), para. 45.

<sup>49</sup> *Ibid.*, para. 46.

<sup>50</sup> In our view, the extension of the „liability under market freedoms“ to the policy of the ITF, is erroneous. – AG Maduro, in his opinion delivered 23 May 2007 - Case C-438/05 (*Viking*), paras. 71, 72, appears to argue that effective transnational union activity represents an infringement of market freedoms. The readiness to assign “horizontal effect”, not just to fundamental rights, but also to economic freedoms contrasts markedly with the origins and meaning of the “*Drittwirkungsdoktrin*” as developed by the German Constitutional Court in its seminal *Lüth* judgment (see *Bundesverfassungsgericht*, judgment of 15 January 1958, *BVerfGE* 7, 198). The exercise of the political right of free expression was protected in this case within the societal sphere. – For a precise and thoughtful analyses of the Europeanisation of the *Drittwirkungs*-doctrine and of the tensions between the freedoms and the right to strike see Preedy, Kara, *Die Bindung Privater an die europäischen Grundfreiheiten. Zur sogenannten Drittwirkung im Europarecht*, (Berlin, Duncker & Humblot, 2005), 15 ff, 211 ff.

<sup>51</sup> *Ibid.*, para. 57. We would like to recall, in contrast, how cautiously Community law and policy have countered restrictions on the free movement of goods by non-state norms. See Schepel, Harm, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, (Oxford, Hart, 2005), 37 ff.

After this bombshell, the ECJ adopts a more conciliatory language, which it again refers to in the *Laval* case:

*According to 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”, but also “a policy in the social sphere”. 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”.*

*Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.<sup>52</sup>*

What conclusion can be drawn from all this? In principle, the “social purpose” would legitimize collective action that is aimed at “protecting the jobs and conditions of employment”. The preconditions however are that the “jobs or conditions of employment at issue ... are in fact jeopardised or under serious threat” and that actions taken „do not go beyond what is necessary to attain that objective“.<sup>53</sup>

The Court leaves such evaluation to those national courts having jurisdiction – in this case ironically, an English court. Still the ECJ provides some indication that the actions of the Finnish union did not actually serve the general interest, generally accepted to restrict market freedoms, as Viking had offered not to discharge any Finnish employees.<sup>54</sup> Apparently, Viking had planned to gradually replace the expensive Finnish crew by a cheap Estonian workforce both through the non-renewal of fixed-term contracts and through transfers to other worksites. This concession would therefore only have meant that the process of re-flagging would not have been as cost-effective as originally intended. These vague indications provided by the ECJ limit in the end – after the European usurpation of Member States' labour constitutions and the direct obligation of unions to the European imperatives – the fundamental rights of the union to a right to protect contracts of employment as they stand.

In essence, the formulation of the ECJ results in a deprivation of the Finnish unions of their power, relativizing their right to strike with the help of an entrepreneurial freedom of constitutional rank. However, it does not reform the Finnish social model in the name of a European economic constitution – such a move would be difficult to comprehend given the degrading of “the system of undistorted competition” from an objective to a mere instrument by the Lisbon Treaty<sup>55</sup> – but in the name of an incomplete European social constitution and despite the explicit deferral to Member State competences in Article 137 (5) EC.

<sup>52</sup> Case C-438/05 (*Viking*), paras. 78-79; this is in similar wording confirmed in *Laval* (Case C-341/05, para. 104-105).

<sup>53</sup> Case C-438/05 (*Viking*), paras. 81, 84.

<sup>54</sup> Case C-438/05 (*Viking*), para. 81.

<sup>55</sup> Cf., Article 4 EG and Article 3 (2) DCT on the one hand and Article 2 TEU on the other.

III.2.b *Laval: European secondary law and the Member States' autonomy of strike*

The plaintiff in the *Laval* case<sup>56</sup> was a company incorporated under Latvian law, whose registered office was in Riga. Laval's previous Swedish subsidiary (Bygg AB) – later both companies were only linked by identical share owners, managers and their brand name<sup>57</sup> – had been awarded the tender for a school building at the outskirts of Stockholm. In obtaining the tender, Bygg had benefited from its ability to post workers earning considerably lower wages from Latvia to Sweden. In May 2004, Laval posted several dozens of its workers to work at the Swedish building sites.

