



Viking-Laval-Rüffert: Economic freedoms versus fundamental social rights – where does the balance lie?

Debate organised by *Notre Europe and the European Trade Union Institute*

Europe won over to the “communist market economy”

ALAIN SUPIOT

Alain SUPIOT, Director, Institute of Advanced Studies, Nantes, France.

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Europe won over to the “communist market economy”¹

How to balance the application of the European Union’s free movement rules - in particular, the right to work and provide services in another member state - with the maintenance of different national social systems?

In particular, how will these freedoms affect trade union rights such as the right to collective action and collective bargaining?

These questions are the object of much debate, following three recent rulings adopted by the European Court of Justice.

The ETUI and Notre Europe have therefore decided to launch this forum, in which users will find information on the different cases and analysis offered by a variety of experts.

The European Court of Justice holds an essential part of the legislative power in the European Union. In the image of the *Ancien Régime* sovereign courts or the Common Law High Courts, it statutes for the future, by ruling *erga omnes*, like the law itself. All those who had hoped that Europe could embody on a world scale a “social model” placing economic freedom in the service of the people awaited eagerly the two judgments it returned on the 11th and 18th of December in the *Viking* and *Laval* cases. These cases happened to raise the question of whether the trade unions have the right to act against companies using the economic freedom guaranteed by the Treaty of Rome to lower salaries and working conditions. In the *Viking* case, a Finnish passenger transport company wished to register one of its ferries under flag of convenience in Estonia with a view to elude Finnish labour agreements. The *Laval* case concerned a Latvian construction society employing a Latvian workforce in Sweden and refusing to honour Swedish labour agreements. In both instances, the trade unions had successful-

¹ This text enlarges on a short article published in the daily *Le Monde* 25 January 2008.

ly resorted to a range of collective actions (sympathetic strike, blockade, boycott) to force the companies to respect those agreements. The European Court was asked to consider the specific point of whether these actions, lawful under national law, could be unlawful under Community Law in so far as they impeded the freedom of companies to place themselves under the social rules least advantageous to the workforce.

In essence, the Court sided with the companies². With the right to strike explicitly excluded from the scope of Community competences in the social sphere³, it should come as a surprise to find it willing to interfere with such regulation. But the Court has considered since long that nothing in internal law should escape the primacy of economic freedom the Treaty guarantees. So that no exception under issues of national competence is likely to curb the power it has awarded itself to lay down the law inside Member States⁴. There is more cause to wonder at the fact that the Court, after the Bolkestein draft directive shambled, should have had no qualms in adding fuel to the fire by forbidding workers to strike against companies opting to operate in a country without observing its Social Law. For it is precisely what it forbids in the *Laval* judgment. On the grounds that Community Law imposes on companies transferring employees in an other state a number of minimal social regulations, the Court has decided that a collective action aimed at obtaining not only the respect of this minimum but also equal treatment with that State's workforce represents an unjustified hindrance to the freedom to provide services. The *Viking*

2 A major daily with a strong suit in business matters reported these judgments under the headline: "Europe legitimates social dumping" (*Le Figaro*, 19 Dec. 2007).

3 Cf. the final provisions of Article 136 of the EC Treaty, which defines the social aims of the European Community: The provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

NB: Citation trouvée à l'article 137 http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html

4 Cf. §40 and 41 of the *Viking* Judgment: "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 (...) Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC."

judgment asserts for its part that the right to resort to flags of convenience proceeds from the freedom of establishment guaranteed by Community Law and that the campaign led by trade unions at international level is therefore liable to infringe this fundamental freedom. The Court recognizes, of course, that the right to strike "is an integral part of the general principles of Community law". But it forbids its use in order to force the companies in country A, operating in country B to respect in full its laws and labour agreements. Barring "overriding reasons of public interest"⁵, trade unions must do nothing "liable to make less attractive, nay more difficult" the resort to relocation or flags of convenience.

