



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*

Laval & co: law and politics in EU social policy

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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.

Rightly or wrongly, the recent rulings of the European Court of Justice have been widely perceived as a threat by trade unions in a large number of European countries. The purpose of this note is not to discuss the accuracy of their view but rather to raise another question: Assuming that the court's rulings would indeed represent a danger for workers' rights, what are the remedies available?

Even though they loathe to admit it, courts are political creatures. As they do not operate in a vacuum, they must anticipate the likely impact of their rulings and the reactions thereto by other institutional actors, be they governments, members of parliament or representatives of specific interests, if they do not want their own authority to be challenged. Indeed, in the wide literature on judicial activism, a widespread view holds that courts will do the utmost to avoid being overruled by political powers. Naturally, being composed of human beings, they may make mistakes and fail to appreciate correctly how broad their margin of manoeuvre may be.

But the relationship between courts and their political interlocutors is generally a key component in the judicial decision-making process.

Rulings often contain clear indications in this sense. The *Laval* case, for instance, concerned Directive 96/71 on the posting of workers in the framework of the provision of services. The Court observed that the Directive on posted workers did not harmonise the material content of mandatory rules for minimum protection to be observed in the host country by employers who post workers there (recitals 59-60). Likewise, in the cautious developments it devoted to the implementation of this text by the Swedish authorities, the Court has stressed that although the Directive “gives Member States the possibility, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, to base themselves on those which are generally applicable to all similar undertakings in the industry concerned”, Swedish law did not contemplate that possibility (recital 65 to 67).

This is standard judicial work – interpreting the rules governing the dispute at issue – but I would suggest these paragraphs also convey between the lines a clear political message: in the actions of the Court’s interlocutors, be it the EU legislature or the Swedish authorities, there was nothing to suggest that the application of the host country’s minimum wage to posted workers was a crucial issue. The EU legislature could have made this one of the mandatory provisions of the Directive and it did not; nor did the Swedish authorities extend the scope of existing collective conventions to cover this issue as well. In this case, the Court seems to say, is it really up to us to do what the relevant political actors failed to do?

Hints of this kind are interesting in another respect: they indicate paths that could be followed by the ECJ’s interlocutors if they wish to correct negative aspects of its rulings. Thus, the Swedish Parliament might revise the law providing for the implementation of the posted workers directive.

The latter could also (in theory) be amended in order to harmonize provisions on minimum wage. True, some of the elements on which the Court’s rulings are based are Treaty provisions, which cannot, in theory, be changed so easily. Yet there are counter-examples: the ECJ interpretation on pension rights for women, for instance, was “supplemented” by an interpretative declaration attached to the Amsterdam Treaty. Moreover, one can imagine that if alternative readings of the relevant Treaty provisions had been upheld by EU legislation, the Court would have hesitated to challenge them directly.

Thus, if political actors wanted to disallow the case-law, they could use different instruments to that end. However, given the form of “mixed government” existing at EU level, for this to take place, several conditions would have to be met: the Commission, which holds a monopoly of legislative initiative, would have to table a proposal, which would then be discussed by the Parliament and the Council, with the need to rally large majorities in each institution. The first hurdle is less problematic than it may seem. Though the Commission is supposed to behave in an independent fashion; it is also a political body, sensitive to the wishes of national governments and of members of Parliament. Both the Council and the Parliament may formally invite it to lay down formal proposals, an invitation which cannot be taken lightly. Indeed, year after year, there are more proposals tabled by the Commission at the request of the Member States than on its own motion.¹

The real problem lies within the legislature: how can one rally the majorities that are required in order to adopt a piece of legislation? The difficulty is particularly acute in the field of social policy, given the wide variety of welfare models existing among European countries. This is probably the reason why the number of votes is significantly lower in this sector than

¹ See e.g. R. Dehousse, F. Deloche-Gaudez and O. Duhamel (eds.), *Elargissement. Comment l’Europe s’adapte*, Paris : Presses de Sciences Po, 2006

in other policy areas in which votes can be taken. This structural factor, combined with the fact that centre-right political parties dominate both in the Council and in the Parliament, makes it unlikely for the time being that the ECJ rulings will trigger a strong political reaction from the “political” institutions. This appears to be perfectly in line with the ‘realist’ reading of judicial decision making mentioned above: the chances of political overruling being very thin, the Court had a broad margin of manoeuvre. Yet things could change if different majorities existed in the Council and in the Parliament.

Thus, the problem we face here is similar to that raised by the European Central Bank. Though the scope of the powers delegated to non-elective bodies like the ECJ or the ECB has been the focus of much criticism, I would suggest that the main source of concern is rather the inability of the political actors to articulate a coherent alternative, and to impose their own will. At the end of the day, this is more a question of political clout than a problem of institutional design.

True, for many years, Nordic countries have been rather lukewarm towards the harmonization of social policies. But the Laval case-law might precisely change that, since it has altered what political scientists call the “default condition”, that is the situation in case no decision is taken. Short of an agreement on a legislative solution, it is the ECJ line of reasoning that will prevail. The recent rulings might therefore represent a strong incentive to make greater use of majority voting in social policy as another famous ruling, Cassis de Dijon, did thirty years ago in relation to the free movement of goods.



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