Concerning the applicability of the freedom to provide services (Art 49 EC) — a question of primary law — the ECJ followed its judgment in *Viking*.<sup>58</sup> However, *Laval* offers additional insights for secondary law, namely the 1996 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.<sup>59</sup> This Directive did not harmonise the substantial-legal provisions concerning the employment of posted workers, but it required Member States to ensure that the working conditions of those workers posted to their territory, in a number of essential working conditions (Article 3 (1)), complied with their own labour standards, provided by law or by collective bargaining agreements.<sup>60</sup>

Sweden implemented the posted workers directive in 1999. The legislation included some legal minimum working conditions, for instance concerning working hours, but no provisions regarding minimum wages; it also introduced no system of internal universal applicability of collective bargaining agreements. The latter is however required by Article 3 (1) of the Directive, in order to apply collectively, bargained wage standards to the jobs of posted workers. Instead, Sweden intended to apply the special provision in Article 3 (8) (2) of the Directive, according to which de facto generally binding wage standards can be equipped with international applicability.<sup>61</sup> However, the conferral of international

---

<sup>56</sup> Case C-341/05 (*Laval*).

<sup>57</sup> *Ibid.*, para. 43.

<sup>58</sup> See the previous section, especially the text accompanying notes 43 *et seq.*

<sup>59</sup> Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1.

<sup>60</sup> The obligation to apply minimum working requirements to the jobs of posted workers, according to Art. 3 (1) of the Directive 96/71/EC, has to be considered against the background of the case law of the ECJ which was established before the Directive came into effect (*cf.*, Recital 12 of the Directive 96/71/EC). The case-law stated that European law did not require (as did the Directive) but, rather “permitted” the application of domestic minimum working conditions to posted workers; this freedom has in fact been used, for example, by France and Germany [*cf.* Eichhorst, Werner, *Europäische Sozialpolitik zwischen nationaler Autonomie und Marktfreiheit. Die Entsendung von Arbeitnehmern in der EU*, (Frankfurt a.M., Campus, 2000), 185 ff]. For a systematic reconstruction of the directive in a conflict of laws perspective, see Rödl, Florian, “Weltbürgerliches Kollisionsrecht”, PhD Thesis (Florence, EUI, 2008), part 2, B II.2.

<sup>61</sup> The Court simply ignores Swedish policy, *cf.* ECJ, Case 341-05 (*Laval*), paras. 67 & 70. With this, the Court follows the Commission's account in its Communication COM(2003) 458 fin where it declared it to be indispensable – without indicating any legal basis for its position – that such an intention be made explicitly within the legislative Act implementing the Directive (sub 4.1.2.1). But *cf.* the Swedish Government Bill 1998/99: 90, p. 27, cited in the Judgment of the Swedish Labour Court, Judgment no 49/05, Case no. A 268/04 on p. 31 of the English translation (on file with authors): To require that foreign employers should *by law* apply Swedish collective bargaining agreements was considered by the Swedish Government to be discriminatory against foreign employers, as domestic employers are exposed to trade unions' claims only as well. Hence, the extension of domestic agreements to posting employers and (posted) employees was considered a matter better left to the social actors concerned.

applicability to collectively bargained internal standards should apparently again have been left to employers and employees to decide upon in collective agreements and not have been determined by state law – a choice which again underlines the strength of the unions in the Swedish social model. In this context, a so-called *lex Britannia* within the Swedish labour law is of particular importance. It states that collective agreements under foreign law do not generate an obligation to refrain from collective action and strike. This seems plausible as well: if the enforcement of domestic wages by trade unions is to be functionally equivalent to legal minimum working requirements – which was the intention of the Swedish legislator – then a foreign collective agreement cannot prevent collective action by the unions, as is equally the case for the application of minimum standards determined by state legislation.<sup>62</sup>

The Swedish building and public works union, supported by the electricians' trade union, was willing to bring to bear the transnational scope of its autonomy, guaranteed in Swedish law, against Laval with determination and intensity. Particularly effective was the blockade of the building sites, compelling Laval to give in.