This jurisprudence casts into sharp light the course taken by Community Law. It was already clear that the evolution of this law almost completely eluded the citizens, given both a want of any real polling at European level and the states' capacity to crush ballot resistance as expressed in national referendums. The rulers of EU countries have managed to get around the rejection in turn of the Maastricht Treaty by the Danish voters, of the Nice Treaty by the Irish and more recently of the Constitutional Treaty by the French and Dutch voters. Hugo Chavez would most certainly not get away with the expedient of getting Parliament to pass a Constitutional Reform freshly denied him by referendum. It is becoming the form, in European matters, to consider the result of a vote as binding only if it meets with the wishes of the leaders who called it⁶. The other contribution of the *Laval* and *Viking* judgments is to shield Community Law from strikes and other collective action liable to fetter its implementation. To this end, trade rules

5 The Court has retained the possibility of such a legitimate motive in the *Viking* case and asked the national judge to check its validity. For an in-depth study of this judgement, see P. Chaumette, "Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises [Collective Action in the mesh of the Four Freedoms]", *Droit Social*, February 2008.

6 Clearly, such practices can only throw discredit on the lessons of democracy Europe so generously lavishes on the rest of the world – especially when associated with the rejection of the winners of free elections when they are not those the "international community" wished elected.

are deemed applicable to the trade unions⁷, the “Freedom of Association and Protection of the Right to Organise” as guaranteed by convention 87 of the ILO notwithstanding. And yet, the respect of this freedom is an essential element of democracy. In the past, the social policies of corporatist or communist regimes may have been more generous or ambitious than those of western democracies. But the hallmark of those despotic regimes had been the top down imposition of a common good that would brook no contradiction and the imposition on the trade unions of the respect of an economic orthodoxy presupposing the correctness of the established order. A defining aspect of democracies has been on the contrary to accept that social justice could not just be imposed from on high but also arose from below, from the confrontation between employers and employees’ interests. Hence the authentic – as opposed to merely formal – recognition and protection of the freedom of association and right to strike whereby the weak may bring the strong up against their own representation of justice. Nevertheless, the legal consecration of the right to strike in western democracies was only won after World War II. Needless to say, it remains fragile in Western Europe and has no precedent in the East. In the context of enlarged Europe, it is not that surprising that the Community judge decided, contrary to earlier decisions in the field of collective agreements⁸, to subordinate the employees’ collective freedoms to the companies’ economic freedoms.

It is to be feared however that these judgments may contribute to push Europe further down the slippery slope. Juridical devices specific to democracy, whether electoral freedom or freedom of association make it

7 Cf. on this point the telling formulation of the Laval judgment: “*The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of state barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (i.e. the trade unions)*”.

8 CJEC 21 September 1999, case C-67/96 Albany ECr. P.I-5751, point 60: *If (the dispositions) of the Treaty (...) are construed as an effective and consistent body of provisions, it follows that agreements concluded in the context of collective negotiations between management and labour, in pursuit of social policy objectives such as the improvement of conditions of work and employment, must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty (prohibiting agreements aimed at restricting competition).*

possible to process the stuff of political or social unrest and to convert tests of strength into test cases. The gradual stalling of all these devices at European level can only foster in due course identity withdrawal, corporatist discontent and violence.

As Perry Anderson⁹ recently observed, Europe is on the verge of implementing the constitutional projects of one of current economic fundamentalism’s fathers, Friedrich Hayek. Hayek has written at length in his books about his project for a “limited democracy”, in which the division of labour, wealth, indeed currency would be totally shielded from political action and electoral hazards: “*The root of the trouble is that in an unlimited democracy the holders of discretionary powers are forced to use them, whether they wish it or not, to favour particular groups on whose swing-vote their powers depend. (...) Once we give licence to the politicians to interfere in the spontaneous order of the market (...) they initiate that cumulative process which by inner necessity leads (...) then to an ever-growing domination over the economic process by politics.*”¹⁰ According to Hayek, the danger does not lie with individual but with group rapacity¹¹. Favourable to the setting up of a minimal survival income, he just loathed trade unionism and more broadly all solidarity-based institutions for he saw there the resurgence of “the atavistic conception of distributive justice”, which can only lead to the ruin of the “spontaneous market order” founded in true pricing and the pursuit of individual gain. According to him, people, in western societies, have become incapable of understanding the law of the market¹². Accordingly

9 P. Anderson, « Depicting Europe », *London Review of Books*, 20 Sep. 2007.

10 F.A. Hayek, *Law, Legislation and Liberty*, vol. 3 : *Political Order of a free People*, University of Chicago Press, 1979.

11 “So long as it is legitimate for government to use force to effect a redistribution of material benefits (...) there can be no curb on the rapacious instincts of all groups”, F.A. Hayek, *op. cit.*

12 *An ever increasing part of the population of the Western World grow up as members of large organizations and thus as strangers to those rules of the market which have made the great open society possible. To them the market economy is largely incomprehensible; they have never practised the rules on which it rests, and economy is largely incomprehensible; they have never practised the rules on which it rests, and its results seem to them irrational and immoral (...) In consequence, the long-submerged innate instincts have again surged to the top. Their demand for a just distribution in which organized power is to be used to allocate to each what he deserves, is thus strictly an atavism, based on primordial emotions.* F.A. Hayek, *op. cit.*, underlined by the author. The idea that Community questions are beyond the people’s grasp and must therefore never be put to it again seems today shared by most of the European elites and there is not a government left wishing to put them to the vote

he recommended to “dethrone politics” by means of constitutional provisions which would ensure that “*nobody can conclusively determine how well-off particular groups or individuals will be*”¹³. As he did not believe in the “rational actor” in economics, he relied on the natural selection of rules and practices from competing laws and cultures on an international scale. According to him the champions of social Darwinism made the mistake of focussing on the selection of congenitally fitter individuals, a process too slow to have a measurable impact, while “*at the same time neglecting the decisively important selective evolution of rules and practices*”¹⁴. This taste for normative Darwinism and this disregard for social solidarity is conspicuous in the *Laval* and *Viking* judgments which pave the way towards open competition between Member States’ social laws, subject only to the respect of the minimal provisions of the 1996 Directive.

The political influence of Hayek’s theories has been and continues to be considerable. It laid the dogmatic foundation of the neo-conservative revolution spearheaded in Europe by the United Kingdom, where it continues to flourish¹⁵. However, the current success of the “limited democracy” and “legal products markets”¹⁶ concepts arises essentially from Eastern Europe’s and China’s conversion to market economy. With customary arrogance, the West has seen in these events, and in the ensuing enlargement of the European Community, the final victory of their societal model when they have in fact heralded what the Chinese leaders call the

“communist market economy”¹⁷. It would be a mistake to make light of this rather improbable notion as it sheds light on the turn taken by globalisation. Our understanding of communism, market economy or democracy, has not equipped us to understand the singularity of the paths trodden today by Russia or China, or to see how these countries are at the forefront of the broader tendencies of new world Capitalism. Neither is it equal to explaining Europe’s “democratic deficit”, or the way politics in western countries has been eclipsed by “governance”, founded on quantified indicators and other “benchmarking” techniques. As against that, these techniques can convincingly be associated with the planning instrument used by the defunct *Gosplan*¹⁸: although deployed in a wholly different environment, they are loaded with the same risks of disconnection from the facts, for they proceed from the same obsession with standards, from the same denial of the necessary gap between is and ought. In this respect at any rate, Hayek must be exonerated for being the first to warn against the excesses of economic goal setting¹⁹. The concept of communist market economy may help to understand these evolutions, just as long as nobody tries to reduce it to either communism or the market. Arrived at with what capitalism and communism had in common (economism and abstract universalism), this hybrid system borrows from the market wholesale competition, free trade and individual utility maximisation, and from communism its “limited democracy”, the instrumentalisation of the law, an obsession with quantification and the complete disconnection between the rulers and the ruled. It offers every country’s ruling class the possibility to acquire

13 F.A. Hayek, *op. cit.*, “The Containment of Power and the Dethronement of Politics”.

14 F.A. Hayek, *op. cit.*

15 Mrs Thatcher whose political action answered the TINA (there is no alternative) principle reportedly brandished one day in the House *The Constitution of Liberty* declaring “This is what we believe” (cf. Susan George, *Hijacking America* Polity Press 2008). Recently asked what her greatest political success was she allegedly answered “Tony Blair”.