The ECJ however, declared illegal all demands and accordingly, all associated activities of the Swedish unions. According to the Court, the posted workers Directive prohibits all union activities beyond those essential working conditions enumerated in Article 3(1) of the Directive, it prohibits union activities for essential working conditions that are better than those already legally provided<sup>63</sup> and it prohibits union activities for all wages outside of the lowest wage group<sup>64</sup>. It must be noted that the posted workers directive, at least according to European public opinion and the European legislator's intent, was enacted in order to prevent a wage-cost competition. The Court, however, interpreted the Directive as imposing a wide restriction on the right to strike. In so doing, the Court does not spend much energy on methodologically justified objections, such as – to cite just the most prominent one – recital 22 of the Directive which states that it does not touch upon “the law of the Member States concerning collective action to defend the interests of trades and professions”.

We wonder whether it was seriously considered during the negotiations over the Directive, that it might restrict the unions' right to strike as protected by national constitutions. It is difficult to establish whether the Sweden delegates had realized that the Directive required quite a substantial modification of the Swedish system of collective labour relations, as at least in the international context, legal provisions about the universal validity of collective agreements have to be introduced. Even if Sweden's capable officials had properly understood the complex regulations and, hence, envisaged its implications: could they not have relied on the fact that European interventions in Member States' collective action law would imply at least a careful and considerate examination of competences, given the negative competence norm in Article 137 (5) EC, as cautiously pointed out by AG Mengozzi?<sup>65</sup> Instead of encumbering the negotiations with Swedish concerns, could they

---

<sup>62</sup> See the paradigmatic decision of the ECJ (27 March 1990) – Case C-113/89 *Rush Portuguesa v Office national d'immigration*, [1990] E.C.R. I-1417, para. 18, according to which the permissibility of legally extending legal and wage minimum working conditions to posted workers does not depend on the fact that the posted workers fall under a collective agreement in their home states.

<sup>63</sup> *Ibid.*, para. 99.

<sup>64</sup> *Ibid.*, para. 70.

<sup>65</sup> AG Mengozzi, Opinion delivered on 23.May 2007 – Case. C-341/05 (*Laval*), paras. 57-58. AG Mengozzi's

not have counted on the fact that the ECJ also emphasised that the posted workers Directive did not aim to “harmonise systems for establishing terms and conditions of employment in the Member States”?<sup>66</sup>

The statements of the ECJ interpret the supremacy claim of European law in a very broad way: Directive 96/71 is certainly an important regulation in labour law. However, it is only concerned with a conflict situation within the internal market and is not an element of a comprehensive European labour and social constitution, whereas the Sweden guarantee of the right to collective action has to be understood as an integral part of the Swedish social model.<sup>67</sup> Is the European Union, based on a rather daring interpretation of a European Directive, authorized to insist that Sweden reconfigures the roles of unions and state competences, which constitute a part of the Swedish Constitution?<sup>68</sup>

### III.3 Viking, Laval and the vocation of the ECJ in constitutional politics

The references to conflict of laws in Section II above made no mention of a further query which was prominently raised by the American conflict of laws scholar Brainerd Currie back in the 1960s. This query concerned the judicial function in interstate constellations:

*[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: ... the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress.*<sup>69</sup>

Currie was referring to the federal system of the US here. There are important differences to consider, before one applies his suggestions to the EU. One difference, or European peculiarity, was underlined at the beginning, namely, the sectoral decoupling of the social from the economic constitution – and the difficulties involved in the establishment of a single European *Sozialstaat*. The ECJ’s argument implies that European economic freedoms, rhetorically tamed only by an unspecified “social dimension” of the Union,

---

argument does not seem convincing, however. For some, he explicitly negates the effects of Art. 137 (5) EC; even more surprising, he does not comprehensively justify the competence that he derives from Art. 47 (2) EC.