16 Concept developed by the World Bank via its *Doing Business* program. V. H. Muir Watt *Economic Aspects of International Private Law (Analysis of 21st century Impact of Economic Globalisation on the Roots of Law and Jurisdiction Conflicts)*, The Hague Academy of International Law, lectures collection t. 307 (2004), Leiden/Boston, Martinus Nijhoff, 2005, 383 pages ; G. Canivet, M.-A. Frison-Roche et M. Klein (dir.) *Mesurer l’efficacité économique du droit [Measuring the Economic Efficacy of the Law]*, Paris, LGD, 2005 A. Supiot, *Le droit du travail bradé sur le marché des normes [Labour Law Sold out on the Norms Market]*, *Droit Social* 2005, pp. 1087-1096.

17 The exact phrase (as it can be read at Article 15 of the Constitution of The People’s Republic of China” is (*shehuizhuyi shichang jingji*) which literally translated means “socialist market economy”. The accepted meaning of the word “socialist” and its association with mixed economy models that have had currency in the West made me opt for translating by “communist market economy”.

18 The Gosplan (State Committee for Planning) and all the institutional machinery it controlled, established the production objectives for every USSR economic agent. All economic agents activity was measured against quantitative targets unrelated to the satisfaction of the population’s real needs or the quality of the goods. (V. A. Gourevitch, *Économie soviétique. Autopsie d’un système [Soviet Economy. The Post-mortem of a System]*, Paris, Hatier, 1992).

19 “And the numerical measurements with which the majority of economists are still occupied today may be of interest as historical facts; but for the theoretical explanation of those patterns which restore themselves, the quantitative data are about as significant as it would be for human biology if it concentrated on explaining the different sizes and shapes of organs (...) With the functions of the system these magnitudes have evidently very little to do.” F.A. Hayek, *op. cit.*

colossal wealth (a thing communism did not allow) while being fully disengaged in respect of the fate of the middle and lower classes (a thing welfare states' political or social democracy did not allow). A new *Nomenklatura* – whose sudden wealth is owed in no small part to the privatisation of public goods – has thus used market liberalisation to avoid financing the national systems of assistance.

This secession of the elites (in Christopher Lasch's felicitous words²⁰) is driven by a new type of leaders (senior officials, former communist bosses or Maoist militant turned businessmen) who no longer have much in common with traditional capitalist entrepreneurs. Both East and West, a fair number of such leaders, moulded by Marxism-Leninism or Maoism, enthusiastically embraced economic deregulation theories and public goods privatisations, by which they profited handsomely. In France in particular, the figure of the oligarch prospered in the wake of public companies' privatisation. Their guiding principle was stated with great candour and clarity by a former Medef²¹ Vice-President, Mr Denis Kessler: it consists in methodically stripping the post-war consensus²². The *Conseil National de la Résistance*, the CNR's programme²³ had such headings as “setting up the broadest possible democracy (...) freedom of the press and its independence from moneyed powers (...) the advent of a genuine economic and social democracy, requiring the removal from economic management of the great economic and financial barons (...) the restoration of a free trade unionism in its traditional rights and endowment with broad powers in the organisation of the economic and social life”²⁴.

20 C. Lasch, *The Revolt of the Elites and the Betrayal of Democracy*, W.W. Norton & Co., 1995

21 French equivalent of the British CBI (TN).

22 D. Kessler « Adieu 1945, raccrochons notre pays au monde ! [Good bye to 1945, let us Hitch our Country to the World!] » *Challenges*, 4 October 2007.

23 The *National Council of the Resistance* is the body that directed and coordinated the different movements of the French Resistance - the press, trade unions, and members of political parties hostile to the Vichy regime. On March 15, 1944, the CNR adopted, after months of negotiations, the Programme of the *Conseil National de la Résistance*. In “Measures to be taken immediately after the liberation of the territory”, it envisioned the establishment in France of a social democracy with a planned economy following her liberation. (TN)