<sup>66</sup> Case C-341/05 (*Laval*), para. 68.

<sup>67</sup> See Case C-341/05 (*Laval*), paras. 10, 92.

<sup>68</sup> This article was written before the ECJ, on 3 April 2008, handed down its judgment in Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] E.C.R. 000. . There the Court confirmed its rigid interpretation of the posted workers-directive. Its new judgment does not directly affect the German system of industrial relations. Instead it assaults and undermines the sensitive interplay established between the exercise of public authority and the autonomy of the social partners. It is worth noting that the German Constitutional Court had only recently after years of debate and litigation, in a judgment of 11 July 2006 (1 BVL 4/00; available at the website the Court, <http://www.bverfg.de/entscheidungen>) confirmed the constitutionality of provisions of the *Vergabegesetz* of the Land Berlin as being equivalent to those held to be illegal in *Rüffert*. The *Bundesverfassungsgericht* had considered the potential incompatibility of the *Vergabegesetz* with European law. It had concluded that there was need for it to examine that statute because the ECJ would otherwise not know whether it was assessing valid or invalid national law (see para. 52). In the context of its own assessment, the *Bundesverfassungsgericht* underlined *i.a.* that the *Vergabegesetz* was to be read in the light of the *Sozialstaatsprinzip* (social state principle) of Art. 20 (1) and the commitment to human dignity (Art. 1 (1) and Art. 2 (1) of the Basic Law). The German Court has hence institutionalized principles of social protection which the ECJ has overruled in the name of its own understanding of Europe’s social commitments. One wonders whether the ECJ can be expected to discuss such discrepancies.

<sup>69</sup> Currie, Brainerd, “The Constitution and the Choice of Law: Governmental Interests and the Judicial Function”, (first published: 1958), in *idem, Selected Essays*, (Durham NC, Duke UP, 1963), 272.

trump the labour and social constitution (*Arbeits- and Sozialverfassung*) of a Member State. In view of the obstacles to the establishment of a comprehensive European welfare state, the respect for the common European legacy of *Sozialstaatlichkeit* seems to require both the acceptance of European diversity and judicial self-restraint whenever European economic freedoms come into conflict with national welfare state traditions. The ECJ is not a constitutional court with comprehensive competences. It is not legitimated to re-organize the interdependence of Europe's social and economic constitutions, let alone replace the variety of European social models with a uniform Hayekian *Rechtsstaat*. It should therefore refrain from "weighing" the values of *Sozialstaatlichkeit* against the value of free market access. Its proper function, we have argued, is to develop supranational law which compensates for the "democracy failures" of nation states. National welfare traditions do not – by definition – represent such failures. Against the background outlined above (Section I), the watering down of welfare state positions through supranational law cannot be accepted as a correction of the failures of national democracy, but rather, as a dismantling of modern democratic self-determination without offering any kind of replacement. The issue in the cases of *Laval* and *Viking* concerned the economic (ab)use of mere wage differences, which resulted in the unions reacting with national strategies in the *Laval* and post-national strategies in the *Viking* case. The unions took action, in order to counter the increased power of employers caused by the European economic freedoms. To argue that the right to collective action to national constellations is subject to a European right is not only to conceal the *de facto* decoupling of the social from the economic constitution, but also to *de jure* subordinate the former to the latter.

What does all this imply for Habermas' *monitum*? A definite evaluation of the impact of *Viking* and *Laval* is not yet possible. It is sufficiently clear, however, that this jurisprudence is a step towards the "hard law" of negative integration. What about the possibilities for a correction of this step through "social market economy", "social rights" and the soft means of the Open Method of Co-ordination? We have expressed our scepticism clearly enough. This is why we have to ask whether it is really in the long-term interest of the new Member States to dismantle the welfarism of their western and northern European neighbours. What would be the implications for their own long-term competitive advantage and their chances for similar developments? Habermas may still be normatively right. The factual chances of his hopes materializing however, have further diminished.