24 Translation by the translator of this paper.

Indeed, none of this is compatible with communist market economy. But how far does the latter require the “stripping” of the rights and principles listed in the CNR's programme? The question requires urgent attention when it comes to human dignity, which the programme took as the foundation of workers' rights to correct wages²⁵. For the principle of dignity is not a fundamental right among others, but the founding principle of a civilised legal order and from it flow as many duties as rights for all human beings. It started its juridical life in two major international declarations contemporary to the CNR programme: the 1944 Philadelphia Declaration (annexed to the ILO constitution) and the 1948 Universal Declaration of Human Rights. At the same time, and for obvious reasons, the new Federal Republic of Germany dedicated the first article of its constitution to it and all German jurists know it by heart²⁶. Dignity does not refer to one right among many but to a metajuridical principle. In spite of its long legal and philosophical history and in spite of the disputes it causes today, this principle means something very simple that everyone can understand: human beings are not animals like the others and must never be treated like beasts. If dignity was thus brought to the fore at the end of the “thirty years war” which devastated Europe and the world from 1914 to 1945, it is because the horrors of this war had shown what came from reducing human beings to “human material”. Whereas “Man” in the declaration of rights inherited from the Enlightenment was a pure spirit, the notion of dignity also gave him a body. That is why it was first used to found the economic and social rights (Labour Law and Social Security Law) which aim to secure decent living conditions for all: to those who live from their work but also to the sick, the disabled, the old or the unemployed.

25 On social issues, the programme included “the guarantee of pay levels ensuring the security, the dignity and the possibility of a fully humane life to all workers and their family”.

26 Art. 1 “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.” (The dignity of man is inviolable. To respect and protect it is the duty of all state authority).

The best thing that can happen to the principle of dignity within the legal system is to remain hidden by an architecture of rights and duties which it underpins and which bestows its positive legal outcomes. If Social Law, for instance, sets the minimum salary at a decent level, there is no more need to refer to dignity in this domain. It is much talked about these days and in too many contexts for it to be a good sign. Besides, it is talked about very badly, as of a right among many, which needs to fit in with all the others. Summarising in new terms one of its earlier judgments²⁷, the European Court of Justice thus states in the *Viking* (§ 46) and *Laval* (§ 94) judgments 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.*” Saying that human dignity must be “reconciled” with the companies’ economic freedoms (or with the right to strike or any other collective right) is as good as saying that it can be infringed if anything can be gained by that. Can the economic freedoms guaranteed by the Treaty justify, on occasions, treating human beings like dogs, resorting to torture or to degrading treatments? It is no doubt in keeping with the Law and Economics doctrine (which, in best Marxist tradition, founds the law in the calculation of economic worth and gives pride of place to the notion of “human capital”²⁸) but it is certainly contrary to the deep meaning of the principle of dignity which establishes an order of values that cannot be reduced to monetary value. And it is no good telling us that dignity thus understood amounts to “bigotry” negating the Enlightenment²⁹. It is

27 CJCE 14 October 2004, case C-36/02 : Omega c/ Oberbürgermeisterin der Bundesstadt Bonn, *Point*. 2004, I-9609.

28 A notion popularised by Stalin during the war ((cf. J. Staline *L’homme le capital le plus précieux*. [Man as the most Precious Asset] followed by *Pour une formation bolchévique* [Mastering Bolshevism], Paris, Éditions sociales, 1945, 47 p.) before being developed by Nobel Prize winning economist Gary Becker in his book *Human capital : A Theoretical and Empirical Analysis, With Special Reference to Education* Univ. of Chicago Press, 1st ed. 1964.

29 As some French jurists put it in order to dismiss it: “Human dignity pertains today to the most dangerous bigotry and the most effective assassination of freedom” (J-P Baud , *Le droit de vie et de mort. Archéologie de la bioéthique* [The Right of Life and Death, an Archology of Bioethics], Paris, Aubier, 2001, p. 308).

the father of Enlightenment, the great Kant himself who gave it its most famous definition: “*In the kingdom of ends everything has either a PRICE or a DIGNITY. What has a price can be replaced by something else as its equivalent; what on the other hand is above all price and therefore admits of no equivalent has a dignity.*”³⁰. The idea of a value that could elude quantification and transcend monetary evaluation is just inadmissible in a communist market economic system. Such a system rests on the calculation of utility and the general equivalence of humans and things. Much is made of the principles of dignity and of individual fundamental rights – indeed, but kept on a plane with economic and monetary rights and freedoms. The insistence on this equivalence is unavoidable in a dogmatic order that treats human beings as “human asset” and national laws as products competing on the European market.



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30 E. Kant, *Groundwork of the Metaphysics of Morals*, translated and edited by Mary Gregor, NY: Cambridge, 1998 (underlined by Kant).